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When Is a User Not a User - Finding the Proper Role for Republication Liability on the Internet

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WHEN IS A USER NOT A "USER"?
FINDING THE PROPER ROLE FOR
REPUBLICATION LIABILITY ON THE INTERNET

James P. Jenal*

I. INTRODUCTION

Although the originator of a defamatory statement is the usual defendant in an action for libel, courts have long held that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." Nevertheless, the common law has recognized a distinction between the liability to be assigned to initial publishers, such as book or newspaper publishers which routinely exercise editorial control over the content of their publications, and distributors, such as bookstores and newsstands which serve as mere conduits for providing content to the public.2

The Internet served to blur that distinction and early cases considering the extent of liability for republication of defamatory content over the Internet created great uncertainty.3 Congress responded by enacting the Communications Decency Act ("CDA"), which immunizes a "provider or user of an interactive computer service" from being "treated as the publisher or speaker of any information provided by another information

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content provider. Early cases interpreting the CDA's so-called "Good Samaritan" provisions attempted to determine the extent of that immunity, but always in the context of immunity for Internet Service Providers ("ISPs") like America Online, Incorporated ("AOL").

Recently, however, a case—Barrett v. Rosenthal—has arisen that focuses squarely on the CDA's apparent protection of users who knowingly republish defamatory content on the Internet. But the extent of that protection is necessarily a more nuanced, and as yet unanswered, question than the blanket immunity courts have decided Congress intended to grant ISPs. Understanding the many roles assumed by users of interactive computer services—some which neither need nor merit the CDA's protection—is the key to understanding the extent of the CDA's grant of immunity for users who intentionally republish libelous content. Achieving that understanding requires a brief review of the cases leading up to the passage of the CDA, an examination of the cultural context and purposes expressed by Congress in passing the CDA, and a critical analysis of the major cases interpreting the CDA as applied to ISPs, and now to users. Two conclusions emerge from that analysis: first, that user roles form a continuum that directly correlates with the appropriateness of immunity under the CDA, and second, that cases such as Barrett can only be properly decided by determining where on that continuum of roles the user in question lies.

II. EARLY LIBEL ANALYSIS AS APPLIED TO THE NASCENT INTERNET

A. Cubby, Inc. v. CompuServe, Inc.

The differences between true publishers and distributors were first examined in the online context in Cubby. Back in 1990, CompuServe was a successful, subscription-based provider of online computer forums covering a host of different subject areas, including a Journalism Forum. Although CompuServe established editorial and technical standards for the
Journalism Forum, it contracted with a third-party entity, Cameron Communications, Inc. ("CCI"), to "manage, review, create, delete, edit and otherwise control the contents' of the Journalism Forum" in accordance with those standards. In turn, CCI contracted with a number of content providers for material to publish, including Don Fitzpatrick Associates ("DFA"), which produced a newsletter known as Rumorville USA ("Rumorville"). CompuServe had no contractual relationship with DFA, nor did it have any "opportunity to review Rumorville's contents before DFA upload[ed] [them] into CompuServe's computer banks, from which [they were] immediately available to approved [CompuServe] subscribers." Moreover,

CompuServe receive[d] no part of any fees that DFA charge[d] for access to Rumorville, nor did CompuServe compensate DFA for providing Rumorville to the Journalism Forum; the compensation CompuServe receive[d] for making Rumorville available to its subscribers was the standard online time usage and membership fees charged to all [CompuServe] subscribers, regardless of the information services they use[d]. CompuServe maintain[ed] that, before this action was filed, it had no notice of any complaints about the contents of the Rumorville publication or about DFA.

Plaintiffs contended that a series of statements appeared in the Rumorville newsletter in April of 1990 which were false and defamatory, and that in providing the posting service for those messages, CompuServe acted as a publisher. CompuServe contended that it was merely a distributor, and that without notice of the allegedly defamatory content it could not be held liable. The court agreed with CompuServe, describing CompuServe as:

in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications . . . . CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory

10. Id.
11. Id.
12. Id.
13. Id.
15. Id. at 138.
statements than it would be for any other distributor to do so.\textsuperscript{16}

The court's acknowledgement of the infeasibility of CompuServe—or any other ISP—to provide comprehensive, pre-posting editorial review of subscriber-submitted content reflected an accurate grasp of a key point. For ISPs to survive as providers of online forums, there would have to be limits on their liability for the flood of content produced by their millions of subscribers.\textsuperscript{17}

Although \textit{Cubby} seemed to establish the proper limit on liability for online providers of computerized information services, another New York court held otherwise, setting the stage for the introduction of the libel provisions of the CDA after the decision was handed down in \textit{Stratton Oakmont, Inc. v. Prodigy Services Co.}\textsuperscript{18}

\textbf{B. Stratton Oakmont, Inc. v. Prodigy Services Co.}

By the mid-1990's, Prodigy—like CompuServe before it—was an online service that featured a host of bulletin boards where more than two million subscribers could post messages on a wide array of topics, including publicly traded stocks.\textsuperscript{19} In October of 1994, an anonymous poster uploaded a series of messages to the most widely read board, Money Talk,\textsuperscript{20} attacking the securities investment banking firm, Stratton Oakmont, and its President, Daniel Porush.\textsuperscript{21} According to the postings, Porush was "soon to be proven criminal" and Stratton Oakmont was a 'cult of brokers who either lie for a living or get fired.'\textsuperscript{22}

Plaintiffs moved for partial summary judgment on the issue of whether Prodigy could be considered a publisher of the allegedly defamatory statements posted on the Money Talk board.\textsuperscript{23} In support of their motion, Plaintiffs pointed to a series of statements and policies promulgated by Prodigy. As the court noted, Prodigy boasted of its family-friendly policies:

PRODIGY held itself out as an online service that exercised editorial control over the content of messages posted on its

\textsuperscript{16} \textit{Id.} at 140 (emphasis added).
\textsuperscript{17} \textit{Id.} (concluding that an electronic news distributor is the "computerized . . . functional equivalent" of "a public library, book store, or newsstand" and should receive the same "lower standard of liability").
\textsuperscript{19} \textit{Id.} at *1–2.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.}
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computer bulletin boards, thereby expressly differentiating itself from its competition and expressly likening itself to a newspaper. (citation omitted) In one article PRODIGY stated:

We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.\(^{24}\)

In addition, Plaintiffs pointed to the existence of "content guidelines" that set forth the parameters of acceptable postings,\(^{25}\) an automated screening program that attempted to analyze postings for offensive language,\(^{26}\) and the "Board Leaders" who had the ability to remove content that did not comply with the content guidelines.\(^{27}\)

In its defense, Prodigy asserted that it changed its practice of manually reviewing all postings "long before the messages complained of by Plaintiffs were posted,"\(^{28}\) and that as a practical matter the sheer volume of postings—in excess of 60,000 a day—made any manual review impossible.\(^{29}\) Moreover, Prodigy beseeched the court not to decide an issue that could "directly impact this developing communications medium without the benefit of a full record . . . ."\(^{30}\)

Dismissing Prodigy's concerns, the court noted that the key question was whether "Prodigy exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper."\(^{31}\) In concluding that Prodigy did, the


\(^{25}\) Id.

\(^{26}\) Id. Reflecting the naiveté of the time, the court accepted this screening ability at face value—an acceptance that anyone who has attempted to filter out offensive content in e-mails today would find questionable at best.

\(^{27}\) Id. Interestingly, the guidelines only required content to be removed "when brought to PRODIGY'S attention." Id.

\(^{28}\) Id. at *3 (citing Schneck affidavit, paragraph 4).

\(^{29}\) Id. Once again, the infeasibility argument was presented to the court, but this time without success.

\(^{30}\) Stratton Oakmont, Inc., 1995 WL 323710, at *3. Prodigy's prayer fell on deaf ears; as the court noted, Prodigy had failed to "describe what further facts remain to be developed on th[e] issue of whether it is a publisher." Id. Ironically, another New York state court would subsequently find that by January of 1994—ten months before these allegedly libelous postings occurred—Prodigy had indeed abandoned any efforts, and disavowed any ability, to review the content of its online postings. Lunney v. Prodigy Serv's Co., 683 N.Y.S.2d 557 (1998) (reversing the trial court and granting Prodigy summary judgment).

court focused almost exclusively on Prodigy's prior public pronouncements of its "family-oriented" policies, and not on its litigation revelations regarding the limits of its actual capabilities. According to the court, **Cubby** was not a bar to this action for several reasons:

First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce. By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste," for example, PRODIGY is clearly making decisions as to content, and such decisions constitute editorial control. (citation omitted). 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. Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs' claims in this action, PRODIGY is a publisher rather than a distributor.

While **Stratton Oakmont** could have been dismissed as a misguided attempt to hold a corporate defendant accountable for the discrepancy between its own advertising hype and its actual ability to deliver, the decision sent shockwaves through the still emerging ISP industry. Caught between the desire to encourage average consumers to "get wired" by touting the benefits of a safe and secure online experience, and the fear of exposure should their Prodigy-like efforts fall short, the industry turned to Congress to take the issue away from the courts and provide clarity to the debate. The stage was set for the passage of the CDA.

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32. *Id.* at *5.
33. *Id.* at *4.
34. See Peter H. Lewis, *Judge Stands By Ruling on Prodigy's Liability*, *N.Y. Times*, Dec. 14, 1995, at D2 (citing the court's decision as providing the impetus for Congress to grant immunity for ISP's that filter indecent material).
35. See *id.*
III. THE ORIGINS AND APPLICATION OF THE CDA

A. Origins—The 1996 Telecommunications Act

Numerous courts and commentators took exception to the paradoxical rule advanced by the Stratton Oakmont court. Prodigy was, after all, being held subject to liability not because it had fostered a breeding ground for libelous posting, but because it had taken steps—however halting—to rid itself of such content. Rather than encourage conscientious efforts at self-regulation, the Stratton Oakmont court seemed to incentivize an entirely “hands-off” attitude toward Internet content by ISPs since, the less involvement they had with content, the less likely they could be found to have crossed the divide from distributor to publisher of the allegedly libelous material.

The import of such contradictory messages was not lost to the industry or its supporters in Congress. In direct response to the Stratton Oakmont ruling, Congressmen Chris Cox (R-CA) and Ron Wyden (D-OR) proposed an amendment to the then-titled Telecommunications Act of 1995, which sought to provide “Online Family Empowerment.” The Cox-Wyden amendment intended to provide a less controversial, but more effective, means of limiting the spread of online indecency by overruling the Stratton Oakmont opinion and allowing ISPs to police the content on their systems without fear of incurring liability if their efforts failed. In

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36. See, e.g., id. at 555 n.136, 138.
37. See, e.g., Lunney, 683 N.Y.S.2d at 588.
comments on the House floor, Congressmen Cox made the connection explicit:

Prodigy said, "No, no; just like CompuServe, we did not control or edit that information, nor could we, frankly. We have over 60,000 of these messages each day, we have over 2 million subscribers, and so you cannot proceed with this kind of case against us." The court said, "No, no, no, no, you are different; you are different because you are a family friendly network. You advertise yourself as such. You employ screening and blocking software that keeps obscenity off of your network... You have content guidelines. You, therefore, are going to face higher, stricker liability because you tried to exercise some control over offensive material."

Mr. Chairman, that is backward. We want to encourage people like Prodigy... to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see....

[O]ur amendment will... protect computer Good Samaritans, online service providers, anyone who... takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. 41

Seemingly convinced of this approach, the House passed the Cox-Wyden amendment 420 to 4. 42

Ultimately, a House-Senate conference committee resolved differences in the competing provisions of what became known as the Communications Decency Act, and the combined measure passed both houses of Congress on February 1, 1996. 43 The conference committee's report affirmed the intent of the Cox-Wyden amendment:

The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides "Good Samaritan" protections from civil liability for providers or users of an

41. 104 CONG. REC. H8468.
42. C.D.T., supra note 40.
interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own *because they have restricted access to objectionable material*. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.  

As finally enacted, section 230 provides as follows:

(c) Protection for “Good Samaritan” blocking and screening of offensive material.

(1) Treatment of publisher or speaker.

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability.

No provider or user of an interactive computer service shall be held liable on account of —

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).  


45. 47 U.S.C. § 230(c) (1996) (codifying the CDA) (citations omitted). In addition, in original paragraph (e), now codified as paragraph (f), the CDA offered definitions for four terms:

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

(2) Interactive computer service — The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such
B. Application

Although the debate over the CDA focused on protecting children from access to indecent material on the Internet, the cases interpreting it have arisen in the context of liability for publication of defamatory content over the Internet.

1. Zeran v. America Online, Inc.

The first case to interpret the CDA’s section 230 was the sad case of Kenneth Zeran (“Zeran”). In the spring of 1995, an anonymous America Online, Inc. (“AOL”) user began posting advertisements on a bulletin board, operated by defendant AOL, that offered for sale “Naughty Oklahoma T-Shirts.” The poster, identified as “Ken ZZ03,” offered t-shirts that sported a series of offensive slogans related to the Oklahoma City bombing and invited readers to call “Ken” at Zeran’s home phone number. Not surprisingly, “Ken” was inundated with irate callers and it took some time for Zeran, who did not even have an account with AOL, to realize the cause of his harassment. Once he did, Zeran contacted AOL and demanded that they take down the inflammatory postings and, in their place, post a retraction. Although AOL agreed to take down the postings, it refused to post a retraction.

To Zeran’s dismay, the removal of the initial postings brought little relief as they were immediately followed by similar postings for even more
offensive products. Again, Zeran was bombarded with irate phone calls and again Zeran contacted AOL. Although AOL agreed to take steps to block the postings, similar false advertisements continued to appear on AOL bulletin boards for another five days. The level of abuse directed toward Zeran was so great that "local police kept [his] house under protective surveillance." Ultimately, Zeran sued AOL for negligence. Zeran asserted that, as a distributor of the libelous postings, AOL had a duty to prevent the further distribution of postings after having been put on notice of their false and malicious nature.

AOL moved for judgment on the pleadings, stating that section 230 provided total immunity from suit for an ISP such as AOL. In AOL’s view, this was a simple case. As the CDA precluded treating an ISP "as the publisher or speaker of any information provided by another information content provider," and since it was undisputed that AOL was not the provider of the offensive postings, AOL argued that Zeran’s state law tort action was preempted by the CDA.

The question before the trial court was: "whether imposing common law distributor liability on AOL amounts to treating it as a publisher or speaker. . . [and] [i]f so, the state claim is preempted." While the CDA expressly prohibits treatment as a publisher, the court concluded that Zeran’s distinguishing of distributor from publisher liability was misplaced. Rather, distributor liability was “merely a species or type of liability for publishing defamatory material,” and thus squarely preempted by the CDA. The Zeran court was clearly concerned that distributor liability could create a disincentive to remove harmful material. Under Zeran’s theory, such conduct could be interpreted as creating a “reason to know” of libelous content, and if all such content was not removed,
liability would attach. In so concluding, however, the trial court conflated that which Congress viewed as separate, and immunized knowing conduct—that is, doing nothing about offensive content—that the CDA was intended to eliminate.

The hapless Zeran fared no better on appeal to the Fourth Circuit. Adopting the trial court's conflation of publisher and distributor to Zeran's detriment, the Fourth Circuit concluded:

To the extent that decisions like Stratton and Cubby utilize the terms "publisher" and "distributor" separately, the decisions correctly describe two different standards of liability. Stratton and Cubby do not, however, suggest that distributors are not also a type of publisher for purposes of defamation law.

Zeran simply attaches too much importance to the presence of the distinct notice element in distributor liability. The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability—the publisher role.

Of course, Zeran was not seeking to impose liability on AOL because of actions taken, but rather, because of actions it could have taken but failed to do. If Congress intended the CDA to incentivize ISPs to police the content of their systems, Zeran suggested that either the incentive was insufficient or courts were too willing to interpret the CDA's plain text apart from the context that spawned it.

2. Blumenthal v. Drudge

The next major test of the extent of the CDA's immunization from liability came in the somewhat more celebrated case of Blumenthal v.
In 1997, Sidney Blumenthal was an operative in the Clinton Administration. As such, he became a target for attack by the more extreme elements of the Republican Party, including the defendant, Matt Drudge. Drudge then, as now, is the creator of a web-based scandal sheet called the Drudge Report. In August of that year, Drudge published a report alleging that “[n]ew White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up.” Blumenthal denied the accusations and, along with his spouse, sued both Drudge as the author and AOL as the publisher of the libelous report. AOL moved for summary judgment asserting immunity under the CDA.

At first glance this might appear to be Zeran all over again, but the Blumenthal case had one more factor that complicated the analysis. AOL had a contractual arrangement with Drudge by which it paid him $3,000 per month—Drudge’s sole income at the time—to carry his reports, and retained the right to “remove, or direct [Drudge] to remove, any content which, as reasonably determined by AOL... violates AOL’s then-standard Terms of Service....” In other words, AOL reserved to itself the right to act as a publisher in determining whether content offered by Drudge met AOL’s editorial standards.

As Blumenthal stressed to the court, “the Washington Post would be liable if it had done what AOL did here—‘publish Drudge’s story without doing anything whatsoever to edit, verify, or even read it (despite knowing what Drudge did for a living and how he did it)’....” But, the court concluded, such arguments had been “rendered irrelevant by Congress.” Clearly sympathetic to the Blumenthals’ plight, the court concluded that it had no options:

If it were writing on a clean slate, this Court would agree with plaintiffs. AOL has certain editorial rights with respect to the content provided by Drudge and disseminated by AOL,

71. See id. at 46 (noting Sidney Blumenthal’s role as “Assistant to the President of the United States”).
72. See id. at 47.
73. Id. at 46.
74. Id.
75. See id. at 46–50. In the same opinion, Drudge moved to dismiss for lack of personal jurisdiction. Id. at 53. His motion was ultimately denied. Id. at 58.
77. Id. (citation omitted).
78. Id.
79. Id. at 49.
80. Id.
including the right to require changes in content and to remove it; and it has affirmatively promoted Drudge as a new source of unverified instant gossip on AOL. Yet it takes no responsibility for any damage he may cause. AOL is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility for what is said over the telephone wires. Because it has the [right] to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. 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-policing the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted. 81

What seems to have been overlooked in *Blumenthal* was that the CDA’s language calls for prohibiting a provider, like AOL, from being “treated as” a publisher as a result of distributing content that it receives from others. 82 In other words, the CDA says AOL cannot be converted into a publisher just because it hosts Drudge’s report. But when an ISP is, in the first instance, acting as the publisher, the CDA does not apply, because no conversion is involved.

Nevertheless, the net effect of *Zeran* and *Blumenthal* was to establish that—at least for providers of interactive computer services—the immunization from tort liability offered by the CDA was unbounded. 83 While it could well be argued that no such immunity for inaction was intended by Congress, it would not be the first time that Congressional intent and Congressional action failed to coincide. Left undecided,

81. *Id.* at 51–52 (internal citations omitted).
82. 47 U.S.C. § 230(c)(1) (stating that “[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”).
however, was the extent to which the CDA’s immunization would apply to users of such services.

IV. USER LIABILITY AND THE BARRETT OPINIONS

Recently, two California state courts have grappled with the CDA’s applicability to user liability and have reached conflicting results.\(^8\) Unfortunately, neither Barrett court has managed to reach the right result for the right reason.

A. The Facts of Barrett

Plaintiffs and appellants Stephen Barrett and Terry Polevoy are medical doctors “primarily engaged in combating the promotion and use of ‘alternative’ or ‘nonstandard’ healthcare practices and products.”\(^8\) Toward that end, they both maintain web sites that attempt to expose what they deem to be “health frauds and quackery,” and through their writings they have attained a certain level of notoriety, particularly among the proponents of the methods that they attack.\(^8\) One of those proponents, defendant and respondent Illena Rosenthal, “direct[ed] the Humantics Foundation for Women, and participate[d] in two Usenet ‘newsgroups,’ which focus[ed] on ‘alternative medicine.’”\(^8\) By all accounts, Rosenthal was a prolific—

\(^{84}\) See id.
\(^{85}\) Barrett, 114 Cal. App. 4th at 1382.
\(^{86}\) See id.
\(^{87}\) Id. at 1382–83. According to a leading online source, Usenet is defined as:
Usenet . . . [from ‘Users’ Network’; the original spelling was USENET, but the mixed-case form is now widely preferred] A distributed bboard (bulletin board) system supported mainly by Unix machines. Originally implemented in 1979–1980 by Steve Bellovin, Jim Ellis, Tom Truscott, and Steve Daniel at Duke University, it has swiftly grown to become international in scope and is now probably the largest decentralized information utility in existence. As of early 1996, it hosts over 10,000 newsgroups and an average of over 500 megabytes (the equivalent of several thousand paper pages) of new technical articles, news, discussion, chatter, and flamage every day.


On an unmoderated newsgroup, once a user posts a message, the host to which she is connected will forward that message to every other host in the network with which it communicates. See, e.g., Jeffrey M. Taylor, Liability of Usenet Moderator for Defamation Published by Others: Flinging the Law of Defamation into Cyberspace, FLA. L. REV., 247, 254 (1995). If those secondary hosts make available the newsgroup to which the message was posted, it will then be available to all users of those hosts. Id. In any event, each of those secondary hosts will then forward the message to every other host that they can connect to and so on. Id. In this way, a posted message can be distributed around the world in very short order, entirely without human intervention.
and vitriolic—contributor who posted more than 10,000 messages to those newsgroups in a two year period. Appellants contended that one or the other of them was mentioned in roughly 200 of those messages, “all of which were intended to injure their reputations.”

Barrett and Polevoy brought their libel suit against Rosenthal and a host of others, but of the 200 allegedly libelous postings, appellants only identified five as having been posted by Rosenthal. In particular, appellants alleged that in August 2000, Rosenthal posted to “two Usenet newsgroups an e-mail message she received from another defendant, Timothy Bolen,” which accused Polevoy of stalking a Canadian radio personality and described his conduct as criminal and part of an alleged “criminal conspiracy.” When appellants learned of the message, they contacted Rosenthal and told her that “it was false and defamatory, asked that it be withdrawn, and threatened suit if it was not.” Undeterred, Rosenthal posted thirty-two additional messages to Usenet newsgroups, forwarding appellants threat to sue and a copy of Bolen’s original allegedly defamatory message. Good to their word, Barrett and Polevoy sued and Rosenthal moved to dismiss, asserting in part that the CDA provided her with absolute immunity.

B. The Trial Court’s Opinion

The allure of Rosenthal’s argument is in its utter simplicity: a poster to an “interactive computer service” must, by necessity, be a “user” of that service; therefore, the poster cannot be held liable for posting any content that the poster did not originally create. Put more bluntly, as long as the poster did not create her libelous content she is immune from any civil liability based on posting it to the Internet, even if she knew that it was false and posted it with malicious intent. Unfortunately, the trial court in Barrett adopted precisely that reasoning in dismissing the case:

88. See id. at 1383.
89. Id.
90. Id. at 1383–84. Of those five, the trial court found only one of them to be actionable, a finding undisturbed by the court of appeal, and that is the statement that will be discussed here. Id. at 1385.
92. Id.
93. Id.
94. Id. at 1383.
96. See id. at *9.
97. See id.
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It is undisputed that Rosenthal did not "create" or "develop" the information in defendant Bolen's piece. Thus, as a user of an interactive computer service, that is, newsgroup, Rosenthal is not the publisher or speaker of Bolen's piece. Thus, she cannot be civilly liable for posting it on the Internet. She is immune. 98

Although Barrett complained that such a reading was inconsistent with the very purpose of the CDA, 99 the court found that the only culpable party under the CDA would be "the person who 'created' the information." 100 Since that person was not Rosenthal, no liability could attach.

The problems with this reading of the statute are legion. First, recalling that the context of the CDA's creation was the desire by Congress to address the rampant distribution of indecent material over the Internet, 101 this reading would immunize all who contributed to such distribution except the creator of the content. Thus, a pornographer who created especially offensive images, but only sold them to a willing audience on a non-Internet media like CD-ROMs, would never have been subject to the CDA. But, according to the Barrett court's opinion, if everyone who purchased one of those CD-ROMs then uploaded the offensive images to all corners of the Internet, they too would be immune since they were not the original creators of the content.

Second, as the Conference Committee made clear in their report, the purpose of granting immunity was to protect from liability those who had taken affirmative steps to restrict access to objectionable material—not to shelter those who deliberately disseminated it. 102

Third, the basis for ISP protection that first arose with Cubby and which was a part of every other case, but notably absent here, is the question of infeasibility and burden. 103 While it would certainly be true that the ISPs and individual computer hosts involved with forwarding Rosenthal's messages as part of Usenet would not have been in any position to monitor those messages for libelous content, no such constraint

98. Id.

99. Id. (citing the purpose of the CDA in § 230(b)(5) "to ensure vigorous enforcement of federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer").

100. Id.


applied to Rosenthal. Presumably not every e-mail that hit her inbox was automatically reposted to a Usenet newsgroup, rather, only those messages that she herself selected were re-published. This was not a matter of asserting that the technology itself should not serve to convert a user into a publisher of another’s content—the prohibition in section 230—since, by any conventional understanding of the term, Rosenthal was already the publisher of this content.104

In short, the Barrett trial court took the CDA places where Congress never intended for it to go. While alternative approaches were available to the court that would have produced a more satisfactory result, they were not recognized.105 Unfortunately, the California Court of Appeal, while reaching a better result, created additional problems with its approach.

C. California Court of Appeal—Right Result, Wrong Reason

The California Court of Appeal vacated the trial court’s order to the extent that it barred liability for Rosenthal on the basis of CDA immunity.106 But to reach what was the “right” result, unfortunately the Court of Appeal apparently felt compelled to revisit Zeran, and in so doing, found it wanting.107 In a lengthy discussion, the court analyzed the history of the CDA’s establishment, the Cubby and Stratton Oakmont cases, and concluded that Congress never intended to immunize distributor liability:

The expressed desire to overrule Stratton Oakmont, the absence of any apparent intent to disturb the effect of the decision in Cubby, and the statements of Representative Cox, the author of section 230, are consistent with exclusion of distributor liability from the statutory immunity.108

But if this is so, then what becomes of the burden argument? Unfortunately, as the court acknowledged, it had no informed basis to consider that issue: “Neither the record before us nor any other information brought to our attention provides an answer to that question.”109 Of course, this is not surprising since this was a user and not a provider case, and as noted above, users like Rosenthal are not confronted with the burden problem. Yet the Court of Appeal opinion establishes a rule that once again puts ISPs in the business of determining

104. See Barrett, 114 Cal. App. 4th at 1384.
105. See infra Part V.
107. See id. at 1396.
108. Id. at 1402.
109. Id. at 1404.
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whether challenged content should really be removed, and in so doing, allows for an Internet-wide heckler's veto on speech.\footnote{110. See, e.g., Reno v. A.C.L.U., 521 U.S. 844, 880 (1997) (holding in part that subsection (d) of the Communications Decency Act of 1996, 47 U.S.C. § 223, granted opponents of indecent speech on the Internet a "veto" and was thereby in violation of the First Amendment). In general, the notion of a heckler's veto is that a threat of violence can be used as an excuse to curtail speech. In this context, the heckler need merely assert that a posting or web site contains content that is libelous and the ISP must either remove the content—thereby limiting the speaker's right of speech—or risk exposure as a distributor of the content.}

The Court of Appeal defended its rule by citing to numerous critics of \emph{Zeran} for the general proposition that the threat of distributor liability to ISPs is greatly overstated.\footnote{111. \textit{Barrett}, 114 Cal. App. 4th at 1407. Although the court professes its neutrality by stating, "[w]e reemphasize that we take no position on whether distributor liability would unduly chill online speech," all of the commentaries cited are decidedly one-sided. \textit{Id.}} Market forces, reasoned the court, would prevent an ISP from taking down content without investigation of the notice since "a service that removes members' postings without any investigation is likely to get a bad reputation in a community whose first value is the free flow of information."\footnote{112. \textit{Id.} at 1405 (quoting David R. Sheridan, \textit{Zeran v. AOL and the Effect of Section 230 of the Communication Decency Act Upon Liability for Defamation on the Internet}, 61 ALB. L. REV. 147, 176); see also \textit{Barrett}, 114 Cal. App. 4th at 1403 (stating "[c]ommon sense dictates that an ISP will not waste its time and money monitoring content over the Internet when it will suffer no repercussions from failing to do so.").} Cold comfort that, since it simply means that ISPs have one more concern, namely the loss of market share, should they act on too many of their received notices.

Not to worry, the \emph{Zeran} critics say, since it would be almost impossible for a plaintiff to prevail in such a suit, and even if she beat the odds and did, the unlucky loser ISP would "not face a large damage award."\footnote{113. See \textit{Barrett}, 114 Cal. App. 4th at 1405--06 (quoting Sheridan, supra note 112, at 173).} Of course, this completely overlooks the reasonable reluctance of any business to set itself up for a wave of repetitive lawsuits. Regardless of what percentage of those suits actually result in damages, every one of them involves litigation expense—a factor overlooked by the commentators cited by the court, but very real to those trying to run an ISP.

The Court of Appeal offered those observations of the debate "only to note its existence and contours, not to attempt its resolution."\footnote{114. See \textit{id.} at 1408 (quoting Intel Corp. v. Hamidi, 71 P.3d 296, 311 (Cal. 2003)).} Nevertheless, the court concluded:

Whether Internet intermediaries should be absolutely immune for the transmission of defamatory materials online is a matter we think best left to the Legislature, which has yet to squarely address the issue. Because section 230 does not ""speak
directly' to the question addressed by the common law," and is capable of more than one construction, we conclude that the statute should not be interpreted as having abrogated the common law principle of distributor or knowledge-based liability.115

Since "Rosenthal has not alleged any fact that would prevent her from being subjected to distributor liability under the common law,"116 the court vacated the portion of the trial court’s order finding her immune from suit and remanded the case for further proceedings.117

Thus, while the Court of Appeal found a way to allow potential liability for Rosenthal’s posting of allegedly libelous content118—certainly the right result—it did so by creating a rule in California which, if broadly applied, would impose substantial new burdens on ISPs and expose them to the threat of ever more lawsuits. Yet all of this occurs in a case where no ISP was even a party to the lawsuit.119

Fortunately, there is a way to interpret the CDA that allows intentional wrongdoers to be held liable, while giving due deference to the burden argument that has been the core motivation for protections in this field since Cubby was decided more than a decade ago.

V. DECIDING BARRETT CORRECTLY—THE ROLE OF THE USER

A. Three Possible Lines of Attack

There are three ways to reach the right result in Barrett. Briefly stated, they are:

1. Distinguish distributor liability from publisher liability—as the Court of Appeal did—but that approach unduly burdens ISPs and could dampen free speech. As we have seen that is not a particularly attractive option.

2. Determine that a poster—like Rosenthal—is actually a developer of the content.

3. Refine the concept of a “user” in the context of online computer services.


117. See id. at 1410–11.

118. Id. at 1410.

119. See id. at 1382–83.
While the last two approaches offer a more attractive solution than that adopted by the Court of Appeal, only the third approach holds real promise and is firmly founded on the realities of how these systems are used. In order to demonstrate why the third approach is preferable, it is informative to consider how the second approach was recently applied by the Ninth Circuit.

In *Batzel v. Smith*, the Ninth Circuit considered the question of liability for a user who operated a listserv and a web site. The user in question, co-defendant Cremers, published a newsletter regarding stolen art work that he distributed through a listserv and posted to his web site. At issue in the case was an e-mail message Cremers received from Smith in which he made allegedly libelous comments about Batzel. Cremers took Smith’s message, edited it into his newsletter and published it via both the listserv and his web site. Given that Cremers exercised complete editorial control over the content of what he distributed over the Internet, the trial court denied his motion to dismiss (based on California’s anti-SLAPP statute), but the Ninth Circuit reversed, finding Cremers immune based on the CDA.

The Ninth Circuit quickly concluded that Cremers was a “user” under the statute. Thus, the only question was “whether Smith was the sole content provider of his e-mail, or whether Cremers can also be considered to have ‘creat[ed]’ or ‘develop[ed]’ Smith’s e-mail message forwarded to the listserv.” While it was undisputed both that Cremers had complete editorial discretion in deciding whether to post Smith’s message, and that Cremers had edited the message before including it in his publication, such actions did not “rise to the level of ‘development.’” The court held that since the CDA prohibits treating someone as a publisher, it stands to reason that exercising the activities of being a publisher are not sufficient to

120. 333 F.3d 1018 (9th Cir. 2003).
121. See id. at 1020–22. The court noted that “[a] listserv is an automatic mailing list service that amounts to an e-mail discussion... subscribers receive and send messages that are distributed to all others on the listserv...” Id. at 1021 n.2.
122. See id. at 1022.
123. See id.
124. Id. at 1023.
125. Id. at 1034–35.
126. See *Batzel*, 333 F.3d at 1030–31 (finding that Cremers’ website and listserv both use interactive computer services and thus are users).
127. Id. at 1031. See also, 47 U.S.C. § 230(c) (1996) (defining “information content provider”).
128. Id. at 1031.
129. Id.
extinguish the immunity. The court explained that "the exclusion of 'publisher' liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message."

The opinion drew a sharp dissent by Judge Gould who also dissented from the denial of rehearing and rehearing en banc. Turning to the plain meaning of "develop," Judge Gould argued that by making the content of Smith's message widely available by posting it on the web, he satisfied the classic meaning. Moreover, the act of placing the message into a new context changed the import of the message, and again served to "develop" it:

There should be little doubt, given ordinary usage that Congress presumably intended, that a publisher's affirmative choice to select certain information for publication for the first time on the Internet "develops" that information. To put the point more concretely, imagine a defamatory e-mail sent to both an on-line bulletin board for appellate litigation and to a popular appellate litigation blog. Let us say, for example, that the e-mail falsely stated that Judge X of the Y Circuit was paid by Z to render decisions in Z's favor. If the blogger decides to publish the e-mail, there is something qualitatively different about the e-mail as published on the appellate blog, as contrasted with the one posted on the bulletin board. The blogger's conscious decision to publish an e-mail would add, by virtue of his or her reputation and that of the blog, a layer of credibility and endorsement that would be lacking from the e-mail merely posted to the bulletin board. And being the first person to post the defamatory material on the Internet would be a novel presentation of the defamatory material.

While Judge Gould's approach makes more sense than the majority's, it does not account for a case—like Barrett—where little or no editing of

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130. Id. Once again, a court overlooked the point that the CDA was seeking to prevent providers and users from being converted into publishers—not to immunize those who already were publishers in their own right.

131. See id. at 1036; see also Batzel v. Smith, 351 F.3d 904, 905 (9th Cir. 2003) (dissenting from the denial of rehearing and rehearing en banc) (Gould, J., dissenting).

132. See Batzel, 351 F.3d at 906.

133. Id. at 906 (citations omitted). Interestingly, although Judge Gould cites to a number of representative blogs, he does not define the term. The term "blog" can be defined as "[s]hort for web log; usually a chronological record of thoughts, links, events, or actions posted on the web." Walt Howe, Walt's Internet Glossary, WALT HOWE.COM (Sept. 10, 2003), at http://www.walthowe.com/glossary/b.html#blog.
the libelous message was performed by the reposter, and where there was nothing transformative in the further distribution, as suggested in the dissent's "appellate blog" example. Rather, a more comprehensive approach is needed, and to achieve that end, one must take a closer look at the roles of users.

**B. Users on a Continuum—The Many Roles of a User**

1. The Many Meanings of a User

The CDA defines very few terms, and user is not one of them. For the few courts and litigants that have considered the question, the term "user" has never meant more than the standard dictionary definition of "one that uses." But that definition is devoid of context, and therefore too general to offer meaningful guidance. More specifically, the CDA covers "user[s] of an interactive computer service." To understand who those persons are—and who they are not—for purposes of the CDA, it is necessary to examine the term more closely.

There are several sources of definitions of terms in the field of interactive computer services. The oldest and most venerable was compiled from computer slang used at the Massachusetts Institute of Technology, Stanford University, and other early participants in what was then known as the ARPANET (predecessor of today's Internet) starting in the 1960s. That compilation was known originally as The Jargon File and later as The Hackers' Dictionary. In that context, the term "user" has a variety of meanings, for example:

**user /n./**

1. Someone doing 'real work' with the computer, using it as a means rather than an end. Someone who pays to use a computer. See real user.
2. A programmer who will believe

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135. From what is reflected in both the Barrett and Batzel opinions, none of the litigants ever challenged whether either Rosenthal or Cremers were "users" under the CDA. See, e.g., Batzel v. Smith, 351 F.3d 904 (9th Cir. 2003); Barrett v. Rosenthal, 114 Cal. App. 4th 1379 (2004).
138. See id. See also New Hackers' Dictionary, OUTPOST9.COM, at http://www.outpost9.com/reference/jargon/jargon_27.html (last visited Feb. 16, 2004). In this parlance, "hacker" was a term of honor and prestige, pre-dating its more recently acquired, pejorative connotations. See id.
anything you tell him. One who asks silly questions... See *luser.* 3. Someone who uses a program from the outside, however skillfully, without getting into the internals of the program. One who reports bugs instead of just going ahead and fixing them.

The general theory behind this term is that there are two classes of people who work with a program: there are implementors (hackers) and *lusers.* The users are looked down on by hackers to some extent because they don’t understand the full ramifications of the system in all its glory.\(^{139}\)

The subspecies of “real users” is defined as:

**real user** /n./

1. A commercial user. One who is paying *real* money for his computer usage. 2. A non-hacker. Someone using the system for an explicit purpose (a research project, a course, etc.) other than pure exploration.\(^{140}\)

And the more pejorative “luser” as:

**luser** /loo’zr/ /n./

A user; esp. one who is also a *loser.*\(^{141}\)

While perhaps not offering the most “user-friendly” set of definitions, these early usages clearly indicate that not all users are alike, and that their differences can be significant.

More recently, other online sources have arisen to provide guidance on the term “user,” providing a myriad of concatenations ranging from “naïve-user” to “power-user” to “end-user,”\(^ {142}\) with each definition providing additional support for rejecting the one-size-fits-all conception assumed by the courts.

Thus, a “naïve-user” is defined as:

A *luser.* Tends to imply someone who is ignorant mainly owing to inexperience. When this is applied to someone who *has* experience, there is a definite implication of

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stupidity.\textsuperscript{143}

Whereas, a "power-user" is:
A sophisticated user of personal computers. A power user is typically someone who has considerable experience with computers and utilizes the most advanced features of applications.\textsuperscript{144}

But, most illuminating of all, is the definition of an "end-user":
In information technology, the term end user is used to distinguish the person for whom a hardware or software product is designed from the developers, installers, and servicers of the product. The term \textit{end user} thus distinguishes the user for which the product is designed from other users who are making the product possible for the end user. Often, the term \textit{user} would suffice.\textsuperscript{145}

When placed in the definitional context of interactive computer services, as set forth in the CDA, the term "user" is properly understood to encompass a broad continuum of experience levels, technological sophistication, and responsibility.\textsuperscript{146} It is within that continuum that the proper meaning of "users" is to be found—amid the many roles users assume.

2. Distilling Meanings into Roles

The continuum of meanings developed above can be distilled into a discrete set of roles that users assume from time to time.\textsuperscript{147} Specifically, it is easy to identify at least four distinct roles that a "user" might assume:

\begin{enumerate}
\item \textsuperscript{144} See \textit{Webopedia}, WEBOPEDIA.COM, at http://www.webopedia.com/TERM/u/power_user.html (last visited Feb. 16, 2004) (defining "power-user").
\item \textsuperscript{145} See \textit{Whatis.com Target Search}, WHATIS.COM, at http://whatis.techtarget.com/definition/0,,sid9_gci212063,00.html (last visited Feb. 16, 2004) (defining "end-user").
\item \textsuperscript{147} To be sure, these roles are in no way mutually exclusive or permanent. An individual may assume many different roles at different times or on different computer systems. Nonetheless, as we shall see, for purposes of analyzing liability under the CDA, the proper analytic approach is to determine the role the defendant was assuming in connection with the particular incident. See generally Taylor supra note 87, at 268–70 (describing the different roles and accompanying liability of the Usenet moderator).
\end{enumerate}
a. Readers

On one end of the continuum are Readers—users who simply read the contents of postings provided by others. These are likely end-users who may or may not also be "naive-users;" but at bottom, this role merely reflects an involvement with the system that requires very little specialized skill, and no responsibility for the introduction onto the Internet of the content being read. Certainly Congress was not worried about Readers when it included the term "user" into the immunity provision of the CDA, since no legal theory supports civil liability simply for reading someone else’s postings.

b. Administrators

At the continuum’s other end are Administrators—sophisticated users who are employed by the provider of the interactive computer service to keep it running. Other terms used to describe users in this role would be “super-user” (a Unix term), or “sysadmin” (a network term), or “sysop” (a bulletin board term). Users in this role are strictly technical resources; as a general rule, they do not make policy for a provider—they simply implement it. As employees or agents of the provider, they are sheltered under the provider’s immunity, and thus, they too could not be

149. The distinction between civil and criminal liability is an important one. Certain criminal statutes make it a crime to knowingly possess—i.e., receive—certain content, such as child pornography, which is frequently distributed over the Internet. See, e.g., 18 U.S.C.S. § 2252(4)(B) (2004).
150. Rob Slade’s Security Glossary, SUN.SOCI.NIU.EDU, at http://sun.soci.niu.edu/~rslade/secgloss.htm. (last visited Feb. 16, 2004) (defining “super-user” as “a user with full and unrestricted access to all aspects and resources of the system. Frequently referred to, particularly in UNIX circles where it is the name of the privileged account”).
151. See Computer, Telephony & Electronics Industry Glossary, CSGNETWORK.COM, at http://www.csgnetwork.com/glossarys.html. (last visited Feb. 16, 2004) (defining “sysadmin” as “[t]he administrator of a network, sometimes called Angel, a notch below the network God; the person who is responsible for the network operation and fixes the problems on a daily basis”).
152. See Matisse’s Glossary of Internet Terms, MATISSE.NET, at http://www.matisse.net/files/glossary.html (last visited Feb. 26, 2004) (defining “sysop” (system operator) as “[a]nyone responsible for the physical operations of a computer system or network resource. For example, a System Administrator decides how often backups and maintenance should be performed and the System Operator performs those tasks”).
153. See generally Taylor, supra note 87, at 251–52 (limiting the responsibility of network administrators to providing technical support at individual Internet sites).
the users Congress was expressly seeking to protect.\textsuperscript{154}

c. Moderators

Moderators and Posters occupy the middle of the continuum, and in failing to recognize and distinguish these two roles, the Barrett court missed the point. Moderators are users who employ a provider’s interactive computer service to create and oversee a forum in cyberspace such as a public discussion bulletin board, a moderated Usenet newsgroup, or an interactive web site where third parties can contribute content to be published to the Internet.\textsuperscript{155}

Within the role of Moderator there can be many degrees of involvement with the content published. At one extreme, the Moderator might simply create, using the interactive computer service of the provider, a forum for hosting content without ever reviewing the content before its distribution.\textsuperscript{156} For example, a Moderator might create one or more listservs on a particular topic.\textsuperscript{157} The Moderator could control who has posting rights or reception rights, but still never review or even see the majority of the content distributed via the listserv.\textsuperscript{158} Or, as was the case with Cremers, the Moderator could review every submission, and even edit them before making their content available on the Internet.\textsuperscript{159} Whatever the degree of involvement with third-party content, the Moderator’s role is most likely to share the provider’s burden argument since, as the volume of contributions rises, the ability to fact check in advance, or even depublish upon notice, becomes ever more burdensome.\textsuperscript{160} If exposed to liability for all content so published, the Moderator must become cautious to the point where free speech via the forum provided could be impaired.

Thus, the Moderators’ role is the one most like, yet distinct from, that of the provider. It is the role of Moderator that is most in need of immunity from a publisher-distributor theory of liability in a manner consistent with

\textsuperscript{154} See id. at 286.

\textsuperscript{155} See Webopedia, WEBOPEDIA.COM, at http://webopedia.com/TERM/m/moderated_newsgroup.html (last visited Mar. 1, 2004) (defining “moderated newsgroup”). Of course, the Moderator might also contribute content, but in that case the role shifts to that of Poster. See discussion infra pp. 127–28.

\textsuperscript{156} See, e.g., L-\textsc{soft} international, inc., general user’s guide for listserv version 1.8c, available at http://www.lsoft.com/manuals/1.8e/user/user.pdf, at 7–8 (last visited Feb. 14, 2004).

\textsuperscript{157} See generally id. at 5 (defining the term “listserv”).

\textsuperscript{158} See Taylor, supra note 87, at 254.

\textsuperscript{159} See Batzel, 333 F.3d at 1022.

\textsuperscript{160} See generally Sheridan, supra note 112, at 177–78 (noting the lack of resources available for a moderator to screen the content of postings before they are distributed).
the stated purposes of the CDA.

d. Posters

The final role is that of Poster—a user who takes content, either of their initial creation or from third parties, and publishes it on the Internet.\textsuperscript{161} A Poster is distinguished from a Moderator in that the Moderator is charged with processing the submissions of others; a Poster has no such duty.\textsuperscript{162} Instead, the Poster publishes third-party content \textit{for the Poster's own purposes}, not as part of a commitment to provide a forum for others.\textsuperscript{163} Nor do Posters face the burden issue that argues for treating providers and Moderators alike, since, by definition, a Poster is not the target of mass submissions like the Moderator. To the contrary, a Poster has a far greater ability to select the material being posted with an eye for possibly libelous content, and to remove such postings upon notice.\textsuperscript{164}

For Posters, the users who make objectionable content \textit{available} online, there can be no entitlement to the CDA's immunity since their conduct is in direct conflict with the stated purposes of the CDA.\textsuperscript{165} To hold otherwise would enable a Poster of third-party-created objectionable material—say an offensive photograph of a celebrity doctored to appear as if she were engaged in illicit sexual conduct—to be immune from liability by virtue of the CDA. It defies all logic to conclude that the same provision that shelters the ISP for taking down the offensive image would also provide a safe harbor to the image's Poster. To the contrary, Congress was immunizing providers and those users engaged in complimentary, not conflicting, conduct.\textsuperscript{166}

\textbf{C. Applying the Role-Driven Analysis to Barrett}

Applying this role-driven analysis to the facts in \textit{Barrett} allows a

\textsuperscript{161} \textit{Webopedia, WEBOPEDIA.COM, at} http://webopedia.com/TERM/p/poster.html (last visited Mar. 1, 2004) (defining "poster"). A Poster who creates original content has a role synonymous with the CDA's definition of an "information content provider," and is therefore not entitled to the CDA's immunity. \textit{See} 47 U.S.C. § 230 (f)(3). A Poster who takes content from third parties and publishes it to the Internet is the focus of this analysis.


\textsuperscript{163} \textit{See id.}

\textsuperscript{164} \textit{See generally} Taylor, \textit{supra} note 87, at 275 (describing the burden on moderators to screen all content for defamatory material as nearly impossible).

\textsuperscript{165} \textit{See} 47 U.S.C. § 230(b).

\textsuperscript{166} \textit{See id.} § 230(c)(2).
court to reach the right result without doing violence to the necessary immunity for ISPs that are genuinely threatened by the unavoidable burdens arising from potential distributor liability. Since *Barrett* is a case turning solely on the conduct of an individual user,\(^{167}\) no provider analysis—such as that engaged in by the Court of Appeal—need be conducted. Rather, we must simply determine Rosenthal’s role as a user.

Nothing in the admittedly scanty record disclosed in the two reported opinions suggests that Rosenthal was anything other than a Poster. Moreover, once Rosenthal received word from Barrett that her original posting of the Bolen e-mail was libelous, she posted a new message containing Barrett’s threat of suit along with her original posting.\(^{168}\) Collectively, those actions suggest strongly that Rosenthal was—for purposes of these communications—acting in a role that is incompatible with CDA immunity. Accordingly, and on that basis, the libel case against her should have been allowed to proceed.

VI. CONCLUSION

The history and purpose of the CDA’s immunity provisions demonstrate the desire to allow ISPs to take a proactive role in regulating online content without being transformed into publishers for purposes of civil liability. The fundamental justification for such immunity was a simple acknowledgement that no such actions could ever be complete or foolproof given the enormous volume of content flowing through ISPs on a daily basis.\(^{169}\) Further credence to this view is provided by recalling that Congress sought to leave undisturbed *Cubby*, where the burden argument was recognized, while overruling *Stratton Oakmont*, where the burden argument was ignored.\(^{170}\) As a result, courts have concluded that ISPs have a literal “get out of jail free” card when it comes to such liability,\(^{171}\) and in the interests of unfettered free speech on the Internet, those conclusions—though occasionally producing unpalatable results—are justified.

\(^{167}\) *See Barrett*, 114 Cal. App. 4th at 1384.

\(^{168}\) *Id.* Even assuming, arguendo, that Rosenthal served as a Moderator with regard to the original distribution of the Bolen e-mail—since it is possible that he sent the content to her as a true third-party submission which she simply redistributed, her subsequent posting of the threat of suit concatenated with her prior message took her out of the Moderator role and into that of Poster.


\(^{170}\) *See id.* at 1401–02.

\(^{171}\) *See id.* at 1404.
Unfortunately, the inclusion of the term “users” in that same immunity provision has created unnecessary confusion where courts seek to apply conventional meanings to a term that is actually rich in nuance in the field of “interactive computer systems.” When viewed in that context, it is clear that users occupy roles, and that only one of those roles—the Moderator—reflects the same policy choices inherent in the CDA’s immunity for providers. More notably, the role of Poster—such as that occupied by Rosenthal in the Barrett case—is not worthy of immunity under the CDA. Under the analysis advanced here, Poster-users who maliciously republish libelous content over the Internet will not be able to use the CDA to shield them from liability.