THE HISTORY AND ECONOMICS OF ISP LIABILITY FOR THIRD PARTY CONTENT

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> There are terrible people who, instead of solving a problem, bungle it and make it more difficult for all who come after. Whoever can't hit the nail on the head should, please, not hit it at all.[1]
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> *–Friedrich Nietzsche*

INTRODUCTION

THE question of whether Internet Service Providers ("ISPs")[2] should be liable for providing access to information that proves injurious to others has received enough attention in the preexisting literature that the normative arguments for various possible liability regimes have been substantially addressed. Indeed, courts can hardly pronounce upon the matter one way or another without being criticized as having taken yet another errant swing at Nietzsche's already severely abused nail. Revisiting these arguments is unlikely to provide new insights. Economic analysis, however, offers a unique perspective.[3] Economic analysis has con-

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[1] Friedrich Nietzsche, Seventy-Five Aphorisms from Five Volumes, The Wanderer and His Shadow, No. 326, *reprinted in* Basic Writings of Nietzsche 165–66 (Walter Kaufmann trans., First Modern Library ed. 1968) (1880).

[2] Various acronyms are used to represent Internet Service Providers and related industries. See Jose I. Rojas, Liability of ISPs, Content Providers and End-Users on the Internet, 507 PLI/Pat. 1009, 1016–17 (1998) (defining and distinguishing subsets of Internet Service Providers). The acronym "OSP" (online service provider) connotes a service that provides general Internet access as well as access to a closed proprietary system. Id. An ICS (interactive computer service) provides access, but not proprietary content. Id. ICSs have employed § 230 of the Communications Decency Act to preempt state law claims. See, e.g., Aquino v. ElectriCiti, 26 Media L. Rep. (BNA) 1032 (Cal. Super. Ct. 1997). On occasion OSPs have been sued over content delivered in their capacity as an ICS. See, e.g., Jane Doe One v. Oliver, 755 A.2d 1000 (Conn. Super. Ct. 2000); Lunney v. Prodigy Servs., 723 N.E.2d 539 (N.Y. 1999). For definitions related to these terms, see the Communications Decency Act, 47 U.S.C. § 230(f) (2001). Because of confusion surrounding the statutory acronyms, the underinclusive nature of both "OSP" and "ICS," and the fact that "ISP" is the term in common parlance, this discussion will use "ISP" to avoid any confusion, with the understanding that it includes both OSPs and ICSs.

[3] Third party content is assumed to be all content originating from an information content provider that is not the ISP to which users or subscribers have access. This content may reside on the ISP's computer servers for a period of time, or it may merely transit a server temporarily as the content is sent from one user to another.

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tributed to advances in several fields of legal thought, not the least of which is tort law.[4] Nevertheless, the economic implications of ISP liability for third party content remain undeveloped despite being largely driven by tort considerations.[5] This analysis will consider the economic implications of various liability regimes, and will conclude that relative to the available alternatives, the current regime, in which ISPs are almost completely immune from suit, is the most efficient. Therefore, the ultimate question is not whether an alternative regime would be more efficient, but how modifications to the present regime could maximize its efficiency.

Part I of the discussion will present a survey of federal, state, and international case law on ISP liability for third party content, excluding cases addressing vicarious or contributory liability for third party infringement of intellectual property rights.[6] This survey will explore how over the past decade, the U.S. standard for ISP liability began as a negligence rule and flirted briefly with a strict liability rule before Congress granted ISPs near-immunity in the Communications Decency Act. Later cases reinforced the no-liability rule by expanding the scope of the Act. In contrast, European courts that initially employed a strict liability rule for ISP liability ultimately converged on a negligence rule, giving European ISPs little chance to receive the deference accorded their

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[4] See 1 Law and Economics: Theoretical and Methodological Foundations, at xxvii (Richard A. Posner & Francesco Parisi eds., 1997).

[5] An economic analysis of whether bulletin board providers should be considered publishers or distributors for the purpose of defamation law appeared in 1997. See Ray Ibrahim, Giving the Internet an Acid Bath of Economics: Electronic Defamation Viewed Through a New Lens, 2 Va. J.L. & Tech. 5 (1997), at http://vjolt.student.virginia.edu/graphics/vol2/vol2_art5.html. This appears to be the only discussion of ISP liability from an economic perspective. Absent from the analysis is the then recently-enacted CDA, the importance of which did not become fully evident until after the United States Court of Appeals for the Fourth Circuit decided *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997).

[6] This discussion does not approach the question of intellectual property, which arguably may not be "content," at least not in the context of speech. ISPs faced with intellectual property liability are held liable for aiding or benefiting from the infringing act rather than the nature of the content. Regardless, this debate has evolved in a separate direction. For discussion of ISP liability for vicarious and contributory copyright infringement, see Alfred C. Yen, Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment, 88 Geo. L.J. 1833, 1836 n.11 (2000) (citing scholarly discussion of ISP liability for subscriber copyright infringement).

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American counterparts. Part II will approach the issue from a law and economics perspective and consider the economics of various liability regimes, referring to the cases in Part I for illustrative purposes. These regimes are considered in the order in which they appeared in U.S. jurisprudence: negligence, strict liability, and no liability, or conditional immunity. The negligence rule first adopted in the United States and presently employed by European courts holds ISPs liable when they fail to exercise due care in the monitoring of third party content. The strict liability rule, adopted briefly in the United States and for some time in Continental courts, holds ISPs liable for all injuries resulting from third party content. The no liability, or conditional immunity, rule presently employed in the United States holds ISPs almost completely immune from liability for third party content, conditioned only on the minimal responsibilities implicit in Section 230 of the Communications Decency Act. Part II will conclude that as a result of the unique nature of the ISPs' costs in monitoring content and the externalities involved, the present conditional immunity regime is the most efficient of the three. Part III will then consider the present regime on the assumption that, as some have argued, it produces suboptimal levels of monitoring. On this assumption, Part III will analyze how subsidies could remedy the problem of shirking of monitoring duties, concluding that subsidization would be less costly than returning to a liability regime.

I. A HISTORY OF ISP LIABILITY FOR THIRD PARTY CONTENT

Though "Internet law" is a relatively recent phenomenon, the issue of ISP liability for third party content has received considerable attention from courts and the academic community. The development of American and European ISP liability regimes is worthy of consideration as a whole, particularly in the context of its economic undertones and the substantial academic discussion that it has engendered.[7] The four Sections that follow discuss the case law preceding the Communications Decency Act of 1996

[7] Most of the literature on ISP liability for third party content can be found by Keyciting or Shepardizing the landmark decision *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997). For scholarly discussion predating *Zeran*, *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991), serves the same purpose.

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("CDA"), the legislative debate over that Act, the case law that followed the Act, and the most recent cases testing the boundaries of Section 230 of the Act. The final Section in this Part summarizes several prominent European cases addressing ISP liability.

A. Early Cases: Cubby *and* Stratton Oakmont

Curiously, the issue of service provider liability for third party content may be older than the Internet itself. As early as 1984, "The Well," a stand-alone online community, developed its "[y]ou own your own words"[8] policy to limit liability for user postings, with the intent that "if you libel somebody they sue you, not us."[9] Though the prospect of liability was present early on, ISPs appear to have evaded judicial oversight until *Cubby, Inc. v. CompuServe.*[10]

In *Cubby*, CompuServe subcontracted out the content creation, review, editing, and management responsibilities for its "Journalism Forum," one of the company's electronic bulletin boards. The subcontractor then in turn contracted with the publisher of a newsletter called "Rumorville USA," which became available as part of the "Journalism Forum."[11] The plaintiffs developed a competing online gossip forum called "Skuttlebut." Statements were published on "Rumorville" alleging that a "Skuttlebut" developer had been "bounced" from his previous place of employment and describing "Skuttlebut" as a "new start-up scam."[12] The plaintiffs filed suit, alleging that CompuServe was the publisher of the statements, and claimed libel, business disparagement, and unfair competition.[13] On a motion for summary judgment, CompuServe argued that it was a distributor and not a publisher and therefore could not

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[8] Katie Hafner, The Epic Saga of The Well, Wired, May 1997, at 98, 104, available at http://www.wired.com/wired/archive/5.05/ff_well.html.

[9] Katie Hafner, The Well: A Story of Love, Death & Real Life in the Seminal Online Community 11 (2001). Though the ARPANET project came online in 1969, it was not until the National Science Foundation-funded NSFNET was developed by private sector telecommunications carriers in 1987 that the Internet evolved beyond its initial research-based function into a commercially-driven enterprise. See Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (June 10, 1998).

[10] 776 F. Supp. 135 (S.D.N.Y. 1991).

[11] Id. at 137–38.

[12] Id. at 138.

[13] Id.

be liable for the content because it did not know and had no reason to know about the statements in question.[14] The United States District Court for the Southern District of New York agreed, stating that "[g]iven 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."[15] Because the plaintiffs failed to meet this standard,[16] the court granted CompuServe's motion.

For several years, *Cubby* was the controlling authority on ISP liability for third party content. This changed with the decision of *Stratton Oakmont, Inc. v. Prodigy Services*.[17] In *Stratton Oakmont*, a securities investment-banking firm sued over allegedly defamatory anonymous postings to Prodigy's "Money Talk" bulletin board, a prominent online forum for discussion of investments and financial

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[14] Id. See Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 932 (E.D. Wash. 1992) ("[T]here is no logical basis for imposing a duty of censorship on the visual media which does not likewise attach to the print chain of distribution."); see also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 113, at 811 (5th ed. 1984) (stating that distributors are not liable "in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published"). A prima facie case of defamation can be made against a publisher upon demonstrating: 1) an unprivileged statement concerning the plaintiff to another was 2) false or defamatory, 3) negligently published by the defendant, and 4) that the statement itself was actionable, or created special harm to the plaintiff. Compare Keeton et al., supra, § 113, at 802, with Michael J. Brady et al., The New World of the World Wide Web: Internet Liability Issues, 67 Def. Couns. J. 47, 55 (2000) (summarizing elements of a defamation claim).

[15] *Cubby*, 776 F. Supp. at 140–41.

[16] See Restatement (Second) of Torts § 290 (1965) (discussing what an actor is required to know for purposes of determining the risk of activities, including "things and forces" that are common knowledge, as well as laws, enactments, and customs that should affect conduct).

[17] 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995). In April of 1995, a Wisconsin court considered the developing issue of online defamation in deciding *It's in the Cards, Inc. v. Fuschetto*, 535 N.W.2d 11 (Wis. Ct. App. 1995). Though involving online defamation, the case was not a question of re-publication. Rather, the plaintiff sued over a posting to an electronic bulletin board. The decision turned on whether the board was a "periodical" under Wisconsin state law, for the purposes of applying the state retraction statute. Id. at 14; see also James S. Brelford & Nicole A. Wong, Online Liability Issues: Defamation, Privacy, and Negligent Publishing, 564 PLI/Pat. 231, 242 (discussing retraction and *Fuschetto* specifically). In reversing the lower court and holding that the statute did not apply, the court foreshadowed the future debate, stating that "it is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway." *Fuschetto,* 535 N.W.2d at 14.

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information. In a motion for partial summary judgment, the plaintiffs sought determination of two questions. The motion first inquired whether Prodigy was a publisher or a distributor.[18] If Prodigy were found to be a publisher, whether Prodigy had ever received notice of the allegedly defamatory postings would be a secondary matter. The next question the court addressed was whether the Bulletin Board Leader of "Money Talk" was an agent of Prodigy for the purposes of imputing the agent's knowledge to Prodigy.[19] The court answered both questions in the affirmative, effectively reaching the former via the latter. It imputed publisher status to Prodigy by linking the editorial control of the Board Leader to Prodigy.[20]

In so doing, Judge Stuart Ain anticipated the firestorm that would follow *Stratton Oakmont*. In his opinion, Judge Ain argued "[f]or the record, the fear that this Court's finding of publisher status for PRODIGY will compel all computer networks to abdicate control [of] their bulletin boards, incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure."[21] He also anticipated congressional intervention, noting that the Communications Decency Act was pending in Congress.[22]

Stratton Oakmont itself may have ultimately doubted the wisdom of construing ISPs as publishers of third party content. The firm dropped its $200 million claim against Prodigy in exchange for a mere apology and declined to contest Prodigy's motion to dismiss, citing "the 'best interests of the parties as well as the online and interactive services industries.'"[23]

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[18] *Stratton Oakmont*, 23 Media L. Rep. (BNA) at 1795.

[19] Id.; see also Restatement (Second) of Agency § 272 (1958) (stating and qualifying the assertion that "the liability of a principal is affected by the knowledge of an agent"); id. § 268(1) (stating that "notification given to an agent is notice to the principal if it is given: (a) to an agent authorized to receive it; (b) to an agent apparently authorized to receive it").

[20] *Stratton Oakmont*, 23 Media L. Rep. (BNA) at 1798–99.

[21] Id. at 1798.

[22] Id.

[23] Peter H. Lewis, After Apology From Prodigy, Firm Drops Suit, N.Y. Times, Oct. 25, 1995, at D1. It may also have influenced Stratton Oakmont's calculus that Prodigy intended to assert the truth as a defense. Id. Curiously, Judge Ain refused to grant Prodigy's uncontested motion to vacate the previous ruling, stating that there was "a

B. The Communications Decency Act of 1996

While various incarnations of the Communications Decency Act had previously been introduced by Senator James Exon (D-Neb.), none contained any provision resembling 47 U.S.C. § 230.[24] As enacted, Section 230 provides a safe harbor for ISPs engaged in "'Good Samaritan' blocking and screening."[25] Two factors ensured that later versions of the CDA would provide good faith immunity for ISPs. The first was congressional opposition to holding ISPs liable for speech potentially protected by the First Amendment.[26] The second was the obvious disincentive for ISPs to monitor content created by *Stratton Oakmont*.[27] This disincentive was

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real need" for precedent in the area of Internet law. *Stratton Oakmont*, 24 Media L. Rep. (BNA) at 1128.

[24] See 140 Cong. Rec. 18,045 (1994) (statement of Sen. Exon); 141 Cong. Rec. 15,501 (1995) (same). Indeed, former President Clinton's Information Infrastructure Task Force took the short-sighted view in its 1995 "White Paper" that ISPs should be strictly liable for IP infringement. See Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 1–6, 114–24 (1995); Daniel R. Cahoy, New Legislation Regarding On-line Service Provider Liability for Copyright Infringement: A Solution in Search of a Problem, 38 IDEA 335, 352–53 (1998).

[25] The complete text of § 230(c) provides:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material.
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> 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.
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> Civil liability. No provider or user of an interactive computer service shall be held liable on account of—
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> 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
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> 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).

Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 138 (1996) (codified at 47 U.S.C. § 230(c) (Supp. V 2000)).

[26] See 141 Cong. Rec. 16,013–14, 16,025 (1995); 141 Cong. Rec. 22,045–46 (1995).

[27] See 47 U.S.C. § 230(b)(4) ("It is the policy of the United States . . . (4) to remove disincentives for the development and utilization of blocking and filtering technologies.").

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troublesome enough to bring the case under attack on the floor of Congress within three weeks of the decision.[28]

Section 230 was originally intended to compete with the CDA. It was introduced as the Online Family Empowerment Amendment or the Cox/Wyden Amendment,[29] and its dual purpose was to overrule *Stratton Oakmont* and to encourage private efforts to cope with Internet indecency.[30] To the extent that the Amendment represented an understanding of the complex future economic implications of ISP liability regimes, it demonstrated commendable foresight by its sponsors. It appears more likely, however, that the sponsors of the Cox/Wyden Amendment saw *Stratton Oakmont* as a political vehicle by which they could undermine the CDA.[31] Many opponents of the CDA perceived its constitutional shortcomings, but were wary of appearing to be soft on Internet pornography. The *Stratton Oakmont* decision offered the Amendment all the political capital it needed to promote the empowerment of private individuals.[32] The Cox/Wyden Amendment served as a mechanism for enlisting ISPs in the battle against indecency, and it therefore provoked minimal debate when it was incorporated into the Act.[33]

Congress passed the Telecommunications Act on February 1, 1996, Title V of which constituted the CDA.[34] The success of the CDA was short-lived, however, since a federal district court enjoined the operative provisions of the CDA in *Reno v. ACLU*[35] one week after the statute was enacted.[36] The Supreme Court affirmed that decision the following year.[37] It is ironic that Section 230 was

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[28] See, e.g., 141 Cong. Rec. 16,024–26 (1995) (statements of Sen. Coats, arguing that *Stratton Oakmont* served to discourage monitoring); 141 Cong. Rec. 22,045 (1995) (statement of Rep. Cox, characterizing the case as "backward"); 141 Cong. Rec. 22,047 (1995) (statement of Rep. Goodlatte, describing *Stratton Oakmont* as a "tremendous disincentive").

[29] 141 Cong. Rec. 22,044 (1995).

[30] H.R. Conf. Rep. No. 104-458, at 193–94 (1996).

[31] See Robert Cannon, The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway, 49 Fed. Comm. L.J. 51, 65–69 (1996) (discussing political opposition to the CDA and the implications of the Cox/Wyden Amendment).

[32] See id. at 61–63.

[33] See 141 Cong. Rec. 22,044 (1995).

[34] 142 Cong. Rec. 2013 (1996).

[35] 929 F. Supp. 824 (E.D. Pa. 1996).

[36] Id.

[37] Reno v. ACLU, 521 U.S. 844, 885 (1997).

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among the surviving provisions of the CDA, since the Cox/Wyden Amendment would likely not have been introduced but for the radical scope of the CDA. At the time, the effect of Section 230 was not yet evident,[38] but proponents of regulation were undoubtedly dismayed when they discovered that the ultimate effect of the CDA was to provide ISPs with increased protection from liability.

C. After the CDA: Zeran *and its Progeny*

In the wake of *Reno*, several cases dealing specifically with Section 230 appeared in state and federal courts. This line of cases established that ISPs are conditionally immune from suit under Section 230 and prompted protests from members of the scholarly community.[39] The first of these cases was *Zeran v. America Online*,[40] in which the plaintiff Kenneth Zeran was the victim of anonymous postings on the bulletin boards of America Online ("AOL"). The fictitious posting advertised T-shirts bearing offensive slogans glorifying the 1995 bombing in Oklahoma City, Oklahoma. The messages directed purchasers to call "Ken," and gave Zeran's home telephone number. Not unexpectedly, Zeran was besieged with threatening calls.[41] He notified AOL, who promised to remove the posting, but similar messages were re-posted under various permutations of the first alias, offering new slogans and merchandise. Because Zeran ran a business from his home, he was unable to change his telephone number.[42] At one point, an

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[38] See Cannon, supra note 31, at 69 (citing descriptions of the Cox/Wyden Amendment as "a bill without a verb"); id. at 92 (stating that the amendment had been "exposed for the nonevent so many had said that it was").

[39] Criticism of the *Zeran* line is not in short supply. See, e.g., Mitchell P. Goldstein, Service Provider Liability for Acts Committed by Users: What You Don't Know Can Hurt You, 18 J. Marshall J. Computer & Info. L. 591, 634–35 (2000); Michael H. Spencer, Defamatory Email and Employer Liability: Why Razing *Zeran v. America Online* is a Good Thing, 6 Rich. J.L. & Tech. 25 (2000) (one of the more vociferous attacks on *Zeran*); Steven M. Cordero, Comment: *Damnum Absque Injuria*: *Zeran v. AOL* and Cyberspace Defamation Law, 9 Fordham Intell. Prop. Media & Ent. L.J. 775, 778 (1999); Robert T. Langdon, Note, The Communications Decency Act § 230: Makes Sense? Or Nonsense?—A Private Person's Inability to Recover if Defamed in Cyberspace, 73 St. John's L. Rev. 829, 852–53 (1999) (arguing that § 230 should be overturned).

[40] 129 F.3d 327 (4th Cir. 1997).

[41] Zeran v. Am. Online, 958 F. Supp. 1124, 1127 (E.D. Va. 1997).

[42] Id.

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Oklahoma radio station learned of the advertisement and also urged listeners to call Zeran. Several weeks passed before the hostile calls subsided to approximately fifteen per day.[43]

Zeran sued AOL over the incident. The District Court noted that in Section 230(d)(3), Congress had preempted the state law remedies upon which Zeran's claim relied.[44] Granting judgment on the pleadings to AOL,[45] the court dismissed Zeran's claims that "distributor liability is a common law tort concept different from, and unrelated to, publisher liability."[46] Interpreting the Restatement (Second) of Torts, the court found that "distributor liability treats a distributor as a 'publisher' of third party statements where that distributor knew or had reason to know that the statements were defamatory."[47] Effectively, the District Court refused to permit what it saw as an end run around the CDA, stating that "[i]f [the CDA's] objective is frustrated by the imposition of *distributor liability* on Internet providers, then preemption is warranted."[48]

While Zeran's appeal was pending, the District Court decision was already making waves. In *Aquino v. ElectriCiti, Inc.*,[49] the plaintiffs brought numerous state law claims against a California-based ISP, based on an anonymous online bulletin board posting distributed by the defendant.[50] The posting alleged that the plaintiffs were "ring leaders" of an "international conspiracy" engaged

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[43] Id. at 1128.

[44] Id. at 1136.

[45] Id. at 1137.

[46] Id. at 1133. At common law, a person who repeats another's statements is subject to the same liability as the first speaker. See Cianci v. New Times Publ'g. Co., 639 F.2d 54, 60–61 (2d Cir. 1980); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (excluding strict liability from the scope of the common law rule); Lewis v. Time, Inc., 83 F.R.D. 455, 463 (E.D. Cal. 1979) (citing language that the defaming party must "take[] a responsible part in the publication").

[47] *Zeran*, 958 F. Supp. at 1133. The District Court understood Zeran's argument to be that distributorship, coupled with notice, equals publisher status. Id. This is not entirely correct; Zeran's argument was an attempt to attach *liability*, not *publisher status*, an argument sustained by the Restatement. See Keeton et al., supra note 14, § 113, at 811 (explaining that a distributor incurs publisher status liability where proof demonstrates that the distributor "knew or had reason to know of the existence of defamatory matter"). Put another way, Zeran was indifferent to AOL's legal status. Rather, he was concerned with liability, for liability is the factor upon which his ability to recover turned.

[48] *Zeran*, 958 F. Supp. at 1134–35 (emphasis added).

[49] 26 Media L. Rep. (BNA) 1032 (Cal. App. Dep't Super. Ct. 1997).

[50] Id. at 1032.

in "'Satanic Ritual Abuse' of children" and various other heinous acts.[51] Defamation, however, was notably absent from the plaintiffs' lengthy list of claims, which may have indicated an attempt to circumvent Section 230.[52] This pleading device was unsuccessful. Citing *Zeran*, a California court held that the plaintiffs' claim had been preempted by Section 230.[53]

On appeal to the United States Court of Appeals for the Fourth Circuit, Zeran reasserted that while Section 230 may have immunized ISPs from liability as publishers, it had not immunized them from being held liable as distributors.[54] Zeran presented a colorable argument, as there is some indication in the legislative history supporting distributor liability.[55] Judge J. Harvie Wilkinson considered this argument but rejected it nevertheless, finding that ISP liability under a distributor standard was contrary to the purposes of the CDA. Judge Wilkinson wrote that "[i]f the original party is considered a publisher of the offensive messages, Zeran certainly cannot attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the statements."[56] Judge Wilkinson also cited the potential effect of adopting Zeran's arguments, noting the "practical implications of notice liability in the interactive computer service context."[57] The sheer volume of notifications, he argued, would create a prohibitive, "impossible

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[51] Id.

[52] The fact that the plaintiffs' complaint alleged negligence, breach of contract, intentional infliction of emotional distress, alter ego liability, and even a violation of civil rights, but not the obvious claim of libel, supports the conclusion that this omission was strategic. See id.

[53] Id.

[54] *Zeran*, 129 F.3d at 331. This argument countered the District Court's assertion that distributor liability would "frustrate[ ] the purpose of the CDA." See *Zeran*, 958 F. Supp. at 1135.

[55] "Distributor" and "publisher" have distinct meanings with respect to defamation law. *Zeran*, 129 F.3d at 332 (citing Restatement (Second) of Torts § 558(b) (1977)); Keeton et al., supra note 14, § 113, at 803 (noting the distinction). Support for Zeran's argument is provided by the legislative history, since Senator Exon agreed that the language of § 230 sought to prevent holding ISPs liable as publishers rather than mere distributors. See 141 Cong. Rec. 16,024–25 (1995). For an in-depth treatment of the legislative history of the Communications Decency Act, see Cannon, supra note 31, at 64–72; Mary Kay Finn et al., Policies Underlying Congressional Approval of Criminal and Civil Immunity for Interactive Computer Service Providers Under Provisions of the Communications Decency Act of 1996, 31 U. Tol. L. Rev. 347, 358–68 (2000).

[56] *Zeran*, 129 F.3d at 333.

[57] Id.

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burden" on ISPs.[58] This burden would lead ISPs to purge information on notice without regard to whether the content was actually injurious.[59] Judge Wilkinson observed that such a regime would contradict the expressed intentions of Congress in enacting the CDA.[60] Thus, the Fourth Circuit affirmed, ruling that Section 230 prohibited the imposition of either publisher or distributor liability on ISPs for injuries resulting from third party content.[61]

The *Zeran* ruling changed the nature of scholarly discussion of ISP liability.[62] Until *Zeran*, the debate had focused on the publisher/distributor distinction.[63] This was essentially a debate over the standard of liability: whether a negligence regime was preferable to a strict liability regime.[64] In *Zeran*, the Fourth Circuit discarded a liability regime in favor of a non-liability/conditional immunity regime.[65] Following *Zeran*, the debate has turned on whether an immunity regime or a liability regime is appropriate.[66]

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[58] Id.

[59] Id. (citing *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 928, 931 (E.D. Wash. 1992) (recognizing the practical and economic problems that would result from plaintiffs' theory of liability); Phila. Newspapers v. Hepps, 475 U.S. 767, 777 (1986) (same)).

[60] Id. at 333, 334.

[61] Id. at 335. The reasoning in *Zeran* is occasionally interpreted to stand for the proposition that ISPs are wholly immune from any suit under state law. Such an interpretation ignores the District Court's admonition that "[t]his provision does not reflect congressional intent to preempt state law remedies for defamatory material on an interactive computer service. To the contrary, § 230(d)(3) reflects Congress' clear and unambiguous intent to retain state law remedies except in the event of a conflict between those remedies and the CDA." *Zeran*, 958 F. Supp. at 1131. This analysis is consistent with the language of § 230 directing that it be applied to those engaging in "'Good Samaritan' blocking and screening," 47 U.S.C. § 230(c) (Supp. V. 2000), so as to "remove disincentives for the development and utilization of blocking and filtering technologies." Id. § 230(b)(4).

[62] See, e.g., David R. Sheridan, *Zeran v. AOL* and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet, 61 Alb. L. Rev. 147, 169–70 (1997); ISP Is Immune from Liability for Negligent Communication of Defamation Under Communications Decency Act of 1996, 15 Computer Law. No. 2, at 20, 21 (1998) (noting that *Zeran* was inconsistent with previous case law).

[63] See *Cubby*, 776 F. Supp. at 138; *Stratton Oakmont*, 23 Media L. Rep. (BNA) at 1795. See generally Ibrahim, supra note 5, ¶¶ 20–23 (evaluating the relative value of distributor versus publisher liability regimes).

[64] See, e.g., Ibrahim, supra note 5, ¶¶ 29–32 (construing distributor liability as no liability, and comparing it with the strict liability imposed by publisher status).

[65] See *Zeran*, 129 F.3d at 333. Non-liability and conditional immunity are effectively the same; however, an ISP which fails to satisfy the statutory conditions of immunity

The pendulum's swing away from *Stratton Oakmont* continued with *Blumenthal v. Drudge*.[67] In August 1997, the popular gossip column the "Drudge Report" reported on the Internet that Sidney Blumenthal, a journalist recently hired by the White House as a communications aide, had a history of spousal abuse.[68] Citing allegations from "top GOP operatives," the Report characterized the accusations as "explosive" but apparently failed to verify the existence of court records to substantiate these accusations.[69] At the time the statement was published, Matt Drudge, the creator of "Drudge Report," had a contract with America Online under which AOL paid Drudge a monthly "royalty payment" in exchange for making the Drudge Report available to all AOL subscribers.[70]

The day after posting the statement in question, Drudge received a letter from the Blumenthals' counsel and retracted the story.[71] He later offered a public apology to the Blumenthals.[72] The Blumenthals' defamation suit against AOL and Drudge culminated in a motion by AOL for summary judgment and a motion by Drudge to dismiss or transfer for lack of personal jurisdiction. In April 1998, the court denied Drudge's motion and granted AOL's motion for summary judgment, citing Section 230 and *Zeran*.[73] Summarizing the policy rationale behind Section 230, Judge Paul Friedman wrote that "[i]n 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 pro-

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will lose that immunity and be subject to notice-based liability. See infra notes 263–65 and accompanying text.

[66] See Goldstein, supra note 39, at 637–38; Spencer, supra note 39, ¶¶ 26–27; Langdon, supra note 39, at 854–55.

[67] 992 F. Supp. 44 (D.D.C. 1998).

[68] Id. at 46.

[69] Id. Under the licensing agreement with AOL, Drudge was responsible for creating, editing, updating, and otherwise managing the content of the Report. AOL, however, reserved the right to "remove content that AOL reasonably determine[d] to violate AOL's then standard terms of service." Id. at 47.

[70] Id. at 47.

[71] Id. at 48.

[72] Id.

[73] Id. at 52, 53, 58. Though AOL was dismissed from the suit, the Blumenthals continued to pursue their claim against Drudge. See Blumenthal v. Drudge, 29 Media L. Rep. (BNA) 1347, 1350 (D.D.C. 2001) (denying defendant's special motion to strike plaintiff's complaint); Blumenthal v. Drudge, 27 Media L. Rep. (BNA) 2004, 2012 (D.D.C. 1999) (granting, denying, and staying various discovery motions, and denying defendant's motion for sanctions).

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viders to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted."[74] The case eventually settled in May 2001.[75]

Scholars have attacked the *Blumenthal* decision on two grounds. The first critique argues that the result in *Blumenthal* exemplifies the flaws in the *Zeran* court's interpretation of Section 230.[76] This critique argues that, in theory, ISPs may subcontract out all their content development to maximize online publishing revenues while minimizing liability.[77] This phenomenon has yet to materialize in the case law.[78] The second and arguably more sustainable critique is that Section 230 did not mandate the outcome in *Blumenthal v. Drudge*.[79] This argument follows the analysis reluctantly rejected by Judge Friedman. Judge Friedman stated, "[i]f it were writing on a clean slate, this Court would agree with plaintiffs."[80] Nevertheless, he specifically rejected the plaintiffs' argument, reasoning that

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[74] *Blumenthal*, 992 F. Supp. at 52.

[75] See Howard Kurtz, Clinton Aide Settles Libel Action Against Matt Drudge—at a Cost, Wash. Post, May 2, 2001, at C1 (reporting that parties signed a settlement agreement in which Blumenthal agreed to pay Drudge $2500 for travel costs).

[76] See e.g., Goldstein, supra note 39, at 636; Spencer supra note 39, ¶14.

[77] In defending against negligence and defamation claims before the Tenth Circuit, even AOL conceded that the immunity provided by § 230 was subject to certain conditions. Ben Ezra, Weinstein, & Co. v. Am. Online, 206 F.3d 980, 985 n.4 (10th Cir. 2000), cert. denied, 531 U.S. 824 (2000).

[78] While some may suggest that *Ben Ezra* represents this scenario, it should be noted that the *Ben Ezra* plaintiffs would have failed to make a case even under *Cubby*. See *Ben Ezra*, 206 F.3d at 986 (finding that defendant did not engage in ex ante verification of the subcontractor's information and was contractually forbidden from making modifications). Contrary to prognostications that ISPs would ignore injurious content, strong arguments have been made for the proposition that policing content is good for business. See Eric P. Bergner, A Sense of Decency: There Are Good Reasons to Police Your Web Site's Bulletin Boards, Indus. Standard, July 9, 1999, at 16.

[79] See, e.g., Sheridan, supra note 62, at 179 (arguing that § 230 did not mandate the outcome in *Blumenthal*); Michelle J. Kane, Case Comment, *Blumenthal v. Drudge*, 14 Berkeley Tech. L. J. 483, 499 (1999).

[80] *Blumenthal*, 992 F. Supp. at 51. Arguably, Judge Friedman was writing on a clean slate—the reasoning employed by the Fourth Circuit in *Zeran*, though sustainable, and demonstrably efficient, was not impervious to attack. Moreover, it was not binding on the District Court's decision. Judge Friedman could have adopted the publisher/distributor distinction that Zeran had unsuccessfully advanced before the Fourth Circuit. Had Judge Friedman relied on that distinction as grounds for imposing liability on AOL, he would have achieved what he viewed to be the equitable outcome, punting the question to the D.C. Circuit Court for a nearly inevitable review.

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"[a]ny attempt to distinguish between 'publisher' and notice-based 'distributor' liability and to argue that Section 230 was only intended to immunize the former would be unavailing. Congress made no distinction between publishers and distributors in providing immunity from liability."[81]

Despite mounting scholarly attack on *Zeran* and *Blumenthal*,[82] the reasoning in these cases prevailed, spawning a line of cases reaffirming the broad scope of Section 230, which incorporated ISP immunity into the common law. In *Doe v. America Online*,[83] a Florida mother brought suit on behalf of her minor son against AOL and one Richard Russell. In 1994, Russell lured the plaintiff's minor son and two other minors to engage in sexual activity with Russell and each other. Russell photographed and videotaped these activities, and later marketed these recordings through AOL chat rooms, effecting at least one sale.[84] The plaintiff alleged that AOL's negligence permitted the transaction to occur. The trial court granted AOL's motion to dismiss, citing *Zeran* and Section 230 of the CDA on the same day that the Supreme Court struck down the remainder of the Act.[85] The Florida District Court affirmed, citing Section 230 and *Zeran* at length.[86] The Florida Supreme Court granted review and affirmed, holding that Section 230 preempted state law remedies.[87]

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[81] Id. at 52. However, this argument is supported, not with the authority of the Congressional Record, but with a quote from *Zeran*. See id. The Congressional Record arguably indicates the contrary. See supra notes 29–34, 55; see also Sheridan, supra note 62, at 161–62, 179 (arguing that Congressional intent as evidenced by the debate over the CDA did not mandate the complete extension of immunity to distributors); Cordero, supra note 39, at 815–17 (same).

[82] See supra notes 39 and 79. In general, critics of these cases argue that rather than giving ISPs an incentive to monitor, the *Zeran* interpretation of § 230 did exactly the opposite and that returning to a negligence rule would better serve the goal of inducing ISP monitoring.

[83] 718 So. 2d 385 (Fla. Dist. Ct. App. 1998), aff'd, 783 So. 2d 1010 (Fla. 2001), cert. denied, 122 S. Ct. 208 (2001).

[84] Id. at 386.

[85] Id. at 387; see also Stephen J. Davidson et al., The Law of Cyberspace Liability of Information Service Providers, 574 PLI/Pat. 143, 154–55 (2000) (noting coincidence of dates and discussing lower court ruling).

[86] *Doe*, 718 So. 2d at 388–89.

[87] Doe v. Am. Online, 783 So. 2d 1010, 1018 (Fla. 2001), cert. denied, 122 S. Ct. 208 (2001).

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At the same time, *Lunney v. Prodigy Services*[88] was working its way through the New York courts. In 1994, an unknown party fraudulently opened several Prodigy accounts in the name of Alexander Lunney, a teenage Boy Scout.[89] This party submitted several profane messages to Prodigy bulletin boards and sent a sexually explicit and threatening email message to a local Scoutmaster entitled "HOW I'M GONNA'KILL U."[90] After the incident was investigated by local police, Lunney sued Prodigy, alleging that Prodigy was negligent in allowing the accounts to be opened in his name. The New York Supreme Court, Appellate Division granted summary judgment to Prodigy, citing *Anderson v. New York Telephone Co.*,[91] a case in which a New York court held that a telephone company was not liable for defamatory material "published" by a third party using phone company equipment.[92]

The New York Court of Appeals affirmed, agreeing with the authority of *Anderson*. Prodigy argued, and the court agreed, that while Prodigy reserved the right to edit content, "it is not required to do so, does not normally do so and therefore cannot be a publisher of electronic bulletin board messages posted on its system by

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[88] 723 N.E.2d 539 (N.Y. 1999), cert. denied, 529 U.S. 1098 (2000).

[89] Id. at 539.

[90] Id. at 539–40.

[91] 320 N.E.2d 647, 649 (N.Y. 1974).

[92] *Lunney*, 723 N.E.2d at 541. One may speculate that had *Lunney* preceded *Cubby*, the entire history of ISP liability may have been different, since the *Lunney* court elected to construe ISPs as common carriers rather than distributors. Both heuristics have been applied to ISPs, and though ISPs function more like common carriers, the present regime in the United States treats ISPs as distributors. Compare *Lunney*, 723 N.E.2d at 542 (holding Prodigy was "merely a conduit"), and Mark A. Lemley & David McGowan, Legal Implications of Network Economic Effects, 86 Cal. L. Rev. 479, 494 (1998) (stating that the Internet itself is "a classic actual network with characteristics similar to the telephone," because it enables communication between users), with Religious Tech. Ctr. v. Netcom On-line Communication Servs., 907 F. Supp. 1361, 1369 (N.D. Cal. 1995) (holding that the ISP, Netcom, was not a common carrier), Melville B. Nimmer, 3 Nimmer on Copyright § 12B.01[A], at 12B-4 n.10 (2001) (citing *Howard v. America Online*, 208 F.3d 741, 752 (9th Cir. 2000), for the proposition that ISPs may not be treated as common carriers under FCC regulations), and Cannon, supra note 31, at 72 n.110 and citations therein (ISPs not treated as common carriers). The fact that the CDA is codified in Chapter 47 of the U.S. Code, which pertains to common carriers, may contribute to this confusion.

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third parties."[93] The court explicitly declined to apply Section 230 of the CDA, finding that "[t]his case does not call for it."[94]

Several months after *Lunney*, the Tenth Circuit considered *Ben Ezra, Weinstein, & Co. v. America Online.*[95] In *Ben Ezra*, the plaintiff software corporation sued AOL, alleging that incorrect information regarding the plaintiff had been posted to AOL's proprietary "Quotes and Portfolios" area by parties with whom AOL had subcontracted. The District Court dismissed the plaintiffs' claim.[96] In an analysis similar to *Blumenthal*, the Tenth Circuit affirmed the dismissal, reasoning that AOL had played no role in developing or creating the information at issue. AOL had not worked closely enough with its subcontractors to be an information content provider for the purposes of the CDA.[97]

A good example of state courts conforming to *Zeran* after the *Lunney* decision is *Jane Doe One v. Oliver.*[98] In *Oliver*, the plaintiffs sued several defendants and AOL over an email message sent to thirty-one addressees, including one plaintiff's employer.[99] The plaintiffs alleged that the defendant Oliver had "confessed to sending the e-mail to 'get even' with the plaintiffs because Jane Doe One purportedly 'stole her man.'"[100] Seven counts of the complaint were directed at AOL, Oliver's ISP, alleging that AOL's failure to prevent the incident constituted negligence and breach of contract.[101] In a motion to strike, AOL again successfully argued that it was immune from suit under Section 230.[102]

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[93] *Lunney*, 723 N.E.2d at 542.

[94] Id. at 543. The *Lunney* decision may carry some symbolic importance since *Stratton Oakmont* was decided by a lower New York court. *Lunney* suggested that New York courts might have eventually righted themselves without congressional intervention. Setting aside the fact that there was no such guarantee in 1995, however, this argument fails to consider the indirect influence of § 230 jurisprudence on the *Lunney* court. It also ignores the effect that *Stratton Oakmont* might have had in the nascent years of the Internet before *Lunney*.

[95] 206 F.3d 980 (10th Cir. 2000), cert. denied, 531 U.S. 824 (2000).

[96] Id. at 984.

[97] Id. at 985–86.

[98] 755 A.2d 1000 (Conn. Super. Ct. 2000).

[99] Id. at 1002.

[100] Id.

[101] Id. at 1002–04.

[102] Id. at 1004.

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D. The Outer Limits of Section 230: Websites, Trademark, and Non-traditional ISPs

Recent cases have indicated the boundaries of ISP protection under Section 230. In *Stoner v. eBay, Inc.*,[103] the popular online auction site was sued for the auctioning of copyright infringing or "bootlegged" sound recordings. Citing *Zeran*, the court held that Section 230 protected eBay because the company had established that: first, eBay was an ICS as defined by Section 230; second, it was not a content provider with respect to the activity in question; and third, the plaintiff sought to hold eBay liable for third party content.[104] That eBay did not conform to the traditional bulletin board model did not change the court's analysis, since it found the legislative intent remained the same.[105] Notably, while the record reflected that eBay did make efforts to limit the auctioning of inappropriate services,[106] the court suggested in dicta that ISPs would not lose immunity unless they were "aiding and abetting" criminal activity.[107]

The scope of Section 230 protection expanded further with the decision of *Kathleen R. v. City of Livermore*.[108] In *Kathleen R.*, the plaintiff's minor son had repeatedly downloaded sexually explicit images from the Internet to floppy disks using the local public library. The plaintiff sued, seeking broad injunctive relief against the library trustees.[109] The court noted that libraries were in a "damned if you do, damned if you don't" situation[110] after *Mainstream Loudoun v. Board of Trustees of Loudoun*,[111] which held that libraries could be sued for limiting Internet access.[112] The court dismissed a collection of creative arguments in affirming the lower court's

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[103] 56 U.S.P.Q.2d (BNA) 1852 (Cal. App. Dep't Super. Ct. 2000).

[104] Id. at 1853.

[105] Id. at 1854.

[106] Id. at 1855. Curiously, the court held that eBay had no legal obligation to monitor because such a responsibility would contradict the immunity-for-oversight that Judge Friedman found implicit in § 230. Clearly ISPs are responding to either a market or a legal imperative to engage in some monitoring. See supra note 78.

[107] *Stoner*, 56 U.S.P.Q.2d (BNA) at 1855.

[108] 87 Cal. App. 4th 684 (2001).

[109] Id. at 690–91.

[110] Id. at 691–92.

[111] 24 F. Supp. 2d 552 (E.D. Va. 1998) (*Loudoun II*).

[112] *Kathleen R.*, 87 Cal. App. 4th at 692–94.

grant of summary judgment to the defendant, ruling that the plaintiff's claims were preempted by Section 230.[113]

Though there may be strong public policy and First Amendment reasons for immunizing libraries from this form of liability, the court did not need to invoke Section 230 because the library would not have been liable as a common law distributor.[114] By applying Section 230 here, the court provided a precedent for future courts to grant immunity to ISPs that willfully ignore harmful activity, thereby abjuring the tacit quid pro quo identified by Judge Friedman—the implied immunity-for-oversight exchange.[115] Subsequent cases have applied Section 230 immunity to other non-traditional ISPs. In *PatentWizard, Inc. v. Kinko's, Inc.*,[116] the plaintiff PatentWizard sought recovery from the photocopying services provider for defamatory statements made in a chat room session by a Kinko's customer using an Internet-connected computer.[117] In a fatal decision, the plaintiff failed to contest whether Kinko's, by making Internet-connected computers available to the public, automatically qualified as a provider of an interactive computer service.[118]

Only a few days after the *Kathleen R.* decision, the Southern District of New York decided *Gucci America v. Hall & Associates*,[119] the first major ruling to deny Section 230 protection to an ISP. Gucci sued the ISP Mindspring (now merged into Earthlink)

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[113] Id. at 698. In an unreported case, the District Court for the Northern District of Illinois rejected a similar attempt to reason around § 230, refusing to find ISPs liable for injurious content made available via web hosting. See John Does v. Franco Prods., No. 99 C 7885, 2000 U.S. Dist. LEXIS 8645, at *15–16 (N.D. Ill. June 21, 2000).

[114] *Kathleen R.*, 87 Cal. App. 4th at 694–95 n.3.

[115] See supra note 74 and accompanying text. Certainly, the legislative history supports Judge Friedman's conclusion as to a quid pro quo. Expanding interpretations of § 230 would appear to reduce whatever benefits Congress may have obtained from this exchange. This alone should not constitute grounds for reversing § 230, however, absent indications that this reduction is independently inefficient.

[116] 163 F. Supp. 2d 1069 (D.S.D. 2001).

[117] Id. at 1070.

[118] Id. at 1071. The court subsequently found that the plaintiff's complaint sought to treat the defendant as a publisher and granted the defendant's motion to dismiss. Id. at 1072. It should be noted that even if Kinko's "hands-off" architecture for providing Internet access had persuaded the court to deny it § 230 immunity, Kinko's would not have been liable as a distributor because notice was lacking. See discussion infra notes 262–63 and accompanying text.

[119] 135 F. Supp. 2d 409 (S.D.N.Y. 2001).

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and a website operator for trademark infringement after the plaintiff had notified Mindspring twice of the infringing use.[120] The defendants sought to assert Section 230 immunity, but the court instead relied on Section 230(e)(2), which states that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property."[121] Faced with the plain language of the law, the court held that Section 230 would not automatically apply to intellectual property claims.[122]

While *Gucci America* checked Section 230's expansion in the area of trademark law, courts have noted that the "of any information" language[123] in Section 230 indicates that it is restricted to tort-based claims. Following the logic of *Kathleen R.*, a Washington state court revisited the website immunity established in *Stoner* and found that Section 230 could protect against liability for breach of contract as well. In *Schneider v. Amazon, Inc.*,[124] an author brought negligence and breach of contract claims against the widely known Internet book vendor, which had posted negative reader reviews of the plaintiff's books.[125] While an Amazon representative agreed to remove the comments when Schneider complained, Amazon took no action in the next two days.[126] Schneider sued Amazon and several unnamed parties.[127] Reviewing much of the Section 230 jurisprudence to date, the court found that though Section 230

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[120] Id. at 411.

[121] Id. at 412.

[122] Id. at 417. A recent unreported decision employed § 230(e)(2) to reach the same result. In *Ford Motor Co. v. GreatDomains.com*, No. 00-CV-71544-DT, 2001 U.S. Dist. LEXIS 21301 (E.D. Mich. Dec. 20, 2001), the court ruled on a supplemental motion to dismiss in an Internet domain name dispute, finding that § 230 could not be applied to trademark claims. Id. at *1. The *Ford Motor Co.* case could herald a clash between expanding intellectual property law and § 230 and may remain unreported for this reason. For example, were a trademark holder to advance vicarious tarnishment claims against an ISP, the court would be faced with the decision of either undermining § 230(c) or reading § 230(e)(2) very narrowly. Not only would the former obliterate the the present incentive regime, it would also create the peculiar result of prioritizing robust speech over defamation victims' rights, but prioritizing trademark holders' rights over robust speech.

[123] 47 U.S.C. § 230(c)(1) ("No provider . . . shall be treated as the publisher or speaker of *any* information provided by another.").

[124] 31 P.3d 37 (Wash. Ct. App. 2001).

[125] Id. at 38–39. At least some reviews contained ad hominem attacks on Schneider—one alleging he was a felon—which violated Amazon's review guidelines. Id.

[126] Id. at 39.

[127] Id.

made no reference to website operators, Amazon's site was no different than AOL's message board in *Zeran*.[128] This observation only reinforced previous Section 230 jurisprudence; in *Stoner*, the only other website liability case at that time,[129] the applicability of Section 230 had not even been contested.[130] The court easily dismissed Schneider's assertion that Section 230 only granted immunity from tort liability,[131] as *Oliver* and *Kathleen R.* had already determined that Section 230 immunity extended beyond tort law,[132] and affirmed the ruling of summary judgment in Amazon's favor.[133]

E. International Cases

Overseas, legal regimes have been far less hospitable to ISPs. Though European policymakers were focusing on ISP liability as early as their American counterparts,[134] European regimes are still

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[128] Id. at 40 (citing *Zeran*, 129 F.3d at 331). Having concluded that no distinction should be made between ISPs and websites, the court quoted Judge Friedman's quid pro quo passage from *Blumenthal*. Id. at 43 (citing *Blumenthal*, 992 F. Supp. at 52).

[129] Though *Stoner* and *Schneider* are the only two cases to date that deal with websites, they are not the only non-ISP cases. In a case that was not officially published, *Barrett v. Clark*, 29 Media L. Rep. (BNA) 2473 (Cal. App. Dep't Super. Ct. 2001), a court considered whether a newsgroup moderator could be considered to have been immunized by § 230. Unlike the *Stratton Oakmont* case, however, Usenet newsgroups are not maintained by any individual provider and require no moderation at all. See Keith Siver, Good Samaritans in Cyberspace, 23 Rutgers Computer & Tech. L.J. 1, 6 (1997). In *Barrett*, the plaintiffs sued one defendant for reposting an allegedly defamatory message. The court found that because the defendant in question had merely reposted the message, she was not a content provider under the terms of the law. Like *Kathleen R.*, this appears to be another unnecessary application of § 230, as the *Barrett* court ultimately found that the complaint failed because the plaintiffs were public figures. *Barrett*, 29 Media L. Rep. (BNA) at 2480. The public figure doctrine notwithstanding, it seems curious that the court could find an individual to be an interactive computer service merely because she claims to be repeating the words of another.

[130] *Stoner*, 56 U.S.P.Q.2d (BNA) at 1853.

[131] *Schneider*, 31 P.3d at 41.

[132] *Kathleen R.*, 87 Cal. App. 4th at 697; *Oliver*, 755 A.2d at 1003–04.

[133] *Schneider*, 31 P.3d at 43.

[134] See Frances Gibb, Menace of Internet Libel Prompts New Defamation Bill, London Times, July 3, 1995, at 6.

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evolving and can be compared to the regime created by Section 230 in the United States.[135]

In the United Kingdom, the Defamation Act of 1996 permits an innocent dissemination defense to ISPs who were unaware of injurious content.[136] However, this defense only applies if the ISP has taken reasonable care in its publication.[137] This caveat thus holds an ISP responsible for allegedly defamatory content about which it receives notice. This was the case in *Godfrey v. Demon Internet.*[138] In *Godfrey*, the plaintiff was a physics lecturer falsely identified as the author of an allegedly defamatory Usenet posting which appeared in the "soc.culture.thai" newsgroup.[139] The plaintiff, Godfrey, notified the ISP of the message and requested that it be removed.[140] Demon declined to remove the posting until it expired two weeks later.[141] Godfrey sued, and Demon sought to raise the innocent dissemination defense provided by the 1996 Act. The court ruled that since the plaintiff had notified Demon of the allegedly defamatory content, Demon could not raise the innocent dissemination defense but noted that the plaintiff was unlikely to receive a substantial recovery.[142] This proved untrue, since Demon ultimately settled for $25,000 and paid the plaintiff's costs, amounting to several hundred thousand dollars.[143]

Notice-based liability also threatened German ISPs, though in a more troublesome context. As early as 1995, German authorities had notified CompuServe Germany that some of the content made

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[135] See, e.g., Godfrey v. Demon Internet Ltd., [2000] 3 W.L.R. 1020, 1022 (Q.B. 1999) (noting a "substantial divergence" in the approaches of American and English defamation law).

[136] Defamation Act, 1996, c. 31 § 1(1)(a)–(c) (Eng.).

[137] Id. § 1(1)(b).

[138] [2000] 3 W.L.R. 1020 (Q.B. 1999).

[139] Id. at 1022–23.

[140] Id. at 1023. A subsequent court's discussion of *Godfrey* suggests that the plaintiff deliberately posted offensive comments about foreign countries and cultures to provoke insults that he could use as grounds for libel claims. See Burstein v. Times Newspapers Ltd., [2001] 1 W.L.R. 579, 591 ¶ 26 (Eng. C.A. 2000).

[141] Sarah Lyall, British Internet Provider to Pay Physicist Who Says E-Bulletin Board Libeled Him, N.Y. Times, April 1, 2000, at A5 (suggesting that giving notice would place ISPs at the mercy of "the rich and litigious").

[142] *Godfrey*, [2000] 3 W.L.R. at 1030.

[143] See Lyall, supra note 141. The uncertainty of the ISPs' position is further underscored by the fact that the defendant ISP in *Godfrey* was liable even though the plaintiff had deliberately provoked the defamatory comments.

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available through CompuServe USA servers was illegal under German law.[144] The head of CompuServe Germany, Felix Somm, took the only remedial action available and notified CompuServe USA.[145] CompuServe USA responded by closing the questionable newsgroups in December 1995, thereby preventing access to all users.[146] American users immediately protested.[147] Under intense pressure, CompuServe elected to implement "parental controls" and lifted access restrictions in February 1996.[148] German officials then filed an indictment against Somm, alleging violations of German criminal law.[149] Somm's defense argued that the illegal materials did not originate from him and sought to invoke Sections 5(2) and 5(3) of the German Teleservices Act.[150] Under Section 5(2), an ISP may be responsible for third party content if it is aware of the content and blocking the content is reasonable and feasible.[151] Under Section 5(3), a mere access provider is not liable for third party content.[152] In light of the findings at trial and the defenses provided by German law, even Somm's prosecutors eventually argued for his acquittal.[153] As in *Godfrey*, however, the relevant statute did not offer protection to the ISP, because the ISP had received notice. The fact that Somm was incapable of removing the material was not lost on the Local Munich Court,[154] yet

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[144] Judgment of the Local Court Munich in the Criminal Case Versus Somm § II.1, http://www.cyber-rights.org/isps/somm-dec.htm, (unofficial translation by Christopher Kuner) (last visited Oct. 6, 2001) [hereinafter *Somm*], also available at http://www.jura.uni-wuerzburg.de/sieber/somm/somm-urteil.pdf (original German, PDF format). For an in-depth discussion of the *Somm* case, see Mark Konkel, Comment, Internet Indecency, International Censorship, and Service Providers' Liability, 19 N.Y.L. Sch. J. Int'l & Comp. L. 453 (2000).

[145] *Somm*, supra note 144, § II.1.

[146] Hans Werner-Moritz, Pornography Prosecution in Germany Rattles ISPs, Nat'l. L.J., Dec. 14, 1998, at B7. Werner-Moritz's perspective is interesting. because he participated in Somm's criminal defense.

[147] Id.

[148] Id.

[149] Id. Somm was charged under various provisions of the German Penal Code. See *Somm*, supra note 144, pre-decision summary § IV, and citations to Strafgesetzbuch (StGB) therein.

[150] See *Somm*, supra note 144, § IV.1.B.1.

[151] Id. § IV.1.B.2.

[152] Id.

[153] Former CompuServe Manager Convicted of Internet Porn, L.A. Times, May 29, 1998, at D3.

[154] See *Somm*, supra note 144, § II.1.

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Somm was convicted and sentenced to two years probation and was fined 100,000 marks.[155] In the wake of the Somm conviction, at least one ISP exited the German market by moving its hosting servers outside of Germany.[156] Somm prevailed on appeal, as a state court in Munich employed a new law enacted by the German Parliament after Somm's first conviction.[157]

The liability risks of French ISPs increased substantially with the decision of *Lefebure v. Lacambre*.[158] French ISPs were already navigating uncharted legal territory; in 1996, French police had temporarily jailed the administrators of two prominent ISPs on charges of distributing child pornography.[159] In *Lefebure*, the defendant Lacambre operated an Internet server, Altern.org, to which an unknown user posted twenty-nine pictures of Estelle Hallyday, a French model, in which she appeared partially or completely naked.[160] Hallyday sought and received damages and a preliminary injunction against Lacambre.[161] The injunction required that Lacambre prevent all transmissions of the offending images from his server, and the court levied a fine for each day that he failed to do so.[162] The court found that "it appears necessary to state that the service provider has the obligation to ensure the morality of those that it serves, that they respect the ethical rules governing the Web, and that they respect laws and regulations and rights of third parties."[163]

On appeal before the Cour d'Appel of Paris, Lacambre argued that the decision of the lower court imposed a duty exceeding the duty imposed on publishers by the common law.[164] In spite of this

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[155] Edmund L. Andrews, German Court Overturns Pornography Ruling Against Compuserve, N.Y. Times, Nov. 18, 1999, at C4.

[156] Kenneth Cukier, PSINet Sends Warning Signals to German State, Comm. Week Int'l, July 20, 1998, at 16.

[157] Id.

[158] T.G.I. Paris, June 9, 1998 (unpublished order), http://www.legalis.net/jnet/decisions/responsabilite/ord_0698.htm [hereinafter *Lefebure*].

[159] Policing the Internet: Hard Line on Porn, The Economist, Aug. 10, 1996, at 42.

[160] *Lefebure*, supra note 158, ¶ 3.

[161] Id. ¶ 5.

[162] Id. ¶ 31.

[163] Id. ¶ 22 (translated by author).

[164] Lefebure v. Lecambre, CA Paris, 14e ch. A, Feb. 10, 1999, J.C.P. 1999, II, 10101, note F. Olivier & E. Barbry, http://www.legalis.net/jnet/decisions/illicite_divers/ca_100299.htm.

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complaint, the court ruled that Lacambre "obviously exceeds the technical role of a simple transmitter of information" and imposed 405,000 francs in damages.[165] Unable to comply with the technical requirements of the decision, Lacambre immediately shut down his service, terminating access to over 47,000 sites.[166]

After a period of uncertainty, the French legislature enacted several provisions to modify the previous law. The new statute first requires that ISPs make filtering software available to their clientele. It also mandates that they maintain records of subscribers.[167] The statute allows ISPs to be held responsible for objectionable content if they should fail to remove the content promptly upon legal notice. Soon after its passage, in *OneTel v. Multimania*,[168] a French court found that Multimania, an ISP, was not liable after promptly removing disparaging content upon the plaintiff's complaint.[169]

The progression of the common law in these European countries indicates a convergence on general notice-based rules, even where the initial rule of liability was strict. In the United States, after a debate over liability rules, the law has finally come to rest on a non-liability regime. The fact that the United States is unique in its history of First Amendment jurisprudence and is similarly unique in maintaining broader protection of ISPs is no coincidence. This rejection of a liability rule is rooted in a legal regime designed to give greater deference to online speech. The following economic analysis bears this conclusion out, ultimately demonstrating that rejecting a liability regime is the only effective means to prevent a reductive effect on the quality and quantity of online speech.

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[165] Id. at 1084, 1085. The *Lefebure* decision was especially pernicious since French law permits one foreigner to bring a claim against another in a French court to vindicate rights established under French law. See Alexander Gigante, Ice Patch on the Information Superhighway: Foreign Liability for Domestically Created Content, 14 Cardozo Arts & Ent. L.J. 523, 547 (1996). Under such a rule, non-French ISPs could feasibly be subject to similar claims in French courts by non-French citizens.

[166] Geoffrey Nairn, The Search for Online Evidence, Legal Issues, Fin. Times (London), Apr. 7, 1999, at 5 (arguing that similar case law and legislation in other European countries has greatly reduced European commerce and content online).

[167] Law No. 2000-719 of Aug. 1, 2000, J.O., Aug. 2, 2000, pp. 11903, 11922; JCP 2000 No. 39, p. 1739, http://www.juriscom.net/txt/loisfr/l20000801.htm.

[168] T.G.I. Paris, Sept. 20, 2000 (unpublished order), http://www.juriscom.net/txt/jurisfr/cti/tgiparis2000920.htm.

[169] Id.

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II. ECONOMIC ANALYSIS OF LIABILITY AND NON-LIABILITY REGIMES

This portion of the discussion considers the economic implications of three possible liability regimes: negligence (which encompasses notice-based liability), strict liability, and non-liability. As Judge Richard Posner has suggested, economic analysis should function as an acid bath, reducing the problem to its core elements.[170] From these elements, the most efficient policy prescription may be determined. The first Section discusses the model employed to conduct these analyses. The following three Sections consider each regime in turn, concluding that only a non-liability regime adequately prevents impediments to free speech[171] and protects the premium that American First Amendment jurisprudence has imputed to unhindered public discourse.

A. Applying an Economic Model to Alternative Regimes

The potential structures governing civil liability may be grouped into three general regimes: negligence and notice-based liability, strict liability, and non-liability (specifically, conditional immunity). The present regime imposed by Section 230 is a non-liability regime, or more accurately, a conditional immunity regime. Upon meeting the conditions of the law, ISPs are afforded statutory immunity from suit. Notice-based liability is a species of negligence

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[170] See Richard A. Posner, Free Speech in an Economic Perspective, 20 Suffolk U. L. Rev. 1, 7 (1986); see also Ibrahim, supra note 5, ¶2 n.6 (discussing the "acid bath" effect in the context of online bulletin board liability).

[171] See Reno v. ACLU, 521 U.S. 844, 871–72 (1997) (discussing the "chilling effect" that the CDA itself would have on speech online). References to a chilling effect in the context of ISP liability for third party content may stem from Judge Ain's statement in *Stratton Oakmont* that ex post facto removal of content created "a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what PRODIGY wants, but for the legal liability that attaches to such censorship." Stratton Oakmont Inc. v. Prodigy Servs., 23 Media L. Rep. (BNA) 1794, 1798 (N.Y. Sup. Ct. 1995). This use of the term is not entirely accurate and has created some confusion. The concept of a chilling effect indicates ex ante deterrence. In this case, the speaker's words are not attributed their full effect due to premature removal by the ISP. If there were in fact a chilling effect, the speaker would be deterred from speaking in the first place because of risk or cost aversion. Accordingly, this is referred to as a "reductive" effect herein, since the actual effect of removal is to reduce the audience to whom the speech is available rather than to discourage the speaker from speaking.

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regime, which is usually described as distributor liability, since distributors are held to the same "knew or should have known" rule commonly applied in negligence regimes. Strict liability is the equivalent of publisher liability, since publisher liability holds publishers strictly liable for the content of their publications, regardless of their knowledge.[172] By analyzing the economic efficiency of these regimes, it will be possible to make a utilitarian evaluation as to which is most preferable.[173]

For the purpose of testing these three regimes, a three-party model is employed.[174] The three primary parties are the ISP, the defamatory content-providing party who employs the ISP's service to communicate the injurious information,[175] and the victim of the defamation. It should be noted that these labels are not legal determinations; the defaming party is not necessarily committing a tort, and the victim is not necessarily entitled to recovery. Since liability will not have been established at the time the parties are making relevant decisions, such legal determinations are impossible, and the terms are merely the most convenient labels.

There is also a fourth party: the market of ISP users, who will respond to changes in the price for ISP service by modifying their demand as their individual demand curves dictate. The aggregate effect of these modifications will create net fluctuations in the demand for ISP service when regimes change. The public, though not an actor in the model, bears all social costs or externalities of the transaction, and the utilitarian analysis ultimately must rest upon the net social cost.

The model assumes a competitive market for Internet service where ISPs are risk-neutral, and all parties are assumed to ration-

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[172] Keeton et al., supra note 14, §113, at 810.

[173] See infra Section II.D.1.

[174] This analysis is based on the model of accidents between sellers and strangers developed by Steven Shavell. See Steven Shavell, Strict Liability versus Negligence, 9 J. Legal Stud. 1, 3 (1980). It is described in detail below. See infra notes 202–06 and accompanying text. Though Shavell only employed two parties, this analysis expands the model to include the defaming party and the market in general.

[175] A claim for defamation cannot be made unless the allegedly defamatory communication is made to another. Keeton et al., supra note 14, § 111, at 771. See, e.g., McGuire v. Adkins, 226 So. 2d 659, 661 (1969) (holding that a complaint failing to allege, inter alia, to whom the alleged defamation was communicated was fatally flawed).

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ally maximize utility. The model also assumes that the victim cannot recover from the defaming party because the content in question was provided under an alias or in an anonymous manner. In some of the cases discussed above, the victims also pursued recovery from the defaming party.[176] Where the original speaker is an available defendant, the economic deterrent rationale for holding the ISP liable is greatly undermined, making it substantially more difficult to argue for strict or notice-based liability regimes. In such cases, the economic question centers on whether the scope of the defaming party's liability is a sufficient deterrent. This is a question of the efficiency of defamation law and will not be considered here. Finally, the model assumes that there is no editorial relationship between the ISP and the content-providing party. Though an editorial relationship has been alleged in some cases,[177] the presence of an editorial relationship indicates that traditional publisher liability should apply, and accordingly, there is little value in analyzing the utility of alternative regimes. The regimes are evaluated on a comparative utilitarian basis, in which the preferable regime is that where the relative mix of care and activity levels is the most efficient, yielding the highest total utility for the parties involved. In other words, the preferable regime will be that which is the most Kaldor-Hicks efficient.[178]

B. Notice-based Liability

As stated in the Restatement (Second) of Torts, negligent conduct is that conduct that fails to adhere to the legally prescribed

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[176] See, e.g., Jane Doe One v. Oliver, 755 A.2d 1000 (Conn. Super. Ct. 2000); Doe v. Am. Online, 718 So. 2d 385 (Fla. Dist. Ct. App. 1998). Even Kenneth Zeran, whose case is often put forth as the classic example of defendant scarcity, made another, though ultimately unsuccessful, attempt to recover from a party other than the ISP. See Zeran v. Diamond Broad, Inc., 203 F.3d 714 (10th Cir. 2000).

[177] See, e.g., Ben Ezra, Weinstein, & Co. v. Am. Online, 206 F.3d 980, 985 (10th Cir. 2000); Blumenthal v. Drudge, 992 F. Supp. 44, 51 (D.D.C. 1998); Cubby, Inc. v. CompuServe, 776 F. Supp. 135, 138 (S.D.N.Y. 1991).

[178] For a general explanation of the economic method of tort law analysis, see Richard A. Posner, Economic Analysis of Law 163–216 (4th ed. 1992). For a discussion of the Kaldor-Hicks concept of wealth maximization and its differences from Pareto superiority, see id. For the origins of the Kaldor-Hicks principle, see J.R. Hicks, The Foundations of Welfare Economics, 49 Econ. J. 696 (1939); Nicholas Kaldor, Welfare Propositions of Economics and Interpersonal Comparisons of Utility, 49 Econ. J. 549 (1939).

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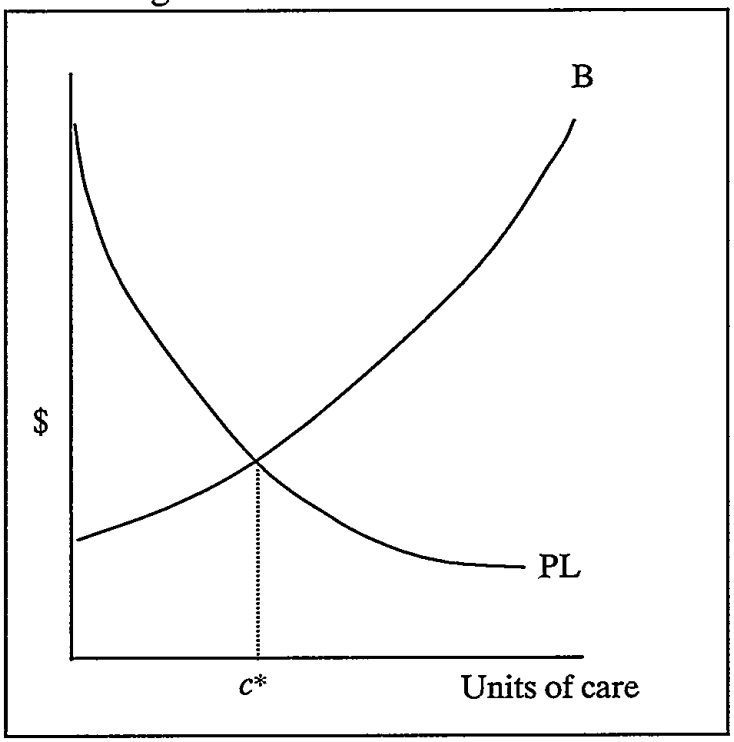
standard for protecting others against an unreasonable risk of harm.[179] In *United States v. Carroll Towing Co.*,[180] Judge Learned Hand expounded the formula for defining negligence that now bears his name. Judge Hand stated that conduct was negligent when the burden of preventing harm was less than the cost of the ensuing injury, qualified by the likelihood of its occurrence.[181] In the algebraic expression of Judge Hand's formula, $B < P \times L$, the variable B represents the burden of prevention, P represents the probability of an accident, and L indicates the ensuing loss. The Hand formula has been depicted graphically on axes representing care and cost by Judge Richard Posner and is reproduced in Figure 1.[182]

Figure 1: The Posnerian Model



The cost of B increases at an accelerating rate as units of care increase. At the same time, the cost of $P \times L$ decreases at a decelerating rate with increasing units of care. The relative posi-

[179] Restatement (Second) of Torts § 282 (1965).
[180] 159 F.2d 169 (2d Cir. 1947).
[181] Id. at 173.
[182] See Posner, supra note 178, at 165 fig.6.1.

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tions of these curves are a function of the activity; the position and slope of B and $P \times L$ changes as the activity changes. The legal standard of due care, c^*, is imposed where these functions meet.[183] That these functions demonstrate exponential growth and decay is a result of the declining marginal value of taking care. Initially, small increments of care are relatively low in cost and reduce expected costs substantially. As demand for care increases, units of care become scarce, there are fewer opportunities to engage in care, and care becomes more expensive, while yielding less benefit in the form of reduced expected costs.[184]

1. Examples of notice-based liability regimes

When grappling with ISP liability for the first time, English and American courts both elected to impose what is widely seen as a negligence standard. Imbedded in the common law as "distributor liability," this regime turns on notice to the defendant, since knowledge of the allegedly injurious content gives rise to a duty on the part of the ISP.[185] Treating the defendant as a distributor, the *Cubby* court refused to find CompuServe liable by applying a "know or should have known" standard,[186] and the *Godfrey* court found that Demon could not raise an innocent dissemination defense since it had been notified of the defamatory messages.[187] Similarly, following Somm's conviction, the German Parliament enacted the Information and Communication Services Act ("IuKDG"),[188] which effectively imposed a liability regime that turned on notice.[189] The imposition of notice-based liability regimes on ISPs is not restricted to tort law; the provisions of the Digital Millennium Copyright Act addressing vicarious or contributory li-

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[183] Id.

[184] Id.

[185] See Zeran v. Am. Online, 129 F.3d 327, 333 (4th Cir. 1997) (referring to the effect of distributor liability as "notice-based" liability).

[186] See Cubby, Inc. v. CompuServe, 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991).

[187] Godfrey v. Demon Internet, [2000] 3 W.L.R. 1020, 1030 (Q.B. 1999).

[188] See Steve Gold, German Govt Plans to Police the Internet, Newsbytes News Network, Apr. 21, 1997, 1997 WL 10171521.

[189] Informations- und Kommunikationsdienste-Gesetz, art. 1, § 5(2), http://www.iid.de/rahmen/iukdge.html (English translation) (last visited Oct. 6, 2001) ("Providers shall not be responsible for any third-party content . . . unless they have knowledge of such content . . . and can reasonably be expected to block the use of such content.").

ability for copyright infringement also employ notice provisions to create a negligence regime.[190]

The most interesting aspect of distributor liability regimes governing ISP liability for third party content is that these regimes are highly unlikely to operate as expected. A simple negligence formulation appears reasonable when viewed narrowly from the perspective of two parties, but in effect, negligence rules produce a unique outcome for ISP decisionmaking. Prior to notice, the costs for the ISP to engage in due care are so high that the market would be faced with a price that is undesirable. Because the victim is better positioned to determine whether information about him or her is in fact defamatory, notice-based liability regimes rely on the victim, as the better "cost-avoider," to provide the ISP with notice before liability can attach.[191] After the ISP has been notified, however, it is better suited to avoid the costs that accompany injury by defamation, and thus would be held liable.[192] When applied to an ISP without notice, the "know or should have known" negligence standard suggests finding no liability due to the sheer volume of online content,[193] whereas an ISP with knowledge of the offensive content has a duty to remove it.

Because of the particular function of notice, the standard model for negligence does not successfully describe what occurs in a notice-based liability regime. Subsection 2 discusses how a negligence regime functions, and how that regime is independently inefficient,

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[190] See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2879–81 (notice provisions of act codified at 17 U.S.C. §§ 512(c)(1)(A) & (C), 512(c)(3), and 512(d)(1) & (3) (2000)); Elizabeth A. McNamara, Online Service Provider Liability Under the Digital Millennium Copyright Act, Comm. Law, Fall 1999, at 5, 7 (describing notice-and-take-down provisions established in the Act). Regardless of the subject matter to which the law applies, the implementation of a negligence rule can be expected, *mutatis mutandis*, to produce the same distortions in content.

[191] See Steven Shavell, Liability for Harm versus Regulation of Safety, 13 J. Legal Stud. 357, 373–74 (1984) (noting the advantages of an injunctive remedy such as content removal where private parties "have superior information about the harm they might suffer, as is perhaps true of ordinary nuisances").

[192] In cases involving injurious third party content posted online, costs usually begin to accrue immediately following the posting, such that "cost avoidance" is less accurate than "cost minimization." This discussion does not distinguish between "cost avoidance" and "cost minimization," because the former is a term of art, and such a distinction would produce more confusion than clarity.

[193] See generally *Cubby*, 776 F. Supp. at 141 (applying the constructive knowledge test and finding no liability).

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even on its face. Subsection 3 explores how notice operates to explode the traditional negligence model and demonstrates that notice-based liability yields an even more perverse result by reducing the quality and quantity of public discourse.

2. The theoretical effect of a traditional negligence liability regime

Assuming that the negligence rule functioned normally in a distributor regime, the parties would interact as follows: The content-providing party posts content to the ISP. The victim becomes aware of the content and deems it injurious. He or she contacts the ISP, notifies it of the content, and requests that the content be removed. Having received notice, the ISP incurs a duty to act with due care toward the victim. The ISP employs this notice to supplement its investigation of the content's veracity, weighing the likelihood that it could cause injury and the cost of removing the content.

This investigation would be the equivalent of applying yet another formula elaborated by Judge Learned Hand—the *Dennis* formula. In *United States v. Dennis*,[194] Judge Hand adapted his oft-cited equation to First Amendment law. Hand proffered that regulation of protected speech should turn on "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[195] This is effectively expressing the question in the algebraic terms $B < P \times L$.[196] In the First Amendment context, B represents the costs of regulation, including the social loss created by suppressing information, P represents the probability that the unregulated speech will result in harm, and L is the loss imposed by the harmful speech.[197]

The *Dennis* formula may be expanded to provide for the temporality of the risk.[198] Under this expansion, it would be expressed as $B < P \times L/(1 + i)^n$, where i is the discount rate and n is the number

[194] 183 F.2d 201 (2d Cir. 1950).

[195] Id. at 212.

[196] See Posner, supra note 178, at 667.

[197] Id.

[198] See id. (discussing the *Dennis* formula as "an expansion of . . . Holmes's more famous 'clear and present danger' test" as long as the formula is rewritten to account for "the fact that the danger may lie in the future").

of years until the harm occurs.[199] More recently, the error costs of decision-making have been noted as accruing on the B side of the formula, so as to add the cost of mistaken determinations to the total costs of suppressing information. Under this expansion the formula becomes $B + E < P \times L/(1 + i)^n$, where E represents error costs.[200]

In applying the *Dennis* formula, the ISP serves the function of the court in making determinations about the costs and benefits of speech. Obviously, notice plays an integral part in achieving this end, insofar as it appears to reduce the costs of the ISP's investigation. Once notified of the content, the ISP can easily remove it. Because the victim has attested to the high likelihood of harm, it is likely to do so. Notice is a windfall, in that through no independent expenditure, the ISP has gained the ability to engage in increased care at no additional cost. Such an effect would shift the ISP's B curve outward to B_n, which reflects the ISP's ability to engage in more care at lower cost. Assuming that the ISP engages in a traditional investigation, this shift effect on the traditional Posnerian model is demonstrated in Figure 2. Indeed, in the context of the Internet, this shift is so great that before notice occurs, ISPs would have to pre-screen instantly all third party communications. Even if this were possible, the resulting price increase would presumably drive users offline. Arguably, this risk prompted the outcry following *Stratton Oakmont* and gave rise to the "First Amendment considerations" that compelled the *Cubby* court to elect for a negligence regime.[201]

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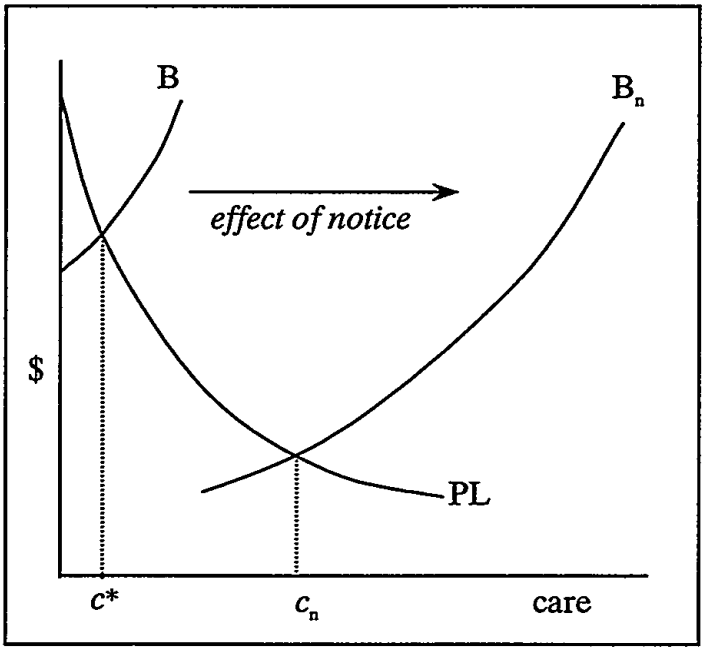
[199] Id. Since in most cases involving the Internet, defamation damages accrue instantly, the n time rate should be virtually zero, yielding a denominator of one and rendering the discounting portion of the formula moot.

[200] See Ibrahim, supra note 5, ¶¶ 5–7 & ¶6 n.19 and accompanying text.

[201] *Cubby*, 776 F. Supp. at 140–41.

Figure 2. Effect of Notice in a Traditional Negligence Regime



As the ISP engages in more notice-aided care, the total benefits from notice increase. It would follow that the vertical distance between the curves B and B_n represents the costs that would be incurred by the ISP to obtain information that is the equivalent of notice. Similarly, c_n represents the new level of due care. This level of care, however, is not the socially desirable level. Employing the Shavellian "sellers and strangers" model[202] demonstrates that a negligence rule on ISPs fails to induce the socially optimal market price.

Professor Steven Shavell's model hypothesizes that injurers produce a good or service in a competitive market.[203] The victims are assumed to be strangers, with no market relationship to the sellers.[204] A useful example, employed by Professor Shavell, is that of taxi drivers.[205] In the taxi example, victims are pedestrians (or, presumably, other drivers). As strangers to the transaction between rider and taxi driver, the victims will not be able to negotiate efficiently prior to the accident.[206] Similarly, the victim is a stranger to

[202] See Shavell, supra note 174, at 3.
[203] Id.
[204] Id.
[205] Id.
[206] Id.

the transaction between the ISP and the party making the defamatory statement and cannot efficiently contract with either party before the injury. This is a typical negative externality.

Applying this model to the present case demonstrates that the ISP can avoid liability to the victim by exercising due care. Due care is satisfied when the ISP engages in a level of monitoring of the defamatory content provider such that the marginal decrease in benefits equals the marginal decrease in expected injury costs.[207] The ISP will not be liable for those accidents about which it does not receive notice. These accidents could not efficiently be prevented since they fall to the right of c_n, the intersection point between the B_n and PL curves. This reflects the fact that the burden of providing additional care would exceed the cost of accidents that such care would prevent.[208]

In a competitive market, the ISP will set its activity level at cost. Because a negligence rule will not impose liability for those injuries that could not efficiently be prevented,[209] the ISP's activity level will not take into account the social cost of those accidents. Consequently, the market price of Internet access will not reflect the true social cost of the industry. The market price will be too low from the social perspective, and the ISP will sell too many accounts to users who in turn will create too much third party content.[210] Posed another way, the ISP's activity level will be too high because it does not internalize the expected social costs of accidents that occur despite the exercise of due care. In this sense, a negligence regime creates a common-law sanctioned externality by permitting a certain level of expected costs to be imposed on the public. Therefore, imposing a negligence or distributor regime is economically inefficient.

3. The actual reductive effect of negligence rules: Notice-based liability

The inefficiency of a negligence or distributor regime is even more pervasive than the Shavellian model demonstrates. The hid-

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[207] See Posner, supra note 170, at 165.

[208] Id.

[209] See id. at 166–79 (citing cases where a low probability of harm eliminated defendants' liability).

[210] See Shavell, supra note 174, at 3.

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den inefficiency results from the fact that notice does not function as an information windfall to the ISP. Rather than shifting out the ISP's B curve as suggested in the previous subsection, notice allows the ISP to forgo the traditional "care-taking" strategy. Instead of expending increasing amounts of care at increasing cost until reaching B_n, the ISP will adopt an entirely different strategy for reducing expected injury losses.

This strategy will employ notice as the determinative factor, such that content about which the ISP is notified will be removed and content about which there are no complaints will not be investigated. This "notice" strategy, though inexpensive for the ISP, is very costly for society. By inducing this strategy shift, notice-based liability induces behavior by the ISP not predicted by the traditional negligence model.

This behavior is evident when considered in the context of the *Dennis* formula. While the *Dennis* calculus allowed the court to objectively weigh the social losses of repressing information against the social losses of unregulated speech that could result in harm, an ISP receiving notice bears some of the costs of the formula's variables. Naturally, one would expect the ISP to minimize the variables for which it may be responsible; that is, it cannot be reasonably expected to apply the formula objectively.

A court weighs the costs of the $B + E$ side of the formula, augmenting the burden of regulation by the risk that it may err and evaluating the result against the expected accident costs, discounted to the present. Since defamation damages accrue almost instantly, the court will not discount to the present, and will prorate the magnitude of the injury only by the probability of its occurrence. The decision of the court will be based on this calculus.

The ISP bases its decision on a different calculus. The ISP views the $B + E$ side of the formula as a single member of society. Accordingly, it is faced with $(y/z)(B + E)$, where y represents the ISP's size as a recipient of social costs and benefits and z represents the total size of the society. Unlike the court applying the *Dennis* formula, the ISP's error costs manifest themselves in two forms. False positive error costs are those costs that accrue when content is erroneously deemed to be injurious and is deleted. These costs reduce the value of public discourse, and they are borne by society.

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Thus, the left-hand side of the formula is more accurately expressed as

$$(y/z)(B + (E_{pos} \times C_{pos}))$$

where E_{pos} represents probability of false positive error, and C_{pos} represents the cost of those errors. False negative error costs are those costs that accrue when content is erroneously deemed not to be injurious and is left online. The latter category increases the expected accident costs, which are borne by the ISP and appear on the other side of the formula.

On the $P \times L/(1 + i)^n$ side of the formula, the ISP must also consider the risk of false negative error costs, yielding

$$E_{neg}(P \times L/(1 + i)^n)$$

where E_{neg} represents false negative error costs. Since the ISP bears expected accident costs only when it makes a wrongful determination, its expected accident costs are multiplied by the probability of error. In essence, the entire right hand side of the formula reflects the ISP's burden created by false negative error costs. As when the *Dennis* formula is applied by a court, the ISP does not discount the future risk of injury since injury occurs immediately by virtue of its online nature. The ISP must also factor in the risk and cost of punitive damages,[211] so that it is faced with

$$E_{neg}(P \times (L + (R \times D))/(1 + i)^n)$$

where R represents the probability of the imposition of punitive damages if the ISP fails to take the content down, and D represents the punitive damages. As the ISP will only bear these costs when it makes an incorrect determination and the victim is in fact injured, $(R \times D)$ is indicated as modifying the L variable. These modifications to the *Dennis* formula to reflect the ISP's individual costs result in

$$(y/z)(B + (E_{pos} \times C_{pos})) < E_{neg}(P \times (L + (R \times D))/(1 + i)^n).$$

Though complex looking, the ISP will have little difficulty performing this calculus. Since it bears only y/z fractional share of B +

[211] Punitive damages may be imposed upon a finding of actual malice or "outrageous conduct." Keeton et al., supra note 14, § 116A, at 846.

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($E_{pos} \times C_{pos}$), the value of this term verges on zero.[212] Conversely, when the ISP is wrong in its evaluation of the *Dennis* formula, which will be E_{neg} percentage of the time, it will bear all of $(P \times (L + (R \times D))/(1 + i)^n)$. When weighing the fractional cost it bears by reducing the quality and quantity of speech online against the risk of liability for incorrect determinations, the ISP will invariably decide to remove the content. The mere threat of litigation created by notice induces the ISP, as stated by Judge Wilkinson in *Zeran*, "simply to remove messages upon notification, whether the contents were defamatory or not."[213]

By virtue of its vested interest in the outcome of the calculus, the ISP cannot objectively employ the original *Dennis* formula; the formula is only effective when applied by a disinterested party. While immediate removal may result in less litigation regarding offensive content, a notice strategy results in the removal of some content that courts would not have judged injurious, and society will be worse off. A negligence liability regime, however, will not hold the ISP responsible for its negative externalities. That is, from the perspective of society, it is problematic that the ISP cannot be liable for having deleted too much content. This strategy is encouraged by the fact that notice-based liability regimes cannot easily impose liability before or after content is removed without returning to a strict liability regime. Prompt deletion is safe for the ISP since a court that finds an ISP liable when it promptly responds to complaints risks undermining the negligence rule. This phenomenon, the creation of a safe-harbor of "strict non-liability," is further incentive to take content down. The function of this "strict non-liability" was evident in *OneTel v. Multimania*, where, under the new negligence rule, the French court refused to impose liability when the ISP had responded to a complaint promptly, even though the plaintiff pled additional injury.[214]

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[212] There is also a risk that users whose content is removed may sue on First Amendment grounds. This risk would result in a greater average value of the C_{pos} variable. At present, § 230(c)(2) forestalls this risk. See Zeran v. Am. Online, 958 F. Supp. 1124, 1134 n.22 (E.D. Va. 1997). Though a survey of the law reveals no such cases during the *Cubby* era, if ISPs were constantly navigating between the Scylla and Charybdis of victim and speaker liability, the costs of service could easily swell to prohibitive levels, which would only lessen the desirability of a negligence regime.

[213] Zeran v. Am. Online, 129 F.3d 327, 333 (4th Cir. 1997).

[214] See supra notes 168–169 and accompanying text.

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This danger of deleting too much is likely to be magnified by strategic behavior.[215] If parties are aware of the legal regime facing the ISP, they may strategically employ this to their advantage, effectively vetoing content to which they object. This strategy has been referred to as a "heckler's veto."[216] This strategic behavior uses the threat of litigation to bias the ISP's analysis of the *B* and *PL* curves to achieve a self-serving end. The veto is, in a general sense, a form of extortion. Extortion occurs "when a change in liability [regimes] gives rise to a redistribution in wealth,"[217] a typical example of which is the strike suit. Here, extorted decisions do not redistribute wealth; they effect a redistribution of the right to control content. Such a regime would effectively create a property right in one's reputation, since the severity of a liability rule would function as a de facto injunction.

The extortion would occur as follows. The "victim" finds something online to which he or she objects. The victim contacts the ISP and requests that the information be removed, perhaps threatening to sue. In reality, the victim does not object to the material so strongly that suing would be rational. The true nature of the content is such that the victim's true loss (L) is very low, though the ISP is most likely unaware of this value. Even if the ISP were aware of the victim's actual valuation, it is faced with the choice to take the content down or risk suit. Because of the almost predetermined result of the *Dennis* formula, the ISP will take the content down. In doing so, the ISP externalizes liability costs, transforming them into social costs by allowing self-interested parties to control the content of public discourse. Even worse, these threats are undetectable; they cannot individually be tested for their veracity, and therefore the ISP cannot determine whether or to what degree its decisions are being biased by strategic threats.

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[215] See *Zeran*, 129 F.3d at 333 (discussing the risk of strategic "notice" to ISPs to suppress content).

[216] Rory Lancman, Protecting Speech from Private Abridgment: Introducing the Tort of Suppression, 25 Sw. U. L. Rev. 223, 253–54 (1996) (discussing "heckler's veto" cases). This concept has also been applied to online content. See Christopher Butler, Note, Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers, 6 Mich. Telecomm. & Tech. L. Rev. 247 (2000), http://www.mttlr.org/volsix/butler.doc.html.

[217] See Harold Demsetz, When Does the Rule of Liability Matter?, 1 J. Legal Stud. 13, 22 (1972).

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In the United States, some may defend the reductive effect on public discourse as a necessary evil. In European regimes lacking a history of First Amendment jurisprudence, this negative externality will be less expensive because of the lower premium placed on unfettered public discourse. Even in the absence of this externality, however, it is unlikely that an ISP engaging in a notice strategy would remove an efficient amount of content. Because of the ISP's distorted *Dennis* calculus and the fact that it will remove only as much content as it receives notice of, the ISP forfeits any independent determination of how much content to remove. Hence, removal will rarely occur at an efficient level, and even then, only by chance. Furthermore, the possibility of strategic threats biasing the ISP's cost-benefit analysis means that such a chance outcome would still be distorted, such that removal would occur at an inefficient level. Because such strategic behavior would be effectively undetectable, the utility of this regime would be rendered eternally suspect in the eyes of the analytical observer.

C. Strict Liability

In a strict liability regime, an injurer is liable to all victims regardless of the care with which he or she conducts activities, even if the exercise of due care would not have prevented the damage.[218] Publishers may be strictly liable for defamatory statements made by the authors of their publications, though they lack specific knowledge or notice of the inclusion of the statement. This duty arises from the fact that the publisher *has an opportunity* to know the nature of the content.[219] Because publishers are afforded this opportunity, the common law imposed strict liability for any publication.[220] The voluminous amount, and more importantly, the instantaneous nature of ISP publication effectively erases this opportunity for ISPs.[221]

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[218] See Posner, supra note 178, at 175.

[219] Keeton et al., supra note 14, § 113, at 810.

[220] Id. § 113, at 809 ("The effect of this strict liability is to place the printed, written, or spoken word in the same class with the use of explosives or the keeping of dangerous animals.").

[221] See Zeran v. Am. Online, 129 F.2d 327, 333 (4th Cir. 1997); see also Restatement (Second) of Torts § 577 & cmt. p (1965) (stating that a defendant need not take steps that are unreasonable to avoid liability).

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A negligence or distributor liability regime would not impose a duty on defendants to ward against unforeseeable consequences or plaintiffs.[222] By allowing a prima facie case to be made against an ISP absent notice, the rule of publisher liability imposes fault without regard to care, and therefore no longer constitutes a negligence regime. Traditional publisher liability, as imposed upon ISPs, thus functions as a strict liability regime, under which ISPs must preemptively determine the veracity of content or face liability.[223] Economically, this is unworkable as a method of ex ante deterrence.[224] Instead, it functions as a means of ex post cost-spreading.

1. Examples of strict liability regimes

At common law, strict liability is imposed when parties engage in abnormally dangerous enterprises such as the use of explosives, excavation, and storage of liquids in quantity,[225] or when a new industry is developing.[226] With respect to ISPs, the *Stratton Oakmont* decision is an obvious example of the imposition of a strict liability regime. Though the court applied the "knew or had reason to know" standard announced in *Cubby*,[227] the determination that an ISP should have known about the content of one message in a near-infinite sea of bytes effectively created a strict liability regime.[228] This initial imposition of strict liability began the

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[222] See Keeton et al., supra note 14, § 43, at 284–86 (citing *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928)).

[223] See *Zeran*, 129 F.3d at 333 (anticipating such an outcome and describing its effect as the imposition of strict liability).

[224] See, e.g., Religious Tech. Ctr. v. Netcom On-Line Communication Servs., 907 F. Supp. 1361, 1372 (N.D. Cal. 1995). The *Netcom* court noted the futility of "a rule that could lead to the liability of countless parties whose role . . . is nothing more than setting up and operating a system that is necessary for the functioning of the Internet" since such a rule would effectively "hold the entire Internet liable for activities that cannot reasonably be deterred." Id.

[225] Keeton et al., supra note 14, § 78, at 549–50. Before economic analysis gave new meaning to the implications of strict liability regimes, strict liability was conceived of as an aspect of nuisance law governing "[the] right thing in the wrong place." Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

[226] See Posner, supra note 178, at 178 (discussing the tendency to apply strict liability to "new activities").

[227] See Stratton Oakmont, Inc. v. Prodigy Servs., 23 Media L. Rep. (BNA) 1794, 1796 (N.Y. Sup. Ct. 1995).

[228] See *Zeran*, 129 F.3d at 333 (noting the *Stratton Oakmont* rule to be one of strict liability).

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movement in the United States that eventually led to the present regime under Section 230.

The imposition of liability in the *Somm* case[229] in spite of Somm's inability to remove the objectionable content is also an example of strict liability. Though Somm received notice of the content, this is not a negligence case since the court acknowledged that Somm had taken all available precautions. Until a German court overturned Somm's conviction, it had effectively imposed a strict liability regime, short-lived though it was. The *Lefebure* case[230] in France similarly imposed a strict liability regime until it was rejected in favor of notice-based liability. The species of publisher liability that resulted from the *Lefebure* decisions holds the ISP responsible for the actions of its users, like an employer who is held liable for the torts of its employees under the respondeat superior doctrine. As is demonstrated below, the imposition of strict liability will have a reductive effect on public discourse.

2. The reductive effect of strict liability regimes on speech

Anecdotal evidence indicates the reductive effect of strict liability, since ISPs have exited markets where such regimes have been imposed—specifically, PSINet in Germany and Altern.org in France.[231] Though Judge Ain correctly argued in *Stratton Oakmont* that imposing publisher liability would not cause ISPs to "abdicate control" of their content, he substantiated this opinion with the doubtful assertion that markets would reward ISPs who risked increased exposure.[232] This argument is dubious. Regardless of the defamation regime, ISPs would still be forced to exercise some measure of editorial control by virtue of other legal obligations under criminal and intellectual property law.[233] In fact, the ISP does

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[229] See *Somm*, supra note 144.

[230] See *Lefebure*, supra note 158.

[231] See supra notes 156, 166 and accompanying text.

[232] *Stratton Oakmont*, 23 Media L. Rep. (BNA) at 1798. On the contrary, strictly liable ISPs have every incentive to remove content upon notice, as do ISPs governed by a negligence regime.

[233] To forestall the over-application of § 230, Congress explicitly stated that § 230 has no effect on federal criminal statutes or trademark law. 47 U.S.C. § 230(e)(1)–(2). See supra text accompanying notes 120–122. Provisions of the Digital Millennium Copyright Act require notice-based content editing. See supra note 190 and accompanying text. However, some such regimes have been invalidated by courts.

abdicate some control, but it gives up control over removal, not content. While the ISP will continue to monitor content in some fashion, the victim, and not the ISP, will determine the character of this monitoring. Because removal is notice-driven, the ISP responds immediately to notice rather than investigating. Just as this phenomenon manifested itself in notice-based liability, it appears in strict liability as well.

This effect may be deduced by again considering the parties in the Shavellian model.[234] Since editorial control is unavoidable, an ISP would still exercise ex post editorial control in order to mitigate its liability to the victim. Because an ISP held to a publisher standard is per se liable for the content of the defaming party, the ISP's incentives are to mitigate the risk of punitive damages.[235] It will therefore remove objectionable content on notice.

At sub-optimal levels of care, the ISP will be able to reduce expenses by reducing or increasing care. Where the ISP engages in too much care, it will reduce total expenses by engaging in fewer increments of care, since the corresponding increase in liability would be less than the cost of care. Where the ISP engages in too little care, it can reduce total expected accident costs by engaging in additional increments of care, as the decrease in total liability will exceed the cost of care. This effect is visible when the ISP seeks to mitigate damages: The expenditure of increments of additional care (cost of removing content upon allegations of notice, prorated by the incremental reduction in demand caused by the loss of information) yields a greater decrease in total expected accident costs (due to diminished risk of punitive damages).

The Shavellian model suggests that since strict liability forces the ISP to internalize the costs of injury to third parties, the price of service will increase to reflect these expenses, effectively internalizing the negative externality created by third party content. Users will not access the Internet "too much," but rather at the socially

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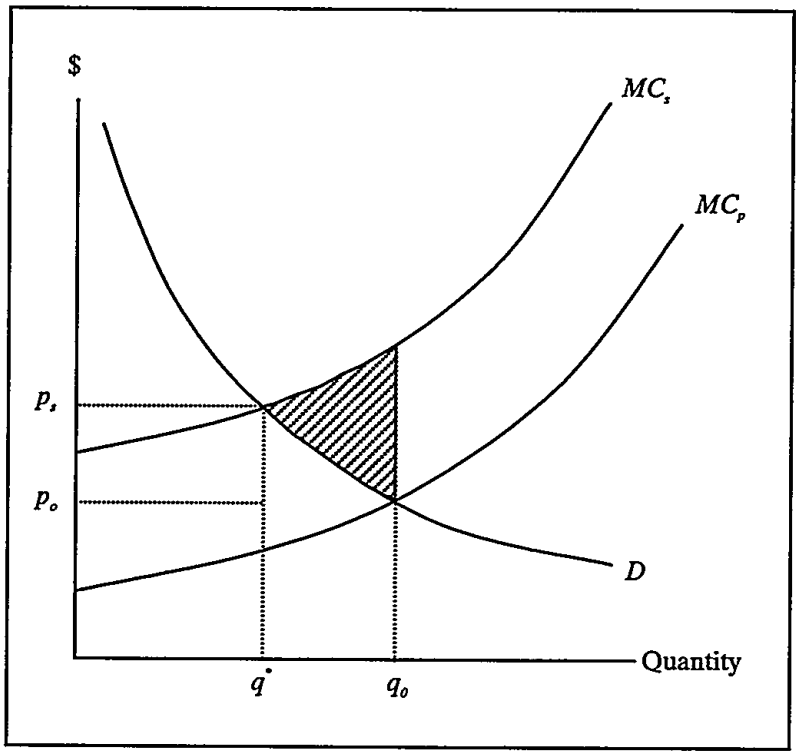
See, e.g., PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611 (W.D. Va. 2000) (enjoining the application of a law imposing criminal liability for the commercial display of sexually explicit materials harmful to juveniles).

[234] See Shavell, supra note 174, at 3.

[235] See Keeton et al., supra note 14, §116A, at 845–46.

optimal level.[236] This internalization, also demonstrated by Judge Posner, is reproduced in Figure 3.[237]

Figure 3: The Effect of Strict Liability on Accident Costs



Three problems undermine the efficiency of the strict liability regime. The first is that the reductive effect, which is created in a notice-based liability regime, persists in a strict liability regime. As previously discussed, the fact that the ISP may be liable though it has not received notice does not mean that when it does receive notice, it will not immediately take content down. On the contrary, in a strict liability regime, notice creates the same self-interested *Dennis* calculus which corrupts the efficiency of a negligence regime.

[236] This is not a normative evaluation; there is merely "too much" Internet use because the corresponding "accident" costs (from alleged defamation etc.) exceed the social benefits.

[237] See Posner, supra note 178, at 177 fig.6.2. The price increase corresponding to liability costs will cause the ISP's MC_p curve to shift to MC_s. The shaded area represents dead weight loss internalized by the ISP.

The second problem is that strict liability undermines the "network effect" of the Internet. A network effect, or network externality,[238] occurs when "the utility that a user derives from consumption of the good increases with the number of other agents consuming the good."[239] This is one of the great benefits of the Internet, and it has been responsible for the exponential growth of most communication networks. The converse of this effect is also true—just as users of the good gain utility when another party begins to use the product, those users incur negative utility when another party ceases to use the product.

This phenomenon does not manifest itself in Professor Shavell's taxi example in the sellers and strangers model. Whether others use taxis is irrelevant to any single taxi passenger. Indeed, though owning the first and only telephone or being the only user on the Internet yields the user virtually no utility, being the only person to use taxis—assuming that such a scenario could exist—would yield just as much utility as if everyone used taxis. This example identifies that for most goods, as long as there is sufficient demand to sustain the industry, the user is indifferent to others' use of the good.[240]

With the Internet, the opposite is the case: The user's utility increases or decreases as the price effect on ISP service changes, such that the price effect undermines the network effect. Whereas users would face the socially optimal price in the taxi example, they will not in the case of ISPs because the price does not reflect the reduction in the positive externality of the network. In terms of the ISP's marginal cost ("MC_p") curve, the effect of imposing strict liability will shift MC_p inward to the original MC_s, internalizing the cost of

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[238] There is literature that distinguishes between network effects and network externalities by using the latter only to refer to negative externalities. See, e.g., Dennis W. Carlton & J. Mark Klamer, The Need for Coordination Among Firms, with Special Reference to Network Industries, 50 U. Chi. L. Rev. 446, 450 n.15 (1983); S.J. Liebowitz & Stephen E. Margolis, Network Externality: An Uncommon Tragedy, 8 J. Econ. Persp. 133, 135 (1994). For purposes of clarity, I refer to this phenomenon of Internet growth as a network effect, though it may also be construed as a positive network externality.

[239] Michael L. Katz & Carl Shapiro, Network Externalities, Competition, and Compatibility, 75 Am. Econ. Rev. 424, 424 (1985).

[240] This assumes a one-time transaction; if the good is scarce and the user must repeatedly purchase it in the market, a price increase will have the effect of decreasing the user's utility.

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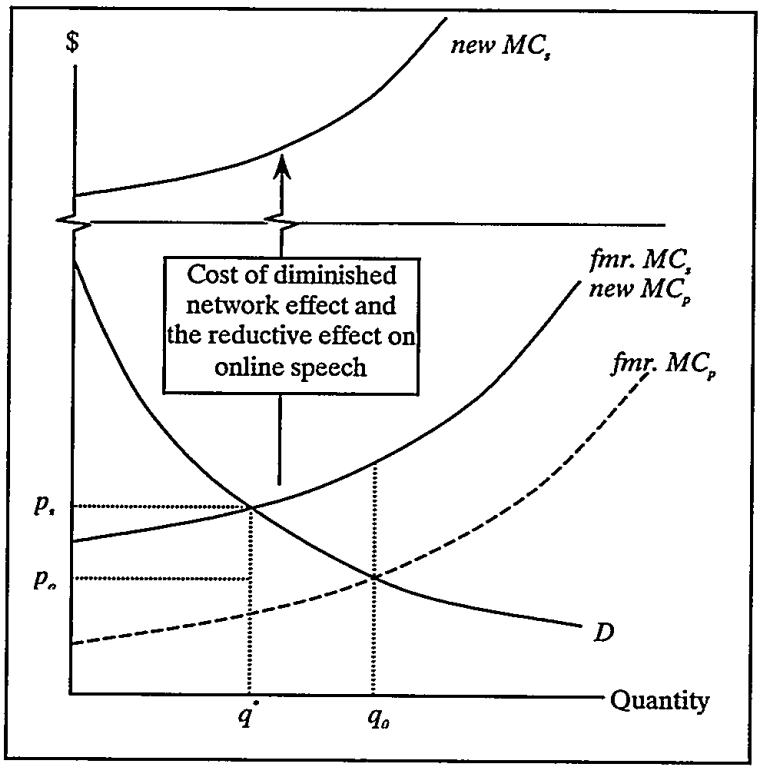
unavoidable accident costs. Yet, in doing so, the liability regime creates even more costly externalities, producing a new MC_s curve. The new MC_s curve represents the summation of the marginal cost to the ISP, the reductive effect on public discourse, and the damage to the network effect of the Internet. This effect is depicted in Figure 4, where the vertical position of the new MC_s would be a function of the social value attributed to unfettered public discourse and the positive network effect of the Internet.[241]

Figure 4: Effect of Negative Externalities on Social Cost in Strict Liability Regime



[241] This appears to be a manifestation of a corollary to the "rule of second best." Economists often assume that the externality under consideration is the only Pareto inefficiency at work. Where inducing an injurer to internalize one externality produces a net loss by magnifying another externality in the same market, the socially optimal choice may not be to induce the internalization of this cost, but rather to allow it to persist and mitigate it through alternative means. See generally R.G. Lipsey & Kelvin Lancaster, The General Theory of Second Best, 24 Rev. Econ. Stud. 11 (1956–57) (developing a theory of second best and introducing negative corollaries). The fact that some European courts willingly tolerated this effect represents the prioritization of other social goals above unfettered speech, such that the new social *MC* curve would be positioned lower.

Moreover, while a negligence regime is predicated on the outward shift of the ISP's *B* curve, a strict liability regime is not.[242] This is undesirable because the ISP is not the least-cost avoider when it comes to discovering content; it is only well suited for cost-avoidance after it is apprized of the problem. When held to pre-notice liability, the ISP carries the responsibility of accident avoidance when the victim may be better suited to engage in this task. Under such a responsibility, liability costs would drive up the market price. Parties would find cheaper alternatives for communicating and the Internet would be used only by wealthy or subsidized users—a result which again reduces the benefits of the network effect.

Such a regime may also have a reductive effect on the Internet industry itself. Because there are lower economic rents available to entrants in a market governed by strict liability regimes,[243] the amount of rent to be distributed among competitors decreases faster with each entry into the market, such that fewer competitors can coexist. This effect was acknowledged by the *Cubby* court, which analogized the ISP to a newsstand, citing *Smith v. California*.[244] In *Smith*, the Supreme Court invalidated a local ordinance holding booksellers strictly liable for selling obscene books, their ignorance of the obscene content notwithstanding.[245] The Court noted that "the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed."[246]

The third problem with the imposition of a strict liability regime is a function of the nature of the "accident." The sellers and strangers model assumes that accidents are positively correlated to the level of activity, such that changes in the activity level produce corresponding changes in the level of accidents. Because of the na-

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[242] In *Smith v. California*, 361 U.S. 147 (1959), Justice William Brennan noted that the ordinance in question bore a "strict liability feature" because sellers could be liable "though they had not the slightest notice." Id. at 152.

[243] See Posner, supra note 178, at 179.

[244] *Cubby*, 776 F. Supp. at 139–40 (citing *Smith*, 361 U.S. at 152–53).

[245] *Smith*, 361 U.S. at 155.

[246] Id. at 153.

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ture of defamatory content, there is reason to believe that this may not be the case with respect to ISPs.

Defamatory content may be divided into three categories. The first is accidental, where incorrect information is accidentally disseminated online without a malicious motive. The second is a species of a crime of passion, where one party becomes angered at another and immediately responds. This activity, often referred to as "flaming," is not an uncommon occurrence in chat rooms. Reducing ISP activity levels may reduce occurrences in these first two categories, but it is unlikely to reduce the occurrence of the third category: premeditated acts. A survey of the case law indicates that premeditated acts dominate as the basis for litigation. Accidental injury occurred only in *Ben Ezra*, and perhaps *Ford Motor Co.* Flaming appears to have occurred in *Godfrey*. Premeditated acts, on the other hand, were the subject of suit in *Cubby*, *Stratton Oakmont*, *Zeran*, *Doe*, *Lunney*, *Oliver*, *Stoner*, *Kathleen R.*, *PatentWizard*, *Schneider*, *Somm*, and *Lefebure*. Whether the defamatory report in *Blumenthal* was accidental or not is subject to debate. Regardless, a substantial majority of the cases are based on allegations of injury by content that was deliberately posted with the apparent intent to injure the victim.

The willful nature of these acts may disturb their correlation with activity levels. Since these parties willingly engage in tortious conduct, these "irresponsible" tortfeasing users will derive some utility from Internet usage that "responsible," non-tortfeasing Internet users do not.[247] As a result, one cannot assume that responsible and irresponsible users exit the market in representative amounts when the price of access increases. The effect of this problem is that imposing strict liability on ISPs would decrease the amount of Internet use without assuring a corresponding reduction in injuries. In fact, it is wholly possible that costs could increase.[248] Ultimately, strict liability regimes are no more successful than neg-

[247] See William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 153 (1987).

[248] If irresponsible users gain more average utility than responsible users, a strict liability regime might create a form of adverse selection bias, causing costs to spiral upward as more responsible users exit the market, imposing the costs of liability on an increasingly smaller group of responsible users.

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ligence regimes in minimizing the burden on speech and reducing inefficiency.

3. The ultrahazardous nature of ISPs

The analysis above presents a complicated result. Victims are unable to contract with sellers for increased care, and they are also incapable of engaging in additional care themselves beyond providing notice. The ISP is faced with a similar conundrum, as decreases in the level of activity may not necessarily decrease accident costs. Neither can adequate care ex ante on the part of the ISP necessarily reduce the levels of accidents, due to the volume and instantaneous nature of publication. If ISPs are to be liable for the torts of their users, ISP service must be considered an ultrahazardous activity.

The Restatement (Second) of Torts specifies six factors that tend to identify ultrahazardous or abnormally dangerous activities, none of which is exclusive or dispositive. Those factors are: 1) a high risk of harm, (or high *P*); 2) a high degree of harm (or high *L*); 3) the inability to eliminate risk by the exercise of reasonable care (or high *B*); 4) the extent to which the activity is not in common usage; 5) inappropriateness of the location of the activity; and 6) the extent to which the value of the activity to the community outweighs its dangerous attributes.[249] These factors fit an ISP relatively well. The high risk of harm and the high loss may be evident when considering both the ISP's inability to reduce costs prior to receiving notice and the fact that the ability of the ISP to engage in care without notice is severely limited.

The common usage factor, though not dispositive,[250] is important from a historical perspective, since many dangerous activities have migrated out of strict liability regimes as they have become more socially accepted.[251] As the technology facilitating any particular ac-

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[249] Keeton et al., supra note 14, § 78, at 555 (citing Restatement (Second) of Torts § 520, cmts. e & f (1977)) (references to Hand formula added).

[250] Id. (noting that "[t]here is no requirement that the activity be of the kind that is not commonly engaged in").

[251] Id. § 78, at 547 (citing automobiles as an example of something "dangerous and fatal . . . for which there is no strict liability"). Similarly, case law on aircraft has retreated from strict liability. Id. § 78, at 556–58 nn.57–59 (citing several aircraft cases).

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tivity improves, it tends to lose its inherent danger, such that a change in regime is appropriate. As Prosser explains, "[r]apid technological changes . . . make such a classification extremely difficult to maintain."[252] The sixth factor was specifically designed to capture the social utility of the activity. The Restatement took the position that strict liability should not be applied to an enterprise serving a public duty or functioning as a common carrier.[253] Judge Posner notes that, as a result, even ultrahazardous activities such as wild animal ownership, which are invariably governed by strict liability,[254] may be exempted from this rule.[255] For example, imposing strict liability on a zoo would likely make its function cost-prohibitive, yet the activity is socially valuable in that it creates positive externalities. For instance, the zoo provides educational benefits that are not captured in the costs of admission. If zoos were forced to internalize the costs of liability for animal-related injuries, the cost of zoo admission could be raised to a socially prohibitive amount. To prevent this result, the common law has made exceptions to the rule of strict liability such that many ultrahazardous activities remain governed by administrative regulation.[256]

Though unfortunately pejorative, the term "ultrahazardous" accurately describes the nature of providing Internet access. The ISP offers a socially desirable yet socially expensive service, similar to that of the zoo in that the price of the service does not fully capture its positive externalities. In the case of the ISP, this positive externality is the network effect created by its function. As the ISP is incapable of reducing the probability or degree of harm caused by content-based injuries through due care without diminishing the network effect, imposing strict liability on this ultrahazardous ac-

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[252] Id., § 78, at 558.

[253] Restatement (Second) of Torts § 521 (1977); Keeton et al., supra note 14, § 78, at 556. This position strongly supported the outcome in *Lunney*, since the court deemed Prodigy to be a common carrier. See Lunney v. Prodigy Servs., 723 N.E.2d 539, 541 (N.Y. 1999).

[254] See Keeton et al., supra note 14, § 76, at 542; Posner, supra note 178, at 178 (discussing the application of strict liability to ultrahazardous activities).

[255] See Posner, supra note 178, at 178.

[256] See Shavell, supra note 191, at 368–69. Professor Shavell notes that in industries where liability regimes fail to adequately reduce risks, "substantial regulation is not a coincidence but rather is needed, both because liability alone would not adequately reduce risks and because the usual disadvantages of regulation are not as serious as in the tort context." Id. at 369.

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tivity would cause more detriment than benefit. It thus follows that strict liability inefficiently governs this ultrahazardous activity. Having noted the inefficiency of strict liability, the following Section considers why a self-regulatory regime would be preferable.

D. Non-liability/Conditional Immunity

The non-liability provided to American ISPs by Section 230 of the Communications Decency Act and the *Zeran* line of cases is singular. By conditionally immunizing ISPs, the regime accomplishes what no liability regime could: It permits ISPs to apply the *Dennis* formula to content objectively. As of yet, no other jurisdiction has elected to govern ISPs through a similar self-regulatory function.

1. The supremacy of non-liability/conditional immunity regimes

The result of Judge Posner's acid bath of economics is clear—both liability regimes induce inefficient levels of content monitoring and create externalities by producing a reductive effect on speech. Early jurisprudence reached this result intuitively;[257] the economic analysis merely substantiates this conclusion. Having reached this conclusion, propounding either liability regime would be to throw out the proverbial baby with the acid bath water. The remainder of this discussion supports the efficiency of a non-liability regime. Part III assumes the existence of shirking of monitoring duties and discusses why the subsidization of monitoring is preferable to a negligence regime.

The counterintuitive nature of advocating non-liability has perhaps contributed to the frequent rejection of this regime in ISP literature.[258] Since non-liability regimes are often applied in situations where victims are best suited to avoid accidents,[259] it would appear that the ISP, as the post-notice least-cost avoider, should be held liable. Conversely, strict liability is usually well suited to cases

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[257] See Zeran v. Am. Online, 958 F. Supp. 1124, 1135 n.23 (E.D. Va. 1997) (discussing how both strict and distributor liability would yield inefficient levels of content monitoring).

[258] See supra note 39.

[259] See Posner, supra note 178, at 178. For example, parties engaging in dangerous sporting activities are themselves in the best position to avoid the expected accident costs of the activity by reducing their activity levels. Id.

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involving ultrahazardous activities,[260] since the victim is not the least-cost avoider and cannot take precautions, either by exercising more care or reducing the level of some activity. Yet, because ISPs create network effects in their operation, the imposition of the least-cost avoider rule generates social costs and creates negative externalities by distorting the ISP's *Dennis* calculus.

The other end of the liability spectrum is similarly problematic, however, as a complete immunity rule would create a moral hazard. The ISP, having no incentive to take any care in the monitoring of its content, would solicit additional content regardless of the risk that it posed to the public. In the context of the *Dennis* formula, the ISP would have no incentive to make the calculus since it would bear none of the costs of the *PL* term but any monitoring would yield costs in the *B* variable. While Coasian logic would dictate that the parties would meet and negotiate to remedy this,[261] the transaction costs in this scenario are exceptionally high. First, injury is likely to be a one-time event, after which negotiation is ineffective. Second, since any individual is hypothetically at risk, it is unlikely that potential victims would recognize this risk and gather to negotiate as a collective.

The self-regulatory regime imposed by Section 230 was intended to strike the balance between these two ends of the spectrum. Since ISPs remain the post-notice least-cost avoider, it is preferable that they engage in monitoring, yet this end cannot be achieved by a liability rule. By conditioning immunity on monitoring, Section 230 achieves the "Good Samaritan monitoring" it sought to induce. The language of Section 230(c)(2)(A) indicates that for immunity to accrue to an ISP under the statute, the ISP must engage in good faith monitoring. It may be inaccurate to argue that the language of Section 230 explicitly provides complete statutory immunity to ISPs, but Section 230 jurisprudence has also rendered it impossible to clarify the conditions that modify immunity.[262] Though this spe-

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[260] See Keeton et al., supra note 14, § 78, at 549–50.

[261] See generally R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960) (arguing that in the absence of transaction costs, property will be allocated between parties through negotiation).

[262] See Stephen J. Davidson et al., The Law of Cyberspace Liability of Information Service Providers, 2 PLI's 5th Ann. Inst. for Intell. Prop. L. 143, 154–55 (1999). The author states that ISPs "can not incur liability for their failure to monitor content." However, this statement arises in the context of a discussion of *Doe v. America*

cific set of facts entailing a deliberately non-monitoring ISP remains untested in the courts, the statute and its legislative history support Judge Friedman's tacit quid pro quo reasoning under which monitoring ISPs receive the protection of Section 230 and non-monitoring ISPs do not.

For example, an ISP that as a matter of policy did not monitor third party content or facilitate consumer screening[263] would arguably not receive the protection of Section 230;[264] the language of the statute would seem to forbid such an interpretation.[265] An ISP no longer governed by Section 230 would revert to traditional common law distributor status and would accordingly be subject to notice-based liability. In adhering to its corporate policy, our hypothetical ISP would then be subject to suit when it did not remove allegedly objectionable content. The very cost-prohibitive nature

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Online, 718 So. 2d 385 (Fla. Dist. Ct. App. 1998), aff'd, 783 So. 2d 1010 (Fla. 2001), cert. denied, 122 S. Ct. 208 (2001), where the plaintiff sought to impose liability for a pre-notice failure. The imposition of liability in such circumstances contemplates strict liability, harking back to *Stratton Oakmont.* To argue that a case reaffirming immunity from pre-notice liability would protect an ISP that, as a matter of policy, did not monitor content is a dubious assertion at best. In fact, an ISP that does not edit content or facilitate content editing runs the risk of losing the protection of § 230 by failing to uphold its responsibility under the implied exchange of immunity for oversight.

[263] See, e.g., Religious Tech. Ctr. v. Netcom On-line Communication Servs., 907 F. Supp. 1361 (N.D. Cal. 1995). In *Netcom,* the ISP's deliberate policy of non-monitoring prompted the court to refuse to grant summary judgment on a claim of contributory copyright infringement against the ISP. See id. at 1381. Netcom ultimately settled the claim. Kristin Spence, Caught in the Crossfire, Wired, Nov. 1996, at 92, 92, available at http://www.wired.com/wired/archive/4.11/updata.html.

[264] Section 230(c)(1) provides against publisher liability, and § 230(c)(2) effectively provides against distributor liability, given the satisfaction of the conditions in (A) or (B). In the unlikely circumstance that an ISP merely provides screening software to its users as suggested in paragraph (B) and deems its responsibilities satisfied, it would rest its entire defense from liability on the "or" in paragraph (A), a perilous policy indeed. It is advisable, if only as a protective measure, that the ISP engage in monitoring as well.

[265] 47 U.S.C. § 230(c) (Supp. V 2000). Since scholars have construed the "plain" meaning of the statute in two different ways, one must question how plain that meaning actually is. Given the divergence of views, it is advisable to consider Congressional intent—particularly considering that Congressional intent was relatively clear—to encourage ISPs to engage in good faith content monitoring. While some have stated that Congress intended to immunize ISPs, this overlooks the fact that monitoring was the ultimate objective and confuses the means with the ends. It would not strain the statutory language to assume that the Communications Decency Act was intended to improve the decency of Internet communication.

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of this regime is partially what motivated the enactment of Section 230.[266] Consequently, ISPs are effectively coerced into some modicum of monitoring, which is why Section 230 is a "conditional immunity" regime.[267]

The efficiency of this regime may be demonstrated by returning to the Shavellian model. In a true negligence regime, the ISP could maximize revenue by producing at market price, since it would not be internalizing the externality of injurious speech. In notice-based and strict liability regimes, the ISP minimizes liability expenses by ignoring the social cost of its distorted *Dennis* calculus and removing content upon notice, creating a reductive effect on speech. In all cases, this revenue maximization imposes costs on society. Under Section 230, however, upon complaint by the victim, the ISP will examine the speech of the defamatory content-provider to avoid risking the loss of conditional immunity. Freed from the risk of liability for its decision, the ISP can objectively apply the *Dennis* formula. Having conducted this cost-benefit analysis as required by law, the ISP then determines in good faith whether to delete the content.

The non-liability regime is the only regime that allows the ISP to conduct the *Dennis* analysis in a risk vacuum. Only conditional immunity can reduce accident rates without reducing the quality of Internet content—an effect of negligence—or the total amount of Internet access—an effect of strict liability. Additionally, both negligence and strict liability fail to protect the network effect of ISPs.[268] In part, this arises from the fact that both of these regimes

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[266] See, e.g., 141 Cong. Rec. 22,045 (1995) (statement of Rep. Cox) (stating that the provision would "protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers"); 141 Cong. Rec. 22,046 (1995) (statement of Rep. Barton) (stating that Congress sought to "help [ISPs] self-regulate themselves without penalty of law").

[267] What exactly Congress obtained from the tacit quid pro quo described by Judge Friedman becomes an increasingly poignant question. Certainly, ISPs obtained the lion's share of the benefits, and projecting the present course of § 230 jurisprudence, the immunity regime will eventually become unconditional. Rather than necessitate a return to a liability regime, such a result would only strengthen the case for subsidization made in Part III.

[268] As a normative matter, the subsidization of positive externalities tends to be good public policy. See Posner, supra note 178, at 150, 678 (describing education as a positive externality, arguing that such subsidization increases overall social utility).

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function inefficiently when neither party is well suited for accident avoidance. A liability regime assumes that someone can avoid the accident and that the liability rule thus deters economically undesirable conduct. If no one is deterred, then liability serves no efficiency purpose. Though failing in its deterrent purpose, the rule still generates social costs for the purposes of making transfer payments between parties. Since litigating wealth transfers from an ISP to a victim for an unavoidable tort creates no deterrence for the ISP, the rule does not serve the public good.[269]

2. The question of sub-optimal monitoring

The much-maligned Section 230 was thus a major step toward minimizing costs imposed by third party content. The problem with the current regime is not, as some critics suggest, that it unfairly granted immunity to ISPs. The true question is whether the risk of losing "Good Samaritan" protection and users' demand for content oversight is enough to induce an efficient level of ISP monitoring or whether there is a market failure for monitoring. If there is in fact a risk of market failure, then it may be appropriate to consider the subsidization of monitoring, as subsidization would mitigate the incentive to shirk.

III. MAXIMIZING THE EFFICIENCY OF MONITORING

In light of the failure of liability regimes to produce efficient levels of Internet use and content monitoring, a self-regulatory regime appears to be the most efficient. Because liability regimes produce over-regulation, a non-liability regime is necessary to avoid these externalities. Because monitoring carries costs, however, it is possible that ISPs may perform their task at less than efficient levels. That is, while monitors might engage in marginal increments of monitoring that would produce greater reductions in expected losses, the risk of liability is not substantial enough to produce maximum efficiency at the margin.

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[269] See Richard A. Posner, Tort Law: Cases and Economic Analysis 8 (1982) ("If the threat of liability . . . does not deter accidents but only shifts wealth about after the accident occurs, tort law will not increase the wealth of society but will serve only to redistribute the diminished wealth that remains.").

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The question remains whether the risk of losing immunity and the pressure of market forces are great enough to induce efficient levels of monitoring. While it may be argued that market pressure would lead to efficient monitoring, this assertion is difficult to establish, and it ignores the nature of the "sellers and strangers" model: The injury does not arise from a market relationship between injurer and victim. Most victims will not be customers of the relevant ISP, and thus their behavior can have no market effect. Moreover, this assertion assumes away the problem—the entire debate over liability for third party content is predicated upon the assumption that the market has failed to address the dilemma of policing injurious content. It is beyond the scope of this discussion to determine quantitatively whether there is a market failure for monitoring. It is assumed for the sake of argument that there may be.

The following discussion argues that if, as critics of conditional immunity insist, there is an insufficient level of monitoring, then subsidizing monitoring efforts would be more efficient than returning to a liability regime. Regardless of how one may characterize the quality and quantity of ISP monitoring, returning to anything that resembles a liability regime would fail to serve the public good.

Reactive monitoring is a reality in the ISP industry. ISPs respond to content-based complaints as a matter of good business practice for the purpose of maintaining customer goodwill and satisfaction.[270] Also, lurking in the background is the ever-present threat of liability for intellectual property rights infringement.[271] While there may be error costs in ISP application of the *Dennis* formula, there is no reason to believe that these costs would exceed error costs in the justice system, since both monitors and judges would make good faith determinations. On average, monitors can be expected to have an equally competent grasp of the standards of propriety as a judge because monitors specialize in making such determinations. By monitoring content, the ISP acts as a private judge in the sense that it offers what is effectively injunctive relief against injury by

[270] Bergner, supra note 78, at 116.

[271] See, e.g., Religious Tech. Ctr. v. Netcom On-line Communication Servs., 907 F. Supp. 1361 (N.D. Cal. 1995).

investigating complaints and conducting an objective *Dennis*-style calculus.[272]

The prospect of governmental monitoring must be rejected for several reasons. Primarily, advocating government regulation of speech content invariably runs afoul of the First Amendment. Judicial hostility to legislation such as the CDA, evidenced in *Reno v. ACLU*[273] and the Child Online Protection Act ("COPA"),[274] indicates that the courts will not tolerate a mandate of private monitoring. Setting aside First Amendment considerations, governmental monitoring would be no more efficient since it would reintroduce secondary monitoring costs on the part of the agency responsible for such oversight.

In that government monitoring is not possible, the activity would have to be conducted by the ISPs themselves. One may begin by assuming that monitoring is socially beneficial, or, stated in the context of economics, that the price effect cost of objective monitoring is less than the costs that accrue to defamed parties. First, detractors of conditional immunity predicate their attack on this assumption. One would not advocate a notice-based liability regime if ISPs would never be liable. If adequate due care, as manifested in monitoring (B), would not prevent expected accident costs (PL), the ISP would not be liable under the Hand formula. Second, some courts have obviously made the determination that monitoring costs would not exceed expected accident costs, since courts found ISPs liable in notice-based liability regimes. Thus, ISPs will monitor to the extent that monitoring produces a greater corresponding reduction in damages, prorated by the likelihood that the ISP will lose its conditional immunity for substandard

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[272] Injunctive relief is a hallmark of regulatory regimes, "for it works in a direct way to control risk; the injunction prevents harm simply by proscribing certain behavior." Shavell, supra note 191, at 373.

[273] 521 U.S. 844 (1997).

[274] 47 U.S.C. § 231 et. seq. (Supp. V 2000). COPA, referred to as the "son of CDA," sought to penalize web sites that provided information that was "harmful to minors." Notably, it specifically excluded ISPs. See Goldstein, supra note 39, at 623–24 (citing 47 U.S.C. § 231(b) and discussing COPA generally). The District Court that enjoined the enforcement of the CDA similarly issued an injunction against the implementation of COPA in February 1999. ACLU v. Reno, 31 F. Supp. 2d. 473, 499 (E.D. Pa. 1999). This result was affirmed by the Third Circuit. ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000). On May 21, 2001, the Supreme Court granted certiorari. Ashcroft v. ACLU, 121 S. Ct. 1997 (2001).

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monitoring. As Section 230 jurisprudence expands, this final factor will increase, and ultimately, it is conceivable that the loss of immunity will be so unlikely that no monitoring will occur. Yet even assuming that this will happen, or has already occurred, it does not follow that the only alternative is to return to a negligence regime.

If ISPs engage in sub-optimal levels of monitoring, subsidization through transfer payments could prevent the shirking of monitoring duties and maximize the potential efficiency of the system. Conclusive action would also forestall the risk of a circuit split on Section 230, which is possibile given the positions taken in the relevant literature and the somewhat peculiar interpretation of *Zeran* that appears in *Blumenthal*. Because Congress intended to modify the liability regime, it would not serve the goals of Congress to allow a circuit split to appear over the interpretation of "distributor" in the CDA. Since a judge is unlikely to fashion a subsidization regime, courts would be more likely to consider the greater and more obvious question of negligence versus immunity and could possibly revert to a rule similar to that of *Cubby* or *Stratton Oakmont*, once again leaving Congress with a regime of which it disapproves.

Unfortunately, like many other solutions to the problem of ISP liability for third party content,[275] subsidization is of questionable feasibility. It is unlikely that Congress will revisit ISP liability for third party content in the near future. Moreover, it is questionable that the public policy process would permit the subsidization of a highly successful industry. In spite of the political obstacles to subsidization, however, the economic analysis is heartening. Having demonstrated the underlying efficiency of the conditional immunity regime, the inquiry has been reduced from whether the underlying legislative regime is a catastrophic failure—which it is

[275] For several proposed solutions, see, e.g., Butler, supra note 216, ¶¶ 30–31 (advocating the institution of explicit rules of notice and a requirement that notice be made under penalty of perjury); Langdon, supra note 39, at 853 (advocating a return to a distributor liability regime by eliminating § 230(c)(1)); Konkel, supra note 144, at 457 (endorsing the negotiation of broad international multilateral treaties on the regulation of content); Michael J. Spencer, Anonymous Internet Communication and the First Amendment: A Crack in the Dam of National Sovereignty, 3 Va. J.L. & Tech 1, ¶¶ 39–40 (1998), at http://vjolt.student.virginia.edu/graphics/vol3/home_art1.html (proposing the creation of an international body to govern the Internet).

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not—to whether the ISP's incentive to shirk is substantial enough to merit subsidization.

CONCLUSION

Whether ISP monitoring occurs at the most efficient level remains to be demonstrated. The economic analysis above illustrates that negligence and strict liability regimes fail to produce an efficient level of monitoring. Both regimes undermine the positive attributes of the Internet by producing a reductive effect on online speech and diminishing network effects. Standing in stark contrast to these results, the effect of Section 230 and the progeny of *Zeran* has been to create a relatively efficient regime that simultaneously preserves positive and prevents negative externalities. Even the assumption that ISP monitoring occurs at less than ideal levels does not provide adequate grounds for advocating a return to a liability regime. Compared to the draconian measure of returning to a negligence or notice-based liability regime, the subsidization of monitoring efforts would be a far more efficient and feasible proposal for minimizing social costs and maintaining the benefits of the Internet.

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