13

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COMPARATIVE PRIVATE LAW

ONLINE DEFAMATION AND SERVICE PROVIDER LIABILITY

- A COMPARATIVE STUDY -

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CONTENTS

1. Introduction

"The Internet is a unique and wholly new medium of world-wide human communication."[1] It enables people to communicate with one another with unprecedented speed and efficiency and is rapidly revolutionising how people share and receive information. From the time when the first vacuum tube computers were introduced in the 1950s it took the U.S. Department of Defence only until 1969 to create the Internet. At that time their goal was to create a decentralised system to protect data and communication in the advent of a thermonuclear war. But they had started a development that could not be stopped anymore. Overtime, the Internet evolved as a world-wide network of government, academic and commercial computer systems and databases linking academics, scientists and government officials.[2] Despite this dramatic growth, it was only in this decade that individuals outside of these spheres used the Internet. Today computers and modems are irreplaceable items of everyday life and the Internet has grown faster than anyone, even its greatest proponents, could have imagined. It is not only the preferred mode of communication for millions of people, but also a source of vast information. Individual users send messages across cyberspace, browse online magazines and newsletters, and participate in "chat rooms", discussing topics with others who share similar interests. One can buy plane tickets, take classes, order nearly everything or publish whatever one wants to let the world know.

These innovations also have their dark side, of course. The Internet makes it possible for everybody to reach millions of people by simply sitting at home and pressing some buttons on the computer. It therefore became just as easy to defame someone in front of millions of people. With a few keystrokes, a reputation can be destroyed around the

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[1] Reno v. ACLU, 117 S. Ct. 2329 (1997) at 2334.

[2] R. Hayes Johnson, Jr., "Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co., 49 Ark. L. Rev. 589, 604 (1996).

world in seconds from the comfort of one's own home.[3]

The then arising problem is that the identity of the defaulter is unfortunately seldom known to the victim. The Internet makes it so easy to stay anonymous and who would commit illegal acts and voluntarily sign his name ? Hence, the defamed party is often left with only one possible plaintiff - the online service provider. While the question of liability of third parties such as newspapers, magazines or television stations for defamatory statements published or said in their newspaper or program, is quite well settled in today's defamation law, the application of these principles to the online world is just now being tested. Because of all the new possibilities it has opened up, the Internet presents many new legal problems. With online defamation, the greatest difficulty has been defining the standard of liability to apply to online service providers.

It is the objective of this paper to examine whether or not the general law of defamation is applicable to the new online world or if it is necessary to establish a new standard of liability specifically for online service providers.

While the liability of online service providers in South Africa is so far a clean slate, there have been a number of cases in the United States which had to deal with the problem. In the meantime, the United States and Germany have enacted national legislation that deals with the question of online service provider liability. This paper will compare the approaches taken by the two countries and afterwards consider what the South African situation of the law might be once a case of online defamation and service provider liability comes to court.

After a short overview of the inner workings of the Internet and an explanation of the

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[3] Lesa-Marie Mullen, "The Fourth Circuit Has Ruled in Zeran v. America Online: Imunity for the Internet Service Provider ?", Computer Law Seminar, Fall 1996, available at http://www.law.stetson.edu/courses/computerlaw/papers/lmullenf97.htm.

necessary technical terms, I will set out the basic principles of the law of defamation in the United States and Germany to point out where exactly problems do arise when it comes to the question of online provider liability.

Next, I will deal in detail with the possible standards of liability as established by the general law of defamation and the question whether they are applicable to an online service provider. Then I will add the above mentioned comparison between the American and the German approach and afterwards consider the South African situation.

2. The Internet

Before concentrating on the legal problems in connection with online defamation it might be helpful to get a short overview of the technical terms used in this essay and their meaning.

Cyberspace is the vast, infinite space known popularly as the Information Superhighway. It is the carrier of all "digitally and electronically transferred information".[4] Within cyberspace lies the *Internet*, the world's largest computer network.[5]

The recent cases of online defamation showed that the typical way for online defamation to occur is that a defamatory message is posted onto a so called *computer bulletin board* of an *online service provider*. Therefore these two technical terms need to be explained.

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[4] Anne Meredith Fulton, "Cyberspace and the Internet: Who Will Be the Privacy Police?" 3 Comm.L.Conspectus 63, 65 (1994).

[5] Doug Abrahms, "Teens Testify on Cyberspace Sex; Senate Committee Hears of Easy Access to On-line Smut", Wash. Times, 25 July 1995, at p. A6.

2.1 Online Service Provider

There are three major categories of online services that operate bulletin board systems: private, public and commercial services. For this paper only the latter two are of importance. The public online service is popularly known as the Internet.[6] Simply put, the Internet is an international network of interconnected computers. The number of people using the internet today is hard to estimate. 1997 there were approximately 40 million people world-wide,[7] a number that then was expected to double each year for the foreseeable future[8]and to reach 200 million per year by the year 1999.[9]

This network can be accessed in a variety of ways, including through commercial online services such as America Online Inc. ("AOL"), CompuServe Inc. ("CompuServe") and Prodigy Services Company ("Prodigy"). Therefore the user typically uses a computer with a modem to establish a telephone link between the user's computer and the service provider's computer system.[10] Once a user connects to the service, but prior to accessing the system, the user must enter a username and a password.[11] The username identifies the specific user and the password verifies the user's identity and allows him to access most of the service's electronic resources.[12] The use of commercial online services has climbed steadily in recent years. During 1996, the users of major commercial online services totalled almost 12 million.[13]

Most online services provide three primary functions: the user/system resources, the gateway and the messaging system.[14] The user/system resources enable users to access

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[6] David P. Miranda, "Defamation in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Services Co., 5 Alb L. J. SCI & TECH. 229, 230-31 (1996).
[7] Reno v. ACLU, 117 S. Ct. 2329 (1997) at 2334.
[8] Matthew Siderits, "Defamation in Cyberspace: Reconciling Cubby, Inc. v. Compuserve, Inc. and Stratton Oakmont, Inc. v. Prodigy Services Co.", 79 Marq. L. Rev. 1065, 1066.
[9] Jack E. Brown, "Obscenity, Anonymity, and Database Protection: Emerging Internet Issues", Computerlaw., Oct. 1997, at 1.
[10] Edward J. Naughton, "Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action", 81 Geo.L.J. 409, 416 (1992).
[11] Ibid at 416-17 & n. 41.
[12] Ibid.
[13] ACLU v. Reno, 929 F.Supp. 824 (E.D.Pa. 1996) at 831.
[14] Eric Schlachter, "Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions", 16 Hastings Comm. & Ent. L.J. 87, 107-11, (1993).

information databases and electronic libraries, store data on the online system, and exchange software.[15] The gateway feature allows subscribers to communicate with other autonomous computer systems by routing electronic information and private electronic messages ("e-mail") from one online service to another.[16] The messaging system permits users to communicate with other subscribers of the same commercial service provider by enabling users to send electronic messages via private e-mail transmissions or postings on computer bulletin boards.[17]

2.2 Computer Bulletin Boards

Computer Bulletin Boards, also known as electronic bulletin boards systems, are available on the Internet or through commercial service providers. They enable users to gather online with others who have similar interests. Simply put, a computer bulletin board works like a traditional bulletin board. One can read all the posted messages and respond by posting own messages.

Since the first electronic bulletin board appeared in 1978,[18] boards have been created by a vast range of organisations and individuals, including police departments, U.S. Army bases, musicians, lawyers,[19] and even patients in need of a diagnosis.[20]

While private e-mails which are electronically transferred by an online service provider from one individual to another without concern for content, are only received by the intended recipient, messages that are posted on a computer bulletin board become part of the collection of postings that other commercial online service users can read. [21]

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[15] Eric Schlachter, "Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions", 16 Hastings Comm. & Ent. L.J. 87, 108-11, (1993).
[16] Ibid at 111.
[17] Ibid at 107.
[18] Loftus E. Becker. "The Liability of Computer Bulletin Board Operators for Defamation Posted by Others", 22 Conn. L. Rev. 203, 209 (1989).
[19] Ibid at 208.
[20] Barbara Buchholz, "On Call: You Should Still Get a Human Opinion but On-Line Services Can Help with Medical Advice", Chi. Trib. 8 June 1995, at C1.
[21] Ibid.

Simply said it is like the difference between a letter send from one person to another and a message that someone pins on a bulletin board. All users of the service can reply to the message by posting their own message on the computer bulletin board. Because the number of participants in a particular electronic bulletin board forum discussion may range from two to several hundred, message postings are analogous to discussing a topic with only one person, but while using a megaphone.[22]

The computer bulletin board forums constitute the main feature of many commercial online service provider. Each provider offers a large variety of different bulletin boards, each one dealing with a different topic, ranging from news of the stockmarket to celebrities' gossip.

Each forum's appeal depends upon the subject matter discussed as well as how well the information is organised. To maintain a high level of quality, most service providers employ or contract a so called Board Leader to oversee the forum and to intervene when inappropriate or irrelevant messages (also called "junk postings") are posted.[23] Board Leader intervention may include "deleting unwanted material, moving certain messages to other discussion arenas deemed more appropriate, (or) freezing certain discussions".[24]

Because subscribers post a high volume of messages daily, it is impossible for a Board Leader of a commercial online service to read every posted message: For example, more than two years ago, the number of notes posted on Prodigy's bulletin boards

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[22] Motoko Rich, "Electronic War of Words Heads from Computer to Court", Financial Times, Aug. 13, 1994, at 24.

[23] These practices are followed by Prodigy and CompuServe. See Douglas B. Luftman, " Defamation Liability for On-Line Services: The Sky Is Not Falling", 65 Geo.Wash.L.Rev., (1997), 1071, 1082, Fn. 90, referring to the Affidavit of Jennifer Ambrozek in 30 Stratton, 1995 WL 805178 (No. 31063/94); Edward J. Naughton. "Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action", 81 Geo.L.J.at 416 n. 42 (1992).

[24] Lance Rose, "Netlaw: Your Rights in the Online World ", p. 9.

exceeded 75.000 a day, which made it almost one per second.[25] Some online providers, therefore, have created different methods for monitoring the content of messages being posted: By using a special software, it is possible to screen the posted messages automatically.[26]

3. Basic Principles of the Law of Defamation

Before focussing on the problem of online defamation and service provider liability in particular, this paper first gives a short overview of the basic principles of the law of defamation to point out where exactly problems would occur in the case of an online defamation. Although different approaches are made in the United States and Germany, it will be shown in the end, that the basic principles and thus the issues that are problematic when it comes to online defamation are correspondent.

3.1 The United States of America

Defamation has been recognised as a common law tort since early in the sixteenth century.[27] The United States adopted much of the law as it existed in England. The Restatement (Second) of Torts defines a defamatory statement as a communication that tends "to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him".[28] Generally, a prima facie case for defamation therefore consists of:

(a) a publication of a statement of fact, which

(b) was false and defamatory,

(c) reasonably referred to the plaintiff,

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[25] David P. Miranda, " Internet Posing New Problems in Law", Times Union (Albany N.Y.), 25 February 1996, at B1.

[26] Edward J. Naughton, "Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action", 81, Geo.L.J. 409, 416 n. 42 (1992).

[27] Marc A. Franklin & David A. Anderson, "Mass Media Law, Cases and Materials, p. 195.

[28] Restatement (Second) of Torts, Art. 559 (1977).

(d) was made with a requisite degree of fault, and
(e) caused injury to the plaintiff.[29]

Presumed that the defamatory material written by a third person and posted on a computer bulletin board was false and defamatory, referred and caused injury to the plaintiff, then the decisive factor for the question whether the online service provider can be held liable is whether he acted with a requisite degree of fault.

With respect to the required element of fault, the American law generally requires at least that the defendant acted negligently. [30] But – as it will be pointed out below – there are certain distinctions between the different types of defendants and plaintiffs.

3.2 Germany

Besides other ways of protecting a person's honour and reputation, § 823 (1) German Civil Code (Bürgerliches Gesetzbuch, "BGB") plays the leading role in German defamation cases. The problem with § 823 (1) BGB was though, that it does not explicitly refer to damages resulting from defamatory action. § 823 (1) BGB only provides:

"A person who wilfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom."[31]

It was only after the Second World War, that German courts, bearing in mind the utter contempt shown towards human dignity by the Nazi regime, decided to overcome this obstacle. Thus in 1954 the Federal Court ("Bundesgerichtshof") stated that

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[29] Jessica R. Friedman, "Defamation", 64 Fordham L. Rev. 794, 795 (1995).
[30] Greg Abott, "Basic Elements of Defamation Law", http://www.abottlaw.com/defamation.html, p. 4.

> "the sacredness of human dignity and the right to free development of the personality protected by [...] the Basic Law are also to be recognised as a civil right to be respected by everyone in daily life, in so far as that right does not impinge upon the rights of others and is not repugnant to constitutional order or the moral law."[32]

Therefore, due to the Bundesgerichtshof, Art. 1 (protection of human dignity) and Art. 2 (right to free development of one's personality) of the German Constitution ensure a general right of personality which – amongst others – protects a person's honour, reputation and privacy and as such falls under the term of an "other right" as used in § 823 (1) BGB.[33] Since this decision it is possible to sanction violations of this right by tort action under § 823 (1) BGB.

For a defamation action to be based on § 823 (1) BGB the following requirements must be fulfilled:

(a) there must be a violation of the general right of personality which was
(b) unlawful, and
(c) culpable (intentional or negligent) and there must be
(d) a causal link between the defendant's conduct (which can be an act or an omission) and the plaintiff's harm.[34]

As the American law, the German law requires a subjective element of fault.
In the German civil law fault includes both intention and negligence.[35] Intention is the state of mind of the person who consciously and willingly pursues a particular wrongful result (*dolus directus*) or recognises this result as a possible by-product of his main aim, and though he does not desire it, accepts its likely occurrence (*dolus*

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[31] § 823 BGB as translated by B.S. Markesinis, "A Comparative Introduction to the German Law of Tort", p. 10.
[32] Schacht-Letter Case, BGHZ 13, 334, 338, translated by B.S. Markesinis in "A Comparative Introduction to the German Law of Tort", p. 198.
[33] Schacht-Letter Case, BGHZ 13, 334.
[34] B.S. Markesinis, "A Comparative Introduction to the German Law of Tort", p. 24.
[35] § 276 BGB.

eventualis).[36] Negligence means the disregard of the ordinary care which is required in everyday life.[37] If the defendant belongs to a particular group or profession he will be judged against the standard expected to be attained by members of that profession.[38]

With regard to the media, the Press Laws (Pressegesetze) of the Länder and the courts have established certain 'rules of care' which have to be regarded by the different persons involved in the publishing process. What kind of standard of care a person has to obtain depends on what kind of level he is working at, in other words, there are of course different standards of care for a publisher than there are for someone who works as a printer. If this person disregards the care that is expected of him, he is at fault. So, concluding it has to be noticed again, that the decisive factor to decide if someone is liable is whether he has disregarded his standard of care and therefore was at fault.

3.3 Conclusion

The comparison of the German and the American law makes it clear that the point to start from when answering the question of service provider liability is the element of fault. Where the defendant is a private individual, the general interpretations of fault are applicable. Because of the powerful position of the media, however, different standards of liability have been developed and have also been dropped again. The next step is to examine these possible standards of liability that have been developed and the result which their application would have on online service providers.

4. Possible Standards of Liability

The problematic question is whether or not and if, how an online service provider

[36] B.S. Markesinis. "A Comparative Introduction to the German Law of Tort", p. 44.
[37] Ibid.
[38] Ibid.

should be held liable for defamatory material posted on its network by a third party. If new developments as the Internet need to be regulated by the law, it is of course the first choice to try and adapt the existing general law to the new situation. To answer the question of online service provider liability it is therefore necessary to examine which of the standards of liability used in general defamation law could be applied to an online service provider.

There are several possibilities to be considered: First of all, one could think of a complete immunity for online service providers in regard to material that they have not written themselves. Second, one could hold the service provider strictly liable for everything that is published on his network, independently of whether he had knowledge of the defamatory contents or acted at fault in any other way. The third possibility is a fault-based liability. Like a private individual the online service provider would only be liable if he was at fault, which means he had to act at least negligently.

The question which of these possible standards of liability should apply to service providers depends on an additional factor:
The way of regulating a person's liability depends greatly on the role he played with regard to the defamation. The author, being the source of the defamatory material is clearly responsible for the effects of his works when he let it leave his own private sphere. The repetition of a defamatory statement by someone else can, however, have the same defamatory effect as the original publication, or even a worse one, because through repetition the defamation reaches a larger number of people. Therefore, everyone who republishes a defamatory statement could become liable in the same way as the original publisher.

When a statement is republished, different people are involved in the process: First of all, there are the publishers of newspapers, magazines and other readable material.

Second, there are the distributors, such as bookstores, libraries and news dealers. Thirdly, there are the common carriers, such as telephone and telegraph companies and satellite communication services. Of relevance to this paper are also traditional bulletin board owners, who place a bulletin board at the disposal of other persons, so that they can put messages on and receive information from it. The last model is interesting because it is clearly the predecessor of the computer bulletin boards that play a major role in most of the defamation actions that have come to court so far.

When it comes to liability for defamatory material, these persons are not treated equally. Regarded objectively, all their actions are causal to the damage suffered to the plaintiff's reputation. It is a standard rule that the delict of defamation requires the publication of the defamatory material[39] Publication in that sense simply means that the statement must have reached at least one person other than the person defamed.[40] So, strictly seen, the acts of a publisher as well as the acts of a distributor, a common carrier and a bulletin board owner are all sine qua non for the injury suffered. Out of policy considerations it is an undesired result that all of them should be liable to the same standard. It would be unfair if a telephone company could be held liable for all the messages that are transmitted through their wires. Unfair and unwanted because that would mean they had to overhear all the conversations going on. So what is the distinguishing element ? Again it is, simply stated, the element of fault. As it will be shown below, the different jurisdictions had and have different ways of separating the groups involved in the republishing process, but basically it is always the element of fault that makes the difference. But where lies the distinguishing factor that justifies a different treatment of publishers, distributors and common carriers?

The question whether the republishing of a defamatory statement was culpable is connected closely to the question of how much influence a person has on the actual

[39] South Africa: WA Joubert (ed.). "The Law of South Africa", Volume 7, par. 244;U.S.A.: Restatement (Second) of Torts, § 559 (1977).
[40] South Africa: WA Joubert (ed.). "The Law of South Africa", Volume 7, par. 254.

contents of the material he is republishing. The person who has got the most influence on the contents of a publication should also be the first one to be held liable because he would also have been the one to prevent the defamatory publication in the first place. Therefore, as a general rule it can be said, that the ore discretion a communicator has to control the content of a message, the higher will be his duty of care, and the more likely that he will be held liable if a defamation is published. [41]

There are different levels of influence that can be taken over published material and thus the degree of influence differs from the work of a publisher to that of a librarian. The former puts together all the articles he wants to have in his newspaper or magazine, he is editing the whole content, he contracts people to write for him about specific topics. A librarian or a bookstore simply puts all the books into a specific order, that makes it easy for the customers to find the things they are looking for. Concluding one can therefore say that primarily important in the process of establishing the standard of liability is the degree of editorial control that the defendant exercised over the disseminated statements.

Until the fast success of the Internet, the system of classifying people involved in the publishing process as publishers, distributors and common carriers worked pretty well. But the information age has made judges rethink some of the most basic principles of the law. For the early self-contained computer bulletin board systems, the board's moderator, who could read and screen all of the content, seemed a logical target for liability for defamation posted on her or his system. The one-person bulletin board systems quickly yielded to huge services like CompuServe and America Online. Since they controlled so little of the content on the various bulletin boards and chat rooms, liability under the "publisher" category is not the self-evident consequence anymore. But what about liability as a "distributor"? Or are service providers more comparable with "common carriers"?

[41] Robert B. Charles, "Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?", 2 J.L.&Tech. 121, 130 (1987).

In the end the questions to answer therefore is, whether or not a service provider – when it comes to editorial control - is most analogous to a publisher or a distributor or a common carrier or a bulletin board owner or whether none of these analogies is applicable to such a novel phenomenon and a new category has to be added to these traditional notions of information disseminators. To answer this question, one first has to look in more detail at the four mentioned categories and the way they are treated by the German and the American law.

4.1 Publishers

4.1.1 United States of America

Prior to 1964 defamation in the United States purely was a matter of state law. Faced with the often difficult balance between the state's interest in protecting the plaintiff's reputation and the public's interest in a free press, the states would sometimes neglect the element of fault by imposing strict liability on the press and publishers in particular.[42] In balancing the publisher's right of free speech against the individual's right to protect his reputation, the common law generally set its presumptions in favour of the individual's reputation.[43]

In 1964, however, in the landmark decision *New York Times co. v Sullivan*[44], the Supreme Court made it clear, that states no longer could impose strict liability for defamation.[45] Since then, the states are not allowed to impose liability without fault", which means that the defendant had to act at least negligently.

As stated above, the standard of liability is closely connected to the degree of editorial control that is exercised. Thus, publishers, such as newspapers, magazines, and broadcasters are facing the strictest liability for defamatory material published in their

[42] Richard A. Epstein, "Cases and Materials on Torts", p. 1066.
[43] Richard A. Epstein, "Cases and Materials on Torts", p. 1066.
[44] New York Times Co. v Sullivan, 376 U.S. 254 (1964).

medium. Under the Restatement (Second) of Torts, "one who repeats or otherwise republishes a defamatory statement is subject to liability as if he had originally published it"[46] because "he 'adopts' it as his own and is liable in equal measure to the original defamer".[47]

Although magazines and newspapers are strictly spoken "republishers" of third party statements and not publishers, the courts have held that because of their editorial control, they are deemed publishers and held to the same liability standard as the original author.

The courts have therefore made it clear that the guidepost for imposing so called primary publisher liability is whether the defendant exercised editorial judgement.[48] Editorial judgement has been defined as choosing material that goes into a publication as well as making decisions about the form of the content printed.[49]

Therefore a publisher such as a newspaper, that exerts comprehensive editorial control over its distribution of information is liable for defamation if four elements are satisfied: (a) the statement at issue is false and defamatory; (b) the statement is an unprivileged communication to a third party; (c) the publisher is at fault, amounting to at least negligence; and (d) the statement's communication causes harm.[50] Thus in practice, publishers are liable for defamatory statements contained in their publications to the same extent as the originators of such statements, because they have editorial control over the material that they publish.[51] Publishers are presumed to be creative, knowing participants in the publication process.[52] The traditional rationale for holding print publishers liable is that they have the opportunity to review, edit, or reject

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[45] New York Times Co. v Sullivan, 376 U.S. 254 (1964).
[46] Restatement (Second) of Torts (1976), § 580B.
[47] Liberty Lobby Inc. v. Dow Jones & Co., 838 F.2d 1287, 1298 (D.C. Cir.), cert. denied, 488 U.S. 825 (1988).
[48] Cubby Inc., v. CompuServe Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991).
[49] Miami Herald Publishing Co. v. Tornillo,418 U.S. at 241 (1974)..
[50] Restatement (Second) of Torts § 588 (1977).
[51] Restatement (Second) of Torts § 581 (1) cmt. B (1976).
[52] W. Keeton et. al., "Prosser and Keeton on the Law of Torts", Par. 111, p. 810.

material before publishing.[53]

With regard to the element of fault, it is therefore generally sufficient if the publisher acted negligently. This does, however, not mean, that he has to have knowledge of the defamatory contents. A publisher can be held liable for defamatory statements contained in his works even absent proof that they had specific knowledge of the statement's inclusion.[54] The element of fault can as well be fulfilled because he does not have knowledge of the defamatory contents and therefore might have neglected the duty of care that is expected of him.

There is, however an exception to the general rule, that negligent acting on behalf of the publisher is sufficient: In *New York Times Co. v Sullivan*, the Court refused to hold a publisher liable for negligence for disseminating defamatory material because the plaintiff was a so called "public official".[55] The court ruled that if the plaintiff is a "public official" he has to prove that the defendant published the statement at issue with "actual malice". Therefore the plaintiff has to prove that the allegedly defamatory statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not".[56] The actual malice standard was later extended to plaintiffs who could be characterised as public figures in general.[57] In cases of these public figures it is therefore not enough if the publisher acted negligently. This rule set out by the Supreme Court in *New York Times Co v Sullivan* has exerted enormous influence in the United States, but has not received support in neither England nor South Africa.[58]

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[53] Loftus E. Becker, "The Liability of Computer Bulletin Board Operators for Defamation Posted by Others", 22 Conn. L. Rev. 203, 223 n. 95 (1989).
[54] Zeran v. America Online, Appellate Opinion, U.S. 4th Circuit of Appeals, available at http://legal.web.aol.com/decisions/dldefam/zeranapo.html, at p. 4, citing W. Page Keeton et al., "Prosser and Keeton on the Law of Torts", Par. 113, at 810.
[55] New York Times Co. v Sullivan, 376 U.S.254 (1964) at 287.
[56] Ibid at 279-80.
[57] Curtis Publishing Co. v Butts, 388 U.S. 130 (1967) at 163.
[58] Jonathan Burchell, "Personality Rights and Freedom of Expression, The Modern Actio Injuriarum", p. 28.

In *Gertz v Robert Welch*, however, the court said that the actual malice standard does not apply when a media defendant defames a private individual.[59] In these cases, the general standard of fault (i.e. negligence is sufficient) has to be applied.

4.1.2 Germany

In Germany the delictual liability for defamatory material in the media is determined by the general law of delict and not by specific press laws.[60] The German Civil Code provides in § 831 BGB that a person who employs another to do any work is bound to compensate for damage which the other unlawfully causes to a third party in the performance of his work. But the following sentence adds that the duty to compensate does not arise if the employer has exercised ordinary care in the choice of the employee, and, where he has to superintend the work, has also exercised ordinary care as regards to such superintendence. [61] Therefore, every publisher could possibly rather easily escape liability with the help of this exculpation provision.

To avoid this scenario the courts have established a stricter liability of publishers and broadcaster.[62] The disregard of § 831 BGB is justified by the thought that the economic representative of a publication should also bear the risk of liability that is connected with it.[63]

With this in mind the courts created an own obligation for publishers and broadcasters to check all published material for probable defamatory contents.[64] The courts do realise, that this is actually impossible to fulfil this task, and that the publisher has to rely on the assistance of his employees but they are obliged to hand over delicate

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[59] Gertz v Robert Welch, 418 U.S. 323 (1974) at 345.
[60] BGH, NJW 1977, 626, 627.
[61] § 831 BGB as translated by B.S. Markesinis, "A Comparative Introduction to the German Law of Torts", p. 12.
[62] Jörg Soehring, "Presserecht", p. 486.
[63] Jörg Soehring, "Presserecht", p. 486.
[64] Constanze Case, BGH NJW 1952, 410; Constanze II Case, BGH NJW 1954, 1682; Soraya Case, BGH NJW 1965, 685.

material to the publisher to wait for his decision. And if he decides to publish it nevertheless, he has to bear the legal consequences. Therefore, publishers and broadcasters are practically not able to escape their liability for any defamatory material that gets published or is broadcasted in their media.[65] This "strict liability" does not – as it is sometimes meant by this term – renounce the element of fault. It rather relies on the existence of a high standard of care for the publisher, the violation of which leads to his delictual liability. Therefore, like under American law, a publisher could probably not escape liability by arguing that he had no knowledge of the defamatory statement.

4.1.3 Are Online Service Providers Publishers ?

The question whether online service providers should be regarded as publishers can only be answered for each specific case separately. Considering the fact that in general service providers do employ so called board leaders to control their computer bulletin boards and are entitled to intervene when inappropriate messages are posted, they exercise editorial control to some extent. On the other hand, one could also say that the online service provider simply provides different bulletin boards for different subjects like a library has different sections for specific subjects.

Newspapers and magazines are limited in the amount that they can print, and each issue is a discrete body of material. The Internet, however, is a continuous stream of communication, and the length of a message can be practically unlimited. The information contained in a newspaper is or should be edited by the time it is printed and distributed. Online messages, on the other hand can appear on a user's screen within seconds of their creation, with no intervention by an editor or publisher.[66]

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[65] Jörg Soehring, "Presserecht", p. 486.

[66] Nancy W. Guenther, "Good Samaritan to the Rescue: America Online Free from Publisher and Distributor Liability for Anonymously Posted Defamation", Communications and the Law, 35, 68 (1998).

With regard to the huge number of messages that are received by some of the online service providers such as AOL and CompuServe, it is practically not possible for them to read through all of them to decide whether or not they contain defamatory material. In this regard online service providers differ clearly from a newspaper or a magazine, the contents of which are always assessable.

Although there might be cases where an online service provider can be compared with a publisher,[67] the general conclusion has to be, that an online service provider can not and does not exercise the same editorial control over his system as a publisher does over a newspaper or a magazine. Thus, publishers are not the closest analogy for online service providers.

4.2 Distributors

4.2.1 United States of America

Distributors, such as bookstores, libraries and news dealers exert more editorial control than a common carrier but still less than a publisher. In *Smith v. California*[68], the Supreme Court first addressed the relationship between a distributor's editorial control and its liability,[69] and held that distributors of information could not be held to the same standard as original publishers.[70]

Smith, a Los Angeles bookseller, has been arrested for selling a magazine in violation of a Los Angeles obscenity statute. In short, the statute made it unlawful for any person to possess an obscene writing in any place where books are sold.[71] The definition

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[67] Such a parallel is for example possible in Blumenthal v Drudge, which is discussed below, where America Online was not simply transmitting a message but had actually contracted a journalist to write a column for them, which then contained defamatory material.

[68] Smith v. California, 361 U.S. 147 (1959)

[69] Ibid at 148-49.

[70] Ibid at 148-49.

[71] Ibid at 148, (quoting Los Angeles, Cal. Muni. Code § 41.01.1 (declared unconstitutional 1959)).

included no scienter element, any violator was held strictly liable.[72]

In overturning the statute, the Court held that by holding the bookseller strictly liable – dispensing with any requirement of knowledge of the contents of the book on the part of the seller – the ordinance tends to impose a severe limitation on the public's access to a constitutionally protected matter.[73] The booksellers burden would become the public's burden , for by restricting him, the public's access to reading matter would be restricted: By holding booksellers to a strict liability standard "[e]very bookseller [was placed] under an obligation to make himself aware of the contents of every book in his shop"[74]. The bookseller's limitation in the amount of reading material with which he could familiarise himself, and his timidity in face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word that the state could not constitutionally suppress directly.[75]

In effect, the ordinance therefore restricted the sale of both obscene literature and constitutionally protected material.[76] The Court concluded that the ordinance's "tendency to inhibit constitutionally protected expression" was impermissible.[77] Accordingly, the Court held that the ordinance was unconstitutional because it made distribution of obscene material unlawful even in the absence of a distributor's knowledge of the content.[78] Therefore a distributor, who "only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character"[79].

Requiring that a distributor have knowledge of a publication's contents before he can

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[72] Smith v. California, 361 U.S. 147 (1959) at 148.
[73] Ibid at 153.
[74] Ibid at 153 (quoting The King v. Ewart [1905] 25 N.Z.L.R. 709, 729 (C.A.)).
[75] Smith v. California, 361 U.S. 147 (1959) at 149.
[76] Ibid at 154.
[77] Ibid at 155.
[78] Ibid.
[79] Restatement (Second) of Torts § 581 (1) (1977).

be held liable for defamation has its roots in the First Amendment (Freedom of Speech). As early as 1877, the Supreme Court acknowledged the importance of freedom of circulation: "Liberty of circulating is as essential to (freedom of the press) as liberty of publishing; indeed, without circulation, the publication would be of little value".[80] Thus holding distributors strictly liable for the content of publications they circulate would impede the free circulation of materials in violation of the First Amendment.[81]

Consistent with *Smith v. California* is *Lerman v. Chuckleberry Publishing*[82]. In this case, Lerman sued Chuckleberry for defamation arising from the publication of a nude photo of a woman incorrectly identified as Lerman on the cover of Adelina magazine. Chuckleberry was the U.S. publisher and distributor of Adelina. In its decision, the court not only confirmed that "the New York Courts have long held that vendors and distributors are not liable if they neither know or have reason to know of the defamation".[83] It even set up the rule that a "dealer is under no duty to examine the various publications that he offers to sale to ascertain whether they contain any defamatory statements".[84] Only where the distributor is put on notice by "special circumstances that should warn the dealer" that a particular publication contains defamatory material, does he have a duty to investigate.[85]

4.2.2 Germany

German law does not contain specific provisions for distributors. Because the increased liability standard for publishers is not applicable to news vendors or libraries, they are simply liable under the general provisions of the law of delict, namely § 823 BGB.[86]

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[80] *Ex parte* Jackson, 96 U.S. 727, 733 (1877).
[81] Smith v. California, 361 U.S. 147 (1959) at 152-53.
[82] Lerman v. Chuckleberry Publishing, 521 F. Supp. 228 (S.D.N.Y. 1981).
[83] Ibid at 235.
[84] Ibid.
[85] Ibid.

Although the dissemination of defamatory material can constitute an infringement of the right of personality[87] the distributor will mostly not be held liable because he usually will not have any knowledge of the defamatory contents.[88] Thus, the required subjective element of fault (i.e. intent or negligence) will not be fulfilled.

Therefore, with regard to distributors the German and the American law come to the same result: A distributor, who only disseminates defamatory matters published by a third person is subject to liability only if he knows or has reason to know of its defamatory contents. As in the United States, there is also no obligation for distributors to examine the various publications that he distributes for defamatory material.[89]

4.2.3 Are Online Service Providers Comparable to Distributors?

Under the distributor analogy, online service providers would be treated as electronic libraries. In many cases this analogy might be the most appropriate one. Like a library, the online service provider mostly only provides the forum for information exchange. The service provider, who receives thousands of messages per day, is, like a library or a news vendor not capable to examine every publication that he carries for potentially defamatory statements. A service provider might have the possibility through his board leaders to intervene if inappropriate messages are found but every news vendor and every library have the same possibility. A library can also intervene and withdraw books from circulation if it considers them inappropriate. Therefore, in most of the cases, an online service provider will have no more editorial control over his publications than a public library, a book store or a news stand.

As stated above, it is, however, possible, to think of cases where an online service provider exercises more editorial control over some of his bulletin boards. The

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[86] Jörg Soehring, "Presserecht", p. 488.
[87] Kurt Rebmann, Franz Jürgen Säcker (eds.). "Münchener Kommentar", § 824, note 28.
[88] BGH, NJW 1976, 799,800.
[89] Wenzel, Wahrheit und Wertung in der Pressekritik", AfP, 1979, 276, 280.

distinction between whether the online service provider acted more like a publisher or like a distributor would therefore depend particularly on the specific circumstances of each case. Nevertheless, in the general scenario, where the service provider simply provides different bulletin boards for the exchange of information, the distributor analogy appears to be the best analogy for online service providers.

4.3 Traditional Bulletin Board Owners

There is only a handful of American cases dealing with the liability of traditional bulletin owners or with the general question of the liability of property owners for defamatory materials put on their property by someone else. In those cases the typical question is always whether the owner of the property/ the bulletin board actually "published" the defamatory material. The courts typically hold that the owners of traditional bulletin boards will not be considered the publisher of a defamatory posting made by another person and therefore will not be held liable, unless they become aware of the posting and thereafter negligently or intentionally fail to remove it after a reasonable amount of time.[90] Then he is liable either for "publishing" the statement or for "ratifying" its publication.[91] Thus the property owner ,by inaction, accepts responsibility for the previous publication of the material by someone else.

A frequently quoted case is *Hellar v. Bianco*[92]. In this case the defendant owned a local tavern. On the wall of the men's bathroom appeared a message "indicating that the plaintiff was an unchaste woman who indulged in illicit amatory ventures". [93] The writer recommended that anyone interested, call a stated telephone number. The name and number given were the plaintiff's. On the same day a gentleman called the plaintiff and ask for the "permission to visit her"[94]. When it became apparent that a visit would not be possible, he informed her of the libellous statements appearing on the restroom

[90] Fogg v. Boston & L.R.R., 20 N.E. 109 (Mass. 1889).
[91] Tidmore v. Mills, 33 Ala. App. 243. 32 So. 2d 769, cert. denied, 249 Ala. 648, 32 So. 3d 782 (1947).
[92] Hellar v. Bianco, 244 P. 2d 757. (Cal. Ct. App. 1952).
[93] Ibid at 758.

wall. Shortly thereafter, the plaintiff's husband called the tavern and told the bartender that he wanted the libellous material removed immediately. The bartender responded that it would be removed "when he got around to it".[95] Later the husband discovered, that the defamatory material had still not been removed.

In reversing the trial court, who had granted a directed verdict for the defendant, the appeals court came to the general decision that those who invite the public to their premises owe a duty to others not to knowingly permit their walls to be occupied by defamatory matter.[96] When the owners knowingly permit defamatory matters to remain after notice and "opportunity to remove the same, the owner of the wall (...) is guilty of republication".[97]

The standard of liability applied to bulletin board owners is therefore similar to the one applied to distributors. The way the court put it in *Hellar v Bianco*, however, positive knowledge on part of the bulletin board owner is required. A distributor on the other hand would already be liable if he had reason to know of the defamatory contents. So there is still a slight difference between the two standards of liability.

If online service providers would be held analogous to bulletin board owners, they would be hold liable only for those defamatory messages that they had notice of, but failed to remove within reasonable time.

Are Online Service Providers Comparable to Traditional Bulletin Boards?

At the first glance, the parallels between computer bulletin boards and traditional bulletin boards are striking. Both traditional and electronic bulletin boards are publicly accessible and owned by an "operator" who makes them available as a forum of

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[94] Hellar v. Bianco, 244 P. 2d 757. 758 (Cal. Ct. App. 1952).
[95] Ibid at 759.
[96] Ibid at 758.
[97] Ibid at 758.

information exchange between third parties.[98] It has been argued that the traditional bulletin board analogy is not a good fit because the potential reach of online communications is far broader than that of traditional bulletin boards and accordingly the harm that can be inflicted by an online defamation is far greater.[99] These thoughts might be used to argue that online service provider's liability should be even stricter than that of traditional bulletin board owners, but it does not convince me as being an argument against applying this standard of liability at all.

It is rather again the practical aspect which distinguishes computer bulletin boards from traditional bulletin boards: If – as stated above – the number of notes posted on Prodigy's bulletin boards exceeds 75.000 a day, the volume of information is far more difficult to control than that of a traditional bulletin board. But even this does not strike me as a convincing argument against the traditional bulletin board analogy. As said above, the traditional bulletin board owner does not have the duty to patrol or police his bulletin boards, he only has to act upon actual notice. If this is the case, than it should not have any impact that a service online provider's computer bulletin boards contain far more notes than traditional bulletin boards do. Even though the number of messages will be much higher, there still will not be that many notifications concerning defamatory messages. Even if their might be, of course, more such notifications than would occur with respect to a traditional bulletin board, it seems unlikely that it would amount to an unmanageable burden. Therefore, if there is no duty to control the messages for defamatory contents, then the number of messages involved should not be of significant importance.

In combination with the arguments given above for the distributor analogy, traditional bulletin boards are also a useful analogy for online service providers.

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[98] Nancy W. Guenther, "Good Samaritan to the Rescue: America Online Free form Publisher and Distributor Liability for Anonymously Posted Defamation", Communications and the Law, 35, 63 (1998).
[99] Ibid at 64..

4.4 Common Carriers

The Supreme Court recently defined a common carrier as "an individual or organisation that offers a service to the public for hire, provides facilities to those who choose to purchase services to transit messages created by the sender, and provides its services to the public without discriminating among members of the public".[100] Therefore telephones, telegraphs, microwaves and satellite communication services can be regarded as common carriers.

When it comes to the question of liability, common carriers - compared to distributors and publishers carry the lowest risk of being hold liable for third person's defamatory statements. The reason for this is that they merely serve as passive conduits for the communication between two other parties and do not exercise any editorial control over the messages they deliver. They are actually considered by the courts not to be publishers at all, so called non-publishers.[101]

Therefore common carrier status provides a qualified immunity from all liability as republishers.[102] The immunity serves to promote efficiency and fairness. Common carriers have little discretion. They are obliged to transmit the transmission unaltered. To hold a common carrier liable for transmitting or carrying a defamatory message of which the common carrier could not reasonably be expected to posses knowledge would be unfair.[103] Moreover, to burden common carriers with such a responsibility would likely destroy efficiency, not to mention the public's expectation of privacy.[104] Since common carriers are not trained to distinguish between libellous and non-libellous matters, even if they view or hear the matter directly, and since their services

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[100] Robert B. Charles, "Computer Bulletin Boards and Defamation: Who Should be Liable? Under What Standard?", 2 J.L. & Tech. 121, 132 (1987), citing National Ass'n of Regulatory Util. Comm"rs v. FCC, 525 F. 2d 630, 64 (D.C.Cir.), cert denied, 425 U.S. 992 (1976).

[101] Loftus E. Becker, "The Liability of Computer Bulletin Board Operators for Defamation Posted by Ohers", 22 Conn. L. Rev.203, 213 (1989).

[102] Robert B. Charles, "Computer Bulletin Boards and Defamation: Who Should be Liable? Under What Standard?" 2 J.L. &Tech. 121. 132 (1987).

[103] Ibid.

[104] Ibid.

require rapid, mechanical processing of a great many messages, the task of listening to or reading messages and distinguishing libellous and non-libellous matters is an unfair burden.[105] Though common carriers enjoy immunity, it is qualified. A common carrier may be subject to liability, but only when the publishing party knows or has reason to know that the sender is not privileged to publish the defamatory matter.[106] In practice the immunity is nearly complete.

In *Von Meysenbug v. Western Union Telegraph Co.*[107] the following message was sent by Western Union to Mimi Von Meysenbug, by or on behalf of her husband's former wife:

> "Last year we were in Daytona with our Mama and Daddie if you stopped committing adultery with our Daddie he could play our dentist oculist music teachers and education and the alimony he owes us now and since 1935 and God will punish you for taking our Daddie and making him do wrong."[108]

Western Union sent the telegram as part of its normal business. Von Meysenbug argued that in transmitting the message Western Union acted with "gross negligence and utter heedlessness", but conceded that the defendant acted without "actual malice, and had no knowledge or notice of a lack of privilege" on the part of the sender.[109] In ruling for the defendant, the court held that common carriers enjoy a broad immunity. This immunity must be broad enough to enable the common carrier to efficiently render its "public service with dispatch"[110]. The companies do not have the actual possibility nor the resources to spend much time pondering the contents of the messages that they are about to deliver, to find out whether or not they are defamatory,

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[105] Robert B. Charles, "Computer Bulletin Boards and Defamation: Who Should be Liable? Under What Standard?", 2 J.L. & Tech. 121, 132 (1987).
[106] Jessica R. Friedman, "Defamation", 64 Fordham L. Rev. 794, 796 (1995).
[107] Von Meysenbug v. Western Union Telegraph Co., 54 F. Supp 100 (S.D.Fla. 1944).
[108] Ibid at 101.
[109] Ibid.
[110] Ibid.

and if so whether or not the sender is privileged. [111] To adequately inquire into such matters requires the "service of experts, and sometimes endless investigation"[112]. Therefore, common carriers are permitted to deliver without liability even statements that they know to be defamatory, unless they know or have reason to know that the sender of the statements cannot claim a privilege in transmitting the statements.[113] To be held liable the it is necessary that the common carrier could have been expected to posses knowledge prior to communication and to prevent it.[114]

If a service provider would be equalled to a common carrier, he would therefore be granted a practically complete immunity from liability even if he had knowledge of the defamatory contents. Since online service providers generally do not view messages until they are already posted, it is exceedingly unlikely that a provider could ever sptop the transmission until after the republication has already occurred. Thus, granting immunity to online service providers unless they know or have reason to know that the statement was not privileged before the message was posted would effectively bar liability.[115]

Are Online Service Providers Comparable to Common Carriers ?

Online service providers might be compared to common carriers in that they both provide service to potentially millions of "subscribers" and both require nearly instantaneous, mechanical processing of these subscribers' messages.[116] With regard to the end user's expectation of privacy, certain facets of online services, like e-mail for

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[111] Von Meysenbug v. Western Union Telegraph Co., 54 F. Supp 100 (S.D.Fla. 1944) at 101.
[112] Ibid.
[113] Restatement (Second) of Torts § 612 (2) (1977).
[114] Lesa-Maria Mullen, "The Fourth Circuit has ruled in Zeran v. America Online: Immunity for the Internet Service Provider?", Computer Law Seminar, Fall 1996, p. 4, available at http://www.law.stetson.edu/courses/computerlaw/papers/lmullenf97.htm.
[115] Ibid.
[116] Nancy W. Guenther, "Good Samaritan to the Rescue: America Online Free form Publisher and Distributor Liability for Anonymously Posted Defamation", Communications and the Law, 35, 64 (1998).

example, are parallel to telecommunications.[117] But the question on hand is whether online service providers should be liable for defamatory messages posted on their computer bulletin boards by a third party. With regard to computer bulletin boards the situation is a different one. Computer bulletin board users are - in contrast to someone who is using a telephone - not necessarily free to communicate information of their own design and choosing, but may be required to comply with a particular board's user guidelines.[118] Online service provider do not simply transmit messages they also organise different bulletin boards for different subjects and in general even employ a so called board leader to intervene when inappropriate messages are posted. Concluding one has to say, that an online service provider has far more editorial control over the messages posted on his bulletin boards than a common carrier has over the messages transmitted through its wires. Therefore common carriers are not a suitable analogy for online service providers.

5. Policy Considerations

Before examining the different legal system's way of dealing with the problem of online provider liability, it might be helpful, to discuss what kind of policy considerations are of importance for establishing a standard of liability for online service providers.

As usually, there are two colliding sides of interest. On the one side stands the reputation of the individual, a strong value as it is today highly protected in most of the existing constitutions. On the other side there is the need of information and education for which the Internet has become of enormous importance. Because of the possibility to reach millions of people at once, the Internet offers uncountable advantages. People can share knowledge and receive information about nearly every existing topic.

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[117] Anne Meredith Fulton, "Cyberspace and the Internet: Who Will Be the Privacy Police?", 3 Comm. L.Conspectus, 3, 65 (1994).

[118] Nancy W. Guenther, "Good Samaritan to the Rescue: America Online Free form Publisher and Distributor Liability for Anonymously Posted Defamation", Communications and the Law, 35, 64-65 (1998).

Communication between experts, which was maybe not possible before because they simply did not know of the other's existence is suddenly easy and can be used by everyone else to gather more information. People can post messages to millions of people at once, they can ask questions and receive answers. Above all, for all this, it is only necessary to possess a computer, a modem and the possibility to get access to the Internet. This can be done in regions of the world which would otherwise be completely cut off from the civilised world and its possibilities of gaining information. Considering all these aspects and the many more not mentioned here, the value of an unrestricted Internet is of great value.

At the core of the conflict between these two values – the personality of the individual and the information interest of the general public – lies the following problem:
If one tries to protect the individual by imposing liability on service providers while the Internet is still young one would likely stunt its growth for a long time because the service providers would respond with a restriction of information made available in order to be able to obtain control over the contents. One important question therefore is, how to find a compromise that would provide sufficient protection to the individual and still allow the development of the internet as the most important new medium of communication.

Connected with this problem is another one: As discussed above, the degree of editorial control is of primary importance for the establishing of a standard of liability. According to this, it is a general rule that the more discretion a communicator has to control the content of a publication, the higher will be his duty of care, and the more likely that he will be held liable if a defamation is published.[119] Therefore, someone who exercises more editorial control, is also more likely to be held liable for defamatory contents. If this is the situation of the law, the reaction of the service providers will most probably be to immediately drop any attempts of exercising

[119] Robert B. Charles, "Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standards?", 2 J:L: & Tech., 121. 130 (1987).

editorial control. This, however, would result in an online world, which is completely left to its own and where no control at all is exercised. To avoid this situation, it is therefore necessary to find a solution that offers acceptable protection to the individual while it neither restricts the development of online communication, nor renders the online world into an ungovernable place.

Faced with these difficulties, it is therefore interesting to examine next, how the United States and Germany have so far approached the problem of online defamation.

6. The American Approach

Since the creation of the Internet, the U.S.A. play the leading role in this fast developing new field. It is not surprising, that therefore, the U.S.A. are also the first and still the main battlefield for cases involving the new Online-Law.

All in all there are four cases that deal with that question. In the meantime, the American Congress tried to solve the problem by introducing the Communications Decency Act of 1996. Therefore, this paper first deals with the two cases that were decided before the creation of that Act and afterwards examine the two most recently decided cases that had to apply the new law.

6.1 Before the Communications Decency Act

Before the introduction of the new law, the American courts had to deal with three cases where they had to determine the standard of liability applicable to online service providers. While the first two decisions come to the same result, the third one did not. In *Daniel v. Dow Jones & Co*[120] and *Cubby v. CompuServe*[121] the courts held the online service provider to be comparable to a bookstore or library and therefore liable

[120] Daniel v. Dow Jones & Co., 520 N.Y.S. 2d 334 (N.Y.Civ. Ct. 1987).
[121] Cubby Inc. v. CompuServe. Inc., 776 F. Supp. 135 (S.D.N.Y.1991).

as a distributor. In contrast, the court in *Stratton Oakmont, Inc. v. Prodigy*[122] found Prodigy more analogous to a newspaper or other publishers. [123]

While this essay is going to examine these decisions and their given reasons in more detail, it is especially important to analyse closely, whether there is actually a contradiction between the decisions or if it is possible to bring them into line with each other.

6.1.1 Daniel v. Dow Jones & Co.

Daniel v. Dow Jones & Co. is one of the early online tort cases. Although it is not a case of online defamation, it is of some importance with regard to the courts statements to online service provider's liability in general.

The defendant, Dow Jones News/Retrieval, is an online service that provided its users with electronic news reports. The plaintiff, a securities investor, alleged that he was harmed by a mistake in a report relating to the restructuring of a Canadian corporation. The report failed to mention that the cited prices were in Canadian, not American currency.

In this case, the court applied a functional analysis and found that an online service was analogous to a distributor or, more specifically, a news vendor.[124] The court rejected the plaintiff's claim because the plaintiff's relationship to Dow Jones was "functionally identical to that of a purchaser of a newspaper".[125] Accordingly, the court granted Dow Jones' motion to dismiss because a seller of news whether in paper or electronic form, is not liable for false statement in the reports as long as he does not have any knowledge of them.[126] The court concluded that a computerised database service "is

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[122] Stratton Oakmont Inc. v. Prodigy Services Co. No. 31063/94, 1995 WL 323710, (N.Y.Sup.Ct.,24 May, 1995) made available at http://www.jmls.edu/cyber/cases/strat1.html.
[123] Ibid.
[124] Daniel v. Dow Jones & Co., 520 N.Y.S. 2d 334 (N.Y.Civ. Ct. 1987) at 337.
[125] Ibid.
[126] Ibid at 337-38, 340.

one of the modern, technologically interesting, alternative ways the public may obtain up-to-the-minute news" and is "entitled to the same protection as more established means of news distribution".[127]

With this judgement, the first step was taken to apply the traditional standards of liability to the online world. The court chose a functional approach and simply adapted the same standards as in a "normal" defamation suit. The decisive factor here was, that Dow Jones did not exercise the same editorial control as a publisher but did simply made the different news reports available for their subscribers.

6.1.2 Cubby v. CompuServe

Four years later, in 1991, the next online tort case came to court. While *Daniel v. Dow Jones* did not deal with defamation, *Cubby v. CompuServe*[128] was the first case to address an online service provider's liability for defamatory material posted by others.

6.1.2.1 The Facts

CompuServe develops and provides computer-related products and services. One of its services is the CompuServe Information Service ("CIS"), which is an online information centre or so called "electronic library" that subscribers may access from a personal computer or terminal in order to look for online information.[129]

Subscribers to CIS pay a membership fee and online time usage fees, in return for which they have access to the thousands of information sources available on CIS. As part of the CIS, CompuServe also organised special interest topics into approximately 150 "topical forums".[130] Such a "forum" is comprised of various electronic bulletin

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[127] Daniel v. Dow Jones & Co., 520 N.Y.S. 2d 334, (N.Y.Civ. Ct. 1987) at 340.
[128] Cubby Inc. v. CompuServe. Inc., 776 F. Supp. 135 (S.D.N.Y.1991).
[129] Ibid at 137.
[130] Ibid.

boards, interactive online conferences, and topical databases.[131]

One of these available forums was the so called "Journalism Forum", which focused on the journalism industry. CompuServe had contracted Cameron Communications, Inc., which is independent of CompuServe, to "manage, review, create, delete, edit and otherwise control the contents" of the Journalism Forum "in accordance with editorial and technical standards and conventions of style as established by CompuServe."[132] Cameron in turn contracted with third-party publishers, who uploaded publications directly onto the CompuServe database so that they were available at the Journalism Forum. [133]

One of these publications available as part of the Journalism Forum was a daily newsletter, called Rumorville USA ("Rumorville"), that provided reports about broadcast journalism and journalists. Rumorville was published by one of the mentioned third-party publishers, with whom CompuServe itself had no contractual relationship with.[134] In the contract between Cameron and the third-party publisher, the latter "accepts total responsibility for the contents" of Rumorville.[135]

CompuServe had no opportunity to review Rumorville's contents before they were uploaded into CompuServe's computer banks, from which they were immediately available to approved CIS subscribers.[136]

In April 1990 Rumorville's gossip of the day in question concerned a competitor of Rumorville, another gossip oriented computer forum called "Skuttlebut". Rumorville allegedly contained numerous disparaging remarks about Skuttlebut. It mentioned for example, that Scuttlebutt gained most of their information from Rumorville trough a

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[131] Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y.1991) at 137.
[132] Ibid at 136, referring to the affidavit of Jim Cameron, sworn to on 4 April 1991.
[133] Ibid at 138.
[134] Ibid.
[135] Ibid at 137.
[136] Ibid.

"back door".[137] Cubby, Inc., the company which owned and operated Skuttlebut sued CompuServe for libel.

CompuServe did not dispute that the statements were defamatory but it maintained that, before the action was filed, it had no notice of any complaints about the contents of the Rumorville publication.[138]

6.1.2.2 The Legal Discussion

The court affirmed the functional approach taken in *Daniel v. Dow Jones* and equated a commercial online service to a distributor.[139] The New York Federal District Court Judge Peter Leisure found that "CompuServe has no more editorial control over such a publication than does a public library book store, or news-stand".[140] The court described CompuServe's CIS product as being in essence an electronic library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. [141]

The court noted that

> "ordinarily, 'one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it'.[142] With respect to entities such as news vendors, book stores, and libraries, however, 'New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation'."[143]

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[137] Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y.1991) at 137.
[138] Ibid.
[139] Ibid at 140.
[140] Ibid.
[141] Ibid.
[142] Cianci v. New Times Publishing Co., 639 F. 2d 54, 61 (2d Cir. 1980), Friendly, J. quoting Restatement (Second) of Torts, Paragraph 578 (1977).
[143] Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y.1991) at 140, quoting Lerman v. Chuckleberry Publishing Inc., 521 F. Supp. 228 (S.D.N.Y. 1981) at 235.

The court relied heavily on *Smith v. California* and stated that the requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment.[144] Citing *Smith v. California*, the court held that the freedom of speech and of the press as guaranteed in the constitution prevents imposing strict liability on distributors for the contents of the reading materials they carry.[145]

Because CompuServe had no more editorial control over their publications than a public library, it would be no more feasible for them to examine every publication it carried for potentially defamatory material than it would be for any other distributor to do so.[146] Judge Leisure pointed out that

> "First Amendment guarantees have long been recognised as protecting distributors of publications. Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment."[147]

Finally the court justified the parallel drawn to *Smith v. California* by stating that

> "although Smith involved criminal liability, the First Amendment's guarantees are no less relevant to the instant action: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards (...) may be

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[144] Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y.1991) at 140.
[145] Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y.1991) at 140 quoting Smith v. California, 361 U.S. 147, 152-53, 4. L. Ed. 2d 205, 80 S.Ct. 215 (1959).
[146] Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y.1991) at 140.
[147] Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y.1991) at 140 quoting Lerman v. Flynt Distributing Co. 745 F.2d 123, 139 (2d Cir. 1984), cert. denied, 471 U.S. 1054, 85 L. Ed. 2d 479, 105 S. Ct. 2114 (1985).

> markedly more inhibiting than the fear of prosecution under a criminal statute." [148]

For online service providers this decision in *Cubby* was gratifying.[149] However, the conclusion drawn by the court that no editorial control means no liability left many questions open. What if there was some indicia of editorial control ? Beyond the total lack of any editorial guidelines, it is hard to imagine a fact situation where editorial control would be as far removed as it was in *Cubby v. CompuServe*. So as one could expect it, this question came up again, four years later in *Stratton Oakmont, Inc. v. Prodigy Services*.[150]

6.1.3 Stratton Oakmont v. Prodigy

In 1994 the $ 200 million libel action *Stratton v. Prodigy* attracted world-wide attention and proceeded successfully to summary judgement on May 26, 1995, after which the parties settled remaining issues.

6.1.3.1 The Facts

Like CompuServe, Prodigy is a commercial online service provider that already in 1995 had at least 2 million subscribers, who communicate with each other and with "the general subscriber population" by using Prodigy's bulletin boards.[151] Prodigy "contracts with Bulletin Board Leaders, who, among other things, participate in board discussions and undertake promotional efforts to encourage usage and increase

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[148] Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y.1991) at 140 citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964) at 277.

[149] Robert B. Charles, "Liability for Online Libel After Stratton Oakmont, Inc. v. Prodigy Services, 28 Conn. L. Rev. 1173, 1187 (1996).

[150] Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710, (N.Y.Sup.Ct., May 24, 1995), made available at http://www.jmls.edu/cyber/cases/strat1.html.

[151] Ibid at p. 2.

users".[152] One of Prodigy's bulletin boards is called "Money Talk". There members can post statements regarding stocks, investments and other financial matters. Money Talk has the reputation of being the most widely read financial electronic bulletin board in the United States.[153]

In October 1994, a still-unidentified person posted on Money Talk allegedly defamatory statements about Stratton Oakmont, Inc., a securities investment banking firm. These statements accused Stratton and its president of committing criminal and fraudulent acts and characterised the firm as a "cult of brokers who either lie for a living or get fired".[154] Stratton Oakmont responded by suing Prodigy and the unidentified person who posted the statements for libel. At trial, Stratton Oakmont moved for summary judgement that Prodigy was a publisher of the defamatory statements.

Stratton's claim that Prodigy should be regarded as a publisher was based in large measure on its policy. Unlike CompuServe, Prodigy held itself out as "an online service that exercised editorial control" over the content of messages posted on its bulletin boards.[155] By advertising that it was a "family oriented online service provider"[156] it differentiated itself from its competitors. For example, in December of 1990, the then-director of market programs at Prodigy wrote a column in The New York Times defending Prodigy's philosophy of content editing. Asserting Prodigy's unrestricted right to editorial discretion, he mentioned several instances where Prodigy had edited out defamatory material.[157] In the same column, the director disavowed any

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[152] Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710, (N.Y.Sup.Ct., May 24, 1995), made available at http://www.jmls.edu/cyber/cases/strat1.html, at p. 2.

[153] Robert B. Charles & Jacob H. Zamansky, "Liability for Online Libel After Stratton Oakmont, Inc. v. Prodigy Services", 28 Conn. L. Rev. 1173, 1179 note 19 (1996).

[154] Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710, (N.Y.Sup.Ct., 24 May 1995), made available at http://www.jmls.edu/cyber/cases/strat1.html, at p. 2

[155] Ibid at p.2.

[156] Ibid at p.2.

[157] Robert B. Charles & Jacob H. Zamansky, "Liability for Online Libel After Stratton Oakmont, Inc. v. Prodigy Services", 28 Conn. L. Rev. 1173, 1180 (1996), citing Geoffrey Moore, "The First Amendment is Safe at Prodigy", The New York Times, Dec. 16, 1990, Section 3 (Business), at 13.

comparison to common carriers, stating "certainly no newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and the unsupported gossip its editor tolerates....Prodigy is like a large newspaper".[158] In furtherance of this family strategy, Prodigy promulgated "content guidelines", which requested users to "refrain from posting notes that are 'insulting'" and are advised that "notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed when brought to Prodigy's attention".[159]

Prodigy then used two different methods to enforce these guidelines. First, they used a software screening program to pre-screen all bulletin board messages for offensive language. In addition, Prodigy employed the above already mentioned bulletin board leaders whose duties included enforcing the guidelines through the use of an emergency delete function.[160]

6.1.3.2 The Legal Discussion

This "family oriented" policy became Prodigy's undoing. At trial Prodigy tried to argue, that even though they had reviewed all postings in the past, they no longer did so because the volume of the messages that had increased to over 60 000 a day made such a review impossible. For legal authority they relied on the Cubby v. CompuServe decision, where the court had noted that CompuServe had no opportunity to review the contents of the publication at issue before it was uploaded into CompuServe's computer banks and that therefore CompuServe should be regarded as a distributor.[161]

But the court did not agree. It confirmed that the decisive factor in this case was the

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[158] Robert B. Charles & Jacob H. Zamansky, "Liability for Online Libel After Stratton Oakmont, Inc. v. Prodigy Services", 28 Conn. L. Rev. 1173, 1180 (1996).
[159] Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710, (N.Y.Sup.Ct., May 24, 1995), made available at http://www.jmls.edu/cyber/cases/strat1.html, at p. 3.
[160] Ibid at p. 4.
[161] Cubby Inc. v. CompuServe Inc., 776 F.Supp. 135 (S.D.N.Y.1991) at 140.

question whether Prodigy exercised sufficient editorial control over its computer bulletin bards to render it a publisher with the same responsibilities as a newspaper.[162] In then granting the motion for summary judgement, the court held that

> "by actively utilising technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste". (...) Prodigy is clearly making decisions as to content, and such decisions constitute editorial control. That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimise or eviscerate the simple fact that Prodigy has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that (...) Prodigy is a publisher rather than a distributor."[163]

Justice Ain added that

> "indeed it could be said that Prodigy's current system of automatic scanning, Guidelines and Board Leaders may have 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."[164]

In the end, Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than other networks.[165] The editorial control that Prodigy exercised over the contents of its bulletin boards was too elaborate and therefore distinguished Prodigy from a mere library or bookseller to being closer to a publisher.

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[162] Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710, (N.Y.Sup.Ct., May 24, 1995), made available at http://www.jmls.edu/cyber/cases/strat1.html, at p. 4.
[163] Ibid at p. 4-5.
[164] Ibid.
[165] Ibid at p. 5.

6.1.4 Cubby v CompuServe and Stratton Oakmont v. Prodigy - Two contradictory decisions ?

Comparing the cases of *Cubby v. CompuServe* and *Stratton Oakmont v. Prodigy* , a superficial observer might at first glance have got the impression of two contradictory judgements: Both cases had to deal with the question of service provider's liability for defamatory material originated by a third person. Both defendants were gigantic online service providers who provided a myriad of services to millions of customers. In both cases the courts noted the increasing difficulty, if not impossibility, of filtering communications on the web. Nevertheless, the courts reached vastly different decisions. In *Cubby v. CompuServe* the court declared CompuServe as liable like a distributor and in *Stratton Oakmont v. Prodigy*, the court summarily ruled that Prodigy was a publisher and liable for the contents of messages posted on its bulletin boards.

Thus, amongst the reactions to the *Stratton Oakmont v. Prodigy* decision were many premature conclusions. According to some commentators, Stratton represented the nullification of the distributor analogy for online providers and the "death-knoll for electronic publishing and for access providers".[166]

But in consideration of the differences surrounding the basic similarities, the two decisions do not contradict but rather confirm each other. Thus, the court in *Stratton Oakmont v. Prodigy* stated that they are in full agreement with *Cubby v. CompuServe* and that generally, computer bulletin boards should be regarded in the same context as bookstores, libraries and network affiliates.[167] Therefore the court made it clear that the standards set by the Cubby court are still valid in the world of modern communication and that they had also been applied in the *Stratton Oakmont v. Prodigy* case. It was only Prodigy's own policies, technology and staffing decisions that have altered the scenario and mandated the finding that it is a publisher rather than a distributor.[168]

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[166] Cynthia L. Counts & C. Amanda Martin, "Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in this New Frontier, 59 Alb. L. Rev., 1083, 1097 (1996).
[167] Ibid.
[168] Ibid.

Therefore, the sudden panic that came up amongst service providers after the *Stratton Oakmont v. Prodigy* decision had no foundation. The decision is simply elaborating the *Cubby decision* by following the chosen path of applying the "old" standards of liability to the online world.

The problem with the *Stratton Oakmont* decision is that it was feared to have an unwanted side-effect: The ironic result of the courts efforts to assign online liability was likely to lead to even more libel and slander because operators would back away from monitoring the content of user messages.[169] Service provider may try and turn a blind eye to any and all communications disseminated through their services in an effort to reduce their potential liability as a publisher. This then may result in an increase in Internet activity involving precisely the kind of material, such as child pornography and bomb-making manuals, currently generating so much paranoia among the general public.

This dreaded but possible effect induced the American Congress to overrule the *Stratton Oakmont v. Prodigy* decision by amending the old Communications Act of 1934.

6.2 The Communications Decency Act of 1996

In 1995, the House passed the Communications Decency Act ("CDA")[170] , adopted as an amendment to the Senate's comprehensive telecommunications reform legislation.[171] On February 8, 1996, it was signed into law and became effective.

The act became famous because it made online providers criminally liable for

[169] R. Timothy Muth, "Old Doctrines on a New Frontier: Defamation and Jurisdiction in Cyberspace, 68 SEP Wis. Law. 10, 13 (1995).

[170] Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V. sec. 509, 1996 U.S.C.L.A.N. (110 Stat.) 56, 133, codified at 47 U.S.C. Paragraph 230.

[171] Radolph May, "On-line Libel and Cyberspace Porn", Conn. L.Trib., 4 December 1995, at 21.

"knowingly" transmitting "indecent" or harassing messages over their services.[172] The American Civil Liberties Union ("ACLU") and a coalition of fifty other organisations, trade groups and businesses moved quickly for preliminary injunction on the grounds that the act was unconstitutional because it violated the First Amendment.[173] In 1997 the Supreme Court, by affirming the earlier lower courts' rulings, stroked the indecency provisions of the CDA as an unconstitutional restraint of First Amendment protected speech.[174]

6.2.1 Section 230 : The Good Samaritan Provision

However, a lesser known provision in that act remains effect: Section 230, titled "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material". In what appears to be a direct response to the *Stratton Oakmont v. Prodigy* decision, Congress included this section, that is designed to protect "good Samaritan" online service providers which exercise some editorial control over user postings by preventing such a service provider from publisher liability for statements posted to their services by third parties.[175]

The so called "Good Samaritan Provision" provides in Section 230 (c) (1)

> "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." [176]

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[172] Radolph May, "On-line Libel and Cyberspace Porn", Conn. L.Trib., 4 December 1995, at 21.
[173] Erik J. Heels, "On-line: The Government Tries - and Fails - to Prosecute 'Indecent' Speech on the Internet, Student Law, Sept. 1996, at 16, 18-19.
[174] Reno v ACLU, 117 S.Ct. 2329 (1997).
[175] Pub. L. No. 104-104 Paragraph 509 (104th Cong. 2d Sess. 1996) (codified at 47 U.S.C. Paragraph 230 (b) (1997)).

Section 230 (e) (2) then defines "interactive computer service" as

> "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[177]

In Section 230 (e)(3) the term "information content provider" is then defined as

> "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service".[178]

The legislative history of the "Good Samaritan Provision" states expressly that it intends to overrule *Stratton Oakmont v. Prodigy* because the decision interferes with the federal policy of encouraging online service provider to police their bulletin boards for objectionable content.[179] The provision reflects Congress' recognition that to ensure consistency and quality in the online communications environments, service providers must exercise some control over the messages posted by subscribers. So the important purpose of the provision was to encourage Internet service providers to monitor their services and act in the role of censor without fear.[180] Therefore it was necessary to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision.[181]

Therefore, subsection (c)(2) provides in addition to subsection (c)(1) that online service

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[176] Communications Decency Act of 1996, 47 U.S.C., Section 230 (c) (1)
[177] Communications Decency Act of 1996, 47 U.S.C., Section 230 (e)(2).
[178] Communications Decency Act of 1996, 47 U.S.C., Section 230 (e)(3).
[179] Jonathan Band, "Online Service Provider Liability", Int'L. Com. Littig., Apr. 1996, 35, 36.
[180] Robert Cannon, "The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway", 49 Fed. Comm. L.J. 51 (Nov. 1996).
[181] Zeran v. America Online, 129F.3d 327, made available at http://legal.web.aol.com/decisions/dldefam/zeranopi.html.

provider should not be held liable on account of any action voluntary taken in good faith to restrict access to or availability of material that the provider deems objectionable. In other words, Section 230 (c)(2) appears to immunise such providers from causes of action brought by persons whose material is screened or blocked from the Internet.[182]

In sum, Section 230 provides protection for online service providers against causes of action brought by persons alleging harm, such as defamation injury, resulting from the dissemination of material (Section 230 (c)(1)) and causes of action brought by persons alleging harm resulting from the deletion or restriction of their material (Section 230 (c)(2)).

Among the community of service online providers, Congress' new approach was gladly received. The "Good Samaritan Provision" was celebrated as a "landmark development in technology law which has strengthened the foundation for continued development of the new electronic medium" and which "has provided much-needed and -deserved protections to AOL, CompuServe, and other Internet access providers". [183]

6.2.2 The Meaning of the term "publisher"

Unfortunately, the scope of Section 230 (c) (1) is not at all clear. The main problem is the statute's use of the term publisher: The Section provides that an online service provider cannot be considered a publisher for information originally published by a third party. The problem now arises from attempting to ascertain Congress' meaning of "publisher".

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[182] Zeran v. America Online, 129F.3d 327, made available at http://legal.web.aol.com/decisions/dldefam/zeranopi.html, p.12, note 22.

[183] Jeffrey S. Tenenbaum, "Liability Protection for Online Communication", September '97 Newsletter, p. 3, http://www.nvrealtors.org/september/online.html

In defamation law there is no uniform definition of the term "publisher". There are actually two different meanings of the term, that are of importance here: In one regard, the term publisher refers to the standard of liability applied to a republisher who exercises editorial control over the contents of his publications. Due to this, the court in *Stratton Oakmont v. Prodigy*, considered the service provider a publisher because it edited the content of the material provided for offensive material. Hence, Prodigy was liable as the original "publisher", while in *Cubby v. CompuServe*, CompuServe was regarded by the court as a distributor, not a publisher and was therefore only liable if it knew or had reason to know that a communication was defamatory.

The second possible interpretation is, that in generally the term "publisher" is also often used to describe anyone who publishes a defamatory statement which would include every republisher. Therefore one could as well say that in *Cubby v. CompuServe*, CompuServe was also a "publisher" of the defamatory statement, but held to the standard of a "distributor".

Which of these different interpretations one applies to Section 230 (1) (c) of the CDA, has a decisive impact on the scope of service providers liability: If the term "publisher" simply referred to any person who communicated the defamatory material the section would grant service provider a complete immunity from all defamation claims with regard to defamatory statements that were originally published by others. If one follows this path, it would mean that even where the provider had positive knowledge of the defamatory content and still remained inactive, he would - due to Section 230 (1) (c) which does not contain any exceptions - not be held liable. One could go even further and paint the picture of an online service provider who did not only positively knew of the defamatory content but remained inactive out of an malicious desire to injure the defamed party, it would according to the actual language of the Section still probably be dismissed from liability. With the interpretation that a publisher is any person who communicated the defamatory statement, service providers

would only be liable for material that they developed or created by themselves.

As indicated above, another possible interpretation, however, is that "publisher" refers to the standard of liability applied in cases, where one who republishes a defamatory statement is subject to liability as if he or she had originally published it. If one imagines the above mentioned threefold standard of liability - publisher, distributor, common carrier - as a pyramid, that would mean, only the first step - the publisher liability - is included in Section 230 of the CDA. In other words, Section 230 (1) (c) only protects service providers from being held liable as a publisher, but not from being held liable as a distributor or a common carrier, if the respective prerequisites are fulfilled. This interpretation would therefore open up a way to constitute service provider liability if the provider knew or had reason to know of the alleged defamatory statements (= distributor's liability).

The vague language chosen by Congress for Section 230 (c)(1) opens the door for both interpretations and it was the task of the courts of the few cases that came up after the enactment of the CDA, to decide, which way to take.

6.3 The Application of the Communications Decency Act

Since the enactment of the CDA, its "Good Samaritan Provision" has been invoked in a number of cases.

6.3.1 Zeran v. America Online

In the first and most important case decided under the new law, *Zeran v. America Online*[184] the plaintiff claimed that America Online ("AOL") was negligent in allowing defamatory material to remain and reappear on AOL's bulletin board despite having

[184] Zeran v. America Online, 129F.3d 327, made available at http://legal.web.aol.com/decisions/dldefam/zeranopi.html.

received notice following the first defamatory communications.

6.3.1.1 The Facts

Six days after the Oklahoma City bombing on 19 April 1995 in which 168 people were killed, an unanimous third person, identified only as "Ken ZZ03" (Ken is the plaintiff's first name) posted a number of libellous messages onto an AOL bulletin boards. In these messages he advertised T-shirts and other items with slogans glorifying the bombing. For instance, one T-shirt read, "Visit Oklahoma...It's a Blast".[185] The messages directed prospective buyers to call the plaintiff and the plaintiff's name and telephone number were given. After that, the plaintiff started to receive angry and scathing telephone calls, many of which included death threats and intimidation.

Zeran contacted AOL and demanded the removal of the advertisement and the placement of a retraction. An AOL representative told Zeran that it was against company policy to post a retraction, but the offensive advertisement would be deleted.[186] AOL did delete the first notice by the next day, however, a second notice appeared almost immediately, posted under the slightly altered name "KenZZ033". After an Oklahoma radio station heard about the story and broadcasted Zeran's number over the air, Zeran was harassed by even more harassing phone calls which became so frequent and threatening that the police placed protection at his home.[187]

When Zeran called AOL again, they advised him that steps were being taken to delete the new note and deactivate the account that was posting the advertisements.[188] Despite this assurance, various similarly offensive notices continued to appear. These notices, like those posted earlier, purported to be authored by "Ken ZZ033" and advertised

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[185] Mike Hadley, "Lybel in Cyberspace". Virginia.Edu, Vol. II, Spring 98 at http://www.itc.virginia.edu/virginia.edu/spring98/policy/all.html, p. 3.
[186] Ibid.
[187] Zeran v. America Online. 129F.3d 327, made available at http://legal.web.aol.com/decisions/dldefam/zeranopi.html, at p. 2.
[188] Ibid.

offensive Oklahoma City bombing paraphernalia, including bumper stickers, key chains and T-shirts.[189]

Zeran sued AOL, alleging that the provider had acted negligently in allowing these notices to remain and reappear on AOL's bulletin board, despite having received notice and complaints from Zeran.[190] Citing *Cubby v. CompuServe*, Zeran asserted that as a distributor of information, AOL was liable for material that they either knew or had reason to know was defamatory.[191] AOL answered the complaint by stating that the Good Samaritan Provision of Section 230 of the CDA pre-empted any state tort claim "for any material on its network as long as that material was put online by a third party" and moved for a judgement on the pleadings.[192] The court for the Eastern District of Virginia granted America Online's motion, and Zeran appealed.

6.3.1.2 The Legal Discussion

Zeran based his claim on the duty, imposed by state law, that distributors have to refrain from distributing material they knew or should have known was defamatory. Thus, the question that was presented in this case was, whether the CDA pre-empted any state common law cause of action Zeran might have had against AOL resulting from its role as a service provider. The court noted that due to the Supremacy Clause of the United States Constitution, an act of Congress can pre-empt state law in two circumstances. First, it is appropriate, where Congress specifically intends to displace state law in a particular field.[193] Second, pre-emption can be commanded by the

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[189] Zeran v. America Online, 129F.3d 327. made available at http://legal.web.aol.com/decisions/dldefam/zeranopi.html, at p. 2
[190] Ibid at p. 1.
[191] Ibid at p. 3.
[192] Ibid.
[193] Ibid at p. 4.

Supremacy Clause to the extent that such laws directly conflicts with federal laws.[194]

The court held, that Congress clearly did not intend to pre-empt state law remedies. To the contrary, Section 230 (d) (3) provides that

> "nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[195]

From this Section, the court concluded that it did not at all reflect congressional intent to pre-empt state law remedies for defamatory material on an interactive computer service. To the contrary, the court held, it "reflects Congress' clear and unambiguous intent to retain state law remedies except in the event of a conflict between those remedies and the CDA".[196] Therefore, the next question was, whether Zeran's claim did directly conflict with Section 230 (c).

Direct conflicts requiring pre-emption exist, (a) where it is impossible for a private party to comply with both federal and state law, (b) where state law conflicts with the express language of the federal statute and (c) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [197]

The court held Zeran's claim pre-empted under two theories. First, Zeran's claim conflicted with the express language of the stature. Relying on *Cubby v. CompuServe*, Zeran's theory was that as a distributor AOL was liable for the advertisements that AOL knew or had reason to know were defamatory. Thus as the court noted:

> "The pre-emption issue reduces to the question whether a state cause for negligent distribution directly conflicts with the CDA's prohibition against

[194] Cipollone v. Liggett Group Inc. U.S. 112 S. Ct. 2608 (1992), cited in Vincent R. Johnson & Alan Gunn, "Studies in American Tort Law", p. 673.
[195] 47 U.S.C. Section 230 (d) (3).
[196] 47 U.S.C. Section 230 (d) (3).
[197] Zeran v. America Online, 129F.3d 327, made available at http://legal.web.aol.com/decisions/dldefam/zeranopi.html, p. 5.

> treating an Internet provider as a publisher or speaker.....Put another way, the question is whether imposing common law distributor liability on AOL amounts to treating it as a publisher. If so, the state claim is pre-empted."[198]

Zeran then brought the above mentioned argument, that the Good Samaritan Provision foreclosed only publisher liability, therefore leaving online service providers open to liability as distributors of defamation if they knew or had reason to know of the defamatory statements. But the court did not agree. Rejecting Zeran's argument, it stated that,

> "The key to answering this question lies in understanding the true nature of so-called distributor liability and its relationship to publisher liability. At the heart of Zeran's argument is the premise that distributor liability is a common law tort concept different from, and unrelated to, publisher liability. This is not so; distributor liability, or more precisely, liability for knowingly or negligently distributing defamatory material, is merely a species or type of liability for publishing defamatory material. This relationship is apparent from the Restatement (Second) of Tort Paragraph 577 definition of "publication" of defamatory material, which states,
> (1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.
> (2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continues publication.
> Thus a publisher is not merely one who intentionally communicates defamatory information. Instead, the law also treats as a publisher (...) one who fails to take reasonable steps to remove defamatory statements from property under her control."[199]

In other words, the court found, that holding AOL liable as a distributor would amount to holding it liable as a publisher. The court, therefore, followed the above discussed interpretation that a publisher is anyone who publishes a defamatory statement which would include every republisher. Thus, a distributor is also a publisher. So the court concluded that because holding AOL liable as a distributor would amount to holding it

[198] Zeran v. America Online, 129F.3d 327, made available at http://legal.web.aol.com/decisions/dldefam/zeranopi.html, at p. 6.

liable as a publisher, Zeran's state claim was pre-empted.

In addition to that, the court found, that there was also an alternative basis for pre-emption, because subjecting AOL to state law distributor liability would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress in passing Section 230 of the CDA. [200] In short, the court believed that distributor liability would likely continue to discourage online service providers from screening or editing offensive material. The courts conclusion was as follows: Congress wants online service providers to screen and edit offensive material. But all the methods that service providers might employ to fulfil this task, "might well provide the basis for liability if objectionable content (...) should slip through the editing process".[201] Even a service provider who would maintain, for example, a hotline, where subscribers might report objectionable content would expose itself to actual knowledge of the defamatory nature and thereby expose itself to liability because he knew or had reason to know about the defamatory content. Faced with this liability, online service providers would refrain from any procedures that might help to control the contents of posted messages. And this, so the court, "frustrates the purpose of the CDA and, thus, compels pre-emption of state law claims for distributor liability against interactive computer service providers".[202]

Zeran appealed to the U.S. Court of Appeals for the 4th Circuit, but without success. Affirming the lower court's ruling, the Fourth Circuit stated:

> "By its plain terms, Section 230 creates a federal immunity to any cause of action that would make service provider liable for information originating with a third-party user of the service. Specifically, Section 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw,

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[199] Ibid.
[200] Ibid at p. 7.
[201] Ibid at p. 8
[202] Ibid at p. 8.

> postpone or alter content - are barred."[203]

Like the first court, the Court of Appeals would not accept the differentiation between publishers and distributors in respect to the scope of the CDA. It held:

> "Assuming arguendo that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by Section 230."[204]

6.3.2 Blumenthal v. Drudge[205]

In this case, White House aide Sidney Blumenthal sued the well-known Internet gossip columnist Matt Drudge for allegedly defamatory comments about Mr. Blumenthal's alleged history of spousal abuse. Blumenthal sued Drudge as well as AOL. Here, AOL was not simply transmitting Drudge's column, as it simply transmitted the postings of the defamer in *Zeran v. America Online,* but AOL actually had a contract with Drudge in which it paid Drudge $ 36.000 per year for his column.[206] The contract also gave AOL the "right to remove or direct (Drudge) to remove, any content, which as reasonably determined by AOL (...) violated AOL's then-standard Terms of Service". AOL also actively promoted Drudge's column as a benefit of an AOL membership.[207]

When the suit against Drudge was allowed to go forward, the Judge dismissed the case against AOL, despite his own misgivings. The court held:

> "If it were writing on a clean slate, this court would agree with plaintiffs. AOL is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility for what is said over the telephone wires. Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to

[203] Zeran v. America Online, Appellate Opinion, U.S. 4th Circuit of Appeals, available at http://legal.web.aol.com/decisions/dldefam/zeranapo.html, at p. 3.
[204] Ibid at p.5.
[205] Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) available at The Law Journal Extra Files, http://www.ljx.com/LJXfiles/drudgedecision.html
[206] Ibid at p. 2-3.
[207] Ibid at p. 2-3

> hold AOL to the liability standards applied to a publisher, or at least, like a book store owner or library, to the standards applied to a distributor. But Congress has made a different policy choice in providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where self-policing is unsuccessful or not even attempted."[208]

6.4 Conclusion

Apparently, the American courts have come to an agreement, however reluctant, as how to interpret Section 230 of the CDA and more specifically Congress' understanding of the term "publisher". Both the courts in *Zeran v. America Online* as well as in *Blumenthal v. Drudge* agreed that Congress did not intend to distinguish between "publishers" and "distributors" and therefore provided immunity for online service providers from publisher's liability as well as from distributor's liability. With regard to this problem of interpreting the term "publisher" as used in the CDA, the decision in *Blumenthal v. Drudge* seems to be more in agreement with the law of the CDA than the decision in *Zeran v. America Online*. Although even the Judge apparently had a uncomfortable feeling by freeing AOL from all liability even though they clearly acted like a typical publisher, this would be a critic to the CDA in general but would at least still correspond with the actual language of the act. Of course, it is still disputable whether or not it is a fair solution to apply a different standard of liability to the online world in contrary to the rest of the media.

The decision in *Zeran v. America Online*, however, had to deal more detailed with the question of interpreting the meaning of the term publisher as used in Section 230. Because the *Zeran v. America Online* case was the first to apply the CDA it has gained an important precedent position. After the outcry from the service provider community that followed the *Stratton Oakmont v Prodigy* decision, the world of AOL, Prodigy

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[208] Ibid at p. 6-7.

and CompuServe seemed to be back to order after *Zeran v. America Online*. But as comforting as this judgement might be for the side of the service providers, it leaves many defamed subscribers without anyone who would take over responsibility. Leaving a very wide freedom to the providers, the *Zeran* case needs some closer examination.

The courts' opinions have many flaws. Primarily, the courts fail to heed its own interpretation of Congress' intent. Throughout the judgement, it is repeatedly noted that the disincentive that Congress specifically wanted to abolish was the liability of the sort described in *Stratton Oakmont v. Prodigy*. The courts cites the relevant part of Section 230, which provides, that "it is the policy of the United States, to remove disincentives for the development and utilisation of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material..."[209] The court itself then noted, that the legislative history of the act reflects that the "disincentive" Congress specifically had in mind was the liability of the sort called for in *Stratton Oakmont v. Prodigy*.[210] Congress therefore intended to overrule those decisions that held online service providers to the standard of a publisher for defamatory statements provided by a third party. A service provider who screens the contents of his bulletin boards and changes them if they do not comply with his policies, would very likely and justly be regarded as a publisher. If Congress sought to remove disincentives for the development and utilisation of blocking and filtering technologies, Congress was apparently primarily aiming at the removal of the publisher liability, because that is the standard of liability that is evoked by these kind of techniques. Therefore the disincentives targeted by Congress were those established by *Stratton Oakmont v. Prodigy*, where online service providers were found to be publishers of defamatory material as a result of attempts to regulate online content. Neither the legislative history nor the statute indicate a desire to grant a

[209] Zeran v. America Online, 129F.3d 327, made available at http://legal.web.aol.com/decisions/dldefam/zeranopi.html, at p. 7.
[210] Ibid at p. 7.

broader immunity.

By stating that every repetition of a defamatory statement is considered a publication,[211] the court opens the door to complete immunity for online service provider: If every repetition of a defamatory statement is a publication and one applies this interpretation to the use of the term publisher in Section 230 of the CDA, the result is, that it is practically impossible to hold a service provider liable for material which he did not create by his own. Thus, the online world would be reigned by completely different standards of law than the rest of the media.

To interpret Section 230 as granting complete immunity for online service providers with regard to third persons' statements could as well collide with the rules of statutory construction. Rules of construction have to be used where the meaning of the statute is not clear. As stated above there are at least two different possible interpretation of the term "publisher" used in Section 230. One of the rules of statutory construction is that when construing a statute that would pre-empt claims arising under state law, the statute should be interpreted narrowly.[212] To construe Section 230 as granting an absolute immunity to online service providers would "disregard over 200 years of common law, which exempts a distributor from liability for defamation only if it does not know or have reason to know of the defamation.[213] Thus holding that section 230 (c) pre-empts distributor liability for defamation manifestly exceeds Congress' intent.

Moreover, there is a stark difference between holding online service providers liable for attempts to screen online content and holding them liable for failing to remove material they know is defamatory. As stated above, Congress sought to remove disincentives for the screening and blocking of contents by service providers. But did

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[211] Zeran v. America Online. Appellate Opinion. U.S. 4th Circuit of Appeals, available at http://legal.web.aol.com/decisions/dldefam/zeranapo.html, at p. 4, citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts". Par. 113. at 810.

[212] 81 A Corpus Juris Secundum., States Paragraph 24, p. 330-331.

[213] Jeffrey P. Cunard & Jennifer B. Coplan, " Recent Internet Related Developments", 460 PLI/PAT 893, 915 (1996).

Congress also intend to protect service providers from the liability for negligently allowing material they know is defamatory to remain on their networks ? Even when the efforts of online service providers to screen online content would expose themselves to actual knowledge, the provider would only be liable where it negligently failed to remove the material. And would it not be fair that the service provider as the only one who has the power and the means to remove defamatory statements from its network once it has been posted there, should be held liable for negligently failing to remove the defamatory material ? Zeran's claim, however, is a completely different type of liability than the one Congress sought to pre-empt.

This argument is also supported by the title of Section 230: the "Protection for the 'Good Samaritan' Blocking and Screening of Offensive Material". That is a clear reference to Prodigy's policy which made the court held Prodigy liable as a publisher in *Stratton Oakmont v. Prodigy*. If Congress had intended to grant online service providers an absolute immunity, why does the statute bear such a limited name ?

Surprisingly, the court in *Zeran v. America Online* refused to address the question whether AOL was immune from all suits arising from defamatory material posted by third parties.[214] In oral argument, AOL's counsel argued that the CDA precludes AOL's liability for any information appearing on its system unless that information was provided by AOL itself. And this would be like this, he contended, "even if AOL knew of the defamatory nature of the material and made a decision not to remove it from the network based on a malicious desire to cause harm to the party defamed"[215]. However, the court held that "these facts were not presented here, nor do they appear to have been contemplated by Congress." This attitude of the court is indeed surprising because their decision comes to exactly this very same result. If one interprets the term "publisher" in Section 230 to the extent that it refers to anyone who communicates

[214] Zeran v. America Online, 129F.3d 327, made available at http://legal.web.aol.com/decisions/dldefam/zeranopi.html, at p. 12, note 20.
[215] Ibid.

defamatory material, then indeed, service provider would be immune from all defamation claims that were originally published by third parties. In the Appellate Opinion the court then actually states, that Section 230 creates an immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.[216] Having opened the door to complete immunity, the court is suddenly reluctant to walk through it, although its interpretation does not allow any other conclusion.

Irrespective of the reluctance of the courts to follow the path they have chosen, it has to be taken as a given, that the American law as it is interpreted at present by the courts, grants a complete immunity to service providers from state common law liability for any material put online by a third party.

7. The German Approach

While the relevant American cases are mainly concerned with online defamation and copyright infringements on the internet, the German courts so far mostly had to deal with the criminal liability for dissemination of pornographic material or national socialistic propaganda[217]. But as in America, the German cases also quickly started to show the need for new regulations about the new media.

With the passing of the new Information and Communication Services Act[218] (Informations- und Kommunikationsdienstegesetz, "IuKDG") the German legislators followed the United States by becoming one of the first countries which attempt to regulate the new media of the online world. The Information and Communication Services Act, which came into force on 1 August 1997, consists of a whole collection

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[216] Zeran v. America Online. Appellate Opinion. U.S. 4th Circuit of Appeals, available at http://legal.web.aol.com/decisions/dldefam/zeranapo.html, at p. 3.

[217] Preliminary proceedings in matters of that kind have been instituted by the district attorney of Dortmund, Hamburg, Mannheim, Munich and Nurnberg, see Ulfrich Sieber, "Kontrollmöglichkeiten zur Verhinderung rechtswidriger Inhalte in Computernetzen (I)", p. 2, note 3.

[218] Information and Communication Services Act, Federal Law Gazette (Bundesgesetzblatt) 1997 I 1870.

of media laws, of which the Teleservices Act[219] (Teledienstgesetz, "TDG") is the most interesting with regard to the problem of service provider liability.

Because there so far was no case which had to deal with the liability of service providers for defamatory material posted by third persons, the question asked by the American courts of whether service providers should be classified as publishers or distributors had never been answered either way. It was only with the enactment of the TDG that Service providers received their own classification.

§5 TDG provides that,

> (1) providers shall be responsible in accordance with general laws for their own content, which they make available for use.
> (2) Providers shall not be responsible for any third-party content which they make available for use unless they have knowledge of such content and are technically able and can reasonably be expected to block the use of such content.[220]

§ 5(1) TDG is only a repetition of the relevant legal situation in the German law of delict. It is important, though, that the fact, that service provider are as liable as everybody else for their own statements, has been explicitly stated in the new law. With the new law, there is now no place left for deviating/departing/differing interpretations or opinions.

§ 5 (2) TDG is not regarded as an independent delict.[221] It has rather been described as a filter for the test of liability under § 823 BGB and the other general provisions of the

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[219] The Teleservices Act, (full title: Act on the Utilization of Teleservices (Gesetz über die Nutzung von Telediensten)), was enacted as Art. 1 of the Information and Communication Services Act, Federal Law Gazette (Bundesgesetzblatt) 1997 I 1870.
[220] § 5 TDG as translated by Gerhard Dannemann, "The German Law Archive", p. 3.
[221] Gerald Spindler, "Dogmatische Strukturen der Verantwortlichkeit der Diensteanbieter nach TDG und MDStV", MMR 1998, 639.

law of delict.[222] In other words, one first has to examine whether a responsibility under § 5 TDG is possible at all. If this is the case, the next step is to examine whether the requirements of the general provisions of liability under for example § 823 (1) BGB are fulfilled as well.

§ 5 (2) TDG contains a novelty. Service providers shall not be liable for defamatory material from other persons unless they have knowledge of the content. The required "knowledge" of the defamatory content has to be understood as positive knowledge.[223] It is not sufficient that the service provider merely had reason to know of the defamatory content.

With the requirement of positive knowledge of the defamatory contents, the German law reduces the responsibility of service providers, which otherwise would be liable under § 823 (1) BGB for intentional as well as negligent acts, to liability for intentional behaviour only.[224] The reason the legislator gave for this decision is, that due to the increasing volume of messages and informative material it is practically not possible anymore for a service provider to screen all the material posted by third persons for defamatory contents.

With the provision in § 5 TDG, the new law makes it clear, that service providers are not to be equated to publishers. The legislator clearly did not want to apply the same high standard of care that has been established for publishers to service providers. By requiring intentional acting on the side of the service provider, the standard of liability of service providers under the new law is even less strict than the standard of liability of a normal person who would be liable for negligence and intention. Thus the standard of liability of service providers is also less strict than the standard of liability of

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[222] Engel/Flechsig/Tettenborn, "Das Neue Informations- und Kommunikationsdienste-Gesetz", NJW 1997, 2981, 2981.

[223] See the reasons given by the legislator of § 5 TDG, BT-Dr. 13/7385, p. 19, 20

[224] Gerald Spindler, "Dogmatische Strukturen der Verantwortlichkeit der Diensteanbieter nach TDG und MDStV", MMR 1998, 639.

distributors, who would – under German law - be held liable under the general provisions.

Conclusion

The new German law itself does not establish any duty for service providers to monitor their computer bulletin boards, the liability is exclusively connected to positive knowledge of the existence of defamatory contents.[225] Thus, even the service provider that closes his eyes, can not be held liable, because negligent ignorance is not sufficient to constitute liability under § 5 TDG.

But the service provider is only freed from the duty to screen and monitor his bulletin boards. As soon as he receives knowledge either through monitoring or through other measures, or is informed by one of his subscribers, he has to become active himself, otherwise he is going to be held responsible. This is the point, where German law differs from the solution followed by the United States.

As discussed above, the new Section 230 of the American CDA is interpreted to render complete immunity from responsibility for third party material to service providers. It is understood to prevent any disadvantages a service provider could possibly suffer from an attempt to screen or monitor his own bulletin boards. Thus, if the service provider acted negligently it would not be sufficient to establish his liability and even if he had full knowledge of the defamatory content on his system and therefore acted with intent, it would – due to the court's recent interpretation of the law – not made him liable even if he remains passive and does not undertake any steps to block the defamatory statement from his system. Therefore, American law treats service providers neither like publishers nor like distributors and thus not like republishers at all. Instead, it created a new and exceptionally safe position especially for them.

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[225] Norbert Wimmer & Gerhard Michael, "Der Online-Provider im Neuen Multimediarecht", p. 56.

The German law is comparable to the American solution only as far as it is also not sufficient to establish liability if the service provider acted negligently, i.e. if he should have had knowledge of the defamatory content. He must have positive knowledge. But once he has knowledge he can – contrary to the American model – be held liable for not blocking the defamatory statement. By choosing this way, the German law has adapted the above discussed traditional bulletin board owner analogy to online service providers.

It has clearly also been in the mind of the German legislator to prevent the formation of disincentives to self-regulating the internet by the service providers themselves. Therefore, they did not want to classify service providers as publishers. Still, the new law leaves some space for service provider responsibility. If the service provider screens the contents of his bulletin boards and finds something, he is probably going to be committed to block it from the board while an American service provider would not even have the duty to do that. By choosing to put at least some responsibility on service providers, the German law has established another possibility of policing the Internet: Other subscribers, or internet users in general, can refer defamatory material, that they happened to find somewhere on computer bulletin boards directly to the service provider. Because of the possible liability, they can be sure, that the service provider becomes active. This possibility is completely disregarded by the American law. As *Zeran v AOL* has shown, there is no obligation for service providers to become active even if they are informed about the existence of defamatory material on their bulletin boards. Because the service provider is the only one who is in the position to do something about defamatory statements that appear on their network (being the only one who have the technical capability to block them) the defamed person looses a if not the most important way of obtaining help.

8. The South African Situation

The issue of whether a service provider can be held liable for defamatory statements made by others has not yet been dealt with by the South African courts. So far there has also been no attempt of regulating the matter through national legislation.
In view of the increasing use of the Internet in South Africa, it is more than likely that South African courts will sooner or later be confronted with this problematic issue. Therefore this paper will give a preview of what is likely to happen, should a case of online defamation and service provider liability come before a South African court. As when dealing with the American and the German jurisdiction, I will start with a short overview of the South African law of defamation and the standards of liability applied by the general law. Thereafter, I will apply the South African law to the new situation of an online defamation.

8.1 The law of defamation

In South Africa the general remedy for wrongs to the plaintiff's personality is the *actio iniuriarum*.[226] In general, the delict of defamation can be defined as the unlawful publication *animo iniuriandi* of a statement concerning another person which has the effect of injuring that person in his reputation.[227]

Animus iniuriandi is the description, for the purposes of the law of defamation, of the concept of *dolus*. In general, a person who commits a delict is liable for damages only where the act and the damage can be attributed to him. In other words he must be at fault. The two main forms of fault are intent (*dolus*) and negligence or carelessness (*culpa*). One of these forms must be present before a person is liable for damages, and in the case of an *actio iniuria* the form of fault required is that of intent. This means

[226] Jonathan Burchell, "Principles of Delict", p. 149.
[227] C. Kinghorn, "Defamation" in "The Law of South Africa" (7), par. 235.

that – strictly spoken – where the defendant has not acted intentionally, but negligently, no liability will ensue.[228] With regard to the element of fault, South African law, however, differs from American and German law by requiring intent and not letting negligent behaviour be generally sufficient for a defamation action.

Animus iniuriandi, though, also includes the state of mind attributed to a person who publishes a defamatory statement recklessly, not heeding whether he will or will not wrongfully defame another. [229] In other words, intent includes *dolus eventualis*.

8.2 Standards of Liability

Although the element of fault has always been regarded as a requirement for defamation generally, the problematic issue was and still is, whether all possible defamers should be treated equally in this regard or whether the mass media should be subject to a different standard.

8.2.1 Publishers

In the beginnings of the 1960s the courts were still reaffirming the general requirement of *animus iniuriandi*.[230] The first change came with the decision in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley*[231]. The court, however, still expressly accepted the principle that consciousness of the wrongfulness of the publication is required. But then Rumpff CJ stated *obiter* that owners, editors, publishers and printers of newspapers ought to be liable in accordance with the English law where liability arises from the publication of defamatory material and not from any particular intention, and where these members of the press are liable for defamation of which they were not aware.[232]

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[228] Yvonne Burns, "Media Law", p. 152.
[229] C. Kinghorn, "Defamation" in "The Law of South Africa (7), par. 245.
[230] Maisel v Van Naeren 1960 (4) SA 836 (C) at 850 in fin – 851 A; Jordaan v Van Biljon 1962 (1) SA 286 (A); Craig v Voortrekkerpers Bpk 1963 (1) SA 149 (A).
[231] Suid-Afrikaanse Uitsaaikorporaisie v O'Malley 1977 (3) SA 394 (A).
[232] Ibid at 430E and 404H.

When in *Pakendorf en Andere v De Flamingh*[233] one of the issues was whether the owner and editor of a newspaper could avail themselves of the fact that an untrue defamatory report had been published as a result of a reporter's mistake, the Supreme Court of Appeal of South Africa, confirming the *obiter* view held in this regard in *SA Uitsaaikorporasie v O'Malley*, held the defendants liable for defamation in the absence of fault after mentioning the great injustice to the plaintiff if the defendants were to be permitted to rely on the absence of *animus iniuriandi* because a mistake had been made.[234]

Therefore, after *Pakendorf en Andere v De Flamingh* the liability of mass media for defamation became what is called strict liability (namely not based on fault of any sort), thus only the element of wrongfulness could be in issue in a case where the defendant was part of the mass media. As the Supreme Court stated in *National Media Ltd and Others v Bogoshi*[235] the

"effect of the judgement [in Pakendorf] was that, unlike ordinary members of the community, - and, for that matter, also unlike distributors – newspaper owners, publishers, editors and printers are liable without fault and, in particular, are not entitled to rely upon their lack of knowledge of defamatory material in their publication or upon an erroneous belief in the lawfulness of the publication of defamatory material."[236]

Thus from 1982 to 1998 the mass media were held to be subject to strict (no fault) liability for the publication of defamatory matter. It was only last year, that things changed again. *National Media Ltd v Bogoshi* is seen as the first substantial advance for freedom of expression under the new South African Constitution. The case was brought to the High Court by a lawyer, Nthedi Bogoshi, who claimed that the weekly

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[233] Pakendorf en Andere v De Flamingh, 1982 (3) SA 146 (A).
[234] Ibid at 156.
[235] National Media Ltd. v Bogoshi, 1998 (4) SA 1195 (SCA).
[236] Ibid at 1204.

newspaper, City Press, defamed him in a series of stories the paper ran between 1991 and 1994. Mr. Bogoshi demanded 1.8 million rand. Forthunately for freedom of expression, the Supreme Court of Appeal rejected strict liability of the mass media as incompatible with freedom of expression as guaranteed by the new constitution. In the landmark judgement of the Supreme Court of 29 September 1998, Hefer JA stated:

> "In my judgement the decision in Pakendorf must be overruled. I am, with respect, convinced that it was clearly wrong."[237]

Replacing the strict liability, the court crafted a rule based on the objective reasonableness of the publication.[238] The court stated that

> "the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time".[239]

Elaborating this point the court held that the liability of members of the media is based on an objectively assesses criterion of the reasonableness or unreasonableness of the publication – a criterion that would include an investigation into whether reasonable steps were taken to verify the accuracy of the information before publication.[240]

But the court then continues:

"Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper. Professor Visser is correct in saying (1982 THRHR 340) that a high degree of circumspection must be expected of editors and their editorial staff on account of the nature of their occupation".[241]

Although with the latter remark, the court clearly touches on the issue of fault, there is no distinctive decision of which standard of liability with respect to the element of fault

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[237] National Media Ltd. v Bogoshi. 1998 (4) SA 1195 (SCA) at 1209.
[238] Jonathan Burchell. "Personality Rights and Freedom of Expression, The Modern Actio Injuriarum", p. 5.
[239] National Media Ltd. v Bogoshi. 1998 (4) SA 1195 (SCA) at 1211.
[240] Jonathan Burchell. "Personality Rights and Freedom of Expression, The Modern Actio Injuriarum", p. 179.
[241] National Media Ltd. v Bogoshi. 1998 (4) SA 1195 (SCA) at 1211.

should be applied to publishers from now on. The court, however, is of the opinion, that the test of proving the reasonableness of a publication includes lack of negligence as well.[242] As Jonathan Burchell states in his comment on the decision, the judgement of Hefer JA in *Bogoshi* "is at its weakest in failing to draw a clear conceptual distinction between the respective domains of unlawfulness and negligence requires".[243] The Supreme Court regarded negligence on the defendant's part as a determinant of the legality (or unlawfulness) of the publication rather than as a determinant of fault.[244]

Nevertheless, the decision can be interpreted as emphasising a fault criterion of negligence for the media, which might to some extent overlap with the unlawfulness inquiry but still requires an independent investigation.[245] This interpretation of the decision is based on the simple realisation that if the court rejects a strict liability of the media it can only mean that it has to be replaced by some kind of fault element.[246] If alternative suggested bases of liability such as *dolus eventualis* are not regarded as appropriate by the court,[247] then the only form of fault that is left is negligence.[248] It can therefore be concluded from the decision in *Bogoshi*, that a publisher might still not be entitled to rely on absence of subjective *animus iniuriandi* as a defence but that he is now allowed the defence to prove that he was not negligent in publishing an allegedly defamatory statement.[249]

Thus, if a publisher can prove that all reasonable steps to verify the accuracy of the material were taken, he did not act negligent, regardless of whether the material published is true. The so established distinction between a standard of subjective

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[242] National Media Ltd. v Bogoshi, 1998 (4) SA 1195 (SCA) at 1211-12.
[243] Jonathan Burchell, "Personality Rights and Freedom of Expression, The Modern Actio Injuriarum", p. 226.
[244] Ibid at p. 179.
[245] Ibid at p. 226.
[246] Ibid at p. 227.
[247] National Media Ltd. v Bogoshi, 1998 (4) 1195 (SCA) at 1212.
[248] Jonathan Burchell, "Personality Rights and Freedom of Expression, The Modern Actio Injuriarum", p. 227.
[249] Michael Sparks, "South Africa: Easier to Defend Libel Suits", The National Law Journal, 19 October 1998, p. A 11.

intention for a individual defendant and objective reasonable care for the media is a more defensible distinction than the old distinction between an intention-based liability for individual defendants and strict liability for the media, because the latter clearly created substantially unequal treatment of the media as opposed to the individual in a defamation action. [250]

8.2.2 Distributors

In South Africa distributors have always been spared from the strict liability applied to the media. In *Trimble v Central News Agency Ltd*[251] Stratford ACJ set out the principles governing the position of distributors, such as newspaper vendors and libraries in South Africa. He stated that

"a newspaper vendor is protected if he proves (1) that he did not know that the newspaper at the time it was sold contained libels of the plaintiff; (2) that it was not by negligence on the vendor's part that he did not know that there was any libel in the newspaper; and (3) that the news vendor did not know that the paper was of such a character that it was likely to contain libellous matter, nor ought to have known. [252]

The liability of distributors is therefore tested by a negligence criterion. Although this principle as set out in the *Trimble* case is not conform with the general requirement of *animus iniuriandi*, it has not been questioned in the fifty years since the judgement was delivered. [253] The principle that distributors may escape liability on the ground of absence of negligence was affirmed by Hefer JA in *National Media Ltd. v Bogoshi*. [254]

The South African law of defamation with regard to distributors, who merely distribute documents, is correspondent with the American and the German situation of the law.

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[250] Jonathan Burchell, "Personality Rights and Freedom of Expression, The Modern Actio Injuriarum", p. 5.
[251] Trimble v Central News Agency Ltd. 1934 AD 43.
[252] Ibid at 48.
[253] Jonathan Burchell, "Personality Rights and Freedom of Expression, The Modern Actio Injuriarum", p. 315.
[254] National Media Ltd. v Bogoshi. 1998 (4) SA 1195 (SCA) at 1200.

8.3 Service Provider Liability Under South African Law

Since South Africa now turned away from a strict liability of the press and towards a fault based liability for the all media, printers and distributors, the first question would be whether or not service providers can be classified as one of these. As discussed above, the closest analogy for service providers are traditional bulletin board owners or distributors.

Traditional bulletin board owners do not appear to occupy a specific position under South African defamation law. Therefore, the general requirement of *animus iniuriandi* could apply to them. In other words they had to act with at least *dolus eventualis*.

It would, however, be an awkward decision to treat an online service provider like a private person. South African law has made it clear that the mass media should be treated differently from the individual person. The mass media is not supposed to rely on the defence of absence of *animus iniuriandi*. The policy reasons for this decision were amongst others, the difficulty of proving intent on the part of the persons involved and the fact that the defenceless individual is placed in an invidious position vis-à-vis the press which is a powerful medium.[255] Both considerations do apply in the case of online defamation as well. A service provider forms without doubt part of the mass media and therefore clearly belongs to the group that - due to its powerful position - should be held liable under a different standard as the individual. Even the new decision in *Bogoshi* does not change the basic implication of this principle. Still the mass media is not allowed to use the defence of absence of *animus iniuriandi*. It would therefore contradict the established principles if an online service provider, being part of the mass media, would be held liable to the same standards as the individual person.

It is therefore more likely, that a South African court would regard service providers as

[255] C. Kinghorn, "Defamation", in "The Law of South Africa", Vol. 7, par. 267, note 2.

comparable to distributors. Thus they would only be able to escape liability on the ground of absence of negligence. If they can prove, that they did not know that the document in question contained defamatory statements and that they did not act negligently, they would not be liable.

9. Conclusion

Throughout the discussion of the question of online service provider liability it has become apparent, that there are various possible scenarios of online defamation to take place. There are cases possible like *Blumenthal v Drudge*, where AOL even contracted the journalist Drudge to write columns about celebrity gossip for their system. On the other hand there can be a case like *Zeran v America Online* where Aol actually only transmitted the defamatory message and failed to remove it. Because the Internet is still young and constantly developing new possibilities for the exchange of information, the way a service online provider is working nowadays will also undergo frequent changes. Therefore, the scale of possible cases of online defamation will grow even wider. The question then is whether it is a good solution to create one law that is supposed to be applicable to all the different cases.

In the case of the United States the CDA – as discussed above – is not a convincing solution. The interpretation that online service providers should be freed from any kind of liability, including publisher as well as distributor liability, is not flexible enough to deal with the large variety of cases which have already come to court and which will follow in the future. That became even more obvious in the case of *Blumenthal v Drudge*, where even the judge remarked upon the fact that AOL actually acted like a typical publisher.

The justification for the complete immunity in America is the argument that applying publisher liability to online service provider would have the undesired side-effect that all online service providers would probably at once stop all exercising of editorial

control out of fear that this kind of influence on the published material would render them publishers and make them liable. But is this sufficient reason to treat all cases of online defamation and service provider liability the same ? That does not seem like a fair solution with regard to the rights of the subscriber. In the "normal" world an individual person has certain rights against the media. The rights might differ depending on whether the defendant is a newspaper or a library, but he still got rights. Under American law, this is suddenly changed. In the "online world" the individual is restricted to the actual defamer as a possible defamer. As explained above, this will in most of the cases be a rather disappointing undertaking because of the popularity to use the internet anonymously.

Although online communication surely occupies a special position amongst the mass media, there is no sufficient reason to treat online service provider completely different than the rest of the media. There is not only the choice between publisher liability and a full immunity. As shown above, both the distributor analogy and the traditional bulletin board owner analogy are providing reasonable solutions. An online service provider is comparable to a distributor as well as a traditional bulletin board owner.

The new German law requires positive knowledge of the defamatory statement and therefore resembles the traditional bulletin board analogy. This approach is far more convincing than the American solution. To avoid creating any incentives to exercise editorial control, the traditional bulletin board analogy would even be more favourable than the distributor analogy. It requires positive knowledge of the defamatory material and therefore the online service provider could still screen and police his system without fearing to be accused that he should have noticed the defamatory statement. Only if he receives positive knowledge of defamatory material, then he should have the duty to act and that, in my opinion, is only fair.

One must not forget, that the online service provider is the only one who has got the

possibility to do something about the defamatory statement. He has the power to delete it and to block further messages from the same sender. If he is the only one who is able to do so, should it not also be his duty to do so? And if he ignores this duty, although he has positive knowledge of the defamation, should he not be held liable for this? I think he should.

To treat online service provider like traditional bulletin board owner will probably also be the better solution compared to a full immunity, if one wants to prevent the Internet from turning into a place that is not controlled at all. The argument that one does not want to discourage online providers from exercising editorial control over their systems is also a double edged sword. By not treating service providers as publishers the United States might have removed a disincentive to exercise control but by granting them a full immunity instead, the American law might has gone too far. Because now a online provider does not have to do anything to police his system. It might be an incentive to do so to keep the system more appealing for his subscribers, but is this a sufficient incentive? Why should an online service provider spend considerably high amounts of money for the screening of his systems for defamatory messages, if he does not have to fear any liability at all ?

If, however, online service providers are treated like traditional bulletin board owners and therefore have to have positive knowledge of the defamation to be held liable, the decisive duty, that would be infringed, would not be a duty to screen their systems but the duty to help and do something if a defamation occurs on their system. The fear to be held liable if they neglect this duty should force online service provider to police their system. And even if this only happens after they have received knowledge, for example, by being informed by the defamed himself, it will help to clean up the Internet from unwanted material.

South Africa should consider these arguments, because – as stated above – as the

situation is now, service provider would most likely be treated on a fault based liability where it would be sufficient to establish liability if the service provider acted negligently, or in other words, had reason to know of the defamatory material. This legal solution would have the just discussed unwanted side effect of keeping service online providers from screening their system for unwanted material. If South Africa wants to avoid this, it should consider to enact a new legislation that deals specifically with the problem of online service provider liability. With regard to the examples of such a legislation in America and Germany, the German approach of shifting the fault element from a duty to screen, to a duty to become active as soon as knowledge of defamatory material is received, is so far the better solution.

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