A Most Uncommon Carrier: A Critical Analysis of Online Service Provider Immunity in *Blumenthal v. Drudge*

Joshua M. Masur
New Media, Democracy, and the Law
Spring Term 1999
Prof. Andrew Shapiro
April 14th, 1999

I. Introduction: Of Twisted Arms and Twisted Words

> Why should [America Online] be permitted to tout someone as a gossip columnist or rumor monger who will make such rumors and gossip 'instantly accessible' to AOL subscribers, and then claim immunity when that person, as might be anticipated, defames another?
>
> 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. … But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. …
>
> While it appears to this Court that AOL in this case has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit, and the Court therefore must grant its motion for summary judgment.[1]

Thus did Judge Paul L. Friedman of the United States District Court for the District of Columbia find America Online immune from civil liability for the allegedly libelous statement of one of its content providers. The immunity provision in question, best known as section 230(c)(1) of Title 47, reads in pertinent part:

> No provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.[2]

Section 230(c)(1) appears at first glance disarmingly simple and straightforward. The statute was crafted to immunize online service providers who fail to police the content present on their systems despite language in their terms of service allowing them to do so with impunity. That is to say, it was intended to protect acts of omission, to ensure that service providers would

---

[1] Blumenthal v. Drudge, 992 F. Supp. 44, 51-53 (D.D.C. 1998).

[2] 47 U.S.C.A. § 230(c)(1) (West 1999).

incur no liability for failure to exert the full range of their contractual power. On this application of section 230, there is little debate.

Blumenthal, by contrast, involved an entirely novel application of the statutory immunity — to protect an act of *commission*, a subject upon which the language is ambiguous even from its most defendant-friendly perspective.

In reality, *Blumenthal* may protest too much when claiming juridical impotence in the face of legislative language and intent. As a matter both of statutory interpretation and policy, the application of section 230 is less clear-cut than the decision presents. Indeed, in that the immunity carves out an exception to the rule of common-law republication liability, if there is any clear and unassailable result, it is the one the decision claims to find preferable but prohibited. Thus, *Blumenthal* casts a precedential specter that should provoke grave concern.

II. The Development of Service Provider Immunity for Defamation

To date, cases involving service provider liability for defamation have been surprisingly infrequent and of relatively narrow precedential reach. Only one decision on the subject has been tendered by a federal appellate court, the Fourth Circuit; of the remainder, fully half have been rendered by trial courts applying New York common law.

Even in this sparse landscape, *Blumenthal* stands literally alone in considering service provider liability for a volitional act, rather than a volitional inaction, a non-volitional act, or some combination of the two.[3] These distinctions are highly significant. The turning point in the

[3] "No federal court has ruled on whether [section 230] applies to people like Drudge, who are paid to post content on a system." Robert Schmidt, *Federal Court Watch: Blumenthal v. Drudge*, LEGAL TIMES, Mar. 9, 1998, at 1.

development of modern defamation caselaw was *New York Times Co. v. Sullivan*;[4] that case and its progeny turn fundamentally on the questions of volition or its absence, as embodied in the "actual malice" standard.[5] Furthermore, actions rather than omissions have historically been the focus of tort law, and courts have been reluctant to find liability for failure to act.[6]

A. Caselaw Prior to the 1996 Act

Both pre-1996 Act cases on service provider liability consider New York defamation law.

1. Cubby v. Compuserve

In *Cubby, Inc. v. Compuserve, Inc.*,[7] the defendant online service provider had contracted with outside companies to "manage, review, create, delete, edit and otherwise control the contents" of its special interest "forums"; one of those managers subcontracted with another company to upload a daily newsletter to the forum. When the subcontractor defamed its competitor in the newsletter, that plaintiff brought claims for libel, business disparagement, and unfair competition against the subcontractor itself, the contractor, and Compuserve. Compuserve's motion for summary judgment was granted based on the limited liability incurred at common law by a distributor for the contents of the publications it markets.

> CompuServe has no more editorial control over [the] publication [at issue] than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so. "First Amendment

---

[4] 376 U.S. 254 (1964) (defendants not liable for defamation of public official opponents of civil rights movement because of absence of "actual malice," defined as knowledge of or recklessness as to falsity of statements).

[5] *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (extending the "actual malice" standard of *New York Times* to public figures as well as public officials); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (distinguishing liability standards for general and limited purpose public figures).

[6] "The general common law rule is that a person has no duty to act for the protection of another person unless his conduct created the risk or there is a special relationship between the parties." Dominick Vetri, Tort Law and Practice (1998), at 226.

[7] 776 F. Supp. 135 (S.D.N.Y. 1991).

> guarantees have long been recognized 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."[8]

2. Stratton Oakmont v. Prodigy

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[9] the defendant was an online service provider, similar to Compuserve in Cubby. An unknown user of one of Prodigy's "bulletin boards" accused the plaintiffs of criminal fraud; they sued for libel. In an unreported decision, the trial court denied Prodigy's summary judgment motion, finding that its failure to exercise its contractual rights under its terms of service to delete a defamatory message transformed it into a publisher rather than a distributor. The judge based the bulk of his analysis on *Cubby* and *Auvil v. CBS 60 Minutes*;[10] the only New York state court case cited is for agency law,[11] despite the presence of mandatory precedent that was at least as applicable as *Auvil*.

3. Anderson v. New York Telephone

Two decades earlier, in *Anderson v. New York Telephone*,[12] New York's high court had held that a telephone company was immune from similar liability. *Anderson* involved an answering machine, owned by the defendant and leased to a subscriber, that played a recorded message accusing the plaintiff Bishop of the Church of God in Christ of such misdoings as fathering illegitimate children. When the plaintiff notified the defendant of the messages, telephone company employees listened to them but did not discontinue service. The plaintiff sued for libel, but the defendant was found immune because it merely provided the facilities for a telephone call

---

[8] *Id.* at 140 (quoting Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)).

[9] 1995 WL 323710, 65 U.S.L.W. 2765, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).

[10] 800 F. Supp. 928 (E.D. Wash. 1992).

[11] 1995 WL 323710 at *6 (citing Ackert v. Ausman, 29 Misc. 2d 962 (N.Y. Sup. Ct. 1961).

[12] 35 N.Y.2d 746 (1974).

through which caller and callee communicated directly; the court analogized lease of the communications equipment to that of a sound amplifier or a typewriter, and denied liability in such circumstances absent a volitional act.

B. The 1996 Act and Section 230

For a single unreported summary judgment denial that ignored clearly controlling and damning precedent, *Stratton Oakmont* struck a disproportionately loud note of fear into online service providers. The "decision was widely criticized as creating a disincentive for [service providers] to monitor their services for inappropriate or illegal conduct."[13]

During the process leading to the Telecommunications Reform Act of 1996, service providers lobbied successfully for legislation overruling *Stratton Oakmont*. The legislative history and context of section 230 make apparent the intention of its drafters:

> One of the specific purposes of this section is to overrule *Stratton-Oakmont* [*sic*] *v. Prodigy* and any other similar decisions which [*sic*] have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.[14]

C. Post-Section 230 Caselaw

Other than Blumenthal, all post-1996 caselaw considering section 230 service provider immunity for defamation concern anonymous or pseudonymous speech by service users.

---

[13] Jeffrey P. Cunard et al, *Internet Law Developments*, in COMMUNICATIONS LAW 1998 (Practising Law Institute 1998), at 1054.

[14] H.R. Conf. Rep. No. 104-458, at 194 (1996) (quoted in *Blumenthal*, 992 F. Supp. at 52, n. 13).

1. Zeran v. America Online

In *Zeran v. America Online, Inc.*,[15] an unknown person purporting to be the plaintiff posted advertisements on AOL, claiming to offer for sale "t-shirts and other items with slogans glorifying the bombing of the Alfred P. Murrah Federal Building in Oklahoma City."[16] The trial court found that section 230 immunity incurred because Zeran had conceded both that the AOL was an "interactive computer service" and that the defamatory materials were not "anything but 'information provided by another information content provider.'"[17] The Fourth Circuit upheld, adding that even if the plaintiff could prove that AOL neglected to remove the defamatory material despite actual knowledge thereof, section 230 would immunize the provider.[18]

2. Aquino v. Electriciti

In *Aquino v. Electriciti Inc.*,[19] the plaintiffs sued a service provider after it was used to distribute anonymous accusations of "'international conspiracy' [led by the plaintiffs] to further 'Satanic Ritual Abuse' of children" as well as "kidnapping, cannibalism, and murder."[20] In a five-sentence opinion, the defendant's demurrer was sustained based on section 230 and *Zeran I*.

3. Lunney v. Prodigy

Lunney v. Prodigy Services Co., Inc.[21] concerned a *Zeran*-type case, this time under the same New York State common law that bred *Cubby*, *Stratton Oakmont*, and *Anderson*. An unknown person masquerading as the plaintiff, a prospective Eagle Scout, had sent an allegedly defamatory

---

[15] Zeran v. America Online, Inc. (Zeran I), 958 F. Supp. 1124 (E.D. Va.), *upheld by* Zeran v. America Online, Inc. (Zeran II), 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998).

[16] *Zeran I*, 958 F. Supp. at 1126.

[17] *Id.* at 1133.

[18] *Zeran II*, 129 F.3d at 332-33.

[19] 26 Med. L. Rep. 1032 (Cal. Sup. Ct. 1997).

[20] *Id.* at 1032.

[21] 683 N.Y.S. 2d 557 (N.Y. App. Div. 1998).

e-mail to a Boy Scout leader. Drawing on *Anderson*, the case holds that the common law of defamation protects non-volitional service provider defendants when they behave as common carriers. *Lunney* cites *Anderson* for the well-established immunity for common carriers that incurs "unless the defendant in question has some 'editorial or at least participatory function' in connection with the dissemination of the defamatory material."[22] *Lunney* explicitly declined to consider section 230, holding its potential application to be merely an "essentially academic question" in light of the common-law outcome.[23] The case is further discussed *infra* at part VII.[24]

III. The Facts of the *Blumenthal* Case[25]

Late in the Spring of 1997, AOL contracted with Drudge to redistribute his gossip column as content on its online service, in exchange for a $3,000 "flat monthly 'royalty payment,'" his sole source of income.[26] Under the "licensing agreement," AOL reserved a limited right to edit out content that it "reasonably determine[d] to violate [its] then standard terms of service."[27]

---

[22] *Id.* at 560 (quoting *Anderson v. New York Tel. Co.*, 36 N.Y.2d 746, 750 (1974) (Gabrielli, J., concurring)).

[23] *Id.* at 563.

[24] *Lunney* contains one odd line of reasoning; it assumes only grudgingly and for the sake of argument that "a statement of fact to the effect that the plaintiff is a bully who has threatened to sodomize a scout leader's sons" would be defamatory. *Id.* at 560. Otherwise, however, the case is a fine exposition of the common law of defamation.

[25] Although irrelevant to the legal determination, it bears noting that the case may have been, at least in part, a proxy war among ideological opponents. Blumenthal, as a White House staffer, is predictably a political player; he has been one of many subpoenaed by the Independent Counsel's office in what might best be termed Fornigate. Drudge was first to break the news of the Lewinsky scandal; his legal defense fund was established by the ex-Maoist neoconservative David Horowitz, who had previously been harshly critiqued in print by Blumenthal, and whose livelihood is largely funded by Richard Mellon Scaife. *See* Robert Schmidt, *Federal Court Watch: Blumenthal v. Drudge*, Legal Times, Mar. 9, 1998, at 1.

[26] 992 F. Supp. at 47.

[27] AOL Mem. at 7 (quoted in 992 F. Supp. at 47).

Pursuant to this contract, Drudge continued to distribute each edition of the Drudge Report by placing it on his website at <http://www.drudgereport.com/> and by distributing it to a list of subscribers via electronic mail.[28] In addition, he e-mailed each new edition to AOL, whereupon someone undertook the volitional act of "posting" it.[29]

On Sunday, August 10th, 1997, "Drudge wrote and transmitted [an] edition of the Drudge Report that contained [an] alleged defamatory statement about [Sidney and Jacqueline Jordan Blumenthal]."[30] That column alleged, based on an anonymous "influential republican" source, that "New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up."[31] The following day, Drudge retracted the column via a "special edition" of the website and via e-mail to his subscribers, and made a public apology.[32] However, it was not until early the following morning that Drudge e-mailed the retraction to AOL, and the retraction was presumably posted on AOL later that day.[33]

---

[28] *See* 992 F. Supp. at 47.

[29] *See id.* In computer bulletin-board and online service parlance, "posting" is the act of making a discrete piece of information publicly available to subscribers or other users; unlike electronic mail, it requires that such end recipients undertake to view it at their instance. Whether any AOL employee who had internal authority to edit the new edition for compliance with the terms of service had the opportunity to review it prior to posting is unclear from the decision.

[30] *Id.*

[31] *Id.* at 46. Potential libel defendants should note that while this allegation was purportedly backed up by "court records," *id.*, it appears that Drudge never actually sought to obtain them as direct evidence. He may rue that omission. Obviously, if they did not exist, he might have foregone publication of the story, thus eliminating any potential liability at its source. However, finding such allegations in court documents would preclude liability even were the statement false and defamatory. Court records may not themselves form the subject matter of a defamation suit; they are absolutely privileged at common law. *See* RESTATEMENT (SECOND) OF TORTS §§ 585-588 (absolute privilege for judicial officers, attorneys, parties, and witnesses, respectively, for statements bearing "some relation to the proceeding"). Furthermore, the fair and accurate report privilege immunizes a defendant who publishes defamatory matter reliance on such official documents from a defamation claim. *See id.* § 611. However, it is insufficient that the allegedly defamatory statement be included in court materials; the defendant must actually have relied thereupon to obtain the privilege. *See id.*

[32] 992 F. Supp. at 48. Although Judge Friedman's opinion does not state when the apology was made, it cites to a story appearing in the August 11, 1997 edition of the Washington Post, titled "Blumenthals Get Apology, Plan Lawsuit: Web Site Retracts Story on Clinton Aide." *Id.*

[33] *See id.*

IV. Is AOL "Another" Provider under Section 230?

In considering whether a defendant receives common carrier immunity from defamation liability under section 230, two questions must be asked. First, is the defendant a "provider or user of an interactive computer service"?[34] To this question, the answer is indisputable; America Online is indeed such a provider. The second question, however, is far more difficult: was the defamatory statement "provided by *another* information provider"?[35] That is, was it provided solely by Drudge, distinctly from AOL, or does AOL's volitional act make it a provider of the content, thereby denying it immunity?

> [Section 230] leaves unanswered the question of whether an [online service provider] should ever be deemed to have exercised sufficient editorial control (e.g., by way of selecting, editing, reviewing or commissioning the content) such that it is deemed the publisher of information posted on its website or online service (i.e. the 'information' is not 'provided by another').[36]

Blumenthal implicitly decides that Drudge alone is the provider of the defamatory falsehood, but his apparent rationale is unsatisfying. His only clear statement on the subject is relegated to a footnote, noting that the plaintiffs "[did] not identify any evidence to support their conclusory assertion that there are genuine issues of fact as to whether Drudge was an employee or agent of AOL."[37] The Blumenthals' failure to prevail on this point may be due in part to a tactical error by their lawyers. However, while the result of this mistake — denial of their claim — might be appropriate at trial, at summary judgment, it is valid to question whether the plaintiff need actually *identify* such evidence, or if it is sufficient for it to be present on the record. Indeed, the presence of such evidence is explicitly acknowledged later in the opinion:

> Drudge was not just an anonymous person who sent a message over the Internet through AOL. He is a person with whom AOL contracted, whom AOL paid

---

[34] 47 U.S.C.A. § 230(c)(1) (West 1999).

[35] *Id.* (emphasis supplied).

[36] Jeffrey P. Cunard et al, *Internet Law Developments*, in COMMUNICATIONS LAW 1998 (Practising Law Institute 1998), at 1056.

[37] 992 F. Supp. at 50, n. 9.

> $3,000 a month — $36,000 a year, Drudge's sole, consistent source of income — and whom AOL promoted to its subscribers and potential subscribers as a reason to subscribe to AOL.

This evidence alone should have been sufficient to establish sufficient dispute as to Drudge's "otherness" and independence from AOL to overcome a summary judgment motion. At very least, the fact that AOL arguably played the roles of both a passive "service provider" and an active "content provider" should have led to consideration of what result is mandated by section 230 when a defendant does not fit neatly into one box or the other.

V. The Multiple Status Defendant Conundrum under Section 230

While section 230 immunizes a "provider or user of an interactive computer service," it clearly does not immunize an "information content provider."[38] It is strangely silent, however, on how to treat a defendant who is, like AOL, *both* a service and content provider; that is, when an entity is both an immune common carrier of traffic without discrimination as to content, and a liable authorial, editorial, broadcasting, or publishing entity that undertakes affirmative steps to publicize information.[39]

Implicitly, *Blumenthal* must be saying that "*[n]o* provider or user" means that multiple roles under the statute are irrelevant: an "access software provider" or "information content provider" that is also an "interactive computer service" provider receives immunity for *all* its activities. In other words, under *Blumenthal*, immunity is pervasive and contagious. But examining relevant hypotheticals calls this rationale into question. If AOL were to contract with a provider called "Hardcore Pix for Kids R Us" — a variety of content that is far more relevant to the provisions of section 230's parent, the Communications Decency Act — under the same terms

---

[38] 47 U.S.C. § 230(c)(1) (West 1999).

[39] *See generally* Ithiel de Sola Pool, Technologies of Freedom: On Free Speech in an Electronic Age (1983).

as Drudge, it seems unlikely that a court would have the same qualms over liability. Similarly, if the New York Times were to offer dial-in Internet access, would it suddenly be able to avoid the type of liability for its advertisers' statement it faced in *New York Times Co.*?

Even more damning of this approach is the apparent preference it would create for otherwise-interchangeable business decisions. Say AOL were to have undergone a corporate reorganization, and explicitly divided its content and service provision functions into separate subsidiaries, AOLcontent.com and AOLaccess.com, both under the auspices of AOL proper. Drudge, having contracted with the content subsidiary, libels Blumenthal; Blumenthal then sues AOLcontent.com, rather than the parent company. It seems clear that section 230 would fail to immunize AOLcontent.com by dint of its relationship with AOLaccess.com. It seems equally clear that the mere fortuity that the two functions are combined in a single entity should not be determinative of liability. To find otherwise is effectively to encourage any potential libel defendant, in any medium, to set up some form of online service to avail itself of contagious immunity in all its activities.

VI. An Alternative to the *Blumenthal* Rule: Function over Status

There is, fortunately, an approach to multiple status defendant liability that does no violence to the statutory language and — perhaps not coincidentally — dovetails neatly with the common law. AOL is not, after all, a defendant for its actions as an "interactive computer service" provider. The Blumenthals had their pick of any number of such defendants with users who had presumably received Drudge's libel via their provider's e-mail service or Web access. Yet they were not named in the suit, because the harm alleged was not merely providing *access* to content, it was *providing that content itself*. In other words, AOL was brought before the court as a publishing entity, not a common carrier.

A. Reading the Statutory Definitions of Content and Service Providers

A comparison of the pertinent statutory definitions is enlightening. A service provider "provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet."[40] In contrast, a content provider "is *responsible*, in whole or in part, *for the creation or development of information provided* through the Internet or any other interactive computer service."[41]

As noted above, the gravamen of the accusation is not that AOL provided access to the Internet, but that it provided defamatory information. In avoiding viewing AOL as a content provider, *Blumenthal* effectively excises pertinent language — "responsible … for" — from the statute, treating the definition of a content provider as limited to one who "in whole or in part, … creat[es] or develop[s] information provided through the Internet." Abandoning the word "responsible" as mere surplusage, however, appears misguided.

B. "Responsibility" under Section 230

Under a full reading of the statutory language, the question is whether AOL is "responsible, in whole or in part, for the creation or development of" Drudge's libel. Black's Law Dictionary is opaque as applied to this statute; it says that "responsible" means "[l]iable; legally accountable or answerable."[42] Effectively, this is tautological. But the common parlance provides another sense of the word, which centers more on causation and lay concepts analogous to respondeat superior. If causation is a reasonable reading of "responsible," and AOL "in whole or in part" caused the publication, then AOL is a content provider and reachable under these facts.

---

[40] 47 U.S.C.A. § 230(e)(2) (West 1999).

[41] *Id.* § 230(e)(3).

[42] Black's Law Dictionary 1312 (6th ed. 1990).

VII. The Common Law and Multiple Status Defendants

Like much else in Internet law, the multiple status conundrum did not arise spontaneously with the invention of the packet-switched internetwork. With the advent of common carriage as a legal concept came the need to determine the limits of the immunity it afforded. The common law rule is clear: carrier immunity is functional, not pervasive, and does not extend to the carrier's own speech or that in which it plays some volitional role.

The *Lunney* case places service provider liability squarely in the common law tradition of telegraph and telephone companies. Drawing on the New York State Court of Appeals' decision in *Anderson v. New York Tel.* and its antecedents, *Lunney* finds common-law qualified immunity dating back to the days of the telegraph.[43] The common law

> states that a telecommunications company can be considered a publisher of those messages in whose transmission it actually participates. It does not hold that such a company, if it were to participate in the formulation of the text of one or two messages, would thereupon expose itself to liability based on the text contained in the millions of other messages in whose transmission it did not participate. … What matters is [whether] there is … proof that any such control was exercised in connection with the transmission of the messages complained of by the plaintiff.[44]

It is a "longstanding … principle that '[s]tatutes which [*sic*] invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'"[45] While the common law non-derogation canon has rightly been subjected to scrutiny due to its frequent tension with the canon requiring broad interpretation of remedial statutes,[46] it remains a valid interpretative tool to which

---

[43] *See* 683 N.Y.S.2d at 561 (citing *Anderson*, 42 A.D.2d at 163).

[44] *Id.* at 562 (citing *Anderson*).

[45] United States v. Texas, 507 U.S. 529, 534 (1993) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)).

[46] The most famous critique is, of course, that of Llewellyn, who contrasted the canonical "thrust" — "Statutes in derogation of the common law will not be extended by construction" — with an equivalent "parry" — "Such acts will be liberally construed if their nature is remedial." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

the Supreme Court continues to refer.[47] This is such a circumstance, for "failure of the statute to speak to a matter [that is] fundamental" cries out for narrow construction.[48] The language of the statute itself is silent about how to resolve a defendant's status conflicts. The legislative history indicates clearly that the statutory purpose is to "overrule … decisions which [*sic*] have treated … providers and users as publishers or speakers of content that is not their own *because they have restricted access to objectionable material*,"[49] not to immunize them when they actively distribute that material.

Effectively, functional line-drawing appears the only fair, effective, and accurate manner in which to interpret the statute: one that provides immunity where appropriate, yet maintains liability where it is not; one that maintains the clear common law standard where it remains unchallenged, and negates the dubious caselaw at which it is directed.

VIII. Conclusion: *Blumenthal* as Precedent

Blumenthal holds that so long as the content in question was initially prepared by a third party, a service provider has absolute immunity under section 230 notwithstanding its active role in the republication at issue. There is no other way to read the case, for the undisputed fact is that an employee, representative, or agent of AOL posted Drudge's defamatory material on its service, yet immunity remains. At common law, that should suffice to make AOL liable; a service

---

[47] *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, __, 118 S.Ct. 1876, 1885 (1998) ("the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law'") (quoting *Texas*, 507 U.S. at 534).

[48] *Id.*

[49] H.R. Conf. Rep. No. 104-458, at 194 (1996) (quoted in *Blumenthal*, 992 F. Supp. at 52, n. 13) (emphasis supplied).

provider may "be held vicariously liable for the tort of an independent contractor" if it "ha[s] taken an affirmative, active part in its commission."[50] Under the *Blumenthal* analysis, it fails.

To date, *Blumenthal* has been cited by courts almost exclusively[51] for its grant of personal jurisdiction over Drudge;[52] that portion of the opinion is beyond the scope of this paper. However, should the case be taken to establish *per se* immunity for an entity's volitional publications based on the mere fact that its functions include online service provision, its effect on the continued viability of libel law in the electronic age is potentially decimating. This is not an abstract and diffuse threat; one neutral outline on the subject squibs the case as holding that "[t]he CDA provides immunity to an interactive computer service provider even where the provider has entered into a licensing agreement with the third party that posted the allegedly defamatory material and where the provider actively marketed the third party's postings."[53]

As the decision correctly notes, section 230 clearly abolishes *Stratton Oakmont*'s "notice-based 'distributor' liability."[54] The relevant question, however, is whether section 230 protects not merely an inactive defendant — the "distributor" — but an active defendant — the "publisher" — who commits a volitional act as well. Logic and precedent dictate that immunity for the former need not — indeed, should not — extend to the latter; section 230, meanwhile, fails to clearly contradict it.

---

[50] *Cubby*, 776 F. Supp. at 143 (applying New York law; citing Ramos v. State, 34 A.D.2d 1056, 1056 (N.Y. App. Div. 1970)).

[51] The one exception is *Lunney*, discussed *supra* at II.C.3, which refers to *Blumenthal* at the tail end of a string cite, then overturns the trial court's finding of liability on common-law qualified privilege grounds; it declines to consider section 230 immunity, dismissing it as an "essentially academic question" in light of the common-law outcome. 683 N.Y.S. 2d at 563.

[52] *See, e.g.*, GTE New Media Services Inc. v. Ameritech Corp., 21 F. Supp. 2d 27 (D.D.C. 1998); Esab Group, Inc. v. Centricut L.L.C., 34 F. Supp. 2d 323 (D.S.C. 1999).

[53] John B. McCrory et al, *Constitutional Privilege in Libel Law*, in COMMUNICATIONS LAW 1998 (Practising Law Institute 1998).

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

The obvious remedy would be to seek legislative amendment of the statute. A minor revision — five simple words — is all that would be required to clarify the provision, ensuring its consistency with well-considered precedent and public policy: "No provider or user of an interactive computer service *acting solely in that capacity* shall be treated as the publisher or speaker of any information provided by another information content provider." Alas, the likelihood is not great; the prospect is practically a case-study in public choice theory. On the one hand stand the interests of ISPs, a small group with shared economic interests in limiting liability by any means whatsoever; against them, the inherently indeterminate and intangible collection of online defamation's future victims, with a diffuse interest in potential vindication should their dignity be assailed. Clearly, the only chance to avoid this perverse result is a common law rule that limits section 230 immunity to volitional nonactors and nonvolitional actors, while denying it to those who purposefully republish defamatory statements online.

Those who are concerned about the ability of individuals to continue to redress invasions of their privacy and dignity in the information age would do well to wish the *Blumenthal* rule a rapid demise. Unfortunately, only time will tell whether other courts will accord *Blumenthal* the precedential value it ill deserves.