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## Barrett v. Rosenthal: Oh, What a Tangled Web We Weave - No Liability for Web Defamation

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**BARRETT v. ROSENTHAL:  
OH, WHAT A TANGLED WEB WE WEAVE —  
NO LIABILITY FOR WEB DEFAMATION**

TERNISHA MILES\*

INTRODUCTION

The World Wide Web has proven to be the ultimate form of mass communication, solicitation, and entertainment. It reaches beyond cultural and language barriers to affect every facet of our global society. Not surprisingly, the Internet's reach has spread to the area of civil litigation and has affected the applicability of defamation<sup>1</sup> claims brought against Internet service providers (hereinafter ISP) and Internet users<sup>2</sup>.

In recent years, state and federal courts have wrestled with the tort of defamation and its place in cyberspace. Generally, these cases have involved claims brought by a private citizen against an ISP, where an anonymous third party had posted defamatory statements on the provider's bulletin board or message board.<sup>3</sup> On this issue, adjudicating courts have overwhelmingly<sup>4</sup> ruled that the Communication and Decency Act of 1996<sup>5</sup> (hereinafter CDA) prohibits the imposition of liability for defamation on an ISP under these circumstances. These cases, however, have not answered the question of whether a private

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1. Defamation is divided into two categories: libel and slander. Slander is generally spoken and libel is generally written. However, courts have determined that where the publication is in permanent form, such publication will be considered libel. *See Matherson v. Marchello*, 473 N.Y.S.2d 998, 1003 (1984). *See generally* PROSSER & KEETON, *LAW OF TORTS* 786-87 (5th ed. 1984); SALMOND & HEUSTON, *LAW OF TORTS* 143-44 (20th ed. 1992) (explaining the distinction between libel and slander).

2. "Users" as interpreted by *Barrett v. Rosenthal*, 146 P.3d 510, 526 (Cal. 2006), refers to person or entity who uses an interactive computer service.

3. Title 47 U.S.C. § 230(f)(3) (2006), defines "information content provider" 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.

4. *See Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Lunney v. Prodigy Services Co.*, 723 N.E.2d 539 (1999).

5. 47 U.S.C. § 230 (1996).

individual who uses an online chat room, blog site, bulletin board, discussion room or other forum for communication on the Internet can be held liable for defamatory statements posted to these forums. Until the decision handed down in *Barrett v. Rosenthal*, there was a small window for the basis of user liability.<sup>6</sup> After the majority's opinion in *Barrett*, the California Supreme Court may have forever closed that window for plaintiffs who have been defamed on the World Wide Web.<sup>7</sup> On November 20, 2006, the California Supreme Court ruled that the co-plaintiff in the *Barrett* case, Dr. Polevoy, did not have an actionable claim for defamation pursuant to the CDA because the defendant, Rosenthal, was immune from liability for defamation as a user under the CDA.<sup>8</sup>

The *Barrett* decision is not binding on courts outside of California; however, it will be interesting to see how other jurisdictions respond to the ruling.<sup>9</sup> Although many legal scholars feel that the application of the CDA leaves a harsh result for plaintiffs whose reputation has been injured by way of the Internet, this ruling may prove resilient for years to come. The *Barrett* decision is significant not only in California, but in courts nationwide because it is the first case to state that the publisher/distributor analysis normally attributable to secondary publishers does not apply to an Internet user.<sup>10</sup> It also establishes for the first time that private individuals can be protected under the CDA.<sup>11</sup> After all is said and done, the *Barrett* decision has completely alleviated liability for defamation against Internet users and has left injured plaintiffs with no means of recovery.<sup>12</sup>

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6. *Barrett v. Rosenthal*, 146 P.3d 510, 526 (Cal. 2006).

7. *Id.* at 529 (holding that Internet users are immune from liability for republication of statements known to be defamatory).

8. *Id.*

9. More specifically, it will be interesting to see how and if the Pennsylvania Courts apply this precedent when deciding the defamation claim filed by Todd Hollis against DontDateHimGirl.com and Tasha Joseph, the owner and operator of the website. Todd Hollis alleged that his reputation was harmed by a user of the site when the user made a posting claiming that he has herpes, fathered multiple children, and was homosexual. Todd Hollis further alleged that Tasha Joseph published the information with knowledge of its falsity and that she published such information with reckless disregard of the truth. See Carl Jones, *Scorned Attorney Sues Kiss-and-Tell Web Site*, DAILY BUSINESS REVIEW, July 5, 2006, available at <http://www.law.com/jsp/article.jsp?id=1151658319991>.

10. *Barrett*, 146 P.3d at 529. See generally RODNEY SMOLLA, LAW OF DEFAMATION § 4:92 (2006) (explaining distinction between primary and secondary publishers).

11. *Barrett*, 146 P.3d at 526.

12. *Id.* *Barrett* may have been decided differently on the issue of whether Rosenthal committed libel when she made statements in e-mails and on Internet postings concerning Dr. Stephen J. Barrett and Dr. Terry Polevoy in a jurisdiction that has not enacted an anti-SLAPP (strategic lawsuit against public participation) statute. Cal. Civ. Proc. § 425.16 (1996). This statute provides, in part:

[A] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution

## THE CASE

Dr. Stephen J. Barrett and Dr. Terry Polevoy, plaintiffs in this case, operated web sites for the purpose of exposing health care frauds. Il-lena Rosenthal, defendant in this case, directed the Humantics Foundation for Women and operated an Internet discussion group. Drs. Barrett and Polevoy filed a suit against Rosenthal under the theory of defamation, claiming that Rosenthal and other Internet users committed libel by maliciously distributing defamatory statements in e-mails and Internet postings. The plaintiffs further alleged that the defendant's posting affected the plaintiffs' reputation, competence, and negatively impacted their efforts to combat fraud. The complaint filed by the plaintiffs also stated that the defendant, Rosenthal, republished various messages even after Dr. Barrett warned her that the messages contained false and defamatory information.<sup>13</sup> The complaint alleged that the following statements were posted on Rosenthal's discussion group:

Dr. Barrett is arrogant, bizarre, close-minded; emotionally disturbed, professionally incompetent, intellectually dishonest, a dishonest journalist, sleazy, unethical, a quack, a thug, a bully, a Nazi, a hired gun for vested interests, the leader of a subversive organization, and engaged in criminal activity.

Dr. Polevoy is dishonest, close-minded; emotionally disturbed; professionally incompetent, unethical, a quack, a fanatic, a Nazi, a hired gun for vested interest, the leader of a subversive organization and engaged in criminal activity and has made anti-Semitic remarks.<sup>14</sup>

After the complaint was filed by the plaintiffs in a lower California court, the defendant, Rosenthal, moved to strike the complaint under the anti-SLAPP (strategic lawsuit against public participation) statute.<sup>15</sup> She claimed that her statements were protected speech and argued that the plaintiffs could not establish a probability of prevailing because she was immune under section 230(c)(1) of the CDA.<sup>16</sup> The lower court granted the motion, finding that Rosenthal's statements concerned an issue of public interest within the scope of the anti-SLAPP statute<sup>17</sup> and were not actionable because the statements contained no provably false facts.<sup>18</sup> The trial court found that the only actionable statement was the statement made by Tim Bolen in an article subtitled "Opinion by Tim Bolen." This article accused Dr.

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in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff will prevail on the claim. § 425.16 (b)(1).

13. *Barrett*, 146 P.3d at 514.

14. *Id.* at 514 n.2.

15. § 425.16.

16. Communication and Decency Act (CDA) 47 U.S.C. § 230(c)(1) (2006).

17. § 425.16.

18. *Barrett*, 146 P.3d at 514.

Polevoy of stalking a Canadian radio producer.<sup>19</sup> Rosenthal posted a portion of this article on two news groups devoted to alternative health issues and the politics of medicine. However, she did not post this article to her own discussion group. Although the lower court found that the statements were facially actionable, it ruled that Rosenthal was immunized from liability for posting a portion of the article written by Tim Bolen pursuant to section 230(c)(1) of the CDA.<sup>20</sup>

Barrett and Stephens appealed the order issued by the lower court to the California Court of Appeal. The court vacated the order granting the motion to strike as applied to Dr. Polevoy. The court held that section 230 of the CDA did not protect Rosenthal from liability as a “distributor” under the common law of defamation, which would have essentially allowed the claim to go forward.<sup>21</sup> Rosenthal petitioned the California Supreme Court for review of the appellate court’s decision, and the court granted her petition.

#### BACKGROUND

The law of defamation has been a perplexing and confusing portion of American jurisprudence since its entry into the law of torts. The claim of defamation was implemented into the law of torts to protect an individual’s interest in not having his reputation tarnished by false statements.<sup>22</sup> Defamation in its simplest form is “a publication without justification or excuse, which is calculated to injure the reputation of another, by exposing him to shame and ridicule.”<sup>23</sup> As articulated by the court in *Kimmerle v. New York Evening Journal Inc.*, defamatory statements are words which tend to “expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace . . . and to deprive one of their confidence and friendly intercourse in society.”<sup>24</sup> From its various pleading requirements<sup>25</sup> to the privileges<sup>26</sup> that work to defeat the claim, the law of defamation has proved to be challenging and ever-evolving. With the excessive societal craze with global interaction on the World

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19. *Id.*

20. 47 U.S.C. § 230(c)(1).

21. *Barrett*, 146 P.3d at 518-19. A distributor is generally referred to as a secondary publisher. See RODNEY SMOLLA, LAW OF DEFAMATION § 4:92 (2006).

22. See PROSSER & KEETON, LAW OF TORTS 771 (5th ed. 1984); SALMOND & HEUSTON, LAW OF TORTS 143-44 (20th ed. 1992).

23. *Parmiter v. Coupland*, 151 Eng. Rep. 340 (1840), cited in PROSSER & KEETON, LAW OF TORTS 773 n.17 (5th ed. 1984).

24. *Kimmerle v. New York Evening Journal, Inc.*, 186 N.E. 217, 218 (1993).

25. Depending on the status of the plaintiff (private citizen, limited and general public figure, and public official) at the pleading stage the plaintiff must allege that the defendant published the information with malice or reckless disregard of the truth or that the defendant negligently published the statements; See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1975); *Getz v. Robert Welch Inc.*, 418 U.S. 323 (1974).

Wide Web and its many forms of communication, the tort of defamation in the 21st century has taken on new characteristics. Not surprisingly, these new characteristics bring more complexity to the application of defamation and have thwarted relief that was once guaranteed to plaintiffs who could prove the basic elements of defamation.<sup>27</sup>

In order to understand the significance of the ruling in *Barrett*, it is necessary to understand the distinction between the common law approach to republication of defamatory statements and the immunity allowed for republication under the CDA. At common law, before ruling on liability, courts would determine whether the individual republishing such statements knew or had reason to know of the statements' defamatory character.<sup>28</sup> This analysis is generally referred to as secondary publisher liability or distributor liability. A primary publisher is defined as the individual who or entity that has created or originally published the defamatory statements.<sup>29</sup> Entities or individuals wearing the primary publisher label are subject to liability for the defamatory material regardless of whether they knew of the defamatory meaning.<sup>30</sup> Primary publishers generally include newspapers, book publishers, radio stations and television networks.<sup>31</sup> Secondary publishers, on the other hand, generally include bookstores, libraries, and other distributors of information that do not otherwise participate in the initial creation, editing, or publishing of the material.<sup>32</sup> The common law requirement of knowledge on the part of a secondary publisher has been instrumental in finding liability for those secondary publishers who know or have reason to know of a publication's defamatory character. However, with the implementation of the CDA, such liability has been eradicated for secondary publishers using the Internet as the vehicle for defamation.<sup>33</sup>

The CDA provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any infor-

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26. There are three basic privileges or defenses to defamation: Truth, Absolute Privilege, and Qualified Privilege. See PROSSER & KEETON, *LAW OF TORTS* 771 (5th ed. 1984); SALMOND & HEUSTON, *LAW OF TORTS* 143-44 (20th ed. 1992).

27. The elements of defamation are: (1) a communication; (2) to a third party; (3) the third party knows at the time of the statement or discovers within a reasonable time the defamatory meaning; (4) of and concerning the plaintiff; and (5) lowers the reputation of the plaintiff in the estimation of the community. See *Denny v. Mertz* 267 N.W.2d 304 (1978); *Gaiimo v. Literary Guild*, 434 N.Y.S.2d 419 (1981).

28. RESTATEMENT (SECOND) OF TORTS § 581 (1977); see also *Wright v. Bachmurski*, 29 P.3d 979 (Kan. Ct. App. 2001).

29. See L. ELDRIDGE, *THE LAW OF DEFAMATION* § 44 at 232-33 (1978).

30. *Id.*

31. RESTATEMENT (SECOND) OF TORTS § 581(2) (1977).

32. *Id.* § 581.

33. 47 U.S.C. § 230 (1996).

mation provided by another information content provider.”<sup>34</sup> It is a well-settled aspect of the CDA that ISPs are completely immunized from liability for defamation suits even where such providers monitor or edit material posted on the web.<sup>35</sup> The CDA is a very broad and drastic Congressional enactment, made in response to a New York Supreme Court holding in 1995. In *Stratton Oakmont Inc. v. Prodigy Services*,<sup>36</sup> the court held that an online computer service provider could be held responsible for libelous statements made by an anonymous poster even if the provider was unaware of the statements.<sup>37</sup> In *Stratton Oakmont Inc.*, an anonymous user of the service’s “Money Talk” bulletin board posted statements alleging that a securities investment banking firm and its president committed criminal and fraudulent acts in connection with an initial public offering of stock.<sup>38</sup> The statement went on to say that the banking firm was a “cult of brokers who either lie for a living or get fired.”<sup>39</sup> The court decided this case by relying on the primary/secondary publisher analysis. The primary/secondary publisher analysis required the court to determine whether the service (1) merely distributed the posted comments or (2) exercised sufficient control over the bulletin board to render it a publisher.<sup>40</sup> The court reasoned that the service exercised substantial control over the bulletin board and therefore was not a mere distributor entitled to the protection afforded to secondary publishers such as libraries, book stores, and other distributors.<sup>41</sup> The court reached this conclusion because the service held itself out to the public and its members as controlling the content of its computer bulletin board and therefore was not a secondary publisher, but rather a primary publisher.<sup>42</sup> In making a “conscious choice” to regulate the content of its bulletin boards, the service exposed itself to greater liability than other computer networks that did not so choose.<sup>43</sup>

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34. *Id.* § 230(c)(1) (The CDA 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 sever, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. “Information Content Provider” is defined as any person or entity that is responsible, in whole or part, for the creation or development of information provided through the Internet or any other interactive computer service.)

35. See *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997); *Lunney v. Prodigy Services Co.*, 723 N.E.2d 539 (1999).

36. *Stratton Oakmont Inc., v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995), *reargument denied*, 1995 WL 805178 (N.Y. Sup. Ct. 1995).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

The decision reached in *Stratton Oakmont Inc.* became the basis of attack and led Congress to enact the CDA.<sup>44</sup> The policy behind the enactment of the CDA, as established in section 230(b), is to promote the continued development of the Internet and other interactive computer services, preserve the free market that presently exists for the Internet, offer a forum of true diversity of political discourse, as well as encourage service providers to monitor and remove “obscene,” “lewd,” “filthy,” and indecent postings on its bulletin boards, chat rooms, and other forums of communication.<sup>45</sup> With the implementation of the CDA, many other legal questions concerning defamation have come to the forefront; specifically, whether a mere individual can be considered a user in order to enjoy the immunity that is afforded to ISPs. With the ruling handed down in *Barrett*, those questions have been answered in the affirmative.<sup>46</sup>

#### ANALYSIS

The *Barrett* court reached its conclusion by relying on the statutory interpretation of the CDA and on prior case law, which extended immunity to ISPs.<sup>47</sup> The issues presented on appeal were whether Rosenthal should be granted immunity as a distributor pursuant to section 230 of the CDA,<sup>48</sup> and whether a user is entitled to immunity if a user engages in active rather than passive conduct.<sup>49</sup> The trial court ruled that Rosenthal’s action of republishing an article written by Tim Bolen was not actionable pursuant to section 230 of the CDA.<sup>50</sup> The California Court of Appeal vacated the order granting the motion to strike the complaint.<sup>51</sup> The court of appeal ruled that section 230 of the CDA did not protect Rosenthal from liability as a “distributor” under the common law of defamation. The California Supreme Court granted Rosenthal’s petition for review and ruled that section 230 of the CDA was a Congressional effort to prohibit liability for Internet providers and users for information created or developed through the Internet. The court held that section 230(c)(1) of the CDA immunizes individual users of interactive<sup>52</sup> computer services, and that no practical or principled distinction can be drawn between active and passive use.<sup>53</sup>

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44. 47 U.S.C. § 203 (1996).

45. *Id.*

46. *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006)

47. *Id.* at 513.

48. 47 U.S.C. § 203.

49. *Barrett*, 146 P.3d at 513.

50. *Id.*

51. *Id.*

52. *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997).

53. *Barrett*, 146 P.3d at 513.

The court began its analysis with an overview of the *Zeran v. American Online Inc.* decision. In *Zeran*, an impostor posted messages anonymously on the service's bulletin board advertising T-shirts with tasteless slogans concerning a bombing of a federal building that had occurred a few days before the posting.<sup>54</sup> The plaintiff brought an action against America Online Inc., claiming that the ISP unreasonably delayed removing an anonymous defamatory statement about *Zeran* from its bulletin boards, refused to post a retraction of the statements, and failed to monitor its message boards for similar defamatory messages thereafter.<sup>55</sup> The *Zeran* court recognized that Congress intended to avoid the undue burden that would be imposed on ISPs if they were required to monitor and remove messages posted to their message and bulletin boards. The *Zeran* court noted that while original posters of defamatory speech do not escape accountability for defamatory statements concerning a plaintiff, Congress "made a policy choice not to deter harmful online speech by imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."<sup>56</sup> The *Zeran* court further articulated that section 230(c)(1) of the CDA reflected the policy concern that if ISPs faced tort liability for republished messages on the Internet, they might choose to severely restrict the number and the type of messages posted.<sup>57</sup>

Relying on legislative history, the *Zeran* court quickly noted that the very purpose for the implementation of section 230 of the CDA was to encourage service providers to self-regulate the dissemination of offensive material over their services.<sup>58</sup> If liability were imposed on these companies, the *Zeran* court argued, there would be no incentive for ISPs to monitor and remove potentially defamatory or offensive statements posted to its message boards.<sup>59</sup> Liability of this nature, the *Zeran* court argued, would defeat the purpose of the CDA's passage.<sup>60</sup>

The plaintiff in *Zeran* argued that since the statute did not directly speak to whether a distributor would be entitled to the same immunity afforded to a publisher, the common law rule should prevail.<sup>61</sup> More specifically, an ISP should be found liable for defamation if it knew or had reason to know of the defamatory statements posted to its discussion forum. Despite his argument, the *Zeran* court reasoned that

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54. *Id.* at 515 (discussing *Zeran*, 129 F.3d at 328-29).

55. *Id.* at 515-16.

56. *Id.* at 516 (quoting *Zeran*, 129 F.3d at 330-31).

57. *Id.* at 516 (discussing *Zeran*, 129 F.3d at 331).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Congress had spoken directly to this issue by employing the term “publisher,” and that preserving distributor liability would defeat the primary purposes of section 230 of the CDA.<sup>62</sup> The *Zeran* court further stated that the policy of strictly construing statutes in derogation of the common law did not require a literal interpretation conflicting with the obvious legislative purpose.<sup>63</sup> This analysis allowed the *Zeran* court to hold that the common law distributor analysis had no impact on section 230 of the CDA and could not defeat the broad scope of the immunity extended by the act.

In *Barrett*, the California Supreme Court also reviewed the opinion entered by the California Court of Appeal. The court of appeal opinion declined to follow the rule of law established by the *Zeran* court.<sup>64</sup> It asserted that the *Zeran* court had created a more expansive immunity guarantee than was necessary, which would actually defeat the goal of encouraging self-regulation among ISPs.<sup>65</sup> The California Supreme Court noted that the court of appeal focused on three factors in determining whether immunity, under section 230 of the CDA, should be extended to Rosenthal: (1) the *Zeran* court’s interpretation of the statutory term “publisher;” (2) the legislative history of section 230 of the CDA; and (3) the practical implications of notice liability in the Internet environment.<sup>66</sup> The court of appeal took the view that the term publisher was ambiguous, because it might refer to primary publishers and distributors.<sup>67</sup> The court of appeal argued that such a “legally uncertain word” could not support the broad immunity that the *Zeran* court derived from the statute.<sup>68</sup> The court of appeal also articulated that it was “reasonable to assume” that Congress had in mind the different standards of common law liability imposed on “primary publishers.”<sup>69</sup> Thus, the omission of any reference to “distributors” in section 230(c)(1) of the CDA was intentional.<sup>70</sup> The court of appeal also reasoned that Congress did not intend to provide blanket protection for cases of this nature.<sup>71</sup> Instead, it argued that in section 230(c)(2) of the CDA Congress intended only to immunize providers and users against liability for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or

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62. *Id.* at 517 (discussing *Zeran*, 129 F.3d at 332).

63. *Id.* at 517-18 (discussing *Zeran*, 129 F.3d at 333-34).

64. *Id.* at 518.

65. *Id.*

66. *Id.* at 518-26.

67. *Id.* at 519.

68. *Id.*

69. *Id.* at 518-19.

70. *Id.* at 519.

71. *Id.*

user considers to be . . . objectionable.”<sup>72</sup> The court of appeal also attempted to compare the CDA with the Digital Millennium Copyright Act (hereinafter DMCA),<sup>73</sup> enacted in 1998, for additional support for limiting the scope of the term “publisher”. It stated that the DMCA immunized ISPs from liability for copyright infringement and acting expeditiously to remove copyrighted material upon notice. It reasoned that Congress specifically included such detailed notice requirements and procedures for replacement of the disputed material upon sufficient counter-notification.<sup>74</sup> The court of appeal also reasoned that because Congress did not include such specific regulations of notice liability in the CDA, Congress intended to preserve the common law distinction between publishers and distributors,<sup>75</sup> thus making Rosenthal liable if she knew or had reason to know that Tim Bolen’s article contained libelous statements regarding the plaintiff.

The California Supreme Court sided with the *Zeran* court rather than the California Court of Appeal. The court stated that the *Zeran* court appropriately construed the meaning of “publisher,” claiming that there was little reason to believe Congress felt it necessary to address publishers and distributors separately.<sup>76</sup> The court reasoned that the court of appeal “failed to respond to the *Zeran* court’s point that once online distributors are notified of defamatory content, they are placed in a position traditionally occupied by publishers, and must make an editorial decision on how to treat the posted material.”<sup>77</sup> The court stated that this was the reason why Congress did not distinguish between the terms “publisher” and “distributor.”<sup>78</sup>

The court also disregarded the court of appeal’s reasoning that a broad reading of section 230(c)(1) of the CDA would make section 230(c)(2) of the CDA unnecessary. It stated that “these provisions address different concerns. Section 230(c)(1) is concerned with liability arising from information provided online.”<sup>79</sup> This section provides immunity from claims by those offended by an online publication while “[s]ection 230(c)(2) is directed at actions taken by Internet service providers or users to *restrict* access to online information.”<sup>80</sup>

The court also stated that “[t]he Court of Appeal’s reference to the DMCA does not support its conclusion that Congress’s use of the

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72. *Id.*

73. 17 U.S.C. § 512 (1998).

74. *Barrett*, 146 P.3d at 519.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 519.

80. *Id.* at 520.

term ‘publisher’ was insufficient to abrogate ‘distributor’ liability.”<sup>81</sup> It further reasoned that “Congress crafted a limited immunity . . . with specific provision[s], [and t]he fact that it did not do so in the CDA . . . supports the conclusion that Congress did not intend to permit notice liability under the CDA.”<sup>82</sup>

After the court dispensed with addressing the flaws within the court of appeal decision that led to a different outcome than in *Zeran*, the court decided the definition of “user.”<sup>83</sup> The court recognized the definition of “user” was not included in the statute, thus to determine its meaning in the context of the statute, the court relied on the interpretation of the statute with legislative history. The court established that “[u]ser plainly refers to someone who uses something and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service.”<sup>84</sup> The court stated “that Congress in Section (b)(3) consistently referred to ‘users’ of interactive computer services as individuals, thus there is no reason to suppose that Congress attached a different meaning in Section (c)(1).”<sup>85</sup> “Rosenthal used the Internet to gain access to newsgroups where she posted [the alleged defamatory article].”<sup>86</sup> She was a “user” in the simplest form of the word,<sup>87</sup> and thus was entitled to the immunity granted under section 230(c)(1) of the CDA. The plaintiffs contended that even though Rosenthal was a user, she was an active user and therefore was not eligible for immunity. The plaintiffs further argued that the immunity extended to users and ISPs was for the “protection of ‘Good Samaritan’ blocking and screening of offensive material”<sup>88</sup> and such immunity was not intended for those persons who actively engage in posting defamatory material on the Internet. To this argument the court responded that because Rosenthal made no changes in the article she republished on the newsgroups, the court did not have to consider whether she was an active or passive user.<sup>89</sup> However, the court acknowledged that the issue of active and passive use was determined in *Batzel v. Smith*.<sup>90</sup> In *Batzel*, the defendant sent e-mail to the operator of a web site, with some changes, and distributed it to the subscribers of his e-mail newsletter.<sup>91</sup> Batzel sued Smith and the op-

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81. *Id.* at 520.

82. *Id.*

83. *Id.* at 526.

84. *Id.*

85. *Id.* at 526 (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995)).

86. *Id.* at 527.

87. *Id.*

88. *Id.*

89. *Id.* at 527 n.19.

90. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir 2003).

91. *Id.* at 1031.

erator for defamation, and the trial court denied the motion to strike the complaint. The court stated that although the theory was a viable one under California law, “Polevoy does not assert it in this case.”<sup>92</sup>

The California Supreme Court held that the defendant Rosenthal and others similarly situated are immune from defamation liability under the section 230 of the CDA based on the interpretation of the word “user.” Such a determination, the court noted, did not require an inquiry into whether the user is active or passive if no facts are present to suggest that the user edited or changed the information in any form.

#### CONCLUSION

On November 6, 2006, the California Supreme Court established with great detail that an individual user was, in fact, immune from liability for defamation under section 230 of the CDA, without inquiry into the common law primary/secondary publisher analysis. This broad interpretation of the CDA may not be consistent with legislative purpose and Congress may not have intended to completely immunize private individuals from liability. However, if there is any change to be made to this drastic law it must come from the legislature; where the California courts “giveth” the legislature “taketh” away. If *Barrett* is accepted by all jurisdictions, like *Zeran*, individuals will have no recourse for defamatory statements made on the World Wide Web.

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92. *Barrett*, 146 P.3d at 528 n.20.