

LIABILITY FOR THIRD-PARTY CONTENT ON THE INTERNET

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I come to the area of "Internet" law with a background different from many of those who speak on this subject. My relevant experience comes largely from representing established media organizations (e.g., newspapers and television stations) in traditional First Amendment related litigation, such as libel and invasion of privacy cases. I have essentially no background in computer technology, and yet I have spoken frequently at a number of different kinds of "computer law" and "Internet law" conferences over the past three years. It's always fascinating to compare the personalities of these various conferences. There's the true "computer law" conference, where you have a bunch of lawyers who represent computer manufacturers and software producers and they all know trademark law and patent law like the back of their hands. But when you mention the First Amendment to this group, they often look at you with a really weird look on their face, as if to say: "The 'First Amendment?' What is that? Some sort of patent procedure?" Then I go to conferences in New York City where the lawyers who represent the traditional media moguls gather; you know, the lawyers for *Time*, *Newsweek*, CBS, and Rupert Murdoch. They know the intricacies of First Amendment law cold, but when you talk to them about copyright and patent protection for computer software, they will stare at you as if you are talking in a foreign language. And then, of course, I go to the academically oriented conferences, where law school professors tend to congregate. There, when I talk about actual reported cases, they stare at me with an expression that says: "Why are you talking about cases? We don't work with cases. At the university we just talk about doctrine and theory."

I really don't have much of a feel for the personality of this audience yet. But the topic that I am going to focus on today is the distinction between the creators of content and the distributors of content under traditional First Amendment doctrine and whether or not the constitutional protections afforded to distributors of content are different in the online world. In short, my inquiry is whether the new dynamics of the online medium require any change to the traditional First Amendment protection afforded to distributors of speech.

In making this inquiry, it is absolutely essential to define your terms precisely. In fact, the confusion in the case law on this subject arose when the

lawyers (and then the court) failed to carefully define their terms. Indeed, the *Stratton Oakmont v. Prodigy*¹ decision is a perfect example of a case which came out with a ridiculous and demonstrably wrong decision because the lawyers in that case did not accurately define the terms they were using and, in particular, the term “publisher.”² The term “publisher” is a tricky word that has multiple personalities in the law. Accordingly, I will instead refer to the “creators” of content on the one hand and to the “distributors” of content on the other.

When I talk about the creators of content, what I am talking about are the people who actually record the content in the format in which it is disseminated to others. They are not necessarily the “authors” of the content. For example, during the “60 Minutes” television show, a reporter may be interviewing some scam artist who, during the interview, makes a defamatory comment about somebody else, and that comment is then transmitted with the rest of the program to affiliates across the country. The scam artist who made the defamatory comment is the “author” of that comment, but I refer to the producers of “60 Minutes” as the “creators” of that content: they are the ones that record it and release it for distribution to affiliates to be broadcast nationwide. In this context, “60 Minutes” is the creator of the content even though it was uttered by somebody else who is not being paid by “60 Minutes” and cannot be considered an agent of “60 Minutes.” Thus, the producers of “60 Minutes” are the creators of content that is actually seen by you, the viewer, on your television set.

A “distributor” of content, on the other hand, is someone who actually physically takes the content that has been created and gives it to you to view, hear, or read. A distributor may have knowledge of the content he gives to you. A distributor can give you something and he or she may already know what it says, and under the law of libel in that circumstance the distributor is subject to liability as a “publisher” of that content.³ But, even in that circum-

¹23 Media L. Rep. (BNA) 1794 (N.Y. Sup. 1995).

²In *Stratton*, the court held that Prodigy was subject to liability as the “publisher” of a defamatory comment posted by a user on one of its bulletin boards because, in that court’s view, Prodigy had assumed the role of “a publisher rather than a distributor.” 23 Media L. Rep. (BNA) at 1797. The court’s analysis was erroneously based on a dichotomy between “publishers” and “distributors” when, under the common law of libel, the legal term “publisher” includes *both* the person who creates the recorded defamatory text *and* the person who distributes it to others, but only when they have knowledge of the defamatory content that is disseminated. See *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1133 (E.D. Va.), *aff’d* 129 F.3d 327 (4th Cir. 1997), *cert. denied*, (1998); Hamilton, “Defamation,” *Internet and Online Law* (Stuckey, ed., Law Journal Seminars-Press 1996) §2.03[3], at 2-30 - 2-62.

³See Restatement (Second) of Torts § 581(1) (1977); note 2, *supra*.

stance, the distributor is not necessarily the creator of the content.

The true distinction between a creator of content and a distributor of content is that a creator of content inherently has knowledge of what that content says. A distributor of content, on the other hand, does not inherently know what the content he or she is disseminating says. And that is the seed of the legal distinction where the First Amendment comes in play.

I have two syllogisms that produce rules for me, the rules that I use to analyze any legal question involving the Internet. The first one starts from a proposition that's really beyond genuine dispute: all lawyers are inherently evil. It therefore follows, it seems to me, that if all lawyers are inherently evil, what they practice must be inherently evil as well; i.e., that the law is inherently evil. And, as we all know, money is the root of all evil. The logical conclusion: money is the root of all law. So analytical rule number one is: follow the money. If you follow the money, you will find the answer to your question on virtually any legal issue.

The second syllogism that produces my two rules of analysis is derived from the quotation that I believe is attributable to George Gilder.⁴ Back in the early days on the Internet law lecture circuit (say, three or four years ago), the popular quip we heard was: "Soon, all law will be Internet law." In fact, we heard a variant of that quip from Mr. Shapiro this morning, in which he repudiated the notion of some distinction between cyberspace and real space and instead suggested that soon it will all be considered the same space. So the first premise is: "All law will be Internet law." To this premise I add what I believe is equally indisputable: "Soon, all Internet law will be pornography law." It therefore follows, then, that soon, all law will be pornography law. Thus, my two analytical rules for all Internet law questions are: (i) follow the money, and (ii) figure out what pornography law has to say about the issue, and you'll get your answer.

Returning to my original inquiry — do the dynamics of the online medium require any change in the First Amendment protections for distribution of content? — let us start with rule number one: follow the money. Consider first the old, pre-online world. In the old, pre-online world, the creators of content were the ones with the deep pockets, not the distributors. The creators of the content that was distributed nationwide or worldwide had to have a lot of money because of the very nature of the medium. It required a lot of capital to publish a national newspaper or a magazine. It required a lot of capital to own and operate a national television network. Distributors of this content, on the other hand, were decentralized. The distributors were the bookstores, the library, the news vendor, the local convenience store, and the local TV affiliate. Compared to the creator of the worldwide content, the distributor did not nec-

⁴George Gilder, Managing Editor, *Forbes* ASAP Magazine.

essarily have a lot of money, and each one typically played only a bit part among the many who distributed the creator's content.

The fact that, in the pre-online world, the creator of widely-communicated content necessarily had a lot of money has two very important implications. One is that because he had a lot of money, there was a remedy for the injury that he caused if his content was tortious. Because the creator had a lot of money, the person harmed by that content could find the creator, sue him, and recover damages from him, which would pay for the costs of the lawsuit and provide an economic remedy for the harm that was suffered. Second, an interesting characteristic about money is that the people who have it don't like to lose it; indeed, they will take many, even extreme, steps to avoid losing money. If you have a lot of money, you will do a lot to avoid losing it. One thing you'll do is hire lawyers to help prevent you from getting into a situation that might force you to pay a huge damage award. You will structure your business conduct in a way that minimizes the chance that you lose your money. Thus, the creators of widely-communicated content used their money to hire a lot of lawyers to help them act responsibly and to help them convince judges and juries that they acted responsibly.

The result of all this money — money to fund litigation against the creators of widely-communicated content — was the creation over the years of a lot of reported case-law that defines the legal obligations imposed on the people who create widely-communicated content. There are boatloads of cases in the libel area, for instance, or copyright area, for instance, as to when the creator of content has published a libel or when the creator of content has infringed someone else's copyright, and there's been a lot of money spent on lawyers and litigation to determine what the law should be in those contexts.

With distributors in the old, pre-online world, the situation is different. There just wasn't a lot of money there to fund litigation against distributors. If the *National Enquirer* publishes an article that defames Shirley Jones, she is not likely to sue the local convenience store that sells the *National Enquirer*. Instead, Shirley Jones is going to sue the *National Enquirer* because it has the deep pockets. If she did sue the local convenience store, the only damages she could recover from that store would be for the harm caused by the actual issues of the magazine that were sold by that store, the one or two copies of that issue. The potential recovery just wasn't sufficient to fund much litigation against the distributors.⁵

⁵The handful of reported cases in which a distributor was sued for libel usually arose in the context of a plaintiff who sued *both* the creator of the content and a local distributor in a state court in the plaintiff's home town, in attempt to defeat diversity of citizenship and prevent the out-of-state creator of content from removing the case to federal court. See, e.g., *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 928 (E.D. Wash. 1992) (local TV network affiliate); *Spence v. Flynt,* 647 F. Supp. 1266 (D. Wyo. 1986) (local convenience store); *Dworkin v. Hustler Magazine, Inc.,* 611 F. Supp. 781 (D. Wyo. 1985) (local convenience

The result of these relatively shallow pockets: While you find in the treatises and in the Restatements a lot of commentators telling you what the law should be for distributors in various contexts, like libel, the truth of the matter is, and believe me I've done it, you won't find much case law because, quite frankly, they have rarely been sued and they have never had a final judgment of liability actually imposed on them. The money just isn't there to fund the litigation.⁶

So, for example, if you look at the Restatement provision for distributors of defamatory material, you will find the suggestion that a mere distributor is subject to liability for publishing a libel "if, but only if, he knows or has reason to know of its defamatory character."⁷ There is really no actual case law to document that suggestion, so we don't know if the courts would adopt it. Literally, the Restatement's suggestion would mean that the local grocery store, whether it be a Kroger or a Safeway or whatever, is subject to liability if one of the cashier clerks who's checking your groceries happened at one of her breaks to have read that issue of the *National Enquirer*, acquired knowledge of that defamatory article about Shirley Jones, and then rang that issue up on her cash register along with rest of your groceries. Now, hypothetically, what if the president of the company, or his spouse had read that issue of the *Enquirer* the day before and talked about the Jones article at dinner? The next day, when the president goes to work, he has knowledge of the defamatory content in the *Enquirer* that is being sold at that time in all of his company's grocery stores. Is the company then responsible for publishing the contents of the *National Enquirer*? It's an interesting intellectual exercise. The truth is there is no dispositive case law because no one has ever prosecuted such a case all the way to a final, reported judgment against a distributor of a printed publication. There was no need to. The money to fund the litigation was in the deep pocket of the creator of the content, not the distributor.

Flash forward to the new, online world and you will find that the foundations for the legal rules that existed in the old world have crumbled. It is

store); *Janklow v. Viking Press*, 378 N.W.2d 875 (S.D. 1985) (local bookstore owner and operator).

⁶There are a handful of decisions in which a court held that a distributor was not subject to liability for publishing the libelous material it disseminated, and there are a few cases in which a court held (or stated in *dicta*) that a distributor was potentially liable for publishing a libel. I have not found a single reported case in this country, however, in which a final judgment of liability was actually imposed on a defendant who merely distributed, and did not create, the libelous content in a printed publication. See Hamilton, "Defamation," *supra* note 2, § 2.03[3] at 2-32 - 2-49.

⁷Restatement (Second) of Torts § 581(1) (1977).

now the case where the creator of content that is communicated worldwide does not necessarily have a lot of money. It can very well be my 12-year old daughter typing away in my basement on our personal computer. She doesn't have a lot of money; take my word for it. Not only do the creators of online content not necessarily have a lot of money, you will also find that people who don't have a lot of money also tend to push the envelope a little more when it comes to the line between responsible and irresponsible "journalism." If you don't have money, your views of what is appropriate conduct are different than the views of people who have money. Why? Because people that have money have something to lose. They are inherently more cautious.

The other thing about the online world that I want to point out is how the distributors of online content, your online service providers, differ from their counterparts in the print world. In both the print and online context, the distributor is the person that provides the place where you go to get the speech. That can be a library, it can be a bar, it can be a grocery store, a bookstore, a newsstand or whatever. The function of providing a forum for communication, such as the function that Seton Hall Law School is performing in hosting and promoting this conference, is in essence the function of distributing speech. So the question could be posed: "Under what circumstances can the distributor be held liable if the distributor permits you to view, read or hear unlawful tortious speech at the forum that they are providing?" For instance, when Andrew Shapiro defamed Jerry Falwell earlier today, can Falwell sue not only Andrew Shapiro but also Seton Hall Law School for hosting this forum?

What makes the distributors — the "forum-providers," if you will — of online communication different from their print world counterparts is that the online service providers of today often have very deep pockets. Here we are referring to the AOLs and the Compuserves of the world. And if you combine those deep pockets with those 12-year olds in the basement that have no money, you find that the *only* deep pocket available to fund litigation may be the provider of the online forum. You also may find that the only choke point, the only place to stop the unlawful content from continuing to spread online, may be the providers of the online forum. Indeed, that is what presumably is behind the litigation strategy of the Church of Scientology, which has sued a number of online service providers, and threatened many more, in its effort to prevent the continued publication over the Internet of its allegedly copyrighted religious texts.⁸

This dynamic creates these new legal questions because now, really for the first time, if you follow the money you will find monetary reasons for wanting to know just exactly what are the legal responsibilities of the distribu-

⁸See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

tors of tortious or unlawful content. Now there is money there to fund litigation against the distributors. The problem is we don't have much case law from the old, print world to tell us about all the details and nuances of those legal obligations. What we have instead is broad, unsupported suggestions from Restatement writers and law professors.

Now that we have followed the money, we now know why we have questions that didn't receive much attention before the development of the Internet. The monetary situation has been reversed. So we now have to go to my rule number two, which is to check out what pornography law has to say on the subject.

When we focus on the obligations imposed on distributors by the law, we need to distinguish between two different burdens that the law can impose. The first is the burden of inspection. The burden of inspection requires the distributor to acquire knowledge of the content that he is disseminating. He has to actually look at it and see what it says. If you're distributing thousands of different books and magazines in your bookstore, or if you are transmitting hundreds of thousands of online messages every day, that can be a considerable, or even an impossible, burden. That's the burden of inspection.

The second burden that the law can impose on distributors is the burden of editorial judgment. In essence, the burden of editorial judgment is, after you have acquired knowledge of something's content, deciding whether to publish it or not. Do I distribute it or not? Now that I know what it says, am I going to participate in the process of communicating it to others? That's the ultimate "editorial" question, and, as a legal burden, it is essentially the burden of determining whether certain content is lawful or not. That burden really has two aspects to it. The first aspect of this burden is the need for factual investigation, which requires you to do some digging to ascertain facts about the material that cannot be ascertained by merely inspecting its content. For example, in the context of libel, you can inspect a publication and see that it contains something defamatory on its face, but you can't just look at it and know by looking whether it's true or false. You have to do more. You have to do a factual investigation. Even if defamatory on its face, the content is tortious only if it's false, but you don't know by just looking at it whether it's true or false. In order to ascertain that you may have to hire reporters to conduct an investigation. That can be an expensive part of the burden of editorial judgment, the burden of determining whether content is lawful or not.

The second part of this burden is the obligation to make the legal judgment. Once you know the facts, once you know what it says, once you know it's true or false, or that it depicts nudity and sexual activity, or that it contains material copyrighted by another, you have to make a judgment as to whether you think, given these facts, the content is tortious, obscene or an infringement of copyright. That's what you hire lawyers for, if you have a lot of money. If you don't, you have to make the judgment yourself. And if you want to avoid

getting sued, or going to jail, generally speaking, and absent any other countervailing factors, you will restrict what you distribute to that which is safe, that which is unlikely to subject you to large monetary judgments or put you in jail.

Given that description of the two kinds of burdens that the law can impose on distributors, what does the First Amendment have to say about them? And in particular, what does pornography law have to say? The answer to that inquiry must start with the Supreme Court's ruling in an old case called *Smith v. California*.⁹ In that case, California had passed a statute that made it illegal for an operator of a bookstore to have in his possession, in his inventory, an obscene book. The statute had no scienter requirement. It was a strict liability statute. It said if you have an obscene book in your store on your shelves, you are criminally liable whether or not you knew the book contained obscene content. The Supreme Court struck that statute down as unconstitutional under the First Amendment, ruling that the burden that it imposed on the bookstore operator, the burden of inspecting the contents of its inventory, was an unconstitutional infringement on the distribution of protected speech. The Court's description of its reasoning is instructive:

For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and . . . the bookseller's burden would become the public's burden, for . . . [i]f the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation of the amount of reading material with which he could familiarize himself, and his timidity in the face of absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.¹⁰

What I want to focus on is how the two burdens that the law can impose on a distributor were dealt with in the *Smith v. California* ruling. With respect to the first burden, the burden of inspection, the passage I just quoted from *Smith* makes it clear that imposing that burden on distributors of speech violates the First Amendment. It said we can't require the bookseller to inspect everything he sells because he won't have time to inspect everything, and if we put that burden on him, it will inherently and drastically limit the amount of

⁹361 U.S. 146 (1959).

¹⁰*Id.* at 153-54 (footnote omitted).

material that he could make available to the public, and that would be an unconstitutional impediment to the distribution of protected speech.

This rule from *Smith* — that imposing the burden of inspection on distributors of speech violates the First Amendment — was later applied in the context of libel cases, on the theory that the threat of civil liability creates the same problem for the bookseller, the same self-censorship of protected speech, that the threat of criminal liability creates.¹¹ It was this same rule that was dispositive in the *Cubby v. CompuServe* case.¹² Relying in large part on the reasoning in *Smith*, the court held that CompuServe, as a distributor of an online publication contained in one of its databases, could not be held liable for defamatory statements in that database unless the plaintiff could prove that CompuServe had knowledge or reason to know of the defamatory content in its database at the time it was distributed online to its subscribers.

The *Smith v. California* rule also tells us that you cannot impose strict liability on the distributor of content for copyright infringement. Think about it. What if you have a book on the bookseller's shelf, and on page 23 there is libelous speech, on page 74 there are obscene pictures, and on page 132 there is copyright infringing material (such as, for example, the lyrics of a copyrighted song)? You can't tell the bookseller that he has no obligation to inspect the book for libel because that would be unconstitutional, that he has no obligation to inspect the book for obscene photographs because that too would be unconstitutional under *Smith*, but that he *does* have the burden to inspect the book for copyright infringing material, because in other contexts courts have held that the Copyright Act of 1976 imposes strict liability for direct copyright infringement. You can't do that. Otherwise, if the bookseller has to look at every page in each book for potential infringements of copyright, he might as well keep an eye out for dirty pictures while he's doing it. But the whole point of *Smith* is that the State cannot impose the burden of inspection on the distributor, not that the First Amendment only limits the number laws he has to consider while he's inspecting his inventory.

The rule in *Smith* means, then, that in the online context, with respect to the online service providers who distribute the online speech of others, the State cannot, consistent with the First Amendment, impose on them strict liability for copyright infringement. That is to me an irrefutable conclusion, one that somehow escaped the author of the White Paper released by the Clinton

¹¹See *Lewis v. Time, Inc.*, 83 F.R.D. 455, 464 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983); *Dworkin v. Hustler Magazine, Inc.*, 611 F. Supp. 781, 786 (D. Wyo. 1985).

¹²See *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). The author represented CompuServe in that case.

Administration's Information Infrastructure Task Force, who argued in that document that the *existing* strict liability imposed by copyright law on online service providers should remain unchanged without even bothering to mention that there's this case called *Smith v. California*, which renders such strict liability unconstitutional under the First Amendment.¹³

Now, with respect to the second burden that the law can impose on distributors, the burden of editorial judgment, the Court's decision in *Smith v. California* was anything but instructive. The Court did refer to the bookseller's "timidity in the face of criminal liability," but arguably only in the context of emphasizing that the bookseller would be unlikely to take the risk of selling books that he had not had the opportunity to inspect. Indeed, the Court in *Smith* expressly declined to decide "whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further" the contents of a particular book and "whether honest mistake as to whether [a book's] contents in fact constituted obscenity need be an excuse" for a bookseller that prevents the imposition of criminal liability.¹⁴

These questions, of course, are precisely what constitutes the burden of editorial judgment — the burden of deciding whether certain content is lawful or not. Imposing the burden of editorial judgment on the bookseller clearly causes some degree of self-censorship, reducing the amount of close-to-the-edge-but-not-over-the-edge pornographic material that a "timid" bookseller is willing to make available to the public. Thus, the question arose: if the bookseller says "I knew the book was on my shelves and I knew what it contained, but I honestly didn't believe it was obscene," does the First Amendment prevent the State from imposing criminal liability on the bookseller? The Supreme Court answered that question fifteen years later in *Hamling v. United States*,¹⁵ in which it held that a bookseller can be held criminally liable for distributing obscene material if "he knew the character and nature of the materials," even if he also believed them to be not obscene.¹⁶ Thus, the law of pornography tells us that if the distributor is already aware that there is

¹³Information Infrastructure Task Force, Working Group on Intellectual Property Rights (Bruce A. Lehman, Chair), *Intellectual Property and the National Information Infrastructure*, at 114-124 (Sept. 1995) (the "White Paper").

¹⁴See *Smith v. California*, 361 U.S. at 154.

¹⁵418 U.S. 87 (1974).

¹⁶*Id.* at 123-24 ("To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by [the statute] nor by the Constitution.").

sexual activity depicted in the book he is distributing, and if the distributor just guessed wrong as to whether that depiction was obscene, well that's just his tough luck — he should have hired a better lawyer. *Hamling* tells us that you can't avoid liability by failing to brush up on the law.

So, with respect to the legal obligations of a distributor of online content, the law of pornography tells us that the First Amendment prevents any statute or common law rule that would impose the burden of inspection on the distributor, but that the State can impose, without violating the First Amendment, the burden of editorial judgment on the distributor, requiring it to determine whether the material which has already been brought to its attention is tortious or unlawful in some way.

Of course, there remains some uncertainty with respect to this latter conclusion, at least in areas outside the context of obscenity. There is essentially no gray area in the context of pornography because all you have to do is look at the picture on the page and you know what's there. Assuming you also know which jurisdiction's law is applicable (a big assumption in the online context, I know) you have all the facts you need to make the legal determination as to whether or not it's obscene or not. You may have to consult a lawyer to know whether it's obscene or not (at least until you get the hang of it), but you don't have to do any more factual investigation.

That analysis, however, doesn't work the same way when you try to apply it to libel or copyright claims. With respect to libel or copyright, a distributor might become aware of what the content he is disseminating says, but he would have to undertake an additional factual investigation to determine if the content is false or if it infringes another's copyright. Yet the burden of additional "fact investigation" in many ways might be just as "chilling" to the distribution of constitutionally protected speech as is the burden of inspection that was found to be unconstitutional in *Smith*. With respect to this specific inquiry, then, the *Smith-Hamling* line of pornography law doesn't tell us whether that additional burden of factual investigation above and beyond the burden of inspection might also violate the First Amendment, at least in the context of libel and copyright infringement claims.

With respect to libel claims, this latter First Amendment inquiry is now arguably moot, given Congress' recent enactment of Section 509 of the Communications Decency Act of 1996¹⁷ (yet another example of how all Internet law will soon become pornography law). The constitutional inquiry remains a critical one, however, in the area of copyright infringement, where millions of dollars are still being spent on and lawyers and lobbyists who right now are trying to hash out on Capitol Hill exactly what obligations should be imposed

¹⁷Communications Decency Act of 1996, § 509 (to be codified at 47 U.S.C. § 230(c)). See *Zeran v. American Online*, 129 F.3d 327.

by the Copyright statute on online service providers who are given notice that material on their systems allegedly infringes another's copyright. But I have heard or read little that suggests that these discussions include any effort to figure out what the First Amendment rules are in that context. What obligations does the First Amendment permit Congress to impose on the distributors of online content that allegedly infringes another's copyright? Is it constitutional to impose on the service providers the burden of fact investigation to determine if material alleged to be the property of another is in fact owned by that person? Is it constitutional to impose on the service providers the burden of making the legal judgment as to whether or not another's use of copyrighted material on the service provider's system constitutes "fair use"? And if we conclude that such burdens can be imposed without violating the First Amendment, what are the implications of imposing such burdens for the revolutionary qualities of this new medium, which has such promise to enable all citizens to participate for the first time as seller's in the marketplace of ideas? Will this promise of the opportunity for true freedom of expression be sacrificed at the altar of the online service providers, who become obligated by the law to serve as omniscient editorial censor boards? These are First Amendment inquiries that I believe deserve far more attention than they are currently receiving. And with that, I'll sit down.