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Defamatory E-mail and Employer Liability: Why Razing Zeran v. America Online Is a Good Thing

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Defamatory E-Mail and Employer Liability:

Why Razing *Zeran v. America Online*^[1]

Is a Good Thing

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I. INTRODUCTION

{1} Electronic mail ("e-mail") has taken its place as an integral part of communication in modern society.[3] Unlike other forms of communication, e-mail can cheaply and efficiently be placed in a public domain for literally the world to see.[4] These public areas, otherwise known as bulletin boards, have expanded society's ability to communicate over vast distances.[5] Individuals or groups can also engage in mass communication, which involves a myriad of topics and concerns.[6] Nevertheless, such electronic communications, as almost any other form of communication, can become volatile and create animosity among users.[7] Hence, many of the remarks made in such exchanges can become defamatory in nature. When such banter becomes litigious, e-mail and Internet service providers ("ISPs") are brought into the fray.[8]

{2} As employers increase in size and sophistication, many are becoming providers or users of e-mail and Internet services.[9] Accordingly, these employers, in hopes of expanding their scope of communication, have opened these communication portals to their employees.[10] As this trend continues, employers are finding that they, like "traditional providers,"[11] are subject to suits involving libel, sexual and racial harassment.[12] Thus, employers find themselves traversing a quagmire of liability. Defamation liability is a primary concern, considering that one misplaced e-mail message can bring forth tort-based suits against an employer. Nevertheless, based on the Fourth Circuit Court of Appeals misinterpretation of the Communication Decency Act of 1996 ("CDA") [13], employers will find that the CDA will serve as their talisman to defamation liability.

{3} This article will focus on the development of libel law as it pertains to publishers and distributors of information. The article will then address the modification of this legal landscape as applied to employee e-mail and Internet communication.[14]

II. PUBLISHER VS. DISTRIBUTOR LIABILITY[15]

{4} According to the Restatement (Second) of Torts, "one who repeats or otherwise republishes defamatory

matter is subject to liability as if he had originally published it." [16] Consequently,

[t]hose who manufacture books by way of printing and selling them, and those who print and sell newspapers, magazines, journals, and the like, are subject to liability as primary publishers because they have the opportunity to know the content of the material being published and should therefore be subject to the same liability rules as are the author and originator of the written material. [17]

Though the printer or seller of newspapers, magazines or journals is not invariably vicariously liable for the acts of the author, [18] there are instances where strict liability was imposed. [19] If a principal-agent relationship exists between the parties, liability on the part of the principal can be found. [20] If this relationship is evident, then the publishing of an intentionally false communication that injures another's reputation or good name may result in defamation liability. [21]

{5} Nevertheless, the United States Supreme Court placed limitations on the class of persons who could be construed as "publishers" for the purpose of defamation actions. This narrow class of individuals, as articulated by the Court in *Smith v. California*, [22] encompasses those construed as "distributors" of publications. [23] In *Smith*, the Supreme Court heard the case of a proprietor of a bookstore who was convicted of violating a Los Angeles city ordinance which prohibited the possession of any obscene or indecent writing, or book. [24] In analyzing this strict liability ordinance, the Court found that, "[b]y dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter." [25] Such restrictions would undeniably reduce the amount of reading material accessible by the public due to the seller's inability to familiarize himself with so many works. [26] The Court reasoned that, "the distribution of all books, both obscene and not obscene, would be impeded." [27] Therefore, the Court held that an ordinance that has a tendency to hinder the freedoms of speech and press "cannot stand under the Constitution." [28]

{6} As a result of this holding, other courts began to seize upon the distinction drawn between publishers and distributors. Accordingly, distributors of defamatory material may be found liable for defamation only "if [they] know[] or ha[ve] reason to know of its defamatory character." [29] This definition forces plaintiffs to meet a higher burden when determining the culpability of vendors, booksellers or distributors. As a result of this higher threshold, courts have been able to ease the fears of chilling communication. The paradigm of this distinction - as applied to Internet communication - surfaced in *Cubby Inc. v. CompuServe, Inc.* [30] The plaintiff, Cubby, Inc. ("Cubby"), filed suit against CompuServe, Inc. ("CompuServe"), for allegedly defamatory messages posted on a forum accessible through CompuServe. [31] The forum was regulated by Cameron Communications, Inc. ("CCI"), which was independent of CompuServe. [32] A publication available as part of this forum was Rumorville USA ("Rumorville") which was published by Don Fitzpatrick Associates of San Francisco ("DFA"). [33] DFA was under contract with CCI, and CompuServe contracted solely with CCI. [34] CompuServe, therefore, had no direct relationship with DFA. [35] Therefore, CompuServe had no opportunity to review Rumorville's contents before DFA uploaded it into CompuServe's computer banks, from which it became immediately available. [36] Thus, when allegedly defamatory remarks concerning the plaintiffs were seen on the Rumorville website, the plaintiffs asserted libel claims against both, CompuServe and Fitzpatrick. [37] CompuServe argued that it was a distributor of Rumorville, but not a publisher; the ISP asserted that it was not "liable on the libel claim because it neither knew nor had reason to know of the allegedly defamatory statements." [38] Cubby, however, argued that CompuServe was a publisher, and because of that status, Cubby proposed that it did not have to meet the higher standard of distributor liability. [39]

{7} The district court, in noting the differences between distributors and publishers, pointed out the similarities between CompuServe and a bookseller. [40] In articulating this point, the court looked to *Smith v. California*, [41] in which the U.S. Supreme Court reasoned that if, "[e]very bookseller would be placed under

an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience."^[42] Hence, the district court found CompuServe to be a distributor, and held that since CompuServe had no knowledge or reason to know of the statements made in Rumorville, it was not liable for the statements.^[43] The Nassau County New York Supreme Court, however, did not follow Cubby's reasoned example. In *Stratton Oakmont, Inc., v. Prodigy Service*,^[44] Stratton Oakmont Inc. ("Stratton Oakmont") initiated a suit against Prodigy Services Company ("Prodigy"), the owner and operator of a computer network on which allegedly defamatory messages appeared on October 23 and 25, 1994.^[45] Judge Ain ruled, as a matter of law, that Prodigy was the publisher of these statements.^[46] The court reasoned that since Prodigy exercised editorial control over its bulletin boards and likened itself to newspapers, the ISP takes on the same liability as a publisher.^[47] Evidence of Prodigy's control was Prodigy's promulgation of guidelines and the use of Board Leaders. The court found that the guidelines and use of the Board Leaders rendered Prodigy a publisher with the same responsibilities as a newspaper.^[48] Accordingly, Prodigy was found liable as a publisher.^[49] This holding created concerns that the development of Internet services would be inhibited due to the fear of ISP liability.^[50] The end result was the creation of provisions of the CDA in order to counteract and mitigate the chilling effect of *Stratton Oakmont*.^[51]

III. THE INTRODUCTION OF THE COMMUNICATIONS DECENCY ACT OF 1996 ("CDA")

{8} Section 230(c) of the CDA provides that, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."^[52] The language of this statutory provision of the CDA evidenced Congress' rejection of classifying ISPs as publishers for liability purposes.^[53] Congress, in articulating this point, prohibited provider or user liability if such provider or user took action to restrict access to material it believed to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable whether or not such material is constitutionally protected; or . . . any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)."^[54] Congress also broadly defined a provider of an interactive computer service to include "any information service system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet"^[55] This specifically tailored language eviscerated Judge Ain's interpretation of provider liability in *Stratton Oakmont*.

{9} The legislative history of this provision reveals Congressional fears that future cases, allied with *Stratton Oakmont*, would force ISPs to stop policing their servers in order to minimize libel suits.^[56] Such an outcome, some believe, would indirectly allow obscenity and other offensive material to flourish.^[57] Congress, anticipating such an outcome, determined that it was necessary to overrule *Stratton Oakmont*.^[58] Congress specifically stated that: "[o]ne of the specific purposes of this section [Section 230] is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which 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."^[59] The conferees further explained their rationale behind Section 230, when they remarked that decisions such as the one in the *Stratton Oakmont* case create serious obstacles to the federal policy of empowering parents to control the content of electronic communications their children receive via the Internet.^[60] Congress made it clear that it is the policy of this country to remove disincentives to the development of filtering technologies.^[61] Further, Congress emphasized this point by expressly preempting inconsistent state laws.^[62] The result of the CDA was the re-emergence of the holding in *Cubby*.^[63] This distinction once made by the district court in *Cubby*, resurrected by Congress' CDA, seemingly destroyed any other interpretation of provider/distributor liability for ISPs. The CDA reduced the field to only distributor-type liability.^[64] Hence, individuals pursuing providers for defamatory messages posted via their servers can only prevail if the provider knew or had reason to know of the defamatory messages. Accordingly, an ISP would be akin to a bookseller, vendor, or distributor. In this manner, Congress maintained an ISP's ability to

exercise editorial control without being subject to a publisher's strict liability. This pendulum, which was finally set by Congress through the CDA legislation, was then pushed in another direction with the emergence of *Zeran v. America Online, Inc.*[65]

IV. THE EMERGENCY OF ZERAN CLOSES OFF ANY DISTRIBUTOR-TYPE LIABILITY FOR INTERNET SERVICE PROVIDERS

{10} An individual, Kenneth Zeran, brought suit against America Online, Inc. ("AOL"), for the unreasonable delay in removing defamatory messages posted by an unknown third party.[66] Specifically, this unidentified third party posted messages on an AOL bulletin board advertising "Naughty Oklahoma T-Shirts." [67] The messages stated that those interested in purchasing the shirts were to call Ken [Zeran] and were given Zeran's home phone number.[68] The posting of these messages resulted in a high volume of calls to Zeran at his private residence.[69] Zeran notified AOL of this situation and was informed that the posting would be removed, but that it was not AOL's policy to post retractions.[70] The next day, an unknown person posted another message advertising the shirts, again gave Zeran's phone number, and told interested parties to ask for "Ken." [71] These postings continued for the next several days and during this time, the volume of angry phone calls to Zeran intensified.[72] Zeran also reported this to the FBI; yet, the angry phone calls still came approximately every two minutes.[73] Finally, Zeran brought suit against AOL, arguing that AOL is liable for defamation.[74]

{11} Zeran argued that Section 230 of the CDA eliminates publisher liability, but leaves distributor liability intact for interactive service providers such as AOL.[75] Accordingly, AOL could only be found liable for the defamatory messages posted on its server if it was shown that they knew or should have known of the defamatory material.[76] Zeran consequently argued that AOL was provided with sufficient notice of the defamatory messages and was therefore liable as a distributor, since AOL acquired knowledge of the defamatory messages.[77] Chief Judge Wilkinson, writing for the panel, reasoned that since every repetition of a defamatory statement is considered publication, when AOL repeats whatever is posted on its server, it is legally considered a publisher.[78] The court found that "AOL falls squarely within this traditional definition of a publisher and therefore, is clearly protected by [Section] 230's immunity." [79] Further, the court reasoned that the distinctions between "publisher" liability and "distributor" liability both fall within the larger publisher category.[80] Though the court was provided with the histories of *Stratton* and *Cubby*, the court nonetheless found that there was nothing in these cases to "suggest that distributors are not also a type of publisher for purposes of defamation law." [81] Therefore, the court held that the CDA "plainly immunizes computer service providers like AOL from liability for information that originates with third parties." [82]

V. ZERAN'S FLAWED REASONING[83]

{12} The Fourth Circuit Court of Appeals' reasoning in *Zeran* is flawed in several ways. Primarily, Congress enacted the CDA to prevent publisher liability as articulated in the legislative history of the CDA.[84] Specifically, Congress wanted to prevent courts from classifying providers as "publishers" and thereby possibly finding them strictly liable for defamatory messages posted by third parties on their servers. The court, in *Stratton Oakmont*, had the option of finding that a provider was a "distributor" or a "publisher." [85]

{13} The court chose the latter and found Prodigy liable, as if they had originally published the defamatory material.[86] This result, as feared by many, would chill providers from actively screening their bulletin boards.[87] Congress, fearing this hands-off approach to Internet interaction as well as the unfettered development of obscene and offensive materials, overruled this case by enacting the CDA, and making it clear that providers or users of interactive computer services would not be treated as a "publisher" or "speaker" if they took any good faith actions to restrict access to the availability of material.[88] This action on the part of Congress specifically focused on the ramifications of *Stratton Oakmont* and thereby

reestablished the validity of *Cubby*, which found that provider liability was equivalent to that of a bookseller, distributor or news vendor.^[89] Nevertheless, the Fourth Circuit Court of Appeals' holding redefined "distributors" as nothing more than a subset of "publishers."^[90] This judicial gloss on defamation liability shifted provider liability from the strict application in *Stratton Oakmont*, to the prerequisite standard of knew or should have known, pursuant to the CDA, to finally, the extremely generous status of no liability whatsoever in a defamation suit in which a third party disseminates defamatory messages. Accordingly, the Fourth Circuit Court of Appeals effectively redefined the parameters of Internet provider liability in actions for defamation. The court stated that, "[l]ike the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation."^[91] The court went on to say that, "[i]f computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message."^[92] Though this statement gives insight into the court's rationale behind finding that a provider will invariably be classified as a "publisher" and therefore not subject to liability for defamation, this is not what Congress meant by enacting the CDA. This judicial legislating, though noble in its foresight, nevertheless falls outside of the parameters of the judge's role in society. As a result of the court's retooling of defamation law, other courts have followed this dangerous, diverging path. A development of this shift from congressional intent to judicial legislating is also evident in the *Blumenthal v. Drudge* case.^[93]

VI. OTHER COURTS FOLLOW DOWN THE SLIPPERY SLOPE

{14} In *Blumenthal*, White House employees brought a defamation action against a gossip columnist, Matt Drudge, and AOL, for allegedly defamatory remarks about the Blumenthals that were posted on AOL.^[94] AOL had a licensing agreement with Drudge to make the publications of Drudge available to all members of AOL.^[95] The licensing agreement gave AOL the right to remove, or to direct Drudge to remove, content that violates its Terms of Service.^[96] The district court granted AOL's motion for summary judgment, finding that AOL was a publisher and therefore immune to liability pursuant to Section 230 of the CDA.^[97] The court used the same reasoning of the *Zeran* court, in finding that "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."^[98] Nevertheless, this court, like the Fourth Circuit, failed to understand that Congress' purpose behind the CDA which was much narrower than the reasoning espoused by both courts. Congress intended to prevent strict liability, as first imposed by the *Stratton* court. If, however, the provider knew or should have known of the defamatory material, liability could be found. The purpose of the CDA was to encourage the filtering of information that may be placed on the Internet.^[99] In that regard, distributor liability would force a provider to actively self-regulate defamatory material if contacted about such information. With the judicial gloss placed on the CDA, there is now no incentive for providers to filter any information or materials placed on their servers by a third party. Based on the holding in *Zeran*, district courts within the Fourth Circuit have continued the misinterpretation of the CDA.

{15} In *Mainstream Loudoun v. Board of Trustees*,^[100] the district court heard a suit in which an association, Mainstream Loudoun, and ten (10) plaintiffs, sued Loudoun County public libraries for adopting a policy which required site-blocking materials from their Internet accessible computers.^[101] The Plaintiffs argued that this policy "blocks their access to protected speech. . . ."^[102] The Defendants, *inter alia*, argued that the CDA, specifically Section 230, made them immune from suits involving the blocking and screening of offensive material.^[103] The Defendants pointed out that this must be true since the CDA defines an interactive computer service to include "a service or system that provides access to the Internet [that is] offered by libraries or educational institutions."^[104] Though this language seemed clear enough, the district court found that this language, though "facially attractive, it is not supported by that section's legislative history or relevant case law."^[105] The court ruled that "[Section] 230 was enacted to minimize state regulation of Internet speech by encouraging *private* content providers to self-regulate against offensive

material. . . "[106] Therefore, the court found that the CDA did not bar this action.[107]

{16} The conclusion reached by the court may have been correct, but the rationale used to reach that conclusion is flawed and creates further confusion as to the proper interpretation of the CDA. The court, in *Mainstream Loudoun*, could have just as easily discussed the applicability of the CDA to libraries; yet, it maintained that Section 230 of the CDA only applied to matters involving "tort-based" liability. Therefore, though libraries would be protected under the CDA from defamation suits, they would have no protection for injunctive-based relief which was sought in this matter.[108] Instead of reading the plain language of the statute, the court seized upon legislative history to make a point. As a result, other courts may interpret the court's language to mean that public institutions would be subject to libel suits for defamation if they exercise any editorial control over Internet access. This will then cause such institutions to either forego Internet access or to refrain from blocking potentially offensive material for fear of acquiring liability as a "publisher." This too will defeat the stated purpose of the CDA, which was to encourage the filtering of the Internet. As a result, the law is skewed to prevent almost all defamation suits from proceeding against providers such as AOL, yet to allow suits against public entities. In essence, the Fourth Circuit has given providers such as AOL, CompuServe, and Prodigy no incentive to monitor their bulletin boards because of immunity, and public entities such as libraries now have ample reason not to screen what comes across the Internet and into a public library because of a lack of immunity. Such decisions pervert the intent of Section 230 of the CDA. [109]

VII. IMPLICATIONS AS APPLIED TO EMPLOYERS

{17} With the advent of the CDA, coupled with its interpretation by *Zeran*, *Blumenthal*, and *Mainstream Loudoun*, an interesting scenario develops. As it currently stands, private ISPs, regardless of their knowledge of defamatory material, are absolved of liability in defamation suits. The only restriction on this absolution would be in situations in which they themselves are the information content provider.[110] Therefore, if a private ISP exercises control over an Internet bulletin board and knows or has reason to know of the defamatory material posted on their board, they are still free from liability.[111] This congressional/judicial change to the landscape of publisher liability for defamation on the Internet effectively creates a two-fold problem when determining employer liability in situations where employers give employees access to e-mail and Internet services.

{18} The CDA defines an interactive computer service to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." [112] The CDA, as previously articulated, prohibits defamation suits against providers or users of interactive computer services for allegedly defamatory statements made by third parties.[113] This language, though originally tailored for Internet providers such as AOL, Prodigy and CompuServe, can apply to other entities such as "employers," [114] who use such services to give their employees Internet access. Thus, the application of the CDA to today's employers, as interpreted by *Zeran* and *Blumenthal*, becomes an important issue. If these cases do apply to "employers," then employers will allow employees to say and post anything, since employers will be immune from liability. If they do not apply to "employers," then liability suits must revert back to the publisher/distributor landscape.

{19} The Fourth Circuit Court of Appeals and the U.S. District Court for the District of Columbia's findings of immunity for AOL translate into the same immunity for employers who know of computer messages being sent by their employees that are defamatory in nature. If the provisions which provide immunity to ISPs, such as AOL, are found to be applicable to "employers," then it is probable that an employer will make no effort to curb many of the current e-mail practices of its employees, as defamation liability would not be forced upon the employer. Imagine the following hypothetical. Assume that an employee who is part of the employer's

hiring committee sends an e-mail to others in the company making disparaging remarks about a potential candidate for employment. The remarks, though untrue, keep the candidate from finding employment. This message is then widely circulated and finds its way to the potential candidate.

{20} Under such a scenario, the employer may find itself facing a defamation suit for these ill-advised remarks. Pursuant to the current setting of ISP liability, an employer would not be considered the Internet content provider.^[115] Therefore, it becomes conceivable that it would be construed as a provider or user of an Internet service. Based upon *Zeran* and *Blumenthal*, the employer is not liable for the employee's statements. Thus, an employer need not take any proactive step to stop such actions by an employee under the current interpretation of the CDA. Though the actual creator of the message can be pursued, they may not be able to remedy the harm already caused by the defamatory message. Therefore, regardless of whether the defamed individual was an employee, the employer would have no reason to stop such actions. This turn of events is contrary to the congressional intent of the CDA, which is to give providers and users incentive to self-regulate.^[116] Accordingly, an employer who may be subject to liability under the previous hypothetical if the allegedly defamatory statement were disseminated in hard copy form, such as in the form of an internal memorandum, would not face liability if it were e-mailed instead.

VIII. THE EQITABLE BENEFITS OF RECTIFYING ZERAN'S MESS

{21} It is necessary to rectify the series of problems that are developing as a result of *Zeran* and its progeny. The rulings of *Zeran* and *Blumenthal* have rolled back the provisions established to foster the development of filtering techniques on the Internet. As a result of *Zeran*, employers/ISPs have a diminished incentive to filter what e-mails are passed through the workplace. However, this setting may not be seen as problematic in most cases. For example, what are the implications of an employee sending offensive images with captions which are defamatory in nature? Pursuant to the Fourth Circuit's interpretation of the CDA, the employer would only have to invoke the provisions of the CDA in order to gain immunity. Due to the ease in which e-mails can be altered, a defamed private party may find no means by which to remedy this wrong. Under a distributor liability framework, if an employer knows or has reason to know of defamatory material that is being passed via the Internet, it can be held liable for the content of the message. As such, the employer would have reason to promulgate policies regarding Internet e-mail usage. Such policies would further the intent of the CDA in filtering information that is passed by this medium of communication. Employees, knowing that such communication could be monitored and recorded, would refrain from acting impulsively and unwisely.

{22} Some may argue that this stance on the development of the Internet and e-mail has Orwellian overtones. Nevertheless, with the proliferation of other Internet and e-mail services, an employee can engage in whatever acts they chose without subjecting the employer to libel claims. Under such circumstances, a preferred balance is struck. The employer who is better able to regulate Internet and e-mail usage in the workplace will do so for fear of liability. Additionally, under this proposed approach, a party who is defamed will not be placed in a situation in which she cannot find a party from whom she can obtain a remedy.

{23} Without a fundamental change in the stance taken by the Fourth Circuit Court of Appeals, employers/ISPs will depart from proactively developing filtering mechanisms in their Internet computing in favor of adopting a more passive approach since distributor liability will no longer be a concern. Therefore, it is imperative that other circuits take note of developments in this area of the law and tread cautiously when entertaining the idea of adopting the reasoning promulgated by *Zeran*. To adopt *Zeran* would be to uncover another level of issues, such as employer liability, which would run contrary to the purpose of the CDA. By taking one step back and reevaluating the course this area of law has taken, the pitfalls of *Zeran* can be avoided. Although, employees may scoff at the idea of an employer actively restricting Internet and e-mail services, the benefits of such filtration merit further investigation and consideration on the part of employers.

This will give users pause when some decide to make statements that are neither true nor appropriate. Maintaining distributor-type liability for employers will effectively clean up the information passed through employer-controlled communication portals.

IX. PRIVACY ISSUES IF EMPLOYERS ACTIVELY FILTER E-MAIL

{24} If other courts decide not to follow *Zeran*, and employers are thereby forced to take a more active role in supervising Internet communication, issues concerning privacy arise.[117] The reasoning behind such fears is that, due to the passwords that are usually required for Internet access, employees believe that their communications are private.[118] Furthermore, some cite to the Electronic Communications Privacy Act ("ECPA")[119] as support for their right to obtain and utilize private e-mail.[120] Specifically, Section 2511(1)(a) of the ECPA prohibits the "interception" of electronic communications; therefore, some believe that the review of e-mail sent through an employer's server would be in direct violation of the ECPA.[121] Nevertheless, a carefully crafted policy statement, as well as the unique workings of Internet and e-mail servers, enable an employer to monitor the e-mail communication of employees without violation the ECPA.

{25} An example of this e-mail monitoring dilemma arose in *Bohach v. City of Reno*,[122] wherein police officers facing an internal investigation argued that investigators could not access messages stored in its computerized paging system, since doing so would violate their right to privacy and be in violation of the ECPA's provisions against the interception of electronic communications.[123] The district court ruled that there was no violation of their right to privacy, nor of the ECPA.[124] The court reasoned that the officers had a diminished expectation of privacy since the then Chief of Police notified all users of the system that messages would be logged on the network.[125] Additionally, the court reasoned that the storage of messages falls outside of the prohibited "interception" of messages because no lines were actually "tapped." [126] Therefore, such messages in storage fall within the confines of Section 2701(c)(1) of the ECPA which "allows service providers to do as they wish when it comes to accessing communications in electronic storage." [127] Other courts in varying contexts have also adopted this "narrow" distinction of removing electronically-stored personal messages from the "interception" definition of electronic communications under the ECPA.[128]

{26} Based on the aforementioned case law, it is evident that an employer can periodically review employee e-mail that is in storage without fear of being subject to violations of privacy and the ECPA.[129] Some may argue, as was done in *Wesley College v. Pitts*, that this narrow definition may allow those who obtain messages from storage to circumvent the ECPA and to use those messages with impunity.[130] Nevertheless, as the *Wesley* court articulated, this change must be made by Congress not the judiciary.[131] This differs from the approach of the *Zeran* court, which used its position as arbiter of a landmark Internet case to legislate. If the CDA was unhindered by its misinterpretation by the *Zeran* court, it would force employers to become more aware of the possible liabilities associated with defamation law, and to take action to prevent liability. Employers would be able to do so without fear of violating the privacy rights or the ECPA.

X. CONCLUSION

{27} If employers are paying attention to the development of this area of the law, they will find *Zeran* and *Blumenthal* to be very powerful allies in averting defamation liability. If other circuits follow the path of *Zeran*, the purpose of Section 230 of the CDA, which is to encourage self-regulation, will evaporate. Thus, "traditional providers" and employers will have no incentive to regulate potentially defamatory information that passes through their computer network. Accordingly, *Zeran* needs to be razed by other circuits in order to reestablish the primary purpose of the CDA. This change would bring back the balance between freedom and responsibility. If employers are forced to face distributor-type liability for e-mail in the workplace, there will be an increase in the demand for filtering and monitoring technology. This will not only enhance accountability for defamation purposes, but will also give others pause before they send a potentially

ENDNOTES[*]

[*].**NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Michael H. Spencer, *Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America Online Is a Good Thing*, 6 RICH. J.L. & TECH. 25 (Spring 2000), at <http://www.richmond.edu/jolt/v6i5/article4.html>.

[1]. 129 F.3d 327 (4th Cir. 1997) (holding that immunity provision in Communications and Decency Act barred claims against ISP for defamatory information posted by third persons).

[2]. Associate, Spilman Thomas & Battle, PLLC; General Counsel to the State Senate Minority Leader; Law Clerk for the Honorable Elizabeth V. Hallanan, U.S. District Court for the Southern District of West Virginia, 1996-98.

[3]. See Michael Booth, *Many in U.S. Don't Mind Being E-mailed*, DENVER POST, Aug. 16, 1998, at A1 (noting that "[e]lectronic mail is the fastest-growing form of communication in America, changing the way we talk to family, conduct business, go to school and introduce ourselves to strangers"). *Id.* See generally Alexis Bloom, *Creating an Effective Web Presence: A Law Firm Web Site Developer Tries to Focus His Customers on Their Services, Not Their Logos*, NAT'L L. J., Sept. 21, 1998, at B11 (noting that e-mail has become an integral part of business communications eliminating functions previously performed by secretaries and receptionists); Neasa Macerlean, *Workplace: Off to the Zoo? Smile You Are on CCTV*, OBSERVER, Aug. 30, 1998, at 1 (explaining that businesses are monitoring employee's e-mail).

[4]. See Robert McGarvey, *Mail Call*, ENTREPRENEUR MAG., July 1, 1998 (detailing that "experts agree the surest online tool is e-mail" for reaching customers). *Id.* See generally Joanne Jacobs, *It's Easy to Become Lost in Cyberspace*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 8, 1998, at A4 (discussing how people who spend many hours online feel lonely).

[5]. Usenet is one such forum that gives Web users a place to communicate electronically. See Katie Hafner, *Old Newsgroups in New Packages*, N.Y. TIMES, June 24, 1999, at G1 (describing "Usenet" as a "sprawling collection of on-line discussion groups that has been an integral part of the Internet"). *Id.*; *Net Newsgroup Traffic Is Clogged with Spam*, ST. LOUIS POST-DISPATCH, May 27, 1998, at C8 (estimating twenty-four million Usenet users, discussing topics in sixty-thousand groups).

[6]. See John House, *Talk, Talk, Talk: On-line Chat Opens Up a Whole New World, If You Know Where to Look*, WALL ST. J., June 1, 1998, at R13 (suggesting ways to find information through mailing lists, discussion groups, and chat rooms); see, e.g., America On-Line, *People & Chat Directory* (visited Feb. 28, 2000) <<http://www.aol.com/community/directory.html>>; Deja.com, *User Tour; Discussions* (visited Feb. 28, 2000) <http://www.deja.com/help/newusers_2.shtml> (explaining how the user can "search across, read, and participate in discussions on more than 60,000 subjects"). *Id.*

[7]. See, e.g., Bill Murdoch, *Junk Emails Costing Irish Businesses Over (pounds) 230m*, IRISH TIMES, Apr. 27, 1998, at 16 (stating that a survey from a networking software company revealed that survey respondents received a fair amount of sinister or offensive e-mails); Tom Standage, *Connected: Office Bullies Lash Out With Email*, DAILY TELEGRAPH (London), June 3, 1997, at 2 (reporting that e-mail is used by business managers to harass and bully employees); *NY, MD Join Anti-Abusive Email Movement*, INTERACTIVE DAILY, Feb. 6, 1997 (noting proposed legislation offered by New York and Maryland lawmakers to make sending abusive e-mails illegal).

[8]. See Sections II and IV *infra*.

[9]. Scott Dean, *E-mail Forces Companies to Grapple With Privacy Issues*, CORP. LEGAL TIMES, Sept. 1993, at 11 (explaining that, with "40 million users sending 60 billion messages by the year 2000, e-mail's biggest fan [is] corporate America. . . ." Further, corporate e-mail systems give workers access to online bulletin boards and other computer systems). *Id.*

[10]. See *id.* The vast number of organizations with a Web presence support this contention.

[11]. This article refers to America Online, CompuServe, and Prodigy as being traditional providers of Internet and e-mail services.

[12]. See, e.g., *Owens v. Morgan Stanley*, No 96 Civ. 9747, 1997 WL 403454 (S.D.N.Y. 1997) (alleging employment discrimination and hostile work environment stemming from racist e-mail); *Curtis v. Citibank*, No. 97-1065 (S.D.N.Y. July 27, 1999) (alleging hostile work environment based on sexist and racist e-mail circulated among employees); see also *Hobson Audley Hopkins & Wood: Employment Expert Offers Guidance on Employer E-mail Liability*, M2 PRESSWIRE, Aug. 7, 1998 (reporting that an employment specialist warns that employers may face liability for an employee's misuse of e-mail "carried out . . . in the course of their employment. . . . Key areas where employers are at risk are libel and sexual and racial harassment"). *Id.*; Peter Brown, *Developing Corporate Internet, Intranet and E-Mail Policies*, 520 PLI/Pat 347, 349, 359 (1998) (noting potential corporate liability for employee misuse of e-mail).

[13]. See Section V *infra*.

[14]. The two major cases that evidence this change in the law are *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) and *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

[15]. This is a general analysis of publisher and distributor liability since states are free to fashion their own law of defamation of a private person so long as they do not impose liability without fault, as articulated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

[16]. Restatement (Second) of Torts § 578 (1977); see also *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (reporting rule from Restatement quoted above).

[17]. W. Page Keeton Et. Al., *Prosser and Keeton on the Law of Torts* § 113, at 810 (5th ed. 1984).

[18]. See *id.*; see also Restatement (Second) of Torts § 580B (1977) (rejecting strict liability). See generally *Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085 (Ala. 1988) (holding that statements accusing employee of theft were not "published" where communicated to other employees acting within scope of employment and in line with duties); *Schneider v. Pay'n Save Corp.*, 723 P.2d 619, 624 (Ala. 1986) (noting that employers have a conditional privilege "conditioned upon publication in a reasonable manner and for a proper purpose"). *Id.*; *Miles v. Perry*, 529 A.2d 199, 207 (Conn. App. Ct. 1987) (finding that qualified privilege based on discharge of public or private duty may be lost by broadcasting defamatory remarks with malice, not in good faith, and to improper parties); *Bagwell v Peninsula Regional Medical Center*, 665 A.2d 297, 316

(Md. Ct. Spec. App. 1995) (finding that plaintiff consented to the publication of the allegedly defamatory information thereby relieving employer of liability); *Great Coastal Express, Inc. v. Ellington*, 334 S.E.2d 846, 852-53 (Va. 1985) (rejecting strict liability for words that are actionable *per se*).

[19]. *See Sleem v. Yale Univ.*, 843 F. Supp 57, 62 (M.D. N.C. 1993) (holding that North Carolina law imposes strict liability). *See generally* Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment and Sex*, 1996 U. Chi. Legal F. 377, 402 (stating that a publisher theoretically may be strictly liable for publishing defamatory statements).

[20]. *See supra* note 16.

[21]. *See* Black's Law Dictionary 417 (6th ed. 1990); 50 AM. JUR. 2D, *Libel and Slander* § 375 (1995).

[22]. 361 U.S. 147 (1959).

[23]. *Id.*

[24]. *See id.* at 148. *See generally* Christina Egan, *Supreme Court Review: Level of Scierter Required for Child Pornography Distributors: The Supreme Court's Interpretation of "Knowingly" in 18 U.S.C. Section 2252*; *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994), 86 J. CRIM. L. & CRIMINOLOGY 1341 (1996) (discussing knowledge requirement in statute criminology distribution of child pornography).

[25]. *Id.* at 153.

[26]. *Id.*

[27]. *Id.* at 154.

[28]. *Id.* at 15. *But see* *Miller v. California*, 413 U.S. 15 (1973) (outlining a three-part test for determining whether speech is obscenity and reaffirming that there is no First Amendment protection for obscenity).

[29]. *Cubby Inc. v. CompuServe, Inc.*, 776 F.Supp. 135, 139 (S.D.N.Y. 1991) (citing *Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228, 235 (S.D.N.Y. 1981)). *See generally* *Smith v. California*, 361 U.S. 147, 152-53 (1959) (striking an ordinance that imposed liability on a bookseller for possession of an obscene book, regardless of whether the bookseller had knowledge of the book's contents); *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (quoting Restatement (Second) of Torts § 578 (1977) that states, ordinarily "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it"). *Id.*

[30]. 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that CompuServe was not liable for defamatory information posted by a third party because CompuServe neither knew or had reason to know of the statements); *cf.* *Stratton Oakmont Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995) (holding that Prodigy could not escape liability when it failed to intercept a defamatory communication after advertising to subscribers that it censored materials published under its control). Congress reacted to *Stratton* in part with the Communications Decency Act ("CDA"). *See* CDA, Feb. 8, 1996, Pub. L. 104104, 1996 U.S.C.C.A.N. (110 Stat.) 13339 (codified at 47 U.S.C. Section 230(c) which states, "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."). *Id.* The validity of the language is now in question, along with the rest of the Communications Decency Act, since key portions of the Act were declared unconstitutional. *See* *ACLU v. Reno*, 521 U.S. 844 (1997).

[31]. *See Cubby*, 776 F. Supp. at 137.

[32]. *See id.* (noting that, according to the affidavit of Jim Cameron, "Cameron Communications, Inc. ("CCI"), which is independent of CompuServe, has contracted to <manage, review, create, delete, edit and otherwise control the contents' of the Journalism Forum <in accordance with editorial and technical standards and conventions of style as established by CompuServe"). *Id.*

[33]. *See id.* (explaining that "Rumorville" was "a daily newsletter that provides reports about broadcast journalism and journalists"). *Id.*

[34]. *See id.* (stating that "[t]he contract between CCI and DFA provides that DFA accepts total responsibility for the contents' of Rumorville"). *Id.*

[35]. *See id.* (remarking that "CompuServe has no employment, contractual, or other direct relationship with either DFA or Fitzpatrick"). *Id.*

[36]. *See id.*

[37]. *Id.* at 138.

[38]. *See id.* at 139.

[39]. *See id.*

[40]. *See id.*

[41]. 361 U.S. 147 (1959).

[42]. *Id.* at 153.

[43]. *See id.* at 140 (finding that "CompuServe has no more editorial control over such a publication than does a public library, bookstore, 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"). *Id.*

[44]. 23 Media L. Rep. 1794 (N.Y. Sup. 1995) *available in* 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) or N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).

[45]. *See* 1995 WL 323710 at *1.

[46]. *See id.*, & at *4; *see also* Michelle J. Kane, *Business Law Electronic Commerce: Internet Service Provider Liability*, 14 BERKELEY TECH. L. J. 483, 487-88 (1999) (exploring shift in defamation law away from liability for ISPs and the removal of incentives for service provider to self-monitor).

[47]. *See* 1995 WL 323710 at *2, *4.

[48]. *See id.* at *2.

[49]. *See id.* at *4.

[50]. *See* Christopher P. Beall, *The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO L. 361, 373 (1997) (remarking that the *Stratton* decision was criticized in commentary and fear of liability of ISPs was an argument for legal reform).

[51]. *See* H.R. Conf. Rep. No. 104-458, at 194 (1996), *reprinted in* 1996 U.S.C.C.A.N. 207-08.

[52]. 47 U.S.C. § 230(c)(1) (Supp. 1998). For a discussion of the legislative history in the Communications Decency Act, see Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Comm. L. J. 51 (1996).

[53]. See H.R. Conf. Rep. No. 104-458, at 194 (overruling decisions that have found ISPs to be deemed as "publishers").

[54]. 47 U.S.C. § 230(c)(2)(A) & (B) (Supp. 1998).

[55]. 47 U.S.C. § 230(f)(2) (Supp. 1998).

[56]. See H.R. Conf. Rep. No. 104-458, at 194 (1996), *reprinted in* 1996 U.S.C.C.A.N. 207-08.

[57]. See *id.*

[58]. See H.R. Conf. Rep. No. 104-458, at 194.

[59]. *Id.*

[60]. See *id.*

[61]. See 47 U.S.C. § 230(b)(4) (Supp. 1998).

[62]. See 47 U.S.C. § 230(e)(3) (Supp. 1998).

[63]. *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

[64]. See 47 U.S.C. § 230(c) (Supp. 1998); H.R. Conf. Rep. No. 104-458, at 194 (1996), *reprinted in* 1996 U.S.C.C.A.N. 208.

[65]. 129 F.3d 327 (4th Cir. 1997). See generally David R. Sheridan, *Zeran v. America Online and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147 (1997) (examining the effect of the CDA on liability for publicizing letters to the editor).

[66]. See *id.* at 328. For a discussion of the detailed pleadings needed to assert libel against a distributor, see *Lewis v. Time Inc.*, 83 F.R.D. 455 (E.D. Cal. 1979).

[67]. See *id.* at 329.

[68]. See *id.*

[69]. See *id.*

[70]. See *id.*

[71]. See *id.*

[72]. See *id.*

[73]. See *id.*

[74]. See *id.* at 329, 331.

[75]. *See id.* at 331. *See generally* David R. Sheridan, *Zeran v. America Online and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147 (1997) (examining the effect of the CDA on liability for publicizing letters to the editor).

[76]. *See id.*

[77]. *See id.*

[78]. *See id.* at 332.

[79]. *Id.* (citing Restatement (second) torts § 558(b) (1977) and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 803 (5th ed. 1984)).

[80]. *See id.* at 332.

[81]. *Id.*

[82]. *Id.* at 328.

[83]. For a more in-depth discussion of the flaws of the *Zeran* opinion, see generally, Ian C. Ballon, *Zeran v. America Online: Why the Fourth Circuit is Wrong*, J. Internet L., Mar. 1998.

[84]. H.R. Conf. Rep. No. 104-458, at 194 (1996), *reprinted in* 1996 U.S.C.C.A.N. 208.

[85]. *Stratton Oakmont v. Prodigy*, 23 Media L. Rep. 1794 (N.Y. Sup. 1995), *available in* 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) *and* 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995)). *See generally* R. Hayes Johnson, Jr., *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co.*, 49 Ark. L. Rev. 589, 595 (examining the problems that could result from the *Prodigy* approach); Steven M. Cordero, Comment, *Damnum* FORDHAM I. P., MEDIA & ENT. L. J. 775 (1999) (criticizing the Fourth Circuit's decision in *Absque Injuria: Zeran v. America Online and Cyberspace Defamation Law 9 Zeran*, arguing that the court overextended protection to ISPs).

[86]. *See* 1995 WL 323710 at *10.

[87]. *See Zeran*, 129 F.3d at 333 (discussing the chilling effect of placing liability on notice). This view also is expressed in Internet chat discussions about the impact of the *Stratton Oakmont* decision.

[88]. *See* 47 U.S.C. § 230(c) (Supp. 1998).

[89]. *See Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

[90]. *See Zeran*, 129 F.3d at 332.

[91]. *Id.* at 333.

[92]. *Id.*

[93]. 992 F. Supp. 44 (D.D.C. 1998).

[94]. *See id.* at 46.

[95]. *See id.* at 47; *see* Matt Drudge, *The Drudge Report* (last modified Feb. 27, 2000)

<<http://www.drudgereport.com/matt.htm>>. AOL promoted its addition of Drudge's column to the service by advertising to its users: "AOL Hires Runaway Gossip Success Matt Drudge." Jonathan Broder, *Libel Suit Tests the Limits of Freewheeling Net Speech*, SALON NEWSREAL, (visited Mar. 2, 2000) <<http://www.salonmagazine.com/aug97/news/news2970829.html>> (quoting AOL press release). See generally Robert M. O'Neil, *The Drudge Case: A Look at Issues in Cyberspace Defamation*, 73 Wash. L. Rev. 623, 625 (1998) (using *Drudge* case as a backdrop to examine the issue of online defamation).

[96]. See *id.*

[97]. See *id.* at 52-53.

[98]. See *id.* at 52.

[99]. See 47 U.S.C. § 230(b)(4) (Supp. 1998).

[100]. 2 F. Supp.2d 783 (E.D. Va. 1998) *aff'd*, 24 F. Supp.2d 552 (E.D. Va. 1998).

[101]. See *id.* at 787.

[102]. *Id.*

[103]. *Id.* at 789; see also Michelle J. Kane, *Business Law: Electronic Commerce: Internet Service Provider Liability: Blumenthal v. Drudge*, 14 Berkeley Tech. L. J. 483 (1999) (exploring shift in defamation law away from liability for ISPs and removal of incentives for service provider to self-monitor).

[104]. *Id.* (quoting 47 U.S.C. § 230(f)(2) (Supp. 1998)).

[105]. *Id.*

[106]. *Id.* at 790 (emphasis added).

[107]. *Id.*

[108]. The court recognized that "[Section] 230 provides immunity from actions for damages; it does not, however, immunize defendant from an action for declaratory and injunctive relief. . . . If Congress had intended the statute to insulate Internet providers from both liability and declaratory and injunctive relief, it would have said so." *Mainstream Loudoun*, 24 F. Supp.2d at 561.

[109]. The U.S. Court of Appeals for the Tenth Circuit in *Ben Ezra, Wenstein, and Company, Inc. v. America Online*, No. 99-2068 (March 14, 2000), has also failed to see the judicial gloss placed on the CDA by *Zeran*; see also *Kempf v. Time, Inc.*, No. BC 184799 (Cal. Super. Ct. June 11, 1998) (dismissing action against defendant ISPs pursuant to *Zeran*).

[110]. See generally *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (discussing that AOL acknowledged it would not be immune from liability for information it developed by itself or in conjunction with another content provider).

[111]. See *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997); *Blumenthal*, 992 F. Supp. at 53.

[112]. 47 U.S.C. § 230(f)(2) (Supp. 1998). See generally Kim L. Rappaport, *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 Am. U. Int'l L. Rev. 765 (1998) (examining the scope of freedom of speech defined by

legislation proposed by Germany and the United States). For discussions on the free speech side of Internet access and the Communications Decency Act, see Michael L. Siegel, Comment, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 Alb. L.J. Sci. & Tech. 375 (1999) (reviewing First Amendment implications of regulating hate speech on the Web); Theodore George, *Censoring Internet Access at Public Libraries: First Amendment Restrictions*, 5 B.U. J. Sci. & Tech. L. 11 (1999) (reporting the findings of the *Mainstream Loudoun* court).

[113]. See 47 U.S.C. § 230(c)(2).

[114]. This phrase is used to describe employers other than those whose primary purpose is to provide Internet service.

[115]. See generally *Zeran*, 129 F.3d at 330 n.2 (detailing that the content provider is the person responsible for creating - not merely posting - the defamatory statement); *Blumenthal*, 992 F. Supp. at 50 (finding AOL immune from liability where it had no role in creating the defamatory information).

[116]. See *Zeran*, 129 F.3d at 331 (stating that an important purpose of the immunity provision was to encourage ISPs "to self-regulate the dissemination of offensive material over their services"). *Id.*

[117]. See Peter Brown, *Developing Corporate Internet, Intranet and E-Mail Policies*, 520 PLI/Pat 347, 351-59 (1998) (discussing employee's right of privacy and policies corporate entities should adopt).

[118]. See *id.* at 351.

[119]. 18 U.S.C. §§2510-22; 2701-11;3121-27 (West. 1999).

[120]. See *Bohach v. City of Reno*, 932 F. Supp. 1232, 1236 (D. Nev. 1996).

[121]. 18 U.S.C. § 2511(1)(a) (West 1999).

[122]. *Id.*

[123]. See *id.* at 1235-36.

[124]. See *id.* at 1236-37.

[125]. See *id.* at 1235.

[126]. See *id.* at 1236.

[127]. *Id.*

[128]. See *United States v. Smith*, 155 F.3d 1051, 1057 (9th Cir. 1998); *Steve Jackson Games Inc. v. United States Secret Service*, 36 F.3d 457, 458 (5th Cir. 1994); *Wesley College v. Pitts*, 974 F.Supp. 375, 384-87 (D. Del. 1997); *United States v. Reyes*, 922 F.Supp. 818, 836 (S.D.N.Y. 1996) (stating that "[r]etrieving numbers from the memory of a pager, then, is more accurately described as accessing electronic communications that are in electronic storage than intercepting electronic communications"). *Id.*

[129]. See generally Thomas R. Greenberg, Comment, *E-Mail and Voice Mail: Employee Privacy and the Federal Wiretap Statute*, 44 AM. U. L. REV. 219 (1994) (discussing issues relating to the privacy rights of employees).

[\[130\]](#). *See Wesley College*, 974 F.Supp. at 389 (highlighting the plaintiff's lament that the court's interpretation of Title I of the ECPA would leave a gap if the Title did not include stored electronic communications. Plaintiff argued that "a person who does not provide an electronic communication service . . . can disclose or use with impunity the contents of an electronic communication unlawfully obtained from electronic storage"). *Id.*

[\[131\]](#). *See id.* (discussing the court's agreement that the gap in the ECPA's coverage was troubling, but "[i]f it is to be bridged, however, it must be through the legislative power of Congress, not by the judiciary"). *Id.*

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