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Defining Cyberlibel: A First Amendment Limit for Libel Suits against Individuals Arising from Computer Bulletin Board Speech

Jeremy Stone Weber

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DEFINING CYBERLIBEL:¹ A FIRST AMENDMENT
LIMIT FOR LIBEL SUITS AGAINST INDIVIDUALS
ARISING FROM COMPUTER BULLETIN BOARD
SPEECH

I. INTRODUCTION

Yesterday's vast, unlitigated frontier of computer-aided communication is quickly becoming today and tomorrow's legal battleground. Computer bulletin boards, in particular, have traditionally been a sanctuary in which participants have generally been able to express their views without fear of a retaliatory measure more severe than a heated response. But, as one writer noted, "Like Wyatt Earp arriving in Dodge City, law and order has come to cyberspace."² Participants on computer bulletin boards are starting to resort to the legal system to resolve their disputes. Given the free and fierce debates that characterize communication on computer bulletin boards,³ the American legal system seems to be on the verge of a litigation explosion regarding who, if anyone, should pay when this communication causes harm.⁴

1. This term is intended as an offshoot of the term "cyberspace," and refers to libel suits arising from messages posted on computer bulletin boards. Michael Benedikt, chair of the University of Texas at Austin's Department of Agriculture, put forth a representative definition of cyberspace as "globally networked, computer-sustained, computer-accessed, and computer-generated, multi-dimensional, artificial, or 'virtual reality.'" Michael Benedikt, *Cyberspace: Some Proposals*, in *CYBERSPACE: FIRST STEPS* 199 (1991). Author William Gibson first popularized the term cyberspace. WILLIAM GIBSON, *NEUROMANCER* (1984); see also Eric Schlachter, Essay, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 *HASTINGS COMM. & ENT. L.J.* 87, 89 n.1 (1993) (noting Gibson's use of the term).

2. W. John Moore, *Taming Cyberspace*, 24 *NAT'L J.* 745, 746 (1992).

3. See *infra* notes 29-37 and accompanying text (discussing the harsh, unregulated nature of discussions on computer bulletin boards).

4. See *Cyberspace Bulletin Boards*, LDRC LIBELLETTER (Libel Defense Resource Ctr., New York, N.Y.), May 1994, at 1 (stating that bulletin board systems "are part of the new frontier for media lawyers"); Ian Barnes, *Free Speech Caught in the Net?*, *INDEPEN-*

The commentary and litigation that exist on this subject have almost exclusively focused on whether the operators of computer bulletin boards can be held liable, consistent with the First Amendment,⁵ for defamatory statements made by users of their bulletin boards.⁶ However, an equally challenging set of First Amendment questions is presented by the limits of liability of the users themselves. The task of this Note is to answer one of these questions and propose a minimum standard that plaintiffs who are defamed by statements posted on computer bulletin boards should be required to meet in order to prevail in a libel lawsuit. This Note proposes that when the libel plaintiff has been defamed by a message posted on a computer bulletin board, and he or she has access to the bulletin board to post a reply, the First Amendment requires that the plaintiff prove that the defendant acted with "actual malice" in defaming the plaintiff.

Part II of this Note explains computer bulletin board technology and describes the types of bulletin board systems to which the thesis of this Note applies. This section also explores the development and rationale of the actual malice standard, which the Su-

DENT, Aug. 22, 1994, at 22 ("[T]he law is catching up with this so-called 'unregulated' technology.").

5. The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

6. The only published case that deals with the applicability of libel law to computer bulletin boards is *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991). In *Cubby*, the court held that a bulletin board operator was a mere "distributor" of information on the bulletin board, and thus could not be held liable for defamatory statements posted on the bulletin board without a showing that it knew or had reason to know of the defamation. This case, and the issue with which it dealt, has received extensive attention from legal scholars. See, e.g., Terri A. Cutrera, *Computer Networks, Libel and the First Amendment*, 11 *COMPUTER/L.J.* 555 (1992); David J. Connor, Case Note, *Cubby v. CompuServe, Defamation Law on the Electronic Frontier*, 2 *GEO. MASON INDEP. L. REV.* 227 (1993); Robert B. Charles, *The New World of On-Line Libel*, *MANHATTAN LAW.*, Dec. 1991, at 40. The reasoning set forth in *Cubby*, was followed in *Stern v. Delphi Internet Servs. Corp.*, 626 N.Y.S.2d 694 (Sup. Ct. 1995), which held that a company that provided access to a computerized database service was a "news disseminator" analogous to a news vendor, bookstore, or library. A recent case, however, held that the commercial computer information system provider Prodigy was a "publisher" of allegedly libelous statements made on one of its bulletin boards, and thus could be liable for the statements as if it had originated the libel. See *Stratton Oakmont v. Prodigy Servs. Co.*, 23 *Media L. Rep.* (BNA) 1794, 1795 (N.Y. Sup. Ct. May 25, 1995). In so holding, the court found a distinction between its facts and those in *Cubby* in that Prodigy held itself out as controlling the contents of its bulletin boards and took steps to do so through an automatic software screening program to delete postings that it deemed offensive or in "bad taste." Thus, because Prodigy exercised editorial control over the content of its bulletin boards, it more closely resembled a publisher than a distributor of information. *Id.* at 1797.

preme Court has found to be a minimum constitutional requirement for libel suits brought by public officials or figures. The exploration of the actual malice doctrine is necessary because the Court's logic for requiring actual malice protection is, at times, analogous to situations in which libel plaintiffs have been defamed by bulletin board speech. Finally, this section summarizes the few prior and current libel suits that have been initiated against individual bulletin board users, litigation that has yet to yield a judicial decision.

Part III of this Note draws a comparison between individuals defamed by computer bulletin board speech and defamation of public officials and figures via more traditional media. This section concludes that libel plaintiffs who have been defamed by bulletin board speech and who have both access to the bulletin board on which the defamatory material appeared and a history of participating on the bulletin board are functionally equivalent⁷ to public figures.

Libel plaintiffs who have the ability to reply to a defamatory statement on the bulletin board resemble public figures in that they have access to the means of counterspeech. In addition, those plaintiffs who have previously participated in discussions on the bulletin board on which the defamatory message appeared resemble public figures because they have thrust themselves into a situation where they invite public scrutiny. In addition to these similarities, there is a significant risk that protected speech on computer bulletin boards would be "chilled" by a low-fault or no-fault standard. As a result, so long as computer bulletin board speech involves a matter of public concern, this Note asserts that the First Amendment requires plaintiffs in such cases to prove that the defendant acted with actual malice to recover damages.

This section also asserts that libel plaintiffs with access to a bulletin board system enjoy an ability to respond that is far superior to the ability of public officials or figures to respond through the more traditional media. As a consequence, libel plaintiffs who have access to a bulletin board, but who have not participated in

7. Functional equivalency is defined as the process courts use to analogize new technologies to more traditional ones, thus adapting existing precedent and standards to new technology. Edward V. Di Lello, *Functional Equivalency and Its Application to Freedom of Speech on Computer Bulletin Boards*, 26 COLUM. J.L. & SOC. PROBS. 199, 212-15 (1993). The term is used in a similar manner in this Note to analogize persons who have access to the computer bulletin board on which they were defamed with public figures who have the ability to respond to defamatory statements in the traditional media.

the bulletin board's discussions, still should be required to prove actual malice to recover damages in a libel suit arising from a defamatory statement on the bulletin board. This section argues that such a standard is justified even though the plaintiffs' lack of participation has not exposed them to an increased risk of scrutiny.

Finally, this section acknowledges that the analogy between cyberlibel plaintiffs and public figures breaks down when the plaintiff has no reasonably available means to post a reply. Thus, for such plaintiffs, some lesser standard, such as that for libel plaintiffs who are private figures in more traditional media, is allowable under the First Amendment.⁸

II. BACKGROUND

A. *Computer Bulletin Boards*

1. Computer Bulletin Boards—Uses and Technology

A computer bulletin board (sometimes referred to as an electronic bulletin board) is exactly what the name implies—a computerized version of a cork and pin board on which users can post, read, and respond to messages.⁹ A bulletin board system, or BBS, is a compilation of individual bulletin boards, and is normally grouped by topic.¹⁰ A bulletin board system is created and maintained by a "sysop,"¹¹ who obtains the necessary hardware, software, and telephone lines to operate the system. Although it generally costs \$1,000 or more to obtain such resources, a basic BBS

8. This Note does not, however, purport to change the established rule for those libel plaintiffs who are deemed to be public figures by a traditional media-oriented analysis. Even if public figures in libel suits have been defamed by bulletin board speech and have no practical means to post a reply, they still must prove actual malice. Such a position is dictated by precedent that establishes the actual malice doctrine. See *infra* notes 78-133 and accompanying text (summarizing the development and rationale of the actual malice doctrine).

9. See David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 82 (1993) (describing computer bulletin board systems as "the computerized equivalent to the bulletin boards commonly found in the workplace, schools and the like").

10. ERIC S. RAYMOND, *THE NEW HACKER'S DICTIONARY* 56 (2d ed. 1993).

11. This term is shorthand for "systems operator." Judith Berck, *It's No Longer Just Techno-Hobbyists Who Meet by Modem*, N.Y. TIMES, July 19, 1992, at 12F. Sysops establish bulletin board systems for a variety of reasons, including for fun, for profit, and as a service to employees and customers. Bob Metcalfe, *How Many Sysops Will Show Up for BBSCon—and Just What Is a Sysop?*, INFOWORLD, Jan. 30, 1995, at 49, 49.

can be established for as little as a few hundred dollars.¹² The software necessary to start a bulletin board system is widely available commercially.¹³

Communicating on a BBS is even easier than creating one. Anyone with a computer, a modem,¹⁴ a telephone, and communications software can log in to, or access, a BBS.¹⁵ Access to other types of bulletin boards, such as Internet-supported bulletin boards¹⁶ and commercial on-line services,¹⁷ is only slightly more complex. This added complexity is due to the special skills and additional software required to navigate the Internet¹⁸ and commercial on-line services' requirement that users subscribe in advance.¹⁹ Once logged in to a BBS, the person may choose to post original messages on the bulletin board, respond to messages already posted, or simply read the discussions without posting any of his or her own messages—a practice commonly referred to as "lurking."²⁰

Computer bulletin boards are rapidly becoming the forum in which society conducts its debates on a variety of matters. With approximately seventeen million people spouting their views through this technology,²¹ the topics discussed on bulletin boards

12. Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 207 (1989).

13. Cutrera, *supra* note 6, at 556.

14. A modem is a device that sends digital information over analog telephone lines. The word "modem" is derived from the terms "MODulation/DEModulation" and reflects the process by which digital information is converted to analog form and vice-versa. Modems may be installed internally within the computer or can be purchased as a separate external device. Paul Taylor, *Perspectives: Internet's Surf City—Here We Come*, FIN. TIMES, Dec. 10, 1994, at 1. Modems are commonly rated by their "baud rate" or "bits per second" (bps). These terms reveal how fast modems can exchange data over telephone lines. *Id.*

15. Berck, *supra* note 11, at 12F.

16. See *infra* notes 48-71 and accompanying text (describing the Internet and the types of bulletin boards available through it).

17. See *infra* notes 72-77 and accompanying text (describing commercial on-line services).

18. See generally Katie Hafner, *Making Sense of the Internet*, NEWSWEEK, Oct. 24, 1994, at 46 (explaining the often confusing methods of gaining access to the Internet).

19. Becker, *supra* note 12, at 209.

20. RAYMOND, *supra* note 10, at 265. Indications are that lurkers are the "silent majority" of bulletin board users. *Id.*; Laurie Flynn, *Lurking On-Line: The Electronic Eavesdroppers*, N.Y. TIMES, Jan. 3, 1995, at C18.

21. In 1994, experts estimated that 17 million people regularly called bulletin boards. Bob Metcalfe, *Sysops Are Reaping the Benefits in the Wake of a BBS Explosion*, INFOWORLD, Sept. 5, 1994, at 52, 52. That number represents a 70% increase over just two years earlier. Berck, *supra* note 11, at 12F.

are as numerous and varied as the bulletin board systems themselves. Subjects of bulletin board discussions range from politics²² to musings on the latest episode of television's "The X Files,"²³ and from Elvis sightings²⁴ to sex.²⁵ Bulletin boards have become a popular forum for businesses to coordinate communications and advertise products,²⁶ for doctors to communicate medical information,²⁷ and for people with nothing better to do, to gossip.²⁸

No matter what the topic of discussion is, computer bulletin board users generally consider their medium one in which users communicate freely and openly. The preferred method of replying to a disagreeable bulletin board message is not to seek legal sanctions, but rather to "flame" the author of the message.²⁹ While such reprisals are a well-recognized feature of computer bulletin boards,³⁰ BBS users largely regard their domain as off-limits to

22. For example, many federal elected officials are wired to their constituents through the Internet, other computer bulletin boards, and commercial on-line services. Lawrence J. Magid, *D.C. Gets On-Line with the Public*, L.A. TIMES, Sept. 14, 1994, at D4.

23. Linda Shrieves, *The X-Files; Fox's Cult Favorite Edges Toward Mainstream Popularity*, ORLANDO SENTINEL, Oct. 14, 1994, at E1.

24. See Karen Thomas, *On-line gossip: alt.have.you.heard.the.latest?*, USA TODAY, July 15, 1994, at 2D (listing several Internet bulletin boards with unusual topics, including "alt.elvis.sighting," "alt.barney.dinosaur.die.die.die," and "alt.fan.tonyaharding.whack.whack.whack").

25. See, e.g., Cutrera, *supra* note 6, at 1 n.6 (stating that adult bulletin boards "are among the fastest growing components of the BBS market"); Berck, *supra* note 11, at 12 (describing "adult only" bulletin boards on which users can view nude images, arrange dates with other users, and have uncensored discussions); Philip Elmer-DeWitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50, 54 (detailing the plethora of pornography available on the Internet).

26. See Nicholas Baran, *Businesses Turn to BBSes*, BYTE, Sept. 1994, at 32 (stating that BBSs have become a popular way to handle external communications and provide a central information system for field offices); Casey Corr, *Ads-New.Internet.Now—Companies in Search of New Profits Are Jumping on the Internet to Advertise Their Wares*, SEATTLE TIMES, Sept. 11, 1994, at F1 (stating that thousands of business owners nationwide are advertising on the Internet); Larry M. Edwards, *Cyberspace Business is Booming on the Internet*, SAN DIEGO BUS. J., Sept. 12, 1994, § 1, at 1 (describing the efforts of San Diego area businesses that profit from advertising on computer bulletin boards).

27. See Alana Kainz, *Surf's Up!; The World Goes On-Line: A Communication Revolution*, THE OTTAWA CITIZEN, Nov. 9, 1994, at E3 (stating that doctors utilize computer networks to exchange X-rays).

28. Thomas, *supra* note 24, at 2D.

29. A flame is a bulletin board message "intended to insult and provoke" and is "directed with hostility at a particular person or people." RAYMOND, *supra* note 10, at 181.

30. Computer bulletin board users' lack of manners when responding to statements they disagree with is well-documented. See, e.g., Jennifer Bojorquez, *The Miss Manners of Cyberspace "Netiquette"*, SACRAMENTO BEE, Sept. 26, 1994, at B5 (describing the efforts

legal sanctions.³¹ This freedom, of course, is not without a price and has its limits. In a well-publicized recent example, a University of Michigan student was accused of posting three sexual fantasies on the Internet depicting the kidnapping, sodomy, and mutilation of a fictional victim, to whom he had given the name of a real female student in one of his classes.³² For this, the student faced possible expulsion and federal criminal charges of sending threats over state lines.³³ Although incidents of such legal intervention are increasing, this is still the exception rather than the rule in cyberspace.³⁴

Part of the "frontier" mentality of BBS communication may be tied to the anonymity that users enjoy. Most computer bulletin board systems allow users to participate using pseudonyms or modifications of their names rather than their full real names. Even if full names are used, other users are unaware of the physical appearance, address, or telephone number of the person posting a message.³⁵ The fact that bulletin boards have been relatively free from censorship also certainly contributes to the frontier attitude.³⁶ What little censoring of bulletin board speech that occurs has come from "moderated" bulletin boards, where the sysop screens messages prior to posting to ensure their suitability.³⁷ Whatever the rea-

of one woman who wrote a book chastising such inappropriate behavior on-line as posting flames in all capital letters—the computerized equivalent of shouting); Brent Staples, *Beastly Manners in Cyberspace*, N.Y. TIMES, Oct. 13, 1994, at A26.

31. See Barnes, *supra* note 4, at 22 (stating that the regulation-free nature of communication on the Internet has led to it being trumpeted as a "true democracy"); Rosalind Resnick, *Cybertort: The New Era*, NAT'L L.J., July 18, 1994, at A1 (stating that on the Internet, people who are harshly criticized respond with criticism rather than legal action); Marc Silver, *Action on the Boards*, U.S. NEWS & WORLD REP., Nov. 18, 1991, at 96, 96 (stating that computer bulletin boards "encourage free speech").

32. Philip Elmer-DeWitt, *Snuff Porn on the Net*, TIME, Feb. 20, 1995, at 69, 69.

33. *Id.*

34. See Rex S. Heinke & Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, COMPUTER LAW., July 1994, at 1 (stating that BBSs are unique in their lack of government regulation); Peter Pringle, *Censor War Looms Over Invasion of Cyberspace*, THE INDEPENDENT, July 4, 1994, at 10 (quoting cyberspace journalist Brock Meeks as saying that legislation of computer bulletin boards is not likely to occur soon because "most [congress members] have never heard of the term 'cyberspace'").

35. Cutrera, *supra* note 6, at 557.

36. See generally Felicity Barringer, *Electronic Bulletin Boards Need Editing. No They Don't.*, N.Y. TIMES, Mar. 11, 1990, § 4, at 4. (discussing a few instances of limited censorship and resulting concerns about the impact on free speech).

37. There are indications, especially in the case of major commercial on-line services, that some sysops are poised to take more active roles in censoring discussion on computer bulletin boards. See Peter H. Lewis, *No More "Anything Goes": Cyberspace Gets Censors*, N.Y. TIMES, June 29, 1994, at A1 (detailing several recent incidents of such

son, up to this point, computer bulletin board users have managed to keep their medium largely an open forum for communication.

2. Types of Bulletin Board Systems (BBSs)

This Note attempts to define the First Amendment limits for defamatory statements appearing over three types of computer bulletin board systems—local computer bulletin boards, Internet-supported bulletin boards such as news groups, and bulletin boards found on commercial on-line services. For brevity's sake, the terms "computer bulletin board," "bulletin board," and "BBS" are used synonymously in this Note to refer to all three types of forums.

a. Local Bulletin Board Systems

The most numerous and easiest to access BBS is a local bulletin board system. Local bulletin boards have existed since 1978 and have experienced tremendous growth since that time.³⁸ As of 1992, the United States alone had approximately "60,000 public and commercial [bulletin board systems], [and] 120,000 private and corporate BBSs."³⁹ Worldwide, an additional 100,000 local bulletin board systems are in existence.⁴⁰

Local BBSs were invented and cultivated by hobbyists, who continue to operate most such systems at their own expense.⁴¹ While many of these sysops do charge some fee, it is usually a nominal one.⁴² More than eighty percent of local computer bulletin board systems are nonprofit.⁴³ However, with the average bulletin board having 600 to 800 regular callers, and with those that do charge averaging annual fees from \$45 to \$75, local BBS usage has become a \$2 billion industry.⁴⁴

Local bulletin boards have remained popular despite the emergence of the Internet and commercial on-line services because they are easier to access. Access to a bulletin board is gained simply by dialing up the bulletin board's telephone number⁴⁵ with a modem.

ensorship). However, most BBSs currently provide little or no control over the content of their postings. Heinke & Rafter, *supra* note 34, at 1.

38. Metcalfe, *supra* note 21, at 52.

39. Schlachter, *supra* note 1, at 91 (quoting Berck, *supra* note 11, at 12F).

40. Heinke & Rafter, *supra* note 34, at 1.

41. Hiawatha Bray, *Into Cyberspace via Bulletin Boards*, THE RECORD, Jan. 17, 1995, at D04.

42. *Id.*

43. Berck, *supra* note 11, at 12F.

44. Metcalfe, *supra* note 21, at 52.

45. These telephone numbers are widely available in computer magazines, on the

Once this connection is established, the user is able to access the BBS through the sysop's central computer. Many bulletin boards, perhaps sensing a demand by users for more wide-spread access, have begun to provide Internet access to their users,⁴⁶ and some have joined together to form their own network, a sort of "mini-Internet."⁴⁷

b. Internet-Supported Bulletin Boards

The massive international computer network known as the Internet (or simply the "Net") is becoming a major route by which users gain access to bulletin boards and other types of information resources.⁴⁸ The Internet is the world's largest computer network, combining "campus, state, regional, and national networks . . . into one single logical network all sharing a common addressing scheme."⁴⁹ The Internet is not a single entity, but rather a group of networks that are organized and paid for separately by participating organizations such as universities, research labs, and commercial companies.⁵⁰ With the help of a backbone network maintained by the National Science Foundation and commercially operated communication lines,⁵¹ computers in more than forty nations worldwide are linked together via the Internet.⁵² The Internet is undergoing a period of incredibly rapid expansion, with the number of people using the Net growing by ten percent each month.⁵³

Through the Internet, millions of users⁵⁴ can communicate

Internet, and through commercial on-line services. Bray, *supra* note 41, at D04.

46. See Baran, *supra* note 26, at 32 (discussing increasing demands by business for multiple BBS services); Dwight Silverman, *Digital Nation*, HOUSTON CHRON., Feb. 5, 1995, at A1 (quoting a sysop who predicted that to survive, bulletin board systems "will have to have some kind of Internet connection, without a doubt").

47. Bray, *supra* note 41, at D04.

48. Brian Livingston, *The Mother of All Networks; Internet*, PC-COMPUTING, Apr. 1994, at 180.

49. BRENDAN P. KEHOE, *ZEN AND THE ART OF THE INTERNET* 86 (1st ed. 1992).

50. JOSHUA EDDINGS, *HOW THE INTERNET WORKS* 13 (1994).

51. *Id.*

52. *Id.* at 14-15. People on every continent, including Antarctica, have access to the Internet. *The Internet Show* (PBS television broadcast, Mar. 7, 1995).

53. *The Internet Show*, *supra* note 52.

54. The precise number of people who use the Internet is unknown. One recent estimate placed the figure at 10 million people, with a projected increase to 100 million by the year 2000. KEVIN M. SAVETZ, *YOUR INTERNET CONSULTANT* 9 (1994). The same study also estimated that somewhat more than 10 million people have access to e-mail over the Internet. *Id.* A slightly more recent source estimates that one million computers and 20 million people have access to the Internet. *The Internet Show*, *supra* note 52.

through bulletin boards or electronic mail. Electronic mail, or e-mail, works much the same as conventional mail—a sender composes a message and sends it to the recipient's electronic address.⁵⁵ Through the Internet, e-mail can be transmitted almost instantaneously to computers throughout the world.⁵⁶

The Internet's vast array of bulletin board topics are arranged by subject in a hierarchical system of "news groups" collectively known as Usenet.⁵⁷ Conceptually, these news groups are simply topical collections of e-mail messages submitted by Internet users.⁵⁸ As of late 1993, the Usenet consisted of about 120,000 sites, representing more than 4.2 million participants.⁵⁹ Among the most popular news groups are those devoted to news reports, sex, and humor.⁶⁰

Like other types of bulletin boards, Usenet news groups may be moderated or unmoderated, with the former category having a moderator who screens incoming e-mail for suitability before placing it on the news group.⁶¹ Censorship, however, is still quite rare.⁶²

In 1991, the incredible communication power of the Usenet was dramatically illustrated during the attempted coup in the Soviet Union. Trying to create the impression that the coup had been successful, hard-line Communists seized control of traditional forms of mass media such as television, radio, and newspapers.⁶³ The coup leaders, however, forgot about the Russian computer network,

55. RAYMOND, *supra* note 10, at 162.

56. *The Internet Show*, *supra* note 52.

57. One author describes the Usenet this way:

The Usenet is simply the largest, most active, and most varied discussion forum in the world. Imagine a bulletin board on the wall. Imagine that as people pass it, they glance at what's there, and if they have something to add, they stick their note up, too. Now (here's the big leap), imagine that there are thousands of bulletin boards in this building, and that there are actually tens of thousands of buildings throughout the world, each with its own identical copy of the bulletin boards. Got it? That's Usenet.

SAVETZ, *supra* note 54, at 160.

58. EDDINGS, *supra* note 50, at 117.

59. SAVETZ, *supra* note 54, at 160.

60. Flynn, *supra* note 20, at C18 (listing the ten most popular Usenet news groups and number of people worldwide estimated to read these news groups).

61. *Id.*

62. See *The Internet Show*, *supra* note 52 ("Censorship is not a part of the Internet culture. In fact, technically speaking, it's pretty much impossible.").

63. *Id.*

Relcom.⁶⁴

Soviet citizens used Relcom to post decrees by Boris Yeltsin and other information on the Usenet. Usenet participants responded by providing summaries of Western news accounts of the coup attempt.⁶⁵ This effort eventually provided a "steady stream of information" to Russian people, and made it clear that the communist hard-liners had not yet taken control of the country's government.⁶⁶

Other components of the Internet relevant to this Note are Free-Nets. A Free-Net is an "electronic town" which, through the resources of the Internet, combines e-mail, bulletin boards, news, and a variety of other services.⁶⁷ Free-Nets thus replicate the Internet's resources at a more local level.⁶⁸

The original and most well-known Free-Net is the Cleveland Free-Net.⁶⁹ This project, which can be accessed by a local phone call in Cleveland or elsewhere through the Internet,⁷⁰ provides not only bulletin board and e-mail facilities, but also information such as weather reports, medical data, and library catalogs.⁷¹

c. Commercial On-line Services

Many people find that the quickest, cheapest, and easiest route to cyberspace is through a commercial on-line service.⁷² These services⁷³ require users to pay a monthly fee.⁷⁴ Upon subscribing,

64. *Id.*

65. *Id.*

66. *Id.*

67. See EDDINGS, *supra* note 50, at 5 ("This convergence of electronic resources has all the elements of a town—an electronic town."); KEHOE, *supra* note 49, at 47 (stating that Free-Nets "provide multi-user chat, email, Usenet news, and a variety of other things to keep you occupied for hours on end").

68. See EDDINGS, *supra* note 50, at 5 ("Free-Nets bring the Internet into our own backyards.").

69. *Id.*; KEHOE, *supra* note 49, at 47.

70. EDDINGS, *supra* note 50, at 5.

71. *Id.*

72. Walter S. Mossberg, *Best Route to Cyberspace Is via Big Three*, SAN DIEGO UNION-TRIB., Jan. 24, 1995, at 6.

73. The three most prominent on-line services are America Online, Prodigy, and CompuServe. As of this writing, CompuServe is the most popular on-line service, with 1.7 million subscribers. *Id.* Other commercial on-line services of note include GEnie and Delphi. See EDDINGS, *supra* note 50, at 109. In addition, software industry giant Microsoft recently introduced its own on-line service. Jube Shiverm Jr., *A Software Sell Microsoft Must Convince Public of On-Line Joys*, L.A. TIMES, Aug. 23, 1995, at D4.

74. As of early 1995, the fees for the "Big Three" services were as follows: America

users receive a membership kit including a local access telephone number, a password necessary for logging in, and the appropriate software.⁷⁵ Each of the major on-line services provide bulletin boards, e-mail capability, news reports, and reference materials.⁷⁶ The bulletin boards of these commercial on-line services are the forums that have produced the scant amount of libel litigation arising from bulletin board speech.⁷⁷

B. Constitutional Libel Law and the Actual Malice Doctrine

1. Precedent

When newspapers and print journalists are sued for libel, the Supreme Court requires courts to conduct a "definitional balancing"⁷⁸ analysis to determine if the speech is protected. Pursuant to this process, a plaintiff must prove that a defendant acted in accordance with a particular standard of fault. This standard varies according to the classification of both the plaintiff and the nature of the speech involved. The Court requires libel plaintiffs to prove that the defendant acted with "actual malice"⁷⁹ when the speech

Online and Prodigy—\$9.95 per month for the first five hours, and \$2.95 per hour thereafter; CompuServe—\$4.80 per hour for services at popular modem speeds, and unlimited access to some common services for a \$9.95 monthly fee. Mossberg, *supra* note 72, at 6.

75. Paul Taylor, *Learner Drivers on the Superhighway*, FIN. TIMES, Dec. 17, 1994, at 3.

76. Mossberg, *supra* note 72, at 6.

77. See *infra* notes 134-57 and accompanying text (discussing recent litigation).

78. Definitional balancing is a process by which the Supreme Court determines what forms of speech are protected as "speech" under the First Amendment. See Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942-43 (1968) (setting forth the definitional balancing theory).

79. Much time and effort has been spent to define exactly what degree of fault the actual malice standard requires. This effort has yielded only moderate success. As defined in the Court's opinion in *New York Times Co. v. Sullivan*, the actual malice standard requires that the plaintiff prove the defendant's libelous statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). The Court has since sharpened the second branch of this test by stating that libel plaintiffs can meet the reckless disregard standard only by showing that the libelous statements were made with a "high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). In the area of journalism, the Court has refused to hold reporters liable for merely doing an inadequate job of verifying facts, instead insisting the libel plaintiffs show that defendants have some hint that the defamatory statements were false prior to publishing them. See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."); cf. *Harte-Hanks Communications v.*

involves a matter of public concern and the plaintiff is a public official,⁸⁰ an "all-purpose" public figure,⁸¹ or has injected himself or herself into the midst of a particular public controversy, thereby becoming a "limited purpose" public figure.⁸² However, the Court has also ruled that where the plaintiff is a private figure and the speech is a matter of purely private concern, states may permit recovery where the plaintiff has shown the defendant acted with some lower level of fault.⁸³

Until 1964, the law of libel was grounded solely in tort law, which generally allowed the plaintiff a monetary recovery for "an invasion of the interest in reputation in good name."⁸⁴ The First Amendment was thought not to protect libelous speech from government-supported sanctions.⁸⁵

But in *New York Times Co. v. Sullivan*,⁸⁶ the Court laid the groundwork for a First Amendment limit on the libel tort. In this landmark case,⁸⁷ the newspaper accepted an advertisement requesting help for the Southern civil rights movement. Sullivan, the Montgomery, Alabama, police commissioner, alleged that two paragraphs of this advertisement libeled him.⁸⁸ When Sullivan sued the

Connaughton, 491 U.S. 657, 692 (1989) (upholding a libel award against a newspaper that reported that a municipal judge's clerk had used improper tactics in his campaign because the newspaper made a "deliberate decision not to acquire knowledge" that would likely have shown the stories were false). One way for a libel plaintiff to prove the defendant acted with actual knowledge that the defamatory statement was false is to show the defamatory statements were fabricated. *See, e.g., Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 252-54 (1974) (finding a reporter who fabricated an interview with a West Virginia widow acted with actual malice). The *New York Times* actual malice standard requires an inquiry into the speaker's state of mind before publishing or writing the libelous statements. *See* KENT R. MIDDLETON & BILL F. CHAMBERLIN, *THE LAW OF PUBLIC COMMUNICATION* 135-36 (2d ed. 1991) (reviewing court cases in which libel plaintiffs were allowed to require journalists to testify about their state of mind and conversations with editors during the publication process).

80. *E.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

81. *E.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162-63 (1967).

82. *E.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

83. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

84. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 771 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].

85. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stating that libelous statements are not within the scope of the First Amendment because they are not an "essential part of any exposition of ideas").

86. 376 U.S. 254 (1964).

87. *New York Times* is generally regarded as the starting point for all constitutional libel issues. Alexander Micklejohn referred to the case as "an occasion for dancing in the streets" after it was released. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125.

88. The Court quoted the advertisement in question:

newspaper for libel, he prevailed in the state courts, which found that the advertisement was "of and concerning" Sullivan and thus defamatory per se under the state's civil libel law.⁸⁹ The U.S. Supreme Court, however, rejected the prevailing view that libel law is merely a matter of state tort law⁹⁰ and held that the state's common law rule, which allowed Sullivan to recover simply upon showing the advertisement was "of and concerning" him, violated the First and Fourteenth Amendments.⁹¹

In so doing, the Court held that "the principle that debate on public issues should be uninhibited, robust, and wide-open" rendered Alabama's common law of libel constitutionally invalid.⁹² The Court was concerned that while false statements are not protected by the First Amendment,⁹³ some truthful speech could be chilled in a country devoted to encouraging free and open debate where mistakes are inevitable.⁹⁴ Requiring libel plaintiffs to prove actual malice, the Court stated, more adequately protects against

"In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authority by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

. . . .

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*. . . ."

New York Times Co. v. Sullivan, 376 U.S. at 257-58 (emphasis in original).

89. *Id.* at 262-64.

90. See W. WAT HOPKINS, ACTUAL MALICE 2 (1989) ("The case was revolutionary because, for the first time, the Supreme Court entered an arena that had previously been reserved to the states—civil libel law.")

91. New York Times Co. v. Sullivan, 376 U.S. at 292.

92. *Id.* at 270.

93. The Court raised the possibility that false statements of fact do have First Amendment value in footnote 19 of its opinion. The Court quoted John Stuart Mill who said that such statements bring about "the clearer perception and livelier impression of truth, produced by its collision with error." *Id.* at 279 n.19 (quoting JOHN STEWART MILL, ON LIBERTY 15 (1947)). However, the remainder of the Court's opinion apparently assumes that only truthful statements of fact have First Amendment value, granting false statements of fact protection only because of the risk that truthful speech would be chilled by the state's common law libel rule.

94. *Id.*

this chilling effect than a lesser-fault or no-fault standard.⁹⁵

The Court also held the actual malice standard is constitutionally required for libel suits by public figures in the combined case of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.⁹⁶ While the central meaning of *New York Times* is often stated as holding that seditious libel is incompatible with the First Amendment,⁹⁷ *Butts* recognized that the public interest in the circulation of materials concerning those people who are of general public interest, such as *Butts*⁹⁸ and *Walker*,⁹⁹ is similar to the interest in news reports about public officials.¹⁰⁰ It further reasoned that since public figures have thrust themselves into the center of an important public controversy, and can respond to defamatory speech arising out of that controversy through the mass media, the actual malice standard strikes the best balance between the media's First Amendment interest and the plaintiff's interest in his or her reputation.¹⁰¹

The actual malice doctrine was extended even further in *Rosenbloom v. Metromedia, Inc.*¹⁰² In *Rosenbloom*, a plurality of the Court extended *New York Times's* actual malice protection to all speech concerning any libel plaintiff involved in a matter of public

95. *Id.* at 279-80.

96. 388 U.S. 130 (1967).

97. In sum, this view of *New York Times* is that the framers of the Bill of Rights sought to abolish seditious libel by enacting the First Amendment, and thus the harm to a government official's reputation is insufficient to overcome the First Amendment's basic guarantee of freedom of speech. Therefore, government officials seeking a redress for libel must show a high level of fault by the plaintiff to recover damages. *Kalven, supra* note 87, at 204-10. Whether the framers actually intended to prohibit seditious libel via the First Amendment is a matter of dispute. Compare ZACHARIAH CHAFFE, JR., FREE SPEECH IN THE UNITED STATES 18-30 (1941) (asserting that one of the principal reasons behind the First Amendment was to reject seditious libel) with LEONARD LEVY, EMERGENCE OF A FREE PRESS 220-81 (1985) (asserting that the framers did not intend to reject seditious libel).

98. *Butts* was the athletic director of the University of Georgia when the *Saturday Evening Post* published an article accusing him of conspiring to "fix" a football game between his school and the University of Alabama. *Curtis Publishing*, 388 U.S. at 135.

99. *Walker* was a former Army officer who had commanded federal troops during a 1957 school segregation confrontation at Little Rock, Arkansas. A wire story from the *Associated Press* stated that during a 1962 university riot *Walker*, encouraged rioters to use violence and gave rioters technical advice on combating the effects of tear gas. *Id.* at 140. Following his retirement from the military, *Walker* gained notoriety by giving several speeches opposing federal intervention. The Court, noting that *Walker* had his own following, stated that he "could fairly be deemed a man of some political prominence." *Id.*

100. *Id.* at 154.

101. *Id.* at 155.

102. 403 U.S. 29 (1971).

concern, regardless of whether the plaintiff would otherwise qualify as a public figure or official.¹⁰³ The plurality paid homage to *New York Times's* "commitment to robust debate on public issues, which is embodied in the First Amendment,"¹⁰⁴ and reasoned that the public's interest in information regarding public events is no less significant than in situations involving public officials or figures.¹⁰⁵ Thus, the Court concluded that the public's interest in such events demands that the protection of the actual malice standard be extended to cover speech in this area.¹⁰⁶

In *Gertz v. Robert Welch, Inc.*,¹⁰⁷ the Court rejected the position that all speech or matters of public concern should be subject to the actual malice standard. The plaintiff in *Gertz* was an attorney who had represented the family of a teenage boy who had been shot and killed by a police officer. In response to *Gertz's* representation, a magazine published an article accusing *Gertz* of being a "Communist-frontier" and a "Leninist."¹⁰⁸ When *Gertz* sued the magazine for defamation, the magazine's publisher attempted to defend the suit based on the *Rosenbloom* standard, asserting that the subject matter of the article was of a public concern.¹⁰⁹ A divided Court, however, refused to apply the actual malice standard to publication of all matters of public interest. Rather, the Court held that private persons defamed from speech concerning public issues should receive more protection of their reputations than the actual malice standard provides.¹¹⁰

Gertz is significant not only for limiting the applicability of the actual malice standard, but for providing the rationale behind the standard. Justice Powell, writing for the Court, stated that public figures differ from private individuals in two ways. First, public figures ordinarily have access to "channels of effective communication" that allow them to respond to false statements about them.¹¹¹ Second, they "invite attention and comment" of the public by seeking a prominent role in society.¹¹² Thus, although pub-

103. *Id.* at 43-44.

104. *Id.*

105. *Id.* at 43.

106. *Id.*

107. 418 U.S. 323 (1974).

108. *Id.* at 325-26.

109. *Id.* at 330-32.

110. *Id.* at 345.

111. *Id.* at 344.

112. *Gertz*, 418 U.S. at 345.

lic figures run an increased risk of being the subject of libelous statements, they also have the means to address them. Private persons, however, are more vulnerable to injury because they have few opportunities to contradict libelous statements through the mass media. A private individual also gives up "no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood."¹¹³

Justice Powell also did not cut off all vestiges of the actual malice standard for persons such as Gertz, whose position in society does not justify labeling them all-purpose public figures.¹¹⁴ Libel plaintiffs who are not all-purpose public figures must still prove *New York Times* actual malice if they are "limited," or "vortex" public figures.¹¹⁵ Such limited public figures, the Court held, must prove the defendant acted with actual malice if the defamation arose out of a public controversy in which the plaintiff voluntarily injected himself or herself.¹¹⁶ However, where the plaintiff is merely a private figure, the Court determined that states may define their own standards of liability so long as the standard is not no-fault liability.¹¹⁷ The Court ruled that Gertz was neither an all-purpose nor a limited public figure, and remanded the case.¹¹⁸

Eleven years later constitutional libel law took another turn in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹¹⁹ The Court in *Dun & Bradstreet* stated that when a false defamatory statement about a private person does not involve a "matter of public concern," a plaintiff may collect presumed and punitive damages without having to prove *any* level of fault.¹²⁰ Justice Powell, again writing for the Court, reasoned that where the content of the defamatory message is of concern only to the parties involved, no threat to the free expression of public issues can be presented by a

113. *Id.*

114. The Court defined such all-purpose public figures as those people who "achieve such pervasive fame or notoriety that [they become] a public figure for all purposes and in all contexts." *Id.* at 351.

115. *Id.*

116. *Id.*

117. *Gertz*, 418 U.S. at 347. The Court did rule, however, that states must require private plaintiffs to prove actual malice to recover punitive damages. *Id.* at 349.

118. *Id.* at 352. Gertz eventually won his libel suit more than 14 years after filing it. MIDDLETON & CHAMBERLIN, *supra* note 79, at 120.

119. 472 U.S. 749 (1985).

120. *Id.* at 763.

less stringent libel standard than actual malice.¹²¹

2. The Two-Pronged Analysis and the Two Theories of the Second Prong

The result of the Court's decisions is a two-pronged analysis to determine whether the actual malice standard is required by the First Amendment. Courts must examine (1) the nature of the speech involved and (2) the public or private nature of the plaintiff. Only where both prongs reveal a distinctly public character—the speech is of a matter of public concern and the plaintiff is a public figure—is the actual malice standard considered constitutionally compelled.¹²²

Through the operation of the second prong,¹²³ the actual malice doctrine has evolved beyond a safeguard against seditious libel. The doctrine now affords greater First Amendment protection to libel directed at public officials or figures on matters of public concern for two main reasons. First, such plaintiffs have a greater ability to respond to libelous statements. As such, they have less need for the protection that libel law affords. Second, public officials and figures have actively sought the public's attention. Having done so, they must accept the risk of defamation that comes with notoriety, since our society is willing to accept some amount of false speech to guard against protected, truthful speech being chilled. Thus, public officials and figures, who have both access to the means of counterspeech and a history of thrusting themselves into the public spotlight, must prove at least that the defendant acted with actual malice in order to recover damages. Private individuals, however, are not constitutionally required to prove actual malice, because they "are both more vulnerable to injury and more

121. *Id.* at 749.

122. *See, e.g.*, Stacey L. Hayden, Note, *Limited-Purpose Public Figures: Spence v. Flynt as an Illustration of the Need for a More Complete Test*, 1992 B.Y.U. L. REV. 827, 830; Linda Kalm, Note, *The Burden of Proving Truth or Falsity in Defamation: Setting a Standard for Cases Involving Nonmedia Defendants*, 62 N.Y.U. L. REV. 812, 826 (1992) (describing the rule in the aftermath of this line of cases as a dual inquiry into the nature of the plaintiff and topic).

123. Because of the Court's decision in *Dun & Bradstreet*, see *supra* notes 119-21 and accompanying text, the thesis of this Note does not extend beyond bulletin board speech that involves speech on matters of public interest. The Court in *Dun & Bradstreet* determined that in libel suits involving speech on matters of a purely private nature, an insignificant threat is posed to public debates. Thus, the First Amendment does not demand that states require *any* fault be shown. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755-63 (1985).

deserving of recovery.”¹²⁴

In formulating the actual malice doctrine, the theory that public plaintiffs have a greater ability to respond is clearly rooted in the predominant theory of First Amendment protection—the “marketplace of ideas.” For nearly eighty years, the theory has posited that in a free and open exchange, truth will naturally prevail over falsity.¹²⁵ The marketplace theory has often supported highly speech-protective decisions by the Court.¹²⁶ This is because the marketplace theory is premised on the belief that by allowing ideas to be freely traded without government-imposed punishment distorting the process, the truth will win out.

Even proponents of this theory, however, have accepted that some restriction on expression is necessary to compensate for marketplace flaws in the trade of ideas.¹²⁷ The actual malice standard, through its focus on the ability of the plaintiff to respond through counterspeech, reflects this marketplace theory.

Libel law, however, is also a compromise between society’s interest in maintaining free and open debate and the libel plaintiff’s interest in his or her good name.¹²⁸ This balancing is reflected in

124. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-13, at 877 (2d ed. 1988).

125. The marketplace concept was first espoused by Justice Oliver Wendell Holmes, in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), who stated that the “ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”

126. *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (prohibiting a well-known evangelist from recovering damages for intentional infliction of emotional distress from a magazine parody of him in part because of the “fundamental importance of the free flow of ideas and opinions on matters of public interest and concern”); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 777-78 (1986) (holding that a private figure plaintiff in a libel suit had the burden of proving falsity of the newspaper defendant’s assertions on a matter of public concern in part because of the need to encourage free trade in ideas).

127. A prime example of marketplace flaws cited as a reason for prohibitions on speech occurred in *Gitlow v. New York*, 268 U.S. 652 (1925), in which the Court upheld the conviction of a person who published and distributed the Communist Manifesto in violation of an anti-anarchy statute. Justice Holmes, dissenting, stated that speech generally should be expressed without government interference. *Id.* at 672. He allowed, however, that if some irrevocable harm would occur before counterspeech could remedy the original speech (a “clear and present danger”), suppression may be necessary and constitutional. *Id.* at 672-73.

128. *See* PROSSER & KEETON, *supra* note 84, § 111, at 771 (“[D]efamation is an invasion of the interest in reputation and good name.”); BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 4.1, at 95 (2d ed. 1993) (“In the beginning, there is injury to reputation: words or pictures that may diminish a person’s good name. Since medieval England, the

what is termed here as the "assumption of the risk" aspect of the second prong. This theory is best exemplified in the *Gertz* decision.¹²⁹ *Gertz* recognized that just as public officials "must accept certain necessary consequences of that involvement in public affairs,"¹³⁰ public figures "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."¹³¹ Thus, "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to an increased risk of injury from defamatory falsehood concerning them."¹³² When purely private plaintiffs are involved, however, "[n]o such assumption is justified."¹³³

C. Libel Cases in Cyberspace

To date, no court in the United States has decided a case involving a suit against a computer bulletin board user arising out of defamatory statements posted on the bulletin board.¹³⁴ Three such cases have arisen, although the parties subsequently settled their disputes.

law of libel has sought to redress that injury.").

129. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

130. *Id.* at 344.

131. *Id.* at 345.

132. *Id.*

133. *Id.*

134. The Supreme Court of Western Australia, however, has decided a libel case arising out of a posting on the DIALx science anthropology computer bulletin board. *See Rindos v. Hardwick*, No. 940164 (Sup. Ct. W. Austl. Mar. 31, 1994). In this case, an American anthropologist posted the message criticizing the University of Western Australia for refusing to grant tenure to the plaintiff, a professor at the University, and for dismissing him. The defendant replied to this posting, and alleged that the plaintiff's academic career "has been built not on field research at all, but on his ability to berate and bully all and sundry on the logic of his own evolutionary theories. In the local pub, drinking and chain smoking all the while for that matter." *Id.* The plaintiff sued, alleging that along with this comment, the defendant had posted messages accusing the plaintiff of engaging in sexual misconduct with a local boy and of being a racist. In a 1994 unreported decision, the court awarded the plaintiff \$40,000 in damages plus interest, making no distinction between defamation on a computer bulletin board and the more traditional media. *Id.* Of course, this case is of limited significance for the purposes of this Note, since Australia has no First Amendment limit upon imposing liability for libelous speech.

1. *Suarez*

In *Suarez Corp. Industries v. Meeks*¹³⁵ journalist Brock Meeks operated a bulletin board called Cyberwire Dispatch.¹³⁶ Meeks, now the Washington bureau chief of *Inter@ctive Week* magazine and, according to *Time* magazine, "the best known chronicler of the Internet,"¹³⁷ posted two messages on his bulletin board about Suarez Corporation Industries.¹³⁸ In these postings, Meeks referred to Suarez's electronic advertisements on the Internet as "questionable marketing scams," and questioned the legitimacy of Suarez's marketing practices.¹³⁹ Suarez responded by suing Meeks for libel.

In a motion for summary judgment and in various statements to the media, Meeks argued that Benjamin Suarez should have to prove actual malice according to the standards set forth in *New York Times*.¹⁴⁰ According to this argument, Suarez was a public figure, not because of his position in society, but because the communication was made on a computer bulletin board. Meeks argued that Suarez could, therefore, respond to the libel by posting a reply on the bulletin board rather than suing for libel damages.¹⁴¹ Before these issues could be resolved, however, the parties settled, with Meeks agreeing not to publish any article about the company or Benjamin Suarez for eighteen months without allowing Suarez a chance to review the article first.¹⁴²

2. *Medphone*

When Peter DeNigris logged on to Prodigy to share his financial investment advice with others, he ended up in the middle of another case with a chance to establish the First Amendment parameters of computer bulletin boards. DeNigris stated that investing in Medphone Corp., a small New Jersey company, was unwise because the "company is really having a difficult time" and "ap-

135. No. 267513 (Ohio Cuyahoga County 1994).

136. *Id.*

137. *Inter@ctive Week Appoints Brock Meeks Washington Bureau Chief; Award-Winning Journalist is Cyberspace Pioneer*, BUS. WIRE, Sept. 22, 1994.

138. *Suarez Corp. Indus. v. Meeks*, No. 267513 (Ohio Cuyahoga County 1994).

139. *Id.* (consent judgment). Other statements in the posting included calling Benjamin Suarez a "slick, direct-mail baron," and accusing Suarez of trying to "pull a P.T. Barnum routine." *Id.*

140. Resnick, *supra* note 31, at A21.

141. *Id.*

142. *Suarez Corp. Indus. v. Meeks*, No. 267513 (consent judgment).

pears to be a fraud."¹⁴³ Medphone responded by suing DeNigris for libel in federal court, claiming that its stock dropped by fifty percent as a result of DeNigris's comments.¹⁴⁴

DeNigris did not argue that an actual malice standard should be applied in this case. Instead, he contended that his messages were not defamatory at all.¹⁴⁵ Observers of the case asserted that Prodigy, not individual users, were ultimately responsible for whatever libel DeNigris's postings contained, on the theory that Prodigy had assumed a duty to screen its messages.¹⁴⁶ Again, however, the parties settled the case for a nominal sum before a judge could determine how far the First Amendment's limits on libel law extend into cyberspace.¹⁴⁷ Medphone, which had sought up to \$40 million in libel damages, agreed to exchange one dollar and settle the case.¹⁴⁸ Although DeNigris claimed victory as a result of the settlement, libel lawyers took a more cautious view of the result.¹⁴⁹

3. *Stratton*

The most recent libel case arising from bulletin board speech also involved Prodigy's Money Talk. A Prodigy subscriber posted a message accusing the Stratton Oakmont investment bank of fraud in connection with Stratton's initial public stock offering.¹⁵⁰ The user accused the bank, which had paid a \$2.5 million penalty for a securities law violation earlier that year,¹⁵¹ of failing to disclose that it had lost its biggest customer until after it launched the offering.¹⁵² The posting read, "This is fraud, fraud, fraud, and criminal!"¹⁵³ Stratton, instead of posting a reply, filed a \$200 million libel action against Prodigy and the subscriber initially suspect-

143. Amy Harmon, *New Legal Frontier: Cyberspace*, L.A. TIMES, Mar. 19, 1993, at A1, A24.

144. *Medphone Corp. v. DeNigris*, Civil Action No. 92-3785 (D. N.J. 1992).

145. Harmon, *supra* note 143, at A24. The company also sued DeNigris for securities fraud. *Id.* at A1.

146. *Id.* at A24.

147. Resnick, *supra* note 31, at A21.

148. Fred Vogelstein, *Suit Over Bulletin Board Chatter Over, but Computer Libel Issue Isn't*, HOUSTON CHRON., Jan. 2, 1994, at 2.

149. *Id.*

150. Catherine Yang, *Flamed with a Lawsuit*, BUS. WK., Feb. 6, 1995, at 70, 70.

151. Jerry Knight, *Free Speech Collides with Cyberspace*, WASH. POST, Nov. 21, 1994, at E19.

152. Yang, *supra* note 150, at 70.

153. *Id.*

ed of posting the message, David Lusby.¹⁵⁴

While the *Stratton* case drew attention for the questions it raised regarding bulletin board operator liability,¹⁵⁵ the case also presented the issue of individual liability, because Stratton sued Lusby individually. However, Lusby was dropped from the suit because he convinced Stratton he did not post the message.¹⁵⁶ The court recently granted partial summary judgment for Stratton on the basis of Prodigy's liability as a bulletin board operator.¹⁵⁷ As a result, the case is significant for its determination of bulletin board operator liability, not for setting First Amendment limits for liability of individual bulletin board users.

III. ANALYSIS

A. *Can Bulletin Board Communication Ever Be Libel?*

Before delving into the constitutionally appropriate standard for libel suits arising from bulletin board speech, it is first necessary to determine whether this speech can be considered libel at all. This involves the resolution of two separate questions. First, whether defamatory bulletin board speech is more accurately characterized as libel or slander; second, whether individual users of bulletin boards, rather than system operators, are the proper target of libel suits.

154. *Id.*

155. See Robert Charles, *Computer Libel Questions in 'Stratton v. Prodigy,'* N.Y. L.J., Dec. 13, 1994, at 1 (raising the question of whether commercial computer bulletin boards owe a duty to those alleging they were defamed by a bulletin board's subscriber); Knight, *supra* note 151, at E26 (exploring the possibility that Prodigy may be held liable for defamatory postings because it edits its bulletin boards); *Stratton Oakmont Lawsuit Against Prodigy Attempts to Pin Responsibility for Content on Operators*, COMPUTERGRAM INT'L, Feb. 10, 1995 [hereinafter *Stratton Oakmont Lawsuit*] ("At issue in the libel claim is whether the computer on-line service is viewed as a newspaper, responsible for its editorial content, or as a telephone carrier or bookstore, and therefore not responsible for content.").

156. *Id.* Lusby, a former Prodigy employee, swore under oath that he did not post the message and that another Prodigy subscriber also named David Lusby denied writing this message as well. Knight, *supra* note 151, at E26.

157. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); see also *supra* note 6 (discussing the applicability of libel law to computer bulletin board systems).

1. Libel or Slander?

Defamation that occurs over computer bulletin board systems is best categorized as libel rather than its sibling tort, slander. While both torts allow recovery for defamation, libel generally covers written or printed defamation, while slander traditionally covers oral defamation.¹⁵⁸ The distinction is not an easy one.¹⁵⁹ Furthermore, the importance of the distinction extends beyond mere concerns about the form of the required pleadings. Slander plaintiffs usually win smaller damage awards than people suing for libel.¹⁶⁰ Slander plaintiffs have traditionally been required to prove a financial loss as a result of the defamation to recover, while no analogous requirement exists in state libel law.¹⁶¹

While characterizing defamation on computer bulletin boards as slander would result in more freedom of speech in cyberspace (because of the provable financial loss requirement), this type of defamation is better characterized as libel. Slander is more transitory and therefore less harmful than libel.¹⁶² One scholar used this distinction to posit a hypothetical in which Sam Slammer posts a bulletin board message accusing Dora Defamed of child abuse, and asserted that because of the more permanent nature of bulletin board speech, any defamation action Dora would have against Sam should be sounded in libel:

Written or printed words are considered more harmful than spoken words because they are deemed more premeditated and deliberate. For example, Sam Slammer had to sit down at a keyboard and compose his post; it is not a matter of a comment carelessly made in a fit of anger. Printed words also last longer, because they are put in a form in which they can serve to remind auditors of the defamation, while the spoken word is gone once uttered. Had Sam Slammer

158. MIDDLETON & CHAMBERLIN, *supra* note 79, at 86-87; *cf.* PROSSER & KEETON, *supra* note 84, at 786-88 (suggesting that the distinction is more complex and revolves around whether the speech is embodied "in some more or less permanent physical form").

159. *See* RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977); PROSSER & KEETON, *supra* note 84, at 786 ("The distinction itself between libel and slander is not free from difficulty and uncertainty.").

160. MIDDLETON & CHAMBERLIN, *supra* note 79, at 87.

161. *Id.* The reason for this distinction is that printed materials have historically been assumed to cause more harm to a person's reputation than the spoken word. *Id.* The Restatement of Torts, however, calls for an end to the libel-slander distinction. RESTATEMENT (SECOND) OF TORTS § 568A (1977).

162. Loundy, *supra* note 9, at 91.

accused Dora Defamed of child abuse in person, the statement would be fleeting; on the BBS it is stored for viewing by any user who decides to read what posts have been left in the [BBS]. For days, weeks or months people can read Sam's Statement unless Samantha Sysop removes it. . . . Text on a computer screen shares more traits with libel than with slander.¹⁶³

In addition, a message posted on a BBS and displayed on a computer screen can become a printed message at the touch of a button if the user prints the message to an attached printer.¹⁶⁴ Therefore, because it takes more time to type out a bulletin board message than to speak, and because such a message is more permanent than a spoken one, postings on bulletin boards more closely resemble written than spoken communication. Any liability for bulletin board defamation should thus come from libel rather than slander law.

2. The Proper Target for Cyberspace Libel Suits

Having decided for what cyberlibel plaintiffs may sue, the next question to answer is whom they may sue. The proper targets for libel suits are generally the individuals who post defamatory messages rather than the bulletin board operators who allow the messages to be posted.

The question of whether sysops of bulletin boards may be held liable for libelous messages posted on their fora¹⁶⁵ turns on what form of traditional media computer bulletin boards resemble. *Cubby, Inc. v. Compuserve*,¹⁶⁶ a 1991 District Court decision, concluded that bulletin board operators are mere distributors of information, much like a bookstore, and thus cannot be liable for defamation unless they knew or should have known of the defamatory

163. *Id.* (footnote omitted); cf. SANFORD, *supra* note 128, at 47 (determining whether computer information systems in general are governed by the law of libel or slander is not a simple task because "the range and combination of variables available in electronic systems make it difficult to generalize about whether they are more like speakers or writers.").

164. Loundy, *supra* note 9, at 91.

165. Libel plaintiffs will presumably wish to sue sysops rather than individual BBS users because sysops may have greater resources. See T.R. Reid, *The New Legal Frontier: Laying Down the Law in Cyberspace*, WASH. POST, Oct. 24, 1994, at F24 (noting the defamed person "is apt to sue the big, rich company that operates the BBS system [sic].").

166. 776 F. Supp. 135 (S.D.N.Y. 1991). For a brief summary of this case, see *supra* note 6.

nature of the message.¹⁶⁷ The *Cubby* decision has been widely praised¹⁶⁸ and may well represent the position most other courts will take.¹⁶⁹ Moreover, the latest draft of the Uniform Defamation Act provides that computer bulletin board operators generally are not to be subject to liability as “republishers” of information.¹⁷⁰ Thus, it appears that individual BBS users are the proper target for libel suits arising from bulletin board speech.

B. Factors in the BBS Public Figure Determination

Given, then, that communication on computer bulletin boards is best characterized as libel generally actionable against the party who posts the defamatory message, it remains to define constitutional standards by which states may hold parties liable.¹⁷¹ Based

167. *Cubby*, 776 F. Supp. at 140.

168. See, e.g., Cutrera, *supra* note 6, at 581 (expressing hope that future courts will follow the *Cubby* decision); Connor, *supra* note 6, at 236 (stating that given the factual scenarios in *Cubby*, the decision was “sound”); Charles, *supra* note 6, at 40 (stating that the case erects “a sturdy fence around this sapling industry”). But cf. Anthony J. Sassin, *Cubby, Inc. v. Compuserve, Inc.: Comparing Apples to Oranges: The Need for a New Media Classification*, 5 SOFTWARE L.J. 821, 843-44 (1992) (“Although correct, the decision in *Cubby* failed to provide courts with an adequate method for applying defamation law to new media technology, the [information system company]. . . . [T]he court should have created a new media classification for Compuserve and other [information system companies].”) (footnote omitted).

169. See *Stern v. Delphi Internet Servs. Corp.*, 626 N.Y.S.2d 694 (Sup. Ct. 1995) (holding that Delphi, in providing access to its computerized database service, was a “news disseminator” rather than a publisher). But see *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995) (holding that Prodigy was the publisher of allegedly libelous statements on one of its bulletin boards because it exercised editorial control over its BBSs).

170. UNIF. DEFAMATION ACT § 21 (1992 draft not approved by the National Conference of Uniform Commissioners). The Act states that a technology such as computer bulletin boards is not subject to liability for republishing if it “(1) is not reasonably understood to assert in the normal course of its business the truthfulness of the information maintained or transmitted; or (2) takes reasonable steps to inform users that it does not assert the truthfulness of the information maintained or transmitted.” *Id.*

171. Because libel law is a creature of both state law and constitutional interpretation, two options exist for how the actual malice standard advocated by this Note may be adopted for cyberlibel plaintiffs. First, the courts could mandate such a constitutional standard when a factually appropriate case is brought before them. Second, because libel law is also a product of state common and statutory law, states could codify an actual malice requirement in their libel laws because it represents not only First Amendment limits, but sound policy as well. However, the first option, a ruling by a court—ideally the Supreme Court—is the most desirable. This option would have the advantage of granting constitutional rather than mere statutory protection to bulletin board users. In addition, difficult choice-of-law problems would arise if all states did not enact the same level of protection for bulletin board participants. Having various levels of libel protection across different states is particularly unpalatable in the case of cyberspace, which makes state

on the Supreme Court's reasoning in developing the actual malice doctrine, the determination of whether the First Amendment requires application of the actual malice standard to defamatory bulletin board speech on matters of public concern should depend on several factors. These factors are (1) whether the plaintiff has access to the bulletin board on which the defamatory message appeared, (2) to what extent the plaintiff has previously participated on the bulletin board, and (3) the likelihood that truthful, protected speech in this medium would be chilled by a less stringent standard.¹⁷²

1. Access to the Bulletin Board—The Reply Rationale

The primary thrust behind a court's determination of whether the actual malice standard should extend to cyberlibel should be how closely the bulletin board in question resembles a true "marketplace of ideas." In other words, the question should be whether the libel plaintiff could respond on the bulletin board. A libel plaintiff who can post counterspeech on the bulletin board where the defamatory statement appeared is thereby analogous to a public official or figure. Thus the actual malice standard should be constitutionally required for that plaintiff to recover damages.¹⁷³

A plaintiff who has the proper computer, modem, and software, and who can dial a bulletin board number without having to pay a substantial fee, has "access"¹⁷⁴ to a bulletin board. In contrast, a

boundaries nearly obsolete. Thus, a judicial ruling is the preferable means to translate this Note's thesis into law.

172. This analysis presupposes that libel suits against individuals raise the same types of issues and require the same First Amendment protections as suits against media entities. This assumption has certainly not been settled and was explicitly passed over by the Supreme Court. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); Jeff Boykin, Note, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.: Does the Actual Malice Standard of Gertz v. Robert Welch, Inc. Apply to Speech on Matters of Purely Private Concern?*, 14 PEPP. L. REV. 337, 337-40 (1987).

173. A recently published book echoes this position, observing that while private citizens have been able to recover libel damages without having to prove actual malice, partly because they do not have the means of access to mass media, this is not the case in cyberspace. EDWARD A. CAVAZOS & GAVINO MORIN, *CYBERSPACE AND THE LAW* 80 (1994) ("Interestingly, this is no longer the case with cyberspace, where everyone has a similar ability to communicate with large numbers of people.").

174. Courts use the term "access" to refer to the determination of whether the plaintiff has attempted to influence public opinion about an important public controversy, so that he or she has captured the attention of the public and will have access to the mass media. Thus, access is a product of the plaintiff's action to thrust himself or herself into the midst of a public controversy. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) ("It is preferable to reduce the public-figure question to a more meaningful context by

person who neither owns nor has access to a computer, who has never used a computer or has no idea how a computer bulletin board functions, or who could not reasonably afford the cost to access the BBS, has no "access" to counterspeech. Thus, "access," as used in this Note, turns on the reasonableness of expecting the plaintiff to be able to respond to a defamatory statement on a BBS. This determination, in turn, may take into account whether a libel plaintiff, through his or her history of participation on a BBS, would be likely to read the defamation soon enough after it is posted to respond effectively.¹⁷⁵

The access enjoyed by the former category of plaintiffs is not merely the equivalent of that enjoyed by traditional public figures. Rather, computer bulletin boards allow a superior form of counterspeech more perfectly resembling the marketplace of ideas, a type of access referred to in this Note as "super-access." Those libel plaintiffs with access to the computer bulletin board on which the defamatory material appeared have the ability to post a nearly universal and instantaneous response. This super-access is in sharp contrast with a public figure who has been defamed in a newspaper, for example. That person must go to the trouble of taking an

looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."). Thus, courts have examined whether a plaintiff has access to the means of reply by examining his or her role in a public controversy, thereby providing the public attention to have his or her reply heard.

This Note breaks with that definition of access to some degree. It asserts that libel plaintiffs who have the ability to respond on the computer bulletin board on which the defamation appeared have access to the reply means not because they have invited the public's attention, but simply because they can post a reply on the bulletin board. Thus, it could be argued that this Note is inconsistent with the public figure precedent in that it focuses on the libel plaintiff's ability to respond, rather than on the ability of the libel plaintiff to make people pay attention to his or her response. However, the author does not believe this is a fatal flaw with this Note's thesis. Communication on computer bulletin boards is more anonymous than in other media; readers usually do not know the name of the person writing a message and cannot identify the sender by any way other than a series of letters or numbers or both. *See supra* note 35 and accompanying text. Thus, all libel plaintiffs responding to bulletin board defamation will have an equal opportunity to make the public read their responses, because readers do not pay attention to bulletin board postings based on the identity of the speaker but rather because of the content of the message. In addition, the author believes that the ability to reply versus the ability to make people pay attention distinction is of dubious significance and should not sway courts to draw a constitutional line in this area.

175. For example, if a libel plaintiff generally only reads the bulletin board on which the defamation appeared once every six months, a court may consider that such plaintiff does not have "access" to that bulletin board because he or she cannot reasonably be expected to respond to that defamation soon enough for the response to be effective.

action to respond, such as calling a press conference; he or she must wait for the response to be printed in the newspaper, and he or she will not reach many people who read the libelous story but not the response.¹⁷⁶

In contrast, a computer bulletin board to which a libel plaintiff has access is a textbook marketplace for the trade of ideas. By allowing libel plaintiffs access to nearly instantaneous and universal counterspeech, the free trade of ideas is allowed to proceed with almost no marketplace flaws. Michael Godwin, staff counsel of the Electronic Frontier Foundation, made this point in connection with the *Suarez* case:

[Cyberspace] is the ultimate free-speech medium, where everybody potentially has the right of reply. In defamation law, public figures who can hold a press conference and get attention for their response can't sue for libel very easily. On a computer network, it's as though everybody is a public figure, and can answer what's said about them.¹⁷⁷

One legal commentator noted how this feature of computer bulletin boards should affect libel law, and has taken the additional step of calling for total immunity for all statements made in this medium.¹⁷⁸

176. For example, the initial defamatory story could be run in a wider-circulated Sunday newspaper while the response, if the newspaper chooses to print it all, could be printed in a different day's edition with a lower circulation.

177. Michael Godwin, *quoted in* Tamar Lewin, *If Flames Singe, Who Is to Blame?*, N.Y. TIMES, Sept. 25, 1994, § 4, at 3 (describing the Electronic Frontier Foundation as an advocacy group that champions freedom of expression in digital media).

178. See Edward A. Cavazos, *Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology*, 12 REV. LITIG. 231, 247 n.88 (1992) (suggesting that a strict application of the right-of-reply theory would point toward absolute immunity from libel suits for bulletin board users). This position is similar to that occasionally taken in the traditional media cases that gives absolute immunity for criticism of public officials, at least as to their official conduct. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring). Another commentator has taken a different position:

Suppose a cyberspace user writes a defamatory message about another user and intentionally sends it over the Internet to a dozen other individuals. Is this situation materially different from sending the same message by fax, mail, or telegraph? It is hard to see how it could be. The same elements—defamatory content, publication to third parties, perhaps actual malice, and so on—must be determined in the cyberspace libel case as elsewhere. Those issues seem indistinguishable from the same issues arising in a non-cyberspace context. In short, the fact that a communication was an electronic mail message on the Internet instead of a paper letter through the postal system makes little difference to the

It is true that the response may never "catch up" with the defamation, because the defamatory posting can be re-posted on other bulletin boards, printed to paper, or transferred through word of mouth. This risk, however, is not sufficient to justify a libel standard lower than actual malice. This is exemplified by the case of public figures, whose ability to respond to defamatory messages may never catch up with the defamatory speech.

Although the Supreme Court has stated that the inadequacy of the rebuttal is a relevant concern,¹⁷⁹ it is not a factor of sufficient weight to affect the actual malice determination. In addition, this fear that counterspeech may not be perfect is particularly insufficient in the computer bulletin board context, where a reply can be posted nearly instantaneously to the entire audience who had access to the first message.¹⁸⁰

2. Past Participation—The "Assumption of the Risk" Rationale

The second factor courts weigh in the second prong of the actual malice doctrine is the actions the libel plaintiff has taken to thrust him or herself into a public controversy, thereby assuming the risk of increased scrutiny. Translated to the cyberspace context, this inquiry should revolve around whether the libel plaintiff has previously participated in discussions on the bulletin board on which the defamatory posting appeared.

As recognized by *Gertz*, the actual malice standard is compelled for circumstances in which the plaintiffs "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."¹⁸¹ The theory is that a public figure, having taken an affirmative step with the knowledge that he or she may be defamed in the process, assumes

legal outcome.

I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 999 (1994) (footnote omitted).

179. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974), the court stated,

Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

180. See Becker, *supra* note 12, at 211 (explaining that the heart of computer bulletin board systems are public message areas in which messages, once posted, can be read by anyone with access to the bulletin board).

181. *Gertz*, 418 U.S. at 345.

the risk of rigorous criticism and must therefore prove the defendant acted with actual malice to recover damages.

In the computer bulletin board context, participants are well aware of the free, open, and fierce debate that characterizes the medium.¹⁸² Thus, like public figures, computer bulletin board users "run[] the risk of closer . . . scrutiny than might otherwise be the case."¹⁸³ In short, a person who posts a message on a bulletin board should expect to be flamed.

This issue is less important in cyberspace than in the traditional media, however, because of the overwhelming ability to respond that those libel plaintiffs with access to the bulletin board enjoy.¹⁸⁴ The ability to remedy the libel by counterspeech allows the cyberlibel plaintiff to keep his or her name intact. This point becomes important in the case of lurkers, those libel plaintiffs who have access to respond to the defamatory posting but who have not previously posted a message, and thus have not thrust themselves into a public controversy.

3. Chilling Effect

Finally, courts must examine the probable chilling effect¹⁸⁵ of allowing plaintiffs to succeed relatively easily in libel suits arising from bulletin board speech. As recognized in *New York Times*, low fault standards are undesirable because of the risk that they may deter truthful, protected speech.¹⁸⁶ The chilling effect represents a

182. Although it is difficult to prove empirically whether people who first sign on to bulletin boards actually know of the harsh nature of bulletin board debates, certainly plenty of warnings exist in the popular media. *See, e.g.*, Silver, *supra* note 31, at 98 (warning potential venturers into cyberspace that users trade insults, lie, and flame other users); Staples, *supra* note 30, at A26 (detailing particular episodes of what would normally be called "verbal venom," but which is transformed into written defamation by computer bulletin boards).

183. *Gertz*, 418 U.S. at 344.

184. *See supra* notes 173-78 and accompanying text (describing the super-access that persons with access to a computer bulletin board possess).

185. *See supra* notes 93-95 and accompanying text (describing the chilling effect and its influence on the development of the actual malice standard).

186. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

[C]ritics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make statements which steer far wider of the unlawful zone.

Id. Subsequent studies show that the Court was justified in this supposition. *See, e.g.*, Stephan M. Renas et al., *An Empirical Analysis of the Chilling Effect, in THE COST OF*

more serious threat to bulletin board users than to journalists in electronic or print media, because bulletin board users usually have no one to pay the costs of defending libel suits. Libel lawyer Simon Gallant noted this problem: "People could find themselves exposed to very costly libel actions in many jurisdictions and at the end of the day find themselves with huge damage awards against them. Ultimately that could lead to their bankruptcy."¹⁸⁷ The *Suarez* case illustrates a prime example of this. Suarez settled the case because Meeks was considered "uncollectible"¹⁸⁸—Meeks had incurred a debt of more than \$25,000 defending the suit brought by Suarez.¹⁸⁹

Because libel litigation is exceedingly expensive compared to other types of civil suits,¹⁹⁰ courts faced with this issue must assess the likelihood that truthful, protected speech will be chilled when determining whether an actual malice standard is constitutionally compelled for bulletin board communication. Courts therefore may want to consider the general makeup of the computer information system's users to determine whether speech on that bulletin board would be severely chilled by a lenient libel standard.¹⁹¹ In determining whether the actual malice standard is compelled by the

LIBEL 41, 55 (Everette E. Dennis & Eli M. Noam eds., 1989) (reporting the results from a survey that showed that a deviation from an actual malice standard would allow plaintiffs to win libel suits more frequently, which would, in turn, cause newspapers to be less likely to publish stories on matters of public concern).

187. Barnes, *supra* note 4, at 22.

188. *Netwatch: News, Culture, Controversy on the Internet*, TIME, Sept. 5, 1994, at 20, 20.

189. *Id.* Some portion of this cost was offset by a defense fund established by Meeks's supporters, although the amount raised was less than hoped. *Marketer Files Suit over Criticism in Article on Internet*, COLUMBUS DISPATCH (Ohio), July 11, 1994, at 7C.

190. See Henry R. Kaufman, *Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation*, in THE COST OF LIBEL, *supra* note 186, at 1, 7 (stating that libel defense costs are greater than in workers compensation cases and amount to 80% or more of all dollars spent by libel insurers of the media). A well-publicized example of the high cost of libel litigation involved a suit brought by General William Westmoreland against CBS, journalist Mike Wallace, and the news program *60 Minutes*. The General alleged that a story, entitled *The Uncounted Enemy: A Vietnam Deception*, was libelous by charging him with a conspiracy to suppress and distort intelligence as to the size of the enemy's forces. The estimated total cost of the litigation for this case, which was ultimately withdrawn, ranges from \$6.5 to \$10 million. LOIS G. FORER, A CHILLING EFFECT 22 (1987).

191. For example, speech on Usenet news groups may be deterred more easily than on local bulletin boards. Many Usenet speakers are college and graduate students, who participate at no cost to themselves through their academic institutions. Students presumably have less wealth reserves than the general population, and therefore, would be easily deterred from freely expressing their views because of costly libel litigation.

First Amendment for bulletin board speech, courts must act to guard against this chilling effect.

C. Application

Assuming, perhaps somewhat unrealistically, that the chilling effect is roughly equal among all types of bulletin board systems and all types of defendants in such cases, the courts will be left with two variables to consider in determining what fault standard is appropriate in bulletin board defamation suits against individuals. The first variable in this determination is whether the plaintiff has access to the means of counterspeech. Second, courts should consider to what extent the plaintiff has previously participated in discussions on the bulletin board. For the reasons discussed below, the more a plaintiff has actively participated on the bulletin board, then the more the First Amendment requires that he or she prove actual malice, in accordance with *New York Times*, to recover damages.¹⁹²

1. Libel Plaintiffs with Access

a. Access and Past Participation on the Bulletin Board

The clearest case in which the rationale of the actual malice standard translates to the context of computer bulletin boards is where the libel plaintiff is an active participant on the BBS. Those plaintiffs who have the ability to post a response on the BBS, and who have consistently participated in public debates by reading and posting messages, should be required to prove actual malice. By their extensive past participation in an arena for fierce debate, such plaintiffs have thrust themselves into a position where they are subject to criticism, and as such, "he who enters the kitchen must accept the heat of the fire."¹⁹³ More importantly, by possessing

192. It is likely that, at some point in the future, the Court will decide the actual malice standard no longer adequately protects the First Amendment rights of speakers in cases involving public figures. See TRIBE, *supra* note 124, § 12-13, at 886 (describing how the Court's current balance in libel law between the defendant's First Amendment rights and the plaintiff's reputational interest "lacks coherence—and, in all likelihood, staying power"). Similarly, the actual malice standard for active participants on computer bulletin boards should not be etched in stone. If the Court creates a different constitutional standard for libel plaintiffs who are public figures, then the standard for active computer bulletin board participants should be correspondingly altered.

193. Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 457 (1988).

access to "effective channels of communication,"¹⁹⁴ such plaintiffs are participants in a true marketplace of ideas, and the state may not skew this market by allowing easy libel recovery.

b. Access with No Past Participation on the Bulletin Board¹⁹⁵

The affirmative step of participating on bulletin board discussions, however, is not necessary for the actual malice standard to be constitutionally compelled for cyberlibel plaintiffs. Libel plaintiffs who enjoy access to the bulletin board on which the libelous posting appeared but who have taken no affirmative act to assume the risk of public scrutiny still should be required to prove actual malice before recovering damages.

A libel plaintiff with access to the bulletin board on which the defamatory message was posted owns a powerful weapon to combat the libelous statement. Even if the plaintiff has never taken advantage of this access to post a message, he or she still has the ability to post a nearly instantaneous and universal response to the defamation. This super-access to reply channels, far superior than that enjoyed by public officials and figures, justifies the conclusion that the First Amendment compels application of the actual malice standard to all plaintiffs who have access to the bulletin board, regardless of whether they have previously posted messages on the BBS.

This situation is best exemplified by the lurker.¹⁹⁶ The libel plaintiff who has access to the bulletin board meets the first theory of the second prong—he or she has access to the means necessary to respond. But if he or she has not previously posted a message, instead choosing to lurk, it seems unlikely that he or she meets the second theory, that of assumption of the risk. The lurker has taken no affirmative step to thrust his or herself into the public spotlight.¹⁹⁷ Yet the lurker plaintiff should still be required to prove

194. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

195. Although such an occurrence makes for an interesting scenario, rarely is a lurker, who is not otherwise a public official or figure (for whom the actual malice standard is already required), defamed on a computer bulletin board. Without the notoriety that comes with being a public official or figure, and without participating in a discussion on the bulletin board, a lurker is not likely to become the topic of conversation on the bulletin board. In this sense, the lurker who is defamed resembles a traditional public figure who has achieved such status through no purposeful action. The *Gertz* court recognized that such instances "must be exceedingly rare." *Gertz*, 418 U.S. at 345.

196. See *supra* note 20 and accompanying text (defining this term).

197. That is, unless one considers the act of dialing up a local bulletin board system,

actual malice, because he or she does have an adequate remedy available—counterspeech. The lurker, immediately upon reading the defamatory posting, can hit a “reply” key and post a response, which will be posted to the same audience that read the initial defamatory posting.¹⁹⁸ If the lurker acts fast enough, he or she may even be able to post the reply before most of the audience has read the initial posting.

In such a case, it is not dispositive that the lurker, or any other plaintiff with access but no history of taking part in the bulletin board’s discussions, has not thrust him or herself into a position where an increased risk of public scrutiny is to be expected. Such a plaintiff may not have given up any interest in his or her good name by assuming the risk of increased public scrutiny, but this fact is not crucial due to the super-access such a plaintiff enjoys to the channels of response.

2. No Access

The rationale behind extending actual malice protection breaks down when the libel plaintiff has no practical means of accessing the bulletin board. Plaintiffs who have no ready access to the bulletin board on which the defamation appeared cannot effectively counter the message, unlike recognized public figures.

Thus, persons with access to computer bulletin boards do not possess either of the two characteristics that the *Gertz* Court claimed separated public figures from private individuals for First Amendment libel purposes.¹⁹⁹ Therefore, the First Amendment does not compel states to require libel plaintiffs who have no access to the bulletin board on which the libelous statement was posted to prove actual malice to recover damages, provided such plaintiffs are not otherwise public figures.

logging on to the Internet, or subscribing to a commercial on-line service a sufficient enough step so that the plaintiff should thereby be expected to give up some interest in his or her name. This Note does not take this position.

198. *The Internet Show*, *supra* note 52.

199. In most cases, access should come along with the history of participating—if the plaintiff has previously posted messages on the bulletin board, he or she will have access to the BBS. It is possible, however, that a plaintiff could have a history of participating on the bulletin board but no longer have access to the board. For example, if the plaintiff sold his or her computer equipment and can no longer sign on to the bulletin board. The logic of this Note’s thesis—that the super-access to channels of reply enjoyed by those plaintiffs with access to a bulletin board justifies an extension of the actual malice doctrine—dictates that should such a situation arise, the First Amendment does not compel states to require such plaintiffs to prove actual malice to recover damages.

D. Responding to Potential Criticisms of this Thesis

1. The "Disincentive Problem"

This standard allows plaintiffs with no practical means of counterspeech on a bulletin board to recover damages more easily for the defamatory speech. This does not mean, however, that this standard creates a serious disincentive for people to acquire the hardware and knowledge to sign on to a bulletin board, the behavior that society presumably wishes to encourage, or at least not to discourage.

First, allowing plaintiffs who have no access to the BBS to more easily recover monetary damages for libel does not create any disincentive to learn how to use a computer bulletin board or to acquire the necessary computer hardware. Those persons who have been defamed and who have access to the bulletin board may not be able to recover monetary damages because they will have to prove actual malice. However, they have an effective, and inexpensive, way to make themselves whole—by responding to the defamatory message. If this nation truly believes that the "ultimate good desired is better reached by free trade in ideas,"²⁰⁰ then the defamed person will presumably be able to make himself or herself whole by simply engaging in counterspeech. This has the advantage of being quicker and less expensive than initiating a libel suit.

Even if one does not believe that posting a response is as adequate a remedy for defamatory speech as monetary damages, one should not expect that one's status in a libel suit will have any significant effect on the decision whether to sign on to a bulletin board. Just as it seems unlikely that the actual malice doctrine in the traditional media has significantly deterred anyone from seeking the benefits of public office or the limelight of a public figure, extending the actual malice doctrine to libel plaintiffs should not seriously deter anyone from enjoying the benefits of access to cyberspace.²⁰¹

200. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

201. Some of the benefits of communicating electronically include communications speed, low cost of communicating, vast information storage, access to large, diverse audiences, search capabilities, and ease of reproduction. Heinke & Rafter, *supra* note 34, at 1.

2. The "Complication Problem"

Libel law is already complicated. The pages of legal texts and law reviews are replete with scholars bemoaning that the injection of constitutional law into the tort of libel has caused confusing rules and doctrines for courts to apply.²⁰² Already, any given libel suit may necessitate resolution of difficult issues such as whether the plaintiff is a public official²⁰³ or a public figure,²⁰⁴ whether the statement is fact or opinion,²⁰⁵ and whether the defendant has acted with the appropriate level of care.²⁰⁶

Some observers are calling for clearer rules governing constitutional libel law.²⁰⁷ This Note, however, calls for courts to make yet another determination—whether the libel plaintiff has access to the necessary means of reply on the bulletin board. As a result, some commentators may criticize this Note for complicating an already confusing area of the law.

The thesis of this Note does not, however, create a significant

202. The leading text on tort law states,

[T]here is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm.

PROSSER & KEETON, *supra* note 84, § 111 at 771-72; *see also* Nicole B. Casarez, *Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming*, 32 DUQ. L. REV. 667, 667 (1994) ("Libel law in America is complex, confusing, expensive, unworkable and ultimately inefficient."); Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1519 (1987) (describing defamation law as "dripping with contradictions and confusion").

203. *See, e.g.*, MIDDLETON & CHAMBERLIN, *supra* note 79, at 116-17 (summarizing the courts' attempts to define public officials).

204. *See, e.g.*, *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) ("Defining public figures is much like trying to nail a jellyfish to the wall.").

205. *See, e.g.*, SANFORD, *supra* note 128, at 133 ("no area of modern libel law can be murkier than the cavernous depths of this inquiry").

206. *See, e.g.*, MIDDLETON & CHAMBERLIN, *supra* note 79, at 128-36 (summarizing the courts' attempts to apply the actual malice definition); *Id.* at 137-41 (reviewing the criteria for determining whether a journalist is negligent).

207. *See generally* REFORMING LIBEL LAW (John Soloski & Randall P. Bezanson eds., 1992) (containing several proposals aimed at making libel suits quicker, less expensive, and less constitutionally perplexing); Randall P. Bezanson, *Legislative Reform and Libel Law*, in LIBEL LITIGATION 1992, at 629 (PLI Pat., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. 338, 1992) (setting forth several advantages and disadvantages of using legislation to reform libel law).

complication problem. Rather, it merely proposes an extension of the actual malice doctrine to situations in which the libel plaintiff has been defamed on a computer bulletin board and has access to post a reply. The access determination should not burden courts too greatly, as it requires a simple common sense determination, which is no more vague than other areas of the law. The standard will turn on the reasonableness of the expectation that the plaintiff has the ability to respond. Courts are quite used to determining reasonableness.²⁰⁸ In addition, this is a determination that often should be so clear that it can be disposed of as a matter of law, saving libel defendants from costly litigation.²⁰⁹

E. Overcoming the Court's Resistance to New Technology

Although the Supreme Court has extended First Amendment protections for libelous speech based on the public nature of the plaintiff or the speech,²¹⁰ courts have been much less willing to extend the protections of the First Amendment to situations in which new technology is the conduit that transmits the message. The Supreme Court has been criticized for its unwillingness to apply the same level of First Amendment protections to users of new communication technology as it does to users of more traditional technology such as printed or written communication.²¹¹ An

208. See PROSSER & KEETON, *supra* note 84, §§ 31-32, at 169-93 (describing the importance of the elements "unreasonable risk" and "reasonable person" in negligence tort law).

209. The *Suarez* case serves as an example of this, as Benjamin Suarez's own advertisements on the Internet led to Meek's allegedly libelous posting. See *supra* notes 135-42 and accompanying text (summarizing the relevant facts of *Suarez*). Since Meeks' bulletin board was on the Internet, it would seem to follow that Suarez, the plaintiff, could have replied.

210. See *supra* notes 78-133 and accompanying text (describing the evolution and rationale of the public figure test).

211. See ITHIEL DE SOLA POOL, *THE TECHNOLOGIES OF FREEDOM* 4 (1983) ("Judges and legislators have tried to fit technological innovation under conventional legal concepts. The errors of understanding by these scientific laymen, though honest, have been mammoth. They have sought to guide toward good purposes technologies they did not comprehend."); Chad E. Milton et al., *Emerging Publication Torts*, in *LIBEL LITIGATION* 1994, at 651 (PLI Pat., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. 389, 1994) ("Law has not kept pace with new technological developments, requiring courts and practitioners to struggle to fit the 'square peg' of new technology into the 'round holes' of existing copyright, trademark and First Amendment law."); Gregory E. Perry & Cherie Ballard, *A Chip by Any Other Name Would Still Be a Potato: The Failure of Law and its Definitions to Keep Pace with Computer Technology*, 24 *TEX. TECH L. REV.* 797 (1993) (criticizing the Supreme Court for decisions involving broadcasting and computer technology where the Court focused on the technology involved rather than

especially infamous example of the Court's reluctance is *Red Lion Broadcasting Co. v. FCC*.²¹² In *Red Lion*, the Court allowed the FCC to force a radio station into providing response time for people "personally attacked" on the radio station.²¹³ The Court dismissed the broadcasting company's assertion that such an action would never be held constitutional in the print media context. The Court stated that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."²¹⁴ *Red Lion* in general, and this phrase in particular, have been soundly criticized by legal commentators.²¹⁵

This attitude toward new technology could curtail the First Amendment rights of computer bulletin board users. Media lawyer Bruce Sanford noted this possibility and predicted that serious First Amendment problems may arise as courts attempt to apply libel law to computer technology: "Courts have been extremely reluctant to adjust traditional remedies to modern forms of communication. . . . Electronic publishing, the transmission of computerized information for video display or printout, presents another generation of questions in applying the established rule of defamation."²¹⁶ This reluctance to retain the core values of the First Amendment as new technologies emerge has led Laurence Tribe to propose a constitutional amendment guaranteeing free speech and press regardless of the technology used to convey the message.²¹⁷

the First Amendment interests which have allegedly been compromised).

212. 395 U.S. 367 (1969).

213. *Id.* at 386, 396 (holding that Congress and the Commission did "not violate the First Amendment when they require[d] a radio [station] . . . to give reply time to answer personal attacks").

214. *Id.* at 386-87 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)) (addressing the application of First Amendment protection to motion pictures).

215. See, e.g., TRIBE, *supra* note 124, § 12-25, at 1003 ("[T]he decision in *Red Lion* . . . amounted to a chain-breaking departure from the constitutional approach to newspapers and magazines."); Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 155 (criticizing *Red Lion's* reliance on the right of people to receive suitable access to ideas and experiences).

216. SANFORD, *supra* note 128, at 46.

217. The proposed amendment states,

This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled.

If the courts refuse to recognize the functional equivalency of public figures and cyberlibel plaintiffs with access to computer bulletin boards, then the actual malice standard certainly would not be held constitutionally mandated. Extending actual malice protection to cyberlibel plaintiffs requires nothing more than applying the rationale the courts have used in their decisions establishing the actual malice standard. However, the courts have been criticized for this very failure to apply First Amendment rights established for traditional media to new communication technologies.

The characteristics of computer bulletin board technology may, however, hold the key for persuading courts to fully enforce the protections of the First Amendment in this area. The two major forces behind the courts' decisions granting lesser First Amendment protection to users of new technologies have been the "scarcity" and the "intrusiveness" principles.²¹⁸ The former is illustrated by *Red Lion*, in which the Court pointed out that radio, unlike print media, operates on a limited number of available frequencies assigned under a government license.²¹⁹ Thus, the Court stated, "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use."²²⁰ The second rationale for granting new technology less First Amendment protection is the "intrusiveness" rationale, set forth in *FCC v. Pacifica Foundation*.²²¹ In *Pacifica*, the Court allowed the FCC to sanction a radio station operator for broadcasting a comedy monologue that contained "pa-

Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Address at the First Conference on Computers, Freedom and Privacy (Mar. 26, 1991) (transcript on file with author); see also Michael Swaine, *The Cyberspace Amendment*, 16 DR. DOBBS J. SOFTWARE TOOLS 115 (1991) (reviewing and evaluating Professor Tribe's proposal).

218. See Philip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Systems*, 61 FORDHAM L. REV. 1147, 1150-54 (1993) (summarizing and characterizing the principles behind the Court's decisions regarding First Amendment protection for users of new communication technologies).

219. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89. For another example of the scarcity principle at work, see *FCC v. League of Women Voters of California*, 468 U.S. 364, 376 n.11 (1984), which sets forth authority supporting Congress's power to regulate broadcasting facilities due to "spectrum scarcity." Despite criticism of this rationale, the Court stated it will not abandon it "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.*

220. *Red Lion Broadcasting*, 395 U.S. at 391.

221. 438 U.S. 726 (1978).

tently offensive" language.²²² In so doing, the Court stated that the "pervasive presence" of radio meant that "indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."²²³

Computer bulletin boards present neither a scarcity nor an intrusiveness problem, and thus the courts should not be troubled by granting bulletin board users the same level of First Amendment protection as users of the fully protected media. Unlike broadcast technology such as television and radio, computer bulletin boards present no predetermined limit to the spectrum of available avenues of communication. The vast numbers of computer bulletin boards²²⁴ show that bulletin board systems are hardly a scarce commodity. Further, as the very title "cyberspace" implies,²²⁵ the only foreseeable limit on the spectrum of available bulletin board forums is the demand for such systems. The scarcity rationale is thus not applicable here.

Similarly, computer bulletin boards are not nearly as intrusive as the *Pacifica* court found radio. Computer bulletin boards are not like radios, which the listener turns on not knowing exactly what will greet him or her—music, talk, commercials, or other programming. Bulletin board systems are grouped by topic and individual messages usually carry a title indicating the nature of the message.²²⁶ BBS users thus should be fairly warned of the topic before reading a message. In addition, while bulletin board speech, like radio communication, does enter the audience's home, computer bulletin boards require a more affirmative step by the audience to be exposed to the speech than does radio. A BBS user must not only turn on a computer, but also must log on to the BBS through the modem, perhaps enter a password, and enter a specific bulletin board. The individual's right to be left alone certainly is less strong where he or she has taken such steps to participate in a bulletin board discussion. Thus, computer bulletin boards do not pose the same intrusiveness considerations that the *Pacifica* Court

222. *Id.* at 731.

223. *Id.* at 748.

224. See *supra* notes 39-40 and accompanying text (providing estimates on the number of BBSs).

225. For a brief definition of cyberspace, see *supra* note 1.

226. *The Internet Show*, *supra* note 52.

found troubling about radio.

Courts have shown signs that they are willing to grant a high level of First Amendment protection to bulletin board users and similar technology. In addition to the *Cubby* case, which granted near-immunity from libel suits for computer bulletin board operators,²²⁷ at least two cases have granted significant First Amendment protection to users of computer communication technology, although those cases did not involve libel. The Second Circuit, in *Legi-Tech v. Keiper*,²²⁸ accorded full First Amendment protection of the press to an operator of a computerized information retrieval service. In *Keiper*, Legi-Tech, a corporation engaged in marketing a computerized legislative information service, brought suit against various New York state officials. The essence of the suit challenged the constitutionality of a state statute prohibiting Legi-Tech from subscribing to the state's "Legislative Retrieval Service."²²⁹ The court of appeals remanded the district court's preliminary denial of injunctive relief, concluding that once New York decided to offer its service, the First Amendment prohibited it from denying access to Legi-Tech or other competitors.²³⁰ In so doing, the court analogized Legi-Tech's technology to an "electronic newspaper," and noted that it was "dealing in an area of rapidly developing technology and . . . novel and expanding forms of the exercise of the freedom of the press guaranteed by the First Amendment."²³¹

In *Daniel v. Dow Jones & Co.*,²³² a subscriber to Dow Jones' on-line news retrieval service asserted that he had received a false news report over the service, on which he relied to his detriment.²³³ In upholding a long-standing rule that "a news service is not liable to its readers for negligent false statements,"²³⁴ a New York court held that this technology did not require any different First Amendment analysis than print media: "The defendant's service is one of the modern, technologically interesting, alternative ways the public may obtain up-to-the minute news. It is entitled to

227. See *supra* notes 6, 165-70 and accompanying text (summarizing the *Cubby* case and the scholarly discussion evaluating it).

228. 766 F.2d 728 (2d Cir. 1985).

229. *Id.* at 731.

230. *Id.* at 734-36.

231. *Id.* at 732.

232. 520 N.Y.S.2d 334 (Civ. Ct. 1987).

233. *Id.* at 335.

234. *Id.* at 336.

the same protection as more established means of news distribution."²³⁵ These two cases provide early indications that courts are more willing to grant computer bulletin board users speech-protective rights, and thus may be open to requiring cyberlibel plaintiffs with access to the bulletin board on which the defamatory message was posted to prove actual malice.²³⁶

IV. CONCLUSION

Given the fierce nature of communication on computer bulletin boards, the issue of the appropriate level of First Amendment protection for libelous statements made on computer bulletin boards will undoubtedly reach the courts.²³⁷ When this happens, courts will be faced with two options. The first is to narrowly and rigidly apply existing precedent and require the actual malice standard only if the plaintiff qualifies as a public official or figure under a traditional analysis. The second option is to examine the rationale behind the Supreme Court's earlier decisions establishing the actual malice doctrine and forge a doctrine for computer bulletin board defamation that gives effect to both the letter and spirit of libel precedent. The latter is the better option.

Cyberlibel cases will test our courts' belief in the centerpiece theory of the First Amendment, the marketplace of ideas. If we truly are a nation that believes that "truth will out,"²³⁸ then the courts must require a strongly speech-protective rule, such as the actual malice standard, for libel plaintiffs who have access to the computer bulletin board on which the defamatory material appeared. If ever a true marketplace of ideas existed, it exists where the cyberlibel plaintiff can make a nearly instantaneous and universal response on the bulletin board. Courts should thus require the actual malice standard regardless of whether the plaintiff has previ-

235. *Id.* at 340.

236. *See also* Telecommunications Research and Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) (holding that the Fairness Doctrine is inapplicable to teletext services, a technology permitting display of text and high-resolution graphics over an unused portion of a broadcast television signal, because of similarities between teletext and traditional print media).

237. *See, e.g.*, Resnick, *supra* note 31, at A21 (quoting law professor I. Trotter Hardy as saying that for cyber-related issues, "the golden age for lawyers is just dawning").

238. This phrase is often cited by courts to convey that truth has a way of revealing itself sooner or later. It dates back at least to Shakespeare's play, *The Merchant of Venice*. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act. 2, sc. 2. ("In the end truth will out.").

ously participated in discussions on the bulletin board.

Differences in the technology used to transmit defamatory messages are no less constitutionally significant than differences in the public nature of the libel plaintiff or of the message. Where the libel plaintiff has access to the bulletin board on which the libelous statement was posted, that plaintiff is functionally equivalent to a public official or figure in the traditional media because in both cases the defamed person has a ready means of nearly instantaneous and universal response. This equivalency becomes even more clear where the plaintiff has a history of participating in discussion on the bulletin board, for in that instance he or she, like a public official or figure, has thrust himself or herself into a public debate, thereby inviting a risk of public criticism. However, because of the super-access possessed by all libel plaintiffs with access to the bulletin board, this extra step of having previously participated in discussions on the bulletin board is not necessary. In addition, because protected speech is easily chilled in this medium, the courts must carefully allow this fledgling form of expression to grow by not allowing states to subject bulletin board users to burdensome libel laws. In other cases, however, the defamed has no practical means of responding to the libelous speech via a bulletin board. As a result, the bulletin board system no longer bears a resemblance to a marketplace of ideas, and requiring the actual malice standard vis-a-vis the First Amendment would be inappropriate.

Drawing this line, and the constitutional ramifications on both sides of it, will require courts to be sensitive to the nature of computer bulletin board speech. The frontier mentality characterizing bulletin board speech must not be casually tossed aside. As Meeks recognized, "If people start to censor themselves, then we've lost the heart and soul of the Internet."²³⁹ Given the potential of the Internet, along with local bulletin board systems and commercial on-line services, to redefine the way the world communicates, the courts must not take this possibility lightly.

JEREMY STONE WEBER

239. *Netwatch: News, Culture, Controversy on the Internet*, *supra* note 188, at 20.