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A Pothole on the Information Superhighway: BBS Operator Liability for Defamatory Statements

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NOTES

A POTHOLE ON THE INFORMATION SUPERHIGHWAY: BBS OPERATOR LIABILITY FOR DEFAMATORY STATEMENTS

I. INTRODUCTION

Technology and "cyberspace"[1] are rapidly changing the world around us. With each new technological revolution come new legal problems.[2] Cyberspace is challenging the established legal framework of defamation law.[3] This Note will examine a special problem concerning the liability of a bulletin board system[4] ("BBS") operator for defamatory statements appearing in cyberspace.

A BBS is the medium that allows individuals to communicate via computer, either on the Internet or on a private BBS system.[5] The Internet is

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1. Novelist William Gibson coined the term "cyberspace," using the term to describe a "consensual hallucination of visually realized data achieved through plugging in a global computer network." WILLIAM GIBSON, NEUROMANCER (1980). Cyberspace technology abolishes physical boundaries, allowing the user to join a "virtual community" in cyberspace without leaving the confines of her own community. Cyberspace connotes a new frontier, unexplored, untamed. NATIONAL RESEARCH COUNCIL, RIGHTS & RESPONSIBILITIES OF PARTICIPANTS IN NETWORKED COMMUNITIES 12-13 (Dorothy E. Denning & Herbert Lin eds., 1994).

Another term frequently used by the media is "information superhighway". This metaphor suggests that networks simply act as links between the information and the user. This metaphor also suggests that the government will be involved in the "information superhighway" in the same way that the government is involved in the construction of asphalt highways. How much the government should be involved in the "information superhighway" is a debate which is still in the preliminary stages. *Id.* at 13-14. Another popular phrase describing the online world of the future is the "electronic marketplace." This suggests that people will eventually learn how to exploit this new medium for gain, once the communication novelty wears off. *Id.* at 15-16.

2. *See infra* notes 12-14 and accompanying text.

3. See *infra* Part III to see how courts have struggled to apply defamation law to cyberspace.

4. In a strict sense, a BBS is a computer networking service that allows users to exchange information with other users, usually charging an access fee for the privilege. *Lingo*, HOUSTON CHRONICLE, Jan. 16, 1995 (Discovery), at 7. For the purposes of this Note, BBS has a broad definition, encompassing all the various aspects of online communication and covering Internet home pages as well. Another common term is "SYSOP," or "system operator." The SYSOP is the editor of the BBS, although their function varies, depending on the size of the BBS. David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 84 (1993).

5. A BBS is not very difficult to set up. A BBS operator may need as little as a modem, a telephone line, and a computer. Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board*

essentially many smaller networks composed of BBSs which comprise a vast international communications system.[6] The networks connect through a common networking protocol called "Internet Protocol."[7]

The Internet is exploding in both size and number of users.[8] Many popular

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Operators for Defamation Posted by Others, 22 CONN. L. REV. 203, 203 n.2 (1989). Professor Becker estimated that the cost of starting one's own BBS from scratch in 1989 was $100. *Id.* Inexpensive multimedia publishing software is now on the market which will make it easier for the average computer user to design her own Web site. Denise Caruso, *Digital Commerce: Some New Tools Should Make It Far Easier to Put Multimedia Displays on the Web*, N.Y. TIMES (Nat'l ed.), Feb. 12, 1996, at C5. For example, the Sybase software is expected to range in price from $40-$250. *Id.*

6. The Defense Department created the Internet. The Internet originally was known as the Advanced Research Projects Agency network, or "ARPAnet." The network was used for U.S. military activities, but the Defense Department quickly realized that the greatest value of ARPAnet was the ability to allow scientists and researchers to communicate electronically because ARPAnet was much quicker and cheaper than other forms of communication. Later, the U.S. National Science Foundation (NSF) began connecting supercomputer sites through commercial telephone providers. Gradually, the NSFnet developed into what we call the Internet today. INTERNET PRIMER FOR INFORMATION PROFESSIONALS 2-3 (Elizabeth Lane & Craig Summerhill eds., 1993) [hereinafter INTERNET PRIMER].

Today, the Internet is composed of many different types of networks, both large and small. Some of the major networks are DDN (Defense Data Network), ESnet (Energy Sciences Network), NSI (NASA Science Internet), NSFnet/Merit. *Id.* at 6-8. The mid-level nets are mostly regional and educational networks. Some of these include BARRnet (Bay Area Regional Research Network) and CICnet (a network connecting the "Big Ten" schools, as well as the University of Chicago). *Id.* at 9-10. Smaller "cooperative networks" are supported by fees paid by the network users. These networks are usually operated by a nonprofit organization or by representatives of the participating sites. BITENET (*B*ecause *I*t's *T*here Network, or *B*ecause *I*t's *T*ime *N*etwork) is an example of a cooperative network designed to be nonrestrictive and inexpensive, charging its members only the minimal costs it takes to run the network. Because it is inexpensive, thousands of BBSs exist on this network. FidoNet is a similar collection of small BBS operators using the Fido software. *Id.* at 18-20.

7. Technically, the way that computers interact with each other is referred to as "protocol." Protocol is the set of rules which allow different machines or pieces of software to coordinate with each other. INTERNET PRIMER, *supra* note 6, at 41. Transmission Control Protocol (TCP/IP) was the original protocol used by the Defense Department during the advent of the Internet. Now, other networking software exists, such as Novell's NetWare. *Id.* at 42.

The World Wide Web uses Hypertext Text Transfer Protocol (HTTP), which is compatible with TCP/IP. HTTP allows a user to use text as a "hyper link," allowing the user to "jump" from BBS to BBS in a nonlinear fashion. *Id.* at 62. The opposite approach is used by the Internet Gopher, which forces the user to travel in a linear fashion by choosing a particular site from a large list of sites. "Gopher" is a highly structured hierarchy, unlike the World Wide Web. *Id.*

8. A 1995 survey of Internet users revealed that 37 million people had Internet access, and that 24 million people had "surfed" the Internet within the last few months. The survey further noted that 2.5 million people have already purchased goods from vendors over the Internet. The survey also found that 64%, or 18 million users, used the World Wide Web, making it the largest and fastest growing area of the Internet. Peter H. Lewis, *On the Net: Another Survey of Internet Users Is Out, and This One Has Statistical Credibility*, N.Y. TIMES (Nat'l ed.), Oct. 30, 1995, at C3. In 1995, it was estimated that 100,000 sites existed on the World Wide Web, with hundreds more being registered each day. Peter H. Lewis, *Help Wanted: Wizards on the World Wide Web*, N.Y. TIMES (Nat'l ed.), Nov. 16, 1995, at C7.

The following gives a flavor of the diversity available online: a user can look up the weather

online activities, such as e-mail and telecommuting, have become a standard part of daily life.[9] Traditional media outlets are being transformed by the speed with which information can be transmitted over the Internet.[10] The Internet is also changing the way companies do business, both in the office

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online, as four different weather companies have weather home pages on the World Wide Web, Stephen C. Miller, *Taking in the Sites: Lightning and Thunder On the Web*, N.Y. TIMES (Nat'l ed.), Nov. 6, 1995, at C4; a consumer can also order lunch at various sites on the Internet, including burritos and pizza, Walter R. Baranger, *Ordering Out on the Web: Cost May Leave You Cold*, N.Y. TIMES (Nat'l ed.), Oct. 30, 1995, at C6; a user can now hunt for a job via the Internet, either through help wanted ads of major U.S. papers or through large job banks with a variety of different career postings, Stephen C. Miller, *High-Tech Job Hunting, Even for Low-Tech Positions*, N.Y. TIMES (Nat'l ed.), Feb. 19, 1996, at C6; tax help is available on the Internet, ranging from the IRS itself to a page named "Nanny Tax," Steven E. Brier, *World Wide Web Offers Tax Help*, N.Y. TIMES (Nat'l ed.), Jan. 29, 1996, at C6; and phone directories are available on the Internet, allowing a user to search for long lost friends or find a lost business number, Mike Allen, *More Phone Directories Spring Up on the Web*, N.Y. TIMES, Mar. 4, 1996, at D4.

One problem with the Internet is that while many interesting sites exist, many personal sites posted by individuals are moronic. People tell you about their families and personal details, which most other users care little about. One writer calls this syndrome the "frontier" mentality, where personalities flourish, revealing all of their eccentric qualities and annoying habits. Edward Rothstein, *Can Twinkies Think, and Other Ruminations on the Web as a Garbage Depository*, N.Y. TIMES (Nat'l ed.), Mar. 4, 1996, at C3. Part of the problem is the ease of establishing home pages, either through universities or through commercial online services. *Id.*

The Web is growing so rapidly that Web site designers are desperately needed as more and more businesses decide that they need Web sites. Trip Gabriel, *The Meteoric Rise of Web Site Designers*, N.Y. TIMES (Nat'l ed.), Feb. 12, 1996, at C1. Organizations trying to track the development of the Web are also struggling to keep up. Publishers of Internet directories hire recent college graduates as "reviewers," and pay them 25¢ a word for their efforts. Denise Caruso, *Wanted: Web Site Reviewers. Little or No Experience Necessary. Pay to Match.*, N.Y. TIMES (Nat'l ed.), Feb. 26, 1996, at C3.

9. Some examples of popular activities people perform on computer networks include the following: send/receive electronic mail systems; browse catalogs of electronic documents; download software; engage in an online discussion group; telecommute; engage in a program of study at a remote school; shop at various retail outlets via network; and join others in electronic fantasy games. NATIONAL RESEARCH COUNCIL, *supra* note 1, at 7.

10. For example, many newspapers and television programs now have a home page. At these sites, users either further explore the news or learn more about a show's character. Over 160 newspapers have sites on the Web. Iver Peterson, *Commitments, and Questions, on Electronic Newspapers*, N.Y. TIMES (Nat'l ed.), Feb. 26, 1996, at C5. Critics wonder why newspapers are making such an investment. *Id.* The usual justification is that because the Internet is changing the way people gather information, if the newspapers are not swift, someone will capture this market. *Id.* However, Internet-only newspapers do not receive the same respect as traditional newspapers, as was illustrated by the denial of press credentials to the Capitol chambers for an Internet-only news provider. Michael Wines, *An Internet Service is Denied Admission to Capitol Chambers for Working Journalists*, N.Y. TIMES (Nat'l ed.), Feb. 26, 1996, at C5.

Steve Case, President of the BBS giant, America Online, argues that traditional communications mediums will not be replaced by BBS offerings. Rather, Case compares it to the invention of the telephone, and how that didn't eliminate letter writing. *Heads Up* (CNN television broadcast, Oct. 29, 1995), *available on* LEXIS/NEXIS.

and in their marketing and sales efforts.[11] In short, the Internet now plays a role in all areas of everyday life.

The creation of cyberspace severely challenges the traditional notion of defamation torts. Two past technological revolutions also forced society to reconsider the defamation torts. It took ten years before courts developed a standard of liability for telegraph operators.[12] Courts also struggled for twenty years with television and radio,[13] uncertain whether to apply traditional defamation principles or to create a new tort, the "defamacast."[14] In both

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11. Computers and the Internet are changing the workplace. For instance, many lawyers now do research on Westlaw and LEXIS, and write their briefs on personal computers. Change in the legal profession is expected to continue into the future as the Internet continues to grow. *See generally A Technology Agenda For 1996 and Beyond ...*, AM. LAW., Dec. 1995 (Supplement) (discussing changes in the legal profession due to technology).

Many companies are using the Internet to market their products. One example is Procter & Gamble. A user can research a particular personal hygiene problem at sites such as "diarrhea.com", "dandruff.com", or "underarms.com." These sites advertise various products offered by the Procter & Gamble Co. *Welcome to paranoia.com,* ECONOMIST, Sept. 16, 1995, at 78-79.

Shopping on the Internet is expected to be its greatest use in the future. Originally, safety concerns over the security of the transaction deterred some from shopping over the Internet. But a consortium of business groups, led by Mastercard International and Visa International, have established a technical standard which they proclaim to be safer than most other credit card transactions. John Markoff, *Plan to Guard Credit Safety on Internet*, N.Y. TIMES (Nat'l ed.), Feb. 1, 1996, at C1. However, a survey reveals that shopping on the Internet is still in its infancy. Fred Faust, *'Net Hopes High, Sales Low*, ST. LOUIS POST-DISPATCH, Mar. 4, 1996, at 10BP. Only 12% of the U.S. population has accessed the World Wide Web (where most retailers can be found), and only 1% has actually purchased something. *Id.*

The Internet is also causing problems in the office. For example, employees are wasting valuable company time "surfing" the Web. *The X-Rated Files: Cyberporn Forays Targeted*, ST. LOUIS POST-DISPATCH, Feb. 7, 1996, at C1. Many workers that have access to the Internet have been visiting sites that are nonbusiness related, such as "Hottest Babes of Amsterdam." Some companies, like Texaco, have warned workers that their online activities are being monitored, and that if they are found visiting certain sites they could be fired. *Id.*

12. W. PAGE KEETON ET. AL, PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 811-12 (5th ed. 1984). The controversy focused on when a telegraph company would be liable for a defamatory message transmitted through its system. *Id.* The issue was resolved in *Western Union Tele. v. Lesesne*, 182 F.2d 135 (4th Cir. 1950). KEETON ET AL., *supra*, at 811 n.12. The decision was later codified in the *Restatement (Second) of Torts*. KEETON ET AL., *supra*, at 812 n.13. The telegraph controversy is very similar to the current controversy of whether a BBS operator will be liable for defamatory messages posted on her BBS.

13. Initially, a distinction was made on whether the broadcaster was reading from a script. If the broadcaster was reading from a script, it was libel; if the broadcaster was speaking extemporaneously, slander. LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION § 13, at 83 (1978). A television station will now be treated as a publisher of libelous material, regardless of whether the information is read from a script or not. KEETON ET AL., *supra* note 12, § 113, at 812. For an explanation of publisher liability, see *infra* notes 60-63 and accompanying text.

14. In 1939, Judge Fuld created the "defamacast" in *American Broad.-Paramount Theatres, Inc. v. Simpson*, 126 S.E.2d 873 (Ga. Ct. App. 1962), reasoning that the "common law must adapt," and

instances, traditional conceptions of defamation were reformulated to comport with the new technologies.

Defamation law exists to protect an individual's reputation.[15] Society has long recognized the necessity of defamation actions because "[e]ven doubtful accusations leave a stain behind them."[16] Traditionally, defamation law was concerned with protecting the individual's reputation within the immediate community[17] because of an individual's economic interest in maintaining a strong reputation within the community.[18]

No legal principles currently govern defamation law in cyberspace. Two courts have tried to establish a judicial approach to defamation in cyberspace, but neither approach was satisfactory.[19] The federal government has attempted to regulate defamation in cyberspace,[20] but a federal district court declared the federal government's regulatory attempts unconstitutional.[21] In short, the question of what legal regime governs cyberspace defamation law

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that "defamation by radio and television falls into a new category." *Id.* at 879. Hence, the defamacast was born. *Id.* at 876. This new tort, however, was not followed by any other courts.

15. *See infra* notes 27-31 and accompanying text.

16. THE HARPER BOOK OF QUOTATIONS 181 (Robert I. Fitzhenry, ed., 3d ed., 1993) (quoting Thomas Fuller).

17. *See infra* notes 27-29 and accompanying text.

18. *See infra* note 30 and accompanying text.

19. See *infra* Part III for a discussion of the two judicial approaches to defamation in cyberspace.

20. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.). The only area of cyberspace directly addressed by Congress is pornography, although the bill does address some of the problems defamation poses for a BBS operator. Basically, the legislation punishes anyone who is knowingly involved in the trafficking of "indecent" materials over the Internet without preventing the materials from ending up in the hands of minors. *See generally* Edmund L. Andrews, *Congress Votes to Reshape Communications Industry, Ending a 4-Year Struggle*, N.Y. TIMES (Nat'l ed.), Feb. 2, 1996, at A1; *Telecom Vote Signals Competitive Free-for-All*, WALL ST. J., Feb. 2, 1996, at B1. The defamation provisions (a.k.a. the "Good Samaritan" provisions, found at § 230(c), 110 Stat. at 138) were a result of lobbying done by the commercial online service providers, and were, in large measure, a direct response to prior court rulings. *See infra* notes 113-19 and accompanying text.

In addition to the Telecommunications Act, states have also begun to write legislation in this area. The problem becomes whether the Telecommunications Bill was intended to be a national regulatory tool and whether or not states have the power to regulate in these areas. Leslie Miller, *State Laws Add to Net Confusion*, USA TODAY, Feb. 5, 1996, *available in* 1996 WL 2045234. This jurisdictional problem is beyond the scope of this Note.

21. U.S. District Court Judge Ronald L. Buckwalter initially issued an injunction on February 15, 1996 barring enforcement of the pornography provisions. ACLU v. Reno, 929 F. Supp. 824, 857 (E.D. Pa), *appeal filed*, 65 U.S.L.W. 3295 (1996); Peter H. Lewis, *Judge Temporarily Blocks Law That Bars Indecency on Internet*, N.Y. TIMES (Nat'l ed.), Feb. 16, 1996, at A1. The district court held that the provisions in the Telecommunications Act violate the First Amendment. *See infra* notes 113-19 and accompanying text.

does not have a definitive answer.[22]

Thus, the legal challenge is what legal regime should govern defamation law in cyberspace. Should traditional defamation standards apply? If not, should legislation be drafted to address the problem of defamation in cyberspace? Congress,[23] courts,[24] and commentators[25] have all struggled to answer these questions on how defamation should be applied to cyberspace. This Note argues that the current law fails to offer a BBS operator any guidance on how to avoid liability for defamatory statements posted on her BBS. Part II of this Note will explore the current state of defamation law, as well as the common-law roots of defamation. Part III will examine how courts struggle with the issue of BBS operator liability for defamatory statements posted on a BBS. Part IV will illustrate the inadequacies of the current approaches to BBS operator liability for defamatory statements. Part V will propose a standard for courts and BBS operators to use. A BBS operator who follows this standard would avoid liability for defamatory postings. This standard will not unduly burden this new communication medium but will still protect an individual's reputation.

II. CURRENT DEFAMATION LAW AND STANDARDS OF LIABILITY

Defamation is a common-law tort. As society has changed over the years, so has the tort of defamation.[26] This Part first examines the common-law roots of defamation torts. Next, it explores the First Amendment limits imposed by the Supreme Court upon state defamation regimes. Finally, this Part discusses the various liability standards which exist for information disseminators.

A. Defamation at Common Law

Defamation law exists to protect an individual's right to a good reputation.[27] One's reputation has economic implications, as in the case of an accountant's reputation for honesty.[28] The tort of defamation allows an

22. One poll has revealed that only 6% of Internet users favor federal regulation of the Internet, while one-third of Internet users prefer self-regulation. James Kim, *Internet Users Favor Self-regulation*, USA TODAY, Sept. 12, 1995 (Money), at 1B, *available in* 1995 WL 2949924.

23. *See supra* notes 20-21 and *infra* notes 113-19 and accompanying text.

24. *See infra* Part III.

25. *See infra* notes 65-68 and accompanying text.

26. *See supra* notes 12-14 and accompanying text

27. ELDREDGE, *supra* note 13, § 2, at 2.

28. *Id.*

individual to recover damages for the economic harm done to her reputation.[29] Another reason society continues to maintain the tort of defamation is because protecting an individual's reputation allows her to maintain her place within the community.[30] Finally, defamation law acts as a deterrent against those who would publish unprivileged defamatory statements.[31]

Defamation is divided into two separate causes of action—libel and slander.[32] Libel is visual or written defamation;[33] slander is audible defamation.[34] Alternatively, libel involves the sense of sight,[35] while slander involves the sense of hearing.[36] Courts, however, have had difficulty differentiating between libel and slander when new communications mediums are created.[37]

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29. Damages for a defamation action can be both compensatory and punitive. JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 882 (4th ed. 1994). In most cases, since compensatory damage will be difficult to prove, the plaintiff will seek punitive damages. *Id.* at 883-84. Historically, the defamed individual was also entitled to a public retraction and apology. ELDREDGE, *supra* note 13, § 3, at 4-5. However, the "public figures doctrine" has severely limited the ability of plaintiffs to recover punitive damages from media defendants. *See infra* notes 49-57 and accompanying text.

30. ELDREDGE, *supra* note 13, § 2, at 2.

31. *Id.*

32. The manner of publication is what distinguishes libel and slander. "Publication" is used as a term of art, encompassing the transmission of a defamatory statement in any form to one other than the defamed. ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 121 (2d. ed. 1994). For publication to occur, the defamatory statement's meaning must have been understood by the statement's recipient. KEETON ET AL., *supra* note 12, § 113, at 798. Each repetition of a defamatory statement is seen as a new publication. However, an exception exists in most courts if a defamatory statement circulates in the mass media. Courts treat this as one defamatory statement. *Id.* at 800. The media defendant will not be liable for every single person who may have heard the defamatory statement. *Id.*

33. The Restatement differentiates between libel and slander in the following manner: an action for libel is actionable without proof of "special harm." Special harm is an economic loss suffered by the plaintiff because of the defamation. RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977).

34. A defamation action for slander is limited to actions where special harm occurs. However, four exceptions to this rule exist. They are when a defendant makes: "imputations of criminal conduct;" "imputations of loathsome disease;" "imputations affecting business, trade, profession or office;" or "imputations of sexual misconduct." *Id.* §§ 570-574.

Prosser and Keeton make the point that these "exceptions" are very likely to cause an individual economic harm and thus special harm. Therefore, these exceptions are simply an extension of the rule that defendants will only be liable for slander when special harm occurs, in that the special harm is more likely to result in the case of these exceptions. KEETON ET AL., *supra* note 12, § 112, at 788.

35. SACK & BARON, *supra* note 32, at 67.

36. For example, some unusual visual forms that have been considered libel are pictures, signs, motion pictures, conduct, and statues. KEETON ET AL., *supra* note 12, § 112, at 786.

37. For instance, a controversy revolved around how radio and television should be handled by the law of defamation—even resulting in the "defamacast" proposal. *See supra* notes 13-14 and accompanying text.

At common law, a plaintiff making a defamation claim was required to show that a false defamatory statement was communicated to a third party, and the statement was either slander that causes "special harm" or libel.[38] Broadly, a defamatory statement was one that damaged a plaintiff's reputation in the community or deterred a third party from associating with the plaintiff.[39] In other words, "[a] defamatory [statement] . . . tends to hold the plaintiff up to hatred, contempt or ridicule."[40] These general definitions encompass a wide variety of different statements which have been termed "defamatory."[41] An individual making what is later proved to be a defamatory statement is liable without regard to the circumstances surrounding the origins of the statement.[42]

Two basic defenses exist to a defamatory claim.[43] The first is privilege.[44] Privilege may either be absolute or qualified.[45] Second, truth is an absolute defense to any defamatory statement.[46] Truth is now the only common-law defense still available to most defendants.[47] However, there is a constitutional defense available to many defendants.

B. Constitutional Restraints on Defamation—The Public Figures Doctrine

In the second half of the twentieth century, the Supreme Court dramatically altered the tort of defamation. The Supreme Court added First Amendment protections to defamation actions brought against media defendants. As a result, the Supreme Court limited the ability of states to

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38. RESTATEMENT OF TORTS § 558 (1938).

39. *Id.* § 559.

40. KEETON ET AL., *supra* note 12, § 111, at 773.

41. Prosser and Keeton list a wide variety of examples of what constitutes a defamatory communication. These include saying that the plaintiff has attempted to commit suicide, is a drunkard, an anarchist, or a eunuch. KEETON ET AL., *supra* note 12, § 111, at 775.

42. ELDREDGE, *supra* note 13, § 5, at 14-15.

43. HENDERSON ET AL., *supra* note 29, at 892-93.

44. *Id.* at 893.

45. *Id.* at 893-95. An absolute privilege exists when First Amendment concerns outweigh the state's interest in maintaining its tort scheme. *Id.* A qualified privilege is limited to very specific situations. *Id.* at 895. A qualified privilege is limited to instances where an individual, through a business or personal relationship with another, has a duty to report or disclose information concerning the other individual or must make a disclosure to protect his own interests. *Id.* at 895-97. The privilege is limited to those particular instances, and cannot be used to protect an individual from disclosures to disinterested third parties. *Id.* at 895-98.

46. *Id.* at 898.

47. *See infra* Part II.B.

establish their own defamation regimes.[48]

The Supreme Court began altering state defamation law in *New York Times v. Sullivan.*[49] Later cases expanded and developed the parameters of the *New York Times* "public figures" doctrine.[50] In these libel cases involving media defendants, the Supreme Court determined that First Amendment concerns for "freedom of the press"[51] outweighed the state's interest in maintaining its tort regime.[52] The public figures[53] doctrine developed in these cases requires that "public officials" or "public figures" prove that a media defendant published a defamatory statement with "actual malice."[54]

In essence, the Supreme Court shifted the burden from the defendant to the plaintiff.[55] The plaintiff now has the burden of proving that the defendant knew the falsity of the published defamatory statement.[56] The public figures

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48. Many argue that the current system offers the plaintiff little chance of success, yet also punishes defendants with large legal bills in defending these suits. REFORMING LIBEL LAW, at viii (John Soloski & Randall P. Rezanson eds. 1992). The plaintiffs are left frustrated, because they have little defense against defamatory statements, while defendants will still be cautious of publishing statements which could be perceived as defamatory to avoid defending costly lawsuits. *Id.*

49. 376 U.S. 254 (1964). Sack and Baron argue that "American defamation law cannot be understood absent familiarity with the major Constitutional decisions" since 1964. SACK & BARON, *supra* note 32, at 1.

50. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Curtis Publ'g v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966).

51. U.S. CONST. amend. I.

52. "[T]he Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *New York Times*, 376 U.S. at 283.

53. Originally, following *New York Times*, the Court's protection of media extended to candidates for public office and to "government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 85. The doctrine was later refined to cover individuals who "achieve such pervasive fame or notoriety that he becomes a public figure .... More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351. These individuals "assume special prominence in the resolution of public questions," and therefore receive the same treatment as "public officials." *Id.*

54. "Actual malice" has been defined as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280.

55. For a description of plaintiffs' common-law burdens, see *supra* note 38 and accompanying text.

56. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 504-05 (1991); REFORMING LIBEL LAW, *supra* note 48, at 10-11. Pre-*New York Times*, the defendant had the "defense of truth," meaning that the defendant had the burden to prove that the statements were in fact in true. *Id.* The Supreme Court expressed its dissatisfaction with this standard in *New York Times*, stating that forcing defendants to "guarantee the truth of all his factual assertions" may deter "would-be critics of official conduct ... from voicing their criticism," thus "dampen[ing] the vigor and limit[ing] the

doctrine altered the face of defamation law. Moreover, it is important to note that the public figures doctrine also applies in most suits brought by private plaintiffs.[57]

C. Various Liability Standards for Defamation

The courts have assigned different standards of liability for defamation to various communications mediums. A "common carrier" will never be held liable for something transmitted over its lines of communication because its role is purely passive.[58] An example of a common carrier who only transmits the message is the phone company.[59]

A "secondary publisher," such as a bookstore,[60] distributes published materials. A secondary publisher has an expanded privilege and will only be liable if the plaintiff can show that the secondary publisher knew or had reason to know of the defamatory statements in the distributed materials.[61]

An "actual" or "primary publisher"[62] is responsible for the content of its publication. An example of a primary publisher is a newspaper. *New York Times* provides a layer of constitutional protection for primary publishers.[63]

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variety of public debate." *New York Times*, 376 U.S. at 279. Later, in *Hepps*, the Court held that the plaintiff's burden of proving the falsity of the statements exists in private figure cases as well as public figure cases. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775-76 (1986). Thus, the Supreme Court has added the defendant's common-law burden of proving the truth of the alleged defamatory statement to the plaintiff's burden in the interest of free speech.

57. The public figures doctrine applies in any case in which a plaintiff sues for punitive damages. In the real world, all defamation cases are taken on a contingent fee arrangement by the plaintiff's lawyers. Therefore, the lawyers always try for punitive damages to maximize their earnings because libel suits are expensive and involve protracted litigation. Thus, very few defamation cases will not involve the public figures doctrine. Anderson, *supra* note 56, at 501. The *New York Times* influence on defamation law has lead many scholars to call for a radical change of libel law. *See generally* REFORMING LIBEL LAW, *supra* note 48, *passim* (exploring a number of different alternatives to the current system).

58. A "common carrier" is a publicly regulated entity, like the phone company, who cannot refuse to transmit messages. SACK & BARON, *supra* note 32, at 465.

59. *Id.* at 466. A telephone company is merely leasing its equipment to the user, and thus cannot be liable for the user's actions. *Id.*

60. Groups that would fall into this category would be libraries, newsstands, distributors, and delivery people. KEETON ET AL., *supra* note 12, § 113, at 810-11.

61. *Id.* at 811. Prosser and Keeton argue that the disseminator in most instances should have an absolute privilege. They analogize the disseminator's role to that of the common carrier. In any event, the privilege should be extended on a case-by-case basis. *Id.*

62. A "primary publisher" is a newspaper or magazine publisher, a television or radio broadcaster, or any other media defendant who exercises editorial control over the content of transmissions to the public. *Id.* at 810.

63. *See supra* notes 49-57 and accompanying text. Prior to *New York Times*, the publisher was

III. THE JUDICIAL PROBLEM IN APPLYING DEFAMATION LAW TO CYBERSPACE

Defamation in cyberspace presents a unique challenge to the law because cyberspace is a communications medium that courts have never before encountered. Traditionally, courts have adapted defamation torts to face changing times and changing media.[64] Legal commentators have made numerous proposals addressing defamation in cyberspace, ranging from applying old theories[65] to establishing an entirely new system to meet the legal needs of cyberspace.[66] Others have recommended that the legal standard

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held strictly liable, but now a less stringent standard exists.

64. *See supra* notes 12-14 and accompanying text.

65. Below are a list of established legal doctrines, beside which appear the proponent arguing for its application to defamation cases in cyberspace.

1. primary publisher: a primary publisher is responsible for the content of their publication. This argument was adopted by Justice Ain in *Stratton Oakmont v. Prodigy*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct., May 24, 1995). *See supra* notes 62-63 and accompanying text.
2. secondary publisher or disseminator of information: a secondary publisher is only liable for distribution of defamatory materials if she knew the materials were in fact defamatory. This was the stance adopted by Judge Leisure in *Cubby v. Compuserve*, 776 F. Supp. 135 (S.D.N.Y. 1991). *See supra* notes 60-61 and accompanying text.
3. privately owned public forums: the judicially created "privately owned public forum" doctrine grants users of the private forum the same constitutional protections that citizens would receive from the federal government under the Constitution. A shopping mall is an example of a public forum. This doctrine is advanced as the appropriate doctrine for cyberspace by Edward Di Lello. Edward V. Di Lello, *Functional Equivalency and Its Application to Freedom of Speech on Computer Bulletin Boards*, 26 COLUM. J.L. & SOC. PROBS. 199 (1993). Di Lello argues that the bookseller analogy is not appropriate for cyberspace, and this doctrine would protect users of a BBS from the type of editorial control previously exercised by Prodigy. *Id.* at 226-33.
4. public figure doctrine: this doctrine was created by the Supreme Court in *New York Times v. Sullivan,* 376 U.S. 254 (1964), discussed *supra* notes 49-57 and accompanying text. A Note recently explored the application of this doctrine to cyberspace. Thomas D. Brooks, Note, *Catching Jellyfish In the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461 (1995).
5. slander: slander is one of the two specific defamation torts, generally dealing with a spoken defamatory statement. *See supra* notes 33-34 and accompanying text. Because of the transitory nature of electronic communications, one commentator has found this communication medium to be more like slander than libel. *See* BRUCE W. SANFORD, LIBEL AND PRIVACY § 2.7 (Supp. 1987).

66. Constitutional law scholar Laurence Tribe has proposed a 27th Amendment to help existing law meet the rapid technological changes occurring within society. Laurence H. Tribe, *The Constitution in Cyberspace*, HUMANIST, Sept./Oct. 1991, at 15, 39. Tribe's 27th Amendment would read as follows:

> 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

should vary according to the size of the BBS involved.[67] Others propose to simply let the online world regulate itself.[68]

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technological method or medium through which information content is generated, stored, altered, transmitted, or controlled.

Id.

A number of other commentators have called for a federal regulatory scheme of cyberspace (something which Congress has taken at least a partial step towards recently with the Telecommunications Act of 1996, *see supra* notes 20-21). *See* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197 (1995); Di Lello, *supra* note 65, at 241; Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994).

67. Robert Charles, Note, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & TECH. 121 (1987). Charles argues for applying a general negligence standard, where the court will examine all the factors in determining whether or not to hold the BBS operator liable. *Id.* at 146-47. A similar argument has been advanced by Professor Loftus Becker. *See* Becker, *supra* note 5, at 237-38.

68. Trotter Hardy believes that no hard and fast rules need to be created for cyberspace. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993 (1994). His article offers a number of ways for individuals to avoid becoming involved in litigation. *Id.* at 995. Anne Wells Branscomb argues that lawyers and judges should not be too hasty in applying old legal precedents to cyberspace, just as legislators should not be too hasty in erecting impediments to cyberspace without having a full understanding of what they are regulating. Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639 (1995). Branscomb argues for self-regulation, *Id.* at 1676-79, and for giving defamation victims the right-of-reply, *id.* at 1671. John Perry Barlow, co-founder of the Electronic Frontier, argues that it is better for society to sort out ethics and community values rather than turning to the law for direction. NATIONAL RESEARCH COUNCIL, *supra* note 1, at 28.

There are a number of different approaches to self-regulating online forums. Social pressure is the main self-regulation tool. Users who violate the unstated honor code are punished by the "virtual community." One example is two Arizona lawyers who "flood[ed] the Usenet portion of the Internet ... with advertisements for their law firm." Peter H. Lewis, *Sneering at Virtual Lynch Mob*, N.Y. TIMES, May 11, 1994, at D7. The lawyers violated the unwritten ethics code, and the "virtual community" responded with "mail bombs," sending hundreds of large mail messages to the lawyers, making it impossible for their system to properly function. *Id.*

Networks and commercial services try to promote self-regulation. Commercial services, such as Prodigy, have contractual agreements with their users. The USENET network distributes a handbook to its members titled *A Primer on How To Work With the USENET Community.* INTERNET PRIMER, *supra* note 6, at 85, 97. The handbook advises members of proper etiquette to follow in the USENET community.

Self-regulating "parental control" is distributed by America Online, Prodigy, CompuServe and the Microsoft Network, allowing parents to filter potentially offensive materials. Peter H. Lewis, *Microsoft Backs Ratings System For the Internet,* N.Y. TIMES (Nat'l ed.), Mar. 1, 1996, at C1. But this software is not infallible. The software is programmed to avoid either particular sites or to avoid sites proclaiming to have certain content. Because so many new BBS are being created every day, it impossible to keep the industrious teenager away from the "forbidden fruit." Peter H. Lewis, *Limiting a Medium Without Boundaries*, N.Y. TIMES (Nat'l ed.), Jan. 15, 1996, at C1.

Self-regulation has had its problems. In early 1996, CompuServe tried to block access to approximately 200 pornographic databases because the online service was under pressure from German prosecutors. After a storm of protest from American civil liberties groups and gay rights groups, CompuServe backed away from its original plan. Peter H. Lewis, *On-line Service Ending Its*

Only two courts have faced the problem of defamation in cyberspace.[69] Both decisions focused on the editorial control exercised by the BBS operator.

A. The First Defamation Case in Cyberspace—Cubby Inc. v. CompuServe, Inc.[70]

In *Cubby*, a BBS operator sued CompuServe for defamatory statements posted on one of its BBSs.[71] The statements concerned a rival BBS, and CompuServe had no opportunity to review the contents of the BBS before it was uploaded onto its system.[72]

In a narrow holding, the district court found that CompuServe was not liable for the defamatory statements.[73] The *Cubby* court held CompuServe to the same liability standard as a bookstore,[74] because CompuServe acted like "an electronic, for-profit library."[75] CompuServe was therefore the

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Ban of Sexual Materials on Internet, N.Y. TIMES (Nat'l ed.), Feb. 14, 1996, at A1.

69. A number of other suits concerning defamation in cyberspace have been brought, but all of the cases have either settled or are still pending. In a recent suit, a resort sued America Online ("AOL") for defaming one of its scuba instructors. Constance Johnson, *Incognito On Internet?: Critics Say Suits Chill On-line Speech*, NEWS TRIB. (Tacoma Wash.), Dec. 6, 1995, at E5, *available in* 1995 WL 12885884. The message, posted by "Jenny TRR", claimed that the resort had a white, "stoned" scuba instructor. Only one caucasian scuba instructor worked at the resort. Because AOL allows its users to adopt pseudonyms, the real name of the poster was unknown. However, once a discovery motion was made by the resort, AOL released the name of the subscriber, thus extracting itself from the defamation lawsuit. *Id.*

Others have sued Prodigy for defamatory messages posted on its "Money Talk" BBS. *See infra* 80-108 and accompanying text. Medphone sued Prodigy for $40 million in 1993, but the case settled for $1 before it went to trial. Fred Vogelstein, *$1 Settles Charge of On-line Libel, Computer-speech Limits Untested*, NEWSDAY, Dec. 28, 1993, at 7, *available in* 1993 WL 11579226.

Another defamation case involving a BBS operator and a self-appointed online crusader for a "pure" Internet ended in a settlement for $64 in court fees and an agreement that the crusader would not criticize the author in the future or a fine would be imposed. Jared Sandberg, *Suarez Corp. Settles Defamation Lawsuit Against Newsletter*, WALL ST. J., Aug. 24, 1994, at B6.

70. 776 F. Supp. 135 (S.D.N.Y. 1991).

71. *Id.* at 137.

72. In *Cubby*, CompuServe had within its Journalism Forum a daily newsletter named "Rumorville USA" that was only available to CompuServe subscribers for an additional fee. *Id.* CompuServe had no opportunity to review the contents of the newsletter before it was loaded into CompuServe's Journalism Forum. *Id.* In April 1990, false and defamatory statements about "Scuttlebutt" and Robert Blanchard appeared on Rumorville. *Id.* at 137-38. Skuttlebutt was a rival of Rumorville USA created by Blanchard and Cubby, Inc. *Id.* at 138. Cubby and Blanchard sued CompuServe for libel, business disparagement, and unfair competition. *Id.*

73. *Id.* at 141.

74. For further discussion of "bookstore" liability, see *supra* notes 62-63 and accompanying text.

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

"functional equivalent of a more traditional news vendor," and holding otherwise would burden the "free flow" of information in society and would be inconsistent with the First Amendment.[76]

Because the court found that CompuServe was a mere distributor of the defamatory statements, it would only be liable if the plaintiff could establish that CompuServe knew or had reason to know of the defamatory materials posted on its BBS.[77] The plaintiffs failed to establish that CompuServe knew of the defamatory statements; thus, the court found no liability for the defamatory statements.[78]

Cubby is a narrow holding because it applies only to a very specific scenario, namely the uploading of a BBS onto a large commercial online service.[79] Therefore, *Cubby* left open what standard of liability BBS operators would be held to for defamatory statements posted on their bulletin boards.

B. The Second Case—Stratton Oakmont, Inc. v. Prodigy Services[80]

In *Stratton Oakmont,* a brokerage firm sued Prodigy for an anonymous defamatory message posted on Prodigy's "Money Talk" bulletin board.[81] The message stated that Stratton Oakmont and its president had committed criminal acts and would soon be out of business. The message also said that the president would soon be put in jail.[82] While the message originally had a user name identifying the poster of the message, Prodigy later determined that

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76. *Id.*

77. *Id.* at 141.

78. *Id.*

79. For a thorough discussion of the implications of the decision, see David J. Conner, Cubby v. CompuServe, *Defamation Law on the Electronic Frontier*, 2 GEO. MASON INDEP. L. REV. 227 (1993).

80. 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).

81. Money Talk is "the leading and most widely read financial computer bulletin board in the United States, where members can post statements regarding stocks, investments, and other financial matters." *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *3.

82. Excerpts from the message included: "THANK GOD! THE END OF STRATTON OAKMONT WILL FINALLY COME THIS WEEK, THIS BROKERAGE FIRM HEADED BY PRESIDENT AND SOON TO BE PROVEN CRIMINAL—DANIEL PORUSH—WILL CLOSE THIS WEEK." Alison Frankel, *On-line, On the Hook*, AM. LAW., Oct. 1995, at 59. The message went on to describe an initial public offering underwritten by Stratton Oakmont for a recruiting and placement company named Solomon-Page. The offering occurred on Thursday, October 20th. The next day after the close of trading, Stratton Oakmont and Solomon circulated a supplement to the prospectus saying that the company's biggest client was dropping the company. The posting then went on to say "THIS IS FRAUD, FRAUD, FRAUD, AND CRIMINAL!!!!!!!!;" and further stated: "STRATTON OAKMONT IS A CULT OF BROKERS WHO EITHER LIE FOR A LIVING OR THEY GET FIRED." *Id.* at 59-60.

the posted name was false,[83] and the identity of the poster remains unknown.[84] Stratton Oakmont's attorney claims he tried to have the message removed, but his efforts were unsuccessful.[85] As a result, Stratton Oakmont filed a $200 million lawsuit against Prodigy, alleging ten separate causes of action.[86] Stratton Oakmont then moved for summary judgment on the issue of whether or not Prodigy was a "publisher" of the alleged defamatory statements,[87] and whether board leader Charles Epstein acted as Prodigy's agent.[88]

The court granted Stratton Oakmont's partial summary judgment motion.[89] The court found that Prodigy acted like a "newspaper editor," because the content of what is placed on its BBS is edited and controlled.[90] The court found that Prodigy promulgated a content guideline, used a software screening program, and used "board leaders" to enforce its guidelines.[91] Because Prodigy had control over the content of what appeared on its BBS, the *Cubby* standard did not apply and Prodigy could be held liable as a publisher for defamatory statements posted on its BBS.[92]

The *Stratton Oakmont* court found that Prodigy should be liable for all defamatory materials posted on its BBS.[93] The court reached this decision

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83. The name originally posted was "David Lusby," a former Prodigy software testing manager who had left the company in 1991, and was then living in Florida. *Id.* at 64. Prodigy neglected to retire an internal ID number from Lusby's staff, and so there was no way to track the message poster. *Id.* Prodigy knew Lusby was not the poster because the original message was thought to originate from Long Island or New Jersey. *Id.*

84. The anonymous posting makes this case not only unusual, but also creates a further legal problem which has never been addressed by the courts. *See infra* notes 128-29 and accompanying text.

85. Frankel, *supra* note 82, at 64.

86. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *2.

87. *Id.* at *1.

88. *Id.* Prodigy employed Charles Epstein as an "independent board leader." Frankel, *supra* note 82, at 63. Epstein's duties were to "take part in board discussions, foster a sense of community, and generally help to make the board a dynamic, active, enjoyable place for our members." *Id.* (quoting Epstein's employment contract). Epstein is required

> to post at least 120 messages a month (answering questions or starting discussions), to spend at least 15 hours a week on-line on the bulletin board, to revise the opening bulletin board screen at least twice a week, to come up with ideas for guests and promotional efforts, and to provide a monthly report to Prodigy on his "plans, achievements, and concerns for the board."

Id. at 63-64. In addition, Epstein rejected approximately 15 notes a month that were "insulting or in bad taste or bad advice." *Id.* at 64 (quoting Epstein's deposition testimony). Epstein testified that had he seen the defamatory statements regarding Stratton Oakmont, he would have deleted them. *Id.*

89. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *1.

90. *Id.* at *10-*15.

91. *Id.* at *2.

92. *Id.* at *10.

93. *Id.* at *18.

because the evidence before the court indicated that Prodigy claimed to control what was posted on its BBS.[94] The court found that Prodigy had made a concerted effort to market itself as a "family" online service, removing all offensive materials and making the service suitable for users of all ages.[95] The court reasoned that Prodigy could not claim publisher status for marketing purposes, but then take another position to avoid liability.[96]

The court stated that this decision was consistent with *Cubby*. In *Cubby*, CompuServe exercised little or no editorial control over the contents of its "Rumorville USA" BBS.[97] The court also compared its decision to *Auvil v. CBS "60 Minutes"*,[98] where a network television affiliate was not liable for defamatory statements rebroadcast over its airwaves.[99] The court thought its holding in *Stratton Oakmont* was consistent with both *Cubby* and *Auvil* because Prodigy exercised control over its airwaves.[100] Indeed, Prodigy's control of its "airwaves" may have a "chilling effect" on free speech,[101] and therefore the court held Prodigy liable for the control Prodigy exercised over

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94. *Id.* Justice Ain relied on "exhibits" which were from 1990, when Prodigy claimed to control the content of its BBS by screening every message before it was posted on its system. The former general counsel of Prodigy admitted that Prodigy was running a risk at that time. Frankel, *supra* note 82, at 62. However, in 1993, Prodigy abandoned its policy of screening every message, and adopted a screening policy similar to that of other online services that screened messages after they are posted. *Id.* Thus, this decision caused alarm among the online services, because if Prodigy had been held liable, other online services could have also been found liable. *Id.* at 65.

The reason Justice Ain was relying on articles about the pre-1993 Prodigy may have been a result of an inadequate defense offered by Prodigy's counsel. *Id.* Prodigy changed counsel shortly after the decision. *Id.* Justice Ain pointed to the inadequacy of the record by writing that while Prodigy claimed to have shifted its policy, the record before him failed to recognize that shift. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *7-*8. Prodigy's new attorneys were likely to begin digging into Stratton Oakmont's checkered past to prepare a defense of truth to the defamation claim, which may have played a role in Stratton Oakmont's sudden decision to settle this case for no money.

95. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *3-*4. Anne Wells Branscomb said of the old Prodigy: "Prodigy, as a joint venture between Sears and IBM, offers an environmentally neutral safe haven for Middle American families seeking an electronic home as comfortable as Disneyland." Branscomb, *supra* note 68, at 1650.

96. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *13-*14.

97. *Id.* at *9-*13.

98. 800 F. Supp. 928 (E.D. Wash. 1992), *aff'd*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1567 (1996).

99. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *11 - *12. In *Auvil* a CBS network affiliate was found not liable for defamatory statements broadcast over its airwaves by the network. The decision rested on the grounds that the affiliate exercised no editorial control over the broadcast; instead, the affiliate acted merely as a "conduit." *Auvil*, 800 F. Supp. at 931. The only way, therefore, the affiliate could be liable was if it knew or should have known of the defamatory nature of the broadcast. *Id.* at 932.

100. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *12.

101. *Id.*

its BBS.[102]

The *Stratton Oakmont* court also found that Epstein acted as Prodigy's agent, primarily because part of the duties of a Prodigy board leader is to uphold the Prodigy Guidelines.[103] The court found persuasive the testimony that Prodigy reviews the guidelines with the board leader and thereafter expects the board leaders to enforce the guidelines.[104] The court found that Prodigy's conduct towards its board leaders could give the impression that Epstein was acting as Prodigy's agent.[105]

Prodigy eventually settled the case and issued an apology to Stratton Oakmont.[106] However, the court refused to reverse its earlier ruling.[107] The *Stratton Oakmont* decision has been widely criticized,[108] and as a result, the defamation standard for BBS operators remains unresolved.

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102. *Id.* at *13.

103. *Id.* at *15-*17.

104. *Id.* at *17.

105. *Id.*

106. On October 24, 1995, Stratton Oakmont and Prodigy issued a joint statement, stating that Stratton Oakmont would not oppose Prodigy's request to reargue the motion to dismiss because Prodigy should not be held to the same liability standards as a newspaper publisher. The statement reads as follows:

> Stratton Oakmont and Daniel Porush do not oppose Prodigy's motion to reargue the motion previously decided by Justice Stuart Ain in the civil action pending against Prodigy in New York State Supreme Court in Nassau County....
>
> The Court had previously ruled that Prodigy could be held liable as publisher of statements posted on its bulletin boards. Prodigy has asked that the Court consider additional facts, and change his prior decision and grant summary judgment to Prodigy finding that Prodigy is not a publisher and that its board leaders are not agents.
>
> Prodigy is sorry if the offensive statements concerning Stratton and Mr. Porush, which were posted on Prodigy's Money talk bulletin board by an unauthorized and unidentifiable individual, in any way caused injury to their reputation.
>
> The parties agree that the disposition of the motion in this manner is in the best interests of the parties as well as the online and interactive services industry.
>
> The parties are pleased with the fact that they have called to the public's and the industry's attention these important issues concerning on-line and interactive services.

Joint Press Release, Oct. 24, 1995, *available in* LEXIS Counsel Connect Library.

107. Justice Ain rejected Prodigy's motion to reargue the libel lawsuit, and he also declined to reverse his earlier ruling. Justice Ain based his decision on "a real need for some precedent" in the laws of cyberspace. Peter H. Lewis, *Judge Stands By Ruling on Prodigy's Liability*, N.Y. TIMES, Dec. 14, 1995, at D2.

108. Frankel, *supra* note 82, at 62 (noting that most lawyers interviewed for the article criticized Ain's decision).

IV. THE CURRENT STATE OF DEFAMATION LAW IN CYBERSPACE IS UNSATISFACTORY

The present state of defamation law in cyberspace is both uncertain and illogical. Recent legislative efforts have not resolved the uncertainty surrounding defamation law in cyberspace.[109] Moreover, current case law makes faulty analogies. Defamation law in cyberspace needs a workable and understandable framework.

In both *Cubby* and *Stratton Oakmont*, the courts focused on the editorial control exercised by the BBS.[110] However, editorial control is not the issue—rather, the focus should be on whether the BBS operator knew of the defamatory statements and how it then responded. *Cubby*'s bookstore analogy is faulty because a bookstore at least exercises some proactive control over its store by selecting the books that will be placed on its shelves. A BBS, however, exercises little control over the initial postings of messages. In essence, the customers are stocking the shelves of the bookstore for others to peruse. *Stratton Oakmont's* comparison of Prodigy to a publisher was probably due more to Prodigy's lawyers' failing to build an accurate record for the court to consider than it was a finding that Prodigy's policies constituted editorial control over the content of its BBS.[111] Comparing a BBS operator to a newspaper publisher responsible for the content of one paper is also ridiculous because Prodigy receives over 75,000 messages a day on its BBS.[112] .

The *Stratton Oakmont* and *Cubby* decisions remove all incentives for a BBS operator to screen the content of its BBS. Following the logic of these two cases, a BBS operator wanting to avoid liability for defamation should refuse to exercise any control of its BBS because of the danger of exercising editorial control and thus being found to be a "publisher."

The Telecommunications Act of 1996 seems to snuff out the little vitality of the *Stratton Oakmont* decision. Congress reacted to *Stratton Oakmont* because of heavy lobbying by the online industry.[113] The

109. *See supra* notes 20-21 and *infra* notes 113-19 and accompanying text.

110. *See supra* Part III.

111. *See supra* note 94.

112. Frankel, *supra* note 82, at 62.

113. *Stratton Oakmont* raised a general alarm among the various online providers, causing heavy lobbying by online services. U.S. Representative Christopher Cox made a statement on the House floor that made careful mention of all the big players in the interactive service industry, including CompuServe, America Online, Prodigy, and the Microsoft Network. 141 CONG. REC. H8470 (daily ed.

Telecommunications Act specifically provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider."[114] The Act also states that a provider of interactive computer service will not be held liable for any voluntary efforts to remove material that they consider "to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[115]

However, the Telecommunications Act still leaves some open questions for defamation law in cyberspace. A three-judge federal district court panel held that the Telecommunications Act violated the First Amendment.[116] The panel issued a preliminary injunction to prevent the government from enforcing the law.[117] The government has appealed the panel's ruling to the Supreme Court.[118]

Due to the vague statutory language of the Telecommunications Act, it is also not clear whether defamatory statements fit into the definitions found in the statute. It is also not entirely clear who receives the immunity conferred by the Telecommunications Act because the definition provided in the Act for an "interactive computer service" is a broad one.[119]

Therefore, the need for a clear defamation standard in cyberspace still exists. Current law has failed to clearly define when a BBS operator will be liable for defamatory postings on her BBS.

Aug. 4, 1995). Representative Cox also stated that the *Stratton Oakmont* decision was "backward," and he argued that monitoring for offensive material should be encouraged instead of being used to impose liability upon BBS operators. *Id.*

114. Telecommunications Act of 1996, Pub. L. No. 104-104, § 230(c)(1), 110 Stat. 56.

115. *Id.* § 230(c)(2)(A).

116. ACLU v. Reno, 929 F. Supp. 824, 849 (E.D. Pa.), *appeal filed,* 65 U.S.L.W. 3295 (1996). The panel concentrated on whether Congress could regulate indecent speech, and did not address the defamation provisions found within the Telecommunications Act.

117. *Id.* at 857. The panel issued the preliminary injunction because of the strong likelihood the plaintiffs would succeed in this litigation, finding that the statute was "facially invalid under both the First and Fifth Amendments." *Id.*

118. ACLU v. Reno, 65 U.S.L.W. 3295 (1996). Many hailed the decision as bringing the First Amendment into the 21st century. *See* Peter H. Lewis, *Judges Turn Back Law to Regulate Internet Decency*, N.Y. TIMES (Nat'l ed.), June 13, 1996, at A1.

119. The definition given is:

> (2) INTERACTIVE COMPUTER SERVICE.—The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

Telecommunications Act of 1996, Pub. L. No. 104-104, § 230(e)(2), 110 Stat. at 139.

V. A PROPOSED STANDARD

Because current law has not defined when a BBS operator will be liable for defamatory postings on her BBS, there is a need for a clear liability standard. This part proposes a set of guidelines clarifying when a BBS operator will be liable for defamatory statements. This standard is then applied to the facts of *Stratton Oakmont* to illustrate how the guidelines would work in practice.

A. The Guidelines

Defamation in cyberspace is not like traditional conceptions of defamation. Messages posted on a BBS are dissimilar to messages found in a newspaper or seen on television. Messages posted on a BBS are not purposefully placed on the BBS by the BBS operator. Rather, users post the messages themselves. Therefore, a BBS operator should not be held to the same liability standards as operators of other mediums.

An individual does, however, have a right to protect her reputation. Therefore guidelines need to be established to guide the actions of BBS operators. The proposed guidelines could either be adopted through legislation or be judicially constructed. If adopted, these guidelines would direct a BBS operator on how to remove herself from the liability equation for the defamatory statements. Supreme Court decisions concerning defamation reflect a balancing between an individual's right to an untarnished personal reputation against First Amendment concerns of free expression.[120] The guidelines promote these dual interests of protecting free speech and an individual's reputation while not unduly burdening a new communications medium.

The proposed guidelines involve a three-step process. The first step imposes a duty on the BBS operator to reasonably monitor the BBS and requires that the operator remove the defamatory message if the second and third steps cannot be satisfied. The second step requires that the BBS operator give the message poster a chance to defend the statement by showing that it is not defamatory, i.e., that it is true. Finally, in the third step, the operator must give any defamed individual a right to respond.

How will a BBS operator know what constitutes a defamatory statement?

120. *See supra* notes 48-57 and accompanying text.

The short answer is that common sense tells the average person what is and is not a defamatory statement. Any statement which harms another's reputation will be sufficient to put a BBS operator on notice that the statement may be defamatory. Further, an outline of what constitutes defamation should be distributed over the Internet to answer any questions BBS operators may have concerning defamatory postings.

A BBS operator has a duty to monitor the statements appearing on her BBS. She will be found negligent if she fails to remove a defamatory message when she has knowledge of the defamatory posting, or when she should have known of a defamatory posting and removed it. This test examines whether or not it was reasonable for the defendant to have been aware of the defamatory statement. If a BBS operator is made aware of a defamatory statement and fails to promptly remove the statement, that BBS operator will have been negligent and will be liable to the plaintiff. The more difficult question is when should a BBS operator, absent explicit notice, have reason to know of an anonymous defamatory statement. This inquiry will be a factual inquiry, done on a case-by-case basis, considering factors such as the size of the BBS and volume of messages received daily.

Next, the BBS operator must give the message poster a chance to defend the content of her message. The BBS operator will contact the poster and allow him an opportunity to explain why the message is not defamatory. For the BBS operator to allow the message to exist on the BBS without liability, she must receive proof from the poster that would satisfy a "reasonable" person that the message is not defamatory. The BBS operator will contact the message poster, most likely through the e-mail address found on the posting. If there is no address of origin, or if the poster is unreachable, or if the poster fails to promptly respond to the BBS operator, she must then permanently remove the message from the BBS to avoid liability for defamation.

Finally, if the BBS operator determines that the message can be posted on the BBS, she must give the defamed individual a right to respond to the defamatory message. The BBS operator must make a good faith effort to contact the defamed individual and allow them to respond to the defamatory message. In some circumstances, it may be impossible to ascertain the identity of the defamed; if that is the case, no further obligation is required of the BBS operator.

If a BBS operator follows the above guidelines she will not be liable for defamatory statements posted on her BBS. This allows a new arena for communication to develop freely by giving a BBS operator guidance on how to avoid liability for defamatory postings.

There are some special problems which the guidelines need to address. Anonymity presents an unusual challenge because it makes the BBS operator the only party the defamed individual can turn to for redress. Proponents argue that anonymity confers specific benefits on many users, such as affording protection to dissidents living in a repressive society[121] or psychological benefits to the user from the freedom of concealing one's identity.[122] A BBS operator may allow her users anonymity to the general public. However, to protect herself from liability, a BBS operator must know the identity of her users to offer them a chance to defend their potentially defamatory statements and to be able to reveal them when another's reputation is at stake. Once a BBS uses makes a defamatory posting,[123] the author's identity must be revealed or the BBS operator will be held liable as if she were the original poster of the defamatory message.

Two questions may arise from this proposal. First, is this an excessive burden to place on BBS operators, i.e., forcing them to remove defamatory postings and allowing a right of response to the defamatory posting? No, because removal does not mean immediate removal. Rather, the obligation for removal does not arise until the BBS operator becomes aware, or should be aware, of the defamatory message. Further, identifying the poster and the defamed will not be difficult for a BBS operator. In most cases the message itself will have the poster's address in the message. Additionally, many BBSs now require visitors to sign a "guest book" before entering any talk rooms. The users may adopt a pseudonym for a BBS's "chat rooms," but the BBS operator requires disclosure of their identity and e-mail address. If a BBS restricts access to members only, checking membership lists will satisfy the BBS operator's obligation.[124] The right of response requires only a good faith

121. For instance, political dissidents in China criticize the government anonymously. NATIONAL RESEARCH COUNCIL, *supra* note 1, at 50-51. However, the Chinese government has attempted to censor these groups by forcing all computer networks to use a channel designated by the Ministry of Post and Telecommunications. Seth Faison, *Chinese Cruise Internet, Wary of Watchdog*, N.Y. TIMES (Nat'l ed.), Feb. 5, 1996, at A1. It is therefore likely that the Chinese government will shut down these networks.

122. "Psychologists and sociologists point out that people benefit from being able to assume different personae." Branscomb, *supra* note 68, at 1642.

123. This is assuming the user is traced back to the BBS operator's system. This could be done in a number of ways, and in fact the methods for capturing each visitor's identity are likely to become the standard in the future, as improved technology will allow for the BBS operator to capture more information about each visitor to its site.

124. Checking membership lists works unless there has been a lapse in the security measures of the BBS, as there was in *Stratton Oakmont*. *See supra* note 83 and accompanying text. A breach in security resulting in the identity of the poster being unknown will result in the immediate removal of

effort; because the message will reveal the identity of the defamed, all that will be required of the BBS operator is a good faith effort to contact the defamed. This will give the BBS operator a way to find the defamed individual and offer her a chance to respond to the defamatory posting.

Second, how much must a BBS operator patrol her BBS? A BBS operator is required to make a reasonable effort to monitor the contents of her BBS. The duty will vary according to the size of the BBS. A large BBS will not entail as much of a duty as a small, independent BBS.[125] This does not mean censorship. It simply requires that an operator have some knowledge of what is occurring on her BBS. Prodigy's technique of employing board leaders for each of its large BBSs would be an adequate degree of care for a large online service under the proposed standard.[126] Similarly, an operator of a small BBS could act like Prodigy's board leaders, occasionally patrolling the BBS and removing all potentially defamatory messages.

These guidelines offer two advantages. First, a new and growing communications medium will not be unduly burdened by having an archaic defamation standard "chilling" free speech. Second, this system would still allow BBS operators to remove obscene or indecent materials from their BBSs without increasing their liability. Thus, the reputation of individuals will be protected while allowing the BBS operator to exercise some degree of control over the content of the BBS.

B. Guidelines Applied to Stratton Oakmont

The *Stratton Oakmont* case offers an interesting factual background in which to test the guidelines.[127] Prodigy's "Money Talk" BBS receives a large volume of messages every day, and expecting Prodigy to screen every message for defamatory content is unreasonable. Prodigy requires users to enter a password to enter its system, thereby reducing the potential for anonymous postings. However, by allowing an expired password to exist for years after its valid purpose had ended,[128] Prodigy allowed an anonymous defamatory posting on its BBS.[129] Prodigy also failed to promptly remove the message after adequate notice had been given. Under this Note's proposal,

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the statement. *See infra* Part V.B (applying the proposal to the *Stratton Oakmont* situation).

125. This is because it will be easier for a small BBS operator to monitor the content of her BBS.

126. For a look at the duties of a Prodigy board leader, see *supra* note 88.

127. *See supra* notes 80-108 and accompanying text.

128. *See supra* note 83.

129. For the anonymity standard, see *supra* notes 122-23 and accompanying text.

Prodigy had a duty to remove the message because it was aware of a potentially defamatory posting by an unidentified individual. Therefore, because Prodigy allowed an anonymous third party to allegedly defame Stratton Oakmont and Daniel Porush, Prodigy could be liable for the defamatory statements as if it had been the original poster of the message.

Under the guidelines, Prodigy would have failed to meet its duty by allowing an anonymous posting. In addition, Prodigy would have been negligent for failing to promptly remove the message once notice had been given. Prodigy would then be subjected to an ordinary defamation trial. However, as in a normal defamation action, Prodigy would have likely prevailed under either the defense of truth or under the public figures doctrine.

As in any defamation case, Prodigy could argue the posting was true. Indeed, that appears to have been the strategy of Prodigy's counsel and may have motivated Stratton Oakmont's sudden decision to settle. Another available defense was the public figures defense. Because Stratton Oakmont was a business entity notorious for its past punishments from the SEC, the argument would follow that it had the necessary access to media outlets to defend their reputation. Absent a showing of Prodigy's malice for the messages placed on the BBS, Prodigy would not be liable for the anonymous posting.

VI. CONCLUSION

Modern communication technology is changing today's world. As the world around us changes, the law needs to adapt to meet the challenges of new technology. Both the courts and legislatures have failed thus far in their attempts to adapt to these changes.

Defamation in cyberspace needs a clear set of workable principles to guide this new communication medium. This Note offers a set of guidelines which will limit the liability of BBS operators to situations in which the BBS operator is either negligent or allows anonymous postings on its BBS. If the BBS operator removes the defamatory posting and allows the defamed a chance to respond to the defamatory posting, a BBS operator will shield herself from all future liability. The guidelines offer a simple solution that will be easy for BBS operators to follow, and which will allow free and open communication to flourish in cyberspace while still allowing the defamed individual the right to protect her reputation.

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