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Iris Ferosie

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DON'T SHOOT THE MESSENGER: PROTECTING FREE SPEECH ON EDITORIALLY CONTROLLED BULLETIN BOARD SERVICES BY APPLYING SULLIVAN MALICE

I. INTRODUCTION

"This is fraud, fraud, fraud, and criminal! . . . Stratton Oakmont is a cult of brokers who either lie for a living or they get fired." exclaimed an anonymous user of a Bulletin Board System ("BBS")¹ in October, 1994.² An information service provider ("ISP")³ monitored the BBS through a BBS editor who was employed to remove certain types of speech from the BBS.⁴ However, the editor failed to remove the message, despite its defamatory implications.⁵ One consequence of employing BBS editors is the possibility of a lawsuit against the ISP for failing to remove defamatory statements placed on the BBSs.

1. BBSs take their name from public message areas. Edward Naughton, *Is Cyber-speech a Public Forum? Computer Bulletin Board Systems, Free Speech and State Action*, 81 GEO. L. J. 409, 417 (1992). Information Service Provider ("ISP") subscribers can post messages on BBSs according to subject matter and allow for interactive conferences with other ISP subscribers. *Id.*

2. *Stratton Oakmont, Inc. v. Prodigy, Inc.*, 1995 WL 323710 (N.Y. Sup. Ct.).

3. ISPs, which are also called computer service bureaus or on-line information services, are "computer system[s], usually operated on a commercial basis . . . provid[ing] data processing services to customers." *System Contracts-Background Materials*, 1 COMPUTER LAW 1982: ACQUIRING GOODS AND SERVICES 303, 327 (P.L.I. Computer Law and Practice Course Handbook Series No. 282, 1982).

4. BBSs are computer programs that act as a traditional bulletin boards. Specifically, the programs allow users to post messages, read existing messages and respond to other users' messages. Pollack, *Free Speech Issues Surround Computer Bulletin Board Use*, N.Y. TIMES, Nov. 12, 1984 at, A1.

5. The tort of defamation deals with false expression that injures reputation. Defamatory speech must adversely affect the plaintiff's reputation in the minds of "right thinking" people. *Kimmerle v. New York Evening Journal*, 186 N.E. 217, 218 (N.Y. 1933); *see also* *Norse v. Henry Holt & Co.*, 991 F.2d 563, 567 (9th Cir. 1993) ("from the standpoint of the average reader"); *Miele v. Rosenblum*, 603 A.2d 43, 46 (N.J. Super. Ct. App. Div. 1991) ("by reasonable persons of ordinary intelligence"); *Ryan v. Herald Ass'n* 566 A.2d 1316, 1321 (Vt. 1989) ("a substantial and respectable group"); *Ingalls v. Hastings & Sons Publ. Co.*, 22 N.E.2d 657, 658 (Mass. 1939) ("considerable and respectable class in the community").

The anonymous user's message referred to the business practices of a large New York securities firm, Stratton Oakmont ("Stratton").⁶ Prodigy Services, Inc. ("Prodigy")⁷ posted the message and consequently found itself the defendant in a \$200 million defamation lawsuit in *Stratton Oakmont, Inc. v. Prodigy, Inc.*⁸ Prodigy is not the first ISP to face a lawsuit, nor will it be the last. Therefore, courts must determine the standard of liability for ISPs that edit BBSs for defamatory content by weighing the importance of the speech contained within the BBSs against the importance of protecting reputation.

The *Stratton* case illustrates the difficulties encountered when courts attempt to analyze a new medium under traditional defamation law.⁹ As courts formulated boundaries for the telegraph in the early part of the century, a similar dilemma now exists with BBSs.¹⁰ The liability question turns on whether an ISP like Prodigy is a primary publisher.¹¹ In the two cases involving BBS defamation, courts have made one poignant distinction: if the ISP chooses to edit or censor its BBSs, it is a pri-

6. Stratton is a brokerage firm located in New York. In February, 1994, Stratton agreed to pay two million dollars to clients and a five hundred thousand dollar fine to the U.S. Securities and Exchange Commission after allegedly defrauding customers through unethical sales practices, unauthorized trading in customer accounts and stock manipulation. David Baines, *How Street Mugging Takes Solucorp Down Tubes*, VANCOUVER SUN, September 13, 1995, at C2.

7. Prodigy, a joint venture of the IBM and Sears, Roebuck & Co., charges its subscribers a flat monthly rate. Naughton, *supra* note 1, at 409. Prodigy is also different from other networks because of its decision to be a "family" network with colorful graphics." Chris Reidy, *Computer Flap: Is Speech Free on Prodigy?*, BOSTON GLOBE, Jan. 30, 1991, at 35. Prodigy actively screens its BBSs for inappropriate language; specifically, all "obscene, profane or otherwise offensive references" are forbidden on the BBSs. Michael Miller, *Prodigy Network Defends Display of Anti-Semitic Notes*, WALL ST. J., Oct. 22, 1991, at B1.

8. *Stratton*, 1995 WL 323710.

9. RESTATEMENT (SECOND) OF TORTS § 558 (1977). There are four elements for a cause of action for defamation: "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Id.*

10. See *O'Brien v. Western Union Telegraph Co.*, 113 F.2d 539, 543 (1st Cir. 1940) (holding telegraph company liable for defamation only where the transmitting agent knew the message was false or that the sender acted in bad faith); *Western Union Telegraph Co. v. Lesense*, 182 F.2d 135, 138 (4th Cir. 1950) (questioning whether telegraph company that was being sued for defamation where the company knew or had reason to know that the sender was not privileged to send the message was a question for the jury).

11. "Any act by which the defamatory matter is intentionally or negligently communicated to a third person is a publication." RESTATEMENT (SECOND) OF TORTS § 577. Primary publishers are liable as if they had originated the statement. *Id.* § 581. Moreover, primary publishers are not necessarily liable without some kind of negligence regarding the truth or falsity of the statement. *Id.*

mary publisher;¹² and if the ISP does not edit its BBSs, it is a secondary publisher.¹³ Because courts hold ISPs that edit postings liable for defamation, this categorization as a primary publisher punishes editing ISPs and allows non-editing ISPs to be absolved from liability. While Prodigy has the opportunity to know the information published on its BBSs, the speech contained within the BBS remains manifestly valuable as editorial-type speech.¹⁴ Consequently, this editorial speech requires protection by the First Amendment.¹⁵

Therefore, because the ISP acts as a primary publisher by disseminating BBS messages, it may be liable for defamation¹⁶ if a potential plaintiff can establish falsity, causation, and harm.¹⁷ However, holding editing ISPs liable for defamation would threaten the importance of the speech contained within the messages.

While one court determined that Prodigy is a primary publisher, no court has decided what standard to apply to an ISP that edits its BBSs.¹⁸ Since the liability question will likely arise, a court will probably draw from previous cases involving primary publishers.¹⁹ Like an editorial page in a newspaper, a BBS provides an average person with a forum to speak his mind about whatever he wishes.²⁰ Moreover, BBSs act as ra-

12. See *infra* note 54 and accompanying text for discussion of primary publisher liability.

13. *Cubby v. CompuServe*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (holding that CompuServe was a secondary publisher and absolved from liability from defamation); *Stratton*, 1995 WL 323710 (holding that Prodigy was a primary publisher and liable for defamatory statements on its BBSs).

14. See *infra* notes 65-70 and accompanying text for a discussion of editorial speech.

15. The First Amendment provides, in part, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Decisions strongly support the constitutional viability of editorial speech. See *infra* notes 79-82 and accompanying text for a discussion of *Koltikoff v. Community News*, 444 A.2d 1086 (N.J. 1983).

16. Primary publishers have the greatest control over the medium and accordingly face the greatest exposure to defamation liability. Eric Schlachter, *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, 116 (1993).

17. W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS 805-06 (5th ed. 1984) [hereinafter PROSSER]. The plaintiff's fault depends on his status as a private or public individual. *Id.* See *infra* notes 35, 37 and accompanying text for discussion of the private/public figure distinction.

18. See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that a newspaper is a primary publisher).

19. Primary publishers include most media outlets, such as the newspaper or book publisher that prints the statement, or the television or radio broadcast that broadcasts the statement. RODNEY A. SMOLLA, THE LAW OF DEFAMATION § 4.13[4] (Clark Boardman 1986); see RESTATEMENT (SECOND) OF TORTS § 581(2). "One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher." *Id.*

20. See *infra* notes 99-105 and accompanying text for a discussion of the ease and cost-effectiveness of using ISPs.

dio broadcasts, which allow spontaneous discussion among a group of widely dispersed people.²¹ Both newspapers and broadcasters, like BBSs, allow individuals to widely disseminate their ideas throughout society.²² Since courts recognized the importance of the type of speech involved in newspaper and radio broadcasts, courts will likely recognize the importance of BBS speech.

BBSs present similar liability issues as newspapers and radio broadcasts, but on a much wider scale.²³ First, ISPs often receive thousands of postings per day.²⁴ Second, the postings are often not purged from the BBS, and thus may remain on the BBS system for an extended period of time.²⁵ Therefore, editorially controlling BBSs pose a greater challenge for BBS editors than for a traditional newspaper or broadcast editors.²⁶

Consequently, as BBS use continues to rise, courts will find that traditional defamation standards do not effectively apply to the BBS medium.²⁷ Because the need to balance the value of the speech on BBSs with the importance of protecting an individual's reputation remains, the standard set forth in *New York Times v. Sullivan*²⁸ applies to BBS speech. *Sullivan* malice ensures that the free exchange of ideas will not be affected and defamed individuals will have recourse against those who defamed them.

This Comment proposes that *Sullivan* malice should apply to ISPs that exercise editorial control. Part II examines current law of defamation as applied to newspapers and radio broadcasts operating in an edito-

21. One of the most popular BBS functions is the ability to post instantaneous public messages. Schlachter, *supra* note 16, at 107; see *infra* notes 89-93 and accompanying text for discussion of broadcast media liability.

22. Naughton, *supra* note 1, at 418. BBSs are like public message areas that are the modern equivalents of the town squares of the past. *Id.*

23. Eric C. Jensen, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COMM. L. J. 217, 220 (1987). The government does not regulate BBSs which means anybody with some money and some computer knowledge may start one. *Id.*

24. One commentator analogized BBSs to electronic club meetings. *Id.* at 258 n.10.

25. Naughton, *supra* note 1, at 417.

26. Furthermore, unlike newspapers, many BBS postings do not concern public figures or matters of public concern. However, this distinction may not be as compelling as it seems. A BBS editor is different from a newspaper editor in that he may not know whether the name on the BBS posting is a public figure.

27. A court decided the standard of liability for ISPs that do not editorially control their BBSs. *Cubby*, 776 F. Supp. at 135. However, to date, no court has decided the liability of an ISP that exercises editorial control but fails to remove a defamatory message from its BBS. A court may hold an ISP that editorially controls its BBSs should be held to the same liability as an ISP that does not censor, but this is unlikely. Although a non-editorially controlled BBS is held to the same standard as a bookseller who has no idea what is inside the books he sells, this same rationale cannot apply to an editorially-controlled BBS where the "bookseller" actively scans his books for content. *Id.*

28. 376 U.S. 254 (1964). See *infra* notes 36-42 and accompanying text for a discussion of the *Sullivan* case.

rial forum.²⁹ Part II also compares the similarities between traditional primary publishers and the different policies employed by ISPs in editing BBSs. Because courts have yet to apply a standard to defamation on BBSs, Part III compares BBSs to existing mediums that encourage free speech but that, by their nature, are unable to expunge all defamatory speech. In Part III, the *Sullivan* malice standard, the standard applicable to newspapers and broadcast media, is applied to ISPs that edit BBSs for content. Part IV proposes that courts must treat all plaintiffs as public figures because of the impossibility of ascertaining the identity of the defamed individual. This standard ensures that valuable BBS speech will be protected but that defamed persons will have recourse against the ISP with a showing of *Sullivan* malice.

II. BACKGROUND

Traditionally, the underlying purpose of defamation law was to protect reputation.³⁰ However, to constitute defamation of an individual, a defamatory statement must be communicated to a third person.³¹ For defamation law purposes, this communication is called a "publication."³² Each reader, listener, or viewer of the defamation must understand that the allegedly defamatory statement possesses a defamatory meaning or the statement is not actionable.³³ In determining the balance between the First Amendment's protection of free speech and the traditional concern for protection of reputation, courts must consider two guidelines.³⁴ First, the basis of liability for a defamation cause of action rests on

29. For purposes of this Comment, "editorial forum" includes both letters to the editor in newspapers and radio talk shows in broadcast media.

30. At common law, the individual's right to protect his name reflected "no more than our basic concept of the essential dignity and worth of every human being The protection of private personality, like the protection of life itself, is left primarily to the individual states." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966). Six concerns reflect the reasoning behind defamation law:

(1) to protect the interest in esteem that a person has in the eyes of others; (2) to compensate for economic injury; (3) to compensate for emotional injury; (4) to promote dignity; (5) to deter publication of false speech; and (6) to provide checks and balances on the media by making them accountable for defamation.

SMOLLA, *supra* note 19, § 1.06[1]-[6].

31. PROSSER, *supra* note 17, at 797. The element of communication is technically called "publication" but the statement does not necessarily have to be written; rather, publication includes oral statements, gestures, or pictures. *Id.*

32. *Id.*

33. *Id.* For example, if an oral statement is made in a foreign language and nobody understands the speaker's defamatory statement, the statement is not actionable. *Economopoulos v. A.G. Pollard Co.*, 105 N.E. 896, 896 (Mass. 1914). However, a newspaper that prints a defamatory statement in a foreign language is not absolved from liability because the readers are presumably familiar with the language. *Steketee v. Kim*, 12 N.W. 177 (Mich. 1882).

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

whether the plaintiff is a public or private figure. Second, liability depends on whether the defendant publisher has reason to know of what it publishes.

A. THE PLAINTIFF'S STATUS

A publisher's liability first depends on the status of the plaintiff.³⁵ In the seminal case of *New York Times v. Sullivan*,³⁶ the United States Supreme Court concluded that in order to prevail in a lawsuit against a newspaper, a public official³⁷ must establish actual malice.³⁸ This standard, also called *Sullivan* malice, exists when a statement is made with knowledge of its falsehood or is made with reckless disregard for the statement's truth.³⁹ The Court reasoned that defamation rules must neither chill free speech nor lead to self-censorship.⁴⁰ The Court stressed the importance of criticism of official conduct and that individuals should shed their timidity from doing so.⁴¹ However, the *Sullivan* Court concluded that the standard applied only to public officials.⁴²

35. One judge described distinguishing between public and private figure plaintiffs as "trying to nail a jellyfish to the wall." *Rossanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976). Chief Justice Warren described the distinction as having "no basis in law, logic, or First Amendment policy." *Curtis Publishing v. Butts*, 388 U.S. 130, 162-63 (1967) (Warren, C.J., concurring).

36. 376 U.S. at 254. In *Sullivan*, the police commissioner of Montgomery, Alabama sued the *New York Times* after the *Times* published a full-page editorial-type advertisement stating that the commissioner mistreated Dr. Martin Luther King, Jr. *Id.*

37. Public officials are those "among the hierarchy of 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.

38. *Sullivan*, 376 U.S. at 279-80.

39. *Id.* Justice Brennan's opinion in *Sullivan* is the starting point for any discussion of defamation. SMOLLA, *supra* note 19, § 2.01[2]. Brennan stressed that the rules of libel should not chill free speech; thus, bringing tort law within the realm of the First Amendment. *Sullivan*, 376 U.S. at 279. The Court stressed that actual malice must be shown with "convincing clarity." *Id.* at 285. As such, the court did not find that the *New York Times*' failure to check the facts in the allegedly defamatory statement did not constitute actual malice. *Id.* at 285-91. A later decision held that the actual malice standard is not an objective standard that is based on the reasonably prudent person; rather, the plaintiff must show that the defendant "in fact entertained serious doubts as to the truth of the publication." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

40. *Sullivan*, 376 U.S. at 279.

41. *Id.* Thus, the *Sullivan* Court reasoned that traditional defamation law "dampens the vigor and limits the variety of public debate." *Id.*

42. The Court later extended the *Sullivan* malice standard to include public figures as well. *Gertz*, 418 U.S. at 345-48.

Ten years later, *Gertz v. Robert Welch*⁴³ narrowed the standard set forth in *Sullivan*.⁴⁴ The *Gertz* Court sensed that "the balance between free speech and private reputation had tipped too far in the direction of free speech."⁴⁵ As such, the Court proposed an approach that recognized the strength of the legitimate state interest in compensating private individuals for injury to their reputation but shielded broadcast media from "the rigors of strict liability for defamation."⁴⁶ The *Gertz* Court extended the *Sullivan* malice standard to public figures.⁴⁷ However, the Court concluded that individual states were not required to apply the *Sullivan* malice standard in a case of defamation brought by a private person.⁴⁸ Therefore, under *Gertz*, if the plaintiff is a private figure,⁴⁹ he need only show that the defendant published the statement knowing of

43. 418 U.S. at 323. In *Gertz*, the plaintiff was an attorney representing the family of a murdered individual against a police officer. A newspaper alleged that the plaintiff was a "Leninist" and a "Communist fronter." *Id.*

44. *Sullivan*, 376 U.S. at 286. Furthermore, the *Gertz* case officially brought opinion to constitutional status. *Gertz*, 418 U.S. at 339-40. Although in *dicta*, the Supreme Court appeared to provide absolute immunity from defamation actions for all opinions and to discern the basis for this immunity in the First Amendment. *Id.* The *Gertz* Court announced that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend on its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.*

45. *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (N.Y. 1975).

46. *Gertz*, 418 U.S. at 345-48.

47. *Id.* A public figure is: (1) one who has "generated fame and notoriety in the community;" (2) one who has "voluntarily injected [himself] into a public controversy in order to influence the resolution of the issues involved;" or (3) "involuntary public figures" who are directly affected by the actions of public officials. *Id.* Lower courts have interpreted the *Gertz* holding as creating an absolute constitutional privilege for expression of defamatory opinion, as opposed to a conditional constitutional privilege for defamatory statements of fact. See *In re Yagman*, 796 F.2d 1165, 1172 (9th Cir. 1986) ("an opinion is simply not actionable defamation"); *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1202 (N.D. Ill. 1984) ("statements of opinion are never actionable"); *Steinhilber v. Alphonse*, 68 N.Y.2d 283 (N.Y. 1986) (concluding that under *Gertz*, expressions of opinion are entitled to First Amendment protection).

48. *Gertz*, 418 U.S. at 345-48. A state cannot apply a lower standard than negligence, which is that the defendant knew or in the exercise of reasonable care should have known the falsity of the statement. ROBERT D. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 251-252 (P.L.I. 1980). The *Gertz* court held, however, that a private figure plaintiff cannot recover punitive damages by a mere showing of negligence. *Gertz*, 418 U.S. at 340. However, a state may require a private plaintiff to show actual malice. *Id.* at 350. States that apply the actual malice standard usually require that the allegedly defamatory statement be a matter of public or general interest. *Sack, supra* at 255.

49. *Gertz*, 418 U.S. at 345-48. The Court concluded that private figures are more vulnerable because they have less access to the media than public figures to counteract false statements. *Id.* Moreover, the Court concluded that private plaintiffs are more deserving of protection because they have not voluntarily interjected themselves into a controversy. *Id.*

its falsity or negligently published the statement with respect to the statement's truth.⁵⁰

The *Gertz* Court also stressed that public officials and public figures had greater access to the media and, therefore, had channels for self-help that private individuals did not.⁵¹ The Court presumed that public figures could more realistically contradict the defamatory statement through counterspeech.⁵²

B. THE PUBLISHER'S ROLE

A defendant publisher's liability depends on the role taken in disseminating the allegedly defamatory statement.⁵³ A publisher's status falls into one of two categories: primary publishers or secondary publishers.⁵⁴ An important difference between the two categories is that primary publishers play an active role in disseminating information while secondary publishers play a passive role.⁵⁵

Examples of primary publishers include radio broadcasters and newspaper printers and editors.⁵⁶ A primary publisher may incur liability for defamation when publishing a statement with the possibility of knowing the content of the material published.⁵⁷ The old common law held primary publishers strictly liable for disseminating defamatory

50. *Id.* at 342. The Court also reiterated that to recover punitive damages from the media, all libel plaintiffs had to show actual knowledge of falsity or reckless disregard of probable falsity. *Id.* This holding was first set forth in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985).

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

52. *Id.*

53. PROSSER, *supra* note 17, at 810.

54. Robert Charles, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J. L. & TECH. 121, 131 (1987). Historically, courts created separate media classifications to respond to technology. *Id.* at 136-9. At present, four classifications exist: publishers, broadcasters, common carriers, and distributors. *Id.* at 125; *see, e.g.*, *Smith v. California*, 361 U.S. 147 (1959) (holding that booksellers are not publishers because they lack editorial control over what is distributed), *reh'g denied*, 361 U.S. 950 (1960); *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (considering the standard of liability for primary publishers); *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W.D. Mo. 1934) (classifying broadcasters as primary publishers); *Nye v. Western Union Tel. Co.*, 104 F. 628 (C.C.D. Minn. 1900) (determining that telegraph companies are common carriers).

55. Charles, *supra* note 54, at 131.

56. *Id.* Although one might expect radio broadcasters to be secondary publishers, courts have generally subjected broadcasters to the same standards as newspapers and other print media for republication of a defamatory statement. RESTATEMENT (SECOND) OF TORTS § 581.

57. Therefore, one who repeats a libel is liable as if the statement were his own. SACK, *supra* note 48, at 87. The rationale behind the rule is that republication by the media may cause greater damage because of the wider breadth of dissemination. *Id.*

speech.⁵⁸ However, under modern law, a plaintiff must show the requisite fault based on the plaintiff's status in order to recover.⁵⁹ If the plaintiff can show such fault, the primary publisher may be subjected to the same liability as the author of the written material.⁶⁰

In contrast, secondary publishers, which include libraries, booksellers and distributors,⁶¹ do not possess the same opportunity to know the content of the information disseminated.⁶² As such, courts presume secondary publishers are not knowledgeable of the content of defamatory statements and thus cannot delete or edit the defamatory statements from the material before another party views the material.⁶³ Therefore, secondary publishers do not incur liability for defamation without a showing by the plaintiff that the publisher knew or had reason to possess knowledge of the defamatory nature of the speech.⁶⁴

1. *Newspaper Liability*

Courts consider newspapers to be primary publishers because newspapers know the content of the material published because editors⁶⁵

58. *Id.*

59. PROSSER, *supra* note 17, at 810. As such, the requisite fault depends on whether the plaintiff is a public or private figure. *Id.*

60. *Id.* However, a primary publisher is not vicariously liable for the author's tortious conduct; rather, the publisher is subject to liability for publishing with negligence for a private figure plaintiff or actual malice for a public figure plaintiff. *Id.* Furthermore, those performing a secondary role in disseminating a defamatory statement are not liable absent proof that they knew or had reason to know of the existence of the defamatory statement. *Id.* at 810-11. Accordingly, a property owner accepts responsibility for another individual's published statement only if he knows of its existence. *Hellar v. Bianco*, 244 P.2d 757, 759 (Cal. Ct. App. 1952). This reasoning has not been applied to a case involving a BBS editor. A Florida court held a BBS editor liable for failing to remove copyrighted photographs even though he removed them after he was made aware of them. *Playboy Enterprises v. Frena*, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993). Similarly, a New York court is now considering whether CompuServe should be liable for permitting the dissemination of a copyrighted song. *Frank Music Corp. v. CompuServe, Inc.*, S.D.N.Y., Civil Action No. 93 Civ. 8153 J.F.K.; *see also* THE ENT. LIT. RPTER., Feb. 25, 1994 (the complaint seeks judgment of at least \$10,000 for each of the over 690 acts of infringement).

61. PROSSER, *supra* note 17, at 810.

62. PROSSER, *supra* note 17, at 811. Additionally, a secondary publisher who knowingly distributes defamatory material is not liable unless the publisher knows or had reason to know that the person's communication was not privileged. RESTATEMENT (SECOND) OF TORTS § 612 (1976).

63. PROSSER, *supra* note 17, at 811.

64. PROSSER, *supra* note 17, at 810-111.

65. An editor is defined as:

One who directs or supervises the policies, content and contributions of a newspaper, magazine, book, work of reference or the like. The term is held to include not only the person who writes, edits or selects the articles for publication, but he who publishes a paper and puts it into circulation.

BLACK'S LAW DICTIONARY 514 (6th ed. 1990).

read and edit stories before publication.⁶⁶ Accordingly, a newspaper may be liable after printing an editorial, even though the newspaper did not acknowledge belief in the statement.⁶⁷

While the Supreme Court has not granted newspapers immunity from defamation actions, the Court does not usually place liability on newspapers because of the high value of editorial speech.⁶⁸ Through letters to the editor, "average" citizens are able to enter the "marketplace of ideas."⁶⁹ The letters give individuals an inexpensive and easily accessible forum to express personal ideas to a large group of readers.⁷⁰

66. Donna R. Euben, *An Argument for an Absolute Privilege for Letters to the Editor After Immuno A.G. v. Moor-Jankowski*, 58 BROOK. L. REV. 1439, 1449 (1993). Specifically, to determine whether a newspaper is liable for publishing an allegedly defamatory statement in a letter to the editor, courts examine whether the statement: (1) was fact or opinion; (2) was about a public or private figure; and (3) involved a matter of private or public concern. *Id.* The fact/opinion distinction is beyond the scope of this Comment. This Comment focuses only on the overall value of editorial speech and not editorial speech as opinion.

67. SACK, *supra* note 48, at 87. But at common law, the neutral reportage privilege gave absolute immunity to letters to the editor under the rationale that when the media reprint letters accurately, they cannot be liable when the letters contain false statements of fact. *Id.* at 144-51. Currently, however, the plaintiff can show the requisite degree of fault to hold the newspaper liable. *Id.* at 150-151. Therefore, the concept of neutral reportage "has quietly been absorbed into the law." *Id.* at 151. Moreover, a newspaper may be liable for letters to the editor even though most readers would understand that the letters were not the newspaper's opinion. *Id.* Furthermore, all employees who play a part in disseminating the defamatory statement may be liable, including reporters, editors, and directors. Charles, *supra* note 54, at 122.

68. Euben, *supra* note 66, at 1442. The newspaper, the actual number of letters that are published are minimal after editors "weed out" possibly libelous messages. *Id.* at 1443. Furthermore, if a court does not consider the letter to be opinion, a newspaper defendant still generally wins because the plaintiff cannot show the actual malice requirement under *Sullivan*. *Id.*

69. As Justice Holmes concluded, "[T]he best test of truth is the power of thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919). Justice Holmes dissented in *Abrams* and expressed his concern when the majority upheld the conviction of several Americans who passed out anti-war leaflets. *Id.* at 627-30 (Holmes, J., dissenting). Since this famous dissent, the phrase "marketplace of ideas" became a term that signifies the importance of free speech, even if the speech may offend some individual sensibilities. Euben, *supra* note 66, at 1444. As such, a commentator made the analogy when the marketplace of ideas is open, letter writers in effect compete with one another for a better idea, promoting spirited debate under the First Amendment. *Id.* at 1446; see SMOLLA, *supra* note 19 (stating that "the editorial context is regarded by the courts as a powerful element in construing as opinion what might otherwise be deemed fact"); Steve Pasternack, *Editors and the Risk of Libel in Letters*, 60 JOURNALISM Q. 311, 311 (1983) (stating that "the vast majority of letter-generated libel suits result in summary judgment or some other outcome favorable to the defendant publisher"); see also Euben, *supra* note 66, at 1439 (arguing that a letter to the editor is a "town meeting in print" and thus, requires an absolute privilege).

70. "Letters to the editor are a valued part of every newspaper. Their variety of topic is endless. They correct—and make—errors. They reflect a multitude of views and moods.

The *Sullivan*⁷¹ Court stressed the importance of editorial speech.⁷² In *Sullivan*, the New York Times published an editorial-type advertisement criticizing the police force for its actions during a civil rights demonstration.⁷³ In denying recovery for the plaintiff, the Court reasoned that the editorial served an important purpose: it allowed a group with limited resources to express its opinion, communicate information, and recite its grievances against the government.⁷⁴ The Court held that to impose liability upon a newspaper would discourage newspapers from carrying editorials and would, therefore, hinder circulation of information and ideas by individuals who do not have access to other means of speech dissemination.⁷⁵ The Court stressed the importance of maintaining a forum for those "who wish to exercise their freedom of speech even though they are not members of the press."⁷⁶

Therefore, the *Sullivan* Court emphasized the value of granting deference to certain types of media so as to encourage the overriding interest of free speech under the First Amendment. Moreover, the *Sullivan* case posits two competing interests: ensuring public debate while also allowing an individual recourse against a potential defamer. While the

They abound in curious information. They constitute a debating society that never adjourns, in which everything knowable is discovered." Irving Rosenthal, *Who Writes the "Letters to the Editor"?*, JOURNALISM: READINGS IN THE MASS MEDIA 135, 142 (Allen & Linda Kirschner, eds., 1971).

71. 376 U.S. at 254.

72. *Id.* at 258.

73. *Id.* According to the Court, some of the statements in the advertisement contained inaccurate information. *Id.* However, the newspaper's editor followed the newspaper's established practice of allowing such an advertisement without actually confirming the accuracy of the information supplied within the advertisement. *Id.* at 260.

74. *Id.* at 265. The Supreme Court has also reasoned that when an individual reads a letter to the editor he is more likely to believe that the statements are opinion, and thus, protected under the First Amendment. *Greenbelt Coop. Publ. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970).

75. *Sullivan*, 376 U.S. at 266.

76. *Id.* See also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (holding that "speech in terms of its capacity for informing the public" should be protected and not the particular speaker or form of speech). The Court reasoned that newspaper editorials encouraged the "unfettered interchange of ideas." *Sullivan*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The Court stressed that the First Amendment's meaning was based on the United States' "profound . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometime unpleasantly sharp attacks on government." *Id.* at 270. The Court explained that free debate of issues was essential and that critics should not be "deterred from voicing their criticisms, 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." *Id.* at 279; see also *Ollman v. Evans*, 750 F. 2d 970, 983 (D.C. Cir. 1984) (holding that "the public has an interest in receiving information . . . even if the trustworthiness of the information is not absolutely certain"), *cert. denied*, 471 U.S. 1127 (1985).

Sullivan Court did not go so far as to grant full First Amendment protection for editorials,⁷⁷ the Court suggested that editorials require a higher degree of constitutional protection due to the value of the underlying speech.⁷⁸

Following the *Sullivan* Court's reasoning, the New Jersey Supreme Court, in *Kotlikoff v. Community News*,⁷⁹ held that statements made in an "editorial forum" constituted protected speech, regardless of the status of the plaintiff.⁸⁰ The court reasoned that a strict semantic interpretation may lead one to conclude that the editorial was factual.⁸¹ However, the court held that since the statements were written in the context of an editorial, the statements deserved more protection under the First Amendment.⁸²

While courts have singled out the speech contained in letters to the editor as being important to society, courts nonetheless decline to grant newspapers absolute immunity from defamatory statements in letters to the editor.⁸³ Courts are not willing to do so because a newspaper employs a team of editors that has an opportunity to investigate letters

77. At the time of the *Sullivan* holding, opinion was protected under the common law privilege of fair comment. RESTATEMENT (SECOND) OF TORTS § 566 cmt. a. Some jurisdictions still use the fair comment privilege and as such, a statement is only privileged when it is a statement of opinion and public interest, and not a misstatement of fact. *Id.* The idea behind the privilege was to protect "both the right to comment on public affairs" and "the public's access to important information." *Immuno A.G.*, 567 N.E.2d at 1272.

78. *Sullivan*, 376 U.S. at 266.

79. 444 A.2d 1086 (1983). In *Kotlikoff*, the plaintiff was the mayor of New Jersey and sued a small community newspaper for a defamatory statement in a letter to the editor. *Id.* at 1087. The statement accused the mayor and the city tax collector for playing parts in a "huge cover up" scheme that led to a decline in property tax revenues. *Id.* Moreover the letter accused the mayor and tax collector of withholding names of delinquent tax payers. *Id.*

80. *Id.* at 1090. The court further reasoned that letters to the editor deserve First Amendment protection no matter how "extreme, vituperous, or vigorously expressed" the statements may be. *Id.* at 1091.

81. *Id.* But see *Rinaldi v. Holt, Reinhart & Winston*, 366 N.E.2d 1299, 1306-08 (N.Y. App. Div. 1977) (holding that statements in an editorial-type book were not constitutionally protected opinion), *cert. denied*, 434 U.S. 969 (1977).

82. *Kotlikoff*, 444 A.2d at 1090. The New York Court of Appeals applied similar reasoning in *Immuno A.G.*, 567 N.E.2d at 1270. In *Immuno A.G.*, the plaintiff was a multinational corporation. *Id.* at 1272. The defendant was the editor-in-chief of the *Journal of Medical Primatology*, and published an editorial criticizing the plaintiff's business practices. *Id.* The letter was written by the head of an organization vigorously against primate testing. *Id.* The *Immuno A.G.* court held that letters to the editor provide an important forum and thus, required higher constitutional protection. *Id.* at 1281. The court, in turn, gave the letter absolute constitutional protection as opinion. *Id.* The court noted that freedoms of expression needed "breathing space" in order to survive. *Id.* at 1273 (quoting *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 772 (1986)).

83. *Euben*, *supra* note 66, at 1442. However, some commentators argue that letters to the editor require absolute immunity to ensure free speech. *Id.*

before publication.⁸⁴ Thus, courts recognize the importance of editorial speech to society while allowing for the protection of reputation. Therefore, while a plaintiff may have a more difficult time winning a defamation suit against a newspaper, the plaintiff still has recourse against the defamer.

2. *Broadcast Media Liability*

Unlike newspapers, debate continues to surround the question whether broadcast media operate as primary publishers.⁸⁵ Broadcasters usually cannot consider the truth of a statement until the statement has already been broadcasted.⁸⁶ However, most courts hold radio broadcast media to the same standard as newspapers.⁸⁷ As such, broadcasters are not liable for publishing defamatory statements absent a showing of fault in permitting the statement to be published.⁸⁸

In so ruling, courts consider the short period of time available to broadcasters before the broadcaster releases information to the public.⁸⁹ Live broadcasts involving on-air callers illustrate the time pressure between the caller's speech and the broadcaster's perception of the speech.⁹⁰ When the spontaneity of disseminating the speech is an important part of the medium, courts do not find *Sullivan* malice unless the publisher had reasonable time to investigate the statement.⁹¹

*Adams v. Frontier Broadcasting Co.*⁹² provides a good illustration of this issue. In *Adams*, the Wyoming Supreme Court refused to hold a radio station liable for publishing, with knowledge of falsity or awareness of probable falsity, a caller's statement when the station failed to use an electronic delay device.⁹³ The *Adams* court reasoned that requir-

84. PROSSER, *supra* note 17, at 87.

85. *Id.* at 81.

86. SACK, *supra* note 48, at 87-88.

87. PROSSER, *supra* note 17, at 812.

88. *Id.*

89. SMOLLA, *supra* note 19, § 3.21[1]. As such, courts have a tendency to give deference to "hot news" situations. *Id.* However, at least one commentator has warned that "[n]o publication is made without time pressure or with the ability to double-check every fact." SACK, *supra* note 48, at 216 n.175.

90. SMOLLA, *supra* note 19, § 3.21[2]. Live broadcasts involve individuals calling into a radio station to talk about a certain topic. *Adams v. Frontier Broadcasting Co.*, 555 P.2d 556, 558 (Wyo. 1976). As such, one individual speaks at a time and the radio station has the option to impose a delay device to screen profanity. *Id.*

91. *Adams*, 555 P.2d at 564-65.

92. *Id.* *But see* *Aku v. Lewis*, 477 P.2d 162, 169 (Haw. 1970) (holding that if a reasonable time elapses to investigate a statement, a broadcaster is liable under actual malice).

93. *Adams*, 555 P.2d at 566. The *Adams* court, citing *Sullivan*, refused to attach liability to the radio station because of the national commitment to "uninhibited, robust, and wide open" public debate. *Id.* Furthermore, the court held that "[p]rograms such as this are the modern version of the town meeting in vogue earlier in our country's history, and

ing a broadcaster to undergo a trial to determine the issue of knowledge or reckless falsity would impose an obligation upon radio broadcasting companies which would substantially inhibit "the free and robust nature of the public debate."⁹⁴ The court held that because of the importance of the underlying speech, as well as the spontaneity of the medium, the broadcaster's failure to screen defamatory speech did not constitute *Sullivan* malice.⁹⁵

Therefore, based on the *Adams* holding, if a radio station failed to use a delay device to screen statements before broadcast, it would not be guilty of publishing with knowledge of falsity or reckless disregard of the truth.⁹⁶ The broadcaster cannot know the defamatory nature of a caller's statement unless the broadcaster employs a long enough delay to ascertain the truth or falsity of the statement.⁹⁷ However, as the *Adams* court recognized, a requirement of long delays may destroy the spontaneity of the forum and inhibit the free exchange of ideas.⁹⁸

C. INFORMATION SERVICE PROVIDERS

Like newspapers and broadcast media, Information Service Providers provide individuals with a medium to express their ideas. In 1994, an estimated 5.2 million people logged on to ISPs,⁹⁹ an increase from 1.7 million people only four years earlier.¹⁰⁰ Consequently, services such as

they are utilized in a similar way to afford every citizen an opportunity to speak his mind on any given issue." *Id.*

94. *Id.* Thus, the court referred to the national commitment set forth in *Sullivan* to the importance of public debate balanced against the right of a public figure to be free from defamatory remarks. *Id.* "Programs such as this are the modern version of a town meeting in vogue earlier in our country's history, and they are utilized in a similar way to afford every citizen an opportunity to speak his mind on any given issue." *Id.* The court held that the impact of the censorship would fall not on the broadcaster, but on members of the public who choose to use broadcasting as a forum for debate. *Id.* at 567.

95. *Adams*, 555 P.2d at 567.

96. *SACK*, *supra* note 48, at 89-90; *but see* *Snowden v. Pearl River Broadcasting Corp.*, 251 So.2d 405, 409 (La. App. 1971) (failure to use electronic delay device is evidence of publishing with knowledge of falsity or awareness of probable falsity).

97. *SACK*, *supra* note 48, at 89-90. A possible reason why radio broadcasters are not liable, even if when failing to use a delay device, is that in the few seconds of delay a broadcaster cannot feasibly determine whether a caller's statement is defamatory. *SMOLLA*, *supra* note 19, § 3.21[2].

98. *Adams*, 555 P.2d at 565.

99. Naughton, *supra* note 1, at 409. ISPs are on-line services where an individual either pays a monthly fee or is billed by the minute for access to the system. *Id.*

100. Catherine Yang, *Flamed with a Lawsuit*, *Bus. Wk.*, Feb. 6, 1995, at 70.

BBSs,¹⁰¹ e-mail,¹⁰² and on-line information¹⁰³ are rapidly becoming the most efficient and prevalent forms of communication.¹⁰⁴

1. *Bulletin Board Systems*

Currently, thirty to forty thousand BBSs operate in the United States,¹⁰⁵ a staggering growth since the first BBS in 1978.¹⁰⁶ BBS popularity stems in part from their ease of operation.¹⁰⁷ Any individual can access a BBS from his home simply by subscribing to an ISP.¹⁰⁸ Therefore, any individual with a computer, modem and telecommunications software¹⁰⁹ may access an ISP that operates remotely from powerful mainframe computer systems.¹¹⁰

101. Loftus E. Becker, *The Liability of Computer Bulletin Board Operators for Defamation Posted By Others*, 22 CONN. L. REV. 203, 207-12 (1989). Users can access bulletin boards through a modem and a home computer. *Id.* Bulletin boards allow users to broadcast information to other users. *Id.* A computer bulletin board is analogous to an "ordinary" bulletin board which users can post any sort of information as well as read any information posted by another user. *Id.*

102. Naughton, *supra* note 1, at 409 n.2. E-mail is a method of sending private messages from one individual to another via a central computer. *Id.* E-mail differs from BBS communication because one person sends e-mail to one person; therefore, e-mail communication closely resembles a telephone conversation. *Id.* BBS communication, however, permits one person to send a message to many people. *Id.* This communication resembles a radio broadcast. *Id.*

103. Becker, *supra* note 101, at 208. There are currently two classes of on-line information. *Id.* One class only distributes information and the user cannot post his own message or interact with the service. *Id.* The most widely known services are of this type and include LEXIS and WESTLAW. *Id.* The second type of information service allows the user to interact with other users by adding information. *Id.* There are several services falling into this category, namely Prodigy, CompuServe and America OnLine. *Id.*

104. Rex S. Heinke and Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, THE COMPUTER LAW., July, 1994, at 1. In 1991, there were an estimated 6,000 services enabling computer users to communicate with each other from one end of the country to the other. Sandra Sugawara, *Computer Network to Ban Repugnant Comments; Prodigy Flap Stirs Debate Over Free Speech*, WASH. POST, Oct. 24, 1991, at A1.

105. Becker, *supra* note 101, at 203-04. BBSs can be run by private individuals from their home computer and are also run by large on-line services, linking hundreds of thousands of users. Barnaby J. Feder, *Toward Defining Free Speech in a Computer Age*, N.Y. TIMES, Nov. 3, 1991, at D5. Furthermore, the major ISPs had 6.3 million subscribers at the end of 1994, a 39 percent increase from the previous year. *Executive Update CEO Briefing*, INVESTOR'S BUS. DAILY, Mar. 8, 1995, at A4.

106. Becker, *supra* note 101, at 204.

107. Becker, *supra* note 101, at 204. In October, 1985, an individual could start up a BBS for less than \$350. *Id.*

108. Becker, *supra* note 101, at 204. Users can gain access to the BBSs by using a modem. Sugawara, *supra* note 104, at A1.

109. Sugawara, *supra* note 104, at A1. For less than \$1000, an individual can purchase the equipment and software to access a BBS. *Id.*

110. Sugawara, *supra* note 104, at A1.

Essentially, the ISP allows a personal computer owner to communicate with a multitude of other computer owners via telephone lines.¹¹¹ Once a subscriber gains access to the system, he possesses an array of options.¹¹² Most ISPs categorize their BBSs by topic and within each topic exist more specific sub-topics.¹¹³

However, as useful as BBSs are, problems have arisen with their use. Individuals have abused BBSs by posting credit card numbers,¹¹⁴ and child pornography.¹¹⁵ To combat this many ISPs employ editing policies to minimize such illegal use.¹¹⁶

2. Editorial Policies of Information Service Providers

Each ISP develops its own policy regarding the editing of BBSs.¹¹⁷ CompuServe,¹¹⁸ for example, develops and provides BBS services to sub-

111. Charles, *supra* note 54, at 122.

112. Jensen, *supra* note 23, at 219. Depending on the ISP, a subscriber may choose from hundreds of BBS topics ranging from computers and dating to U.F.O. sightings. *Id.*

113. Naughton, *supra* note 1, at 417. Prodigy, for example, has 114 BBSs, carrying over 200,000 messages weekly. Feder, *supra* note 105, at D5. The topics range from employment opportunities, to games, to electronic banking. Naughton, *supra* note 1, at 147. BBSs act as conventional bulletin boards because they allow users to "post" messages that will be read by a large group of people. Edward V. DiLello, *Functional Equivalency and its Application to Freedom of Speech on Computer Bulletin Boards*, 26 COLUM. J. L. & SOC. PROBS. 199, 205 (1993). The word "posting" for computer BBSs employs the same meaning as conventional bulletin boards. *Id.* Therefore, a subscriber writes a message and then Prodigy posts the message on the BBS system. Felicity Barringer, *Electronic Bulletin Boards Need Editing, No They Don't*, N.Y. TIMES, Mar. 11, 1990, § 3, at E5. Furthermore, BBSs allow other subscribers to reply to another subscriber's posting. *Id.* Message posting resembles one-to-many communication of publication and broadcasting, and not the one-to-one communication of telephones. Schlachter, *supra* note 16, at 135.

114. Brock N. Meeks, *As BBSs Mature, Liability Becomes an Issue*, INFOWORLD, Jan. 22, 1990, at S14. In 1985, police arrested a BBS operator after discovering stolen credit card information on his BBS. *Id.* While the operator did not know of the information, the police still attempted to charge him with the crime, however, the case was eventually dropped due to lack of evidence. *Id.*

115. Edward Glovin, *Man Held in Computer Child-Porn Case*, THE BERGEN RECORD, May 13, 1994, at A-1; see Heinke and Rafter, *supra* note 104, at 1 for a discussion of liability for placing pornography on computer bulletin boards.

116. One commentator stated, "[t]he board is merely the messenger, and the message can be as varied as human ingenuity." Becker, *supra* note 101, at 213.

117. Gregory Spears, *Cops and Robbers on the Net*, KIPLINGER'S PERS. FIN. MAG., February, 1995, at 56. For example, CompuServe, an ISP based in Columbus, Ohio, denies responsibility for the content of its BBSs. *Id.* CompuServe currently has 1.69 million subscribers. William Grimes, *Computer as a Cultural Tool: Chatter Mounts on Every Topic*, N.Y. TIMES, Dec. 1, 1992, at C13. Similarly, America OnLine, a Virginia corporation, posts disclaimers on its BBSs, but does not review messages before posting. Spears, *supra* at 56. America OnLine is also a large ISP, with over 1.5 million subscribers. *Id.*

118. CompuServe, Inc., which is owned by H&R Block, is based in Columbus, Ohio. *Id.* CompuServe has nearly 2.5 million subscribers worldwide. Spears, *supra* note 117, at 56.

scribers who pay a membership fee.¹¹⁹ CompuServe adopts an "anything goes" policy for its BBSs, only removing speech that is highly obscene, illegal or abusive.¹²⁰ Once a member accesses a BBSs, he may post almost anything he wishes, including profanity, defamatory statements or pornography.¹²¹ Nevertheless, this policy has not successfully insulated CompuServe from defamation lawsuits.¹²²

In April, 1990, a subscriber posted a defamatory message on a CompuServe BBS.¹²³ In *Cubby v. CompuServe*,¹²⁴ the United States District Court, Southern District of New York, held that because CompuServe did not edit its BBSs, CompuServe acted as a secondary publisher and had little or no editorial control over the content of its BBSs.¹²⁵ The court reasoned that CompuServe could no more feasibly examine every publication for defamation than could a public library or newsstand.¹²⁶ The *Cubby* court concluded that because CompuServe acted as a news distributor, it did not incur liability for defamation unless the plaintiff could show that CompuServe knew or had reason to know of the defamatory speech.¹²⁷

In contrast to CompuServe, Prodigy employs a stringent editorial policy.¹²⁸ Specifically, Prodigy relies on BBS "editors"¹²⁹ to screen

119. *Cubby*, 776 F. Supp. at 137.

120. Schlachter, *supra* note 16, at 113. A systems operator for CompuServe stated, "You have to take what you read with a grain of salt." Spears, *supra* note 117, at 56. Other ISPs have also maintained a similar editing policy. GENie, which is owned by General Electric, has over 400,000 subscribers and contracts with 120 who remove messages. Schlachter, *supra* note 16, at n.272. America OnLine, with over 350,000 subscribers, deletes about a message per year. *Id.*

121. Spears, *supra* note 117, at 56.

122. Spears, *supra* note 117, at 56.

123. *Cubby*, 776 F. Supp. at 137. The allegedly defamatory statement suggested that a Skuttlebut developer, Robert Blanchard, was fired from his job before starting "a new start-up scam." *Id.*

124. *Id.*

125. *Id.* at 140. The *Cubby* court relied on the Supreme Court decision in *Smith v. California*, 361 U.S. 147 (1959). In *Smith*, the Court held that a distributor's lack of editorial control precluded states from holding it strictly liable for the contents of its publications. 361 U.S. at 153. The Court reasoned that the large quantity of publications made inspection by distributors unreasonable. *Id.*

126. *Cubby*, 776 F. Supp. at 140. The *Cubby* court reasoned that "technology is rapidly transforming the information industry." *Id.* The court stressed that to hold an ISP to a different standard of liability from other media would result in inconsistent decisions. *Id.* The court concluded that inconsistent decisions would restrict available publications and, therefore, burden the free flow of information. *Id.*

127. *Id.* at 141.

128. Peter H. Lewis, *On Electronic Bulletin Boards, What Rights are At Stake?* N.Y. TIMES, Dec. 23, 1990, § 3, at 8. Before becoming a Prodigy subscriber, individuals must enter into a subscriber contract pledging not to "submit, publish, or display on the Prodigy service any defamatory, inaccurate, abusive, obscene, profane, sexually explicit, threaten-

messages posted to the BBSs by subscribers.¹³⁰ Before Prodigy posts a subscriber's message, a BBS editor may remove portions of the subscriber's message or may even reject the message by sending the

ing, ethnically offensive, or illegal material." *Id.* Prodigy also posts "content guidelines" on the network, in which users are advised, among other things:

- (1) Not to post statements on the Network which are libelous, defamatory or insulting;
- (2) Not to use "pseudonyms," i.e., a name which is other than the poster's "real name," and
- (3) Prodigy will "delete or remove" from the Board's messages which violate the guidelines and, in the case of "problem posters" or repeat offenders, the user's access to the Network will be restricted or terminated.

See Second Amended Complaint at 3, *Stratton Oakmont v. Prodigy Services Co.*, N.Y. Sup. Ct. No. 94-031063.

129. BBS editors play a role like traditional newspaper editors. Miller, *supra* note 7, at B1. Prodigy employs one BBS editor to screen messages written by subscribers before the message is placed on the BBS. *Id.* Accordingly, the BBS editor makes subjective judgments about what types of speech are allowed on the BBSs. *Id.* Moreover, Prodigy tells its members that it will not carry personal ads, notes "judged to be too personal," "requests for pen pals," "personal insults directed at a member," "notes not related to a listed topic," and "notes containing abusive and insulting language." *Id.* If a BBS editor finds an offensive statement, he returns the entire note to the subscriber. Telephone interview with Brian Ek, Director of Communications for Prodigy Services Company (April 3, 1994) (hereinafter *Ek Interview*). If the statement has only profanity, either the BBS editor or software removes the profanity before posting the message. *Id.* Therefore, a message with profanity is not returned to the subscriber, but is instead posted absent the profane words. *Id.*

130. Prodigy informs its subscribers in the Prodigy Member Agreement that Prodigy "reserves the right to review and edit any material submitted for display or placed on the Prodigy service." Prodigy Service Member Agreement, § 8 (on file with author). For example, Prodigy BBS editors have censored BBSs when discussions centered around abortion and homosexuality. Simson L. Garfinkel, *Computer Network Users Attempt a Mutiny*, CHRISTIAN SCI. MONITOR, Dec. 5, 1990, at 12. BBS editors also forbade a subscriber from using the phrase "death certificate" in a genealogy discussion. Reidy, *supra* note 7, at 35. Furthermore, BBS editors censored BBSs when subscribers discussed their disdain over Prodigy rate increases. Naughton, *supra* note 1, at 417. An example of how Prodigy's screening process can go wrong is when a collector attempted to post a message on a BBS asking for "Roosevelt dimes" and "Winston Churchill memorabilia," the board editors refused to post the message, believing the names to be other subscribers. Miller, *supra* note 7, at B1. Consequently, Prodigy has been the subject of criticism on several occasions because of its editorial control policy regarding its BBSs. The most notable criticism of Prodigy was brought by the Anti-Defamation League of B'nai B'rith ("ADL"), a national human rights agency. The ADL criticized Prodigy when it allowed anti-Semitic speech on its BBSs even though Prodigy's policy was to forbid all obscene, profane or "otherwise offensive references" on its BBSs. Miller, *supra* note 7, at B1. The criticism stemmed from BBS postings where subscribers posted messages doubting the existence of the Holocaust and made statements such as, "Hitler had some valid points," and "[Jews] only got what they richly deserved." *Id.* Prodigy specifically called the Hitler statement "grossly repugnant," but said it would allow the other type of speech in future BBS exchanges. *Id.* Prodigy's reasoning for allowing the messages was that the messages were directed to a class of people and not an individual. *Id.* For example, if during the Gulf War, "Prodigy would have carried a message saying 'Bomb the Iraqis,' but not one saying 'Bomb Mr. Smith's house.'" *Id.*

message back to the subscriber.¹³¹ As a result, Prodigy's BBS editors, like newspaper editors, make subjective determinations in deciding which messages will be posted.¹³²

Prodigy's editorial policies came under fire after an anonymous user posted three messages on Prodigy's "Money Talk" BBS in October, 1994.¹³³ While the user did not have authorization to access the system, the user gained access to Prodigy's system by acquiring a former Prodigy employee's identification number.¹³⁴ The posted BBS messages criticized Stratton after Stratton disclosed that one of its clients lost its biggest customer only after Stratton introduced a public stock offering.¹³⁵

131. However, a BBS editor differs from a newspaper editor because the BBS editor must edit a larger amount of text in a shorter amount of time. Furthermore, the BBS editor does not have an opportunity to check every statement for a possible defamatory meaning. Therefore, the BBS editor is a hybrid of both a newspaper editor and a radio broadcaster employing a delay device.

132. See *supra* notes 66-84 and accompanying text for discussion of newspaper liability.

133. A Prodigy subscriber can read the "Money Talk" guidelines on-line before using the BBSs. A portion of the guidelines reads:

Notes posted to the Money Talk BB are for informational and discussion purposes only, and are not meant to be taken as investment recommendations. Prodigy does not verify, endorse or otherwise vouch for the contents of any note . . . and cannot be responsible in any way for information contained in any such note, or for any transaction involving or connected with the Money Talk Bulletin Board.

Money Talk Guidelines, available on Prodigy and on file with author.

134. On October 23, 1994, at 7:25 a.m., an unknown user utilized the identification number of David Lusby and posted a statement on Prodigy's "Money Talk" BBS. Second Amended Complaint at 6, *Stratton Oakmont v. Prodigy Services Co.*, N.Y. Sup. Ct. No. 94-031063. Some ISPs require that subscribers enter a password. Manuel Schiffres, *The Shadowy World of Computer Hackers*, U.S. NEWS & WORLD REP., June 3, 1985, at 58. This serves as both a security measure as well as a way to keep track of subscribers for billing. *Id.*

135. The statement submitted to Prodigy's BBS on October 23, 1994, at 7:25 a.m. read as follows:

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. Stratton took public an IPO Thursday called Solomon Page!!!!!! (Symbol SOLP)

The stock went public at \$5.50 a share Thursday and closed Friday at \$6.50 a share.

Friday 4:15 (15 minutes after the market closed). Solomon Page Wall St. news: Solomon Page loses its largest customer (Union Bank of Switzerland) responsible for 40% of Solomon Page's 1992, 1993, 1994 Revenues.

The company goes public on Thursday and loses its largest customer on Friday. This is fraud, fraud, fraud, and criminal!!!!!!!

My heart goes out to anybody who purchased this stock. Over 10 million shares were traded Thursday and Friday. Monday morning: 1 or 2 things will happen!!!!!!!

1. The trading of this company will be halted immediately, while the NASD (National Association of Securities Dealers) and the SEC (Securities and Exchange Commission) investigate the illegalities of the above mentioned—IPO—

2. If the stock does open it will instantly drop from \$6.50 a share to between \$1.00 - \$3.00 a share, at which point trading will be halted.

As a result, Stratton sued Prodigy for publishing a defamatory statement with knowledge of the statement's defamatory meaning.¹³⁶

In *Stratton Oakmont, Inc. v. Prodigy, Inc.*,¹³⁷ the court granted Stratton partial summary judgment and ruled that Prodigy was a primary publisher.¹³⁸ The court concluded that because Prodigy held itself out to the public as controlling the content of its BBSs, Prodigy made decisions as to the content of the BBSs.¹³⁹ The court reasoned that because Prodigy made a conscious choice to regulate the content of its

I am not a shareholder of this stock. I am an attorney who specializes in business fraud. My recommendation is to be calm. Wait and see what happens Monday. News will be flying in all your major publications.

I am already potentially representing 20-30 shareholders of this stock. Mostly personal friends and acquaintances. By Monday I should have a list of about 100-200 shareholders of this stock.

Remain calm you have recourse!!!!!!!

I will give you further direction Monday after the news hits. Rest easy theyre [sic] are solutions.

The anonymous user posted another message on the same day at 2:28 p.m.:

Stratton is not stupid. They definitely have a game plan. You are very gullible if you think Stratton knew nothing about the news. In any case it is fraud for SOLB to go public knowing there [sic] #1 customer was terminating business.

I am not an attorney trying to stir up trouble that doesn't exist. This deal is major criminal fraud. You can not fault the Stratton customers. Stratton Oakmont is a cult of brokers who either lie for a living or they get fired.

Monday will show you this situation and the fraud committed are factual.

The final message appeared on October 25, 1994 at 5:00 a.m.:

Mr. Porush,

Had meeting Monday a.m. with his staff of brokers. He was telling them to tell their customers not to worry because he knew 2 months ago that SOLP had lost theyre [sic] #1 account the Bank of Switzerland.

This is 100% criminal fraud. (To know before the deal they lost their #1 account and not to disclose this until the day after the company is taken public)

All the Stratton brokers were admitting the above fact to their clients Monday. I have 4 clients who tape recorded their conversations with their brokers Monday confirming the above mentioned fact . . .

Without the Bank of Switzerland account SOLP bottom line is very much in the red.

The support of this stock, and the issuance of the IPO concealing all the above mentioned facts is criminal fraud committed by SOLP and Daniel Porush Stratton Oakmont. The outcome of this criminal fraud is imminent.

Second Amended Complaint at 6-8, *Stratton Oakmont v. Prodigy Services Co.*, N.Y. Sup. Ct. No. 94-031063.

136. Stratton sued Prodigy for \$200 million, which included \$100 million in punitive damages on November 7, 1994. Yang, *supra* note 100, at 70. The lawsuit cites eighty-three lines of postings alleging facts of the public offering. Robert B. Charles, *On-line Libel: A \$200 Million Bug*, *COMPUTERWORLD*, Jan. 23, 1995, at 33.

137. *Stratton*, 1995 WL 323710.

138. *Id.* at *3. The court framed its issue as whether the evidence presented established a prima facie case that Prodigy exercised editorial control over its BBSs to render Prodigy a publisher "with the same responsibilities as a newspaper." *Id.*

139. *Id.* The court reasoned that Prodigy was a primary publisher because it utilized technology and manpower to delete BBS postings from its BBSs on the basis of offensiveness and "bad taste." *Id.*

BBSs, Prodigy must accept the legal consequences of being held to the primary publisher standard.¹⁴⁰

Because a BBS editor read the statement before publication, the *Stratton* court determined that Prodigy should be elevated to the status of a primary publisher.¹⁴¹ Prodigy is distinguishable from CompuServe in that it actively edits its BBSs, thus, the *Cubby* court's reasoning did not apply.¹⁴² The *Stratton* case eventually settled without the court adopting a standard of liability applicable to editing ISPs.¹⁴³

III. ANALYSIS

Similarities exist between the editorially-controlled BBS medium and both newspapers and broadcast media. Subscribers to ISPs use BBSs to express their opinions, much in the way that newspaper subscribers write letters to the editor. However, unlike newspapers, BBSs require spontaneity.¹⁴⁴ Therefore, BBSs are similar to radio broadcasts. Because BBS speech is a hybrid of both newspaper speech and radio broadcast speech, courts will be forced to treat BBS speech differently than newspaper speech and radio broadcast speech.¹⁴⁵ After recognizing BBS speech as a new category in defamation law, courts will be able to

140. *Id.* at *4. The court also reasoned that the holding would not dissuade other ISPs from editing BBSs. Rather, the court reasoned that this reasoning "incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure." *Id.*

141. Geoffrey Moore, *The First Amendment is Safe at Prodigy*, N.Y. TIMES, Dec. 16, 1990, § 3, at 13.

142. *Cubby*, 776 F. Supp. at 137.

143. Elizabeth Corcoran, *\$200 Million Libel Suit Against Prodigy Dropped: On-Line Industry Had Worried About Case*, WASH. POST, Oct. 25, 1995, at F2. *Stratton* settled the case for an apology from Prodigy. *Id.*

144. Anthony J. Sassan, *Cubby, Inc. v. CompuServe, Inc.: Comparing Apples to Oranges: The Need for a New Media Classification*, 5 SOFTWARE L. J. 821, 836 (1992). Because ISPs cannot employ a delay device, a subscriber's defamatory statements are immediately available to the subscribers. *Id.* Therefore, courts must first consider the ISP's inability to select the statements to post on its BBSs. *Id.*

145. One commentator suggested that ISPs have the duty to mitigate the damage caused by defamatory statements in a "timely fashion." Sassan, *supra* note 144, at 838. If an individual was defamed, he would be required to inform the ISP of the defamatory statement. *Id.* As such, the ISP would be required to remove defamatory speech and print a retraction. *Id.* at 841. If the ISP failed to remove the statement, an arbitrator would determine liability. *Id.* at 841-42. This rationale does not take into account the chilling effect on speech if an ISP is required to remove speech that may not be defamatory. For example, if an individual finds that speech about a certain public or private figure is offensive, the ISP would be required to remove the statement or face arbitration. Because the complaining individual nor the ISP is learned in defamation law, the ISP would be making *ad hoc* determinations at the detriment to free speech.

balance the importance of the protection of reputation against the importance of the marketplace of ideas.¹⁴⁶

For example, consider the following hypothetical situation. John Doe subscribes to an ISP. After signing on,¹⁴⁷ John chooses to view the BBS menu,¹⁴⁸ and selects a BBS discussing current events. John chooses the sub-topic "Things I Hate." John skips to the last response of seventy-five total responses which reads:

I HATE REPUBLICANS

John posts a return message, response number seventy-six:

FRED THOMPSON WAS ARRESTED FOR SOLICITING A PROSTITUTE

As previously discussed, some ISPs employ BBS editors that scan BBS postings for profanity, defamatory speech, or obscenity. While John's message may possess defamatory implications, the BBS editor might not remove the message because the BBS editor usually relies on his own judgments and is not legally trained.¹⁴⁹ Therefore, he may pass over the message without comprehending that the message may hold a defamatory meaning.¹⁵⁰ Moreover, the BBS editor might not know that Fred Thompson is a Senator from Tennessee and thus, he is a public figure. Also, the BBS editor must also make his judgment quickly to ensure the spontaneity of the medium by rapidly posting the message.¹⁵¹ Furthermore, the BBS editor must screen thousands of BBS messages per day. Therefore, a difficult situation arises. If the BBS editor posts John's message, the ISP may incur liability for defamation. On the other

146. As Supreme Court precedent has determined, absent a showing of *Sullivan* malice, the media are immune from liability of public officials and public figures, including private figures who voluntarily thrust themselves into a public controversy. See *supra* notes 36-42 and accompanying text for a discussion of *New York Times v. Sullivan*. See also *supra* notes 43-52 and accompanying text for a discussion of *Gertz v. Robert Welch*.

147. Subscribers "sign on" to ISPs using authorized identification numbers. Naughton, *supra* note 1.

148. After signing on, an individual must choose which Prodigy service they would like to utilize. Naughton, *supra* note 1, at 417. For example, if a subscriber chooses BBSs, they must again choose which topic they are interested in. *Id.* Topics range anywhere from music, to dating, to discussions about current news events or law schools. DiLello, *supra* note 113, at 205.

149. Mr. Ek stated that BBS editors are not attorneys and that Prodigy employs only one BBS editor per board. *Ek Interview, supra* note 129.

150. *Ek Interview, supra* note 129.

151. Accordingly, if a BBS editor waits too long, a court may find that he had reasonable opportunity to investigate the truth. *Abrams v. United States*, 250 U.S. 616, 630 (1919); see *supra* notes 85-91 and accompanying text for discussion of broadcast liability.

hand, if the BBS editor removes the message, John and other BBS users may become frustrated because they pay the ISP to use the BBSs in order to obtain quick information.¹⁵² This hypothetical illustrates the potential legal problems an ISP faces by using BBS editors to monitor the content of its BBSs.

A. APPLYING *SULLIVAN* MALICE

If courts strictly follow the current law for primary publishers, the first step in determining the liability of an ISP is the status of the plaintiff.¹⁵³ As *Sullivan*¹⁵⁴ established and as the *Gertz* Court¹⁵⁵ further advanced, the *Sullivan* malice standard usually only applies to public officials or public figure plaintiffs.¹⁵⁶ Moreover, the *Gertz* Court gave deference to state courts to decide whether a public figure plaintiff must show *Sullivan* malice to prevail against a newspaper.¹⁵⁷

However, the public/private figure distinction cannot apply to a medium where the status of the plaintiff is difficult, if not impossible, to ascertain.¹⁵⁸ Such is the case with editorially-controlled BBSs.¹⁵⁹ For example, the BBS editor may not contemplate that Fred Thompson is a public figure. As such, a BBS editor would need to make a difficult decision in a short time: (1) decide outright to avoid any possibility of legal liability by not posting the message; (2) take time to read the numerous previous postings to ascertain the identity of the Fred Thompson subject,

152. Furthermore, the longer it takes for the BBS editor to decide whether to post a message, the more likely that a court will find that he had a reasonable time to discover the statement's falsity. See *supra* notes 85-91 and accompanying text for discussion of broadcast liability.

153. See *supra* notes 35-52 and accompanying text for discussion of the plaintiff's status.

154. *Sullivan*, 376 U.S. at 254; see *supra* notes 36-42 and accompanying text for a discussion of the *Sullivan* case.

155. *Gertz*, 418 U.S. at 323; see *supra* notes 43-52 and accompanying text for a discussion of the *Gertz* case.

156. See *supra* notes 36-42 and accompanying text for discussion of *Sullivan* malice.

157. *Gertz*, 418 U.S. at 351.

158. Newspapers publish few editorials per day and have ample opportunity to check the status of the plaintiff and the falsity of the statements. Charles, *supra* note 54, at 130-31. A newspaper hires many employees to participate in the editing process. *Id.* As such, newspapers hire employees to check the content of the statements at each level of publication. *Id.* For example, one story passes through a reporter, several editors and a director. *Id.* While the newspaper must print "hot news," a newspaper editor's time pressure is not equivalent to that of a BBS editor that must publish thousands of messages per day. Moreover, since a BBS's time constraints are stricter, ascertaining the status of all persons mentioned in all BBS postings is impossible. Therefore, public policy dictates that because the speech is so important, courts should give deference to the ISP.

159. Such was also the case with radio broadcasts. Accordingly, courts took notice of the fact that radio broadcasters could not feasibly ascertain the status of the plaintiff before broadcasting an individual's statement. SMOLLA, *supra* note 19, § 3.21[1].

which will destroy the spontaneity of the BBS;¹⁶⁰ or (3) leave the message on the BBS and incur possible liability.¹⁶¹

B. EDITORIAL SPEECH

Courts attach special significance to editorial speech because the speech is highly valuable to society.¹⁶² BBS messages operate in a manner similar to letters to the editor — they both provide individuals with a forum to disseminate their ideas and opinions.¹⁶³ Moreover, BBSs give individuals with limited resources a forum to express their opinions.¹⁶⁴ BBSs also allow an individual to spread his opinion to a large group of people.¹⁶⁵

BBSs exist as new players in the marketplace of ideas because they give the average citizen a forum for speech that would otherwise be unavailable to him.¹⁶⁶ BBSs give private individuals access to counter-

160. A court reached a similar conclusion pertaining to broadcast media: "Where the defamatory statements made by the defendant do not involve an element of 'hot news' and the need for expeditious release is not present, reckless disregard for the truth may be evidenced in part by failure to investigate thoroughly and verify the facts." *Widener v. Pacific Gas & Elec. Corp.*, 75 Cal. App. 3d 415, 435 (1977) *cert. denied*, 436 U.S. 918 (1978). As such, courts have given deference to mediums that require contemporaneous transmission and only impose liability when the broadcaster had reasonable time to ascertain the truth or falsity of the statement. *See supra* notes 85-98 and accompanying text for a discussion of radio broadcasters.

161. *SMOLLA*, *supra* note 19, § 3.2[2]. Courts continually take notice to the presence of deadlines in determining the primary publisher's fault. *Id.* The presence or absence of a deadline may be the only tangible proof available to a court. *Id.* The BBS editor, therefore, has "deadlines" that require him to disseminate the BBS postings as quickly as possible. *Id.* Failure to do so would interrupt the spontaneity of the medium. *Id.*

162. Conversely, courts will not extend First Amendment protection to offensive speech or deceptive commercial speech. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 748-50 (1978) (holding FCC may regulate broadcast of material considered to be indecent but not obscene); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 770-71 (1976) (holding deceptive and inaccurate commercial speech may be subject to state-imposed regulation to greater degree than inaccurate political speech); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 62 (1976) (holding that city may use zoning to regulate location of theaters based on their showing of adult films).

163. *Schlachter*, *supra* note 16, at 140. Thus, following the *Sullivan* Court's reasoning, BBS speech serves an important editorial purpose in that it allows individuals with limited resources to express their opinion, communicate information and recite grievances against the government. *Sullivan*, 376 U.S. at 266.

164. *Sullivan*, 376 U.S. at 266.

165. *Naughton*, *supra* note 1, at 413. Only a small percentage of Americans communicate through ISPs but, nevertheless, BBSs are quickly replacing newspapers and broadcast media as the least expensive and most effective means of communication to a large audience. *Id.*

166. One commentator proposed that BBSs are "electronic soapboxes," a modern revival of the traditional soap box that enabled people to speak their minds in centuries past. *Jensen*, *supra* note 23, at 217. Another commentator analogized BBSs as "bringing back the

speech to rebut defamation. ISPs, as the providers of BBSs, allow subscribers to editorialize about whatever they wish while also providing individuals a choice of what type of speech they want to read.¹⁶⁷ As such, the speech remains important and compelling.¹⁶⁸ Accordingly, the constitutional significance of the speech on the editorially-controlled BBS requires the same consideration with respect to the publisher's liability for defamation as letters to the editor.¹⁶⁹

BBSs also exist as part of the marketplace of ideas because they allow the free exchange of viewpoints.¹⁷⁰ Like newspapers, BBSs give individuals a forum to disseminate ideas and opinions to a potentially large audience.¹⁷¹ This free exchange occurs whether or not an ISP elects to edit its BBSs for content. To impose greater liability for defamation to ISPs that edit BBS postings for content may chill speech of equivalent importance to speech placed on a non-edited BBS.¹⁷²

Furthermore, the *Sullivan* Court¹⁷³ found that editorial speech requires protection from liability so that newspapers would not be discouraged from printing criticizing material.¹⁷⁴ Similar reasoning applies to BBS messages, because the speech operates in the manner of an edito-

era of the pamphleteer." John Dembart, *The Law Versus Computers: A Confounding Terminal Case*, L.A. TIMES, Aug. 11, 1985, at 3. Pamphleteers have also been accorded higher constitutional value, although this aspect is beyond the scope of this Comment.

167. This factor may be what makes ISPs like Prodigy so popular. These types of ISPs, therefore, are geared towards individuals who wish to exercise their free speech, but who do not wish to read profanity or vulgarity.

168. Furthermore, like newspaper editorials, BBS messages should be considered to be opinion largely because of the reader's knowledge that he is reading another's opinion. See *Nat'l Ass'n of Gov't Employees v. Central Broadcasting Corp.*, 396 N.E.2d 996, 1000-01 (Mass. 1979) (holding that normally libelous statements could not constitute actionable defamation because the listeners would consider the format of the program and conclude that the statements were pure opinion).

169. *Sullivan*, 376 U.S. at 450. Like letters to the editor, the speech retains value because BBSs allow ordinary individuals who are not members of the press to exercise their freedom of speech. See *supra* notes 36-42 and accompanying text for discussion of the *Sullivan* case.

170. Therefore, BBSs may fall within the precious "marketplace of ideas" and be more deserving of First Amendment speech. See *supra* notes 66-84 and accompanying text discussing newspapers as part of the marketplace of ideas.

171. Accordingly, an individual may receive messages from individuals across the country for low cost. See *supra* notes 99-104 and accompanying text for discussion of ISPs. Thus, the BBS medium differs from an editorial page in a newspaper because an individual gives and receives information.

172. CompuServe, a non-editing ISP, offers its BBSs as a "source for candid, concise answers to questions people may feel free to ask only with computer anonymity." Robert Charles, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & TECH. 121, 125 n.14 (1987). Prodigy offers similar advantages, but without the anonymity. *Ek Interview*, *supra* note 129.

173. *Sullivan*, 376 U.S. at 254. See *supra* notes 36-42 discussing the *Sullivan* case.

174. *Sullivan*, 376 U.S. at 450.

rial.¹⁷⁵ Requiring that the plaintiff make a higher showing of fault will help to ensure that BBSs remain a viable forum for individuals to express their viewpoints freely.¹⁷⁶

Moreover, even when an ISP exercises editorial control over the content of BBS postings, BBSs allow greater access to counterspeech than newspapers, even though both operate as private commercial forums.¹⁷⁷ For example, Prodigy allows subscribers to choose from over 420 BBSs.¹⁷⁸ The response is overwhelming: Prodigy often receives over 75,000 BBS postings per day.¹⁷⁹ In contrast, a newspaper usually publishes only a handful of editorials once daily. Thus, it is apparent that ISPs allow for greater and wider dissemination of individual viewpoints.

C. CONTEMPORANEOUS SPEECH

Given the importance of the speech posted on BBSs, action must be taken to protect it, especially in light of the need for spontaneity.¹⁸⁰ The most popular BBS function is the ability to post public messages throughout the world almost instantaneously.¹⁸¹ To impose a duty on

175. *Id.* As noted previously, BBS messages are not only used for giving opinions and venting grievances; rather, many individuals use BBSs to get information. For the purposes of this Comment, the only statements in question are those that would be considered defamatory. Those statements usually concern a public figure or a matter of public concern as a newspaper editorial. This is true because most of the people communicating with each other have never met or had the opportunity to acquire any information about another private subscriber that could be used to defame them. While this type of situation is possible, the potentiality of defamatory speech would arise with discussions about public persons or matters of public concern.

176. *Ek Interview, supra* note 129. Primary publisher liability would either force Prodigy to stop editing its BBSs for content or would require Prodigy to scan the BBSs more thoroughly for defamatory speech. *Id.* Both scenarios would effectively force Prodigy out of the BBS business because many Prodigy subscribers use Prodigy because of its editing policy and for the spontaneity of the medium. *Id.*

177. BBSs offer advantages over newspapers. First, modems can carry larger amounts of information. John D. Faucher, *Let The Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045, 1047 (1993). Second, BBSs use no paper. *Id.* Third, people can talk more freely because of less social constraints. *Id.*

178. Yang, *supra* note 100, at A1.

179. Yang, *supra* note 100, at A1. This is a large increase from the mere 200,000 messages per week that Prodigy received in November, 1991. Feder, *supra* note 105, at D5.

180. This concern is crucial to Prodigy. A Prodigy spokesperson stated that if Prodigy were held liable for defamation on its BBSs, "Prodigy would be out of the BBS business," and further added that for this reason "it would never come to that." *Ek Interview, supra* note 129.

181. Schlachter, *supra* note 16, at 107.

ISPs to investigate and censor defamatory speech would destroy the spontaneous nature of the medium.¹⁸²

Editorially controlled BBSs operate much in the same way as radio broadcasters.¹⁸³ While ISPs can remove or alter messages on BBSs before widespread transmission of a defamatory message, instantaneous transmission is an essential component to user satisfaction.¹⁸⁴ Courts have recognized the importance of spontaneity in radio broadcasts but nonetheless have given plaintiffs recourse if the broadcaster possessed a reasonable time to investigate the statement.¹⁸⁵ Applying the same reasoning, a BBS editor should not be required to delay publication until removal of all possible defamatory speech. Any other requirement would mean an unsatisfactory delay of publication, lasting days or weeks, depending on the number of postings.¹⁸⁶ Requiring ISPs to delay publication would financially impact ISPs because of the extra time and manpower needed to erase defamatory messages. Furthermore, the subscriber would be impacted because his forum for debate would be greatly limited.¹⁸⁷

D. RECOGNIZING CYBERSPEECH¹⁸⁸

Speech posted on BBSs is a hybrid between letters to the editor and radio broadcasts. Since BBS speech does not efficiently fit into either category, courts should recognize BBS speech as a separate type of

182. Furthermore, if the law forced ISPs to edit all defamatory speech, effectively requiring the BBS editor to make daily legal decisions, it would destroy the choice that users now have to either use ISPs that do not edit or to use ISPs that do edit for content. Faucher, *supra* note 177, at 1047. However, courts must determine the legal limits to impose on ISPs because as computer use becomes more widespread, more individuals will use BBSs and consequently, more defamatory statements will be made. *Id.* at 1048.

183. See *supra* notes 85-98 and accompanying text for discussion of broadcaster liability.

184. Charles, *supra* note 54, at 126-39. Therefore, BBS editors do not ordinarily control the content of the BBS until after a message is transmitted from one subscriber's terminal to another subscribers terminal. *Id.* at 126. Therefore, when a BBS editor finds inappropriate statements, he ordinarily removes the offensive statement from all terminals on the board. *Id.*

185. See *supra* notes 85-98 and accompanying text for a discussion of radio broadcasters.

186. J. TYDEMAN ET AL., TELETEXT AND VIDEOTEXT IN THE UNITED STATES 77 (1982). There is no waiting period from the time the user posts a message to the time that subscribers can view the messages on the BBS. *Id.*

187. Prodigy, for example, vows that if a court requires it to scan all BBSs for defamatory speech, it will be forced to stop offering BBS services. *Ek Interview, supra* note 129. Therefore, Prodigy hopes that "it would never come to that." *Id.*

188. The term "cyberspeech" is a hybrid of the word speech which is the constitutionally protected right enumerated under the First Amendment, and cyberspace, a term referring to communication through computer networks. Don Oldenburg, *The Law: Lost in Cyberspace*, COMM. DAILY, Mar. 27, 1991, at 9.

speech with special characteristics. The special characteristics of "cyber-speech" necessitate different treatment by the courts. That is, ISPs that censor BBSs operate to protect individuals from obscenities and other unprotected speech and should not be punished for failing to remove a defamatory statement.¹⁸⁹

ISPs that exercise editorial control offer individuals a valuable forum without accompanying profanity or offensiveness.¹⁹⁰ Moreover, individuals can choose whether to subscribe to an ISP that employs an editing policy or a non-editing ISP depending on the type of messages they wish to read.¹⁹¹ Both types of forums are valuable to society, as they offer people viable alternatives.¹⁹²

Furthermore, while a large commercial ISP such as Prodigy may have the commercial resources to edit all of its BBSs to remove defamatory statements, this process would eliminate live, spontaneous conversation on BBSs.¹⁹³ This is due not only to the large number of BBS postings per day, but also the cumulative effect of previous BBS postings.¹⁹⁴ For example, an individual may write a BBS message which responds to several previous messages.¹⁹⁵ Based on the potentially large number of postings, a BBS editor could not possibly read all past and present BBS postings for defamatory content.¹⁹⁶

Furthermore, ascertaining the defamatory nature of a statement may require investigation into the truth or falsity of the statement.¹⁹⁷

189. Because courts give deference to radio broadcasts, courts should allow similar deference to cyberspeech. Both mediums allow one person to almost instantaneously disseminate his ideas to many. Courts have taken this spontaneity into consideration and have been less willing to attach liability. *See supra* notes 85-98 and accompanying text for discussion of radio broadcasters.

190. Moore, *supra* note 141, at 13. *See supra* notes 99-104 and accompanying text for discussion of editing versus non-editing ISPs.

191. Moore, *supra* note 141, at 13. A Prodigy spokesperson stated, "one of the blessings of our society is its diversity, letting citizens choose anything . . . from Prodigy to 'adult' computer bulletin boards." *Id.*

192. Moore, *supra* note 141, at 13. Presumably, subscribers enjoy this type of forum. Prodigy is currently the only editing ISP and also has the largest number of subscribers. Sugawara, *supra* note 104, at A1. Individuals may choose Prodigy because they do not wish to see profanity when reading a BBS posting. Moore, *supra* note 141, at 13. By requiring editing ISPs to change their policy would erase this type of forum as well as this type of speech. *Id.*

193. Jensen, *supra* note 23, at 258 n.11. This would effectively destroy one of the most valuable and popular aspect of BBSs: instant interaction. *Id.*

194. *See supra* notes 105-16 for discussion of the nature of BBS postings.

195. Moreover, these messages may remain on the BBS for weeks. Jensen, *supra* note 23, at 258. Therefore, a BBS editor would be required not only to read the day's postings, but also the cumulative postings of days past. *Id.*

196. Jensen, *supra* note 23, at 258.

197. *See supra* notes 85-98 and accompanying text for discussion of radio broadcasters employing a delay device long enough to ascertain the truth or falsity of a statement.

Therefore, a BBS editor would not only have to carefully read all past and present BBS postings, he would need to determine whether or not the statement is true. These factors would not only destroy the spontaneity of the medium, but would chill speech out of fear of potential liability.¹⁹⁸ Faced with these choices, an ISP would likely stop offering BBSs, resulting in the loss of an important forum. The ISP could also stop editing the BBSs for content, which would remove an individual's ability to choose which BBS to which he will subscribe.

IV. PROPOSAL

A. THE PLAINTIFF'S STATUS

When determining a standard for editorially controlled BBSs, the plaintiff's status should be the first inquiry. This follows the *Sullivan*¹⁹⁹ Court's reasoning that the first level of inquiry turns on the level of fault the plaintiff must show based on his status.²⁰⁰ However, because a BBS editor cannot feasibly ascertain the plaintiff's status, the first inquiry may be the most difficult. Lower courts have followed the *Gertz* Court's reasoning and held that access to media channels may suffice to create public figure status.²⁰¹ Therefore, this Comment proposes that courts create a presumption that the plaintiff is a public figure because of the ease of rebutting defamatory speech on BBSs.

The plaintiff is presumed to be a public figure because of the nature of cyberspeech. That is, individuals who would never normally meet communicate through ISPs; thus, the likelihood that they would speak about public figures is much greater.²⁰² Moreover, if the individuals communicate about a private figure, that private figure has access to the

198. See *supra* notes 66-84 and accompanying text for discussion of how placing liability on newspapers would discourage the newspapers from offering the forum.

199. *Sullivan*, 460 U.S. at 254.

200. *Sullivan*, 460 U.S. at 450. The *Sullivan* Court recognized the importance of reputation, but because the speech was so important for First Amendment purposes, the Court made the standard for liability difficult to prove. *Id.*

201. See *e.g.*, *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Clark v. American Broadcasting Co.*, 684 F.2d 1208 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983).

202. For example, two individuals that have never met would be more likely to speak about a public figure than a private individual that the other speaker does not know. Moreover, courts have found almost all types of individuals to be limited public figures. *SMOLLA*, *supra* note 19, § 2.21[1]-[3]. While an analysis of limited public figures is beyond the scope of this Comment, they include all individuals who thrust themselves into controversy. *Id.* This classification system results in an *ad hoc* determination of the plaintiff's status in each case. *Id.*

ISP to rebut the statements.²⁰³ Furthermore, the plaintiff should be presumed to be a public figure because there is no feasible way for the BBS editor to determine the status of the individual named in the BBS message.²⁰⁴

B. KNOWLEDGE OF FALSITY

The public figure plaintiff must show that the ISP published the allegedly defamatory statement with knowledge of its falsity. As such, a plaintiff must show that the ISP knew the extrinsic facts about the plaintiff and therefore, knew the statement was false. Accordingly, if a BBS editor is blamelessly unaware of the extrinsic facts that make the statement defamatory, the ISP should be constitutionally protected.²⁰⁵

To illustrate, a BBS editor in the hypothetical situation would have to know the extraneous facts about Fred Thompson's personal life. Therefore, if Fred Thompson could show that the BBS editor posted the message knowing that the allegations were false because the editor worked as his chauffeur, the ISP would be liable for defamation.

C. RECKLESS DISREGARD OF THE STATEMENT'S TRUTH

If a public figure plaintiff cannot show that the ISP published the allegedly defamatory statement knowing of its falsity, the plaintiff can still prevail by proving that the ISP published with reckless disregard of the statement's truth. To prove this part of *Sullivan* malice, a plaintiff must establish that the ISP was subjectively aware of the facts surrounding the statement, that those facts probably existed and those facts probably rendered the communication defamatory.²⁰⁶ To illustrate with the Fred Thompson hypothetical, if Fred Thompson could show that the BBS editor investigated the posting and discovered that Mr. Thompson was never arrested for solicitation of a prostitute, this may show that the BBS editor knew, based on surrounding circumstances that the statement was probably false. Furthermore, if the BBS editor had refused to post similar accusations in the past, this shows his subjective decisions

203. As such, the First Amendment interests recognized in *Gertz* are better served, and self-remedy rather than litigation is encouraged by this approach. SMOLLA, *supra* note 19, at 2-45.

204. For example, one Prodigy user attempted to post the message, "My neighbor, William, embezzled \$10,000 from his company and is still stealing today." Moore, *supra* note 141, at 13. This message would be relayed to thousands of other users who do not know the writer or William. *Id.* However, if William had an account on Prodigy, William could rebut the defamatory statement and could self-remedy the situation. *Id.*

205. SACK, *supra* note 48, at 111.

206. SACK, *supra* note 48, at 111. The determination is not based on whether a reasonable person would consider the statement defamatory; rather, whether the BBS editor would consider the statement defamatory based on the totality of the circumstances. *Id.*

on the matter and makes a stronger case that he published with reckless disregard.²⁰⁷

This part of the *Sullivan* malice standard gives wide deference to BBS editors to make their own determinations of what is defamatory. As such, this encourages the BBS editor to remove defamatory speech while encouraging the dissemination of ideas.

IV. CONCLUSION

BBSs are a new and valuable source of communication between members of society. Therefore, society has an interest in the continued growth of BBS use so that individuals may continue to voice their ideas and opinions. However, as more individuals discover the benefits of using BBSs, the potential for abuse grows as well. Because so many individuals currently use BBSs to communicate with others, defamatory statements will continue to appear on BBSs.

When ISPs choose to edit BBSs for content, they act as primary publishers. However, the fact that they are primary publishers does not eradicate the importance of the speech contained within the BBSs. Therefore, ISPs should not be punished for editing BBSs.

In order to ensure that BBSs continue to operate as catalysts for free speech, the *Sullivan* malice standard should be applied. Primary publisher liability allows defamed individuals to bring a cause of action against an ISP, but because *Sullivan* malice is a difficult standard to meet, speech will not be chilled.

Therefore, *Sullivan* malice remains a viable standard for BBSs. The *Sullivan* Court introduced the standard over thirty years ago, and today *Sullivan* malice continues to ensure that editorial speech will be protected even with a medium as novel as BBSs. Additionally, *Sullivan* malice allows an individual recourse and protects his reputation, which is the purpose of defamation law. Thus, applying *Sullivan* malice to editorially controlled bulletin boards protects reputations while encouraging free expression in the electronic marketplace of ideas.

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207. SACK, *supra* note 48, at 225-26. Accordingly, a plaintiff must prove reckless disregard with "convincing clarity" which is more than a "preponderance of the evidence" and less than "beyond a reasonable doubt." *Sullivan*, 376 U.S. at 285-86. Courts have employed the "clear and convincing" test in situations where the "interests at stake . . . are deemed to be more substantial than mere loss of money" and "to protect particularly important interests in civil cases." *Addington v. Texas*, 441 U.S. 418, 424 (1979).

