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COMPUTER NETWORKS, LIBEL AND THE FIRST AMENDMENT

By TERRI A. CUTRERA*

I. INTRODUCTION

Computer bulletin boards are among the fastest-growing components of the burgeoning electronic information market in the 1990s. By linking individual personal computers together via modem, computer bulletin boards offer subscribers information and features much like electronic magazines, as well as provide them with electronic mail and shopping services. Along with the emergence of this nascent media has come many legal questions concerning the rights and responsibilities of both computer bulletin board users and operators. One of the most interesting questions concerns the liability of computer bulletin board operators for false and defamatory statements carried on their systems.

This article will explore the issue of system operator liability for defamatory material published on computer bulletin boards. First the nature of computer bulletin boards will be examined in an effort to discover why defamation is so endemic to this media. The basics of defamation law from its common law origins to the first amendment gloss imposed upon it by the Supreme Court will be reviewed. The critical questions as to the legal classification of bulletin board systems—whether they should be considered publishers, broadcasters, private information services, or common carriers—will be examined in light of the legal properties of each type of media. An important recent case, *Cubby, Inc. v. Compuserve, Inc.*¹ will be studied to ascertain what directions federal courts are taking in this area. Finally, the methodology of classifying technological advances, the needs of computer users and the interests of computer bulletin board networks will be reviewed in order to recommend one possible solution to the questionable legal status of

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1. 776 F. Supp. 135 (S.D.N.Y. 1991).

computer information services—that the exact legal relationship and responsibilities between members and providers should be left solely up to the freedom of the parties to contract for services.

II. THE NATURE OF COMPUTER BULLETIN BOARDS

Electronic bulletin board systems are strange, hybrid entities that defy the legal system's propensity to define and pigeon-hole human constructs. These networks are not exactly like magazines, not exactly like telephone calls, not exactly like television programs, and not exactly like neighborhood coffeehouses. Computer networks *are*, however, a seductive and proliferating cultural phenomenon.

An electronic information network consists of computers, ranging in size from small PCs to large mainframes, connected via modem to a central node computer which is owned and operated by the system operator [sysop]. Sysops can be individual hobbyists, educational institutions, governmental departments or even large commercial entities. All that is required to get the system online is a moderate sized personal computer, a modem and any of the large variety of commercially available BBS software.

The relative simplicity and low cost of starting a computer bulletin board has resulted in the creation of numerous boards of varying sizes and constituencies throughout the world. The latest estimate is that 50,000 bulletin boards are currently online in the United States,² an increase of over 35,000 in the last year.³ In fact, online services have become so numerous that BOARDWATCH,⁴ a monthly magazine for BBS users and operators, publishes only partial lists of national online information services and supplements this with lists of individuals who keep lists of bulletin boards.

The subject matter of computer bulletin boards is tailored to all tastes—from the general⁵ to the prurient⁶ to the arcane.⁷ This wide va-

2. Oldenburg, *Rights on the Line; Defining the Limits on the Networks*, WASH. POST, Oct. 1, 1991, STYLE, at E5.

3. Silver, *Action of the Boards*, U.S. NEWS & WORLD REP., Nov. 18, 1991, at 96.

4. See generally BOARDWATCH MAG., Mar. 1992. BOARDWATCH is available in most large computer stores or from Boardwatch Magazine, 5970 South Vivian Street, Littleton, Colorado 80127.

5. Good examples of general-interest bulletin boards are services such as CompuServe, Prodigy and Genie which provide a multitude of services (such as news and information, private electronic messaging, and shopping malls) for their subscribers.

6. Adult bulletin boards such as Lifestyles B.B.S. ("where couples and singles meet and talk dirty"); Pleasure Dome ("sexually explicit fantasy chat system") and Nixpix ("large library of adult GIF graphic images") are among the fastest growing components of the BBS market.

7. Specialty bulletin boards abound covering such eclectic topics as taming exotic birds (Bird Info Network); research into DANTE'S DIVINE COMEDY (Dante Project BBS);

riety of available services undoubtedly accounts for a large part of bulletin boards' popularity. Although national services offer the greatest choices, most are accessible only through long distance phone numbers causing frequent users to amass large telephone bills. Local computer networks are more topically limited⁸ but are much cheaper to use on a daily basis. Large commercial enterprises such as Prodigy, launched by a joint venture of Sears and IBM, offer general information services nationwide to users via local telephone lines for one flat monthly fee.⁹ The wide variety of bulletin boards and the economy and user friendly formats of the large national services help account for the growing popularity of computer networking over the last few years.

Another factor contributing to the attractiveness of BBSs is the anonymity afforded their users. From the privacy of his home a computer networker can connect with other people to discuss anything that strikes his fancy—even sensitive topics—in a frank and open manner. Most bulletin boards allow a subscriber to sign on using a pseudonym or a modification of his name.¹⁰ Even when a person does use his own name others on the service are unaware of his physical appearance, place of residence or telephone number. This creates the unique opportunity for people to reveal intimate secrets of their lives anonymously to others, without ever having to worry about meeting the “listener” face to face. People also use this situation to alter the facts of their own lives—such as the bachelor on one Atlanta chat line whose clever writing style and description of himself as debonair and wealthy belied the fact that he was living on a disability pension, suffered from cerebral palsy and dictated his remarks to his elderly mother.¹¹ This example illustrates an axiom of life in the Net: you never know exactly who you are talking to. Any anxiety arising from this situation, however, is more than compensated for by the security gained from realizing that no one knows exactly who you are either.

Federal R&D budget-technical market labor market statistics (Science Resource Studies BBS); and even an online Zen Buddhist Monk/PC consultant (That Old Frog's Swamp).

8. The March 1991 issue of BOARDWATCH MAGAZINE, for example, lists about 180 local bulletin boards in the Orlando, Florida area. The subject matter of these networks, while still surprisingly diverse, does not represent the wide range offered by national services.

9. Prodigy is now the largest computer bulletin board service, boasting 1.1 million subscribers. See Charles, *Libel Law Comes On-Line*, AM. LAW. MEDIA, L.P. THE RECORDER, Jan. 17, 1992, at 8. Prodigy services are available to subscribers for the flat monthly fee of \$12.95.

10. This strategy is widely used by female subscribers who often alter their names to sound more masculine. This is because, sooner or later, most female users find sexually explicit come-ons or slurs in their electronic mailboxes.

11. Silver, *supra* note 3.

The attraction of pursuing interests with kindred spirits, the security in being able to express thoughts anonymously, and the ability to step outside of oneself and adopt an alter ego all contribute to the popularity and allure of computer bulletin boards. Unfortunately, these attributes are also the sources of many of the medium's most serious and persistent problems.

III. ILLEGAL ACTIVITIES ON COMPUTER BULLETIN BOARDS

James Madison once commented "[s]ome degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."¹² Computer bulletin boards are the modern equivalents of the 18th century press and their abuses are, in fact, inseparably intertwined with their use. Much attention has been paid in recent years to the illegal use of electronic networks by computer criminals, spies and adolescent hackers.¹³ In the public perception, such activities as defrauding credit card providers, illegally accessing private systems in order to destroy or pilfer information contained therein, posting stolen telephone charge numbers, and releasing virus infestations have all been closely associated with computer bulletin board use.

The liability of both the perpetrators and their bulletin board hosts for computer crimes has created much discussion in the legal community.¹⁴ The possibility that a sysop might be held liable for illegal activity on his bulletin board was driven home on May 16, 1984 when the personal computer and data storage devices of Thomas G. Tcimpidis were seized by the Los Angeles police after the bulletin board he operated was found to contain a stolen telephone credit card number.¹⁵ Tcimpidis plead not guilty to misdemeanor charges of telephone fraud for "knowingly and willfully publishing" the stolen numbers.¹⁶ Charges against Tcimpidis were ultimately dropped by the prosecution who could not prove the scienter elements.¹⁷ Although few, if any, sysops have been convicted as a result of illegal activities on their boards, the

12. Madison, Report on the Virginia Resolutions of 1798, quoted in *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 340 (1974).

13. See generally Cutrera, *The Constitution in Cyberspace: The Fundamental Rights of Computer Users*, 60 U.M.K.C. L. REV. 139 (1991).

14. See *Colleagues Debate Dennings Comments*, 34 COM. ACM 33 (March 1991); Barlow, *Crime and Puzzlement: In Advance of the Law on the Electronic Frontier*, WHOLE EARTH REV., Fall 1990; Gemignani, *What is Computer Crime and Why Should We Care*, 10 U.A.L.R. L.J. 55 (1987).

15. Pollack, *Free Speech Issues Surround Computer Bulletin Board Use*, N.Y. TIMES, Nov. 12, 1984, § A, at 1, col. 1.

16. *Id.*

17. Gemignani, *supra* note 14, at 66.

government has repeatedly seized and impounded the equipment of operators when stolen material has surfaced on their systems.¹⁸ The liability debate was recently revitalized due to an unfortunate incident that occurred on America Online¹⁹ in December, 1991, when subscribers were found to be exchanging child pornography as downloadable GIF (Graphics Interchange Format) files.²⁰ In this instance the FBI said the traffickers and *not America Online* were under investigation,²¹ perhaps signaling a change in law enforcement's stand as to sysop liability. As computer crime increases in the years to come, the legal system will need to reach a definitive resolution to the question of a system operator's liability for crimes associated with his bulletin board. At the present time, however, the answer remains elusive.

As murky as criminal liability for bulletin board operators may be, their possible civil liability is even less clear. Commentators have recently proposed making hackers and sysops civilly liable for damages caused by virus releases.²² Other scholars have pondered the complexity of copyright infringement when documents are electronically published, recopied or altered on a computer bulletin board.²³ But as anyone who spends much time on the boards can attest, the one issue of civil liability that presents itself most prominently is that for defamation.

Because of the remote nature and the anonymity of bulletin board interactions and also possibly because of the below average social skills of *some* users,²⁴ discussions on posted topics have a tendency to become very nasty. When people talk person to person they can see each others' expressions and sense each others' mood. Similarly, when people talk on the telephone, they can hear each others' tone of voice. Opinions read off a computer screen, devoid of any physical human interaction, carry a stronger message than if they were said over the

18. See Cutrera, *supra* note 13.

19. America Online is a national computer bulletin board service with a user friendly format and about 150,000 members. See Schwartz, *Sex Crimes on Your Screen*, NEWSWEEK, Dec. 23, 1991 at 66.

20. See *id.* See also Lindquist, "Child Porn" Sent on America Online, COMPUTERWORLD, Dec. 9, 1991 at 7.

21. See Schwartz, *supra* note 19.

22. See generally Samuelson, *Can Hackers Be Sued for Damages Caused by Computer Viruses*, 32 COM. ACM 666 (1989).

23. See generally Branscomb, *Common Law for the Electronic Frontier; Computers, Networks and Public Policy*, SCI. AM., Sept. 1991, at 154; Meeks, *As BBSes Mature, Liability Becomes an Issue*, INFOWORLD, Jan. 22, 1990 at 14.

24. See Denning, *Concerning Hackers Who Break Into Computer Systems* (paper presented at the 13th National Computer Security Conference, Washington, D.C., Oct. 1-4, 1990).

phone or face-to-face.²⁵ "The result is a phenomenon that computer experts call 'flaming'—the electronic version of an out-of-control shouting match."²⁶ A simple discussion about the quality of a movie or a book can quickly degenerate into vicious ad hominem attacks.²⁷ Some services such as Prodigy attempt to eliminate offensive messages before they are openly posted; but most systems accept flaming as a way of life and rely on the "white corpuscle effect" (users rush to the scene of the infection and eliminate the problem themselves)²⁸ to rid the board of irritants. Some networkers actually enjoy insult matches and a few boards are notorious flamer hang-outs.²⁹

In addition to flaming, bulletin boards are besieged by ubiquitous gossip. Just as neighbors enjoy trading juicy stories over the back fence, network subscribers love to discuss the lives of public figures and well-known computer celebrities. What they do not realize, of course, is that whispering gossip in private is different from publishing it nationwide on a computer bulletin board. It is not uncommon to encounter posted messages from a self-proclaimed "Hollywood insider" discussing which stars have AIDS or from a local flamer listing all of the "verified" homosexuals on the Board.

A third, and perhaps the most potentially litigated, source of defamation on computer bulletin boards is the product review/advice columns. In these areas either the network itself or one of its agents or contractors reviews and comments on the quality of various computer products and services. Occasionally users will message in and post their own impressions of the items, often without any logical rationale or facts to support their opinions. A good or service trashed on a nationwide network can suffer a real market loss which can lead to the filing of a defamation suit.³⁰

25. Barringer, *Electronic Bulletin Boards Need Editing, No They Don't*, N.Y. TIMES, Mar. 11, 1990, § 4, at 4, col. 1, quoting Frank Connolly, director of academic computing at American University in Washington.

26. *Id.*, quoting Eugene Spafford, assistant professor of computer science at Purdue University.

27. For example, a recent post of the Prodigy (the family network) Movie Club read: "Only a brainless, spineless, gelatinous cube of flesh like you could like that piece of crap . . ." Prodigy, Arts Club, Science Fiction Topic, posted Sept. 1990.

28. Oldenburg, *supra* note 2, quoting Cliff Figallo, manager of The Well (Whole Earth 'Lectronic Link), a San Francisco based bulletin board.

29. One bulletin board known for free, no holds barred discussions is Usenet, a worldwide system based on Unix computers and connected to the Internet. Usenet contains nearly a thousand newsgroups, one of which, dedicated to flaming, is called alt.flame. When a flame war gets out of hand on another newsgroup the flammers are told to take their discussion to alt.flame.

30. This is the type of situation that lead up to the *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) lawsuit that will be discussed later in this paper.

In order to assess the liability of bulletin board operators for defamatory matter published on their services, it is necessary to first understand the basics of defamation law. The tort of defamation which encompasses both slander and libel will be discussed in the next section.

IV. THE COMMON LAW TORT OF DEFAMATION

The history of defamation law is a complex and convoluted one. Originally, the crime of slander was punishable by seigniorial and then ecclesiastical courts as a sin against God.³¹ In order for the common law courts to claim jurisdiction in a slander case a real, temporal injury separate from the spiritual injury had to be shown.³² Libel actions, on the other hand, arose in the seventeenth century and were punishable as the crime of sedition.³³ Because of the political nature of a libel action no actual injury needed to be shown in order for a plaintiff to recover damages.³⁴ Due to these separate origins "libel became identified with written or printed defamation while slander remained oral."³⁵

The four elements of defamation are (1) a false and defamatory statement about another (2) published without privilege to a third person (3) by a publisher who was at least negligent (4) which caused presumed or actual damages.³⁶ In Missouri, for example, "a communication is defamatory if it tends so to harm the reputation of another as to lower him the estimation of the community or to deter third persons from associating or dealing with him."³⁷ A defamatory communication may consist of a false statement of fact or a statement in the form of an opinion which implies undisclosed defamatory facts.³⁸ Plaintiffs in defamation suits may be any living individual, a definable group of people, or a business corporation. In response to a defamation claim the truth is an absolute defense;³⁹ also certain statements are absolutely privileged and other statements receive a conditional privilege.⁴⁰

31. Prosser, *Libel Per Quod*, 46 VA. L. REV. 838, 841 (1960).

32. *Id.*

33. W. PROSSER, ET. AL., *TORTS* 853 (8th ed. 1988).

34. *Id.*

35. *Id.*

36. Thornton, Gerlach & Gibson, *Legal Issues in Electronic Publishing: Libel*, 36 FED. COM. L.J. 178 (1984).

37. *Henry v. Halliburton*, 690 S.W.2d 775, 776 (Mo. 1985), quoting *Restatement (Second) of Torts* § 559. Judge Welliver's opinion in this case is an excellent review of the common law of defamation.

38. W. PROSSER, *supra* note 33 at 874. The Missouri Supreme Court takes a more liberal stance and has held that statements of opinion are constitutionally protected from defamation actions. 690 S.W.2d at 786, 787.

39. MO. CONST., art. 1, § 8.

40. 690 S.W.2d at 780.

Although modern practice has combined slander and libel under the common tort of defamation, the legal distinction between them remains. Determining when an action is slander and when it is libel, however, is far from clear cut. Nevertheless it is important to make this distinction since slander actions require proof of special damages⁴¹ while libel actions do not. Over the years, case law has confused the oral/written test because some non-oral occurrences such as searching a women's handbag have been ruled to be slander⁴² while some oral communications such as dictating a letter have been held to be libel.⁴³ Professor Prosser concludes that in modern tort law libel is the "embodiment of the defamation in some more or less permanent physical form"⁴⁴ while slander tends to be more transitory.⁴⁵ But how does this distinction apply to the world of electronic communications? Electronic signals stored in a computer are transitory. Messages posted on a bulletin board have no permanent, physical form and can be erased instantaneously. For these reasons, some commentators have thoughtfully pointed out that defamation that occurs in the electronic medium should be considered slander and not libel.⁴⁶

To this author, the better argument seems to be that electronic messages are printed material—or at least they can become printed material through a simple "print screen" command—and hence should fall under the auspices of libel. For the remainder of this article, we will assume that defamation on computer bulletin boards is covered by the law of libel. It is important to remember, though, that a defense attorney could make a legitimate argument that slander, with its heightened proof of damages standard, should apply to defamatory statements appearing on electronic information services.

V. FIRST AMENDMENT LIMITATIONS ON LIBEL ACTIONS

The First Amendment to the United State Constitution provides: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁴⁷

41. Exceptions to proof of damages occur for slander per se. Slander per se are defamatory statements that fall into one of four categories: imputations of major crime, loathsome disease, serious sexual misconduct or questionable business or professional conduct. *Carter v. Wilbert Home Prods., Inc.*, 714 S.W.2d 506, 509 (Mo. 1986).

42. *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959).

43. *Ostrowe v. Lee*, 256 N.Y. 36, 175 N.E. 505 (1931).

44. W. PROSSER, *supra* note 33 at 882.

45. *Id.*

46. See B. SANFORD, *LIBEL & PRIVACY* 47 (2d ed. 1991).

47. U.S. CONST., amend. I.

The existence of free speech and of a free press is generally considered to be one of the paramount rights guaranteed to United States citizens. A tension exists, however, between the right to speak and publish freely and the states' interest in protecting the reputation and privacy of individuals through libel laws.

The Supreme Court has often reiterated that the freedom of speech is not absolute, and has refused to give first amendment protection to speech that represents a clear and present danger to the public welfare,⁴⁸ fighting words,⁴⁹ and obscenity.⁵⁰ Even on a computer bulletin board dedicated to a wild and free exchange of ideas, most users would agree that some limitations apply to what may be posted. Examples of speech that might not be protected on a computer network are the publication of stolen credit card numbers, graphic displays of child pornography and false advertising by mail order stores on an electronic shopping network. The question of whether or not libelous bulletin board postings should be included in the list of unprotected speech is debateable. If all statements of fact or of opinion where the writer is not personally, absolutely sure of the true facts were unprotected very few people would be willing to post messages at all. Bulletin board discussions would effectively be stifled.

On the other hand, if egregious falsehoods or insults against an innocent person or business were absolutely protected on the boards, the result would turn every system into a chaotic and fundamentally unfair battleground. This dilemma well illustrates the free speech-individual protection tension that runs throughout this area of jurisprudence.

Libel represents a unique and troublesome category of speech with which the Supreme Court has struggled repeatedly in the later half of this century. In *Beauharnais v. Illinois*⁵¹ the Court held that libel was not protected by the first amendment and placed it in the same class of speech as obscenity.⁵² Later Court decisions⁵³ modified this position and extended some protection to libelous statements, arguing that a harsh enforcement of libel laws has a chilling effect on free speech and the press. Three recent Court decisions are particularly pertinent to the discussion of electronic information services. These cases, *New York Times Co. v. Sullivan*,⁵⁴ *Gertz v. Robert Welch, Inc.*⁵⁵ and *Dun &*

48. See *Whitney v. California*, 274 U.S. 357 (1927).

49. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

50. See *Alberts v. California*, 354 U.S. 476 (1957).

51. 343 U.S. 250 (1952).

52. *Id.* at 266.

53. See *infra* notes 54-56.

54. 376 U.S. 255 (1964).

55. 418 U.S. 323 (1974).

Bradstreet, Inc. v. Greenmoss Builders, Inc.,⁵⁶ will be discussed in detail in this section.

*New York Times v. Sullivan*⁵⁷ marked the first time the Court determined the extent to which first amendment protections for speech limited a state's power to award damages in a libel action. The suit arose from a full page advertisement placed in the *New York Times* by a group of civil rights activists that falsely accused officials of Montgomery, Alabama, of having engaged in several repressive and discriminatory actions. The question was to what extent the *New York Times*, as the publisher of the ad, was responsible for the libel. In reaching its decision, the Court gave great weight to the political nature of both the plaintiff and the challenged accusations.

The Court held that "the Constitution guarantees . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁵⁸ Notice that this ruling shifts the burden of proof from the defendant, who previously had to show the truth of his statement, to the plaintiff, who now must show that the defendant had actual knowledge or was wilfully blind that the statement was false. This is a very difficult burden to meet and since the *Times* decision was handed down, libel suits by public officials against newspapers have been rare and usually unsuccessful. In addition to setting this national standard for malice in libel actions, *Times* also represented a federal encroachment upon the states' power to define the law of defamation.

In *Gertz v. Robert Welch, Inc.*⁵⁹ the Court refused to extend the *Times* actual malice standard to libel suits that did not involve public officials as plaintiffs. Private individuals, such as Mr. Gertz, could recover against media defendants under the libel laws of the forum state so long as the state did not impose liability without fault, but the compensation awarded was limited to actual injuries suffered.⁶⁰ This decision therefore contracted the first amendment protection given to libel defendants in *Times* by not requiring the plaintiff to prove knowledge

56. 472 U.S. 749 (1985).

57. 376 U.S. 354 (1964).

58. *Id.* at 279, 280.

59. 418 U.S. 323. Gertz was an attorney who represented the family of a boy killed by a Chicago police officer. The magazine, *AMERICAN OPINION*, published by the John Birch Society, was angered by the civil action filed against the police officer and accused Gertz of being a "Leninist" and a "Communist fronter."

60. 418 U.S. at 349, 350.

of falsity or reckless disregard of the truth as a threshold to recovery.⁶¹ However, it also afforded defendants more protection than the common law of libel required by holding that plaintiffs must prove actual damages in order to recover and by not permitting the award of punitive damages in libel actions absent proof of actual malice.⁶²

Justice Powell, writing for the Court in *Gertz*, seems to be setting up a two-tiered approach to first amendment speech analogous to the Court's recent approaches to substantive due process and equal protection questions.⁶³ According to Powell, libel falls into the second tier of speech which receives some, but not full, first amendment protection. Exactly how much protection libel is afforded is the result of balancing the government's first amendment interest in the type of speech involved (political speech, matters of public concern, private speech, etc.) against the nature of the harm to the individual. In the case where a private person is harmed by the libel, Powell stresses the fact that such individuals had never consented to be in the public spotlight as had public figures and also that they are not capable of meaningful self-help since they are not on equal footing with the defaming medium.⁶⁴

In *Times* the Court decided the libel standard when a public official sued a medium over defamation arising out of an issue of public concern. In *Gertz* the Court decided the libel standard when a private individual sued under similar circumstances—a public medium defamation arising out of a public issue. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁶⁵ the Court addressed yet another permutation of these factors—a private entity suing another private entity over defamation arising from a matter of private concerns.

Justice Powell writing for the plurality⁶⁶ in *Dun & Bradstreet* applied the *Gertz* balancing test to the facts of the case. When evaluating

61. States, of course, are free to impose the higher standard of proof of actual malice themselves through their own libel laws. See *Henry v. Halliburton*, 690 S.W.2d 775.

62. See *McDowel v. Credit Bureaus of Southeast Missouri*, 747 S.W.2d 630, 633 (Mo. 1988).

63. See generally S. SHIFFRIN & J. CHOPER, *THE FIRST AMENDMENT*, ch. 3 (1991) for a good discussion of the classification of speech for first amendment purposes.

64. 418 U.S. at 344.

65. 472 U.S. 749 (1985). *Dun & Bradstreet*, a credit reporting agency, issued a report to its subscribers erroneously indicating that Greenmoss Builders had filed for bankruptcy. Greenmoss was awarded both compensatory and punitive damages at trial.

66. The Court in *Dun & Bradstreet* was badly split with only Powell, Rehnquist and O'Connor joining in the plurality opinion. Burger concurred but expressed the view that both *Gertz* and *Times* should be re-evaluated. White concurred in the judgment but said *Gertz* should be overruled and in any event it should not be applied in this case. Brennan, Marshall, Blackmun and Stevens joined in dissent arguing that the first amendment required restraints on presumed and punitive damage awards in all libel suits. 472 U.S. at 763-96.

the government's first amendment interest in protecting private speech Powell stated that "[i]t is speech on matters of public concern⁶⁷ that is at the heart of the First Amendment protection. In contrast, speech on matters of purely private concern is of less first amendment concern."⁶⁸ After noting that the private person's interest is just the same in this case as in *Gertz*, the plurality held that the state interest adequately supported awards of presumed and punitive damages— even absent a showing of actual malice.⁶⁹ Thus the Court refused to grant any first amendment protection to private speech in these circumstances. *Dun & Bradstreet* is a confusing case because it offers no guidance about how to proceed in cases where private speech is aimed at a public individual or where private speech is aimed at a private individual but the issue is a matter of public concern.⁷⁰ Also the Court was so badly split in this decision that it is hard to assign much precedential value to the holding at all.

The rules of law derived from the above three cases apply to most types of defendants in libel actions. The rules obviously apply to the news and publishing media because they were the named defendants in *Times* and *Gertz*. Similarly, the cases apply to private publishers because that was the nature of the defendant in *Dun & Bradstreet*. Finally, broadcasters are expressly included under this legal umbrella because throughout the *Gertz* decision the Court consistently referred to the type of defendants under consideration as "publishers or broadcasters." Thus when determining what standards apply in a libel action private persons, news and publishing media, private information services, and broadcasters are all covered by the set of laws developed in *Times*, *Gertz* and *Dun & Bradstreet*.

One type of communications media whose legal treatment differs significantly from those above is the common carrier. A common carrier is "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio."⁷¹ "For common carrier status (1) there must be a practice of indifferent service by the operator to all whom desire it; and (2) the system must be such that customers can transmit information of their own choice."⁷² Everyday examples of

67. "Whether speech addresses a matter of public concern must be determined by the expression's content, form and context as revealed by the whole record." 472 U.S. at 761, quoting from *Connick v. Myers*, 461 U.S. 138, 147, 148.

68. 472 U.S. at 759.

69. *Id.* at 763.

70. See Shriffrin, *supra* note 63, at 90.

71. 47 U.S.C. § 153(h) (1992).

72. Comment, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COM. L.J. 217, 252 (1987), quoting *National Association of Regulated Utilities Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976).

common carriers are telegraph companies, telephone companies and the United States Postal Service.

On a practical level, deciding what falls under the classification of a common carrier is far from clear-cut. Author Paul Berman⁷³ points out that the FCC may not even have a mechanism to reach a binding decision on whether or not a communications medium is a common carrier or if it falls under FCC jurisdiction.⁷⁴ The inadequacy of the current regulations to embrace modern advances in communications technology is well illustrated by the difficulty the system has had in classifying cable television⁷⁵—a medium quite similar to computer networks. Many of the cases are finally decided by the federal court system.⁷⁶

Common carrier status affords more protection to information disseminators than even the *Times* first amendment shield offers.⁷⁷ The Restatement (Second) of Torts § 612(2) reads:

A public utility under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory, unless

- (a) the sender of the message is not privileged to send it, and
- (b) the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it.⁷⁸

The main reason for granting immunity from defamation actions to communication common carriers is the desire by the government to make quick and efficient communications services available to everyone.⁷⁹ If the utility were forced to monitor or censor transmissions, not only would individual privacy be invaded but the dispatch of messages would be slowed almost to a standstill. This conferred immunity also recognizes the practical fact that the "utility does not control or endorse a message, but merely provides a conduit."⁸⁰

It is therefore extremely difficult—if not impossible—for a plaintiff to recover in a defamation action against a common carrier. In the com-

73. Berman, *Computer or Communications? Allocation of Functions and the Role of the Federal Communications Commission*, in A. OETTINGER, P. BERMAN & W. READ, *HIGH AND LOW POLITICS: INFORMATION RESOURCES FOR THE 80's*. (1977).

74. *Id.* at 185.

75. See Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Government Demarcation and Roles*, 44 *FED. COM. L.J.* 1 (1991).

76. See, e.g., *Farmers Educational & Coop. Union of America, North Dakota Div. v. WDAY, Inc.*, 360 U.S. 525 (1959) (The Supreme Court granted broadcast stations who air political commentary in compliance with § 315(a) of the Federal Communications Act of 1934 (the equal access provision) limited common carrier status in order to protect them from defamation suits arising from political spots.)

77. Thornton, *supra* note 36, 179.

78. Restatement (Second) of Torts § 612 (1977).

79. See *Von Meysenbug v. Western Union*, 54 F. Supp. 100 (SD. Fla. 1944).

80. Comment, *supra* note 72, at 250.

puter bulletin board context, recovery is conceivable in a situation where on a common carrier bulletin board a user has been legally removed from the service, the sysop knows the user is not permitted to sign onto or transmit on the service, but the sysop knowingly posts a message from this user anyway. This would seem to be an unlikely occurrence. Common carrier status has some drawbacks in that it imposes on the communication service a variety of governmental regulations and requirements which will be discussed later in this article.

A final class of information disseminators that have been traditionally recognized is that of "secondary publishers."⁸¹ Examples of secondary publishers are newspaper printers and distributors, libraries, newsstands and bookstores. Distributors of publications must take care, however, not to cross over the line and become republishers. "Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."⁸² Thus if a distributing service recopies or alters original material they will become primary publishers for legal purposes.

Entities qualifying as secondary publishers have no direct control over the content of the material they handle and are considered not liable for defamation "unless they know or have reason to know of the statement's defamatory character."⁸³ Courts have held that requiring distributors of publications to monitor each periodical they distribute would be an impermissible burden on the first amendment.⁸⁴ Notice that by requiring proof of knowledge instead of the lesser *Times* requirement of merely showing reckless disregard, the courts are according secondary publishers almost common carrier status. Given the nature of secondary publisher's contacts with the libelous materials, in conjunction with the higher standard of proof, it would be extremely difficult to meet this burden of proof at trial.

A problem may be looming on the horizon for secondary publishers. As a class of speech, libel has often been compared to obscenity. In recent Supreme Court cases Justice Scalia has advocated permitting legal sanctions against secondary publishers of pornographic material

81. See W. PROSSER, *supra* note 33 at 894; *Dworkin v. Hustler Mag., Inc.*, 611 F. Supp. 781 (D. Wyo. 1985).

82. Restatement (Second) of Torts § 578 (1977).

83. *Lerman v. Chuckleberry Pub., Inc.*, 521 F. Supp. 228, 235 (S.D.N.Y. 1981); *Thornton*, *supra* note 36, at 179.

84. See *e.g.*, *Lerman v. Flynt Distrib. Co.*, 645 F.2d 123, 139 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). This is just one of a line of cases, stretching back to the nineteenth century, absolving secondary publishers from liability for defamatory material absent proof of knowledge or reason to know that such defamation existed.

even if no one work in the store is shown to be obscene and even if the store owner did not know any work was obscene.⁸⁵ So far, his opinions have not been accepted by a majority of the Court, but with the recent changes in Court personnel and the ascendancy of Scalia's influence and views, this may soon change. If the Court were willing to impose legal penalties upon secondary publishers of obscenity just because of the "feel" of their business, it is possible they would impose the same liability upon secondary publishers of libelous materials in situations where the bulk of a store's business was in "scandalous" or outrageous publications.

VI. THE LEGAL IDENTITY OF COMPUTER BULLETIN BOARDS

As discussed in the last section, the laws of libel vary according to the nature of litigants bringing the action. In electronic publishing, therefore, the first test for liability is the medium of each defendant.⁸⁶ The difficulty in litigation concerning computer bulletin boards is that they have never been legally defined as belonging to any one type of communication disseminator. In fact, computer information services have attributes similar to several different media as well as characteristics unique to themselves. Making matters worse, no two bulletin boards are exactly the same. Some service providers, such as Prodigy with its special features, news articles, editorial columns and the like, are more like magazines; while others, such as Usenet which does not even have an identifiable group in charge, are more like common carriers. Large national networks like CompuServe are undoubtedly public media, but a small bulletin board run out of a sysop's basement with only a few dozen members is probably a private publisher. All of these variations make an explicit categorization applicable to all computer information services quite elusive. In this section the relative advantages and disadvantages of each potential legal classification will be discussed.

A. ELECTRONIC PUBLISHERS

Computer bulletin boards are most often likened to electronic publishers.⁸⁷ In fact the Prodigy service openly claims that it is an electronic magazine, and exercises a publisher's right to censor and reject submitted postings.⁸⁸ As a publisher with a large national circulation,

85. *FW/PBS v. Dallas*, 493 U.S. 215 (1990) (Scalia, dissenting).

86. Thornton, *supra* note 36, at 178.

87. See Meeks, *supra* note 23. Meeks cites an Office of Technology report that clearly states that bulletin boards are a publishing medium.

88. Prodigy's censorship policy has caused much anger and disaffection among its subscribers. See Reidy, *Computer Flap: Is Speech Free on Prodigy?*, BOSTON GLOBE, Jan. 30, 1991, Living, at 35.

such a bulletin board would fall under the *Times/Gertz* standards. The first questions to ask then in a libel action would be whether the plaintiff is a private person or a public figure.

The answer to that question is not as simple as it seems. A computer user who is maligned on a board is certainly a private person in the common sense of the word. However, whether or not he should be granted private person status for legal purposes is debatable under the rationale employed by the Court in *Gertz*. In *Gertz*, the Court gave two justifications for the heightened need of the state to protect a private person. The first was that private persons were unable to effectively pursue "self-help"—that is, they were not on equal footing with the libeler so as to defend themselves.⁸⁹ That may be true when an average person is facing the New York Times, but it is not so true when the libel appears on a computer bulletin board. Computer services are extremely egalitarian media. A defamatory message posted on a bulletin board can be answered, almost immediately, by a reply posted in the same manner on the same bulletin board. In fact, the problem of flaming on the boards indicates that not only are people not shy about defending themselves, they have a problem knowing when to stop doing so. Therefore, the concern over a private person's inability to respond to the libel is not as great when dealing with an electronic information service as when dealing with a hard copy publisher.

The second rationale in *Gertz* for offering publishers less first amendment shielding when the plaintiff is a private person was that public officials hold themselves up to public scrutiny and ridicule, while private people do not.⁹⁰ Electronic bulletin boards are not a pervasive media. In order to come to the attention of others on the board you must seek out the service, connect it to your computer, sign a membership agreement and initiate contact with other users. After signing on, a user can read messages already on the board and see that postings occasionally attract nasty responses. If that user nevertheless chooses to post a message, an act that invites response, he might be deemed to have waived his private status and be holding himself up for comment from other subscribers. For these reasons, the underlying rationale in *Gertz* is not compelling when considering libel that appears on a computer bulletin board. A user suing an electronic publisher for libel should be required to meet the *Times* standard of proof—that the operator knew the defamatory statement was false or that he was willfully reckless to the possibility that it was false.

This argument, of course, is not applicable to situations where the plaintiff is not a member of the bulletin board service but is instead a

89. 418 U.S. at 344.

90. *Id.* at 345.

commercial enterprise or a non-service member. A commercial enterprise would most likely be considered a public figure and hence burdened to prove actual malice under the *Times* test. A private non-member maligned on the boards would most likely qualify for the *Gertz* standard, but the defamation of such persons on a computer bulletin board would probably be rare.

Proving a large computer service's liability for defamation under the *Times* standard would be very difficult. Given the volume of electronic mail such a service must handle and the short time window in which messages are expected to be posted, an agent of the service does not have enough time to read every message. In order to recover, a plaintiff would have to show not only that the service had read this particular message, but that they actually knew it was defamatory. The management of large services know this and their smugness in their relative security is somewhat annoying. For example, the following message was posted on the Genie law issues bulletin board:

The PRODIGY service (gotta respect those trademarks!) holds itself out as a publisher, and thus controls its content, but nowhere does it claim to review EVERY message before it appears on a bulletin board. Thus there is a question of whether Prodigy can be liable for something it doesn't know about. Put another way, Prodigy claims the RIGHT to control the content of its bulletin boards (and I'll dispute whether this can accurately be deemed "censorship"), but does not assume an OBLIGATION to monitor them. This is the same standard that applies to any sysop, just more pro-actively applied. —Bill Schneck (who happens to be Counsel for Prodigy Services Company, but is off-duty right now).⁹¹

Prodigy wants to have its cake and eat it too. It would be hard to imagine an attorney for the New York Times stating that the Times editors were under no obligation to read what they printed. By over-relying on the difficulty of proving a case against them, large computer information services may be inviting government regulation.

One of the main advantages of publisher status is that the newsmedia is subject to little government regulation. Of course, the usual limitations on speech that is not protected by the first amendment apply (for example, false advertising, obscenity), but little else in the way of content regulation constrains what can be published. The FCC regulates the newsmedia collaterally, by refusing to issue broadcast station licenses to corporations within the same area in which that corporation owns a local newspaper.⁹²

91. W. Schneckl, Genie Service, Legacy Roundtable, Category 3, Topic 14, Message 11, April 1, 1991, 22:57 EST.

92. I. DE SOLA POOL, TECHNOLOGIES OF FREEDOM 49 (1983).

B. PRIVATE INFORMATION SERVICES

Bulletin boards provide a variety of information services such as stock market prices, sports scores, news and weather to their subscribers. These services are available to all members of the network. This is quite similar to Dun & Bradstreet's business in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* where credit reports were sent to the agency's subscribers. Dun & Bradstreet was held to be a private information service on the basis of the number of clients to whom the information was given.⁹³ While Justice Powell commented that Dun & Bradstreet might have been held to be addressing a matter of public concern if their reports had been generally distributed among the population, he gave no clue as to just how many subscribers an information service must have before it is considered to be public.⁹⁴ All that can be said for certain is that five subscribers—the number who received the Dun & Bradstreet report—are not enough. Computer bulletin boards operated by a single system operator and having a closed membership list with only a few members would probably be considered a private information publisher.

Private information publishers are not constrained nor regulated by the government any more than is a private individual. They are also not shielded from libel actions in the name of the first amendment, as are media publishers. For that reason there is no particular advantage in a computer bulletin board seeking this kind of classification.

C. BROADCAST MEDIA

The classification of broadcast media which encompasses such entities as television and radio stations is probably the least advantageous legal classification for a computer bulletin board to receive. Some of a bulletin board's services are analogous to broadcast station programming, however. For example, many bulletin boards have regularly scheduled, live chat-lines hosted by a system employee or even a guest celebrity. Users type in their comments and questions and the result is very much like a call-in radio program.

The libel standard for broadcast stations falls under the *Times*⁹⁵ and *Gertz*⁹⁶ cases, so speech on these media do receive some degree of first amendment protection. The main drawback to this classification is that broadcasters are subject to extensive government regulations

93. 472 U.S. at 759.

94. *Id.* at 762.

95. See *supra* text at notes 57-58.

96. See *supra* text at notes 59-64.

under a "public trustee/public interest" standard.⁹⁷ The FCC was given authority to regulate the broadcast media under Title III of the Communications Act of 1934.⁹⁸ The rationale for allowing the government to have such broad regulatory powers, even when they openly restrict content and thus conflict with the first amendment guarantee of free speech,⁹⁹ are two-fold: the available spectrum of radio and television frequencies is limited and thus must be allocated responsibly; and the pervasive broadcast media exposes people to its programming without their consent and so the government has a duty to protect citizens from offensive broadcasts.¹⁰⁰ This reasoning is generally considered antiquated¹⁰¹ and has been strongly attacked both from within the FCC and from the federal judiciary.¹⁰² The Supreme Court, however, continues to defer to the judgment of Congress and the FCC as to how much regulatory control of the broadcast media they require.¹⁰³

Because electronic signals travel over coaxial cable or optical fiber from one modem to another, computer information services are neither a pervasive media nor a spectrum limited broadcaster. Another reason sometimes given to justify federal regulation of broadcasting—the fear of a monopoly gaining too much power through control of the media¹⁰⁴—is also unconvincing in the computer bulletin board context. The cost of starting a bulletin board is so low¹⁰⁵ that a thriving, competitive market is developing. For these reasons it seems unlikely that computer bulletin boards will ever seek or be given broadcast media status.

D. COMMON CARRIERS

As previously discussed, common carriers enjoy the greatest protection from libel actions. It is difficult to say how closely computer bulletin boards meet the common carrier model. The primary function of a

97. Nadel, *A Technology Transparent Theory of the First Amendment and Access to Communications Media*, 43 FED. COM. L.J. 157, 158 (1991).

98. See Berman, *supra* note 73, at 180.

99. See I. POOL, *supra* note 92, at 134. Examples of FCC content regulation are the restrictions on what subjects may be discussed over amateur radio bands (*Lafayette Radio Elec. Corp. v. United States*, 345 F.2d 278 (2d Cir. 1965)) and the warning to a radio station by the FCC not to play George Carlin's record of "seven dirty words" (*FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

100. See Kapor, *Civil Liberties in Cyberspace; Computers, Networks and Public Policy*, *Sci. AM.*, Sept. 1991, at 158.

101. *Id.*

102. See *FCC v. League of Women Voters*, 468 U.S. 364 n.11 (1984) (Brennan, J.).

103. *Id.*

104. See I. POOL, *supra* note 92, at 116.

105. The cost of starting a small bulletin board was estimated in 1985 to be about \$2500. Comment, *supra* note 72, at 220.

common carrier is the "transmission or carriage of signals from place to place along the paths of the network."¹⁰⁶ Other operations that attend this function, such as the switching of signals and the design of signal receivers, are referred to as "services incident to carriage".¹⁰⁷ Since its inception the telephone company has been allowed to engage in both signal transmission and service incident to carriage. The services incident to carriage, however, have become increasingly computerized and increasingly difficult to distinguish from a computer information network.

The FCC attempted to resolve the issues of government regulatory control over the emerging data processing market and also the degree to which the telephone company should be permitted to develop this technology for their own use¹⁰⁸ in Computer Inquiry I and Computer Inquiry II.¹⁰⁹ The result of these inquiries was that traditional common carriage was redefined as "basic" services while incidental computer service was defined as "enhanced" service.¹¹⁰ AT&T was allowed to enter the enhanced services market only through a separate subsidiary.¹¹¹

On a computer bulletin board, the underlying carrier signal that transmits electronic impulses from modem to modem is the basic common carriage provided by the telephone company. Some of the services provided by the bulletin board itself might be classed as "enhanced" services. Examples of services that might be considered enhanced common carriage could be e-mail, chat-lines, and simple display of posted messages. Other services, however, such as news and weather, product reviews and bulletin boards that are pre-censored by the sysop would probably be above and beyond the enhanced services rubric. The net result is that some very basic computer networks might be deemed common carriers while more sophisticated boards could at best be described as "quasi common carriers"—a status considered for television cable operators.¹¹²

Federal regulation of common carriers has traditionally be confined to rate regulation and setting service areas that must be served by the utility. In that aspect, the FCC already regulates computer bulletin

106. Berman, *supra* note 73, at 148.

107. *Id.*

108. *Id.* at 155.

109. See generally Blaszak, *Chairman, Strategy for Users in the Post Divestiture, Computer II Inquiry Environment*, in TELECOMMUNICATIONS COMMON CARRIERS IN A COMPETITIVE ERA 1019-28 (1983) for a discussion of the impact of Computer Inquiry II on the communications field.

110. *Id.*

111. *Id.*

112. See Copple, *supra* note 75.

boards somewhat through its regulation of the underlying telephone system. Content regulation by common carriers has historically not been allowed, but this may be changing due to the current debate about limiting consumer access to "dial-a-porn" numbers over the telephone.¹¹³

In summary, common carrier status would afford maximum protection from libel suits with a moderate amount of additional federal regulation. The drawbacks to common carrier status would be that system operators could not deny access to their boards to anyone—short of a legal adjudication—and operators could not refuse to run a message regardless of its inappropriate or offensive content. Furthermore, because common carrier status cannot be elected but must be *conferred* by the FCC and because the FCC has been very frugal in granting entities this status, it seems unlikely that computer bulletin boards will be classed as common carriers in the near future.

E. SECONDARY PUBLISHERS

Secondary publishers have the enviable position of being protected by a libel standard of proof that is very difficult to meet coupled with a relative lack of government regulation. The problem is that the definition of a secondary publisher is fairly specific and only a limited number of business types can qualify. Any republishing of the original defamatory material will cause the secondary publisher to lose its protected status. The question becomes whether the placing of a member's message on a bulletin board constitutes a republishing. If a service, like Prodigy, claims editorial control over messages then it is much more likely to be deemed a republisher than a service who merely posts, without reviewing, every message that is sent in. The application of secondary publisher rules to service features other than the public boards will be discussed in connection with the *Cubby, Inc. v. Compuserve, Inc.* case.¹¹⁴ The classification of secondary publisher is legally advantageous, but due to its limited scope there probably will only be a small number of computer bulletin boards, or portions of computer information services, that will meet its definitional requirement.

Table 1 summarizes the laws and regulations that apply to each possible classification for an electronic bulletin board. As already discussed, the standard for libel varies not only with the type of defendant but also with the nature of the plaintiff.

113. See *State Regulation to MFJ; Audiotext Standards Pose Complex Problems*, COM. DAILY, July 26, 1988, at 2 (strong argument that the telephone companies should not take responsibility for dial-a-porn content).

114. See *infra* text at notes 115-35.

Table 1: Legal Status of Possible BBS Classifications

PARTIES TO LITIGATION	SOURCE OF LAW	STANDARD FOR LIBEL	APPLICABLE FEDERAL REGULATION
Public Figure v. Publisher	NY Times v. Sullivan	Actual malice — knowingly false statement or reckless disregard of whether or not it is false	None except some collateral regs. by FCC
Private Person v. Publisher	Gertz v. Robert Welch, Inc.	State standards of liability, but must have proof of actual damage; no punitives absent actual malice	None except some collateral regs. by FCC
Private Person v. Private Publisher	Dun & Bradstreet v. Greenmoss Bldrs.	State libel law	None
Public Figure v. Private Publisher	No cases	Unknown	None
Public Figure v. Broadcaster	NY Times v. Sullivan	Actual malice — knowingly false statement or reckless disregard of whether or not it is false	Public trustee/ interest std., licensing, content reg.
Private Person v. Broadcaster	Gertz v. Robert Welch, Inc.	State standards of liability, but must have proof of actual damage; no punitives absent actual malice	Public trustee/ interest std., licensing, content reg.
Anyone v. Common Carrier	Restatement of Torts § 612	Sender of message not privileged to do so and agent of common carrier knows or has reason to know that sender is not privileged to publish it	Rate and service area regulations; licensing
Anyone v. Secondary Publisher	Lerman v. Flynt Distributing and other common law holdings	Must know or have reason to know statements were of defamatory character	None
Anyone v. Private Person	State common law	State libel law	None

With this information as background, it is interesting to look at the federal court's decision in *Cubby, Inc. v. CompuServe, Inc.*,¹¹⁵ a case that represents the first time the judiciary was asked to determine the legal identity of a computer information service.

VII. *CUBBY, INC. V. COMPUSERVE, INC.*

In October, 1991, United States District Judge Peter Leisure of the Southern District of New York granted CompuServe's motion for sum-

115. 776 F. Supp. 135.

mary judgment in the first libel case against a nationwide computer service to reach district court.¹¹⁶ This holding received national attention not only in the computer community but in the public press as well.¹¹⁷ The court's reasoning in reaching its decision and the precedential value of the holding are worth close examination.

CompuServe Information Service, the defendant in the litigation, is a subsidiary of H & R Block, Inc. and is headquartered in Columbus, Ohio.¹¹⁸ CompuServe was one of the first nationwide computer services and now claims over 868,000 subscribers.¹¹⁹ Included in CompuServe's service are over one hundred and fifty special interest forums, composed of electronic bulletin boards, interactive on-line conferences, and topical data bases.¹²⁰ These forums are provided by independent contractors who agreed to control their contents in accordance with editorial and technical standards set by CompuServe.¹²¹ This particular business arrangement is relatively unique among computer bulletin board systems.

The Journalism Forum is provided to CompuServe by Cameron Communications Inc., a company based in Darien, Connecticut.¹²² To add to its forum, Cameron buys a daily computer newsletter called "Rumorville, U.S.A.," produced in San Francisco, by Don Fitzpatrick Associates.¹²³ Rumorville carries reports about broadcast journalism and journalists.¹²⁴

In 1990 the plaintiffs in this action, Cubby Inc. and Robert Blanchard, jointly developed "Skuttlebut," a computer data base designed to carry news of the journalism industry, with the intent to compete directly with Rumorville for subscribers.¹²⁵ On several occasions in April, 1990, Rumorville published items about the plaintiffs that were carried on the CompuServe service nationwide.¹²⁶ Claiming

116. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

117. See Charles, *Libel Law Comes On-Line*, RECORDER, Jan. 17, 1992, at 8; Feder, *Toward Defining Free Speech in the Computer Age*, N.Y. TIMES, Nov. 3, 1991, § 4, at 5, col. 1; Jackson, *CompuServe Picked It's Fight in Libel Case*, UMI DATA COURIER, Nov. 18, 1991, § 1, at 4; Picarille, *BBS Not Liable for Libel, Court Says*, INFOWORLD, Nov. 11, 1991, 130; *Provider of On-Line Information Service Wins Dismissal of Unfair Competition Claim* ANTITRUST & TRADE REG. REP., Nov. 14, 1991 [hereinafter *Provider*].

118. Jackson, *supra* note 117.

119. Feder, *supra* note 117.

120. *Provider*, *supra* note 117.

121. *Id.*

122. Charles, *supra* note 117.

123. *Id.*

124. 776 F. Supp. at 137.

125. *Provider*, *supra* note 117.

126. Rumorville carried a statement saying that Skuttlebut "gained access to information first published by Rumorville 'through some back door,' a statement that Blanchard

these statements were false and defamatory, plaintiffs filed a diversity action in federal district court. CompuServe did not dispute that the statements were defamatory but rather claimed it was a distributor and not a publisher of the material and could not be held liable since it did not know and had no reason to know of the statements.¹²⁷ Agreeing with CompuServe's arguments, Judge Leisure dismissed the action pursuant to Federal Rule of Civil Procedure 56.¹²⁸

The court seemed to take two factors into account in affording CompuServe secondary publisher status. The first was the contractual relations that gave CompuServe no editorial control over the publication. The second was the short time frame within which CompuServe was obliged to load the presented forum onto its service.

In the court's words:

CompuServe's . . . product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. CompuServe and companies like it are at the forefront of the information industry revolution. High technology has markedly increased the speed with which information is gathered and processed; it is now possible for an individual with a personal computer, modem and telephone line to have instantaneous access to thousands of news publication from across the United States . . . While CompuServe may decline to carry a given publication altogether, in reality once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe. . . . Technology is rapidly transforming the information industry. A computerized data base is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, bookstore or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statement.¹²⁹

CompuServe was undoubtedly delighted with this decision, but there are some troubling aspects of the court's assumptions. The uploading process, presumed to be instantaneous, is actually fairly com-

was 'bounced' from his previous employer, and a description of Skuttlebut as a 'new start-up scam.' " *Id.*

127. 776 F. Supp. at 138.

128. Fed. R. Civ. P. 56 (1991). Rule 56 covers motions for summary judgment.

129. 776 F. Supp. at 140, 141.

plex.¹³⁰ CompuServe employees occasionally have as much as two days prior to distribution to review a publication.¹³¹ Even when the uploading is rapid, system operators usually run a virus detection program and an obscenity scanning program which searches for specific offensive words before distribution. It is not clear whether these facts are unimportant or whether Judge Leisure was merely unaware of them. The plaintiffs opposed the summary judgment motion arguing that additional discovery was needed, but they did not specify what additional information was sought in sufficient detail to defeat the Rule 56 motion.¹³² Perhaps if more information were available concerning CompuServe's uploading procedures, the holding would have been more specific as to what kind of editorial control would be enough to defeat secondary publisher status.

The general counsel and secretary for CompuServe, Kent D. Stucky, stated after the holding that raising the secondary publisher defense had been a strategic decision.¹³³ "We were careful about which argument we would allow to go to a decision like this. If the court found against us, it was not likely to set harmful precedent."¹³⁴ Although the argument was successful for CompuServe it produced a decision that is difficult to apply to other circumstances. The case did not address issues of the service's liability for defamatory messages posted by CompuServe members themselves on the service's boards. Would the short time available to review such messages protect CompuServe, even though the explicit supplier-distributor contract relationship did not exist? Furthermore, the organizational structure of CompuServe is not followed by much of the industry. Prodigy, for example, produces its own information features and openly claims to be a primary publisher. It seems doubtful that the *CompuServe* holding would apply to it.

Overall the *CompuServe* decision is a very favorable one for computer information services. Not only does the court take notice of the rapid dissemination of information indigenous to this medium,¹³⁵ but it recognizes the reduced capacity of computer bulletin board services to edit or preview material submitted for uploading. The court also manifests the clear intent to shield the computer information medium with first amendment protections.¹³⁶ Because the decision is a ruling on a summary judgment motion, the precedential value of *CompuServe* is

130. Charles, *supra* note 117.

131. *Id.*

132. 776 F. Supp. at 144.

133. Jackson, *supra* note 117.

134. *Id.* (quoting Kent D. Stucky).

135. *See supra* text at note 129.

136. *Id.*

somewhat limited. Hopefully, though, future courts will favorably rely on this opinion in extending first amendment protections to other aspects of computer information services.

We have so far considered what classifications could be given to a computer bulletin board and what classification a federal district court in New York has actually given to one such network. The matters that must now be addressed are the more difficult questions of whether the government actually *should* be involved in assigning legal identities to these systems, and whether one single legal classification is advisable or even possible.

VIII. CONVERGENCE OF MODES

In his exceptional book, *TECHNOLOGIES OF FREEDOM*,¹³⁷ Ithiel de Sola Pool explains how modern technology has caused a blurring—a convergence of modes—among the historic types of media.¹³⁸ Traditionally, America has had a trifurcated system of communications in which each mode be it print, common carrier or broadcast, performed its specific function in ways unique to itself.¹³⁹ Nowadays, as a result of advances in technology, one single physical means can carry all of the formerly discrete modes of communication.¹⁴⁰ For example, one optical fiber cable can carry telephone communications, cable television, computer information networks, electronic newspapers and magazines, fax messages and radio programs all in a single modulated, multiplexed signal. "Conversely, a service that was provided in the past by any one medium . . . can now be provided in several different physical ways."¹⁴¹ In other words, a single page of hard copy can arrive at its destination in a variety of ways: it can be printed on a press and mailed; it can be sent over a computer information network and downloaded to a printer; it can be faxed over the telephone lines; or it can be telexed over a cable television channel. In each case the same result is reached by different technical means. Because of mode convergence the task of the law in defining and regulating the media has become extremely complicated.

One of the reasons classifying a new communications technology poses such a problem to government entities is that the fixed, legal definitions of the three main types of media are technologically-based descriptions crafted at the time of each medium's emergence.¹⁴² The legal

137. I. POOL, *supra* note 92.

138. *Id.* at 23.

139. *Id.* at 2.

140. *Id.* at 23.

141. *Id.*

142. See Nadel, *supra* note 97, at 158, 159.

definition of a telephone network is inexorably linked to the idea of two mechanical receivers connected by a wire over which an electrical signal travels, much like a speeding train over a railroad track.¹⁴³ The problem is that when a medium advances and the technology changes, offshoots of that medium are still compared to the original definition. The legal system is essentially trying to fit square pegs into round holes.

The concept of a communications medium as technology frozen in time creates one other, more systemic problem. Most of the current government regulatory structure imposed upon the communications industry was enacted as a response to the technological limitations of the nascent media.¹⁴⁴ Radio broadcasting was only possible over the open air waves and so spectrum scarcity caused the government to appropriate the right to allocate broadcasting licenses. Because telephone and telegraph signals were originally carried over copper wire that was laid down at great cost by private monopolies, the government imposed common carrier duties upon those media and regulated their price rates.

With modern mode convergence, broadcasts can be carried over coaxial or optical cable, greatly reducing, if not eliminating, spectrum-availability constraints; and cellular (packet) communication, microwave relays, computer switching stations and satellite up-links have drastically altered the physical face of telephone communications. Yet the federal regulatory structure remains, an artifact of a foregone era, to classify and control new communications technology. While the Constitution clearly states the Founders' desire to promote the development of technology,¹⁴⁵ the bureaucracy now in place often is an obstacle in the path of advancement.

One bit of federal law that addresses itself to a communications technology that is diffuse, decentralized, versatile and available to all is the first amendment to the United States Constitution. Enacted at a time when printing presses were the state of the art in communications, the first amendment clearly reflects the Founders' desire to protect the freedom of speech and of the press from government encroachment. The state of communications in America today has become very similar to that which existed in the late 18th century. Computer bulletin boards, satellite receivers, cable television and video cameras to name a few have conferred an easily accessible and unlimited communications capability on the average citizen. While central control became necessary for a while when scarcity and monopolization of communications

143. See Berman, *supra* note 73 (discussion of the development of common carrier law).

144. See generally I. POOL, *supra* note 92. (Chapter 5 contains a discussion of the birth of the broadcast media.)

145. See U.S. CONST., art. I, § 7, cl. 8.

technology threatened the general welfare, the baby is now weaned and the multitude of communication media should be set free to compete and grow in the open market. The protector and limiter of this market should be the first amendment, and not an ill-fitting government regulatory structure.

On a very practical level it is unlikely that government regulations will simply go away. In addition to a bureaucracy's gift for self-perpetuation, a small amount of common carrier regulation will remain necessary until the means of propagating electronic signals becomes less expensive. The FCC took a step forward with its Computer Inquiry I and II. Lawmakers should encourage the FCC to continue to deregulate the communications industry and the FCC should restrain from exerting regulatory jurisdiction over new types of communications technology. The silence of the FCC concerning computer bulletin boards may be a positive sign that this is happening.

IX. CONCLUSION

In order to assess the liability of computer information services for defamatory material appearing on their bulletin boards, it is necessary to first determine the legal identity of the service. Many legal and computer experts have expressed their opinions as to which legal model is preferable, and some have proposed a hybrid model adopting characteristics of several different classifications.¹⁴⁶ In fact, computer bulletin boards are so diverse in terms of their size, services offered and nature of ownership that no single model could apply equally well to all.

One option is to allow the courts to make a case-by-case determination concerning the status of each particular bulletin board as litigation arises. This approach would be costly, would burden the legal system and would be filled with uncertainty for the system operators.

Another possible answer would be to allow the board and its users to contract concerning the nature and legal identity of the service to be supplied. This is very similar to the "nexus of contract" model for business corporations that has emerged in recent scholarly literature.¹⁴⁷ When signing-on to a bulletin board for the first time a user could be presented with a complete statement of the service's policies and regu-

146. *Information Policy, Computer Communications Networks Face Identity Crisis Over Their Legal Status*, DAILY REP. FOR EXECS., Feb. 26, 1991, at A-6.

147. See R. HAMILTON, CORPORATIONS 12-13 (4th ed. 1990), citing Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U.L. REV. 99 (1989):

The contractual theory views a [business enterprise] as founded on private contract, where the role of the state is limited to enforcing contracts . . . Each contract in the 'nexus of contracts' warrants the same legal and constitutional protections as other legally enforceable contracts . . . Parties to the 'nexus of contracts' must be allowed to structure their relations as they desire.

lations as well as a statement of what rights are accorded to members. A user should always be free to revoke this contract and leave the service at will. This approach has the advantage of allowing for a varied market that will tailor itself to users' demands. For example, there is undoubtedly a market for a Prodigy-like service that will strictly enforce a family oriented posting policy. On such a service a member can be free from upsetting personal attacks and feel at ease in permitting his children to explore the service freely. In order to accomplish this, of course, the user would have to agree to submit messages subject to previewing by the systems operators and to strict censorship. All of this can be detailed initially in the contract. A market probably also exists for a bulletin board where open uncensored discussions are carried on, unfettered by the systems operator. Services which offer the type of framework that most users want will prosper. Those that have unpopular policies will fail. With 50,000 bulletin boards on line and growing, a user should have no trouble finding several services that exactly meet his needs. When a defamation suit arises in this model, a court would review the initial membership contract and determine what standard of libel liability to apply according to the express intent and understanding of the parties. Both sides could be protected from unfairness and overreaching through the well-established doctrines of contract law.

In the future homes will be connected to a national fiber optic cable network. Over these lines will flow thousands of nodes, each representing a television station, a radio station, a newspaper, a computer bulletin board, etc.¹⁴⁸ This network will afford users huge choices of with whom to contract. The underlying fiber optic network will probably be subject to common carrier regulations, at least until a more advanced means of accessing private homes is developed.¹⁴⁹ The nodes on the line should be free to offer services to users consistent with the objectives and constraints of the first amendment.

For the present, BBS services should set out clear service policies and guidelines. System operators should be diligent in not allowing clearly illegal activity on their boards and in not making arrogant statements about their legal invulnerability. Irresponsible operation of a system could precipitate action by the FCC who up to now has been content to let BBS systems develop on their own. Those who feel bulletin boards are too free to post illegal or defamatory publications should take comfort in knowing that in exchange for a lessened degree of protection they are receiving the benefit of a free and open environment in which to gather information and express their ideas.

148. See Kapur, *supra* note 100.

149. *Id.*

