NETWORKING IN CYBERSPACE: ELECTRONIC DEFAMATION AND THE POTENTIAL FOR INTERNATIONAL FORUM SHOPPING

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1. INTRODUCTION

"Cyberspace"¹ is quickly becoming the communication medium of choice for the technologically literate. Cyberspace travelers now use computers to communicate globally² through electronic mail,³ interactive conferencing,⁴ and

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¹ The term “cyberspace” was coined in 1984 to refer to the digitized arena of electrons connecting one computer to another. See WILLIAM GIBSON, NEUROMANCER 51 (1984).

² See Ethan Katsh, Law in a Digital World: Computer Networks and Cyberspace, 38 VILL. L. REV. 403, 414 (1993) (noting that “cyberspace ... links computers and supports communication that occurs so quickly that it removes spatial distance as a constraint in obtaining information and even in working with people”); W. John Moore, Taming Cyberspace, 24 NAT'L J. 745, 745 (1992) (depicting cyberspace as “an electronic universe, unmeasurable and unquantifiable, where digital impulses travel at almost the speed of light”); 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, 89 n.1 (1993) (quoting Michael Benedikt, Chair of
bulletin board postings. This dimensionless realm of interaction has even earned international acceptance. For example, the Internet, a worldwide collection of computer networks, connects seventy-five countries with full service and provides E-mail to an additional seventy-seven. In five years, the Internet is expected to link more than one hundred million computers worldwide. Recognizing this trend, the Clinton Administration has supported the development of a National Information Infrastructure ("NII") in the United States, more commonly known as an

University of Texas' Agriculture Department, who defines cyberspace as a world where "actual, geographic distance is irrelevant [and where] objects seen or heard are neither physical nor, necessarily, presentations of physical objects, but are rather—in form, character, and action—made up of data, of pure information").

Also known as E-Mail, it has become the most common use of computer networks. See Edward J. Naughton, Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action, 81 GEO. L.J. 409, 418 (1992) (explaining that senders transmit their messages to other individuals by addressing letters to personal computer user names whereby these messages are "accessible only to the addressee").

Interactive conferencing is the computer equivalent of a telephone "party line." Computer users instantaneously converse with one another by sending messages to a central system that immediately posts these responses on the individual screens of all those connected to the system. See Loftus E. Becker, Jr., The Liability of Computer Bulletin Board Operators for Defamation Posted by Others, 22 CONN. L. REV. 203, 212 (1989).

Computer operators often search topic files or bulletin board systems to read messages left by other users. These topics range anywhere from gardening to politics to sports. In turn, operators then leave responses, questions, criticisms, etc., for others to review. See Edward A. Cavazos, Note, Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology, 12 REV. LITIG. 231, 232-33 (1992).


See Money-Go-Round: Negotiating the Net — Language and Prices, DAILY TELEGRAPH, June 4, 1994, available in LEXIS, News Library, Tltleg File [hereinafter Money-Go-Round]. The Internet has been described as the "catch-all word for the millions of computers talking to each other using TCP/IP." Id. TCP/IP is defined as "Transmission Control Protocol/Internet Protocol[,] [t]he computer language that allows machines connected to the Internet to talk to each other." Id.

See Verity & Hof, supra note 6, at 82.

See id.
“information superhighway.”

There are a number of reasons for the growing popularity of interactive communication in cyberspace. First, national and international communication through cyberspace is relatively inexpensive compared to traditional means of communication. Computer users need only make local telephone calls to link their personal computers to international networks via modems. Moreover, while some commercial computer networks charge consumers for on-line use, many services on the Internet remain free of charge. Second, phone lines and computers transmit vast amounts of data without using paper. Not only does this allow users to communicate with one another instantaneously, they also can save money and avoid the environmental costs associated with more traditional mediums of exchange. Third, bulletin boards and similar systems facilitate interaction between people who share similar interests regardless of geographical distance. Finally, Internet access promises to have a tremendous impact on

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12 Modems are devices that enable computer users to send and receive data over a telephone line. The sending modem translates computer data into a language that can travel through the telephone wire. The receiving modem then rewrites that language in the original code. See Becker, supra note 4, at 207.
13 See Preston Gralla, Online Fever, PC COMPUTING, Sept. 1994, at 140, 161 (listing the various on-line rates for the largest commercial networks, including Prodigy, America Online, and CompuServe).
15 See David J. Conner, Casenote, Cubby v. CompuServe, Defamation Law on the Electronic Frontier, 2 GEO. MASON INDEP. L. REV. 227, 228 (1993) (describing bulletin boards as computers set up to receive information from other computers and to exchange information with those other computers).
16 Author Howard Rheingold described his varied bulletin board use as ranging from comforting someone whose son had just been diagnosed with leukemia to role-playing in a fantasy identified only as the "Pollenator." See Howard Rheingold, The Virtual Community: Homesteading on the Electronic Frontier 2-3 (1993).
national business.\textsuperscript{17}

One of the most attractive features of communication in cyberspace is user anonymity.\textsuperscript{18} Cyberspace travelers communicate with one another while shielding their identities with personal code names.\textsuperscript{19} Unfortunately, the freedom that accompanies this anonymity has spurred the growth of computer defamation suits.\textsuperscript{20} In one of the more recent defamation cases, \textit{Stratton Oakmont, Inc. v. Prodigy Services Co.},\textsuperscript{21} a Long Island investment banking firm

\textsuperscript{17} Global Internet use will foster electronic mail and data exchange, facilitate collaborative research projects, alter business marketing strategies, and contribute to product sales and distribution. \textit{See} MARY J. CRONIN, \textit{DOING BUSINESS ON THE INTERNET: HOW THE ELECTRONIC HIGHWAY IS TRANSFORMING AMERICAN COMPANIES} 240 (1994). For a discussion about these attributes, as well as possibilities for advertising, see Scott Donaton, \textit{OK to Put Ads on Internet, But Mind Your Netiquette}, \textit{ADVERTISING AGE}, Apr. 25, 1994, at 3, and for a discussion on on-line shopping, see generally Verity & Hof, supra note 6, at 80 (discussing possibilities for shopping while using one's computer). These characteristics demonstrate that the "efficiency of a nation's communications infrastructure may be an increasingly important determinant of its competitiveness" and overall international business success. Jonathon D. Blake & Lee J. Tiedrich, \textit{The National Information Infrastructure Initiative and the Emergence of the Electronic Superhighway}, 46 FED. COMM. L.J. 397, 431 (1994) (describing cyberspace as "an international web of computers and electronic information services that enables businessmen, universities, and individuals instantaneously to access information and communicate electronically").

\textsuperscript{18} \textit{See} Terri A. Cutrera, \textit{Computer Networks, Libel and the First Amendment}, 11 COMPUTER/L.J. 555, 557 (1992); \textit{see also} Schlachter, supra note 2, at 91-92.


sued Prodigy for alleged defamatory remarks posted on the service's "Money Talk" bulletin board. Like the court in *Stratton*, most U.S. courts and commentators have struggled to assess the liability of these commercial carriers. Although a few of these defamation suits have settled, *Cubby, Inc. v. CompuServe Inc.* suggests that the rather pro-defendant U.S. libel laws will continue to protect computer networks, such as CompuServe and America Online, from liability, thus preserving the First Amendment's guarantees of freedom of speech and the press.

Given the distinct global nature of cyberspace, computer operators can read, download to disk, and print electronic data almost anywhere in the world. At the same time, computer users can transmit electronic information to countries such as England that maintain pro-plaintiff defamation laws. Consequently, individuals and companies located in the United States with reputations to protect overseas may soon forego their own federal and state courts and file defamation charges in countries with such laws. For example, in contrast to the U.S. legal system, the British cause of action remains one of strict liability, often holding defendants liable in cases "involving what [U.S.] courts would characterize as core political discourse." Defamation generated in cyberspace thus has the potential to encourage calculated forum shopping abroad.

This Comment first examines computer Bulletin Board

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23 *See* Cubby, Inc., 776 F. Supp. at 135; Medphone Corp. v. Denigris, No. 92-CV-3785 (D.N.J. filed Sept. 11, 1992); *see generally* Becker, *supra* note 4, at 205 (questioning the liability of operators of computer bulletin boards when their boards are used by others to further unlawful ends).

24 *See* Cubby, Inc., 776 F. Supp. at 135.


26 U.S. CONST. amend. I.

27 *See* CRONIN, *supra* note 17, at 1-3.

28 U.S. defamation law is not based on strict liability. Instead, the First Amendment guarantees the freedoms of speech and the press, often posing as a barrier to recovery for plaintiffs in defamation suits. *See generally* RODNEY A. SMOLLA, *LAW OF DEFAMATION* (1994) (discussing the modern law of defamation in the United States).

29 *Id.* § 1.03[3].

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Systems and the Internet, familiarizing readers with cyberspace technology. Next, this Comment traces the development of U.S. libel law and discusses why the United States has abandoned strict liability for defamation. Third, this Comment analyzes cyberspace defamation suits recently filed or decided in both the United States and abroad. Fourth, this Comment explores the possibilities for international forum shopping, particularly for suits filed in England. Their prevalence will depend on how English courts classify a media defendant and whether a defamed plaintiff can collect a favorable judgment overseas. Finally, this Comment suggests that the potential for forum shopping will negatively impact cyberspace travel, ultimately chilling the freedom of speech and individual expression.

2. COMPUTER BULLETIN BOARD TECHNOLOGY

To understand cyberspace, one can visualize it as the electronic version of physical space. Cyberspace resembles a digital world connecting millions of computers so that users can instantaneously exchange and obtain information. Yet, computer users are not natural citizens of this environment. Instead, they must "apply" to establish proper residency. To enter cyberspace, computer operators link their personal machines to two-way computer communication services called Bulletin Board Systems ("BBS"s). Two of the more popular ways of accomplishing this link are application via commercial network services and through the Internet.

2.1. Computer Bulletin Board Systems

A cyberspace passport has three requirements: a personal computer ("PC"), a modem, and a telephone line. The computer user dials the BBS via a modem and the PC soon connects to a central "host" computer. This

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30 See supra note 2 and accompanying text.
32 See Naughton, supra note 3, at 416.
33 See generally Heinke & Rafter, supra note 10, at 2 (discussing the extent to which the Internet is used).
computer nucleus is typically owned and operated by a system operator ("sysop") who manages the bulletin board and sometimes exercises editorial control. The extent of this editorial control will determine a sysop's liability for electronic defamation. Once a computer operator connects to a host computer, a user can then utilize the many interactive and non-interactive services that BBSs offer to citizens of cyberspace.

Despite the astronomical number of BBSs, there are essentially two basic types: those operated by hobbyists and those managed by commercial computer networks. Hobbyists establish their personal BBSs by subscribing to larger computer networks, typically to a local or regional Internet subsidiary. An Internet access provider connects the hobbyist to the Internet by supplying him or her with software and leasing a telephone line to the hobbyist. The hobbyist then posts the new BBS on the Internet and thereby gains access to information transmitted

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34 See Cutrera, supra note 18, at 556; see also Charles, supra note 31, at 126. A sysop is "an employee of a computer service bureau who manages the large central computer through which subscribers send messages to each other. A sysop manages the use of various boards and may exercise format or content control over messages disseminated by the computer service bureau." Id.

35 See infra notes 148-50 and accompanying text.

36 Also known as an Internet access provider, which allows local computers to access the Internet.

37 Interactive services allow users to directly compose or alter the content of messages. These services include E-Mail, round-table format, and real-time conferencing (providing users with instantaneous communication). See Conner, supra note 15, at 230-31.

38 Non-interactive services deny the user any opportunity to directly affect the content of messages. These options include news services, electronic newsletters, stock quotations, and the LEXIS/NEXIS and WESTLAW databases. See id. at 231.

39 According to a recent study, more than 20 million people worldwide regularly log onto one of the 100,000 local electronic BBSs scattered throughout the globe. See Heinke & Rafter, supra note 10, at 2.

40 A third, but less widely utilized BBS is the corporate BBS. Corporations recently have established internal BBSs to improve customer relations, provide E-Mail service for employees, and facilitate client interaction. See Schlachter, supra note 2, at 103-04.

41 See id.

42 See id. at 2.
over the BBS. Hobbyists serve as their own sysops and typically do not charge for their services. In addition, hobbyists may restrict membership to family, friends, associates, or any other selected group.

The second type of BBS is one managed by a larger commercial network service. These commercial networks also are divided into service categories: national and regional. The largest national commercial network is Prodigy, a joint venture between Sears Roebuck & Co. and International Business Machines, with over two million subscribers. What separates Prodigy from the other online networks is not its productivity or data access, but rather its editorial control and on-line “family” atmosphere. The company uses a screening process that enables the sysop to eliminate from a bulletin board obscene messages that do not meet Prodigy’s established standards.

H&R Block’s CompuServe, Inc. ("CompuServe"), with approximately 1.8 million subscribers, is the second largest national electronic network. Other national online services include America Online, with approximately 900,000 members, and General Electric’s GEnie, with about 150,000 subscribers. These on-line networks are com-

43 See id.
44 Hobbyists are not profit-driven. These cyberspace aficionados establish their own BBSs to serve the community and to support discussion groups that they find interesting.
45 See Gralla, supra note 13 at 140, 161.
46 While these larger national networks receive much of the current cyberspace attention, particularly with regard to defamation suits and global business opportunities, it is worth noting that there are a few regional on-line services which are also managed for profit. These include the California-based WELL (Whole Earth ‘Lectronic Link), with approximately 7,000 subscribers, see John Schwartz, On-Line Lothario’s Antics Prompt Debate on Cyber-Age Ethics, WASH. POST, July 11, 1993, at A1, A8, and the Channel 1 BBS based in Cambridge, Massachusetts, see Schlachter, supra note 2, at 102. Channel 1 generates about $250,000 worth of revenue each year. Id. at 103.
47 See id. at 161.
48 See Schlachter, supra note 2, at 101-02. “Prodigy envisions itself as the Disneyland of bulletin boards, a family network providing a variety of useful services . . . .” Moore, supra note 2, at 748.
49 See Schlachter, supra note 2, at 102 n.54.
50 See Gralla, supra note 13, at 161.
51 See id.
commercially driven and therefore profit-oriented. While Prodigy consumers pay a monthly fee for basic service, most of the other networks charge members hourly rates. Whether these networks collect revenue hourly or monthly, the on-line market generates billions of dollars in revenue each year. It is expected that sales will increase significantly over the next three years, yielding over an estimated $14 billion in 1997.

2.2. The Internet

The U.S. Department of Defense Advanced Research Projects Agency created ARPAnet in 1969 to connect government and academic computer systems. ARPAnet laid the foundation for today's Internet ("NET"), the computer network which now links computers over long distances using telephone wire, fiber optic cable, and satellite transmission. Worldwide use of the NET has grown so quickly that it now serves as "an all-purpose network that, within limits, lets anyone send anything digital to anyone anywhere."

To operate the NET, a user must have a PC, a modem, and a telephone line. The operator must also "subscribe" to the system. This connection process is complex, as NET users must establish an account with a connecting service which provides subscribers with access to the NET. In addition, the NET also requires software which allows a PC to transmit TCP/IP (the NET language) to the network and which also translates TCP/IP into data that a computer will

52 See Conner, supra note 15, at 229.
53 See Gralla, supra note 13, at 161.
54 See Conner, supra note 15, at 229 (noting that the on-line service market had an estimated sales revenue of $11.9 billion in 1992).
55 See id.
56 See RESNICK & TAYLOR, supra note 11, at xxiii, 47.
57 See Money-Go-Round, supra note 7, at 15.
59 Verity & Hof, supra note 6, at 81.
60 See Hellen Fielding, A Non-Anorak Wearers Guide to the Internet; All You Wanted to Know About the Global Computer Network, But Were Too Afraid of Being Bored to Ask, INDEPENDENT, May 29, 1994, at 21.
understand.\textsuperscript{61}

Despite their similarities,\textsuperscript{62} the NET differs from the national commercial networks in three distinct ways. First, the NET is a computer cooperative rather than a corporation.\textsuperscript{63} Nobody owns the NET and it has no central operator. Therefore, there is no NET executive to hold accountable if something malfunctions or if users post defamatory statements. Second, members rarely subscribe directly to the NET, as one would subscribe to Prodigy or to CompuServe. Instead, NET members link their PCs to a local connecting service that is itself linked to the NET.\textsuperscript{64} In other words, the NET resembles "an electronic nervous system . . . where information in tributaries flows into increasingly larger channels, eventually converging in the major conduit that ties the entire structure together."\textsuperscript{65} The "information superhighway" is actually the major conduit that links regional and NET systems, providing users worldwide with NET access. Third, the NET is cheaper than the commercial networks. The U.S. government continues to subsidize the NET, infusing $11.5 million each year.\textsuperscript{66} This generous subsidy allows local NET access providers to furnish NET members with unlimited use and on-line time for only twenty dollars each month.\textsuperscript{67} This fee is significantly cheaper than fees for popular networks, such as CompuServe and America Online, which charge consumers for hourly service.\textsuperscript{68}

The international and economic significance of the NET has yet to be determined. The NET already links an estimated 152 countries and is expected to connect over 100 million computers worldwide by the year 1998.\textsuperscript{69} In

\begin{itemize}
  \item \textsuperscript{61} See Money-Go-Round, supra note 7, at 15.
  \item \textsuperscript{62} Once connected, NET users, like commercial network subscribers, can use a number of services, including sending and receiving E-Mail, previewing electronic bulletin board postings, accessing many on-line libraries, and downloading files.
  \item \textsuperscript{63} RESNICK & TAYLOR, supra note 11, at xxiii.
  \item \textsuperscript{64} See Burk, supra note 58, at 8.
  \item \textsuperscript{65} Id. at 9.
  \item \textsuperscript{66} See RESNICK & TAYLOR, supra note 11, at 47.
  \item \textsuperscript{67} See id. at 46.
  \item \textsuperscript{68} See Gralla, supra note 13, at 161.
  \item \textsuperscript{69} See Verity & Hof, supra note 6, at 82.
\end{itemize}
addition, over 20 million users worldwide rely on the services of today’s wide area networks (“WAN”s), such as the NET, the UKnet in the United Kingdom, the Dnet in Germany, or the AUSEAnet in Australia and Southeast Asia. Moreover, the NET provides countless business opportunities for individual PC owners and major corporations. As observers note, the NET “will become one of the busiest business districts the world has ever known.” It will increasingly provide opportunities for sales, link buyers with sellers, and facilitate customer service.

3. DEFAMATION: THE DEVELOPMENT OF U.S. LIBEL LAW

Long before the NET revamped global communication opportunities, people defamed others through more conventional means. While modern science expands the means by which people communicate, so too does technology increase the potential for electronic defamation. To understand where the law of libel likely will lead, it is necessary to examine where the law has been, and discuss how the developing trends of present defamation law will continue to shape such law in the future.

Communication is “defamatory if it tends to harm the reputation of another as to lower him [or her] in the estimation of the community or to deter third persons from

70 The NET itself is a WAN, a network that ties “together users who are widely separated geographically.” JAMES MARTIN, LOCAL AREA NETWORKS: ARCHITECTURES AND IMPLEMENTATIONS 3 (2d ed. 1994). Another WAN is the BITNET, which connects thousands of people in more than 32 countries. Regional networks like the Bay Area Regional Network in northern California or the research oriented AUSEAnet in Australia link thousands of computers together and connect them to these WANs. See id.

Similarly, a local area network (“LAN”) facilitates communication over shorter distances. Id. Students at the University of Pennsylvania, for example, can access the NET via the campus PENNnet. Computer users connect to one of these types of access providers, either a WAN or LAN, in order to gain NET privileges.

71 See Burk, supra note 58, at 17-18.

72 See supra note 17 and accompanying text.

73 Verity & Hof, supra note 6, at 88.
associating or dealing with him [or her]." The tort of defamation takes two forms: slander and libel. "Slander is publication in transitory form," such as speech; libel is publication in a more permanent form. A remark could be libelous if published in a magazine, newspaper, or book. The transmission of defamatory messages in cyberspace is best characterized as a libelous tort because such messages are usually premeditated remarks more closely resembling printed publications than speech. Furthermore, computer messages can be saved, downloaded to disk, printed, and distributed, thus lasting longer than transitory broadcasts.

3.1. Strict Liability

Before 1964, the U.S. common law action for defamation was a strict liability tort. Free from constitutional restrictions, the individual state courts and legislatures independently determined the elements of defamation. Consistent with strict liability requirements, in most states the plaintiff neither had to prove that the defamatory

74 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th ed. 1984) (citing RESTATEMENT (SECOND) OF TORTS § 558 cmt. e (1977)).
77 See id. at 91.
78 See id.
80 See SMOLLA, supra note 28, § 1.03[1]. "The prevailing attitude . . . was that libelous speech was a personal assault and that the person's reputation could be vindicated through suit without creating any constitutional conflict [i.e., the curbing of free speech]." Symposium, Values in Conflict: Twenty-Five Years After New York Times v. Sullivan, PROCEEDINGS OF THE FIRST ANNUAL SYMPOSIUM OF THE CONSTITUTIONAL LAW RESOURCE CENTER, Drake University Law School, Mar. 30-31, 1990, at 12 [hereinafter Values in Conflict].
81 The Restatement of Torts suggested a guideline for the states to follow. See RESTATEMENT OF TORTS § 558 (1938). "To create liability for defamation there must be an unprivileged publication of false and defamatory matter of another which (a) is actionable irrespective of special harm, or (b) if not actionable, is the legal cause of special harm to the other." Id.
statement was false, nor that he or she suffered any actual injury to reputation. The complainant merely had to demonstrate that "the defendant was responsible for uttering or publishing to another a derogatory statement that would expose the plaintiff to public hatred, shame[,] or ridicule." The burden rested with the defendant to prove that the statements were true or that he or she qualified for a conditional or absolute privilege. Absent such a showing, the defendant was liable to the plaintiff for general, and often punitive, damages.

3.2. Constitutionalizing the Law of Defamation

In *New York Times v. Sullivan*, the Supreme Court determined that First Amendment principles limited state defamation laws. A group of civil rights activists had purchased an advertisement in the New York Times that falsely accused Montgomery, Alabama public officials of engaging in several repressive and discriminatory practices in 1960. Although L.B. Sullivan was not explicitly named in the advertisement, Alabama law allowed criticism of the police department he supervised to reflect upon his personal reputation. Sullivan sued the New York Times for libel and won. The Supreme Court of Alabama then affirmed the decision of the lower court.

The U.S. Supreme Court, however, reversed. Justice Brennan, speaking for the Court, asserted that "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The Court held that Sullivan could not recover

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82 See *Values in Conflict*, supra note 80, at 11.
83 *Id.*
84 See *id.*
85 See *id.*
87 See *id.* at 256-58.
88 See *id.* at 257-58. L.B. Sullivan was the former Director of Public Safety for Alabama. *Id.*
89 See *id.* at 263.
91 Sullivan, 376 U.S. at 270 (citations omitted).
for the defamatory falsehood unless he proved the statement was made with "actual malice." Actual malice was defined as "knowledge that [a statement] was false or with reckless disregard of whether it was false or not." This decision altered U.S. libel law forever. Not only were state laws henceforth limited by the First Amendment, but libel and slander were to be analyzed according to behavior, as opposed to a strict liability standard.

The Supreme Court extended this "actual malice" test to include "public figures" other than "public officials" in Curtis Publishing Co. v. Butts and its companion case, Associated Press v. Walker. In these two cases the Court found that "some people, even though they are not part of the government, are nonetheless sufficiently influential to affect matters of important public concern." In Butts, the Court ruled that a college athletic director accused by a national magazine of fixing a football game was a public figure. Similarly, the Court in Walker found that General Walker's involvement in the desegregation of the University of Mississippi qualified him as a public figure. The Butts and Walker decisions continued the Court's constitutionalization of state defamation laws. Criticism of public figures could no longer be curtailed without violating the First Amendment.

The Supreme Court eventually determined that the "actual malice" standard was too high a burden for defamed
private plaintiffs to satisfy. In *Gertz v. Robert Welch, Inc.*, 101 the Court refused to extend the *Sullivan* "actual malice" standard to libel suits brought by private plaintiffs. Instead, the Court held that states could allow private individuals to recover against defendants under some form of liability with a standard of proof higher than strict liability (i.e., negligence, recklessness, or knowing falsity), but lower than "actual malice." 102 The Court reasoned that private individuals were deserving of more protection than public figures because they did not voluntarily expose themselves to the public spotlight, nor did they have access to the same channels of communication to challenge defamatory remarks. 103 The Court limited a private plaintiff's damages under the negligence standard to actual injuries suffered. 104 In order to collect punitive or presumed damages, the higher "actual malice" standard had to be satisfied. 105 Still, *Gertz* endorsed the "actual malice" standard for defamation of public officials, 106 emphasizing the Court's shift away from a common law strict liability standard for defamation.

More recently, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 107 the Supreme Court held that the First Amendment protects only speech of public concern. The Court applied a balancing test to weigh a state's interest in compensating private individuals for injury to their reputation against an individual's First Amendment right of expression. 108 The Court determined that speech concerning

102 *See id.* at 347.
103 *See id.* at 344-45.
104 *See id.* at 349-50.
105 *See id.*
106 Note that *Gertz* also narrowed the interpretation of a public figure. The Court determined that there are three types of public figures: (1) those of general fame who are public figures for all purposes; (2) those who have voluntarily injected themselves into a controversy are public figures with respect to that controversy; and (3) those who are affected by the actions of other public figures (i.e., a defendant in a highly publicized murder trial). *See id.* at 351.
108 *See id.* at 757.
private matters merited reduced constitutional safeguards. Therefore, a private plaintiff suing over alleged defamatory statements could receive "punitive damages — even absent a showing of 'actual malice.'" Dun & Bradstreet restricts the "actual malice" test to cases in which "the plaintiff is a public figure and . . . the contested statement is a matter of public concern."

4. CYBERSPACE CASE LAW

In light of New York Times Co. v. Sullivan and its progeny, state courts no longer view defamation as a strict liability tort. Instead, jurisdictions have shifted from the strict liability standard to one of actual fault. Much of today's libel litigation, however, revolves around the identity of the litigants involved, not the libel. In other words, the fault requirement rests more upon a defendant's status as a publisher or bookstore than upon the contested action of that party (since negligence is not the only applicable standard).

The same analysis applies to electronic libel. As one commentator notes: "[t]he first test for liability for electron-

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109 See id. at 759.
110 Id. at 761.
111 TRIBE, supra note 93, § 12-13.
112 After Dun & Bradstreet, at least one commentator has argued that the Court returned "at least a portion of the law of defamation that had apparently been 'constitutionalized' back to its common law status." SMOLLA, supra note 28, § 1.05[3].
113 The Restatement (Second) of Torts, published after the Gertz decision, incorporates a negligence standard for defamation. See RESTATEMENT (SECOND) OF TORTS § 558 (1977). The Restatement includes four elements in an action for defamation: "(1) a false and defamatory statement concerning another, (2) an unprivileged publication to a third party, (3) fault amounting at least to 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.
115 See Mitchell Kapor, Civil Liberties in Cyberspace: When Does Hacking Turn from an Exercise of Civil Liberties into Crime?, SCI. AM., Sept. 1991, at 158, 162 (noting that "[n]etworks as they now operate contain elements of publishers, broadcasters, bookstores[,] and telephones, but no one model fits").
ically published libel is the medium of each defendant." 116 Much of the literature on electronic defamation questions the nature of this medium, focusing on whether "computer BBSs should be viewed as similar to other existing forms of communication for the purposes of legal analysis." 117 Another observer notes that "[s]ignificant First Amendment issues will necessarily arise as courts attempt to apply traditional defamation law, which assumes a publisher with multiple recipients, to an 'information superhighway' where virtually everyone can instantly become publisher, source, recipient, and target of allegedly defamatory information." 118 Courts should simplify their approach by first determining how a BBS is utilized and then applying traditional defamation law.


CompuServe, like other commercial computer networks, provides many on-line electronic fora 120 for its members' use. One of the more popular forums available to subscribers is the Journalism Forum, which provides users with an opportunity to discuss the journalism industry with one another. 121 Unlike traditional publishers, CompuServe relinquishes its editing control to independent organizations such as Cameron Communications, Inc. ("CCI"). 122 In 1991, CCI agreed to review and edit the contents of the Journalism Forum, including Rumorville USA ("Rumorville"), an electronic newspaper published by

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120 See id. at 137. These electronic fora include "libraries" of bulletin boards, interactive on-line conferencing, and topical databases. See id.
121 See id.
122 See id.

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Don Fitzpatrick Associates ("DFA"). Under a contract between CCI and DFA, DFA accepted total responsibility for the contents of Rumorville. Thus, CompuServe did not actually review the contents of Rumorville before placing the newsletter on-line.

Cubby, Inc. ("Cubby") soon developed the database Skuttlebut to challenge Rumorville as the leading journalism forum of the on-line market. Cubby later charged CompuServe with making defamatory remarks about Skuttlebut via Rumorville. CompuServe admitted that the remarks at issue were defamatory. CompuServe argued, however, that it was a distributor and not a publisher of the material and therefore was not liable unless it had reason to know of the newsletter's content. New York's Southern District agreed and granted CompuServe secondary status, noting that bookstores and other "distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation." The district court held that CompuServe was not liable because it had contracted out its editorial control to CCI and therefore had no opportunity to review the periodical's content before it was made available to subscribers. The court suggested that to require CompuServe to screen all forum publications would be akin to requiring a bookseller "to make himself [or herself] aware of the contents of every book in his [or her] shop. It would be altogether unreasonable to demand so near an approach

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123 See id. CompuServe had no contractual relationship with DFA. See id.
126 See id.
127 See id.
128 See id.
129 See id.
131 See id. at 140.
to omniscience."\(^{132}\)

Although the medium of communicative exchange has changed dramatically, the First Amendment can address itself to a more diffuse and versatile communications industry if courts can liken network carriers to one of four publisher categories: primary publisher,\(^{133}\) distributor,\(^{134}\) republisher,\(^{135}\) or common carrier.\(^{136}\) The courts must then determine what standard of liability is appropriate for each classification. In essence, the Southern District did exactly that while concentrating on the identity of the defendant in \textit{Cubby}.\(^{137}\) The court first compared CompuServe to a traditional news vendor, a bookstore (or distributor), and then applied a negligence standard.\(^{138}\) This two-step analysis will soon become the dominant approach for assessing the liability of network carriers.\(^{139}\) Whereas \textit{Cubby} formulated a test for distributors of defamatory material, publishers merit a stricter standard of liability because they exercise editorial control over the content of messages.

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\(^{132}\) \textit{Id.} at 139 (quoting Smith v. California, 361 U.S. 147, 153 (1959)). The Court noted that the constitutional guarantees of freedom of speech and the press preclude holding distributors strictly liable for the contents of the reading materials they carry. Otherwise, bookshops might restrict their sales to books they have inspected and therefore reduce the amount of information available to the public. \textit{Id.}

\(^{133}\) A primary publisher, like a newspaper, gathers and disseminates information. Those who aid publication of a defamatory statement also qualify as primary publishers. This group includes reporters, managing editors, and the like. \textit{See} Thornton, \textit{supra} note 116, at 179.

\(^{134}\) A distributor, like a bookstore, merely passes along the material. He or she is rarely cognizant of the contents of the published work. \textit{See id.}

\(^{135}\) A republisher, like a radio station which broadcasts information, is held liable as if it originally published the statement or story. \textit{See id.}

\(^{136}\) A common carrier, like a telephone company, has no editorial control over messages sent. Although a common carrier often falls victim to FCC regulation, it may not be held liable for any defamatory transmissions by its customers. \textit{See id.} at 179-80.


\(^{138}\) Schlachter further summarizes the holding of \textit{Cubby}, alleging that "BBSs/sysops that develop electronic databases will be treated as primary publishers, while BBSs/sysops that act as a 'conduit' for other database developers or publishers will be treated as secondary publishers [or distributors]." Schlachter, \textit{supra} note 2, at 144.

4.2. Cubby's Cyberspace Successors: Home and Abroad

Recently, Stratton Oakmont, Inc. ("Stratton Oakmont") and its President, Daniel Porush, filed a libel suit against Prodigy for alleged defamation remarks posted on the defendant's "Money Talk" bulletin board. A third party had posted a message on the board, accusing the plaintiffs of conducting a fraudulent and dishonest brokerage business. Stratton Oakmont insists that it has been disgraced and humiliated publicly, not only on Long Island, but wherever publication of the statement has occurred. Stratton Oakmont and Porush argue that Prodigy had an obligation to remove the defamatory messages, which first appeared on October 23, 1994, and remained on-line well into November. Prodigy asserts, however, that it is not responsible for what is published on the bulletin board unless its system operator has endorsed affirmatively the position taken, or has failed to notify customers that Prodigy itself does not endorse the positions expressed by other subscribers. Furthermore, Prodigy maintains that there are simply too many messages posted simultaneously for an operator or sysop to review and remove all potentially defamatory statements.

This case may be distinguished from Cubby in that Prodigy exercises editorial control over its bulletin board and thus has reason to know of the defamation. As one scholar recently noted, the "issue is whether Prodigy should be held to a higher standard of care because it apparently has taken on a greater duty by screening its system for

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141 See id. at 1.
143 See id. at 3.
144 See Conner, supra note 15, at 241 (summarizing the views of George M. Perry, Prodigy's Vice President and General Counsel).
145 See id. at 241-42.
A New York Supreme Court recently decided whether Prodigy was a publisher or distributor on a motion for partial summary judgment. The court noted a twofold distinction between CompuServe and Prodigy: (1) Prodigy holds “itself out to the public and its members as controlling the content of its computer bulletin boards;” and (2) Prodigy implements “this control through an automatic software screening program” and certain guidelines which Board leaders are required to enforce. The court explained that “[b]y actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste.’ . . . [Prodigy] is clearly making decisions as to content.” Based on the foregoing, the court ruled in favor of the plaintiff, determining that Prodigy “is a publisher rather than a distributor.”

As indicated above, the court ruled only on the motion for partial summary judgment. Whether a computer network is a publisher or distributor, however, may have tremendous implications for the on-line industry. If computer networks lack the capital and resources to exercise editorial control, executives may decide to shut down operations and avoid altogether any effort to monitor messages, rather than face potential liability for defamation. Alternatively, computer networks may follow CompuServe’s lead and relinquish editorial control to independent contractors. This may only encourage rampant on-line defamation. Regardless of whether Prodigy becomes the

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147 Goldstein, supra note 140, at 7 (discussing a statement by Henry H. Perritt, Jr., a professor at Villanova Law School); see also Kathleen Price, The International Legal Information Network (ILIN)- A Practical Application of Perritt’s Tort Liability, the First Amendment, and Equal Access to Electronic Networks, 38 VILL. L. REV. 555, 559 (1993) (stating that the “decision to exercise control may well bring with it tort liability”).


149 Id. at 1797. The court further held that even though “such control is not complete . . . [it] does not minimize or eviscerate the simple fact that [Prodigy] has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards.” Id.

150 Id.
“big one”\textsuperscript{151} for assessing network liability for cyberspace defamation, courts should continue first to compare computer networks like Prodigy with traditional publication classifications and should then apply the First Amendment tests.

Two other cyberspace defamation cases that recently have settled are \textit{Medphone Corp. v. Denigris}\textsuperscript{152} and \textit{Suarez Corp. Industries v. Brock N. Meeks}.\textsuperscript{153} In \textit{Medphone}, Peter Denigris used Prodigy’s “Money Talk” to make defamatory remarks about the Medphone Corporation (“Medphone”) and its products.\textsuperscript{154} Medphone argued the product disparagement conducted by Denigris on “Money Talk” reduced the price of the company’s stock, damaged its reputation, and otherwise caused Medphone irreparable harm.\textsuperscript{155} Rather than proceed to trial, Denigris agreed not to make any future false statements about Medphone via Prodigy or through any other means or mode of communication.\textsuperscript{156}

In \textit{Suarez}, Brock N. Meeks, editor of \textit{CyberWire Dispatch}, an electronic newsletter posted on California’s WELL,\textsuperscript{157} accused Suarez Industries (“Suarez”) of running

\textsuperscript{151} Robert B. Charles, \textit{Freedom of Expression and Libel in Cyberspace: Defamatory Transmissions over a Major Computer Network Present the Next First Amendment Forum}, NATL L.J., Dec. 12, 1994, at B10. This case will not become the “big one” for determining the legal implications for all commercial on-line information services. As this Comment was submitted for publication, Stratton Oakmont dropped its $200 million libel suit against Prodigy in return for an apology. See Peter H. Lewis, \textit{For an Apology, Firm Drops Suit Against Prodigy}, N.Y. TIMES, Oct. 25, 1995, at D1. There is no assurance, however, that Judge Ain of the New York Supreme Court will vacate or reverse his earlier ruling. See \textit{id}. Therefore, the issues examined in this Comment remain completely germane to a discussion of cyber-libel availability.

\textsuperscript{152} See Medphone Corp. v. Denigris, No. 92-CV-3785 (D.N.J. filed Sept. 11, 1992).


\textsuperscript{154} See Plaintiff’s Complaint at 6-7, Medphone Corp., No. 92-CV-3785.

\textsuperscript{155} See \textit{id}. at 1.

\textsuperscript{156} See Medphone Corp. v. Denigris, No. 92-CV-3785 (D.N.J. filed Nov. 30, 1993) (order of dismissal at 1).

\textsuperscript{157} See generally \textit{Rheingold}, supra note 16, at 2-3 (providing a personal account of WELL experiences).
an Electronic Postal Service ("EPS") "scam."\footnote{158} Suarez had advertised on the Internet that its EPS was a guaranteed moneymaker. Meeks responded by distributing an article on the WELL stating that Suarez was conducting a scam through their advertisement.\footnote{159} Despite the activity on the NET, Suarez decided to sue Meeks personally for his defamatory remarks. The NET (which includes the WELL) has no central operator to hold liable for libelous remarks.\footnote{160} Therefore, it was easier to sue Meeks directly rather than test the NET's presumed immunity. When legal fees finally grew too burdensome, Meeks agreed to pay sixty-four dollars in court costs and to fax questions about future Suarez stories to the plaintiff within forty-eight hours of publication.\footnote{161}

Finally, there have been two Cyberspace defamation suits filed overseas. In \textit{Rindos v. Hardwick},\footnote{162} the Western Australian Supreme Court ruled that anthropologist Gilbert Hardwick defamed fellow anthropologist David Rindos on DIALx Science Anthropology, the international bulletin board for anthropologists.\footnote{163} Hardwick's messages suggested that Rindos both engaged in pedophilia and relied on bullying tactics rather than appropriate research methods.\footnote{164} Judge David Ipp awarded $40,000 in damages to Dr. Rindos for two reasons: (1) for the harm done to his personal and professional reputation; and (2) for the difficulty that Dr. Rindos may experience in finding employment as a result of the defamation.\footnote{165}


\footnote{159} See Resnick, supra, note 20, at A21.

\footnote{160} See supra notes 62-68 and accompanying text.


\footnote{162} See, e.g., Thompson, supra note 20, at 41S (discussing the Australian case Rindos v. Hardwick, No. 1994 of 1993 (Austl. filed March 31, 1994)).


\footnote{165} See id.
Another case was recently settled in the United Kingdom, further demonstrating the “awesome potential the net offers to individuals to publish very widely . . . .” Dr. Laurence Godfrey, a former nuclear physicist at the German Electron Synroton Laboratory in Hamburg, issued a writ against Dr. Philip Hallam-Baker for libelous remarks about his professional work posted on USENET in 1993. The case settled in June 1995, with Dr. Hallam-Baker paying a significant sum in damages out of court. Once again, a damaged plaintiff chose not to sue the NET as it has no central operator to exercise editorial control. It remains far easier for defamed plaintiffs such as Dr. Godfrey to sue individual defendants rather than the NET because such wrongdoers are identifiable. Although the NET may not itself be liable for defamatory remarks posted by subscribers, this case suggests it does not shield its users from personal liability.

5. CYBERSPACE JURISDICTION: FORUM SHOPPING POTENTIAL ABROAD

Not only are there difficulties with defining the status of computer networks, but the global nature of cyberspace creates opportunities for international libelous torts and forum shopping. One of the advantages of interactive communication in cyberspace is that it does not recognize

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166 See, e.g., Rich, supra note 20, at 24 (discussing the dispute between Dr. Laurence Godfrey and Dr. Philip Hallam-Baker).
167 See id.
168 CompuServe Users May Soon Plug Into the Internet Buzz, S. CHINA MORNING POST, Aug. 2, 1994, at 3, available in LEXIS, Asiapc Library, Schina File (noting the that “largest collection of discussion groups on the Internet is USENET, which involves nearly seven million people. reading and posting messages on thousands of constantly updated topics”).
170 See Clare Dyer, Scientist Wins Out of Court Damages for Internet Libel, GUARDIAN (Manchester), June 5, 1995, at 5.
171 Again, the identity of a computer network defendant will determine the liability for libelous remarks posted on the particular service. A distributor must have reason to know of a defamatory remark before it is held liable for the tort of libel. A publisher, on the other hand, is presumed to know of the defamatory remark. Traditional Sullivan and Gertz standards of liability apply to publishers.
physical boundaries. As one commentator notes: "[w]ith a worldwide communications network such as the Internet, which spans 146 countries, a [defamation] suit could be filed practically anyplace the network touches." 172 Computer networks simply offer unparalleled opportunities for injuring individual reputations anywhere in the world. In light of this potential for international defamation and forum shopping, more U.S. residents may soon select from a number of favorable forums, such as England, and choose to file defamation suits abroad. As one observer notes: defamation charges generated in cyberspace will "catch a lot of people napping, as more and more suits will wind up in English courts."173 Another commentator argues one step further, alleging the consequences of cyber-libel for the British legal system will be considerable.174

5.1. Forum Shopping Rationale: Personal Jurisdiction in the United States

Under the substantive law of libel, due process only requires that a defendant have certain "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"175 Furthermore, a defendant must reasonably foresee the publication causing injury in that state, for "the foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum state are such that he [or she] should reasonably anticipate being haled into court there."176 Therefore,

172 Resnick, supra note 20, at A1, A21; see also Burk, supra note 58, at 4 (noting that "[w]ithin this shadowy realm of cyberspace, time, distance, and physical barriers are meaningless").
173 Telephone Interview with Robert D. Sack, Partner with Gibson, Dunn & Crutcher, New York, N.Y. (Nov. 18, 1994).
174 See Martin Bright, Caught in the Net, GUARDIAN (Manchester), Apr. 25, 1995, at Law10 (summarizing the thoughts of Nick Braithwaite, a media lawyer with the London law firm Clifford Chance). Braithwaite believes that "[a]nyone with an international reputation will sue [in England] because, relatively speaking, it's like falling off a log." Id.
U.S. residents can file defamation suits anywhere the libel is published, since it is presumed that the damage occurs where the defamation has been read. For example, in *Stratton*, the plaintiff could have filed a defamation suit in New Jersey if it had had a reputation to uphold in that state. Prodigy has thousands of subscribers in New Jersey and therefore meets the "minimum contacts" test of *International Shoe*. Prodigy also reasonably could have foreseen users reading the libelous statements in New Jersey and therefore satisfies the *World-Wide Volkswagen* jurisdictional standard.

The interesting question is whether plaintiffs like *Stratton Oakmont* will file defamation suits abroad to take advantage of favorable libel laws. For example, U.S. residents will fare better filing cyberspace defamation suits in England, not because they lack an appropriate forum at home, but rather because the First Amendment governs U.S. libel law. While *Sullivan* constitutionalized the law of defamation and increased the freedoms of expression and the press, the British cause of action remains one of strict liability, a much easier standard for plaintiffs to meet. Therefore, U.S. residents may be willing to satisfy tough foreign jurisdictional requirements to take advantage of foreign libel laws.

5.2. British Law of Defamation

As mentioned above, British law assumes that defamatory statements are false.\(^{177}\) As long as printed or spoken words are in permanent form, the United Kingdom presumes a libelous remark adversely affects the complainant's reputation.\(^{178}\) Plaintiffs need only "establish that the

\(^{177}\) See SMOLLA, supra note 28, § 1.03[3].

\(^{178}\) See Defamation Act, 15 & 16 Geo. 6 & 1 Eliz. 2 ch. 66, § 3 (1952) (Eng.). The text of the Act is as follows:

1. In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage—
   
   a. if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
   
   b. if the said words are calculated to cause pecuniary
words complained of refer to them, were published by the defendant, and bear a defamatory meaning.\textsuperscript{179} Strict liability assumes actual damages and places the burden of both justification and proving the truth of the purportedly defamatory statement on the defendant.\textsuperscript{180} There is no actual malice standard governing publications about public figures, nor can defendants rely on a negligence test to escape liability.\textsuperscript{181} Instead, the United Kingdom "presumes that a tort has been committed from the very fact that a criticism has been published, and leaves the [defendants] to exculpate themselves as best they can."\textsuperscript{182} Such an antiquated approach makes London the "international libel capital,"\textsuperscript{183} providing plaintiffs, particularly public figures in the United States, with a more favorable forum to exploit.

5.3. Satisfying British Jurisdictional Requirements

5.3.1. Territorial Jurisdiction

British defamation law clearly favors the plaintiff in a libel action.\textsuperscript{184} To bring a defamation suit in the United Kingdom successfully, however, it is necessary to establish first that the British courts may adjudicate the case. That is, the courts must both possess and exercise jurisdiction over the defamation matter. A plaintiff must first serve a writ on the defendant.\textsuperscript{185} Service of the writ poses no

\textsuperscript{180} See id.
\textsuperscript{181} See id.
\textsuperscript{182} Youm, supra note 25, at 242 (quoting Geoffrey Robertson, a prominent British media lawyer).
\textsuperscript{183} SMOLLA, supra note 28, § 1.03[3].
\textsuperscript{184} See infra note 230.
problems if the defendant is present within the United Kingdom or submits to the court's jurisdiction.\(^{186}\)

In order to serve a writ outside Great Britain, however, the plaintiff must demonstrate at least two things: (1) the complainant has a good arguable case on the merits; and (2) one of the heads of Order 11, rule 1(1) applies.\(^{187}\) When the claim is founded on the tort of libel, the plaintiff must prove that the damage to his or her reputation was sustained or resulted from an act committed within the English jurisdiction.\(^{188}\) For example, if Stratton Oakmont had suffered damages in England, the company could have filed suit against Prodigy in England. The burden is on the plaintiff to show why the British courts provide the proper forum to hear the case.\(^{189}\) Of course, as in the United States, the defendant does have the right to invoke the doctrine of forum non conveniens\(^ {190}\) to demonstrate why another forum would be more appropriate. This doctrine, however, has only recently been accepted in the United Kingdom and would be unlikely to pose problems for a plaintiff.\(^ {191}\)

Two important foreign cases illustrate the growing trend

\(^{186}\) See id.

\(^{187}\) See id. at 191, 199. The appropriate head of Order 11, Rule 1(1) for Torts includes: "(f) When 'the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction.'" Id. at 199.

A person defamed in England by a person domiciled in the European Economic Community may also avail him or herself of the English courts. See generally Civil Jurisdiction and Judgments Act, 1982, § 2(1) (Eng.) (giving legal effect to the 1968 Brussels Convention's jurisdictional provisions).

\(^{188}\) See Rules of the Supreme Court 1965 Order 11, r 1(1)(f) (Eng.) (formerly Ord. 11, r 1(1)(h)) (allowing a writ to be served on a defendant outside of Scotland); Private International Litigation § 2.14 (Sir Jack Jacob ed., 1988).

\(^{189}\) See NORTH & FAWCETT, supra note 185, at 204.

\(^{190}\) Black's Law Dictionary defines forum non conveniens as the "discretionary power of courts to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum." BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

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of filing libel suits in England. In Kroch v. Rossell,\textsuperscript{192} the plaintiff was a foreign national without any English associations.\textsuperscript{193} The defendants had published defamatory remarks about the petitioner in two foreign countries.\textsuperscript{194} Copies of the same publication were eventually sold in England and Kroch filed suit.\textsuperscript{195} The British Court of Appeals refused to serve a writ outside of the jurisdiction because it determined that the plaintiff lacked a reputation to protect in England.\textsuperscript{196}

In Contrast, in Jenner v. Sun Oil Co.,\textsuperscript{197} a Canadian court ruled that “if the hearing and understanding is within the jurisdiction the place of origin of the sound-waves or ether-waves is immaterial.”\textsuperscript{198} The court allowed the plaintiff, a resident and businessman of Ontario, to serve a writ on two U.S. broadcasters.\textsuperscript{199} The court reasoned it was of little consequence that the slanderous statement originated in the United States, so long as the plaintiff could demonstrate that the broadcast was “transmitted as to be published within the jurisdiction and cause[d] the plaintiff to suffer substantially in his reputation within the jurisdiction.”\textsuperscript{200} British barrister John Cooper notes that U.K. courts will most likely accept this latter ruling such that “any transmission received in England will be published in England and will be governed by English libel laws and procedure.”\textsuperscript{201} This same analysis lends itself to defamation in cyberspace and the potential for suits filed overseas.

\begin{thebibliography}{9}
\bibitem{192} Kroch v. Rossell, [1937] 1 All E.R. 725 (Eng. C.A.).
\bibitem{193} \textit{See id.} at 729.
\bibitem{194} \textit{See id.} at 726-27.
\bibitem{195} \textit{See id.} at 728-29.
\bibitem{196} \textit{See id.} at 729.
\bibitem{199} \textit{See Jenner}, 2 D.L.R. at 526-27.
\bibitem{200} Cooper, \textit{supra} note 198, at 1021.
\bibitem{201} \textit{Id.} at 1022. Cooper further alleges that “all persons may invoke or become subject to the jurisdiction of the English courts, even though they are foreign by nationality or of foreign domicile and even though the cause of action has arisen abroad or is connected with a foreign country.” \textit{Id.} at 1021.
\end{thebibliography}
5.3.2. Choice of Law

Territorial jurisdiction will undoubtedly influence a plaintiff's decision to forum shop. Yet, the determination is not fully informed unless the proponent ascertains which choice of law a jurisdiction will apply. The U.K. courts "test the defendant's conduct by reference to the English as well as to the foreign law of tort." In other words, the English system first looks to see whether the wrong, if committed in England, would have been actionable in England. The courts then look to see whether the action would have been justifiable by the law of the forum where the wrong was committed. If the tort originated in England, British law governs the claim because both the lex fori and lex loci delicti coincide. Yet, even if the tort was committed abroad, the courts have seemed to combine the two laws with flexibility. There is a special provision for defamatory remarks published abroad, and simultaneously read or previously published within the United Kingdom, that applies the applicable law of "the relevant part of the United Kingdom." Therefore, U.S. parties can file defamation suits in England regardless of whether their claims are justifiable under U.S. libel laws.

5.4. Cyberspace Defamation Suits In England: The Innocent Dissemination Exception

As mentioned above, if defamatory material has been

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202 NORTH & FAWCETT, supra note 185, at 533.
203 See Phillips v. Eyre, [1869] 4 L.R.-Q.B. 225, 241-43, aff'd, [1870] 6 L.R.-Q.B. 1 (discussing whether a plaintiff must prove the defendant offended both English law and the law of the place where the tort occurred).
204 Black's Law Dictionary defines lex fori as the "law of the forum, or court." BLACK'S LAW DICTIONARY 910 (6th ed. 1990).
205 Black's Law Dictionary defines lex loci delicti as "[t]he law of the place where the crime or wrong took place." Id. at 911.
207 NORTH & FAWCETT, supra note 185, at 551.
208 See id. at 28-29.
published to a third party in England and the plaintiff has suffered damage to his or her reputation there, the complainant can choose England as an appropriate forum to file suit.\textsuperscript{209} While English defamation law governing traditional means of communication denies protection to publishers, printers, and authors of books, certain general defenses do exist.\textsuperscript{210} For the most part, however, the British law of defamation remains one of strict liability for publishers, including publishers in cyberspace.\textsuperscript{211} Therefore, U.S. plaintiffs defamed on the NET may soon take advantage of the more favorable English forum and file defamation suits overseas. Given the NET's cooperative nature, however, it cannot and should not be held liable for the irresponsible remarks posted by its users. Instead, individual publishers should be held personally accountable for their own defamatory remarks. The \textit{Medphone} and \textit{Godfrey} cases attest to this growing trend.

\subsection*{5.4.1. Innocent Dissemination Defense}

The key determinant for cyberspace liability in England, however, rests on who actually "publishes" the material.\textsuperscript{212} Whereas the British law of defamation remains one of strict liability for publishers, "[t]here are certain circumstances in which a person playing a subordinate part in the distribution of libellous matter can escape liability."\textsuperscript{213} The "innocent dissemination" defense is reserved solely for news vendors, booksellers, and distributors.\textsuperscript{214} This con-

\textsuperscript{209} See id. at 551.
\textsuperscript{210} See \textsc{Peter F. Carter-Ruck \& Richard Walker}, \textsc{Carter-Ruck on Libel and Slander} 191 (1985). General defenses include: (1) justification or truth, see id. at 86; (2) fair comment or honest opinion, see id. at 97; (3) absolute privilege (i.e., during judicial or Parliamentary proceedings), see id. at 109; (4) qualified privilege (i.e., statements made in Parliamentary reports or in the performance of a moral duty), see id. at 119; (5) vulgar abuse and therefore not understood to be slanderous, see id. at 149-50; (6) unintentional defamation, see id. at 85; and (7) apology and payment into court. See id.
\textsuperscript{211} See id. at 197.
\textsuperscript{212} See id.
\textsuperscript{213} Id. at 197.
\textsuperscript{214} Telephone Interview with Ms. Nikki Keat, Associate with Stephens Innocent, London, England (Feb. 5, 1995). Courts will not hold a distributor liable if it can demonstrate that it did not know the
cept may be troublesome to reconcile with any of the other
tenets applicable to British libel laws. Indeed, the
justification completely contradicts the notion of strict
liability. The rule suggests, however, that the British
courts will address cyberspace defamation suits in much the
same way as their American counterparts: by first examin-
ing the litigants and then applying British libel law. This
approach, in turn, will have a tremendous impact on forum
shopping decisions.

The Queen's Bench first applied the innocent dissemina-
tion defense in Emmens v. Pottle, holding that a news
vendor had not published a libel if the distributor could
prove:

(a) that [it] did not know that the newspaper in
question contained the alleged libel, and
(b) that [it was] not negligent in not knowing that it
contained the libel, and,
(c) that [it] neither knew nor ought to have known
that the newspaper was of a character that it was
likely to contain libellous matter.

The negligence standard inherent in the first application of
this innocent dissemination defense almost completely
mirrors that of Judge Leisure in Cubby.

Defendants in British courts have invoked this defense
on a number of occasions, most recently in Goldsmith

publication contained the libel complained of, that it did not know that
the publication was supposed to contain libelous matter, and that its
ignorance was not due to any want of care on its part. See CARTER-
RUCK & WALKER, supra note 210, at 197.

See CARTER-RUCK & WALKER, supra note 210, at 197.

See discussion infra §§ 5.4.2, 6.


CARTER-RUCK & WALKER, supra note 210, at 197; see Emmens,
16 Q.B. at 357.


See Sun Life Assurance Co. of Canada v. W.H. Smith & Son Ltd.
150 L.T.R. 211 (1933); Bottomley v. F.W. Woolworth & Co., 48 T.L.R.
521 (Eng. C.A. 1932); Weldon v. "The Times" Book Co., 28 T.L.R. 143
(Eng. C.A. 1911).
In this dispute, Lord Denning affirmed the holding of Emmens, noting that no distributor of a periodical "should be held liable for a libel contained in it unless he [or she] knew or ought to have known that the ... periodical ... contained a libel." Of course, this defense rests on the particular facts of each case. A court concluded in *Sun Life Assurance Co.* that the mass and volume of dissemination should not preclude a defendant from monitoring defamatory remarks. Although the courts have determined that a distributor does not have to preview every newspaper or magazine sold, sheer volume will not justify a failure to examine materials periodically.

5.4.2. Impact of the Innocent Dissemination Defense

The innocent dissemination defense will have a significant impact on defamation suits that are generated in cyberspace and ultimately filed in England. For example, if Cubby had brought suit in the United Kingdom, British courts first would have determined Cubby's publishing status. In light of Cubby's independent contractual relationship with CCI, and its own lack of editorial control, the British bench most likely would have concluded that Cubby functioned as an innocent distributor of information that did not know or have reason to know of the defamatory nature of the contents. A distributor, as mentioned above, must know or have reason to know of a defamatory remark before it is held liable for the tort of libel. Thus, the Bench would have agreed with the Southern District's holding. The pro-defendant ruling, in turn, would ultimately discourage U.S. plaintiffs from forum shopping. Defamed plaintiffs will not file suit overseas if English courts apply the same negligence standard available to defendants at home. The primary reason U.S. plaintiffs contemplate filing suit overseas is to capitalize on the British strict liability action. If this action proves unavailable, more and more

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222 Id. at 572.
223 Sun Life Assurance Co. of Canada, 150 L.T.R. at 214-16.
224 See Bottomley, 48 T.L.R. at 521.
225 See id.
U.S. citizens will either sue defendants at home or drop the suit.

The Prodigy decision, on the other hand, articulates a different standard of liability and may have a significant impact on the potential for international forum shopping. Again, assuming Stratton Oakmont could file suit in England, an English court would likely examine Prodigy's monitoring process, determine it functioned as a publisher, and hold it to a higher standard of liability. A publisher is presumed to know of the defamatory remark. In light of Sun Life Assurance Co., the court would not entertain a defense incumbent on the sheer volume of messages that Prodigy must review each minute of the day. Instead, the court would hold Prodigy strictly liable for any defamatory remarks posted on the computer network. The Nassau County Supreme Court potentially has encouraged forum shopping overseas, as it has decided on partial summary judgment that certain computer networks function as publishers. If English courts follow suit, U.S. plaintiffs will soon file actions in England in order to take advantage of strict liability laws for publishers.

6. POTENTIAL FOR FORUM SHOPPING?

U.S. plaintiffs injured on the NET or on a commercial BBS may "in the future flee the fault requirements of the Constitution and seek redress in more media-hostile jurisdictions." The Cubby and Prodigy decisions, however, have only confused American prospects for filing defamation suits abroad. The Prodigy decision may ultimately encourage injured plaintiffs to file suit overseas, as British courts will hold publishers strictly liable for defamatory statements posted on-line. In light of the innocent dissemination defense, however, English courts may not always provide such an unfriendly forum for defendants. Forum shopping will ultimately depend on two things: (1) England's standard of liability for defamation;

and (2) whether U.S. plaintiffs will collect judgment overseas.

6.1. Standard of Liability

England’s strict law of liability will at times encourage U.S. plaintiffs defamed in cyberspace to file defamation suits abroad. Plaintiffs, however, will limit their overseas filing to those instances when this stricter standard of liability applies. For example, a U.S. plaintiff will file a defamation suit in England when the defendant is a publisher. NET users are publishers and therefore are strictly liable for their remarks in cyberspace. In addition, Prodigy suggests that computer networks exercising editorial control over their public fora are publishers. Therefore, in light of the recent Prodigy decision, more and more U.S. citizens defamed on Prodigy, or on the international equivalent, will file suit in England over the next few years.

The innocent dissemination defense, however, may also reduce this incentive to forum shop. British courts may likely side with Cubby and soon rule that certain computer networks such as CompuServe function as distributors. The courts will then allow these networks to plead the innocent dissemination defense, holding them liable only if the networks know or have reason to know of the defamation. Since it is likely that defendants will satisfy this test, U.S. plaintiffs will not file suit in England if courts apply this Cubby-like negligence standard. Nor should they want to sue computer networks such as CompuServe abroad. U.S. courts utilize this same negligence test at home, and, as a result, practically eliminate any incentive to travel to England to file suit. It would be more practical and cost efficient for U.S. plaintiffs to file suit at home and prove network negligence.

6.2. Collecting Judgment

The standard of defamation liability utilized in British courts is a key factor to consider when determining whether to forum shop. The most important reason to file suit overseas, however, should not be the ability to receive a favorable judgment, but rather the ability to collect a
favorable judgment. A plaintiff will only collect damages in England if the defendant has substantial assets in the foreign forum. If not, the plaintiff has no other alternative than to enforce the judgment at home. Bachchan v. India Abroad Publications, Inc. however, holds that English libel judgments may not be enforceable in the United States. Moreover, just last year Matusevitch v. Telnikoff affirmed the Bachchan decision, concluding that in light of the different burdens of proof associated with British and American defamation laws, it would be terribly unfair to the defendant for an American court to enforce a foreign libel judgment. Thus, a judgment in an English court may be only a hollow victory.

The practical effect of Bachchan and Telnikoff will be to reduce the incentive to forum shop when the defendant is a computer network that has no overseas assets, regardless of whether the service functions as a publisher or a distributor. Prodigy and CompuServe do not have substantial assets overseas. Therefore, a British court cannot compel either network to satisfy a libel judgment. These two cases, however, will have no bearing on the incentive to forum shop if the defendant is an individual NET user. NET operators are publishers and will be held strictly accountable for their defamatory remarks. Plaintiffs always bear the risk of suing an individual who lacks the financial means to satisfy judgment. It therefore makes more sense to file a libel suit in a forum that applies a strict standard

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227 See Youm, supra note 25, at 259-60.
228 Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661, 664-65 (N.Y. Sup. Ct. 1992) (noting that "[t]he protection to free speech and the press embodied in that [First] [A]mendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution").
230 See Bachchan, 585 N.Y.S.2d at 662-63. Note that in the United Kingdom, a plaintiff must prove only that the defamatory words referred to him or her, that they were published by the defendant, and that they bear a defamatory meaning. In the United States the plaintiff must prove "actual malice" or negligence in addition to the above requirements. Therefore, Judge Fingerhood ruled that the plaintiff's failure to prove falsity in the English libel action renders the judgment unenforceable in the United States. See id. at 663-64.
231 See e.g., CARTER-RUCK & WALKER, supra note 210, at 197.
of liability for publishers than in a forum that utilizes a negligence standard. Thus, defamed U.S. plaintiffs will seek to avoid the protections of the First Amendment and file suit in England.

6.3. Chilling Free Speech

Perhaps the most troubling aspect of forum shopping is the potential to force self-censorship in cyberspace. As mentioned above, U.S. plaintiffs will most likely avoid bringing suit overseas if the defendant is not a publisher. This likelihood will protect those computer networks that do not exercise editorial control, such as CompuServe, from liability. Yet, individual NET users are constantly at risk of damaging somebody's reputation overseas. As mentioned above, they are deemed publishers of material and are therefore strictly liable for defamatory remarks. The problem is twofold: (1) what may constitute defamation in the United States will not necessarily constitute defamation in England; and (2) U.S. plaintiffs have no opportunity to alter their messages before they are transmitted internationally, thereby eliminating any possibility of tailoring a particular message to satisfy foreign libel laws. NET users may choose to avoid "surfing" the information superhighway altogether to escape any possibility of defaming another.

The U.S. Supreme Court constitutionalized the tort of libel in Sullivan in an effort to protect the freedom of speech. The Court recognized that strict liability chills free speech because publishers afraid of sanctions would choose not to publish certain stories. The same holds true in cyberspace. If the Prodigy decision influences U.S. citizens to forum shop, scientists may soon forego challenging their colleagues or attacking new theories in order to avoid any possible defamation challenge. In addition, NET users may blindly accept statements as truth without testing their validity. Justice Brennan's instruction that

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233 See supra note 86 and accompanying text.
234 See id.
“profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” remains as true today in cyberspace as it did in 1964. Forum shopping, however, has the potential to destroy this national commitment, as softened acquiescence soon may replace caustic and robust commentary. This consequence will not only hamper scientific and political dialogue, but will chill free speech throughout cyberspace.

U.S. citizens place a tremendous value on their freedoms of speech and the press. Consequently, First Amendment interpretation of cyberspace defamation will not change so as to align U.S. defamation law concerning publishers with that of England. Although many issues remain unsettled in the cyberspace arena, one remains perfectly clear: forum shopping serves no place in the cyber-libel arena. The First Amendment should continually serve the needs of cyber-space inhabitants. It should not be a mere theory to be discarded when a better opportunity surfaces overseas. Such activity will not only further complicate legal issues within cyberspace, but will ultimately curb free speech and threaten individual expression.

7. THE FORUM SHOPPING SOLUTION: A NEED FOR SELF-REGULATION

While some scholars propose a federal common law to govern computer bulletin board defamation cases, others insist that the quick right of reply suffices. One constitutional scholar has even proposed a 27th Amendment to govern the protection of speech without regard to technological method or medium.

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236 See Faucher, supra note 14, at 1051.
238 See Loundy, supra note 76, at 152-53. Professor Tribe's 27th Amendment reads:

This Constitution's protections for the freedoms of speech, press, petition[,] and assembly, and its protections against unreasonable searches and seizures and the deprivation of life,
Villanova University's Henry H. Perritt, Jr., however, proposes a much sounder solution for governing cyberspace defamation suits at home. He recommends autonomy for electronic communities, encouraging commercial networks to create "their own legal systems, more or less independent of national systems of law, and from each other." In essence, Perritt adopts a market approach for cyberspace conduits, allowing consumers to elect "one provider or another according to their wishes and differences in the types of service available." A market system would replace classifying networks as publishers or distributors with choosing an appropriate level of liability for each particular computer network. So long as the commercial networks and individual sysops accept their commensurate responsibilities proposed by such an approach, cyberspace may eventually achieve self-regulation. Such autonomy will provide independence for cyberspace users, and at the same time will hold them accountable for defamatory statements. Moreover, self-regulation will preserve the dignity of the First Amendment and its place as the appropriate libel authority in this country.

8. CONCLUSION

The NET and commercial network BBSs have "developed into the largest forum for research, communications[,] and information the world has ever seen." In addition, they offer tremendous opportunities for expanding the growth of liberty[,] or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled.


241 See James Kim, Internet Users Favor Self-Regulation, USA TODAY, Sept. 15, 1995, at B1 (noting that "nearly one-third [of Internet users] favor a governing body of experts and neutral parties to regulate cyberspace").

international business. Just as the medium of global communication has advanced, the ability to defame through the use of cyberspace similarly has increased. When a defendant is a publisher, the U.S. law of defamation may very well encourage U.S. plaintiffs to avail themselves of Britain's strict liability cause of action and file suit overseas. This opportunity could in turn increase opportunities for forum shopping and chill free speech.

On the other hand, the liability test for distributors outlined in both *Emmens* and *Cubby* suggests that an international standard of fault for these types of BBSs already exists. U.S. plaintiffs will not forum shop when English courts provide defendants with the same innocent dissemination defense available to defendants at home. Furthermore, U.S. entities soon will realize that a successful libel suit overseas does not always translate into recoverable damages. Instead of searching for an international solution to cyberspace defamation, cyberspace citizens should choose for themselves what type of regulation should govern their travels. This will ultimately protect both users and plaintiffs. Only then will courts develop an acceptable standard of responsibility, "imposing some measure of accountability on computer networks for republishing a defamatory statement without stifling the flow of information."243

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