

CHAPTER 2

Defamation*

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§ 2.01 Introduction

[1]—Scope

This chapter addresses the potential tort liability of an online service provider (OSP) and its users when a statement transmitted by the OSP tends to harm a person’s reputation. Such liability is generally governed by the law of defamation. This chapter does not address the separate but related torts of intentional and negligent infliction of emotional distress, which impose liability for “extreme and outrageous” conduct causing “severe emotional distress.”¹ Defamatory statements frequently cause a person mental anguish and emotional distress, and damages for such injury are recoverable in a successful defamation action. When an allegedly false statement is not actionable under the law of defamation, however, courts typically will not permit recovery under a separate claim

¹ See generally, *Restatement (Second) of Torts*, § 46 (1965).

for infliction of emotional distress, usually on the ground that such speech is, either as a matter of law or on the facts in a given case, insufficiently outrageous to support that type of claim.²

The law of defamation principally is concerned with the torts of slander (oral communications) and libel (written communications), which address harm to a plaintiff's reputation. There are other related causes of action for "injurious falsehoods," which address injuries to the reputation of a plaintiff's property. These actions, which include slander of title, trade libel, and product disparagement, are subject to much the same analysis applied to defamation claims, but they are not directly discussed in this chapter.³

[2]—Common Law Defamation and the First Amendment

The torts of libel and slander are generally defined by each state's common law, although aspects of each tort are often the subject of statutory provisions in many states. Since the 1960s, however, much of the common law governing these torts has been displaced by court decisions applying the First Amendment to allegedly defamatory speech. While the body of case law "constitutionalizing" the law of defamation is extensive, the boundaries of the First Amendment's applicability to state defamation law are still undecided.

² See, e.g.:

Sixth Circuit: Crall v. Gannett Satellite Information Network, Inc., 1992 WL 400713 at *5, 20 Media L.Rep. (BNA) 1987, 1991 (S.D. Ohio 1992).

Eighth Circuit: Deupree v. Iliff, 860 F.2d 300 (8th Cir. 1988).

Ninth Circuit: Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188 (9th Cir.), cert. denied 493 U.S. 812 (1989).

State Courts:

Colorado: Brooks v. Paige, 773 P.2d 1098 (Col. App. 1988).

New Jersey: Decker v. Princeton Packet, Inc., 561 A.2d 1122 (N.J. 1989).

See also:

Supreme Court: Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (First Amendment bars emotional distress claim by public figure based on parody that does not imply a false fact published with actual malice).

Fourth Circuit: Zeran v. America Online, Inc., 958 F. Supp. 1124, 1133 n.19 (E.D. Va. 1997), aff'd 129 F.3d 327 (4th Cir. 1997), cert. denied 524 U.S. 937 (1998).

But see, Esposito-Hilder v. SFX Broadcasting, 654 N.Y.S.2d 259 (Sup. Ct. 1996) (refusing to extend the *Hustler v. Falwell* ruling to an action for intentional infliction of emotional distress brought by a private person, who was the "winner" of a radio station's "ugliest bride contest"). See generally, Smolla, "Emotional Distress and the First Amendment: An Analysis of *Hustler v. Falwell*," 20 Ariz. St. L.J. 423 (1988).

³ See generally: Sack, *Libel, Slander, and Related Problems*, § 11.1 (2d ed. 1994); Keeton, *Prosser and Keeton on the Law of Torts*, § 128 (5th ed. 1984); *Restatement (Second) of Torts*, § 623(A) (1977). See also, 15 U.S.C. § 1125(a)(2) (1988) (Section 43(a)(2) of the Lanham Act, which imposes civil liability on one who, in "commercial advertising or promotion," misrepresents the qualities of another's "goods, services, or commercial activities").

Cases applying the First Amendment to state defamation law provide a key context for the development of general First Amendment principles applicable to other areas of government regulation of the OSP industry. In addition, the nature of online communications—which permit unprecedented levels of widely distributed speech by private individuals, about other private individuals, on matters on the fringe of what is normally considered of legitimate public concern—makes it likely that litigation in this area will ultimately define the extent to which state defamation law is not subject to First Amendment constraints. Thus, the interaction between the common law of defamation and the First Amendment in the context of online communications may have far-reaching consequences both for regulation of the OSP industry and for the law of defamation.

[3]—Chapter Overview

This chapter considers how the courts are likely to apply the law of defamation to an OSP, both when it is the author of the defamatory statement and when it transmits a statement authored by another. The chapter discusses the common law of defamation and the extent to which that law has been altered by application of the First Amendment. These common law and First Amendment principles are analyzed to see how likely it is that they would be applied in the context of statements transmitted by an OSP. Finally, the chapter examines the potential defamation exposure that OSPs face based on the law in other countries, many of which have far less regard for the freedom expression that is protected in this country by the First Amendment.

§ 2.02 Defamation Law in the United States

Since 1964, when the Supreme Court first applied the First Amendment to state defamation law,¹ the elements of a defamation claim have become increasingly complex, with substantial variations dependent on the identity of the plaintiff, the identity of the defendant, and the subject matter of the statement. Even before the First Amendment was applied to it, however, the common law of defamation had evolved into an extensive and complicated body of law.

[1]—Common Law Elements of a Defamation Claim

Generally speaking, an action for defamation is allowed at common law if a defamatory statement about the plaintiff was published by the defendant with malice, although some kinds of defamatory statements are not actionable unless they also caused “special harm” to the plaintiff, such as pecuniary injury. Each element of this deceptively simple description warrants brief elaboration.

[a]—“Defamatory Statement”

A statement is defamatory if it “tends” to cause injury to a person’s reputation, exposes him to public hatred, contempt, ridicule, shame or disgrace, or affects him adversely in his trade or business.² The plaintiff must demonstrate that the words “tend” to injure a person’s reputation; however, proof of actual damage to her reputation may not be needed to establish that they are defamatory.^{2.1} To be actionable, the

¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

² See: Sack, *Libel, Slander, and Related Problems*, § 2.4.1, at 71-74 (2d ed. 1994); Keeton, *Prosser and Keeton on the Law of Torts*, § 111, at 773 (5th ed. 1984); *Restatement (Second) of Torts*, § 559 (1977).

^{2.1} The traditional common law rule is that reputational harm is presumed to flow from words that “tend” to injure reputation and thus a plaintiff need not prove that her reputation was *actually* impaired by the defendant’s statement in order to establish a claim for libel. See, e.g.:

Supreme Court: Time, Inc. v. Firestone, 424 U.S. 448, 460, ___ S.Ct. ___, ___ L.Ed.2d ___ (1976).

State Courts:

Florida: Miami Herald Publishing Co. v. Ane, 458 So.2d 239, 10 Media L. Rep. (BNA) 2383 (Fla. 1984).

Virginia: Poulston v. Rock, 251 Va. 254, 467 S.E.2d 479 (1996).

See also, *Restatement (Second) of Torts* § 612, comment b (1977).

Some jurisdictions, however, have departed from the traditional rule and instead require a plaintiff to allege and prove that her reputation was actually impaired, at least unless “actual malice” is also alleged and proven. See, e.g.:

Eighth Circuit: Pfannenstiel v. Osborne Publishing Co., 939 F. Supp. 1497 (D. Kan. 1996).

statement must be capable of bearing a meaning that is defamatory—a legal question decided by the court. If the court finds that a statement, when read in context, can bear two different meanings, only one of which is defamatory, the plaintiff then must prove that the recipients of the communication understood the statement to have the defamatory meaning—a fact question for the jury.³ In a few states, the courts apply an “innocent construction rule,” which prevents the imposition of

(Text continued on page 2-7)

Arkansas: United Insurance Co. of America v. Murphy, 331 Ark. 364, 961 S.W.2d 752 (1998).

Hawaii: Jenkins v. Liberty Newspapers Ltd. Partnership, 89 Haw. 254, 267-269, 971 P.2d 1089, 1102-1104 (1999).

Iowa: Schlegel v. Ottumwa Courier, 585 N.W.2d 217 (Iowa 1998).

New Jersey: McLaughlin v. Rosanio, Bailets & Talamo Inc., 331 N.J. Super. 303, 751 A.2d 1066 (2000) (“From the foregoing cases we distill a shift in favor of the rule that a plaintiff in a libel or slander action must adduce concrete proof that he or she was harmed, either by way of pecuniary losses or injury to his reputation.”).

New York: Salomone v. MacMillan Publishing Co., 77 A.D.2d 501, 429 N.Y.S.2d 441 (1st Dep’t 1980).

Other jurisdictions will presume injury to reputation but not permit recovery for emotional injuries without proof of actual injury to reputation. See, e.g., Richie v. Paramount Pictures Corp., 544 N.W.2d 21 (Minn. 1996).

See generally, *Sack on Defamation*, § 2.4.17 (3d ed. 2000).

³ See: Yeager v. Local Union 20, 6 Ohio St. 3d 369, 372, 453 N.E.2d 666 (1983); *Restatement (Second) of Torts*, § 614 (1977); Sack, N. 2 *supra*, § 2.4.16, at 112-113 (2d ed. 1994).

liability if the allegedly defamatory statement reasonably may be construed as having a meaning that is not defamatory.⁴

[i]—*Defamation “Per Se” and Extrinsic Facts.* If a reasonable person would expect that the words “on their face” would tend to harm a person’s reputation, the statement is considered defamatory “per se” and harm to the plaintiff’s reputation is presumed as a matter of law. A statement that is not defamatory on its face can still be understood as having a defamatory meaning in light of “extrinsic facts” known by those who read the statement. For example, announcing that Mary and Bob are the proud parents of a new baby could injure Mary’s reputation if she is known by those who read the announcement to be married to Tom. All states permit a plaintiff to establish a defamatory meaning by reference to such extrinsic facts. In most states, however, such statements are referred to as defamatory “per quod” and liability can be imposed only if the plaintiff also proves special damages.⁵

[ii]—*Hyperbole, Epithets and Insults.* Usually, calling someone a “sleazebag,” “blackmailer,” “bastard,” “bitch,” or some similar epithet does not expose one to liability for defamation. The common law generally holds that name-calling, hyperbole, abusive epithets, and other loosely figurative statements are not defamatory because, when taken in context, a reasonable reader understands that the author is only using “colorful” language to emphasize his point of view, not describing facts about the person that would harm that person’s reputation.⁶ When such language cannot reasonably be interpreted as stating actual facts about the plaintiff, the Supreme Court has held that this common law rule is required by the First Amendment as well.⁷

Many epithets have literal meanings that imply defamatory facts. The statement “Bob is a bastard,” if read literally, could mean that Bob was born out of wedlock, defaming both Bob and his parents. Usually, the

⁴ See: *Kolegas v. Hefel Broadcasting Corp.*, 154 Ill. 2d 1, 607 N.E.2d 201 (1992); *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 372, 453 N.E.2d 666 (1983); Sack, N. 2 *supra*, § 2.4.14.

⁵ See, e.g.:

Ohio: *Becker v. Toulmin*, 165 Ohio St. 549 Syll. ¶ 4, 138 N.E.2d 391 (1956).

South Carolina: *Holtzscheiter v. Thompson Newspapers, Inc.*, 411 S.E.2d 664 (S.C. 1991).

See also, Sack, *Libel, Slander, and Related Problems*, § 2.7.3, at 132 (2d ed. 1994). But see, *Restatement (Second) of Torts*, § 569, comment b (1977) (stating that requirement of special damages for “per quod” actions is the “minority” rule).

context of the statement is sufficient to indicate whether it should be read literally or figuratively. Nevertheless, from time to time courts have ignored the common law and constitutional rule and permitted a plaintiff to sue for libel based on epithets that were clearly meant figuratively, not literally.⁸

[b]—“About the Plaintiff.” To be actionable, a statement must be defamatory about the plaintiff, not some other person. It is not necessary for the publication to name the plaintiff if his identity can be discerned from the statement’s content or in light of extrinsic facts known by those who received it. The intent of the author is not relevant. “The test is not whom the story intends to name, but who a part of the audience may reasonably think is named, ‘not who is meant but who is hit.’”⁹ A defamatory statement about a group of people can give rise to a claim by one of its members, if the group is sufficiently small (usually fewer than twenty-

⁶ See: *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966) (“Not being intended or understood as statement of fact, they are impossible of proof or disproof. Indeed such words of vituperation and abuse reflect more on the character of the user than they do on that of the individual to whom they are intended to refer. It has long been settled that such words are not themselves actionable as libelous”); Keeton, *Prosser and Keeton on the Law of Torts*, § 111, at 776 (5th ed. 1984) (“A certain amount of vulgar name-calling is tolerated, on the theory that it will necessarily be understood to amount to nothing more”). See also: *Ward v. Zelikovsky*, 136 N.J. 516, 529-530, 643 A.2d 972, 978-979 (1994); *Restatement (Second) of Torts*, § 566, comment e (1977).

⁷ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Greenbelt Cooperative Publishing Ass’n v. Bressler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970). See § 2.02[3][c] *infra*.

⁸ See, e.g.:

Fifth Circuit: *Smith v. McMullen*, 589 F. Supp. 642 (S.D. Tex. 1984) (“despicable human being”).

State Courts:

Georgia: *Brooks v. Stone*, 170 Ga. App. 457, 317 S.E.2d 277 (“bitch”), *aff’d* 253 Ga. 565, 322 S.E.2d 728 (1984).

Wyoming: *Spence v. Flynt*, 816 P.2d 771 (Wyo. 1991) (describing attorney as “vermin-infested turd dispenser”), *cert. denied* 503 U.S. 984 (1992).

⁹ *Sims v. KIRO, Inc.*, 20 Wash. App. 229, 234, 580 P.2d 642, 645 (1978), *cert. denied* 441 U.S. 945 (1979). See generally, Annot., “Sufficiency of Identification of Plaintiff by Matter Complained of as Defamatory,” 54 A.L.R.4th 746 (1987).

five) and if a reasonable reader would understand the comment as applying to the plaintiff.¹⁰

[c]—“**Published by the Defendant.**” The word “publication” is a term of art in defamation law. A statement is “published” when it is communicated to someone other than the person it defames.¹¹ If a recipient repeats the statement to someone else, the statement has been “republished.” Every repetition is itself a “publication.” The republisher is usually treated as having “adopted” the statement and is subject to liability as if he were the original publisher.¹² Thus, the law treats as “publishers” persons who participate in the process of disseminating a statement to others, although those who merely “deliver” or “transmit” it are subject to liability as republishers only if they know or have reason to know of its

¹⁰ Compare *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952) (statement that “all saleswomen employed by” department store were “call girls” did not defame any one of the 382 saleswomen, but statement that “most” of the salesmen were “faggots” did defame each of the twenty-five salesmen), with *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015-1016 (3d Cir. 1994), cert. denied 115 S.Ct. 1691 (1995) (reference to phone-order wallpaper merchants as “pirates” did not defame plaintiff, although there were fewer than twenty-five such merchants, because group was too “amorphous and ill-defined”). See *Ogren v. Employers Reinsurance Corp.*, 19 Wis. 2d 379, 350 N.W.2d 725 (Wis. App. 1984) (criticism of a “family” for not being loving enough to prevent a man’s suicide did not defame the man’s uncles and aunts but did defame his mother and sister).

¹¹ *Ostrowe v. Lee*, 256 N.Y. 36, 38, 175 N.E. 505 (1931) (Cardozo, J.) (“A defamatory writing is not published if it is read by no one but the one defamed. Published it is, however, as soon as read by any one else”). State law varies as to whether a statement made by one employee to other employees of the same corporation has been “published” by the corporation or, instead, simply constitutes the corporation communicating with itself. See: *Bals v. Verduzco, Inc.*, 600 N.E.2d 1353 (Ind. 1992); Annot., “Defamation: Publication by Intracorporate Communication of Employee’s Evaluation,” 47 A.L.R.4th 674 (1986); *Restatement (Second) of Torts*, § 577, comment i (1977).

¹² *Third Circuit*: *Schiavone Construction Co. v. Time, Inc.*, 735 F.2d 94 (3d Cir. 1984).

Tenth Circuit: *Dixon v. Newseek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977).

District of Columbia Circuit: *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir.), cert. denied 488 U.S. 825 (1988).

See: Sack, *Libel, Slander, and Related Problems*, §§ 2.6.1 and 6.1 (2d ed. 1994); Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 799 (5th ed. 1984); *Restatement (Second) of Torts*, § 578 (1977).

defamatory content.¹³ The original publisher also is liable for all republications of his statement that are reasonably foreseeable.¹⁴

[d]—“**With Malice.**” Under the traditional common law, “malice” was a necessary element of a defamation claim. At common law, “malice” generally refers to action taken by a defendant with an improper motive, such as hatred, ill will, revenge, or with conscious disregard for the rights, safety and feelings of the plaintiff.¹⁵ Over time, courts determined that the mere fact of publishing defamatory words (or at least those defamatory on their face) implies a level of “malice of the character necessary to support a judgment” for defamation.¹⁶ Thus, “implied malice” or “legal malice”—associated with a wrongful act, intentionally done, without just cause or excuse—became automatically presumed by the common law of defamation.¹⁷ While a plaintiff might offer proof of traditional “common law malice” to defeat a privilege or to justify punitive damages, such proof is not necessary to state a defamation claim. If the defendant published the statement, and that statement was defamatory, false and unprivileged, he is liable under the common law, *even if he had*

¹³ Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 799, 803 (5th ed. 1984); *Restatement (Second) of Torts*, § 581 (1977). This distinction between “primary publishers” and those who merely “transmit” or “deliver,” sometimes referred to as “secondary publishers,” is detailed below (§ 2.03[3][a] *infra*) in the context of an OSP’s liability for transmitting third party content.

¹⁴ See, e.g.:

Fourth Circuit: Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir. 1989).

State Courts:

Virginia: Weaver v. Beneficial Finance Co., 199 Va. 196, 98 S.E.2d 687 (1957) (foreseeable republication after expiration of statute of limitations gives rise to new cause of action against original publisher).

But see,

Seventh Circuit: Oberman v. Dun & Bradstreet, Inc., 586 F.2d 1173, 1175 (7th Cir. 1978) (original publisher liable for republication only if it occurs with his express or implied consent).

See generally: Sack, *Libel, Slander, and Related Problems*, § 2.6.2, at 126-127 (2d ed. 1994); Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 799 (5th ed. 1984); Painter, “Republication Problems in the Law of Defamation,” 47 Va. L. Rev. 1131 (1961); Annot., “Liability of Publisher of Defamatory Statement for its Repetition or Republication by Others,” 96 A.L.R.2d 373 (1964).

¹⁵ See, e.g., Preston v. Murty, 32 Ohio St. 3d 334, 512 N.E.2d 1174, 1175-1176 (1987).

¹⁶ Westropp v. E.W. Scripps Co., 148 Ohio St. 365, 74 N.E.2d 340, 347 (1947).

¹⁷ See, e.g., Quinones v. United States, 492 F.2d 1269, 1274-1275 (3d Cir. 1974).

no reason to know that the statement was false. In this context, libel and slander at common law have been referred to as “strict liability” torts.¹⁸

[e]—**Damages.** There are typically three types of damages in a defamation action: special damages, general damages, and punitive damages. Special damages are awarded for actual economic or pecuniary loss caused by the defamation.¹⁹ Liability for slander is imposed only if special damages are proven, unless the statement falls within one of the four categories of “slander per se.”²⁰ In most states, special damages are also a prerequisite to liability for statements that are defamatory only in light of extrinsic facts (“per quod”).²¹

General damages are awarded to compensate the plaintiff for injuries that are not readily measured in money terms, such as impairment of reputation and standing in the community, disgrace, insulted honor, indignation, personal humiliation, mental anguish and emotional distress. “The common law of defamation is an oddity of tort law” because it allows a plaintiff who establishes the defendant’s liability to recover general damages without proving that she actually incurred any such general harms.²²

¹⁸ *Herbert v. Lando*, 441 U.S. 153, 159 n.4, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). See Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 803-804, 808-810 (5th ed. 1984).

¹⁹ See: *Lieberman v. Gelstein*, 80 N.Y.2d 429, 434-435, 605 N.E.2d 344, 347, 590 N.Y.S.2d 857 (1992); Keeton, *Prosser and Keeton on the Law of Torts*, § 112, at 794 (5th ed. 1984); *Restatement (Second) of Torts*, § 575, comment b (1977).

²⁰ See, e.g., *Ward v. Zelikovsky*, 136 N.J. 516, 539-542, 643 A.2d 972, 984-985 (1994). The four categories of “slander per se” at common law are statements that impute to the plaintiff (1) a serious criminal offense, (2) a loathsome disease, (3) a matter incompatible with her business, trade, profession, or office, and (4) serious sexual misconduct. 136 N.J. at 526; *Restatement (Second) of Torts*, § 570 (1977).

²¹ See N. 5 *supra*.

²² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). See, e.g.:

Supreme Court: Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760-761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (plurality opinion); 472 U.S. at 765 (White, J., concurring).

Eighth Circuit: Luster v. Retail Credit Co., 575 F.2d 609, 619 (8th Cir. 1978).

See also, Anderson, “Reputation, Compensation, and Proof,” 25 Wm. & Mary L. Rev. 747, 749-750 (1984) (“Judges cannot give meaningful instructions when the substantive law concedes that ‘[t]here is no legal measure of damages in actions for these wrongs. The amount which the injured party ought to recover is referred to the sound discretion of the jury.’ As a result, the process of fixing an amount of presumed damages is inherently irrational”). (Citation omitted.)

Such damages are “presumed” by the common law from the fact of publication of a defamatory statement about the plaintiff. While the plaintiff is permitted to offer proof of actual injuries of this type, such proof is not required to recover presumed damages at common law, even in those cases where proof of special damages is required to establish liability.²³

At common law, punitive damages are available if the plaintiff establishes that the defendant acted with “common law malice,” that is, with bad faith, ill will, spite, or with conscious disregard for the rights, safety and feelings of the plaintiff. Some states require proof of actual injury before a plaintiff may recover punitive damages, while the common law in other states permits recovery of punitive damages whenever nominal or presumed damages are awarded.²⁴ The defendant can prove that he has retracted the defamatory statement to rebut evidence of malice and to mitigate general and punitive damages;²⁵ in many states, a “retraction statute” now bars the award of punitive damages against a media defendant if the defendant has made a proper retraction or correction.²⁶

[2]—Common Law Defenses to a Defamation Claim

Because the common law presumes that a defamatory statement was made with “implied” or “legal” malice, it is up to the defendant to rebut this presumption by showing some “just cause or excuse” for making the statement. These defenses are typically referred to as “justification” (i.e., the statement was true) and “privilege.”

[a]—Truth (or “Justification”). While “falsity” is generally an element of a defamation claim, an unprivileged defamatory statement is presumed by the traditional common law to be false, placing the burden on the defendant to prove the truth of the statement as an affirmative defense.²⁷ In some states, this common law rule has been codified by statute and, in most states, truth is an absolute defense.²⁸ In a substantial minority of states, truth does not bar recovery if the defendant did not

²³ Schaffer v. Zekman, 196 Ill. App. 3d 727, 733, 554 N.E.2d 988, 992 (1990); Keeton, *Prosser and Keeton on the Law of Torts*, § 112, at 794-795 (5th ed. 1984).

²⁴ Sack, *Libel, Slander, and Related Problems*, § 8.3.5.1, at 502 nn.87-89 (2d ed. 1994).

²⁵ *Id.*, § 9.1, at 535-536; Keeton, *Prosser and Keeton on the Law of Torts*, § 116A, at 845-846 (5th ed. 1984).

²⁶ See § 2.03[5] *infra*.

²⁷ See *Restatement (Second) of Torts*, § 581A, comment b (1977).

²⁸ *Id.*, § 581A, comment a. See, e.g., Ohio Rev. Code Ann. § 2739.02 (“In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof of the truth thereof shall be a complete defense”).

publish the statement with “good motives” and “for justifiable ends.”²⁹

[i]—*Substantial Truth*. The “literal” truth or falsity of a statement is not determinative. What matters is whether the allegedly defamatory statement is “substantially true.” Minor inaccuracies do not make a statement “false” so long as the “gist” or “sting” of the statement is in fact true. The test is often described as whether the alleged defamation as published “would have a different effect on the mind of the reader from that which the [literal] truth would have produced.”³⁰ Thus, the statement “Mary was arrested on criminal charges,” when in fact she was charged with “juvenile delinquency,” is literally false but substantially true.³¹

[ii]—*Implication and Insinuation*. Just as statements that are “literally” false may be deemed substantially true, statements that are “literally” true may be deemed “false” if they imply or insinuate facts that are false and defamatory.³² When the statement is literally true, some states permit liability to be imposed for a false and defamatory implication only

²⁹ Sack, *Libel, Slander, and Related Problems*, § 3.3.2.1, at 176 & n.18 (2d ed. 1994). Any qualification on truth as a defense violates the First Amendment in most contexts, although the issue is still open for defamatory speech that is not about public figures or public concerns. Compare *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (truth may not be sanctioned “where the discussion of public affairs is concerned”, with *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (Court has “carefully left open the question whether” First Amendment requires truth as a defense in defamation actions brought by private persons) and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) (private-figure plaintiff must prove falsity where speech is of “public concern”). See § 2.02[2][b] and [e] *infra*.

³⁰ *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), quoting Sack, *Libel, Slander, and Related Problems*, 138 (1980).

³¹ See *Piracci v. Hearst Corp.*, 263 F. Supp. 511 (D. Md. 1966), *aff'd* 371 F.2d 1016 (4th Cir. 1967). But see, *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309 (3d Cir. 1994) (statement that a person was under “criminal investigation” was not substantially true where the person was actually under an “administrative investigation”).

³² See, e.g.:

Ninth Circuit: *Church of Scientology v. Flynn*, 744 F.2d 694, 696 (9th Cir. 1984).

District of Columbia Circuit: *Southern Air Transport, Inc. v. American Broadcasting Cos.*, 877 F.2d 1010, 1012 (D.C. Cir. 1989) (“The applicable law holds that a defamatory inference may be derived from a factually accurate news report”).

State Courts:

Tennessee: *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978).

See generally, Dienes and Levine, “Implied Libel, Defamatory Meaning, and State of Mind: The Promise of *New York Times Co. v. Sullivan*,” 78 *Iowa L. Rev.* 237 (1993).

if there is “additional, affirmative evidence suggesting that the defendant intend[ed] or endorse[d] the defamatory inference.”³³

[b]—Privilege.

[i]—*Absolute Privilege.* An absolute privilege is a total immunity from defamation liability. The common law grants an absolute privilege to public officials, including judicial officers, legislators, and executive officers, for statements made in the course of their duties, and to participants in proceedings conducted by such officials for statements made during the course of those proceedings.³⁴

[ii]—*Conditional Privilege.* The strict liability at common law arises from the presumption of the defendant’s “implied malice” in making a defamatory statement about the plaintiff. The defendant can rebut this presumption by proving that on the occasion on which he made the statement, he either had a duty to make it or a legitimate interest that was served or protected by making it. The occasions giving rise to such duties or interests are referred to as “privileged.”³⁵ The privileges are characterized as “conditional” or “qualified” because they are lost if the plaintiff can prove that the defendant “abused” them.

Occasions on which a speaker makes a defamatory statement for which the common law recognizes a conditional privilege include those on which the statement is made to protect the speaker’s own interest (e.g., to defend oneself in response to a charge of improper conduct³⁶), to protect the interest of the recipient or some other third party (e.g., reports by credit agencies and better business bureaus³⁷), to enable the recipient to act in the public interest (e.g., reports of suspected criminal activity to the

³³ White v. Fraternal Order of Police, 909 F.2d 512, 518 (D.C. Cir. 1990).

³⁴ See: *Restatement (Second) of Torts*, §§ 585-592A (1977); Sack, *Libel, Slander, and Related Problems*, § 7.2 (2d ed. 1994).

³⁵ See Hahn v. Kotten, 43 Ohio St. 2d 237, 246, 331 N.E.2d 713 (1975) (“All that is necessary to entitle such communications to be regarded as privileged is, that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving information, and to deprive the act of an appearance of officious intermeddling with the affairs of others”). See also: Bauer v. State of Minnesota, 511 N.W.2d 447, 449 (Minn. 1994); *Restatement (Second) of Torts*, Chapter 25, Topic 3, Conditional Privileges, Scope N., at 258 (1977).

³⁶ See, e.g., Mencher v. Chesley, 193 Misc. 829, 85 N.Y.S.2d 431 (1948) (press conference by discharged official to rebut alleged reasons for discharge). See *Restatement (Second) of Torts*, § 594, comment k (1977).

³⁷ See, e.g.: Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511 (10th Cir. 1987); *Restatement (Second) of Torts*, § 595, comment h (1977).

police³⁸), and to share information about which the speaker and recipients have a common interest. The “common interest” privilege reflects the common law’s judgment that members of a group are entitled to communicate with one another about matters concerning the group.³⁹ Thus, the privilege protects partners, employees, and members of religious, fraternal, professional and charitable organizations, when they inform one another about matters relating to the group.⁴⁰

A common law conditional privilege is lost if the defendant abuses it, which is established by proof (1) that the publication of the statement exceeded the scope of the privilege, or (2) that the defendant had an improper motive.⁴¹ Under the traditional common law, any motive outside the purposes of the privilege can cause the defendant to forfeit the

³⁸ See, e.g., *Cashen v. Spann*, 125 N.J. Super. 386, 311 A.2d 192 (1973), *modified* 66 N.J. 541, 334 A.2d 8, *cert. denied* 423 U.S. 829 (1975). See *Restatement (Second) of Torts*, § 598 (1977).

³⁹ *Restatement (Second) of Torts*, § 596, comment c (1977) (The privilege “is based on the fact that one is entitled to learn from his associates what is being done in a matter in which he has an interest in common with them. This interest in their common affairs entitles him to information as to how they are conducted, . . . even though he is not personally concerned with the information”).

⁴⁰ See, e.g.:

Fourth Circuit: *Molever v. Levenson*, 539 F.2d 996 (4th Cir.), *cert. denied* 429 U.S. 1024 (1976) (shareholders have a qualified privilege to defame president and directors).

State Courts:

Kansas: *Scarpelli v. Jones*, 229 Kan. 210, 626 P.2d 785 (1981) (medical students and administration had common interest regarding faculty).

Ohio: *Mosley v. Evans*, 90 Ohio App. 3d 633, 636-637, 630 N.E.2d 75 (1993) (church members privileged to circulate defamatory letter about pastor to members of entire congregation).

See: Sack, *Libel, Slander, and Related Problems*, § 7.3.4, at 458 (2d ed. 1994); *Restatement (Second) of Torts*, § 596 (1977).

⁴¹ Under the traditional common law in the majority of states, a conditional privilege was also “abused” if the defendant did not have “reasonable grounds” to believe in the truth of his statement. See *Restatement of Torts*, § 601 (1938). In light of the Supreme Court’s ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), requiring a plaintiff to prove the defendant’s “fault” as an element of her case, see § 2.02[2][b] *infra*, most courts and commentators have concluded that mere negligence by the defendant is no longer sufficient to defeat a conditional privilege; otherwise, any *prima facie* defamation case under *Gertz* would automatically defeat any conditional privilege defense. See: *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 597-600, 350 A.2d 688, 698-700 (1976); Sack, *Libel, Slander, and Related Problems*, § 7.4.4.2, at 475-476 (2d ed. 1994); *Restatement (Second) of Torts*, § 580B, comment 1 and § 599, comment d (1977).

privilege.⁴² Proof of “common law malice,” such as hatred, ill will, or revenge, is a common form of improper motive recognized by the courts. In many states, proof of “common law malice” is still sufficient to defeat a qualified privilege.⁴³ In some states, however, the rule has been superseded by a requirement of clear and convincing proof of “actual malice”—in the sense required by the First Amendment in cases brought by public figures—to defeat the existence of a common law qualified privilege.⁴⁴

[3]—First Amendment Modifications of State Defamation Law

[a]—Fault

[i]—*Public Officials and Public Figures.* In *New York Times v. Sullivan*,⁴⁵ the Supreme Court held for the first time that the First Amendment, as applied to the states through the Fourteenth Amendment, imposes constitutional limits on state defamation law. The Court held that the First Amendment “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,’” which the Court defined as, “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁴⁶

The Supreme Court later refined its definition of the “actual malice” standard, holding that “reckless disregard” of whether a defamatory statement is false requires proof “that the defendant in fact entertained serious

⁴² See *Kennedy v. Children’s Service Society of Wisconsin*, 17 F.3d 980, 985 (7th Cir. 1994) (Wisconsin law) (privilege abused if “the defamatory matter is published for a purpose other than that for which the privilege is given”). *Accord, Restatement (Second) of Torts*, § 603 (1977).

⁴³ See, e.g.:

New York: *Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57, 62 (2d Cir. 1993), applying New York law.

California: *Lundquist v. Reusser*, 7 Cal. 4th 1193, 1204, 31 Cal. Rptr. 2d 776, 875 P.2d 1279, 1285 (1994).

See Sack, *Libel, Slander, and Related Problems*, § 7.4.1, at 468-470 (2d ed. 1994).

⁴⁴ See:

Colorado: *Dominguez v. Babcock*, 727 P.2d 362 (Col. 1986).

Maryland: *Marchesi v. Franchino*, 283 Md. 131, 387 A.2d 1129 (1978).

Ohio: *Jacobs v. Frank*, 60 Ohio St. 3d 111, 116, 573 N.E.2d 609 (1991).

⁴⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

doubts as to the truth of his publication”⁴⁷ or, alternatively, that he published the statement “with [a] high degree of awareness of [its] probable falsity.”⁴⁸ This standard differs substantially from the common law’s “improper motive” standard. “Evidence of hatred, spite, vengeance, or deliberate intention to harm can never, standing alone, warrant” a finding of actual malice, because “the focus of the inquiry is *not* on the defendant’s attitude toward the plaintiff, but rather on the defendant’s attitude *toward the truth or falsity* of the statement alleged to be defamatory.”⁴⁹

The Supreme Court has stated that the scope of the term “public official” is broad, applying “at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”⁵⁰ The *New York Times* “actual malice” requirement was later extended by the Court to defamation actions brought by “public figures.”⁵¹ The Court has stated that “public figures” are, “for the most

⁴⁶ *Id.*, 376 U.S. at 279-280. The Court further held that “actual malice” must be proven with “convincing clarity,” and that a finding of actual malice is subject to “an independent examination of the whole record” by the trial and appellate courts. *Id.*, 376 U.S. at 285-286. See: *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989); *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

⁴⁷ *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

⁴⁸ *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964).

⁴⁹ *Varanese v. Gall*, 35 Ohio St. 3d 78, 79-80, 518 N.E.2d 1177 (1988). (Emphasis by the court.) See also, e.g.:

Supreme Court: *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) (emphasizing difference between common law malice and “actual malice,” an “unfortunate” phrase that the Court uses “as a shorthand to describe First Amendment protections” under *New York Times*).

Second Circuit: *Reliance Insurance Co. v. Barron’s*, 442 F. Supp. 1341, 1349-1350 (S.D.N.Y. 1977) (“In the context of a libel suit ‘actual malice’ simply does not mean ill-will or spite” and “reckless” disregard of falsity “does not mean grossly negligent, its common use, but rather, intentional disregard. When the Supreme Court uses a word, it means what the Court wants it to mean. ‘Actual malice’ is now a term of art having nothing to do with actual malice”).

See generally, Sack, *Libel, Slander, and Related Problems*, § 5.5, at 277-306 (2d ed. 1994).

⁵⁰ *Rosenblatt v. Baer*, 383 U.S. 75, 85, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) (finding public recreation area supervisor to be public figure). (Footnote omitted.)

⁵¹ See: *Greenbelt Cooperative Publishing Ass’n, Inc. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163-164, 87 S.Ct. 1975, 18 L. Ed.2d 1094 (1967) (Warren, C.J. concurring); *id.*, 388 U.S. at 172-174 (Brennan, J., concurring).

part,” those who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes” and, “more commonly,” those who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”⁵²

[ii]—*Private-Figure Plaintiffs*. In a defamation action brought by a private individual, as opposed to a public figure or public official, the First Amendment now prohibits—at least in media cases about matters of public concern—the strict liability imposed by the common law’s presumption of “implied malice,” although it does not require proof of *New York Times* “actual malice” as a prerequisite to liability. In *Gertz v. Robert Welch, Inc.*,⁵³ the Court held that, so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of a defamatory falsehood injurious to a private individual.⁵⁴

Most states have responded to *Gertz* by adopting a “negligence” standard, which requires a private-figure plaintiff to prove that the defendant knew, or in the exercise of reasonable care should have known, that the statement was false in some material respect.⁵⁵ A few states have adopted variations of the “actual malice” standard for private-figure defamation actions based on statements about matters of public concern.⁵⁶

⁵² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

⁵³ *Id.*

⁵⁴ *Id.*, 418 U.S. at 347. The Court implied in a later decision that the First Amendment’s prohibition of “liability without fault” might not apply in actions brought by private figures for defamatory speech about matters of purely private concern. See § 2.02[3][e][i] *infra*.

⁵⁵ Sack, *Libel, Slander, and Related Problems*, § 5.9.1, at 343 (2d ed. 1994), citing *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976) and *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975). See Sack, at 340-342 (listing cases from thirty-four states adopting the negligence standard in response to *Gertz*).

⁵⁶ See:

Colorado: *Walker v. Colorado Springs Sun, Inc.*, 188 Col. 86, 538 P.2d 450, *cert. denied* 423 U.S. 1025 (1975).

Indiana: *Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied* 424 U.S. 913 (1976).

New Jersey: *Sisler v. Gannett Co.*, 104 N.J. 256, 516 A.2d 1083 (1986).

New York: New York has adopted a “gross irresponsibility” standard for statements “arguably within the sphere of legitimate public concern.” *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975).

[b]—Falsity. The common law presumption that a defamatory statement is false, requiring the defendant to prove its truth as an affirmative defense, is arguably prohibited by the First Amendment requirement that plaintiffs prove “actual malice” (public officials and public figures) or “fault” (private figures).⁵⁷ This issue is now moot, at least in defamation actions against a media defendant for speech on matters of public concern. In *Philadelphia Newspapers, Inc. v. Hepps*,⁵⁸ the Supreme Court confirmed in *dicta* that, as a result of its decision in *New York Times*, a public-figure plaintiff must prove falsity.⁵⁹ The Court then held that the First Amendment also prohibits the common law presumption of falsity when a private-figure plaintiff “seeks damages against a media defendant for speech of public concern.”⁶⁰ In such cases, the First Amendment requires the private-figure plaintiff to prove that the defendant’s defamatory statement is false.

[c]—Opinion. Some defamatory comments (e.g., “Bob is a terrible writer”) are not really capable of being proven true or false in a courtroom. At common law, defamatory expressions of opinion were presumed false and were actionable, unless the comment was protected by a privilege.⁶¹ In *Gertz*, the Supreme Court stated in *dicta* that “[u]nder the First Amendment there is no such thing as a false idea” and that we must depend “on the competition of other ideas,” rather than on judges and

⁵⁷ Some courts reason that, in order to prove that a defendant had knowledge of a statement’s falsity or probable falsity (“actual malice”) or that he should have known that the statement was false (negligence), a plaintiff is legally required to prove that the statement was in fact false. See, e.g.: *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 (6th Cir.), *cert. granted* 454 U.S. 962, *cert. dismissed* 454 U.S. 1130 (1981); *Restatement (Second) of Torts*, § 580B, comment j (1977). The view that proof of falsity is legally required to prove “fault” under *Gertz* is implicitly inconsistent with the Court’s majority opinion in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), which states that proof of fault “will generally encompass evidence of” falsity “as a practical matter” (but, by implication, not as a matter of law) because the jury is “more likely to” find fault if it is convinced that the statement is false. 475 U.S. at 778.

⁵⁸ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

⁵⁹ *Id.*, 475 U.S. at 775. *Accord*, *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). But see, *Philadelphia Newspapers, N. 58 supra*, 475 U.S. at 788 n.10 (1986) (Stevens, J., dissenting) (expressing view, in an opinion joined by Chief Justice Burger and Justices Rehnquist and White, “that public figures should not bear the burden of” of proving the falsity of statements made with “actual malice”).

⁶⁰ *Id.*, 475 U.S. at 777.

juries, to correct a pernicious “opinion.”⁶² Seizing on this *dicta*, state and lower federal courts developed an extensive body of case law affording absolute protection under the First Amendment for expressions of opinion.⁶³ Much of that case law focused on developing standards for distinguishing between expressions of “opinion” (which received absolute protection) and publications that state or imply defamatory “facts” about a plaintiff (which were actionable if false).⁶⁴

In *Milkovich v. Lorain Journal Co.*,⁶⁵ the Supreme Court expressly rejected the notion that the *Gertz dicta* was intended “to create a wholesale defamation exemption that might be labeled ‘opinion.’”⁶⁶ Instead, the Court declared that expressions of opinion are already adequately protected by the constitutional requirement in *Hepps* that “statements on matters of public concern must be provable as false” and by its earlier decisions providing First Amendment protection for “imaginative expression” or “rhetorical hyperbole” that cannot reasonably be interpreted as stating actual facts about a plaintiff.⁶⁷

⁶¹ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), quoting *Restatement (Second) of Torts*, § 566, comment a (1977). The common law “fair comment” privilege protects expressions of opinion on matters of public concern that are based on “truly stated” or generally known facts, although many courts have required the comment to be “fair” and left that determination to the jury. See Sack, *Libel, Slander, and Related Problems*, § 4.4.6, at 243 (2d ed. 1994), citing Hill, “Defamation and Privacy under the First Amendment,” 76 *Columbia L. Rev.* 1205, 1233 (1976). See generally, e.g.:

Louisiana: *Mashburn v. Collin*, 355 So.2d 879 (La. 1977).

New Jersey: *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 516 A.2d 220 (1986).

⁶² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

⁶³ See Sack, *Libel, Slander, and Related Problems*, §4.2.3.1, at 208-210 (2d ed. 1994) (compiling cases from every federal circuit and thirty-six states adopting a First Amendment privilege for “opinion” under *Gertz*).

⁶⁴ See, e.g.:

Second Circuit: *Mr. Chow v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985).

Eighth Circuit: *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.), *cert. denied* 479 U.S. 883 (1986).

District of Columbia Circuit: *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *cert. denied* 471 U.S. 1127 (1985).

⁶⁵ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

⁶⁶ *Id.*, 497 U.S. at 18.

⁶⁷ *Id.*, 497 U.S. at 19-20. See: *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Greenbelt Cooperative Publishing Ass’n v. Bressler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).

Under *Milkovich*, any comment that “does not contain a provably false factual connotation” is constitutionally protected, assuming that the plaintiff must prove falsity under *Hepps*. Whether a statement contains “factual connotations” about the plaintiff is essentially the same inquiry that courts developed prior to *Milkovich* to distinguish between statements of fact and expressions of opinion.⁶⁸ Thus, the practical significance of *Milkovich*, if any, may be that the First Amendment’s protection of “opinion” is now limited to the undefined scope of *Hepps*’ requirement that plaintiffs prove falsity.

Whether a statement contains or reasonably implies a “provably false factual connotation” under *Milkovich* is often a difficult and controversial legal inquiry. The inquiry requires a court to consider both the specific context and language of the challenged statement (i.e., “whether it was ‘loose, figurative, or hyperbolic language which would negate the impression that the writer’ was stating fact”) and the broader context in which it was made (including the “general tenor of the article” and the setting and format in which it appears).^{68.1} In conducting this inquiry, one court has found that statements accusing a plaintiff of criminal behavior, perjury and dishonesty, which were

⁶⁸ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 24, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (Brennan, J., dissenting). See *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir.), cert. denied 115 S.Ct. 202 (1994). See generally: Sack, *Libel, Slander, and Related Problems*, § 4.2.4.2, at 214 (2d ed. 1994) (“most courts considering opinion since *Milkovich* have reached the results they likely would have reached before”); Nowell, “The ‘Opinion’ Defense Is Not Dead: a Survey of Cases Decided under the *Milkovich* Test,” *Communications and the L.* 73-89 (Dec. 1993). Some states continue to apply their pre-*Milkovich* case law protecting “opinion” on the basis of their state constitutions. See:

Massachusetts: *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 612 N.E.2d 1158, 1162 (1993).

New York: *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 566 N.Y.S.2d 906, 567 N.E.2d 1270, cert. denied 111 S. Ct. 2261 (1991).

Ohio: *Vail v. Plain Dealer*, 72 Ohio St. 3d 279, 281-282, 649 N.E.2d 182 (1995).

Utah: *West v. Thompson Newspapers*, 872 P.2d 999 (Utah 1994).

^{68.1} *Agora vs. Axxess, Inc.*, 2001 U.S. App. LEXIS 6057 (4th Cir., April 9, 2001) (upheld trial court dismissal of defamation action concluding defendant’s Web site rating of plaintiff’s magazine as an unpaid promoter was not actionable because it constituted an expression of opinion based on disclosed or readily available facts); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184 (4th Cir. 1998) (quoting *Milkovich*, N. 68 *supra*, 497 U.S. at 21) (holding that statements in a “Streetwalker” column in bi-weekly business magazine, which stated that plaintiff’s stock was overvalued, were constitutionally protected because “no fact finder could ‘reasonably interpret’ any of them as stating or implying ‘actual facts’”). Compare, *Flamm v. American Ass’n of University Women*, 201 F.3d 144, 150-153 (2d Cir. 2000) (“Considering the ‘general tenor’ of the publication—a directory [of attorneys] for referrals put out by a national professional organization—it would not be unreasonable to think that the description of” the plaintiff as an “ambulance chaser” “conveyed an assertion of fact,” i.e., that plaintiff has engaged in “the unethical or criminal behavior of solicitation”).

published by a defendant on her personal Web site and in Usenet newsgroup postings, were less likely to be viewed by readers as assertions of fact because they were “part of a heated debate concerning a bitter legal dispute.”^{68.2} That same court found that accusations made in a newsgroup posting should be assessed in the broader context of the defendant’s Web site, which contained articles reporting the underlying facts on which she based her accusations, because her newsgroup posting included “a hyperlink for immediate access to such articles,” which the court characterized as “at least as connected to the news group posting as the back page of a newspaper is connected to the front.”^{68.3}

[d]—Presumed and Punitive Damages

In *Gertz*, the Supreme Court held that the First Amendment prohibits an award of presumed or punitive damages when liability is not based on a showing of *New York Times* “actual malice.” Thus, a private-figure plaintiff who establishes the defendant’s fault by proving negligence, but not “actual malice,” may recover damages only for “actual injury.”⁶⁹ The Court did not limit the term “actual injury” to “out-of-pocket loss” (i.e., special damages), but it did hold that awards for general damages, such as impairment of reputation, personal humiliation, and mental anguish, “must be supported by competent evidence.”⁷⁰

[e]—Categories of Defamatory Speech Possibly Unprotected by the First Amendment

Under current First Amendment doctrine, when a plaintiff sues a media defendant for a defamatory statement about matters of public

^{68.2} *Nicosia v. De Rooy*, 72 F. Supp.2d 1093, 1101 (N.D. Cal. 1999). See also *id.*, at 1106 (“Moreover, in the context of the heated debate on the Internet, readers are more likely to understand accusations of lying as figurative, hyperbolic expressions.”). See generally, Lidsky, “Silencing John Doe: Defamation & Discourse in Cyberspace,” 49 Duke L. J. 855, 935-939 (Feb. 2000) (arguing that “the culture” of most online bulletin boards “encourages” participants “to play fast and loose with facts” and that anonymous accusations on such boards that a company is a “scam” and its officers “criminals” probably should not “be taken any more literally than the statement that” the company “is “a flying turd;” “[v]iewed in this light,” such inflammatory comments “seem immature and irresponsible, but not necessarily factual”).

^{68.3} *Nicosia v. De Rooy*, N. 68.2 *supra*, 72 F. Supp.2d at 1103.

⁶⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350, 94 S.Ct. 2297, 41 L.Ed.2d 789 (1974). The Court later held that the *Gertz* restriction on presumed and punitive damages applies only where the defamatory speech is about matters of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). See § 2.02[3][e][i] *infra*.

⁷⁰ *Gertz*, N. 69 *supra*, 418 U.S. at 350.

concern, she must prove both falsity and fault (ranging from negligence to “actual malice”) and she can recover presumed and punitive damages only if she proves “actual malice.” The Supreme Court has not yet defined the full extent to which these First Amendment modifications of state defamation law apply to speech about matters not of “public concern” and to speech by “nonmedia” defendants.

[i]—Matters Not of “Public Concern”

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁷¹ a construction company won a jury verdict for presumed and punitive damages against a credit reporting agency, which had falsely reported to five of its subscribers that the company had filed for bankruptcy. The Supreme Court held that *Gertz’s* prohibition of presumed and punitive damages without proof of “actual malice” did not apply because the defamatory statement was not about a matter of public concern. In a plurality opinion joined by Justices Rehnquist and O’Connor, Justice Powell explained that *Gertz*, “[l]ike every other case on which this Court has found constitutional limits to state defamation laws,” involved speech “on a matter of undoubted public concern,” and that constitutional limits were imposed by the Court in those cases because the First Amendment interest in protecting open discussion about public matters outweighed the states’ interest in providing compensation for injury to reputation.⁷² He reasoned that the balance of these interests in *Gertz* does not apply to “speech on matters of purely private concern” because such private speech “is of less First Amendment concern” and has “reduced constitutional value.”⁷³ Stating that “the role of the Constitution in regulating state libel law is far more limited when” speech is on private matters, Justice Powell concluded that the First Amendment permits the award of presumed and punitive damages in such cases without proof of “actual malice.”⁷⁴

Justice Powell did not discuss how the Constitution’s “far more limited” role in the context of private speech affects the other First Amendment limitations imposed by the Court on state defamation law. In a

(Text continued on page 2-23)

⁷¹ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

⁷² *Id.*, 472 U.S. at 756-759.

⁷³ *Id.*, 472 U.S. at 759-761.

⁷⁴ *Id.*

concurring opinion, however, Justice White concluded that, under the plurality's reasoning, "it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases" involving private speech.⁷⁵ Several lower courts also have construed *Dun & Bradstreet* as limiting *Gertz*'s prohibition of liability without fault to speech of public concern.⁷⁶ In *Hepps*, decided one year after *Dun & Bradstreet*, the Court was careful not to address whether the rule requiring plaintiffs to prove falsity would apply in defamation actions based on private speech.⁷⁷

⁷⁵ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773-774, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (White, J., concurring). Justice White and Chief Justice Burger concurred with the plurality's limitation of *Gertz* to matters of public concern, based on their belief that *Gertz* should be overruled, *id.*, 472 U.S. at 764 (Burger, C.J., concurring), 472 U.S. at 774 (White, J., concurring), even though Justice White "had thought *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation . . . whether or not it implicates a matter of public importance." *Id.*, 472 U.S. at 772. In fact, *Gertz* contains language indicating that its "fault" requirement does apply to speech on private matters. In deciding what standard of liability is constitutionally required when the plaintiff is a private figure, the Court in *Gertz* expressly rejected the alternative approach of requiring proof of *New York Times* "actual malice" whenever the speech was of "public or general interest"—the approach suggested by the plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971)—in part because it "inadequately served" the First Amendment values at stake by allowing the imposition of "strict liability" on "a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

⁷⁶ See:

Fourth Circuit: *Mutafis v. Erie Insurance Exchange*, 775 F.2d 593 (4th Cir. 1985) (*per curiam*).

Fifth Circuit: *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1334 (5th Cir. 1993).

State Courts:

Arizona: *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562 (1986).

Maine: *Ramirez v. Rogers*, 540 A.2d 475 (Me. 1988).

Utah: *Cox v. Hatch*, 761 P.2d 556 (Utah 1988).

⁷⁷ The holding in *Hepps* was expressly limited to defamation cases based on "speech of public concern." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) ("When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape"). *Id.*, 475 U.S. at 775. See *Ramirez v. Rogers*, 540 A.2d 475 (Me. 1988) (finding *Hepps*' requirement that plaintiffs prove falsity inapplicable to private speech by nonmedia defendant). See also, N. 29 *supra*.

[ii]—*Nonmedia Defendants*. Proof of fault by a private-figure plaintiff was characterized in *Gertz* as the appropriate standard of liability “for a publisher or broadcaster” of defamatory falsehoods.⁷⁸ The *Gertz* opinion spoke in terms of the First Amendment interests of the “newspaper or broadcaster,” the “publisher or broadcaster,” the “communications media,” “the press,” the “news media,” the “press and broadcast media,” or, simply, “the media.”⁷⁹ A few lower courts have construed this language as a “deliberate” choice by the Supreme Court to limit *Gertz*’s constitutional protections to “media” defendants,⁸⁰ although most lower courts have stated or assumed that *Gertz* applies to all defendants, not just the media.⁸¹

The possibility of a media/nonmedia distinction was first expressly acknowledged by the Court in *Hutchison v. Proxmire*,⁸² in which it was noted that the “Court had never decided the question” whether “the New York Times standard can apply to an individual defendant rather than to a media defendant.”⁸³ That comment was curious—while the Court may not have “decided” the question, it had repeatedly applied the *New York Times* protections to individual defendants, dating back to *New York Times* itself, when the Court applied the First Amendment standards announced in that case to reverse the libel judgment against both the newspaper defendant and the individual defendants who were allegedly

⁷⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

⁷⁹ *Id.*, 418 U.S. at 332, 337, 340, 341, 342, 343, 345, 346, 348, 350.

⁸⁰ *Oregon*: *Wheeler v. Green*, 286 Ore. 99, 593 P.2d 777, 784 (1979).

See also:

Iowa: *Vinson v. Linn-Mar Community School District*, 360 N.W.2d 108 (Iowa 1984).

Wisconsin: *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied* 459 U.S. 883 (1982).

⁸¹ See, e.g., *Bagley v. Iowa Beef Processors, Inc.*, 797 F.2d 632 (8th Cir. 1986), *cert. denied* 479 U.S. 1088 (1987). See Sack, *Libel, Slander, and Related Problems*, § 5.9.4.1, at 353-54 & nn.592-610 (2d ed. 1994) and cases cited therein.

⁸² *Hutchison v. Proxmire*, 443 U.S. 111, 96 S.Ct. 2675, 61 L.Ed.2d 411 (1979).

⁸³ *Id.*, 443 U.S. at 133-134 n.16.

responsible for placing the defamatory advertisement in the newspaper.⁸⁴

The issue was served up to the Court in *Dun & Bradstreet*, when the Vermont Supreme Court denied the credit reporting agency the protections of *Gertz* on the ground that *Gertz* did not apply to nonmedia defendants.⁸⁵ While the plurality opinion did not address the lower court's media/nonmedia distinction, relying instead on the distinction between public and private speech, at least five Justices in that case expressly endorsed the proposition that, "in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities."⁸⁶ Nevertheless, the following year, the Court brought back to life the potential distinction it has never endorsed, limiting its holding in *Hepps* to cases brought against "media defendants" and expressly refusing to "consider" whether a private-figure plaintiff who sues a "nonmedia defendant" must prove falsity.⁸⁷

⁸⁴ *New York Times v. Sullivan*, 376 U.S. 254, 256, 261, 264, 286, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See also: *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); *Henry v. Collins*, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965); *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773 n.4, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (White, J., concurring). Thus, notwithstanding Chief Justice Burger's footnote in *Hutchison*, virtually all lower courts have held or assumed that the *New York Times* standards apply to "nonmedia" defendants. See Sack, *Libel, Slander, and Related Problems*, § 5.6.1, at 311 & n.383 (2d ed. 1994), including courts that construed *Gertz* to apply only to media defendants. See *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979).

⁸⁵ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983), *aff'd on other grounds* 472 U.S. 749 (1985).

⁸⁶ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (Brennan, J., joined by Blackmun, Marshall, and Stevens, J.J., dissenting); *id.*, 472 U.S. at 773 and n.4 (White, J., concurring) (noting that "[n]one of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn").

⁸⁷ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) (citing the *Hutchison* footnote). The Court again asserted the possibility of a distinction in refusing to consider whether its ruling in *Milkovich* applied to nonmedia defendants. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 n.6, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (citing the *Hepps* footnote).

§ 2.03 Applying Defamation Law to Online Service Providers

[1]—Overview

An online service provider can transmit a defamatory statement to others in many different contexts—for example, in a message sent to every user who logs on to the OSP's computers, in material contained in a database that is viewed or downloaded by a user, in a message posted on a "bulletin board" generally accessible to all or some of the OSP's users, in a comment made during an online, "real-time" discussion among users connected to the OSP, or in a message sent to one or more specific "e-mail" addresses. When the OSP is the author of the statement it transmits, application of existing defamation law is a rather straightforward process, although the context in which an OSP transmits a defamatory statement may affect both its classification as libel or slander¹ and the extent to which the common law rules must be modified to comply with First Amendment requirements.²

When a defamation action is brought against an OSP based on its transmission of a statement authored by another, application of existing defamation law to determine the appropriate standard of liability is a more novel inquiry, and one which is often likely to be substantially affected by the context in which the OSP transmitted the statement. Moreover, as the technology continues to evolve, the distinctions among current services offered by an OSP may blur and new ones may develop. Some commentators suggest that the contexts in which OSPs transmit the statements of others are so new and unique that application of existing legal principles is inappropriate and new standards should be developed for OSP defendants.³ Whether such new standards should or will be developed, however, is still an open question.⁴ In any event, for debate on the need for new standards to be productive, one must first identify the liability standards under existing law that courts are likely to apply to an OSP that transmits third party content.⁵

[2]—Libel or Slander?

Whether a defamatory statement transmitted by an OSP is characterized as slander (spoken words or transitory gestures) or libel (recorded words or images) can have substantial practical significance. In most states, if the statement does not fall within one of the four traditional cate-

¹ See § 2.03[2] *infra*.

² See § 2.03[4] *infra*.

gories of “slander per se,” liability for slander is imposed only if the plaintiff can prove special damages, that is, actual pecuniary loss caused by the defamatory statement.⁶ A plaintiff’s inability to prove special damages can result in an early summary judgment for the defendant, because the requirement is an element of the cause of action, not simply a limita-

³ See, e.g.: Hardy, “The Proper Legal Regime for ‘Cyberspace,’” 55 U. Pitt. L. Rev. 993, 996-1006, 1044-1048 (1994) (advocating rule of strict liability for OSP); Perritt, “Dispute Resolution in Electronic Network Communities,” 38 Vill. L. Rev. 349, 395-400 (1993) (proposing statute that permits OSP to “contract” for common carrier immunity from tort liability); Loundy, “E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability,” 3 Albany L.J. Sci. & Tech. 79, 90-91 (1993) (advocating constitutional amendment proposed by Professor Laurence Tribe); Cavazos, “Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology,” 12 Rev. Lit. 231, 243-247 (1992) (advocating immunity where OSP provides right of reply); Cutrera, “Computer Networks, Libel and the First Amendment,” 11 Computer/L. J. 555, 582-583 (1992) (proposing that liability be determined by allocation of responsibility between OSP and users in service contract); Note, “Cubby Inc. v. CompuServe Inc.: Comparing Apples to Oranges: The Need for a New Media Classification,” 5 Software L. J. 821 (1992); Katsh, “The First Amendment and Technological Change: The New Media Have a Message,” 57 Geo. Wash. L. Rev. 1454, 1460 (1989) (detailing how new “electronic media” will “exert considerable pressure for change” on legal standards governing flow of information); Charles, “Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?,” 2 J. L. & Tech. 121, 146-150 (1987) (proposing federal legislation and possible licensing scheme).

⁴ See Becker, “The Liability of Computer Bulletin Board Operators for Defamation Posted by Others,” 22 Conn. L. Rev. 203, 237 (1989) (stating that there “is little chance” the Supreme Court will apply the First Amendment “in a different way to computer bulletin boards than to more traditional means of disseminating information” and that the “spectre of different rules for computer bulletin boards is a chimera”). See also: Miller, “New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services,” 61 Fordham L. Rev. 1147, 1197-1201 (1993) (advocating application of existing standards based on function performed by OSP); Naughton, “Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action,” 81 Georgetown L.J. 409, 435-440 (1992) (advocating application of traditional “actual knowledge” standard applied to newsstands and bookstores). See generally, Cate, “The First Amendment and National Information Infrastructure,” 30 Wake Forest L. Rev. 1 (1995) (rejecting claim that characteristics of the online medium justify new and different First Amendment standards).

⁵ See § 2.03[3] *infra*.

⁶ See § 2.02[1][e], Ns. 19 and 20 *supra*.

tion on recovery.⁷ This substantial hurdle is not imposed in most libel cases,⁸ on the theory that written words are more permanent, are capable of wider circulation, and are the product of greater deliberation by their author than are spoken words.⁹

Most commentators have concluded (or at least assumed) that a defamatory statement transmitted in an online communication should be governed by the law of libel, not slander.¹⁰ To the extent online communication between two people is achieved through the use of text or recorded images (digitally recorded in the computer's memory and displayed on a video monitor, rather than on paper), that conclusion appears sound. When compared to the spoken word, an electronic publication shares the relative permanence of a publication printed on paper—both can be read repeatedly, copied and circulated to others, until an affirmative act is taken to erase the text or image from the medium on which it is recorded.¹¹ On a practical level, it also may be reasonable to expect that some recipients of an electronic communication, with a few simple keystrokes, will print the electronically communicated text or images onto paper.¹²

The question is more difficult with respect to statements communicated during an online, live discussion, in which the text of each partici-

⁷ Anderson, "Reputation, Compensation, and Proof," 25 Wm. & Mary L. Rev. 747, 748 (1984). See, e.g.:

New York: Liberman v. Gelstein, 80 N.Y.2d 429, 605 N.E.2d 344, 590 N.Y.S.2d 857 (1992) (summary judgment).

Ohio: Sullivan v. Tucci, 69 Ohio App. 3d 20, 590 N.E.2d 13 (1990) (summary judgment in libel *per quod* action).

Wisconsin: Bauer v. Murphy, 530 N.W.2d 1 (Wis. App. 1995) (summary judgment).

⁸ Many states make special damages an element of an action for libel *per quod*, i.e., where the written statement is defamatory only when considered in light of extrinsic facts already known to its recipients. See § 2.02, N. 5 *supra*.

⁹ Spence v. Funk, 396 A.2d 967, 970 (Del. 1978). The *Restatement* defines "slander" as "defamatory matter by spoken words, transitory gestures or by any form of communication other than" libel. *Restatement (Second) of Torts*, § 568(2) (1977). It defines "libel" as "defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has potentially harmful qualities characteristic of written or printed words," *id.* at § 568(1), and states that factors to use in distinguishing libel from slander include the area of dissemination, the deliberate and premeditated character of the publication and the persistence of the defamation. *Id.*, at § 568(3).

¹⁰ See, e.g.: Loundy, "E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability," 3 Albany L.J. Sci. & Tech. 79, 90-91 (1993); Perritt, "Tort Liability, the First Amendment, and Equal Access to Electronic Networks," 5 Harv. J. L. & Tech. 65, 97 n.149 (1992).

pant's message can be read by users connected to the OSP's computer for only a very brief period of time. Arguably, the transitory nature of such statements is similar to that of a statement written on paper that is shown to another for only a brief moment and then erased or destroyed. The publication of that written statement, even if brief and transitory, would probably be governed by the law of libel. On a more practical level, however, one might argue persuasively that, even if they can be read online by a large audience, defamatory statements made in such "virtual" discussion rooms are sufficiently and "spontaneous" to be classified as slander rather than libel, particularly when the audience is likely to perceive them as being functionally equivalent to spoken words.¹³ Thus, statements made during transitory online discussions might be actionable only if the plaintiff can prove special damages. When it is reasonably foreseeable that the content of

¹¹ An analogy can be made to copyright cases holding that the portion of a computer's random access memory that contains the digital information constitutes a "material object in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated . . . with the aid of a machine or device" under Section 101 of the Copyright Act, 17 U.S.C. § 101. Such information is deemed sufficiently "fixed" to constitute a "copy" of the same information on the storage disk from which it was loaded into the computer's RAM, because it is "stable enough to be perceived, reproduced, or otherwise communicated for a period of time of more than transitory duration." *Id.* See:

Fourth Circuit: *Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 845 F. Supp. 356, 362-364 (E.D. Va. 1994).

Ninth Circuit: *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993).

¹² When a speaker intends or expects his oral statement to be reduced to writing and republished, and it is then republished in written form, his original oral statement is treated as libel, not slander. See, e.g., *Bander v. Metropolitan Life Insurance Co.*, 313 Mass. 337, 47 N.E.2d 595 (1943). See: Keeton, *Prosser and Keeton the Law of Torts*, § 112, at 786 (5th ed. 1984); *Restatement (Second) of Torts* § 568, comment f (1977) (citing example of oral statement to reporter that is later published in newspaper). But see: *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 307 (Mo. 1993) (en banc) (statements to reporters not subsequently republished in print are slander); *Restatement (Second) of Torts*, § 577, comment f (1977). See also, § 2.02[1][c], N. 14 *supra* (original publisher liable for foreseeable republications).

¹³ See *Ward v. Zelikovsky*, 136 N.J. 516, 528, 643 A.2d 972, 978 (1994) ("A jury can generally assume that a measure of thought preceded the words printed in a newspaper or magazine. In contrast, spoken words often do not evidence that a similar level of deliberation preceded them. This distinction is significant because the apparent deliberation of the speaker or writer will influence how a reasonable audience perceives the speech"). (Citation omitted.) Cf.: Sack, *Libel, Slander, and Related Problems*, § 2.3, at 68 (2d ed. 1994) (describing differing treatments of defamatory television and radio broadcasts, which have potentially huge audiences); N. 52 *infra*.

the online conference will be republished in a more permanent context, however, defamatory statements made during the conference are likely to be treated as libel.¹⁴

[3]—Liability of an OSP for Statements Made by Others

A defendant is not liable for defamation unless he has “published” a defamatory statement. In some circumstances, the law imposes liability on a person who facilitates the dissemination of a defamatory statement, not because he is assisting in the author’s publication of the statement, but because his conduct itself constitutes a tortious repetition, or “republishing,” of the statement—that is, because he too has communicated to another a defamatory statement about the plaintiff.¹⁵ Under what

¹⁴ See *State of Washington v. Townsend*, 28 Media L. Rep. (BNA) 1374, 1377 (Wash. Super. Dec. 15, 1999) (state Privacy Act, which bars unauthorized recording of “private communication” using “any device,” does not apply to e-mail or instant messages between computer users because “it can be presumed that defendant knew that the intended recipients” “may retain and/or disseminate” his messages. “In an age where millions of e-mails are sent daily, it is unreasonable for a user to expect that a recipient will not save, transmit and/or copy an e-mail or an ICQ (chat) communication.”). See generally, N. 12 *supra*. Even if courts eventually treat defamatory online communications as slander in some contexts, the online communication of defamatory text or images “uploaded” onto the sender’s computer from a previously prepared document would still be treated as a libel. See: *Christy v. Stauffer Publications, Inc.*, 437 S.W.2d 814, 815 (Text 1969) (television broadcast of statement read from prepared script treated as libel); *Restatement (Second) of Torts*, § 568, comment e (1977) (publication of a libel may be made by reading aloud a defamatory writing).

¹⁵ See *Restatement (Second) of Torts*, §§ 558(b)-(c) and 578, comment b (1977). Accord:

Fourth Circuit: Zeran v. America Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997), *cert. denied* 524 U.S. 937 (1998) (“Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability”).

State Court:

Georgia: Mullinax v. Miller, 242 Ga. App. 811, 814-815, 531 S.E.2d 390, 392-393 (2000) (that defendant merely contributed information or physical resources that another uses to communicate a libel is insufficient; plaintiffs must prove that defendant “published” the libel, which “entails the ability to control the libel”).

But see:

State Courts:

Pennsylvania: Ertel v. Patriot-News Co., 544 Pa. 93, 674 A.2d 1038, *cert. denied* 117 S.Ct. 512 (1996) (while noting that, “[o]rdinarily, a plaintiff in a defamation case must prove that the defendant actually published the defamatory material,” court found that defendants could also be held liable if they “procured” the publication, “in the sense that they directed publication of the article”).

West Virginia: Cram v. Lightner, 178 W. Va. 765, 773, 364 S.E.2d 778, 786(1987) (“alleged procurers or assistants are not responsible as publishers of libel absent a showing of their participation or involvement in the publication”).

circumstances, then, will courts treat an OSP as a “publisher” of defamatory content created by a third party and electronically transmitted to others by the OSP’s computers?

This inquiry is now largely governed by Section 509 of the Communication Decency Act of 1996, which affords the provider of an interactive computer service immunity from civil liability for defamatory content on its service if that content was provided by a third party.^{15.1} The scope of this statutory immunity, however, is open to interpretation, which in turn calls for a detailed analysis of both the common law principles that the statute arguably preempts and the case law applying those principles to OSPs that moved Congress to act.

Prior to the enactment of Section 509 of the CDA, there were few defamation actions filed against OSPs based on their transmission of third party content, and only two reported decisions addressed the common law standards of liability that should be applied to an OSP in such cases.¹⁶ There is, however, an extensive body of case law,

(Text continued on page 2-31)

^{15.1} The Communications Decency Act of 1996 (the CDA) was enacted as Title V of the Telecommunications Act of 1996, reprinted in 142 Cong. Rec. H1099-H1102 (daily ed. Jan. 31, 1996). The language of Section 509 of the CDA (to be codified at 47 U.S.C. § 230), which creates the immunity for OSPs for defamatory third party content, and the cases applying that provision, are analyzed in § 2.03[3][f] *infra*.

¹⁶ See *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794 (N.Y. Sup., May 25, 1995) and *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y.1991), discussed in § 2.03[3][c][iii] *infra*. In addition, in a later, post-CDA decision, *Lunney v. Prodigy Services Co.*, 94 N.Y.2d 242, 723 N.E.2d 539 (1999), *cert. denied* 146 L.Ed.2d 776 (2000), the court applied common law liability standards to affirm summary judgment for an OSP defendant and, based on that holding, did not determine whether the CDA afforded Prodigy federal statutory immunity for the statements at issue in that case. *Lunney* is also discussed in § 2.03[3][c][iii] *infra*. See also, *Jaisinghani v. Capital Cities/ABC, Inc.*, 973 F. Supp. 1450 (1997) (libel suit against two online service providers, Datatimes and Prodigy, based on newspaper article circulated electronically by Datatimes and summarized by a Prodigy user on a Prodigy message board, held to be barred by statute of limitations).

applying both common law and constitutional principles, for other types of defendants who facilitate the production and dissemination of defamatory statements. Two common principles can be derived from these cases. First, a person is subject to liability as a “publisher” only if he communicates a defamatory statement to another.¹⁷ Second, a person communicates that statement to another if, but only if, he is aware of its content at the time he disseminates it.¹⁸

[a]—“Publication” and “Republishers” at Common Law.

[i]—*Primary Republishers of Printed Material.* “Publisher” is a term with multiple personalities. When used in a nonlegal, commercial context, the term “publisher” has typically referred to those who produce multiple, identical copies of printed material for sale to the public—that is, those who publish books, magazines and newspapers.¹⁹ Print publishers often rely on third parties to create content for their publications. Book publishers reproduce and disseminate the work of independent authors.

¹⁷ See, e.g., *Restatement (Second) of Torts*, § 577(1) (1977) (“Publication of defamatory matter is its *communication* intentionally or by a negligent act to one other than the person defamed”). (Emphasis added.) Compare *MacFadden v. Anthony*, 117 N.Y.S.2d 520 (Sup. 1952) (radio broadcast that called listeners’ attention to a defamatory magazine article without repeating any of the defamatory material was “not a republication or publication of a libel”), with *Restatement (Second) of Torts*, § 581, comment c, illustration 3 (1977) (person who gives his copy of a newspaper to B and calls B’s attention to a defamatory article in that newspaper is subject to liability for publishing a libel).

¹⁸ Becker, “The Liability of Computer Bulletin Board Operators for Defamation Posted by Others,” 22 Conn. L. Rev. 203, 218 (1989) (that “there is no publication without knowledge” is “a thread . . . that runs almost without exception through the whole of defamation law”). See *Restatement (Second) of Torts*, § 581, comment c, illustration 1 (1977) (person who gives newspaper containing defamatory article to another without having read the article has not published a libel).

¹⁹ See Perritt, “Tort Liability, the First Amendment, and Equal Access to Electronic Networks,” 5 Harv. J.L. & Tech. 65, 68-69 (1992) (detailing functions performed by the “modern print publisher”). Even more personalities have been added by the development of an “electronic publishing” industry. See: *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131, 181 (D.D.C. 1982), *aff’d* 460 U.S. 1001 (1983) (defining “electronic publishing” to mean “the provision of any information which a provider or publisher has, or has caused to be originated, authored, compiled, collected, or edited, or in which he has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means”); Katsh, “The First Amendment and Technological Change: The New Media Have a Message,” 57 Geo. Wash. L. Rev. 1454, 1472-1478 (1989) (detailing how the “very definition of ‘publishing’” in the commercial context is being changed by the electronic communications media).

Magazines and newspapers reproduce and disseminate content created by advertisers, syndicated columnists, wire services and readers (letters to the editor).

Such third party content is initially “published,” under the law of libel, when it is communicated to the print publisher. Because of the nature of the print medium, print publishers necessarily review third party content during the process of producing the multiple copies of the printed material they later sell to the public. Thus, a print publisher’s decision to reproduce and disseminate copies of a defamatory statement authored by another is always made with knowledge of the statement’s content.²⁰ Having reproduced and disseminated the defamatory statements with knowledge of what they say, print publishers are characterized by the courts as “republishers” who have “adopted” the statements as their own,²¹ on the theory that “tale bearers are as bad as tale makers.”²² On this basis, print publishers are usually subject to liability for third party content as “primary” republishers—that is, “as if they had originally published” the material.²³

[ii]—*Distributors of Printed Material*. The common law has long recognized the rule that “one who only delivers or transmits defamatory mat-

²⁰ See Becker, N. 18 *supra*, 22 Conn. L. Rev. at 222 & n.91 (1989) (observing that “[e]verything that goes into a book, newspaper or magazine is ‘known’ to some agent of the publisher,” but noting that future developments in electronic publishing may change this practice in some contexts).

²¹ *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir.), *cert. denied* 488 U.S. 825 (1988) (newspaper republication of syndicated column); *Restatement (Second) of Torts*, § 578, comment b (1977). See § 2.02[1][c], N. 12 *supra*.

²² *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1112 (N.D. Cal. 1984).

²³ Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 803 (5th ed. 1984); *Restatement (Second) of Torts*, § 578 (1977). See, e.g.:

Supreme Court: *New York Times, Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (newspaper subject to liability as republisher of advertisement).

First Circuit: *Geiger v. Dell Publishing Co., Inc.*, 719 F.2d 515, 516 (1st Cir. 1983) (book publisher subject to liability for republication of author’s work).

State Courts:

Michigan: *Hodgins v. Times Herald Co.*, 169 Mich. App. 245, 425 N.W.2d 522 (1988) (newspaper liable for publishing defamatory letter to the editor).

Oklahoma: *Weaver v. Pryor Jeffersonian*, 569 P.2d 967, 972 (Okla. 1977) (newspaper is a “republisher” of letters to the editor).

ter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.”²⁴ Such persons—sometimes referred to as “secondary publishers or disseminators”—often “are in the business of making their facilities available to disseminate” content created by others,²⁵ but they differ from primary republishers because they play no active role in the production of the physical material that they deliver or of the content that they transmit.

Some courts hold that a person who merely delivered defamatory material without knowing its contents did not “publish” a libel, while others suggest he has “published” a libel but is immune from liability.²⁶ Many of the older decisions required such a person to prove his ignorance as an affirmative defense, while most of the more modern cases have required the plaintiff to allege and prove the defendant’s knowledge as an element of her claim.²⁷ The substantive common law rule, however, is firmly established: liability is not imposed on a person who merely delivers or transmits defamatory material if that person did not know and had no reason to know of the material’s defamatory nature at the time he disseminated it. The rule is applied without exception to the distributors of books, magazines and newspapers,²⁸ to the newsstands and stores that sell them,²⁹ to the libraries that make them available to the public,³⁰ and to the people who buy them and later give them to others.³¹

²⁴ *Restatement (Second) of Torts*, § 581(1) (1977) (expressly excluding radio and television broadcasters from the rule). See § 2.03[3][a][vi] *infra*.

²⁵ *Keeton, Prosser and Keeton on the Law of Torts*, § 113, at 803 (5th ed. 1984).

²⁶ Prosser and Keeton describe such persons as “secondary publishers” apparently because “[t]hey are intentionally making the contents available to others.” Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 803 (5th ed. 1984). See also, *Restatement (Second) of Torts*, § 578 (1977) (such persons are exceptions to general rule for “one who repeats or otherwise republishes defamatory matter”). But see, *Church of Scientology v. Minnesota Medical Ass’n Foundation*, 264 N.W.2d 152, 156 (Minn. 1978) (sending copies of article to others, with no reason to believe that article was false and defamatory, “did not constitute publication”).

²⁷ *Compare Albi v. Street & Smith Publications, Inc.*, 140 F.2d 310, 313-314 (9th Cir. 1944) (burden on defendant), *with Lewis v. Time, Inc.*, 83 F.R.D. 455, 463-465 (E.D. Cal. 1979), *aff’d* 710 F.2d 549 (9th Cir. 1983) (plaintiff must allege specific facts showing defendant’s knowledge of content or duty to investigate in order to state a claim).

²⁸ See, e.g.:

Second Circuit: *Macaluso v. Mondadori Publishing Co.*, 527 F. Supp. 1017, 1019 (E.D.N.Y. 1981) (magazine distributor); *Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228, 235-236 (S.D.N.Y. 1981) (magazine distributor).

Fifth Circuit: *Sexton v. The American News Co.*, 133 F. Supp. 591, 593 (N.D. Fla. 1955) (magazine distributor).

Seventh Circuit: Hartmann v. American News Co., 171 F.2d 581, 583, 585 (7th Cir. 1948), cert. denied 337 U.S. 907 (1949) (magazine distributor.)

Ninth Circuit: Lewis v. Time, Inc., 83 F.R.D. 455, 463-465 (E.D. Cal. 1979), aff'd 710 F.2d 549 (9th Cir. 1983) (magazine distributor); Albi v. Street & Smith Publications, Inc., 140 F.2d 310, 313-314 (9th Cir. 1944) (magazine distributor).

State Courts:

Michigan: Bowerman v. Detroit Free Press, 287 Mich. 443, 451, 283 N.W. 642, 645 (1939) (newspaper distributor).

New York: Balabanoff v. Fossani, 192 Misc. 615, 81 N.Y.S.2d 732, 733 (Sup. 1948) (newspaper distributor).

²⁹ See, e.g.:

California: Osmond v. EWAP, Inc., 153 Cal. App. 3d 842, 852-857, 200 Cal. Rptr. 674, 679-682 (1984) (adult bookstore selling video with defamatory cover).

South Dakota: Janklow v. Viking Press, 378 N.W.2d 875, 881-882 (S.D. 1985) (bookstore).

Wyoming: Spence v. Flynt, 647 F. Supp. 1266, 1273-1274 (D. Wyo. 1986) (convenience store selling magazine); Dworkin v. L.F.P., Inc., 647 F. Supp. 1275, 1277 (D. Wyo. 1986) (same convenience store sued in *Spence*); Dworkin v. Hustler Magazine, Inc., 634 F. Supp. 727, 729 (D. Wyo. 1986) (magazine distributor and same convenience store sued in *Spence*); Dworkin v. Hustler Magazine, Inc., 611 F. Supp. 781, 785-787 (D. Wyo. 1986) (same convenience store sued in *Spence*).

³⁰ Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 803 & n.61 (5th ed. 1984) (citing two cases decided in England in 1894 and 1900); *Restatement (Second) of Torts*, § 581, comment e (1977). See Becker, "The Liability of Computer Bulletin Board Operators for Defamation Posted by Others," 22 Conn. L. Rev. 203, 227 (1989) ("no one seems to have sued a library for defamation in this century").

³¹ *Restatement (Second) of Torts*, § 581, comment c, illustrations 1-3 (1977). The rule has also been applied to those who apparently made photocopies of a defamatory magazine article and sent the photocopies to others. See:

District of Columbia Circuit: McBride v. Merrell Dow and Pharmaceuticals, Inc., 613 F. Supp. 1349, 1356-1357 (D.D.C. 1985), aff'd in relevant part on other grounds 800 F.2d 1208 (D.C. Cir. 1986).

State Courts:

Minnesota: Church of Scientology v. Minnesota Medical Ass'n Foundation, 264 N.W.2d 152, 156 (Minn. 1978).

The courts in *McBride* and *Church of Scientology* did not expressly discuss whether there are circumstances in which a person who *makes* photocopies of a defamatory article and delivers them to others, rather than simply delivering documents made by others, would be deemed a "primary publisher" of the defamatory statements contained in the photocopies.

[iii]—*Telegraph Companies*. The *Restatement (Second) of Torts*' rule limiting the liability of distributors includes those who only "transmit" defamatory matter, and defines the term "transmits" as referring to both the delivery of physical material and "in addition the conveyance of defamatory words by methods other than physical delivery, as in the case of a telegraph company putting through a call."³² Characterizing a telegraph company (or any private wire or ticker-tape service) as a mere distributor, however, is problematic. Due to the nature of the medium, an agent of the company must necessarily review, and reproduce, the content of the sender's message in order to "transmit" it as a telegraph. Thus, applying the basic rule for distributors—no liability for disseminating statements without knowledge of their defamatory content—protects the company only from libel *per quod* actions.³³ Telegraph companies have, in fact, received effective common law immunity from defamation liability, but that protection has been afforded by a common law privilege based on their status as common carriers, not by the rule applied to distributors.³⁴

[iv]—*Telephone Companies*. There is only one reported case in which a plaintiff sued a telephone company for transmitting defamatory content

³² *Restatement (Second) of Torts*, § 581, comment b (1977).

³³ *Id.*, § 581, comment f (telegraph company that transmits a communication innocent on its face, in secret code, or in a foreign language is not liable to one defamed by reason of extrinsic facts known to recipient of message). Several early cases refused to permit telegraph companies to be held liable for transmitting messages that were not defamatory on their face. See, e.g.:

Kansas: *Stockholm v. Western Union Telegraph Co.*, 10 Kan. App. 580, 63 P. 658 (1901).

Massachusetts: *Rogers v. Postal Telegraph Cable Co.*, 265 Mass. 544, 164 N.E. 463 (1929).

Minnesota: *Nye v. Western Union Telegraph Co.*, 104 F. 628 (C.C.D. Minn 1900).

Missouri: *Grisham v. Western Union Telegraph Co.*, 238 Mo. 480, 142 S.W. 271 (1911).

³⁴ *Restatement (Second) of Torts*, § 612(2) and comment g (1977). See N. 159 *infra* and accompanying text. Plaintiffs were successful against telegraph companies in only a few early cases. See:

Minnesota: *Paton v. Great Northwestern Telegraph Co.*, 141 Minn. 430, 170 N.W. 511 (1919); *Peterson v. Western Union Tel Co.*, 65 Minn. 18, 67 N.W. 646 (1896).

North Carolina: *Parker v. Edwards*, 222 N.C. 75, 21 S.E.2d 876 (1942) (jury found defendant acted in bad faith).

over the phone lines. In *Anderson v. New York Telephone Co.*,³⁵ a man used equipment leased from the telephone company to play recorded messages that defamed the plaintiff. The messages were heard by any person who called the man's telephone number, which he urged listeners to do during his weekly radio broadcasts. The plaintiff sued the telephone company only after counsel had advised him that injunctive relief against the man was not permitted by the law, the police had refused to intervene, and the telephone company, after being notified of the defamatory recordings, had refused to remove the man's telephone equipment or disconnect his service.³⁶

The New York Court of Appeals unanimously held that the telephone company had not "published" the recorded messages transmitted over the telephone lines.³⁷ In a dissenting opinion at the Appellate Division later adopted by the Court of Appeals, the telephone company's role was distinguished from that of a telegraph company on the ground that a telephone message is "communicated directly" by the sender to the recipient without being communicated "by or to any person employed by the telephone company."³⁸ The opinion concluded that the telephone company's role is "not legally different" from that of any supplier who leases "com-

³⁵ *Anderson v. New York Telephone Co.*, 35 N.Y.2d 745, 320 N.E.2d 647 (1974), reversing 42 A.D.2d 151, 345 N.Y.S.2d 740 (1973).

³⁶ *Anderson v. New York Telephone Co.*, 42 A.D.2d 151, 162, 345 N.Y.S.2d 740, 751 (1973) (Witmer, J., dissenting).

³⁷ *Anderson v. New York Telephone Co.*, 35 N.Y.2d 745, 746, 320 N.E.2d 647 (1974) (reversing "on the dissenting opinion" at the Appellate Division, N. 36 *supra*, and on the judgment of the trial court). The trial court had directed a verdict for the company on the grounds that it had not published the recordings and because it had no right to interfere with a subscriber's communication unless it was obscene, profane or illegal. The Appellate Division had reversed, holding that the company had the legal authority to remove the man's recording equipment or terminate his service if it determined that his use of the company's "facilities" was "improper," and that liability could be imposed on the company if the plaintiff could prove that a defamatory falsehood "was transmitted by the company" with knowledge or reckless disregard of its falsity. *Anderson*, N. 36 *supra*, 345 N.Y.S.2d at 746-747.

³⁸ *Anderson*, N. 36 *supra*, 345 N.Y.S.2d at 752 (Witmer, J., dissenting) ("when the telegraph sender submits a message to agent A who transmits it to agent B who delivers it to the recipient, agent A has *communicated* the message to agent B and agent B has *communicated* the message to the addressee"). (Emphasis added.) See also, *Anderson*, N.37 *supra*, 320 N.E.2d at 649 n.2 (Gabielli, J., concurring) ("the predicates for liability of the telegraph company" do not "apply with respect to the telephone company the employees of which perform no active or affirmative function in the preparation or transfer of the message").

munication facilities” to a person who uses them to publish a defamatory message. In such cases, it was reasoned, the supplier is not a “publisher,” even if he is aware of the nature of the message being communicated by the person using his facilities, because no person employed by the supplier has “participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility.”³⁹

The *Restatement* applies the same reasoning to exclude from its rule for distributors “one who merely makes available to another equipment or facilities that he may use himself for general communication purposes.”⁴⁰ Such suppliers, including telephone companies, are not “publishers,” even if they have reason to know their equipment will be used to publish defamatory matter.⁴¹ “Since it is the user of the telephone rather than the telephone company who is treated as transmitting a telephone message, the company is not subject to liability for a defamatory statement communicated by a customer.”⁴²

The analysis applied to telephone companies in *Anderson* and the *Restatement* reflects the fundamental principle that the mere use of a defendant’s *property* to publish a libel does not make the defendant a publisher; a defendant can “publish” a statement only if he, or a *person* for whom he is legally responsible, communicates the statement to another.

[v]—*Messages Posted on Private Property*. In *Anderson*, the defamatory messages were recorded on property over which the telephone company had no direct control. The applicable rule differs when a third party places a defamatory message on property controlled by the defendant, as

³⁹ *Anderson v. New York Telephone Co.*, 42 A.D.2d 151, 163, 345 N.Y.S.2d 740, 752 (1973) (Witmer, J., dissenting). In what later became the *dicta* of the Court of Appeals, Justice Witmer also stated his view that, if the telephone company were deemed to have published the recordings because of its refusal to terminate the man’s service, the publications would have been protected by the common law privilege for common carriers, such as telegraph companies (see N. 159 *infra*). *Id.*, 42 A.D.2d at 163-171.

⁴⁰ *Restatement (Second) of Torts*, § 581, comment b (1977).

⁴¹ See: *Anderson v. New York Telephone Co.*, 35 N.Y.2d 745, 320 N.E.2d 647, 649 (1974) (Gabrielli, J., concurring) (“It could not be said, for example, that [IBM], even if it had notice, would be liable were one of its leased typewriters used to publish a libel”); Becker, “The Liability of Computer Bulletin Board Operators for Defamations Posted by Others,” 22 Conn. L. Rev. 203, 219 (1989) (“[i]n other words, IBM is not liable even if it knowingly sells a typewriter to The National Inquirer”).

⁴² *Restatement (Second) of Torts*, § 612, comment g (1977). *Accord*, Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 804 (5th ed. 1984).

when a sign is posted on a defendant's porch, building, or interior wall. Most courts have held that when the defendant (1) has knowledge of the defamatory matter posted on his property and (2) allows it to remain after a reasonable opportunity to remove it, he is liable for its "continued publication," on the theory that he has "adopted" or "ratified" the defamatory matter and thereby "republished" it.⁴³

In a Seventh Circuit case,⁴⁴ for example, someone posted a sign on a wall inside a GM plant that defamed an employee. After the sign was removed three days later, the same defamatory statement was painted on the wall and remained there for seven months. The Seventh Circuit held that "[a] person is responsible for statements he makes or adopts" and that "[f]ailing to remove a libel from your building, after notice and opportunity to do so, is a form of adoption."⁴⁵ The court held that, although management "had to be aware of the sign," a reasonable person could not infer that GM had adopted it because it was removed within three days.⁴⁶ As to the painted message that remained for seven months, however, the court held that a jury could conclude that GM "'intentionally and unreasonably fail[ed] to remove' this sign and thereby published its contents."⁴⁷

⁴³ *Hellar v. Bianco*, 111 Cal. App. 2d 424, 244 P.2d 757, 759 (1952) (where defamatory words were written on wall of men's room, it was question for jury whether bartender's failure to remove the graffiti on the same evening on which he was informed of it by plaintiff's angry husband constituted a "republishing" by owners of the bar). *Accord:*

Alabama: *Tidmore v. Mills*, 33 Ala. App. 243, 32 So 2d 769 (1947) (jury could find ratification from defendant's failure to remove defamatory sign on defendant's property).

Massachusetts: *Fogg v. Boston & Lowell R.R.*, 148 Mass. 513, 20 N.E.109 (1889) (where defamatory article remained on bulletin board at railroad station for forty days, jury could "presume" that railroad had ratified it).

Minnesota: *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N.W. 387, 388 (1883) (failure to remove sign on table outside defendant's shop).

Restatement (Second) of Torts, § 577(2) (1977).

⁴⁴ *Tacket v. General Motors Corp.*, 836 F.2d 1042 (7th Cir. 1987).

⁴⁵ *Id.*, 836 F.2d at 1046.

⁴⁶ *Id.*, 836 F.2d at 1047 ("A sign posted on one day, seen and ordered removed the next, and down on the third day plainly is the work of a prankster rather than General Motors Corporation. A large bureaucracy takes time to remove a sign").

⁴⁷ *Id.*, 836 F.2d at 1047, quoting *Restatement (Second) of Torts*, § 577(2) (1977). (Brackets by the court.) At the subsequent trial, the jury found that the message was defamatory based on extrinsic facts known to GM and its employees at the plant, that GM had "intentionally and unreasonably failed to remove that sign (thereby 'publishing' it)," and awarded the plaintiff \$100,000. The Seventh Circuit reversed the award because the plaintiff had not proven special damages (see § 2.02[1][a][i], N. 5 *supra*). *Tacket v. Delco Remy Division of General Motors Corp.*, 937 F.2d 1201, 1203 (7th Cir. 1991).

The liability standard for a property owner differs from that applied to a distributor. The latter arguably is liable as a “publisher” of material anytime he knows the defamatory nature of the material he delivers. A property owner is a “publisher” only if his knowing failure to remove material is deemed “unreasonable.” The difference reflects the more affirmative nature of the distributor’s conduct. A bookseller’s shelves can display a defamatory book, but his liability arises primarily from the affirmative act of selling the book to a customer, not from failing to remove it from the shelves.⁴⁸

Courts differ as to how one should determine the point at which a defendant’s “failure to remove” defamatory material from his property becomes unreasonable.⁴⁹ And one court has held that a mere failure to remove a defamatory message, by itself, cannot constitute a publication; there must be some affirmative act, such as inviting others onto his property with knowledge that they will see the message, to subject a defendant to liability as a “publisher” of that message.⁵⁰ But all courts have agreed on the fundamental principle that a property owner can be subject to liability for publishing a defamatory message only if he *knows* that the mes-

⁴⁸ Compare *Tacket v. General Motors Corp.*, 836 F.2d 1042, 1047 (7th Cir. 1987) (sign removed from plant wall within three days not “published” by GM), *with* *Spence v. Flynt*, 647 F. Supp. 1266, 1274 (D. Wyo. 1986) (convenience store potentially liable for publishing defamation in magazine when it “continued to sell” the issue for two days after store employee first received notice of its defamatory content).

⁴⁹ In *Tacket*, the court described the question as whether a reasonable person could “infer adoption from the presence of the statement,” disagreeing with the suggestion in *Heller v. Bianco* that a bar owner could be liable for graffiti that remained on a bathroom wall for only “a single hour” after he received notice of it. *Tacket v. General Motors Corp.*, 836 F.2d 1042, 1046-1047 (7th Cir. 1987) (“The common law of washrooms is otherwise, given the steep discount that readers apply to such statements and the high cost of hourly repainting of bathroom stalls.” The inference of adoption “may be unreasonable for a bathroom wall or the interior of a subway car in New York City but appropriate for the interior walls of a manufacturing plant, over which supervisory personnel exercise greater supervision and control . . . (because employees may attribute statements to their employer more readily than patrons attribute graffiti to bar-keeps”).

⁵⁰ *Scott v. Hull*, 22 Ohio App. 2d 141, 142-145, 259 N.E.2d 160 (1970) (building owner’s failure to remove graffiti from outside wall did not constitute “publication” because owner took no “positive act” that communicated message to viewing public).

sage is being exhibited on his property.⁵¹

[vi]—*Radio and Television Broadcasters*. The common law of defamation has had a rough time coming to grips with the broadcast medium.⁵² The most difficult conceptual problem for the courts has been determining liability standards for a broadcaster who transmits third party content. Although muted to some extent by state statutory provisions⁵³ and by the constitutional requirements of fault in *New York Times* and *Gertz*, the problem persists, and it portends some of the conceptual difficulties that courts might have with OSPs and online communications.

[A]—*Scripted or Pre-Recorded Third Party Content*. When a broadcaster permits a third party to read from a script, or when he airs pre-recorded material, he often has the opportunity to review the material before it is aired. Whether he uses that opportunity or not, his role is much the same as the role of a distributor, who often disseminates material without reviewing its content. Thus, a broadcaster arguably should not be liable for “publishing” such material unless he knows or has reason to know of its defamatory character at the time he transmits it.⁵⁴

⁵¹ See *Heller v. Bianco*, 244 P.2d 111 Cal. App. 2d 424, 759, 244 P.2d 757 (1952) (“People who invite the public to their premises owe a duty to others not to *knowingly* permit their walls to be occupied with defamatory matter”). (Emphasis added.) See *Restatement (Second) of Torts*, § 577, comment p (1977) (duty to remove “arises only when the defendant knows that the defamatory matter is being exhibited on his land or chattels, and he is under no duty to police them or to make inquiry as to whether such use is being made”).

⁵² There is still no consensus as to whether defamatory broadcasts should be deemed slander, libel, or some new category (e.g., “defamacast”). See: *American Broadcasting-Paramount Theatres, Inc. v. Simpson*, 106 Ga. App. 230, 126 S.E.2d 873 (1962); Annot., “Defamation by Radio or Television,” 50 A.L.R.3d 1311 §§ 3-5, at 1325-1329.

⁵³ See, e.g.:

Mississippi: Miss. Code Ann. § 95-1-3(1) (1993) (no liability for third party statements).

New Hampshire: N.H. Rev. Stat. Ann. §§ 507-A:3 (1994) (no liability for uncontrolled network broadcasts).

Utah: Utah Code Ann. § 45-2-5 (1994) (no liability for “having made its broadcasting facilities or network available to any person” without proof of actual malice).

⁵⁴ If the broadcaster is compelled by 47 U.S.C. § 315(a) to transmit the speech of a candidate for public office, and thus has “no power of censorship over the material,” *id.*, he is immune from defamation liability even if he has advance knowledge of the defamatory character of its content. *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525, 531-534, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959).

The case law regarding the broadcast of scripted or pre-recorded third party content is sparse and split.⁵⁵ In *Auvil v. CBS "60 Minutes,"*⁵⁶ the court applied the rule for secondary publishers to broadcasters who aired a pre-recorded program that discussed a chemical used to grow apples. Apple growers had sued the program's producer, CBS, and three local CBS affiliates that aired the program. The affiliates were aware of the program's subject matter, but not its defamatory content, prior to airtime.⁵⁷ They had the ability and contractual right to screen and "censor" network programming, and occasionally had done so for other programs believed "unsuitable for local consumption," but did not exercise such "editorial control" over this particular broadcast.⁵⁸ The court rejected the argument that the affiliates' power and opportunity to censor "triggered the duty to censor" and instead held that they were subject to the same rule applied to secondary publishers—no liability without reason to know of the material's defamatory content.⁵⁹

The *Restatement* excludes broadcasters who transmit third party programming from its rule for distributors on the theory that they "cooperate actively in the publication."⁶⁰ The *Auvil* court rejected such a distinction for a broadcaster who serves as "a mere conduit" by "relaying an unedited feed," stating that "there is no logical basis for imposing a duty of censorship on the visual media which does not

⁵⁵ Compare *Kelly v. Hoffman*, 137 N.J. 695, 701-703, 61 A.2d 143, 146-147 (1948) (broadcaster who rented facilities and had access to "copies" of lessee's defamatory comments prior to airtime was "a disseminator" and could not be liable for defamatory broadcast by lessee if he could not have prevented publication by exercise of reasonable care), with *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P.2d 847 (1933) (radio station strictly liable for defamatory comments read from script by third party lessee, equating broadcast to a newspaper's publication of a paid advertisement) and *Sorenson v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932) (broadcaster strictly liable for defamatory speech read from an uninspected script by a politician who received air time under compulsion of federal law (but see N. 54 *supra*)).

⁵⁶ *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 928 (E.D. Wash. 1992).

⁵⁷ 800 F. Supp. at 931-932. The affiliates had received a "telex communique setting out in general terms the nature of the subject matter," which indicated that it might be controversial but contained "not a hint . . . that the content would be defamatory."

⁵⁸ *Id.*, 800 F. Supp. at 931. CBS transmitted the program via satellite to Los Angeles three hours before the program's West Coast air time. During that three-hour period, the network's West Coast affiliates had "both the right and the technical capability to access" the program. *Id.*

⁵⁹ *Id.*, 800 F. Supp. at 931-932.

⁶⁰ See *Restatement (Second) of Torts*, § 581(2) and comment g (1977) (a broadcaster is "an original and primary publisher and is not subject to" the rule for secondary publishers because "by contract [he] permit[s] others to make use of [his] facilities" and "cooperate[s] actively in the publication" of material by others, an activity that "is similar to that of a newspaper, which . . . by contract agrees to publish matter, such as advertisements, prepared and controlled by others").

likewise attach to the print chain of distribution.⁶¹ The truth may lie somewhere in between. Affiliates who contract with networks to relay unedited feeds are no more “active” in the publication process than are distributors who contract with publishers to sell their books and magazines. At the same time, the amount of material that broadcasters transmit is inherently limited. A broadcaster typically transmits only twenty-four hours of programming on one channel each day. Imposing a general duty to inspect recorded material before airing it would not create the type of physical impossibility that such a duty might create for many disseminators of newspapers, magazines and books. Thus, at least in contexts where pre-transmission review is practical (e.g., local commercials), there may be a “logical basis” to impose on broadcasters a general “duty” to inspect content that does not “attach to the print chain of distribution.”⁶²

[B]—Unscripted, “Live” Third Party Content

The concept of a “duty to inspect” prior to transmission assumes there is an opportunity to do so. With a “live” broadcast of unscripted material, there is no such opportunity. Here the case law is again split. Two early cases arrived at opposite conclusions. In one, a live program in New York was transmitted by telephone to a Missouri radio station, which broadcasted the program live. The court held the station strictly liable for a three-second defamatory utterance that it had no way of knowing would occur and no way of interrupting once it started.⁶³ In the

⁶¹ *Auvil v. CBS “60 Minutes,”* 800 F. Supp. 928, 931-932 (E.D. Wash. 1992).

⁶² But see, *id.*, 800 F. Supp. at 931 (Such a duty “would force the creation of full time editorial boards at local stations throughout the country which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face \$75 million dollar [sic] lawsuits at every turn. That is not realistic It is difficult to imagine a scenario more chilling on the media’s right of expression and the public’s right to know”).

⁶³ *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W.D. Mo. 1934). The court stated the broadcast was analogous to someone “surreptitiously” inserting a libelous remark in a newspaper without the knowledge of the publisher or any of his employees, for which the court asserted the publisher could not claim absence of negligence as a defense. *Id.*, 8 F. Supp. at 890, citing *Peck v. Tribune Company*, 214 U.S. 185, 189, 29 S.Ct. 534, 53 L.Ed. 960 (1909). The *Peck* decision, however, only states the common law rule that one “who sees fit to publish manifestly hurtful statements” is strictly liable, even if he is without fault in not knowing they are false or about the plaintiff. *Id.*, 214 U.S. at 189. That rule assumes the publisher has knowledge of what he “sees fit” to print. See Becker, “The Liability of Computer Bulletin Board Operators for Defamation Posted to Others,” 22 Conn. L. Rev. 203, 223 (1989) (“There are simply no reported cases to establish the contrary where a prankish third party crept into the print shop and inserted a libel into an otherwise innocuous publication after it was proofread”).

second, the court held that a broadcaster is not liable for "an interjected defamatory remark" by a lessee, at least when the broadcaster "exercised due care in the selection of the lessee, and, having inspected and edited the script, had no reason to believe" the remark would be made.⁶⁴

The same issue arises today in the context of live "call-in" shows, in which concepts of inspecting a script in advance and "exercising due care in the selection" of a third party speaker have little relevance.⁶⁵ Some-

(Text continued on page 2-43)

⁶⁴ *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 204, 8 A.2d 302, 312 (1939). *Accord*, *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N.Y.S.2d 985, 986 (Sup. 1942). The *Summit Hotel* court rejected *Coffey's* newspaper analogy (see N. 91 *infra*) and stated that the "closest analogy" is "the loudspeaking device installed in public halls, owned, maintained and operated, very much like the radio, by the owner of the premises. The halls are rented for public addresses, and may be equipped with outside amplifiers or loud-speakers, increasing the size of the audience. The only practical difference here is the number of persons who hear the remarks." 336 Pa. at 197, citing Bohlen, "Fifty Years of Torts," 50 Harv. L. Rev. 725, 731 (1937).

⁶⁵ See *Denman v. Star Broadcasting Co.*, 28 Utah 2d 50, 51, 497 P.2d 1378 (1972) (such shows feature "a two-way gabfest where anonymous persons call what appears to be a suspiciously deliberate controversial communicator, whose forte seems designed to increase the crescendo of debate to a lively repartee sometimes bordering on mutually belligerent rhetoric").

times, the broadcaster uses special (and expensive) equipment to create a seven-second delay before a caller's words are aired, during which he can prevent the broadcast of defamatory words by hitting the "abort" button. When such equipment is used, the broadcaster arguably "publishes" a caller's defamatory words because he has some knowledge of them before they are aired.⁶⁶ But what if a broadcaster does not use the seven-second-delay equipment to screen comments by callers?

⁶³ *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W.D. Mo. 1934). The court stated the broadcast was analogous to someone "surreptitiously" inserting a libelous remark in a newspaper without the knowledge of the publisher or any of his employees, for which the court asserted the publisher could not claim absence of negligence as a defense. *Id.*, 8 F. Supp. at 890, citing *Peck v. Tribune Company*, 214 U.S. 185, 189, 29 S.Ct. 534, 53 L.Ed. 960 (1909). The *Peck* decision, however, only states the common law rule that one "who sees fit to publish manifestly hurtful statements" is strictly liable, even if he is without fault in not knowing they are false or about the plaintiff. *Id.*, 214 U.S. at 189. That rule assumes the publisher has knowledge of what he "sees fit" to print. See Becker, "The Liability of Computer Bulletin Board Operators for Defamation Posted to Others," 22 Conn. L. Rev. 203, 223 (1989) ("There are simply no reported cases to establish the contrary where a prankish third party crept into the print shop and inserted a libel into an otherwise innocuous publication after it was proofread").

⁶⁴ *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 204, 8 A.2d 302, 312 (1939). *Accord*, *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N.Y.S.2d 985, 986 (Sup. 1942). The *Summit Hotel* court rejected *Coffey's* newspaper analogy (see N. 91 *infra*) and stated that the "closest analogy" is "the loudspeaking device installed in public halls, owned, maintained and operated, very much like the radio, by the owner of the premises. The halls are rented for public addresses, and may be equipped with outside amplifiers or loud-speakers, increasing the size of the audience. The only practical difference here is the number of persons who hear the remarks." 336 Pa. at 197, citing Bohlen, "Fifty Years of Torts," 50 Harv. L. Rev. 725, 731 (1937).

⁶⁵ See *Denman v. Star Broadcasting Co.*, 28 Utah 2d 50, 51, 497 P.2d 1378 (1972) (such shows feature "a two-way gabfest where anonymous persons call what appears to be a suspiciously deliberate controversial communicaster, whose forte seems designed to increase the crescendo of debate to a lively repartee sometimes bordering on mutually belligerent rhetoric").

⁶⁶ See, e.g., *Pacella v. Milford Radio Corp.*, 18 Mass App. 6, 462 N.E.2d 355, 358-361 (1984) (affirming dismissal of public figure's action against radio station that did not censor caller's defamatory question during seven-second delay, where plaintiff failed to prove that talk show host acted with "actual malice" in permitting the question to be aired). *Accord*, *Denman v. Star Broadcasting Co.*, 28 Utah 2d 50, 51, 497 P.2d 1378 (1972) (affirming summary judgment for broadcaster using seven-second delay because he did not act with actual malice in airing defamatory remarks by "an unknown male phonomaniac"). See also, *Weber v. Woods*, 31 Ill. App. 3d 122, 334 N.E.2d 857 (1975) (television station not liable for defamatory comment by third party participant on "talk show" because "actual malice" by station not proven; no indication whether program was broadcasted live or on tape).

A Louisiana appellate court asserted that the “publication” of live remarks by an anonymous caller was “done by the station,” and held that the station, which did not use a tape-delay system, published the remarks with “reckless disregard” under *New York Times* because its format “amounted to an open invitation” to listeners to make defamatory statements, thus placing the station “in a position fraught with the imminent danger of broadcasting” defamatory remarks.⁶⁷

The “reckless disregard” standard under *New York Times*, however, requires proof that the publisher had serious doubts about a matter’s truth when he published it.⁶⁸ A broadcaster cannot have serious doubts about the truth of a matter he is transmitting if he has no knowledge of the matter’s content until after it has been transmitted. Thus, in *Adams v. Frontier Broadcasting Co.*,⁶⁹ in which an anonymous caller’s defamatory remark was aired live, the court held that it was legally “impossible” for the public-figure plaintiff to establish that the station published the remark with “actual malice,” since that standard “assumes” that a publisher had the opportunity to evaluate the matter’s content and form some belief about its truth or falsity before he published it.⁷⁰

The *Adams* court refused to modify the “reckless disregard” standard to encompass the station’s failure to use a delay device. The court reasoned that such a rule would cause broadcasters, fearing costly litigation, to “regularly use” the device to “edit” and “censor” callers’ comments, undermining the free and robust public debate that the “reckless disregard” standard was meant to protect and leading to “the ultimate extinction” of “this kind of public forum.”⁷¹ The court’s reasoning is curious. A broadcaster cannot know in advance whether a caller’s comment will concern a public figure. He cannot selectively use a delay device only for comments about private figures, who are not required to prove “actual malice.” Thus, to protect the free and robust debate in “this kind of public forum,” the broadcaster must be immune from liability for not using a delay device in all cases in which defamatory remarks by callers are transmitted live, not just those involving public figures. In short, he must not be subject to liability as a “publisher” for live third party remarks.

⁶⁷ Snowden v. Pearl River Broadcasting Corp., 251 So.2d 405, 410-411 (La. App.), application denied 259 La. 885, 253 So.2d 217 (1971).

⁶⁸ See § 2.02[3][a][i], Ns. 47-49 *supra*.

⁶⁹ Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo. 1976).

⁷⁰ *Id.*, 555 P.2d at 564.

⁷¹ *Id.*, 555 P.2d at 565-567.

In this context, then, there may be a theoretical basis to treat a broadcaster as one who merely “supplies” the equipment that another uses to publish defamatory remarks, like the owner of an auditorium equipped with amplifiers⁷² or a telephone company.⁷³ The early broadcast cases balked at such “theoretical” analogies, however, noting the “practical” difference in the size of the audience that broadcasters reach.⁷⁴ Even in *Auvil*, the court refused to impose on local stations the duty to inspect and censor only with respect to network feeds, indicating that its analysis might have been different for material from a less responsible or unknown source.⁷⁵ The *Adams* decision stands alone in suggesting that a broadcaster may not be responsible as the publisher of live remarks by an anonymous third party.

⁷² See N. 64 *supra*. But see, *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W.D. Mo. 1934) (broadcaster is “certainly not like” one who “only provides another with an instrumentality” because the station “is operated by the owner for another who has hired him to operate it”).

⁷³ See Ns. 37-42 *supra* and accompanying text.

⁷⁴ *Eighth Circuit: Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W.D. Mo. 1934) (A telephone company “carries a message (in a sealed envelope, as it were) from the sender to a single person.” The broadcaster “publishes messages to the world. If this distinction is a practical one rather than theoretical, it is nevertheless a most significant distinction and quite enough to support an entirely different measure of responsibility”).

State Courts:

Pennsylvania: Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 197, 8 A.2d 302, 309 (1939) (“[r]adio companies are not in [the same] category” as the telephone company because they “may choose between applicants for the use of their facilities, which are designed, not for private communications from one individual to another, but for those to the public generally”).

⁷⁵ The *Auvil* court held that the local stations were “republishers” under state law and applied the rule for “book sellers” on the premise that state law did not permit liability for defamation “without fault.” *Auvil v. CBS “60 Minutes,”* 800 F. Supp. 928, 931 (E.D. Wash. 1992). Presumably, the court would have reached the same decision even if it had characterized the stations as “primary” republishers who reasonably relied on the reputation of the authors of the material. See N. 150 *infra* and accompanying text. The court did not expressly comment on the reliability of “60 Minutes” and CBS, but it did acknowledge their deep pockets. *Id.*, 800 F. Supp. at 932 (“[p]ersons injured by defamatory material are not impaired by limiting conduit liability to those situations” where the local broadcaster has knowledge since the “generating source, which in a national broadcast will generally be the deepest of the deep pockets, may still be called upon to defend”).

[b]—Knowledge of Content and the First Amendment. Outside the unsettled context of broadcasting, the common premise in cases that impose liability on republishers is the defendant's knowledge of the material's defamatory content. Indeed, the one functional distinction between "primary" and "secondary" republishers is that the common law presumes that primary republishers are aware of the third party content contained in the material they produce and that secondary publishers are unaware of the content contained in the material they distribute.

[i]—Distributors and "Reason to Know." According to the *Restatement*, a distributor is subject to liability for republishing defamatory material, even if he does not know what it says, if he "has reason to know of its defamatory character" when he disseminates it.⁷⁶ There is not even one reported case in which liability was actually imposed on a print distributor based on a "reason to know" theory. Nevertheless, courts have discussed the "reason to know" concept in this context, and one key principle is discernible from those discussions.

The mere fact that a person intentionally distributes material that he knows will be read by others does not give him "reason to know" that it contains defamatory content. A distributor "is under no duty to examine the various publications that he offers for sale to ascertain whether they contain any defamatory items."⁷⁷

This common law rule is compelled by the First Amendment. In *Smith v. California*,⁷⁸ the Supreme Court held that the First Amendment prohibited a statute that imposed criminal liability on a bookseller for selling an obscene book even if he had no knowledge of the book's contents. The Court held that such a strict liability standard would cause booksellers to engage in an impermissible level of "self-censorship," suppressing the distribution of constitutionally protected, non-obscene material:

"For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and . . . the bookseller's

⁷⁶ *Restatement (Second) of Torts*, § 581(1) (1977).

⁷⁷ *Id.*, comment d (1977). See *Bowerman v. Detroit Free Press*, 287 Mich. 443, 451-452, 283 N.W. 642, 645 (1939) ("In these days of speedy dissemination of news it seems unreasonable to hold that a local distributor of newspapers should be required to check the contents of each issue for libelous matter in order to protect himself against liability for damages").

⁷⁸ *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

burden would become the public's burden, for . . . [i]f the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."⁷⁹

Smith v. California addressed a distributors's potential criminal liability for distributing obscene matter. The courts have held, however, that the same First Amendment prohibition of a general duty to inspect content applies in the context of a distributor's potential civil liability for distributing defamatory matter.⁸⁰

Other First Amendment limitations on defamation law—the *New York Times* “actual malice” requirement, the *Gertz* limitation on presumed and punitive damages, and possibly the requirements that plaintiffs prove fault (*Gertz*) and falsity (*Hepps*)—are limited to speech about public figures or matters of public concern.⁸¹ Under *Smith*, however, a distributor cannot be expected to ascertain the subject matter of each potentially unlawful statement, passage, or picture contained in the material he distributes. Thus, the prohibition in *Smith* of any general duty to inspect content must apply to distributors regardless of the subject matter of the allegedly defamatory material.

⁷⁹ *Id.*, 361 U.S. at 153-154. (Footnote omitted.)

⁸⁰ See *Lewis v. Time, Inc.*, 83 F.R.D. 455, 464 (E.D. Cal. 1979), *aff'd* 710 F.2d 549 (9th Cir. 1983) (applying *Smith* to libel action against magazine distributor; “[i]t makes no difference that here we deal with civil liability, for ‘fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute’” (quoting *New York Times v. Sullivan*, 376 U.S. at 277) (ellipses by the court)). *Accord*, *Dworkin v. Hustler Magazine, Inc.*, 611 F. Supp. 781, 786 (D. Wyo. 1985) (applying *Smith* in libel action against convenience store selling magazine; “[t]o avoid such private censorship, courts have required a specific showing of scienter, knowledge of the defamatory material, before allowing mere distributors to be held liable”).

⁸¹ See § 2.02[3][e] *supra*.

The Supreme Court expressly declined in *Smith* to decide what knowledge the First Amendment requires a bookseller to have about a particular book to be subject to prosecution for possessing obscene material and, in particular, “whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further” the contents of a particular book “and what such circumstances might be.”⁸² In applying the “reason to know” concept in defamation actions, however, courts have discussed three “special circumstances” that plaintiffs have argued were sufficient to “warn the [distributor] that a particular publication is defamatory.”⁸³

The most obvious “special circumstance” is when the distributor is notified of the defamatory content by another person (typically the plaintiff or her attorney).⁸⁴ A second circumstance may be when he reads a summary or description of the material that would suggest to a reasonable person that it contains defamatory content.⁸⁵ In both circumstances, a dis-

⁸² *Smith v. California*, 361 U.S. 147, 154, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). The Court also refused to decide “whether honest mistake as to whether [a book’s] contents in fact constituted obscenity need be an excuse.” *Id.* The Court later held that a bookseller can be held criminally liable for distributing obscene material if “he knew the character and nature of the materials,” even if he believed them to be not obscene. *Hamling v. United States*, 418 U.S. 87, 123-124, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (“To require proof of a defendant’s knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by [the statute] nor by the Constitution”).

⁸³ *Restatement (Second) of Torts*, § 581, comment d (1977).

⁸⁴ See, e.g.:

Tenth Circuit: *Spence v. Flynt*, 647 F. Supp. 1266, 1273-1274 (D. Wyo. 1986) (convenience store continued to sell magazine for two days after plaintiff’s attorney notified store employee of its defamatory content).

State Courts:

South Dakota: *Janklow v. Viking Press*, 378 N.W.2d 875, 876 (S.D. 1985) (plaintiff sued bookstore owners and operators who “willfully refused to remove the book from the shelves” of their stores “even though he had notified them of its libelous nature”).

⁸⁵ See: *Auvil v. CBS “60 Minutes,”* 800 F. Supp. 928, 932 (E.D. Wash. 1992) (affiliates did not have “reason to know” that network program would contain defamatory content, even though they had received an advance “telex communique setting out in general terms the nature of the subject matter” of the program, because the telex only suggested that the program would be “controversial” and contained “not a hint . . . that the content would be defamatory”); *Restatement (Second) of Torts*, § 581, comment e (1977) (distributor is not liable “if there are no facts or circumstances known to him which would suggest to him, as a reasonable man, that a particular book contains matter which upon inspection, he would recognize as defamatory”).

tributor cannot avoid liability for “republishing” the material by simply not reading or viewing the specific content when he already knows that it is (or at least is claimed to be) defamatory; rather, such circumstances “giv[e] rise to a duty to investigate” the material to ascertain whether it in fact contains defamatory content and, if so, to refrain from distributing it.⁸⁶

The *Restatement* suggests a third “special circumstance” that gives a distributor “reason to know” of a matter’s defamatory content: when he “offers for sale a particular paper or magazine that notoriously persists in printing scandalous items” or a book by “a particular author or publisher [who] has frequently published notoriously sensational or scandalous books.”⁸⁷ No court has expressly endorsed that suggestion, although two have construed it as referring only to those “who notoriously use *defamatory* material in their publications.”⁸⁸ The suggestion arguably would not survive First Amendment scrutiny; indeed, one court has rejected it as “not in our society’s best interests.”⁸⁹

⁸⁶ *Ninth Circuit*: Lewis v. Time, 83 F.R.D. 455, 465 (E.D. Cal. 1979), *aff’d* 710 F.2d 549 (9th Cir. 1983).

Tenth Circuit: Dworkin v. Hustler Magazine, Inc., 634 F. Supp. 727, 729 (D. Wyo. 1986).

State Courts:

California: Osmond v. EWAP, Inc., 153 Cal. App. 3d 842, 856, 200 Cal. Rptr. 674, 682 (1984).

Cf. Heller v. Bianco, 111 Cal. App. 2d 424, 244 P.2d 757, 759 (1952) (although bartender “was not told of the exact terminology of the writing” on the bathroom wall in his bar, he “was told enough about the defamatory nature of it to put him upon inquiry and to charge him with the duty of removing” it).

⁸⁷ *Restatement (Second) of Torts*, § 581, comments d and e (1977).

⁸⁸ Dworkin v. Hustler Magazine, Inc., 611 F. Supp. 781, 786 (D. Wyo. 1985). (Emphasis by the court.) *Accord*, Osmond v. EWAP, Inc., 153 Cal. App. 3d 842, 856, 200 Cal. Rptr. 674, 682 (1984). In Osmond, the court held that producers of sexually explicit films are not necessarily within the category of those “who notoriously use defamatory material” and thus did not decide whether the *Restatement’s* suggestion of a general duty to inspect such publications is correct. 153 Cal. App. 3d at 856.

⁸⁹ Dworkin, N. 88 *supra*, 611 F. Supp. at 787: (“If that was the proper standard, every distributor of publications, such as the *National Enquirer*, or such respected publications as *Time* and *The New York Times*, which have also had their fair share of libel suits, would have to check each issue, at his peril, for possible libelous statements about people or events of which the average publication distributor might have no basis for judgment. Such a standard . . . would foster excessive censorship, and would deprive the public of reading educational and entertainment materials, all in direct contradiction of right of freedom of the press guaranteed by the First Amendment”). Because it implies that all speech by a particular speaker is presumed by the law to contain defamatory content, thus imposing a duty to inspect on those who distribute that speaker’s publications, the *Restatement’s* suggested standard would arguably constitute an unconstitutional “prior restraint” on that speaker’s speech.

[ii]—*Primary Republishers and “Reason to Know.”* The common law has typically characterized as primary republishers those who actively participate in the production of material that contains defamatory third party content, such as commercial printers and the publishers of books, newspapers and magazines.⁹⁰ This characterization reflects the assumption that, because of the nature of the production process, those who actively participate in it will acquire knowledge of the third party content before the material is disseminated.⁹¹ Substantial cracks in the factual basis of that assumption are widening as the technology of producing multiple copies of written material moves into electronic and digital formats. The question thus arises as to whether or not that assumption is a *rebuttable* legal presumption; that is, may a person who produces material containing defamatory third party content avoid liability for “republishing” it by proving that he had no knowledge of that content when he distributed the material to others?

There is a group of extremely old cases holding that the managing editor of a newspaper is “equally liable” with the proprietor of the paper for publishing *every* matter in each issue, and as such is not allowed to plead his ignorance of a defamatory matter as a defense, “on the theory that the matter is constructively under his supervision.”⁹² These cases reasoned that a managing editor is liable “whether he knows of the publication or not, *for it is his business to know*, and mere want of knowledge constitutes no defense.”⁹³ That reasoning is questionable. The managing editor, unlike his employer, is not vicariously liable for the conduct and knowledge of other newspaper employees who knowingly insert into the newspaper words that are defamatory.⁹⁴ In essence, these courts took the managing editor’s contractual duty (owed to his employer) to supervise the production of the paper’s content and changed it into a common law duty (owed to each person discussed in each article) to inspect and evalu-

⁹⁰ See § 2.03[3][a][i] *supra*.

⁹¹ See: *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 196, 8 A.2d 302, 309 (1939) (“Newspaper matter is prepared in advance, reviewed by members of various staffs, set into type, printed, proofread and then ‘run off’ by employees of the publisher; at all times opportunity is afforded the owner to prevent the publication of the defamatory statement up to the time of the delivery of the paper to the news vender [sic]. The defamation thus may be said to be an intentional publication, or at least one published without due care”); Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 803 (5th ed. 1984) (“Those who manufacture books by way of printing and selling them, and those who print and sell newspapers, magazines, journals, and the like, are subject to liability as primary publishers because they have the opportunity to know the content of the material being published and should therefore be subject to the same liability rules as are the author and originator of the written material”).

ate all matters contained in each edition before it is published. There is no obvious legal justification for changing the nature and scope of the managing editor's duty in this manner.

A more recent decision indicates that, under the modern common law, even a person who *produces* copies of a publication for another is subject to liability only if he knew or had reason to know that it contained defamatory content. In *Maynard v. Port Publications, Inc.*,⁹⁵ a newspaper publisher contracted with other publishers to reproduce their publications using its photo-offset printing machinery. A newspaper that it reproduced in its capacity as a contract printer contained an article accompanied by a photograph that imposed the plaintiff's face on the nude figure of another woman. Because of the nature of photo-offset printing, the contract printer was able to reproduce the newspaper without acquiring knowledge of its contents. Although it had refused on two prior occasions to reproduce issues of that newspaper containing potentially obscene photographs, the contract printer did not inspect the newspaper's contents when it reproduced the particular issue that defamed the plaintiff.

⁹² *Smith v. Utley*, 92 Wis. 133, 65 N.W. 744, 746 (1896).

Accord:

Illinois: *Danville Press Co. v. Harrison*, 99 Ill. App. 244 (1901) ("general manager" of newspaper).

Oklahoma: *World Pub. Co. v. Minahan*, 70 Okla. 107, 173 P. 815, 817-818 (1918) (managing editor away on vacation).

Pennsylvania: *Nevin v. Spieckemann*, 1 Sadler 400, 4 A. 497 (Pa. 1886) (officer engaged in "general management" of newspaper).

See also, *A.H. Belo & Co. v. Fuller*, 84 Tex. 450, 452, 19 S.W. 616, 617 (1892) (dicta) (officers of corporate publisher liable only if "their duties as officers" are "of such a nature that the law would imply that such officer knew or *should have known* of the publication of such libelous matter"). (Emphasis added.) *Compare* *Weil v. Nevin*, 1 Monaghan 65 (Pa. 1889) (refusing to extend *Nevin* holding regarding "general manage[r]" to an "assistant editor" of the newspaper, "for his work is limited").

⁹³ *Smith v. Utley*, 92 Wis. 133, 65 N.W. 744, 746 (1896). (Emphasis added.)

⁹⁴ Two of the cases contained language suggesting that the managing editor was liable on the dubious theory that the employee who knowingly inserted the defamatory words into the newspaper was the managing editor's "agent." *World Publishing Co. v. Minahan*, 70 Okla. 107, 173 P. 815, 817 (1918), quoting *Danville Press Co. v. Harrison*, 99 Ill. App. 244 (1901). Contrast *Mullinax v. Miller*, 242 Ga. App. 811, 815, 531 S.E.2d 390 (2000) (libel suit against chairman of campaign committee for ad issued by committee) ("Although the doctrine of respondeat superior applies in libel cases, so that a principal is liable for the libel committed by his employees in the scope of their employment, plaintiffs essentially seek to hold the agent (Miller) liable for the acts of the principal (the campaign committee). We find no support for this theory of liability in logic or in case law."). (Footnote omitted.)

⁹⁵ *Maynard v. Port Publications*, 98 Wis.2d 555, 297 N.W.2d 500, 16 A.L.R.4th 1361 (1980).

The plaintiff sued the contract printer for publishing the defamatory photograph and article. The Wisconsin Supreme Court affirmed the entry of summary judgment for the defendant, holding that “a contract printer having no knowledge of the content of the material it prints cannot be subject to liability for defamation resulting from such printing.”⁹⁶ The court noted that, “in the past,” a printer “when setting print had contact with the content of what it printed,” but that the defendant, using newer photo-offset technology, “does not need to read the material or check its content in any way before it is printed.”⁹⁷ Thus, the court stated that it was “appropriate” to “acknowledge this changing technology and its effect on the responsibilities and duties of a contract printer.”⁹⁸

The court expressly rejected the argument that the printer was “subject to liability because of its failure to read and investigate material submitted for publication in order to discover and censor any potentially defamatory material.”⁹⁹ Instead, the court held that, to be subject to defamation liability based on his role in the publication process, a person “must know or have reason to know of the existence of the libel.”¹⁰⁰ The court refused to impose a common law duty on the printer to inspect every publication that it reproduced for others:

“Port, like other contract printers, provides a quick and inexpensive printing service that by its low cost allows access to the print media by groups that would otherwise not find such access. If liability for failure to inspect were imposed on printers like Port, they would of necessity become censors and their services would become more expensive. Increased costs might preclude the publication of small, low-budget newspapers. Such potential liability might also deter contract printers from contracting to print material they consider to be controversial. All of this would have a deleterious effect on the free dissemination of information which is fundamental to our society.”¹⁰¹

⁹⁶ *Id.*, 98 Wis.2d at 556.

⁹⁷ *Id.*, 98 Wis.2d at 567-568.

⁹⁸ *Id.*, 98 Wis.2d at 568.

⁹⁹ *Id.*, 98 Wis.2d at 566-567. The court also held that “it would be unreasonable to infer from” the two prior instances when the printer refused to print potentially obscene photographs that the printer “exercised editorial control over the content of” the newspaper. 98 Wisc.2d at 566. The opinion is unclear as to whether the court believed that the inference was “unreasonable” only because the printer “was concerned about violating obscenity laws” or because it had censored material on only two occasions. 98 Wisc.2d at 564.

¹⁰⁰ *Id.*, 98 Wis.2d at 568.

¹⁰¹ *Id.*, 98 Wis.2d at 567.

The court found it “unnecessary” to decide whether the common law standard it applied to the printer was compelled by the First Amendment. Nevertheless, its reasoning mirrored the constitutional analysis that the Supreme Court applied to the bookseller in *Smith v. California*,¹⁰² suggesting that both the modern common law and the First Amendment require that the *producer* of material containing defamatory content have knowledge or reason to know of a publication’s defamatory nature before he can be subject to liability for that content.¹⁰³

**[c]—OSP Liability for Transmitting Third Party Speech
Without Knowledge of Its Defamatory Content**

Because of the nature of online communication, third party content can be transmitted to an OSP’s computer and retransmitted from there to others without any human intervention by the OSP. When online communication of defamatory material is accomplished using the OSP’s computer but without the OSP’s knowledge of its content, the OSP can be subject to liability for publishing the defamatory content only if the OSP had a duty to inspect the material before it was transmitted to others. Whether, and in what circumstances, the courts will impose on an OSP a common law duty to inspect third party content will probably depend on the nature of the online service through which the content is transmitted and the manner in which the OSP operates that service.

¹⁰² See text accompanying N. 79 *supra*.

¹⁰³ *Accord*, *Musit v. Mooney*, 125 Misc.2d 95, 475 N.Y.S.2d 233 (Sup. 1984). In *Musit*, the contract printer produced printed copies of allegedly defamatory newspapers created by a third party publisher. Even though the printer inspected the materials for “nudity, profanity or vulgarity” to avoid offending its keyboard operators, and even though the operators presumably become aware of their content when inputting them on their keyboards, the court found “no indication that the printer had any knowledge or any reason to know of the libelous nature” of the newspapers. 125 Misc.2d at 100. The court held that such knowledge was constitutionally required under *Gertz*, but disagreed with *Port Publications* that such knowledge was required by the traditional common law, which the *Musit* court characterized as imposing “strict liability” on printers. 125 Misc.2d at 100-101, citing *Youmans v. Smith*, 153 N.Y. 214, 47 N.E. 265 (1897). In *Youmans*, which is the only other reported case in this country in which a contract printer was sued for libel, the owners of a printing facility claimed ignorance of defamatory material that their foreman had printed for an attorney during their absence. The court held that the owners were subject to liability as publishers of the material on the basis of the knowing conduct of “their agent”—the foreman—who presumably become aware of the content of the material during the process of printing it for the attorney. 153 N.Y. at 219.

[i]—“Real-Time” Discussions and Conferences

Real-time online communication can take many forms, ranging from informal “chatter” among OSP users to more formal “conferences,” “seminars,” and “meetings.” In every context, however, the defining characteristic is that each message transmitted to the OSP’s computer is retransmitted only once and virtually instantaneously to all the other participants in the “discussion.” When the number of such participants is limited, it is reasonable to expect that courts will characterize the OSP’s participation in the communication process as equivalent to that of a telephone company, which permits customers to use its facilities to transmit oral messages. Indeed, in many cases, each “real-time” message is being transmitted from the sender to the OSP, and from the OSP to the other participants, by a telephone company, also without human intervention.¹⁰⁴ In such contexts, the OSP, like the telephone company, would not be subject to defamation liability for failing to “screen” the real-time messages transmitted from one user to others as it passed through the OSP’s computer.¹⁰⁵

Telephone calls, however, typically involve a relatively small number of participants. A different standard might be considered if real-time messages are received online by a large audience of OSP users.¹⁰⁶ A defamed plaintiff might argue that the OSP in that context was equivalent to a broadcaster hosting a live, listener call-in show, particularly if the OSP acted as an online host or moderator of the conference. It is conceivable that in such a context, the OSP might have had both the technical capability and the practical opportunity to screen the real-time messages before retransmitting them to the other participants, similar to the broadcaster’s ability to use a seven-second delay device to screen caller comments. Although their validity is questionable, cases holding a broadcaster liable for broadcasting live third party content might support a finding that the OSP had “published” the real-time messages during a moderated online conference.¹⁰⁷

¹⁰⁴ See N. 38 *supra*.

¹⁰⁵ See § 2.03[3][a][iv] *supra*. See also, Becker, “The Liability of Computer Bulletin Board Operators for Defamation Posted by Others,” 22 Conn. L. Rev. 203, 221 n.86 (1989) (“For the same reason, when computer bulletin boards with different owners are connected into a network, intermediate boards on the network which do nothing but pass information along should also not be held to have published the information transmitted”).

¹⁰⁶ See N. 74 *supra*.

¹⁰⁷ Contrast *Snowden v. Pearl River*, 251 So.2d 405, 410-411 (La. App.), *application denied* 259 La. 885, 253 So.2d 217 (1971) (broadcaster’s failure to use tape delay during call-in show constituted publication of caller’s defamatory comment with “reckless disregard”) and *Coffey v. Midland Broadcasting*, 8 F. Supp. 889, 890

[ii]—Electronic Mail

Like real-time messages, e-mail communications can take many forms. The sender can address his message to the e-mail address of another user of the same OSP or of a different OSP to which the sender's OSP has network access. He also can send his message to a large number of e-mail addresses, using his own "mass-mailing" list or by sending it to a "list-server," which relays the message to the e-mail addresses of everybody else who subscribes to that list-server.¹⁰⁸

The Electronic Communications Privacy Act,¹⁰⁹ which in most contexts prevents an OSP from disclosing an e-mail message to anyone other than its designated recipient,¹¹⁰ might not prevent an OSP from screening e-mail messages for unlawful or tortious content before retransmitting them to their intended destination.¹¹¹ Nevertheless, for many users, the loss of privacy associated with such screening would substantially reduce the attractiveness of the e-mail service.

Again, it is reasonable to expect that courts will permit OSPs to assure users of privacy when sending and receiving e-mail and will not impose on the OSP a common law duty to screen such messages. If an

(W.D. Md. 1934) (broadcaster strictly liable for third party live remark), *with Maynard v. Port Publications*, 98 Wis.2d 555, 566-567, 297 N.W.2d 500, 506, 16 A.L.R.4th 1361 (1980) (failure of contract printer to inspect newspaper reproduced for another did not subject printer to liability for publishing its defamatory content). See § 2.03[3][a][vi][B] and text accompanying Ns. 96-101 *supra*. OSP liability for transmitting real-time third party content, even in cases where the OSP moderates the online discussion, is arguably foreclosed by the Communications Decency Act of 1996 (see N. 16 *supra*), which contains a provision that bars the states from treating an OSP as the publisher of information provided by another content provider, although it is possible that a plaintiff could contend that the OSP's role in moderating and promoting the discussion was sufficient to characterize the OSP as the "provider" of that content. See § 2.03[3][f] *infra*.

¹⁰⁸ See Perritt, "The Congress, the Courts and Computer Based Communications Networks: Answering Questions About Access and Content Control—Introduction," 38 Vill. L. Rev. 319, 324 n.7 (1993) (A list-server is "a kind of multiplier or reflector, an automatic mailing list. It is technically a use of electronic mail. It functionally is a hybrid of electronic mail, electronic conferencing and electronic publishing").

¹⁰⁹ Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified in scattered sections of 18 U.S.C.).

¹¹⁰ See 18 U.S.C. §§ 2511(1), 2702 (1988).

¹¹¹ See: 18 U.S.C. § 2511(2)(a)(i) (agent of OSP may intercept an electronic communication "in the normal course of his employment while engaged in any activity which is a necessary incident . . . to the protection of the rights or property of the" OSP); 18 U.S.C. § 2702(b)(4) (authorizing disclosure of e-mail stored on OSP's computer to OSP); Perritt, Tort Liability, the First Amendment, and Equal Access to Electronic Networks," 5 Harv. J. L. & Tech. 65, 108 (1992); Becker, "The Liability of Computer Bulletin Board Operators for Defamation Posted by Others," 22 Conn. L. Rev. 203, 221 n.83 (1989).

e-mail message is retransmitted by an OSP's computer immediately after it receives it (presumably to another OSP through a network connection), the OSP's role is equivalent to that of a mere supplier of communications equipment, like a telephone company. If an e-mail message is stored on an OSP's computer for an extended period prior to its retransmission, the OSP has control over that message that is more like the control exercised by a distributor of physical material. Even if the OSP were characterized as a distributor, however, the common law of defamation would impose no general duty on the OSP to screen each e-mail message for defamatory content.¹¹²

While mass-mailings of an e-mail message might not implicate the same level of privacy concerns, their transmission by an OSP computer cannot be fairly equated with the airing of third party content by broadcasters, even if one were to assume the validity of the few cases imposing liability on broadcasters for such content. The broadcaster typically transmits only one message at a time, on a single channel. An OSP's computers might receive and transmit hundreds or thousands of e-mail messages every day. Requiring the OSP to review each message sent to its computers for unlawful or tortious content before transmitting it to its addressee would create cost and time constraints that, as a practical matter, would destroy the utility of the service for most users. Both the common law of defamation and the First Amendment prohibit a liability standard that would create that kind of impediment to the free flow of constitutionally protected information.¹¹³

[iii]—Databases, File Areas and Bulletin Boards

Third party content contained in a database, file area, or bulletin board that is maintained on an OSP's computer typically remains there for an extended period of time, during which it is retransmitted on separate occasions to the various users who seek access to it. While every retransmission of such content can occur without human involvement by the OSP, the OSP nevertheless has control over the ongoing

¹¹² See § 2.03[3][b][i] *supra*. See also, *Lunney v. Prodigy Services Co.*, 250 A.D.2d 230, 236, 683 N.Y.S.2d 557, 562 (1998), *aff'd* 94 N.Y.2d 242, 723 N.E.2d 539 (1999), *cert. denied* 146 L. Ed.2d 776 (2000) (holding that Prodigy cannot be considered "publisher" of defamatory e-mail messages transmitted over Prodigy's service, notwithstanding ruling in *Stratton Oakmont* (N. 16 *supra* and § 2.02[3][c][iii][B] *infra*) that it was publisher of bulletin board postings, because "[w]hatever editorial control over such [bulletin board] postings might have been possible, it is clear from the present record that a service provider such as Prodigy cannot screen all of the e-mail by its subscribers").

¹¹³ See text accompanying Ns. 79 and 101 *supra*. Such a liability standard is also prohibited by the Communications Decency Act of 1996. See N. 16 *supra*, and § 2.03[3][f] *infra*.

distribution of that content once it is uploaded onto its computers. The privacy concerns associated with e-mail are largely absent, and the physical constraints imposed by the need for immediate delivery associated with real-time messages are more attenuated. Will the courts impose a duty on an OSP to screen such content before it is retransmitted by its computers?

The role played by the OSP in communicating such content to others, and the OSP's control over that content while it is stored on its computers, are functionally equivalent to the role and control of the traditional "secondary publisher" in the print context: the magazine distributor, the news vendor, or the university library. The two reported decisions that address the liability standard for an OSP that transmits third party content, *Cubby, Inc. v. Compu-Serve Inc.*¹¹⁴ and *Stratton Oakmont, Inc. v. Prodigy Ser-*

(Text continued on page 2-57)

¹¹⁴ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

vices Co.,¹¹⁵ both arose in this context. The *Cubby* decision confirmed the applicability of the common law's distributor standard to an OSP that transmits third party content contained in a database. The *Stratton Oakmont* decision, however, imposed on Prodigy a duty to screen user content posted on its bulletin boards.

[A]—*Transmission of Third Party Content Contained in a Database.* In *Cubby, Inc. v. CompuServe Inc.*, a newsletter that allegedly defamed the plaintiffs was uploaded by its publisher onto a database maintained on CompuServe's computers. The database was part of the "Journalism Forum," one of many special interest forums available to subscribers of CompuServe's general online information service. The Journalism Forum offered subscribers access to real-time conferences, topical bulletin boards, and databases. The forum was developed and managed by an independent company, which had contracted with the newsletter's publisher to make the newsletter available to certain subscribers on one of the forum's databases.¹¹⁶ The newsletter was available to approved subscribers immediately after the publisher uploaded it onto the database. CompuServe did not review the newsletter's content either before or after it was uploaded, and thus had no knowledge of its allegedly defamatory content until the plaintiff sued CompuServe for libel.¹¹⁷

The court characterized CompuServe's online service as "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

¹¹⁵ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. May 25, 1995).

¹¹⁶ *Cubby*, N. 114 *supra*, 776 F. Supp. at 137. The forum manager had contracted with CompuServe "to 'manage, review, create, delete, edit and otherwise control the contents' of the Journalism Forum 'in accordance with editorial and technical standards and conventions of style as established by CompuServe.'" 776 F. Supp. at 137. The forum manager's obligation to "create," "edit" and "control the contents" of the forum gave it "control over the assembly of the contents of the" forum, 776 F. Supp. at 143, requiring it to select the publications that would be included in the databases; it did not, however, give the forum manager any editorial right to control the content of those publications. The forum manager's contract with the newsletter's publisher provided that the publisher "accepts total responsibility for the contents" of the newsletter. 776 F. Supp. at 143.

¹¹⁷ Although not mentioned in the *Cubby* opinion, the forum manager also did not review the newsletter before it was made "instantaneously available" on the database to approved subscribers by its publisher, nor did he have any knowledge of the allegedly defamatory content of the newsletter until the plaintiff filed his suit. See Affidavit of Jim Cameron in Support of Defendant CompuServe's Motion for Summary Judgment (filed April 5, 1991) at ¶¶ 6-7. The plaintiff did not name the forum manager as a defendant.

access to the publications.”¹¹⁸ The court concluded that “it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so,”¹¹⁹ and that a “computerized database service ‘is one of the modern . . . ways the public may obtain up-to-the-minute news’ and ‘is entitled to the same protection as more established means of news distribution.’”¹²⁰

The court observed that the “protection” afforded the “more established means” of news distribution—no general duty to inspect content—“is deeply rooted in the First Amendment,” quoting extensively from the Supreme Court’s ruling in *Smith v. California* regarding the potential criminal liability of a bookseller.¹²¹ Noting that “the First Amendment’s guarantees” applied in *Smith* “are no less relevant” in a libel action,¹²² the court held that application to CompuServe of the same standard of liability applied to other distributors—“whether it knew or had reason to know of the allegedly defamatory” content¹²³—was required both by the common law and by the First Amendment:

“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 a telephone line to have instantaneous access to thousands of news publications from across the United States and around the world A computerized database

¹¹⁸ *Cubby*, N. 114 *supra*, 776 F. Supp. at 140.

¹¹⁹ *Id.*

¹²⁰ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991), quoting *Daniel v. Dow Jones & Co.*, 137 Misc. 2d 94, 102, 520 N.Y.S.2d 334, 340 (N.Y. Civ. 1987). *Daniel* involved a misrepresentation claim against an online database. See §§ 3.03, 3.04 *infra*.

¹²¹ *Cubby*, N. 120 *supra*, 776 F. Supp. at 139-140. See text accompanying N. 79 *supra*. The court also quoted from a case applying the same First Amendment protections in a statutory, “false light” privacy action. 776 F. Supp. at 140, quoting *Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 139 (2d Cir. 1984), *cert. denied* 471 U.S. 1054 (1985) (“Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment”).

¹²² *Cubby*, N. 120 *supra*, 776 F. Supp. at 140, quoting *New York Times v. Sullivan*, 376 U.S. 277, 376 S.Ct. 710, 11 L.Ed.2d 686 (1964) (“What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute”).

¹²³ *Cubby*, N. 120 *supra*, 776 F. Supp. at 140-141.

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, book store, or newsstand would impose an undue burden on the free flow of information.”¹²⁴

Because CompuServe neither knew nor had reason to know of the allegedly defamatory statements in the newsletter, the court entered summary judgment for CompuServe on the plaintiffs’ libel claim.

[B]—*Duty to Screen User Content Posted on Bulletin Board.* In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, an unknown person obtained access to Prodigy’s online service with a former user’s account number and posted defamatory messages on Prodigy’s “Money Talk” bulletin board. Prodigy had contracted with a “Board Leader,” whose duties included enforcing Prodigy’s “content guidelines” by deleting “insulting” or otherwise offensive messages from the bulletin board.¹²⁵ The plaintiffs sued Prodigy, but not the Board Leader, for libel. After some discovery, the plaintiffs moved for partial summary judgment on whether Prodigy “may be considered a ‘publisher’ of the” defamatory messages.¹²⁶

The court granted the plaintiffs’ motion. The court asserted that it was “in full agreement” with the *Cubby* decision and that “[c]omputer bulletin boards should generally be regarded in the same context as book stores, libraries, and network affiliates.”¹²⁷ Nevertheless, it stated that the distributor standard applied to CompuServe in *Cubby* should not be applied to Prodigy for two reasons.

First, the court determined that Prodigy “held itself out to the public and its members as controlling the content of its computer bulletin boards.”¹²⁸ That determination was based on articles written by a Prodigy marketing official that were published in national newspapers, in which he characterized Prodigy as a “private publisher[] like the New York Times,” and defended Prodigy’s practice of “using its editorial discre-

¹²⁴ *Id.*, 776 F. Supp. at 140.

¹²⁵ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794-1796, 1799 (N.Y. Sup. May 25, 1995).

¹²⁶ *Id.*, 23 Media L. Rep. (BNA) at 1795. The plaintiffs also requested, and the court granted, a partial summary judgment that the Board Leader was Prodigy’s “agent,” for whose conduct Prodigy was liable. *Id.*

¹²⁷ *Id.*, 23 Media L. Rep. (BNA) at 1798.

¹²⁸ *Id.*, 23 Media L. Rep. (BNA) at 1797.

tion” not “to publish” messages on its bulletin boards that are contrary to the “value system” of “the millions of American families we aspire to serve,” stating (in a passage quoted by the court): “Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.”¹²⁹

Second, the court found that Prodigy “implemented” its publicly claimed control over content through its “automatic software screening program,” which “prescreens *all* bulletin board postings” for certain words identified in the program as “offensive,” and by requiring Board Leaders to enforce its content guidelines, which state that offensive messages “will be removed when brought to PRODIGY’s attention.”¹³⁰ Thus, the court concluded that it was Prodigy’s “own policies, technology and staffing decisions which have altered the scenario” in which bulletin board services are generally regarded as secondary publishers:

“By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste,’ for example, PRODIGY is clearly making decisions as to content, and such decisions constitute editorial control. That such control is not complete and is enforced both as early as the notes arrive and as

¹²⁹ Moore, “The First Amendment Is Safe at Prodigy,” N. Y. Times, § 3 at 13 (Dec. 16, 1990). Prodigy’s public statements analogizing itself to a newspaper were made amidst controversy among its users and legal commentators regarding its legal right to censor messages posted on its bulletin boards. Conner, “Cubby v. CompuServe, Defamation Law on the Electronic Frontier,” 2 Geo. Mason Indep. L. Rev. 227, 239-241 (1993); Schlachter, “Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions,” 16 Hast. Comm/Ent L.J. 87, 96 & nn.33-34, 136 & n.271 (1993). See Di Lello, “Functional Equivalency and Its Application to Freedom of Speech on Computer Bulletin Boards,” 26 Columbia J.L. & Soc. Prob. 199 (1993) (arguing that Prodigy is functional equivalent of a shopping center whose right to censor speech on its premises can be restricted by state or federal law). Although Prodigy argued that its “former policy of manually reviewing all messages prior to posting was changed ‘long before’” the defamatory messages were posted, the court stated that “no documentation” of the change, “or of the dissemination of news of such a change, has been submitted.” *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1796 (N.Y. Sup. May 25, 1995).

¹³⁰ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1796-1797 (N. Y. Sup. May 25, 1995). (Emphasis added.) The court characterized Prodigy as having “virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes.” 23 Media L. Rep. (BNA) at 1798.

late as a complaint is made 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. Based on the foregoing, this Court is compelled to conclude that for purposes of Plaintiffs' claims in this action PRODIGY is a publisher rather than a distributor."¹³¹

The court held that Prodigy was a "publisher" of the defamatory messages without making any express finding as to whether it knew or had reason to know of their defamatory content when they were retransmitted to other Prodigy users, and there is nothing in the court's opinion suggesting that Prodigy or the Board Leader had such knowledge. In essence, then, the court imposed on Prodigy a common law duty to inspect manually and evaluate for defamatory content, before allowing them to be retransmitted to other users, each of the 60,000 messages posted on its bulletin boards every day.¹³²

It is possible to limit the significance of the *Stratton Oakmont* decision by focusing on facts unique to Prodigy on which the court arguably based its decision, such as Prodigy's unusual public relations history¹³³ and use of automatic screening software.¹³⁴ There is a basic flaw in the court's reasoning, however, that makes it unlikely that it would survive appellate scrutiny: it assumes that Prodigy's "editorial control" over the content of its bulletin boards—which the court ultimately defined as Prodigy's right to determine which messages are

¹³¹ *Id.*, 23 Media L. Rep. (BNA) at 1797. (Citations omitted.) (Emphasis added.)

¹³² *Id.*, 23 Media L. Rep. (BNA) at 1796.

¹³³ See N. 129 *supra* and accompanying text.

¹³⁴ While such software might help prevent the transmission of offensive words, it is essentially useless to identify and prevent transmission of defamatory messages. Offensive words are not necessarily defamatory, particularly when read in context, which software cannot do but which is required by both the common law and the First Amendment. See § 2.02[1][a][ii] *supra*. And statements that are defamatory can easily consist of words that would not be identified as "offensive" in even the most sophisticated software program imaginable. If an OSP has a duty to inspect messages for defamatory content, such software does little if anything to relieve the burden of manual inspection that such a duty creates. See *Lunney v. Prodigy Services Co.*, 250 A.D.2d 230, 235, 683 N.Y.S.2d 557, 561 (1998), *aff'd* 94 N.Y.2d 242, 723 N.E.2d 539 (1999), *cert. denied* 146 L.Ed.2d 776 (2000) ("But application of any unintelligent automated word-exclusion program of this type cannot be equated with editorial control. A highly offensive message can be composed in the most impeccable prose, just as words often thought of as offensive can be used affectionately or humorously in certain contexts. Intelligent editorial control involves the use of judgment, and no computer program has such a capacity."). See generally: *Bruck v. Cincotta*, 56 Ill. App. 3d 260, 13 Ill. Dec. 782, 371 N.E.2d 874, 879 (1977) ("[t]here is no general rule defining what words are defamatory, and each case must depend upon its own facts"); Sack, *Libel, Slander, and Related Problems*, § 2.4.2, at 79 (2d ed. 1994) ("[c]ontext is thus typically determinative").

“proper for its members to post and read on bulletin boards”—makes it a “publisher” of each message under the law of defamation. That assumption is clearly false.

While it is true that a publisher’s “choice of material to go into a newspaper” constitutes “the exercise of editorial control and judgment” by that publisher,¹³⁵ his “increased liability” for defamation arises from the *knowledge of content* that he inherently acquires as result of exercising that judgment to include the material in the newspaper;¹³⁶ it does not arise from the mere fact that he has a right to make that judgment. All distributors, like primary publishers, exercise the very same right to determine what material they will disseminate and what material they will not. But the exercise of that right does not necessarily give the distributor knowledge of a particular publication’s content, nor does it mean that he exercises “editorial control” over the content of those publications he chooses to disseminate, a fact emphasized by the court in *Cubby* and equally applicable to the “publications” posted by users on OSP bulletin boards.¹³⁷ Similarly, his right to refuse to distribute a particular publication by a publisher whose work he normally distributes does not give the distributor “editorial control” over the content of the publisher’s works that he does distribute.¹³⁸ Indeed, the liability standard applied to a distributor presumes that he has such a right to refuse distribution and requires him to exercise it whenever he knows or has reason to know that a particular publication contains unlawful or tortious content. His efforts to exercise that right, therefore, cannot create the very same general duty to inspect content that is prohibited by that common law standard (and by the First Amendment).

Accordingly, the ruling in *Stratton Oakmont*—that Prodigy’s efforts to claim and exercise the right to refuse distribution of objectionable material make it liable for publishing every defamatory message posted on its bulletin boards, even if it has no knowledge or reason to

¹³⁵ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1796 (N.Y. Sup. May 25, 1995), citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974).

¹³⁶ See N. 91 *supra* and accompanying text.

¹³⁷ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (“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 CompuServe has no more editorial control over such a publication than does a public library, bookstore, or newsstand”).

¹³⁸ See, e.g., *Auvil v. CBS “60 Minutes,”* 800 F. Supp. 928, 931 (E.D. Wash. 1992) (discussed in text accompanying N. 58 *supra*). See also: *Maynard v. Port Publications*, 98 Wis. 2d 555, 566, 297 N.W.2d 500, 506 (1980) (discussed in N. 99 *supra*); *Misut v. Mooney*, 125 Misc.2d 95, 100, 475 N.Y.S.2d 233, 236 (Sup. 1984) (discussed in N. 103 *supra*).

know of the message's defamatory content—is contrary to both the common law of defamation and the First Amendment.¹³⁹

The *Stratton Oakmont* ruling was effectively repudiated in a later case by the Court of Appeals of New York.¹⁴⁰ In this case, an “infantile practical joker” fraudulently opened an account with Prodigy using the plaintiff's identity and then used that account to publish under the plaintiff's name allegedly defamatory statements in an e-mail message and in two posts on a Prodigy bulletin board. The court found dispositive a prior case in which it had held that a telephone company, as opposed to a telegraph company, is not a publisher of material transmitted over its lines because the material is “communicated directly” by the sender to the recipient without being communicated “by or to any person employed by the telephone company.”¹⁴¹ The court found the distinction between a telegraph company and telephone company in the earlier case to be dispositive because “Prodigy's role in transmitting e-mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers' conversations.”¹⁴² Thus, the court found that Prodigy, “like a telephone company, is merely a

¹³⁹ After the *Stratton Oakmont* court entered its partial summary judgment ruling, Prodigy retained new counsel and filed a motion “for Renewal and/or Reargument,” together with new affidavits from Prodigy employees in an attempt to clarify Prodigy's practices and to correct errors in the record on which the court had based its ruling. In an apparent attempt to settle the litigation, the plaintiffs filed an affidavit stating that they did not oppose Prodigy's motion, and the parties issued a joint press release stating their agreement “that disposition of the motion in this manner is in the best interests of the parties as well as the online and interactive services industry.” See Goldstein, “Prodigy, Investment Firm Seek to End Libel Lawsuit,” *New York Law Journal*, at 1 (Oct. 25, 1995). Nevertheless, the trial court denied the motion because Prodigy had not demonstrated “an acceptable excuse” for omitting the evidence in the new affidavits from the original record. *Stratton Oakmont Inc. v. Prodigy Services Co.*, 24 Media L. Rep. (BOA) 1126, 1127-1128 (N.Y. Sup. Dec. 11, 1995) (refusing to vacate summary judgment ruling “as part of a settlement package,” based on the court's belief that “there is a real need for some precedent” in this “developing area of the law (in which it appears the law has thus far not kept pace with technology)”). The trial court's desire to preserve the importance of its summary judgment ruling as “precedent” was promptly thwarted by Congress, which included a section in the Communications Decency Act of 1996 (see N. 15.1 *supra*) that creates a federal statutory defense to civil liability for an OSP that transmits tortious third party content. That section is expressly intended to overrule the *Stratton Oakmont* decision. See § 2.03[3][f] *infra*.

¹⁴⁰ *Lunney v. Prodigy Services Co.*, 94 N.Y.2d 242, 723 N.E.2d 539 (1999), *cert. denied* 146 L.Ed.2d 776 (2000).

¹⁴¹ *Anderson v. New York Telephone Co.*, 35 N.Y.2d 745, 320 N.E.2d 647 (1974), *reversing* 42 A.D.2d 151, 345 N.Y.S.2d 740 (1973). The *Anderson* decision is detailed in § 2.03[3][a][iv] *infra*.

¹⁴² *Lunney v. Prodigy Services Co.*, N. 140 *supra*, 94 N.Y.2d at 249, 723 N.E.2d at 542.

conduit” when transmitting e-mail messages and therefore “was not a publisher” of those messages under New York common law.¹⁴³

The court noted that there were “more complicated legal questions associated with” the messages posted on Prodigy bulletin boards, “owing to the generally greater level of cognizance that their operators have over them.”¹⁴⁴ Nevertheless, the court agreed with the Appellate Division’s finding that, “even if Prodigy ‘exercised the power to exclude certain vulgarities from the text of certain [bulletin board] messages,’ this would not alter its passive character in ‘the millions of other messages in whose transmission it did not participate,’ nor would this . . . compel it to guarantee the content of those myriad messages.”¹⁴⁵ Thus, the court affirmed the Appellate Division’s holding that Prodigy was not a “publisher” of the bulletin board messages because “there is no proof that any such control was exercised in connection with the transmission of the messages complained of by the plaintiff.”¹⁴⁶ In short, Prodigy was not the publisher of the

¹⁴³ *Id.* The court also affirmed the Appellate Division’s alternative holding that, even if Prodigy were assumed to have published the e-mail messages, it would be protected from liability by the common law qualified privilege afforded common carriers. *Id.* See *Lunney v. Prodigy Services Co.*, 250 A.D.2d 230, 683 N.Y.S.2d 557 (1998), *aff’d* 94 N.Y.2d 242, 723 N.E.2d 539 (1999), *cert. denied* 146 L. Ed. 776 (2000) (“The common law privilege which benefits telegraph companies must apply to Internet service providers as well. E-mail is, in substance, nothing but an updated version of the telegraph.”). See N. 39 *supra* and N. 159 *infra*. The Appellate Division concluded that this holding rendered its decision “in complete harmony with” the federal statutory immunity now afforded by Section 509 of the Communications Decency Act, 47 U.S.C. § 230(c)(1), discussed in § 2.02[3][f] *infra*, and chose not address “the essentially academic question of whether this Federal statute would apply to” any of the messages at issue. 683 N.Y.S.2d at 563. The Court of Appeals also “decline[d]” to rule on the applicability of Section 509 of the CDA because, in its view, the “case does not call for it.” *Lunney v. Prodigy Services Co.*, N. 140 *supra*, 94 N.Y.2d at 251, 723 N.E.2d at 543. See *id.*, 94 N.Y.2d at 248-249, 723 N.E.2d at 541 (“Because Lunney’s defamation action is grounded in New York common law, we evaluate it in accordance with our established tort principles. Although they were fashioned long before the advent of e-mail, these settled doctrines accommodate the technology comfortably, and with apt analogies.”). (Citations omitted.)

¹⁴⁴ *Lunney v. Prodigy Services Co.*, N. 149 *supra*, 94 N.Y.2d at 249-250, 723 N.E.2d at 542.

¹⁴⁵ *Id.*, 94 N.Y.2d at 250, 723 N.E.2d at 542. (Citations omitted.)

¹⁴⁶ *Lunney v. Prodigy Services Co.*, N. 142 *supra*, 250 A.D.2d at 237. While the Court of Appeals did not expressly mention the *Stratton Oakmont* ruling in its opinion, the Appellate Division expressly held that *Stratton Oakmont* was not “controlling” because the reasoning underlying that ruling was inconsistent with the Court of Appeals’ decision regarding the liability of the telephone company in *Anderson*. *Id.* The Appellate Division also stated that *Stratton Oakmont* was “made in an entirely different factual context” because the “efforts at editorial control” described in that ruling had been in fact abandoned by Prodigy in January 1994, prior to the events giving rise to the *Lunney* complaint. *Id.*, 250 A.D. at 236-237, 683 N.Y.S.2d at 562. Finally, the Appellate

bulletin board messages because there was no proof that a “human being in the employ” of Prodigy had acquired knowledge of their content prior to allowing them to be transmitted over its service.¹⁴⁷

[iv]—Anonymous Users

Some OSPs permit their computers to be used as “anonymous remailers,” which strip a sender’s message of all identifying information and then retransmit it to other OSPs as an anonymous e-mail or bulletin board message. Although a plaintiff defamed by an anonymous message might be able to obtain the author’s identity from the anonymous remailer, in many cases discovery of the sender’s identity may not be possible.¹⁴⁸

The common law of defamation contemplates that plaintiffs will have no remedy for damage caused by anonymous messages in some contexts, such as an anonymous telephone call or letter.¹⁴⁹ An anonymous e-mail or bulletin board message, however, arguably justifies a different standard because it can be circulated as easily and quickly among thousands or millions of OSP users, without any material difference in cost or likelihood of detection for its sender. Unless the OSP is subject to liability for publishing the message, the plaintiff might have no remedy for the damage caused by the widespread circulation that the OSP made possible. Will a state’s interest in providing the plaintiff with a remedy for such widespread damage cause courts to impose liability on the OSP for permitting its computers to retransmit an anonymous message, even if the OSP had no knowledge of its defamatory content?

Division stated that its “disagreement” with the *Stratton* ruling was “dictated” by “one simple consideration of fairness,” concluding that an OSP should not be “punished for allegedly performing in an inadequate way the very conduct (exercise of editorial control) which, initially, it had no legal duty to perform at all.” *Id.* (noting that the *Stratton* rule “discourages the very conduct which the plaintiff” in *Stratton* argued should be encouraged”).

¹⁴⁷ *Id.*, 250 A.D.2d at 235, 683 N.Y.S.2d at 561. See *Lunney v. Prodigy Services Co.*, N. 140 *supra*, 94 N.Y.2d at 250-251, 723 N.E.2d at 542 (“We see no occasion to hypothesize whether there may be other instances in which the role of an electronic bulletin board operator would qualify it as a publisher.”).

¹⁴⁸ See Hardy, “The Proper Legal Regime for ‘Cyberspace,’” 55 U. Pitt. L. Rev. 993, 1011 (1994) (“obvious answer” is for a court to subpoena the records of the anonymous remailer, but this might not be “practical” if the remailer “systematically erases the records of its anonymously forwarded mail” or if it “is located in a difficult to reach foreign jurisdiction”). See generally, Akst, “Postcard From Cyberspace: The Helsinki Incident and the Right to Anonymity,” L.A. Times, at D1 (Feb. 22, 1995) (describing anonymous remailer in Finland that “processes more than 7,000 messages daily, mostly for Americans”).

¹⁴⁹ See *Restatement (Second) of Torts*, § 581, comment b (1977) (telephone company not liable for anonymous defamatory calls made from “a pay station” telephone).

The First Amendment prohibits any rule that would prevent an OSP from transmitting anonymous messages regardless of their content.¹⁵⁰ While the constitutional protection afforded such speech does not prevent the imposition of liability on one who distributes an anonymous message with knowledge of its defamatory content, the First Amendment would prohibit any rule requiring the OSP to inspect manually all messages sent to its computers to ascertain whether their source is anonymous, just as it prohibits any such general duty to inspect to ascertain whether they are obscene or defamatory.¹⁵¹

If an OSP's computer, without human intervention, could screen all messages it receives and segregate those that have no identifiable source, a plaintiff might argue that the OSP should have a duty to use such technology and to inspect manually just the segregated, anonymous messages for defamatory content, thus rendering the OSP liable at common law for publishing whatever anonymous messages it permits to be retransmitted by its computers.¹⁵² Such a rule might still

¹⁵⁰ See: *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426, 438 (1995) (First Amendment prohibits statute banning distribution of anonymous campaign literature; state's interest in identifying source of libelous campaign literature did not justify ban, which "plainly applies" to anonymous speech "even when there is no hint of falsity or libel"); *Talley v. California*, 363 U.S. 60, 64, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) (First Amendment prohibits ordinance barring distribution of unsigned handbills).

¹⁵¹ See Ns. 79 and 122 *supra* and accompanying text. Such a rule would also be prohibited by the Communications Decency Act of 1996 (see N. 15.1 *supra*), which bars the states from treating an OSP as the publisher of information provided by another information content provider without making any exception to that rule for "anonymous" third party content providers. See § 2.03[3][f] *infra*. The analysis might differ for the anonymous remailer, whose modification of the sender's message to make it anonymous might justify a rule requiring it to inspect the message for unlawful or tortious content. Identification of the anonymous remailer, however, might not be possible in many cases. See Hardy, "The Proper Legal Regime for 'Cyberspace,'" 55 U. Pitt. L. Rev. 993, 1051 (1994) (plaintiffs "might be able to find a court congenial to the application of strict liability" for anonymous remailers, "but not be able to find a defendant to whom it should apply"). See generally: Johnson-Laird and Johnson-Laird, "A House of Ill Repute: Internet Technology, E-Mail, and Anonymity," J. Internet L. 8-20 (Sept. 1997); Note, "Establishing Legal Accountability for Anonymous Communication in Cyberspace," 96 Columbia L. Rev. 1526 (1996). Froomkin, "Anonymity and Its Enmities," 1995 J. Online L. art. 4 (available over the Internet at <http://www.wm.edu/law/publications/jol/>); Branscomb, "Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace," 104 Yale L. J. 1639 (May 1995).

¹⁵² Under the common law of defamation, an OSP that intentionally permits messages of an unknown origin to be posted on its computers might be barred from disclaiming responsibility for "publishing" such messages in much the same way that some courts have barred a libel defendant who refuses to disclose the identity of a "confidential source" from relying on that source to prove that he did not act with the requisite degree of fault in publishing the defamatory article. See, e.g.:

Ninth Circuit: *Laxalt v. McClatchy*, 116 F.R.D. 438, 452 (D. Rev. 1987); *DeRoburt v. Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981).

violate the First Amendment by imposing a potentially significant burden on the distribution of anonymous messages, since all would have to be screened manually for defamatory (or otherwise unlawful) content. In any event, Section 509 of the Communications Decency Act of 1996 now preempts any such duty to inspect the content of anonymous messages that might be imposed on an OSP by state law.¹⁵³

An OSP's immunity from liability under Section 509, however, does not relieve the OSP from responding to a subpoena issued by a court compelling the OSP to disclose to the allegedly defamed party whatever identifying information it has about the source of the anonymous message. During the three-year period of 1998-2000, there were reportedly more than 120 instances in which a person or company initiated litigation to compel various OSPs to disclose identifying information about anonymous or pseudonymous users who allegedly had posted defamatory comments or proprietary information on Internet message boards.¹⁵⁴ Plaintiffs typically pursue such information from OSPs either by filing a "John Doe" lawsuit against the unknown posters and then serving a non-party subpoena on the OSP in that action or, in some states, by filing an action against the OSP for "an equitable bill of discovery."¹⁵⁵ Before responding, many OSPs provide notice to their users of the subpoena seeking their identity. When a "John Doe" defendant who receives such notice enters a special

District of Columbia Circuit: Liberty Lobby, Inc. v. Rees, 111 F.R.D. 19, 22(D.D.C. 1986); Dowd v. Calabrese, 577 F. Supp. 238, 244 (D.D.C. 1983).

State Courts:

Nevada: Las Vegas Sun v. District Court, 104 Nev. 508, 761 P.2d 849 (1988).

New Hampshire: Downing v. Monitor Publishing Co., 120 N.H. 383, 415 A.2d683 (1980).

New York: Greenberg v. CBS, Inc., 69 A.D.2d 693, 709, 419 N.Y.S.2d 988, 977 (1979).

¹⁵³ See N. 15.1 *supra* and § 2.03[3][f] *infra*.

¹⁵⁴ Most of the news reports of such litigation are compiled online at: http://www.cybersecuritieslaw.com/lawsuits/cases_corporate_cybersmears.htm (visited January 31, 2001). See generally, Bell, "Dealing with the 'Cybersmear,'" New York Law Journal at T3 (April 19, 1999) ("since June 1988, American companies fighting . . . cyber-smears reportedly have been filing one or two lawsuits a week in Santa Clara County, Calif., the home of Yahoo! Inc.").

¹⁵⁵ See: Annot., "Propriety of Use of Fictitious Name of Defendant in Federal District Court," 139 A.L.R. Fed. 533 (2001); Annot., "Existence and Nature of Cause of Action for Equitable Bill of Discovery," 37 A.L.R.5th 645 (1999). Courts have denied as procedurally improper, however, a "petition to preserve testimony" filed against an OSP to seek such information. See, e.g., In re Petition of Texaco, Inc., 51 Va. Cir. 411, 2000 Va. Cir. LEXIS 59 (March 14, 2000). See generally: Keller and Johnson, "Online Anonymity: Who Is John Doe?," 5 Electronic Commerce & L. Rep. (BNA) 70, 72-73 (Jan. 19, 2000); Sobel, "The Process that 'John Doe' is Due: Addressing the Legal Challenge to Internet Anonymity," 5 Va. J.L. & Tech. 3 (2000).

appearance and moves to quash the subpoena, some courts have held that, because the user's interest in preserving his anonymity is protected by the First Amendment, the subpoena may not be enforced unless the plaintiff has demonstrated, or at least alleged, a prima facie case of defamation against the defendant.¹⁵⁶

**[d]—OSP Liability for Transmitting Third Party Speech
with Knowledge of Its Defamatory Content**

While an OSP probably has no general common law duty to acquire knowledge of the third party content stored on its computer, it often obtains such knowledge in fact during the course of administering its service.¹⁵⁷ The OSP also might choose to monitor third party material for defamatory or otherwise unlawful content, or it might be informed of such defamatory content by an angry, soon-to-be plaintiff

¹⁵⁶ See, e.g.:

New Jersey: *Dendrite International Inc. v. Doe*, No. MRS C-129-00, (N.J. Super. Nov. 28, 2000) (discussed in 29 Media L. Rep. (BNA) No. 1, "News Notes") (denying subpoena to Yahoo! in defamation action against John Doe defendants where plaintiff failed to "prove" a prima facie case because claim of reputational injury was unsupported by competent testimony).

Pennsylvania: *Melvin v. Doe*, 29 Media L. Rep. 1065 (BNA) (Pa. C.P. Nov. 15, 2000) (court stayed discovery of identifying information from OSP to provide John Doe defendants with "opportunity to show that plaintiff could not make out a prima facie case" of defamation but refused to bifurcate issue of defendants' state of mind from all other issues and stay discovery on state of mind—including identity of defendants—until plaintiff prevails before a jury on all other issues).

See also:

Ninth Circuit: *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 577-580 (N.D. Cal. 1999) (denying TRO motion against John Doe defendant because order could not be served on defendant and finding that discovery to uncover identity of John Doe defendant should not occur unless plaintiff demonstrates, *inter alia*, that his suit "could withstand a motion to dismiss").

State Court:

Virginia: *Melvin v. Doe*, 49 Va. Cir. 257, 27 Media L. Rep. (BNA) 2144 (Loudoun County June 24, 1999) (quashing subpoena served on AOL and granting John Doe defendant's motion to dismiss where plaintiff failed to allege sufficient facts to demonstrate that defendant had "minimum contacts" with Virginia to support exercise of personal jurisdiction).

See generally: Lidsky, "Silencing John Doe: Defamation & Discourse in Cyberspace," 49 Duke L.J. 855 (Feb. 2000); Tien, "Who's Afraid of Anonymous Speech?: McIntyre and the Internet," 75 Ore. L. Rev. 117 (1996).

¹⁵⁷ See Perritt, "Tort Liability, the First Amendment, and Equal Access to Electronic Networks," 5 Harv. J. L. & Tech. 65, 70 and n.7 (1992) (noting that electronic database vendors often remove much of the formatting or "chunking and tagging" for print-on-paper formats and substitute structures "more appropriate for the electronic formats"). Bulletin board operators often monitor the messages posted on their boards to ensure that each message is relevant to the board's topic, to answer questions, for other administrative and business reasons, or because of personal interest. The same could be said for any bookseller, news vendor, or librarian.

or her attorney. Whatever the precipitating cause may be, once an OSP has reason to know of the defamatory nature of third party content stored on its computer, it is subject to liability for “republishing” the material under the common law of libel if it then permits the material to be retransmitted to its users.¹⁵⁸

Being “subject to liability,” however, is not the same as being “liable.” Even if a message republished by an OSP is in fact both defamatory and false, the OSP can avoid liability if the plaintiff fails to establish that the OSP acted with the requisite degree of fault regarding the message’s accuracy or if the OSP can establish that its retransmission of the message was privileged.

[i]—Fault

If the plaintiff is a public figure, she must prove that the OSP republished the third party content with “actual malice”—that is, with knowledge of falsity or with “reckless disregard” of its accuracy.¹⁵⁹ Application of the “actual malice” standard gets tricky if the OSP only had “reason to know” of the material’s defamatory nature and not actual knowledge of what the material said, since the “reckless disregard” standard assumes sufficient knowledge of content to have “serious doubts” about its truth or to form a belief as to its “probable falsity.”¹⁶⁰

¹⁵⁸ See: *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 139 (2d Cir. 1984) (“At the same time a distributor as an integral part of the movement of information from the creator to the reader . . . cannot be entirely immune from liability. When a distributor acts with the requisite scienter in distributing materials defaming or invading the privacy of [another], it must be subject to liability”); N. 86 *supra* and accompanying text. An OSP might not be subject to republisher liability for retransmissions that occurred after it became aware of the material’s content but before it had a “reasonable” time in which to make and implement the decision to remove it from its system. See N. 48 *supra* and accompanying text. The Communications Decency Act of 1996 (see N. 15.1 *supra*) contains a provision that has been construed by the courts as immunizing an OSP from liability even if it had knowledge of the material’s defamatory content at the time it was transmitted to the OSP users. See § 2.03[3][f] *infra*.

¹⁵⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See § 2.02[3][a][i] *supra*.

¹⁶⁰ *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). See *Adams v. Frontier Broadcasting Co.*, 555 P.2d 556 (Wyo. 1976) (discussed in text accompanying N. 69 *supra*). In *Spence v. Flynt*, 647 F. Supp. 1266 (D. Wyo. 1986), the court addressed the issue, albeit in *dicta*, and concluded that “in this context, both phrases ‘reason to know’ and ‘reckless disregard of the truth’” mean that though the defendant may not have known the exact content of the allegedly libelous statement, it knew enough about the statement so that it should have investigated the statement’s truth before distributing, or continuing to distribute the publication.” 647 F. Supp. at 1273. See generally, *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. 657, 686, 692, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (the “meaning” of such “elusive constitutional standards” as “actual malice” and “reckless disregard” is not “readily captured in ‘one infallible definition’” and, while “failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category”). (Citations omitted.)

If the plaintiff is a private figure, most states would require her to prove that the OSP was negligent—that is, that if it had exercised “reasonable care” it would have known that the statement it republished was false.¹⁶¹ In most cases, however, an OSP is not in a position to undertake its own “investigation” to ascertain whether a third party statement—one that it knows is defamatory—is true or false. If the OSP is aware of the defamatory third party statement but has no knowledge as to whether it is true or false, does the negligence standard require it to take any steps to verify the statement’s accuracy?

If the author of the defamatory statement is known to the OSP to be reliable, there is reason to believe that courts will reject any claim that the OSP’s failure to conduct its own investigation of the statement’s accuracy was negligent.¹⁶² While such a rule might protect the OSP from liability for defamatory statements contained in databases of established and generally reliable publications, it would have little relevance to bulletin board postings by the OSP’s users, the reliability of whom the OSP typically has no knowledge. There is language in some cases that suggests that an OSP who conducts no investigation into the truth of a republished statement would be subject to liability only if it had substantial reason to believe that the defamatory statement was in fact false.¹⁶³ If such a doctrine is viable, however, it is more likely to develop as common law privilege.

¹⁶¹ See § 2.02[3][b], N. 55 *supra* and accompanying text. In the context of a “professional disseminator of news,” there is disagreement among various states as to whether the proper referent in determining whether the defendant acted with “reasonable care” is the “customs and practices within the profession” or, instead, “what a reasonably prudent person” would have done in the same circumstances. See: Sack, *Libel, Slander, and Related Problems*, § 5.9.1.2, at 344-346 (2d ed. 1994); *Restatement (Second) of Torts*, § 580B, comment g (1977).

¹⁶² See, e.g.:

Sixth Circuit: O’Brien v. Williamson Daily News, 735 F. Supp. 218, 225 (E.D. Ky. 1990), *aff’d* 931 F.2d 893 (6th Cir. 1991) (“to impose upon a news organization the requirement that it independently verify the accuracy” of reports received from established wire services “would be to impose a duty of extraordinary care, not ordinary care”).

State Courts:

New York: Weiner v. Doubleday & Co., Inc., 74 N.Y.2d 586, 550 N.Y.S.2d 251, 549 N.E.2d 251 (1989) (in private-figure action, book publisher entitled to rely on research of “established writer”); Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 416 N.E.2d 557, 566-567 (1980) (publisher of book containing previously published newspaper articles entitled to rely on research of newspaper’s reporters).

¹⁶³ See, e.g.:

First Circuit: Geiger v. Dell Publishing Co., Inc., 719 F.2d 515, 518 (1st Cir. 1983) (applying New York’s “gross irresponsibility” standard) (“We do not agree with appellant that the injurious nature of the statements is itself a ‘substantial reason’ to question their accuracy; instead, the publisher must have some reason to believe the statements are untrue”).

District of Columbia Circuit: McBride v. Merrell Dow and Pharmaceuticals, Inc., 613 F. Supp. 1349, 1356-1357 (D.D.C. 1985), *aff’d in relevant part on other grounds*

[ii]—Privilege to Provide Means of Publication

The *Restatement* recognizes a common law, conditional privilege for one who “provides a means of publication of defamatory matter published by another.”¹⁶⁴ That person’s conduct is privileged if the original publisher “is privileged to publish” the matter *or* if that person “reasonably believes” that the original publisher is privileged, “even though in fact he is not.”¹⁶⁵ The purpose of the privilege “is to make it possible for those who have a privilege to publish defamatory matter to find a means of publication without which the privilege would be of little or no use to them.”¹⁶⁶

The privilege provides little protection for one who disseminates third party content to the public. Although the *Restatement* indicates that it applies to a newspaper that prints “a letter to the editor” and to a broadcaster “providing time on the air,”¹⁶⁷ there do not seem to be any cases discussing the privilege in those contexts, nor is that surprising. Any

800 F.2d 1208 (D.C. Cir. 1986) (corporation not liable for republication where corporate employees who sent copies of defamatory article to American Medical Association had no reason to know article was false).

State Courts:

California: *Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 200 Cal. Rptr. 674 (1984) (adult bookstore owners selling video with defamatory cover never “informed that the libelous statement” on the cover “was untrue”).

¹⁶⁴ *Restatement (Second) of Torts*, § 612(1) (1977).

¹⁶⁵ *Id.*, § 612(1)(a)-(b) and comment d. See Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 811 (5th ed. 1984) (privilege “applies despite awareness on the part of the disseminator that the communication is both false and defamatory and is therefore a much broader privilege than the constitutional or qualified privilege of the primary publisher”). But see, *Restatement (Second) of Torts*, § 612, comment e (1977) (“If the person supplying the means of publication knows of the falsity or has serious doubts as to the truth, he may well be under a duty to bring his knowledge or doubts to the attention of the holder of the original privilege and thus affect the continued existence of the original privilege. A failure to do this might be treated as an abuse of his own privilege”).

¹⁶⁶ *Id.*, comment a. See, e.g., *Youmans v. Smith*, 153 N.Y. 214, 222, 47 N.E. 265, 267 (1897) (discussed in N. 103 *supra*) (attorney could “employ” a “printer with a printing press” to do “[w]hatever he could lawfully do himself in preparing for trial” and the “privilege that protected him also protected his agents and employees in whatever they did at his request”).

¹⁶⁷ *Id.*, comment c (the rule “applies to a newspaper that prints an article or a letter to the editor, a radio or television broadcasting station providing time on the air, a ticker, teletype or other private wire service, a printer, or a stenographer who takes dictation and who transcribes and mails the letter”). See, e.g., *Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 221 (7th Cir. 1997) (producer of taped television talk show entitled to assert the privilege afforded by law to a participant on the show to defend herself by making statements attacking the credibility of her attacker, even though her statements invaded the privacy of the attacker).

privilege that encompasses publication to the general public would also typically apply to the republisher, who does not need to rely on a separate privilege to protect his conduct.¹⁶⁸ Those common law privileges that would not apply directly to the republisher also do not apply to the original publisher (or are considered “abused”) when the defamatory statement is published to persons not within the scope of the privilege.¹⁶⁹ Thus, a person who provides another with the means to publish a matter to the general public typically has no “reasonable” basis to believe that the publication is protected by any privilege. The privilege to provide the means of publication to another may have some significance to an OSP, whose service may permit a user to circulate privileged material only to a limited group of people who are all within the scope of the user’s privilege.¹⁷⁰

The privilege provides even greater protection to a “public utility under a duty to transmit messages,” who is privileged to do so, “even if it knows the message to be false and defamatory,” unless “the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it.”¹⁷¹

Prior to the enactment of Section 509 of the CDA, there was considerable discussion among commentators of the need for a much broader privilege for those who disseminate works published by others, and for OSPs in particular.¹⁷² In 1992, the National Conference of Commissioners on Uniform State Laws considered, but did not adopt, a standard that would immunize from republisher liability any

¹⁶⁸ The separate privilege arguably would protect a newspaper publisher who prints a defamatory letter to the editor if he “reasonably believed” that the letter was protected by the “fair comment” privilege (which contemplates publication to the general public, see § 2.02[3][c] N. 61 *supra*), even if the court ultimately decides that the fair comment privilege did not apply.

¹⁶⁹ See: *McGranahan v. Dahar*, 119 N.H. 758, 408 A.2d 121, 124 (1979) (absolute privilege for statements made in complaint does not apply to general circulation of the document); *Green Acres Trust v. London*, 141 Ariz. 609, 688 P.2d 617 (1984) (copies of draft complaint given to reporter); *Restatement (Second) of Torts*, § 604 (1977) (“excessive publication” constitutes “abuse” of conditional privilege).

¹⁷⁰ See § 2.02[2][b][iii], Ns. 39-40 *supra* and accompanying text (describing the “common interest” privilege).

¹⁷¹ *Restatement (Second) of Torts*, § 612(2) (1977). See: *O’Brien v. Western Union Telegraph Co.* 113 F.2d 539, 542-543 (1st Cir. 1940); Annot., “Liability of Telegraph or Telephone Company for Transmitting or Permitting Transmission of Libelous or Slanderous Messages,” 91 A.L.R.3d 1015 (1996).

¹⁷² See Keeton, *Prosser and Keeton on the Law of Torts*, § 113, at 811 (5th ed. 1984) (“It would be rather ridiculous, under most circumstances, to expect a bookseller or a library to withhold distribution of a good book because of a belief that a derogatory statement contained in the book was both false and defamatory of the plaintiff”). Contrast Johnson and Marks, “Mapping Electronic Data Communications into Existing Legal Metaphors: Should We Let Our Conscience (and Our Contracts) Be Our Guide?” 38 Vill. L. Rev. 487, 494 (1993) (applying secondary publisher rule to OSP “could be disastrous for the growth of electronic data communications” by demanding “that the sysop choose between operating a system and not participating

“library, archive, or similar information retrieval or transmission service” that provides access “to information originally published by others,” if it is not “reasonably understood to assert in the normal course of its business the truthfulness of” such information or if it “takes reasonable steps to inform users” that it makes no such assertion.¹⁷³

[e]—OSP Use of Independent Contractors to Manage Third Party Content

Some of the larger OSPs delegate the responsibility of managing various segments of their service to independent contractors, whose responsibilities typically include assembling the content of the segment’s databases and monitoring the messages posted by users on the segment’s bulletin boards to ensure compliance with the OSP’s general standards and policies. By contracting with a third party to administer a particular area of its service, an OSP is unlikely to learn of the defamatory nature of a particular publication in that area and thus become subject to liability for any further retransmissions of it unless the matter is specifically brought to its attention by a complaining party. The independent contractor might become subject to liability for permitting defamatory third party content to be retransmitted after acquiring knowledge of its content in the course of administering his segment of the service. The OSP, however, would not be “vicariously liable” for the independent contractor’s knowledge or conduct, so long as he was not acting as the OSP’s “agent” at the time he permitted the retransmission of the defamatory publication.¹⁷⁴

in it, or operating a system, participating in it, and taking his chances with liability”), with Becker, “The Liability of Computer Bulletin Board Operators for Defamation Posted by Others,” 22 Conn. L. Rev. 203, 229 n.86 (1989) (“Allowing liability only for continued dissemination after the [OSP] has knowledge of the defamatory character of the material is a reasonable balance of the competing interests”).

¹⁷³ See Perritt, “Tort Liability, the First Amendment, and Equal Access to Electronic Networks,” 5 Harv. J.L. & Tech. 65, 108 (1992). A broader, federal statutory privilege has since been created by the Communications Decency Act of 1996. See: N. 15.1 *supra*, § 2.03[3][f] *infra*.

¹⁷⁴ See *Secord v. Cockburn*, 747 F. Supp. 779, 787 (D.D.C. 1990) (“actual malice” cannot be “imputed from one defendant to another absent an employer-employee relationship giving rise to respondeat superior” liability; book editor and publisher not vicariously liable based on actual malice of author who was “an independent contractor”). See generally: *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) (“In determining whether a hired party is an employee under the general law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished”—listing twelve factors relevant to that inquiry); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581, 590 (1992) (“Since the common-law test contains ‘no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive’”); *Restatement (Second) of Agency* § 220(2) (1958).

In *Cubby*, the court determined that CompuServe did not exercise sufficient control to create such an agency relationship with the independent contractor who managed the Journalism Forum, and thus held that CompuServe was not vicariously liable for any role the manager might have had in publishing the defamatory statements.¹⁷⁵ The court in *Stratton Oakmont* reached the opposite conclusion, holding that Prodigy exercised sufficient control and direction over the Board Leader's actions to make him Prodigy's "agent," at least "for the limited purpose of monitoring and editing" the bulletin board on which the defamatory messages had been posted.¹⁷⁶

[f]—The Communications Decency Act of 1996

On February 8, 1996, the Telecommunications Act of 1996 was signed into law. Title V of that Act is the Communications Decency Act (the CDA).¹⁷⁷ The CDA makes it a federal crime to use "an interactive computer service" to send or display in a manner available to a minor any indecent material or to knowingly permit a service under one's control to be used for such activity.¹⁷⁸ At the same time, the

¹⁷⁵ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 142-143 (S.D.N.Y. 1991). The court found that CompuServe's "ultimate right" to "remove text from its system for noncompliance with its standards merely constitutes control over the result of" the manager's "independent work"—a level of control "insufficient to rise to the level of an agency relationship." 776 F. Supp. at 143.

¹⁷⁶ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1799 (N.Y. Sup. May 25, 1995).

¹⁷⁷ Communications Decency Act of 1996, reprinted in 142 Cong. Rec. H1099-H1102 (daily ed. Jan. 31, 1996).

¹⁷⁸ Communications Decency Act of 1996, § 502(2) (to be codified at 47 U.S.C. § 223(d)), reprinted in 142 Cong. Rec. H1099 (daily ed. Jan. 31, 1996). The provisions of the CDA restricting indecent online communications are discussed in Chapter 4 *infra*. The CDA defines "interactive computer service" to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." *Id.*, § 509 (to be codified at 47 U.S.C. § 230(e)(2)), reprinted in 142 Cong. Rec. H1101 (daily ed. Jan. 31, 1996). See:

Fourth Circuit: *Truelove v. Mensa International Ltd.*, No. PJM 97-3463, available online at <http://legal.web.aol.com/decisions/dldefam/truelove.html> (D. Md. Feb. 10, 1999) (mail list operator was "provider" of "interactive computer service" entitled to immunity under § 230(c)(1)).

Seventh Circuit: *Does v. Franco Productions*, 2000 U.S. Dist. LEXIS 8645, *12-*16 (N.D. Ill. June 22, 2000) (OSPs that provided "web hosting" services, "which enable someone to create a web page" that offers tortious material for sale, were "providers" of an "interactive computer service" entitled to immunity under Section 230(c)(1) from liability for third-party content posted on the Web sites they hosted).

State Court:

Ohio: *Sabbato v. Hardy*, 28 Media L. Rep. (BNA) 1575, 1576 (Ohio C.P. Feb. 22, 2000) (defendant, who "designed and controls an internet website," was a "provider" of an "interactive computer service" entitled to immunity under Section 230(c)(1) for content posted on the Web site "by third-party users" of the Web site).

CDA declares that “[i]t is the policy of the United States” to “remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.”¹⁷⁹ Pursuant to that policy, the CDA amended Title 47 of the United States Code by adding Section 230(c), entitled “Protection for ‘Good Samaritan’ Blocking and Screening of Offensive Material.”¹⁸⁰ Paragraph (1) of Section 230(c) provides:

“TREATMENT OF PUBLISHER OR SPEAKER.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁸¹

Paragraph (2) of Section 230(c) provides that no provider or user of an interactive computer service shall be subject to civil liability “on account of any action taken voluntarily in good faith to restrict access to or availability of” online material that the user or provider considers to be “objectionable.”¹⁸²

Congress enacted Section 230(c) for the express purpose of overruling *Stratton Oakmont v. Prodigy*, which held that Prodigy was the “publisher” of a defamatory comment posted on its bulletin board by an unknown user in part because Prodigy had used board leaders and screening software to delete messages from its boards “on the basis of offensiveness and ‘bad taste.’”¹⁸³ In the conference report on the CDA, Congress stated:

¹⁷⁹ Communications Decency Act of 1996, § 509 (to be codified at 47 U.S.C. § 230(b)(4)), reprinted in 142 Cong. Rec. H1100 (daily ed. Jan. 31, 1996).

¹⁸⁰ *Id.* (to be codified at 47 U.S.C. § 230(c)), reprinted in 142 Cong. Rec. H1100-H1101 (daily ed. Jan. 31, 1996).

¹⁸¹ *Id.* (to be codified at 47 U.S.C. § 230(c)(1)), reprinted in 142 Cong. Rec. H1101 (daily ed. Jan. 31, 1996).

¹⁸² *Id.* (to be codified at 47 U.S.C. § 230(c)(2)), reprinted in 142 Cong. Rec. H1100-H1101 (daily ed. Jan. 31, 1996). Similar protection is afforded by Section 502(2) of the CDA (to be codified at 47 U.S.C. § 223(f)(1)) (“No cause of action may be brought in any court” against any person “on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under [Section 223] or otherwise to restrict or prevent the transmission of” indecent online communications), reprinted in 142 Cong. Rec. H1099-1100 (daily ed. Jan. 31, 1996). In the conference report that accompanied the CDA, Congress stated: “Subsection 223(f)(1), supplements, without in any way limiting, the ‘Good Samaritan’ liability protections of new Section 230.” Telecommunications Act of 1996, Joint Explanatory Statement of the Committee of Conference, at 72, reprinted in 142 Cong. Rec. H1107, H1129 (daily ed. Jan. 31, 1996).

¹⁸³ *Stratton Oakmont v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1797 (N.Y. Sup. May 25, 1995). See § 2.03[3][c][iii][B] *supra*.

“One of the specific purposes of [Section 230(c)] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.”¹⁸⁴

Accordingly, OSPs now enjoy a federal statutory defense to defamation liability for transmitting third party content. Indeed, because the common law of defamation imposes liability on a defendant only if he “published” the defamatory statement,¹⁸⁵ Section 230(c)(1) completely immunizes an OSP from defamation liability for content on its service that was “provided by” another “information content provider,” such as an OSP user.¹⁸⁶ Moreover, this statutory immunity probably applies to similar state law claims that are based on the OSP’s dissemination of third party content, such as invasion of privacy, fraud, negligent misrepresentation, tortious interference with business, or breach of contract,¹⁸⁷

¹⁸⁴ Telecommunications Act of 1996, Joint Explanatory Statement of the Committee of Conference, at 75, reprinted in 142 Cong. Rec. H1107, H1130 (daily ed. Jan. 31, 1996).

¹⁸⁵ See Ns. 15-17 *supra* and accompanying text.

¹⁸⁶ Communications Decency Act of 1996, § 509 (to be codified at 47 U.S.C. § 230(c)(1)), reprinted in 142 Cong. Rec. H1100 (daily ed. Jan. 31, 1996). The CDA defines “information content provider” to mean “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* (to be codified at 47 U.S.C. § 230(e)(3)), reprinted in 142 Cong. Rec. H1101 (daily ed. Jan. 31, 1996).

¹⁸⁷ See, e.g.:

Tenth Circuit: *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000), *cert. denied* 121 S.Ct. 69 (2000) (affirming summary judgment against plaintiff’s fraud, negligence, and defamation claims against AOL arising out of inaccurate information about plaintiff’s stock on AOL bulletin board; court held that action was preempted by § 230(c)(1), notwithstanding company’s effort to repackage it as a negligence claim, because it attempted to hold AOL liable for the “publication” of information from third party information content providers).

State Court:

Florida: *Doe v. America Online*, 718 So.2d 385, 1998 Fla. App. LEXIS 12841 (Oct. 14, 1998) (affirming trial court’s dismissal of claims against AOL for negligence and violation of state obscenity and child pornography statutes; court held that § 230(c)(1) preempts plaintiff’s claims against AOL for “allowing” an AOL user to post sexually explicit images of the plaintiff’s minor son in an AOL chat room; court further held that questions regarding the application of § 230 “to be of great public importance” and therefore certified three questions to the Florida Supreme Court, including “whether a computer service provider with notice of a defamatory third party posting is entitled to immunity under” § 230).

although another subsection expressly provides that the immunity provided by Section 230(c) does not apply to any federal criminal statute

(Text continued on page 2-77)

Washington: Jerome Schneider v. Amazon.com, Inc., 2001 Wash. App. LEXIS 2086 (Sept. 17, 2001) (online bookseller with an open community book review service was held to be a provider of an “interactive computer service” and not an “information content provider” for purposes of § 230(f), with immunity under § 230(c)(1) applicable to claims of negligent misrepresentation, tortious interference with business expectancy, and breach of contract).

or to any “law pertaining to intellectual property,” such as copyrights or trademarks.¹⁸⁸

The scope of this absolute, statutory immunity to liability for OSPs that distribute tortious third party content will depend on how the courts construe the phrase “provided by” in Section 230(c)(1), a phrase that is not defined by the statute and for which there is no direct legislative history explaining its meaning. The issue is: in what circumstances will courts rule that a defamatory statement, authored by a third party, was effectively adopted by the OSP as its own and thus was “provided by” the OSP, rather than by “another information content provider,” for purposes of Section 230(c)(1)?¹⁸⁹

Section 230(c) obviously repudiates the erroneous reasoning of the *Stratton Oakmont* decision, reaffirming the common law and First Amendment principle that a distributor of third party material cannot be subjected to civil or criminal liability based on the unlawful content of that material if the distributor had no knowledge nor any reason to know of that content.¹⁹⁰ The language of Section 230(c)(1), however, makes no distinction between an OSP that has no knowledge of defamatory material on its site and one that does have such knowledge. Construed literally, it provides absolute immunity to an OSP that permits third party material to remain on its system even after it *knows* that the material is there and that it is defamatory, false, and not privileged, and even if the OSP is the only entity with the power to remove it from its site. There is no precedent in the common law for such total immunity from liability for the knowing dissemination of defamatory content,¹⁹¹ nor is there any express statement in the CDA’s legislative history that Congress intended such a result.¹⁹²

Nevertheless, the Fourth Circuit has ruled that Section 230(c)(1) does indeed immunize an OSP from liability for a defamatory message posted by an OSP’s user even when the OSP has received notice

¹⁸⁸ Communications Decency Act of 1996, § 509 (to be codified at 47 U.S.C. § 230(d)(1)-(2)), reprinted in 142 Cong. Rec. H1100-H1101 (daily ed. Jan. 31, 1996).

¹⁸⁹ See *Zeran v. American Online, Inc.*, 958 F. Supp. 1124, 1133-1134 n. 20 (E.D. Va. 1997), *aff’d* 129 F.3d 327 (4th Cir. 1997) (“there is no occasion here to consider whether, under some set of facts, information initially placed online by a third party, might be deemed to be information provided by the service provider itself, thereby rendering [Section] 230(c) inapplicable”). See generally: *Tacket v. General Motors Corp.*, 836 F.2d 1042, 1046-1047 (7th Cir. 1986) (company deemed to have “adopted” and was thus the “publisher” of defamatory graffiti that remained on manufacturing plant’s wall for seven months); § 2.03[3][a][v] *supra*.

¹⁹⁰ See §§ 2.03[3][a][iii] and 2.03[3][b] *supra*.

¹⁹¹ But see, *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525, 531-534, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959) (discussed at N. 54 *supra*).

¹⁹² See *Zeran*, N. 189 *supra*, 958 F. Supp. at 1133-1134 n. 20.

of the message and chosen not to remove it from its service. In *Zeran v. America Online, Inc.*,¹⁹³ an AOL user posted a series of offensive advertisements on an AOL bulletin board that fraudulently identified Zeran as the source of the advertisements. AOL removed the ads when they were brought to its attention, but the ads continued to reappear on its service over a period of several days, subjecting the plaintiff to harassing telephone calls and death threats from people offended by the ads. The plaintiff sued AOL for “negligence” in the “distribution” of the ads, arguing that AOL should have removed the ads more quickly and that AOL, after receiving notice of the first ad, should have blocked all subsequent postings on its service that contained the plaintiff’s phone number.¹⁹⁴

The plaintiff argued that Section 230(c)(1), which was enacted after the ads appeared but before he sued AOL, did not preempt his action because he sought to impose liability on AOL as a “distributor,” but not the “publisher,” of the ads. The district court rejected the argument, observing that the common law of defamation, “properly understood,” imposes liability on a distributor of defamatory information only when it “treats a distributor as a ‘publisher’ of third party statements,” that is, “where the distributor knew or had reason to know that the statements were defamatory.”¹⁹⁵

The court held that the plaintiff’s action was preempted by federal law, because his “attempt to impose distributor liability on AOL is, in effect, an attempt to have AOL treated as a publisher of the defamatory material,” which is contrary to Section 230(c)(1).¹⁹⁶

The Fourth Circuit affirmed and, in so doing, expressly rejecting the plaintiff’s claim that Section 230(c)(1) did not preempt liability for conduct by AOL *after* it had received notice of the defamatory content on its bulletin board. The court found that such “notice-based liability” would be contrary to the policy choice made by Congress, which was to minimize government interference with the “robust nature” of communication over the Internet, including the indirect

¹⁹³ *Zeran v. America Online* 129 F.3d 327 (4th Cir. 1997), *cert. denied* 141 L.Ed. 2d 712 (1998), *affirming* 958 F. Supp. 1124 (E.D. Va. 1997).

¹⁹⁴ *Id.*, 129 F.3d at 329-330; Carome, “Don’t Sue the Messenger: New Immunity for Online Service Providers,” *Legal Times*, at p. 25 (April 21, 1997). Zeran also filed a separate lawsuit against a radio station for broadcasts that described Zeran as the source of the offensive online advertisements. See *Zeran v. Diamond Broadcasting, Inc.*, No. CIV-96-0008-T, 3 ECLR 18 589 (W.D. Okla., Dec. 29, 1997) (dismissing defamation and false light claims on grounds that no injury to reputation and no “reckless” conduct by the defendants was established).

¹⁹⁵ *Zeran*, N. 189 *supra*, 958 F. Supp. at 1133. See Ns. 15-17, 24-31 *supra* and accompanying text.

¹⁹⁶ *Zeran*, N. 189 *supra*, 958 F. Supp. at 1133.

“self regulation” by “intermediaries” that would occur if OSPs were subject to liability any time someone provided them with notice of a potentially defamatory statement.¹⁹⁷

Neither the district court nor the Fourth Circuit in *Zeran* discussed whether circumstances other than an OSP merely refusing to remove a defamatory third party message after receiving notice of it might justify treating the message as having been “provided by” the OSP for purposes of Section 230(c)(1). Future litigation over the scope of Section 230(c)(1) may focus on, for example, whether it applies when an OSP had contracted with the third party to provide the content that the plaintiff claims to be defamatory, when an OSP plays a more active role in packaging, re-packaging, or promoting the allegedly defamatory third party content, or when an OSP claims a copyright or other ownership interest in such content.¹⁹⁸

Many of these issues were implicated in a case brought by a White House assistant and his wife based on defamatory statements in a gossip column authored by Matt Drudge.¹⁹⁹ Pursuant to a licensing contract with AOL, Drudge had e-mailed his gossip column to AOL, which in turn had placed it on AOL’s online service for review by AOL subscribers. The plaintiffs sued both Drudge and AOL for libel, but the trial court held that the claim against AOL was barred by Section 230(c)(1). In so holding, the court found it dispositive that AOL had no “role in creating or developing any of the information in” the column, even though AOL had a contractual right to edit the column and even though AOL had promoted the column on its service.²⁰⁰ The

¹⁹⁷ *Zeran*, N. 193 *supra*, 129 F.3d at 331-333. The court observed that if an OSP were subject to “notice-based liability,” each notice of a potentially defamatory statement on its service “would require a careful yet rapid investigation,” a “legal judgment” as to its defamatory nature, and “an on-the-spot editorial decision whether to risk liability by allowing” continued publication. *Id.*, 129 F.3d at 333. “Although this might be feasible for the traditional print publisher, the sheer number of postings” on OSPs “would create an impossible burden in the Internet context.” *Id.* Moreover, the court observed that, because OSPs “would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.” *Id.* The court concluded that the resulting “chilling effect on the freedom of Internet speech” would be “directly contrary to [Section] 230’s statutory purposes.” *Id.* For a critical analysis of the Fourth Circuit’s decision in *Zeran*, see I. Ballon, “*Zeran v AOL: Why the Fourth Circuit Is Wrong*,” 1 J. Internet L. 6 (March 1998).

¹⁹⁸ See N. 19 *supra*.

¹⁹⁹ *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

²⁰⁰ *Id.*, 992 F. Supp. at 50. AOL’s license agreement with Drudge gave AOL the right “to require reasonable changes to . . . content, to the extent that such content will, in AOL’s good faith judgment, adversely affect operations of the AOL network.” *Id.*, 992 F. Supp. at 51. AOL promoted the availability of Drudge’s column on its service with a press release, captioned: “AOL Hires Runaway Gossip Success Matt Drudge,” in which it stated that “maverick gossip columnist Matt Drudge has teamed

court indicated that, were it “writing on a clean slate,” it would not permit AOL “to tout someone as a gossip columnist or rumor monger who will make such rumors and gossip ‘instantly accessible’ to AOL subscribers” and then “claim immunity when that person, as might be anticipated, defames another.”²⁰¹ The court concluded, however, that Congress intended Section 230(c)(1) to afford AOL immunity in these circumstances.²⁰²

In those cases in which the parties dispute whether the OSP defendant is entitled to the statutory immunity afforded by the CDA, at least one court has held that the OSP is entitled to a stay of discovery on all other issues in the case while the parties litigate the issue of Section 230(c)(1)’s applicability.²⁰³ That court found that “Congress’[s] grant of immunity to interactive computer service providers, such as AOL, w[as] intended to afford a special protection to this unique electronic medium” and that the policy considerations for this protection, “as enunciated in *Zeran*,” are “similar” to those for the qualified immunity provided to government officials in Section 1983 cases, which protects them not only from liability but also from “the other burdens of litigation,” such as “the burdens of broad reaching discovery.”²⁰⁴

up with America Online” and that “[g]iving the Drudge Report a home on America Online . . . opens up the floodgates to an audience ripe for Drudge’s brand of reporting.” *Id.*, 992 F. Supp. at 51.

²⁰¹ *Id.*, 992 F. Supp. at 51. See generally: *Restatement (Second) of Torts*, § 581, comments d and e (1977); Ns. 87-89 *supra* and accompanying text.

²⁰² *Blumenthal v. Drudge*, 992 F. Supp. 44, 51-52 (D.D.C. 1998) (“Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted”). See *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp.2d 1055, 1068 (C.D. Cal. 2002) (recognizing potential liability of “interactive computer service” provider if it acts as an “information content provider”).

²⁰³ *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, No. CIV 97-485, 26 Media L. Rep. (BNA) 2211 (D.N.M. July 16, 1998).

²⁰⁴ *Id.* at 2212-2213, quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985), (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)).

[4]—Application of First Amendment Doctrines to Online Speech

[a]—Definition of a “Public Figure”

Applying *Gertz*, courts generally define two categories of “public figures”—the “pervasive” or “all-purpose” public figure;^{204.1} and the “vortex” or “limited-purpose” public figure, which refers to people

(Text continued on page 2-81)

^{204.1} *Carafano v. Metroplash.com, Inc.*, 207 F. Supp.2d 1055, 1073 (C.D. Cal. 2002) (recognizing actress as “public figure” and dismissing on the basis that plaintiff did not establish by clear and convincing evidence a genuine issue of material fact as to whether defendant acted with actual malice).

who have “thrust themselves to the fore-front of particular public controversies in order to influence the resolution of the issues involved.”²⁰⁵ This definition raises two key questions—“Is there a public controversy?” and “Has the plaintiff played a sufficiently central role in the controversy?”²⁰⁶—that are likely to generate contentious litigation in the online context.²⁰⁷

Courts addressing the first question have for the most part centered more on whether an issue constitutes a “controversy,” not whether it is “public.”²⁰⁸ The concept of a “virtual” community of OSP users, however, makes the question whether a controversy is “public” one on which defendants and plaintiffs are likely to have different views.²⁰⁹

In analyzing the second question, whether the plaintiff played a sufficiently central role in the controversy, courts have focused on

²⁰⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). See text accompanying § 2.02[3][a][i], N. 52 *supra*.

²⁰⁶ *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-1298 (D.C. Cir.), *cert. denied* 449 U.S. 898 (1980).

²⁰⁷ Indeed, it already has. Many of the “public figure” issues in the online context were implicated, and briefed, in *Suarez Corp. Industries v. Meeks*, Civ. No. 267513 (Comm. Pl., Cuyahoga Co., Ohio 1994), but the case was settled before any decision was reached by the court. See: “News, Culture, Controversy on the Internet,” *Time*, at 20 (Sept. 5, 1994); Resnick, “Cybertort: the New Era,” *National Law Journal*, at A1 (July 18, 1994). See generally, Note, “Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards,” 21 *Rutgers Comp. & Tech. L.J.* 461 (1995).

²⁰⁸ See, e.g., *Waldbaum v. Fairchild Publications, Inc.*, N. 181 *supra*, 627 F.2d at 1297 (that public has some interest in story does not establish a “public controversy”; it must be “a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants”).

²⁰⁹ Under the common law “fair comment” privilege, which protects commentary on matters of “public concern” or “public interest,” see § 2.02[3][c], N. 61 *supra*, it is not necessary for the subject to be of interest to the entire community, so long as a substantial sector of the community is concerned.

Arizona: *Klahr v. Winterble*, 4 Ariz. App. 158, 418 P.2d 404 (1966).

California: *Maidman v. Jewish Publications, Inc.*, 54 Cal. 2d 643, 7 Cal. Rptr. 617, 621, 355 P.2d 265 (1960).

Mississippi: *Reaves v. Foster*, 200 So.2d 453 (Miss. 1967).

A similar issue arises in the context of all-purpose public figures. See *National Life Insurance Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627, 633-634 (D. Md. 1992) (plaintiff was not an all-purpose public figure where its pervasive influence was within Vermont but defendant’s publication was national). See Bunker and Tobin, “Pervasive Public Figure Status and Local or Topical Fame in Light of Evolving Media Audiences,” 75 *Journalism & Mass Communications Q.* 112, 121 (Spring 1988) (“The logic that has compelled some lower courts to recognize geographic ‘local’ public figures seems equally to point toward recognition of public figures whose ‘locale’ is cultural rather than geographic. Particularly in an age in which cultural space may become as important as physical space, with the boundaries of a ‘culture’ being informed by the media in which the libel is disseminated, recognition of topical pervasive public figures can only add to the uninhibited debate Sullivan and its progeny sought to advance”).

factors discerned from language used in Supreme Court opinions that one court distilled into three inquiries: first, the extent to which participation in the controversy is voluntary; second, the extent to which there is access to channels of effective communication in order to counteract false statements; and third, the prominence of the role played in the public controversy.²¹⁰

As to “voluntary participation,” if the plaintiff defamed by online communication drew such defamatory comment as a result of her participation in online dialogue, the concept of an “internet culture” might be applied to argue that she “assumed the risk” of such commentary when she first entered the Internet door. And even if the plaintiff is an Internet “virgin,” the second inquiry regarding “access to channels of effective communication” is certain to be controversial in the context of online defamation. In many cases, the plaintiff certainly would have “access” to the same “channel” of online communication through which the defamatory statement was published.²¹¹ Whether access to that channel represents an opportunity for “effective communication in order to counteract false statements” is a more difficult question, and is arguably influenced by whether the plaintiff’s communications on that channel could attract the same level of attention from users as the defendant’s.

[b]—Definition of “Media” and “Private Speech”

The Supreme Court has expressly left open the question whether the First Amendment requires a private-figure plaintiff to prove the falsity of the defamatory statement (*Hepps* and *Milkovich*) and “fault” on the part of the defendant (*Gertz*) when the defendant is not a member of the “media” and/or when his defamatory speech was not about a matter of “public concern.”²¹² With respect to the issue of a simple

²¹⁰ *Clark v. American Broadcasting Co.*, 684 F.2d 1208, 1218 (6th Cir. 1982), *cert. denied* 460 U.S. 1040 (1983).

²¹¹ Compare *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 706-708 (4th Cir.) (*en banc*), *cert. denied* 501 U.S. 1212 (1991) (scientist employed by National Cancer Institute, allegedly defamed by reprimand letter republished in industry newsletter, was public figure because he had access to same “for where [his] reputation was presumably tarnished and where it could be redeemed”), with *Greenberg v. CBS, Inc.*, 69 A.D.2d 693, 419 N.Y.S.2d 988, 994 (1979) (author of fifty articles in medical journals did not have sufficient media access to be classified as public figure where defamatory statement was made on national network television). See generally: Bunker and Tobin, “Pervasive Public Figure Status and Local or Topical Fame in Light of Evolving Media Audiences,” 75 *Journalism & Mass Communications Q.* 112, 122 (Spring 1988); Godwin, “The First Amendment in Cyberspace,” 4 *Temple Pol. & Civil Rights L. Rev.* 1, 7-9 (1994) (arguing that, in cases of libel published on the Internet, every defendant may qualify as a public figure in light of their access to the same channel of communication).

²¹² See § 2.02[3][e] *supra*.

“media/nonmedia” distinction among defendants entitled to these First Amendment protections, there is good reason to believe that, if the Supreme Court is faced with the question again, it will reject any such distinction, as did at least five of the Justices in the *Dun & Bradstreet* decision.²¹³ Most courts and commentators agree that there is no rational basis, under either the First Amendment or basic principles of tort law, for extending First Amendment protections to allegedly defamatory speech by a media defendant while denying such protections for the same speech when made by a nonmedia defendant.²¹⁴

Several years ago, the Second Circuit clearly rejected the notion that an OSP engaged in the process of distributing news about the government was entitled to lesser First Amendment protection in obtaining access to such information than the traditional print and broadcast media.²¹⁵ Indeed, any attempt to define who is “media” and who is not is certain to raise “First Amendment difficulties.”²¹⁶ As Justice Brennan

²¹³ See § 2.02[3][e][ii], N. 86 *supra*. See also: § 2.02[3][e][ii], N. 81 *supra* and accompanying text (most courts apply *Gertz* fault requirement to both media and non-media defendants); Sack, *Libel, Slander, and Related Problems* (2d ed. 1995 Supp.) at 41-42 and n.39A (lower courts routinely apply *Hepps* in cases brought against nonmedia defendants).

²¹⁴ As Justice Brennan repeated in his *Hepps* concurrence, “such a distinction is irreconcilable with the fundamental First Amendment principle that ‘[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.’” *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 780, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). (Brackets and ellipses by Justice Brennan.) See: Sack, *Libel, Slander, and Related Problems*, § 5.9.4.2, at 357-358 (2d ed. 1994); “The Supreme Court, 1973 Term,” 88 Harv. L. Rev. 41, 148 n.52 (1974) (distinction would be “bizarre” under tort law principles of strict liability). But see, *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied* 459 U.S. 883 (1982) (refusing to apply *Gertz* to individual who made statement to magazine reporter but applying *Gertz* to magazine publisher that printed the individual’s statement).

²¹⁵ *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728 (2d Cir. 1985).

²¹⁶ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 782 and n.6, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (Brennan, J., dissenting). In *Dun & Bradstreet*, the Vermont Supreme Court characterized the credit reporting agency as “nonmedia” because it was “in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services,” suggesting a “clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience.” 143 Vt. 66, 73, 461 A.2d 414, 417 (1983). Justice Brennan rejected the distinction: “That petitioner’s information is ‘specialized’ or that its subscribers pay ‘substantial fees’ hardly distinguishes these reports from articles in many publications that would surely fall on the ‘media’ side of the line that the Vermont Supreme Court seeks to draw. Few published statements are of universal interest, and few publications are distributed without charge. Much fare of any metropolitan daily is specialized information for which a selective, finite audience pays a fee.” 472 U.S. at 782 n.6.

has noted, such a distinction is “likely to be born an anachronism,” given the “increasing convergence” of the two categories as a result of “transformations in the technological and economic structure of the communications industry.”²¹⁷

With respect to the issue of speech on private matters, however, the Supreme Court, in *Dun & Bradstreet*, has already held that the *Gertz* limitation on presumed and punitive damages does not apply. Nevertheless, there is still reason to believe that the *Gertz* fault requirement and the *Hepps* falsity requirement will not suffer the same fate.²¹⁸

In any event, determining when speech about private figures crosses the line between matters of purely private concern and matters of public concern is largely an *ad hoc*, subjective inquiry for which there are few principled criteria available to the courts.²¹⁹ Justice Powell’s plurality opinion in *Dun & Bradstreet* stated that the answer “must be determined by [the expression’s] content, form, and context . . . as revealed by the whole record.”²²⁰ He concluded that the defendant agency’s false report of the plaintiff’s bankruptcy was not about a matter of public concern because (1) credit agency reports are “unlikely” to be “chill[ed]” by libel suits because the speech is “solely

²¹⁷ *Id.*, 472 U.S. at 782 and n.7. *Accord*, *Flamm v. American Ass’n of University Women*, 201 F.3d 144, 149 (2d Cir. 2000) (quoting Justice Brennan’s “anachronism” argument agreeing “that a distinction drawn according to whether the defendant is a member of the media or not is untenable”). See generally: Berman and Weitzner, “Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media,” 104 *Yale L.J.* 1619 (1995); Gibbons, “Convergence in Communications Technology and the First Amendment,” 25 *Seton Hall L. Rev.* 1375 (1995); Hammond, “Regulating the Multi-Media Chimera: Electronic Speech Rights in the United States,” 21 *Rutgers Comp. & Tech. L.J.* (1995); Krattenmaker and Powe, “Converging First Amendment Principles for Converging Communications Media,” 104 *Yale L.J.* 1719 (1995); Volokh, “Cheap Speech and What It Will Do,” 104 *Yale L.J.* 1805, 1819-1831 (1995); Negroponte, *Being Digital* (1995).

²¹⁸ See § 2.02[3][e][i], N. 75 *supra*. Moreover, many states have modified their common law of defamation in response to *Gertz* to require plaintiffs to prove both fault and falsity. See § 2.02[3][a][ii], Ns. 55-56 *supra*. Even if the Supreme Court ultimately rules that the First Amendment does not require such modifications in the context of private speech, the states might decide not to revert back to the old rules of strict liability and presumption of falsity. See, e.g., § 2.02[3][c], N. 68 *supra*.

²¹⁹ See *Grossman v. Smart*, 807 F. Supp. 1404, 1411 (C.D. Ill. 1992).

²²⁰ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (brackets and ellipses by Justice Powell), quoting *Connick v. Myers*, 461 U.S. 138, 147-148, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (First Amendment limits ability to discharge public employee for objectionable speech only when speech is of public concern).

motivated by the desire for profit” and credit reporting agencies already have powerful market incentives to publish accurate reports, (2) it was speech “solely in the individual interest of the speaker and its specific business audience,” and (3) it did not further “the free flow of information” or “debate on public issues” because it was sent to only five subscribers who were contractually obligated not to disseminate it to others.²²¹

(Text continued on page 2-85)

²²¹ Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762-763, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

These factors provide little guidance. News on public matters published by the institutional media is also “motivated by a desire for profit” for publishers who have strong market incentives to publish accurate information. And as Justice Brennan noted in dissent, the bankruptcy of a local company is “information of potentially great concern to residents” of the local community.²²² The same false report, had it been published in the business section of the local newspaper, probably would have been deemed “of public concern.” Justice Powell noted that not “all” credit reporting was outside the scope of *Gertz*, suggesting that it was the limited and confidential nature of the report’s circulation in that case that made it a matter of private concern.²²³

If the media/nonmedia distinction has any meaningful role in the application of the First Amendment to defamation law, it may be in the context of determining whether speech is about a “matter of public concern” under *Dun & Bradstreet*.²²⁴ In that context, the “institutional” or “mass” media may be distinguished from others, not with respect to the identify of the defendant, but with respect to the nature of the medium through which the defamatory statement is published—that is, the “form” and “context” of the speech. Thus, speech by an individual defendant that is circulated to the general public by the institutional press (e.g., the advertisement in the *New York Times*) may be deemed “of public concern,” whereas speech by an individual through a medium of quite limited circulation (e.g., the credit report in *Dun & Bradstreet*) may be deemed “of purely private concern.” In this context, the media/nonmedia distinction may have relevance in determining the applicability of at least some First Amendment protections for OSP defendants.

[5]—Retraction Statutes

A retraction statute typically provides that a defamed party may, or must, as a condition precedent to litigation, serve written notice on the

²²² *Id.*, 472 U.S. 789 (Brennan, J., dissenting).

²²³ *Id.*, 472 U.S. at 762 n.8. The dissent described this factor as “crucial to the outcome” reached by Justice Powell and as “the linchpin” of his analysis.” 472 U.S. at 786 n.12, 795 n.18.

²²⁴ Indeed, courts and commentators who have endorsed the distinction often justify it by characterizing “nonmedia” speech as concerning the type of “private” matters that *Dun & Bradstreet* later held to be outside the scope of *Gertz*. See, e.g.:

Colorado: *Rowe v. Metz*, 195 Col. 424, 579 P.2d 83 (1978).

Oregon: *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Ore. 361, 366, 568 P.2d 1359 (1977).

Wisconsin: *Calero v. Del Chem Corp.*, 68 Wis. 487, 506, 228 N.W.2d 737, 748 (1975).

See Shiffrin, “Defamatory Non-Media Speech and First Amendment Methodology,” 25U.C.L.A. L. Rev. 915, 935-936 (1978).

publisher of the defamatory statement and request a correction or retraction. If a proper demand is not made, or if a proper retraction is published within the specified time limits, the type and amount of damages that a plaintiff can recover from the defendant may be limited.²²⁵ Of the thirty-three states that have enacted such statutes, only eight apply to any defendant regardless of his connection with the media.²²⁶ The remainder typically apply only to the owner of "a broadcasting station" or the publisher of a "newspaper,"²²⁷ while some also apply to the publisher of a "magazine" or "periodical,"²²⁸ and still others apply to "those alleged to be responsible or liable" for defamatory matter published in a "newspaper, magazine or periodical."²²⁹

The latter type of statute was at issue in one case in which the plaintiff sued an OSP user who had posted an allegedly defamatory message on the OSP's bulletin board.²³⁰ The trial court entered summary judgment against the plaintiff on the ground that bulletin board communications were a "periodical" under the Wisconsin retraction statute and thus a demand for retraction was required before the plaintiff could bring suit against the OSP user who posted the message.

The court of appeals reversed. It held that posting a bulletin board message "is a random communication of computerized messages analogous to posting a written notice on a public bulletin board, not a publication that appears at regular interval," and thus bulletin board messages "are not periodicals under the ordinary meaning of the term."²³¹ Perhaps wary that it was perched at the top of a very long

²²⁵ See Sack, *Libel, Slander, and Related Problems*, § 9.2, at 537 (2d ed. 1994).

²²⁶ The eight are Connecticut, Louisiana, Maine, Massachusetts, Michigan, Nebraska, Texas and West Virginia. *Id.*, § 9.2, at 537 n.7. See *id.*, Appendix 2 (compilation of statutes from all thirty-three states).

²²⁷ See, e.g., Ohio Rev. Code Ann. §§ 2739.03, 2739.13-2739.16.

²²⁸ See, e.g., Mont. Rev. Code Ann. § 27-1-818 (1994).

²²⁹ Wis. Stat. Ann. § 895.05(2) (1994). See also, Iowa Code § 659.2 (1995) (statute applies to libel in a "newspaper, free newspaper or shopping guide"). See generally, Annot., "Libel and Slander: Who Is Protected by Statute Restricting Recovery Unless Retraction Is Demanded," 84 A.L.R.3d 1249 (1978). In *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d 121, 216 P.2d 825, *appeal dismissed* 340 U.S. 910 (1950), the court upheld the constitutionality of a retraction statute that limited damages only for newspapers and radio stations against a claim that it denied "equal protection" of the laws by not applying equally to all defamation defendants. But see, *White v. Manchester Enterprise Inc.*, 910 F. Supp. 311 (E.D. Ky. 1996) (state retraction statute that applied only to "newspapers" violated state constitution, which prohibits "special law," because there is "no rational basis for classifying newspapers differently from magazines, newsletters or other print publications").

²³⁰ *It's in the Cards Inc. v. Fuschetto*, slip op. no. 94-3162, 1995 Wis. App. LEXIS 489 (April 11, 1995).

²³¹ *Id.*, 1995 Wis. App. LEXIS 489, at **6-7. The court noted that it had previously held that the retraction statute (see N. 204 *supra*) "relates only to libelous publications in print media, not broadcast media. The nature of bulletin board postings on computer network services cannot be classified as print." 1995 Wis. App. LEXIS 489, at *7.

and slippery slope, the court refused to “indulge” in the “judicial legislation” it thought would be necessary to construe the term “periodical” to include computer bulletin board messages:

“Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services. Consequently, it is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway.

“The rate of technological development coupled with the complexity of technology is beyond many laypersons’ ken. A uniform system of managing information technology and computer networks is needed to cope with the impact of the information age. It is the responsibility of the legislature to manage this technology and to change or amend the statutes as needed.”²³²

If retraction statutes applicable to “newspapers” and “periodicals” are construed (or amended) to apply to such publications when they are transmitted online to OSP users, some new and difficult issues may arise with respect to the nature of the correction or retraction required by such statutes. If the publication containing the defamatory article continues to be available online, and the would-be plaintiff makes the requisite demand under the statute, disputes may arise as to whether the publisher should rewrite the original story to remove the defamatory content, append a correction to the erroneous story, or rewrite the original story *and* publish a separate correction in a later issue.

[6]—Single Publication Rule

Similar questions arise when applying the “single publication rule” to online publications. The “general” common law rule is that “each communication of the same defamatory matter” is a separate publication, “for which a separate cause of action arises.”²³³ Courts and legislatures developed an “exception” to that general rule for the publisher of a single “edition” of a book, newspaper, magazine, or broadcast, in order to protect the publisher and the courts from the “undue harassment” of multiple actions brought in different courts

²³² *Id.* at **8-9. (Footnote omitted.)

²³³ *Restatement (Second) of Torts*, § 577A, comment a (1977).

²³⁴ *Id.*, § 577A(3) and comments b & c. See: *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984); *Keeton v. Hustler Magazine, Inc.*, 131 N.H. 6, 549 A.2d 1187, 1188-1189 (1988) (“Without the rule, the burden that libel suits would place on parties and the courts might well be intolerable”).

against the same defendant based on the same defamatory statement.²³⁴ Although it technically results in multiple communications at different times and places, the distribution of copies of the same “edition” is treated as a “single publication,” for which:

(a) only one action for damages can be maintained;

(b) all damages suffered in all jurisdictions can be recovered in the one action; and

(c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.²³⁵

In addition, the date of publication for purposes of the statute of limitations usually is deemed the first day on which the “edition” was distributed to the public.²³⁶

A “new” edition of the same material, however, is treated as a new publication giving rise to a separate cause of action governed by a new statute of limitation period.²³⁷ Thus, application of the single publication rule to OSPs will turn on how courts construe the concept of an “edition” in the context of online publishing. The test does “not depend on an interval of time, or a separate sale, but upon the answer to the question, was the act of the defendant” to publish “a conscious independent one?”²³⁸ The issue will likely center on whether “conscious

²³⁵ *Restatement (Second) of Torts*, § 577A(4) (1977). A judgment on the merits might not be given *res judicata* effect in an action brought in a foreign country based on the same “single publication.” See Youm, “Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law,” 16 *Hast. Comm/Ent L.J.* 235, 251 (1994).

²³⁶ *Keeton v. Hustler Magazine, Inc.*, 131 N.H. 6, 549 A.2d 1187, 1189-1190 (1988).

²³⁷ See, e.g.:

Seventh Circuit: Wheeler v. Dell Publishing Co., 300 F.2d 372, 375 (7th Cir. 1962) (“reprintings” of same book edition).

State Courts:

Georgia: Cox Enterprises, Inc. v. Gilreath, Ga. App. 297, 235 S.E.2d 633 (1977) (new edition of same day’s newspaper).

New York: Rinaldi v. Viking Penguin, 5 Media L. Rep. (BNA) 1295 (N.Y. Sup. 1979) (softcover edition of a book first published in hardcover).

²³⁸ *Barres v. Holt, Rinehart & Winston, Inc.*, 131 N.J. Super. 371, 330 A.2d 38, 46 (1974), *aff’d* 141 N.J. Super. 563, 359 A.2d 501 (1976), *aff’d* 716 N.J. 461, 378 A.2d 1148 (1977). See, e.g., *Gregoire v. G.P. Putnam Sons*, 298 N.Y. 119, 81 N.E.2d 45 (1948) (“miscellaneous copy” of book sold one year after first date of publication did not give rise to new cause of action).

independent” additions to a database that already contains defamatory content constitute new “editions” of a defamatory publication.²³⁹

A second issue with respect to online “republications” might concern material reviewed online by an OSP user who later forwards that materials to others. Even in those states that have adopted the single publication rule, the common law typically provides that republications by third parties that are “reasonably foreseeable” give rise to a new and separate cause of action, with a new statute of limitations period.²⁴⁰ Accordingly, a difficult factual issue in future cases may be whether an online republication of defamatory material by an OSP user should be deemed to have been “reasonably foreseeable” by the original online publisher.

Courts have reached different conclusions as to whether the single publication rule should apply to various types of Internet postings.²⁴¹ The Tennessee Court of Appeals declined to apply this rule when allegedly defamatory information regarding medical quality of care standards was reported to at least three separate entities on separate occasions.²⁴² In the absence of reported authority addressing application of the rule to Internet communications, the court analogized to credit reporting cases, concluded there existed “no aggregate publication” because the information was accessed on “separate and distinct occasions” and held that “a separate limitations period attaches to each publication.”²⁴³

²³⁹ *Contrast Swafford v. Memphis Individual Practice Ass’n*, No. 02A01-9612-CV-00311, 1998 Tenn. App. LEXIS 361 (Tenn. App. June 2, 1998) (new cause of action arose of statute of limitations purposes each time defamatory information maintained by data bank was accessed), *with Van Buskirk v. New York Times Co.*, 2000 U.S. Dist. LEXIS 12150, 28 Media L. Rep. (BNA) 2525 (S.D.N.Y. 2000) (rejecting contention that Internet publisher should not be protected by single publication rule on theory that he “makes a ‘conscious decision every minute of every day not to remove’” the material from the Internet), and *Firth v. State*, 184 Misc.2d 105, 706 N.Y.S.2d 835 (Ct. Cl. 2000) (applying the single publication rule: “[w]hile the act of making the document available [on the Internet] constitutes a publication, in the absence of some alteration or change in form, its continued availability on the Internet does constitute a republication acting to begin the Statute of Limitations anew each day”).

²⁴⁰ See § 2.02[1][d], N. 14 *supra*. See also, *Hickey v. St. Martin’s Press, Inc.*, 978 F. Supp. 230, 236-239 (D. Md. 1997) (although defendants’ liability for foreseeable republications gave rise to a new cause of action not barred by statute of limitations, court did not have personal jurisdiction over defendants based on third party’s republication in forum state).

²⁴¹ See Note, “Cyber-Defamation and the Single Publication Rule,” 81 B.U.L. Rev. 895 (Oct. 2001).

²⁴² *Swafford v. Memphis Individual Practice Ass’n*, No. 02A01-9612-CV-00311, 1998 Tenn. App. LEXIS 361 (Tenn. App. June 2, 1998).

²⁴³ *Id.*, at *23.

The Court of Appeals of New York has upheld application of the single publication rule to the posting of allegedly defamatory statements on an Internet site.²⁴⁴ The court went further to hold as a matter of law that a modification to unrelated information on the site did not constitute a republication of the allegedly defamatory report. The court stated that a “republication exception” to the single publication rule was inapplicable on the basis that it was not reasonable to infer “the intent or the result of communicating the earlier and separate defamatory information to a new audience.”²⁴⁵

A federal district court also held the single publication rule applicable to the posting of a letter allegedly subjecting the plaintiff to prosecution for committing war crimes.²⁴⁶ The court expressly rejected the notion that the non-commercial status of a publisher or the ability of Internet publishers to withdraw the information readily should affect application of the rule.²⁴⁷

One commentator has reconciled these decisions on the basis that the single publication rule should apply to general access Internet sites, but that a multiple publication rule is more appropriate for cases involving limited or restricted availability to a small group of readers, such as the medical and credit reporting cases.²⁴⁸

²⁴⁴ *Firth v. State of New York*, 2002 N.Y. LEXIS 1901 (Ct. App. N.Y., July 2, 2002), *affirming* 287 A.D.2d 771 (2001).

²⁴⁵ *Id.*, at **9-11.

²⁴⁶ *VanBuskirk v. New York Times Co.*, No. 99 Civ. 4265, 2000 U.S. Dist. LEXIS 12150 (S.D.N.Y. Aug. 24, 2000).

²⁴⁷ *Id.*, at **5-6.

²⁴⁸ See N. 241 *supra*.

§ 2.04 First Amendment Protection for American Online Service Providers Subjected to Defamation Law of Foreign Countries

First Amendment limitations on defamation law in the United States provide substantial protections to publishers and distributors. Because of the international scope of online communications, however, online service providers in this country might find themselves subject to liability based on the defamation law of a foreign country that does not provide the same level of protection for such activity.¹ In two contexts, however, an American OSP will still receive protection from the First Amendment in libel actions governed by foreign law.

[1]—Enforceability of Foreign Libel Judgments in the United States

Plaintiffs who obtain a foreign-country libel judgment against an American defendant must seek enforcement of the judgment in the

(Text continued on page 2-91)

¹ Two American online service providers, Cornell University and the University of Minnesota, have been sued for libel by a British physicist in two separate actions filed in England. Each action is based on comments about the physicist that were posted to a Usenet newsgroup by a student at the university; “English Court May test U.S. Ideals on Online Speech,” N.Y. Times on the Web, at <http://www.nytimes.com/library/tech/98/06/cyber/cyberlaw/05law.html> (June 5, 1998). England’s libel law “is widely considered more pro-plaintiff than that of the United States or other nations mainly because it presumes the falsity of an allegedly defamatory statement and does not require a plaintiff to prove fault.” Fifer & Sachs, “The Price of International Free Speech: Nations Deal with Defamation on the Internet,” 8 J. Art & Ent L. 1, 5 (1997). See Youm, “Suing American Media in Foreign Courts: Doing an End-Run round U.S. Libel Laws,” 16 Hast. Comm/Ent L.J. 235, 239-244 (1994) (comparing American and British libel law), and at 254 (quoting American attorney Neal Goldman: “Winning a libel case in London is a slam dunk”). The English Parliament narrowed the gap between English and American libel law when it enacted, on July 4, 1996, the Defamation Act, which includes a provision that states: “A person shall not be considered the . . . publisher of a statement if he is only involved . . . in processing, making copies of, distributing or selling any electronic medium in which the statement is recorded.” Defamation Act, 1996 (Eng.) § 3(c). This provision reflects a “modernization of the defense of innocent dissemination currently available to organizations such as booksellers and libraries if they are unaware of the libel.” *Id.* See generally: Gigante, “Ice Path on the Information Superhighway: Foreign Liability for Domestically Created Content,” 14 Cardozo Arts & Ent L.J. 523 (1996); McCarthy, Note, “Networking in Cyberspace: Electronic Defamation and the Potential for International Forum Shopping,” 16 U. Pa. J. Int Bus. L. 527 (1995). Porter and Potts, *Canadian Libel Practice* (1986); Knudstadt, *The Protection of Personal and Commercial Reputation: A Study of the Law in Western Europe and the United States* (1980); Note, “Constitutional Law: First Amendment Jurisprudence in Great Britain,” 24 Seton Hall L. Rev. 1549 (1994); Josephs, “Defamation, Invasion of Privacy, and the Press in the People’s Republic of China,” 11 U.C.L.A. Pacific Basin L. J. 191 (1993).

United States if the defendant has no substantial assets anywhere else. Unlike the judgments of other state or federal courts, however, a foreign-country judgment is not entitled to automatic recognition and enforcement under the Full Faith and Credit Clause of the United States Constitution.² Instead, its enforcement is governed by state law, either under general common law principles of comity or pursuant to statutory provisions that typically codify the same key principles.³ In either instance, the foreign-judgment cannot be enforced against a defendant in this country unless a civil action is initiated in a state or federal court to obtain recognition of the foreign-country judgment under the applicable state law.⁴ Such recognition can be denied if the court finds that the judgment “is repugnant to the public policy of the State.”⁵

Accordingly, if a foreign-country libel judgment was rendered against an American OSP on the basis of legal rules that are inconsistent with the First Amendment, the OSP defendant could contest its recognition and enforcement in the United States on the ground that enforcement by any court in this country is constitutionally prohibited by the First Amendment, and on the ground that recognition of the judgment should be denied under basic comity principles because it is repugnant to the public policy of the state in which recognition is sought.⁶ American courts have refused to recognize and enforce foreign-country libel judgments on both grounds.⁷ Such First Amendment protection, however,

² *Hilton v. Guyot*, 159 U.S. 113, 163-164, 182-188, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

³ Many states apply the common law comity principles set forth in *Hilton v. Guyot*, *id.*, 195 U.S. at 202-203. Nearly half the states have enacted some variation of the Uniform Foreign Money-Judgments Recognition Act (UFMJRA), proposed by the National Conference of Commissioners on Uniform State Laws in 1962, and the Uniform Enforcement of Foreign Judgments Act, proposed in 1964. See 13 Uniform Laws Annotated 261 (1986).

⁴ *Restatement (Third) of the Foreign Relations Law of the United States*, § 481, comment g (1986). See:

Fourth Circuit: *Guinness PLC v. Ward*, 955 F.2d 875, 891 (4th Cir. 1992).

District of Columbia Circuit: *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 2-3 (D.D.C.1995).

⁵ Uniform Foreign Money-Judgments Recognition Act § 4(b)(3). See *Hilton v. Guyot*, N. 2 *supra*, 159 U.S. at 164 (comity “does not require, but rather forbids” recognition “where such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens”).

⁶ See generally: Devgun, “United States Enforcement of English Defamation Judgments: Exporting the First Amendment?” 23 *Anglo-Am. L. Rev.* 195 (1994); Sanders, “Extraterritorial Application of the First Amendment to Defamation Claims Against American Media,” 19 *N.C. J. Int. L. & Com. Reg.* 515 (1994); O’Connell, “Libel Suits Against American Media in Foreign Courts,” 9 *Dick. J. Int. L.* 147 (1991).

⁷ See:

District of Columbia Circuit: *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995) (declining to recognize libel judgment from England, pursuant to Maryland’s version of UFMJRA, because it was based on British libel standards inconsistent with

would not extend to any assets the OSP (or its employees) might have in any other foreign country.⁸

[2]—Application of Foreign Libel Law in Domestic Litigation

If an American OSP transmits defamatory content to users in a foreign country, it is subject to suit in the United States, where it resides, based on a publication that arguably “occurs” in the foreign country where the users who received the transmission reside. If the plaintiff sues the OSP in the state where the OSP resides, the court must decide whether to apply the defamation law of that state or the defamation law of the country in which the content transmitted by the OSP was received. That determination would be governed by the choice-of-law rules of the forum state for defamation actions.

Choice-of-law rules vary widely from state to state.⁹ In certain circumstances, however, such rules might call for application of the foreign country’s libel law to some or all of the elements of the plaintiff’s cause of action. If the foreign law would require application of principles prohibited in this country by the First Amendment, however, the courts have enforced the relevant First Amendment protections, either by “grafting”

requirements of the First Amendment and therefore “repugnant to the public policies of the State of Maryland and the United States”).

State Courts:

New York: *Bachchan v. India Abroad Publications, Inc.*, 154 Misc.2d 228, 585 N.Y.S.2d661, 665 (N.Y. Sup. 1992) (refusing to enforce libel judgment from England against New York publisher, on the basis of an article published in India: “The protection to free speech and the press embodied in [the First Amendment] 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”).

⁸ The plaintiff could circumvent First Amendment protections by seeking to enforce her foreign-country judgment in the country where those assets are located. See: Youm, “Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Laws,” 16 *Hast. Comm/Ent L.J.* 235, 260-261 (1994); Warren, “The Free Press and Its Territorial Limitations: United States Correspondents in the Soviet Courts,” 5 *Brook. J. Int. L.* 349 (1979). *Cf.* *Pindling v. National Broadcasting Co.*, No. 17549/84, 1989 Ont. C.J. LEXIS 98 (Ont. Sup. 1989) (NBC refused to appear and defend against libel suit brought in Bahamas based on broadcast originating in United States; subsequent action in Canada based on cable retransmission of broadcast in Canada, which sought enforcement of Bahamian judgment, was settled) (discussed in Youm, 16 *Hast. Comm/Ent L.J.*, at 254, 257).

⁹ See: Sanders, “Extraterritorial Application of the First Amendment to Defamation Claims Against American Media,” 19 *N.C. J. Int. L. & Com. Reg.* 515, 522-523 (1994); *Restatement (Second) of Conflict of Laws*, § 6 (1971). See generally: Faucher, “Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases,” 26 *U. C. Davis L. Rev.* 1045 (1993); Richards, “Defamation Via Modern Communication: Can Countries Preserve Their Traditional Policies?” 3 *Transnat’l L.* 613 (1990).

them onto the foreign country's libel law,¹⁰ or by concluding that the First Amendment required application of American libel law.¹¹

¹⁰ See *DeRoburt v. Gannett Co.*, 83 F.R.D. 574 (D. Haw. 1979) (applying Nauran libel law (virtually identical to English libel law), as modified by First Amendment protections, to libel action by president of the island-nation Nauru against the American owner of newspaper published in Guam and distributed throughout the Western Pacific, including Nauru). See also, *Desai v. Hersh*, 719 F. Supp. 670 (N.D. Ill. 1989), *aff'd* 954 F.2d 1408 (7th Cir.), *cert. denied* 113 S.Ct. 190 (1992) (libel claim brought by former prime minister of India against an American author who sought damages under American law for injuries suffered in America and damages under Indian law (also virtually identical to British law) for injuries he suffered in India; the court applied First Amendment protections to the claim for damages under Indian law, but suggested that they would not apply to extraterritorial speech on matters not "of public concern" or when the publisher has "intentionally and directly published the speech in a foreign country in a manner consistent with the intention to abandon first amendment protections").

¹¹ See *Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515, 1994 WL 419847 (S.D.N.Y. May 4, 1994) (dismissing libel claim brought under British law by Jordanian citizen on the ground that "establishment of a claim under the British law of defamation" in the United States "would be antithetical to the First Amendment protections") (quoted in *Abdullah v. Sheridan Square Press, Inc.*, 154 F.R.D. 591, 593 (S.D.N.Y. 1994)).