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Cyberlibel: Workable Liability Standards?

Paul R. Niehaus

For centuries, the common law torts of slander and libel allowed individuals to sue for the broadcast and publication of false and injurious words. Like other tort actions, a major concern of defamation law is determining who will pay for the injury. Should liability be limited to the person making the defamatory statement, or should other parties also be liable? Although the law governing libel always allowed plaintiffs to sue the defaming individual, the rules governing liability for disseminators of libelous material differ depending on the legal status of the disseminator. The various legal classifications carry differing standards of care that often determine ultimate liability. While common carriers, such as the phone company, generally are not liable for defamatory statements transmitted over their systems, newspapers and magazines are held to a higher standard of care for information published in their pages.

The advent of computers, cyberspace, and electronic bulletin boards (BBSs) has created situations which defy the traditional categories for defamation liability. Computer bulletin boards allow the instant transmission of thoughts and ideas to millions of potential readers. These transmissions are not the carefully-considered, polished words of news broadcasters, station managers, newspaper editors, or network executives, but rather are the spontaneous thoughts of ordinary people. Nor is their distribution limited to a single transmission, as are radio and television broadcasts, since electronically posted messages can linger on bulletin boards for weeks, continuing distribution to new persons and dramatically increasing the harm to defamed individuals.

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1 Historically, slight differences have existed between the laws of libel (written defamation) and slander (verbal defamation). The modern trend, however, is to use similar laws for each under the catch-all term “defamation.” See, for example, Dun & Bradstreet, Inc. v Greenmoss Builders, Inc., 472 US 749 (1985).

2 There are approximately 150,000 BBSs in the United States, the majority of which are run by hobbyists. David J. Conner, Cubby v. CompuServe, Defamation Law on the Electronic Frontier, 2 Geo Mason Independent L Rev 227, 229 (1993). Regrettably, this Comment has only enough space to consider BBSs and not other forms of electronic communication.
To apply defamation law to the new medium of BBSs, courts must decide how to classify BBSs for liability purposes. The simplest, and most tempting, approach may be to squeeze the new technology into one of the traditional classifications created for newspapers, telephones, and television. Such an approach, however, would ignore the new realities created by advanced technology, force BBSs into an improper classification, and squander an opportunity to fashion law that makes practical sense. A more fruitful approach would create a new classification for BBSs by combining relevant elements from the present classifications and adjusting them in light of modern public policy concerns.

I. ANALYSIS OF CURRENT LAW

Currently, individual states draw the specific contours of defamation law. Typically, to recover damages for defamation, a plaintiff must show falsity, injury, publication of the statement to a third party, and failure by the defendant to exercise proper care. If any element is absent or unproven, a suit for damages fails. In other words, if an allegedly libelous statement is true, causes no injury to the plaintiff, or is not repeated by the defendant to another party, no cause of action exists. For the purposes of this comment, it is assumed that the elements of falsity, injury, and publication have been met. The remaining task is to determine who the injured party may reach for damages, and what standard of care a defendant must exercise to escape liability.

A. Current Classifications

Defamation law generally recognizes three categories of information distributors and three corresponding standards of care. Since liability doctrines were fashioned around the traditional media, it is useful to examine the categories into which traditional media have been placed.

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3 Gertz v. Robert Welch, Inc., 418 US 323, 347 (1974) ("We hold that . . . the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."). Since defamation law is state specific, the Restatement (Second) of Torts (1976) will be used to discuss those provisions of defamation law that are generally accepted among the states.

4 Restatement (Second) of Torts § 558 (1976).
1. Common carriers.

Common carriers are information disseminators who indiscriminately allow all those able to pay a user fee to transmit original messages via their services.\(^5\) Phone companies, telegraph companies, satellite services, and the postal service are examples of common carriers.\(^6\)

Common carriers are held to the lowest of the three standards of care for information disseminators. Actual knowledge of a statement’s defamatory nature prior to transmission is necessary for liability to attach to a common carrier.\(^7\) A common carrier has no duty to inspect messages or information.\(^8\) The only obligation of a common carrier is to prevent transmission of information known to be defamatory.\(^9\) For example, in Western Union Telegraph Co. v Lesesne, the court held that a telegraph company would be liable if an employee knew that a libelous message was about to be sent and failed to prevent the transmission.\(^10\)

The rationale behind such a rule stems from fairness and efficiency concerns.\(^11\) Any law assigning liability for damages should allow the parties a mechanism for preventing or minimizing liability. Given that common carriers presently lack the legal ability to alter harmful messages prior to transmission, it would be unfair to hold them liable for damaging messages actually sent over their services.\(^12\) If common carriers were responsible for screening all of their messages, efficiency would be seriously impaired—an issue courts have confronted in the past.\(^13\) Taken to its (il)logical extreme, such a rule could drive a phone company to prohibit real-time conversations between individuals, since the

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\(^7\) Restatement (Second) of Torts § 612 comment g (1976).

\(^8\) See, for example, Von Meyenburg v Western Union Telegraph Co., 54 FSupp 100, 101 (SD Fla 1944); Mason v Western Union Telegraph Co., 52 Cal App 3d 429, 438-39, 125 Cal Rptr 53 (1975). In fact, 47 USC § 202(a) (1994) prevents common carriers from monitoring or editing the messages they carry.

\(^9\) Restatement (Second) of Torts § 612 comment g (1976).

\(^10\) Western Union Telegraph Co. v Lesesne, 198 F2d 154 (4th Cir 1952).


\(^12\) Restatement (Second) of Torts § 612 comment g (1976).

\(^13\) See, for example, O'Brien v Western Union Telegraph Co., 113 F2d 539, 541 (1st Cir 1940) and Von Meyenburg, 54 F Supp at 101.
phone company would have to screen each sentence for potentially defamatory material. Because such a notion is eminently unreasonable, the common carrier is not normally liable for defamatory statements made by those using its services.

2. Secondary publishers.

Secondary publishers do not originate the material they disseminate.\(^1\) The secondary publisher receives the information in final form and makes no editorial changes. Newsstands, bookstores, libraries, and television affiliates are secondary publishers.\(^2\)

The standard of care for these publishers is that of "knew or should have known";\(^3\) they are held liable only if they knew or should have known of the defamatory nature of the information they distribute.\(^4\) Two lines of reasoning animate this standard. First, as enunciated in *Auvil v CBS "60 Minutes"*, secondary publishers are held to a "knew or should have known" standard because distributors have neither the resources nor the expertise to review all the material they receive.\(^5\) Second, such a review might violate the First Amendment as it would unduly inhibit or "chill" free speech.\(^6\) Courts have also placed traditional bulletin boards into this category, although the case law is rather sparse. The court held in *Hellar v Bianco* that once the controller of a bulletin board or premises is aware of defamatory material on the premises, failure to remove the material within a reasonable time will subject the controller to liability.\(^7\) This standard, however, attaches only after notice has been given to the owner of the bulletin board. There is no duty to police the bulletin board, even if it is foreseeable that defamatory material may be posted on the board.\(^8\)

\(^{15}\) Restatement (Second) of Torts § 581(1) comments d and e (1976).
\(^{16}\) Id.
\(^{17}\) Id. See also *Lerman v Chuckleberry Publishing, Inc.*, 521 F Supp 228, 235 (SD NY 1981).
\(^{18}\) *Auvil v CBS "60 Minutes"*, 800 F Supp 928, 931 (ED Wash 1992). This idea will be discussed further in Part II.
\(^{20}\) *Hellar v Bianco*, 111 Cal App 2d 424, 427, 244 P2d 757 (1952).
\(^{21}\) Id.

Any original media source may be considered a publisher. Publishers include newspapers, magazines, television networks, and individual television and radio stations. While publishers are theoretically held to a negligence "knew or should have known" standard, given the editorial process at traditional publishers, a publisher rarely does not "know" an item's content. Magazines and newspapers, as well as the authors of individual articles, are held liable for defamatory statements they publish.

The rationale behind this rule is that a publisher has full control over the information published. An agent of the publisher often edits every word prior to publication. Editors choose what items to publish, in what form, and using what words. Concurrent with other factors, editors weigh defamation considerations in determining what information to publish.

Two possible rules may be gleaned from these classifications. First, and most obviously, the more discretion exercised by an information disseminator, the higher the standard of care required to avoid liability. Second, the law holds an information disseminator to the highest standard of care feasible in light of its operating methods.

B. Distinguishing BBSs from Traditional Information Disseminators

None of the preceding designations adequately captures the novel characteristics of electronic bulletin boards. Although similarities exist between BBSs and each of the three traditional classifications, the differences point to the necessity of a new standard. Before discussing the current case law and the possible contours of a new standard of care for BBSs, the inadequacies of the traditional scheme must be explored.

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22 Restatement (Second) of Torts § 577(1) (1976).
24 Id.
25 Restatement (Second) of Torts § 612 (1976). Determination of several liability is left to the individual states.
1. **Common carriers.**

The common carrier classification is both intuitively and practically unworkable. For the same reasons that traditional bulletin boards have been held to a higher standard of care (negligence) than common carriers (actual knowledge), it would be inappropriate to classify BBSs as common carriers. Both traditional and electronic bulletin boards allow anyone with access to the board to post a message to a relatively indeterminate audience. Private, one-on-one messages are impossible in such a setting—a setting which virtually assures that any message posted will be read by the entire community using the bulletin board. As such, a single message posted on a BBS can inflict far more damage than a discreet message from one individual to another. In the common carrier setting, once the libelous message is transmitted, the damage is complete. No subsequent steps are necessary to rectify any on-going harm because no on-going harm exists. In the case of the BBS, however, the harm is continual and potentially extended. The longer a message lingers on a BBS, the more people are likely to read it, thus increasing the harm done to the defamed individual.

Although common carrier status requires the lowest standard of care, most BBS operators do not wish to be classified as common carriers due to cost concerns. To achieve common carrier status, a BBS would have to conform with a welter of FCC regulations. The effort of complying with such regulations apparently outweighs the potential benefits, even for such commercial giants as CompuServe and Prodigy, which could feasibly comply with the regulations. Neither company, in various court battles, has ever argued that its BBS services should be classified as common carriers. As for the smaller systems, (which comprise the vast majority of BBSs), an attempt to force their system

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28 Although the duration of a message on a BBS is variable, in almost all cases the message will linger longer than will a common carrier transmission.
29 Although some would argue that anyone could download the message, copy, and redistribute it, this assertion does not prevent the above characterization. The same could be said for anyone with a telephone and a tape recorder. Such incidents are very rare, and logic has long ago dictated that this possibility is one that can be safely ignored for the purposes of liability classification.
31 See, for example, 47 USC §§ 201-27 (1994) and 47 CFR §§ 20-69 (1994).
operators to conform to FCC common carrier regulations would shut down virtually all of them;\textsuperscript{33} the smaller operations simply do not have the resources to tailor their systems to common carrier standards.\textsuperscript{34}


The publisher classification also fails to fit BBSs. Traditional publishers review, edit, and delete portions of items submitted to them by individuals or groups. Because this review process is presumed to be informed and thoughtful, publishers are held to a high standard of care when a libelous item slips through their net.\textsuperscript{35} This is not an undue burden to place on traditional publishers because even absent liability concerns, they would conduct this conscientious editorial process for quality-control purposes. Requiring the additional task of proofing items for defamatory content adds only a small marginal cost.

In the same vein, there are fundamental differences between traditional publishers and BBS operators. A traditional publisher receives far more material than he may profitably publish. Publishers must therefore decline to publish most of the information they receive. The costs of publication, as well as the inherent time and space constraints of traditional media, have created a bottleneck that hinders the dissemination of information. In popular literature, one of the often-touted benefits of BBSs, the Internet, and cyberspace generally is the low marginal cost of disseminating information. If a choice is made to designate BBS operators as publishers, not only will overall costs increase enormously due to the additional costs associated with editorial control exercised, but the rapid and voluminous exchange of ideas now possible will again be slowed for editorial purposes.

Another historical reason for holding publishers to such a high standard of care is the fact that they control what the public sees.\textsuperscript{36} Limited space leads to limited information, which creates an unavoidable bias. The particular rules of libel arose to counteract the problems inherent in having the fountains of informa-


\textsuperscript{34} To begin running a BBS one needs only a computer, a modem, and a phone line. This allows many individuals of moderate means to operate BBSs. See, Melinda Gipson, On-Line Services United for Competitive Clout, Electronic Media 14 (Sept 6, 1993).

\textsuperscript{35} Restatement (Second) of Torts § 581 (1976).

There are, however, tens of thousands of BBSs with theoretically unlimited space. The original difficulty of limited information has been eliminated, so there is no longer any reason to apply an inappropriate and out-dated rule to the new technology of electronic bulletin boards.

3. **Secondary publishers.**

Classifying BBSs as secondary publishers offers the most promising possibility of the three traditional categories. Yet even this classification is inappropriate given the novel nature of the BBS. Unlike plaintiffs suing a traditional publisher, individuals defamed by messages on a BBS would likely find the defendants relatively judgment proof. That is, the only persons liable for damages would be the originator of the message and the system operator ("sysop"). Most sysops could neither afford to pay a large damage award nor afford insurance against such an eventuality. Unlike the case of a newsstand or library, there is no primary publisher to reach in the case of a BBS defamation suit. Publishers are usually "deep pockets" with sufficient assets to cover a damage award or to secure insurance against such awards. A defamed party might be able to collect against a large publisher, but would probably fail to recover substantial damages against a small system operator.

A difference of type exists between libraries and BBSs given the control each institution has over its inventory of information. Libraries choose the items stocked on their shelves. If a library removes a book on account of libelous content, that item will likely never reappear on the shelves. Problems can be handled in a reasonably short time, and the particular difficulty should not recur. On a BBS, however, either the original sender or any other subscriber who has downloaded the defamatory message could immediately repost a message which had been previously removed by the system operator. To ask a BBS operator continually to remove previously-deleted postings or somehow to prevent such postings from reappearing is to impose additional burdens.

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37 Id.
38 Conner, 2 Geo Mason Independent L Rev at 229 (cited in note 2).
39 For similar reasons, secondary publishers are rarely sued in light of the (usually) deeper pockets of a publisher.
40 Most BBSs are run by individual hobbyists who could not satisfy a large award or would find the cost of insurance prohibitive. Conner, 2 Geo Mason Independent L Rev at 226 (cited in note 2). This idea was articulated in the telegraph context in O'Brien, 113 F2d at 542.
not incumbent on a library, thus collapsing the secondary publisher analogy.

The final factor against adopting the library or secondary publisher analogy is the paucity of law on secondary publishers. For example, no one appears to have sued a public library in this century.\textsuperscript{41} Although the horn book and Restatement rules appear relatively clear, courts have been reluctant to impose liability on secondary publishers.\textsuperscript{42} Since the courts would be forced to reinterpret the "library" rule in any event, drawing torturous analogies to old situations never adequately explored, there is no reason why a clear rule should not be created and enforced. A new doctrine would refocus the law on the fairness and efficiency concerns contemplated in formulating the traditional media law without forcing the courts to squeeze a new situation into an old rule.

C. Attempts to Classify BBSs

In recent years, courts have issued two opinions addressing the specific issue of BBS sysop defamation liability.\textsuperscript{43} Both cases have factual idiosyncrasies which preclude their widespread adoption as the paradigm for a new standard, but the courts in both cases grappled with the same issues dealt with above. As will be discussed below, neither court provided an adequate guide for future decisionmaking.

In Cubby, Inc. \textit{v} CompuServe Inc., the court held that CompuServe, through its BBSs, was a distributor rather than a publisher of information.\textsuperscript{44} The lack of a clearly articulated test, however, will hinder the future applicability of Cubby.

For a membership fee and online usage fees, CompuServe provides its customers with access to over 150 special interest "forums," comprised of electronic bulletin boards, interactive online conferences, and topical databases.\textsuperscript{45} The forum at issue

\textsuperscript{41} Becker, 22 Conn L Rev at 227 (cited in note 23).
\textsuperscript{42} Id at 226-27.
\textsuperscript{44} Cubby, 776 F Supp at 140-41. The terms "distributor" and "secondary publisher" are interchangeable for the purposes of this Comment.
\textsuperscript{45} Id at 137.
in *Cubby* was the Journalism Forum. CompuServe had contracted with Cameron Communications to independently “manage, review, create, delete, edit and otherwise control the contents” of the Journalism Forum.\(^4^6\) One of the publications available was “Rumorville,” which was contractually furnished to Cameron by a third party, Don Fitzpatrick Associates.\(^4^7\) CompuServe had no direct contract with Don Fitzpatrick, and CompuServe did not have the opportunity to review the content of Rumorville before it was posted on the Journalism Forum. The plaintiff, Cubby, maintained that Rumorville published defamatory remarks about his fledgling online publication, “Skuttlebut.” Cubby then sued both Fitzpatrick and CompuServe for libel.\(^4^8\)

The court held that CompuServe was a distributor of the information and was therefore held to the secondary publisher’s standard of knew or should have known.\(^4^9\) The court based its decision on the theory that CompuServe’s electronic forums were essentially like a “for-profit library,” and therefore a secondary publisher under the reasoning of *Smith v California*.\(^5^0\) The *Smith* court noted that it was unreasonable to expect that a bookseller would know the contents of every book in his store or library.\(^5^1\) Not only would this call for omniscience on the part of the bookseller, but it would also unduly restrict the public’s access to reading materials, and perhaps, violate the First Amendment.\(^5^2\) The *Cubby* court further noted that “CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and 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.”\(^5^3\) Finally, the court seemed to find significant that another company, completely unrelated to CompuServe, managed the publication at issue.\(^5^4\)

The other case directly addressing this issue is *Stratton Oakmont, Inc. v Prodigy Services Co.*\(^5^5\) In *Stratton*, the court

\(^{46}\) Id.
\(^{47}\) Id.
\(^{48}\) *Cubby*, 776 F Supp at 138.
\(^{49}\) Id at 140.
\(^{50}\) *Smith v California*, 361 US at 147.
\(^{51}\) Id at 153.
\(^{52}\) Id.
\(^{53}\) *Cubby*, 776 F Supp at 140.
\(^{54}\) Id. Unfortunately, Cameron Communications was not joined as a defendant in this case, and the court did not address the issue of Cameron’s potential liability.
\(^{55}\) *Stratton*, 1995 NY Misc LEXIS 229.
ultimately held Prodigy to a publisher's standard of care due to Prodigy's editorial control over the contents of its bulletin boards. Prodigy argued that it was impossible manually to control some 60,000 messages posted each day on Prodigy bulletin boards, and that only duty of the "Board Leaders" was to remove objectionable material brought to their attention. The court, however, ruled that through public statements, "Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards [and] implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce." The court summed up its argument as follows:

It is Prodigy's own policies ... which have altered the scenario (of Cubby) and mandated the finding that it is a publisher. Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.

The court also reasoned that this ruling would not necessarily lead all computer bulletin boards to eschew editorial controls because there was a certain "family-oriented" niche of the market that would value such control.

There are no major logical leaps in either the Cubby or Stratton decision. It is reasonable to view CompuServe as an electronic for-profit library, although as outlined above, this analogy has its limits. Similarly, the court's reasoning in Stratton was sound. Although a jury probably should have made the factual determination of publisher status, the court's reasoning process is not obviously erroneous.

Nor is there anything particularly disturbing in the fact that the two cases reached different conclusions. The factual differences in the cases made probable a divergence of opinion. Far more problematic is the lack of a uniform standard by which to adjudicate such cases.

Concerns over editorial control exercised by the sysop factored heavily in each decision. The Cubby court reasoned that it

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56 Id at 13-14.
57 Id at 10.
58 Id at 13. The court did not elaborate what these "benefits of control" might be. Presumably, the benefit would be the retention of subscribers who might leave the network if certain items were allowed to be posted.
was impossible for a sysop to exercise traditional editorial control over messages given the sheer volume of postings each day.\textsuperscript{60} In essence, the court excused CompuServe from any editorial duties.\textsuperscript{61} The \textit{Stratton} court altered \textit{Cubby}'s logic to read "excused from any \textit{involuntary} editorial duties." Once a representation of editorial control was made or attempted by Prodigy, Prodigy shouldered a duty to insure that its information network did not carry defamatory messages.\textsuperscript{62}

Although the court scrutinized editorial control in each case, the two courts clearly differed in their approach to the issue and in the amount of weight this issue should carry in the decision-making process. The courts neither formulated nor followed any clear test in spite of their analyses of editorial control and of various possible contributing factors.\textsuperscript{63} The divergent reasoning in these cases provides the most vivid illustration of the need for a uniform standard of care. If courts cannot agree on what methods to use in deciding cases, all predictability ceases; even similar fact patterns could result in different decisions. Rather than continuing with the present muddle, courts should simply adopt an "editorial control" test, thus restoring some measure of predictability.\textsuperscript{64} Such a solution, however, would not be wholly satisfactory and would ultimately be self-defeating.

As articulated above, use of the \textit{Cubby} standard is unacceptable since defamed parties might have no legal redress at all. Additionally, \textit{Cubby} offers little insight into how to solve the present situation, given that the court simply let CompuServe off the hook.

The \textit{Stratton} decision offers a more clearly-articulated test, providing a better starting point for a prospective discussion, but not reaching a final conclusion. Using the logic of \textit{Stratton}, liability will lie if a certain (as yet undetermined) amount of editorial

\textsuperscript{60} \textit{Cubby}, 776 F Supp at 140. The Prodigy online service receives approximately 60,000 messages each day. \textit{Stratton}, 1995 NY Misc LEXIS 229 at 8.

\textsuperscript{61} \textit{Cubby}, 776 F Supp at 140.


\textsuperscript{63} \textit{Cubby}, 776 F Supp at 135.

control is exercised or claimed. At least two difficulties, however, arise from such a test. The first is a line-drawing problem: how much editorial control is enough to trigger the type of liability imposed on Prodigy? Presumably, the screening of every incoming message for defamation would be labeled editorial control, but where does one draw the line? Is the use of "George Carlin" software enough? Or the use of software designed to look for proper names, so editors could manually screen those postings? Alternatively, assume an individual has repeatedly posted lewd comments on the BBS. If the sysop removed the offender from the subscriber list, would this constitute editorial control? Without answers to each of these questions, and with few analogous common law guidelines, an "editorial control" standard would create more problems than it would solve.

The second disturbing aspect of a simple editorial control test stems from the impact such a test would have on market choices, as its uncertainty would limit the flexibility sysops have in choosing a level of editorial control. Under the Stratton court's reasoning, BBSs could avoid liability by refraining from any form of editorial control. The court believed that the market would create a niche for "family-oriented" services that exercise editorial control over their BBSs to insure the purity of their postings. If people are willing to pay the higher rates caused by the expense of editorial control, then such a service would be provided. There is no reason, however, to force "family-oriented" services to charge higher rates since certain software provides a fairly simple and inexpensive means of exercising a modicum of editorial control.

For example, a certain segment of the population would prefer not to have messages containing profanity posted on the BBSs to which they subscribe. Of course, on an open BBS, anyone could post an obscene or profane message. Using the Stratton logic, it is possible that if a sysop were to screen incoming messages for profanity, he would have exercised editorial control, thus making himself potentially liable. Even though this screening could be accomplished by using very simple, low-cost software

66 "George Carlin" software, so named for Carlin's "7 Words You Can't Use on Radio" comedy routine, allows a sysop to remove or "screen out" messages containing certain words, usually profanity. See Peter H. Lewis, "Censors Become a Force on Cyberspace Frontier," Dallas Morning News 2D (June 29, 1994).
68 Id at 13.
without any manual interference, the sysop would have become as much a publisher as the Rand-McNally corporation.

To illustrate the foolishness of such a state of affairs, imagine a bookstore owner who chooses not to carry Playboy. At virtually no cost, the store exercises a form of editorial control that is assumed to be agreeable to at least some of its customers. It cannot, however, be argued that an anti-Playboy decision means that every book in the store will be unobjectionable to everyone. A superficial screening of a single publication cannot hope to rid the store of all objectionable material. Although a bookstore would not be liable under common-law "secondary publisher" status, this is the logic that the Stratton court used to find Prodigy liable. Under Stratton, sysops might fear that preventing certain obviously offensive messages from being posted would trigger "publisher" liability, thus leading them to decline to exercise even minimal editorial control. There is no reason that sysops should not exercise minimal control in some circumstances and thereby provide more market choices. The law should not inhibit such behavior.

Even with the "simple" editorial control standard, therefore, uncomfortable situations will arise, and courts will have to draw new legal lines for the rule to make sense in all circumstances. Rather than attempt to jury-rig an outmoded categorization scheme to accommodate BBSs, a new standard of care tailored specifically to BBSs should be created. Using ideas and logic borrowed from each of the traditional classifications, a new classification can be built around the new technology.

II. A NEW STANDARD-OF-CARE CLASSIFICATION

A. Prior Attempts to Classify BBSs

As might be imagined, various commentators have addressed the possibility of a new classification. These articles, however,

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69 Although such a decision would probably alienate the Playboy-purchasing crowd, the extremely low administrative costs of the decision allow the bookseller to make his own decisions without fearing that a customer offended by a Demi Moore Vanity Fair cover might bring suit.


71 See, for example, id; Rex S. Heinke and Heather D. Rafter, Rough Justice in Cyberspace: Liability on the Electronic Frontier, 11:7 Computer Lawyer 1 (July 1994) (cited in note 30); Loftus E. Becker, Jr., The Liability of Computer Bulletin Board Operators for Defamation Posted by Others, 22 Conn L Rev 203 (1989) (cited in note 23); and David
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were written prior to the Stratton case, which cast a new light on the entire enterprise.

Robert Charles articulated the most comprehensive scheme in a 1987 article. Charles argues that, in some circumstances, sysops should be liable for statements made on their BBSs. A specifically-tailored negligence system, a “reasonable systems operator” standard, lies at the heart of Charles’s suggestions. In support of this standard, Charles lists some specific examples of negligent acts that would trigger liability. First, a sysop would have a duty to establish an identification code system, thereby allowing the defamed party to identify the originator of the libelous remark. Second, a sysop must warn subscribers of their twin duties not to post libelous material and to inform the system operator if any such material is found on the BBS. Third, a sysop would have a duty to inspect, within a reasonable time, all messages posted. Finally, a sysop would be required to remove material he knew or had reason to know was defamatory. Under Charles’s scheme, if a sysop failed to fulfill any of the four duties, the sysop would be liable.

Charles’s underlying assumption is that expectations of privacy are considerably diminished in the realm of the BBS. Whereas an individual expects that his telephone conversations will remain private, there is no such expectation when posting a message on a BBS. Since there is no privacy expectation on a BBS, individuals should not care if a fellow subscriber or an editor reads their messages. Some form of editorial control by a sysop should therefore be neither unexpected nor particularly onerous to BBS users. Although some users might object, if they truly wish their communications to remain uncensored, they must use a common carrier.


73 Id at 147.
74 Id.
75 Id.
76 Charles, 2 J L & Tech at 147. Under Charles’s proposal, each message or posting would be identified by a code known only to the sysop. Pseudonyms could still be used, but in the event of a libelous posting, an anonymous author could be identified.
77 Id.
78 Id.
79 Id.
80 Charles, 2 J L & Tech 121 at 143.
81 Id.
82 For a good first look at privacy expectations in cyberspace, see Lawrence Lessig,
Charles's first suggestion, that the BBS be required to institute an identification system, is generally reasonable. The cost to a system operator would be minimal, involving only the administrative costs of assigning codes to each subscriber. Individuals could still appear anonymously on the bulletin board, with only the system operator knowing which identification codes accompany which pseudonyms or names. In the event of a defamation action, sysops would be required to disclose the identity of the person making an anonymous defamatory statement. This would allow defamed persons to reach the originator of the libelous message and impose no liability on the sysop personally.

One difficulty with such an identification system is the fact that cyberspace has always been characterized by the possibility of anonymity. The knowledge that a list of identification codes is stored somewhere in a system operator's computer could inhibit free exchange of information and ideas. Enforcement of such a rule also presents difficulties discussed below.

Charles's second suggestion involves a duty to warn subscribers not to post defamatory material, coupled with a plea for subscribers to report any such postings to the system operator. This warning would serve as notification to subscribers and as a thin screen or deterrent to defamatory material.

This suggestion, too, seems reasonable. It may not, however, be very effective. Such a warning or admonition could be quickly ignored. Like the warnings on cigarette packages, a BBS warning of this type would become routine and would exert no impact on the subscriber after a few viewings. By itself, however, this consideration should not prevent such a warning, however ineffectual, from being posted. If the costs of adding such a warning

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With computer support, administrative costs would occur only in generating and updating subscriber lists. Each time an individual posted a message, the computer could automatically make a note of the posting.

Presumably the sysop would be under some duty not to share the identification codes with others or to inform users that their identities might be shared.

Lessig, 104 Yale L J at 1750 (cited in note 82) (discussing the positives and negatives of anonymity and cryptography).

Charles, 2 J L & Tech at 147 (cited in note 11).

See, for example, Donald W. Garner, Cigarette Dependency and Civil Liability: A Modest Proposal, 53 S Cal L Rev 1423, 1437 (1980) (questioning the efficacy of warning labels on cigarettes); S. Hyland and S. Birrell, Government Health Warnings and the "Boomerang" Effect, 44 Psychological Rep 643 (1979) (stating that warning labels may at times increase the use of an item).
to a welcome screen are negligible and some deterrent effect could be achieved, no reason exists not to add these warnings.

Charles's third suggestion, however, creates serious difficulties. Charles suggests that sysops should have a duty to inspect all publicly-posted messages within a reasonable time of their posting. Although not clearly articulated, the surrounding language suggests that this inspection would consist of a full, substantive reading of each message. Such a duty imposes a tremendous burden on the system operator. There is no intuitive difference between such a standard for a sysop and that of a publisher; each has to read and pass judgment on every piece of information. Nor is there any real difference between inspecting all messages "within a reasonable time" and inspecting them prior to posting. The same number of messages have to be inspected, and the same marginal number of messages have to be inspected each day. Under this regime, a system operator is responsible, at some point, for every message which appears on his BBS.

This suggestion also does not make any sense in light of the other criteria Charles advocates. Clearly, this inspection standard of care is far higher than that of posting warnings to subscribers. If a sysop is forced to read every message, why should the law care if the sysop asks the BBS subscribers not to post such material? If a subscriber ignores the warning and the sysop fails to catch the defamatory message, presumably the sysop could sue the poster for indemnification. If full indemnification is possible, however, it is not clear why the BBS should be involved at all. If full indemnification is not possible, the preposted warning does not help the BBS legally.

Charles's final suggestion, that libelous items be removed when brought to the sysop's attention, deserves a hard look. While a good idea in theory, there are practical problems which prevent the institution of such a rule. First, one must worry about a sysop being forced to decide what constitutes libel. Without adequate knowledge or expertise, sysops would have to make repeated judgment calls on whether or not to remove an item. Second, if sysops decide to play it safe and simply remove every reported item, any subscriber could wipe out whole sections of the BBS or have removed those messages with which he did not

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*Charles, 2 J L & Tech at 147 (cited in note 11).*

*Id.*
agree—thus destroying any hope of meaningful broad-based communication.

B. A More Workable Standard

Prior attempts to classify BBSs have either failed to address all of the issues or have combined the wrong ideas in formulating a solution. A more workable standard would hold BBS sysops to a standard of care similar to that of a secondary publisher, but with special adjustments made in light of the technology at issue.

First, it must be underscored that imposing the requirement that a sysop read every posted message is both unworkable and undesirable. The sheer volume of messages received prevents an operator from even beginning such an undertaking. Just as a library or newsstand staff cannot be expected to read every word of every item received from the publisher, we cannot impute omniscience to a BBS operator. Such a system would also be undesirable as it would call for innumerable judgment calls by individual BBS operators who have no expertise in libel law. To hold a lay person liable for failing properly to determine what constitutes libel is unfair. Most system operators begin BBSs because they are interested in a particular topic and would like to discuss that topic with others holding similar interests, not to gain publishing or media experience. Additionally, to ask individual operators to judge for themselves what constitutes libel would undoubtedly cause a reduction of information dissemination. Perfectly innocuous messages would be edited out by skittish operators, disrupting the flow of ideas and information—the flow of which is the purpose of BBSs.

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90 In the case of Prodigy, some 60,000 messages are received every day. While some smaller BBSs have relatively few postings, reading all of them still takes time. Smaller operators run BBSs primarily as a hobby, and it would be unfair to ask such sysops to take considerable time each day to read every message.

91 Courts have agreed with this position as well. In Auvil the court stated that to "force the creation of full time editorial boards at local stations throughout the country which possess insufficient knowledge, legal acumen, and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face $75 million lawsuits at every turn. That is not realistic." Auvil v CBS "60 Minutes", 800 F Supp 928, 931 (ED Wash 1992). Although defamation suits against small BBSs would likely be for smaller amounts, the hobbyists running these boards have even less access to experts and probably less legal acumen.


93 Such a rule may also violate the holding of Smith v California, 361 US 147 (1956).
Although system operators should not be burdened with the obligation of reading every message, there are technologically feasible steps that should be taken to attempt some monitoring. A combination of identification codes, removal of material to which subscribers object, and minimal automatic screening procedures would eliminate a significant number of problems for both the sysop and the defamed party.

First, BBS operators should not be held liable if they keep accurate identification codes. Identification codes, held only by the sysop, would allow the defamed party to seek redress from the individual originating the message. Such a system is merely the equivalent of current law, whereby a publisher knows the identity of a statement's originator. Presently, the only way an originator of libel may evade a lawsuit is if a publisher chooses to publish comments anonymously or pseudonymously. In such a case, the publisher has made a conscious choice to assume liability for the statement should the comment prove defamatory.

There is, however, a difficulty in administering such an identification scheme. Without further incentive, there is no reason that an individual would necessarily give his real name when identifying himself to the sysop. Of course, large, for-fee services such as CompuServe and America On-Line keep careful track of their subscribers for billing purposes. Smaller sysops, however, running their BBSs for free, have no real incentive to insure the veracity of identifying statements made by their subscribers. To insure a defamed individual the capability of reaching the originator of a libelous message, an incentive must be created.

The most obvious and least intrusive incentive is to hold BBS sysops liable in defamation actions if they cannot provide accurate information regarding the identity of those posting messages. Similar to a publisher, sysops could choose for themselves whether identification codes were "worth it," and if sysops chose not to keep such codes, they would be liable for defamatory postings. While the administrative costs of keeping accurate records are not negligible, they can be minimized if courts acknowledge that reasonable efforts to ensure accuracy will allow the sysop to escape liability.

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94 Witness, for example, that most newspapers will not publish anonymous letters to the editor.
95 That is, if a publisher disseminates information without knowing its source, the publisher may be liable in a defamation action.
96 Reasonable efforts might include such simple acts as requiring a credit card number that can be checked with the issuing company, or requiring a home phone num-
In addition to keeping identification codes, sysops should also be obligated to remove material about which subscribers complain. To correct the over-inclusiveness of Charles's fourth suggestion, such an obligation should attach only when the person allegedly being libeled or his agent complains. This solution will minimize the concerns regarding sysops making personal judgments about what constitutes libel. If BBS operators were under a duty to inspect or remove any item complained of for reasons of libel, many more decisions would have to be made by the system operator, and a single complaint by any random subscriber could wipe out whole sections of the bulletin board or specific ideas posted by others. If the potential plaintiff finds nothing objectionable in the statement, it should not be removed. Acting on a complaint by the individual allegedly being libeled allows the sysop to minimize the damage without the huge cost of actively prescreening all messages. This is the most cost-effective solution even though a small amount of harm is allowed in order to spare massive costs.\footnote{The small harm allowed is the initial, brief publication of the libel. This solution eliminates, however, the potential for libelous messages to linger on the BBS.}

The most important part of any future standard of care is not a duty, but an option. The law should allow for minimal screening procedures that do not trigger full-blown publisher liability. Use of a screening program that seeks and excises profanity should not constitute editorial control in the traditional sense. Traditional classifications did not have to take into account the possibility that a library or newsstand could, to some degree, search out certain objectionable phrases and excise them. Since new technology is available, there is no reason not to use it, especially in the field for which it was designed. Screening for profanity has nothing to do with protecting individuals from defamation and cannot be considered editorial control for libel purposes.

This clear line is far better than the present system.\footnote{See note 63 and accompanying text. Clear lines are necessary for predictability.} With a bright-line rule, actors could consciously choose to place themselves in one category or another. A reasonable line, however, would be the involvement of human judgment. But the use of computer software, however sophisticated, would not trigger publisher-type liability.
This system would not only prevent humans from having to make judgment calls, it would also serve to provide almost perfect notice to all subscribers of the BBS. Because computer programs run perfectly logically, in theory the ground rules would be established, explained, and equally applicable to all messages. An individual could choose to subscribe to a BBS based on the level of screening software used, thus duplicating the Stratton court's "niche market" without forcing the heaviest liability regime on actors taking only minimal control steps.

CONCLUSION

If new technologies are to survive in the years ahead, rules must be created to govern them. Without such rules, fledgling industries will be unable to make informed decisions concerning the legal operation of their enterprises. As long as new rules are being formulated, however, rules specific to the new institutions ought to be created, rather than attempting to force cyberspace into a legal regime created for the print and broadcast media.