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DEFAMATION IN CYBERSPACE: RECONCILING CUBBY, INC. V. COMPUSERVE, INC. AND STRATTON OAKMONT V. PRODIGY SERVICES CO.

I. INTRODUCTION

Baud. RAM. Megabyte. Mouse. E-mail. CD-ROM. Hard drive. Multimedia. World Wide Web. Five years ago, these were words that few in the population understood, let alone used in conversation. These few were part of a small subculture who were often derided with negative nicknames. That time, however, has passed.

Today, personal computers are an inescapable and necessary part of any business, be it a large multinational corporation that conducts all aspects of its business using computers, or a small proprietorship that wishes to send a bimonthly newsletter to its customers. Personal computers are now moving from the office to the home in record numbers; in 1994 alone, 2.3 million American families were projected to have bought new personal computers for their homes, and as of January, 1996, 33.9 million households have home computers.¹

These new computers are packed with high speed processors and modems, making electronic communication one of the most popular uses for personal computers in the home. Information is available via a myriad of networks and on-line services² that can be reached from almost any home computer equipped with a modem. Much of the action in this new world is on the Internet,³ which reaches more than 37

2. Generally, on-line services are comprised of three things: (1) file libraries, (2) bulletin boards, and (3) discussion groups. File libraries include text and graphic images that can be retrieved to the user's computer. Bulletin boards are places where messages can be posted for other members to read. Bulletin boards usually focus on particular topics. Discussion groups, or chat groups, are areas where users can interact with others who are on-line. Discussion groups are essentially group conversations in which users type out what they wish to say and send their message to the other discussion group participants through the on-line service. For the purposes of this Comment, the term "commercial on-line services" refers to systems that charge a user fee or membership fee, such as CompuServe, America Online, or Prodigy.
3. "The Internet is a worldwide collection of linked networks and organizations . . . that grew up around [what was then called the] Arpanet, a Department of Defense communications network." Daniel P. Dern, Federal Networking Council to Widen Access to the Internet, DATA COMM., Oct. 1, 1990, at 64, available in WESTLAW, 1990 WL 2213659. It "was created to encourage communications between the Department of Defense, academic researchers, and suppliers." Id. Much of it was originally supported by the taxpayers, although that is no longer the case. Gearing Up For Life on the Internet, OPEN SYSTEMS TODAY, June 6, 1994,
million users in 135 countries, a number that is expected to double each year for the foreseeable future.\textsuperscript{4} Commercial on-line services, including America Online, Prodigy, and CompuServe are experiencing similar growth with a subscriber count estimated at over 8.1 million customers at the beginning of 1996.\textsuperscript{5} This represents a twenty-two percent increase from the previous year.\textsuperscript{6} Although only a few members of this rapidly expanding electronic community have been forced to confront legal issues so far, this is not likely to continue.\textsuperscript{7}

With the arrival of new technologies, owners, operators, and users must come to terms with new legal issues of liability for the use of these technologies as communications devices. Courts are being forced to confront issues touching on defamation, intellectual property, and obscenity, especially as they relate to the uploading and downloading\textsuperscript{8} of information from one computer system to another. One of the threshold questions in this new frontier is whether commercial on-line services, such as Prodigy or CompuServe, can be held liable for statements uploaded by their customers.

Part II of this Comment will discuss background information on the on-line marketplace and the legal issues raised by this new marketplace. Part III will discuss the frames of analysis that courts apply in examining this issue. Parts IV and V will discuss Cubby, Inc. v. CompuServe, Inc.\textsuperscript{9} and Stratton Oakmont, Inc. v. Prodigy Services Co.,\textsuperscript{10} the only two

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\textit{available in} WESTLAW, 1994 WL 3812929. There are plans to restructure the Internet into two separate networks, one for research and education that is an extension of the existing National Science Foundation network, and one for commercial operators. \textit{Id.}


\textsuperscript{6} \textit{Id.}

\textsuperscript{7} Derek Slater, \textit{Legal Expert Edward Cavazos Warns IS Chiefs to Safeguard Their Companies from On-line Abuses or End Up in Court}, COMPUTERWORLD, Dec. 5, 1994, at 114, H.

\textsuperscript{8} Uploading is a process whereby a user sends a message or file via modem to an on-line service, which is essentially another larger computer system. Once uploaded, the message or file can be read by other users of the service. Downloading is the inverse process: selecting a file located on the on-line service and retrieving it via modem to the user's personal computer.


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reported cases that have directly addressed some of the questions regarding the liability of on-line services for defamatory statements. Part VI offers a recommendation for an appropriate application of these frameworks to present and future cases.

II. BACKGROUND

A. The Computer and On-line Market

To access an on-line service, the only equipment required is a personal computer, a modem, and a phone line. With the advent of inexpensive software, the same three pieces of equipment can be used to create an on-line system. In fact, there are approximately 100,000 of these systems scattered around the globe, many of which make up distinct communities on the Internet and other electronic networks. Most of these on-line services are accessed by local users, numbering approximately twelve million. A few systems are national in scope with large membership bases and user-friendly graphics, most notably the “big three” commercial on-line services: Prodigy, America Online, and CompuServe. The largest of these, America Online, accounts for 4.5 million of the 8.1 million total users of major on-line services. In light of alliances forged with other major technology companies, America Online is poised to dominate the market.

As more American families put computers in their homes, the competition for their business has grown more intense. In the last quarter of 1994, CompuServe, Prodigy, and America Online announced major restructuring of their pricing tiers, making cuts up to thirty-three percent. Many speculate that the price cuts were in preparation for the debut of the new commercial on-line service from Microsoft Corp., which launched during the fall of 1995. More changes are expected

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11. Other recent cases that have raised this issue have settled prior to trial; see infra part II.B.
14. Id.
16. Rublin & Savitz, supra note 5.
18. Eng, supra note 1.
19. Id. Microsoft packages its on-line software with its new operating system, Windows 95. Id. Over 20 million copies of Windows 95 have been sold through the spring of
as flat-fee Internet service providers, such as AT&T's Worldnet, begin to take hold in the market. All seek part of the estimated fifteen billion dollars in sales projected to be generated by on-line services in 1997.

Considering that these services can cost the typical user around twenty dollars per month, what makes them so popular? Most offer a wide range of features such as e-mail, current news reports, detailed investing information, and travel reservation systems. In addition, most allow access to the Internet and the World Wide Web, including a wealth of software files, discussion groups, and raw information on subjects ranging from child-rearing to nuclear fission.

B. Legal Issues in Cyberspace

Today, software libraries, bulletin boards, and discussion groups pose the greatest legal problems for on-line consumers and raise the most important questions for legal scholars. The most recent legal disputes involving on-line services center around the liability of commercial on-line services for messages or images uploaded by their users. These cases bring up important legal questions that must be grappled with as the on-line community continues to grow.

Most on-line services act as repositories for large numbers of files that can contain games, graphic images, and other useful tools for the typical computer user. Many of these files are placed in the system

23. Id. Included in most services, without additional cost, is unlimited use of electronic mail within that system or to any other Internet address. Id. Most also provide access to up-to-the-minute stock reports as well as the ability to trade stocks and other types of investments on-line. Id. They also provide access to Easy Sabre, a reservation system used by professional travel agents that allows the user to book reservations with over 300 airlines, 18,000 hotels, and 45 car-rental companies all over the world. Id. In addition, there are interest groups for everyone from bird-watchers to Star Trek fans. Id.
24. Id. The World Wide Web is a sub-network of the Internet that allows users to download information in the form of graphical "pages." Eng, supra note 1.
26. See supra note 23 and accompanying text.
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by users, not by the operator of the system; this raises the question of liability for the presence of these files on the system. In one case, a small commercial on-line service operator in Florida was held liable for making available digital copies of Playboy photographs, although he claimed that he did not put them on the system and that he was unaware that they had been pirated. In another case, a music publisher sued CompuServe for copyright infringement based on the presence of at least 550 compositions owned by Frank Music on its system.

Four recent suits, two of which settled prior to trial, questioned the applicability of defamation law to statements made on-line. The first was Cubby, Inc. v. CompuServe, Inc., which, to date, is the only reported federal case to discuss the liability of commercial on-line services for the defamatory statements of their users. The facts and holding of Cubby are discussed at length infra. The second, was a 1992 libel case brought by Medphone Corp., a medical equipment company, against Peter J. DeNigris, that was settled in December of 1993 for a nominal sum. Medphone alleged that DeNigris made defamatory statements about Medphone on Money Talk, a bulletin board on the Prodigy service, causing Medphone's stock to drop dramatically. In the third case, Brock N. Meeks, the writer of a publication called CyberWire Dispatch, wrote an unflattering article about a large direct mail company, Suarez Corporation Industries. Suarez filed suit against Meeks for libel. CyberWire Dispatch was available on the Internet for free and referred

27. Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D.Fla. 1993). Liability in this case hinged in large part on the fact that copyright violation is a strict liability issue: "It does not matter that [the defendant] may have been unaware of the copyright infringement . . . . Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement . . . ." Id. at 1559.


31. Id.


33. Suarez Corp. Ind. v. Meeks, No. 267513 (Ct. of Common Pleas Ohio 1994).
to Suarez' direct mail programs as scams. In September 1994, Meeks agreed to notify Suarez forty-eight hours before writing anything about the company. The most recent case involving libel on-line raised many of the same questions, but in this case, the companies and the damages sought were much larger. The Stratton Oakmont case is more fully discussed infra, including its notably different result from the Cubby case.

III. FRAMES OF ANALYSIS

The crux of any question regarding the liability of a commercial on-line service provider for the defamatory statements of its users will lie in the governing court’s analysis of the way in which the service conveys its information. The service provider could be classified under one of three standards: (1) the distributor framework, (2) the publisher framework, or (3) the FCC’s Common Carrier doctrine.

A. The Distributor Framework

Traditionally, distributors of publications have been given broad First Amendment protection. The United States District Court for the Southern District of New York used the distributor analogy to examine the claim brought by Cubby, Inc. in Cubby, Inc. v. CompuServe, Inc.

Although a party who repeats or republishes defamatory statements is subject to liability as though she originally published it, entities such as news vendors, book stores, and libraries are not liable if they neither know nor have reason to know of the defamatory statements.

The Supreme Court has reasoned that “constitutional guarantees of the freedom of speech ... stand in the way of imposing” strict liability

34. Resnick, supra note 30. The article documented a month-long investigation into Suarez’s business practices, which included a plan to make money over the Internet. In response to Suarez’s solicitations, Meeks wrote such comments as “[l]et’s flip this latest Internet scam on its back and gut that soft white underbelly.” Id.


37. See infra note 75 and accompanying text.

38. See infra notes 74-76 and accompanying text.


on distributors for the content of materials they carry.41 The Court has stated that barring such a rule, "'[e]very bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop.'"42 In restricting the bookseller, the court would restrict the public's access to printed matter.43 The concern here is for the free exchange of ideas and information; holding a distributor accountable for all she distributes would have a chilling effect on free expression.

Under the distributor analogy, commercial on-line services are essentially electronic libraries that contain large numbers of documents in the form of files and collect user fees from their members.44 Rather than going to a building or a newsstand, the on-line user brings the newsstand into her home and browses the material electronically. The application of this analysis presupposes lack of knowledge and lack of a reason to have knowledge of any defamatory statements. Also important to this analysis is freedom from editorial control. Commercial on-line service providers that attempt to edit or screen the information they receive may not have the benefit of distributor status.45

B. The Publisher Framework

The publisher framework is derived from the very definition of defamation. Defamation includes the twin torts of libel and slander, the former relating to written or printed works, and the latter relating to oral statements.46 Defamatory statements include those that hold a person up to hatred, contempt or ridicule, or that cause her to be shunned or avoided.47 It is the reputation that is protected by the law of defama-

42. Id. at 153 (citation omitted).
43. Id.

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.

Id. at 153-54.

tion; therefore, an essential element of the tort claim itself is that the statement be communicated to some third party. This element of communication is given the technical name of publication, and each party that takes part in the publication is charged with liability for the publication.

Under the publisher analysis, commercial on-line services would be treated the same as a newspaper; they would be subject to defamation claims for all that they publish by making the material available on-line. The key question before the courts is whether commercial on-line service providers are a part of the publication process and, therefore, subject to liability as one of the parties to publication.

C. The FCC Common Carrier Doctrine

Common Carriers are defined in Title II of the Federal Communications Act of 1934. Were commercial on-line services placed in this scheme, they would not be liable for defamatory statements transmitted by their users. This is the same status afforded television broadcasters. It may be possible for commercial on-line services to be classified under the modified definition of a common carrier set out in FCC v.

48. Id. § 113, at 797.
49. Id.
50. Id. at 799. It is well-settled law that a publisher may be held liable for defamation by the writers it employs under the doctrine of respondeat superior. William E. Francois, Mass Media Law and Regulation 68 (1978). "One who falsely publishes matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication." Restatement (Second) of Torts § 569. Exceptions to this general rule were carved out by New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (public officials) and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (public figures). For historical reference, see also Crane v. Bennett, 69 N.E. 274 (N.Y. 1904); Davis v. Hearst, 116 P. 530 (Cal. 1911) (owner held liable); Smith v. Utley, 92 Wis. 133, 65 N.W. 744 (Wis. 1896); World Publishing Co. v. Minahan, 173 P. 815 (Okla. 1918) (editor held liable).

51. "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier. 47 U.S.C.A. § 153(h) (West 1995). For a complete treatment of the Common Carrier Doctrine including its evolution and its future, see Phil Nichols, Note, Redefining "Common Carrier": The FCC's Attempt at Deregulation by Redefinition, 1987 Duke L.J. 501.

52. Restatement (Second) of Torts § 581 cmt. b.; see also O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940); Western Union Tel. Co. v. Brown, 294 F. 167 (8th Cir. 1923).

Midwest Video Corp. in 1979. However, common carriers are closely regulated by the federal government; a common carrier must file rate schedules with the FCC for review as well as get FCC approval for any new services or lines installed. Although it is conceivable that courts would classify commercial on-line services as common carriers, such a classification is likely to be opposed by the operators of the systems who would not want to be subjected to such intense scrutiny and regulation. It is also unclear whether the commercial on-line services could actually meet the strict definition of a common carrier.

IV. Cubby, Inc. v. CompuServe, Inc.

A. The Facts of Cubby v. CompuServe

As mentioned above, CompuServe is one of the largest of the commercial on-line services. It is a general information service or "electronic library" that allows access to thousands of information sources. Over 150 special interest forums are also available, which include electronic bulletin boards, interactive on-line conferences, and topical databases. One of these forums is the Journalism Forum, which focuses on the journalism industry.

A company called Cameron Communications, Inc. (CCI) contracted with CompuServe to manage and control the Journalism Forum,

54. "A common carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . .'" Id. at 701.

55. Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may . . . enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission . . . may suspend the operation of such charge, classification, regulation, or practice, in whole or in part . . .


56. No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line . . .


57. See supra part II.A.


59. Id.

60. Id.
including editorial control to see that the forum operated according to the editorial standards of CompuServe. Rumorville USA is a publication available on the Journalism Forum that provides information about broadcast journalism and journalists. It is published by Don Fitzpatrick Associates of San Francisco (DFA). There was no relationship, contractual or otherwise, between DFA and CompuServe; DFA contracted with CCI to provide Rumorville to the Journalism Forum. DFA’s contract with CCI stipulated that DFA was totally responsible for the contents of Rumorville and also required that CCI limit access to Rumorville to those CompuServe users who had previously made membership arrangements with DFA. CompuServe has no power to review the contents of Rumorville prior to it being uploaded onto the Journalism Forum. There were no fees exchanged by CompuServe and DFA; DFA users were charged an access fee directly and CompuServe users are charged standard on-line and membership fees.

In 1990, the plaintiff in the case, Cubby, Inc., developed a computer database called Skuttlebut intended to directly compete with Rumorville. It contained news and gossip from the television news and radio industries. As with CompuServe, access to this new database was available through a personal computer and modem, provided the user completed a subscription agreement.

The source of the dispute was allegations that Rumorville published false and defamatory statements about both Cubby, Inc. and its developer, Robert Blanchard. Cubby, Inc. and Blanchard brought suit for libel, business disparagement, and unfair competition based upon the

61. Id. CCI 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.’” Id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id. at 138.
69. Id.
70. Id.
71. Id. “The allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville ‘through some back door’; a statement that Blanchard was ‘bounced’ from his previous employer, WABC; and a description of Skuttlebut as a ‘new start-up scam.’” Id.
allegedly defamatory statements on Rumorville. CompuServe moved for summary judgment based on the argument that they acted as distributors rather than as publishers of these statements and therefore could not be held liable for the statement’s content.

B. Rules and Holding of Cubby v. CompuServe

In granting CompuServe’s motion for summary judgment on the libel claim, the court stated, “CompuServe has no more editorial control over . . . 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.” The court compared a computerized database to a traditional news vendor, citing an earlier case: “‘First Amendment guarantees have long been recognized as protecting distributors of publications . . . . 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.’” It ruled that CompuServe did not know or have reason to know of Rumorville’s contents; thus, as a distributor, CompuServe could not be held liable.

Likewise, the court granted summary judgment on the business disparagement claim, stating that CompuServe lacked knowledge or reason to have knowledge of the Rumorville postings. It also dismissed the unfair competition claim, stating that a disparaging statement must be intentional to give rise to such a claim, and that CompuServe clearly lacked the knowledge to render the statements intentional. Cubby, Inc. also attempted to tie liability to CompuServe on a vicarious liability claim. However, the court ruled that DFA and CompuServe lacked the agency relationship necessary for a vicarious

72. Id.
73. Id.
74. Id. at 140.
76. Cubby, 776 F. Supp. at 141. “Plaintiffs have not set forth any specific facts showing that there is a genuine issue as to whether CompuServe knew or had reason to know of Rumorville’s contents.” Id.
77. Id. at 142.
78. Id.
79. Id.
liability claim; DFA was an independent contractor to CCI, and CCI was an independent contractor to CompuServe.80

C. Conclusions and Comments on Cubby v. CompuServe

Many commentators suggest that the holding in Cubby v. CompuServe is limited to cases with identical facts, and that the court's reasoning cannot be applied to the on-line marketplace as a whole.81 It is distinguishable due to the specific contractual relationships between the parties.82 CompuServe contracted out managerial and editorial control of the Forum to another party, CCI, who in turn contracted with a third party, DFA, for editorial control of Rumorville.83 However, if CompuServe had editorial control over the material in question, the court may have treated CompuServe as a publisher rather than as a distributor.84 Also, the court did not address the liability of DFA or CCI, as they had not been joined in the action; however, the crucial aspect of editorial control by DFA and CCI would have likely been a threshold question had DFA or CCI been named as defendants. These questions have been addressed in Stratton Oakmont's suit against Prodigy. The decision in that case hinged on the frame of analysis the court used to address Prodigy's role in making available the defamatory statements.

80. Id. at 143. For an employer to be vicariously liable for the tort of an independent contractor, the employer must have directed the act from which the injury resulted or have taken some affirmative, active part in the act. See Ramos v. State, 312 N.Y.S.2d 185, 186 (N.Y. App. Div. 1970).


82. Milton, supra note 81.

83. Cubby, 776 F. Supp. at 137.

84. Milton, supra note 81.
V. STRATTON OAKMONT, INC. v. PRODIGY SERVICES CO.

A. The Facts of Stratton Oakmont v. Prodigy

Like CompuServe, Prodigy is one of the large commercial on-line services, with over two million members at the institution of the lawsuit.\(^\text{85}\) Money Talk is one of the bulletin boards available on the service where members can post statements regarding stocks, investments, or other financial information.\(^\text{86}\) Prodigy contracts with people to serve as Bulletin Board Leaders. These people are responsible for promotional work to encourage usage and also participate in on-line discussions.\(^\text{87}\)

On October 23 and 25 of 1994, an unidentified bulletin board user posted messages about Stratton Oakmont, Inc., a securities investment banking firm on one of Prodigy's bulletin boards.\(^\text{88}\) The messages referred to a recent initial public offering from Stratton Oakmont, saying that the offering was a "major criminal fraud" and "100% criminal fraud."\(^\text{89}\) Stratton Oakmont commenced an action against Prodigy and the unknown user, alleging ten causes of action including per se libel.\(^\text{90}\) Stratton Oakmont sought summary judgment on whether Prodigy could be considered a publisher of the posted statements.\(^\text{91}\)

Prior to this incident, Prodigy had on numerous occasions held itself out as a family oriented network that exercised a level of editorial control over the content of its bulletin boards.\(^\text{92}\)


\(^{86}\) Id. Money Talk "is allegedly the leading and most widely read financial computer bulletin board in the United States . . . ." Id.

\(^{87}\) Id.

\(^{88}\) Id.

\(^{89}\) Id. The posted messages also referred to the president of Stratton Oakmont, Daniel Porush, as a "soon to be proven criminal," and described Stratton Oakmont as a "cult of brokers who either lie for a living or get fired." Id.

\(^{90}\) Id.

\(^{91}\) Id. Stratton Oakmont also sought summary judgment on whether the person employed as Board Leader for the Money Talk bulletin board acted as Prodigy's agent. Id.

\(^{92}\) Id. at *2. In one article produced by Prodigy's Director of Market Programs and Communications, Prodigy stated:

We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. 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.

Id.
B. Rules and Holding of Stratton Oakmont v. Prodigy

The court granted the plaintiff's motion for summary judgment on the issue of whether Prodigy acted as a publisher, saying that "Prodigy exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper." Prodigy relied on the Cubby v. CompuServe decision in support of its position, arguing that although they had reviewed all e-mail messages in the past, they did not do so any longer. Prodigy argued that the sheer volume of postings made it impossible for the service to manually edit each and every message. Prodigy also argued that although the Board Leaders had a certain level of control over their respective areas, they did not act as editors. However, the court noted two factual distinctions that altered its analysis of Prodigy's liability.

First, the court recognized that Prodigy had held itself out as controlling the content of its bulletin boards. Although Prodigy argued that newspaper accounts of its editorial control did not reflect the company's policy in October 1994, the time of the offending posting, the court did not find that Prodigy had produced sufficient evidence to refute this claim. The court took note of Prodigy's own out-of-court statements and additional evidence that indicated that Prodigy was a family oriented computer network.

Second, and more importantly, the court looked to the evidence of Prodigy's editorial control over the content of their bulletin boards. Prodigy utilized a software screening program which automatically screened all postings for offensive language, and implemented guidelines that Board Leaders were required to enforce. The court stated that "[b]y actively utilizing technology and manpower to delete notes from its

93. Id. at *3.
94. Id.
95. Id. At the time of the trial, 60,000 messages per day were posted on Prodigy. Id.
96. Id.
97. Id. at *4.
98. Id. at *3.
99. Id. at *2.
100. Id. at *4.
101. Id. The guidelines advise users that "notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed when brought to Prodigy's attention ...." Id. at *2. It bears mentioning that although commercial on-line services have the ability to screen out offensive language (i.e., curse words and racial epithets), there is no program which is able to detect defamatory statements.
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. Further, the court noted that Prodigy had assumed "the role of determining what is proper for its members to post and read on its bulletin board[s]," and that for these reasons, Prodigy is a publisher rather than a distributor.

C. Conclusions and Comments on Stratton Oakmont v. Prodigy

In deciding Stratton Oakmont v. Prodigy, the court gave full consideration to the decision in Cubby v. CompuServe, but differences in the fact patterns significantly altered the decision-making process and the outcome. In Cubby, CompuServe was connected to DFA, the company with editorial control over Rumorville, by an indirect independent contractor relationship. Prodigy could not make the same claim; Prodigy did not contract with anyone for editorial control over Money Talk. Another difference is that CompuServe made no claims that it screened or limited incoming postings to Rumorville, whereas Prodigy used a program to reject any messages containing obscenities. Also of note is the fact that Prodigy held itself out as a family oriented service that refused to provide bulletin boards or discussion groups that it deemed sexually explicit. This fact significantly influenced the court in its analysis of how to classify Prodigy.

If the court had applied the distributor framework to Prodigy, as the Federal District Court in New York did to CompuServe, the result would have been much the same as the Cubby case. As a simple distributor, Prodigy would have been treated as a newsstand or a book store; therefore, it could only have been assessed liability if it knew or had reason to know of the defamatory statements. Had the court chosen this analysis, it would have sent a message to prospective plaintiffs that if they do not like what is said about them, their solution lies on-line in the form of a rebuttal rather than in the arena of the court system.

Instead, the court ruled that Prodigy was a publisher; therefore, Prodigy faced full liability for the statements that one of its users posted,

102. Id. at *4 (citation omitted).
103. Id.
104. See supra part IV.A.
106. See supra note 40 and accompanying text.
as if it were a newspaper and the user were one of its writers. In the wake of this decision, it is likely that most major commercial on-line services will be faced with difficult choices. A service might choose to institute very strict standards to prevent any such defamatory language from reaching the bulletin boards. Alternatively, it might choose to take a totally hands-off approach in order that it appear to have no editorial control whatsoever, so as to fall under the auspices of a distributor rather than a publisher.

VI. RECOMMENDATION

Determining the framework in which to classify on-line services is the first step necessary to ascertain the liability of on-line services for the defamatory statements of their users. Assessment of liability will flow from this initial determination.

In the wake of the decision in the Stratton-Prodigy lawsuit, courts in this country could classify commercial on-line services as either publishers or distributors; there is now precedent to support both determinations. However, the court that next faces this issue should rule that commercial on-line services are distributors entitled to protection from liability for defamatory statements made by its users. Both CompuServe and Prodigy act as electronic libraries or newsstands that allow users to browse their collections. Considering the vast volume of cyber-communication, commercial on-line services such as Prodigy or CompuServe neither know, nor have reason to know of defamatory statements; therefore, like all distributors, commercial on-line services should be free from liability.

The court reasoned that because Prodigy held itself out as a family oriented service and subjected incoming messages to screening software, it had to be held to a higher standard. It stated that the more an entity exerts editorial control over its contents, the more it begins to resemble a publisher, rather than a distributor. The courts in future cases, however, must examine the nature of the editorial control exercised by commercial on-line services. They must consider that the process used by some commercial on-line services is only a mechanical process; employees do not act as censors over incoming material by


108. See supra notes 93-103 and accompanying text.
reading every message. Considering the scope of the information available in cyberspace and the exponential growth of the on-line community in the last few years, courts would place an unreasonable burden on commercial on-line services and the First Amendment protection of free speech by holding those services liable for all that is posted on their systems.

If courts continue down the path trod by the Supreme Court of New York and treat on-line services as publishers, all commercial on-line services would be faced with the Herculean task of reading through each and every posting sent to their bulletin boards or developing a screening system that could distinguish between defamatory speech and other types of speech. Either option would excessively burden on-line service providers and would likely result in nondefamatory messages being accidentally rejected.

Even more importantly, institution of the Stratton Oakmont v. Prodigy legacy would chill the free expression that most on-line users have come to expect. The economic impact on the commercial on-line services would be significant; not only would they have the financial cost of instituting speech-limiting measures, they would also likely face a loss of users who do not relish the idea of a big brother entity monitoring all they say on-line. These are the very reasons the courts have protected distributors from liability.

VII. CONCLUSION

Thus far, courts in our country have not satisfactorily addressed the liability of a commercial on-line service for the defamatory statements of a user. With the outcome of the Stratton-Prodigy litigation, this new area of the law must be clarified. Although the Stratton court tries to reconcile its decision with Cubby v. CompùServe, it fails and leaves this area of the law uncertain and inconsistent.

Although some may argue that on-line services act as publishers, the proper standard to apply to on-line services is the distributor framework. It would be excessively burdensome on both the commercial on-line services and the First Amendment for future courts to rule otherwise. Courts would be wise to consider the words of Judge Fremming Nielsen of the U.S. District Court for the Eastern District of Washington:

109. Were they required to do so, Prodigy would have to edit over 75,000 postings on 1000 bulletin boards each day. Goldstein, supra note 45.
[Such a] construction would force the creation of full time editorial boards... which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face [multimillion dollar] lawsuits at every turn. That is not realistic.\textsuperscript{110}

On this issue, the courts must make the wise decision to avoid imposing unnecessary burdens on both the commercial on-line service providers and the millions of users of these systems.

Most on-line service users believe cyberspace to be a system allowing for the free exchange of ideas. In such a system, there is a better response than a lawsuit when one finds a statement on-line that one does not like: get on the keyboard and send a measured statement in kind letting people know what you think.

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\textsuperscript{110} Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 931 (E.D.Wash. 1992). In this case, Washington apple growers brought suit against CBS and local CBS affiliates for defamation and disparagement following an investigative report regarding the use of Alar by apple producers. The report alleged that Alar caused cancer.