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THE LIABILITY OF COMPUTER BULLETIN BOARD OPERATORS FOR DEFAMATION POSTED BY OTHERS

*Loftus E. Becker, Jr.**

I. INTRODUCTION

New technologies bring new dreams, but the memory of the law is long and its dreams are often old. In the last decade, millions of Americans have bought powerful home computers. One consequence has been the blossoming of thousands of computer *bulletin boards* across the nation—indeed, the world—since the first was set up in 1978.¹ Many computer owners find these boards a new and exciting medium of communication.

Computer bulletin boards range in size from wholly private boards run from a small home computer² to commercial services run on extremely powerful, linked mainframe computers³ with hundreds of

* Professor of Law, University of Connecticut School of Law. A.B., Harvard College; LL.B., University of Pennsylvania. Member, District of Columbia Bar. Work on this article was substantially advanced by two research assistants, Alison Mneek and Laura Welsh. Some statements in this article about the way computers or computer bulletin boards operate are made without citation of authority. I have been involved with computers as a programmer since I first worked for the National Aeronautics and Space Administration in 1961, and with personal computers and computer bulletin boards for more than five years. Since 1987, I have been an Assistant Sysop on MAUG(r), a set of bulletin boards on the CompuServe network. Otherwise unsupported statements are made from my own experience and knowledge. The opinions expressed here are entirely my own.

I welcome comments, electronically CompuServe 76703,4054 or by ordinary mail: University of Connecticut Law School, 65 Elizabeth Street, Hartford, CT 06105-2290. Copyright (c) 1987-1989, Loftus E. Becker, Jr.

1. *Computer Pornography and Child Exploitation Prevention Act: Hearing on S. 1305 Before the Subcomm. on Juvenile Justice of the Committee on the Judiciary, U.S. Senate*, 99th Cong., 1st Sess. 62 (1985) [hereinafter *S. 1305 Hearings*] (testimony of William J. Cook).

2. In October 1985, it was possible for an individual with a home computer and access to a telephone line to set up a computer bulletin board with less than \$350 of additional expenditure. *Id.* at 28 (statement of Jack D. Smith, General Counsel, Federal Communications Commission); *id.* at 61-62 (statement of William J. Cook). Today it could be done for less than \$100, and a functioning bulletin board could be started from scratch for under \$500.

3. The industry typically groups computers into four categories, depending roughly on the size

thousands of users.⁴ These boards allow users to disseminate their knowledge, questions, and opinions—within minutes or hours—to widespread audiences.⁵ The next section of this article describes in more detail my definition of the term *computer bulletin board*; for now, it can be thought of as the electronic analogy to a public, ordinary bulletin board—a kind of computerized Democracy Wall—on which users can post whatever information they desire, and from which users can retrieve information provided by others.

With power come problems. Wide dissemination of knowledge, ideas, opinions, and exhortations is not always a good thing. Computer bulletin boards have been used for cheap and convenient communication among people engaging in sexual activities with young children.⁶ They have been used to publicize credit card and long-distance charge numbers,⁷ and to disseminate illegal copies of copyrighted, commercial

and power of the machine, although with new technology appearing on an almost monthly basis the divisions are necessarily blurry. "Microcomputers" (or "personal computers") are the smallest. Typically used by one person, this group includes the various IBM-PC's and clones, and Apple computers; they usually cost from \$400 to \$10,000. "Minicomputers" are larger, more expensive, and often used simultaneously by several people. "Mainframe" computers are quite large, typically requiring a room or rooms to themselves, and extremely powerful. Sold by only a few makers, they are owned or rented by organizations such as NASA, universities, and large private businesses. "Supercomputers" are rare, extraordinarily fast, and expensive; the best known are those manufactured by Cray, and there are fewer than 500 in existence. *World Market Dynamics in High Performance Computing*, SUPERCOMPUTING REV. Dec. 1989, at 38, 39.

4. Although the major services are chary about revealing details, an on-line newsletter called *Interactivity Report* estimated in March 1989, half a million subscribers for CompuServe, 275,000 for Dow Jones News/Retrieval, and 150,000 for General Electric's GENie network. CompuServe Information Service, *Survey Finds 1.6 Million Online*, ONLINE TODAY, March 23, 1989 (OLT-598).

5. In general, anyone with the proper equipment and access to a telephone line can get access to a computer bulletin board. The cost of accessing a private board will typically be the cost of the telephone call, whether local or long distance. Commercial boards generally charge access fees ranging from \$5.00 to \$30.00 or more per hour, and provide local phone numbers throughout most of the continental United States. Access from other countries and continents is typically more expensive.

Notwithstanding the costs, commercial services in the U.S. are regularly used by Canadians and frequently used by correspondents in Asia, Europe, Australia, and New Zealand.

6. *S. 1305 Hearings*, *supra* note 1, at 16-18 (opening statement of Special Agent Kenneth V. Lanning, FBI); *id.* at 31 (testimony of Henry Hudson, Commonwealth's Attorney, Arlington, Va.) (five computer systems in operation in the Washington, D.C. area communicating "information pertaining to children disposed to engage in sexual activities with adults," including one with the reported capacity to transmit photographic images).

7. After *Newsweek* published a signed article critical of computer "hackers," the author found his Visa account number posted on a number of private bulletin boards. *Writer Feels Wrath of Computer Buffs Angered by Article*, N.Y. Times, Dec. 9, 1984, § 1, at 88, col. 4.

computer programs.⁸ A computer bulletin board (like most means of communication) can be used to commit or facilitate almost any imaginable kind of legal wrong.

One important question is the liability of *operators* of computer bulletin boards when their boards are used by others to further unlawful ends. When *are* operators of a computer bulletin board criminally or civilly responsible for the dissemination of information placed on the bulletin board by third parties, that may be tortious, criminal, or in violation of copyright—and when *should* operators be responsible? The answer to these questions will not only directly affect the legal rights of some thousands of system operators. The answers will also help determine whether computer bulletin boards continue to develop as a widespread alternative to the far more limited, traditional methods of communication.⁹

At the moment, legal issues surrounding computer bulletin boards comprise a land with no maps and few native guides.¹⁰ There are analo-

8. In the summer of 1986, one frustrated Macintosh user on a large public service complained that a local *pirate* bulletin board had a broader selection of commercial software available for downloading than any nearby computer store offered for sale.

9. Of course, traditional print, wire, and broadcast media at present allow individuals to get a message to far more people (or to a few people, but more quickly) than computer bulletin boards. But traditional media have substantial limitations. Phone calls are cheap but reach only a few. Letters to periodicals may reach a wide audience, but only a few letters are actually printed and those few are often heavily edited. Advertising, in periodicals or on radio or television, can reach many people, but at a cost prohibitive for most individuals.

10. There are a few published discussions. See, e.g., J.D. WALLACE & R.W. MORRISON, *SYS-LAW: THE SYSOP'S LEGAL MANUAL* 45-46 (1988) (discussing the question briefly and advising caution on the part of system operators); Comment, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COMM. L.J. 217 (1987) [hereinafter Comment, *Electronic Soapbox*] (discussing some of these questions, primarily from a constitutional perspective); Note, *Computer Bulletin Board Operator Liability for User Misuse*, 54 *FORDHAM L. REV.* 439 (1985) (considering potential tort liability at some length and potential criminal liability in a paragraph; it takes the position, contrary to that urged in this article, that bulletin boards are primary publishers of defamation posted by third parties); Soma, Smith & Sprague, *Legal Analysis of Electronic Bulletin Board Activities*, 7 *W. NEW ENG. L. REV.* 571 (1985) (collecting a considerable number of state and federal criminal statutes directly regulating the transmission of information on bulletin boards); Stevens & Hoffman, *Tort Liability for Defamation by Computer*, 6 *RUTGERS J. COMPUTERS & L.* 91 (1977) (an early article, written before the first public computer bulletin board was started in 1978, focusing on liability for inaccurate credit reports disseminated by computerized credit reporting firms).

The most extensive discussion is Note, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 *J. L. & TECH.* 121 (1987). Taking a position directly contrary to that argued here, that Note objects to any rules that would "require different treatment for different bulletin boards or even for different uses of the same board," *Id.* at 140, and proposes a single "new standard of liability specific to computer bulletin boards." *Id.* at 123. Absent voluntary action by bulletin boards, the author of the note proposes federal legislation

gies in the law, which have dealt specifically with the responsibility of telegraph and telephone companies, broadcasters, publishers, and newsdealers for passing along defamatory statements. But the analogies are not obvious, and the traditions not fully coherent. Nor have answers been clarified either by litigation or by legislation.

My purpose in this article is to provide some answers to the question of liability for defamation resulting from computer bulletin board use. I choose this particular topic for two reasons. Since tort litigation is instituted by private parties, and there are a host of potential plaintiffs, we can expect to see the first cases arising shortly.¹¹ Application of the peculiarly "medieval" tort of defamation to yet another new technology makes the subject particularly interesting.

My discussion is influenced by two particular considerations. First, I believe that computer bulletin boards should be taken seriously as a medium of communication. Although it would be premature to claim that they have an influence comparable to the printed press or the broadcast media,¹² computer bulletin boards are important to many people now. It is certainly conceivable that in twenty or thirty years they may be more important to most Americans than printed newspapers and books. Second, and contrary to the position taken by previous writers on the subject,¹³ it is a mistake to turn the legal rules on whether or not an entity is called a computer bulletin board. Instead, we should recognize that *computer bulletin boards* transmit different kinds of information in different ways, and apply different regulatory norms to the very different ways of communicating information through them. We should not be misled by a label into thinking that all communication through computer bulletin boards is the same.

Part II of this article describes the *computer bulletin boards* of which I write, and the (in my view) very different services they provide.

adopting his standard and, perhaps, licensing and regulation of bulletin boards by the FCC. *Id.* at 149-50. The author does not discuss the question whether licensing of such a means of communication would be constitutional.

11. Cf. Complaint, *Thompson v. Predaina*, No. IP-88 93C (S.D. Ind. filed Jan. 27, 1988) (alleging wrongful disclosure of private messages and defamation through messages posted by the system operator).

12. They are not, however, without influence. The *Wall Street Journal* has noted that a recent FCC proposal that would increase access charges by about \$5.00 per hour had generated more than 5,000 letters of comment by the date of the article's publication, which was before the close of the comment period. *Wall St. J.*, Sept. 29, 1987, at 41, col. 3. The greatest number of letters ever generated by an FCC proposal regarding the telephone system was 6,000. *Id.*

13. Comment, *Electronic Soapbox*, *supra* note 10; Note, *Computer Bulletin Board Operator Liability for User Misuse*, 54 *FORDHAM L. REV.* 439 (1985).

Part III discusses the existing law of defamation. In that section, I argue that under existing law, some transmissions by computer bulletin boards should be without liability because the operator should not be seen as a *publisher* of the information. Other transmissions, however, should expose the operator to liability, although only upon a showing that the operator had actual knowledge that defamatory material was being transmitted. Part IV briefly considers the impact of the first amendment on these conclusions.

II. AN OVERVIEW OF COMPUTER BULLETIN BOARDS

Computer bulletin board is not a term of art; it means what the speaker points to when he says it. Accordingly I shall describe, with some specificity, just what my subject is.

A. *Computer Information Systems*

Computer bulletin boards are a subgroup of a more general class which may be called computer information systems. Such services are a means to distribute information by computer. They require at least one computer, to which individual users may gain access. They also require some capacity to store the information that will be distributed (typically, magnetic disks or tape); a *host* program, which controls the computer¹⁴ and allows users to gain access to the stored information; a *modem*,¹⁵ which translates information from a form in which it is usable by the computer to a form in which it can be transmitted over telephone lines, and vice versa; and access to one or more telephone lines.¹⁶ In 1985, a computerized information service could have been set up for a few hundred dollars.¹⁷ Generally, however, a useful one will require an investment of \$1000 or more, and commercial services involve far larger investments.

Using the service is much easier than running it. A user need have only a *terminal*—a display device and a keyboard¹⁸—connected to a

14. Such host programs are typically designed to run with as little human intervention as possible. Large commercial systems run host programs designed specifically for that system, and often implemented and maintained by the system's own staff. Bulletin boards operating on personal computers more often run free or commercial programs, of which a number are available.

15. *Modem* is shorthand for *modulator-demodulator*.

16. There is no theoretical reason that communication need be over telephone lines. It could be by other methods, ranging from direct connection to radio or satellite communication. In practice, however, almost all computer bulletin boards presently operate via telephone lines.

17. *S. 1305 Hearings*, *supra* note 1, at 63 (statement of William J. Cook).

18. A terminal can be a form of electric typewriter, like an old Teletype machine, or a video

modem, which in turn is connected to a telephone line, and the information (phone number and sometimes passwords) necessary to access the service.

Computer information services can be usefully divided into two classes. One class is designed only to distribute information placed in the system by the operator. Many of the best-known services such as LEXIS, Dialog, WESTLAW, and Medline are of this kind.¹⁹ Users may access the service to receive information stored in it, but they cannot add information to the system for distribution to others.²⁰ The second category, which I refer to as *computer bulletin boards*, comprises systems that store information sent in by users and retransmit that information to other users. These range from large commercial services, such as CompuServe and GENIE, with hundreds of thousands of users,²¹ through large linked systems, such as FidoNet,²² to individual systems which at their smallest may have only a few users. Almost anyone can (and does) run a computer bulletin board, including police departments, politicians running for office, and state legislatures.²³

display device and keyboard. Most often these days, however, the user's terminal is a personal computer running a program which allows the computer to act like an old-fashioned terminal.

19. Technically, this is not quite correct. Due to the way they communicate, many such services in fact "echo" to the user everything the user sends to the computer. Moreover, services such as LEXIS and WESTLAW do take a small amount of information from their subscribers (such as the name of the client, the matter worked on, search information, and so forth). However, since this information is not available for general distribution, but only retransmitted to the particular user, these systems for all practical purposes distribute only information placed there by the service operators.

20. At least they are not supposed to be able to do so. I have not heard reports that anyone has gained access, for instance, to LEXIS to add spurious cases or modify existing ones; but as the technical ability of young people continues to rise, I expect to see it happen sometime.

21. For instance, CompuServe, a subsidiary of H & R Block, takes in over \$70 million in revenues. *S. 1305 Hearings*, *supra* note 1, at 50 (statement of George Minot).

22. FidoNet is an informal network of more than 2,000 personal computer bulletin boards, located "from Singapore to Stockholm." Manning, *Program to Link Mac BBSs Worldwide With FidoNet*, *Macintosh Today*, Oct. 26, 1987, at 16, cols. 1-2. Each board on the network spends some time late at night automatically calling other boards and passing messages on. A message will percolate throughout the United States in about three days. Other well-known networks include Internet, much in the news recently when it was used to distribute an irritating computer tapeworm program. See *Spreading a Virus*, *Wall St. J.*, Nov. 7, 1988, at 1, col. 1.

23. Garramone, Harris & Anderson, *Uses of Political Computer Bulletin Boards*, 30 J. BROADCASTING & ELEC. MEDIA 325, 325-26 (1986). A recent listing of high-speed bulletin boards distributed electronically by Hayes Microcomputer Products included the Health & Safety System, run by the University of Tennessee in Knoxville, distributing health information; ChemNet, run by the University of Akron for the distribution of hazardous chemical information; MedMug, from the U.S. Army medical base at Fort Devins; LegalEase, a bulletin board for lawyers in Spokane, Washington; and others directed at lawyers, government computer users, musicians, or broadcasters, in addition to general and computer-oriented boards. *Hayes V-series*

The smaller systems go up and down literally on an hourly basis, and no one really knows how many are presently operating. One article estimated that there were more than 3,500-4,500 such systems available to the general public as of late 1985,²⁴ and the number is certainly larger now. The Videotex Industry Association recently estimated that about half a million people in the United States use one or more free public access bulletin boards.²⁵

B. *Access to the Board*

Subject to the limitations of the host program, the operator of the board decides who has access to it. Some boards, such as company bulletin boards, are restricted to a few individuals or groups. But many (probably most) boards are not so limited. They may have completely open access, that is, they are available to anyone with the necessary equipment who dials the proper phone number.²⁶ Sometimes access is limited until the caller leaves a name and telephone number; the operator may call that number in a simple attempt to verify the user's identity, and allow greater access only if the verification appears successful. There may be a one-time or annual charge to use the board.²⁷ Commercial services require users to sign up and provide verifiable billing information, typically a credit card number. Such commercial services generally bill their clients a fee depending on how long the client has used the board or on the particular services obtained.

Smartmodem 9600 Bulletin Board Listing (June 6, 1989) (published electronically, on file at the Connecticut Law Review).

24. Soma, Smith & Sprague, *Legal Analysis of Electronic Bulletin Board Activities*, 7 W. NEW ENG. L. REV. 571, 572 & n.3 (1985) (estimating 3,500-4,500 boards). FidoNet is an informal network of some 6,000 bulletin boards worldwide. Blankenhorn, *The State of the Fido is Healthy but Troubled*, NEWSBYTES, Sept. 12, 1989 (NEW09120093). A spokesman from Hayes Microcomputer Products, a major modem manufacturer, on November 9, 1988, tallied 120 boards running with its new, extremely fast, and relatively expensive 9600-baud modems.

25. Comments of the Videotex Industry Association on the Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies at 8, *United States v. Western Elec. Co.*, Civ. Action No. 82-0192 (D.D.C.)^{*} (the *Connecticut Law Review* was unable to check this citation).

26. Programs exist to automatically dial telephone numbers (randomly, or in a particular sequence), to determine whether a computer attached to a modem has answered, and if so, to record the number for future use. Some hobbyists make extensive use of these programs to locate bulletin boards, usually late at night when long-distance rates are cheapest.

27. Typical charges for amateur boards are \$10.00 to \$25.00; the highest I have heard of was \$50.00.

C. *Limitations on Use*

Not all users have access to all aspects of a board. Invariably, the operator of the system and his assistants can do many things that ordinary users cannot. In addition, some features of a board may be available only to some users. As with limitations on access to the board, the availability of special features is controlled by the system operator within the constraints imposed by the host program. Amateur boards may restrict more sensitive materials to friends of the operator or to cash contributors. Commercial services often have sections available only to employees of a particular company or other defined groups,²⁸ and they often charge additional fees for some services, such as the electronic Official Airline Guide.

Access is limited by a *logon sequence*. Where security is critical, logging on may be extremely complicated;²⁹ more often, it is quite straightforward. The user dials the board's number³⁰ and when connection is established gives two pieces of information: his *user name* (sometimes a number), which others on the system will use to send him messages,³¹ and his private password. The combination of user name and password is an attempt, not always successful, to insure that third parties do not leave messages, incur charges, receive mail, and so forth, in the user's name.³²

28. For instance, GENie (a commercial service run by General Electric) has forums open only to people who have purchased particular programs. MCI Mail, another commercial service, maintains areas open only to people who have been vetted by subscribing companies which use these areas to distribute confidential information on their products. One "pirate" board, Dragon's Lair, allowed only those who had "contributed" pirated computer programs to have access to similar programs "contributed" by others.

29. A user may be required to dial the board, identify himself, and hang up; the board may then look up his authorized telephone number and call him back at that number, thereby attempting to insure that anyone who cannot use or tap into one of a limited number of phone lines cannot get access to the board. More complicated and more secure schemes are possible. Obviously, there is a continuing war between security and ease of use.

30. Amateur boards most often have a single telephone number. Commercial services can usually be accessed through nationwide networks providing local telephone numbers in much of the United States.

31. This may or may not be the user's real name. Most often it is either a number or a collection of letters chosen by the user. The author, for instance, is 76703,4054 on CompuServe, D0529 on AppleLink, and LBECKER on MCI Mail.

32. The attempt may be unsuccessful because the user has failed to keep the password confidential, because the system has failed to keep the password confidential, because of an error in the host program, or because someone has successfully managed to guess another person's password. Errors in host programs are by no means unknown. Over the last four years, the author has several times been logged on to one major national service under someone else's identity—after signing on with his own user name and password.

D. *The Components of a Bulletin Board*

Bulletin boards are typically divided into sections. An amateur's board may have a few sections, a commercial board hundreds.³³ It is no more possible to characterize them all than it would be to characterize the organization of periodicals. But typically, the sections operate in one of a few ways relevant to the present discussion.

1. Public Message Areas

The heart of the system is typically one or more public message areas, where users may read messages previously *posted* by others and may post their own messages (by typing them from a keyboard, or by otherwise transmitting a message previously prepared and stored). Commercial services have scores of sections, arranged by topics ranging from politics, sex, and religion through literary criticism to tropical fish. The common denominator of these sections is that messages, once posted, may be read by anyone else with access to the section involved. Their attractiveness to users is the breadth of the audience and the speed with which messages are available and answers may be given.³⁴ Messages are typically posted and available for reading immediately, without additional human intervention.³⁵

2. Private Mail

Many boards also offer private mail. Users can send messages to specific individuals, which messages supposedly can be read only by the person to whom the message is addressed—more precisely, only by someone gaining access to the system using the name and password of the person addressed. It is usually true that such “private” mail can easily be read by the operators of amateur systems, and probably true that it can be read by the operators of commercial services should they want to do so.³⁶ But the attractiveness of private mail is obviously its

33. CompuServe, for instance, has more than four hundred sections, some of which have ten or more subsections.

34. See, e.g., Rittner, *Electronic Bulletin Boards Offer 'Round-the-Clock Services*, MACWEEK, Feb. 23, 1988, at 31, 34.

35. There is no technical reason that this need be so—host programs could be written to delay posting until the message is approved by the system operator—but delay would decrease the attractiveness of the system and impose a large burden on the operators. For instance, the most popular of several Macintosh-oriented sections on CompuServe currently receives about 400 messages a day. Many, but not all, operators, however, review messages regularly and occasionally delete those they find offensive; most large commercial systems review messages at least daily.

36. This is so because any large computer system will regularly be *backed up*, that is, all the

privacy. It is invariably transmitted without any human intervention from the operator of the board.

3. Conferencing

Boards that can handle many users at one time often have *conference* systems, sometimes described as the computerized equivalent of citizens' band radio. Users go to a conference area of the system where whatever they type is immediately displayed to all other users in the section.³⁷ Some conferences are entirely unstructured and consist mostly of chatter; others are quite formal, rather like a press conference designed to let users ask questions of a popular or important personality; and still others are quasi-professional meetings for the discussion of common problems or the creation of common standards. The messages typed in are viewed by others immediately and typically not retained for further use or retransmission by the bulletin board. However, the user of a system typically has the capacity to record anything he receives and to print it out or otherwise distribute it later.

4. File Areas

Almost every bulletin board system maintains one or more public *file areas* to which files may be *uploaded* (sent) by users and from which the files may be *downloaded* (received) by others.³⁸ A file is anything readable by a computer. It may be a simple text file, *i.e.*, a stream of letters, numbers, and punctuation. It may be a *formatted* text file, as used by a word processor, containing not only text but also information on how the text is to be presented (including typeface, paragraph indentations, and underlining). It may be a computer program (commercial or otherwise, copyrighted or not), or a file of information to be used by a computer program. It may be a graphic image—simple,

information in the system will be stored on magnetic tape or disks so that it can be restored in the event of a catastrophic failure. Accordingly, even if the system software does not allow the operator to read "private" mail in the ordinary course of operation, the mail will have been stored on tape or disk and, with some effort, can be read from there. *See, e.g.*, Brief in Support of Motion to Quash Grand Jury Subpoena, *In re* Grand Jury Subpoena, Misc. No. 83-020 (E.D. Mich. filed July 15, 1983) (responding to motion to quash subpoena for backup tapes containing private mail, opposing party admitted that private mail on the system at the time the backups were made could, with some difficulty, be located and read).

37. A system may have many separate conference areas. Some systems also allow a user to send a brief message to anyone else currently logged on. These messages are displayed immediately and typically not retained by the system. Unlike messages sent in conference, however, they are seen only by the addressee.

38. There also may be private file areas for individual users or groups.

like the Santa Clauses made of X's and O's, or more complicated, like *digitized* photographs.³⁹ It may even be a (usually rather primitive) movie. It may be music or other sounds, again *digitized* (translated) into a form that can be processed by a computer. For many users, a major attraction of computer bulletin boards is the information, particularly the computer programs, that they can download from the board's file areas.⁴⁰ In part because of quite realistic fears that some users may illegitimately upload copyrighted computer programs, material uploaded to files areas on large systems is typically put in a *holding* area not available to the public until it has been in some way reviewed by an agent of the system.⁴¹

III. OPERATORS' LIABILITY FOR DEFAMATION

Computer bulletin boards, like any means of communication, can be used to further unlawful ends. The board is merely the messenger, and the message can be as varied as human ingenuity. The law historically has been ambivalent in its treatment of bearers of bad tidings. Medieval rulers sometimes vented their spleens at unwelcome news on its bearer. While modern law holds the telephone company wholly harmless for the phone calls it carries daily,⁴² those who publish printed matter have routinely been subject to civil (though never, so far as I can determine, to criminal)⁴³ liability for the contents of advertisements originated by others.⁴⁴ Telegraph companies, which have faced

39. The current active state of the art easily allows for computer transmission and receipt of good line drawings and quite good photographs, better than most photographs printed in daily newspapers. In theory, however, a graphic image can be of almost any quality.

40. It is not unusual for a single file to be downloaded by several hundred people during the first day it is posted.

41. Recent concern with potentially dangerous computer programs—computer *viruses* and their ilk—is another reason that files are often reviewed.

42. RESTATEMENT (SECOND) OF TORTS § 581 and comment b (1976), states the tort law rule (one who only delivers or transmits defamatory matter published by a third person is subject to liability if he knows or has reason to know of its defamatory character; but the telephone company neither "delivers" nor "transmits" matter within the meaning of the rule). Not surprisingly, I have been unable to find a criminal prosecution of any American telephone company based on its transmission of criminal messages. Cf. *People v. Lauria*, 251 Cal. App. 2d 471, 59 Cal. Rptr. 628 (1967) (unsuccessful prosecution of telephone answering service extensively used by prostitutes).

43. Some state criminal libel statutes could apply to paid advertisements, see, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (Illinois statute), but I am not aware of any actual prosecutions of publishers for advertising.

44. E.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (seminal case holding the first amendment applicable to libel actions, involved an advertisement in *The New York Times*; Court did not find it significant that the matter was published as an advertisement).

criminal prosecution,⁴⁵ are said to fall in between telephonic and print message carriers, with a broad but not unlimited immunity from liability for the transmission and delivery of messages.⁴⁶ The highly regulated radio and television industries have at times been held liable for information originated by others in which they had only a mechanical part in the transmission.⁴⁷ Where computer bulletin boards should fit in this patchwork of different rules for different types of carriers is a question not yet decided.⁴⁸

The "medieval" common-law tort of defamation has not adapted gracefully to modern times.⁴⁹ Its outlines, however, are reasonably clear. A case for defamation was classically made out if the defendant had "published" a false and defamatory communication⁵⁰ about the

45. *E.g.*, *Commonwealth v. Western Union Tel. Co.*, 112 Ky. 355, 67 S.W. 59 (1901) (transmission of apparently innocent messages not criminal); *State v. Western Union Tel. Co.*, 12 N.J. 468, 97 A.2d 480, *appeal dismissed*, 346 U.S. 869 (1953) (conviction for maintaining a disorderly house based on transmission of gambling information).

46. *See* RESTATEMENT (SECOND) OF TORTS § 612 comment g (1976) (Telegraph companies are "privileged to accept and transmit an obviously defamatory message, not only when the sender is in fact privileged to send it, but also when he is not, unless the transmitting agent knows or has reason to know that the sender is not privileged.").

47. *See infra* notes 100-10 and accompanying text.

48. There are, as yet, no reported cases involving the liability of a bulletin board operator for disseminating information provided by a user of the board. The closest so far reported are *California Software, Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356 (C.D. Cal. 1986), a suit about (among other things) messages posted on a computer bulletin board, as it turned out, by the operators of the board; and *L. Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425 (D. Conn. 1986), where a bankruptcy report was disseminated with the wrong social security number. In *Cohen*, however, the social security number had been provided by the person who asked for (and received) the information.

In the middle of 1986, when a derogatory message about a Connecticut software mail order house was posted on one California bulletin board, the board was contacted by lawyers from the mail order house threatening suit if the material was not removed. This author was contacted by the board for advice. The matter lapsed when the mail order house, under investigation by a state department of consumer protection, went bankrupt.

49. Criticism is legion. *See, e.g.*, W. PROSSER & W. KEETON, *THE LAW OF TORTS* 771-72 (5th ed. 1984) [hereinafter PROSSER & KEETON], and articles cited *supra* note 10. If, however, one thinks of the "law" of defamation as being, in Holmes's words, "what the courts will do *in fact*," O.W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 173 (1920) (emphasis added), it is questionable how many of the odder asserted rules of the law of defamation would be followed by a modern court. For example, Prosser and Keeton's statement that defamation law holds the printer in the print shop where a newspaper is printed liable for a defamatory statement published in the newspaper is supported by a single case from 1775, and a "cf." citation to another case from 1897. PROSSER & KEETON, *supra*, at 799 n.26. Prosser and Keeton, of course, recognize that defamation law is changing. *See id.* at 804-05.

50. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1976).

plaintiff to a third person.⁵¹ In addition, and in part under constitutional compulsion, the law frequently but not invariably now requires some showing of fault on the part of the plaintiff.⁵² *Publication* is a term of art which we will examine later. For the moment, it is sufficient to define *publication* as communicating the defamation in circumstances where it can reasonably be expected to be understood by others, and is so understood.⁵³

Existing law divides those who disseminate defamatory information into three categories: primary publishers, secondary publishers, and "not publishers at all."⁵⁴ Primary publishers—such as magazines or newspapers, as well as the authors of defamatory articles therein—are fully liable for defamation.⁵⁵ Secondary publishers—such as bookstores, news dealers, and telegraph companies—typically are said have a qualified privilege, and are liable only if they know or have reason to know of the defamatory character of the information they are transmitting.⁵⁶ Still others, such as the telephone company, may pass information along but are not said to have published it and thus are not liable at all.⁵⁷ The question is where bulletin boards fit into this scheme. Since the reasons, other than history, for the current classifica-

51. In addition, the publication must have been without "privilege," and unless the defamatory statement was of a kind actionable irrespective of special harm, the plaintiff must show actual damages. RESTATEMENT (SECOND) OF TORTS § 558 (1976). I am not here concerned with the allocation of burdens of pleading and proof.

52. See *infra* section IV.

53. There is no defamation unless some person other than the defendant and the one defamed becomes aware of the communication, RESTATEMENT (SECOND) OF TORTS § 577 comment d and illustration 2 (1976), although this element may be satisfied by a showing that the communication was made in circumstances where others probably understood it. *Gaudette v. Carter*, 100 R.I. 259, 214 A.2d 197 (1965). And there is no defamation if the defendant did not and could not reasonably have expected others to become aware of the communication, as in the case of private letters opened by a third party. See, e.g., *Barnes v. Clayton House Motel*, 435 S.W.2d 616 (Tex. Civ. App. 1968).

54. PROSSER & KEETON, *supra* note 49, at 803 (labeling the third category "suppliers of equipment and facilities" who "are not publishers at all").

55. RESTATEMENT (SECOND) OF TORTS § 581 comment c (1976). By "fully liable" I mean only that they are liable as if they had originated the statement, and not that they are necessarily liable without some kind of negligence regarding the truth or falsity of the statement (although the common law rule is often said to have imposed strict liability). See *id.* at § 580B comment b (where the act in issue is publication of a communication to a third party, "the common law of defamation has consistently required negligence or other fault for liability to be imposed").

56. E.g., *Hartmann v. American News Co.*, 171 F.2d 581 (7th Cir. 1948) (magazine distributor), *cert. denied*, 337 U.S. 907 (1949); *Church of Scientology v. Minnesota Medical Ass'n*, 264 N.W.2d 152 (Minn. 1978) (association distributing clippings and articles on request); see also RESTATEMENT (SECOND) OF TORTS § 581(1) (1976).

57. RESTATEMENT (SECOND) OF TORTS § 581 comment b (1976).

tions are not at all evident, the position of bulletin boards is far from clear.

Navigation in these waters is rendered even more treacherous by the uncertain applicability of the first amendment. Since *New York Times v. Sullivan*⁵⁸ held that amendment applicable to defamation cases under state law, no chart would be complete without including it. But new technology has made the location of that "fixed star in our constitutional constellation"⁵⁹ less certain and its brilliance more variable; it may or may not shine brightly on computer bulletin boards.⁶⁰ Hence, I shall deal first with defamation law as it developed with the first amendment in eclipse, and then consider the extent to which different results are permitted (or compelled) by the constitutional protection of free speech and press.

I begin with the assumption that a user of a computer bulletin board has received through that board information posted by a third party which defames someone else, and that the person defamed could recover damages from the person who posted it. The question I address is in what circumstances the bulletin board operator is also liable.

A. *What is "Published"*

Alice, a user of a computer bulletin board, logs on to the board and transmits information defaming Barbara. The information is stored electronically and automatically by the "host" program controlling the board's computer. Thereafter, without human intervention on behalf of the bulletin board,⁶¹ Carol logs onto the board and receives the information. There is no question that distribution of information by computer can sometimes be a publication,⁶² and that the person who provides the information for access by the person who gets it⁶³ publishes

58. 376 U.S. 254 (1964).

59. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.).

60. *See infra* section IV.

61. *See supra* text accompanying notes 34-35.

62. *E.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985); *California Software, Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356 (C.D. Cal. 1986). In both cases, the point was assumed and not challenged or discussed. *See generally* Stevens & Hoffman, *Tort Liability for Defamation by Computer*, 6 *RUTGERS J. COMPUTERS & L.* 91, 93 (1977).

63. Only if the sender could have reasonably expected that the message would be communicated to someone who would have an actionable claim against him, would he be deemed to have "published" it to the third party under existing law. This would occur, for instance, where a third party has read defamatory electronic mail sent to the subject of the defamation or a vandal gains access to private files. *See supra* note 53.

it.⁶⁴ The question is whether the bulletin board operator publishes it as well.

Two analogies suggest that the operator may not have published the defamation. An engaging line of cases, dealing with the liability of physical bulletin board owners for defamatory material posted by others,⁶⁵ would hold at least that there is no publication unless the operator, knowing of the defamatory material, thereafter fails to remove it. The doctrine that one who merely provides "facilities and equipment" for the dissemination of defamation has not "published" it should apply to at least some kinds of transmissions by computer bulletin boards.

1. *Bulletin Board Cases*

A handful of litigated cases have involved the liability of property owners for defamatory materials put on their property by someone else. Those cases view the critical question as that of publication, and typically hold that the owner who knows of the defamatory statement, and fails or refuses to remove it after a reasonable amount of time, is liable either for "publishing" the statement or for "ratifying" its publication.⁶⁶ Thus, the property owner, by inaction, accepts responsibility for

64. Since all of the existing cases of defamation by computer involve information supplied by an agent of the system's operator, it would be possible to argue that they are finding the operator liable not because it provided the information with the intention that it be communicated to others, but only because it made the actual physical transmission. Thus, he who provides the libelous information would be treated as guiltless, while the bulletin board would be liable. This would be like holding the news vendor but not the author of a defamatory article liable, and one can assume that courts will not reach such an absurd result.

65. More precisely, they discuss the liability of those in control of property for messages placed on that property by others. There are, in all, five American cases, only three of which date from this century, and only one of which was decided within the past quarter of a century. See *infra* note 66.

66. *E.g.*, *Tidmore v. Mills*, 33 Ala. App. 243, 32 So. 2d 769, *certification denied*, 249 Ala. 648, 32 So. 2d 782 (1947) (in case involving sign on defendant's property accusing others of mistreating the defendant, jury could find ratification from failure to remove); *Hellar v. Bianco*, 111 Cal. App. 2d 424, 244 P.2d 757 (1952) (where defamatory words appeared on men's room wall in bar, there was jury question whether the bartender's knowing failure to remove, after notice and demand, amounted to a publication when the offended party's husband went with others to view the notice); *Fogg v. Boston & L.R.R.*, 148 Mass. 513, 20 N.E. 109 (1889) (from fact that article was on railroad's bulletin board for 40 days, jury could "presume" it had been made with railroad's authority or that posting had subsequently been ratified); *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N.W. 387, 388 (1883) (in case involving defamatory signs on a table outside defendant's shop, if "having authority to remove them, he allowed them to remain, the act [of publication] was his"); *Scott v. Hull*, 22 Ohio App. 2d 141, 259 N.E.2d 160 (1970) (in case involving defamatory graffiti on outside of building, mere failure to remove was not "ratification" or publication); *Byrne v. Deane*, 1 K.B. 818 (1937) (dictum; posted poem held not actionable).

its previous publication of the material by someone else.

When closely examined, however, these cases are less authoritative than they may seem, even though their rationale has been adopted by the *Restatement (Second) of Torts*.⁶⁷ At least two, and perhaps four, of the six cases arose in circumstances making it quite likely that the property owner or his agents had actually posted the defamatory material.⁶⁸ One of the cases involved a posting the court found not defamatory, and thus the discussion whether the owner would be liable if the material were defamatory is clearly dictum.⁶⁹ And the only two American cases in the last thirty-seven years reach different and arguably opposite results: one held that a bar owner could be liable for failing to remove defamatory remarks from the men's room after being informed of them by the injured party's angry husband (who promptly collected a group of friends to go and view the offensive language),⁷⁰ while the other found the owner of a building not liable for failing to remove defamatory graffiti on an outside wall.⁷¹ Nevertheless, the cases are consistent in their insistence that there is no publication without knowledge of the material's existence—a thread, as I argue below, that runs almost without exception through the whole of defamation law.

2. Mere Suppliers

A second line—more doctrine than cases—also supports an argument that not everything distributed by a computer bulletin board is

67. See RESTATEMENT (SECOND) OF TORTS § 577(2) (1976) (“[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication”); see also *id.* at comment p (“the duty arises only when the defendant knows that the defamatory matter is being exhibited on his land or chattels”).

68. The clear cases are *Tidmore v. Mills*, 33 Ala. App. 243, 32 So. 2d 769, *certification denied*, 249 Ala. 648, 32 So. 2d 782 (1947) (sign on defendant's property accusing others of mistreating the defendant), and *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N.W. 387 (1883) (defamatory signs on a table outside defendant's shop accusing a customer of not paying for merchandise). The possible ones are *Fogg v. Boston & L.R. Co.*, 148 Mass. 513, 20 N.E. 109 (1889) (evidence would authorize finding that posting on railroad ticket agent's bulletin board was with the railroad's authority), and *Byrne v. Deane*, 1 K.B. 818 (1937) (poem accusing club member of reporting illegal club gambling to the police).

69. *Byrne v. Deane*, 1 K.B. 818 (1937).

70. *Hellar v. Bianco*, 111 Cal. App. 2d 424, 244 P.2d 757 (1952) (sufficient evidence to go to jury on the question of publication).

71. *Scott v. Hull*, 22 Ohio App. 2d 141, 259 N.E.2d 160 (1970). The court in *Scott* distinguished *Hellar v. Bianco*, arguing that bars “invited” people to go to their bathrooms (and read the walls?), while a building owner does not invite the public to look at its exterior and ponder the graffiti. *Id.* at 142, 259 N.E.2d at 161.

published by the operator of the board. According to the *Second Restatement*, the rule is that "one who merely makes available to another equipment or facilities that he may use himself for general communication purposes" is not liable for publication,⁷² even if the supplier knows or has reason to know the equipment will be used to disseminate defamatory information. In other words, IBM is not liable even if it knowingly sells a typewriter to *The National Inquirer*, and a telephone company is not liable for its subscribers' slanderous phone calls. However, this doctrine, although plausible and supported by the American Law Institute and other commentators, has been tested in only a single case.⁷³ In *Anderson v. New York Telephone Co.*,⁷⁴ the New York Court of Appeals unanimously held the telephone company had not "published" a series of four defamatory tape recordings sent over telephone lines by a subscriber, even though the company had been informed of the messages by the offended party and could have removed its leased recorded-message equipment without disrupting the subscriber's ordinary phone service.⁷⁵

Even assuming *Anderson* was correctly decided on its facts, the operators of computer bulletin boards should not always be held mere suppliers of facilities and equipment, and thus not publishers of the information they transmit. To be sure, in a sense they are just renting out their equipment for the use of others, like the telephone company—or even providing it for free, in the case of many boards. Still, they sometimes exert substantial control over the material disseminated in public areas of the board.⁷⁶ At least two features distinguish public messages and files from defamatory material transmitted by the telephone company. First, the originator of the material transmitted by telephone retains control over its transmission. By contrast, once mate-

72. RESTATEMENT (SECOND) OF TORTS § 581 comment b (1976). *Accord*, PROSSER & KEETON, *supra* note 49, at 804.

73. The virtually complete absence of litigation may indicate the strength, not the weakness, of the doctrine. But it makes it difficult to determine its bounds.

74. 35 N.Y.2d 746, 320 N.E.2d 647, 361 N.Y.S.2d 913 (1974), *rev'g* 42 A.D.2d 151, 345 N.Y.S.2d 740 (1973).

75. *See Anderson*, 42 A.D.2d 151, 157, 345 N.Y.S.2d 740, 747 (Appellate Division opinion). The Court of Appeals merely reversed on the reasoning of the dissenting opinion in the Appellate Division. *See id.* at 161-72, 345 N.Y.S.2d at 750-60 (Witmer, J., dissenting).

76. *See supra* note 35. Indeed, several major public services (CompuServe, Delphi, and Genie) claim their work in deciding what should be made available in the public files areas is sufficient to give them a "compilation copyright" in the collection of material. *See, e.g.*, CompuServe Statement of Compilation Copyright Policy, CompuServe Information Service, RUL-5 (as of Jan. 26, 1990).

rial has been transmitted to a computer bulletin board, its further transmission is beyond the originator's control; dissemination is wholly in the hands of the board and its operator.⁷⁷ Second, where defamation is repeatedly transmitted by telephone, as in *Anderson*, the originator can be traced, and at least sued for damages if not enjoined.⁷⁸ But it may be impossible to trace the originator of defamatory material on a bulletin board: the poster may have signed on anonymously,⁷⁹ may have used another person's identity without authorization or the possibility of tracing,⁸⁰ or may even have died while his message lingers behind. A bulletin board's potential, and frequently its actual control over the files and messages in its public areas warrants the conclusion that those messages are published by the board when it transmits them to users.⁸¹

Electronic mail, conferences, and real-time chatter are quite another matter. Like the ordinary telephone call,⁸² those messages are transmitted only once, without human intervention on the part of the board.⁸³ Of course the sender may be anonymous,⁸⁴ but so may a tele-

77. Contrast repeated messages sent by a phone company subscriber: each phone call is a single transmission, and each transmission is in the control of the subscriber. In the case of bulletin boards, once the material is under the board's control, the originator cannot even erase it without the board's cooperation. In fact, ordinary practice is for the host program to allow an individual to delete public messages he originated immediately, but to require requests for file deletion to be acted upon by the system operator.

78. It is doubtful whether an injunction would lie, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) (Minnesota statute authorizing suppression of publication where publisher has "conducted a business of publishing . . . defamatory matter" is inconsistent with constitutional guarantees of freedom of the press), although arguably that rule would not apply to an injunction against repetitions of the same defamatory words. It is of course true that an anonymous caller could move from pay phone to pay phone, calling other people and repeating defamatory statements over and over again. But any such action would be far less effective (and thus less likely) than using a single number and a recorded message, thereby allowing the curious to call.

79. See *supra* notes 29-32 and accompanying text.

80. See *supra* note 32.

81. A finding that defamatory material has been published by the bulletin board does not, of course, close the question of whether the operator is liable for the publication. See *infra* notes 88-112 and accompanying text.

82. And unlike a telegram, at least as telegrams were sent in the days when defamation cases were brought against telegraph companies.

83. Bulletin board host programs could be written so that no mail was sent before it had been read by the board operator. It appears that the Video Privacy Protection Act of 1988, 18 U.S.C. §§ 2701 to -10 (1988) would permit this, since § 2702(b)(4) authorizes disclosure of communications "to a person employed or authorized or whose facilities are used to forward such communication to its destination," and § 2702(b)(5) authorizes disclosure "as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service." However, it is unlikely that users would want to send private mail so scrutinized. Moreover, the cost of scrutiny—especially prompt scrutiny—would be substantial.

Similarly, although real-time chatter could be censored before it was transmitted, the cost

phone caller.⁸⁵ When acting only in these ways, a computer bulletin board really is doing no more than providing facilities for the use of others, and should no more be held a publisher of the material transmitted than the telephone company is.⁸⁶

This distinction is strengthened by the bulletin board cases, which invariably require knowledge of the defamatory material before the board owner is found to have published it.⁸⁷ It is possible to argue even further that the board operator should not be considered a "publisher" even of material in public message and file areas until it knows what material is there. Although the result may be appealing (and I will urge something very much like that below), this argument goes too far as a matter of syntax. A computer bulletin board, offering public messages to a wide audience, is more like a radio or television broadcaster than it is like a telephone company. A better rule would be that the board has published whatever is generally available to its users, and treat its liability for that publication as a separate question.

B. *Liability for What is Published*

It is often said that those who disseminate defamatory material are liable for its distribution either as primary or as secondary publishers, the main difference being that (except in recent years, and under constitutional prodding, if not always compulsion) a primary publisher is liable for the defamation regardless of his fault in publishing it, whereas a secondary publisher is liable only if he knew or should have known of the defamatory character of what he was publishing.⁸⁸ I am

would be great and the loss of immediacy would no doubt kill the genre.

84. This is either because the board permits anonymity, or by misuse of another's identification.

85. The *Restatement's (Second)* discussion of the telephone company explicitly includes pay telephones that may be used by anyone. *RESTATEMENT (SECOND) OF TORTS* § 581 comment b, at 232 (1976).

86. 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.

87. One might "return to Year Book distinctions between feaseance and nonfeaseance," *Lambert v. California*, 355 U.S. 225, 231 (1957) (Frankfurter, J., dissenting), and deny the applicability of these cases since the computer bulletin board is, however automatically, acting affirmatively to send the information out. Such an argument, however, does not line up with the cases. For example, the offended husband in *Hellar v. Bianco*, 111 Cal. App. 2d 424, 244 P.2d 757 (1952), did not bring his own candles to view the message in the men's room, but relied on light provided (at some cost) by the bar. Moreover, telephone companies provide very sophisticated services indeed when they transmit the phone calls which the law says they do not publish.

88. In addition, even a secondary publisher who knows it is distributing defamatory material

not sure the cases support the statements; indeed, I have been able to find only a single case clearly holding a primary publisher liable for defamation in the absence of some colorable fault. In any event, there are at least differences in the ways the cases treat newspapers, radio and television broadcasters, and other distributors (news agents, telegraph companies, and so forth) of defamatory material. Intelligent consideration of the treatment of computer bulletin boards should begin with a canvass of these cases.

1. The Print Media

Newspapers and other ordinary publishers of printed matter have routinely been held to account for what they publish, whether the words were written by their agents or are advertisements or letters to the editor prepared by others.⁸⁹ This rule has sometimes been considered to do away with the requirement of knowledge of what is being published,⁹⁰ but it should not. Everything that goes into a book, newspaper, or magazine is "known" to some agent of the publisher,⁹¹ who is thus vicariously chargeable with that knowledge.⁹² Although the cases are replete with quotation of Lord Mansfield's statement that

will not be liable unless it knew or had reason to know that the person on whose behalf it was distributing it was not privileged to make the communication. RESTATEMENT (SECOND) OF TORTS § 612 (1976).

89. See RESTATEMENT (SECOND) OF TORTS § 577(1) (1976); PROSSER & KEETON, *supra* note 49, at 803, 810. It is interesting to note that none of the *Restatement's* (Second) examples involve the publication of advertisements or letters to the editor, *see, e.g.*, RESTATEMENT (SECOND) OF TORTS § 577A, illustrations 3, 5-8; *id.* at § 578, illustrations 1, 2, but the cases do not appear to make such a distinction. *See, e.g.*, *Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936) (advertisement); *Safarets, Inc. v. Gannett Co.*, 80 Misc. 2d 109, 361 N.Y.S.2d 276 (Sup. Ct. 1974) (letter to the editor decrying conditions in pet shop), *aff'd*, 49 A.D.2d 666, 373 N.Y.S.2d 858 (1975).

90. *E.g.*, Leflar, *Radio and TV Defamation: "Fault" or Strict Liability?*, 15 OHIO ST. L.J. 252, 253-54 (1954).

91. At least, this has been the case under traditional methods of publication where the words are set into type by a printer, whether setting type by hand (as Ben Franklin did), by Linotype, or by a more modern electronic typesetter. Recent developments in electronic publishing have made it feasible for a periodical, for instance, to use a computer to publish advertisements never seen by any agent or employee of the paper. As far as I know, however, no periodicals allow such a practice, and certainly no such cases involving such a practice have been litigated. *Cf.* D. ADAMS, DIRK GENTLY'S HOLISTIC DETECTIVE AGENCY (1987) (work of fiction published by Simon & Schuster—and, in fact, presumably read by the editors there—but set in type entirely by the author); N.Y. Times, Oct. 8, 1987, at A1, col. 3 (discussing the growing electronic publishing industry).

92. See RESTATEMENT (SECOND) OF TORTS § 577 comment f (1976) (liability for publication by one's agent); *cf.* PROSSER & KEETON, *supra* note 49, at 810.

"[w]henever a man publishes, he publishes at his peril,"⁹³ the unstated assumption seems always to be that the publisher or one of his agents knows *what* he is publishing.⁹⁴ There simply are 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. Accordingly, the print cases should not be taken as establishing the principle that a publisher is liable for publishing something he does not know he is publishing, but only as recognizing the fact that there is always present in these cases an equivalent of the opportunity to remove the offending material that the bulletin board cases require. Even if the print cases are the appropriate analogy, a computer bulletin board should be liable for transmitting defamatory information only if it continued to make the information available after it became aware the specific material was being transmitted.⁹⁵

2. Broadcast Media

As with those who publish printed material, it seems always to have been assumed that a broadcaster through whose facilities defamatory information has been broadcast is a publisher of that information.⁹⁶ Like newspapers and book publishers, radio and television broadcasters have physical (and usually legal)⁹⁷ control over what they

93. *The King v. Woodfall*, 98 Eng. Rep. 914, 916 (1774); *see also, e.g., Peck v. Tribune Co.*, 214 U.S. 185, 189 (1909) (Holmes, J.).

94. Justice Holmes's language in *Peck*, 214 U.S. at 189, makes precisely this point. After quoting the cited words of Lord Mansfield, he explains them by saying,

The reason is plain. A libel is harmful on its face. If a man *sees fit to publish manifestly hurtful statements* concerning an individual, without other justification than exists for an advertisement or piece of news, the usual principles of tort will make him liable, if the statements are false or are true only of someone else.

Id. (emphasis added).

95. Of course there is a sense in which the board—or more precisely, its host program—is "aware" of the material the instant it is transmitted. Future developments in artificial intelligence may make it possible to write bulletin board programs with a reasonable degree of common sense. For now, however, the required awareness should be that of some human being in the board operator's employ. Compare Note, *Computer Bulletin Board Operator Liability for User Misuse*, 54 *FORDHAM L. REV.* 439, 449-50 (1985) for consideration and rejection of a rule that would require host programs to be written so as not to accept messages containing "objectionable" language.

96. *E.g., Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W.D. Mo. 1934).

97. With some exceptions, broadcasters are required by the Communications Act Amendments, 1952, 47 U.S.C. § 315(a) (1982), to provide reply time to other legally qualified candidates if they give broadcast time to one candidate. In addition, the FCC in the past has imposed various affirmative obligations on broadcasters, including some programming for children, 47 C.F.R. § 73.4050 (1984), and reasonable access by candidates for public office, 47 C.F.R. §

broadcast. But although broadcasters may control who gets within range of the microphone, they can not always control what those in range may say. And although "delay systems," devices that impose some delay between words and actions and their ultimate broadcast, have been technologically feasible for decades, they are often not used.⁹⁸ Accordingly, unlike the print cases, some broadcast defamation cases squarely raise the question of a broadcaster's liability for defamatory statements it did not know would be broadcast.⁹⁹

The cases answer the question in two directly opposite ways.¹⁰⁰ One line holds broadcasters liable¹⁰¹ although they did not know (and

73.1940. The District of Columbia Circuit has held that most of the existing rules are not required by statute, *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), and the FCC repealed the Fairness Doctrine in 1987. *Syracuse Peace Council v. WTNH*, 2 FCC Rcd. 5043 (1987). The same day it rejected proposed alternatives to the doctrine. *See Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligation of Broadcast Licensees*, 2 FCC Rcd. 5272 (1987), *recon. denied*, 3 FCC Rcd. 2050 (1988). It is generally accepted that equivalent controls would be unconstitutional if applied to the print media. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (unanimous decision striking down right-of-reply statute applied to a newspaper; Justices Brennan and Rehnquist expressly reserved the question of the constitutionality of state law "retraction" statutes requiring publication if plaintiff can prove defamatory falsehood).

98. Devices that simply impose a small delay can be relatively expensive for small stations. *See Snowden v. Pearl River Broadcasting Corp.*, 251 So. 2d 405 (La. App.) (radio station), *application denied*, 259 La. 885, 253 So. 2d 217 (1971). Of course, a radio station could tape all its broadcasts and play the tapes later if nothing untoward was said, and television stations could do the same; even commercial-quality tape and videotape recorders are relatively inexpensive, and most stations probably have them anyway. But many viewers and listeners would miss the excitement of live coverage even if the delay was short.

99. In one small area, the question is governed by federal nonconstitutional law. Where the Communications Act requires broadcasters to provide time to political candidates and forbids them from censoring the remarks, they cannot as a matter of federal law be held liable for any defamation the politician chooses to emit. *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959). For a discussion of how the first amendment may affect the question, see *infra* Section IV.

100. The commentators likewise are split. Those favoring liability without knowledge included Vold, *Defamatory Interpolations in Radio Broadcasts*, 88 U. PA. L. REV. 249 (1940); Donnelly, *Defamation by Radio: A Reconsideration*, 34 IOWA L. REV. 12 (1948); Remmers, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L. REV. 727, 756 (1951); Leflar, *supra* note 90 (arguing primarily on the grounds that stations can and should obtain liability insurance). Major opponents include Sprague, *Freedom of the Air*, 8 ATR L. REV. 30 (1937); Farnum, *Radio Defamation and the American Law Institute*, 16 B.U.L. REV. 1 (1936); and Seitz, *Responsibility of Radio Stations for Extemporaneous Defamation*, 24 MARQ. L. REV. 117 (1940). Since the 1950s, statutory and constitutional developments have muted the debate. *See supra* note 99; *infra* section IV.

101. *Sorenson v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932) (speech delivered by politician given air time under compulsion of the Communications Act), *appeal dismissed sub nom.* KFAB Broadcasting Co. v. Wood, 290 U.S. 599 (1933); *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20

in at least one of the cases could not have known¹⁰²) that the defamatory statements were to be broadcast. These cases typically assert that print media are liable if they knew about the defamatory material,¹⁰³ and argue it would be "unfair" to give greater protection to their radio competitors.¹⁰⁴ A second line, slightly later in appearance, holds broadcasters liable for what they did not know would be broadcast only if they were at fault in failing to find out.¹⁰⁵ The first and leading case, *Summit Hotel v. National Broadcasting Co.*,¹⁰⁶ denied that the print media were liable without fault in Pennsylvania,¹⁰⁷ and rejected any analogy to ordinary printed matter where someone not under the broadcaster's control made the defamatory statement.¹⁰⁸ The court opted instead for a negligence standard.¹⁰⁹ Two other cases give few reasons for their conclusions.¹¹⁰

P.2d 847 (1933); *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W.D. Mo. 1934) ("sudden utterance" of defamatory words by person of good reputation speaking from an unexceptionable script). The specific result in *Sorenson* is now forbidden by *Farmers Educational*, 360 U.S. 525 (1959).

102. *Coffey*, 8 F. Supp. at 890.

103. This is an assertion I believe is wrong. See the discussion of print media cases, *supra* notes 89-95 and accompanying text.

104. *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (D. Mo. 1934); *Sorenson v. Wood*, 123 Neb. 348, 357, 243 N.W. 82, 86 (1932), *appeal dismissed sub nom.* KFAB Broadcasting Co. v. Wood, 290 U.S. 599 (1933); *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 472-73, 20 P.2d 847, 849-50 (1933); *see also* *Irwin v. Ashurst*, 158 Ore. 61, 67, 74 P.2d 1127, 1130 (1938) ("difficult to see any difference in principle between radio broadcasting of court proceedings and the publication of the same in newspapers"; result is nonliability for broadcast of defamation occurring in the course of broadcast trial).

105. *Kelly v. Hoffman*, 137 N.J.L. 695, 61 A.2d 143 (1948) (facilities rented to defamer); *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N.Y.S.2d 985, 986 (Sup. Ct. 1942) (case involving political candidate; issue resolved in one sentence); *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939) (Al Jolson ad-libbed, "It's a rotten hotel").

106. 336 Pa. 182, 8 A.2d 302 (1939).

107. *Id.* at 192, 8 A.2d at 307. The court's view of Pennsylvania defamation law is very close to the view that I have urged accurately represents defamation law in general.

108. *Id.* at 193-96, 8 A.2d at 307-09, 311. The court also rejected other asserted analogies. *Id.* at 196-98, 8 A.2d at 309-11.

109. The court viewed negligence as the norm except in the special case of damages to land. *Id.* (semble).

110. *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N.Y.S.2d 985, 986 (Sup. Ct. 1942), merely asserts, without discussion, that the "physical aspects of radio broadcasting warrant" a negligence standard. The court may or may not have been referring to the fact that the print media have the opportunity to review what is printed before it is disseminated. And although the court in *Kelly v. Hoffman*, 137 N.J.L. 695, 61 A.2d 143 (1948), engaged in more extended discussion, in the end it merely quoted Professor Bohlen's statement that "justice would be done and the good reputation of mankind given sufficient protection" by a negligence rule. *Id.* at 701, 61 A.2d at 147 (quoting Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 731

Under the influence of legislation¹¹¹ and constitutional considerations, the second line has clearly prevailed for more than a generation; there have been no reported cases holding a broadcaster liable for a third party's statement, in the absence of fault for fifty years. This does not, however, mean that the fault line would or should prevail when computer bulletin boards are involved. Specific legislation directed at the perceived special problems of broadcasting is not applicable to computer bulletin boards,¹¹² and the applicability of first amendment principles developed in other contexts is not clear. The broadcast cases, if applicable to computer bulletin boards, could support either result.

3. Secondary Publishers

It is regularly said that a secondary publisher—one who only “delivers or transmits defamatory matter published by a third person”—is liable only if he knows or has reason to know of the defamatory character of what he is transmitting.¹¹³ In this category are placed the sellers and distributors of books and magazines,¹¹⁴ libraries,¹¹⁵ and telegraph companies.¹¹⁶ In fact, the cases are not as quick to impose liability as

(1937)).

111. By 1954, 32 states had enacted statutes which governed, at least in part, the liability of broadcasters for defamatory information they broadcast. Leflar, *supra* note 90, at 267-71. The current tally, by my count, is 40. Twelve of these statutes establish rules requiring some degree of fault for broadcasts compelled by law or statements by political candidates, but are silent on the general question of third-party defamation. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 3-503 (1986) (no liability if political speech cannot be censored); MASS. GEN. LAWS ANN. ch. 231, § 91A (West 1987) (same as Maryland law); MONT. CODE ANN. § 27-1-811 (1988) (proof of actual malice required if broadcast is on important controversial topic). The remainder require proof of fault before a broadcaster can be held liable for defamatory statements by a third party. *See, e.g.*, CAL. CIV. CODE § 48.5 (West 1987); GA. CODE ANN. § 105-712 (Harrison 1984); MISS. CODE ANN. § 95-1-5 (1987) (no liability for third-party statements); N.H. REV. STAT. ANN. §§ 507-A:1 to :3 (1983) (no liability without lack of due care; no liability at all for uncontrolled network broadcasts).

112. There is some state legislation regulating computer bulletin boards, but it is criminal legislation dealing with the disclosure of credit card and similar information, *see, e.g.*, CAL. PENAL CODE § 484j (West 1988) (misdemeanor to publish credit card and other codes with intent to defraud, specifically including publication by “computer network or computer bulletin board”), or unauthorized access to computer systems, *see, e.g.*, MINN. STAT. ANN. § 609.89 (West 1987). A general survey of such statutes appears in Soma, Smith & Sprague, *Legal Analysis of Electronic Bulletin Board Activities*, 7 W. NEW ENG. L. REV. 571, 577-603 (1985).

113. RESTATEMENT (SECOND) OF TORTS § 581(1) (1976). The *Restatement (Second)*, however, makes a special exception for radio and television broadcasters, who are liable as original publishers. *Id.* at § 581(2) and comment g.

114. *Id.* at § 581(1) comments d and e.

115. *Id.* comment e.

116. *Id.* comment f.

the *Second Restatement* and hornbooks, for although they do contain statements supporting this rule, there are few if any cases actually finding liability. For instance, no one seems to have sued a library for defamation in this century;¹¹⁷ no American appears ever to have recovered for defamation from a bookseller or distributor not controlled by the primary publisher; even the telegraph company has had remarkable success in litigation against it.¹¹⁸ Statements about when such secondary publishers are liable are almost entirely dicta; the holdings, with few exceptions, deal with when they are not liable. At most, if these cases were applicable, they would hold computer bulletin boards liable only if they knew or had reason to know what they were transmitting. Moreover, notwithstanding repeated dicta, they may in fact argue for even less liability.

C. *Applying the Cases*

It often may be unnecessary to resolve the question whether a computer bulletin board operator, with regard to messages in its public message and file areas, is a primary publisher like the print and broadcast media, or a secondary publisher like newsdealers and libraries. Only a single line of cases (the *Snowden* line of broadcast defamation cases)¹¹⁹ suggests that even a primary publisher can be held liable for

117. The closest thing I have been able to find is *LaMons v. City of Westport*, 44 Wash. App. 664, 723 P.2d 470 (1986). The LaMonsees had sued city police officers on constitutional grounds; when the city paid part of its officers' litigation expenses, it placed the case file in the public library so that interested citizens could read it and find out how their money was being spent. The LaMonsees, claiming material in the file was defamatory, promptly sued the city (but not the library) for defamation. The city obtained summary judgment on a showing, disappointing for proponents of democratic government, that nobody had ever troubled to read the file.

118. *Peterson v. Western Union Tel. Co.*, 65 Minn. 18, 67 N.W. 646 (1896) ("Slippery Sam, your name is pants."), may be the only reported case in which a plaintiff prevailed. Even then, it took Sam four trials to collect his \$1000 judgment. See *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 77 N.W. 985 (1899). Speaking through Judge Magruder, the First Circuit in 1940 expressed some doubt as to whether the telegraph company could ever be held liable for defamatory messages it transmitted. *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539, 542 (1st Cir. 1940). The other cases typically cited do not involve ultimate victories for the plaintiffs. See *Lesesne v. Willingham*, 83 F. Supp. 918 (E.D.S.C. 1949) (complaint survived motion to dismiss; no record whether plaintiff ultimately prevailed); *Nye v. Western Union Tel. Co.*, 104 F. 628 (C.C.D. Minn. 1900) (verdict should have been directed for the company); *Stockham v. Western Union Tel. Co.*, 10 Kan. App. 580, 63 P. 658 (1900) (company's demurrer to the evidence sustained); *Grisham v. Western Union Tel. Co.*, 238 Mo. 480, 142 S.W. 271 (1911) (directed verdict for company affirmed).

119. See *supra* notes 101-04 and accompanying text. Professor Lefflar, who took a similar position, rested his argument on the commercial nature of broadcasting and the availability of low-cost insurance to spread the risk of defamation. Lefflar, *supra* note 90, at 265-67. It is possible

publishing defamatory material unless it knows what it is publishing. And that line of cases is explicitly based on an asserted parity with publishers of printed materials—an assertion that, I have argued, misunderstands the print cases.¹²⁰ Therefore, *all* of the cases reviewed support the position that the operator of a computer bulletin board should not be liable for defamatory materials distributed through public message or files sections until the operator is actually aware that the defamation is available for distribution.

This does not, however, end the matter; the cases do differ in their treatment of the publisher who knows the words or pictures he is publishing, but is unaware of their defamatory import or believes they are (or may be) true. At least until the constitutional revolution, the print cases held such a publisher liable; the broadcast cases appear to split between a holding of liability and a holding that liability will attach only if the broadcaster was negligent;¹²¹ and the secondary publisher cases appear to require a high degree of fault indeed.

For these purposes, computer bulletin board operators should be treated as secondary publishers, like news vendors, libraries, and telegraph companies. The print media typically employ extensive editorial, copy editing, and proofreading staffs; what is published in books, magazines, and even the daily newspaper is regularly read and reread by several—sometimes even dozens—of people before publication takes place. The same is often, though by no means always, true of radio and television broadcasts; even on live broadcasts, most of what is broadcast is spoken by employees or agents of the broadcaster. By contrast, the essence of public messages and open files on a computer bulletin board is not the presentation of the ideas of a few to the many, but the participation of many in the interchange of ideas, opinions, and information. They are perhaps most like communication by telegraph, with an expanded audience. The operator may give some direction and control by

but by no means certain that such insurance would be cheap (or available at all) for bulletin board operators today, when the newspapers are full of stories decrying rising insurance rates. Even if it is, however, the majority of bulletin boards are not commercial operations.

120. See *supra* notes 89-95 and accompanying text.

121. I say "appear" because in all of the reported cases, the defamatory character of the broadcast words was apparent on their face; none of the broadcast cases thus squarely raises the question of liability for apparently innocent, but actually defamatory, comments or pictures. However, the no-fault line, depending as it does on a desire for parity between the print and broadcast media, see *supra* notes 100-04 and accompanying text, would presumably follow the print rule. The *Summit Hotel* line, ultimately based on the notion that negligence should be the general standard in the absence of overwhelming reason to the contrary, presumably would require negligence with regard to this aspect as well. See *supra* notes 106-09 and accompanying text.

directing the general topics to be discussed, and even by deleting an occasional message or file. But this degree of control is nothing like the control a radio broadcaster exercises over program content. Although nothing (except, perhaps, user disinterest) would stop a computer bulletin board from controlling operating in this manner, for the law to do so would cut to the very heart of what the users find attractive about the boards.¹²²

Taken as far as they might be carried, these considerations could lead one to argue for complete immunity from liability for computer bulletin boards. But as noted above in connection with the discussion of "publication,"¹²³ there are countervailing considerations, particularly the fact that once information is posted on a bulletin board, it is not only out of the hands but also out of the control of the original disseminator. Complete immunity would mean that the posted information could remain in circulation indefinitely—particularly if the source of the information could never be found. Allowing liability only for continued dissemination after the disseminating bulletin board operator has knowledge of the defamatory character of the material is a reasonable balance of the competing interests.

The argument above, if accepted, would also resolve the additional question whether the operator of a bulletin board must actively police the public areas of the board in order to find out what is being distributed through its facilities, or whether it is liable only when it has actual knowledge (or, at the least, good reason to know) that it is distributing defamatory material. The law is clear that secondary publishers are not required to investigate the contents of what they are distributing in order to avoid liability.¹²⁴

There are good policy reasons for such a result. Although practice on the large commercial boards is often (but no means invariably) to preview files and review public messages, turning general practice into legal obligation would impose a considerable onus. The burden on small private boards, which are often volunteer services and sometimes oper-

122. See *supra* note 34 and accompanying text.

123. See *supra* notes 76-81 and accompanying text.

124. E.g., *Sexton v. American News Co.*, 133 F. Supp. 591 (N.D. Fla. 1955) (magazine distributor); *Church of Scientology v. Minnesota Medical Ass'n*, 264 N.W.2d 152 (Minn. 1978) (medical association passing out clippings on request). Telegraph companies, of course, traditionally had to read the words before they could transmit them. Even then, they were not responsible for making additional investigation to determine their defamatory character. See, e.g., *Nye v. Western Union Tel. Co.*, 104 F. 628 (C.C.D. Minn. 1900) (telegram that plaintiff had been "bought off" could have referred to commercial sale and not to corruption; no duty to investigate).

ate without intervention for days or weeks at a time, would be especially harsh.¹²⁵ Should future developments show that failure to impose such a duty is causing serious hardship, the question might well be reconsidered, either by a legislature or by the courts. But until such a time, the rule for secondary publishers should apply to computer bulletin boards as well.

IV. THE FIRST AMENDMENT

I have argued in Section III that computer bulletin boards should not be liable at all for defamatory material transmitted privately, as by electronic mail, or conveyed in one-time transmissions like on-line conferences or real-time messages. In those circumstances they are not the publishers of the defamation but merely its transmitters, like a telephone company. I have also argued that information available for multiple transmission, such as that in public message and file areas, has been "published" by the board and its operators. Such bulletin board systems are best treated in the same light as a secondary distributor, and the operators should not be liable for defamation unless they know of the defamatory character of the transmission.

The question remains whether any of these conclusions are either compelled or forbidden by the first amendment. I argue below that existing first amendment doctrine gives at least this much breathing space to computer bulletin boards, and sometimes gives more. But the answer to the question is neither simple nor certain.¹²⁶ Some of the well-known cases may or may not apply to computer bulletin boards. Under *New York Times Co. v. Sullivan*¹²⁷ and its successors, just how much freedom state law must give defamatory statements depends in part on what and whom the statements are about. Moreover, the Supreme Court is not yet clearly satisfied with the rules it has enunciated. Recent cases¹²⁸ (and commentary)¹²⁹ have indicated some dissatisfaction

125. It could be argued that this fear is chimerical because nobody will sue such operators due to their limited resources. This argument, however, neglects three things. First, some private bulletin board operators are rich, or insured. Second, some defamed plaintiffs will want revenge even if they do not get money; indeed, a major motive for litigation could be to put the offending board out of business. And third, small bulletin board operators may stop the practice from fear of liability, even if as a practical matter the liability is unlikely to arise.

126. This is the conclusion reached in Beck, *Control of, and Access to, On-Line Computer Data Bases: Some First Amendment Issues in Videotex and Teletext*, 5 COMM/ENT L.J. 1, 9, 17, 18-19 (1982), an article that (notwithstanding its title) primarily discusses FCC regulation of the industry.

127. 376 U.S. 254 (1964).

128. See *infra* notes 141-55 and accompanying text.

with established first amendment law. The Court has even hinted that there may be a difference between defamation published by the media and by the rest of us.¹³⁰ And finally, the Court's application of different first amendment rules to the printed and broadcast word¹³¹ raises the possibility—albeit slim in my view—that the Court could hold that computer bulletin boards, too, are governed by different rules.

A. *A Page of History*

At the height of the civil rights movement, a group of individuals under the name of the "Committee to defend Martin Luther King and the struggle for freedom in the South" published a fund-raising advertisement in the *New York Times*, claiming—not entirely inaccurately—that Dr. King had been mistreated in a number of specific ways. Sullivan, who supervised the Montgomery, Alabama police, sued and recovered a judgment for \$500,000 damages on the ground that the statements in the advertisement were false, defamatory, and understood by several people to refer to him. The Supreme Court, in *New York Times v. Sullivan*,¹³² held that under the first amendment, public officials cannot recover damages for defamatory falsehoods about their official conduct unless they can prove "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."¹³³ By the end of the decade, the Court had concluded that the *New York Times* standard extended to all those appearing "to the public to [have] substantial responsibility for or control over the conduct of government affairs,"¹³⁴ to unofficial conduct of officeholders¹³⁵ and candidates for public office,¹³⁶ and to "public figures" as well as to actual or would-be holders of gov-

129. E.g., Symposium, *Defamation and the First Amendment: New Perspectives*, 25 WM. & MARY L. REV. 743 (1984); Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603 (1983).

130. See *infra* notes 152-55 and accompanying text.

131. See *infra* notes 156-57 and accompanying text.

132. 376 U.S. 254 (1964).

133. *Id.* at 280-81. The Court also held that general criticism of governmental conduct cannot serve as a basis for a libel action by specific government officials. In that case, Sullivan had not been specifically named and had brought his lawsuit on the ground that the criticism of the Montgomery police department had been understood by several people to refer to him. See *id.* at 288-92.

134. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (supervisor of a publicly owned ski resort).

135. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

136. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

ernmental offices.¹³⁷

But the *New York Times* standard is not a universal rule. After some backing and filling,¹³⁸ a bare majority in *Gertz v. Robert Welch, Inc.*¹³⁹ 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 defamatory falsehood injurious to a private individual."¹⁴⁰

B. *The Currently Unsettled Law*

The rules so far stated seem clear in outline, though occasionally requiring some difficult characterization. Under the first amendment, damages can be recovered for defamation of a public official or public figure for statements relevant to that person's public status only if the statements were published with at least reckless disregard of their truth or falsity. Damages for other defamation can be recovered if the defendant was negligent with regard to the falsity of the statement.¹⁴¹

But "things are not always as they seem,"¹⁴² and so it is here. First, the *Gertz* decision itself is under considerable stress. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹⁴³ a badly fragmented majority of the Court refused to apply *Gertz's* holding on punitive damages to punitive damages imposed for defamatory financial statements communicated by a credit service to its customers. A different

137. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (state university athletic director and prominent retired military officer taking well-publicized positions on public affairs). As to just where the line is drawn between "public figures" and the rest of us, see *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979) (engaging in crime does not necessarily a public figure make); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (same as to receipt of federal grant); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (public figure as to some issues by voluntarily injecting oneself into controversy).

138. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (five separate opinions, none of the Court, supporting judgment).

139. 418 U.S. 323 (1974).

140. *Id.* at 347. In context, *fault* means at least negligence as to falsity when the statement on its face indicates defamatory potential and may mean more if the statement is innocent on its face. *Id.* at 347 n.10, 348.

The Court also held that in order to recover "presumed or punitive damages," even a private plaintiff has to prove at least "knowledge of falsity or reckless disregard for the truth." *Id.* at 349. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985), a badly fragmented Court concluded (in three separate opinions supporting a 5-4 judgment) that this aspect of *Gertz* did not apply when the speech did not relate to a matter of public concern—specifically, to a credit bureau's erroneous report about an individual's financial status.

141. See *supra* note 140.

142. W.S. GILBERT, *H.M.S. PINAFORE*, Act II, No. 14 (Duet), line 1.

143. 472 U.S. 749 (1985) (plurality).

majority, however, agreed that the result—supported by Justice Powell, the author of the *Gertz* opinion, but by no other member of the majority in that case¹⁴⁴—was flatly inconsistent with *Gertz*.¹⁴⁵ And the replacement of Justice Powell by Justice Kennedy adds yet another unknown to the equation. It is possible, but doubtful, that *Dun & Bradstreet* indicates dissatisfaction with the holding on liability as well. Both Justice White and then Chief Justice Burger flatly called for overruling *Gertz*.¹⁴⁶ Justice Powell's plurality opinion, although explicitly limited to the question of punitive damages, characterized *Gertz* only as "restrict[ing] the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern,"¹⁴⁷ although when writing for the Court in *Gertz* he had doubted the ability of courts to determine what issues were of "general or public interest" and which were not.¹⁴⁸ But in other cases, the Court for thirty years has insisted that strict liability has no place in first amendment law. In *Smith v. California*,¹⁴⁹ the Court struck down a California ordinance imposing strict liability on booksellers found in possession of obscene materials, although it expressly reserved the question what state of mind would be constitutionally sufficient.¹⁵⁰ And although the Court has not significantly expanded *Smith*, it has continued to cite it regularly both in obscenity and in libel cases.¹⁵¹ There is no reason to believe that dissatisfaction with *Gertz* extends to its general requirement of fault.

Second, the Court has recently suggested that there may be a different standard depending on whether the defamation was published by a "media defendant" or a private person.¹⁵² Although at least three

144. Justice Powell, of course, is no longer a member of the Court.

145. See *id.* at 772 (White, J., concurring in the judgment), 785 (Brennan, J., dissenting).

146. *Id.* at 764 (Burger, C.J., concurring in the judgment), 772-73 (White, J., concurring in the judgment).

147. *Id.* at 751.

148. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

149. 361 U.S. 147 (1959).

150. *Id.* at 154. The Court in *Hamling v. United States*, 418 U.S. 87, 123 (1974), held that knowledge of the contents, "character and nature" of the materials was sufficient, even if the defendant did not know that the materials were legally obscene.

151. E.g., *Hamling*, 418 U.S. 87 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 789 (1985) (Brennan, J., dissenting).

152. *Philadelphia Newspapers, Inc., v. Hepps*, 475 U.S. 767, 775 (1986) ("Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant."). Occasional lower courts have so held. See, e.g., *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982).

Justices are on record as opposing any such distinction¹⁵³ and the Court has in the past rejected distinctions between the press and ordinary people in other contexts,¹⁵⁴ the fact that it has been explicitly raised means that at least some Justices are willing to consider some such distinction. But although the Court has raised the question, it has not even hinted at the contours of any distinction between media and others; speculation in this regard is beyond the scope of this article.¹⁵⁵

Finally, it is possible that the Court might conclude that the new technology involved in computer bulletin boards, like that of radio and television broadcasting, warrants a different set of first amendment rules than those applied to the spoken and printed word. It has in the past reached similar conclusions for radio and television broadcasts.¹⁵⁶ Since computer bulletin boards share some of the characteristics of radio and television broadcasting,¹⁵⁷ such a conclusion is possible. But it

153. *Philadelphia Newspapers*, 475 U.S. 767 (Brennan, J., concurring); *Dun & Bradstreet*, 472 U.S. at 773 & n.4 (White, J., concurring in the judgment). One might count five, since in *Dun & Bradstreet* Justice Brennan, joined by Justices Blackmun, Stevens, and Marshall, stated in dissent that the rights of the institutionalized media are "no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Dun & Bradstreet*, 472 U.S. at 784 (Brennan, J., dissenting). However, Justice Stevens, in dissent, and Justice Marshall, who was a member of the majority, did not repeat that proposition in *Philadelphia Newspapers*, 475 U.S. 767 (1986).

154. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 782 (1978) (corporate advertising); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (no special constitutional rule for press subpoenas); see also *New York Times v. Sullivan*, 376 U.S. 254, 286 (applying the rule of the case to the individual petitioners as well as the *Times*).

155. If, as I have argued, computer bulletin boards transmitting information provided by third parties are sometimes analogous to those who merely provide a facility for dissemination (like the telephone company) and sometimes to those who are at most secondary publishers (like booksellers and telegraph companies), the media/nonmedia distinction would seem to be beside the point. See *Smith v. California*, 361 U.S. 147 (1959) (holding that a bookseller could not be convicted for selling obscene materials in the absence of knowledge of what he was selling). At least one appellate court has given a computerized information retrieval service access to state information. See *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728 (2d Cir. 1985).

156. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (government may require license to broadcast); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (broadcasters may be ordered to give reply time in cases involving personal attacks or editorials); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (government may prohibit broadcast of some "indecent," although not constitutionally obscene, material); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (limited but compulsory access to broadcast time).

157. They are a means of communication unfamiliar to the Framers. They involve interstate communication by wire, and in fact the FCC has concluded that it could take jurisdiction over such services, even though it has declined to do so. See generally Becker, *Electronic Publishing: First Amendment Issues in the Twenty-First Century*, 13 *FORDHAM URB. L.J.* 801, 822-27 (1985) for a good discussion of the regulatory history. (I share a first initial and last name with that author, but we are unrelated and have never met.) If the use of such boards increases, it is even possible that questions of the allocation of scarce resources may arise, since the capacity of inter-

is unlikely for several reasons. First, although the Court has held that some different first amendment rules apply to broadcasting, it has never even hinted at a distinction in the area of defamation.¹⁵⁸ Second, the Court reached its conclusions with regard to broadcasting giving heavy deference to the considered Congressional judgment that broadcasters could be regulated.¹⁵⁹ Absent action by Congress to regulate bulletin boards, it is unlikely the Court would strike out on its own into such a new technological area, especially when special treatment of broadcasting is under heavy attack within and without the government.¹⁶⁰

C. Bulletin Boards

The overview presented above leads to some clear, and other indefinite, conclusions about the limits of potential liability for bulletin board operators.

1. The Bedrock Requirement of Fault

Liability without fault, if it ever was permissible, is no longer permissible. In other words, the old asserted strict-liability rule for publishers of printed material cannot be applied either to them or to computer bulletin board operators consistent with the first amendment. This much, at least, follows from the continued viability of *Smith v. California*.¹⁶¹

It is less clear, however, just what may comprise the constitutionally required showing of "fault." It could be that the general standard I argue for in Part III—no liability without actual knowledge of the defamatory character of the material transmitted—is in fact the constitutional line. But although the Supreme Court has held something very much like this to be sufficient,¹⁶² it has not held it necessary in all circumstances.¹⁶³ Further, in the broadcast area, one state court found not

state telephone lines is not infinite.

158. Indeed, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) involved defamatory material distributed by computer.

159. See *Red Lion Broadcasting*, 395 U.S. at 379-86.

160. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985) (FCC Position). Published criticism is legion; a good and otherwise representative example is Krattenmaker & Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151.

161. See *supra* notes 149-51 and accompanying text.

162. *Hamling v. United States*, 418 U.S. 87 (1974).

163. Cf. *St. Amant v. Thompson*, 390 U.S. 727, 731, 733 (1968) (holding that failure to investigate the possible falsity of information prior to publication does not establish the "reckless

only "fault" but also "reckless disregard" when a broadcaster failed to make use of a delay system on a talk show.¹⁶⁴ It is therefore possible that, at least in some circumstances, the first amendment would allow a bulletin board operator to be found liable for failure to police his board and remove public defamatory notices.¹⁶⁵ Private transmissions, such as electronic mail, should in any event be protected under *Smith* so long as the operator does not ordinarily read those private transmissions, since "fault" can hardly be found in the failure to read other people's mail.

2. Different Strokes for Different Folks

Mere fault, however, is not all that is required. Under *New York Times* and its progeny, "reckless disregard" of the probable falsity of information must be shown if that information relates to a public official or a "public figure" on matters of general importance.¹⁶⁶ In practice there may be little difference between this standard and the one proposed in Part III, since in the normal course of events the operator is likely to hear about the defamatory material by an angry message from the person who thinks he is defamed. To the extent there is a difference, however, and absent a wholesale revision of the *New York Times* standard, the first amendment gives even more protection than the proposed standard to some classes of defamatory statements.

disregard" required by *Times v. Sullivan* unless the publisher acts with a "high degree of awareness" that the material is probably false).

164. *Snowden v. Pearl River Broadcasting Corp.*, 251 So. 2d 405 (La. App.), *application denied*, 259 La. 885, 253 So. 2d 217 (1971) (La. 1971). Although the court found that the radio station had issued an "open invitation to make any statement a listener desired, regardless of how untrue or defamatory it might be," the evidence on which that characterization was based showed little more than the ordinary invitation to callers to phone in their information. *Id.* at 410.

165. I have argued above that the general application of such a rule would deprive bulletin boards of much of their openness and attractiveness to users and would impose such a burden, particularly on amateur operators, that many would have to shut down their boards. *See supra* notes 124-25 and accompanying text. However, even if this argument is correct and also identifies an issue of constitutional magnitude, "fault" might be found for failure to police the board over long periods of time, for instance, or in circumstances where the operator knew that some person or people were regularly logging on and posting defamatory messages. In *Dun & Bradstreet*, one of the factors relied on by the lower courts (and mentioned, but not passed on by the Supreme Court) was that *Dun & Bradstreet* had failed to follow its usual checking procedures with regard to the information distributed. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 752 (1985).

166. *See supra* notes 132-40 and accompanying text.

3. A Different First Amendment for Bulletin Boards?

Finally, there is little chance that the Court will hold the first amendment applies in a different way to computer bulletin boards than to more traditional means of disseminating information. That an industry is technologically new does not of itself mean that different constitutional rules should apply to it. Moreover, even if the Court continues the *Red Lion* tradition that broadcasters are governed by a slightly different first amendment than the rest of us, most of the special features found determinative in broadcasting are irrelevant to bulletin boards and in any event have not been found relevant to defamation cases, where the liability of broadcasters has been judged by the same rules applied to more traditional means of expression.¹⁶⁷ The spectre of different rules for computer bulletin boards is a chimera.

V. CONCLUSION

Computer bulletin boards are a new and growing medium of communication. When used by people other than the operators of the boards to transmit messages and other information, they are very different from the now traditional media of books, magazines, radio, and television. Instead of presenting the ideas of the few to the many, they allow for an interchange of ideas among the many. The closest analogies in existing law are thus not to print publishers and broadcasters, but to telegraph and telephone companies.

Calling something a *computer bulletin board* describes it no more precisely than calling it a *corporation*. Computer bulletin boards are not a single, unitary entity. Instead, they provide a number of services used in different ways. The law of defamation should not treat all those services identically. When a board is used for the private distribution of information, as through private mail and file areas, it should be treated as nothing more than a service renting its equipment and facilities to users—like the telephone company, it should not be liable for any defamation so transmitted, because it has not published the information. On the other hand, when a computer bulletin board makes information provided by third parties generally available, as in public message and file areas, it is acting like a news vendor or distributor. In these circumstances, the bulletin board is indeed a publisher of any defamatory information so passed along, but it should be liable, like such secondary publishers, only upon a showing of fault.

167. See *supra* notes 153-57 and accompanying text.

These conclusions from traditional defamation law are reinforced by the first amendment. Indeed, in some circumstances—for instance, where the defamation relates to conduct relevant to the performance of a public official—it is clear that the first amendment requires an even higher standard: a showing of “actual malice” under *New York Times Co. v. Sullivan*. Even where “purely private” defamation is involved, it may be that the first amendment will be held to require more, but the law in this area is presently in a condition of extraordinary uncertainty. Traditional principles of the law of defamation, at least, provide a safe and reasonably comfortable level of protection for bulletin board operators.