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## Defamation

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## DEFAMATION

Jessica R. Friedman

Because electronic communications networks like the Internet make it possible to "libel [someone] instantly in front of one and a half million people,"<sup>540</sup> it is inevitable that the law of defamation will play a prominent role on the information superhighway.<sup>541</sup> Part I of this section of the Report will outline some of the basic principles of the law of defamation. Part II will discuss the liability of online service providers for defamatory statements that are transmitted over their networks. Part III will consider other questions which may arise from the application of existing defamation principles and precedents to modern technologies.

## I. BASIC PRINCIPLES OF DEFAMATION

A defamatory statement is a false statement of fact about a living person, corporate entity, or other business unit that tends to injure his or its reputation or the esteem, respect, or goodwill in which the subject is held by a substantial and respectable group of people.<sup>542</sup> To recover damages for defamation, a plaintiff must plead and prove (1) the publication of a statement of fact which (2) was false and defamatory, (3) reasonably referred to the plaintiff, (4) was made with the requisite degree of fault, and (5) caused actual injury to the plaintiff.<sup>543</sup> A statement reasonably refers to the plaintiff if, from the statement, the plaintiff is identifiable to even a small group of people.<sup>544</sup>

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540. Peter H. Lewis, *Libel Suit Against Prodigy Tests On-Line Speech Limits*, N.Y. Times, Nov. 16, 1994, at D1 (quoting Jacob H. Zamansky).

541. Defamation encompasses libel (written or printed statements) and slander (oral statements). 1 Slade R. Metcalf & Leonard M. Niehoff, *Rights and Responsibilities of Publishers, Broadcasters and Reporters* § 1.01, at 1-4 (1982 & Supp. 1994).

542. See Restatement (Second) of Torts § 559 (1976); see generally 1 Metcalf & Niehoff, *supra* note 541, §§ 1.10-1.14 (discussing what constitutes defamatory matter).

Certain kinds of statements whose harmful effect is clear from the words themselves are considered defamatory *per se*. Statements which allege one or more of the following have traditionally been held to constitute libel or slander *per se*: (1) the plaintiff's commission of a criminal offense; (2) that the plaintiff has a "loathsome disease"; (3) that the plaintiff lacks integrity or is not qualified for his or her trade, business, or profession; and (4) a female plaintiff's unchastity. See 1 Metcalf & Niehoff, *supra* note 541, § 1.11.

543. 1 Metcalf & Niehoff, *supra* note 541, § 1.01, at 1-6 (citing Restatement (Second) of Torts § 558 (1976)); Herbert v. Lando, 441 U.S. 153, 199-200 (1979). The elements of a defamation cause of action vary slightly from state to state. See, e.g., Bickling v. Kent Gen. Hosp., Inc., 872 F. Supp. 1299, 1307 (D. Del. 1994) (including "understanding of the defamatory nature of the communication by the third party" as an element of a cause of action for defamation).

544. See Fetler v. Houghton Mifflin, 364 F.2d 650, 651 (2d Cir. 1966) ("It is sufficient if those who knew the plaintiff can make out that he is the person meant."); Keeton et al., *supra* note 212, at 773-74.

At least where the defendant is a member of the media, a defamation plaintiff must demonstrate that the defendant acted with some degree of fault in order to recover damages.<sup>545</sup> The requisite level of fault necessary to establish a cause of action depends on the plaintiff's status. If the plaintiff is a "public official,"<sup>546</sup> "public figure,"<sup>547</sup> or "limited purpose public figure,"<sup>548</sup> he must prove, by "clear and convincing evidence,"<sup>549</sup> that the defendant published the statement at issue with "actual malice."<sup>550</sup> Actual malice, which is sometimes referred to as "constitutional malice" to distinguish it from common law malice,<sup>551</sup> is knowledge that a statement is false or a reckless disregard for whether the statement is true or false.<sup>552</sup> A plaintiff who is a private person must satisfy a lesser standard to recover damages in a defamation action.<sup>553</sup> In most states, a private plaintiff must show

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545. 1 Metcalf & Niehoff, *supra* note 541, § 1.17, at 1-51.

546. The basis for the "public official" distinction is the United States Supreme Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This category of defamation plaintiffs casts a wide net. In fact, "judges appear to characterize anyone who is a government employee with a modicum of responsibility as a public official." 1 Metcalf & Niehoff, *supra* note 541, § 1.50, at 1-109.

547. The Supreme Court first extended the "public official" distinction to encompass "public figures" in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, which were argued together and are both reported at 388 U.S. 130 (1967). Although initially it appeared that *Butts* and *Walker* would result in a higher standard of fault for public figures than for public officials, the view that the two classes of plaintiffs should be held to the same standard later prevailed. 1 Metcalf & Niehoff, *supra* note 541, at § 1.26.

548. "Limited purpose public figures," also known as "vortex public figures," are people who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Determining whether a plaintiff is a limited purpose public figure requires a resolution of (1) whether a public controversy exists, (2) the nature and extent of the plaintiff's role in the controversy, and (3) whether the alleged defamation was germane to the plaintiff's participation in the controversy. *Waldbaum v. Fairchild Publications, Inc.* 627 F.2d 1287, 1296-98 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980).

549. *Gertz*, 418 U.S. at 329 n.2.

550. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991); *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551 (4th Cir. 1994). Two rationales underlie the imposition of a heavier burden on public figure plaintiffs. First, such plaintiffs generally have greater access to the media and thus are in a better position to correct any alleged defamation by publicizing their own versions of the events at issue. *Id.* at 1552. Second, public figures are less deserving of protection from defamation because they "have voluntarily exposed themselves to increased risk of injury" from defamatory statements. *Id.*

551. See 1 Metcalf & Niehoff, *supra* note 541, § 1.67.

552. *Masson*, 501 U.S. at 510. A defendant has a reckless disregard for the truth or falsity of a statement if prior to making the statement he "entertained serious doubts as to [its] truth" or had a "high degree of awareness of [its] probable falsity." *Harris v. Quadracci*, 48 F.3d 247, 251 (7th Cir. 1995) (alterations in original) (citations omitted).

553. In *Gertz*, the Supreme Court held that "so long as [the States] 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." *Gertz*, 418 U.S. at 347.

only that the defendant acted negligently in publishing the defamatory statement.<sup>554</sup>

Ordinarily, the same liability attaches to the republication of an actionable defamatory statement as attaches to the original publication of the statement.<sup>555</sup> To establish liability for a republication, however, the plaintiff must demonstrate that in distributing the publication at issue, the defendant had "knowledge of the contents of [the] publication."<sup>556</sup> Thus, publishers such as newspapers, magazines, and broadcasters are liable for defamatory statements contained in their publications to the same extent as the originators of such statements, because they have editorial control over the material that they publish.<sup>557</sup> But distributors such as bookstores, libraries, and news dealers, who have no responsibility for, and usually no knowledge of, the contents of the material they distribute are liable for the republication of defamatory material only if they knew or had reason to know of its defamatory character.<sup>558</sup> Common carriers such as telephone companies, who simply deliver material to its destination, are permitted to deliver without liability even statements that they know to be defamatory, unless they know or have reason to know that the sender of the statements cannot claim a privilege in transmitting the statements.<sup>559</sup> At the bottom of the ladder are those who merely supply communications equipment; these suppliers are never liable for defamatory statements transmitted through or with the equipment they supply.<sup>560</sup>

## II. LIABILITY OF ONLINE SERVICE PROVIDERS

One of the most pressing issues concerning defamation and digital communication is what standard of liability the courts should apply to online information service providers<sup>561</sup> named as defendants in cases

554. See *Foretich*, 37 F.3d at 1552; 1 *Metcalf & Niehoff*, *supra* note 541, § 1.66, at 1-148; see also *id.* § 1.17 (discussing degree of fault that private plaintiffs must show in defamation suits against media defendants).

555. Restatement (Second) of Torts § 581 (1976).

556. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991); see also *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 932 (E.D. Wash. 1992) (holding that the power to censor a broadcast is not enough because applying such a standard would force unrealistic monitoring duties on all of an affiliate's local stations).

557. See Restatement (Second) of Torts § 581(1) cmts. c & g (1976).

558. See *Dworkin v. Hustler Magazine, Inc.*, 634 F. Supp. 727, 729 (D. Wyo. 1986); Restatement (Second) of Torts § 581(1) cmts. d & e (1976); Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 Conn. L. Rev. 203, 215 (1989).

559. Restatement (Second) of Torts § 612(2) (1976).

560. See Restatement (Second) of Torts § 581(1) cmt. b (1976); Becker, *supra* note 558, at 215.

561. There are many different categories of digital information service providers, or "online service providers." These categories include the following: (1) individuals who run electronic bulletin boards from their personal computers; (2) companies that provide particular database systems, such as LEXIS or WESTLAW; (3) "Internet access providers," such as NETCOM, which offer access to the Internet (and the World

that involve allegedly defamatory statements transmitted over their networks.<sup>562</sup> Should the courts classify online service providers as publishers, distributors, or common carriers?

Only two cases have addressed this question. In *Cubby, Inc. v. CompuServe Inc.*,<sup>563</sup> the plaintiff claimed that CompuServe was liable for defamatory statements contained in a newsletter that was available on CompuServe's Journalism Forum.<sup>564</sup> Cameron Communications, Inc. ("CCI"), an independent company, controlled the contents of the forum, and an outside publisher supplied the newsletter to CCI.<sup>565</sup> CompuServe had no opportunity to review the contents of the newsletter before the outside publisher uploaded it to the forum and CCI made the newsletter available to subscribers.<sup>566</sup> Finding that CompuServe had little or no editorial control over statements transmitted on its system,<sup>567</sup> the court classified CompuServe as a distributor.<sup>568</sup> Accordingly, the court held that CompuServe could not be held liable for the statements in the newsletter unless it knew or had reason to know that the statements were defamatory.<sup>569</sup> Concluding that CompuServe had no such knowledge, the court granted summary judgment in favor of the online service provider.<sup>570</sup> In reaching its decision, the court stated that the imposition of a higher standard of liability for online service providers "would impose an undue burden on the free flow of information."<sup>571</sup>

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,<sup>572</sup> however, Prodigy was held to be a publisher rather than a distributor of defamatory

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Wide Web) and electronic mail for fixed fees; and (4) comprehensive service providers such as America Online, Prodigy, and CompuServe that provide databases, bulletin boards, electronic mail, and Internet access in a single subscriber package.

562. For a thorough discussion of this issue, see Becker, *supra* note 558; Robert Charles, Note, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & Tech. 121 (1987). The inquiry here is whether online service providers should be liable for defamatory statements originated by users, not whether liability should attach for statements that the providers themselves originate.

563. 776 F. Supp. 135 (S.D.N.Y. 1991).

564. *Id.* at 138. A "forum" is "comprised of electronic bulletin boards, interactive online conferences, and topical databases." *Id.* at 137.

565. *Id.*

566. *Id.*

567. *Id.* at 140. The court stated that:

While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.

*Id.*

568. *Id.* at 140; see also *Stern v. Delphi Internet Servs. Corp.*, 626 N.Y.S.2d 694, 697 (Sup. Ct. 1995) (classifying computer bulletin boards as distributors in the context of a right of publicity claim under N.Y. Civ. Rights Law § 51 (McKinney 1992)).

569. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

570. *Id.* at 141.

571. *Id.* at 140.

572. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

statements posted on Prodigy's "Money Talk" bulletin board.<sup>573</sup> The court based its holding on the fact that Prodigy held itself out as exercising editorial control over its network and did in fact exercise such control<sup>574</sup> by (1) promulgating content guidelines that instructs users to refrain from posting certain types of messages,<sup>575</sup> (2) using software designed to automatically prescreen all bulletin board postings for offensive language,<sup>576</sup> (3) employing "Board Leaders" to monitor the bulletin boards, and (4) using an "emergency delete function" that permits Board Leaders automatically to delete undesirable messages.<sup>577</sup> The court concluded that by using these techniques, Prodigy had taken a role analogous to the role of a newspaper or television network<sup>578</sup> and could be held liable accordingly.<sup>579</sup>

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573. *Id.* at \*4. Money Talk is a popular bulletin board upon which subscribers "can post statements regarding stocks, investments and other financial matters." *Id.* at \*1. The statements at issue claimed that the plaintiffs, a securities investment banking firm and its president, had committed acts amounting to criminal securities fraud. *Id.* For example, one posting asserted that the investment firm was a "'cult of brokers who either lie for a living or get fired.'" *Id.* The suit also named David Lusby, the Prodigy subscriber from whose account the messages were posted. See Peter H. Lewis, *A New Twist in an On-Line Libel Case*, N.Y. Times, Dec. 19, 1994, at D10 [hereinafter Lewis, *A New Twist*]. Mr. Lusby was able to show that his account was inactive and therefore whoever had posted the allegedly defamatory statements had used his account without authorization. See Peter H. Lewis, *Libel Suit Against Prodigy Tests On-Line Speech Limits*, N.Y. Times, Nov. 16, 1994, at D1. Stratton Oakmont dropped its claims against Mr. Lusby and Prodigy agreed to track down the user who had posted the messages. *Id.* at D2; Lewis, *A New Twist, supra*, at D10.

574. *Stratton Oakmont*, 1995 WL 323710, at \*4. The court found that Prodigy had asserted the right to review and edit material placed on its network that was "harmful to other members, to merchants or information providers, or to the service or the business interests of Prodigy." Robert B. Charles, *Computer Libel Questions in 'Stratton v. Prodigy'*, N.Y. L.J., Dec. 13, 1994, at 1, 4 (quoting Prodigy online warning). The court also noted that Prodigy had advertised and defended its monitoring policies. *Stratton Oakmont*, 1995 WL 323710, at \*2; see Lewis, *A New Twist, supra* note 573, at D10.

575. Prodigy discourages the posting of "insulting" messages and warns users that "[messages] that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, w[ould] be removed when brought to PRODIGY's attention." *Stratton Oakmont*, 1995 WL 323710, at \*2.

576. Prodigy calls this software "George Carlin software," referring to the comedian who performs a monologue, entitled "Seven Dirty Words," about censorship in broadcasting. Peter H. Lewis, *No More 'Anything Goes': Cyberspace Gets Censors*, N.Y. Times, June 29, 1994, at A1. Prodigy's own list of offensive words "has grown into the dozens." *Id.*

577. *Stratton Oakmont*, 1995 WL 323710, at \*2-\*3.

578. See *id.* at \*5 (noting that Prodigy had "virtually created an editorial staff of Board Leaders [with] the ability to continually monitor incoming transmissions").

The *Stratton Oakmont* court indicated that it did not intend its holding to deter online service providers from implementing policies similar to Prodigy's so long as there is a market for such controlled service. See *id.* at \*5.

579. The court also found that the "Board Leader" responsible for monitoring the bulletin board upon which the defamatory statements were posted was Prodigy's agent for purposes of the plaintiff's claims. *Id.* at \*7.

The *Stratton Oakmont* decision, which is pending rehearing,<sup>580</sup> would seem to impose a stricter standard on online service providers than the standard imposed by the common law. The decision imposes liability not just for actual or constructive knowledge of the specific contents of bulletin board postings, which the court did not attribute to Prodigy, but also for the "mere right to make editorial judgments."<sup>581</sup>

Online service providers assert that because users transmit "trillions of bits of data" on online networks during the course of a single day,<sup>582</sup> it is virtually impossible to monitor networks for defamatory statements. Bulletin board operators or monitors can attempt to locate and remove defamatory statements through random spot checks. But such a system will not necessarily discover all or even any potentially defamatory statements. Some statements are defamatory only in context, and the context that makes a particular statement defamatory could be a message that was posted, and removed, long before the execution of a spot check. In addition, monitoring by network operators would severely reduce the speed of communication and real-time interaction that attract people to online networks.<sup>583</sup> Online service providers also argue that policing their systems would increase

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580. As of this writing, the parties in *Stratton Oakmont* had settled and the plaintiffs had dropped the suit. See Jared Sandberg, *Securities Company That Had Sued Prodigy Services for Libel Drops Suit*, Wall St. J., Oct. 25, 1995, at B7. Prodigy, however, was still seeking to overturn the decision on reargument and the plaintiffs did not intend to oppose Prodigy's efforts. Matthew Goldstein, *Parties Seek End to On-Line Defamation Lawsuit*, N.Y. L.J., Oct. 25, 1995, at 1, 1. The general counsel to one of the major online service providers has stated that "the *Stratton Oakmont* decision [is] . . . likely to be short-lived." Kent D. Stuckey, *Rights and Responsibilities of Information Service Providers*, in *Business and Legal Aspects of the Internet and Online Services* 203, 220 (1995).

581. Stuckey, *supra* note 580, at 219. Specifically, the court found that:

The key distinction between CompuServe [in the *Cubby* case] and PRODIGY is two fold [sic]. First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce.

*Stratton Oakmont*, 1995 WL 323710, at \*4.

It is arguable that an online service provider could preclude being classified as a publisher by informing subscribers that it has no *obligation* to remove offensive messages. The *Stratton Oakmont* decision, however, indicates that such a disclaimer will not enable an online service provider to avoid liability if the provider takes actual steps to censor material transmitted on its network. See *id.* at \*5. It appears that courts will classify online service providers as distributors only if they do not take any such steps.

582. See Comments of Online Service Providers on a Preliminary Draft of the Report of the Working Group on Intellectual Property Rights 12 (Sept. 7, 1994) (on file with author). These comments were made for the purpose of urging a new standard of liability for online service providers in the context of copyright infringement, see *id.*, but the points concerning the service providers' ability to monitor information apply with equal force to the issue of liability for defamatory statements.

583. *Id.* at 19.

the cost of providing online services, and that they would be forced to pass these increased costs on to consumers.<sup>584</sup> One response to this argument is that online service providers are compensated for increased expense and exposure by the attraction of consumers who, except for the existence of monitoring systems, would not join the network.<sup>585</sup>

Not all online service providers exercise the same level of editorial control as Prodigy, so not all necessarily would be considered publishers. If, however, the *Stratton Oakmont* decision survives rehearing and remains law, it may force online service providers to choose between risking publisher status by exercising some level of editorial oversight, and completely abdicating editorial control of their networks to avoid being vulnerable to the payment of large damage awards in libel suits.<sup>586</sup>

### III. OTHER DEFAMATION ISSUES ON THE INFORMATION SUPERHIGHWAY

The availability of online technology and the nature of some online communications may result in certain online plaintiffs' being treated as public figures. One of the rationales for requiring a higher standard of proof from public officials and public figures is that such people generally enjoy superior access to the media and thus are better positioned than private people to rebut or reply to offensive statements.<sup>587</sup>

584. *Id.*

585. The *Stratton Oakmont* court stated, "For the record, the fear that this Court's finding of publisher status for PRODIGY will compel all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure." *Stratton Oakmont*, 1995 WL 323710, at \*5.

586. From a business point of view, the latter is hardly a viable option because it puts the online service provider at risk of being "blindsided not only by litigation, but by consumer dissatisfaction" with the nature or quality of material appearing on its network. Jessica R. Friedman, *Libel in Cyberspace*, Folio: The Magazine for Magazine Management, Sept. 1, 1995, at 57, 58. This dilemma may be compounded by the Communications Decency Act of 1995, H.R. 1004, 104th Cong., 1st Sess. (1995); S. 314, 104th Cong., 1st Sess. (1995), and the Protection of Children from Computer Pornography Act of 1995, H.R. 2104, 104th Cong., 1st Sess. (1995); S. 892, 104th Cong., 1st Sess. (1995), which would make it a crime to transmit pornography over the Internet, but which would allow as a defense a showing that certain efforts were made to restrict such transmissions. See H.R. 1004, § 2, 104th Cong., 1st Sess. (1995); S. 314, § 2, 104th Cong., 1st Sess. (1995); 47 U.S.C. § 223 (1988 & Supp. V 1993). For a discussion of the impact of this legislation on the duty of online service providers after *Stratton Oakmont*, see *Defamation Online: Stratton Oakmont v. Prodigy*, Multimedia Strategist (Editors' Roundtable), Sept. 1995, at S-1, S-3 to S-4 [hereinafter *Defamation Online*].

An encouraging development, perhaps, is the plaintiffs' strategy in *Bowker v. America Online Inc.*, in which the plaintiffs are not immediately seeking recovery from the online service provider, but "have filed a petition for discovery, asking the court to force [America Online] to reveal the name of the subscriber that published the allegedly defamatory statement." *Defamation Online*, *supra*, at S-4.

587. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).



A subscriber to an online service or someone with an Internet account has the ability to send a rebuttal easily and quickly to thousands if not millions of people<sup>588</sup> without having to go through an intermediary such as a newspaper editor.<sup>589</sup> Should such a person be deemed to have "access to the media" sufficient to qualify as a public figure?<sup>590</sup> This question is deceptive because "not all users of [the] Internet and other on-line services have access to all news groups or bulletin boards."<sup>591</sup> A person could be defamed on a bulletin board or in a news group to which he or she does not subscribe or, in other words, defamed in a forum to which he would not necessarily have "access."<sup>592</sup>

Another question that may arise in the context of online defamation is whether one who participates in an online debate is a "limited purpose public figure."<sup>593</sup> As noted above, the first step in deciding whether a defamation plaintiff is a limited purpose public figure is to ascertain whether the plaintiff was involved in a "public controversy" when he was allegedly defamed.<sup>594</sup> What constitutes a "public" controversy in an environment where millions of people debate each other continuously on a wide variety of controversial subjects?<sup>595</sup> One way to answer this question is to consider the number of users that participated in the online discussion in which the defendant made the allegedly defamatory statements, or, in the context of online news articles, how many people called up the story which contained the state-

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588. See Thomas D. Brooks, Note, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 Rutgers Computer & Tech. L.J. 461, 479-83 (1995).

589. *Id.* at 482.

590. The question assumes that online communications constitute "media" in the traditional sense.

591. Brooks, *supra* note 588, at 480.

592. See *id.* One could easily obtain access to the forum in which he was libeled by paying a small subscription fee. Nonetheless, "given the myriad of news groups and news group providers, the burden of finding the proper provider and accessing its (potentially incompatible) software may be prohibitive." *Id.* (citation omitted).

593. For a discussion of the "limited purpose public figure" doctrine, see *supra* note 548 and accompanying text.

594. See *id.* The Supreme Court has not provided a definition of "public controversy." One court has noted that "[a] public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d, 1541 1554 (4th Cir. 1994); see also 1 Metcalf & Niehoff, *supra* note 541, § 1.60 (discussing factors used in determining the existence of a public controversy). At a minimum, the controversy must precede the publication of the allegedly defamatory statement. *Id.*

595. Of course, many bulletin boards and newsgroups clearly do not discuss "public controversies." One example of a newsgroup which arguably would not fall into this category is "alt.barney dinosaur.die.die.die," which discusses the children's character Barney the dinosaur. *What's Out There: Newsgroups*, Buff. News, Apr. 3, 1995, at A6. Another example might be a newsgroup or bulletin board about the O.J. Simpson trial, depending on whether the topic under discussion was Marcia Clark's hair or the significance of the jury verdict to race relations in the United States.

ments. Arguably, if only a few people participated in the discussion or read the news story, there was no "public" controversy. Another question which arises in this context is what satisfies the element of "thrusting oneself to the forefront" necessary to qualify as a "limited purpose public figure."<sup>596</sup> One could argue that it should depend on the number and length of postings that the plaintiff made to the bulletin board or forum in which the defamatory statement appeared.

The ease with which online information can be manipulated also may indirectly impose certain duties on online service providers in connection with retractions. The failure to publish a retraction is generally not considered evidence of actual malice.<sup>597</sup> Other courts, however, have held that the refusal to issue a retraction could be evidence of actual malice,<sup>598</sup> and that a publisher's willingness to issue a retraction may show that the publisher did *not* act with constitutional malice in publishing the original statement.<sup>599</sup> Electronic technology makes it easy to publish a retraction within hours, if not sooner, after learning of a potential claim. One could argue that the failure of an online service provider to remove an allegedly defamatory statement from its network, or at least to post a retraction immediately upon ascertaining that the statement is false, indicates that the original statement was published with actual malice.

Claims of online defamation also raise several procedural issues. First, when does publication, which triggers the statute of limitations in defamation cases,<sup>600</sup> occur in the context of statements made on information networks? An allegedly defamatory article included in a database could be considered published either when it is first uploaded on to the database or when it is downloaded by a subscriber.

Second, what is the existence and extent of personal jurisdiction over distant online defamation defendants? Questions that arise in this context include: (1) Can an online service provider be sued in any jurisdiction into which its network reaches?<sup>601</sup> (2) If a newspaper

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596. See *supra* note 548 and accompanying text.

597. See 1 Metcalf & Niehoff, *supra* note 541, § 1.70, at 1-157 to 1-158.

598. See *Bandido's, Inc. v. Journal Gazette Co.*, 575 N.E.2d 324, 328 (Ind. Ct. App. 1991).

599. See *Bryant v. Associated Press*, 595 F. Supp. 814, 818 (D.V.I. 1984); *Powell v. Toledo Blade Co.*, No. 91-1550, 1991 WL 321960, at \*3 (Ohio Ct. C.P. Sept. 18, 1991); *Cape Publications, Inc. v. Teri's Health Studio, Inc.*, 385 So.2d 188, 190 (Fla. Dist. Ct. App. 1980).

600. See 1 Metcalf & Niehoff, *supra* note 541, § 1.77, at 1-184.

601. A complaint filed in Florida in September 1994 by a Florida resident raises these questions. The complaint alleges that *The Kansas City Star* published a defamatory article carried by Datatimes Corporation, an online service, and that a Prodigy user republished the allegedly defamatory article in a message on a Prodigy service. See *And Another Libel Suit Against the Computer Bulletin Board*, Libel Defense Resource Center Libel Letter, Dec. 1994, at 2, 2. The defendants named in this case include *The Kansas City Star* and one of its reporters, Capital Cities/ABC (which owns the *Star*), Datatimes, and Prodigy (which allegedly permitted the subscriber to transmit the message which contained the alleged defamatory statements). *Id.*

publishes an article in its hometown which is subsequently republished by an online service, can the newspaper be sued in any location to which the article is transmitted online?<sup>602</sup> and (3) Is an individual subscriber who lives in state A subject to suit in state B because he posted, from his home in state A, a message that allegedly defamed a resident of state B?

The idea that an online subscriber is subject to suit in any location through which his network connection travels is chilling because many online network connections are circuitous and it is virtually impossible to anticipate where a transmission might travel. Some connections even temporarily exit the United States. Also chilling is the prospect that material uploaded by user A in the United States could be downloaded by user B without user A's knowledge and then uploaded, also without user A's knowledge, to a network located in a foreign country. At least theoretically, user A may find himself subject to suit thousands of miles away in a country that does not require a showing of due process before allowing a court to exercise jurisdiction over a nonresident.

Choice of law is also a concern in cases which arise from the use of network technology. The case of *United States v. Thomas*<sup>603</sup> raises this issue even though it does not involve a defamation claim. In *Thomas*, a Tennessee court convicted two California residents for the interstate transportation of obscene images over their computer bulletin board after a Tennessee postal inspector dialed into the bulletin board and downloaded some of the images.<sup>604</sup> Although a California court might not have considered the images obscene, the *Thomas* court found the material to be obscene according to the "community standards" of Tennessee.<sup>605</sup> The case is now being appealed,<sup>606</sup> and numerous organizations have submitted amicus briefs urging reversal on the ground that the appropriate standard is that of California, where the obscene material originated.

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602. *See id.*

603. No. 94 CR 20019 (W.D. Tenn. Dec. 25, 1994). For a thorough analysis of the issues addressed in this case, see Pamela A. Huelster, Note, *Cybersex and Community Standards*, 75 B.U. L. Rev. 865 (1995).

604. Huelster, *supra* note 603, at 865-66.

605. *Id.*

606. *Thomas v. United States*, Nos. 94-6648 & 94-6639 (6th Cir. Jan. 20, 1995); *see Multimedia Docket Sheet*, *Multimedia Strategist*, July 1995, at 8, 8.