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Liability of Usenet Moderators for Defamation Published by Others: Flinging the Law of Defamation into Cyberspace

Jeffrey M. Taylor

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Taylor: Liability of Usenet Moderators for Defamation Published by Others
**LIABILITY OF USENET MODERATORS FOR
 DEFAMATION PUBLISHED BY OTHERS:
 FLINGING THE LAW OF DEFAMATION
 INTO CYBERSPACE**

*Jeffrey M. Taylor**

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* Associate, Gunster, Yoakley, Valdes-Fauli & Stewart, P.A. B.A., 1992, Northwestern University; J.D., 1995, University of Florida College of Law. I would like to thank Michael G. Platner, Esq., J. Phillip Draughon and Professor Lyrissa Lidsky for their assistance, advice, and constructive criticism. Comments regarding this Article may be directed to the author by email: jtaylor@gunster.com.

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I. INTRODUCTION

In the last twenty years, the increasing availability of computers¹ has revolutionized the fundamental methods of communication.² Today, through the use of computers and the Internet,³ more people than ever have direct access to an increasing amount of information.⁴ In addition, the advent of complex information systems, such as the Internet, have made direct communication between individuals more accessible,⁵ more rapid,⁶ and more powerful.⁷ But the heightened ability to communicate

1. See Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 203 (1989) (“In the [1980’s], millions of Americans have bought powerful home computers.”); Robert Charles, Note, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & TECH. 121, 121 & n.1 (1987) (citing an estimate made in 1982 that, by 1990, computers would appear in up to 40 million homes (citing J. TYDEMAN ET AL., TELETEXT AND VIDEOTEXT IN THE UNITED STATES 77 (1982))). See generally LOY A. SINGLETON, TELECOMMUNICATIONS IN THE INFORMATION AGE (2d ed. 1986) (discussing how the explosion of computers has changed the structure of telecommunications).

2. See OFFICE OF TECHNOLOGY ASSESSMENT, 100TH CONG., SCIENCE, TECHNOLOGY, AND THE CONSTITUTION 11-12 (1987), *microformed on* CIS No. 87-J952-59 (Congressional Info. Serv.); Anthony J. Sassan, Note, *Cubby, Inc. v. CompuServe, Inc.: Comparing Apples to Oranges: The Need for a New Media Classification*, 5 SOFTWARE L.J. 821, 822 (1992).

3. The Internet is an international network of computers connected by phone lines, fiber optic cables, and special hardware devices designed to propagate and route communication. HARLEY HAHN & RICK STOUT, THE INTERNET COMPLETE REFERENCE 2-3 (1994). For a brief description and introduction to the Internet, see *infra* Part II.A.

4. Phillip H. Ault, *Introduction to Part Three: The Technology Revolution*, in MAINCURRENTS IN MASS COMMUNICATIONS 203, 204-06 (Warren K. Agee et al. eds., 1986).

5. David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 81 (1993); see David J. Conner, Casenote, *Cubby v. CompuServe, Defamation Law on the Electronic Frontier*, GEO. MASON INDEP. L. REV., Winter 1993, at 228-31 (discussing how computer bulletin board systems (BBS) have increased accessibility).

6. Becker, *supra* note 1, at 204; see Rex S. Heinke & Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, COMPUTER LAW., July 1994, at 1; Eric Schlachter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87, 107 (1993).

7. See Ault, *supra* note 4, at 209 (discussing how fiber optics increase the amount of transmission that can be sent over a single line); Loundy, *supra* note 5, at 82-86 (describing

over great distances via the Internet also has introduced a new medium for spreading defamation⁸ and pornography,⁹ and has provided a unique forum for committing criminal acts.¹⁰ However, given the rapid development of the Internet and other similar networks,¹¹ the legal response to civil and criminal liability for acts committed on or through these networks has been limited.¹²

Although some federal and state laws directly address computer-related crimes,¹³ the usual response is to apply traditional legal doctrines to network wrongdoing.¹⁴ In some cases, the law can and should remain the same for both computer and noncomputer misconduct.¹⁵ But much of the law is unable to regulate the special computer domain that has colloquially become known as "cyberspace."¹⁶ In cyberspace, the

various forms of communication offered by computer information systems).

8. Phillip H. Ault, *Introduction to Part Six: Living in the Information Society*, *supra* note 4, at 415; Jonathan Gilbert, Note, *Computer Bulletin Board Operator Liability for User Misuse*, 54 FORD. L. REV. 439, 439 (1985); Robert B. Charles, *A New World of On-Line Libel*, LEGAL TIMES, Jan. 6, 1992, at 16, 18.

9. Becker, *supra* note 1, at 204-05; Terri A. Cutrera, *Computer Networks, Libel and the First Amendment*, 11 COMPUTER/L.J. 555, 556 n.6 (1992); Daniel Pearl, *Government Tackles a Surge of Smut on the Internet*, WALL ST. J., Feb. 8, 1995, at B1; *see also* Loundy, *supra* note 5, at 101-04 (discussing child pornography on computers).

10. Becker, *supra* note 1, at 204-05; *see* Loundy, *supra* note 5, at 104-07 (discussing "computer crime" and "computer fraud"); Mark Eckenwiler, *Criminal Law and the Internet*, LEGAL TIMES, Jan. 23, 1995, at S32.

11. Other popular large networks include CompuServe and Prodigy. *See* Loundy, *supra* note 5, at 86 & n.22. There are also America OnLine and legal and media databases such as WESTLAW and Lexis. Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, HARV. J.L. & TECH., Spring 1992, at 65, 65 n.1.

12. Loundy, *supra* note 5, at 81.

13. *See, e.g.*, Communications Decency Act of 1996, Pub. L. No. 104-104, §§ 501-561 (codified in scattered sections of 18, 28 and 47 U.S.C.) (crimes involving indecent communications to minors). However, the enforcement of these provisions were recently enjoined on First Amendment grounds by *American Civil Liberties Union v. Reno*, Nos. CIV A. 96-963, CIV. A. 96-1458, 1996 WL 311865, * 64 (E.D. Pa. June 11, 1996); 18 U.S.C. § 1030 (1994) (crimes involving computer fraud); Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2521 (1994) (crimes involving electronic communication interception); Florida Computer Crimes Act, FLA. STAT. §§ 815.01-.07 (1995) (crimes involving computers); Computer Pornography and Child Exploitation Prevention Act of 1986, FLA. STAT. § 847.0135 (1995) (crimes related to computer pornography).

14. *See infra* Part III.

15. For example, many criminal law doctrines can be readily adapted to on-line behavior. Statutes prohibiting theft, child pornography, and fraud should equally apply to people who carry out crimes on the Internet. *See supra* note 13.

16. This term has been credited to William Gibson, who used it in his 1984 book *Neuromancer*. *See* Schlachter, *supra* note 6, at 89 n.1. Cyberspace is commonly defined as a virtual reality comprised of electronic data and information. *Id.* Cyberspace is generally accessed through a computer and seen through a video display or other visual output devices. *See id.*

law should adapt to reflect the dichotomy between acts committed on computer systems and similar acts committed outside cyberspace.

Defamation law provides a prime reason to establish this legal dichotomy. This tort provides a civil remedy for persons harmed by the unprivileged publication of false statements.¹⁷ Although no legal dichotomy is needed to represent the liability of the creator of a defamatory message,¹⁸ the current system of defamation cannot adequately represent the realities of operators or administrators of Internet systems.¹⁹ Specifically, this Article examines this area of the law of defamation with respect to Usenet, the "newsgroup" service of the Internet.²⁰ First, this Article discusses the various options for newsgroup moderator liability under the current framework of defamation. Second, this Article argues that this framework does not sufficiently fit the realities of newsgroup moderators on a large computer network. Finally, this Article suggests alternatives that may balance the

An example of a cyberspace domain is a chat or conference room on a bulletin board service. *See id.* at 108 & n.97. Although users of these services are really only in the sense of "real time," not in a physical room, their domain may be limited so that they can talk to only those users in that room. *See id.*; Becker, *supra* note 1, at 212. They may have the choice of whether to speak out loud to the entire conference area or to whisper private, brief messages to particular people currently logged on. *See Becker, supra* note 1, at 212 n.37. Through the ability to mimic communication of the physical world, cyberspace is in many respects an alternate electronic dimension in which users can replicate tasks performed in "real life." *See Loundy, supra* note 5, at 84 n.13.

17. *See* BLACK'S LAW DICTIONARY 417 (6th ed. 1990).

18. *See* Charles, *supra* note 1, at 134-36.

19. Becker, *supra* note 1, at 205; Charles, *supra* note 1, at 134-36.

20. *See infra* Part II.B. (discussing what Usenet is and how it works). Although newsgroups do take different forms, they generally provide a central meeting place for discussing a particular topic. *See HAHN & STOUT, supra* note 3, at 178. These topics range from the normal, such as sports, television, religion, computers, and food, to the more arcane, such as pornography, bondage, and explosives. *See id.* at 740-94 (listing many current newsgroups). Special newsgroups may reflect local or regional interest. *See id.* Media newsgroups, such as those offered by Clarinet, provide the latest wire service reports on a wide variety of subjects. *Id.* at 170-71. Newsgroups are identified by a series of names, separated by periods. *Id.* at 172-74. Each name reflects a hierarchy of general groups and more specialized subgroups, and refines the scope of the identified group. *Id.* at 166-68. For example, rec.sports.waterskiing means that the group is found under the general "rec" (recreational) group, a subgroup dealing with "sports," and a sub-subgroup about "waterskiing." *See id.* (providing similar examples). Thus, newsgroups may be as narrow (rec.sports.fan.baseball.atlanta-braves) or as broad (soc.singles) as maybe desired.

Most newsgroups (a notable exception are the Clarinet newsgroups) allow a user to "post" messages to the newsgroup and other users to respond to posted messages. *See id.* at 171. Thus, newsgroups often support many threads, or running dialogues on a particular topic, at any given time.

interests between maintaining the free flow of information on the Internet and protecting the rights and goals of the network and its users.

II. INTRODUCTION TO THE INTERNET AND USENET

In order to fully understand the difficulties in applying traditional defamation law to the Internet and Usenet, one must first analyze how this computer network operates. Furthermore, an introduction to the Internet may illuminate the differences between computer-based communications and more traditional media, such as newspapers. These differences are important to determine whether defamation law can simply be "mapped" onto perceived cyberspace equivalents of traditional media.²¹

A. *What Is the Internet?*

The Internet is one of the largest networks of computer information resources.²² The Internet began as a computer network called Arpanet.²³ The Department of Defense developed Arpanet in the late 1960s to link communications among military installations in order to survive a nuclear exchange involving the United States.²⁴ Later, this military system was expanded to include computer networks connecting academic and research communities.²⁵ This network eventually became the Internet.²⁶ One writer has reported that in 1993, the Internet had more than 20 million users in 135 countries, and carried approximately 45 billion packets of information a month.²⁷ Another reporter stated that in 1994, there were 25 million Internet users.²⁸ A 1996 estimate claimed that more than 40 million people worldwide use the Internet.²⁹ Despite its vast size and increasing usage worldwide, the Internet is largely unregulated.³⁰ However, the Internet is supported at each site

21. It is difficult to compare cyberspace media with traditional media forms. *See* Cutrera, *supra* note 9, at 556 (describing computer networks as "strange, hybrid entities that defy the legal system's propensity to define and pigeon-hole human constructs").

22. HAHN & STOUT, *supra* note 3, at 2.

23. *Id.*

24. Molly Ivins, *Do Not Censor My Cyberspace*, GAINESVILLE SUN, Apr. 7, 1995, at 8A. The premise behind Arpanet was to create a flexible network of communications that would survive, even after a network member had been destroyed. *Id.*

25. *Id.*

26. *Id.*; Tommi Chen, *Sense and Censorship on the Internet*, BUS. TIMES, Mar. 27, 1995, at 15.

27. *See* Heinke & Rafter, *supra* note 6, at 2.

28. *See* Brent Staples, *Beastly Manners in Cyberspace*, N.Y. TIMES, Oct. 13, 1994, at A26.

29. *Reno*, 1996 WL 311865, at *4.

30. *See* HAHN & STOUT, *supra* note 3, at 3.

by a system or network administrator, who ensures that the network is functioning properly at that site.³¹ Internet sites are supported by academic and governmental institutions, as well as by private companies and organizations.³² Smaller networks called local-area networks, or LANs, allow distribution of computer services within a particular site.³³

Users can access the Internet in a variety of ways. First, a user can connect a computer directly to the Internet.³⁴ A direct Internet connection can have two forms.³⁵ One type of connection is through a computer that is physically hard-wired to the network system.³⁶ The other is through terminals which do nothing but provide access to a computer attached directly to the Internet.³⁷ An example of the former might be a workstation plugged into the Internet through a special cable.³⁸ An example of the latter is lab terminal comprised of merely a keyboard and a monitor connected to a computer which provides Internet access.³⁹

Second, a user can connect to the Internet through a "dial-up" connection.⁴⁰ The dial-up method requires a computer, a modem,⁴¹ and a telephone line.⁴² A modem, which is connected from the user's computer to a standard phone jack, sends information to the computer with Internet access.⁴³ It also is possible to place a home computer on the Internet through a dial-up service.⁴⁴ This allows the user's computer to maintain its own unique address on the Internet.⁴⁵

Once a user has access, the Internet allows users to communicate ideas and information and to share expensive computer resources.⁴⁶

31. *See id.* at 10-11.

32. *See id.* (describing how these institutions implement both large- and wide-area networks, which are then connected to the Internet).

33. *Id.*

34. *Id.* at 35. A computer attached directly to the Internet will have its own electronic "address," or unique identifier. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *See id.*

39. *Id.*

40. *Id.*

41. The term "modem" stands for "modulator-demodulator," which represents the conversion from a digital computer signal to an analog telephone signal (modulation) and its conversion back to digital on the other end (demodulation). *Id.* at 36.

42. *Id.* at 35-36.

43. *Id.* at 37.

44. *Id.* at 39-40. However, a dial-up service can be difficult and costly to set up and maintain. *Id.* at 40.

45. *Id.*

46. *Id.* at 10.

Most Internet providers allow their users to receive electronic mail, transfer files, connect to other Internet computers, and access Usenet, the Internet's system of news and discussion groups.⁴⁷ Many Internet providers also feature on-line chat or talk facilities, text editing, computer programming compilers, and other utilities.⁴⁸ However, this Article focuses solely on the use of Usenet newsgroups on the Internet.

B. *What Is Usenet and What Are Newsgroups?*

Unlike the Internet, Usenet is not a separate network entity.⁴⁹ Rather, it is merely a network service which uses the Internet to provide access to a collection of newsgroups.⁵⁰ A newsgroup is a computerized version of a bulletin board, upon which users can post messages and topics for discussion on a particular subject.⁵¹ Overall, Usenet boasts more than 11,000 newsgroups,⁵² with new newsgroups frequently being created.⁵³

Usenet is composed of approximately 76,000 Internet and non-Internet sites which collect and propagate newsgroup messages.⁵⁴ Each site is run by a news administrator who ensures that his or her news server is running and that messages are reaching machines at the news administrator's site.⁵⁵ Therefore, unlike newsgroup services on networks such as CompuServe or Prodigy, no centrally organized authority manages Usenet.⁵⁶ Despite this lack of centralized authority, much of Usenet's content is guided by generally accepted conventions, or "netiquette,"⁵⁷ that have been developed to foster cooperation among users.⁵⁸ Violations of these conventions may subject the offender to

47. *Id.* at 19-23; *see infra* Part II.B. (discussing what Usenet is and how it works).

48. HAHN & STOUT, *supra* note 3, at 20-23.

49. *Id.* at 161.

50. *Id.* at 158-60. The term "Usenet" is an abbreviation of "users network." *Id.* at 161.

51. *Id.*

52. The number of current newsgroups was determined by accessing the Netcom Communications, Inc. newsgroup database.

53. *Id.* at 172. Over one six-month span, the number of newsgroups grew by approximately 26%. *Id.* For a discussion of how new newsgroups are started, *see id.* at 178-79.

54. *Id.* at 165.

55. *Id.* at 162.

56. *Id.* at 162-63.

57. While presenting ten governing core rules, one writer defines netiquette as a set of requirements to "get along" in the cyberspace society. VIRGINIA SHEA, NETIQUETTE 19, 32-33 (1994).

58. HAHN & STOUT, *supra* note 3, at 163.

public criticisms called “flames,”⁵⁹ or private rebukes to the offender’s personal mailbox.⁶⁰

Usenet newsgroups may be moderated or unmoderated.⁶¹ Users have restricted access to moderated newsgroups.⁶² A user may send an article to a moderated group in the same way as an unmoderated group, but the article is first routed to a moderator.⁶³ The moderator may edit or refuse to post an article that does not conform to a particular topic or that does not meet the moderator’s quality standards.⁶⁴ Therefore, a moderator has a great deal of control over which articles will be disseminated through a moderated newsgroup.⁶⁵

Alternatively, any user can post a message or “article” to an unmoderated newsgroup without restriction.⁶⁶ Articles posted to unmoderated newsgroups are not edited for content, quality, or length.⁶⁷ An overwhelming majority of the newsgroups on Usenet are unmoderated.⁶⁸

III. DEFAMATION AND NETWORK OPERATOR LIABILITY

A. Defamation Standards

Generally stated, defamation provides a remedy for damages proximately caused by the publication or declaration of a false, defamatory, and unprivileged statement to a third person.⁶⁹ Some jurisdictions also require a finding of malice on the part of the publisher or speaker.⁷⁰ For example, in Florida, the statement must expose a person to ridicule, contempt, hatred, or injury to the person’s business or profession.⁷¹ In Florida, slander, or oral defamation, may be action-

59. *Id.* at 199.

60. *Id.* at 163.

61. *Id.* at 175. On Clarinet, a third method to access news, users cannot post messages. *Id.* at 171. Rather, a private company that provides Clarinet posts news articles from UPI and other wire services. *Id.*

62. *See id.*

63. *Id.*

64. *Id.*

65. *Id.* Authors Hahn and Stout view a moderated newsgroup as a form of “censorship.” *Id.* at 175.

66. *See id.* at 175.

67. *See id.*

68. *Id.*

69. *Cooper v. Miami Herald Publishing Co.*, 31 So. 2d 382, 384 (Fla. 1947).

70. *See, e.g., Layne v. Tribune Co.*, 146 So. 234, 238 (Fla. 1933) (“Without malice, either express or implied by law, no tort could result from the publication of a defamatory statement concerning another, however untrue it might be.”). A court may imply malice when a false or defamatory statement is published without an excuse. *Id.*

71. *Perez v. City of Key West*, 823 F. Supp. 934, 938 (M.D. Fla. 1993) (citing *Layne*, 146

able per se if it imputes to another: (1) a felonious offense; (2) a presently existing venereal or communicable disease; (3) a course of conduct incompatible with the defamed person's business; or (4) if a woman, unchastity.⁷² A plaintiff who can classify a defamatory statement into one of these four categories does not need to plead or prove damages because they are presumed as a matter of law.⁷³ Damages are presumed for these types of communications because they necessarily cause injury to a person's reputation or standing in the community.⁷⁴ If an allegedly defamatory statement does not fall into one of these categories, the plaintiff must then plead and prove special damages.⁷⁵ Thus, in order to survive a motion to dismiss, a plaintiff suing under Florida law and alleging slander which is not per se, must show that she suffered economic or pecuniary losses stemming from the injury to her reputation.⁷⁶

Similarly, under Florida law, libel may be actionable per se without proof of malice or damages.⁷⁷ To successfully prove libel per se, a plaintiff must plead and prove that an average person would find that the defendant's written statement alone caused injury.⁷⁸ If the plaintiff can show libel per se, she does not need to prove special damages to recover.⁷⁹ However, a statement which is not libelous on its face requires proof of special harm.⁸⁰

Although the common law widely recognized the libel-slander distinction, new forms of technology and communication have blurred the line between the two types of defamation.⁸¹ Originally, this distinction depended on whether the defamatory statement was oral (slander) or written (libel).⁸² Early common law considered libel a

So. at 237-38).

72. *Wolfson v. Kirk*, 273 So. 2d 774, 777 (Fla. 4th DCA 1973) (quoting *Campbell v. Jacksonville Kennel Club*, 66 So. 2d 495, 497 (Fla. 1953)). This is also commonly called slander per se. *Id.*

73. *Id.*

74. *Id.*

75. *See id.* at 777.

76. *See id.*; *Barry College v. Hull*, 353 So. 2d 575, 578 (Fla. 3d DCA 1978); RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1976).

77. *Perez*, 823 F. Supp. at 938; *Richard v. Gray*, 62 So. 2d 597, 598 (Fla. 1953).

78. *Perez*, 823 F. Supp. at 938. The determination of whether a libelous statement is per se defamatory must be made "without reference to anything except the words used." *Wolfson*, 273 So. 2d at 778.

79. *See Perez*, 823 F. Supp. at 938; *Matherson v. Marchello*, 473 N.Y.S.2d 998, 1002 n.3. (App. Div. 1984).

80. *See Perez*, 823 F. Supp. at 938.

81. *Matherson*, 473 N.Y.S.2d at 1003.

82. *Id.*

more serious offense than slander because few people could read or write; thus, the written word carried a "louder ring of purported truth."⁸³ Furthermore, written defamation was permanent and could be widely disseminated.⁸⁴ In modern times, however, statements broadcast over radio and television can reach a larger audience than written statements.⁸⁵ Thus, a number of courts have reasoned that defamatory material published over radio and television should be classified as libel.⁸⁶

The early development of defamation law was a product of state common law⁸⁷ until the United States Supreme Court held that, in certain circumstances, the Free Speech Clause of the First Amendment protects defamatory speech.⁸⁸ In the landmark case of *New York Times v. Sullivan*,⁸⁹ an Alabama city commissioner sued the *New York Times* for defamation after it published an advertisement claiming that he and other commissioners were conducting a "wave of terror" against African-Americans.⁹⁰ In reversing a verdict for the commissioner, the Supreme Court held that the First Amendment prohibited a public official from seeking damages for a defamatory statement relating to his or her official duties, unless he or she could show that the statement was made with actual malice.⁹¹ The Court defined actual malice as knowledge or reckless disregard for whether or not the statement was false.⁹² The Court reasoned that the need to protect the ability to criticize public officials outweighed any harm those officials might suffer.⁹³

Later Supreme Court decisions applied the *New York Times* holding to "public figures" as well.⁹⁴ However, in *Gertz v. Robert Welch*,

83. *Id.* (citing MARC A. FRANKLIN, TORT LAW AND ALTERNATIVES: INJURIES AND REMEDIES 898 (2d ed. 1979)).

84. *Id.*

85. See Jeffrey F. Ghent, Annotation, *Defamation by Radio or Television*, 50 A.L.R.3d 1311, 1325-29 (1973).

86. See *id.*

87. Charles, *supra* note 1, at 127.

88. See *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. This amendment has been applied to the states through the Fourteenth Amendment's Due Process Clause and the doctrine of incorporation. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

89. 376 U.S. 254 (1964).

90. *Id.* at 256-58.

91. *Id.* at 279-80. Thus, the Court reversed the jury verdict because it did not state that the defendants had made the statements with actual malice. *Id.* at 283-84.

92. *Id.* at 279-80.

93. See *id.* at 281-82.

94. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154 (1967). Although the Supreme Court's definition of a public figure is not clear, the *Curtis Publishing* Court described this term

Inc.,⁹⁵ the Court refused to extend the *New York Times* holding to private persons.⁹⁶ In *Gertz*, a private person claimed that the publisher of a magazine defamed him.⁹⁷ The Court held that the constitutional protection afforded for statements about public officials was not applicable to private individuals, even when the matter was of general or public interest.⁹⁸ Although the Court did not extend First Amendment protection to defamatory statements against a private individual, the Court refused to allow states to impose strict liability for defamation.⁹⁹ Nonetheless, the *Gertz* Court explicitly acknowledged that states have a legitimate interest in protecting individuals from wrongful injury arising out of defamation.¹⁰⁰ The Court noted that in protecting this interest, states must at least require a negligence standard of liability and may not constitutionally permit recovery of presumed or punitive damages without a finding of actual malice.¹⁰¹

Although the *Gertz* holding applied to defamation of a private person involving matters of general or public concern, the Court implied that its rationale could also be extended to any type of defamation of any private plaintiff, including statements regarding matters of purely private concern.¹⁰² The Court directly addressed this situation in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹⁰³ In *Dun & Bradstreet*, a construction contractor sued a credit reporting agency for defamation after the credit agency issued a false report to the contractor's creditors claiming that the contractor had filed for bankruptcy.¹⁰⁴ After the trial court awarded the contractor presumed and punitive damages, the credit agency appealed and claimed that under *Gertz*, presumed or punitive damages could not be awarded unless a plaintiff shows that the defendant acted with actual malice.¹⁰⁵ The Court held that speech on matters of purely private concern did not invoke the same First

to mean a person who "command[s] sufficient continuing public interest and ha[s] sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.* at 155 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).

95. 418 U.S. 323 (1974).

96. *Id.* at 345-46; Cutrera, *supra* note 9, at 564.

97. *Gertz*, 418 U.S. at 327.

98. *Id.* at 345-46.

99. *Id.* at 347.

100. *Id.* at 348-49.

101. *Id.* at 349.

102. *See id.* at 345-48 (discussing reasons for not imposing First Amendment concerns upon private plaintiffs, without regard to the public or private nature of the subject matter).

103. 472 U.S. 749 (1985); *see* Cutrera, *supra* note 9, at 565.

104. *Dun & Bradstreet*, 472 U.S. at 751-52.

105. *Id.* at 752.

Amendment concerns that *New York Times* and *Gertz* sought to protect.¹⁰⁶

In reaching its holding, the Court reasoned that statements of private concern did not interfere with “free and robust debate of public issues.”¹⁰⁷ Furthermore, restricting First Amendment protection when only private concerns are involved neither denies individuals a right to redress the government nor induces self-censorship upon the press, two policy concerns that often trigger constitutional protection.¹⁰⁸ The Court found that in a case with a private plaintiff and private subject matter, states have a “substantial” interest in providing a remedy, even when the plaintiff may not be able to prove actual damages.¹⁰⁹ To further this state interest, states may permit awards of presumed or punitive damages absent a showing of actual malice.¹¹⁰ The Court concluded that the agency’s defamatory credit report did not address matters of public concern, and thus the plaintiff could recover presumed and punitive damages without showing actual malice.¹¹¹

B. *Primary and Secondary Publishers*

Reflecting the Supreme Court’s decisions in the area of defamation, state courts now generally distinguish between the type of injured plaintiff in a defamation suit and the nature of the communication.¹¹² Defamation standards also vary depending on the character of the party who causes the defamatory statement to be published.¹¹³ The author of a defamatory statement may be liable under the standards of defamation previously discussed.¹¹⁴ Similarly, primary publishers such as magazines and newspapers can be held liable for publishing a defamatory statement.¹¹⁵ Primary publishers are responsible for a defamatory statement because they are in complete control of the writing, editing, and publication of such material.¹¹⁶ In fact, many of the common law

106. *Id.* at 759.

107. *Id.* at 760 (quoting *Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1363 (Or. 1977)); see also *New York Times*, 376 U.S. at 270 (stating that the First Amendment ensures that “debate on public issues should be uninhibited, robust, and wide-open”).

108. See *Dun & Bradstreet*, 472 U.S. at 760 (citing *Harley-Davidson*, 568 P.2d at 1363).

109. *Id.*

110. *Id.* at 761.

111. See *id.* at 761, 763.

112. See *Cutrer*, *supra* note 9, at 569.

113. See *id.*

114. E.g., *Dun & Bradstreet*, 472 U.S. at 761 (finding credit agency as author liable); *Nodar v. Galbreath*, 462 So. 2d 803, 805 (Fla. 1984) (finding individual as author not liable).

115. See *Gertz*, 418 U.S. at 346.

116. See Joseph P. Thornton et al., *Legal Issues in Electronic Publishing—Libel*, 36 *FED.*

defamation cases¹¹⁷ and defamation cases involving constitutional issues have involved publisher liability.¹¹⁸

On the other hand, parties who merely act as distributors of defamatory material, known as secondary publishers, may be held liable only if they know or have reason to know about the defamatory statement.¹¹⁹ Bookstores, libraries, telegraph companies, and news dealers are common examples of secondary publishers.¹²⁰ The *Restatement (Second) of Torts* section 578 provides that “[e]xcept as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”¹²¹ To be considered a secondary publisher, the distributor must not alter, recopy, or otherwise exhibit direct control over the original material.¹²²

A common carrier also may be liable for defamation.¹²³ A common carrier generally is defined as an operator that indifferently provides a specific service to whomever desires it, thereby allowing subscribers to transmit information of their choice without control from the operator.¹²⁴ Even if a common carrier knows that the false statements exist,

COMM. L.J. 178, 179 (1984) (stating that many people who aid in the publication of a defamatory statement may be held liable as a primary publisher); RESTATEMENT (SECOND) OF TORTS § 581 cmt. c (1976).

117. See, e.g., *Miami Herald Publishing Co. v. Ane*, 458 So. 2d 239, 240-41 (Fla. 1984) (developing Florida law of defamation in the context of publisher liability).

118. See, e.g., *Gertz*, 418 U.S. at 326-27 (magazine editor); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 31 (1971) (radio station); *Curtis Publishing*, 388 U.S. at 135 (magazine publisher); *New York Times*, 376 U.S. at 256 (newspaper publisher); Edward A. Cavazos, Note, *Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology*, 12 REV. LITIG. 231, 234-37 (1992). For more citations to cases discussing newspaper and magazine publisher liability, see *Rosenbloom*, 403 U.S. at 30 n.1.

119. RESTATEMENT (SECOND) OF TORTS § 581(1) (1976); see, e.g., *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984) (magazine distributor), *cert. denied*, 471 U.S. 1054 (1985); *Hartmann v. American News Co.*, 171 F.2d 581 (7th Cir. 1948) (article distributor). The Supreme Court has acknowledged the distinction between primary and secondary publishers, albeit in the criminal context. *Smith v. California*, 361 U.S. 147, 153 (1959). In *Smith*, a bookstore owner was convicted under a Los Angeles ordinance prohibiting the possession of obscene materials in a place where books are sold. *Id.* at 148. The ordinance imposed strict criminal liability. *Id.* at 149. The Court found that by not requiring knowledge of the content of the material sold, the city ordinance placed a “severe limitation on the public’s access to constitutionally protected matter.” *Id.* at 153. Thus, distributors could not be held liable for the material distributed without some showing of knowledge of its contents. See *id.*

120. *Cutrer*, *supra* note 9, at 568.

121. RESTATEMENT (SECOND) OF TORTS § 578 (1976).

122. *Cutrer*, *supra* note 9, at 568.

123. See RESTATEMENT (SECOND) OF TORTS § 612(2) (1976); *Cutrer*, *supra* note 9, at 566.

124. *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (quoting *Washington ex rel. Stimson Lumber Co. v. KuyKendall*, 275 U.S. 207, 211-12

it is generally not held liable for its users' defamatory statements, even if it knows that the false statements exist.¹²⁵ Common carrier status generally provides more protection to disseminators than the protection afforded by *New York Times*.¹²⁶ By removing the burden of inspecting and regulating individual communication, this status protects a common carrier from most tort liability, thus ensuring efficient communication services to a large number of people.¹²⁷ The common carrier rule also prevents communication agents from becoming sponsors or endorsers of a particular message.¹²⁸ However, without litigation, it is often difficult to determine whether a particular service is a common carrier and thus qualifies for this higher level of immunity from defamation liability.¹²⁹

C. *Traditional Defamation Liability with Respect to Operators of Computer Networks*

1. *Daniel v. Dow Jones & Co.*

As can be expected, few courts have applied these principles of defamation law to computer networks like the Internet. At least two cases involving computer services have received recent notoriety. In *Daniel v. Dow Jones & Co.*,¹³⁰ a subscriber of the Dow Jones News/Retrieval service received investment information about a Canadian corporation.¹³¹ The subscriber used this information to invest in the corporation; however, the information did not reveal that the stated prices were in Canadian, not United States, dollars.¹³² The subscriber sued the service, claiming that it had negligently published false and misleading statements.¹³³

First, the *Daniel* court noted that a news service is not liable to readers for printing negligent statements.¹³⁴ Furthermore, the court

(1927)).

125. See, e.g., *Anderson v. New York Tel. Co.*, 320 N.E.2d 647, 649 (N.Y. 1974); RESTATEMENT (SECOND) OF TORTS § 612(2) (1976).

126. *Cutrer*, *supra* note 9, at 567.

127. *Id.*

128. *Id.*

129. *Id.*; see also Communications Act of 1934, 47 U.S.C. § 153(h) (1994) (defining a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio").

130. 520 N.Y.S.2d 334 (Civ. Ct. 1987).

131. *Id.* at 335. The Dow Jones News/Retrieval service provides to up-to-date news and information for a per minute user fee. *Id.* In 1986, the Dow Jones service had more than 200,000 subscribers. *Id.*

132. *Id.*

133. *Id.* at 336.

134. *Id.* (citing *Jaillet v. Cashman*, 189 N.Y.S. 743 (Sup. Ct. 1921), *aff'd*, 194 N.Y.S. 947

stated that liability for making a negligent misstatement does not exist without a "special relationship" between the parties.¹³⁵ In examining the relationship between the subscriber and the electronic news service, the court equated the service to a "moderate circulation newspaper or subscription newsletter."¹³⁶ The court found that the subscriber of the computer service was "functionally identical" to a reader of a newspaper.¹³⁷ Because a newspaper could not be held liable for negligent misstatements, the court held that the subscriber could not maintain a cause of action against the computer service for its negligent misstatements.¹³⁸

Second, the *Daniel* court stated that the subscriber's suit was barred by the First Amendment.¹³⁹ Citing *Gertz*, the court found that the First Amendment protected the media from liability in the absence of actual malice.¹⁴⁰ The court likened the service to a media defendant and asserted that it was entitled to the "fullest protection of the First Amendment."¹⁴¹ Thus, the court held that even if the material were false or misleading,¹⁴² the subscriber could not hold Dow Jones liable for merely negligently publishing material on the computer database.¹⁴³

Although the facts of *Daniel* only obliquely pertain to the issue of Usenet defamation, Judge Friedman's opinion in *Daniel* may nevertheless apply to other computer service cases. First, he recognized the need for the law to adapt to changing technology.¹⁴⁴ However, he added a

(App. Div. 1922), *aff'd*, 139 N.E. 714 (N.Y. 1923)). The *Daniel* court stated that this rule had been followed in other jurisdictions. *See id.* at 338.

135. *Id.* at 336-37. For example, a "special relationship" can exist between accountants and members of a defined group of interests that the accountant is supposed to serve. *Id.* at 337 (citing *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985)). Another example of this relationship is when the United States publishes maritime and aviation charts. *Id.*

136. *Id.* at 337.

137. *Id.*

138. *See id.* at 338.

139. *Id.* at 339.

140. *See id.* (citing *Gertz*, 418 U.S. at 340). Although the *Daniel* court recognized the tenuousness of a media/nonmedia defendant distinction that seemed to arise from *Gertz*, the court acknowledged that this question was not dispositive of the instant case because the service so closely resembled a media provider. *Id.* at 339-40.

141. *Id.* at 340 (citing *P.A.M. News Corp. v. Butz*, 514 F.2d 272, 277 (D.C. Cir. 1975)).

142. The *Daniel* court did not address the issue of whether the service's report was true. *Id.* at 340. However, in response to the subscriber's assertion that the failure to state the price in Canadian currency made the entire report misleading, the court noted that some media in rebuffing the subscribers' falsehood must be tolerated to generally protect a free press. *Id.* (citing *Gertz*, 418 U.S. at 341).

143. *See id.* at 340.

144. *Id.* at 338 ("Technological advances must continually be evaluated and their relation

caveat: “[I]f the substance of a transaction has not changed, new technology does not require a new legal rule merely because of its novelty.”¹⁴⁵ This caveat implies that if a type of technology alters the way people communicate with each other, then the law should change accordingly.¹⁴⁶ In *Daniel*, Judge Friedman did not believe that Dow Jones’ news service performed functions differently than those of the *Wall Street Journal*.¹⁴⁷ Nonetheless, Judge Friedman’s comments indicate that he would be inclined to recognize changes in the law when new technology warrants them.¹⁴⁸

Additionally, *Daniel* offers computer services similar to Dow Jones the First Amendment protections usually afforded to traditional media defendants.¹⁴⁹ However, it seems that this protective standard might apply to computer services which do not resemble media services. First, Judge Friedman noted that the distinction between media and nonmedia defendants “makes little sense” given the rapid changes in communications.¹⁵⁰ Second, he recognized that New York courts, which have a large caseload, have not addressed this dichotomy.¹⁵¹ Finally, he asserted that the actual malice standard promotes “[t]he societal right to free and unhampered dissemination of information. . . .”¹⁵² Arguably, computer services that do not resemble traditional media functions, like the Internet, may still qualify for First Amendment protection under the *Daniel* rationale.

2. *Cubby, Inc. v. CompuServe Inc.*

At least one court has attempted to set a standard of defamation liability for a particular aspect of a nationwide computer network. In *Cubby, Inc. v. CompuServe Inc.*,¹⁵³ a small computer database service

to legal rules determined so that antiquated rules are not misapplied in modern settings.”).

145. *Id.*

146. *See id.* at 335 (posing the question of whether “technological advances require rethinking of legal principles that have existed for previous modalities”).

147. *See id.* at 337. Arguably, however, this news service was technologically more advanced than a regular newspaper. A user could query the database for specific subjects or words, and the computer would return articles matching those specifications. *Id.* at 335. Searches of the actual newspaper would take significantly longer. In addition, Dow Jones probably provided news at least a day ahead of a regular newspaper. Thus, it could be argued that Dow Jones was more than just a new way of transmitting news.

148. *See id.* at 338.

149. *Id.* at 339-40.

150. *Id.* at 339.

151. *Id.* at 339-40.

152. *Id.* at 339. One of the basic purposes of the Internet is to allow free and unfettered access to information. *See infra* text accompanying notes 248-49.

153. 776 F. Supp. 135 (S.D.N.Y. 1991).

and its operator claimed that CompuServe libeled them by allowing allegedly defamatory statements to be posted to a database service.¹⁵⁴ CompuServe's computer network featured more than 150 "forums," each of which provided bulletin boards, interactive chat lines, and informational databases.¹⁵⁵ One of these, the Journalism Forum, was managed and edited by an independent contractor.¹⁵⁶ This forum contained a daily newsletter called "Rumorville USA" which reported news on journalists and broadcasters.¹⁵⁷ One Rumorville remark contained suggestions that the plaintiffs' computer gossip service was a " 'new start-up scam' " which published information received from Rumorville " 'through some back door.' " ¹⁵⁸

Based on these statements, the plaintiffs sued CompuServe as a publisher of the false statements.¹⁵⁹ CompuServe did not deny that the statements were defamatory, but asserted that it acted as a distributor and not a publisher.¹⁶⁰ Because of this status, CompuServe argued that the correct legal standard was whether it knew or had reason to know of the statements.¹⁶¹ CompuServe claimed that it was not liable under this standard because it did not review the contents of the forum before they were uploaded to the network.¹⁶² Therefore, CompuServe moved for summary judgment on the issue of liability.¹⁶³

One issue in *Cubby* was whether CompuServe was a distributor or publisher for the purposes of applying defamation liability.¹⁶⁴ In order to classify the network, the court attempted to equate it with a comparable nonelectronic information service.¹⁶⁵ In doing so, the court chose to characterize CompuServe as a service which resembled a for-profit library or a "traditional news vendor."¹⁶⁶ The court noted that the network "carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the

154. *See id.* at 137. CompuServe maintained and operated CompuServe Information Service, "an on-line general information service . . . that subscribers may access from a personal computer or terminal." *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 138 (quoting Plaintiffs Affidavit, ¶¶ 5-9, 776 F. Supp. 135 (S.D.N.Y. 1991)).

159. *Id.*

160. *Id.*

161. *Id.* at 139.

162. *Id.* at 140 & n.1.

163. *Id.* at 138.

164. *See id.* at 139.

165. *See id.* at 140.

166. *Id.*

publications.”¹⁶⁷ Given the large amount of information uploaded daily and the rapid speed of transmission, it would be impractical for the network to monitor everything sent to its computers.¹⁶⁸ The court also considered that the application of a lower standard of liability would hinder the free flow of information over the network.¹⁶⁹ Thus, by using an analysis similar to *Daniel*, the *Cubby* court found that CompuServe more closely resembled a distributor than a primary publisher.¹⁷⁰

Also, the court focused on the lack of editorial control over the publication process of the material on the individual forum.¹⁷¹ Because the Journalism Forum was largely maintained by an unrelated independent contractor, CompuServe had little opportunity to inspect the material before offering it to the public.¹⁷² Additionally, CompuServe could not possibly exercise enough editorial control to monitor the large quantities of information placed upon its computer systems.¹⁷³ The court again compared the amount of editorial control that CompuServe exercised to that of ordinary non-computer distributors, such as libraries, bookstores, and newsstands.¹⁷⁴ Citing the *Daniel* court with approval, the *Cubby* court held that CompuServe was a traditional distributor rather than a publisher of information.¹⁷⁵ Applying the “knew or should have known” standard used for distributors,¹⁷⁶ the court concluded that the plaintiffs produced no evidence to suggest that CompuServe could have been liable for the defamatory comments and therefore granted summary judgment in favor of CompuServe.¹⁷⁷

Some inferences can be drawn on the status of computer networks with respect to defamation liability based on *Daniel* and *Cubby*. First, both courts drew a parallel between the computer network and a well-known, non-computer information system.¹⁷⁸ Both analyses tried to fit a changed system of communication into the traditional categories of

167. *Id.*

168. *Id.* at 140 & n.1.

169. *Id.* at 140.

170. *See id.*; Sassan, *supra* note 2, at 829.

171. *Cubby*, 776 F. Supp. at 140.

172. *Id.* at 140 & n.1.

173. *Id.*

174. *Id.* at 140.

175. *Id.* at 140-41 (citing *Daniel*, 520 N.Y.S.2d at 340).

176. *See supra* text accompanying note 98.

177. *Cubby*, 776 F. Supp. at 141.

178. *See id.* at 140; *Daniel*, 520 N.Y.S.2d at 337-38. The attempt to apply traditional legal norms to cyberspace by comparing electronic to nonelectronic media is sometimes referred to as a “mapping” analysis. *See* David R. Johnson & Kevin A. Marks, *Mapping Electronic Data Communications Onto Existing Legal Metaphors: Should We Let Our Conscience (and Our Contracts) Be Our Guide?*, 38 VILL. L. REV. 487, 487-88 (1993).

defamation liability.¹⁷⁹ However, some network functions do not have a direct non-computer analog.¹⁸⁰ For example, an unmoderated Usenet newsgroup arguably resembles both a “newsstand” and a “bulletin board” because users not only read messages, but also post messages of their own to the newsgroup.¹⁸¹ Although both courts recognized that computer networks provide a novel method to communicate and retrieve information,¹⁸² Usenet newsgroup moderators do not seem to fit under a single traditional communication paradigm.¹⁸³ Thus, this “mapping” analysis¹⁸⁴ only supports the notion that defamation law should not apply to Usenet moderators.

Though not at issue in *Daniel*, the *Cubby* court focused on the editorial control of the disseminator in determining the appropriate standard of liability.¹⁸⁵ Under New York law, distributors, as opposed to republishers, were only liable for defamation if they knew or had reason to know of the defamation.¹⁸⁶ In determining whether CompuServe met this scienter requirement, the court looked at the degree of editorial control CompuServe exerted over the Journalism Forum.¹⁸⁷ The court found that CompuServe’s independent contractor uploaded data onto CompuServe’s computers, thereby making such data immediately available to subscribers.¹⁸⁸ CompuServe did not review or revise any of the Journalism Forum material, and the *Cubby* court maintained that imposing such a burden would inhibit CompuServe’s ability to establish a free flow of information on its service.¹⁸⁹ Thus, the court found that the issue of editorial control was an important factor in holding CompuServe to the distributor standard of defamation liability.¹⁹⁰

179. See *Cubby*, 776 F. Supp. at 140; *Daniel*, 520 N.Y.S.2d at 337-38.

180. See Johnson & Marks, *supra* note 178, at 487-88.

181. See HAHN & STOUT, *supra* note 3, at 159, 162-63.

182. *Cubby*, 776 F. Supp. at 140 (“CompuServe and companies like it are at the forefront of the information industry revolution.”); *Daniel*, 520 N.Y.S.2d at 340 (“[The Dow Jones service] is one of the modern, technologically interesting, alternative ways the public may obtain up-to-the-minute news.”).

183. See Johnson & Marks, *supra* note 178, at 492-98 (asserting that computer bulletin boards do not fit under the publisher, distributor, or common carrier paradigms).

184. See *id.* at 487-88; *supra* note 178.

185. See *Cubby*, 776 F. Supp. at 140.

186. *Id.* at 139.

187. *Id.* at 140.

188. *Id.*

189. *Id.*

190. See *id.* at 139-40. In one of the few judicial decisions to apply *Cubby*, a New York state court has held that a computer on-line service was liable as a publisher for the posting of defamatory material by one of the service’s users. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*,

No. 31063/94, 1995 WL 323710, *4 (May 24, 1995), *reh'g denied*, 1995 WL 805178 (N.Y. Sup. Ct. Dec. 11, 1995). In *Stratton Oakmont*, an unidentified user of a financial bulletin board on the Prodigy computer on-line service posted statements claiming that Stratton Oakmont, Inc., a securities investment banking firm, and its president, committed criminal and fraudulent acts in connection with an initial public offering. *Id.* at *1. The plaintiff sued the company providing the computer network services for libel and argued that Prodigy “exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.” *Id.* at *3.

In finding that Prodigy did exercise the requisite editorial control to incur direct publisher liability, the *Stratton Oakmont* court found that despite the fact that 60,000 messages a day are posted on Prodigy’s bulletin boards, Prodigy had established procedures by which it could deter and eliminate messages which are “‘in bad taste’” or “‘grossly repugnant to community standards.’” *Id.* at *2, *3. These procedures included (i) the development of “content guidelines” designed to communicate to users Prodigy’s policy against posting articles which, *inter alia*, “‘are deemed harmful to maintaining a harmonious online community’”; (ii) the use of a software screening program which “prescreens all bulletin board postings for offensive language”; and (iii) the use of “Board Leaders” and other management personnel who are responsible for enforcing Prodigy’s content guidelines. *Id.* at *2. With Prodigy’s active use of these procedures, the *Stratton Oakmont* court found that Prodigy was able to “clearly [make] decisions as to content,” and to “uniquely [arrogate] to itself the role of determining what is proper for its members to post and read on the bulletin boards.” *Id.* at *4 (citation omitted). Thus, applying the *Cubby* court’s rationale, Prodigy should be deemed as a publisher and not a distributor due to its editorial control over its bulletin boards. *Id.*

Despite this decision, the *Stratton Oakmont* court explicitly held that its conclusion is neither a repudiation of nor a distinction from the *Cubby* analysis. *Id.* at *5. Instead, however, it demonstrates that computer networks which exercise control over the content of its posted material must “accept the concomitant legal consequences” of such control. *Id.* Although the *Stratton Oakmont* court recognized the fact that increased liability for computer networks such as Prodigy could prevent such networks from exercising control over content, the court dismissed this concern by implying that “the market will . . . compensate a network for its increased control and the resulting increased exposure.” *Id.* However, the court’s logic is not sound when applied to the Internet, and Usenet moderators in particular, where there is no market to compensate Usenet moderators who might possibly incur liability under *Stratton Oakmont* as original publishers of articles posted to their newsgroups. *See supra* Part II.B.

However, in *Stern v. Delphi Internet Servs. Corp.*, 626 N.Y.S.2d 694 (N.Y. Sup. Ct. 1995), nationally-renown radio talk show personality Howard Stern sued an on-line computer network under New York’s commercial misappropriation statute after the computer network featured a photograph of Stern to advertise an on-line subscriber debate on Stern’s candidacy for the office of governor of New York. *Id.* at 695. Although *Stern* involved a claim for commercial misappropriation of his likeness and not defamation, the issue of whether Delphi, the computer network, could avail itself of the common law “incidental use exception” as a defense to Stern’s claim depended upon whether Delphi’s electronic bulletin board service was essentially a news disseminator or distributor. *Id.* at 696. The *Stern* court concluded that Delphi’s on-line information services, which included “electronic mail, on-line conferences [and] bulletin board messages,” were more akin to that of a news vendor, bookstore or letters-to-the-editor column of a newspaper, as such services “require purchase of their materials for the public to actually gain access to the information carried.” *Id.* at 695, 697. In so holding, the *Stern* court found that Delphi’s services were functionally similar to those provided by CompuServe; therefore, under *Cubby*, Delphi’s actions as a distributor of information fell under the incidental use exception

IV. APPLYING TRADITIONAL DEFAMATION LIABILITY TO USENET MODERATORS

Like the *Daniel* and *Cubby* courts, many commentators have asserted that, although Usenet and similar "bulletin board" systems are technologically different from their non-electronic analogs, the traditional standards of defamation still apply.¹⁹¹ Nonetheless, these authorities fail to agree on a single standard that best represents newsgroup services.¹⁹²

To apply traditional defamation standards to Usenet, it may be helpful (and realistic) to borrow from the *Cubby* analysis because it offers one of the few comprehensive judicial treatments of computer networks. Using the *Cubby* analysis, this section classifies the computer network service in terms of an analogous non-computer service. This classification will determine the applicable standard of liability for Usenet moderated newsgroups.

under New York law. *Id.* at 697.

Although the *Stern* decision explicitly reinforces the precedent set by the court in *Cubby*, two aspects of the *Stern* court's reliance upon *Cubby* remain troubling. In *Stern*, Judge Goodman summarily equates the services at issue provided by CompuServe (an on-line newsletter published by a third party) with those provided by Delphi (an interactive subscriber debate service). In her factual analysis, however, Judge Goodman did not distinguish the fact that although Delphi offers electronic services which resemble those of news distributors, such as news reports, stock market quotations and access to reference sources, it also provides interactive services where users can post messages and participate in debates and on-line conferences. *Id.* at 695. Arguably, such interactive user services do not fit into the "traditional" republisher paradigm. Nonetheless, it is not clear from her opinion in *Stern* whether she considered these latter services in concluding that Delphi was subject to distributor and not a publisher. Furthermore, in dismissing the plaintiff's complaint in *Stern*, Judge Goodman neglected to analyze the level of control exercised by the computer service, which was part of the court's analysis in *Cubby*. *Stern*, 626 N.Y.S.2d at 697; *see Cubby*, 775 F. Supp. at 140. Given the differences in analysis between *Stern*, *Cubby* and *Stratton Oakmont*, it is unclear as to the precise factor or factors which will be examined by a court when it attempts to fit a particular computer on-line service into a traditional defamation liability paradigm.

191. *See Becker, supra* note 1, at 227-30; Cutrera, *supra* note 9, at 569-76; Loundy, *supra* note 5, at 134-43; Schlachter, *supra* note 6, at 98, 111; Gilbert, *supra* note 8, at 442.

192. *See e.g., Becker, supra* note 1, at 228 (treating computer bulletin boards as secondary publishers); Cutrera, *supra* note 9, at 569 (asserting that Usenet resembles a common carrier); Johnson & Marks, *supra* note 178, at 490 (suggesting that computer networks should be governed by contract law and not "extraneously imposed regulations" or traditional defamation paradigms); Schlachter, *supra* note 6, at 135-39 (applying primary and secondary liability paradigms to computer "message posting" services); Charles, *supra* note 1, at 136 (asserting that a bulletin board posting service most closely resembles a common carrier); Conner, *supra* note 5, at 237 (viewing the *Cubby* application of distributor liability as sound with regard to non-interactive computer services).

A. *Liability of Newsgroup Moderators as Primary Publishers*

Applying the traditional defamation framework to Usenet, the primary publisher liability standard seemingly represents the nature of most moderated newsgroups.¹⁹³ In such a newsgroup, a moderator takes an article that a user sends to her and decides whether to edit the article for content or whether to post it at all.¹⁹⁴ Such actions certainly qualify as "editorial control." In this respect, a moderated newsgroup is analogous to an editorial page in a newspaper.¹⁹⁵ Editorial page editors decide which letters are of interest for publication, and many newspapers include disclaimers that they may edit the letters for length or content.¹⁹⁶ Both moderated newsgroups and editorial pages feature communication from a single subscriber to the whole pool of subscribers.¹⁹⁷ Furthermore, in both media, a single subscriber is not permitted to post an article without the approval of the moderator or editor.¹⁹⁸

In the current defamation jurisprudence, primary publishers of defamatory statements are liable as if the publisher were the actual speaker.¹⁹⁹ Thus, a publisher of defamation likely would be subject to state tort law if the statement were about a private person in a matter of purely private concern.²⁰⁰ Otherwise, the communication raises First Amendment implications and would require either actual malice²⁰¹ or a state law standard of at least negligence.²⁰² In exchange for the right to control the content of articles, the primary publisher status would expose newsgroup moderators to the maximum liability for defamation.²⁰³ Therefore, such moderators would need to exercise extreme care in screening articles to ensure that they do not publish defamatory statements.

193. See Cutrera, *supra* note 9, at 569; Loundy, *supra* note 5, at 135.

194. HAHN & STOUT, *supra* note 3, at 175; *supra* text accompanying notes 62-65. For example, the newsgroup rec.humor.funny only posts articles with jokes that the moderator thinks are funny. HAHN & STOUT, *supra* note 3, at 175.

195. Jon Wiener, *Static in Cyberspace: Free Speech on the Internet*, 258 NATION 825, 827 (1994).

196. See, e.g., "The Letters Policy," FLORIDA TIMES-UNION, Jan. 7, 1996, at F2 ("It may be necessary to condense letters.").

197. HAHN & STOUT, *supra* note 3, at 175.

198. See *id.*; "The Letters Policy," *supra* note 196, at F2.

199. Charles, *supra* note 1, at 130; *supra* text accompanying notes 115-16.

200. See *Dun & Bradstreet*, 472 U.S. at 761.

201. *New York Times*, 376 U.S. at 279-80 (requiring actual malice for public officials in a matter of public concern). Nonetheless, the distinction between public and private plaintiffs or concerns may become blurred in the realm of cyberspace. Cutrera, *supra* note 9, at 570.

202. *Gertz*, 418 U.S. at 347-48 (requiring at least negligence for private person in a matter of public concern).

203. See Schlachter, *supra* note 6, at 137.

B. *Liability of Newsgroup Moderators as Secondary Publishers or Distributors*

Although the primary publisher status seems appropriate for the majority of Usenet moderators, it may be possible to classify some moderators as distributors or secondary publishers. For instance, a moderator of a newsgroup might not exercise editorial control over the content of the articles, but instead would transmit them under a fictitious username in order to protect the identity of the poster. One such example is the "alt.personals" newsgroup. This newsgroup resembles a large personal advertisement service. On this group, subscribers are assigned a unique and nondescript username. When a subscriber sends a personal advertisement to the newsgroup, it is first rerouted to the moderator, who then reposts the message under this anonymous username. Others may respond to the message by sending mail to the coded username. This reply is then forwarded directly to the subscriber. Thus, communication between subscribers and other interested parties is kept completely anonymous until the subscriber wishes to reveal her identity.

Another example of a non-editorial moderator is the digest newsgroup moderator.²⁰⁴ This type of moderator merely collects articles or other information posted onto the newsgroup and retransmits them into a digest form according to subject matter, with very little substantive editing.²⁰⁵ More commonly, a moderator may limit her editorial control to ensuring that all articles submitted to a particular newsgroup are appropriate for that group.²⁰⁶

Moderators who merely retransmit articles under different names or in an ordered fashion are comparable to librarians.²⁰⁷ In a library, books published by others are classified and arranged according to subject matter. However, in determining whether a Usenet moderator is a distributor, a court would consider the nature of the control that the moderator exercises over the article publication process.²⁰⁸ In distinguishing between primary and secondary publishers, it is unclear whether courts would consider editorial control on a sliding scale, or would instead hold that any editorial control, no matter how slight, would create publisher liability. Nonetheless, the Restatement has

204. HAHN & STOUT, *supra* note 3, at 175. Two such digest newsgroups are comp.sys.ibm.pc.digest and sci.psychology.digest. *Id.*

205. *Id.*

206. Charles, *supra* note 8, at 18.

207. Under the *Cubby* analysis, librarians would be considered distributors rather than primary publishers. *See Cubby*, 776 F. Supp. at 140.

208. *See, e.g., id.*

apparently defined secondary publishers narrowly as an exception rather than the rule.²⁰⁹ Arguably, Usenet moderators who merely retransmit articles under a different username or who collect and order submitted information do not perform the editorial functions of primary publishers. On the other hand, one commentator has noted that the distributor category is extremely narrow and few newsgroup moderators could avail themselves of its protection.²¹⁰

Assuming that a Usenet moderator could utilize the distributor classification, she would receive significant legal protection against defamation liability.²¹¹ The moderator would only be liable for statements that she knew or had reason to know were defamatory.²¹² Plaintiffs would generally have difficulty proving that the moderator had actual knowledge of the defamation.²¹³ For example, the moderator who merely retransmits articles under a different username could easily write a computer program that would take the message, look up the coded username in a list, replace the real username with the coded username, and post the anonymous article to the newsgroup, all without reading the contents of the article. She would then tell her news server to execute this program hourly or daily, and the newsgroup would virtually run itself. The distributor rule would protect the moderator against a defamation suit because she would have had no knowledge of the defamatory statement in the first place. Although this may oversimplify a moderator's duties, it demonstrates the possibility that a Usenet moderator could fall under the secondary publisher paradigm.²¹⁴

209. RESTATEMENT (SECOND) OF TORTS § 578 (1976). Section 578 states, "Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." *Id.* (emphasis added).

210. Cutrera, *supra* note 9, at 575.

211. *Id.*

212. Charles, *supra* note 1, at 131, 142-44.

213. Cutrera, *supra* note 9, at 575.

214. One commentator has suggested that Usenet newsgroups may be classified as common carriers. *Id.* at 573-75; see also *supra* text accompanying notes 123-29 for a description of common carrier status and liability.

Usenet is similar to a common carrier because it transmits information without qualification for anyone who requests it. See Cutrera, *supra* note 9, at 574. Most likely, this commentator was considering only the vast number of Usenet's newsgroups, which are unmoderated. See HAHN & STOUT, *supra* note 3, at 175. This Article does not assert that moderated newsgroups resemble common carriers, because moderators can refuse to post an article if not germane to the newsgroup. *Id.*

V. CRITIQUE OF APPLYING TRADITIONAL DEFAMATION LIABILITY TO USENET

A. *The "Mapping" Dilemma: Applying Defamation Law to Cyberspace*

In applying the current law of defamation to Usenet, it is necessary to assume that the comparisons between cyberspace and non-cyberspace are valid. In fact, many commentators have analyzed the law of computer-generated defamation by making this assumption.²¹⁵ However, other commentators have begun to question the application of rigid rules of law to the relative unknown of cyberspace,²¹⁶ including the publisher/distributor distinction in the law of defamation.²¹⁷ Some commentators have noted that it is often difficult or misleading to try to analogize electronic services to a non-cyberspace standard, such as a common carrier, distributor, or publisher.²¹⁸ Thus, it seems that the law should be reanalyzed to fit cyberspace, instead of merely trying to fit cyberspace functions into the holes of traditional defamation law.²¹⁹

The Restatement and case law interpretations of the publisher doctrine would have a definite limiting effect on Usenet moderators.²²⁰ Both interpretations appear to set up an all-or-nothing approach in determining whether a disseminator has acted as a publisher. Arguably, the slightest amount of editorial control that a moderator exercises could trigger the primary publisher standard of liability. In turn, this would subject many Usenet moderators to a variety of common law and constitutional defamation standards, each with a different measure of fault.²²¹ Furthermore, the specter of tort liability stemming from this publisher status could deter individuals from forming new moderated newsgroups.²²²

Such a rigid rule would have a chilling effect on messages posted to moderated newsgroups. Moderators may be afraid to allow questionable articles onto the newsgroup, especially those that might contain flames of other users. The ability to flame other users for a variety of reasons

215. See Johnson & Marks, *supra* note 178, at 487.

216. See, e.g., *id.* at 488; Cutrera, *supra* note 9, at 580-81.

217. Johnson & Marks, *supra* note 178, at 491-94.

218. See, e.g., Loundy, *supra* note 5, at 88-89.

219. Cavazos, *supra* note 118, at 243; Loundy, *supra* note 5, at 89; see also *Reno*, 1996 WL 311865, at *52-56 (distinguishing the Internet from broadcast media).

220. See RESTATEMENT (SECOND) OF TORTS § 578 (1976); see also *supra* notes 115-18 and accompanying text (examining cases interpreting the publisher doctrine).

221. See *supra* Part III.A.

222. See Loundy, *supra* note 5, at 137; cf. Conner, *supra* note 5, at 237 (arguing that the "prospect of increased liability" would discourage the formation of new bulletin board systems).

is considered an Internet right and a way to redress violations of netiquette.²²³ Additionally, such a standard might make moderators liable for users sending other types of statements, such as racially derogatory, obscene, or indecent comments.²²⁴

223. See HAHN & STOUT, *supra* note 3, at 199.

224. Outside of the defamation law context, moderators are liable for indecent messages sent to minors under the Communications Decency Act of 1996. See 47 U.S.C.A. §§ 223(a)(1)(B), 223(d) (1996). On February 8, 1996, Congress enacted the Communications Decency Act of 1996 (CDA) as Title V of the Telecommunications Act of 1996. See Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 1, 501, 110 Stat. 56, 56, 133 (codified in scattered sections of 18, 28 and 47 U.S.C.). Section 502(1) of the CDA amends 47 U.S.C. § 223(a) to read in relevant part:

(a) Whoever—

(1) In interstate or foreign communications—

....

(B) by means of a telecommunications device knowingly—

(i) makes, creates or solicits, and

(ii) initiates the transmission of;

any comment, request, suggestion, proposal, message or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication . . . shall be fined in accordance with Title 18, or imprisoned not more than two years, or both.

Pub. L. No. 104-104, 110 Stat. 56, 133, § 502(1) (codified at 47 U.S.C.A. § 223(a)(1)(B) (1996)). This statute was intended to reach communications via modem, and thus users of the Internet and Usenet, because a modem is deemed to be a "telecommunications device." See *Reno*, 1996 WL 311865, at *2 n.5. Section 502(2) creates 47 U.S.C. § 223(d), which provides in relevant part:

(d) Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses an interactive computer service to display in a manner available to a person under 18 years of age,

any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication . . . shall be fined under Title 18, or imprisoned not more than two years, or both.

Pub. L. No. 104-104, 110 Stat. 56, 133-34 § 502(2) (codified at 47 U.S.C.A. § 223(d) (1996)). An "interactive computer service" would include services or systems that provide users with access to the Internet. *Id.* § 509 (codified at 47 U.S.C.A. § 230(e)(2) (1996)). In enacting this legislation, Congress sought to protect minors from indecent material available through

Likewise, the use of the distributor label for moderators without editorial control also may create difficulties. Although distributor status provides generous protection against liability, it lessens the role of

interactive computer services, such as the Internet, by imposing criminal penalties upon individuals who provide such material to minors. *Reno*, 1996 WL 311965, at *29.

However, the enforcement of both §§ 502(1) and 502(2) was recently challenged on the grounds that they unconstitutionally restricted speech protected by the First Amendment. In *Reno*, various organizations and individuals associated with the Internet and the communications industry filed a temporary restraining order against enforcement of §§ 502(1) and 502(2). *Id.* at *1. The plaintiffs argued that these provisions of the CDA violate the First and Fifth Amendments because they “effectively ban[] a substantial category of protected speech from most parts of the Internet.” *Id.* at *32. A three-judge panel convened pursuant to § 561(a) of the CDA agreed and enjoined enforcement of these two provisions. *Id.* at *64. In granting the injunction against enforcement, the court in *Reno* held that these provisions violate the First Amendment by regulating protected speech (i.e., offensive or indecent material) and that specific statutory defenses designed to protect certain interactive computer service providers from prosecution under the CDA do not provide a “least restrictive means” of regulation. *Id.* at *34-36. Judge Buckwalter also found these provisions to be void for vagueness, because the terms “indecent” and “patently offensive” could not be clearly defined in cyberspace. *See id.* at *42-43. It is interesting to note that Senator Jesse Helms (R.-N.C.) has in no uncertain terms requested that the United States Senate call for the Department of Justice to “vigorously defend” the CDA by appealing the *Reno* decision to the United States Supreme Court. 142 CONG. REC. S6864-02, S6889 (Sense of the Senate, as provided in Helms Amendment No. 4209 to S. 1745).

Nonetheless, the *Reno* decision is particularly enlightening because it presents one of the first judicial decisions which directly addressed and analyzed the nature and scope of the Internet. *Id.* at *4-13 (discussing the origins of, and methods of accessing and communicating via, the Internet). In determining whether the government can regulate protected speech on the Internet, the *Reno* court found that the unique characteristics of the Internet’s underlying technology and the widespread reach of information on the Internet were important factors to be considered. *Id.* at *56-57. The court reasoned that, unlike television broadcasts, the Internet requires affirmative and calculated steps to be taken by its users in order to locate and view indecent or sexually explicit materials. *Id.* at *56 & n.19. Additionally, because the Internet is “an abundant and growing resource,” restrictions on television broadcasters which are imposed to allocate limited broadcasting frequencies and to prevent interference between such frequencies are not applicable to the Internet. *Id.* at *56. Furthermore, the *Reno* court acknowledged the lack of barriers to the Internet, the “astoundingly diverse content available” there and the fact that “the Internet evolved free of content-based considerations.” *Id.* at *57.

Undoubtedly, it is unclear whether and how the *Reno* decision will affect the applicability of defamation jurisprudence to the Internet. The *Reno* court was faced with a criminal statute which imposed jail sentences for the publication of protected speech. Although *Reno* clearly prevents the government from regulating in any manner *protected* speech on the Internet, *id.* at *57, this decision did not alter the fact that certain classes of speech, such as child pornography or obscenity, are *not protected* by the First Amendment. *Id.* at *45. Given the fact that *New York Times* and its progeny delineates the scope of First Amendment protection for defamatory speech, it is likely that the protections afforded to Internet service providers (and Usenet moderators) by *Reno* do not apply to defamatory speech not protected by the First Amendment. However, the *Reno* court’s pellucid analysis of the nature and scope of communications on the Internet may prove helpful for other courts in deciding future issues of Internet defamation.

moderators in Usenet newsgroups because fewer individuals would accept the risk of increased liability for defamatory statements.²²⁵ Moderators might be wary of exercising editorial control in certain circumstances for fear of incurring publisher liability. Furthermore, moderators presumably would be less inclined to set up ground rules for content, length, or other criteria of the newsgroup for fear that they would be controlling the content of the group. Thus, the distributor standard would inhibit the moderator's ability to regulate a group's subject matter.

As a more fundamental critique, however, some legal commentators have questioned the continued viability of current defamation law to adapt to changes in the traditional, nonelectronic media.²²⁶ Defamation law has been characterized as unclear, confused, dissatisfying, and impossible to apply.²²⁷ Professor Robert Ackerman has argued that the law of defamation is "feudal in origin" and is today in "chaos."²²⁸ First, defamation is based upon a distinction between slander and libel which "serves no useful purpose" in today's technological world.²²⁹ Because this dichotomy is largely a product of state law, the legal standards of liability and burdens of proof varies from state to state.²³⁰ Furthermore, the juxtaposition of the First Amendment analysis of *New York Times* and its progeny against this state law system adds to the problem of assessing liability for defamatory interstate communication, both in the traditional media and on the Internet.²³¹ Many courts and commentators are unclear about whether nonmedia defendants can utilize the publisher's right to First Amendment protection.²³² In fact, in his *Dun & Bradstreet* dissent, Justice Brennan acknowledged that today's advances in communication technology may essentially render the media/nonmedia dichotomy moot.²³³ Even if this distinction is

225. See *supra* text accompanying notes 119-22 (describing distributor status and standards).

226. Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 296-301 (1994).

227. *Id.* at 293; Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1519 (1987).

228. Ackerman, *supra* note 226, at 294, 296.

229. *Id.* at 296 ("In an age of broadcast and cable communications and on-line information services, the effort to maintain a distinction between these two torts serves no useful purpose.")

230. *Id.* at 297.

231. *Id.*

232. See *Daniel v. Dow Jones & Co.*, 520 N.Y.S.2d 334, 339-40 (Civ. Ct. 1987); Ackerman, *supra* note 226, at 297 & n.20; Smolla, *supra* note 227, at 1572 tbl. 2 (noting that the Supreme Court has had no clear direction in determining the fault standard for nonmedia defendants).

233. See *Dun & Bradstreet*, 472 U.S. at 782 n.7 (Brennan, J., dissenting).

valid today, it is unclear whether it could or should apply to computer bulletin boards and newsgroups.²³⁴

Second, defamation law has become difficult to apply today because of the inefficient and costly nature of litigation.²³⁵ Defamation suits often lead to prolonged litigation, which places burdensome expenses upon defendants who may be ruined financially even if they win in court.²³⁶ Professor Ackerman has acknowledged that these costs outweigh the actual harm caused by the defamatory statement.²³⁷ This may prove especially true in cyberspace, as it still is unclear if theories of reputation loss can be “mapped” to the world of the Internet.²³⁸

B. *Monitoring Costs May Be Prohibitive*

The implementation of the publisher negligence standard of liability would place a cost-prohibitive burden upon Usenet moderators because they would presumably need to read every article they posted for defamatory content. The Supreme Court has recognized that standards of liability for disseminating material must be reasonable—they cannot require an impossible or onerous effort to comply with them.²³⁹ In 1994, a computer that counts the number of Usenet messages, recorded an average of 26,400 new messages each day.²⁴⁰ A major Usenet news feed service reported that during a two-week period, its feed had received more than 400,000 articles from more than 90,000 users.²⁴¹ It is doubtful that today’s moderators have the ability to screen every article for defamatory content, and the number of Usenet subscribers is increasing daily.²⁴² Given the increases in Internet and Usenet use, such a burden will be even heavier, if not entirely impossible, in the near future.

234. Cavazos, *supra* note 118, at 231; *cf.* Johnson & Marks, *supra* note 178, at 491-94 (questioning the application of current defamation paradigms to bulletin board systems).

235. Ackerman, *supra* note 226, at 299.

236. *Id.* at 299-300.

237. *Id.* at 300.

238. Daniel Waggoner & Bruce E.H. Johnson, *On the Road Again: Detours on the Information Superhighway*, COMM. LAW., Summer 1994, at 3, 4.

239. *See* Smith v. California, 361 U.S. 147, 153 (1959).

240. HAHN & STOUT, *supra* note 3, at 165.

241. *Id.*

242. Wiener, *supra* note 195, at 825.

C. *Liability Is Inimical to the Freedom of the Internet*

Although Usenet is not confined to the Internet, many Usenet servers are located on Internet sites.²⁴³ Furthermore, many Usenet users have Internet addresses.²⁴⁴ Therefore, any legal standard of defamation liability should at least consider its effect and interaction with the unique environment of the Internet.²⁴⁵

For the laws of our world to work in cyberspace, we must first understand what cyberspace is and how it operates.²⁴⁶ Many authors have described the Internet as a vast realm with no state or national boundaries.²⁴⁷ Currently, no governmental body or agency controls or runs the Internet, a characteristic which likely helps to maintain open access to information.²⁴⁸ Internet services are widely used because they are available to most people and contain an expansive wealth of information.²⁴⁹ Internet users themselves are largely responsible for maintaining and expanding this accessibility.²⁵⁰ In order to protect and preserve these qualities, Internet users have grown to be fiercely anti-totalitarian in their views of censorship and regulations.²⁵¹ Instead of relying upon control and domination, cooperation and adherence to protocol largely governs conduct in cyberspace.²⁵² Users follow protocol out of respect for each other rather than in adherence to a particular set of rigid laws or standards.²⁵³

Despite these attempts at internal control, some commentators believe that Internet users are not doing enough to police themselves.²⁵⁴

243. HAHN & STOUT, *supra* note 3, at 161.

244. *Id.* at 165.

245. *Cf. Reno*, 1996 WL 311865, at *56 (considering the unique environment of the Internet in analyzing the constitutional validity of the CDA); Charles, *supra* note 8, at 18 (noting that lawyers must educate judges on new technologies so that decisions may comport with the various aspects of each medium).

246. *See supra* note 16 (defining cyberspace).

247. HAHN & STOUT, *supra* note 3, at 2; Chen, *supra* note 26, at 15.

248. *See* HAHN & STOUT, *supra* note 3, at 3; Ivins, *supra* note 24, at 8A.

249. *See* HAHN & STOUT, *supra* note 3, at 3.

250. *See id.*

251. *See* Tommi Chen, *Quotable Quotes: Food for Thought*, BUS. TIMES, Apr. 17, 1995, at 16 (quoting various sources). *But see* Wiener, *supra* note 195, at 826 (claiming that moderated newsgroups have actually "abandoned" the "utopian ideal" of free speech on the Internet).

252. HAHN & STOUT, *supra* note 3, at 163. The term "netiquette" is often used to refer to an unwritten protocol on the Internet, which governs how users interact with the system and each other. *Id.* For instance, it is considered a gross breach of netiquette to advertise on Usenet (except in special newsgroups where such solicitations are permitted) because the Internet is supposed to be used for the common good rather than to enrich any particular user. Wiener, *supra* note 195, at 827.

253. *See* HAHN & STOUT, *supra* note 3, at 163.

254. *See, e.g.,* Martha S. Siegel, *Computer Anarchy: A Plea for Internet Laws to Protect*

Author Martha Siegel has argued that the “broadcasting of sexually explicit material[,] . . . sexual harassment, profanity, defamation, forgery, and fraud” have created the “equivalent of mob rule” on the Internet.²⁵⁵ Siegel has attributed Internet abuse to a combination of the “secretiveness” of on-line communication and a lack of Internet regulation.²⁵⁶ To help stem this tide of abuse, she has proposed that countries and international lawmaking bodies should control electronic communications at the point of origin.²⁵⁷ Additionally, she has asserted that “legislation should be passed making Internet access providers common carriers.”²⁵⁸

Although some of these claims of abuse may be valid, one Usenet moderator has noted that the underlying problem stems from the “logarithmic” increase in Internet users.²⁵⁹ In conjunction with this explosion in the number of users worldwide,²⁶⁰ many net-watchers have commented on a gamut of Internet problems, including net-advertising, garbage posting, and sexism.²⁶¹ Despite these complaints, Internet groups and users have already responded with their own internal solutions to resolve these issues. For example, Usenet administrators are currently developing programs that will cancel repeated and multiple postings to newsgroups, practices which attempt to drown out particular viewpoints by crippling a Usenet news server.²⁶² Users also flame attempts to advertise on Usenet newsgroups.²⁶³ Thus, the Internet community seems more than capable of addressing and correcting these problems internally.

Furthermore, the imposition of defamation standards on Usenet and the Internet may be taken as a hostile attempt to force regulation on the medium rather than allow self-regulation.²⁶⁴ From the viewpoint of

the Innocent, CHI. TRIB., Dec. 12, 1994, at 15. Martha Siegel is a co-author of *How to Make a Fortune on the Internet*. *Id.*

255. *Id.* *But see Reno*, 1996 WL 311865, at *64 (“Just as the strength of the Internet is chaos, so the strength of our liberty depends on the chaos and cacophony of the unfettered speech the First Amendment protects.”) (Dalzell, J.).

256. Siegel, *supra* note 254, at 15.

257. *Id.*

258. *Id.*

259. Wiener, *supra* note 195, at 826. Wiener points out, “[a] million new users will bring a few sociopaths.” *Id.* (quoting Joel Furr, a Usenet moderator).

260. *See supra* text accompanying notes 27-29.

261. *See Wiener, supra* note 195, at 826-28.

262. Tony Sidaway, Usenet Post to misc.legal.computing, Mar. 19, 1995, 19:21 GST.

263. Wiener, *supra* note 195, at 827. *See supra* text accompanying note 59 for a definition of flame.

264. *See Ivins, supra* note 24, at 8A (asserting that congressional leaders who know little or nothing about cyberspace should not attempt to regulate it).

Usenet subscribers, this would likely be seen as an imposition of a legal standard by those who do not completely comprehend the scope and nature of the network.²⁶⁵ Thus, users might view such an attempt as incompatible with the basic principles of the Internet.²⁶⁶ Realistically, no single model of defamation law can best summarize the role of Usenet moderators.²⁶⁷ However, in the end, the application of these defamation standards to the Internet may eventually chill the openness of information and commentary that characterizes the Internet today.²⁶⁸

VI. ALTERNATIVES TO THE TRADITIONAL APPROACH

A. Self-Regulation

One alternative to imposing the traditional defamation standards to Usenet moderators is to allow the network to regulate itself.²⁶⁹ In essence, both Usenet and the Internet already have self-regulation

265. See, e.g., *id.* On February 8, 1996, Congress passed the Communications Decency Act of 1996 which attempted to criminalize the transmission of indecent or "patently offensive" materials to minors on the Internet. See Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133; *supra* note 224 (describing relevant portions of the Act). However, many Usenet users are alarmed at this attempt to regulate the Internet. See, e.g., Ivins, *supra* note 24, at 8A. One Usenet user stated:

I think the problem is that people who are not "wired" plain simply [sic] do not understand that the Internet is not like a movie or TV, where it is fairly easy to control the content—it is more like an [sic] bulletin board, where anyone can put anything they want on the bulletin board. Would a laundromat be liable if someone put a centerfold from Hustler on the laundromat's bulletin [sic] board? The Internet is the same way. The Internet can not be controlled—look at all of the difficulty we have at controlling [illegal copying of software], and the net.attitude is that [such activity is equal to] stealing! Even if the US government tried to control pornography or whatever from all USA domains, nothing, short of the USA cutting itself off from the rest of the world, stops a kid from downloading a kiddie-porn [picture file] from a foreign [sic] country. The ONLY way to stop this is for parents to be responsible. . . . I do not think the government can protect people from what they might find on the Internet, however. Finally, I believe in a world of free ideas.

Sam Trenholme, Usenet Post to comp.org.eff.talk, Mar. 16, 1995, 03:28 EST.

266. See *supra* text accompanying note 251.

267. Mitchell Kapor, *Civil Liberties in Cyberspace: When Does Hacking Turn from an Exercise of Civil Liberties into Crime?*, SCI. AM., Sept. 1991, at 158, 164.

268. See *supra* text accompanying notes 222-24. See generally Rosalind Resnick, *Cybertort: The New Era*, NAT'L L.J., July 18, 1994, at A1, A21 (discussing the emergence of defamation litigation arising from Internet communications); *Netwatch: News, Culture, Controversy on the Internet*, TIME, Sept. 5, 1994, at 20 (contemplating Internet self-censorship as a result of an attempted defamation suit).

269. Charles, *supra* note 1, at 149.

mechanisms in place, through netiquette,²⁷⁰ unwritten codes of protocol, and social pressures.²⁷¹ Additionally, violations of netiquette are often greeted with net-wide admonitions in the form of “flames.”²⁷² Moderated newsgroups can refuse to post articles that do not conform to the topic or that are apt to spark a long “flame war.”²⁷³ Overly abusive users run the risk of losing their Internet connections.²⁷⁴

Unfortunately, self-regulation is not a cure-all. Defamation still occurs through Usenet and the Internet, and the results can sometimes be harmful beyond self-repair.²⁷⁵ With the movement of the Internet into the mainstream culture, its popularity is ever-increasing,²⁷⁶ and, as Usenet moderator Joel Furr has noted, “[a] million new users will bring a few sociopaths.”²⁷⁷ At least one commentator has implicitly called for legal intervention to halt uncontrollable “cyberspace wrongdoing.”²⁷⁸ Nonetheless, Usenet moderators and users have argued that they, rather than judges and legislators, better understand how to respond to problems on the Net.²⁷⁹

B. Automatic Right of Reply

Another possible solution also supports the “in-house” remedy of providing parties who have been allegedly defamed the right to submit a reply to the moderated newsgroup.²⁸⁰ This alternative would allow aggrieved users to vindicate themselves through the medium in which they were allegedly wronged.²⁸¹ Giving Usenet subscribers the right of reply could provide an efficient alternative to litigation and the subsequent application of a defamation standard to moderated newsgroups.

In traditional media contexts, the right of reply remedy has been criticized.²⁸² In *Miami Herald Publishing Co. v. Tornillo*,²⁸³ the Court

270. See *supra* note 252.

271. See Wiener, *supra* note 195, at 827.

272. HAHN & STOUT, *supra* note 3, at 199; Wiener, *supra* note 195, at 827.

273. HAHN & STOUT, *supra* note 3, at 175; Wiener, *supra* note 195, at 827.

274. Loundy, *supra* note 5, at 145.

275. See Wiener, *supra* note 195, at 827; cf. Peter H. Lewis, *A New Twist in an On-Line Libel Case*, N.Y. TIMES, Dec. 19, 1994, at D10 (discussing a \$200 million electronic libel lawsuit against Prodigy Services Company).

276. Siegel, *supra* note 254, at 15.

277. Wiener, *supra* note 195, at 826 (quoting Joel Furr, a Usenet newsgroup moderator).

278. Siegel, *supra* note 254, at 15.

279. See Ivins, *supra* note 24, at 8A.

280. Cavazos, *supra* note 118, at 244.

281. See Richard C. Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867, 892, 896-97 (1948).

282. See generally Donald Meiklejohn, *Speech and the First Amendment, Public Speech*

found unconstitutional a state statute that required newspapers to provide political candidates with a right of reply in response to published editorials.²⁸⁴ The Court reasoned that a mandatory right of reply violated the Free Press Clause of the First Amendment because it impermissibly intruded into the editorial duties of a newspaper.²⁸⁵ Commentators also have argued that the right of reply is inefficient and fails to remedy the wrong because of the time gap between the original defamation and the reply.²⁸⁶

Although the right of reply has received short shrift in the printed media context, its application to electronic media may be more acceptable.²⁸⁷ In *Red Lion Broadcasting Co. v. FCC*,²⁸⁸ the Supreme Court viewed a government-mandated forced right of reply as a benefit in the public broadcasting area.²⁸⁹ Usenet seems to provide a more supportive arena for the use of the right of reply. First, it is not clear that a moderated newsgroup is a media actor when it publishes other users' articles.²⁹⁰ If it is not a media actor akin to an editor, there is a less likelihood of violating First Amendment principles discussed in *Tornillo*.²⁹¹ Second, any time gap between the original posting and the reply is short because of the rapid propagation time for Usenet articles.²⁹² At least one commentator has asserted that the right of reply remedy could solve the problem of trying to apply defamation liability standards to bulletin board operators.²⁹³

C. "Network Defamation" Tort: A First Amendment Standard

If the above in-house remedies are not sufficient to address Usenet defamation, another possible solution to the problem of Usenet moderator liability may be to create a new tort for defamation arising out of moderated Usenet newsgroups.²⁹⁴ This cause of action would

and Libel Litigation: Are They Compatible?, 14 HOFSTRA L. REV. 547 (1986) (discussing criticisms of the right of reply).

283. 418 U.S. 241 (1974).

284. *Id.* at 258.

285. *Id.*

286. Meiklejohn, *supra* note 282, at 568.

287. Cavazos, *supra* note 118, at 244-47.

288. 395 U.S. 367 (1969).

289. *Id.* at 369-70.

290. *See supra* note 192 and accompanying text.

291. *Tornillo*, 418 U.S. at 258.

292. *See supra* note 6 and accompanying text.

293. Cavazos, *supra* note 118, at 246.

294. Such a tort would not need to apply specifically to the creator of the message because it has always been maintained that the original poster would be liable in classic defamation.

need to balance the state interest in providing a remedy for persons who have suffered actual injury as a result of Usenet defamation against the goals of protecting the integrity and openness of the Internet.²⁹⁵ This new tort would be largely based on a condensation of First Amendment defamation jurisprudence, but would be narrowly tailored to apply only to the medium of moderated newsgroups.²⁹⁶

First, a network defamation cause of action would need to establish the scope of liability in order to determine who could be sued under the law. Arguably, the scope of potential defendants should be extremely narrow because some moderators do not and cannot examine each posting for defamatory content.²⁹⁷ For example, the moderator who merely assigns anonymous usernames and reposts articles under those usernames should not be responsible for reading each message.²⁹⁸ Other moderators who perform merely cursory or de minimis editorial functions should also not be liable because these groups should be considered unmoderated.²⁹⁹ Thus, only moderators who perform meaningful editorial control over the content of newsgroup articles should be liable under this tort.³⁰⁰

Such a standard comports with the judicial standards in *Cubby* and *Daniel*. In *Cubby*, the court held that an on-line service could not be held liable for defamation because it did not perform editorial functions on the specific bulletin board.³⁰¹ In *Daniel*, the court refused to hold an electronic database liable for negligent misstatements because it was entitled to the "fullest protection of the First Amendment."³⁰² The *Cubby* holding implies that only network operators who exercise editorial control over published material could be liable for defamation published on that network or bulletin board. Additionally, under a

Charles, *supra* note 1, at 134-35; see Schlachter, *supra* note 6, at 99 (arguing the cyberspace regulations should be based on existing legal norms).

295. Charles, *supra* note 1, at 145.

296. *Id.* at 146. One commentator has also suggested a new standard for bulletin board operators. See *id.* at 147-48. This liability scheme is based upon a combination of negligence and actual scienter requirements. *Id.* It punishes bulletin board operators for either knowledge of defamatory material or failure to take certain precautions, such as posting disclaimers, reviewing the content of messages, and maintaining a list of subscribers. *Id.* Given the more amorphous nature of Usenet as compared to a local bulletin board system, this author argues that Charles' standard should not apply to Usenet moderators.

297. See *supra* text accompanying notes 202-03.

298. See *supra* Part IV.B.

299. See *supra* text accompanying notes 204-06.

300. See HAHN & STOUT, *supra* note 3, at 175 (describing moderators who have meaningful editorial control).

301. See *Cubby*, 776 F. Supp. at 140.

302. *Daniel*, 520 N.Y.S.2d at 340.

traditional defamation paradigm, a newsgroup or bulletin board service could be equated with the traditional letters-to-the-editor column of a printed newspaper,³⁰³ which are normally held to a publisher standard of liability for defamation.³⁰⁴ If a moderator has substantial editorial control over the newsgroup contents, the moderator would be outside the scope of both *Cubby* and *Daniel*. Therefore, these decisions, if extended to Usenet moderators, potentially limit the application of defamation liability to those moderators who exercise more than merely de minimis editorial control.

Given that only Usenet moderators who significantly edit newsgroups articles would be treated as primary publishers under this new network defamation tort, a party who alleges network defamation against a newsgroup moderator would be able to hold the moderator liable as if the moderator originally published the defamatory article.³⁰⁵ The next question, then, is to what standard of fault a moderator should be held.

Arguably, Usenet moderators should receive the benefits of the First Amendment's actual malice standard when posting articles about public figures.³⁰⁶ Thus, a plaintiff alleging a claim of defamation against a Usenet moderator would need to prove that a defamatory statement was published by a moderator who either (1) knew that the statement was defamatory or (2) acted in reckless disregard of its defamatory nature.³⁰⁷ Additionally, to recover, a plaintiff would need to plead and prove actual damages,³⁰⁸ except when the defamation imputes one of the common law per se categories upon the plaintiff.³⁰⁹

Even when the subject of a Usenet post may not be a public figure, Usenet moderators should still receive the protection of the First Amendment actual malice standard. When Usenet moderators edit and post articles to their newsgroups, they are effectively performing the combined functions of newspapers and broadcast media.³¹⁰ Although case law has not clearly made a media/nonmedia distinction in the law of defamation,³¹¹ Usenet arguably acts as a media source. Thus, Usenet

303. See *supra* notes 195-98 and accompanying text.

304. See *supra* text accompanying notes 195-200. But see Gilbert, *supra* note 8, at 442 (arguing against publisher standard for bulletin board operators).

305. Cf. Schlacter, *supra* note 6, at 116 (arguing that primary publishers have the "greatest control," and therefore are constantly exposed to defamation liability).

306. See *id.* (noting that *Dun & Bradstreet* suggests that both media and nonmedia primary publishers should be held to an actual malice standard).

307. See Charles, *supra* note 1, at 127.

308. See Perritt, *supra* note 11, at 101.

309. See *supra* text accompanying note 72.

310. Charles, *supra* note 1, at 146.

311. *Id.* at 140.

moderators should receive the protection of the First Amendment from defamation suits as “editors” of their “media.”³¹² Given this scope of publication, the character of moderators’ transmissions could qualify them for the more stringent constitutional malice standard, regardless of whether the plaintiff is a Usenet user.

This result adequately combines the Internet’s aim to foster open and uninhibited communications with a primary purpose of defamation liability—the imposition of liability for speech that arguably adds little to rational, intelligent discourse. Users should be able to express themselves without fear of censorship. However, the imposition of the traditional defamation paradigm also insists that users cannot always say what they want about others, especially when the statements harm the reputation and esteem of another person. Usenet moderators who control the content of a newsgroup must be vigilant in weeding out defamatory speech and should be held liable when they either know of the defamatory character before publication or when they recklessly ignore its content.

The requirement of pleading and proving actual economic damages unless the speech falls under a common law category of *per se* defamation is both justified and necessary. Many commentators recognize that the electronic universe is still “unstable, unknown and changeable.”³¹³ It is unclear how defamation affects “reputation” in cyberspace or if the measure of damages equates that of real life.³¹⁴ For example, does the natural openness of the Internet allow defamed users to combat the harmful publication with statements of their own? Is there any difference between a user’s “net-reputation” and the user’s “real life” reputation?³¹⁵

Moreover, the determination of damages in cyberspace would be extremely speculative. Understandably, the calculation of reputational damages in normal defamation lawsuits also is highly speculative, a task that requires defamation plaintiffs to call expert witnesses and other

312. *See id.* at 146.

313. Johnson & Marks, *supra* note 178, at 488.

314. *See* Charles, *supra* note 1, at 145 (claiming that reputational damage is greater in cyberspace). However, an Australian state supreme court has found that libel can occur in cyberspace and that the “ ‘publication of [libelous] remarks will make it more difficult for [plaintiff] to obtain appropriate employment. . . . The damages award must compensate him . . . and vindicate his reputation to the public.’ ” Wiener, *supra* note 195, at 827 (quoting West Australian Supreme Court Justice David Ipp) (third alteration in original). One attorney, a “libel law authority,” asserted that a similar result could occur in the United States. *Id.*

315. *Cf.* Wiener, *supra* note 195, at 828 (suggesting that “virtual reality hasn’t escaped the bounds of real life”).

testimony to support claims of reputational injury.³¹⁶ However, in cyberspace, it is unclear whether injury can occur, much less whether it can be measured or quantified. While the legal system relies on expert testimony from psychologists and social behaviorists to recognize and quantify defamation damages, it is possible that these measurement techniques are inapplicable to cyberspace. Thus, by requiring plaintiffs to prove actual loss to recover other damages, defendants only would incur liability for cognizable, as opposed to highly conjectural, injury. Furthermore, this damage requirement may prevent lawsuits against moderators arising out of off-the-cuff but commonplace “flaming,” which in many instances can be defamatory speech.³¹⁷ Of course, if it could be shown that cyberspace reputation is easier to measure than in “real life,” the damage standard may need to be adjusted accordingly.

The requirement that a plaintiff plead and prove economic harm, with the exception of specific categories of *per se* defamation, is a standard borrowed from the common law of slander.³¹⁸ Some commentators assume that on-line defamation takes the form of libel.³¹⁹ However, the distinction between libel and slander in cyberspace is strained, as cyberspace entities are represented only in the ephemeral language of electronic signals.³²⁰ Concepts such as “bulletin boards,” “newsgroups,” “articles,” “flaming,” and so forth, are merely representations of things that only exist as computer signals.³²¹ Thus, it has been argued that defamation in the electronic medium takes the form of slander and not libel.³²² Of course, this distinction may be inaccurate, because the difference between libel and slander also recognizes that slander has a lesser impact than libel, the reason why plaintiffs must prove actual economic harm.³²³ On the Internet, hundreds of thousands of users may read a defamatory newsgroup article.³²⁴ Additionally, electronic messages can be transferred into printed form by downloading them to a printer, and these messages may be “kept alive” by routine

316. See *Wolfson*, 273 So. 2d at 777-78; but see *Miami Herald Publishing Co. v. Ane*, 458 So. 2d 239, 242 (Fla. 1984) (stating that a defamation plaintiff does not need to prove reputation damage to recover).

317. See Benny Tabulujan, *Beware the Info-Traps in Cyberspace*, BUS. TIMES, Sept. 15, 1994, at 17; Cutrera, *supra* note 9, at 559-60.

318. See *supra* text accompanying notes 72-76.

319. See, e.g., Charles, *supra* note 1, at 134; Cutrera, *supra* note 9, at 562.

320. Cutrera, *supra* note 9, at 562; see also *supra* Part II.A. (discussing the differences in slander and libel). In fact, courts have often confused the distinction between libel and slander in non-cyberspace. Cutrera, *supra* note 9, at 562.

321. Cutrera, *supra* note 9, at 562.

322. *Id.*

323. See *id.*

324. See HAHN & STOUT, *supra* note 3, at 165.

tape backups of Usenet articles from a news server.³²⁵ However, the common law rules of slander could be used to give defamation plaintiffs a limited exception to the actual damages rule.³²⁶

VII. CONCLUSION

The Internet and its related network services have initiated a communication revolution that has just begun to impact mainstream society.³²⁷ What was once a forum for academic and research discussion has now exploded into a new and exciting medium for more than 40 million people.³²⁸ Usenet provides a valuable Internet service as a source of information and discussion on hundreds of topics.³²⁹ Unlike the major on-line services, Usenet is generally free, uncensored, and open to anyone.³³⁰ Moderators on a minority of Usenet newsgroups help facilitate discussion by constraining the subject matter and removing irrelevant messages.³³¹ Thus, Usenet attempts to provide an efficient and diverse medium for the exchange of ideas worldwide.

However, the question of moderator liability for the publication of defamatory statements on Usenet may threaten this system of communication. Under traditional paradigms of defamation, moderators could be as liable for defamatory statements as the original creator of the message.³³² The specter of liability would certainly deter moderated newsgroups, as many moderators are unpaid volunteers who run newsgroups in their spare time.³³³ In addition, defamation liability could rationally extend to other network administrators. Moreover, the extension of defamation liability runs counter to the core values of freedom from censorship and regulation which have characterized the Internet since its inception.³³⁴

Thus, defamation liability should not be extended to include Usenet moderators. However, the Internet instead should and does regulate itself to limit defamatory speech. Many Internet users know and follow "netiquette," an unwritten set of protocols that regulate cyberspace

325. Cutrera, *supra* note 9, at 562; Tabulujan, *supra* note 317, at 17.

326. *See supra* text accompanying notes 72-76.

327. Siegel, *supra* note 254, at 15; *see supra* note 29 and accompanying text.

328. Siegel, *supra* note 254, at 15.

329. HAHN & STOUT, *supra* note 3, at 158.

330. *Id.* at 175.

331. Wiener, *supra* note 195, at 827.

332. *See supra* Parts IV.A. & IV.B. (discussing the application of traditional defamation liability standards to Usenet moderators).

333. *See* HAHN & STOUT, *supra* note 3, at 175.

334. *See supra* notes 246-53 and accompanying text.

conduct.³³⁵ The Internet community often reacts harshly to those who violate netiquette, especially in Usenet newsgroups. Users have also lost network privileges for exceptional on-line abuse. Furthermore, moderated newsgroups could allow allegedly defamed users an automatic right of reply in order to vindicate themselves on the newsgroup. However, if defamation liability must apply to Usenet moderators, they should be held to a First Amendment standard that requires proof of actual malice.³³⁶ In addition, network defamation tort plaintiffs should have to prove actual harm in order to recover damages, due to the highly speculative nature of damages and reputational harm on the Internet.³³⁷ However, damages may be presumed if the speech is per se defamatory, based upon the common law slander categories.³³⁸ In this way, liability of network administrators and newsgroup moderators will be limited in order to protect the freedom and openness of communication that has characterized the Internet since its inception.

335. *See supra* notes 57, 252 and accompanying text.

336. *See supra* Part II.A.

337. *See supra* notes 71-80 and accompanying text.

338. *See id.*