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# FAULT-BASED LIBEL AND COPYRIGHT INFRINGEMENT LIABILITY FOR ON-LINE CONTENT PROVIDERS AND BULLETIN BOARD OPERATORS AS “INFORMATION DISTRIBUTORS”

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I am a member of a law department representing a company traditionally associated with print media. This presentation, therefore, will focus on libel and on copyright problems and, in particular, those raised by bulletin boards.

Time Warner is in an unusual position because we provide copyrighted materials to others.<sup>1</sup> For example, Time Inc. magazines have been licensed to various on-line service providers, primarily CompuServe.<sup>2</sup> We also own a substantial number of copyrights. Our chairman, Gerald M. Levin, has noted that Time Warner has the largest collection of copyrights in the world, both in terms of magazines and in terms of films and music. However, Time Inc. is also an on-line content provider through Pathfinder,<sup>3</sup> a heavily

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Ms. Fenster is the co-author of *Libel and Copyright Problems On-Line: A Publisher's Perspective*, published in the April 1996 edition of the *Multimedia and Technology Licensing Law Report*.

<sup>1</sup> Cf., e.g., James C. Goodale, Symposium, *Panel 1: The Changing Landscape of Jurisprudence in Light of The New Communications and Media Alliances*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 427, 428, 457 (1996) (noting that Time Warner Cable of New York provides several different news services, including CNBC and Turner Financial News Network).

<sup>2</sup> Cf., e.g., Rex S. Heinke and Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, COMPUTER LAW., July 1994, at 1-2 (noting CompuServe owns and operates one of largest on-line services).

<sup>3</sup> See, e.g., Kate Maddox, *Still Waiting to Unlock the Magic Code: Web Publishers Have Invested Millions, But Key to Success Remains Elusive*, ADVERTISING AGE, May 6, 1996, at 38 (noting Pathfinder was one of three publishing pioneers on Worldwide Web).

trafficked site on the Worldwide WEB,<sup>4</sup> which makes available material from both Time Inc. products and from others who license their content to us.

Simply stated, we believe that a fault-based model is the appropriate model for determining on-line liability within both the libel and the copyright contexts.<sup>5</sup> This model exemplifies fairness notions in terms of responsibility and, we believe, is also an appropriate allocation of the risk.<sup>6</sup>

Let me distinguish libel and copyright. First, in terms of libel, those who publish the statement are responsible. Therefore, if there is a defamatory statement in an article in *Time Magazine*, it is our responsibility. *Time* has the ability to amend that article, to conduct extensive fact checking on that article and, if necessary, to have it reviewed by counsel. These steps would help protect the magazine from liability.

The bulletin boards present an interesting issue.<sup>7</sup> Technological difficulties, including speed, make it very difficult to deal with and to vet real-time communications. The question really is, "At what point is it appropriate to say that the bulletin board operator should be responsible for the communication?"<sup>8</sup> There are two cases on the aspect of liability.

Two recent cases deal with this issue: *Cubby, Inc. v. CompuServe, Inc.*<sup>9</sup> and *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>10</sup> It is not surprising that Time Inc. believes the correct view is

<sup>4</sup> See, e.g., Alex Alben, *What is an On-Line Service? (In The Eyes of The Law)*, COMPUTER LAW., June 1996, at 1, 8. The author defines the Worldwide Web as "a computer communications protocol . . . which links thousands of servers throughout the world [and] runs over the Internet." *Id.*

<sup>5</sup> See, e.g., Rex S. Heinke and Lincoln D. Bandlow, *Roadblocks and Exit Ramps on the Information Superhighway*, in LITIGATING LIBEL AND PRIVACY SUITS, at 203, 220 (PLI Pat., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G4-3963, 1996) (indicating no-fault standard in copyrights is problematic).

<sup>6</sup> See, e.g., Rex S. Heinke and Lincoln D. Bandlow, *Liability of On-Line System Providers For Defamation and Obscenity*, in COMMUNICATIONS LAW 1995, at 1177, 1190 (PLI Pat., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G4-3945, 1995) (asserting it is unfair to impose liability on common carriers who have little or no ability to alter messages).

<sup>7</sup> See Alben, *supra* note 4, at 8. "Bulletin board" is defined as "one computer running software allowing multiple people to post information access the same information." *Id.*

<sup>8</sup> Cf., e.g., Adam P. Segal, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 97, 138 (1996) (echoing necessity of resolving responsibility issues in cyberspace for copyright area).

<sup>9</sup> 776 F. Supp. 135, 143 (S.D.N.Y. 1991) (dismissing action for publication of defamatory statements because evidence showed CompuServe did not know or have reason to know of alleged defamatory statements).

<sup>10</sup> 1995 N.Y. Misc. LEXIS 229, at \*1 (N.Y. Sup. Ct. May 24, 1995).

taken in *Cubby*. *Cubby* held that the on-line service provider acted as a distributor, similar to a public library or a book store.<sup>11</sup> In *Stratton Oakmont*, the court held that Prodigy, a service provider, acted more like a publisher because of certain policies and technologies that the court believed Prodigy had in place.<sup>12</sup>

It is likely that Congress has sidelined this issue for the present. The Communications Decency Act includes a provision that an on-line service provider should not be treated as a publisher.<sup>13</sup>

We do not believe, however, that an on-line service provider should, in all instances, be off the hook, and this view is echoed by *Cubby*.<sup>14</sup> If the on-line service provider knows it is transmitting a defamatory, or an allegedly defamatory statement, it should conceivably be liable for such communication.<sup>15</sup>

I want to raise another issue, damages in on-line libel cases, which is an interesting problem, although slightly off point. Typically, damages in the libel context are determined by circulation.

<sup>11</sup> *Cubby*, 776 F. Supp. at 140. "CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so." *Id.*

<sup>12</sup> 1995 N.Y. Misc. LEXIS 229, at \*10. Justice Ain distinguished this case from *Cubby* and held that unlike CompuServe, Prodigy was "clearly making decisions as to content . . . and such decisions constitute editorial control." *Id.* This, he reasoned, put Prodigy within the purview of publisher, and not distributor. *Id.*; see also, Alben, *supra* note 4, at 3. The "publisher model" is limited to services "publishing" original content of the material selected and displayed, as distinguished from other models. *Id.* But see *Cyberporn and Children: the Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearings on S.892 Before the Senate Comm. on the Judiciary*, 104th Cong. 76 (1995) (statement of William Burrington) (citing *Stratton* as obstacle to comprehensive measures to block offensive material).

<sup>13</sup> Communications Decency Act, 47 U.S.C. § 223, Pub. L. No. 104-104, 110 Stat. 133 (1996). This provision may be read in a broad manner, as some have done: that, merely by being an on-line service provider, one is not a "publisher." Another, more limited reading of the provision is also possible: that if an on-line service provider undertakes measures to comply with the Communications Decency Act (which measures could make it look more like a "publisher" than a mere distributor), it does not, by virtue of taking such measures, become a "publisher" for purposes of liability for libel. This latter interpretation may be the better view since the provision in question falls into what's been called the "Good Samaritan" portion of the Act.

<sup>14</sup> *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991). The court held that knowledge of the offending statements was necessary for imposing liability. *Id.* The "appropriate standard of liability to be applied to [an on-line service provider] is whether it knew or had reason to know of the allegedly defamatory . . . statements." *Id.*; see also Heinke and Rafter, *supra* note 2, at 4 (illustrating current trend of naming bulletin board service owners and operators as defendants in copyright actions).

<sup>15</sup> See generally Leslie G. Berkowitz, *Am I My Sister's Keeper? More Vicarious Liability—Now On Line*, 24 COLO. LAW. 2539, 2539-40 (1995). This article highlights three theories of liability for copyright infringement. *Id.* at 2539. *Sega Enterprises v. Maphia* is discussed as an example of a court following the traditional rule that a defendant must have "knowledge and control and actively induce infringement." *Id.* at 2540.

For example, Time Inc. claims that there are approximately thirty million readers of *Time Magazine*. It would, therefore, be presumed in calculating the damages that the defamatory statement was read by thirty million people.

Bulletin boards are slightly different because it is possible to determine the number of people who access a particular message or screen of messages. It is possible, therefore, that any award of damages, should a case progress that far, should be less than one would find in the typical print context. By the same token, it could be argued that anyone who is on the bulletin board is part of an affinity group and, therefore, the damage to reputation could be greater than if it was just a single reader of *Time Magazine*.

In sum, the concept for libel, as seen by Time Inc., is that the distribution of a communication, with nothing more, should not impose liability on the bulletin board operator; the on-line service provider should not be responsible for mere distribution.

In terms of copyright, the basic rule is also that those who publish an infringing work, are liable. If *Time Magazine* ever published material that was a copyright infringement, Time Inc. would be responsible for that infringement.

The issue then becomes, "What happens on bulletin boards?"<sup>16</sup> *Netcom*<sup>17</sup> is the leading case in this regard. In *Netcom*, a bulletin board operator had put on its bulletin board materials from L. Ron Hubbard, which the Church of Scientology claimed was copyrighted by them.<sup>18</sup> *Netcom* provided the server—the access point from the bulletin board operator to the Internet. In that case, the court held that *Netcom* itself was not a direct infringer,<sup>19</sup> but that it could conceivably be contributorily liable<sup>20</sup> because there existed the possibility that *Netcom* may have had knowledge that the information being transmitted was a copyright infringement.<sup>21</sup>

<sup>16</sup> See, e.g., Segal, *supra* note 8, at 133 (questioning at what point bulletin board system sustains subscriber growth so substantial as to relieve operator of liability for infringing postings).

<sup>17</sup> *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Ca. 1995) (holding system operator, *Netcom*, not liable for direct infringement of plaintiff's exclusive distribution and display rights because no affirmative action was taken by defendant).

<sup>18</sup> *Netcom*, 907 F. Supp. at 1365-66.

<sup>19</sup> *Id.* at 1368-69.

<sup>20</sup> *Id.* at 1375.

<sup>21</sup> *Id.* at 1370 (holding that although copyright is strict liability statute, liability requires element of knowledge). See generally Joseph V. Myers III, Note, *Speaking Frankly About*

In a sense, the court's model is similar to the model that we propose for libel; that simply by virtue of being a distributor (using the servers and the wires) there should be liability for copyright infringement only if there is some knowledge. Knowledge changes the focus of the question, and in such cases there could conceivably be liability.<sup>22</sup>

The White Paper<sup>23</sup> takes a different view of copyright on-line and of copyright infringement.<sup>24</sup> They did, however, invite the possibility of a legislative exemption,<sup>25</sup> and to date such subject is the basis for fairly heated conversations occurring within Congress. Interestingly, I am not so sure which are more heated, the conversations going on in Congress or the conversations going on at Time Warner.

I believe the proposal that is supported by the on-line service providers is that there should be some sort of safe-harbor provision. If an on-line service provider, therefore, takes certain preventive actions to respond to an alleged claim—certain stipulated actions—then it would not be accountable for transmitting copyright infringing material. At the very least, this is the Time Warner position, and this is our way of attempting to compromise the two views.

*Copyright Infringement On Computer Bulletin Boards: Lessons To Be Learned From Frank Music, Netcom, and The White Paper*, 49 VAND. L. REV. 439, 472-75 (1996) (noting court's decision in Netcom provided "a consummate example of the under-protectionist interpretation" in finding only subscribers liable for causing distribution).

<sup>22</sup> See generally Kelly Tickle, *The Vicarious Liability of Electronic Bulletin Board Operators For The Copyright Infringement Occurring on Their Bulletin Boards*, 80 IOWA L. REV. 391, 403-18 (1995) (providing discussion on liability theories for copyright infringement with respect to bulletin board operators).

<sup>23</sup> See, e.g., Myers, *supra* note 21, at 481 n.20. The "Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights" is colloquially termed the "White Paper." *Id.* It is a 238-page report examining intellectual property issues pertaining to information network systems. *Id.*

<sup>24</sup> See, e.g., Mark C. Morrill and Sarah E. Eaton, *Protecting Copyrights On-Line: Copyright Liability for On-Line Service Providers*, 8 No. 4 J. PROPRIETARY RTS. 2, 3 (1996) (noting White Paper concludes, as matter of public policy, service providers are better suited to prevent copyright infringement than are copyright owners).

<sup>25</sup> See, e.g., Intellectual Property: Copyright, *Rep. Boucher Proposes Amendments to Internet Copyright Bill*, WEST'S LEGAL NEWS, Feb. 21, 1996 (noting recommendation of several amendments to proposal by Working Group on Intellectual Property Rights).

