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FUNDAMENTAL FIRST AMENDMENT ISSUES IN RELATION TO ON-LINE LIABILITY

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The advent of the Internet and the liability of on-line service providers is the topic of this panel and has caused all of us to challenge, to expand, and, at least to some degree, to alter our traditional thoughts and perceptions of how we define the media. These issues fundamentally implicate what role or roles we conceive the media to play in our society.

What is it about the Internet, about the information which is transmitted to our homes and offices through these on-line service providers, that brings about this uncertainty and causes this very healthy reflection? It is several attributes and phenomena.

At one level, the Internet provides enormous promise as probably the closest modern day analog to the town meeting, and the truest democratic marketplace any of us could ever imagine.[1] It is pluralistic in the extreme. Everybody has an equal voice. All have equal access, at least those who can afford the fees of the on-

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[1] For an informative collection of scholarly writings on the pivotal role of the First Amendment in public debate, see generally DEMOCRACY AND THE MASS MEDIA: A COLLECTION OF ESSAYS (Judith Lichtenberg ed., 1990) (discussing free speech, libel and restrictions on media communication); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1996) (focusing on fundamental right of free speech); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1972) (exploring freedom of speech and its constitutional implications).

line service providers and the Internet access providers. It is cacophonous and anarchic in many ways. There are very few rules of the road. From a traditional First Amendment standpoint, all one can say is positive. Speech on the Internet goes to the roots and the heart of the First Amendment.[2] In many ways, it embodies our First Amendment ideals.[3] Some of those very same qualities (*e.g.*, the wide and instantaneous dissemination of information to often unknown audiences) create enormous fear and concern in the public at large, in the government, and in the courts.[4]

Diane Feinstein,[5] and some other well meaning legislators, have expressed the notion that bomb making manuals on the Internet are terrible things,[6] whereas, for better or worse, one can find equivalent material, and have for years, in our book stores and libraries. This raises the level of debate and alarm over the First Amendment to a new, different, and troublesome level.

The very notion that someone can speak anonymously over this medium raises alarm in some quarters—in the defamation area and in other areas.[7] Privacy considerations are also implicated by anonymous speech over the Internet.[8]

[2] US CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, ... *Id.*

[3] *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The essential meaning of the First Amendment has been eloquently described by Justice Brandeis as "freedom to think as you will and to speak as you think." *Id.* Public discussion is, in Justice Brandeis' words, "a fundamental principle of the American government." *Id.*

[4] *See, e.g.*, KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 257 (1993) (noting that use of computer networks has grown drastically in recent years).

[5] *See, e.g.*, Bill Stall & Tracy Wilkinson, *California Gets Its First Woman State Senator*, L.A. TIMES, Nov. 4, 1992, at 1 (reporting Diane Feinstein's defeat of incumbent Republican John Seymour, to become California's first female United States Senator).

[6] *See* Internet Symposium: *Legal Potholes Along the Information Superhighway*, 16 LOY. L.A. ENT. L.J. 541, 551 (1996) (discussing widespread fear about bomb-making information disseminated on Internet); *see also* Eric B. Easton, *Closing the Barn Door After the Genie is Out of the Bag: Recognizing a "Futility Principle" in First Amendment Jurisprudence*, 45 DEPAUL L. REV. 1, 42 (1995) (noting "mayhem manuals" are used on Internet to offer information on building bombs).

[7] *See* Trotter Hardy, *The Proper Legal Regime for Cyberspace,"* 55 U. PITT. L. REV. 993, 996-1014 (1994) (evaluating soundness of existing law for cyberspace). *See generally* David Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability*, 12 COMPUTER L.J. 101, 109-11, 129-33 (1993) (examining computer information systems and law concerning defamation and privacy).

[8] *See* JOHN R. BITTNER, LAW AND REGULATION OF ELECTRONIC MEDIA 153-54 (2d ed. 1994) (predicting increased litigation over privacy issues as result of ability to store secrets on computers); *see also* CREECH, *supra* note 4, at 257 (warning network users not to transmit information loosely unless intending data to be shared with public).

I will discuss the implications of some of these concepts, specifically with respect to the evolving area of defamation law. What one observes is that the schizophrenia with which people react to the various attributes of this new medium also reflects itself in the developing case law in the defamation field.

Many of you are familiar with the *Cubby*[9] and *Stratton Oakmont*[10] cases. They essentially take very divergent views. One could argue that the *Cubby* case took a fairly relaxed view, an expansive view of the desirability of, loosely speaking, "letting it all hang out" on this medium.

That is not to say that the speaker, per se, of defamatory remarks would not be held liable in a courtroom. Nothing in *Cubby* says otherwise. What the decision says is that the transmitting medium, fairly distant from the transaction and without realistic control over it, ought not to be held answerable in the dock.[11] Therefore, one would argue from a broad First Amendment policy standpoint that by limiting the liability of an on-line service provider in that situation, it encourages rather than discourages a flow of discourse over this medium.

So at one philosophical level, *Cubby* is a good case from the standpoint of "letting it all hang out" on the Internet, representing a very expansive view of First Amendment interests. Then along comes the *Stratton Oakmont* case, scrambling the deck quite significantly and causing everybody to scratch their heads about what signals one wants to send to an on-line service provider which attempts to take at least modest steps—and I emphasize

[9] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 135 (S.D.N.Y. 1991) (finding in favor of defendant on-line service provider in suit for defamation; reasoning defendant was not "publisher" of information).

[10] Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995) (holding on-line service provider liable in action for libel; concluding company was "publisher" by virtue of statements made on its electronic bulletin boards).

[11] *Cubby*, 776 F. Supp. at 137. CompuServe is a computer network which provides an on-line information service to its subscribers, with access to special interest forums, comprised of electronic bulletin boards. *Id.* Cubby sued CompuServe for alleged defamatory statements that appeared in CompuServe's on-line Journalism Forum. *Id.* at 138. Granting summary judgment in favor of CompuServe, the District Court reasoned that the service provider was a mere "distributor" for purposes of determining liability for the alleged defamation. *Id.* at 135. Thus, the appropriate standard of liability to be applied to CompuServe was whether it knew or had reason to know of the allegedly defamatory statements. *Id.* at 140-41.

modest—in controlling what flows over its networks and over its bulletin board services.[12]

In *Stratton Oakmont*, we had a result arising out of modest efforts on the part of the on-line service provider to exercise some degree of control[13] — far less, I would submit, than control one normally associates with a traditional publisher, book, magazine, or otherwise. This was not a case of taking a publication and selecting works and editing and vetting those works. This was software designed to catch a word or two, here or there, and some efforts, however limited, through a moderator and other techniques to sanitize some language—a far cry from traditional publisher-related activities. Nevertheless, the *Stratton Oakmont* court says once an on-line service provider insinuates itself into the process, it starts to look a little bit like a publisher and a higher level of liability exists under the traditional *New York Times v. Sullivan*[14] standard.[15] This does not mean that the on-line service provider will be held liable, but it means that it will have a harder time avoiding and defending a defamation suit.

The prior panel discussed incrementalism and our tradition in this country of evolving media through the years.[16] The broadcast media had a traumatic experience dealing with speech concepts during its own formative period.[17] New technology's facilitation of photocopying has been the subject of varying and disparate court opinions and most recently has been evaluated in the Sixth Cir-

[12] *Stratton Oakmont*, 1995 WL 323710, at *4. *Stratton Oakmont* held, for the first time, that an on-line computer network can be sued for libel as if it were a newspaper, or other publisher, because of the editorial control it exercises over its service. *Id.*

[13] *Id.* at *2. Prodigy Services, the on-line provider, used a software screening program which automatically prescreened posted messages for offensive language. *Id.* This approach was implemented in lieu of monitoring posted messages for content. *Id.*

[14] 376 U.S. 254 (1964). *New York Times* and its progeny created the constitutional standard governing recoveries by libel plaintiffs against publishers of allegedly defamatory material. *See generally* Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 4 (1985). The author observes that *New York Times* and its progeny "represent the Court's response to what it perceived as an alarming increase in the frequency of defamation litigation instituted by public persons as well as in the size of monetary sanctions and related expenses assessed against press defendants." *Id.*

[15] Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *2 (N.Y. Sup. Ct. May 24, 1995).

[16] *See, e.g.*, Anthony L. Clapes, *Proceed With Caution—Information Superhighway Under Construction: Selecting the Proper Intellectual Property Rights Paradigm to Apply to Passengers on the Internet*, 11 ST. JOHN'S J. LEGAL COMMENT. 621 (1996); *see also* Lawrence Lessig, *Intellectual Property and Code*, 11 ST. JOHN'S J. LEGAL COMMENT. 635 (1996).

[17] *See, e.g.*, Kathryn S. Banashek, *Can a Public Figure Win in a Libel Suit When the Media Reported Truth? Defamation and False Impressions*, 69 WASH. U. L.Q. 1009, 1015-20 (1991) (exploring clash between media and First Amendment regarding libel law).

cuit's *MDS*[18] opinion. Courts tend to struggle with hard concepts implicated by new technology and new media.[19] The difference with cyberspace technology is that under the Communications Decency Act of 1996,[20] Congress, with a stroke of its pen, has taken a significant step towards undoing the implications of the *Stratton Oakmont* case by, in essence, saying that if you are not the originator of the content, if you are not the creator, but you are merely the pipe through which it flows, then you are not to be treated for purposes of defamation (or any other tort doctrine, for that matter) as a publisher or as a speaker.[21] In essence, the *Cubby* kind of approach has been legislated.

I will leave to others to determine whether this is good or bad public policy to race to this kind of legislative solution in the relative infancy of this type of media. This is an interesting and rather quick fix viewed against our traditional means for dealing with and sorting through these difficult kinds of media-related issues.

It is notable that the very same provision that I just referred to[22] also has a fascinating safe harbor, going beyond what I just mentioned. It says that:

> No provider or user of interactive computer services shall be held liable on account of any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.[23]

It is debatable whether, in terms of public policy, it is desirable for Congress to push private parties, such as on-line service providers, in the direction of actively policing speech on this medium.

[18] Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996).

[19] *Compare* United States v. Thomas, 74 F.3d 701, 701 (6th Cir. 1996) (defendants subject to liability in state where guilty of violating such state's obscenity law via electronic bulletin board) *with* CompuServe v. Patterson, 89 F.3d 1257, 1257 (S.D. Ohio 1994) (on-line service provider not necessarily liable in state where services provided).

[20] Included as part of the Telecommunications Act of 1996, 104 Pub. L. No. 104, 110 Stat. 56 (to be codified in scattered sections of 47 U.S.C.).

[21] Telecommunications Act of 1996, 110 Stat. 56 (to be codified at 47 U.S.C. § 223). This provision requires "knowingly making, creating, or soliciting obscene information" as a prerequisite to tort liability. *Id.*

[22] *Id.* (requiring Internet access providers to screen, rather than eliminate, indecent material).

[23] 47 U.S.C. § 230 (c).

I believe reasonable points of view can vary. It is a fascinating concept; we are not here to resolve it today so much as raise it, but it is fascinating to think about the implications of this kind of tinkering with the speech system.

There are many unresolved and fascinating questions yet to be determined in the application of defamation law principles to online service providers, such as the application of the general concept of public versus private figures with respect to the Internet.[24] This is a significant distinction in defamation law.[25] What does this distinction mean in the context where everybody has instantaneous access to the medium to respond to an attack on one's reputation; where again, one can do so fairly instantaneously and relatively, if not completely, to the same audience? What does this do to traditional notions of two tiers of defamation recovery in our society?[26]

What about opinion and fact distinctions which are terribly important in the area of Constitutional law? The courts, as you know, look to the context in which statements are made to determine whether they have a literal meaning to them, whether their sting is meant to be literal as opposed to reflecting opinion.[27] In a

[24] *See* CREECH, *supra* note 4, at 258 (recognizing that as scientific technology progresses so must related law and regulatory activity); *see also* MARTIN LONDON & BARBARA DILL, AT WHAT PRICE? LIBEL LAW AND FREEDOM OF THE PRESS 70 (1993) (pointing out that there is disagreement over which new issues involving libel law must be tackled).

[25] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding public figures or officials, unlike private plaintiffs, must prove "actual malice" to prevail on defamation claims); *see also* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (deciding private figure plaintiffs alleging defamation have burden of proving falsity of media defendant's speech on matter of public concern); Gertz v. Robert Welch, Inc. 418 U.S. 323, 351 (1974) (refusing to extend *New York Times* standard to defamation of private individuals). *See generally* M. Linda Dragas, *Curing a Bad Reputation: Reforming Defamation Law*, 17 U. HAW. L. REV. 113, 127-28 (1995) (explaining that contemporary Supreme Court defamation cases look to whether plaintiff is public official or private figure and to whether statement in question is public versus private issue).

[26] *See* Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657, 1678-79 (1987) (proposing defamatory speech should invoke "actual malice" standard while content and status should be considered in determining if less demanding standard should apply); *see also* Arlen W. Languardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMP. L. REV. 903, 963 (1989) (describing "two-tiered" approach of defamation law as governing some cases by "actual malice" standard and others by "negligence-fault" standard).

[27] In *Gertz v. Welch, Inc.*, 418 U.S. 323, (1974), the Supreme Court, in dictum, stated that "[u]nder the First Amendment there is no such thing as a false idea." *Id.* at 339. This language encouraged courts for a number of years to draw a constitutional distinction between fact and opinion.

Thereafter in *Milkovich v. Lorain Journal Co.*, 497 U.S. 18 (1990), the Court stated that it did not believe "*Gertz* was intended to create a wholesale defamation exemption for any-

computer bulletin board setting, are we closer to a letter to the editor or closer to an opinion column in a newspaper? Where on the fact/opinion spectrum is speech on the Internet going to lie? I believe we will witness a mix of judicial reaction.

I believe in all of these arenas, out of fear, and frankly out of lack of knowledge about how this medium will develop, there will be both good and bad opinions from the courts and there will be both good and bad federal and state legislation as well. We all need to stay tuned.

thing that may not be labeled opinion." *Id.* "Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact." *Id.* The opinion area today remains a murky one, lending itself to case-by-case determination. *Id.*