

First Amendment Postcards From the Edge of Cyberspace (Keynote Address)

Floyd Abrams

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FIRST AMENDMENT POSTCARDS FROM THE EDGE OF CYBERSPACE

FLOYD ABRAMS*

It is very nice to be here and to participate in this fascinating day. I cannot think of a topic that would have drawn so many people from so many different disciplines, all trying to divine the future direction of the law in so new an area.

I want to start with a disclaimer that will be unnecessary for those of you here who know me: I have yet to surf the Net. Ever. I am not a techie. Not at all. From my office in downtown New York, the Internet community sometimes seems like what one scholar called frontiers people,¹ which I also do not quite think of myself as being.

It all reminds me of a day when I was in law school some years ago. We had a professor, Fritz Kessler,² with a marvelous, almost theatrical German accent. He was German born, German educated, and German accented, with American law school savvy. He called one of my classmates to present a case. The student explained, "I'm sorry, Professor, I haven't read the case." Professor

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Mr. Abrams has argued frequently before the United States Supreme Court in cases involving freedom of the press. He was co-counsel to the New York Times in the Pentagon Papers case and has represented various networks, journalists, and media.

Mr. Abrams thanks Landis C. Best, an associate at Cahill Gordon & Reindel, for her assistance in preparing this speech.

¹ See, e.g., Mike Godwin, *The First Amendment in Cyberspace*, 4 TEMP. POL. & CIV. RTS. L. REV. 1, 1 (1994) (analogizing burgeoning legal and social ramifications of computer technology to unexplored prairie frontier).

² See Ronald K. L. Collins, *Gilmore's Grant (Or the Life & Afterlife of Grant Gilmore & His Death)*, 90 NW. U. L. REV. 7, 11 (1995) (explaining Professor Kessler's role in development of American contract law); see also Anthony T. Kronman, *My Senior Partner*, 104 YALE L.J. 2129, 2129-31 (1995) (paying tribute to Professor Kessler).

Kessler replied, "Ah, from you vee get zee fresh approach." There the student stood for an hour with Professor Kessler, who was delighted to hear the facts, the holding, the law, and then to pillory the student in front of us all. I know those things do not happen any more in law school.

Let me start with what may seem like an anomaly, but it seems to me something we should consider as we think about the Internet and the law. The question I raise is: Whose law, or what law? I mean to raise it not so much on a legalistic level—who has the right to impose law—but on an intensely practical one. Which country's law will affect what is carried, or what is not carried, on the Internet?

Let me start with a non-cyber example—the *Spycatcher* cases which occurred around the world in the late 1980s.³ These cases were brought by the United Kingdom to ban publication of the book, *Spycatcher*.⁴ The book was written by Peter Wright, a former MI5 operative who served for twenty years as a member of the English Secret Service.⁵ Wright did a lot of work on counter-espionage, particularly on the topic of widespread Soviet penetration of the Service.⁶ Upon his retirement, he requested a full-scale investigation relating to his charges that the Secret Service operations in England had been used to destabilize the government under the Labor Prime Minister.⁷ When Mr. Wright concluded that there would be an inadequate investigation, he started writing his book and sought to publish it.⁸

The British government first went to court in 1985 to enjoin publication of *Spycatcher*, citing national security concerns.⁹ It went to court in Australia where the book was about to be pub-

³ *Attorney-General v. Guardian Newspapers Ltd. (No. 2)*, 2 W.L.R. 805, 872 (Ch. 1988); *Attorney-General v. Guardian Newspapers, Ltd.*, 3 All E.R. 316 (1987) (Eng.); *Attorney-General v. Newspaper Publishing*, 3 All E.R. 276 (1987) (Eng.). See generally *ECONOMICAL WITH THE TRUTH: THE LAW AND THE MEDIA IN A DEMOCRATIC SOCIETY*, 17-42 (Dimity Kingsford-Smith & Dawn Oliver eds., 1990) (discussing *Spycatcher* litigation and implications raised concerning freedom of speech).

⁴ PETER WRIGHT, *SPYCATCHER: THE CANDID AUTOBIOGRAPHY OF A SENIOR INTELLIGENCE OFFICER* (Viking 1987).

⁵ *Id.* at 1.

⁶ *Id.* at 1-2, 190-212, 367, 375.

⁷ *Id.* at 272-75, 362-65.

⁸ *Id.* at 377-82.

⁹ *Attorney-General v. Guardian Newspapers Ltd. (No. 2)*, 2 W.L.R. 805, 815 (Ch. D. 1988).

lished, and the Attorney General of Australia obtained a restraint against publication.¹⁰

There was a good deal of reporting in the English and American press about the book. Then the book was released in the United States. When it was, it changed the world about the book because the secrets were out and nothing was left to protect, so that everything the Crown wanted to keep from being said was being said perfectly freely and in a manner wholly protected by the First Amendment in the United States.¹¹ I submitted an affidavit in that case on behalf of one of the accused English newspapers, summarizing American law and pointing out that it would be impossible to obtain a prior restraint on publication of the book in the United States.

Once the book was published in the United States, contrary rulings to what had occurred earlier started to come down around the world. The English government continued, for its own quixotic reasons, to try to prevent publication of the book around the world, although it was freely available in the United States. Consequently, people were able freely to bring the book into the United Kingdom.¹² I recall reading about one English person who brought eighty copies into Heathrow Airport while dressed as Uncle Sam and sold them in England.¹³ He was arrested, not for importing the book, but for selling books without a vendor's license—those wily English!

So the book was out, and because it was out in America, the courts in Australia¹⁴ and the courts in New Zealand¹⁵ re-

¹⁰ *Id.* at 872.

¹¹ U.S. 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; . . ." *Id.*

¹² See George Christian, *Memoirs of a Spy Hunter / The Book the British Government has Banned*, HOUS. CHRON., Aug. 9, 1987, at 14 (discussing international availability of *Spycatcher* and its importation by tourists).

¹³ Cf. Philomena M. Dane, *The Spycatcher Cases*, 50 OHIO ST. L.J. 405, 409 (1989) (discussing free availability of book to British citizens).

¹⁴ See, e.g., *Attorney-General (U.K.) v. Heinemann Publ'rs Austrl. Pty. Ltd.* (1988) 165 C.L.R. 30 (Austl.) (declining to enforce obligation concerning foreign government's intelligence secrets).

¹⁵ See, e.g., *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* 2 W.L.R. 805, 820 (Ch. D. 1988) (dismissing injunction against newspaper and refusing to grant temporary restraining order pending appeal of decision), *aff'd* *Attorney-General v. Wellington Newspapers Ltd.* (unreported), Apr. 28, 1988 (noted in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* 3 W.L.R. 776, 790 (H.L.(E) 1988)); Dane *supra*, note 13, at 409.

jected British attempts to get a prior restraint against the book.¹⁶

It seemed to me at the time that the message from the incident was that the country with the greater amount of legal freedom was likely to triumph over those with more restrictive laws. That is to say, if something *could* be published in the United States and *was* published in the United States, what was the point of banning it in any democratic country elsewhere in the world? It seemed to me that so long as our broad level of First Amendment freedoms persisted, it would become increasingly difficult to ban publication in advance, and maybe altogether, in other countries—at least those that were unwilling to be wholly repressive. This scenario was happening more and more, in many different ways.

I was in Malaysia once to give a talk to a law school class about American First Amendment law. The questions coming from the students of a country which banned Salman Rushdie's book, *The Satanic Verses*¹⁷, were "What are we missing? Is the book good? Did you read the book? Did you like the book?" I asked, "Where did you all learn about this book that is banned here?" And they replied, "CNN."

I again came to a similar conclusion. How can a country, not willing to become a really repressive state, ban some books here and there without becoming a repressive state? How can you do it? Or to put it differently, does this not mean, I asked myself, that American First Amendment law was quietly but effectively sweeping the world? Yet, as I look at the Internet situation around the world, I start to wonder if we may see just the opposite situation developing.

Consider the case you have read about and perhaps heard about this morning, in which an Attorney General in Bavaria, Germany commenced proceedings against Prodigy for posting antisemitic material which is protected under the First Amendment here, but which is criminal in Germany.¹⁸ The result, at least for a time,

¹⁶ On British (ultimately unsuccessful) attempts to ban the publication of excerpts of *Spycatcher* in newspapers in England and other countries, see generally Dane, *supra*, note 13.

¹⁷ SALMAN RUSHDIE, *THE SATANIC VERSES* (1989).

¹⁸ See, e.g., AOL Added to German Probe of Racism on Internet, L.A. TIMES, Feb. 3, 1996, at 2 (discussing German prosecution of antisemitic material on Internet).

was that Prodigy stopped carrying the material, or tried to stop carrying the material here, so as not to be in trouble with German law.¹⁹

That is something that seems to be a risk, perhaps a reality, in situations where the technology that we are talking about is such that the same material appears in the United States at the same time as it appears everywhere else in the world. This is the opposite lesson from the one I thought we were learning from the *Spy-catcher* cases. It is one that varies depending on the nature of the technology itself.

The *New York Times* is not published abroad; the Paris edition of the *Herald Tribune* is. One of the things that the *Herald Tribune* does differently is to read the stories in the *New York Times* for libel under English, French, and—alas—Singapore libel laws.²⁰

What if you cannot check the material because of the differences in technology, because once something is up and out there, it is everywhere? The result could be a situation where countries that afford less protection are the ones that really rule in terms of what is ultimately posted or carried at all by other forms of media. That, at least, is the risk.

I have seen this occur in some cases I have worked on involving American television which broadcasts into Canada. A few people have brought libel suits in Canada about American television news broadcasts aimed almost exclusively at the American public, claiming their reputations were hurt in Canada.²¹ This has not happened enough to cause American broadcasters to make many major changes in what they broadcast. But it does not take much imagination to conjure up the visage of law suits in Mexico, or some of the Caribbean Islands, or in Canada—all because we sim-

¹⁹ See *id.*

²⁰ See, e.g., William Glaberson, *Paper to Pay \$214, 285 in Singapore Libel Case*, N.Y. TIMES, Nov. 29, 1995, at A10 (discussing *International Herald Tribune's* decision to settle libel suit brought against it by former Prime Minister of Singapore for opinion piece about Singapore judiciary); see also William Glaberson, *Newspaper Decides Not to Fight Singapore Libel Award*, N.Y. TIMES, Aug. 6, 1995, at A3 (discussing *International Herald Tribune's* decision not to appeal \$678,000 verdict that opinion article about "dynastic politics" in Singapore violated Singapore libel law); Philip Shenon, *Paper Told to Pay \$678,000 in Singapore Suit*, N.Y. TIMES, July 27, 1995, at A5 (discussing decision of Singapore Supreme Court finding article in *International Herald Tribune* to be libelous of Singapore officials).

²¹ See, e.g., Amy Dockser, *Plaintiffs Take Libel Suits Abroad, To Favorable Laws*, WALL ST. J., June 6, 1989, at §2, p.1 (discussing defamation lawsuit brought by Bahamian Prime Minister Lyndon O. Pindling against NBC in Canada).

ply do not have the technological means to keep a television image from going into countries that have different bodies of law.

Think of this situation as applied to the Internet. Consider the possibility that, absent some greater cohesiveness, at least in the democratic world community, of what may be published and what may not, we could have a situation where what Americans come to read, see, and learn, is determined by less protective laws than the ones that exist here, because the information that is posted is available simultaneously.

I was struck by the situation not so long ago when the President of France was gravely ill and his doctor wrote a book called *Le Grand Secret*.²² The secret was that the President had been unfit to serve for the last five years of his tenure due to the gravity of his illnesses, which were being treated by this doctor.²³ French authorities responded in the democratic way we see sometimes—by banning the book one day after publication for breaching medical confidentiality and privacy laws.²⁴ During the one day that it was available, at least one person bought it and posted the complete book on the Internet for anyone to read.²⁵ This raises the question: Given this new forum and the nature of this new means of communication, can we keep secrets at all anymore?

Twenty-five years ago I was involved in the Pentagon Papers case,²⁶ where a source of the *New York Times* made available twenty-four volumes of a TOP SECRET Defense Department study of how the United States got involved in the war in Vietnam.²⁷ I wonder if that individual wanted to leak such information today, if, instead of giving it or making it available to the *New*

²² CLAUDE GUBLER, *LE GRAND SECRET* at <<http://www.cs.cmu.edu/afs/cs/user/declan/www/le-secret>>.

²³ *Id.*

²⁴ See Douglas Lavin, *Browsing a Tangled Web of Cafes, Scandal, Intrigue*, WALL ST. J. (Europe), May 2, 1996, at 4 (detailing events surrounding January 18th ban of book released after President Mitterrand's death on January 8th); see also Jana Mikoska, *Mitterrand Mania keeps French Publishers, Courts Busy*, AGENCE FRANCE-PRESSE, Apr. 25, 1996 (5,000 copies out of 40,000 first printing seized by police); cf. Bill Gates, *Internet Filtering Requires Delicate Balance*, L.A. DAILY NEWS, Apr. 1, 1996, at B1 (discussing ramifications of access to banned publication on Internet).

²⁵ See GUBLER, *supra* note 22.

²⁶ *United States v. New York Times Co.*, 328 F. Supp. 324 (S.D.N.Y.), *cause remanded by* 444 F.2d 544 (2d Cir.), *rev'd sub nom. New York Times Co. v. United States*, 403 U.S. 713 (1971).

²⁷ *Id.* at 325-27; see also John Cary Sims, *Triangulating the Boundaries of the Pentagon Papers*, 2 WM. & MARY BILL OF RTS. J. 341 (1993); Floyd Abrams, *The Pentagon Papers a Decade Later*, N.Y. TIMES, June 7, 1981, at 22. See generally DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED* (1996).

York Times, it would just be posted on the Internet. There would be no prior restraint problem and little risk because, so it seems, there are ways that this can be done to make it extremely difficult to find out who posted it. This is certainly a far different situation than that faced by the *Times* source in 1971.

It is interesting, with this as background, to talk a little bit about the legislation that has been adopted in this area which affects in one way or another what may and may not appear on this new communication. I refer to the Communications Decency Act²⁸ and the Online Family Empowerment Act.²⁹ Both of these provisions relate to a common theme—the expressed desire to protect children from sexually explicit and other inappropriate material on-line.³⁰

There is no question that the government has a serious interest, or that the courts would certainly conclude that the government has a serious interest, in this area.³¹ There is also no question that extremely serious First Amendment questions are raised whenever Congress prevents adults from reading or seeing material which they have a constitutional right to read or see, simply because it is viewed as harmful to children. It does not answer every such question to repeat Justice Frankfurter's observation of thirty-nine years ago, that the government may not reduce the adult population to reading what is fit for children.³² But it is a good start. Whether the Supreme Court will start there is another question.

In looking at the Online Family Empowerment provision, there are two important First Amendment concerns regarding the Internet: The first is the potential liability of on-line services for

²⁸ Communications Decency Act of 1996, Pub. L. No. 104-104, §§ 501-502, 110 Stat. 133 (1996).

²⁹ Online Family Empowerment Act, Pub. L. No. 104-104 § 509, 110 Stat. 137 (1996) (proposed June 10, 1995 as "Internet Freedom and Family Empowerment Act" by Rep. C. Christopher Cox (R. Calif.) and Rep. Ron Wyden (D. Ore.) as amendment to Telecommunications Act of 1995).

³⁰ See H.R. CONF. REP. NO. 458, 104th Cong., 2d Sess. (1996) (discussing desire to protect children through proposed legislation); S. REP. NO. 230, 104th Cong., 2d Sess. (1996) (setting forth legislative purposes of Telecommunications Act of 1996); H.R. REP. NO. 223, 104th Cong., 1st Sess. (1995) (discussing "V-Chip" and noting goal to "clean up the Internet").

³¹ Cf. Bill Freza, *Fear Mongering: "Just Say No to Cybercrats"*, COMMUNICATIONS WEEK, July 22, 1996 (discussing increasing attempts to regulate cyberspace).

³² See *Butler v. State of Mich.*, 352 U.S. 380, 383-84 (1957) (Frankfurter, J.) (reversing conviction under Michigan obscenity statute and declaring "[t]he incidence of [that] enactment is to reduce the adult population of Michigan to reading only what is fit for children").

libel;³³ the second is the growing concern about the Internet as a particularly hospitable forum for hate speech.³⁴

The Communications Decency Act contains three separate prohibitions that raise serious First Amendment issues. First, it criminalizes the transmission across computer networks of "any comment, request, suggestion, proposal, image or other communication which is obscene, lewd, lascivious, filthy or indecent, with intent to annoy, abuse, threaten or harass another person."³⁵ Second, it bans the transmission across computer networks of any comment, etc., that is obscene or indecent if the party transmitting the information knows that the recipient is under the age of eighteen.³⁶ Third, it prohibits transmission of any comment that in context depicts or describes in terms patently offensive—as measured by contemporary community standards—sexual or excretory activities or organs in a manner that the communication is available to people under the age of eighteen.³⁷

These broad provisions imposing criminal liability are rife with First Amendment concerns. It is not surprising that within minutes after being signed into law, a lawsuit was filed in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of the Act, particularly the "indecent" and "patently offensive" provisions. The federal district court granted a temporary restraining order against the "indecent" portion of the statute, declaring that the word is a constitutionally vague basis for judging one's future conduct.³⁸ It will be interesting to track that case as it proceeds through a three-judge court for review³⁹ and, probably, to the Supreme Court.⁴⁰ It may

³³ See, e.g., *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (brokerage firm later withdrew its libel suit against on-line service provider after it obtained an apology).

³⁴ See, e.g., John Schwartz, *With Innovative Use, the Web Empowers the First Amendment*, WASH. POST, July 15, 1996, at F19 (exploring extensive "hate speech" on Internet, indexing mechanisms, and vocal on-line opponents).

³⁵ Communications Decency Act of 1996 § 502(a).

³⁶ *Id.* at § 502(d).

³⁷ *Id.*

³⁸ *ACLU v. Reno*, 1996 WL 65464 (E.D. Pa. Feb. 15, 1996) (Buckwalter, J.).

³⁹ Editorial Note: After Mr. Abrams' speech, injunctive relief against enforcement of the Communications Decency Act was upheld by a three-judge panel. *ACLU v. Reno*, 929 F. Supp. 824, 849, 856 (E.D. Pa. 1996) (declaring Communications Decency Act unconstitutional in that it violated freedom of speech and failed to define adequately "indecent" and "patently offensive"). The first portion of the opinion was devoted to describing the development of Cyberspace and the Internet. *Id.* at 830-49. The judges actually went on-line themselves to assist in the writing of the opinion.

be that the Supreme Court will ultimately have to address the question of what "indecenty" means and, whatever it means, whether it is clear enough and predictable enough in its application to be constitutional.⁴¹

There have been prior cases involving indecenty, such as the *Pacifica* "seven dirty words" case⁴² in radio and the *Sable Communications* case⁴³ with respect to telephones, but the Court has never defined exactly what "indecenty" means.⁴⁴ It is also not at all clear how the peculiar on-line environment will affect a reviewing court's thinking. For example, there has been much commentary about the Internet community being different from one's local community, which is the current standard used to decide obscenity cases.⁴⁵ Individuals in the privacy of their home communicating around the world with other people is the very nature of the Internet. Therefore, the question of what the relevant community is for judging indecenty or even obscenity is not at all an easy one.

The Online Family Empowerment Act seems to raise questions at least as difficult. This Act was adopted at the same time as the Communications Decency Act and contains a number of findings

⁴⁰ Editorial Note: Subsequent to Mr. Abrams' speech, the United States Supreme Court has indeed granted review. *Reno v. ACLU*, 117 S. Ct. 554 (1996) (noting probable jurisdiction).

⁴¹ See Harvey Berkman, *Medium is Message — Courts Say Congress Goofed in CDA Focus on Smut, not the Internet*, NAT'L L.J., Aug. 19, 1996, at A1 (stating focus of Communications Decency Act is incorrect and focus should be on mode of communication rather than content); see also Jared Sandberg, *On-line: Federal Judges Block Censorship on the Internet*, WALL ST. J., June 13, 1996, at B1 (discussing implications of *ACLU v. Reno* decision).

⁴² *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 729-30 (1978) (banning afternoon radio broadcast of comedian George Carlin's "Filthy Words" did not constitute censorship under Communications Act of 1934).

⁴³ *Sable Communications v. F.C.C.*, 492 U.S. 115, 131 (1989) (holding prohibition and restriction of adult access to "dial-a-porn" unconstitutional and stating "the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages").

⁴⁴ See Floyd Abrams, *Prior Restraints*, in COMMUNICATIONS LAW 1995, at 343 (PLI Pat., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 343, 1995) (outlining developing standards for assessing obscenity and indecenty); see also Laurence H. Winer, *The Signal Cable Sends, Part II—Interference from the Indecency Cases*, 55 *FORDHAM L. REV.* 459, 489 (1987) (discussing content control in broadcasting).

⁴⁵ See *Hamling v. United States*, 418 U.S. 87, 104 (1974) (permitting jurors to draw on personal beliefs when assessing obscenity); see also *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (individual states may establish geographical limits for assessing obscenity); *Miller v. California*, 413 U.S. 18, 24 (1973) (requiring jury to apply local community standards in obscenity case); *Roth v. United States*, 354 U.S. 476, 489-90 (1957) (explaining contemporary community standards determine whether obscenity appeals to prurient interest). See generally Monroe E. Price, *The Market for Loyalties: Electronic Media and the Global Competition for Allegiances*, 104 *YALE L.J.* 667, 694-95 (1994) (discussing "localism" and First Amendment in broadcasting).

about the desirability of the Internet as an entity. Congress states that it "offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, myriad avenues for intellectual activity. The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."⁴⁶ After saying more good things about the Internet, Congress did something very interesting. Under the heading of "Protection for 'good samaritan' blocking and screening of offensive material," it states, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁴⁷ A pre-emption section follows this provision.⁴⁸

The most obvious purpose of this Act was to disapprove of and, insofar as Congress is able, to overrule the approach followed by *Stratton Oakmont v. Prodigy*.⁴⁹ In *Stratton*, the court found Prodigy to be a publisher rather than an electronic billboard operator because Prodigy was taking editorial care about what it was posting and what it was not posting.⁵⁰ The conference report specifically says that one of the bill's purposes is to "overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content"⁵¹ The disavowal of the *Stratton Oakmont* case will no doubt please the many commentators who have criticized the opinion.⁵² Many of these same commentators, with many of whom

⁴⁶ Online Empowerment Act § 509(a)(3) and (4).

⁴⁷ *Id.* § 509(c).

⁴⁸ *Id.* § 509(d)(1)-(4) (declaring statute will have no effect on criminal law, intellectual property law, state law, or communications privacy law).

⁴⁹ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, WL 323710, at *1, *4-5 (N.Y. Sup. Ct. May 24, 1995) (holding Prodigy was publisher rather than distributor because it used technology and manpower to delete offensive notes from bulletin board).

⁵⁰ See *id.* at *4-*5.

⁵¹ S. REP. NO. 230, 104th Cong., 2d Sess. (1996). The legislative history states: [o]ne of the specific purposes of this section (referring to Section 509 - Online Family Empowerment provisions) is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

Id.

⁵² See Iris Ferosie, *Don't Shoot the Messenger: Protecting Free Speech on Editorially Controlled Bulletin Board Services by Applying Sullivan Malice*, 14 J. MARSHALL J. COMPUTER & INFO. L. 347, 347 (1996) (applying *Sullivan* malice test to information service providers exercising editorial control); see also Frederick B. Lim, *Obscenity and Cyberspace: Commu-*

I am ideologically aligned as a general matter, praised the previous decision of Judge Leisure in the Southern District of New York in a case called *Cubby, Inc. v. CompuServe, Inc.*⁵³ *Cubby* held that CompuServe was more like a distributor, such as a library or a book store, than a publisher because it did not exercise editorial control over what it transmitted.⁵⁴ Since CompuServe was a distributor, the court held that the appropriate standard of review for liability is whether it knew or had reason to know of the allegedly defamatory statements.⁵⁵ This is the same standard set forth in the Restatement (Second) of Torts which says, "one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character."⁵⁶

The removal of the *Stratton Oakmont* case, while certainly a relief to on-line providers, by no means settles what I consider to be the difficult questions in this area. I have both bad news and good news in that regard. The bad news is, read fairly, the language that has been repeated in opinions that are supposed to be speech protective, such as *Cubby*, is not very protective at all. Everyone was so busy trying to prove *Stratton Oakmont* wrong, that I think not enough attention has been paid to the "know or reason to know standard" for distributors.

Of course, the common understanding is that on-line services, due to the sheer volume of messages crossing their computer lines each day, can never "know" of the content. That was the rationale of the *Cubby* case where the Court stated in glowing language:

"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."⁵⁷

nity Standards in an On-Line World, 20 COLUM.-VLA J.L. & ARTS 291, 311-12 (1996) (explaining inconsistent results under *Stratton Oakmont*); David P. Miranda, *Defamation in Cyberspace: Stratton Oakmont v. Prodigy Services Co.*, 5 ALB. L.J. SCI. & TECH. 229, 235 (1996) (discussing adverse ramifications of *Stratton Oakmont*).

⁵³ 776 F. Supp. 135 (S.D.N.Y. 1991) (Leisure, J.).

⁵⁴ *Id.* at 140.

⁵⁵ *Id.* at 140-41.

⁵⁶ RESTATEMENT (SECOND) OF TORTS § 581 (1976).

⁵⁷ *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

But what is meant by "reason to know?" Is this a negligence standard underprotective of on-line providers and their First Amendment rights? It sure sounds a lot less protective than *New York Times v. Sullivan*,⁵⁸ which is the opposite of "reason to know" and applies a standard of actual knowledge or actual serious doubts as to truth or falsity.⁵⁹

What would happen if an on-line service was given notice that it was going to carry a defamatory message or that some named author was going to submit something which is defamatory? Suppose the warning came from a reliable source. Would the on-line provider be on some notice, some duty to investigate and face liability if it did not? Or even worse, what happens after something has been carried and a letter comes in to an on-line service claiming it is defamatory, and it remains there. Is the provider obliged to investigate and make a judgment as to truth or falsity? We know on-line services have absolutely no facilities to make judgments as to truth or falsity at all; that is not what they exist to do. To impose that sort of responsibility under defamation law, therefore, would so drastically change the way these companies do business that it could imperil their businesses.

It seems to me that a far more protective standard is needed than "reason to know;" something like "knowing," more like "actual knowledge." It does not now exist as a matter of common law. Where it does exist, interestingly enough, is in the Online Family Empowerment statute.⁶⁰ Congress has said that on-line providers not only are not publishers, but are not speakers at all.⁶¹ If they are not speakers, then they should not be liable under any theory. The Congress has provided absolute immunity against libel with a pre-emption section, making it impossible for the state courts, under state law, to impose liability.⁶² This is a plain reading of the

⁵⁸ 376 U.S. 254 (1964) (holding actual malice necessary element in defamation action by public official against newspaper).

⁵⁹ *Id.* at 279-80.

⁶⁰ *Cf. Cubby*, 776 F. Supp. at 139 (noting requirement that distributors have actual knowledge of content before incurring responsibility "is deeply rooted in the First Amendment").

⁶¹ Online Family Empowerment Act § 509(c)(1). According to this section, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.*

⁶² *Id.* § 509(d)(3). According to this section, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.*

statute, if not necessarily its primary statutory purpose. It will be a topic of very interesting litigation yet to come.

Let me conclude with a final thought. I have spent a lot of time representing journalists,⁶³ newspapers,⁶⁴ and magazines.⁶⁵ Sometimes when I give them lectures, I tell them that I think the development of law will be impacted enormously by the level of responsibility that they show in the way they behave—by their journalism itself. I have sometimes thought that if publications behave like Australian and English publications we will wind up with Australian or English law someday, if we are not careful. That is not a speech I can give with respect to the Internet. The Internet is not something about which one can give little lectures to small groups of journalists asking them to be responsible and do a good job so that I or all the other lawyers in the country who do what I do, can go before judges and say, “Look, trust us. You know what we do is generally good. It is usually worthy. It is better to leave us alone. It will be all right.” That is not Internet language at all. You cannot even use the language of “responsibility” in this context.

⁶³ See *Herbert v. Lando*, 441 U.S. 153, 155 (1979) (action against CBS producer Lando and narrator Mike Wallace for broadcasting report on accusations of retired army officer concerning Vietnam War atrocities); see also *Newton v. National Broad. Co.*, 930 F.2d 662, 665-66 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991) (litigation concerning NBC broadcast of “Wayne Newton and the Law” concerning Las Vegas organized crime); *Smith v. Nixon*, 606 F.2d 1183, 1185 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981) (action by *New York Times* reporter against telephone utility alleging unconstitutional wiretapping and electronic surveillance); *Dowd v. Calabese*, 589 F. Supp. 1206, 1209 (D.C. 1984) (defending *Wall Street Journal*, its publisher and reporter in libel action by members of San Francisco Strike Force).

⁶⁴ See *United States v. Providence Journal Co.*, 485 U.S. 693, 694 (1988) (proceeding to enjoin FBI, newspaper, and television station from revealing information obtained as result of illegal electronic surveillance); see also *Daily Herald Co. v. Munro*, 838 F.2d 380, 382 (9th Cir. 1988) (litigation brought by Secretary of State against NBC, *New York Times*, and *The Daily Herald* to prohibit exit polling in area of polling places on election day); *Edwards v. National Audubon Soc’y*, 556 F.2d 113, 115 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977) (libel action against *New York Times* for critical reports concerning National Audubon Society and use of insecticides); *Democratic Nat’l Comm. v. McCord*, 356 F. Supp. 1394, 1395 (D.C. 1973) (motion to quash deposition subpoenas of Committee for Reelection of President to reporters affiliated with *New York Times*, *Time Magazine*, and *Washington Post* concerning Watergate break-in photographs, tapes, notes, etc.); *Gross v. New York Times Co.*, 632 N.E.2d 1163 (1993) (defamation action brought by former Chief Medical Examiner of New York City against *New York Times* for publishing allegations of professional misconduct).

⁶⁵ See *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 541 (1985) (copyright infringement action against *The Nation* for publishing excerpts of unpublished manuscript by President Gerald Ford); see also *Bressler v. Fortune Magazine*, 971 F.2d 1226, 1227 (6th Cir. 1992), *cert. denied*, 507 U.S. 973 (1993) (defamation action against *Fortune Magazine*); *Church of Scientology Int’l v. Time Warner, Inc.*, 903 F. Supp. 637, 639 (S.D.N.Y. 1995) (defamation claim against *Time Magazine* and its publisher).

It is true that an on-line service can make what decisions it wants about what to carry. What decisions it should reach are sometimes difficult. The nature of the Internet, it seems to me, fits closely with what Justice Brennan was talking about in *New York Times v. Sullivan*: robust, wide open, and uninhibited.⁶⁶ That is what the Internet is and what it has to be, because there is no way to impose standards of responsibility akin to those of journalism that I occasionally preach to some of my clients.

The medium itself, it seems to me, is one which really tests our faith in the First Amendment. The medium gives technological tools for people to communicate more effectively, more directly, more widely. It is quite different from the traditional forms of media which are increasingly run by fewer and fewer entities. While the cost of Internet access remains prohibitive to some members of the community, there is every reason to think that the cost will go down in the future.⁶⁷

The question, I think, is this: How will the public, the courts, and the Congress determine whether the Internet offers too much First Amendment freedom? Is it all too much of a good thing? Is it too vigorous a marketplace of ideas? Is it, as some in Congress seem to think, too safe a haven for potentially dangerous individuals intent on spreading hate speech and pornography?

Those of us who speak the First Amendment language should not ignore the reality that the Internet has become a better home for people who engage in hate speech and spread pornography than any other means of communication we have ever had.⁶⁸ I

⁶⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (Brennan, J.) (asserting "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .").

⁶⁷ See *Internet Access: Cisco Enables network users to connect easily to the Internet; hardware/software solutions reduce cost & complexity for 50 million network users*, EDGE WORK-GROUP COMPUTING REP., May 6, 1996 (introducing new methods in Internet programs offering services at lower prices); see also Wayne Madsen, *Securing Access and Privacy on the Internet*, COMPUTER FRAUD & SEC. BULL., Jan. 1, 1996 (discussing pricing aspects of internet access); cf. *Hearings Before the Subcomm. on Africa of the House Comm. on International Relations*, 104th Cong., 2d Sess. (1996) (statement of Thomas R. Lansner Senior Consultant of Freedom House) (discussing international impact of and need for access to information through Internet).

⁶⁸ See Jason Kay, *Sexuality, Live Without a Net: Regulating Obscenity and Indecency on the Global Network*, 4 S. CAL. INTERDISCIPLINARY L.J. 355, 362 (1995) (discussing fear of Internet becoming haven for hate speech and pornography due to low-cost capacity to reach broad audience); see also *The Web of Hate: Extremists Exploit the Internet*, ANTI-DEFAMATION LEAGUE REPORT ON ANTISEMITISM ON LINE, Jan. 1996; *Group Seeks to Muzzle Cyberhate; Internet: Censorship debate flares as Wiesenthal Center asks providers to deny access to those who denigrate minorities*, L.A. TIMES, Jan. 11, 1996, at 1 (detailing ongoing

could read you long quotes from skinheads praising the Internet. They have never had a better way to communicate. Those of us who walk the First Amendment line ought not to deny the truth of this reality.

What the Internet does is make us decide at the end of the day how much we really believe in the idea that, on balance, it is a good idea to have more speech rather than less, even if the speech is sometimes awful, and maybe even if the speech is sometimes dangerous. It is not surprising that some fringe speakers have been some of the first to use and exploit the new technology. It seems to me that supporters of freedom of cyberspeech are going to have to do a lot more to convince the public that far more is to be gained by allowing freedom of expression of the broadest sort to flourish on the Internet, even unsavory speech, then to attempt to censor it.

In that respect, I sort of like my own current vantage point as a First Amendment practitioner looking at this strange new medium from the outside. One of these days soon, maybe before I see any of you again, I promise to take my maiden voyage on the 'Net. Next time I come back, I will not have the purity of vision that only comes from having so little idea about the technology of the medium of which I have been talking. But I will still remember the words of the First Amendment.

debate concerning use of online services to spread hate speech and pornography); Serge F. Kovaleski, *Universities Vexed by Use of Their Internet Connections for Hate Mail*, WASH. POST, Aug. 4, 1995, at A4 (exploring anonymity and rampant hate speech on Internet); Kelly Owen, *Oklahoma City: After the Bombing Hate Speech on Internet Called Protected by Constitution*, L.A. TIMES, May 12, 1995, at 17 (debating whether increased violence requires stricter regulations for computer network access).

