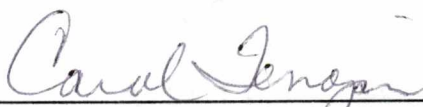


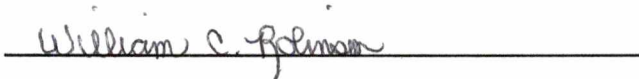
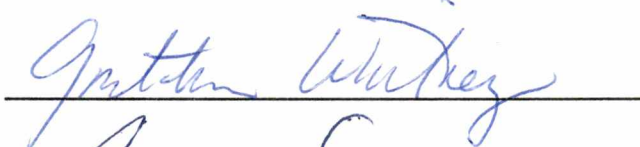
To the Graduate Council:

I am submitting herewith a thesis written by Teresa L. Conaway entitled "Libel in Cyberspace: Federal Judges and the Internet." I have examined the final copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Science, with a major in Information Sciences.



Carol Tenopir, Major Professor

We have read this thesis
and recommend its acceptance:



Accepted for the Council:



Associate Vice Chancellor and
Dean of The Graduate School

LIBEL IN CYBERSPACE: FEDERAL JUDGES & THE INTERNET

A Thesis
Presented for the
Master of Science
Degree
The University of Tennessee, Knoxville

Teresa Louise Conaway
December 1996

DEDICATION

This thesis is dedicated to

Cindy,

Rick,

Lowell,

&

Arlene.

The four best friends
anyone could ever ask for.

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Abstract

This purpose of this study was two-fold:

First, to study the intersection of the American law of defamation with the new medium, cyberspace. Specifically, what liability do providers of Internet access risk for defamatory content posted by others? In addition to examining the current law of defamation and how its been applied to cases of online libel, this study surveys the relevant professional literature.

Second, to study the familiarity of federal trial judges with the Internet and World Wide Web. The results of a survey administered to a sample of sitting federal trial judges are presented and discussed.

The study illustrates that the existing law of defamation is sufficiently flexible to apply to cases of online libel. However, law-makers may be well-advised to consider a new rule of liability for online service providers to ensure that the new medium flourishes. It also illustrates that younger and more recently appointed federal trial judges have had more experience using computers for online functions, but that generally, the federal trial bench personal exposure to cyberspace is limited.

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CHAPTER ONE

INTRODUCTION

"Since I'm a little new to [scuba] diving, needless to say diving with a stoned instructor was a little scary [sic].... I won't mention his name but he's the only white instructor there."

America Online (AOL) subscribers who visited the scuba diving forum in 1995 might have read the above posting if they were looking for recommendations of dive shops on the Caribbean island of Bonaire. It was posted by someone using the AOL handle, "Jenny TRR." "Jenny" posted it to warn others of a bad experience she had had when she went diving with an instructor from the dive shop at the Carib Inn in Bonaire.

Soon, a regular customer of the Carib Inn told the owner, Arnold Bowker, about the message. Bowker investigated and determined that the charge made about one of his instructors, John Joslin, was untrue. Bowker posted a message on the AOL scuba diving bulletin board refuting the charge and asking "Jenny TRR" to retract her comments. When she didn't, Bowker decided to sue.¹

¹ Brian Bergstein, *Internet's Anonymity Challenged; Libel Suit Seeks Name of Computer User*, The Record, Sept. 16, 1995, at A01.

But the plaintiffs had one problem: Who was "Jenny TRR"?

To learn the name of their defamer, Bowker and Joslin filed suit in Cook County (Illinois) Circuit Court asking the court to compel America Online to reveal the identity of "Jenny TRR." Eventually AOL relented and released the subscriber's name, address, and credit card and checking account information."² "Jenny TRR" turned out to be a male former employee of the Carib Inn. After he retracted his comments and apologized, Bowker and Joslin dropped their suit.

In the case of "Jenny TRR," America Online dodged a bullet. Had it not released the subscriber's identity (thus incurring the wrath of advocates of web privacy)³, AOL might have become the third of the three major commercial online services (after CompuServe and Prodigy) to be faced with a libel suit for comments posted by others.

In recent years technology has advanced rapidly, making access to the Internet--once an enclave for higher education, military, and government--a means of communication, information, and entertainment for the masses. As the masses rush to

² *Legal Uncertainties Abound Online*, The Tampa Tribune, February 17, 1996, at 19.

³ *Id.*

cyberspace, they take real world legal problems with them and where technology takes them, the law is sure to follow--eventually.

Legal scholars began pondering the potential legal issues faced by online service providers almost as soon as the technology emerged. Only recently, however, have state and federal courts begun to consider these issues.

One broad issue of concern to online service providers (OSP)⁴ is their potential liability to third parties for online misdeeds by service users. For example, is CompuServe liable for pirated software posted in its library files? Is Prodigy liable for pornography posted by or distributed among its members? Is America Online liable for defamatory comments posted by its users?

This study will examine the law of defamation as it applies to cyberspace. Chapter Two will provide an overview of the law of defamation, the current law of libel in cyberspace, and some implications of the Communications Decency Act for this law. Chapter Three will survey the commentators who have written on

⁴ This study will use the term "online service providers," or "OSPs" very broadly to include every type of service provider from the large commercial services such as Prodigy, CompuServe, and America Online, to regional and national internet service providers, such as U.S. Internet and Netcom, to small hobbyist bulletin board systems run out of private homes.

this topic. Chapter Four will present the results of a survey of federal trial court judges made to determine their familiarity with the Internet and World Wide Web. Chapter Five will offer some conclusions and recommendations based on the existing law, the literature, and the survey.

CHAPTER TWO

THE LAW OF DEFAMATION & CYBERSPACE

For centuries American and English courts have been deciding cases brought for defamation. Although the cause of action is not new, the courts have had to adjust with each new technological advance. Understanding how the law of defamation might apply in cyberspace requires first that we understand its underlying principles. Part 1 of this chapter will survey the existing law of defamation, including its constitutional implications. Part 2 will look at the law of defamation in cyberspace as it currently stands. Part 3 will briefly consider the implications of the defenses provided in the Communications Decency Act.

The Law of Defamation

When we were children our first defense against insults was "Sticks and stones may break my bones, but words will never hurt me." But words can hurt our feelings, our reputations, and our livelihoods. Ask Michael Jackson, whose career has been off track since allegations of child sexual abuse.⁵ Or ask Hillary Rodham

⁵ John Mastrini, *Michael Jackson Launches Comeback Tour in Prague*, Reuters North American Wire, Sept. 7, 1996; Richard Drew,

Clinton, who journalist William Safire recently called a "congenital liar."⁶ Harmful statements that are false may give rise to an action in tort for defamation.

To compensate the victims of false defamatory statements, the law provides two tort actions: slander and libel. Generally, slander is oral and libel is written.⁷ A statement is defamatory if it creates an idea of disgrace. The Second Restatement of Torts defines a communication as defamatory if it "tends to harm a person's reputation so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."⁸

Slander and libel both require the same basic elements.

First, the statement in question must be defamatory. Second, it

Can Jackson Revive His Career in Ads?, Chicago Sun-Times, Sept. 26, 1994; Ira Robbins, *Now, Can He Revive His Career?*, Newsday, Sept. 22, 1994.

⁶ "Americans of all political persuasions are coming to the sad realization that our First Lady -- a woman of undoubted talents who was a role model for many in her generation -- is a congenital liar." William Safire, *Blizzard of Lies*, N.Y. Times, January 8, 1996, at A27.

⁷ W. Page Keeton et al., *Prosser and Keeton on the law of Torts* § 112 (5th ed. 1984 & Supp. 1988). The courts which have decided cyberspace defamation cases have not explicitly ruled which classification applies. However, they and scholars who have considered this question, have assumed that it is libel as it has more in common with the written word than with the spoken word.

⁸ Restatement (Second) of Torts § 559 (1977).

must be false. Third, it must be about an identifiable person. Fourth, it must be published (i.e., heard or read by a third person). Finally, the plaintiff must have suffered damage.⁹ These elements have been litigated extensively over the years, and though they pose some interesting twists in the world of cyberspace,¹⁰ only the final element--damages-- is relevant for this discussion.

The final element--damages--is the one which creates the most confusion and which led the United States Supreme Court to intervene for constitutional reasons. Generally, plaintiffs may seek several different kinds of damages.¹¹ They are:

1. Compensatory Damages
 - a. General (presumed) damages
 - b. Special (actual) damages
2. Punitive Damages
3. Nominal Damages

Compensatory damages are intended to compensate the victim of defamation for harm suffered. There are two kinds of

⁹ Keeton *et al.*, *supra* note 1, § 113.

¹⁰ For example, has an "identifiable person" been defamed when false defamatory statements are made online about her online persona if no one knows her true identity?

¹¹ Keeton *et al.*, *supra* note 1, § 116A.

compensatory damages: general and special. General damages to a plaintiff's interest in his reputation are presumed. It is for the finder of fact to quantify this damage in dollars. Special damages are actual financial losses suffered by the plaintiff. For example, if, as the result of a defamatory statement, the plaintiff lost a contract worth a \$20,000 profit to him, his special damages would be \$20,000.

Punitive damages are above and beyond any presumed or actual damages the plaintiff suffers. They are intended to punish the defendant for his misdeed and supposedly are severe enough to prevent the defendant from committing similar misdeeds in the future. The finder of fact determines the punitive damages to be awarded, if any.

Nominal damages are awarded to a plaintiff in a very small or merely symbolic amount. They are awarded when the plaintiff proves a technical violation but no significant injury. With the high cost of litigation today, few plaintiffs can afford to prosecute a defamation case merely for nominal damages.

In general, slander is not actionable without a showing of special damages. There are four exceptions to this general rule. Oral defamatory statements which constitute *slander per se* are actionable without a showing of special damage. In other words,

damages will be presumed. The four exceptions are the imputation of (1) a crime, (2) a loathsome disease, (3) unchastity of a woman, and (4) misfeasance or malfeasance in one's business, trade, or profession. All other slanderous words are actionable only upon a showing of special damages.¹²

Historically, libel has been treated as the more serious of the two defamation torts. Libel and slander were originally defined during an era when there was no television, radio, or other audio mass media. Only those within earshot could hear a slanderous statement. If it was not repeated, the damage to the subject's reputation was limited. A libelous statement, however, once committed to written or printed form, could be distributed among readers easily. A libelous statement had the potential to do more harm because it had the potential to reach more people.

Under the common law, libel is actionable without a showing of special damages. In other words, the defamatory statement is presumed to damage the plaintiff's reputation. The finder of fact must determine what amount of money damages to award to compensate for the presumed injury to reputation and can award punitive damages if it finds malice.¹³

¹² Keeton *et al.*, *supra* note 1, § 112.

¹³ *Id.*

The United States Supreme Court was content to let the states enforce their laws against defamation without interference until 1964. In that year, the Court found constitutional implications in libel suits brought by public officials against media defendants. The Court was concerned that to allow the states to enforce their libel laws against the mass media would have a chilling effect and impede the freedom of the press.

The issue of the constitutional implications of libel arose in the context of civil rights struggle in the south. An elected city commissioner in Montgomery, Alabama brought suit against the *New York Times* for its publication of an advertisement in which civil rights leaders criticized Montgomery officials for police responses to civil rights demonstrations. In *New York Times v. Sullivan*,¹⁴ an Alabama jury had awarded presumed and punitive damages. Justice Brennan, writing for a unanimous court, considered the "profound national commitment" to public debate might well include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹⁵ The Court then held that the Constitution

¹⁴ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁵ *Id.* at 270.

prohibits a public official from recovering [presumed or punitive] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.¹⁶

The rule in *New York Times v. Sullivan* was soon expanded to cover a broader category of plaintiffs. In 1967 the Court returned to the issue in two consolidated cases, *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.¹⁷ Both cases involved plaintiffs who were not "public officials" but who, nevertheless, were in the public spotlight.

In *Butts* the *Saturday Evening Post* had published an article entitled "The Story of a College Football Fix." In the article, the *Post* reported that Wally Butts, athletic director at the University of Georgia, had given the University of Alabama coach, Paul "Bear" Bryant, information in advance about Georgia's game plans for the upcoming football game between the two rival schools. The reporter based the story on information provided by an insurance agent in Atlanta who said he had overheard a telephone conversation between Butts and Bryant through an electronic glitch. The *Post* did not attempt to verify the information before

¹⁶ *Id.* at 279-280.

¹⁷ 388 U.S. 130 (1967).

publishing it. In *Walker*, the Associated Press, in a hurried on-the-scene dispatch, reported that U.S. Army General Edwin Walker had led the charge of whites in an attack on the federal marshals who were enforcing a desegregation order at the University of Mississippi. The reports in both cases were false.

The Court found that both Butts and Walker were public figures¹⁸ and were subject to the rule of *New York Times v. Sullivan*. Based on the facts, the Court affirmed the judgment against the *Saturday Evening Post* but unanimously reversed the judgment against the Associated Press. The former had printed the defamatory matter with reckless disregard for the truth while the latter had not.

A few years later the Court revised the rule again in *Rosenbloom v. Metromedia*.¹⁹ In *Rosenbloom* the Court held that the First Amendment's impact on state libel laws depended on whether the defamation concerned "an issue of public or general concern,"²⁰ rather than on whether the plaintiff was a public official, a public figure, or a private individual. In other words, the

¹⁸ Chief Justice Earl Warren explained that "some people, even though they are not part of the government, are nonetheless sufficiently influential to affect matters of important public concern." *Id.* at 164 (Warren, C.J., concurring).

¹⁹ 403 U.S. 29 (1971)

²⁰ *Id.* at 44.

Court extended the *New York Times* standard to include private figures who were actively involved in matters of public concern.²¹ This decision emphasized the content of the speech involved rather than the plaintiff's identity. This rule would force a private individual to satisfy the rigorous requirement of knowing-or-reckless falsity simply because the defamatory falsehood became an issue of public or general interest.

Recognizing that public officials and public figures have opportunities to use the media to rebut defamation, the Court narrowly overruled *Rosenbloom* in *Gertz v. Robert Welch, Inc.*²² and returned the emphasis to the plaintiff's identity. In *Gertz*, a Chicago lawyer named Elmer Gertz represented the family of a young black man who had been killed by a Chicago police officer. The family sought civil damages in a lawsuit for wrongful death. An ultraconservative magazine, the *American Opinion*, a John Birch Society publication, published an article claiming that Gertz was a "communist-fronter" and a "Leninist." The article also falsely accused Gertz of subversive activities. Gertz won a \$50,000 judgment from Robert Welch, the magazine's publisher. However,

²¹ *Id.* at 31-32.

²² 418 U.S. 323 (1974). The *Gertz* decision was 5 to 4. Justice Blackmun joined partly because the country needed a clear-cut majority opinion on libel law. *Id.* at 354.

the trial judge set the judgment aside, ruling that Gertz was a public figure who could not win a libel judgment without proving actual malice.

Writing for the majority, Justice Powell weighed the two competing social values: the need to avoid self-censorship by the news media and the need to compensate individuals for harm. He reasoned that private individuals deserved more protection than public officials and public figures because they do not have the same access to methods of mass communication and because they did not voluntarily expose themselves to the public spotlight.²³ The Court prohibited liability without proof of fault,²⁴ and permitted the awarding of only special damages when any test less arduous than actual malice is applied. *Gertz* barred presumed and punitive damages without a showing of actual malice. To permit strict liability would lead to self censorship and thereby have a chilling effect on speech.²⁵ However, the Court left it open

²³ *Id.* at 344.

²⁴ Generally, a libel defendant can not be held strictly liable for defamatory falsehoods. The plaintiff must prove either that the defendant intended to publish a defamatory falsehood or did so either negligently or recklessly. *Keeton et al., supra* note 1, § 112.

²⁵ *Gertz* at 340.

In its next major decision on the First Amendment and state libel laws, the Court ruled that *Gertz* applies only to issues of public concern, not to libel cases arising from discussions of purely private matters. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,²⁷ the plaintiff, a Vermont construction company, proved that the defendant, a credit reporting agency, had falsely informed several clients that Greenmoss had filed for bankruptcy. The error resulted from the negligence of a young Dun & Bradstreet employee. Greenmoss could not prove actual malice; however the court awarded a \$350,000 judgment which included both presumed and punitive damages.

In a plurality opinion²⁸ written by Justice Powell, the Court returned somewhat to an emphasis on speech content rather than the defendant's status. The plurality said that the actual malice rule from *Gertz* should continue to apply to libel cases involving issues of public concern, but not to cases involving purely private matters. In other words, a private figure who is libeled regarding

²⁶ *Id.* at 347.

²⁷ 472 U.S. 749 (1985).

²⁸ A plurality opinion is a weak precedent. Three justices agreed on both the outcome and reasoning. Two justices concurred, agreeing with the plurality on the outcome, but not agreeing with the reasoning. Four justices dissented. Three of the five justices who agreed on the outcome are no longer on the court. Only one of the dissenters remains.

a matter of private concern may be awarded presumed and punitive damages without showing actual malice.

Table 1 illustrates how these precedents affect the type of damages which may be recovered in defamation cases according to the status of the plaintiff, the content of the speech, the standard applied.

A year after *Dun & Bradstreet v. Greenmoss Builders, Inc.* the Supreme Court stirred the waters again in *Philadelphia Newspapers, Inc. v. Hepps*,²⁹ when it addressed the common law rule that the defendant bears the burden of proving that a defamatory statement is true. Hepps was the principal stockholder in a corporation that franchised a chain of convenience stores. The *Philadelphia Inquirer*, a newspaper the defendant owns, published a series of articles reporting that Hepps and his co-plaintiffs were linked to organized crime and used those links to influence state legislators and agencies. Hepps brought suit in Pennsylvania state court. By statutory law, Pennsylvania followed the common law presumption that defamatory statements are false, placing the burden of proving truth on the defendant.³⁰

²⁹ 475 U.S. 767 (1986).

³⁰ 42 Pa. Cons. Stat. § 8343(b)(1) (1982).

Table 1. Relationship between the type of plaintiff, the standard of liability, and the damages which may be recovered:³⁰

Plaintiff	Standard	Damages
Public Official or Public Figure	Actual Malice	Actual Presumed Punitive
Public Official or Public Figure	Negligence	Actual
Private Figure in Public Concerns	Actual Malice	Actual Presumed Punitive
Private Figure in Public Concerns	Negligence	Actual
Private figure in Private Concerns	No fault (not strict liability)	Actual Presumed Punitive

³⁰ Adapted from a chart in Cavazos & Morin, *Cyberspace and the Law: Your Rights and Duties in the Online World* (Cambridge, MA: MIT Press, 1994).

The trial court declared the state statute unconstitutional and instructed the jury that the plaintiffs bore the burden of proving falsity. The jury found for the newspaper and the plaintiffs appealed directly to the state Supreme Court which reversed the trial court and remanded for a new trial. In another plurality opinion, the U.S. Supreme Court reversed the state Supreme Court, finding that "It]o ensure that true speech on matters of public concern is not deterred"³² the common law presumption of falsity is unconstitutional when a plaintiff seeks damages against a media defendant.³³

One thing the Court did not do in *Dun & Bradstreet* and *Hepp* was define "media defendant." Presumably the rules in *New York Times v. Sullivan* and its progeny apply only when the defendant in a defamation case is a media defendant. In 1979, in *Hutchinson v. Proxmire*,³⁴ Chief Justice Warren Burger noted that the Court had not yet decided whether the *New York Times* standard applies to non-media defendants as well as media defendants.³⁵

³² *Hepps*, at 776.

³³ *Id.* at 777.

³⁴ 443 U.S. 111 (1979).

³⁵ *Id.* at 133 n.16 (1979).

The lower court in *Dun & Bradstreet* had concluded that the credit bureau was not a member of the media, and, therefore, constitutional issues were not raised. In his plurality opinion Justice Powell avoided addressing this question. In his dissent, Justice Brennan (joined by Justices Marshall, Blackmun, and Stevens) remarked that there is no distinction between media and non-media defendants.³⁶ In his concurring opinion, Justice White agreed with the dissenters that the media/non-media distinction was irrelevant.³⁷ In other words, five of nine justices at the time did not recognize a distinction between media and non-media defendants.³⁸

The plurality opinion in *Hepp* did not address the issue of media vs. non-media defendants either, for clearly the defendant newspaper was a media defendant. However, in his concurring opinion, Justice Brennan (joined by Justice Blackmun) once again expressed his view that a distinction between media and non-media defendants was irreconcilable with the First Amendment.³⁹

³⁶ *Dun & Bradstreet*, 472 U.S. at 781-784 (Brennan, J., dissenting).

³⁷ *Id.* at 733 (White, J., concurring).

³⁸ Of those five, only Justice Stevens is still a member of the Court.

³⁹ *Id.* at 780.

The identity of the parties and the nature of the defamatory content is not the only question of concern for the First Amendment analysis. Also important is the defendant's status as a purveyor of information. The courts have created a legal distinction between primary publishers, secondary publishers or distributors, and common carriers, which is significant when determining liability for defamatory content.

Primary publishers, such as newspapers, magazines, or television stations, have more control over the content of their publications. Because of this they are held to a higher standard of liability.⁴⁰

Secondary publishers or distributors, such as bookstores and libraries, merely make the material published by primary publishers available to others. They have no control over the content of the material they distribute; they are mere "passive conduits." Because of this they are held to a less strict standard than primary publishers. Generally they are liable only if they knew or had reason to know of the defamatory content they were distributing. Few bookstore owners or librarians are aware of the

⁴⁰ Keeton *et al.*, *supra* note 1, § 113.

content of everything they stock, and to expect them to be aware is unreasonable.⁴¹

Common carriers, such as telephone and telegraph companies, merely make available facilities for the transfer of information. They must provide service to all paying customers. Because they exercise no editorial control over the content they transmit they generally are not held liable when those messages include defamatory content.⁴²

The Law of Defamation in Cyberspace

The current state of the law on the issue of OSP liability for defamatory content posted by others can be summed up in three words: There is none. There are two well-known cases but neither reached an appellate court. Two other suits were settled before the trial courts could issue any relevant rulings. In any event, trial court decisions carry no value as precedent in our system. These cases make interesting reading, and may indicate the direction future trial courts will take, but they hardly constitute the final word.

⁴¹ *Id.*

⁴² *Id.*

The first of the reported cases is *Cubby, Inc. v. CompuServe, Inc.*,⁴³ In *Cubby* the plaintiff took exception to some defamatory information contained in a CompuServe forum known as "Rumorville." Rumorville had referred to the plaintiff's competing on-line newsletter, "Skuttlebut," as a "start-up scam," that stole information, published by a man who had been fired by his previous job at WABC. Rumorville was the work of Don Fitzpatrick Associations which contracted with CompuServe to carry its newsletter. CompuServe had no editorial control over Rumorville's content.

CompuServe moved for summary judgment, taking the position that as a distributor, it was liable only if it knew of the libelous content of the Rumorville newsletter. Federal District Court Judge Leisure compared CompuServe to a bookseller and found as a matter of law that it was a secondary publisher or distributor. He based this finding on *Smith v. California*,⁴⁴ a landmark U.S. Supreme Court decision which struck down a state law holding bookstores liable for possessing obscene books even though the bookseller did not know about the book's contents. In *Smith* the Court ruled that a distributor must have knowledge

⁴³ 766 F. Supp. 135 (S.D.N.Y. 1991).

⁴⁴ 361 U.S. 147 (1959).

of the wrongful contents of a publication before it can be held liable.⁴⁵ Judge Leisure ruled that Cubby, Inc. had failed to show that a genuine issue of fact existed as to whether CompuServe knew or had reason to know of Rumorville's libelous content.

The following year a medical equipment company brought a libel suit against Peter J. DeNigris, a New Jersey man who subscribed to another commercial online service, Prodigy.⁴⁶ Medphone Corporation alleged that DeNigris made defamatory statements about it on "Money Talk," a Prodigy bulletin board, causing Medphone's stock value to drop dramatically. Prodigy was not joined as a defendant, although it was subpoenaed to appear. The case settled in December, 1993 for a nominal sum.

In 1994, Suarez Corporation Industries sued Brock Meeks, the editor of the internet newsletter, *CyberWire Dispatch*, for libel. Meeks had investigated a questionable solicitation he had received from the "Electronic Postal Service," a pseudonym used by Suarez Corporation. He learned that state and federal enforcement agencies had brought actions against Suarez Corporation to halt its

⁴⁵ *Id.* at 152-155.

⁴⁶ *Medphone Corp. v. DeNigris*, Civ. Action No. 069400012 (D.N.J. 1992).

questionable direct mailing practices. In his newsletter, Meeks called the company's sales pitch a "scam" and called the company's president "a slick direct-mail baron." The case was settled when Meeks agreed to pay the plaintiff's \$64 court costs and to notify the plaintiff at least forty-eight hours before he wrote anything about the plaintiff.⁴⁷

A year later a New York Supreme Court judge⁴⁸ ruled that Prodigy was a primary publisher and was liable for the content of messages posted in its forums. The suit stemmed from critical comments a Prodigy user made on a bulletin board about Stratton Oakmont, Inc., a securities investment banking firm. The comments repeatedly referred to Stratton Oakmont's recent stock offering as "criminal" and "fraud," and suggested that the poster was a lawyer who had tape recordings and inside information to support his claims.⁴⁹

⁴⁷ *Suarez Corp. v. Meeks*, Civil Action No. 267513 (Ct. of Common Pleas, Cuyahoga Cty. Ohio, 1994).

⁴⁸ Despite its name, the New York Supreme Court is a trial court.

⁴⁹ Robert B. Charles, *Beware the Spectre of Corporate On-Line Libel*, *AI Expert*, March 1995, at 15. The comments were made by someone using the identification code of a Prodigy employee, David Lusby. Lusby was originally named as a party in the suit but was dropped when both sides agreed that an anonymous hacker had used Lusby's account to post the defamatory comments. The identity of the person who posted the comments is still unknown. Peter H. Lewis, *A New Twist in an On-Line Libel Case*, *New York Times*, December 19, 1994, at D10.

In *Stratton Oakmont, Inc. v. Prodigy Services Company*,⁵⁰ the court found that Prodigy's "family friendly" policy of pre-screening posted material and deleting "inappropriate" postings rendered it liable. Unfortunately for Prodigy, its lawyer had given the court incorrect information about the policies in effect at the time the allegedly defamatory material was posted. The judge denied Prodigy's motion for renewal or reargument (to give the court the correct information) based on a strict reading of New York's rules of civil procedure and in the belief that any precedent was better than no precedent:

[T]he Court finds that this is a developing area of the law (in which it appears that the law has thus far not kept pace with the technology) so that there is a real need for some precedent. To simply vacate that precedent on request because these two parties (or this Plaintiff) [have] lost interest or decided that the litigation would be too costly or time consuming would remove the only existing New York precedent in this area leaving the law even further behind the technology.⁵¹

This is an odd position for a trial court to take because a trial court decision (especially one that is not published)⁵² carries virtually no

⁵⁰ 1995 WL 323710 (N.Y. Sup.), 63 U.S.L.W. 2765 (1995), 23 Media L. Rep. 1794. Unlike most states, New York publishes some of its trial court decisions. However, *Stratton-Oakmont* was not chosen for publication.

⁵¹ 1995 WL 805178 (N.Y. Sup.), 24 Media L. Rep. 1126.

⁵² See *infra*, note 50.

value as precedent. Both *Cubby* and *Stratton Oakmont*, though often treated as authority on this issue, are trial court decisions and offer no real authority for other courts to follow.

The only appellate court decision even close to being on point comes from the Court of Appeals of Wisconsin. In *It's in the Cards, Inc. v Fuschetto*,⁵³ one of two business acquaintances who had been arguing via email posted information about the argument on the bulletin board feature of an online system, SportsNet. The other sued, claiming defamation. SportsNet was not a party to the suit. The defendant moved for summary judgment, claiming that the plaintiff had failed to comply with a state statute which required the plaintiff to demand retraction before filing suit.

The statute in question⁵⁴ requires that a party claiming to have been defamed in a "newspaper, magazine, or periodical" must give the other party an opportunity to retract the alleged libel before commencing suit. The case turned on whether an online system is a "newspaper, magazine, or periodical." The trial court, without deciding whether the comments were defamatory,

⁵³ 535 N.W.2d 11 (Wis. Ct. App. 1995)

⁵⁴ Wis. Stat. § 895.05(2) (1995)

ruled that the online bulletin board was a "periodical" and the statute applied.

The Wisconsin Court of Appeals reversed and remanded, refusing to engage in "judicial legislation" to extend the interpretation of "periodical" to include online bulletin boards.⁵⁵ This was an interesting position for the court to take considering that interpreting statutes is one of the court's roles. Essentially, the court engaged in "judicial legislation" by ruling that "periodical" does NOT include online bulletin boards. Although *It's in the Cards, Inc.* is the only appellate court decision to determine the status of an OSP (although only for the purposes of a state statute, not for a First Amendment analysis), its value as precedent is limited to Wisconsin, and specifically to the correct interpretation of the statute involved.

Unfortunately, only a decision from the U.S. Supreme Court will finally settle the question. Given the cost of litigation, the low damages obtainable in most libel suits, and the odds against having the Supreme Court grant *certiorari*, it is likely to be a long time before any case reaches even the U.S. Court of Appeals, let alone the U.S. Supreme Court.

⁵⁵ *It's in the Cards, Inc. v Fuschetto*, 535 N.W.2d 11, 15 (Wis. Ct. App. 1995).

The scope and variety of new legal questions presented by cyberspace will also add to the difficulty and delay. Before the courts can decide the issue of OSP liability for defamatory content, it may be necessary to rethink other elements of the tort of defamation. Anonymity, for example, potentially could require the courts to devise an entirely separate rule for libel online. Who, for example, would have standing to sue if an online personality is libeled? What if more than one person uses the same online name (as is fairly common on Internet Relay Chat)? Can a person's reputation be damaged if his online persona is libeled when no one knows his mundane identity? Or, if the libeler himself is anonymous, how would this impede the finder-of-fact's ability to determine the amount of assumed damages to award the plaintiff? Are the remarks of a person who slings mud while hiding his own identity taken seriously enough by others to harm the reputation of the purported victim?

The courts must also consider more practical issues such as the appropriate jurisdiction in which to bring suit. If the defamatory comments can be viewed internationally on the World Wide Web, can the plaintiff go on a forum-shopping spree and bring suit in those countries where the libel laws are the most lenient? And if judgments are obtained in other countries that

could not have been obtained in the United States because of constitutional limitations will the courts of this country enforce them?

These issues and many others involving cyberspace--e.g., intellectual property, community standards for pornography prosecution, fraud online, privacy, government attempts to restrict speech online, and harassment and service of process by email--will eventually require the attention of the federal and state courts.

Defamation & the Communications Decency Act

On February 1, 1995, Senator James Exon, a Democrat from Nebraska, threw down the gauntlet by introducing a bill which would become known as the "Communications Decency Act" (CDA). The battle began immediately as First Amendment and cyberspace advocates leaped into the fray to defeat the proposed legislation.

Senator Exon's original proposal simply intended to substitute "telecommunication device" for the word "telephone" in Section 223 of the existing Federal Communication Act of 1934⁵⁶ and to increase the penalties for violating the Act. Had this version been enacted, it would have punished OSPs for any

⁵⁶ 47 U.S.C. § 223 (b) (1982 & Supp. V 1987).

indecent communications carried through their service.

Everyone, including Senator Exon, soon realized that the CDA was cast in such broad strokes that it had virtually no chance of surviving a First Amendment challenge. Over the next twelve months several amendments to the bill were offered⁵⁷ and the conference committee made numerous changes before the bill was finally enacted one year later on February 1, 1996. As finally enacted, the CDA would criminalize the act of using a telecommunications device to initiate

the transmission of, any comment, request, suggestion, proposal, image, 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 communication⁵⁸

and the act of using 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,

⁵⁷ An archive of legislative documents can be found at *CDT's Communications Decency Act Issues Page*, Center for Democracy & Technology, <<http://www.cdt.org/cda.html>>.

⁵⁸ Act of February 8, 1996, Pub. L. No. 104-104, § 502(a)(1)(B)(ii), 110 Stat. 133, 134 (to be codified at 47 U.S.C. § 223).

regardless of whether the user of such service placed the call or initiated the communication....⁵⁹

President Clinton signed the bill into law on February 8, 1996. Later the same day the American Civil Liberties Union and a number of Internet- and computer-related organizations filed a motion in the United States District Court for the Eastern District of Pennsylvania, asking for a temporary restraining order to enjoin the government from enforcing the law. The court granted the restraining order February 15, 1996 pending a hearing on the motion for a preliminary injunction.

On its face, the CDA appears to be irrelevant to the topic of this study, i.e., the liability of OSPs for defamatory content. The CDA's target is indecent, obscene, and pornographic material communicated to children. However, the defenses provided in the CDA give some insight into Congress' understanding of the internet.

The CDA provides three defenses: (1) the Access Provider Defense;⁶⁰ (2) the Good Faith Defense;⁶¹ and, (3) the Vicarious

⁵⁹ Act of February 8, 1996, Pub. L. No. 104-104, § 502(a)(2)(d)(1)(B), 110 Stat. 133, 134 (to be codified at 47 U.S.C. § 223).

⁶⁰ Section 502(e)(1).

⁶¹ Section 502(e)(5).

Liability Defense.⁶² The first two of these merit some attention in the context of OSP liability for defamatory content.

The Access Provider Defense shields from prosecution any person, such as an OSP, who merely provides access or connection to material not under that person's control. This is essentially the rule of *Cubby, Inc. v. Compuserve*.

The Good Faith Defense shields from prosecution any person, such as an OSP, who "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors"⁶³ to obscene or indecent material or who "has restricted access to [obscene or indecent material] by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."⁶⁴

In its report, the conference committee offered some insight into Congress' reason for providing the Good Faith defense:

⁶² Section 502(e)(4).

⁶³ Section 502(e)(1).

⁶⁴ Section 502(e)(5). The Act also gives the Federal Communications Commission the authority to "describe measures which are reasonable, effective, and appropriate to restrict access...." Section 502(e)(6). It also authorizes the use of such measures to be admitted as evidence of good faith. *Id.*

One of the specific purposes of this section 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 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.⁶⁵

Stratton-Oakmont involved neither obscenity and indecency nor minors. It is curious that the members of the Congressional committee would use the opportunity of the Communications Decency Act to comment upon a state court decision in a libel case. However, the committee's comments and the two defenses themselves, suggest that at least some members of Congress may understand the issue and be amenable in the future to provide similar defenses to OSPs who permit access to defamatory material, or who unsuccessfully try to screen-out defamatory material.

On June 11, 1996, in *American Civil Liberties Union v. Reno*,⁶⁶ a three-judge panel⁶⁷ unanimously concluded that the

⁶⁵ *Joint Explanatory Statement of the Committee of Conference*, H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess., at 78 (1996).

⁶⁶ 929 F. Supp. 824 (E.D. Pa. 1996).

⁶⁷ Congress provided for an expedited appeal process, requiring that "any civil action challenging the [Act's] constitutionality" would

Communications Decency Act was unconstitutional and granted the plaintiffs' motion for a preliminary injunction. In separate opinions the judges found that the law was unconstitutionally vague and overbroad. On July 1, 1996, the Department of Justice filed its Notice of Appeal with the District Court. This appeal will give the United States Supreme Court its first opportunity to rule on the constitutional implications of regulating the internet.

Less than a month after *American Civil Liberties Union v. Reno* was decided a second federal district court ruled that the CDA was unconstitutional. The three judge panel convened in the United States District Court for the Southern District of New York did not agree with the earlier court's finding that the CDA was unconstitutionally vague. However, it agreed that the statute was unconstitutionally overbroad.⁶⁸

be heard by a district court of 3 judges with an appeal as of right directly to the United States Supreme Court. Act of February 8, 1996, Pub. L. No. 104-104, § 561, 110 Stat. 133, 134 (to be codified at 47 U.S.C. § 223). The United States Supreme Court has almost unlimited control of its docket. Most cases reach the Court by way of a "Petition for a writ of *certiorari*." It is within the Court's discretion whether to grant the petition (and thus, accept the case) or to deny the petition (and thus, not accept the case). An "appeal as of right," however, is not discretionary and must be accepted. Of course, just because the Court must accept a case doesn't necessarily mean it will pay much attention to it.

⁶⁸ *Shea ex rel. The American Reporter v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996). The same day, complaintiff American Library Association filed a brief making similar constitutional arguments in

More recently, on October 31, 1996, The American Civil Liberties Union filed a motion for a summary affirmance, asking the Supreme Court to affirm the lower court's decision in *A.C.L.U. v. Reno*. The A.C.L.U.'s brief makes two main arguments: (1) Given the lower court's extensive and largely undisputed findings regarding the nature of cyberspace, the decision is "plainly correct; and (2) That the government has failed to raise any legitimate arguments against summary affirmance in its brief."⁶⁹

favor of upholding the lower court's decision, but stop short of asking for summary affirmance. *Id.*

⁶⁹ American Civil Liberties Union • Press Releases, *ACLU Background Briefing, Reno v. ACLU: The Road to the Supreme Court*, <[http:// www.aclu.org/news/n103196b.html](http://www.aclu.org/news/n103196b.html)>.

CHAPTER THREE

REVIEW OF THE LITERATURE

Chapter Two surveyed the existing law of defamation in general and as it applies to cyberspace in particular. Of course courts have considered the issue only in the context of disputes brought to them for resolution. In addition, trial courts--which are the only courts to date which have heard and decided cases applying the law of defamation to cyberspace--are generally bound by mandatory authority from higher courts. To some degree, their ability to be creative in resolving disputes in cyberspace is constrained by previous decisions of higher courts.

Scholars and other commentators, on the other hand, have not been constrained by mandatory authority. They have been free to consider not only how to apply existing legal principles to cases from cyberspace, but also, to step outside the existing law and consider alternative approaches and theories. Although none of these scholars or commentators currently has the power to impose their theories on the law, they do have the power to persuade. To anticipate how the courts will respond to cases from cyberspace in the future, therefore, it would be useful to study the professional literature.

The Wisdom of the Mundane in Cyberspace

Some commentators take a broad, forward-looking approach to imposing real-world legal principles on cyberspace. These authors are concerned primarily with the future growth and development of cyberspace rather than with the immediate resolution of minor legal disputes such as the ones presented in the Prodigy and CompuServe libel cases. They watch with trepidation as legislators begin eyeing the internet as a venue requiring regulation.

In 1993, Professor Trotter Hardy, of the Marshall-Wythe School of Law at the College of William & Mary, invited approximately twenty interested lawyers to participate in a closed listserv to discuss the legal future of cyberspace. Although there was no consensus regarding what the rules in cyberspace should be, the group generally agreed that regulators should take a hands-off approach and allow cyberspace to develop further before trying to bring it into conformity with real-world legal rules.⁷⁰

In his own writing, Professor Hardy has compared cyberspace to the Law Merchant, a body of customary rules that developed in medieval Europe to provide uniformity in international

⁷⁰ *Newjuris: A Conference on Law in Cyberspace* (Oct. 1993)(Transcript on file with author.)

commerce.⁷¹ The Law Merchant did not replace the law of individual jurisdictions; rather, it created a body of rules that applied to merchants doing business through international trade fairs. Merchant Courts were created to settle disputes between merchants and eventually the rules of the Law Merchant began to be applied by common law courts. Today, the rules of the Law Merchant are the basis of the Uniform Commercial Code.⁷²

Professor Hardy sees many parallels between the Law Merchant and cyberspace. He sees the beginnings of a cybercourt system in the form of on-line discussion groups and electronic mail. A "Law Cyberspace coexisting with existing laws," he believes, would be an "eminently practical and efficient"⁷³ method of resolving legal disputes in cyberspace.⁷⁴

⁷¹Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. Pitt. L. Rev. 993, 1019-1021 (1994).

⁷² *Id.* at 1019-1022.

⁷³ *Id.* at 1021.

⁷⁴ In December, 1995, the Cyberspace Law Institute and the National Center for Automated Information Research initiated a pilot program called "Virtual Magistrate." The purpose of Virtual Magistrate is to "resolve disputes about online postings through new, rapid-response, online arbitration." It will offer arbitration to online users, those who claim to be harmed by wrongful messages, and system operators. A description of the Virtual Magistrate program and a FAQ can be found at www.11.georgetown.edu/lc/cli.html#VM Description. This could be the beginnings of the "Law Cyberspace" that Professor Hardy advocates.

Lawrence Lessig urges legislators and the appellate courts to allow the legal issues raised by cyberspace to "simmer" before stepping in to fashion new rules or regulations.⁷⁵ The common law, he believes, is particularly well-suited to cyberspace in that it is the nature of the common law to allow experience to catch up with technology. Leaving cyberspace to the trial courts to apply the common law's constructive process--i.e., "its partial answers, to repeated if slightly varied questions"⁷⁶--will best serve cyberspace, letting it develop and mature without heavy-handed and politically-influenced regulation.⁷⁷

Similarly, Branscomb urges lawyers to become more experienced in the workings of cyberspace communities before attempting to apply current legal theories to legal disputes in cyberspace. Calling cyberspace a "precious laboratory of law in gestation,"⁷⁸ she hopes lawmakers will understand that they do not necessarily have to "follow the path of the past."⁷⁹

⁷⁵ Lawrence Lessig, *The Path of Cyberlaw*, 104 Yale L.J. 1743, 1752 (1995).

⁷⁶ *Id.* at 1745.

⁷⁷ *Id.*

⁷⁸ Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 Yale L.J. 1639, 1679 (1995).

⁷⁹ *Id.*

Lessig, Hardy, and Branscomb are the most philosophical in their approaches to cyberspace. Others, though agreeing that cyberspace legal issues should be approached cautiously, proceed to address those issues from the vantage point of practitioners and regulators.

Who Should Regulate Cyberspace?

One question asked by some is, if regulation is to come, where should it come from? The authors who address this question at any length have reached vastly divergent conclusions.

Writing in 1987--before *Cubby* and *Stratton-Oakmont*--Charles concluded that the existing common law of defamation was inadequate to the task of regulating cyberspace.⁸⁰ He advocated self-policing by the industry as an alternative to continued development of the common law by the courts. His suggestion that the industry develop a set of industry-wide rules or a code of professional conduct with a narrowly drawn duty of care⁸¹ is reminiscent of the "Law Cyberspace" Professor Hardy advances. However, absent such self-policing, Charles believes that Congress

⁸⁰ Robert Charles, Note, *Computer Bulletin Boards and Defamation: Who Should be Liable? Under What Standard?*, 2 J.L. & Tech. 121 (1987).

⁸¹ *Id.* at 149.

should draft legislation to provide the statutory basis for a minimal federal regulatory scheme which, when necessary, the courts would apply.⁸²

Di Lello, although not specifically discussing OSP liability for defamation, reached a similar conclusion. Concerned with censorship by OSPs (such as Prodigy's censorship of public messages), he concluded that Constitutional change may be the ideal solution, but in the meantime, the best protection for technological free speech may be state courts and Congress.⁸³

After exploring how cyberspace communities differ from real-world communities, Byassee concluded that traditional legal paradigms are not adequate. He sees difficulties and injustice resulting from attempts to apply the existing law to conduct in cyberspace. These are an "early warning system,"⁸⁴ he says, that change is needed. He urges courts not to attempt to stretch current law to fit cyberspace; rather, he believes that legislative

⁸² *Id.*

⁸³ Edward V. Di Lello, *Functional Equivalency and Its Application to Freedom of Speech on Computer Bulletin Board*, 26 Colum. J.L. & Soc. Probs. 199, 246 (1993).

⁸⁴ William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 Wake Forest L. Rev. 197, 219 (1995).

action is the appropriate method for addressing the problem.⁸⁵

Faucher believes the federal courts should create a federal common law for cyberspace.⁸⁶ There is some question about whether federal courts have the power to create federal common law.⁸⁷ Assuming that it is possible, however, a federal common law for cyberspace would have the advantage of being uniform throughout the nation and make the judicial task much easier.⁸⁸ Muth agrees that a uniform approach is needed but advocates legislative action, rather than judicial action, to recognize the unique attributes of cyberspace.⁸⁹

Schlachter disagrees with the need for a uniform law for cyberspace. He believes the variations inherent in state regulation will extend substantive and procedural protections further than a

⁸⁵ *Id.* at 197.

⁸⁶ John D. Faucher, Comment, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. Davis L. Rev. 1045, 1066-1073 (1993).

⁸⁷ Under the *Erie* Doctrine, in diversity cases federal courts must apply substantive state law. *Erie* also says that federal common law does not exist. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁸⁸ *Id.* at 1068.

⁸⁹ R. Timothy Muth, *Old Doctrines on a New Frontier: Defamation and Jurisdiction in Cyberspace*, 68 Wis. Law. 10-13 (1995).

uniform federal approach.⁹⁰ More importantly, he believes that this system will defer the creation of rigid rules, giving cyberspace more time to develop naturally.⁹¹

Finally, Professor Lawrence Tribe has proposed what he calls the "cyberspace corollary"⁹² which would make it clear that the Constitution's core values articulated by its framers through the Bill of Rights and subsequent amendments, applies to those technologies with which the framers were not familiar. He would have this done either by its gradual acceptance as a principle of judicial interpretation, or by a twenty-seventh amendment. He offers the following language for such an amendment:

This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled.⁹³

⁹⁰ Eric Schlachter, *Cyberspace, The Free Market and the Free Market-Place of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 Hastings Comm./Ent. L.J. 87, 128 (1993).

⁹¹ *Id.*

⁹² Professor Laurence H. Tribe, *The Constitution in Cyberspace, Keynote Address at the First Conference on Computers, Freedom & Privacy* (March 26, 1991).

⁹³ *Id.* In 1992, in a roundtable discussion of the risks of the computer revolution, Professor Tribe revealed that he had

Classifying OSPs Under the First Amendment

Much of the literature surveyed in this study is concerned with the proper classification of online service providers (OSPs) under a First Amendment analysis. The commentators ponder whether OSPs should rightly be treated as publishers, disseminators, or common carriers. They attempt to apply existing legal principals to this new medium.

Connor examined the court's reasoning in *Cubby* and found it "legally, logically, and technically sound"⁹⁴ but questioned its applicability to the more interactive forms of online communication.⁹⁵ For the court to have held otherwise would have a severe chilling effect on OSPs as distributors of information. The

proposed the "cyberspace corollary" amendment to the Constitution

more as a thought experiment than as a practical suggestion. I certainly don't think we should have to change the constitution to cope with changing technology, computerized or otherwise. But the history of how judges and others have interpreted existing constitutional provisions as new technologies have emerged is not encouraging.

Tech Talk, Wall Street Journal, April 6, 1992, p. R13.

⁹⁴David J. Conner, Casenote, *Cubby v. Compuserve*, *Defamation Law on the Electronic Frontier*, 2 Geo. Mason Ind. L. Rev. 227, 236 (1996).

⁹⁵*Id.* at 236-239.

bookstore or newsstand analogy is reasonable, he concludes, though could be misapplied. An OSP typically has greater knowledge of the content he carries than does the book seller or newsstand operator. He may screen messages to keep them "on-topic" or to prevent wholesale obscenity. Strictly applying the bookstore analogy would place an unacceptable burden on the OSPs, forcing them either to engage in in-depth screening for defamation or to abandon screening all together.⁹⁶

The primary publisher analysis, on the other hand, does not make sense when applied to OSPs. The analogy to a newspaper publisher does not fit most OSPs who generally do not select items for publication. Prodigy, he points out, is the only major commercial OSP that monitors all public messages and screens them for content. Writing before *Stratton Oakmont*, Connor wonders whether Prodigy should be held to a higher standard of liability for user messages than the average OSP. To hold all OSPs to a higher standard would not only chill speech, it would also greatly increase the financial burden on OSPs which generally have too much volume and too little staff to screen every message. Add to this the difficulty inherent in attempting to identify defamatory content (as opposed say, to obscenity or pornography), and OSPs

⁹⁶ *Id.* at 241-242.

would be left with little choice but to close up shop.⁹⁷

Finally, Connor examines the common carrier classification. If OSPs are common carriers they will not be liable for the content of messages they carry. While this may appear on the surface to solve the problem, it is unlikely that most OSPs would be willing to submit to the regulations the federal government imposes upon common carriers.⁹⁸

Connor concludes that it is "exceptionally difficult to fit OSPs into any of the existing categories of communication services."⁹⁹ At times, OSPs are primary publishers (e.g., when distributing material it originated), at other times they share the characteristics of a bookstore (e.g., their public message boards), and at still other times they are more similar to common carriers (e.g., email).¹⁰⁰

Cutrera agrees that OSPs possess characteristics of primary and secondary publishers and common carriers.¹⁰¹ However, she elaborates that the difficulty in fitting OSPs into one or the other of these classifications stems not just from the different services

⁹⁷ *Id.* at 239.

⁹⁸ *Id.* at 243-246.

⁹⁹ *Id.* at 247.

¹⁰⁰ *Id.*

¹⁰¹ Terri A. Cutrera, *Computer Networks, Libel and the First Amendment*, 11 *Computer/L.J.* 555, 569 (1992).

provided. Rather, the variations in the OSPs themselves add to the difficulty. For example, large national services, small home hobby BBSS, and the Usenet are, in many ways, more different than they are alike. She weighs the advantages and disadvantages of each classification, concluding that none of them adequately protects all the interests involved without unduly burdening one to the benefit of another.¹⁰² She also considers and rejects two options for resolving the definitional difficulty: 1) the costly process of allowing the courts to develop the common law on a case-by-case basis;¹⁰³ and 2) allowing OSPs to determine their own classification by contract with their users.¹⁰⁴ However the problem is resolved, until then she urges OSPs to set clear policies and be diligent in not allowing their systems to be abused.¹⁰⁵ Perhaps she would have concluded differently if *Stratton-Oakmont* had already been decided.

Becker disagrees with those who believe that cyberspace requires a new model. That a technology is new, he says, does not

¹⁰² *Id.* 582-583.

¹⁰³ *Id.* at 582.

¹⁰⁴ *Id.* at 583.

¹⁰⁵ *Id.*

mean that it requires different constitutional rules.¹⁰⁶ Although he concedes that in the future legislatures and the courts may need to reconsider the applicability of the secondary publisher rule to OSPs, until then, at least, it "provide[s] a safe and reasonably comfortable level of protection for OSPs."¹⁰⁷

Siderits warns courts against following the *Stratton-Oakmont* court down the primrose path. To classify OSPs as publishers would excessively burden OSPs as they would have to educate themselves on the complicated law of defamation in order to be able to screen all messages posted. There is no doubt that this would have a chilling effect on free express. He recommends that courts faced with this issue should classify OSPs as disseminators.¹⁰⁸

Ferosie engages in a balancing approach similar to Cutrera's, weighing the importance of the speech contained within the OSP against the importance of protecting reputation. She proposes that courts should apply the *Sullivan* malice standard to those OSPs

¹⁰⁶ Loftus E. Becker, Jr. *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 Conn. L. Rev. 203-238 (1989).

¹⁰⁷ *Id.* at 238.

¹⁰⁸ Matthew C. Siderits, Comment, *Defamation in Cyberspace: Reconciling Cubby, Inc. v. Compuserve, Inc. and Stratton Oakmont v. Prodigy Services Co.*, 79 Marq. L. Rev. 1065, 1080-1081.

who engage in editing messages.¹⁰⁹ Her approach is similar to the Good Faith defense in the Communications Decency Act.¹¹⁰ Holding editing OSPs liable for defamation only when they act (or better, failed to act) with actual malice, would free them to remove clearly objectionable language without assuming liability for any defamatory content they did not recognize and, therefore, did not remove.¹¹¹

Naughton, writing about freedom of access to OSPs, joins the majority of the writers in decrying the imposition of any standard less than "actual malice" to OSPs. To impose a lesser standard would be "tantamount to censorship"¹¹² in his view. He would require a showing of actual malice in order to foster the freedom of expression on computer networks. He, too, recommends the slower, deliberate development of rules by the common law process over the imposition of legislation or regulation.¹¹³

¹⁰⁹ Iris Ferosie, Comment, *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, 377 (1995).

¹¹⁰ See *infra* pp. 31-32.

¹¹¹ *Id.*

¹¹² Edward J. Naughton, Note, *Is Cyberspace a Public Forum? computer Bulletin Boards, Free Speech, and State Action*, 81 Geo. L.J. 409, 439 (1992).

¹¹³ *Id.* at 441.

These and other commentators, despite committing themselves to one classification or the other, all seem to have one thing in common: none of them is truly happy with any of the classifications. Each of them hopes for better, despite being willing to settle for less for now. They, like the first group of authors discussed, fear that regulators will rush in and make poor decisions that will be difficult, if not impossible, to change in the future. For this reason, they are willing to accept less than they think is needed in order to prevent inappropriate over-regulation now.

Perhaps a Model Specifically for Cyberspace

Some commentators--unhappy with any of the existing analogies and metaphors--suggest unique rules, fashioned specifically for cyberspace. Cavazos, for example, calls for a "different model," one which considers the "unique nature and unprecedented capabilities of [OSPs] as ... novel communication [media]."¹¹⁴ Cavazos sees too many differences between OSPs and traditional media formats to apply existing rules.

Gilbert wants OSP liability for misuse to be as objective as possible. This will ensure a level of certainty for OSPs who may be

¹¹⁴ Edward A. Cavazos, Note, *Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology*, 12 Rev. Litig. 231, 237 (1992).

faced with numerous questionable messages. He does not want the law to impose a burden that would discourage OSPs from operating. He proposed a multi-part rule for OSPs that would absolve the OSP from liability if (1) it uses deterrent measures such as poster identification, prescreening (without liability attached), and automatic deletion of messages according to a clear statutorily or judicially imposed rule; and (2) it mitigates damages by deleting the wrongful posting upon notice of its existence.¹¹⁵ To impose any greater burden than this on OSPs, he says, would foster censorship. He also discusses possible criminal sanctions against OSPs who fail to comply with this rule when the posted material is criminal, not just tortious.¹¹⁶

Some authors, such as Sasson and Miller,¹¹⁷ argue that the courts or legislatures should craft a new media classification with a new standard of liability. To attempt to use existing classifications and standards is, according to Sasson, "comparing apples to oranges,"¹¹⁸ producing uncertain results and impeding the

¹¹⁵ Jonathan Gilbert, Note, *Computer Bulletin Board Operator Liability for User Misuse*, 54 Fordham L. Rev. 439, 455-452 (1985).

¹¹⁶ *Id.* at 453-454.

¹¹⁷ Philip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 Fordham L. Rev. 1147 (1993).

development of new media technology.

Meyer believes it would be far better to find an OSP liable only when it has a high degree of involvement in the wrongful speech. The more involved it is, the more appropriate it is to treat the speech as the speech of the OSP. He proposes a rule that would hold the OSP liable only if it is an active participant in the illegal speech or if an independent tribunal has determined the speech to be unprotected.¹¹⁹ Similarly Sasson would subject an OSP to liability only after it has refused to retract the allegedly defamatory content and the complainant has submitted the matter to an independent arbitrator. If the arbitrator determines that the statement is defamatory the OSP must retract it. However, if the arbiter finds the content is not defamatory, the OSP is insulated from liability while the plaintiff retains a cause of action against the poster of the content.¹²⁰

While these approaches would relieve OSPs from most of the potential liability for defamation, both would add significantly to

¹¹⁸Anthony J. Sassan, Note, *Cubby, Inc. v. Compuserve, Inc.: Comparing Apples to Oranges: The Need for a New Media Classification*, 5 Software L.J. 821, 844 (1992).

¹¹⁹Michael I. Meyer, *Authors, Editors, & Uncommon Carriers: Identifying the "speaker" within the New Media*, 71 Notre Dame L. Rev. 79, 81 (1995).

¹²⁰Sasson, *supra*, note 118, at 840.

the complexity of the problem. Under Meyer's proposal the plaintiff must first litigate the defamatory nature of the content, allow the OSP time to remove the wrongful item, and then collect damages from the OSP only if it fails or refuses to remove the item. Given the expense of litigation these days, this is not likely to be a popular approach with wronged parties. It will, however, give OSPs the room they need to function without censorship. Sasson's approach would add an entire layer to the procedure and, in the end, the plaintiff might find himself with a judgment against a judgment-proof defendant.

Johnson and Marks take a truly revolutionary approach in that they would hold only the wrongdoer (the party who actually posted the wrongful item), and not the OSP liable. They would do this by contract. "Cyberspace is, and should be, ruled mostly by contract,"¹²¹ they argue, suggesting that contract law is the best protection for OSPs until tort law has developed a new model for cyberspace speech issues. They recognize, however, that existing legal doctrines could not accommodate this rule.¹²² Lawyers are

¹²¹ David R. Johnson & Devin 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 (1993).

¹²² *Id.*

accustomed to using vicarious liability to seek out the defendant with the deepest pockets; in the case of cyberspace defamation the deepest pockets will often be found in the trousers of the OSP.

Therefore, Johnson and Marks recommend legislation that makes it clear that the wrongdoer, not the person who merely allows the wrongdoer to use a communications system, is liable for wrongful acts. They would also put an affirmative duty on the OSPs to be clear and candid regarding the rules of their systems. In exchange for the shield from liability the OSPs must make it clear that they do not screen, edit, or alter messages, and that they will not interfere with attempts to determine the identity of the wrongdoer.

OSP Users as Public Figures & the Right to Reply

Weber agrees that the proper target of defamation suits should be the person who posted the defamatory material. However, he differentiates between plaintiffs based on whether or not they have access to the OSP where the defamatory material was posted. If they do have access, he says, they satisfy the *Gertz* standards for a public figure. As public figures they would be required to show that the user who posted the offending material did so with actual malice. However, those plaintiffs who do not

have access to the OSP do not possess either of the two characteristics that *Gertz* said separated public figures from private individuals for First Amendment libel purposes.¹²³

Weber is not the only author to approach the problem from the vantage point of the plaintiff being a public figure. Brooks examined the applicability of the public-figure doctrine to OSP defamation cases and argued that three elements of public-figure law are significant for on-line defamation cases: (1) whether the plaintiff has access to the media; (2) whether there was a public controversy; and (3) to what degree the plaintiff injected himself into this controversy.¹²⁴

Similarly, Gordon suggests that virtually everyone who posts on the internet is a public figure, with the concomitant right to reply. This, he suggests, would be an adequate remedy for defamatory content posted online.¹²⁵ Ferosie also proposes that courts should assume every user is a public figure; even those who

¹²³ Jeremy Stone Weber, Note, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 Case W. Res. L. Rev. 235 (1995).

¹²⁴ Thomas D. Brooks, Note, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 Rutgers Comp. & Tech. L.J. 461 (1995).

¹²⁵ David Gordon, *Taking the First Amendment on the Road: A Rationale for Broad Protection for Freedom of Expression on the Information Superhighway*, 3 CommLaw Conspectus 136 (1995).

do not have access to the internet could be given access for the purpose of replying to defamatory comment.¹²⁶

Those who advocate the right of reply as the solution overlook one thing: surfing. They assume that the same people regularly access the same web sites and will see the reply posted by the alleged victim. In reality, however, many cybernauts are constantly searching for new web sites to explore and may never return to a site after having seen defamatory comments posted on it. A reply won't have the desired effect (of repairing the damage done to the victim's reputation) if web surfers who see it never return to see the reply.

Any First Amendment issue is difficult. By subjecting defamation suits to a First Amendment analysis, the Supreme Court made murky what was once a relatively clear legal issue. Juxtaposed with the strange new world of cyberspace it is easy to see why the question of OSP liability of defamation is so difficult to address.

There is not much doubt, however, that this is a point of law that must be dealt with. As long as the issue remains unsettled, it will have the dreaded chilling effect that is so crucial to First

¹²⁶ Ferosie, *supra*, note 109, at 375-378.

Amendment analysis. It is difficult, however, to know which would be the better approach: to rush in and establish legal rules via legislation so that all internet users and OSPs will know what behavior is expected in order to avoid liability; or, wait and let the technology and the developing community mature before attempting to regulate cyberspace. Those who know little about cyberspace may prefer the former; those who are familiar with cyberspace culture may prefer the latter.

The question is, who will decide and how familiar will they be with cyberspace? An "Open Letter to Internet Users"¹²⁷ released by a number of Congressmen and Senators may be the first step in familiarizing our legislators with cyberspace. The letter's signers admit that "Congress must not make these decisions without [a] full understanding of and familiarity with the Internet." They announce that they have formed an "Internet Caucus," a bipartisan, bicameral group of members with diverse viewpoints. Members of the caucus pledge to 1) educate themselves about the Internet, 2) get on-line, and 3) educate other Congress members about the Internet. This is certainly a step in the right direction.

¹²⁷ Congressional Internet Caucus, *An Open Letter from the Congressional Internet Caucus to the Internet Community*, <http://www.house.gov/white/internet_caucus>.

But what about judges? While some members of Congress are taking steps to prepare themselves for cyberspace and other future communication technologies, how prepared are the members of the federal and state judiciaries for resolving disputes in cyberspace? How many of them are familiar with the unique culture of cyberspace? Do they ever visit IRC channels and join in the irreverent banter? Have they ever participated in a MUD or MOO? Have they been spammed or flamed? Have they surfed their way through web sites and seen the amount and type of information, disinformation, and entertainment available online? To paraphrase Senator Howard Baker, what do the Judges know, and how well do they know it?

CHAPTER FOUR

ANALYSIS

Rationale

A frequent concern voiced by the commentators discussed in Chapter Three was that those who will be making decisions about regulating cyberspace may make those decisions with an incomplete or erroneous understanding of its culture. They may not understand that the Internet is not easily defined. It is amorphous,¹²⁸ expanding constantly in directions unimagined just a year earlier. A recurring theme in the literature is that before would-be regulators try to regulate cyberspace, they must first know or experience that which they would attempt to control. They call for policy- and law-makers to educate themselves about cyberculture before attempting to restrict it.¹²⁹

These commentators seem to assume that the policy- and law-makers are unfamiliar with cyberculture. Given the anonymous nature of cyberspace, however, how do we know that witty fellow in the IRC channel isn't a judge? Or that the articulate leader of a newsgroup discussion isn't a member of Congress? How do we know that the wacky web site we visit every week wasn't built by

¹²⁸ Dominic Andreano, Note and Comment, *Cyberspace: How Decent is the Decency Act?*, 8 St. Thomas L. Rev. 593, 599 (1996).

¹²⁹ See, e.g., Alex Alben, *What is an On-Line Service? (In the Eyes of the Law)*, 13 Computer Law. 1 (1996).

an attorney in a silk-stockings law firm or the Federal Communications Commission? There's only one way to find out how familiar our law-makers and policy-molders are with cyberspace: Ask.

This study takes a small step toward answering that question by surveying trial judges to see how much experience they have had with the Internet.

Methodology

State courts can hear and decide law suits involving federal questions (e.g., the proper interpretation of the First Amendment to the United States Constitution). However, the federal courts provide the mandatory authority the state courts must follow when deciding a federal question. Also, because the Internet crosses state and national boundaries, many suits are likely to originate in federal court as diversity actions.

Because it is likely that federal courts will decide most cases raising issues of law in cyberspace, I elected to survey federal judges. None of the cases involving libel in cyberspace have reached an intermediate appellate court. Therefore I also elected to limit my survey to sitting federal trial judges.

Any number of seats on the federal trial bench may be vacant

at any given time.¹³⁰ This makes it difficult to pinpoint the exact size of the population. Using *Want's Federal-State Court Directory*, 1996 edition,¹³¹ I determined that there were 619 sitting federal trial judges at the time the directory was published. I numbered each sitting trial judge in the directory. Using a random number generator to select a number between one and one-hundred-fifty (the size of my sample), I identified which judge corresponded to that number. From there I counted, selecting for my sample every fourth judge on the list until I had selected 150 judges.

I prepared a cover letter and very short questionnaire (Appendices A & B) which could be completed in less than a minute, hoping brevity would result in a higher rate of return. I mailed the survey in early September and by the end of September

¹³⁰ As of August 1, 1996, there were 607 sitting federal trial judges and 42 vacant positions. Telephone Interview, Deborah Lewis, Alliance for Justice (October 24, 1996). President Clinton estimates that there were approximately 115 vacancies in the federal judiciary (not limited to trial courts) when he took office in 1993, that more than 150 judges have retired during his term, and that he has filled over 200 judgeships. American Judicature Society, *Presidential Candidates Respond to Questions about Justice System*, <<http://homepage.interaccess.com/%7Eajs/President.html>>. Unfortunately, it appears that the federal government does not officially maintain demographic information about the federal judiciary. Letter from Fred Thompson, United States Senator to Teresa Conaway (October 31, 1996)(on file with author).

¹³¹ Robert S. Want, editor, *Want's Federal-State Court Directory*, 1996 edition (1995).

I had received 69 completed surveys for a return rate of 46%.

Analysis

1. Demographic Frequency

Age

The respondents range in age from 39 to 82 (table 2). The median age is 56 years; the mean age is 57.2 years. Categorized as being in their 30s, 40s, 50s, 60s, 70s, or 80s, the largest group is those who are age 50 to 59. Those who could be classified as "baby boomers" (i.e., born 1946 to 1965) constitute 21.7% of the total. Those who could be classified as the "World War II generation" (i.e., born before 1946) constitute 78.3% of the total.

Gender

Both genders are represented in the sample (table 3).

Presidential Appointment

Judges appointed by six different Presidents of the United States (Kennedy, Ford, Carter, Reagan, Bush, Clinton) responded to the survey (table 4).

Table 2. Distribution by Age.

	30s	40s	50s	60s	70s	80s
No. in sample response	1	12	27	24	4	1
% of sample response	1.4%	17.4%	39.1%	34.8%	5.8%	1.4%

Table 3. Distribution by Gender.

	Male	Female
No. of respondents to survey	60	9
% of respondents to survey	87%	13%
No. of total population ¹³²	498	109
% of total population	82%	18%

¹³² Telephone Interview with Deborah Lewis, Alliance for Justice (October 24, 1996).

Table 4. Distribution by Presidential Appointment.

Appointed By	% of Population ¹³³	% of Respondents
John F. Kennedy (n = 1)	.2	1.4
Gerald Ford (n = 3)	1.2	4.3
Jimmy Carter (n = 6)	10.4	8.7
Ronald Reagan (n = 24)	34.6	34.8
George Bush (n = 20)	23.4	28.9
William Clinton (n = 15)	27.7	21.7

¹³³ *Id.* Remaining judges appointed by President Nixon (2.3%) and President Johnson (.33%).

2. Topical Frequency

Computer Use

A large proportion (88.4%) of the respondents report that they use a computer, though not necessarily for online functions. I constructed a 90% confidence interval for proportions which included the finite population correction factor. I used the correction factor because my sample was greater than 5% of the population ($69/619 = 11.15\%$ of the population). This statistical analysis indicated that 88.4% of sitting federal trial judges use computers ($\pm 6\%$ for 90% confidence).

Computer Use for Online Functions

Of those who report using computers, 93.4% report having used a computer for online functions. Most of the respondents report using email. Fewer report using a computer for other online functions, from a high of 36.2% using newsgroups to a low of 21.7% using telnet (table 5). This distribution is illustrated in figure 1.

"Cyberculture" is a word that is heard often but is difficult to define. "Cyberculture" as used in this study refers partly to the human interactivity offered by the Internet through functions such as newsgroups, IRC, and listservs; and partly to the Internet-created

Table 5. Reported Use of Computers for Online Functions.

	email	newsgroups	listserv	IRC	telnet	web
No. reporting use	57	25	18	18	15	18
% reporting use	82.6%	36.2%	26%	26%	21.7%	26%

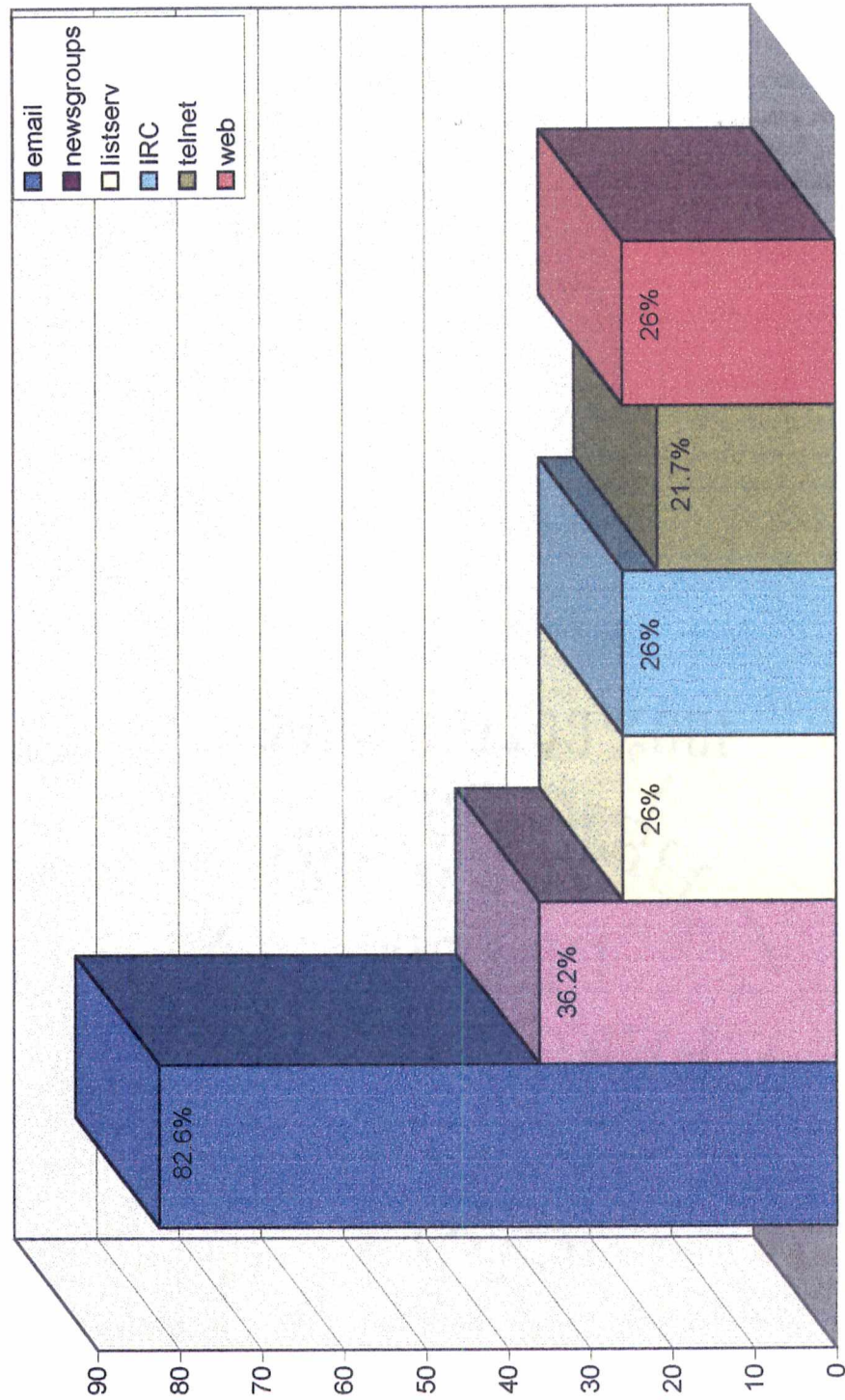


Figure 1. Reported Use of Computers for Online Functions

opportunity for Everyman to disseminate information, opinion, dissatisfaction, desires, and, indeed, every other aspect of his personality (or personality disorder) to everyone else.

Four of the identified computer uses--newsgroups, internet relay chat (IRC), listservs (mailing lists), and the web--are more related to this culture of cyberspace than the others. The first three provide personal interactivity while the last is important to the dissemination function of the Internet. Reported use of computers for these functions varied according to the respondents' age (table 6) (figure 2), generation (table 7), and which President appointed (table 8) (figure 3).

At first glance, age appears to be related to whether a judge is familiar with the Internet. Older judges, however, were not exposed to computers early in life because personal computers did not exist then. When the first "Gen X" judges are appointed the difference between them and the older "baby boomer" judges probably will not be as great as the current difference between the "baby boomer" judges and the "World War II generation" judges. At some point in the future it will probably seem as odd to ask "Do you use a computer?" as it would be today to ask "Do you use a telephone?"

The difference in reported use between judges appointed by

Table 6. Reported Use of Computers for Email, Newsgroups, Listserv, IRC, and Web According to Age Category.

	Email	Newsgroups	Listsrv	IRC	Web
30s	100% (n = 1)	0%	0%	0%	0%
40s	100% (n = 12)	41.7% (n = 5)	33.3% (n = 4)	33.3% (n = 4)	58.3% (n = 7)
50s	85.2% (n = 23)	37% (n = 10)	22.2% (n = 6)	25.9% (n = 7)	44.4% (n = 12)
60s	79.2% (n = 19)	33.3% (n = 8)	20.8% (n = 5)	20.9% (n = 5)	37.5% (n = 9)
70s	50% (n = 2)	50% (n = 2)	50% (n = 2)	50% (n = 2)	50% (n = 2)
80s	0%	0%	0%	0%	0%

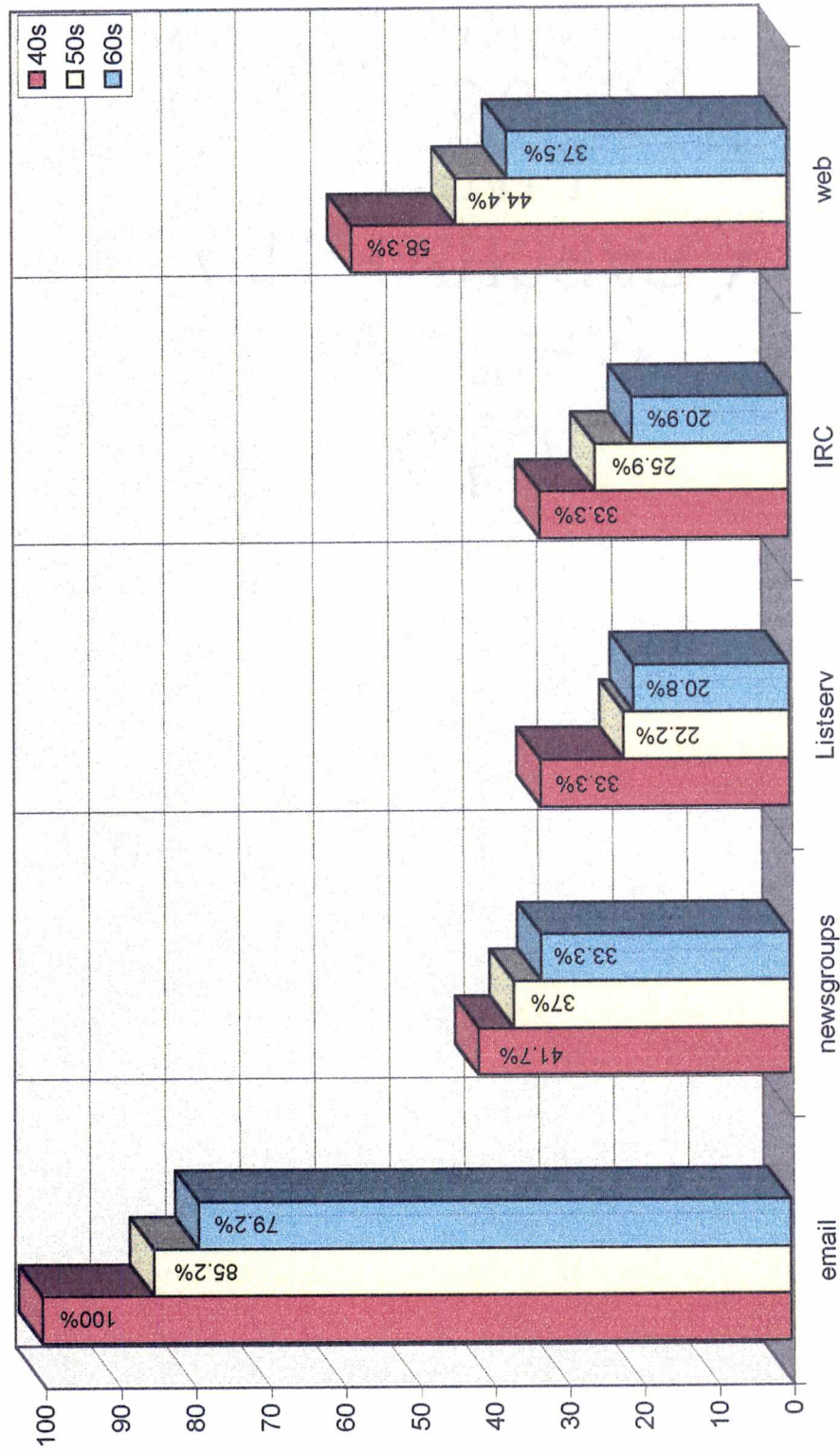


Figure 2. Reported use of Computers for Email, Newsgroups, Listserv, IRC, and Web According to Age

Table 7. Use of Email, Newsgroups, Listserv, IRC, and the Web by Generation.

Use	% World War II Generation (n = 54)	% Baby Boom Generation (n = 15)
email	79.6% (n = 43)	100 % (n = 15)
newsgroups	35.2% (n = 19)	40% (n = 6)
Listserv	24.1 (n = 13)	33.3% (n = 5)
IRC	24.1% (n = 13)	33.3% (n = 5)
web	40.7% (n = 22)	53.3% (n = 8)

Table 8. Use of Email, Newsgroups, Listserv, IRC, and the Web by Appointing President.

	% use Email	% use Newsgroups	% use listserv	% use IRC	% use Web
Kennedy	0	0	0	0	0
Ford	100% (n = 3)	33.3% (n = 1)	33.3% (n = 1)	33.3% (n = 1)	33.3% (n = 1)
Carter	83.3% (n = 5)	33.3% (n = 2)	17% (n = 1)	20% (n = 1)	33.3% (n = 2)
Reagan	75% (n = 18)	12.5% (n = 3)	17% (n = 4)	21.1% (n = 5)	33.3% (n = 8)
Bush	85% (n = 17)	50% (n = 10)	45% (n = 9)	52.9% (n = 11)	60% (n = 12)
Clinton	93.3% (n = 14)	20% (n = 3)	20% (n = 3)	21.4% (n = 3)	46.7% (n = 7)

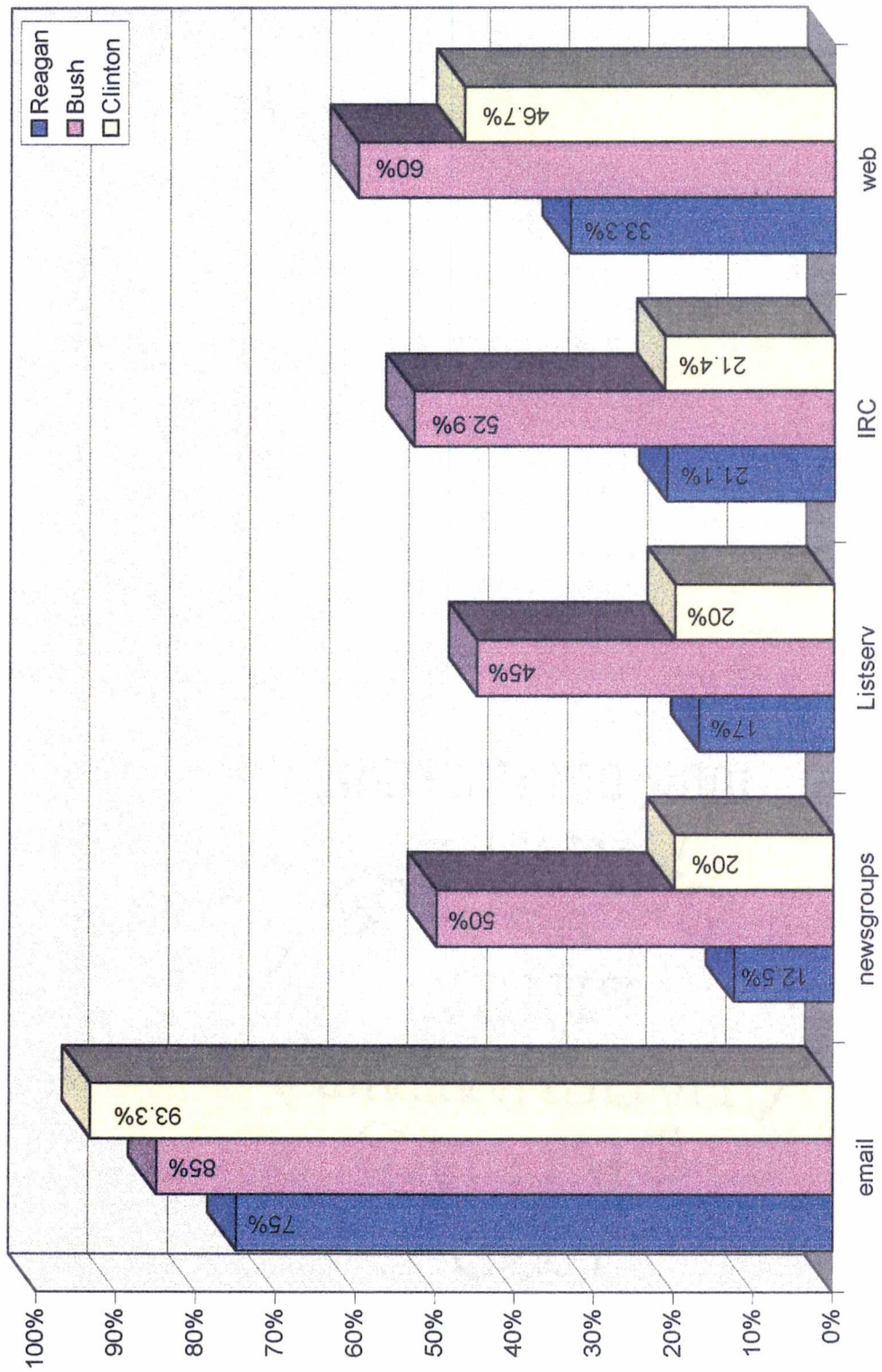


Figure 3. Use of Email, Newsgroups, Listserv, IRC, and the Web by Appointing President

President Clinton and those appointed by President Bush is interesting. Generally Presidents appoint members of their own party.¹³⁴ A higher percentage of President Clinton's (presumably Democratic) appointments report using email and newsgroups than President Bush's (presumably Republican) appointments. The reverse is true with respect to internet relay chat and the World Wide Web. Could this mean there could be a relationship between political affiliation and use of certain online functions?

Frequency of Use

Taken alone, the figures in tables 4 through 8 are misleading. Although at least 25% of the respondents report using newsgroups, IRC, and the web, it is the frequency of their use which better illustrates the respondents' familiarity with these functions. The survey asked recipients to describe the frequency with which they used online functions as either rarely, sometimes, frequently, or daily (tables 9 through 13). The frequency of use of all five functions is illustrated in figure 4. Although email is used either frequently or daily by a majority of respondents, no one reported using newsgroups, IRC, or the web on

¹³⁴ Of President Clinton's appointees confirmed in 1993 and 1994, 88.8% were Democrats. Of President Bush's appointees, 88.5% were Republicans. Of President Reagan's appointees, 93.1% were Republicans. Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 *Judicature* 276, 281 (Table 2) (1995).

Table 9. Frequency of Use of Email.

Use email	% of all respondents	% of respondents who use email
rarely	13% (n = 9)	15.5%
sometimes	13% (n = 9)	15.5%
frequently	23.2% (n = 16)	27.6%
daily	34.8% (n = 24)	41.4%

Table 10. Frequency of Use of newsgroups.

Use newsgroups	% of all respondents	% of respondents who use newsgroups
rarely	15.9% (n = 11)	44%
sometimes	18.8% (n = 13)	52%
frequently	1.4% (n = 1)	4%
daily	0	0

Table 11. Frequency of Use of Listserv.

Use Listserv	% of all respondents	% of respondents who use Listserv
rarely	23.2% (n = 16)	88.9%
sometimes	3% (n = 2)	11.1%
frequently	0%	0%
daily	0%	0%

Table 12. Frequency of Use of Internet Relay Chat.

Use IRC	% of all respondents	% of respondents who use IRC
rarely	23.1% (n = 16)	89%
sometimes	2.9% (n = 2)	11%
frequently	0	0
daily	0	0

Table 13. Frequency of Use of the web as a percentage of all respondents and as a percentage of respondents who use the web.

Use the web	% of all respondents	% of respondents who use the web
rarely	21.7% (n = 15)	50%
sometimes	10.1% (n = 7)	23.3%
frequently	11.6% (n = 8)	26.7%
daily	0	0

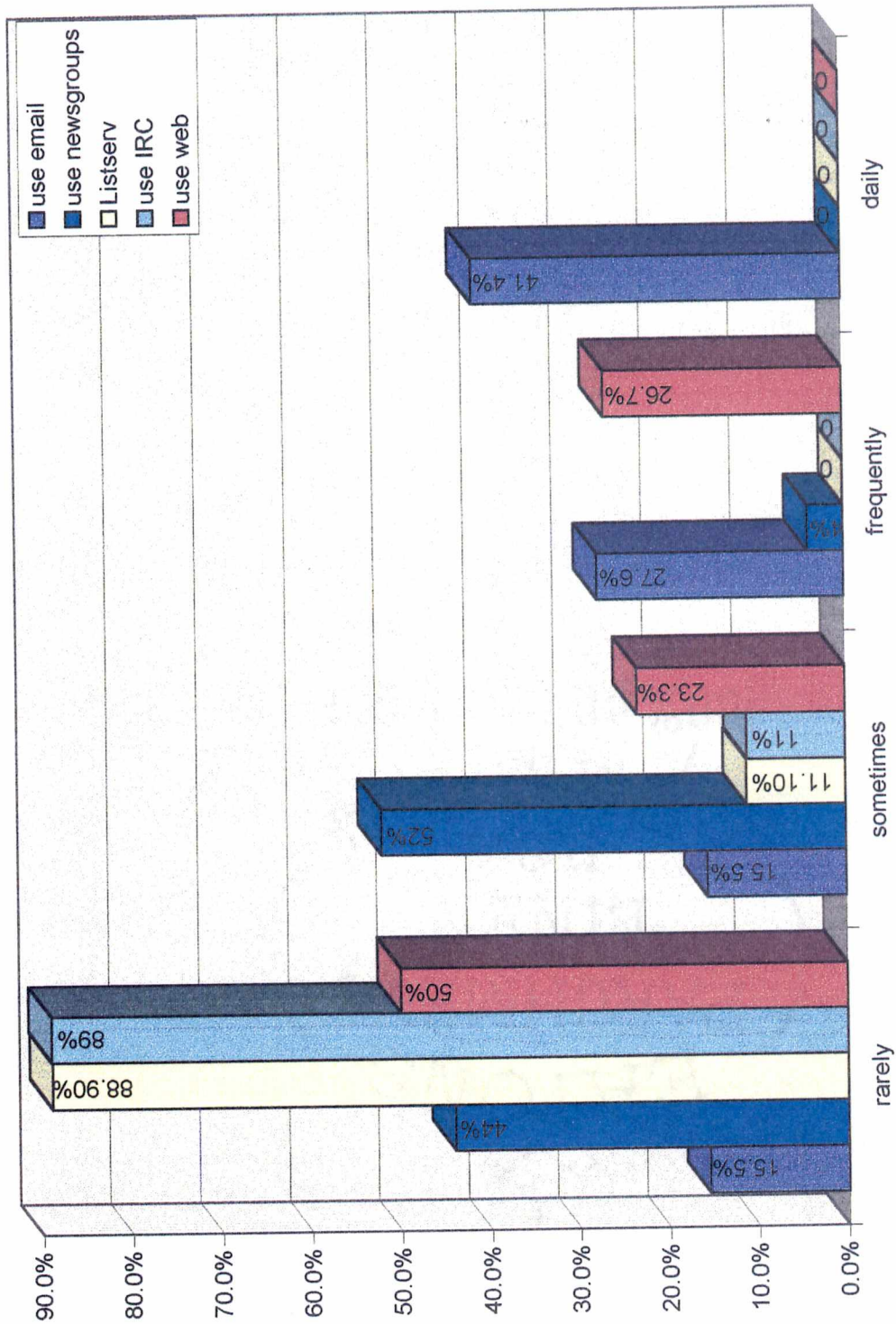


Figure 4. Frequency of Use of Email, Newsgroups, Listserv, IRC, and Web

a daily basis. These figures show that most respondents have had little or no exposure to any Internet function other than email.

Internet/Web Skills

The survey asked recipients to rate their Internet/web skills as none, novice, some experience, experienced, and expert. Only 13% of the respondents rate their skills as better than novice, with none rating themselves as expert. Nearly one-half rate them-selves as novices and over one-quarter rate themselves as having no internet/web skills (table 14). This could reflect the workload carried by federal trial judges. Few may have leisure time they are able and willing to devote to learning a new technology.

Offensive Web Sites

The survey asked recipients whether they had ever seen a web site which they personally found offensive. Five respondents (7%) report having seen an offensive web site. Of these five, four had reported that they do not use the web. That only one respondent who uses the web has seen a personally offensive site, suggests either that these judges are not easily offended or that they do not deliberately look for pornographic or other objectionable material on the web. Perhaps the four who do not use the web had these sites brought to their attention

Table 14. Respondents rating their Internet/Web Skills as None, Novice, Some Experience, Experienced, and Expert.

Self-rating of Internet/Web Skills	Percentage
None	29% (n = 20)
Novice	46.4% (n = 32%)
Somewhat Experienced	11.6% (n = 8)
Experienced	1.4% (n = 1)
Expert	0

by a friend or colleague, by a lobbyist or politician, or perhaps by their own child or grandchild.

Interest in Results

The questionnaire offered respondents an opportunity to receive a summary of the survey results. Twenty-two of the respondents (32%) asked to receive the summary. Eighty-nine percent of those who asked for the summary had reported their Internet/Web skills as either "none" or "novice" (as compared to 75% of all respondents). Fifty-nine percent reported using the Web, IRC, and Newgroups rarely or not at all.

Seventy-seven percent of the judges asking to receive the summary were appointed to the bench by Presidents Bush and Reagan compared to twenty-three percent appointed by President Clinton. Is it possible that these older judges (who are still years away from retirement) are concerned that they might be falling behind their younger colleagues with respect to their computer- and Internet-literacy, and saw the summary as an opportunity to find out?

3. Statistical Analysis of Findings

I conducted a chi square test for dependence at a 90% degree of confidence to determine whether there was a relationship

between age and use of selected Internet computer functions (email, newsgroups, IRC, and the Web), or between Presidential appointment and use of those functions.¹³⁵

The results were inconclusive for all but two relationships examined because the assumptions of the test were not met. The exceptions were Web use and presidential appointment and Listserv use and presidential appointment. All assumptions were met for these relationships. The tests showed that there is a relationship between Listserv use and presidential appointment but not between Web use and presidential appointment.

The failure to meet the assumptions of the chi square test increases the likelihood of a Type One error, i.e., finding a relationship when none exists. In almost every instance, despite not meeting the test's assumptions, the null hypothesis was not rejected. In other words, despite a weakness in the test that would typically cause the finding of a relationship when there is none, I found no relationship between age or presidential appointment and the use of email, newsgroups, or the web. The only exception was the relationship between presidential appointment and use of

¹³⁵ Statistical analysis was limited to the age groups in their 40s, 50s, and 60s, and Presidential appointment groups of Clinton, Bush, and Reagan, because of extremely low numbers of respondents in the remaining groups (30s, 70s, and 80s, and Kennedy, Ford, and Carter).

IRC. The test resulted in rejecting the null hypothesis and thus finding that a relationship existed. However, because the assumptions were not met, we cannot rely on this result.

The law and its practitioners have always presented an unusual dichotomy. On the one hand the law and lawyers are slow to change, reason and caution being prized above experimentation and innovation. On the other hand, the law and lawyers are sometimes ahead of society in adopting and advancing change. With these figures we see a picture of a judiciary only beginning to feel the effects of the information revolution. Rather than taking the lead, the judiciary seems cautious about entering cyberspace. This reluctance to participate in the information revolution could impede the judiciary's ability to adjudicate disputes in cyberspace.¹³⁶

¹³⁶ "The law will lumber along like an unwieldy dinosaur wending its way to extinction if it cannot keep up with the pace of change in this new interactive, information-intense environment." Anne Wells Branscomb, *Who Owns Information?: From Privacy to Public Access* 5 (1994).

CHAPTER FIVE

CONCLUSIONS

Introduction

This study was born on MTV.

In 1995 MTV opened a forum on America Online. The forum included, among other things, a bulletin board where users could open topics for their favorite performers. One performer for whom a topic was opened immediately was Michael Jackson. Within its forum's first few days of operation, MTV was host to a full-blown war.

The war began innocently enough as several inarticulate fans expressed their love for the "King of Pop," and elevated him to the status of a deity. These were quickly followed by equally inarticulate anti-fans who suggested that O.J. Simpson and "pedophiles" like Michael Jackson should be shot without a trial. Before the end of the day, having exhausted their vocabularies of respectable insults, the posters had resorted to outbursts of obscenity and profanity that would have shocked Senator Exon. By the end of the first week, both sides were hurling threats of death, dismemberment, and worse, at each other and at Jackson.

I watched this war break-out in the MTV forum. Thinking I must be the only adult reading the board, I posted a message

suggesting that everyone calm down and stop the obscenities, the death threats, and the defamatory statements. I was immediately flamed by both sides as a "spy" for America Online, an interesting accusation as I had been battling an AOL censor for weeks over postings in another forum.

I remembered enough libel law to begin asking myself the right questions. Were the statements defamatory? Were they "published"? Were they true? Was Michael Jackson a "public figure"? Had he suffered any damages as a result of this war in the MTV forum? How could he learn who his defamers are given the anonymous nature of AOL user names? Would he be limited to suing the users who posted the libelous material or could he go for the deep pockets of MTV and AOL? Would he have to prove actual malice, and, if so, how could he? What court would have jurisdiction?

It was about this time that I read an article about the "Jenny TRR" suit which Bowker and Joslin had filed against American Online and only a matter of a few weeks before I became aware of *Cubby* and *Stratton-Oakmont*. Clearly the issue of libel in cyberspace was one of growing importance. If the behavior of AOL users in the MTV forum was any example, when the masses reach the Internet they speak their minds without regard to common sense or courtesy, let

alone the law of libel.

I have observed this phenomenon since the mid-1980s when I first ventured online via CompuServe, then American People Link,¹³⁷ Portal, and later Prodigy, AOL, and finally directly to the Internet by an Internet service provider.¹³⁸

A form of anarchy reigns online, a free-for-all where the innocent and naive can be traumatized, and no one feels responsible for his words or conduct. In fact, scathing wit and a devil-may-care attitude are usually rewarded in chat rooms and channels with popularity and acceptance from other regulars. Timidity and courtesy online are often the lonely refuges of the newbie and the mortally shy. Consider this description of human interaction online:

The evidence of public virtue in cyberspace is so far more alarming than noble and salutary. Electronic salons already contain broken furniture and have mud on their walls. The notorious phenomenon of "flaming"-issuing a nasty and often profane diatribe--is now a familiar sociological curiosity. UseNet news groups... have become vast libraries of pyrotechnic insults.... Electronic communication is providing a disturbing

¹³⁷ Affectionately known as "Plink" to its users.

¹³⁸ What many refer to as an "Internet service provider" or "ISP" differs from CompuServe, Prodigy, and AOL in that the latter three provide proprietary content in addition to Internet access. An ISP generally provides only access to the Internet. Examples of some national ISPs are Earthlink, Mindspring, and SpryNet.

glimpse of what may be the smoldering, heretofore unsaid, in the minds of many Americans.

....

More generally, electronic conversations appear to be prone to misinterpretation, sudden and rapidly escalating hostility between the participants, and a weird kind of implosion when the conversants express their anger with sulking silence.... [P]eople who are completely removed from one another physically can assault each other verbally without fear of bodily harm....

Electronic anonymity also encourages fantasy life, often tilting toward the dark side. Dedicated network denizens frequently inhabit alter egos attached to their computer names. [M]illions of electronic Walter Mittys nationwide...take on a more aggressive personality behind a computer and a modem--ferociously pouring out their otherwise sublimated middled-class angst.

....

Bigotry and misogyny are prevalent as well. [B]igots are showing up on computer networks with increasing frequency because they can't get a hearing anywhere else. Networks are a cheap means for white supremacists and neo-Nazis to get their hate messages to thousands of people at once.

....

Finally, the general quality of the rhetoric on the Internet is discouraging in itself. Even without all the cranks, poseurs, charlatans, fetishists, single-issue mono-maniacs, sex-starved lonely hearts, mischievous teenagers, sexists, racists, and right-wing haranguers, many participants in unstructured Internet conversations have little of interest to say but a lot of room in which to say it. Goofy opinions and comical disregard for facts are rampant. Spelling is haphazard and even simple typos sometimes produce absurd flaming fire-fights. Nearly every reasonable discussion is sooner or later discovered by someone with a hobby horse or an abrasive personality or both.... The new electronic Acropolis seems to foster rhetoric stylistically closer to Beavis and Butthead than to Pericles.¹³⁹

¹³⁹Gary Chapman, *Flamers*, <<http://as.wvu.edu/~thumm/flamers.html>>.

A judge unfamiliar with cyberculture might be disturbed by the language and conduct of its users. Accustomed to a reasonable degree of courtesy in human interactions, a judge might be surprised, or even shocked, to see how "netizens" behave when shorn of their real world identities and speaking from the comfort, safety, and anonymity of their own homes. Accustomed to the relatively bland and censored content of television, a judge might be aghast at the type of social contact, information, and entertainment available on the World Wide Web.

This line of thought raises the question: How much do the law-makers who will regulate the Internet know about the culture of the Internet? Many members of Congress, facing re-election every few years and always seeking new ways to communicate with constituents, have already jumped into cyberspace. Congress itself has a web site. So does the White House. But what about the courts? Federal judges are conspicuously absent from the Internet and World Wide Web. It is possible to obtain copies of court decisions by telnet and gopher, and more recently through the World Wide Web, of course, but the individual judges are not

involved in this process. The federal courts have a web site¹⁴⁰ and so does the Federal Judicial Center,¹⁴¹ but none of these web offerings actively involves sitting judges.

Ordinary citizens who are offended or terrorized during their first ventures into cyberspace will have two choices: acclimate or drop out. However, judges faced with the "wild wild west" atmosphere of the Internet for the first time may have the power to restrict what all of us may say or have access to online. If for no other reason, it is important that the members of the judiciary become acquainted with cyberspace.

This problem apparently concerned attorneys on both sides of *American Civil Liberties Union v. Reno*.¹⁴² Attorneys for the Department of Justice offered examples of online indecency¹⁴³ to the three-judge District Court panel which ultimately enjoined enforcement of the Communications Decency Act. Attorneys for

¹⁴⁰ U.S. Federal Judiciary Home Page, <www.uscourts.gov/>. "The purpose of this site is to function as a clearinghouse for information from and about the Judicial Branch of the U.S. government."

¹⁴¹ Federal Judicial Center, <www.fjc.gov>. "The Federal Judicial Center is the federal courts' agency for research and continuing education."

¹⁴² See *infra*, p. 33-35.

¹⁴³ Playboy magazine's site and the alt.binaries.picutres.erotica Usenet newsgroup. Declan McCullagh, *Court Weighs Decency Act*, Internet World, June 1996, at 16, 16.

the plaintiffs gave the panel a "crash course" on the Internet, demonstrating newsgroups and the World Wide Web and how blocking software prevents children from accessing the most offensive groups and site.¹⁴⁴ Unfortunately, we have no way of knowing how much the attorneys' educational efforts affected the three-judge panel's decision to enjoin enforcement of the *Communications Decency Act*.

What do the Survey Results Mean?

Fundamentally, the survey results suggest that most federal trial judges are not familiar with the Internet and its culture. The results also suggest that familiarity with the Internet may be related to some factors such as age or political affiliation.

Any relationship there may be between age and familiarity with computers and the Internet should self-correct as the older judges retire. Today's younger judges will be tomorrow's older judges and will be more familiar with the Internet than their predecessors. As the members of the next generation enter professional life, they will bring with them a lifelong familiarity with

¹⁴⁴ *Id.* For an almost "blow-by-blow" summary of the evidence presented in *A.C.L.U. v. Reno*, and for case materials, pleadings, and transcripts of trial testimony, see American Civil Liberties Union, *Cyber-Liberties*, <<http://www.aclu.org/issues/cber/trial/trial.htm>>.

computers and the Internet. Eventually most federal judges should be generally familiar with cyberspace just as they are now generally familiar with television, telephones, and the cinema.

Any relationship that exists between political affiliation and familiarity with computers and the Internet will probably also self-correct. Today children are introduced to computers at a young age, long before they are old enough to develop a political identity. However, ultra-conservative families, unwilling to expose their children to the Internet, may not have home computers with Internet access or may enroll their children in schools where Internet access is unavailable or closely supervised. Future judges from these families may be less familiar with cyberspace than are their professional peers.

We might also deduce from the study that there is not much interest among judges in becoming more familiar with cyberspace. For example, nearly thirty percent of the respondents report having used IRC. However, nearly ninety percent of them report having used it rarely. They may have been repulsed by what they found, or unimpressed with the intellectual level of discussion. In either event they may not be sufficiently interested in IRC to participate more frequently. Similarly, half of those who report using the World Wide Web also report using it only rarely. And

when given an opportunity to learn more about this study, less than one-third of the respondents asked to receive a summary of the survey results.

Given the judiciary's lack of experience and apparent lack of interest, the attorneys in *American Civil Liberties Union v. Reno* were wise to use the hearing to educate the judges who would initially decide the constitutional status of the Communications Decency Act. Other attorneys would be wise to follow this strategy in future trials and hearings involving cyberspace legal issues. In the meantime, organizations such as the American Civil Liberties Union and the Electronic Frontier Foundation should increase their efforts to acquaint the judiciary with the culture of cyberspace and to consider the Constitutional implications of government efforts to restrict its use.

Limitations

The results obtained in this study must be interpreted within the limitations of the survey response. Judges who do not use computers or the Internet or who are not interested in computers or cyberspace, may have been less likely to return the completed questionnaire. As a result, the response may be biased toward judges who use computers and the Internet. Similarly, female

members of the federal trial bench were under-represented in the response rate. Fewer women than men use the Internet.¹⁴⁵ Their under-representation in this study might also bias the results toward those who are interested in and familiar with the Internet.

A greater limitation is the design of the questionnaire. The number and type of questions I could ask was limited by the decision to limit the questionnaire to one side of one page in an effort to obtain an adequate response rate. In addition to fitting the limited space, the questions asked had to be capable of answered quickly and easily.

Finally, because of the brevity of the questions, some questions may have confused some respondents. Some terms would have benefited by definition. For example, two respondents reported that the only online function they used was email and yet rated their Internet/Web skills as "novice." Misunderstandings of this sort could have caused some respondents to have over- or under-rated their experience level.

Future Directions

Future studies might target other types and levels of judges,

¹⁴⁵ Andrew Kantor and Michael Neubarth, *Off the Charts: The Internet 1996*, Internet World, December 1996 at 45, 47.

such as the United States Court of Appeals or state trial and appellate judges. Eventually the major issues of cyberspace law will be decided by the appeals courts, and eventually the United States Supreme Court (when federal questions are involved). It would be useful to attorneys and scholars to know more about these judges and their familiarity or interest in computers and the Internet.

A more thorough study asking more detailed questions would also provide greater insight into the familiarity of judges with the Internet. Unfortunately, given the workload carried by most judges (particularly federal trial judges), it is unlikely that enough judges would respond to a lengthy, more complex questionnaire.

Others might consider similar studies of related professionals, such as attorneys, elected officials at federal and state levels, and members of relevant administrative agency officials (e.g., the Federal Communications Commission). These are the people who will be deciding for the rest of us what restrictions we will face online.

In the meantime, Internet professionals and legal scholars must continue the critical analysis of the law as it intersects with cyberspace. Is a new theory of liability for defamatory content posted by others (and other illegal or tortious acts) needed? If so, who should establish the new rules? Congress? State Legislatures?

The courts? Or can existing legal principles accomodate the new technology in a way that will not chill speech? Will efforts to create a cyberspace dispute resolution mechanism such as the Virtual Magistrate be successful?

Conclusion

It is inevitable that more and more legal disputes originating in cyberspace will reach the courts eventually. Already we have seen cases involving defamation, copyright, pornography, commercial misappropriation, and the personal jurisdiction of courts. We have already seen Congress (and some states) attempt to regulate the Internet by legislation and have seen that legislation signed by the President.

Scholars are researching the legal implications of cyberspace. Civil libertarians are defending the Internet from attempts to limit the First Amendment rights of netizens. But no one seems to be studying those who will ultimately decide how free speech on the Internet will be. This study is a small first-step toward understanding the law- and policy-makers who will decide these issues.

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Appendices

Teresa L. Conaway
[address deleted]
Knoxville, TN 37922
September 4, 1996

FIELD(Name)
FIELD(Court)
FIELD(Address1)
FIELD(Address2)
FIELD(Address3?)

Your Honor:

Will you give me just a few minutes of your time to complete the enclosed survey? I am a graduate student at the University of Tennessee School of Information Sciences. This survey is to gather data on the familiarity of the federal trial bench with the Internet and World Wide Web for my master's thesis. The survey is very short and does not ask for your legal opinions.

The number in the upper right corner is for administrative purposes and will be removed as soon as I have recorded receipt of your completed survey. I have enclosed a stamped, addressed envelope for your use and will appreciate it if you could place the completed survey in the mail by September 23.

If you have any questions, comments, or concerns about this survey I can be reached at [phone # deleted] and emailed at tconaway@pstcc.cc.tn.us. My committee chair is Dr. Carol Tenopir and can be emailed at tenopir@utkux.utk.edu.

Thank you very much for your time and courtesy. I am

Sincerely yours,

Teresa L. Conaway
Tenn. BPR#15923

2 Enclosures

Survey

No. _____

1. **Month and year born?** _____
2. _____ **male** _____ **female**
3. **Appointed to current position by President** _____.
4. **Where do you personally use a computer?**
 _____ Do not use a computer.
 _____ At home.
 _____ In chambers.
 _____ On the bench.
 _____ Other (please identify) _____
5. **Which of the following have you used and how often?**

	Rarely	Sometimes	Frequently	Daily
___ email	___	___	___	___
___ Newsgroups	___	___	___	___
___ Listservs	___	___	___	___
___ Internet Relay Chat	___	___	___	___
___ Telnet	___	___	___	___
___ Gopher	___	___	___	___
___ World Wide Web	___	___	___	___
6. **How would you rate your internet/web skills?**
 ___ none
 ___ novice
 ___ somewhat experienced
 ___ experienced
 ___ expert
7. **Have you ever seen a World Wide Web site which you personally found offensive?** ___ yes ___ no

If you would like to receive a summary of the results of this survey, check this box: ☐

Vita

Teresa Conaway was born in Norfolk, Virginia on October 19, 1955. She attended Carroll County public schools in Westminster, Maryland, where she graduated from Westminster High School in June, 1973. She entered Pikeville College, Pikeville, Kentucky during August of 1973 where in May, 1977 she received the Bachelor of Arts in Political Science, *magna cum laude*. She then entered the Dickinson School of Law in Carlisle, Pennsylvania during August, 1977 where in June, 1980 she received the Juris Doctor degree in Law. She then entered the Virginia Polytechnic Institute & State University in Blacksburg, Virginia during July, 1980 where in June, 1981 she received the Master of Arts in Education in College Student Personnel.

She has been employed as an Assistant Dean for Student Affairs at a liberal arts college, an Assistant County Attorney in Maryland, and a Governor's Management Intern for Governor Baililes in the Commonwealth of Virginia. She is presently an Assistant Professor of Legal Assistant Technology at Pellissippi State Technical Community College in Knoxville, Tennessee.