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LDRC Libel Defense Resource Center

LIBELLETTER

May 1994

CYBERSPACE BULLETIN BOARDS

We are all aware of the emergence of "bulletin boards" reachable via your home or office computer. Some have active input by the bulletin board provider; others have little or none. They are part of the new frontier for media lawyers. Attached is an article prepared by Steve Lieberman of Defense Council Section member Rothwell, Figg, Ernst & Kurtz entitled "Defamation Claims in Cyberspace: Liability of Owners and Operators of Electronic Bulletin Boards for Statements 'Uploaded' by Subscribers."

This is but the first in a series of short pieces that LDRC hopes to publish on the issues raised by the new forms of communications and publication; issues such as jurisdiction over material made available in computer data bases (your local newspaper, for example, now read in New York, San Francisco and London!), publication for purposes of the statute of limitations, choice of law, etc.

If any of you, upon reading Steve's article, have issues or thoughts that you think should be raised or added to the subjects he has covered, please let us know. LDRC envisions this article as the beginning of an ongoing dialogue. We want to avoid the possibility of media lawyers (not to mention their clients) being amongst the first road kill on the information superhighway.

SAVE THE DATE! NOVEMBER 9, 1994

That is the date of the LDRC ANNUAL DINNER, preceded by the Annual Membership Meeting. The dinner will once again be at the Waldorf-Astoria and is the night before the PLI Communications Law Conference. Please put it on your calendars! We hope to see all of you there.

AND DCS MEMBERS: SAVE THE NEXT MORNING!

On Thursday morning, November 10, from 7:15 a.m. to 9:00, the DCS sponsors a fundraising breakfast and annual meeting. This year, it will be held at the Holiday Inn Crowne Plaza. Details of the activities to be conducted at the breakfast and meeting will be sent out at a later point. But we hope that all DCS members will take the opportunity to get together and discuss DCS business and potential projects, as well as simply to get together with old friends and colleagues.

MOLDEA V. NEW YORK TIMES CO. - TURNABOUT

On May 3, 1994, in a response to a Request for Rehearing and Rehearing En Banc filed by *The New York Times*, a panel of the D.C. Circuit reversed its decision and issued a new opinion in *Moldea v. New York Times Company*. In a virtually unprecedented action, the two member majority of the original panel simply apologized for having misread and misapplied the basic principles regarding opinion in libel, and agreed with the district court's determination that plaintiff's claims, arising out of a book review, were not capable of sustaining a libel claim.

Of significance, the panel concluded that it had erred in its prior opinion in treating the context of the statements at issue as fundamentally irrelevant. Following the lead of the First Circuit in *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724 (1st Cir. 1992), *cert. denied*, 112 S.Ct. 2942 (1992), the panel concluded, again contrary to its previous determination, that the Supreme Court's decision in *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), was not intended to disavow the importance of context in determining which

statements were actionable as factual and which were not. The panel ran through the precedents in the Supreme Court that support the principle that context has to be a meaningful criteria in the analysis, from *Greenbelt Cooperative Publishing Association v. Bresler*, 389 U.S. 6 (1970), to *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419 (1991), which, as the panel notes, post-dated *Milkovich*.

A book review, the panel stated, is a context where readers fully expect to find evaluations and, indeed, evaluations just of the type found in the review at issue in the case. The panel then adopted a standard proposed by *The New York Times*: "'The proper analysis would make commentary actionable only when the interpretations are *unsupportable by reference to the written work*'" (emphasis in original). As the panel restated the proposition later in the opinion: "...the correct measure of the challenged statements' verifiability as a matter of law is whether *no reasonable person could find* that the review's characterizations were supportable interpretations of [the reviewed book]" (emphasis in original).

Relying on analogies to the Supreme Court's concerns in *Bose Corp. v. Consumers Union of United States*, 446 U.S. 485 (1984), *Time Inc. v. Pape*, 401 U.S. 279 (1971), and *Masson*, the panel concluded that the Supreme Court has recognized that certain materials require interpretation -- materials such as books under review -- and that latitude must be afforded those who undertake that task. Moreover, "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability."

The *Times*'s review had asserted that plaintiff's book, an investigative journalism effort on the subject of football, contained "too much sloppy journalism" to be trusted. As it had in its first opinion, the court concluded that this statement was not actionable if the underpinnings of that conclusion were stated and were themselves either not false or otherwise not actionable. Of the two remaining statements at issue -- both of which were among the examples cited in the review to support the reviewer's "sloppy journalism" conclusion -- one was found to meet the "supportable interpretation" standard. The other, which the court found was a closer call under the test, in itself was not defamatory. It was only relevant as a supporting proposition for the "sloppy journalism" conclusion. In that the review had numerous examples to support this conclusion and only this one statement remained at issue, it fell to a "substantial truth" analysis.

With the dismissal of the libel claims, the court also upheld the district court's decision to dismiss plaintiff's related false light claim, and the district court's refusal to allow plaintiff to amend his complaint to allege new causes of action along the lines of breach of promise and promissory estoppel, asserting that "a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim."

Finally, the panel rejected plaintiff's allegations that the bias of the reviewer should be relevant to the analysis. The panel concluded instead that there is no way to distinguish between opinions honestly held and those prompted by less noble leanings. Absent unsupportable interpretations, allegations of bad intent are not enough to support a libel claim in the context of a review.

In the end, a major reversal of perspective by two members of the panel. One has to commend these two judges -- intelligent jurists both -- for their willingness simply to confess error and move forward.

LDRC has copies of the opinion and all related briefs and would be glad to make these available to members.

LDRC publishes each year the LDRC *Defense Counsel Section Membership Directory*

A copy of this year's edition was mailed to all LDRC media members and to all DCS members in February. Because we want our media members -- those most likely to need the services of the media lawyers on LDRC's roster of DCS members -- to be able to effectively use this *Directory*, LDRC wants to make an additional number of copies of the *DCS Membership Directory* available.

If, in addition to the representative of your organization who received the *DCS Membership Directory*, you have others in your organization, or in subsidiary or sister or parent organizations, who have responsibility for retaining or recommending counsel and who would find the *DCS Membership Directory* useful, please let LDRC know so that we can send those individuals their own copies.

We hope that all of you who have already received copies are using them when decisions as to counsel need to be made, and that you will identify others for us who will similarly find the *DCS Membership Directory* a useful resource in selecting outside counsel.

EAVESDROPPING: CIVIL LIABILITY

Among the causes of action that have surfaced -- or at least seem to be more prevalent -- in recent times is the claim based upon the Federal Wiretap Statute (18 U.S.C. 2510, *et seq*). While it is worrisome enough for a media organization to be sued based upon a claim that its employees violated the statute by their allegedly unlawful recording of a conversation, more unsettling as a matter of principle is the claim based upon the publication of information derived from a tape made by others and played for your reporter by a source.

That is the basis of the claim in *Natoli v. Sullivan*, recently argued before an appellate panel of the Fourth Department in New York State.

In *Natoli*, a New York Supreme Court justice in Oswego County held that a civil claim could be maintained against a newspaper for publication of information alleged to have been illegally obtained under the Federal Wiretap Statute (18 U.S.C. 2510, *et seq.*), even when the newspaper itself was not alleged to have been involved in the underlying illegal eavesdropping. At issue was a conversation between the police chief and a local businessman concerning local political events, allegedly recorded illegally in violation of the Federal Wiretap Statute. The *Oswegonian*, the school newspaper of the State University of New York in Oswego, was not responsible for the initial illegal recordation. Reporters for the paper were made privy to its contents by a political candidate who was one of a number of individuals who received a copy of the tape in the mail. The newspaper, however, published an article which included portions of the recording. On a motion to dismiss, the court accepted plaintiff's allegation that the *Oswegonian* knew the conversation was illegally obtained and ruled that, even though the substance of the *Oswegonian*'s article was true, a claim could lie under that part of the statute which prohibits disclosure of a recording with knowledge or reason to know it was unlawfully obtained.

The court dismissed co-defendant *The Palladium Times*, which only published portions of the recording previously published by the *Oswegonian*, the court reasoning that *The Palladium Times* published only that which was already public information.

The case is now on appeal to the Appellate Division, Fourth Department. On appeal, the *Oswegonian* argues, *inter alia*, that the First Amendment and the intent of the Federal Wiretap Statute preclude the imposition of liability under that statute. Citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and *Florida Star v. B.J.F*, 491 U.S. 524 (1989), among other cases, the *Oswegonian* argues that the lower court erred both in its failure to appreciate the constitutional burden that must be met before imposing sanctions upon defendants for publication of lawfully obtained truthful information on a matter of public interest and in its conclusion that the privacy interst asserted by plaintiffs was sufficient to meet that constitutional test.

LDRC is concerned about this claim and will be following this case through the New York court system. But we are interested in any similar claims that may exist in other jurisdictions. Please let LDRC know about any other cases on this issue of which you are aware.

If you are interested, LDRC has a copy of the opinion of the trial judge as well as the briefs filed on behalf of the *Oswegonian* and *The Palladium Times*.

Puerto Rico, Did You Note?

For those who may have an interest in the libel laws of Puerto Rico, please take note of a case recently reported in Media Law Reporter: *Rodriguez v. El Vocero De Puerto Rico Inc.*, 22 Media L. Rep. 1495 (1994). The Supreme Court of Puerto Rico allows a vicarious libel suit, brought by the wife of the individual named in the allegedly defamatory news article. While determining that the "of and concerning" doctrine is constitutionally mandated under *New York Times v. Sullivan*, the Court goes on to find that the requirement only applies to impersonal discussion of government activities. In an instance where the defamed individual is specifically identified, an action for damages apparently can be brought by a relative or any third parties "who have suffered damages and mental anguish due to the information published...."

The claim is subject to all limitations, burdens of proof, defenses, etc. that would exist were the claim to have been brought by the individual actually defamed. Thus, for example, if the individual named in the article was a public figure, any party suing for damages as a result of the article would have to prove actual malice.

The Puerto Rico Supreme Court also mentions, in a footnote (note 6), that it had recently upheld "defamation of the dead" actions, brought under a Puerto Rico statute, on behalf of relatives or friends of the deceased.

Counsel for defendants filed a *cert* petition with the United States Supreme Court this month.

DCS Newsletters

LDRC is aware of the fact that a number of our DCS member firms produce newsletters on media and related issues that would be of interest to LDRC media members. First, we would ask that all of our DCS member firms send LDRC copies of their newsletters. We find that the ones we do get are very worthwhile resources for us.

Second, if your firm is interested in distributing copies of your newsletter to LDRC media members, please let us know. In future issues of the LDRC LibelLetter we will list those firms which have newsletters that they would make available to LDRC members, along with their addresses and fax numbers. LDRC members can then contact the DCS member firms directly to request copies.

Newly Released *LDRC Bulletin* Reports on Ten Years of Independent Appellate Review

The LDRC has just published a comprehensive 86-page survey of *Ten Years of 'Independent Appellate Review' in Defamation Cases* in issue number 2 of the 1994 volume of the *LDRC Bulletin* (April 30, 1994). The new study, which compiles data on 112 appeals since 1984, documents that during the decade-long period only 26.8% of the awards entered against libel defendants were fully upheld on appeal. The critical importance of "independent appellate review" is underlined by the finding that defendants secured complete reversals at more than double the rate when the appellate court employed the doctrine in hearing the appeal (53.7% versus 23.7%).

Included in the study are the following:

- **Background material** on independent appellate review and previous LDRC studies.
- **Tables** empiricizing appellate results, including (1) overall disposition on appeal, (2) effects of (a) independent appellate review and (b) party status on the disposition of the appeal, and (3) effect of varying standards of review on the disposition of discrete issues in each case.
- A **"practitioners' roundtable,"** with Floyd Abrams, Peter Axelrad, Lee Levine, and Richard Rassel presenting their views on the operation of independent appellate review.
- A detailed **42-page case** list with complete citations and information on the status of the parties as determined by the appellate court, the nature of the judgment from which the appeal was taken, the result on appeal, whether - and to what issues - independent appellate review was applied, and a summary of other important legal issues addressed on appeal.
- An **index of cases** includes the name and firm of the defense attorney and indicates whether the brief is available through LDRC.

The issue is available to nonsubscribers through the LDRC at $35.00 per copy. It is also available to subscribers as part of the annual subscription of $110 (four issues). **Contact Melinda Tesser** at the LDRC for ordering information.

DCS Committees: Sign Up!

The Defense Counsel Section has a number of committees up and running. We want all of our members to be aware of these committees, their current projects and your opportunities to participate in them.

Below is a list of the committees and their current chairs. Accompanying the LibelLetter are short statements prepared by the committee chairs about their committees, and a committee membership sign-up form (it is on page 3 of the DCS membership form). Please review the committee statements, make your selections - indicate first, second, third choices - and send the sign-up forms back to LDRC. Committee membership is not infinite - too many people simply make a committee unmanageable - so we may be forced to make assignments on a first come, first serve basis.

DCS Committees and Chairs

Brief Bank Committee
Robert C. Vanderet, Chair (O'Melveny & Myers)

Conference and Education Committee
Terrence B. Adamson, Co-Chair (Kaye, Scholer, Fierman, Hays & Handler)
Daniel M. Waggoner, Co-Chair (Davis Wright Tremaine)

Expert Witness Committee
Guylyn Cummins, Chair (Gray, Cary, Ware & Freidenrich)

Jury Instructions Committee
Thomas R. Julin, Chair (Steel, Hector & Davis)

Pre-Publication/Pre-Trial Committee
Susan Grogan Faller, Chair (Frost & Jacobs)

Advisory Committee on New Legal Developments
Slade R. Metcalf, Chair (Squadron, Ellenoff, Plesent Sheinfeld & Sorkin)

Trial Techniques Committee
Thomas B. Kelley, Chair (Cooper & Kelley)

Tort Reform Committee
Richard E. Rassel, Chair (Butzel Long)

Complete your membership form. Many of you filled out DCS membership forms when you first joined LDRC. They are important because they clarify who is the main contact person at each firm, as well as others at the firm who may be interested in participating in LDRC activities. They are also used by LDRC in responding to requests for referrals. Except for those firms that have filled it out recently, we would kindly request that *all* of our DCS members fill it out and send it back so that we can be sure that our records are as up to date as possible. Thank you.

LDRC DEFENSE COUNCIL SECTION COMMITTEES

Brief Bank Committee

The Brief Bank Committee will be undertaking to assess and evaluate how the LDRC Brief Bank is functioning and the extent to which it is meeting the needs of the LDRC media and Defense Counsel Section membership. The Committee will be soliciting comments from the LDRC community on the Brief Bank's operations and working with LDRC staff to implement appropriate modifications and improvements.

Conference and Education Committee

The Conference and Education Committee is responsible for planning and implementing the Bi-annual LDRC/NAA/NAB Conference on Defamation and Related Claims. The next Bi-annual Conference is scheduled for September 1995 at the Ritz-Carlton in Tysons Corner, Virginia. Planning for each conference commences approximately one year in advance.

Expert Witness Committee

The Expert Witnesses Committee is in the process of collecting information and pleadings concerning: (1) all types of expert witnesses and categories of expert testimony used in defamation lawsuits; (2) motions *in limine* dealing with expert witness issues; and (3) resumes and testimony of expert witnesses, including depositions, declarations, treatises, and other information helpful for direct and cross-examinations.

Please forward any such information and *in limine* motions you have regarding *expert witnesses* to:

Guylyn R. Cummins, Esq.
Gray, Cary, Ware & Freidenrich
401 B Street, Suite 1700
San Diego, CA 92101-4297.

The Expert Witness Committee of the Defense Counsel Section will be working with LDRC staff on a study of expert witnesses for future publication, including an analysis of *in limine* motions. We hope that you respond as fully and as promptly as possible to this request for information by the Expert Witness chair.

Pre-publication/Pre-trial Committee

All matters pertaining to pre-publication and pre-broadcast review and pre-trial procedures come within the jurisdiction of this Committee. The Committee has published a survey of cases dealing with pre-publication and pre-broadcast review, including its impact on the malice issue and on attorney-client privilege. The Committee also has conducted and compiled results of a survey of the practicalities of practice in these areas by both in-house and outside counsel for various media organizations, the allocation of time and resources to various problems in these areas, and common agreement as to "red

flags" and practice pointers. The Committee has considered other surveys and projects, including pre-trial procedure studies, research into various retraction and discovery issues relating to trial practice and reasons for disqualification of counsel. The Committee stands ready, willing and able to undertake new projects as requested by the Defense Counsel Section or its Executive Committee.

Advisory Committee on New Legal Developments

The Committee intends to assist LDRC staff in identifying significant judicial and legislative developments in libel and privacy law in the United States and, when pertinent, in foreign jurisdictions. For the more significant occurrences, members of the Committee will prepare articles or memos which can be circulated to the members of the full DCS and to LDRC's media members. The Committee plans to work closely with the Executive Director of LDRC in not only learning about new cases, statutes, and regulations, but also assisting the Executive Director in preparing portions of any informational newsletters sent to LDRC members. Members of the Committee may assist in conducting a panel discussion on new legal developments at the biennial LDRC/NAA/NAB Conference. In connection with legislative proposals, the Committee may prepare position papers on particular legislation.

Jury Instructions Committee

Under discussion as areas to be covered by the Jury Instructions Committee are (1) working with LDRC staff to collect sample jury instructions for libel from as many jurisdictions and recent jury trials as possible, (2) developing model jury instructions to be used nationwide for the constitutionalized elements, e.g., actual malice and burden of proof of falsity, (3) collecting and developing jury instructions in privacy and new torts for key jurisdictions and collecting instructions in recent jury trials of these torts, and (4) urging Section members to examine the process by which their states develop pattern jury instructions, in those states like New York which have such a process, and encouraging participation by Section members in that process.

Tort Reform Committee

The mission of the Tort Reform Committee of the LDRC is to work with LDRC staff to monitor local or national proposals in the tort reform movement affecting broadcasters and publishers, to mobilize task force support from Defense Counsel Section membership to respond to any such proposals, and to insure that any such tort reform proposals are publicized for comment to the LDRC membership.

Trial Techniques Committee

The Trial Techniques Committee has discussed an interest in preparing a model brief concerning innovative techniques used or recommmended by trial judges to guide the jury throughout the trial (e.g., bifurcation, sequential issues, trial instructions, and mid-trial summations) in understanding the *New York Times* rule and its application. We have also discussed expanding such a brief to include common subjects of motions *in limine*, in which the defendant relies in whole or in part upon federal law.

DEFAMATION CLAIMS IN CYBERSPACE: LIABILITY OF OWNERS AND OPERATORS OF ELECTRONIC BULLETIN BOARDS FOR STATEMENTS "UPLOADED" BY SUBSCRIBERS

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In recent years, speech on electronic bulletin boards has given rise to a number of defamation suits against the owners and operators of the electronic bulletin boards,[2] as well as against the authors of the allegedly defamatory material.[3] Such lawsuits raise a variety of novel legal issues relating to the potential liability for the owners and operators of electronic bulletin boards for defamatory statements "uploaded"[4] onto those bulletin boards by subscribers, readers or others. These include the issue of whether there is an obligation to police the content of the bulletin boards for defamatory material, and the consequences of choosing either to police or not to police the bulletin boards. These issues, and some strategies that electronic bulletin board owners and operators may use to protect themselves, are discussed below.

Protecting oneself from on-line liability for allegedly defamatory statements is no longer of interest only to owners and operators of high-tech computer services such as

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[1] The authors gratefully acknowledge Albert Robbins, General Counsel of the New York Law Publishing Co., for his insights and comments.

[2] See, e.g., Cubby, Inc. v. CompuServe Inc., 776 F.Supp. 135, 139-41, 19 Med.L.Rptr. (BNA) 1525 (S.D.N.Y. 1991) (Leisure, J.) ("Cubby"); Hagler v. Proctor & Gamble, Civil Action No. 069400012-CZ (101st District Court for Texas) (in which a Texas jury awarded over $15 million to an employee of Proctor & Gamble who had sued the company for allegedly defamatory statements made over the company's electronic bulletin boards; that award is currently on appeal).

[3] Medphone v. Denigris, Civil Action No. 92-3785 (D.N.J.) (defamation action, now settled, arising from allegedly defamatory statements made on Prodigy's "Money Line" by private investor). C.f. Playboy Enterprises, Inc. v. Frena, 839 F.Supp. 1552, 22 Med.L.Rptr. (BNA) 1301 (M.D. Fla.) (in which Playboy initiated a copyright action against a subscription computer bulletin board service which had displayed photographs from Playboy's copyrighted magazine).

[4] Uploading involves transmitting data in the form of either a private e-mail message or public bulletin board posting from a local source or personal computer onto a multiple access host or server, e.g., the process of transferring data from one's personal computer to an electronic bulletin board.

CompuServe or Prodigy. During the last few years a wide variety of traditional media entities, such as the publishers of newspapers and news magazines, have begun to make various news or news-related products available in various on-line computer systems (which is sometimes referred to as cyberspace). And, on a number of the electronic systems now being utilized by traditional publishers, users/readers/subscribers can now provide their own input in the form of letters to the editor, comments to publishers, or responses in electronic discussion groups or on-line seminars.

One of the threshold issues in evaluating potential liability is whether the owner or operator of an electronic bulletin board will be considered a "publisher" or a "distributor" of the allegedly defamatory material. This distinction is crucial since distributors of written material (such as news vendors, bookstores, and libraries) are generally not liable for allegedly defamatory statements contained in publications they distribute, unless they know or have reason to know of the allegedly defamatory statements. See, e.g., Cubby, 776 F.Supp. at 139, 19 Med. L. Rptr. at 1527, and cases cited therein. Thus, if the owner or operator of an electronic bulletin board can convince a court that it should be considered a "distributor" rather than a "publisher,"[5] it has a good chance to prevail on a summary judgment motion early on in the case (or perhaps, as in Cubby, before any depositions have been taken).

The leading (and only published) decision directly addressing this issue is Judge Leisure's thoughtful opinion in Cubby. Cubby involved allegedly defamatory statements made available to the subscribers of CompuServe Information Service ("CIS"), an on-line electronic library which its subscribers could access from their own personal computers or terminals. Subscribers to CIS could gain access to more than 150 special interest forums containing different electronic bulletin boards, interactive on-line conferences, and the like. The allegedly defamatory material appeared in an electronic publication available through one of the forums relating to the journalism industry. This journalism forum was operated by Cameron Communications Inc. ("CCI"), which was independent of CompuServe, and had entered into a contract with CompuServe to manage, edit and otherwise control the contents of the journalism forum. The particular publication involved, Rumorville, was published and

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[5] Any media entity that is sued for defamation as a result of a message placed on an electronic bulletin board by a user or subscriber should consider arguing that it should be judged by an even more lenient standard -- that applicable to a common carrier. There are many useful parallels between the operator of an electronic bulletin board on the one hand, and the telephone company or an express mail service on the other. With the right set of facts -- and we emphasize that point -- this argument can be made persuasively. In view of the unformed state of the law, however, an attempt to push this theory on a bad factual record could result in a very dangerous precedent.

managed by Don Fitzpatrick Associates ("DFA"), which provided Rumorville to the journalism forum under a contract with CCI. DFA had no contract with CompuServe. The plaintiff sued CompuServe and DFA. It did not sue CCI.

In granting CompuServe's summary judgment motion (DFA did not move), Judge Leisure recognized the complete absence of any law directly on point and drew from analogous areas to determine the applicable legal principles. He reasoned that CompuServe performed precisely the same function as news vendors or libraries, and cited several cases applying New York law on this point. He also looked to the Supreme Court's ruling in Smith v. California, 361 U.S. 147, 152-53 (1959), striking down an ordinance that imposed liability on a bookseller for possession of an obscene book regardless of whether the bookseller had knowledge of the book's contents. Invoking both New York law and the First Amendment, Judge Leisure held that CompuServe was entitled to the application "of a lower standard of liability applicable to a public library, bookstore, and newsstand," and that therefore, CompuServe could not be liable unless "it knew or had reason to know of the allegedly defamatory Rumorville statements." 776 F.Supp. at 141, 19 Med. L. Rptr. at 1529. After finding that the plaintiff had failed to raise any genuine issue concerning CompuServe's knowledge, Judge Leisure dismissed the libel claim. He also dismissed the plaintiff's related claims for business disparagement and unfair competition on similar grounds.

In a discussion of some significance to managers of electronic bulletin boards, Judge Leisure also rejected the plaintiff's argument that CompuServe could be held "vicariously liable," concluding that neither CCI nor DFA "should be considered an agent of CompuServe." 776 F.Supp. at 143, 19 Med. L. Rptr. at 1531. Judge Leisure reached this conclusion because CCI, pursuant to the terms of its contract with CompuServe, had agreed to "manage, review, create, delete, edit, and otherwise control the contents" of the journalism forum and thus CompuServe had "delegated control over assembly of the contents" of the journalism forum to CCI. Id. Judge Leisure held that this "level of control is insufficient to rise to the level of an agency relationship." Id. Because the plaintiff did not sue CCI, there was no discussion of its potential liability.

While Cubby is a helpful case, it by no means addresses all of the publisher/distributor issues of interest to owners and operators of electronic bulletin boards. Indeed, in many ways, it raises more questions than it answers.

To obtain some of these answers, courts are likely to look, as Judge Leisure did, to analogous areas of the law. One such related area is defamation suits arising from live republication by a broadcaster of listener comments on call-in radio shows. The central question in these cases (when they involve public figures) is whether a radio station has

published listener comments with knowledge of their falsity or awareness of their probable falsity, if it fails to use an electronic delay system to screen callers' statements for allegedly defamatory material, and thereby broadcasts a defamatory statement which the broadcaster knows or believes to be false. The courts have apparently split on this issue: a Louisiana court holding that the broadcaster is liable; the courts of Utah and Wyoming holding that it is not. See generally R. Sack and S. Baron, Libel, Slander and Related Problems at 368 (2nd Ed. 1994).[6]

A related area involves the potential liability of television network affiliates for allegedly defamatory material prepared elsewhere and then broadcast by the affiliates without any editorial review. In Auvil v. CBS "60 Minutes", 800 F.Supp. 928, 20 Med.L.Rptr. (BNA) 1361 (E.D.Wash. 1992), the court granted a motion to dismiss filed on behalf of three Washington State CBS affiliates who had been joined in a defamation suit arising from a 60 Minutes broadcast concerning the use of Alar in the apple industry. The facts before the district court were that (i) the affiliates had exercised no editorial control over the broadcast, although they had the power to do so under the terms of their contracts with CBS; (ii) the affiliates had in the past occasionally censored programing; and (iii) the affiliates were in possession of the broadcast (and a memorandum setting forth in general terms the subject matter of the broadcast) three hours prior to air time. The court assumed for the purposes of its analysis that the affiliates had "published" the 60 Minutes program. It then held that under Washington law there is no liability for defamation absent fault. The court concluded that because there was no evidence that the affiliates knew or had reason to know of the allegedly defamatory character of the broadcast, there was no fault and thus no liability. In reaching this conclusion, the Court relied on decisions addressing the liability of other "conduits" of information (including the Cubby case) and touched on both First Amendment and policy concerns. In a particularly well-reasoned passage, the court rejected plaintiffs' argument that

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[6] Another potentially relevant area is lawsuits brought against print media publishers for statements that appear in their classified advertising sections. In the non-defamation context, the courts have discussed extensively the liability of Soldier of Fortune magazine for violent acts committed by persons who advertised their services in the magazine. Compare Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 20 Med. L. Rptr (BNA) 1777 (11th Cir. 1992), cert denied 113 S. Ct. 1028 (1993) (holding that the magazine could be sued for wrongful death based on the publication of a classified ad which listed an assassin-for-hire, and which led to a murder, where the Court determined that the classified ad, on its face, presented a clearly identifiable and substantial danger of harm to the public) with Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830, 16 Med. L. Rptr. (BNA) 2148 (5th Cir. 1989), cert denied 493 U.S. 1024 (1990) (no liability because the ad was not specific enough to indicate any illegal intent).

the affiliates were at fault because they had the power to censor the broadcast but chose not to do so:

> "plaintiffs' construction would force the creation of full time editorial boards at local stations throughout the country which possess sufficient knowledge, legal acumen, and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face $75 million dollars lawsuits at every turn. That is not realistic."

20 Med.L.Rptr. at 1363. We believe that this reasoning applies with considerable force to the operators of electronic bulletin boards.

In the absence of clear guidance from the courts, what steps can traditional media entities take to protect themselves against liability for allegedly defamatory statements uploaded onto an electronic bulletin board or other electronic media?

First, if the electronic bulletin board is owned, but not operated by the media entity itself, care should be taken to ensure that the contractual agreement between the media entity and the bulletin board operator contains appropriate provisions protecting the media entity. Based on the Cubby decision, it is important that the contract provide that the operator be solely responsible for the content of the publication. You may wish to consider including in the contract a further provision requiring the bulletin board operator to review the contents of the bulletin board on a regular basis to delete material known or believed by the bulletin board operator to be false and defamatory. While this is likely to give the traditional media entity additional protection, it is, for obvious reasons, likely to be resisted by bulletin board operators.[7]

Second, if the media entity does itself operate the electronic bulletin board, a decision needs to be made about whether to "police" for allegedly defamatory statements. As an initial matter, given the nascent state of the law, it is not at all clear that even an operator of a bulletin board should be held to be a publisher rather than a distributor. The answer to this question is likely to be tied very closely to the particular facts. For example, a court is more likely to hold the operator to be a publisher if the claim arises from an interactive seminar in which subscribers participate by uploading responses to specific questions posed by a moderator, than if it arises from a "bulletin board" on which thousands of subscribers'

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[7] Indemnification provisions (which should include the obligation to reimburse the costs of litigation) are, of course, always useful. You should also consider whose libel insurance, if any, is applicable, and how indemnification provisions can be used to reduce your insurance costs. If the indemnitor does not have sufficient assets to cover potential claims, consider a contractual provision requiring the indemnitor to obtain and maintain appropriate insurance.

comments are immediately posted and there is no real interaction between the operator and subscribers.

In the context of the on-line seminar, the operator can seek to protect itself in a variety of ways. For example, it can design the seminar so that subscriber comments are made available to other subscribers only after they are reviewed and approved by the moderator.

Outside the context of on-line seminar, it becomes extremely difficult, as a practical matter, to police effectively an electronic bulletin board. On many networks thousands of messages are posted in a very short period of time. Often, information is automatically re-transmitted from other bulletin boards or immediate responses and responses-to-responses to messages are posted. To seek to impose a general policing function on such a system (i) would be extremely expensive, (ii) would probably be unsuccessful, and (iii) could seriously interfere with the spontaneous and robust interchange that makes many of the on-line systems attractive to its users. In certain systems it is also not technologically feasible to screen messages before they are made generally available to subscribers.

In light of these points, for many of the broader-based electronic bulletin boards or on-line networks, establishing a policy of generally policing content for potentially defamatory material has serious risks. Once a media entity undertakes the task of generally reviewing, pre-clearing and/or editing subscriber messages, it is more likely to be characterized by a court as a publisher rather than a distributor (with the attendant lower standard of liability). If the policing effort is not successful in preventing defamatory messages, one serious layer of defense will have likely been abandoned.[8]

Even if a media entity adopts a general no-policing policy, if an allegedly defamatory statement is called to the attention of the media entity (e.g., by a user or subscriber who feels that he or she has been defamed), the prudent course in such a situation is promptly to remove the allegedly offending item and investigate the allegation. Care should be taken that the

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[8] Of course, in the event that the media entity is found to be a publisher rather than a distributor, the consequences of a no-policing policy could be severe. In cases in which a standard lower than that established by New York Times v. Sullivan applies, a plaintiff would surely argue that the deliberate decision not to review subscriber comments constitutes negligence or even gross negligence. Libel plaintiffs will also no doubt argue (in reliance on Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)) that such a policy suggests a "deliberate effort to avoid the truth." While there are persuasive responses to such arguments, the risks attendant upon establishing and following a policy that does not include the general editing and policing of subscriber comments should not be dismissed.

media entity not cross the line between responsibly addressing specific complaints about allegedly defamatory material and assuming a general editorial or policing function.[9]

Finally, where a media entity does not undertake general editorial duties, a disclaimer may be of some use. A disclaimer might state that: "subscriber comments on this [electronic bulletin board] are solely those of their authors and do not reflect any review or input by, or endorsement of, [the board operator]." Such a disclaimer may help to persuade a court that the operator should be treated as a distributor rather than a publisher. It may also be of use in an Ollman v. Evans analysis, allowing the media entity to urge that the "context" of the electronic bulletin board makes it analogous to that of a letter to the editor, thus, implicating a more lenient standard for determining whether the statement embodies a verifiable factual assertion.

[9] Since the media entity, if sued, will likely wish to move for summary judgment based solely on affidavits (with attached exhibits), consideration should be given to establishing a formal written policy setting forth the circumstances under which editing will and will not take place.