
FREE SPEECH ON THE LINE: MODERN TECHNOLOGY AND THE FIRST AMENDMENT

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The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.¹

In recent years, technological advances have created a new medium through which we can communicate known as Cyberspace.² Messages and information are sent between computer users over telephone lines, blurring the distinctions previously formulated between print and broadcast mediums. The speed at which technological advancements are being made in the communications industry has made it difficult for the legislative and judicial branches to determine exactly what protection computer speech warrants. Even if the government decides that regulating the flow of information across computer networks is constitutional, the vastness of the Cyber universe will allow users to easily circumvent any attempts made to censor or control communications. At present, there is no formal regulation of information or communications carried across Cyberspace. For the majority of on-line bulletin boards,³ self-regulation has thus far proven sufficient. However, more conservative groups have expressed concern that some users may be accessing the Internet to further their subversive agendas. Because of its anonymous character, potential for reaching mass audiences, and capacity to connect cohorts all over the world, the Internet appears to be a virtual playground for pedophiles and anarchists to roam, thereby creating a demand for increased regulation. Yet, a review of the legal standards used to determine the constitutionality of regulating speech

reveals that current standards are not applicable to computer-generated speech.

This Comment explores the level of First Amendment protection available to computer-generated speech. Part I introduces the reader to the Information Superhighway and the potential for communication offered to users. Part II explores the approach taken by the judiciary in developing permissible guidelines for First Amendment free speech regulation. Part III evaluates current judicial decisions and the effect on information exchanged through Cyberspace. Part IV analyzes the insufficiency of the current legal standards for determining free speech protection for computer-generated speech. This Comment concludes that if regulation is found to be warranted, new free speech guidelines are necessary to sufficiently protect the constitutional rights of computer users.

I. THE INFORMATION SUPERHIGHWAY

A. An Introduction to Cyberspace

There exists a vast realm of opportunity for the transportation of information and communications on what Vice President Al Gore has termed the Information Superhighway.⁴ The most competent users are young, knowledgeable, and highly skilled at maneuvering through Cyberspace. However, because of technological advances that provide easy access to all, computer networking has become a daily routine for many people. A computer, a telephone line, and a modem⁵ are all that is needed to get on-line.⁶

¹ Roth v. United States, 354 U.S. 476, 484 (1957).

² Most clearly defined, Cyberspace is where computer-mediated communications take place, such as exchanging messages and information, and accessing on-line services and data. Michael Bauwens, *What Is Cyberspace?*, *COMPUTERS IN LIBRARIES*, Apr. 1994, at 42, 42.

³ Computer bulletin boards receive, store, and transmit information between users. See Loftus E. Becker, Jr. *Liability of Computer Bulletin Board Operators for Defamation Posted by*

Others, 22 *CONN. L. REV.* 203, 203-04 (1989).

⁴ See Al Gore, *Networking the Future: We Need a National "Superhighway" for Computer Information*, *WASH. POST*, July 15, 1990, at B3.

⁵ Modem is short for modular-demodular, a device that transmits data across telephone lines. Eric Jensen, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 *FED. COMM. L. J.* 217, 217 n.1 (1987).

⁶ On-line is the term used to describe communications over

Rapid advancements in computer technology are drastically increasing the efficiency and speed of communication and information exchange. In Canada, for example, when a court imposed a gag order on the media to prevent potential jurors from learning the details of a confession made by an accused murderer's accomplice, computer users set up a newsgroup on a computer bulletin board service ("BBS") to post daily information.⁷ The police discovered the bulletin board and twice failed in their attempts to shut it down and keep information from being obtained on-line.⁸ Although the gag order remained in effect, BBS communications rendered it completely ineffective at preventing news, rumors, and hearsay from being disseminated.⁹

With minimal equipment, effort, and knowledge, an individual can access a seemingly unlimited amount of data. As computer communications currently remain unregulated,¹⁰ questions arise as to the appropriate level of First Amendment protection available for this medium of communication.

B. On-line Networking

On-line services, such as LEXIS and WestLaw,

telephone lines that link users either to each other or to a mainframe. See, Rosalind Resnick, *E-Mail Goes Female*, LADIES HOME J., May 1994, at 100, 100. A mainframe is the central processing unit of a computer. THE AMERICAN HERITAGE DICTIONARY 756 (2d ed. 1985).

⁷ Jon Weiner, *Free Speech on The Internet*, NATION, June 13, 1994, at 825, 825. The case involved a sex-torture-murder in which Karla Homolka and her husband, Paul Bernardo, were tried separately; Homolka pled guilty and implicated her husband. *Id.* The authorities imposed the gag order to prevent potential jurors from hearing Homolka's allegations. *Id.*

⁸ *Id.* When the Royal Canadian Mounted Police logged on to the second newsgroup, local access to the bulletin board was shut down. *Id.* Undaunted, users began posting information on other boards. *Id.*

⁹ Canadian officials even went so far as to ban and confiscate all copies of a magazine that contained a short piece on the story. *Id.* The magazine, however, made the article available over the Internet, eluding the government's attempts at stopping circulation of the information. *Id.* at 825-26.

¹⁰ The Federal Communications Commission ("FCC" or "Commission") found that enhanced services, those services considered not to be traditional common carrier communication services, were best left unregulated. See generally *In re Amendment of Section 64.702 of the Commissioner's Rules and Regulations, (Second Computer Inquiry), Final Decision*, 77 F.C.C.2d 384 (1980) (this proceeding focused on questions of regulation of advancing computer technology). However, Sen. Jim Exon of Nebraska has introduced a bill, the Communications Decency Act of 1995, aimed at the regulation of obscene and indecent computerized transmissions. S. 314, 104th Cong. 1st Sess. (1995).

¹¹ Commonly referred to as e-mail, it is the sending and re-

function in a manner similar to that of a textbook or other printed material, while other services provide users with access to electronic mail¹¹ or bulletin board services and function more as secondary distributors, similar to a library or bookstore.¹² The global network to which the majority of these services are interconnected is known as the Internet.¹³

The Internet, referred to as "the mother of all networks,"¹⁴ is the oldest and largest on-line computer network in the world.¹⁵ It is a "free space" that no one controls or owns.¹⁶ There is no center; rather, the Internet is comprised of smaller, computer-linked networks throughout the world that connect educational, governmental, and commercial sites to provide users with one-on-one and group interactions, information, and innumerable services.¹⁷ An individual can start a bulletin board service with a few hundred dollars, basic computer hardware, and a relatively small amount of computer knowledge.¹⁸ As a result, the subjects on which these message exchange systems carry information are limitless.¹⁹

The instantaneous communications that computer dialoging has made possible creates a new arena for communication. When *Newsweek* released a controversial cover story entitled *Men, Women & Com-*

trieving of documents, graphics, and programs from one computer to another. Carol L. Schlein, *Advice on data base programs and scanners*, NEW JERSEY LAWYER, Feb. 13, 1995, at 33.

¹² See generally Becker, *supra* note 3.

¹³ *Guide to the Ways and Words of Cyberspace*, TIME, Spring 1995, at 41, 41. As of spring 1995, more than 46,000 networks are interconnected through the Internet. *Id.*

¹⁴ Brian Livingston, *The Mother of All Networks*, PC-COMPUTING, Apr. 1994, at 180, 180. For additional background on the Internet, see generally Michael Antonoff, et al., *The Complete Survival Guide to the Information Superhighway*, POPULAR SCIENCE, May 1994, at 97 (describing the vast potential and current capabilities offered on the Internet).

¹⁵ See John Markoff, *Building the Electronic Superhighway*, N.Y. TIMES, Jan. 24, 1993, §3 at 6, 6 (the Internet links together over ten million users in 102 countries).

¹⁶ Weiner, *supra* note 7, at 825. There exist approximately 1.7 million host computers that allow access to 17 million users. *Id.*

¹⁷ See *Guide to the Ways and Words of Cyberspace*, *supra* note 13, at 41. See generally Livingston, *supra* note 14. Services available on-line include: electronic banking, chatting networks, shopping, television channels, video games, and interactive entertainment, among others. *Id.*

¹⁸ See generally Becker, *supra* note 3.

¹⁹ A variety of bulletin boards can be found by accessing Usenet newsgroups which are set up by subject matter ranging on topics from molecular biology to nude sunbathing. Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50, 53-54.

puters,²⁰ users jumped on-line to criticize the author's broad generalizations of men as power-obsessed individuals and women as needy and fickle dependents. One of the contributing reporters logged on to the Internet to defend the article, initiating an on-line discussion between author and reader.²¹ This type of debate and communication is essential in a democratic society that relies on an informed and educated populous.

The ease in which a BBS can be established and accessed, however, has facilitated the instance of abuse.²² Unfortunately, the media has focused on the abuse and the potential for the Internet to become a breeding ground for psychos, perverts, pedophiles and other societal outcasts,²³ rather than on the beneficial possibilities created by its increased use.²⁴ Although the potential for abuse exists, the positive impact of the Internet greatly outweighs the negative.²⁵

II. DEFINING THE LIMITS OF FREE SPEECH UNDER THE FIRST AMENDMENT

The First Amendment of the United States Constitution guarantees the freedom of speech and of the

press, as well as the right of the people to peacefully assemble.²⁶ A free exchange of ideas, unencumbered by censorship or threat of imprisonment, leads to the betterment of society.²⁷ Despite the importance of a free exchange of ideas in bringing about compromise and societal evolution necessary in a democratic society, the Supreme Court has found that freedom of speech is not an absolute right.²⁸

A. Exclusion of Obscenity from First Amendment Protection

Judicial attempts to create a clear test by which obscenity determinations may be based have produced an evolving standard. In 1957, the Court in *Roth v. United States*,²⁹ based on the presumption that obscenity is utterly without social importance, held the proper test of obscenity to be: "whether . . . the average person, applying contemporary community standards, [found] the dominant theme of the material taken as a whole appeals to a prurient interest."³⁰

However, nine years later in *Memoirs v. Massachusetts*³¹ in a plurality opinion³² the Supreme court

²⁰ Deborah Tannen, *Men, Women & Computers*, NEWSWEEK, May 16, 1994, at 48, 48.

²¹ Jon Katz, *Hackers 1, Media Elite 0*, N.Y. MAG., May 30, 1994, at 16, 16. One user involved in the on-line debate remarked:

It's strange to say but it was thrilling when she logged on. My heart really raced. Because I've often been angry at how the mainstream media covers the computer culture, but I've personally never had the chance to communicate directly with one of them before. And while nothing she said changed my mind about the article, it was great that she did it. Guts and class.

Id. at 19.

²² See *Pornography in the Global Community*, ST. LOUIS POST-DISPATCH, Aug. 18, 1994, at 6B (describing a California couple convicted in Tennessee on eleven counts of transmitting obscene material on their computer bulletin board). See also Philip Elmer-Dewitt, *supra* note 19, at 50. (describing a husband and wife law firm that offered their services on the Internet and were met by dozens of angry e-mail responses, including one user who sent in 1,000 phony requests for information each day).

²³ As of August 1994, three of the top ten bulletin boards were sex-related (alt.sex.stories, alt.binaries.pictures, and alt.sex) with between 200,000 and 400,000 readers each month. David Landis, *Sex, lies and cyberspace; Regulating porn: Does it compute?*, USA TODAY, Aug. 9, 1994 at 1D, 2D.

²⁴ Politicians, always eager for a new forum to disseminate their rhetoric, are making use of computer bulletin board systems, thus getting their message out to a greater percentage of the voting population. COMM. DAILY, Aug. 15, 1994, at 3.

²⁵ For example, a Virginia man logged on to the Christian Interactive Network and read what he perceived to be a suicide

note. Scott Bowles, *Cyberspace Rescue Prevents a Suicide*, WASH. POST, Oct. 12, 1994, at D1. Using the identification number posted with the note, he tracked down the author in Miami, Indiana and phoned local police. *Id.* The police found a man inside his closed garage with the car engine running. *Id.* Police rescued the man and rushed him to the hospital. *Id.*

²⁶ U.S. CONST. AMEND. I. The First Amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

²⁷ See *Roth v. United States*, 354 U.S. 476, 484 (1957) (stating that the First Amendment protections of free speech and freedom of the press were designed to foster an exchange of ideas in order to produce desired political and social change).

²⁸ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that "fighting words" are not protected by the Constitution); *Schneck v. United States*, 249 U.S. 47 (1919) (holding permissible the regulation of speech that presents a clear and present danger, such as shouting fire in a crowded theater).

²⁹ 354 U.S. 476 (1957).

³⁰ *Id.* at 489. The court in *Roth* upheld the validity of a federal statute preventing the mailing of obscene material, and a California statute criminalizing the keeping for sale or advertising of obscene material. *Id.* at 494.

³¹ 383 U.S. 413 (1966).

³² The Supreme Court in *Marks v. United States*, 430 U.S. 188 (1977), ruled that the "view of the *Memoirs* plurality . . . constituted the holding of the Court and provided the governing standards." 430 U.S. at 195. The standard includes the burden of showing the material is "utterly without redeeming social

held that there is not a presumption that obscenity lacks social importance.³³ In *Memoirs* the test was determined to be based on three factors: "(1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material is utterly without redeeming social value."³⁴ The *Memoirs* Court, rather than presuming obscene speech to be without social value, made the question of its value an element of the test.³⁵

Finally, in 1973, the Supreme Court in *Miller v. California*³⁶ established a three part test that permitted regulation without evaluating the social value of the material.³⁷ The criteria set out in *Miller* is as follows:

- (a) whether "the average person applying contemporary community standards" would find the work taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes in a patently offensive manner sexual conduct specifically defined by applicable state law; and (c) whether the work taken as a whole lacks serious literary, artistic, political or scientific value.³⁸

B. Applying Free Speech Protections to Different Mediums of Communication

1. Broadcast Speech

Broadcast speech has been distinguished from

other forms of speech, *inter alia*, because of its easy accessibility to children.³⁹ The Supreme Court has recognized that the power of broadcast programming, both radio and television, can invade the sanctity of the home of the unsuspecting listener.⁴⁰ The Court interpreted the First Amendment to provide only limited protection for indecent broadcast speech, making regulation permissible when the government can show a compelling interest.⁴¹ The Court has defined indecent speech as that which fails to conform with accepted standards of morality.⁴²

In *FCC v. Pacifica Foundation*,⁴³ the Supreme Court upheld the FCC's power to regulate a radio broadcast of material found to be indecent.⁴⁴ The Court stated that broadcast speech is entitled to the most limited First Amendment protection due to its unique ability to invade individual privacy and its easy accessibility to children.⁴⁵

However, where the government has not sufficiently tailored the regulation to the stated interest, the Court has refused to uphold restrictions. In *Action for Children's Television v. FCC*,⁴⁶ the FCC ordered a ban on the broadcast of indecent speech from six a.m. to midnight.⁴⁷ The Court found that this ban on constitutionally protected speech was too extensive, as it denied access to adults.⁴⁸ The best interest of children is a compelling government interest; however, regulation must be sufficiently tailored so as not to unnecessarily infringe on the rights of adults.⁴⁹

Regulation of broadcast programming has been justified based on the "scarcity rationale."⁵⁰ This ra-

value." *Id.*

³³ *Memoirs*, 383 U.S. at 418.

³⁴ *Id.* at 419.

³⁵ *Id.* The Court reversed the lower court decision because it did not independently weigh the social value of the material. *Id.* 413 U.S. 15 (1973).

³⁶ *Id.* at 24. The Court stated that the idea of "utterly without social value" had not been historically adopted. *Id.* at 24-5.

³⁷ *Id.* at 24.

³⁸ *Id.* at 24.

³⁹ See *In re A Citizen's Complaint Against Pacifica Foundation Station WBAI, Memorandum Opinion and Order*, 56 F.C.C.2d 94, para. 9 (1975). The Commission stated:

[b]roadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference . . . ; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.

Id.

⁴⁰ *Pacifica*, 438 U.S. at 748-49. The Court stated that prior

warnings were ineffective because listeners were constantly tuning in and out. *Id.*

⁴¹ *Id.*

⁴² *Id.* at 740.

⁴³ 438 U.S. 726 (1978).

⁴⁴ *Id.* at 739. The FCC identified several words used in an afternoon broadcast, to which children had access, to be "patently offensive" and therefore found the broadcast to be indecent. *Id.*

⁴⁵ *Id.* at 731.

⁴⁶ 11 F.3d 170 (D.C. Cir. 1993).

⁴⁷ *Id.* at 171.

⁴⁸ *Id.* at 176. The Court stated that the government failed to weigh the First Amendment interest of adult listeners in its designation of a safe harbor. *Id.* at 181.

⁴⁹ *Id.* at 182. The Court ordered the FCC to conduct a "full and fair hearing . . . to determine the times at which indecent material may be broadcast," if it intended to impose regulations. *Id.* at 183.

⁵⁰ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 369 (1969)(holding constitutional the "fairness doctrine" which requires broadcasters give equal coverage to all sides on public issues).

tionale stands for the proposition that the spectrum is a scarce resource with limited space.⁵¹ Regulation is vital to apportion this space to a fixed number of broadcast license holders.⁵²

2. Telephonic Communications

As previously stated, where the governmental interest is compelling and sufficiently tailored, the Court has allowed restrictions. In *Sable Communications of Cal. Inc. v. FCC*,⁵³ Sable brought suit seeking declaratory and injunctive relief against a recently amended statute imposing a ban on all indecent and obscene interstate commercial telephone messages.⁵⁴ The Court held that the statute, as amended, was not sufficiently tailored to serve the compelling government interest of protecting children from exposure to these messages.⁵⁵ The Court found that the service offered by Sable was different than broadcast radio where the audience is comprised of unsuspecting listeners.⁵⁶ Rather, the "dial-it" audience must take affirmative steps to access the messages, such as entering a credit card or access code.⁵⁷

C. Possession versus Dissemination of Obscene Material

Despite its decisions to allow the government to restrict obscene speech, the Supreme Court sustained an individual's constitutional right to possess obscene material in *Stanley v. Georgia*⁵⁸ by refusing to up-

hold a conviction based on an individual's private possession of obscene material.⁵⁹

In further defining the status of obscene matter in First Amendment jurisprudence, the Supreme Court in *United States v. Reidel*⁶⁰ upheld an indictment under the federal obscenity statute⁶¹ for a mailing of an illustrated booklet entitled "The True Facts About Imported Pornography."⁶² The Court differentiated between the right announced in *Stanley*, to view what one chooses in the privacy of his or her own home, and the asserted right in *Reidel* to deal in, distribute, and sell obscenity.⁶³ *Reidel* failed a constitutional challenge because it was not founded on a right to privacy or free expression.⁶⁴ The Court refused to find a right to deal in obscenity as basic to the First Amendment freedom of expression.⁶⁵

III. JUDICIAL TREATMENT OF ON-LINE INFORMATION AND COMMUNICATION

A. Sex On-line

With the advent of increased computer dialoging, free expression claims regarding obscene computer speech have been brought under judicial scrutiny. In New York, a hacker made use of a computer bulletin board system to contact boys between the ages of twelve and fifteen.⁶⁶ Once the boys responded, the hacker, Timothy Poplaski, would telephone the boys, attempt to hypnotize them, and instruct them to masturbate.⁶⁷ Poplaski claimed that NY Penal Law § 260.10(1)⁶⁸ violated his right to free speech.⁶⁹ The

⁵¹ *Id.* at 396-97.

⁵² *Id.* at 400.

⁵³ 492 U.S. 115 (1989).

⁵⁴ *Id.* at 117-18. Sable was engaged in a "dial-a-porn" business that provided sexually-oriented prerecorded telephone messages. *Id.*

⁵⁵ *Id.* at 131. The complete ban on indecent phone messages far exceeded the need to prevent exposure to minors. *Id.*

⁵⁶ *Id.* at 128. See also *A Citizens Complaint*, *supra* note 39.

⁵⁷ *Id.* at 128. The FCC has found that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors." *Id.*

⁵⁸ *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

⁵⁹ *Id.* at 568. Pursuant to a search warrant for evidence of alleged bookmaking activities, federal and state agents found three reels of eight millimeter film in the defendant's home. *Id.* at 556. The agents viewed the films at the defendant's home, determined that the material was obscene, and arrested the defendant for violating state law. *Id.* at 558. The arrest was based on GA. CODE ANN. § 26-6310 (Supp. 1968), reprinted in *Stanley*, 394 U.S. at 558-59 n. 1, which states in relevant part:

[a]ny person . . . who shall knowingly have possession of .

. . . any obscene matter . . . shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years . . .

. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion.

⁶⁰ 402 U.S. 351 (1971).

⁶¹ Section 1461 of Title 18 of the United States Code declares as nonmailable "every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance;" and that "[w]hoever knowingly uses the mails for [such] mailing . . . shall be fined not more than \$5,000 or imprisoned not more than five years." 18 U.S.C. § 1461 (1988).

⁶² *Reidel*, 402 U.S. at 353.

⁶³ *Id.* at 356-57.

⁶⁴ *Id.* at 357.

⁶⁵ *Id.*

⁶⁶ *People v. Poplaski*, 616 N.Y.S. 434, 436 (Dist. Ct. 1994).

⁶⁷ *Id.*

⁶⁸ *Id.* at 438. NY PENAL LAW § 260.10(1), reprinted in

court found the New York legislature's intent to protect the health, morals, and safety of children to be a compelling government interest.⁷⁰ The court indicated that "restrictions on the defendant's right to have sexually explicit conversations with children is not constitutionally guaranteed."⁷¹

In July 1994, a Tennessee court convicted two system operators of distributing pornography via interstate telephone lines.⁷² Robert and Carleen Thomas operated a computer bulletin board system that carried files featuring adults engaged in scenes of bestiality and other sexual fetishes.⁷³ Only paying members could access these files.⁷⁴ The Thomases operated their bulletin board out of their California home; however, they were tried and convicted in Memphis, Tennessee. The charges against them arose when a Tennessee postal worker joined "Amateur Action" under a fake name, received sexually explicit images on his computer, and complained.⁷⁵

This case alarmed many system operators because the Thomases were prosecuted in the community where the material was received rather than where it originated.⁷⁶ The material was found to be obscene based on the contemporary community standards of Memphis, Tennessee, not California where the couple originally published the material.⁷⁷ Advances in computer technology and electronic communication have altered the definition of community. If the courts are to permit convictions for on-line obscenity in remote, conservative locations within the United States, a new test needs to be established as a matter of fundamental fairness. The use of "contemporary community standards" is not applicable to the global Cyber community.

B. Anarchy On-line

Free speech questions also arise when the information exchanged is not obscene. In West Hartford, Connecticut, a young man was arrested for operating a bulletin board service containing a file that provided bomb-making instructions and advice on how to bomb law enforcement agents.⁷⁸

Police charged twenty-one year old Michael Elansky with inciting injury to persons or property, and risk of injury to a minor.⁷⁹ Judge Richard A. Damiani set bail at \$500,000, an amount usually reserved for violent and extremely dangerous offenders.⁸⁰

Detailed "recipes" found on the bulletin board provided instruction on how to construct a variety of bombs and explosives, including pipe bombs, grenades, plastic explosives, and smoke bombs.⁸¹ Elansky's attorney asserted that *The Anarchist Cookbook* could be purchased for approximately twenty dollars at a local book store.⁸² Moreover, his attorney pointed out the fact that the United States government published books containing more detailed instructions regarding explosive devices that may be obtained at any military surplus store.⁸³

If a print publisher is permitted to print and report information that is available to the public, then a computer systems operator should not be denied that same freedom. The information that Michael Elansky published was not classified; indeed, it was freely available to the public at large. Denying him the right to publish the information was a violation of his rights.⁸⁴

Unfortunately for First Amendment scholars, Michael Elansky did not get his day in court on the charges stemming from the operation of his com-

Poplaski, holds an individual guilty of endangering the welfare of a child if he or she "knowingly acts in a manner likely to be injurious to the physical, mental, or moral welfare of a male child less than seventeen years old".

⁶⁹ *Poplaski*, 616 N.Y.S.2d at 436.

⁷⁰ *Id.* at 437.

⁷¹ *Id.*

⁷² *Couple Guilty of Sending Pornography by Computer*, L.A. TIMES, July 29, 1994, at A10.

⁷³ *Id.*

⁷⁴ The Thomases ran their "Amateur Action" bulletin board out of their home in Milpitas, California. Landis, *supra* note 23, at 1D.

⁷⁵ *Id.*

⁷⁶ A Phoenix BBS operator posted a notice denying members from other states access to its adult file section "until further notice" following the verdicts. Naaman Nickell, *Obscenity Convictions Raise Fears on Bulletin Boards*, ARIZ. REPUBLIC, Aug. 8, 1994, at E3.

⁷⁷ *Id.*

⁷⁸ Matthew Kauffman, *West Hartford man may get 3-year term in bomb recipe case*, HARTFORD COURANT, Oct. 23, 1993, at B7. The BBS contained files with excerpts from "The Anarchist Cookbook," a book that contains instructions for making bombs and explanations on how to blow up bridges and booby-trap doors. *Id.*

⁷⁹ Steven G. Vegh, *Man Faces Charges Over Bomb-Making Recipe*, HARTFORD COURANT, Aug. 3, 1993, at B5.

⁸⁰ Matthew Kauffman, *Student, on probation for making bombs, sent back to jail*, HARTFORD COURANT, Aug. 7, 1993, at B5. In response to a motion requesting a reduction, Judge Damiani stated, "I think he's more of a danger to society than a rapist in prison." *Id.*

⁸¹ John M. Moran, *Free speech and computers central to bomb-recipe case*, HARTFORD COURANT, Sept. 27, 1993, at A1.

⁸² Kauffman, *supra* note 78, at B7.

⁸³ *Id.*

⁸⁴ See *United States v. Progressive, Inc.*, 486 F.Supp. 5 (W.D. Wis. 1979).

puter bulletin board. The Ionizer, as he is known on-line,⁸⁵ opted instead to plea bargain.⁸⁶ Elansky admitted to two probation violations in exchange for the prosecutor's guarantee that he would get no more than three years in jail⁸⁷ and an agreement to drop the charges relating to the BBS.⁸⁸

A BBS allows other users to download files onto a board without the consent or even knowledge of the operator, therefore a system operator has even less control and opportunity to edit than a publisher.⁸⁹ The most disturbing part of Elansky's original indictment on the computer bulletin board related charges is that he did not create the files that were retrieved from his BBS.⁹⁰ The files were created by Lucas Benfey, who operated under the *nom de plum*, Deth Vegetable.⁹¹ Furthermore, it would be impossible for Elansky to edit all of the information that other users added to the board.⁹² Users logon to a system and are free to download or retrieve data without submitting to any control or input by the operator.

C. Liability of System Operators On-Line

The issue of on-line service providers' liability was first addressed in *Cubby, Inc. v. CompuServe Inc.*⁹³ CompuServe Inc. provides an on-line information service called CompuServe Information Service

("CIS").⁹⁴ CIS is an electronic library accessible by computer to individuals who pay a membership fee and an on-line usage fee.⁹⁵ Users have access to more than 150 forums consisting of electronic bulletin boards, interactive on-line conferences, and topical databases.⁹⁶ The Journalism Forum is run by Cameron Communications Inc. on a contractual basis with CompuServe, Inc.⁹⁷ Cameron Communications manages, edits, creates, deletes, and reviews Journalism Forum files.⁹⁸ CompuServe does not have the opportunity to review information carried on the Journalism Forum.⁹⁹

Cubby Inc. filed suit against CompuServe Inc. based on alleged defamatory statements found on "Rumorville," a daily newsletter provided on-line on the Journalism Forum.¹⁰⁰ CompuServe claimed it was acting as a distributor, not as a publisher.¹⁰¹ The Court agreed with CompuServe and granted its motion for summary judgment.¹⁰² Distributors of printed matter, such as vendors and bookstores, are not liable if they can show they neither knew, nor had reason to know of the defamation contained in the materials they distribute.¹⁰³

In another case involving the liability of a systems operator, a student from Massachusetts Institute of Technology was indicted on federal charges for managing a BBS used to distribute copyrighted software.¹⁰⁴ The government charged David

⁸⁵ Moran, *supra* note 81, at A1.

⁸⁶ Kauffman, *supra* note 78, at B7.

⁸⁷ Elansky was sentenced to 28 months in jail, plus five years probation, for violation of his probation resulting from previous charges involving explosives and illegal credit card use, and for conspiring to burglarize chemicals from the science lab at Hall High School in West Hartford. John M. Moran, *Interest in explosives nets 28-month term*, HARTFORD COURANT, Nov. 20, 1993, at B7.

⁸⁸ John M. Moran, *Family says incarcerated man is not dangerous*, Family Says, HARTFORD COURANT, Nov. 2, 1993, at C7.

⁸⁹ Users post and retrieve information directly; systems operators do not have the opportunity to review files before they are posted.

⁹⁰ Kauffman, *supra* note 78, at B7.

⁹¹ See Moran *supra* note 81, at A3; see also Mike Gordon, *Computer data can be dangerous*, GAZETTE, Dec. 20, 1993, at A1. Benfey, the original author of the files, came forward when he learned that three teens in Laval, Canada accessed a BBS, and retrieved a "recipe" that contained the ingredients and directions for constructing a pipe bomb. *Id.* The boys followed the instructions and constructed a bomb that subsequently blew up in their hands. *Id.* One boy lost two fingers and another lost a part of his finger. *Id.* Benfey was 15 years-old when he created the program by copying recipes from a college level chemistry text book. *Id.* at A8. According to Canadian officials, no remedy exists against Benfey because it is not forbidden to publish pub-

licly available information. *Id.*

⁹² Vegh, *supra* note 79, at B5.

⁹³ 776 F. Supp. 135 (S.D.N.Y. 1991).

⁹⁴ *Id.* at 137.

⁹⁵ *Id.* CIS serves as a general on-line information service. *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* The Journalism Forum is one of CIS's special-interest forums targeted at the journalism industry. *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* CompuServe cannot view files before they are uploaded onto its computer banks. *Id.* Once uploaded, files are available immediately to subscribers. *Id.*

¹⁰⁰ *Id.* at 138. In 1990, Cubby Inc. developed "Skuttlebut," a database aimed at publishing news and gossip relating to the television and radio industry, with the intent of competing with "Rumorville." *Id.* Cubby Inc. claims "Rumorville" published false and defamatory information about the designers of "Skuttlebut" and that CompuServe carried these remarks as part of the Journalism Forum. *Id.*

¹⁰¹ *Id.* As a distributor, CompuServe could not be held liable, as it did not know and had no reason to know of the statements. *Id.*

¹⁰² *Id.* at 137.

¹⁰³ *Id.* at 140-41. Any other holding would effect an undue burden on the free flow of information and violate the purpose behind the First Amendment. *Id.* at 140.

¹⁰⁴ *United States v. LaMacchia*, 871 F.Supp. 535 (D.Mass. 1994).

LaMacchia with conspiracy to commit wire fraud¹⁰⁵ based on his operation of a computer bulletin board that allowed users to download copyrighted word-processing software.¹⁰⁶ Users could access the BBS over the Internet.¹⁰⁷ The only claim against David LaMacchia was that he maintained the BBS, knowing it facilitated the illegal distribution of copyrighted software; LaMacchia did not post, download, or even profit from the software found on the BBS.¹⁰⁸ LaMacchia maintained that he was only a distributor, and thus was no more liable than a bookstore owner who supplies information that is later used illegally by others.¹⁰⁹

Computer users maintain that the bulletin board merely facilitates the exchange of information and therefore, the information found there should be constitutionally protected speech.¹¹⁰ If the Court applies its holding of *CompuServe* to all system operators, criminal liability should not attach to individuals such as Michael Elansky or David LaMacchia. In fact, the District Court held that LaMacchia's conduct did not violate the wire fraud statute and therefore, granted his motion to dismiss.¹¹¹

IV. THE FUTURE OF FIRST AMENDMENT JURISPRUDENCE IN CYBERSPACE

A. User Liability On-line

One case in which authorities are attempting to

¹⁰⁵ *Id.* at 536. There is no statute specifically covering LaMacchia's actions. *Id.* at 545.

¹⁰⁶ Stephanie Stahl, *Highway Robbery?* INFO. WK. Apr. 25, 1994, at 17, 17. The BBS contained Microsoft Excel and WordPerfect. *Id.* It is reported that software companies lose approximately 12 billion dollars per year due to computer piracy. *Id.* In 1992, after extensive lobbying efforts, Congress finally passed legislation making software piracy a felony. *Id.*

¹⁰⁷ LaMacchia used MIT computers to connect to the Internet. Gary H. Anthes, *Piracy on the rise; companies fear liability; MIT case highlights user vulnerability*, COMPUTERWORLD, Apr. 18, 1994, at 12.

¹⁰⁸ *LaMacchia* 871 F.Supp. at 536-37.

¹⁰⁹ Anthes, *supra* note 108.

¹¹⁰ Counsel for the Washington-based Electronic Frontier Foundation are diligent watchdogs of government attempts to circumvent constitutionally guaranteed civil liberties. Joan H. Lowenstein, *How Free Is Speech In Cyberspace?* CHI. TRIB., Mar. 12, 1995, at C1.

¹¹¹ *LaMacchia* 871 F.Supp. at 545. The Court stated that in order to punish those who illegally copy and distribute copyrighted software, statutes must be modified to permit prosecution without a showing of financial gain. *Id.*

¹¹² Lowenstein, *supra* note 110, at C1. Baker's story was found on the alt.sex.stories user group. *Id.*

¹¹³ Megan Garvey, *Crossing the Line on the Info Super-*

impose criminal liability on a BBS user involves a University of Michigan student, Jake Baker, who played out a rape-torture-murder fantasy in Cyberspace.¹¹² Baker has been charged with transmitting threatening communications over state lines.¹¹³ Baker's fantasy is not the most horrific tale found on-line, however, he did make one grave mistake, he gave the victim the name of a female classmate.¹¹⁴ Baker was held without bail for almost a month before a federal judge released him on his own recognizance.¹¹⁵

The controversy has people up in arms on both sides of the issue. Senator Jim Exon has used the arrest to raise support for the Communications Decency Act of 1995 proposed to regulate the transmission of obscene and indecent speech through Cyberspace.¹¹⁶ Users have responded with a letter-writing campaign and petition, in an attempt to stop the bill and preserve the right to free speech on the Internet.¹¹⁷ A major problem with the bill is that it censors more than just sexually explicit stories. Rather, its passage could make all telecommunication providers liable for messages that are transmitted over their networks.¹¹⁸ The Act would require regulation of everything from public postings to private e-mail messages.¹¹⁹

B. Balancing the Interest of the Government with

highway, WASH. POST, Mar. 11, 1995, at H1. The charge only requires a showing that Baker intended to issue a threat to a third party, not that he could or would carry out the threat, nor does it require he make a direct threat. *Id.*

¹¹⁴ John Schwartz, *Sexually Explicit Story Sparks Debate Over On-line Rights*, WASH. POST, Feb. 27, 1995, at 20. Baker was found out when an alumnus in Moscow discovered the story and alerted University officials. Garvey, *supra* note 115, at H1.

¹¹⁵ *Id.* The judge's decision came after two judicial colleagues and the 6th Circuit Court of Appeals in Cincinnati had ruled the streets would be safer with Baker behind bars. *Id.*

¹¹⁶ S. 314, 104th Cong. 1st Sess. (1995). The Act would subject individuals transmitting such speech to penalties of up to \$100,000 in fines and two years in prison. S. 314, 104th Cong. 1st Sess. § 2(b)(1) and (2) (1995). Sen. Exon claims his intent is to make the Information Superhighway safe for users, young and old. Marco R. della Cava, *Users abuzz over Internet obscenity bill*, USA TODAY, Mar. 7, 1995, at 1D.

¹¹⁷ *Id.* Jerry Berman of the Center for Democracy and Technology stated that users want the freedom of speech guaranteed by the First Amendment. *Id.*

¹¹⁸ Schwartz, *supra* note 114, at 20.

¹¹⁹ *Freedom of speech guaranteed in cyberspace too*, USA TODAY, Mar. 9, 1995, at 10A. Enforcement of the proposed standards would force on-line service providers to constantly invade the privacy of their subscribers. *Using existing laws to rid*

the Constitutional Rights of Users

When computer bulletin board services are utilized as a means of promoting criminal or dangerous behavior, particularly that found to endanger the safety of children, there is a compelling government interest in providing protection from any form of harm. In formulating such regulations and policies, however, legislators and adjudicators must carefully choose the manner in which they will proceed to determine what will constitute permissible regulation of transmissions across computer networks.

On-line services are capable of linking users on opposite sides of the world, thus making the test established in *Miller*,¹²⁰ that obscenity be determined by "contemporary community standards," technically ineffective. The Court must re-examine not only the definition of obscenity, but also the free speech parameters that exist for CyberSpeech, specifically when a BBS is accessible only to paying customers.

The FCC has found that credit card and access code rules are sufficient to protect children from indecent messages.¹²¹ As access to bulletin boards may be limited, users argue that governmental intervention is unnecessary. A BBS can prevent access to children by requiring users to pay a fee or provide proof of age or a credit card number before allowing access. Furthermore, computer dialogue does not invade the home and disrupt the unsuspecting individual whom the Court was concerned with in *Pacifica*.¹²² A user must take the affirmative steps of subscribing to a service, paying a service fee, and offering proof of age in order to access a bulletin board system or other on-line service. Consequently, one cannot argue that he or she has not received prior warning.

Individuals such as Carleen and Robert Thomas should not be facing fifty years in prison for carrying explicit pictures on a paying-members only BBS. The current ruling on this issue gives prosecutors great latitude to forum shop for the most conservative jurisdictions to assure a higher number of convictions. A determination must be made as to what extent system operators may be held liable. Arguments to hold system operators liable as publishers are not persuasive. An individual running a BBS does not have the opportunity to edit, delete, or alter information that is loaded onto a board, whereas a traditional publisher of printed matter has an opportunity to exert control over the material before it is

released to the public. A better argument is to hold system operators liable as secondary distributors, such as print retailers or libraries that have no control over the editing of the actual product they distribute, but rather only have control over granting access to the product.

V. CONCLUSION

Different forms of speech have received different treatment under the First Amendment. Printed matter, such as that found in books and magazines, has received the greatest First Amendment protection, and it has been asserted that electronic communications are entitled to the same degree of protection. If an individual can obtain information from a book in a library, that same information should not be treated differently when found on a computer bulletin board. The framers of the Constitution adopted the First Amendment to facilitate and promote the free expression and exchange of ideas and information. Communication, when accessed on a home computer, should not be subjected to lesser First Amendment protection.

Cyberspace communication presents legislators and adjudicators with a new realm of First Amendment issues. The potential for beneficial as well as detrimental uses of advanced technology creates innumerable challenges to existing legal standards. A community is no longer a cluster of individuals found within a ten mile radius, rather, computer communities include members from different towns, states, and countries. Defining contemporary community standards is a practical impossibility in Cyberspace. Furthermore, the printed word is no longer found exclusively on paper. The printed word now travels across computer lines, potentially into homes throughout the world. Yet it is difficult to support an argument based on an invasion into the sanctity of the home, when the user must initiate the communication.

An understanding of the capabilities of technical advancements is essential for Congress and the courts to effectively determine if regulation of CyberSpeech is even warranted. Whatever the legal outcome, hackers will continue to mobilize on-line to share information, state opinions, and debate both frivolous and important issues, bringing about the debate and compromise that is an integral part of democratic society.

the Internet of obscenities, USA TODAY, Mar. 13, 1995, at 14A.

¹²⁰ 413 U.S. 15 (1973).

¹²¹ See 492 U.S. 115 (1989).

¹²² 438 U.S. 726 (1978).

