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Legally Speaking

They Shoot Internet(s), Don't They?

Column Editor: Glen M. Secor (YBP, Inc.)

Libel and Obscenity in Cyberspace: the Prodigy and AA-BBS Cases

Many have likened cyberspace to that great frontier of the previous century, the American Wild West. Like the Wild West, the Internet is expansive, fairly unstructured, and brimming with possibilities. The Internet has its pioneers and cowboys. Flame wars are shootouts with keyboards instead of six-guns. Newbies are greenhorns.

Some also find in cyberspace a sense of lawlessness not unlike what we imagine existed in the Wild West. This is where the analogy begins to fail. You see, cyberspace, unlike the early western territories and states, is lacking in neither

laws nor lawmen. We may be a bit confused now about how to apply our laws to some of what happens online, but make no mistake that the laws apply and that the police presence is high in cyberspace. We may not have the bandwidth to rustle cattle, but we can do all sorts of things online that will bring lawsuits and prosecution, as the following news items disclose.

Prodigy sued for libel

This case, which has received some press as of this writing and which will no doubt have been widely reported by the time this column is published, appears to be the big online service provider liability case that lawyers and industry experts have been anticipating. Someone posted some very unkind remarks about Stratton Oakmont, Inc., a New York investment bank, in a Prodigy discussion group, accusing Stratton Oakmont and its president of criminal fraud. The post appeared on October 23 of this year and allegedly remained on the system for 19 days. The poster, whose identity has not yet been determined, used a dormant identification number of someone who had worked at Prodigy three years ago to gain online access. The Prodigy ex-employee, under whose name the defamatory post was made, has apparently been cleared and is due to be released from the suit.

Stratton Oakmont is suing for \$200 million, including \$100 million in punitive damages. Out of the potential defendants, Prodigy is certainly the one with deep pocket, being jointly owned by IBM and Sears, Roebuck. Stratton Oakmont is arguing that Prodigy has a duty to screen posted messages for defamatory remarks. They further charge that Prodigy was negligent for allowing a hacker to access the ex-employee's old identification number.

From a legal liability standpoint, the issue here is whether Prodigy is a common carrier, simply passing communications along like the phone company, or a private information provider, with responsibility for what appears on its system. Is Prodigy like a bookstore or newsstand, as CompuServe was found to be in a 1991 libel case (*Cubby v. CompuServe, Inc.*, 776 F. Supp. 135 (1991)), or is it more like a publisher, with editorial responsibility and accountability. That Prodigy does do scanning of posted messages, using software to delete posts with profane or offensive language, indicates that they are more than a mere conduit for online communications. Yet,

using software to scan for certain dirty words is a bit different than scanning messages for potentially libelous statements. The latter involves a great deal of judgment and probably a tremendous commitment of labor, given that more than 75,000 messages are posted to more than 1,000 Prodigy boards each day.

And what of free speech in cyberspace? Would not massive screening and censoring by online service providers dampen the free exchange of ideas and information that many believe are the *raison d'être* of the Net? This is a profound case for all information providers and Net users.

In *Cubby v. CompuServe*, CompuServe's liability, like that of a bookstore or newsstand, was limited to instances in which "it knew or had reason to know" of an allegedly libelous statement and failed to take appropriate action. My guess is that a court would be reluctant to impose on Prodigy and other service providers an obligation to screen all message postings for defamatory statements (or statements constituting hate crimes or civil rights violations, or threats upon other people, or . . .), and that the "knew or should have known" standard will be applied in this case. Unless Prodigy actually knew or should have known of the post in question (i.e. if a user had notified Prodigy of a problem in that particular board, with or without specifying the content of the allegedly defamatory message), or unless they are found to have been negligent in leaving the door open for the hacker who posted the message, I will be surprised if Prodigy is found liable.

Then again, I am constantly surprised by the outcomes of trials, so hold off on placing your bets on this one.

(Primary source: "Prodigy Case May Solve Troubling Liability Question" by Matthew Goldstein in *The National Law Journal*, Dec. 19, 1994, p. B1).

California BBS operators convicted of obscenity violations in Tennessee

BBS busts seem to come weekly these days, but this case has caused a firestorm among cyber libertarians. Robert and Carleen Thomas, operated the Amateur Action BBS from Milpitas, CA. After a postal inspector in Memphis, TN downloaded certain images from the AA BBS, and after this same inspector mailed a kiddie porn tape to Mr. Thomas, the Thomases were arrested for distribution of obscene material and receipt of child pornography. The child pornography charge did not stick, as the Thomases had not requested that material and were unaware of its shipment until they received it, but the couple was convicted in U.S. District Court on the obscenity charges. On Dec. 2, Mr. Thomas was sentenced to 3 years and a month in prison, while Mrs. Thomas received two-and-a-half years.

Obscenity, as you may know, is a legal standard amazingly devoid of definition, but is supposed to be based upon community standards. Here, the images were downloaded from a database in California to a computer in Tennessee. The trial took place in Tennessee, using the standards of the community in Tennessee to define obscenity. One supposes that the prosecution could have taken place in any of the fifty states, so long as that state is where the images were downloaded. This is an important fact for BBS operators and online information providers: where obscenity is concerned, prosecution can take place anywhere in the U.S., according to the standards of that community.

I make no case here for the fairness or unfairness of the Thomases' convictions and sentences. Rather, I simply point out

the difficulty of fitting existing legal standards and practices, in this case the geography-based community standards test in obscenity cases, into a world of national and international data networks. If this had been a traditional printed obscenity case, at least the Thomases would have taken the affirmative step of mailing the offending materials to Tennessee. Even sending the materials in an email-type transaction to a recipient whose system the sender knows is in Tennessee would be a more positive step than the one taken. A user in Tennessee downloading the files from a database in California does not strike me as the same type of affirmative step by the database owner to distribute the materials in Tennessee.

One other possible "community," in addition to California and Tennessee, exists here — the community of online users who utilize the Internet and BBSs. Perhaps this community is too amorphous to have "standards" which could be used in obscenity cases or other trials, but is that not truly the community whose standards should be used to judge the appropriateness of what is online? Perhaps geographic definitions of "community" are not the most useful in judging acts committed in cyberspace.

For more information on the AA-BBS case, and on the law and civil liberties in cyberspace generally, I refer you to the **Electronic Frontier Foundation's** database of publications at: ftp.eff.org/pub/EFF/Legal/ or gopher.eff.org, 1/EFF/Legal or <http://www.eff.org/pub/EFF/Legal/>.

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