

**DISPARAGEMENT AND MISINFORMATION  
ON THE INTERNET: LITIGATION REMEDIES**

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**CLE International  
April 19-20, 2001 (Dallas)  
May 17-18, 2001 (Houston)**

## DISPARAGEMENT AND MISINFORMATION ON THE INTERNET: LITIGATION REMEDIES

### I. EXAMPLE SCENARIOS

- A. Product Statements.** Every company has some disgruntled customers. The Internet, however, has made it far easier for those customers to reach a wide audience with their complaints. Chat rooms, bulletin boards, message boards and other public areas of web-sites provide forums for a customer's revenge. Disgruntled customers may post commentaries about the performance of a company's product or service. These statements may range from mere opinion about why the customer does not like the product or service (*e.g.*, "I don't like the way XYZ Company's product counts widgets") to outright false statements (*e.g.*, "The widgets made by ABC Company cause cancer").
- B. Company Statements.** Frustration and complaints are not the sole province of disgruntled customers; companies often find that they are the target of an employee's or ex-employee's derision. These current or former employees might post defamatory comments in chat rooms devoted to that company's stock. These defamatory comments may range from personal attacks on an officer or director (*e.g.*, "The CFO is embezzling funds from the company") to attacks targeted directly at the company (*e.g.*, "ABC Corporation is infringing the patent of XYZ Corporation").
- C. "Sucks Sites."** If you are a well known company, a prominent dot.com, a celebrity, or a politician, chances are you are already the target of a "sucks site." The formula for a "sucks site" is an easy one: start with a recognized name or trademark, add the word "sucks," and end with dot.com. Popular examples include: aolsucks.com; disneysucks.com; chasebanksucks.com.<sup>1</sup> Not surprisingly, these sites provide a forum for ex-employees, customers, and other generally disgruntled people to vent their frustrations about you or your company. ("Sucks sites" are discussed in more detail in Section V below.)
- D. Watch Dogs.** On the Internet, the bar to publication is extremely low. Anyone with a computer can create a newsletter and distribute it electronically. Self-styled electronic crusaders keep a solitary vigil for "snake-oil salesmen on the electronic frontier."<sup>2</sup> However, these on-line lone rangers often go too far and cross the defamation line. In one case, a company was described as "nothing more than a shell company for a direct mailing scam."<sup>3</sup>
- E. Reverse Defamation.** Imagine a scenario in which an anonymous person makes you the victim of a vicious on-line hoax. This person finds a bulletin board, posts offensive messages, and signs your name to those messages including your address and phone number. Not only does he give

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<sup>1</sup> While there are some variations on the "sucks site" theme (*e.g.*, etradestinks.com), "sucks" appears to have become the preferred site for vitriolic speech. Perhaps the analogy goes something like this: "sucks" is to dot.com as "stinks" is to dot.net and dot.org.

<sup>2</sup> Jared Sandberg, Newsletter Faces Libel Suit for "Flaming" on the Internet, *Wall St. Journal*, April 22, 1994 at B1.

<sup>3</sup> *Id.*

out your personal information, but also he encourages everyone reading the offensive message to respond directly to you.<sup>4</sup>

## II. ACTIONABLE TORTS

### A. Defamation

Common law courts have recognized claims for defamation since the sixteenth century.<sup>5</sup> Defamation includes both the torts of libel and slander. While libel is written defamation, slander refers to oral defamation. Though both forms can exist on the Internet—the prevalence of sound and video transmission over the net is ever increasing—libel is still the most significant form of defamation on the Internet as most information is presented in text format.

#### 1. Elements at a Glance<sup>6</sup>:

- a. *Falsity*: a false and defamatory statement concerning another;
- b. *Publication*: an unprivileged publication to a third party;
- c. *Fault*: if the defamatory matter is of public concern, fault amounting at least to negligence on the part of the publisher;
- d. *Harm*: damage to the reputation of the plaintiff, whether actual or presumed by law.

**It is especially significant in the cyberspace context that under traditional principles of libel law, a “republisher” who repeats a libelous statement that was first made by someone else may itself be liable for the defamation. However, this principle is considerably tempered by the protections provided to Internet service providers (“ISPs”) under the Communications Decency Act. This is discussed in more detail below.**

#### 2. Falsity

- a. *Truth as a Complete Defense*. Defamation allows recovery for **unfair** damage to reputation. As a consequence, if true statements are made about a person which damage their reputation, they cannot maintain a lawsuit. **Truth is a complete defense to a defamation claim. This is simply the flip side of the requirement that plaintiff prove the falsity of the alleged defamatory statement.**
- b. *Historical Origins*. This is a relatively recent development. One origin of libel and slander laws was a criminal cause of action by the English Crown used to silence its critics; hence, it was the truth of the alleged libel which provoked the lawsuit. However, as the right of free speech developed and gained support, the

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<sup>4</sup> See generally *Zeran v. America Online, Inc.*, 958 F. Supp. 1124 (E.D. Va.), *aff'd*, 129 F.3d 327 (4<sup>th</sup> Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998).

<sup>5</sup> Kenny Silverman, *Defamation on the Internet*, 601 PLI/Pat 327, 330 (2000).

<sup>6</sup> RESTATEMENT (SECOND) OF TORTS § 558

use of defamation to suppress true statements was rejected. Virtually all states today require that the alleged defamatory statement be false before a defamation action may proceed. However, the U.S. Supreme Court has expressly reserved the question of whether the U.S. Constitution requires purely private defamation plaintiffs to prove falsity in all cases.<sup>7</sup> In other words, there may be no constitutional barrier if a particular state wishes to allow defamation actions even for true statements.

**“Libel, by definition, consists of publication of a false and unprivileged fact.” *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 648 (8th Cir. 1985), *cert. den.*, 479 U.S. 883 (1987)**

- c. *How false is false?* The test is whether the alleged defamatory statement as a whole is true or false. Minor inaccuracies are not subject to defamation claims if the overall substance of the statement is true.<sup>8</sup>
- d. *No Defamation by Implication.* Failure to report all the facts may lead to a defamatory conclusion by the reader. But unless the overall substance of the statement can be proven false, no defamation claim will arise.<sup>9</sup>

### 3. Defamatory Statement/Harm

- a. *Definition:* While there are many definitions, essentially the plaintiff must prove that a statement is “false and injurious to the reputation of another or exposes another person to hatred, contempt, or ridicule.”<sup>10</sup>
- b. *Defamation per se:* Some statements are so defamatory that they are considered defamation *per se*; and the plaintiff does not have to prove that the statements harmed his reputation. The classic examples of defamation *per se* are allegations of serious sexual misconduct; allegations of serious criminal misbehavior; or allegations that a person is afflicted with a loathsome disease. The historical examples of loathsome diseases are leprosy and venereal diseases. Allegations that a person is afflicted with AIDS may well constitute a modern variation on this form of defamation *per se*. When a plaintiff is able to prove defamation *per se*, damages are presumed, but the presumption is rebuttable.<sup>11</sup>
- c. *What constitutes an injury to reputation? Mitigation and the “libel-proof” plaintiff.*
  - Evidence of plaintiff’s poor reputation is generally admissible to mitigate damages. If an individual’s reputation cannot be further damaged, a

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<sup>7</sup> See *Philadelphia Newspapers, Inc. v. Hepps*, 476 U.S. 767, 779 n.4 (1986).

<sup>8</sup> *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491 (Minn. 1985).

<sup>9</sup> *Diesen v. Hessberg*, 455 N.W.2d 446, 451 (Minn. 1990).

<sup>10</sup> See, e.g., *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 573 (Minn. 1987); *Romaine v. Kallinger*, 537 A.2d 284 (N.J. 1988).

<sup>11</sup> *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914 (Tex. App.--Corpus Christi 1991, writ dismissed w.o.j.); *Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325 (5th Cir. 1993), *cert. dismissed*, 511 U.S. 1050 (1994).

defamation suit serves no purpose, wastes judicial resources, and hinders First Amendment interests.<sup>12</sup>

- A plaintiff is “libel-proof” when his reputation has been irreparably stained by prior publications. At the point the challenged statements are published, then, plaintiff’s reputation is already so damaged that a plaintiff cannot recover more than nominal damages for subsequent defamatory statements.<sup>13</sup> However, a court will not dismiss a defamation action merely because the plaintiff already has a bad reputation.<sup>14</sup> Rather the statement upon which the defamation claim is based should relate to the same matters upon which the prior bad reputation was founded, or to substantially similar matters.
- In extreme cases, a plaintiff’s general reputation may be so bad that a court will hold a plaintiff libel-proof on all matters. For example, Charles Manson or Adolph Hitler could not be damaged by defamatory statements.<sup>15</sup>

#### 4. Publication

**You cannot defame someone by speaking to them alone, or by muttering to yourself.**

- a. *General Rule.* Defamatory statements must be communicated to a third party.<sup>16</sup> This element of defamation is virtually always satisfied when claims are made against newspapers and broadcast media.
- b. *When Does Publication Occur?*
  - (i) Supreme Court Definition: Publication occurs when “possession of the printed material is delivered with the expectation that it will be read by some third person, provided that result actually occurs.”<sup>17</sup> This technology neutral definition suggests that posting a message on the Internet or sending an email satisfies the requirements for publication.
  - (ii) Uniform Single Publication Act (USPA). At common law, a statement is said to be “published” each time it is distributed. However, a number of states have adopted the USPA which provides an exception to the common law: all issues of a mass media-publication are treated as single publication and the statute of limitations begins to run when the first copy is distributed.<sup>18</sup>

<sup>12</sup> *Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512, 517 (Tex. App. 1987).

<sup>13</sup> *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1079 (3rd Cir. 1985).

<sup>14</sup> *Schiavone Construction Co. v. Time, Inc.*, 646 F. Supp. 1511, 1516 (D.N.J. 1986), *rev'd*, 847 F.2d 1069, 1072-73 (3rd Cir. 1988). *Finklea*, 742 S.W.2d at 516 (“[E]ven the public outcast's remaining good reputation is entitled to protection.”)

<sup>15</sup> *Langston v. Eagle Publishing Co.*, 719 S.W.2d 612, 623 (Tex. App. 1986).

<sup>16</sup> *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331 (Tex. App.--Dallas 1986, no writ).

<sup>17</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

<sup>18</sup> *Silverman*, 601 PLI/Pat at 334.

- (iii) Importance of the Publication Date. It is unclear whether the USPA applies to Internet publications and, thus, it may be equally unclear when a statement will be deemed to have been published. However, the date of publication is crucial to any defamation suit for three reasons:
- The date of publication determines whether the statute of limitations bars the action.
  - It may set the deadline by which a plaintiff can demand a retraction.
  - It is important in quantifying damages.

**While it is unclear when a statement made on the Internet will be deemed to have been published, it is important to note that the publication date determines whether the statute of limitations bars the action. Thus, in order to avoid statute of limitations problems, you should rely on the earliest arguable publication date.**

5. Fault

- a. *Fault by the Publisher.* At issue here is whether the publisher took the appropriate steps to ascertain the truth or falsity of the defamatory statements.
- b. *Level of Fault Required at a Glance.* (This is discussed in more detail in Section IV below)
- (i) Public Officials. When the plaintiff is a public official, actual malice—a high level of fault often defined as “knowledge of falsity” or a “reckless disregard as to whether the information printed was true”—must be shown.<sup>19</sup>
- (ii) Private Plaintiff. When a private plaintiff files suit, the standard is lower. Most states have adopted a negligence standard for private plaintiffs.<sup>20</sup>

6. Opinion Defense. The First Amendment protects statements of opinion—as distinct from statements of fact—against claims of defamation. However, the test is not the author’s mere characterization of the statement as “opinion.”<sup>21</sup>

**If a statement is determined to be an opinion, then it cannot be the subject of a defamation suit. The reason is that opinions are not capable of being proven true or false, and the plaintiff cannot therefore prove one of the elements of a defamation claim.**

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<sup>19</sup> *Id.* at 279-80.

<sup>20</sup> *See* Silverman at 332. The *Sullivan* court was clear that strict liability may not be imposed. *Sullivan*, 376 U.S. at 283-84.

<sup>21</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

- a. *Elements of an Opinion.* A statement is an opinion when:
- (i) the statement addresses matters of public concern;
  - (ii) the statement is expressed in a manner that is neither probably true nor probably false; and
  - (iii) the statement cannot be reasonably interpreted as intended to convey actual facts about a person.<sup>22</sup>
- b. *Standards for Determining and Actual Fact.* In addition to the elements of an what constitutes an opinion, the U.S. Supreme Court articulated some standards to assist in determining whether a statement is intended to convey an actual fact:
- (i) Is the language loose, figurative, or hyperbolic, which would negate the impression that the speaker was seriously maintaining the truth of the underlying facts?
  - (ii) Does the general tenor of the article negate the impression that the speaker was seriously maintaining the truth of the underlying fact? and
  - (iii) Is the connotation sufficiently factual to be susceptible of being proved true or false?<sup>23</sup>

7. Other Defenses.

- a. *Qualified Privileges.* A defamatory statement is protected by a qualified privilege if made upon a proper occasion, from a proper motive, and based upon reasonable or probable cause.<sup>24</sup> Examples: an employer's response to unemployment claims, workers' compensation claims, or a response to a request for verification of employment.
- The plaintiff may typically only overcome a qualified privilege by showing actual malice.<sup>25</sup> It is the plaintiff's burden to show that the defendant did not have "reasonable and proper grounds" for the allegedly defamatory statement.
- b. *Consent as a Defense.* "[T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his actions for defamation."<sup>26</sup>

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<sup>22</sup> *Id.* at 17.

<sup>23</sup> *Id.* at 21.

<sup>24</sup> *Holloway v. Texas Medical Ass'n*, 757 S.W.2d 810 (Tex. App. Houston [1st Dist] 1988, cert. den.)

<sup>25</sup> *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995).

<sup>26</sup> RESTATEMENT (SECOND) OF TORTS § 583.

- While consent is an absolute defense to defamation, it arises rarely in practice.
- c. *Legal Obligation to Publish is an Absolute Defense to Defamation.* If a defendant was legally required to publish the allegedly defamatory statement, they cannot be held liable for defamation.<sup>27</sup> Responses to court subpoenas, formal requests for information from government agencies, and the like fall into this category.

## 8. Distributor v. Publisher Liability

- a. *Publisher:* the entity or person responsible for the creation or editing of content in a publication.<sup>28</sup>
- may be deemed liable for defamation without being aware of the defamatory nature of the specific utterance that is the subject of the suit
  - The party that created the defaming content (i.e., the author or editor), as well as the publishers of magazines, newspapers and books, are fully liable for defamation based on the assumption that the publisher would have knowledge of the defamatory material due to its creative involvement in the process of publication.
- b. *Distributor:* an entity, such as a bookseller or library, that makes publications available to the public<sup>29</sup>
- may only be liable if the plaintiff can prove that the distributor was aware of the defamatory nature of a specific utterance<sup>30</sup>
  - Bookstores and libraries are treated as distributors and are liable for defamation only if they know or have reason to know that the information they are transmitting is defamatory.<sup>31</sup>
  - The distributor's ignorance of the defamatory material and inability to modify the defamatory statement justifies the lower standard of liability.
- c. *Distributor v. Publisher Liability and the Internet.* The two seminal cases dealing with the distinction between distributor and publisher liability in the context of the Internet, *Cubby, Inc. v. CompuServe, Inc.* and *Stratton Oakmont, Inc. v. Prodigy Services. Co.*, predate the enactment of the Communications Decency Act of 1996 ("CDA"). While these two cases provide interesting

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<sup>27</sup> See, e.g., *Moore and Associates v. Metropolitan Life Ins.*, 604 S.W.2d 487 (Civ. App. Dallas 1980, no writ).

<sup>28</sup> See *Stratton v. Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995).

<sup>29</sup> *Id.* (citing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991)).

<sup>30</sup> RESTATEMENT (SECOND) OF TORTS § 581 (“[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.”)

<sup>31</sup> *Id.* at comments d and e.

historical background, they have largely been superceded by the CDA's safe harbor for Internet service providers.

*Cubby, Inc. v. CompuServe, Inc.*: the Court equated CompuServe, a commercial on-line service, to a distributor, like a bookstore or a library

*Facts:*

CompuServe offered its users on-line information and distributed a forum's electronic newsletter called Rumorville USA, which allegedly carried false and defamatory statements about the plaintiffs. CompuServe did not review the newsletter's content before it was loaded onto its system.

*Observations of the Court:*

The Court observed that third-party defamation liability arises only if that party "repeats or otherwise republishes defamatory matter," and that "vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation." The court viewed CompuServe's computerized databases as a "functional equivalent of a more traditional news vendor" and explained that "CompuServe [had] no more editorial control over such a publication than [did] a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carried for potentially defamatory statements than it would be for any other distributor to do so." The court further noted that, although "CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents" and that it has "no duty to monitor each issue of every [newsletter] it distributes. To hold otherwise, the court believed, "would impose an undue burden on the free flow of information."

*Stratton Oakmont, Inc. v. Prodigy Services. Co.*

*Facts:*

Unlike *Cubby*, which involved a commercial on-line service's "electronic library" feature, *Stratton Oakmont* involved allegedly defamatory statements posted to Prodigy's "Money Talk" BBS forum about Stratton Oakmont, an investment banking firm, and its president. Unable to identify the alleged defamer, Stratton Oakmont sued Prodigy for allowing the message to be posted.

*Observations of the Court:*

The Court held Prodigy liable and distinguished this case from *Cubby* by observing, "first, Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, Prodigy implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce." Thus, the court determined that Prodigy's efforts to edit offensive postings transformed Prodigy from a mere distributor of information to a publisher that "is clearly making decisions as to content" and that Prodigy assumed a "role of determining what is proper for its members to post and read on its bulletin boards."

Since Prodigy “virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes,” the court held that Prodigy’s operations were not analogous to a bookstore or broadcast network affiliate and that it was to be treated as a publisher of the statement.

### *The Paradox of Stratton Oakmont*

Not surprisingly, *Stratton Oakmont* created a minor uproar because of the apparent paradox resulting from subjecting Internet service providers that tried to monitor their content to defamation lawsuits and liability on account of their efforts, while leaving those who made no efforts to control content free from liability.<sup>32</sup>

9. **Retraction Statutes.** Retraction statutes either provide a partial or complete defense to a defamation action, depending on the jurisdiction involved.<sup>33</sup> While these statutes were originally intended to protect traditional print publishers, a retraction of the defamatory material previously published can often be a means of providing some form of restoration of the injured party’s reputation. However, though retraction in a traditional print media can be effective, it is not necessarily as effective in an on-line context where web-surfers may only cross a specific page once and may be less likely to reach the same page daily. Nevertheless, when a particularly offensive statement or communication is carried on a web page, a strong retraction may prove to quell the damage done.<sup>34</sup>

- a. **Notice Requirement.** Many of the retraction statutes require libel plaintiffs to serve notice and/or seek retraction or correction as a prerequisite to filing a civil lawsuit.<sup>35</sup>

**It is extremely important to heed the requirements of any retraction statute. For example, if the notice requirement is not met, a civil suit may be dismissed in some jurisdictions. If suit was filed at or near the end of the statute of limitations, failure to comply with the notice requirement, therefore, may have the effect of barring the action entirely.**

- b. **Applicability to On-Line Publishers.** Whether a retraction statute applies to on-line publisher will depend on the type of publication involved, the language of the statute, and judicial interpretation of the statutory provision.
  - (i) Florida Example: Florida’s notice requirement applies to a plaintiff who intends to sue a “newspaper, periodical, or other medium...” On-line publisher likely fall within the scope of this provision.

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<sup>32</sup> See David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147, 159 (1997).

<sup>33</sup> See Barry J. Waldman, *A Unified Approach to Cyber-Liber: Defamation on the Internet, a Suggested Approach*, 6 Rich. J.L. & Tech. 9, 57 (1999). Currently thirty-three states have some form of retraction statute.

<sup>34</sup> *Id.* (“For example, when indiscreet pictures of Dr. Laura Schlesinger reached the Internet, they received extensive media coverage. However, quick action on the part of Laura Schlesinger reduced exposure, and the pictures were removed and a statement was posted within forty-eight hours.”)

<sup>35</sup> See, e.g., Fla. Stat. § 770.01 (requiring plaintiff, prior to filing suit, to serve notice on defendant specifying article or broadcast and statement alleged to be defamatory); Wis. Stat. § 895.05(2)(requiring libeled persons to provide those alleged to be responsible for a defamatory publication a reasonable opportunity to correct the matter before filing suit).

- (ii) Wisconsin Example: Wisconsin's pre-filing notice requirement applies only to lawsuits based on publications in "any newspaper, magazine, or periodical." A Wisconsin appellate court held that a national computer subscription service did not enjoy the benefit of the state's notice statute because it did not fit the definition outlined in the statute. The court noted that, rather than appearing periodically, the service was accessible by electronic subscribers at all times.<sup>36</sup>

## B. Trade Libel

1. Business Disparagement/Commercial Defamation. Business disparagement, like libel and slander, is a species of the tort of "injurious falsehood." While the action for defamation is to protect the personal reputation of the injured party, the action for business disparagement is to protect the economic interests of the injured party against pecuniary loss.<sup>37</sup>

- (a) *Elements of Business Disparagement*

- (i) publication by the defendant of the disparaging words;
- (ii) falsity of the statement;
- (iii) malice;
- (iv) lack of privilege; and
- (v) special damages<sup>38</sup>

**To establish a claim for business disparagement, the communication at issue "must play a substantial part in inducing others not to deal with plaintiff with the result that special damage in the form of loss of trade or other dealings, is established, for plaintiff to have a cause of action for business disparagement." *Hurlbut v. Gulf Atlantic Life Insurance Co.*, 749 S.W.2d 762 (Tex. 1987).**

- (b) *Restatement Definition:*

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if

- (i) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes that it is likely to do so, and

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<sup>36</sup> *See It's in the Cards v. Fuschetto*, 535 N.W.2d 11 (Wis. App. 1995).

<sup>37</sup> *Hurlbut v. Gulf Atlantic Life Insurance Co.*, 749 S.W.2d 762 (Tex. 1987). It is important to note that an injured party may sue for both personal defamation and business disparagement in the same suit so long as he avoids duplication of damages. *Dwyer v. Sabine Min. Co.*, 890 S.W.2d 140 (Tex. App.--Texarkana 1994, writ denied).

<sup>38</sup> *Hurlbut*, 749 S.W.2d at 766.

- (ii) he knows that the statement is false or acts in reckless disregard of its truth or falsity.<sup>39</sup>
- 2. Slander of Title. In rare cases, the defamatory speech may rise to the level of a slander of title. However, the speech must be directed at a specific property interest. In the context of cyber-speech the property interest that is most likely to be affected is a business' intangible intellectual property. Prosser and Keeton state that intangible interests such as "trademarks, copyrights [and] patents" may be the subject of the tort of slander of title.<sup>40</sup>
  - a. *Elements of Slander of Title*
    - (i) the uttering and publishing of disparaging words;
    - (ii) that they were false;
    - (iii) that they were malicious;
    - (iv) that special damages were sustained thereby;
    - (v) that the plaintiff possessed an estate or interest in the property disparaged; and
    - (vi) the loss of a specific sale<sup>41</sup>
  - c. *Example*. Among the examples listed in Section I.B is a statement about how a company's product infringes another's patent. This is the prime example of slander of title.
- 3. Trade Libel Under Section 43(a) of the Lanham Act. Cyber-libel does not always occur in the context of disgruntled employees or customers taking out their anger in an on-line forum. Commercial defamation and disparagement can occur on-line when legitimate businesses misrepresent the nature or quality of their competitors goods or services. In 1989, Congress amended Section 43(a) of the Lanham Act to add a claim of trade libel under the false advertising umbrella.
  - a. *Elements of a Section 43(a) Claim*
    - (i) the defendant has made a false or misleading description or representation regarding the "nature, characteristics, qualities, or geographic origin of the plaintiff's products or business;
    - (ii) the statement was made in commercial advertising or promotion;
    - (iii) the statement has caused or is likely to cause damage to plaintiff; and

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<sup>39</sup> RESTATEMENT (SECOND) OF TORTS § 623A.

<sup>40</sup> Prosser and Keeton, *The Law of Torts*, § 128, pp. 962-67 (5th Ed. 1984).

<sup>41</sup> *Clark v. Lewis*, 684 S.W.2d 161, 163-164 (Tex. App.--Corpus Christi 1984, no writ). Malice as a basis for recovery of actual damages in a slander of title case means merely that the acts must have been deliberate conduct without reasonable cause. *Id.* at 161; *Williams v. Jennings*, 755 S.W.2d 874 (Tex. App.-- Houston [14th Dist.] 1988, writ denied).

(iv) the statement was made in interstate commerce.<sup>42</sup>

- b. *Advertising Requirement.* By its terms, Section 43(a) only applies to statements made in the context of “commercial advertising or promotion.”<sup>43</sup> Thus, while a claim for trade libel under Section 43(a) may be a useful tool against a competitor who has gone too far in its on-line advertising, it may not be used against that disgruntled employee or customer. Posting inflammatory or untrue statements about a product will likely not rise to the level of advertising for purposes of a claim under Section 43(a) because it is not the context of selling a good or service.

## II. EFFECT OF THE COMMUNICATIONS DECENCY ACT

### A. Insulation from Liability for ISPs

The Communications Decency Act of 1996 (“CDA”) received nationwide attention as Congress’ first attempt to thwart the on-line transmission of pornography to children. In a well publicized decision, the Supreme Court in *Reno v. American Civil Liberties Union*,<sup>44</sup> struck down the portion of the statute dealing with pornography holding that it went beyond protecting children and instead encroached on the First Amendment rights of adults to communicate freely with one another. However, the Supreme Court only struck down a small portion of the CDA. Though the remaining provisions received little attention in the press, they have a significant impact on the imposition of liability for on-line defamation. In effect, the CDA established strong limitations on the potential liability of Internet service providers (“ISP”) for information content created by third parties.

1. CDA § 230: “No provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

**Absent an affirmative showing that an ISP was the actual author of the defamatory content, the CDA provides a complete shield from a defamation suit.**

2. *Zeran v. America Online, Inc.*

*Facts:*

Kenneth Zeran brought an action against America Online (“AOL”) for unreasonably delay in removing defamatory messages posted by third party and for refusing to post a retraction. The action was precipitated by a posting to an AOL bulletin board on April 25, 1995, by an unidentified party who advertised that Zeran was selling t-shirts making fun of the Oklahoma City bombing. The posting directed people to contact Zeran at his

<sup>42</sup> See, e.g., *National Artists Management Co. v. Weaving*, 769 F. Supp. 1224, 1230 (SDNY 1991).

<sup>43</sup> Michael A. Albert and Robert L. Bocchino Jr., *Trade Libel: Theory and Practice Under the Common Law, the Lanham Act, and the First Amendment*, 89 TMR 826, 858 (1999)

<sup>44</sup> 117 S. Ct. 2329 (1997).

home phone number in order to purchase the t-shirts. As a result of this posting and subsequent similar postings, Zeran received a “high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats.” Zeran contacted AOL to have the messages removed, a retraction posted, and the account from which the postings were emanating closed. While the parties disputed how long the delay was in removing the defamatory posting, AOL outright refused to post a retraction.

#### *The Fourth Circuit’s Opinion*

The Fourth Circuit rejected Zeran’s argument that AOL should be held liable for failing, upon being given notice, to remove the defamatory material, to notify its customers that the statements were false, and to screen for future similarly false statements. The court stated that, “[b]y its plain language § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” Thus, the failure to exercise editorial control was not a basis for recovery after the passage of CDA § 230.

#### *Four Holdings from Zeran*<sup>45</sup>:

- (i) The CDA bars ISP liability for acting as either a publisher or distributor of defamatory statements.
- (ii) This complete protection for ISPs was the explicit intent of Congress.
- (iii) As a matter of law, notice to an ISP of defamatory content in the information it provides does not create liability.
- (iv) **The only party which may be held liable is the original author of the defamatory statement.**

### 3. *Blumenthal v. Drudge*

#### *Facts:*

Matt Drudge was the author of an electronic publication known as the Drudge Report, which focused on gossip relating to the entertainment industry and government officials. Drudge disseminated his publication by e-mail, his personal web site, and through AOL, with whom he had a contract to provide his information. Drudge received a flat monthly fee of three thousand dollars from AOL for providing his publication to AOL customers. However, AOL did reserve the right to modify the content of the report to meet AOL’s standards. An edition of the Drudge Report contained allegedly defamatory statements regarding Sidney and Jacqueline Blumenthal. The statements claimed that Sidney Blumenthal, a government employee associated with the Office of the President, had a history of domestic violence against his wife. Drudge posted a retraction of the report after receiving a letter from Blumenthal’s attorney. Nevertheless, the Blumenthals filed suit against Drudge and AOL. The court held that pursuant to the CDA, AOL was entitled to summary judgment.

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<sup>45</sup> Barry J. Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 Rich. J.L. & Tech. 9, 47 (1999).

*Findings and Implications from Drudge:*

- (i) Only if a direct employee of an ISP is the author of the defamatory statements will liability attach to the ISP. (The fact that Drudge was a contract employee of AOL was not sufficient.)
- (ii) While AOL would have been liable under traditional defamation law as either a “publisher” or “distributor,” even its retention of editorial control did not give rise to liability in the face of the CDA.
- (iii) **Again, the only potentially liable party is the original author.**

**B. Tips for dealing with ISPs: the Anonymous Author**

**The CDA and its progeny, *Zeran* and *Blumenthal*, have all but removed the possibility of imposing liability for defamation on ISPs. A defamation plaintiff’s only recourse, therefore, is to sue the original author. However, many Internet postings are either anonymous or pseudonymous. While ISPs generally attempt to safeguard their members’ identities, each has procedures for releasing this information when so required by a court of competent jurisdiction. The defamation plaintiff must be patient and adhere strictly to both the rules of procedure and the rules of the ISP.**

1. Civil Subpoena Policy: AOL Example

The Electronic Communications Privacy Act of 1986 (“ECPA”) prescribes what information may be disclosed by providers of electronic communication services.<sup>46</sup> While the ECPA strictly prohibits ISPs from disclosing the content of electronic communications, it permits the release of information sufficient to identify the sender of a specific communication. Thus, if a defamatory posting is either anonymous or pseudonymous, the defamation plaintiff must subpoena the records of the ISP in order to determine the true identity of the author.

- a. *AOL Terms of Service.* AOL’s Terms of Service provide that AOL will release account information or information sufficient to identify a member “only to comply with valid legal process such as a search warrant, subpoena or court order . . .” Thus, if you seek such identity or account information in connection with a civil legal matter, you must serve AOL with a valid subpoena.
- b. *AOL’s Policies and Procedures.* Upon receipt of a valid subpoena, it is AOL’s policy to promptly notify the Member(s) whose information is sought. In non-emergency circumstances, AOL will not produce the subpoenaed Member identity information until approximately two weeks after receipt of the subpoena, so that the Member whose information is sought will have adequate opportunity to move to quash the subpoena in court. AOL invoices for costs associated with subpoena compliance. Finally, it is AOL’s policy to release information sufficient to identify an AOL member only where the party seeking the information has filed a legal action that implicates the AOL member in some

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<sup>46</sup> 18 U.S.C. § 2701 *et. seq.*

legally cognizable impropriety or wrongdoing. AOL requests a copy of the complaint and any supporting documentation to indicate how the AOL e-mail address is related to the pending litigation.

2. Civil Subpoena Policy: Yahoo! Example

Yahoo!'s privacy policy states that Yahoo! will send personally identifiable information regarding a user they "respond to subpoenas, court orders or legal processes."<sup>47</sup> The Yahoo! policy is far more lax than the AOL system outlined above (e.g., there is no mention of a waiting period so that the anonymous user can move to quash a subpoena). In fact, Yahoo! has been sued by one of its users for too easily disclosing personally identifiable information.

3. Relevant Cases in Brief.

- a. *In re Subpoena Duces Tecum to America Online, Inc (IPA v. May*, No. 107CL00022399-00 (Va. Cir. Ct. Dec. 6, 1999) (protective order granted excusing AOL from compliance with subpoena due to plaintiff's failure to provide court with mandate, writ, or commission from court in which underlying action was pending).
- b. *Melvin v. Doe*, 1999 WL 551335 (Va. Cir. Ct. June 24, 1999) (no jurisdiction in Virginia courts over defamation action against anonymous speaker where only alleged basis for jurisdiction was AOL's presence in Virginia; quashing subpoena issued in connection with such action); opinion (Pa. Ct. of Common Pleas Nov. 15, 2000) ("A plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit.").
- c. *In re Texaco Inc.*, Law No. 23163 (Va. Cir. Ct. Mar. 14, 2000) ("[A] Virginia Court does not acquire jurisdiction merely because an actionable email passed through AOL's facilities in Loudoun County, Virginia.").
- d. *In re Subpoena Duces Tecum to America Online, Inc. (Anonymous Publicly Traded Co. v. Does)*, Misc. Law No. 40570 (Va. Cir. Ct. 2000) ("[A] court should only order a non-party, Internet service provider to provide information concerning the identity of a subscriber (1) when the court is satisfied by the pleadings or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim.").
- e. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").

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<sup>47</sup> See <http://privacy.yahoo.com/privacy/us/fin>

- f. *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), aff'd, 194 F.3d 1149 (10th Cir. 1999) (First Amendment right to anonymity applies to “communicating and accessing information anonymously” over the Internet).
- g. *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (protected speech includes “the use of false identification to avoid social ostracism, to prevent discrimination and harassment, and to protect privacy”).
- h. *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) (because of the “legitimate and valuable right to participate in online forums anonymously or pseudonymously,” party seeking discovery to uncover the identity of an online speaker must satisfy a heightened burden, including establishing that suit could withstand motion to dismiss).
- i. *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998) (party seeking identity of anonymous speaker must demonstrate a reasonable basis for seeking such information).
- j. *Rancho Publications v. Superior Court*, 81 Cal. Rptr. 2d 274 (Cal. Ct. App. 1999) (“The need for discovery [of the identity of anonymous speakers] is balanced against the magnitude of the privacy invasion, and the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material.”).
- k. *Dendrite Int’l v. John Does* (N.J. Super. Ct. Ch. Div. Nov. 23, 2000) (adopting Seescandy.com analysis and denying request for order granting leave to conduct discovery aimed at identifying Does who opposed request).

### **C. Post-Publication Injunctive Relief.**

Does an ISP have the obligation to delete a defamatory article from its archives? The answer is currently unknown and has yet to be tested in the courts. However, the problem is a very real one. While newspapers and magazines remain in archives for generations, there are practical problems with gaining access to these materials, thus minimizing the effect of statements actually determined to be tortious remaining available to the public. Yet the ease of access to old, on-line speech raises the question of whether an ISP has an obligation to delete the speech from its archives if such speech has been found to be libelous.

- *Zeran Revisited*. As discussed above, *Zeran* holds that Section 230 of the CDA protects ISPs from liability for defamation even when it refuses to remove a message from its service after being provided notice of the messages’ false and defamatory nature. It is unclear, therefore, whether an injured party can obtain an injunction to get a defamatory statement removed from the archive if the ISP will not voluntarily remove it.

#### IV. CONSTITUTIONAL CONCERNS: THE FIRST AMENDMENT MEETS DEFAMATION LAW

##### A. **Public Officials.** *New York Times v. Sullivan*<sup>48</sup>

*Facts:*

In *New York Times v. Sullivan*, the Supreme Court examined a defamation claim that arose after the New York Times accepted and printed a full-page advertisement that decried Southern resistance to the civil rights movement, listed various examples of the “wave of terror” being brought to bear by Southern police on black college students engaged in nonviolent protests, and asked for support in the battle for civil rights. Unfortunately, certain of the allegations were false and L.B. Sullivan, the Commissioner of Public Affairs for Montgomery, Alabama, sued in state circuit court, contending that the reference to the “police” referred to him and impugned his reputation. Sullivan was awarded \$500,000, and the Supreme Court of Alabama upheld the judgment stating that since the words tended to injure Sullivan in his trade or business, and also alleged the commission of an indictable offense, they were libelous *per se*, and Sullivan could recover without proof of actual harm.

*The Supreme Court’s Opinion:*

The Supreme Court momentarily introduced the First Amendment of the Constitution into defamation law by overturning the judgment and noting that the purpose of the First Amendment is “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” The defense of truth, previously available to defendants under the common law, was found by the Court to be insufficient to protect public discussion because a “rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable “self-censorship.” Thus, the then existing strict liability standard of the common law was said to “dampen the vigor and limit the variety of public debate,” and the Court concluded:

“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘*actual malice*’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>49</sup>

##### B. **Public Figures, Public Concern:** *Curtis Publishing Co. v. Butts*<sup>50</sup>. Three years after the *New York Times* decision, the Supreme Court expanded the “actual malice” privilege beyond public officials to cover persons of public interest (*i.e.*, public figures).

*The Supreme Court’s Opinion:*

In *Curtis Publishing Co. v. Butts*, Justice John Harlan, writing for a plurality, wrote that since the case involved a member of the press writing about a public figure on matters of public concern, the standard should be “highly unreasonable conduct constituting an extreme departure from the

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<sup>48</sup> 376 U.S. 254 (1964).

<sup>49</sup> *Id.* at 279-80 (emphasis added).

<sup>50</sup> 388 U.S. 130 (1967).

standards of investigation and reporting ordinarily adhered to by responsible publishers.” Justice Harlan argued that since the concerns of “seditious libel” underlying the *New York Times* case did not apply in public figure cases, the state interest in protecting the reputations of its citizens was entitled to greater weight and, accordingly, a standard easier for a plaintiff to meet than actual malice was appropriate. In a separate concurring opinion, Chief Justice Warren argued that the *New York Times* actual malice standard should be applied to public figures when the matter is one of public concern. The Chief Justice noted that the line between public officials and public figures had “blurred,” and “[i]n many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government.” Most importantly for purposes of a discussion regarding defamation on the Internet, Chief Justice Warren argued that the higher actual malice standard was appropriate for both public officials and public figures because they both have access to mass media in order to (i) influence public policy and (ii) respond to criticisms of their views and activities. The actual malice standard for public figures regarding matters of public concern, a stricter standard than that proposed by Justice Harlan, ultimately was adopted by the courts as the appropriate approach.

- C. **Private Parties, Public Concern: *Gertz v. Robert Welch, Inc.***<sup>51</sup> In *Gertz*, the Supreme Court held that the *New York Times* actual malice standard did not apply to a defamation suit brought by a private party.

*Facts:*

Gertz was an attorney who had been retained by the family of a boy who had been shot and killed by a Chicago policeman. American Opinion, a magazine owned by the defendant, published an article alleging that the policeman was set up by a communist conspiracy in an attempt to discredit law enforcement officials. The article further stated that Gertz had been “an official of the “Marxist League for Industrial Democracy ... which has advocated the violent seizure of our government,” and that he was a “Leninist” and a “Communist-frontier.” Gertz sued for libel and was awarded \$50,000; however, the trial court overturned the verdict and entered judgment against Gertz, concluding that under *New York Times* standard applied to all discussions of matters of public concern, regardless of the status of the person defamed, and that Gertz could not demonstrate actual malice.

*The Supreme Court’s Opinion:*

The Supreme Court reversed the decision. Although the matter involved was clearly one of public concern, the Supreme Court felt Gertz had done nothing personally to bring himself into the public eye or to influence policy, and therefore was not a public figure himself. Although the Court noted that in order to protect the media’s First Amendment right “[s]ome degree of abuse” may be necessary, and the media should not be forced to *guarantee* the truth of their accusations, the Court added that “the individual’s right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.” The Court further observed that the actual malice rule for public figure and public official plaintiffs, which “administers an extremely powerful antidote to the inducement to media self-censorship,” also “exact[s] a correspondingly

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<sup>51</sup> 418 U.S. 323 (1974).

high price from the victims of [defamation]. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.”

*Implications of Gertz:*

The Court concluded that for private figures, a state may dictate the applicable rules of recovery, with three caveats:

- (i) negligence is the minimum standard allowed under the Constitution,
- (ii) negligence supports recovery for only special damages that are ascertainable with relative certainty (i.e., compensation for actual injury), and
- (iii) private plaintiffs must still prove actual malice in order to recover punitive damages.

Thus the Court split the world of defamed parties into two camps: those who purposefully and intentionally thrust themselves into the public with a desire and ability to influence public policy being required to demonstrate actual malice on the part of the defendant, and everyone else being required to demonstrate mere negligence.

**D. Private Parties and No Matter of Public Concern: *Dun & Bradstreet v. Greenmoss Builders*<sup>52</sup>**

*Facts:*

*Dun & Bradstreet v. Greenmoss Builders*, involved a credit reporting agency that falsely reported on the plaintiff’s credit report that its business had filed for bankruptcy. The credit report was not deemed to have been a matter of public concern. At the initial trial, a jury found in favor of the plaintiff and awarded both compensatory damages and punitive damages; however, the trial court granted the defendant’s motion for a new trial on the ground that instructions to the jury permitted it to award damages on a lesser showing than actual malice. The Vermont Supreme Court reversed the trial court, holding that the actual malice standard was inapplicable to non-media defamation actions.

*The Supreme Court’s Opinion:*

The Supreme Court affirmed the Vermont Supreme Court’s holding, but for a different reason. Rather, a plurality of the Supreme Court concluded that when speech does not involve “matters of public concern,” a state may allow punitive and presumed damages *without* a showing of actual malice. A majority of the Court’s members expressed their belief that the analysis of the issue was unaffected by whether the defendant was part of the “media.”

**E. Summary of the Supreme Court’s Defamation Law**

1. When the plaintiff is a public official or public figure, actual malice in making the statement must be shown (per the *New York Times* and *Butts* cases).

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<sup>52</sup> 472 U.S. 749 (1985).

2. When the plaintiff is a private figure, a negligence standard (or higher if required by state law) is permitted for recovery of *actual* damages regardless of whether the statements pertain to matters of public concern (per *Gertz*).
3. When the defamation pertains to a private matter and the plaintiff is a private figure, the plaintiff can recover *punitive* damages upon a showing of negligence (unless state law establishes a higher standard) (per *Dun & Bradstreet*).

**F. Standards for Determining a Public Figure.** The classification of a plaintiff as a public or private figure is critical for purposes of determining the applicable standard of proof in a defamation case, regardless of the nature of the defendant. The Supreme Court in *Gertz* identified two types of public figures: general purpose public figures and limited purpose public figures. A general purpose public figure, such as a high-level elected official or a prominent celebrity, must prove actual malice for virtually any subject of defamation. A limited purpose public figure is one who has assumed prominence for a limited time or on a limited range of issues, and thus the *New York Times* actual malice standard would apply only to speech involving that limited range. Courts have attempted to establish criteria for identifying limited purpose public figures, which one commentator summarized as follows:

1. The extent to which the “controversy” preexisted the defamatory speech;
2. The effect of the “controversy” on the interests of nonparticipants;
3. The level of voluntariness in the plaintiff’s involvement in the controversy;
4. The plaintiff’s access to channels of communication for counterspeech;
5. The degree of public divisiveness concerning the controversy;
6. The extent of the plaintiff’s prominence in the controversy;
7. The extent of the plaintiff’s efforts to attempt to influence resolution of the controversy;
8. The extent to which the plaintiff’s public figure status continued to exist at the time of publication;
9. The extent to which the allegedly defamatory speech is geographically or institutionally limited to the area in which the plaintiff had achieved public figure status.<sup>53</sup>

## V. “SUCKS SITES” AND WHAT TO DO ABOUT THEM

**A. What are Your Remedies?** Practically, your remedies are severely limited. Free speech and fair use concerns are likely to trump any action against a “sucks site.” However, “sucks sites” are not without their limitations.

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<sup>53</sup> *Pendleton v. City of Haverhill*, 156 F.3d 57 (1st Cir. 1998).

1. Defamation Actions. As discussed above, if a statement is either true or an opinion it is not actionable. Further, the commentary on most “sucks sites” are likely to be considered within the sphere of legitimate public concern and such speech is “imbued ... with a heavy presumption of constitutional protection.”<sup>54</sup> This leaves little room for defamation actions against a “sucks site.” However, if “sucks site” commentary crosses the opinion/fact line, is clearly untrue, and meets the other requirements of a defamation action, liability may be imposed.
  2. Trademark Infringement/Dilution Actions.
    - a. *Trademark Infringement.* The formula for a “sucks site” involves the use of the target company’s trademark or trade name. However, the use of a company’s trademark for non-commercial criticism does not run afoul of trademark law so long as consumers are not confused or tricked into believing that the site is sponsored by or affiliated with the company. Confusion in this context is highly unlikely because people viewing the “sucks site” simply would not believe that the criticism came from the company itself.<sup>55</sup>
    - b. *Trademark Dilution.* Section 43(c) of the Lanham Act provides protection for owners of famous marks (even if the use of such mark is not likely to cause confusion) where the use of the famous mark dilutes its distinctive quality.<sup>56</sup> Thus, if a “sucks site” associates the mark with negative things such as drugs or prurient sexual activity, the mark may be tarnished and dilution claim may be possible. However, dilution actions only apply to commercial uses. Thus, since most “sucks sites” are not commercial in nature, a dilution action is not likely to be successful unless merchandise is being sold at the site.
- B. Practical Concerns.** It is important to keep in mind that even if you have a strong case, you still might not want to pursue it. Taking legal action against a “sucks site” may only worsen your public relations problem, with the resulting publicity generating even more traffic to the “sucks site.”
- C. Host Rules Violation.** You should check to see if the "sucks site" is hosted on another site that has rules governing proper content. Some "sucks sites" are hosted without charge by another site that has rules prohibiting defamatory, pornographic or sexual content. If you investigate and find a violation of such rules, you may be able to report the violation and have the "sucks site" removed from the web, at least temporarily.
- D. Other Options.** You can always attempt to beat potential “sucks sites” to the punch by registering all domain names that might be likely targets. Of course, this strategy is not always successful. For example, President Bush registered dozens of domain names before embarking on his campaign, including bushsucks.com and bushbites.com. But, for the one that got away, visit bushfuckz.com.

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<sup>54</sup> See *Bihari et. al. v. Gross et. al.*, No. 00 Civ. 1664 (S.D.N.Y., Sept. 25, 2000)(citing *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 46 (2d Cir. 1983).

<sup>55</sup> See *Id.*

<sup>56</sup> 15 U.S.C. § 1225(c).