PROTECTING ONE'S REPUTATION–HOW TO CLEAR A NAME IN A WORLD WHERE NAME CALLING IS SO EASY

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I. INTRODUCTION

Our reputations are dear to us. As long as humans have walked the earth, we have cared deeply about what others say and think about us. Whether a hunter in ancient times or the CEO of a major company, everyone cares about their reputation. In the workplace, reputation can make or break a career, cost a promotion, or even lead to termination.

This paper explores ways that reputations can be easily tarnished. This paper then discusses options for protecting reputations in today's legal society.

II. THE IMPORTANCE OF REPUTATION

Throughout history, mankind has cherished and protected his reputation. Shakespeare said it well in Othello:

> Good name in man and woman, dear my lord, is the immediate jewel of their souls. Who steals my purse steals trash–'tis something, nothing–'Twas mine, 'tis his, and has been slave to thousands–But he that filches from me my good name Robs me of that which not enriches him And makes me poor indeed.[1]

The Bible also discusses the importance of reputation: "a good name is rather to be chosen than great riches, and loving favour rather than silver and gold."[2] An emphasis on reputation throughout history shows the extent to which society values the subject.

III. REPUTATIONS CAN BE EASILY DAMAGED

Damage to reputation is not a new idea. For centuries, people have disseminated falsities among the masses. The relatively recent advent of

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[1] WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3.
[2] *Proverbs* 22:1 (King James).

media, especially the Internet, however, has established new forums and methods to disseminate material to mass audiences. Consequently, comments that may have initially reached a very limited audience can now instantly reach millions. Thus, the need to protect one's reputation is greater than ever.

Slanderous and libelous remarks have been around as long as communication has been around. For example, during the Middle Ages, the ecclesiastical courts exercised jurisdiction over defamation cases.[3] It was not until the reign of Henry VIII that common law courts exercised jurisdiction over defamation cases.[4] At that time, defamation could only occur through oral statements, which were classified as slander.[5]

Over time, courts determined slander was inadequate to encompass the entire tort and, therefore, gradually established libel.[6] Since the establishment of libel, many have criticized the legal distinction between the two torts, arguing instead for a generic tort of defamation.[7] Under a few narrow circumstances, however, the distinction between the two torts could make some difference. For example, in *Hirsch v. Cooper*, the Arizona Court of Appeals allowed presumed damages after it found a statement slanderous per se because the statement "tend[ed] to injure a person in his profession."[8] Conversely, many more recent courts have criticized the distinction between the two torts.[9]

Libel is "a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead or the reputation of one who is alive, and expose him or her to public hatred, contempt, or ridicule."[10] Libel includes malicious statements made in newspaper articles, books, magazines, photographs, cartoons, and motion pictures.[11] On the other hand, slander is "the publication of defamatory matter by spoken words, transitory gestures, or by any form of

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[3] RESTATEMENT (FIRST) OF TORTS § 568 cmt. b (1938).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* cmt. d.
[8] Hirsch v. Cooper, 737 P.2d 1092, 1095 (Ariz. Ct. App. 1986), *disapproved on other grounds by* Godbehere v. Phx. Newspapers, Inc., 783 P.2d 781 (Ariz. 1989).
[9] *E.g.*, Regalia v. Nethercutt Collection, 90 Cal. Rptr. 3d 882, 887 n.3 (Ct. App. 2009) (recognizing criticism of the distinction); *see also* Pyle v. Meritor Sav. Bank, Nos. Civ. A. 92-7361, 92-7362, 1996 WL 115048, at *3 (E.D. Pa. Mar. 13, 1996) ("In a defamation per se case, a plaintiff must prove general damages from a defamatory publication and cannot rely upon presumed damages.").
[10] 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 3 (2010).
[11] *Id.*

communication other than those [that are libel]."[12] Slander includes defamatory statements made on television, radio, or in live speeches. Accordingly, while libel and slander both involve defamatory communications, libel is *published* while slander is *spoken*. Courts occasionally struggle to differentiate libel from slander because of this fine distinction; but, the distinction will rarely make any real difference.

Mass communication dramatically increases the potential impact of a defamatory statement, regardless of whether the communication is published or spoken. The progression from newspapers to radio and television, to the Internet, and, currently, to social media has increased the ease of name–calling and reputation–bashing. Each of these communication mediums has uniquely influenced the nature of defamation.

A. Newspapers

One of the first media outlets to reach mass audiences was the newspaper. Early newspapers differed from modern newspapers in several ways. They were relatively expensive, difficult to print, and often politically slanted.[13] Newspapers were often only read at public businesses, such as coffee houses and libraries, and were not disseminated to the population at large because of their high cost.[14]

The "penny press" revolutionized England's newspaper business in the 1830s.[15] New technologies made newspaper publication more affordable, decreasing newspaper's cost to just a penny.[16] This technology quickly made its way to the United States, resulting in one of the first American tabloids, *The Sun*.[17] When news was slow, *The Sun* often fabricated stories its publishers knew to be false just to increase readership.[18] This form of journalism, relying on sensational headlines to sell papers, became known as "yellow journalism."[19] Yellow journalism gave rise to the modern tabloid magazine.

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[12] RESTATEMENT (FIRST) OF TORTS § 568(2) (1938).

[13] *E.g.*, John Steele Gordon, *The Man Who Invented the Newspaper*, AM. HERITAGE MAGAZINE, Aug./Sept. 2002, http://www.americanheritage.com/articles/magazine/ah/2002/4/2002_4_24.shtml.

[14] *Id.*

[15] DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET, 105-06 (2007).

[16] *Id.* at 106.

[17] *Id.*

[18] *Id.*

[19] *E.g.*, PBS, American Experience, People & Events, Annie Oakley's Libel Suits (1903-1910) (Feb. 14, 2006), http://www.pbs.org/wgbh/amex/oakley/peopleevents/e_papers.html.

Many libel suits derived from yellow journalism. One famous example is the Annie Oakley libel suits from 1903 to 1910.[20] In August of 1903, two Chicago newspapers published stories claiming that Annie Oakley was arrested for stealing a Negro's pants to fund her purchase of cocaine.[21] Once the newspapers realized that Ms Oakley was not the arrested person, the newspapers quickly printed retractions.[22] By the time the original newspapers published the retractions, however, other newspapers across the country had picked up the story. This wide dissemination of the story destroyed Ms. Oakley's reputation, and she was not content with the mere publication of the retractions.[23] She instigated fifty–five lawsuits and won or settled fifty–four of them with awards ranging from $900 to $27,000.[24] Nevertheless, Ms. Oakley ultimately lost money on the lawsuits because of attorney's fees, court costs, travel expenses, and lost wages.[25] From Ms. Oakley's perspective, however, she won something more valuable in the case than money–her reputation.[26]

The history of newspapers and yellow journalism helped establish the law of defamation over this communication medium. Generally, for a court to hold a newspaper statement libelous, the statement must be a false statement of fact, rather than a mere statement of opinion.[27] Truth is always a complete defense to a libel claim.[28] Statements clearly published as a parody or as satire do not qualify as libel.[29] When newspapers and other similar print media publish false material, courts may hold not only the publishing newspaper liable, but also hold the publisher and author of the story liable.[30] But some jurisdictions, including Arizona, have adopted the doctrine of "fair comment," which generally holds that a *republisher* of a defamatory statement, regardless of whether the republisher knows of the

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[20] *See id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *E.g.*, Elizabeth D. Lauzon, J.D., Annotation, *Liability of Newspaper for Libel and Slander—21st Century Cases*, 22 A.L.R. 6TH 553 (2007) (noting that a large number of jurisdictions characterize newspaper statements as opinions rather than as facts, and thus, newspapers are not subject to a libel claim).
[28] *Id.*
[29] *Id.*
[30] 50 AM. JUR. 2D *Libel and Slander* § 347 (2010).

statement's falsity, is not liable if the article is a fair and accurate report of some newsworthy event or proceeding.[31]

Although the Internet has reduced newspaper circulation and caused many newspapers to publish their content on the web, newspapers still remain a popular method for disseminating material. Yet, before the Internet affected how newspapers communicate their stories, the advent of radio and television first provided alternative avenues of communication other than in newspapers. These two mediums have presented courts with ever–changing situations in which to employ defamation law. The complications presented by radio and television communications have caused the courts to reach varying conclusions about the law of defamation.

B. Radio and Television

With the advent of radio and television, the courts faced new challenges. There have been conflicting decisions on whether broadcasts are classified as libel or slander. Even though that distinction may have not made a difference, suits against broadcast media have helped shape the laws of defamation.

The courts' treatment of defamation broadcast by radio or television generally falls into four categories: (1) only libel; (2) only slander; (3) libel if read from a script while slander if extemporaneous; or (4) defamacast. Some courts classify a defamatory broadcast over radio or television as purely libel, believing that a defamatory communication, whether printed or oral, has the same damaging effect because the public tends to accept statements disseminated to the public at large as the truth.[32] Conversely, there are courts that classify radio or television defamatory broadcasts as purely slander.[33] Other courts base the defamation classification on whether the broadcast statements came from a prepared manuscript.[34] For these courts, the broadcast is libelous when the publisher uses a prepared script,[35]

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[31] *Id.*

[32] *E.g.*, RESTATEMENT (SECOND) OF TORTS § 568A (1977) (discussing disagreement over classification).

[33] *E.g.*, Jeffrey F. Ghent, J.D., Annotation, *Defamation by Radio or Television*, 50 A.L.R.3D 1311 § 4 (1973).

[34] *E.g.*, *id.* § 3 (demonstrating that many jurisdictions find a defamation cause of action for statements read from a prepared script, but differentiate between libel and slander depending on the nature of the communication).

[35] 50 AM. JUR. 2D *Libel and Slander* § 10; *see also* Am. Broad.–Paramount Theatres, Inc. v. Simpson, 126 S.E.2d 873, 877 (Ga. Ct. App. 1962) (upholding rationale that broadcasts using a script establishes a libel action); Hartmann v. Winchell, 73 N.E.2d 30, 312-32 (N.Y.

but slanderous when the publisher makes the statement extemporaneously.[36] Finally, the remaining courts disregard this libel–slander distinction entirely, and classify a defamatory broadcast as its own tort, aptly named "defamacast."[37]

Regardless of whether the broadcast is characterized as libel or slander, broadcast media greatly influenced the law of defamation. The Supreme Court has decided at least three significant cases in the context of broadcast media that have led to the advancement of defamation law. *St. Amant v. Thompson* modified and explained the concept of malice.[38] In *CBS, Inc. v. Davis*, the Court expanded the extraordinary circumstance which justified stays of a preliminary judgment.[39] Lastly, in *Cohen v. Cowles Media Co.*, the Court grappled with the issue of confidential sources.[40]

Although radio and television influenced defamation law, the advent of the Internet broadened the complications produced by radio and television defamatory broadcast, providing courts with new challenges.

C. Internet

In 2006, the Merriam–Webster English Dictionary adopted the word "Google" as a verb, with the accompanying definition "to use the Google search engine to obtain information about (as a person) on the World Wide Web."[41] As reputation management becomes more of an everyday concept, people turn to the Internet to determine what information about them is

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1947) (holding defamatory statements read from a script and broadcast over the radio are still libel even though the written statements are not read by public).

[36] 50 AM. JUR. 2D *Libel and Slander* § 10; *see also* Am. Broad.–Paramount Theatres, 126 S.E. 2d at 877 (noting the varying treatment by courts of defamatory statements); Charles Parker Co. v. Silver City Crystal Co., 116 A.2d 440, 443 (Conn. 1955) (holding that in action by manufacturer against mayor candidate and radio broadcasting company for defamation because of statement read over radio by candidate during election campaign, libel law rather than slander law applied where statement was read from prepared manuscript).

[37] *E.g.*, 50 AM. JUR. 2D *Libel and Slander* § 10 (defining "defamacast").

[38] St. Amant v. Thompson, 390 U.S. 727 (1968) (holding a public official must prove that defamatory publication was made with actual malice, that is, with knowledge that it was false or with reckless disregard whether it was false or not).

[39] CBS, Inc. v. Davis, 510 U.S. 1315 (1994) (finding that indefinite delay of broadcast was an extraordinary circumstance which justified the stay of the preliminary judgment).

[40] Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (holding the First Amendment did not prohibit source from recovering damages under promissory estoppel law for publishers' breach of promise of confidentiality given in exchange for information).

[41] MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/google?show=0&t=1291511686 (last visited December 4, 2010); *see also* Robert L. Mitchell, *How Do Tech Terms Become Legit?*, ABOUT.COM (Sept. 23, 2008) http://pcworld.about.com/od/softwareservices/How-Do-Tech-Terms-Become-Legit.htm.

made available to the consuming public, as well as how to control the disclosure of that information. In 2007, "106 civil lawsuits against bloggers and others in social networks and online forums were tallied by the Citizen Media Law Project at the Berkman Center for Internet & Society at Harvard University, up from just 12 in 2003."[42] According to the Media Law Resource Center in New York, a nonprofit clearinghouse that tracks free–speech cases, as of May, 2009, there had been about $17.4 million in trial awards against bloggers.[43]

Not only the source of new litigation; the Internet has opened the door to a host of new issues within defamation law. Generally, courts have, and should, treat Internet defamation the same as defamatory statements published in other mediums. Unlike traditional mediums, however, the Internet enables the publishers of statements to broadcast their messages to much wider audiences, usually at no cost. Regardless of the particular outcome forum utilized, the content finds ever–increasing opportunities for worldwide reach. Consequently, the escalating prevalence of the Internet has resulted in four unique (and continuously evolving) legal issues arising out of defamation law.

First, the Internet makes it easier for its users to communicate anonymously, which presents interesting litigation challenges when identifying who the responsible parties are for authoring the defamatory statement. Second, the vast spread of the Internet presents difficulties when establishing jurisdiction over the author of the defamatory statements. Third, the Communications Decency Act insulates the owners of websites from liability for defamation, sometimes presenting unique challenges for the defamed party to get the remedy they are seeking. Finally, some plaintiffs have been forced to utilize creative alternative legal theories through which to remedy their reputations.

1. The Role of Anonymity in the Internet

A significant issue raised by defamation on the Internet involves a user's ability to anonymously communicate. Individuals and corporations can become targets of Internet defamation by potential defendants who make comments anonymously on websites, in social media, or by sending anonymous comments to others. Because an individual may find themselves attacked by an unidentified author, ascertaining an anonymous

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[42] M.P. McQueen, *Bloggers, Beware: What You Write Can Get You Sued*, WALL ST. J., May, 21, 2009, at D1, http://online.wsj.com/article/SB124287328648142113.html.

[43] *Id.*

author's identity is not simple. Even if individuals can ascertain the source of the information, they face additional challenges when ascertaining the author's actual identity because the law protects the rights of Internet speakers.

The Supreme Court of the United States has held that the First Amendment protects a person's right to speak anonymously.[44] Therefore, Internet service providers, such as Yahoo, may refuse to voluntarily furnish information regarding the true identity of an anonymous author. An individual wishing to obtain an author's identity will likely need to obtain a court order before a service provider will release the requested information. In the seminal Arizona case of *Mobilisa, Inc. v. Doe*, the court of appeals held that to compel production of an anonymous Internet speaker's identity, the requesting party must show: (1) the speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request; (2) the requesting party's cause of action could survive a motion for summary judgment on elements not dependent on the speaker's identity; and (3) a balancing of the parties' competing interests favors disclosure.[45] Although each state has created its own standard to force the production of an anonymous Internet speaker's identity, many of them remain in line with *Mobilisa*.[46]

Anyone seeking disclosure of an anonymous author's identity should review this case carefully because it provides detailed explanations about the steps a party must take when seeking to discover an anonymous Internet user.

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[44] *E.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (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.").

[45] Mobilisa, Inc. v. Doe, 170 P.3d 712, 721 (Ariz. Ct. App. 2007).

[46] Dendrite International, Inc. v. John Doe No.3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); Doe v. Cahill, 884 A.2d 451 (Del. 2005); Sinclair v. TubeSockTedD, 596 F.Supp.2d 128 (D.D.C. 2009) (citing Lee v. Dep't of Justice, 413 F.3d 53, 59-60 (D.C. Cir. 2005)); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986); FEC v. Florida for Kennedy Comm., 681 F.2d 1281, 1284-85 (11th Cir. 1982); Independent Newspapers, Inc. v. Brodie, 966 A.2d 432 (Md. 2009); UMG Recordings, Inc. v. Does I–IV, 2006 WL 1343597, * 1 (N.D.Cal. 2006). *But see* Maxon v. Ottawa Pub. Co., 402 Ill. App. 3d 704, 714, 929 N.E.2d 666, 676 (Ill. App. Ct. 2010) (rejecting the idea that the party seeking the identity of the anonymous author must be subjected to a hypothetical motion for summary judgment).

2. Jurisdiction Issues in the Internet

The second legal issue the Internet created is the difficulty of establishing jurisdiction over a person accused of committing online defamation. Someone defamed on the Internet generally wants to sue where the defamed person lives, but this may not be possible. Courts continue to struggle with establishing jurisdiction in one state, when the posting occurred in another state.

Arizona's long–arm statute empowers Arizona courts to exercise jurisdiction to the fullest extent permitted by the United States Constitution.[47] Jurisdiction may be established through "intentional conduct, [in another state,] calculated to cause injury" in the forum state.[48] In *Calder v. Jones*, the Supreme Court of the United States ruled that California courts had jurisdiction over Florida defendants who had written, edited, and widely distributed in California, an allegedly libelous story published in a national magazine about the California activities of a California resident.[49] The Court held "California [was] the focal point both of the story and of the harm suffered," noting the defendants' intentional actions were "expressly aimed at California" and not merely untargeted negligence.[50] However, defamatory Internet postings, without more, are probably not sufficient to confer jurisdiction.[51]

Jurisdiction issues over the Internet will likely continue to be a significant source of litigation.

3. Suing Websites and the Communications Decency Act

The third legal issue advanced by the advent of the Internet concerns suing websites under the Communications Decency Act. Under defamation law applying to traditional media, distributors and publishers are treated

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[47] *E.g.*, A. Uberti & C. v. Leonardo, 892 P.2d 1354, 1358 (Ariz. 1995) (citing ARIZ. R. CIV. P. 4.2(a)); Houghton v. Piper Aircraft Corp., 542 P.2d 24, 26 (Ariz. 1975) ("Arizona's long arm statute . . . is intended to give Arizona residents the maximum privileges permitted by the Constitution of the United States.").

[48] Calder v. Jones, 465 U.S. 783, 791 (1984).

[49] *Id.* at 789-91.

[50] *Id.*

[51] *See* Batton v. Tenn. Farmers Mut. Ins. Co., 736 P.2d 2, 8 (Ariz. 1987); s*ee also* Rollin v. William V. Frankel & Co., 996 P.2d 1254 (Ariz. Ct. App. 2000) (posting market quotes on the NASDAQ stock exchange did not satisfy the due process requirement of purposefully availing oneself of the privilege of conducting activities in Arizona); Holland v. Hurley, 212 P.3d 890 (Ariz. Ct. App. 2009) (out of state eBay seller of car did not subject himself to Arizona jurisdiction even though he sold the car to an Arizona buyer).

quite differently from website operators. With traditional media, courts can hold publishers (and authors) liable for the material they publish, but cannot hold distributors (like some website operators) liable.[52]

Web operators have found significant protection under the Communications Decency Act ("CDA").[53] The CDA provides that, when a user writes and posts material on an "interactive website," the site itself, in most cases, is not legally responsible for the posted material.[54] Specifically, the CDA states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[55] The rationale behind this law is simple. Congress recognized that websites could not feasibly monitor the accuracy of the huge volume of information that their users may choose to post. If the law permitted an angry plaintiff to hold a website liable for information that the website did not create, such liability would stifle free speech as fewer and fewer sites would be willing to permit users to post anything at all.[56] Xcentric Ventures, LLC, which operates the website Ripoff Report, one of the websites most frequently sued for defamation, has successfully defended more than twenty lawsuits because of the safe harbor provisions in the CDA.[57]

4. Other Issues

The fourth and final issue the Internet created concerns additional challenges individuals face when protecting their reputations on the Internet, and the other causes of action defamation plaintiffs rely upon to prevent Internet sources from ruining their reputations. One of the most significant challenges potential plaintiffs face for their Internet–based

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[52] DEFAMATION & THE INTERNET, http://www-cs-faculty.stanford.edu/~eroberts/cs201/projects/defamation-and-the-internet/sections/worldwide/usa.html (last visited Dec. 12, 2010).

[53] 47 U.S.C. § 230 (1998).

[54] *Id.* § 230(c)(1).

[55] *Id.*

[56] *See generally* Batzel v. Smith, 333 F.3d 1018, 1027-28 (9th Cir. 2003) (recognizing "[m]aking interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 [of the CDA] therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.").

[57] Ed Magedson, *Why I Do What I Do…What Keeps Ed Magedson, Founder of Ripoff Report Going Every Day*, RIPOFF REPORT, http://www.ripoffreport.com/ConsumersSayThankYou.aspx (last visited Dec. 4, 2010).

defamation claims is the "Streisand Effect."[58] In sum, the Streisand Effect results when a plaintiff's attempt to stifle defamatory statements instead causes greater publication of the information.[59]

The concept of the Streisand Effect arose in 2003 when Barbara Streisand sued for invasion of privacy to have a photo of her home removed from the Internet.[60] Before she filed the lawsuit, no one knew the photograph existed. After she filed the lawsuit, the photo was downloaded and viewed 420,000 times.[61] An Internet commentator thereafter titled this phenomenon–where attempted censorship results in wider publication–the "Streisand Effect."[62] The Electronic Frontier Foundation maintains a database named the "Takedown Hall of Shame," pointing out the most embarrassing online content removal requests.[63] The lesson that individuals can learn if they wish to remove an Internet posting of private information is that the simple act of attempted repression may not achieve the desired

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[58] *See* Mickey Mellen, *About the Streisand Effect*, THE STREISAND EFFECT, http://www.the streisandeffect.com/ about/ (last visited Dec. 5, 2010) (stating "'The Streisand Effect' is when a person, often a celebrity, tries to have a piece of information censored or removed, only to have it backfire and cause the information to receive much more attention than it was previously receiving.").

[59] Andrew Moshirnia, *Hello Gorgeous! The Streisand Effect Survives Assassination Attempt*, CITIZEN MEDIA LAW PROJECT (Feb. 19, 2010), http://www.citmedialaw.org/blog/ 2010/hello-gorgeous-streisand-effect-survives-assassination-attempt ("The Internet has fundamentally changed the economics of menace: attempts to gag individuals will only result in a greater publication of those pieces of information that the litigant is trying to hide.").

[60] Mike Masnick, *Streisand Suing over Environmentalist's Aerial Shots of Her Home*, TECHDIRT (June 1, 2003, 7:13 PM), http://www.techdirt.com/articles/20030601/1910207. shtml.

[61] Paul Rogers, *Streisand's Home Becomes Hit on Web*, THE MERCURY NEWS (June 24, 2003), http://www.californiacoastline.org/news/sjmerc5.html.

[62] *See* Mike Masnick, *Since When Is It Illegal To Just Mention a Trademark Online?*, TECHDIRT (Jan. 5, 2005, 1:36 AM), http://www.techdirt.com/articles/20050105/0132239. shtml. Masnick states:

> How long is it going to take before lawyers realize that the simple act of trying to repress something they don't like online is likely to make it so that something that most people would *never, ever see* . . . is now seen by many more people? Let's call it the Streisand Effect.

Id.

[63] *See Takedown Hall of Shame*, ELECTRONIC FRONTIER FOUND., http://www.eff.org/ takedowns (last visited Oct. 30, 2010); *see also* Richard Esguerra, *Hello Streisand Effect: Takedown Hall of Shame Grows by Four*, ELECTRONIC FRONTIER FOUND. (Jan. 19, 2010), http://www.eff.org/deeplinks/2010/01/hello-streisand-effect-takedown-hall-shame-grows-f.

result.[64] Instead, that act might cause information that would never have been seen by others to be seen by many more people than if the actor had just left the posting alone.[65]

Regardless of the medium in which a publisher disseminates defamatory information, a plaintiff must plead and prove the traditional elements of defamation to prevail. In addition to the traditional defamation cause of action, potential plaintiffs may sue for other torts such as invasion of privacy, intentional interference, or intentional infliction of emotional distress. In *Yath v. Fairview Clinics*, the Minnesota Court of Appeals held that posting illegitimately obtained health information to a MySpace webpage qualified as "publicity" for purposes of an invasion of privacy claim.[66] The court explained, "Yath's private information was posted on a public MySpace.com webpage for anyone to view. This Internet communication is materially similar in nature to a newspaper publication or a radio broadcast because upon release it is available to the public at large."[67] As a result, the publication qualified as "publicity" although the webpage only posted the material for less than forty–eight hours and the plaintiff could only prove that a small number of people actually viewed the material.[68]

Unfortunately, because the Internet is constantly evolving, there has been a lack of consistency among state and federal court decisions concerning the impact of online defamation. For example, a Texas court recently found that emailing links to a third party's defamatory blog constituted "publication" of the blog for defamation purposes.[69] Just three weeks later, a California court decided nearly the same issue completely differently, holding that forwarding a defamatory email with comments is protected by the CDA.[70] In yet another decision on a similar issue, a Kentucky court found that providing a link to and referencing an allegedly defamatory article was not a new publication of the original content.[71] These varied decisions require that a potential plaintiff be wary of the jurisdiction in which the plaintiff wants to litigate because the rules change depending on the court.

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[64] *See* Masnick, *supra* note 62.
[65] *Id.*
[66] Yath v. Fairview Clinics, 767 N.W.2d 34, 42-45 (Minn. Ct. App. 2009).
[67] *Id.* at 43.
[68] *Id.* at 43-45.
[69] *See In re* Perry, 423 B.R. 215, 269-70 (Bankr. S.D. Tex. 2010).
[70] *See* Phan v. Pham, 105 Cal. Rptr. 3d 791 (Cal. Ct. App. 2010).
[71] *See* Salyer v. Southern Poverty Law Ctr., 701 F. Supp. 2d 912, 915-18 (W.D. Ky. 2009).

D. Social Media

Reputation management is, perhaps, most challenged by social media and its growing role in today's technical society. Social Media allows individuals to create and publicize defamatory content in new and increasingly harmful ways. In today's mobile environment, there is a virtual plethora of locations where people can publish and share information online with a large number of people instantly. Facebook, LinkedIn, and Twitter are the "big three" today.[72] However, when evaluating how the courts treat social media, individuals must also consider the "grandparents" of social media–MySpace and AOL–as they laid the groundwork for today's treatment of defamation in social media.[73] Additionally, an evaluation of social media must include Craigslist even though it is not traditionally recognized as a part of mainstream social media because Craigslist has suffered a litany of litigation in which courts have considered the web service a forum for Internet defamation.[74] Such a broad arena for publishing potentially defamatory statements might prohibit defamed individuals from ever discovering the statements at all. But, potential litigants are increasingly Internet–savvy and, with a plethora of tools in existence to allow them to efficiently scan all social media sites for mentions of particular information, litigation over statements made via social media will become more prevalent.[75]

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[72] *See* Don Bulmer, *The Big Three Social Networks Have Emerged as Professional Networks: LinkedIn, Facebook and Twitter*, SOCIALMEDIATODAY (Nov. 19, 2009), http://www.socialmediatoday.com/SMC/143975.

[73] *See, e.g.*, Blumenthal v. Drudge, 992 F. Supp. 44, 46 (D.D.C. 1998); Complaint, Sorenson's Ranch Sch., Inc. v. My Space, No. 2:06-CV-00632, (D. Utah July 31, 2006), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2006-07-31-Complaint.pdf.

[74] *See, e.g.*, Petition of Plaintiff, Heston v. AAA Apartment Locating, No. 09-2571-F, (D. Ct. of Nueces Cnty., Tex. May 29, 2009), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-05-29-%20First%20Call%20-%20Craigslist%20-%20Plaintiffs'%20Petition.pdf.

[75] For example, a Chicago apartment management company sought damages against a tenant for a statement she made on Twitter on May 12, 2009. *See* Verified Complaint, Horizon Grp. Mgmt. v. Bonnen, No. 2009-L-008675, (Cook Cnty. Cir. Ct., Ill. May 12, 2009), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-07-27-Horizon%20Complaint.pdf; *see also* Horizon Group v. Bonnen, CITIZEN MEDIA LAW PROJECT (July 28, 2009), http://www.citmedialaw.org/threats/horizon-group-v-bonnen. The case was dismissed in January 2010. *See* Dismissal Order, Horizon Grp. Mgmt. v. Bonnen, No. 2009-L-008675, (Cook Cnty. Cir. Ct., Ill. Jan. 1, 2010), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2010-01-20-Horizon%20v.%20Bonnen%20Dismissal%20Order.pdf.

While courts do not necessarily appreciate or understand how publishers use social media, recent cases demonstrate that courts are comfortable applying traditional notions of defamation for the purposes of analyzing allegedly defamatory publications.[76] However, the plaintiff's desire to remove content from social media should not overshadow the requirement that the plaintiff prove the statements at issue are both false and defamatory. Plaintiffs who fail to adhere to these requirements may find themselves on the losing end of defamation lawsuits against social media users because the content is often opinion–based.

Reputation management is further complicated by social media's growing role as a news medium. More Americans now get their news from the Internet than from old–fashioned newspapers.[77] The Pew report suggests that social media has its own significant role in the creation and dissemination of news:

> The rise of the Internet as a news platform has been an integral part of these changes. This report discusses two significant technological trends that have influence[d] news consumption behavior: First, the advent of social media like social networking sites and blogs has helped the news become a social experience in fresh ways for consumers. People use their social networks and social networking technology to filter, assess, and react to news. Second, the ascent of mobile connectivity via smart phones has turned news gathering and news awareness into an anytime, anywhere affair for a segment of avid news watchers.[78]

Despite the usefulness of social media, it can have significant negative consequences in the workplace, as well as other important aspects of life. For example, in November 2009, a supposedly depressed woman on long–term sick leave lost her insurance benefits due to photos she published on

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[76] *See* Quigley Corp. v. Karkus, No. 09-1725, 2009 WL 1383280, at *5 n.3 (E.D. Pa. May 15, 2009) (stating "the Court assigns no significance to the Facebook 'friends' reference. Facebook reportedly has more than 200 million active users, and the average user has 120 'friends' on the site . . . . Indeed, 'friendships' on Facebook may be as fleeting as the flick of a delete button.").

[77] Kristen Purcell et al., *Understanding the Participatory News Consumer*, PEW INTERNET 3 (Mar. 1, 2010), http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_Understanding_the_Participatory_News_Consumer.pdf.

[78] *Id.* at 2.

Facebook showing her having a good time.[79] Additionally, in April 2009, a Swiss employee was fired when her employer noticed she was on Facebook while she was supposed to be nursing a migraine.[80] In June 2009, a woman charged in a DUI–related crash faced increased penalties after police found Facebook photos of her consuming alcohol that were dated after she was released on bail under the condition she would not consume alcohol or be around others who were consuming alcohol.[81]

The difficulty of verifying users' identities is an additional concern arising from increased use of social media. Separate from the issue of anonymous authorship, individuals can pretend to be anyone they choose while using social media. This anonymity includes the ability to commit identity theft. Prior to Twitter's instituting a "verified account" feature, the web service allowed people to create accounts posing as other individuals, including celebrities.[82] Although typically these accounts were obviously satirical in nature, individuals struggled with preserving their personal identity through social media outlets. For example, in May, 2009, an individual signed up for a Twitter account using the name "Tony LaRussa," the then-manager of the St. Louis Cardinals.[83] The real LaRussa filed a lawsuit against Twitter for unauthorized and offensive content that was posted in his name, claiming the tweets damaged his reputation and caused him emotional distress.[84] Social media can harm not only individuals, but also companies and brand names. Companies like General Motors, General Electric, Kellogg Company, MasterCard, Nestle, and Walt Disney, to name a few, were all "beat to the tweet" of their corporate name by false users.[85] Valid concerns still exist with regard to the protection of both brand and individual names; because social media sites allow their users to register for

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[79] *Depressed Woman Loses Benefits Over Facebook Photos*, CBC NEWS, http://www.cbc.ca/canada/montreal/story/2009/11/19/quebec-facebook-sick-leave-benefits.html?ref=rss (last visited Dec. 12, 2010).

[80] *'Ill' Worker Fired Over Facebook*, BBC NEWS, http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/8018329.stm (last updated Apr. 25, 2009).

[81] *Update: Photos Lead to Monitoring*, CHICAGO TRIB., June 5, 2009, at 8, *available at* 2009 WLNR 10866255.

[82] *About Verified Accounts*, TWITTER, http://twitter.com/help/verified (last visited Nov. 13, 2010).

[83] *E.g., Tweets Can Raise Legal Issues, Warns Privacy Expert*, CLAIMSJOURNAL.COM (June 11, 2009), http://www.claimsjournal.com/news/national/2009/06/11/101256.htm.

[84] *Id.*

[85] Rupal Parekh, *GM, Kellogg, Nestle Beat to the Tweet as Squatters Take Over Twitter Names*, ADVERTISING AGE (Nov. 9, 2009), http://adage.com/digital/article?article_id=140377.

an online identity without any verification of whether that individual does indeed go by the registered name.[86]

Given that the creators of social media services naturally consider themselves trendsetters, it is not surprising that nearly all social media services have written policies regarding the removal of content. Generally located in the "terms of service," most social media services provide policies for dealing with allegedly defamatory statements published on the website.[87] The terms of service also provide information regarding privacy features that ensures social media users can protect their personal information as much as they wish.[88]

The increasing ease of publishing defamatory matter due to ever–changing media technologies, especially the Internet, demonstrates that the need to protect one's reputation is greater than ever. Although courts and the law have progressed with the changing media to account for novel challenges and issues, the law is still an imperfect means of remedying a damaged reputation. A defamed individual, however, has other remedial options.

IV. AVAILABLE REMEDIES

Historically, when a person was defamed he would challenge the defamer to a duel.[89] One of the most famous duels involved then Secretary of the Treasury Alexander Hamilton and sitting Vice President Aaron Burr.[90] On July 11, 1804, Burr shot and mortally wounded Hamilton over Hamilton's alleged written defamations about Burr.[91] Thankfully, today, we employ less archaic methods for settling defamation disputes and there are many possible remedies available to a defamed person. Often, a person may employ a combination of different remedies.

Of primary importance to remedying defamation is learning the defamed person's goal. In our experience, a very common goal is a desire to prevent continued publication. However, there are related and somewhat different goals. The defamed person may want to set the record straight and

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[86] *Id.*

[87] *See, e.g.*, *Facebook Principles*, FACEBOOK, http://www.facebook.com/principles.php (last visited Nov. 13, 2009) (stating the "Facebook Principles" that all users are required to adhere to); *Terms of Service*, TWITTER, http://twitter.com/tos (last visited Nov. 13, 2010).

[88] *Id.*

[89] *Alexander Hamilton and Aaron Burr's Duel*, PBS: PUBLIC BROADCASTING SERVICE, http://www. pbs.org/wgbh/amex/duel/peopleevents/pande17.html (last visited Dec. 5, 2010).

[90] *Id.*

[91] *Id.*

prove the defamation is wrong. The defamed person may want to protect their future reputation or obtain damages for injuries already suffered. They may even want vengeance. In the employment field, the individual likely wants to protect their reputation, job, or to set the record straight for future employment possibilities. Such remedies are discussed in more detail below.

A. Confrontation?

One possible remedy is the most obvious–simply ask the person who is defaming to stop. Sometimes, personal confrontation and discussion can resolve the issue and stop the defamatory statements from spreading. This remedy is by far the easiest and least expensive approach and it may work. However, this remedy alone is not always enough because people may choose to keep doing what they are doing. Additionally, simply stopping publication of defamatory information will not necessarily clear a person's name or reputation and it certainly does not provide damages if any were suffered.

B. Get the Other Side of the Story Out?

Another way to repair one's reputation is to tell the other side of the story. A defamed individual can accomplish this remedy by disseminating the correct information through the same source that first published the defamatory information. In traditional media, for example, a defamed individual can hold a press conference, issue a press release, write a letter to the editor, or take other efforts to publicize the rest of her story. In the workplace, the defamed individual could respond to a defamatory memo with a like memo, addressed to the same persons as the first memo. Or, the defamed individual could send a responsive email, file a grievance, or utilize any of the other methods of communication established within a particular workplace.

On the Internet, the defamed individual can find a way to get the other side of the story posted at the same place as the original defamatory posting. Sometimes this type of posting is easy because many websites have open blogs where the offended person can freely communicate.[92] Many websites, like www.ripoffreports.com, allow businesses that have been bad–mouthed to post their side of the story. The goal of this remedy is to simply go to the same forum containing the negative information and respond in kind.

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[92] *See, e.g.*, www.ripoffreport.com, www.complaintsboard.com; www.yelp.com.

C. Write a Letter?

A letter is another possible means of persuasion to get a person to stop publishing the defamatory statement, while thus limiting the damages, if any. A defamed individual may also use a letter to repair her reputation without expending too much time or money. The type of letter written depends on the desired response sought by the defamed person. The following subsections detail certain forms of letters that the defamed person may use.

1. Demand for Apology or Retraction Letter?

A demand for retraction seeks to stop the dissemination of damaging information. Additionally, it often urges the defamer to publish a statement to the opposite effect. Typically, a defamed person will couple a demand for retraction with a threat of litigation if the retraction is not issued. Essentially, the party sending the letter is looking for an apology from the defamer. The defamed person wants the defamer to not only stop publishing the defamatory information, but also to disseminate information contrary to the statements previously published.

If the publication was in the media, there may be a retraction statute available to address the issue. Most states have retraction statutes. These statutes mostly apply to media publications and are likely inapplicable to the Internet or the workplace.[93] Arizona attempted a retraction statute that applied to the media, but the Arizona Supreme Court held it unconstitutional.[94]

Retraction demands can have uses beyond obtaining a retraction. For example, a defamed individual can use the defamer's failure to retract the defamation as evidence of malice.[95] Accordingly, there may be a strategic reason to ask for a retraction. The problem with a retraction demand, however, is that if the defamer refuses to retract, the person demanding the

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[93] For a collection of retraction statutes, *see* MEDIA LIBEL LAW 2009-2010, REPORTS FROM ALL FIFTY STATES, THE FEDERAL COURTS OF APPEALS, U.S. TERRITORIES, CANADA, AND ENGLAND (Media Law Resource Center, Inc. ed., 2010). For a discussion of retraction statutes *see* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 11:2 (4th ed. 2010).

[94] *See* Boswell v. Phx. Newspapers, Inc., 730 P.2d 186 (Ariz. 1986) (holding Arizona Revised Statutes Section 12-653 was an unconstitutional abrogation where the statute allowed a jury to award special but not general damages against a media defendant that had published a retraction).

[95] *See* Dombey v. Phx. Newspapers, Inc., 724 P.2d 562, 575 (Ariz. 1986); *see also* Ross v. Galant, Farrow & Co., 551 P.2d 79, 81 (Ariz. Ct. App. 1976).

retraction may be forced to file a lawsuit. If the goal was to clear one's name, then this remedy may not be the best alternative.

2. Cease–and–Desist Letter?

A cease–and–desist letter is a formal request to a party to refrain from continuing a particular course of action or conduct, specifically, the action or conduct that is damaging to one's reputation. This letter may contain a variety of information. For example, the letter could contain not only a description of what is being said and where it was said, but it could also contain a complete explanation about why the statements are false. The cease–and–desist letter could contain even more information. It could, and should, attach exhibits showing why the original statement is false. It could include "fluff" about the defamed person, explaining why the person does not deserve the defamation and why the person has an otherwise stellar and well–deserved reputation. In other words, the defamed person, or her attorney, could write the cease–and–desist letter in such a way as to refute the negative and to fully advertise the positive about the defamed person.

Many defamed people want a cease–and–desist letter simply to have it. A well–crafted and well–supported letter, with exhibits, could be shown to others who may have seen or heard the original defamatory statement. Such an advertising means can be useful in the marketplace because the defamed person can readily give the letter to anyone who heard the first defamation. The defamed person could similarly use the letter in the workplace–if someone does raise the defamation issue, the defamed person can proffer the letter as a self–contained explanation or contradiction. This remedy is limited to the number of individuals to which the defamed person can provide the letter and may not be best for defamatory information broadcasted to large audiences.

3. Demand for Damages Letter?

A third type of letter is a demand for damages letter. In this letter, a person seeks compensation for the damage to her reputation. A threat of legal action usually accompanies a demand for damages. The party seeking damages often asserts her claim in the form of a letter stating her demand, and then follows her demand with the threat of a lawsuit if the defamer does not pay damages. This type of letter is used to open negotiations for a possible settlement of the claims. If the parties are unable to settle, litigation likely follows.

D. Sue for Defamation?

When a defamer unfairly and falsely tarnishes a reputation, the most common way to protect one's reputation is to initiate a defamation lawsuit. Defamation lawsuits can be effective and can significantly repair damage to one's reputation. The following two sections provide the elements of and the problems with the defamation lawsuit.

1. Summary of the Elements

In simple terms, the tort of defamation requires the following elements: (1) the defendant must publish a defamatory statement; (2) that is false; (3) that is of and concerning the plaintiff; (4) the defendant must have some degree of fault; and (5) the statement must damage the plaintiff.[96] Each jurisdiction may interpret the elements of defamation differently, and so, the following summary focuses on a general treatment of the elements with some examples from Arizona.

Defamatory Statement. The Restatement (Second) of Torts defines a defamatory statement as a communication that tends "to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[97] Arizona courts have adopted a similar definition of defamation which is often referred to synonymously with libel. In Arizona, the definition of libel comes from a now repealed criminal libel statute and is "any malicious falsehood expressed in writing, printing, or by signs or pictures, which tends to bring any person into disrepute, contempt or ridicule . . . ."[98] The Arizona Supreme Court adopted this definition in *Central Arizona Light & Power Co. v. Akers*[99] and the state has followed this definition ever since. To determine the meaning of words, courts look at the "natural and probable effect on the mind of the average [listener]."[100] To determine whether a communication is defamatory, a court must review the communication as a whole and not out of context.[101] The process used to determine whether a communication is defamatory is different than determining whether a

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[96] RESTATEMENT (SECOND) OF TORTS § 558 (1977).
[97] RESTATEMENT (SECOND) OF TORTS § 559 (1977).
[98] Cent. Ariz. Light & Power Co. v. Akers, 46 P.2d 126, 131 (Ariz. 1935) (citing Ariz. Rev. Code § 4617 (1928) (repealed).
[99] *Id.*
[100] Yetman v. English, 811 P.2d 323, 329 (Ariz. 1991) (citing Phx. Newspapers, Inc. v. Church, 447 P.2d 840, 845 (Ariz. 1968)).
[101] *E.g.*, Phx. Newspapers, Inc. v. Choisser, 312 P.2d 150, 153 (Ariz. 1957).

plaintiff can ultimately recover damages as no actual harm is necessary to make a communication defamatory.[102]

In the past, the distinction between libel and slander was necessary in determining damages; however, as technology changes, the distinction between the two has blurred.[103] Further, the U.S. Supreme Court has said that actual damages are required for most defamation cases, which makes the distinction even less significant.[104]

False Statement. A defamatory statement must be false to be actionable as truth is an absolute defense.[105] Substantial truth is also a complete defense which the court can determine as a question of law if the facts are not in dispute.[106] A statement of opinion is only actionable when it is capable of being proved true or false.[107]

Of and Concerning the Plaintiff. The recipient of the defamatory statement must clearly recognize that the statement is about the plaintiff.[108] It is not necessary that the person defamed be actually named, as long as the recipient correctly or mistakenly, but reasonably, understands that the defamer intended the communication to refer to the plaintiff.[109] Occasionally, a defamatory statement may relate to a group of persons. If the group of persons is so small that the object of the defamatory statement is readily ascertainable, the statement is actionable even if the individuals are not identified by name.[110]

Fault. The plaintiff must also prove that the defendant acted with some degree of "fault." The type of fault depends on the nature of the plaintiff and the circumstances of the publication. State law determines a private

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[102] RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (1977).

[103] Bradley C. Rosen, *Proof of Facts Establishing Affirmative Defenses Against a Claim for Defamation*, 99 AM. J. PROOF OF FACTS 3d 393 (2010).

[104] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[105] *See* Cent. Ariz. Light & Power Co. v. Akers, 46 P.2d 126, 134 (Ariz. 1935).

[106] Read v. Phx. Newspapers, Inc., 819 P.2d 939 (Ariz. 1991) (holding that defendant's statement was substantially true when defendant claimed plaintiff was convicted of a misdemeanor for firing a gun when the actual conviction was for displaying a weapon); Turner v. Devlin, 848 P.2d 286, 293 (Ariz. 1993) (holding a statement that police investigation was "bordering on police brutality" was based on subjective impressions which were not provable as false).

[107] *See Turner*, 848 P.2d at 290.

[108] RESTATEMENT (SECOND) OF TORTS § 617(a) (1977).

[109] RESTATEMENT (SECOND) OF TORTS § 564 (1977).

[110] *See* Hansen v. Stoll, 636 P.2d 1236, 1240-41 (Ariz. Ct. App. 1981) (holding defamatory statements about seven unnamed federal narcotics agents actionable where law enforcement community could identify plaintiffs from the statements).

individual's burden, but the burden cannot be less than negligence.[111] The degree of fault is "actual malice" if the plaintiff is a public official,[112] a public figure,[113] or if the statement is made on a privileged occasion.[114] A party proving actual malice must show that the party publishing the statement had knowledge of its falsity or acted with reckless disregard of the statement's falsity.[115]

Damages. Finally, the plaintiff must prove damages and causation. The damage must flow from the false statement (i.e., the defamation caused the plaintiff's harm). Damages can include:

- Compensatory damages for all emotional distress and bodily harm.
- General damages for any impairment of reputation and standing in the community.
- All special damages to the plaintiff's property, business, trade, profession, or occupation (e.g., financial losses).
- Punitive damages, but only if the plaintiff proves that the defamer had knowledge of the statement's falsity or acted in reckless disregard of the truth. Presumably, the plaintiff must also meet the standards of *Linthicum v. Nationwide Life Insurance Co*.[116] Arguably however; a plaintiff meets this standard by showing actual malice.
- Presumed damages, so long as the plaintiff shows "actual malice" (knowing falsity or reckless disregard).[117]

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[111] *See* Peagler v. Phx. Newspapers, Inc., 560 P.2d 1216, 1222 (Ariz. 1977) (holding that an Arizona plaintiff must establish negligence if the publication is a matter of public concern). However, if the plaintiff is a private person and the publication is a matter of private concern, then states are free to retain the common law presumption of falsity. Dombey v. Phx. Newspapers, Inc., 724 P.2d 562, 567 (Ariz. 1986).

[112] Lewis v. Oliver, 873 P.2d 668, 675 (Ariz. Ct. App. 1993).

[113] Scottsdale Publ'g, Inc. v. Super. Ct., 764 P.2d 1131, 1138 (Ariz. Ct. App. 1988).

[114] Aspell v. Am. Contract Bridge League, 595 P.2d 191, 192-93 (Ariz. Ct. App. 1979).

[115] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[116] Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 679-80 (Ariz. 1986).

[117] RESTATEMENT (SECOND) OF TORTS §§ 621 cmt. b, 623 (1977); *see also* Dombey, 724 P.2d at 567; Nelson v. Cail, 583 P.2d 1384, 1388-89 (Ariz. Ct. App. 1978).

2. Problems with a Defamation Suit

Defamation suits, like many lawsuits, are time–consuming, expensive, invasive, and difficult on the parties. Many people believe they should win a defamation lawsuit merely because a statement about them is false. However, many plaintiffs lose in defamation cases because they fail to prove the requisite elements of fault or causation.[118] Another problem is that a lawsuit can cause further publication of the defamatory statements. By filing suit, the original information becomes part of the public record and can receive media attention. If the suit is unsuccessful, not necessarily because the statement was true, but because the claimant was unable to prove the necessary fault, then the lawsuit can have the opposite effect desired.

The largest likely deterrent to a defamation lawsuit is the cost. Litigation costs and fees are large in many cases, but defamation cases are even more costly to litigate. The increased expenses derive from the challenges of litigating First Amendment and constitutional issues and from the extensive types of damages and discovery allowed. Many cases are not pursued because of a lack of resources and the lack of lawyers willing to offer contingency fee agreements in defamation practice.

Defamation lawsuits are, however, the most common way to protect one's reputation. The mere act of filing a lawsuit is a message that harm to a reputation by false statements justifies a lawsuit. Publicity can follow from the act of filing a lawsuit or pursuing it. The defamed person can tell others that they have actually filed a lawsuit and use this information as a way to protect her reputation. Ultimately, a victorious lawsuit in and of itself should repair damaged reputations.

E. Declaratory Judgments–A New Tool

Another way to possibly fix a damaged reputation is to file a declaratory judgment lawsuit in which a court declares the defamatory statement false. This type of lawsuit is a controversial method and not yet widely used. This relief–a declaration of falsity–is appropriate under the Uniform Declaratory Judgments Act,[119] which permits courts to liberally construe and administer declaratory judgments.[120] Courts are familiar with claims that combine a

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[118] *See generally* Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, AM. B. FOUND. RES. J. 455 (1980) (discussing the seventy percent pre-trial rate due to the inability to prove malice by clear and convincing evidence).

[119] ARIZ. REV. STAT. ANN. §12-1831 (2010).

[120] § 12-1842; *see also* Schwamm v. Super. Ct., 421 P.2d 913, 915 (Ariz. Ct. App. 1966).

declaratory judgment and a declaration of falsity.[121] Moreover, the Restatement of Torts specifically approves using a declaratory judgment in defamation cases.[122] In Arizona, the Revised Statutes specify the parties that a plaintiff can properly name in a declaratory judgment action.[123]

A declaratory judgment may have the same effect as a defamation lawsuit because a court is disavowing a false statement. However, unlike a defamation lawsuit, the plaintiff need not prove damages. Also, under a declaratory judgment, the plaintiff likely does not have to prove all the necessary–and often difficult to prove–elements of a defamation suit. Instead, the only element the plaintiff must prove is that the statement was false. A declaratory judgment action, standing alone, can be a more expeditious and less expensive way to vindicate the truth if the primary goal is to have a court declare a statement false.

F. Lawful Threats and Seeking Removal of Offending Material

One issue that tends to remain after a plaintiff has successfully adjudicated that a statement is false and defamatory is forcibly removing the statement from Internet publication. Unlike traditional media, statements published on the Internet can, theoretically, remain publicly available in perpetuity.[124] Where an individual chooses to publish their statements will dramatically impact the plaintiff's ability to remove (or suppress) the presence of those statements on the Internet.

One of the issues that a party seeking removal of defamatory material must confront is the theory of prior restraint. The Supreme Court has recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn" and that

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[121] *See* Polk v. Koerner, 533 P.2d 660, 661 (Ariz. Ct. App. 1975); *see also* Henein v. Saudi Arabian Parsons Ltd., 818 F.2d 1508 (9th Cir. 1986); Merlo v. United Way of Am., 43 F.3d 96 (4th Cir. 1994); Copper State Bank v. Saggio, 679 P.2d 84, 86 (Ariz. Ct. App. 1983).

[122] *See* RESTATEMENT (SECOND) OF TORTS, ch. 27, Special Note On Remedies for Defamation Other than Damages (1977) ("In a jurisdiction where declaratory relief is available as a general remedy and statutory provisions do not preclude it, resort may be had to a suit for a declaratory judgment that the defamatory statement is untrue.").

[123] ARIZ. REV. STAT. ANN. § 12-1841 (2010) ("When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.").

[124] The Internet Archive is building a digital library of Internet sites and other cultural artifacts in digital form. Among its collection are over 150 billion web pages archived from 1996 to as recent as a few months ago. *See* Internet Archinve, WayBack Machine, http://www.archive.org/web/web.php (last visited December 5, 2010).

"[t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools."[125] The term prior restraint is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."[126] It "exists when the enjoyment of protected expression is contingent upon the approval of government officials."[127] Temporary restraining orders and permanent injunctions–i.e. court orders that actually forbid speech activities–are classic examples of prior restraints.[128] "Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[129] Thus, the Court must determine whether, "the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[130]

Over the years, Supreme Court decisions have "steadfastly preserved the distinction between prior restraints and subsequent punishments."[131] While not per se unconstitutional,[132] an injunction on speech is presumptively unconstitutional.[133] Yet, "[I]t has never been held that liberty of speech is absolute."[134] One long adhered principal in defamation cases is that courts decline to enjoin libels.[135] To withstand scrutiny, prior restraints, "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints and . . . must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech."[136]

Arizona courts have held that while not per se unconstitutional, prior restraints are to be viewed strictly.[137] The majority of Arizona cases discussing prior restraint have remained in line with the federal precedents.[138]

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[125] Blount v. Rizzi, 400 U.S. 410, 417 (1971) (citations omitted).

[126] Melville Nimmer, NIMMER ON FREEDOM OF SPEECH § 4.03, p. 4-14 (1984) (emphasis added).

[127] Dream Palace v. County of Maricopa, 384 F.3d 990, 1001 (9th Cir. 2004) (citing Near v. Minnesota, 283 U.S. 697, 711-13 (1931)).

[128] NIMMER, *supra* note 126, § 4.03 at 4-16.

[129] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[130] United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd* 341 U.S. 494 (1951).

[131] Alexander v. United States, 509 U.S. 544, 553-54 (1993).

[132] Southeastern. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975); *see also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 n.10 (1963).

[133] *Stuart*, 427 U.S. at 559.

[134] Times Film Corp. v. City of Chicago, 365 U.S. 43, 47 (1961).

[135] 1 ROBERT D. SACK, SACK ON DEFAMATION §10.6.1 (2009).

[136] *Conrad*, 420 U.S. at 559.

[137] State v. Bauer, 768 P.2d 175, 182 (Ariz. Ct. App. 1988).

[138] State *ex rel*. Corbin v. Tolleson, 773 P.2d 490, 501 (Ariz. Ct. App. 1989).

In the recent case of *Blockowicz v. Williams*, the Illinois District Court held that plaintiffs could not compel an Internet website host to remove defamatory material pursuant to a permanent injunction issued in an action to which the website host was not a party.[139] In that case, the plaintiffs had successfully obtained: (1) a default judgment against defendants who had defamed the plaintiffs own Internet website; and (2) a permanent injunction ordering the defendants to remove their statements.[140] The plaintiffs then attempted to enforce the injunction against a third party Internet website host to force it to remove defamatory content posted by defendants.[141] The Illinois District Court determined the plaintiffs could not force the website host to remove those statements in accordance with the website's terms of use where the website host had too tenuous of a connection with the defendants that did not amount to an attempt to assist the defendants with their defamatory conduct.[142]

The *Blockowicz* case demonstrates some of the difficulties that arise when defamers publish statements in locations where a plaintiff is later unable to reach. If an offending website contains defamatory matter about a defamed person, there still may be other ways to assist that person. Specifically, it can be requested that the website's owner, the web host, or both remove the offending material.

When looking to the website to get material removed, the first place to look is the website's terms of use. Many of the terms of use contain prohibitions as against users posting offensive or defamatory material. Relying on the terms of use, a direct request to the website pointing out the user's violation of the terms might get the offending material removed. Even absent specific terms of use, some less sophisticated web operators may comply with a request for removal because of their lack of understanding of the CDA, or simply because they find it easier to avoid potential litigation. Generally, the information necessary to identify the website operator can be found within the website itself.

When looking for relief from the web host, there must be an understanding that the host of the website has no direct control over the content of the website itself. However, many hosts are risk averse, and thus, sending them a removal request may get them to put pressure on the owner of the website. Information regarding the identity of the web host's agent can typically be obtained from the United States Copyright Office, which

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[139] Blockowicz v. Williams, 675 F. Supp. 2d 912, 915-16 (N.D. Ill. 2009).
[140] *Id.* at 913-14.
[141] *Id.* at 914.
[142] *Id.* at 915-16.

requires that these agents be registered. Whereas the web host will not be able to remove the content on its own, it likely will send the complaints it receives about offensive content to the owner of the website, who may accede to the pressure from the web host.

G. Name Clearing Hearings

Another way to protect one's name only applies if a government body, such as a state, county, city, or agency, makes the statement. If a government agency makes a false statement of fact about a person, the injured person may have a right to a "name clearing" hearing.

The right to such a hearing arises almost entirely from the employment context, and generally occurs when the agency makes a defamatory statement upon terminating an employee. Additionally, this right arises only if infringement occurs upon a property or liberty interest of the employee.[143] Therefore, like any property or liberty interest, a person must receive due process before the government may deprive the person of that right. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"[144] Similarly, when information regarding termination is publicly disclosed, an employee has a liberty interest in clearing her name.[145] Failing to provide a name clearing hearing is a violation of due process under the Fourteenth Amendment.[146]

For example, in the Ninth Circuit case of *Cox v. Roskelley*, the defendant County did not afford a public employee a hearing prior to his termination.[147] At the time the defendant fired the plaintiff, the defendant placed a letter in the plaintiff's personnel file stating the reasons for his termination.[148] Local media got word of the story and requested a copy of the personnel file, including the termination letter.[149] The County released the plaintiff's letter to the press after a determination that the Washington Revised Code mandated release under the public records release requirement.[150] Subsequently, the plaintiff filed suit, claiming deprivation

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[143] *See* Bd. of Regents v. Roth, 408 U.S. 564, 578 (1972); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 537 (1985); Paul v. Davis, 424 U.S. 693 (1976).

[144] Loudermill, 470 U.S. at 542 (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

[145] Cox v. Roskelley, 359 F.3d 1105, 1110 (9th Cir. 2004).

[146] *Id.* at 1110.

[147] *Id.* at 1109.

[148] *Id.* at 1105.

[149] *Id.*

[150] *Id.* at 1109.

of his due process rights when the County placed the termination letter in his personnel file without first providing him notice and a right to respond.[151] The court in *Cox* held that placing stigmatizing information into a personnel file is publication, which requires a name clearing hearing.[152] Washington law classifies a public employee's personnel file as a public record and, accordingly, the public may access it.[153]

A similar case in the Fourth Circuit further clarified when the government must provide a name clearing hearing after placing information in a personnel file.[154] In *Sciolino v. Newport*, the court held that the mere placement of information in a personnel file does not amount to a deprivation of a liberty interest unless the employee shows a likelihood that the public or prospective employers will view the file.[155] Ultimately, these two cases show that, if a government agency wishes to place stigmatizing information into an employee's file, it should offer the employee a hearing of some type and should advise the employee of his right to seek such a hearing.

H. Search Engine Optimization ("SEO")

Today, many people find defamatory material online by using search engines, like Bing, Google, or Yahoo. If a client complains that someone has defamed her on the Internet, one approach is to suggest the client seek to ensure the "good information" about her is first seen by Internet users. In other words, suggest the client use "SEO." SEO is an acronym for "search engine optimization" or "search engine optimizer."[156] As an Internet marketing strategy, SEO considers how search engines work and what people search for. Website optimization primarily involves editing the website's content, HTML, and associated coding to both increase its relevance to specific keywords and to remove barriers to search engines' indexing activities.[157] A number of companies provide SEO services.[158]

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[151] *Id.* at 1105.
[152] *Id.* at 1110.
[153] *Id.*
[154] Sciolino v. Newport, 480 F.3d 642 (4th Cir. 2007).
[155] *Id.* at 650.
[156] *Search Engine Optimization–Webmaster Tools Help*, GOOGLE WEBMASTER CENTRAL, http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=35291 (last visited Nov. 8, 2010).
[157] *See* Gregg Malin, *SEO: Search Engine Optimization and Why You Must Use It*, GREGG MALIN WEB DESIGN (July 25, 2009, 10:54 AM), http://www.greggmalin.com/search-engine-optimization/34-seo-marketing/46-search-engine-optimization-and-why-you-gotta-use-it.html.

Although hiring an SEO company may significantly improve web visibility,.[159]

Although SEOs can provide clients with valuable services, a large number of SEOs (including many of the early adopters) have given the SEO industry a black mark through overly aggressive marketing efforts and attempts to manipulate search engine resulting in border-line illegal or unethical ways.[160] Also known as "black hat SEO" or "spamdexing," these companies use methods such as link farms, keyword stuffing, and article spinning that degrade both the relevance of search results and the user–experience of search engines.[161] Keep in mind that there are no SEO companies that have "relationships" with any of the search engines that can somehow put specific web pages and content on the front pages of search results.[162]

I. Take Down Notice–Digital Millennium Copyright Act ("DMCA") it can also be expensive and risk damage to reputation.163 For additional help with SEO, Google offers basic guidelines

Another tool that may help a client is a "take down notice" under the Digital Millennium Copyright Act[164] ("DMCA"). The DMCA was signed into law by President Clinton on October 28, 1998.[165] Under certain circumstances, as set forth below, it may be possible to convince website hosts to remove offending material under the DMCA.

Title II of the DMCA, titled the Online Copyright Infringement Liability Limitation Act ("OCILLA"), created four new limitations on

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[158] *See id.*

[159] *See Google Search Engine Optimization Starter Guide*, GOOGLE, http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/webmasters/docs/search-engine-optimization-starter-guide.pdf (last visited Nov. 8, 2010).

[160] *See* GOOGLE WEBMASTER CENTRAL, *supra* note 156.

[161] *See id.*

[162] *See id.*

[163] Gregg Malin, *How Can I Improve My Website's Ranking in Google? Search Engine Optimization*, GREGG MALIN WEB DESIGN (Aug. 8, 2009, 8:12 PM) http://www.greggmalin.com/search-engine-optimization/34-seo-marketing/53-how-can-i-improve -my-websites-ranking-in-google.html.

[164] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.).

[165] Randy Alfred, *Oct. 28, 1998: President Signs New Copyright Law*, WIRED.COM, http://www.wired.com/science/discoveries/news/2008/10/dayintech_1028.

liability for copyright infringement by online service providers.[166] OCILLA also allows plaintiffs to subpoena ISPs requesting their users' identity.[167] The significance of OCILLA is that the service provider must promptly block access to allegedly infringing material (or remove such material from its system) if it receives an infringement notification from a copyright holder or the copyright holder's agent.

This limitation can be used to the defamed person's advantage to your client's advantage. Be aware, however, that Title II creates a safe harbor for online service providers (including ISPs) against copyright liability, but only if they adhere to and qualify for certain prescribed safe harbor guidelines.[168] One of these guidelines is that website operators register an agent with the United States Copyright Office before they receive DMCA immunity.[169] A website operator's failure to register an agent, alone, will cause it to lose immunity. A list of registered agents can be found online at the Copyright Office's website[170] or through a search of www.whois.com[171], although privately registered web sites may not be available at this website.

The DMCA establishes proper notification procedures and provides rules about the notification's effect.[172] Pursuant to the notice and takedown procedure, a copyright owner submits a notification under penalty of perjury, including a list of specified elements, to the service provider's designated agent.[173] If a copyright owner substantially fails to comply with the statutory requirements, a court will not consider the notification when it determines the service provider's requisite knowledge level.[174] If, upon receipt of proper notification, the service provider promptly removes or blocks access to the material identified in the notification, the provider is exempt from monetary liability.[175] Additionally, the service provider is not liable to any person for claims based on its good faith removal of or blocking access to the material.[176]

The effect of the DMCA, particularly OCILLA, is that copyright holders have the incentive to monitor Internet websites for offending

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[166] 17 U.S.C. § 512 (1998).
[167] 17 U.S.C. § 512(h) (1999).
[168] 17 U.S.C. § 512(c)(1).
[169] 17. U.S.C. § 512(c)(2).
[170] *U.S. Copyright Office–Service Provider Agents*, COPYRIGHT.GOV, http://www.copyright.gov/onlinesp/list/ (last visited Dec. 5, 2010).
[171] WHOIS.COM, http://www.whois.com (last visited Dec. 8, 2010).
[172] 17 U.S.C. § 512(c)(3).
[173] 17 U.S.C. § 512(c)(3)(A).
[174] 17 U.S.C. § 512(c)(3)(B).
[175] 17 U.S.C. § 512(c)(1).
[176] 17 U.S.C. § 512(g)(1).

material and to send ISPs notifications when appropriate. ISPs have an incentive to cooperate with copyright holders and terminate repeat infringers' accounts or else they forfeit OCILLA's safe harbor.

V. CONCLUSION

Historically, reputations have been an important asset, and continue to be today. Damage to reputation is not a new idea. However, with the constant creation of new technology and ways to disseminate information, defamation law continues to grow and adapt. When a person believes they have been defamed, there are many options to help a client restore their defamed reputation–from a simple demand for an apology or retraction, to a complicated and litigious suit for defamation, declaratory judgment, or other claims and forms of relief. But no matter the avenue a defamed person chooses, careful consideration must be given to how best to address false statements in today's changing world.