

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

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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 time or the CEO of a major company, everyone cares about their reputation. In the workplace, a 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. It then explores options for protecting that reputation in today’s legal society.

I. The importance of reputation

Throughout history, reputation has been cherished and protected. 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. Proverb 22:1 says, “a good name is rather to be chosen than great riches, and a loving favour than silver and gold.” An emphasis throughout history on the subject of reputation shows the extent to which society values it.

II. Reputations can be easily damaged

Damage to reputation is not a new idea. For centuries falsities have been disseminated among the masses. Slandorous and libelous remarks have been around for as long as there has been language or a way to communicate them. However, the fairly recent (in relative terms) advent of media and, more recently, the internet, have established new forums and methods for dissemination of material that reach mass audiences. As a result,

¹ *Othello* (3.3.155-161).

comments that may have initially reached a very limited audience can now reach millions in an instant. The need to protect reputations is greater than ever.

Historically, in the Middle Ages the ecclesiastical courts exercised jurisdiction over defamation cases.² It was not until the Reign of Henry VIII that the common law courts began to exercise jurisdiction over the tort of defamation.³ At that time, the only real forms of defamation came through oral statements and were classified as slander.⁴

In time, Slander was found to be inadequate to encompass the entire tort and the courts gradually established libel.⁵ Since then, many have criticized allowing any legal distinction between the two and argue that it should be demolished in favor a generic tort of defamation (id). However, under a few narrow circumstances the distinction could make some difference. For example, in *Hirsch v. Cooper*, 153 Ariz. 454, 457, 737 P.2d 1092, 1095 (App. 1986) the Court allowed presumed damages after it found a slander *per se* since the statement “tends to injure a person in his profession.” However, many more recent Courts have criticized the distinction. See discussion in *Nethercutt Collection v. Regalia*, 172 Cal.App.4th 361, 368, fn. 3 (2009); 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.”).

Libel is generally defined as “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.”⁶ Some examples of this would include statements made in newspaper articles, books, and magazines, as well as photographs, cartoons and motion pictures.⁷ On the other hand slander “consists of the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication” other than those that are libel.⁸ Examples would include statements made on television, radio, or in speeches. Sometimes the courts have a hard time differentiating between the two, but the distinction will rarely make any real difference.

A. *Newspapers*

One of the first media outlets established that reached mass audiences was the newspaper. Historically, newspapers were not like the newspapers of today. They were relatively expensive, difficult to print and often politically slanted.⁹ Due to the cost of

² Restatement (First) of Torts § 568 (1938).

³ Restatement (First) of Torts § 568 (1938).

⁴ Restatement (First) of Torts § 568 (1938).

⁵ Restatement (First) of Torts § 568 (1938).

⁶ 53 C.J.S. Libel and Slander; Injurious Falsehood § 3.

⁷ 53 C.J.S. Libel and Slander; Injurious Falsehood § 3.

⁸ Restatement (First) of Torts § 568 (1938).

⁹ http://www.americanheritage.com/articles/magazine/ah/2002/4/2002_4_24.shtml

newspapers they were often read only at public businesses such as coffee houses and libraries and not disseminated to the population at large.¹⁰

The “penny press” revolutionized the newspaper business in England in the 1830’s.¹¹ New technologies made publication of newspapers affordable and allowed the papers to be sold for just a penny.¹² It wasn’t long before the technology made its way to America giving way to one of the first tabloids published in the United States: *the Sun*.¹³ When news was slow, *the Sun* would often make up stories that they knew to be false just to increase readership.¹⁴ This led to the advent of the tabloid magazine.

This form of journalism was often referred to as “yellow journalism” - relying on sensational headlines to sell papers.¹⁵ Many libel suits derived from this form of journalism. One famous example is the Annie Oakley libel suits from 1903 to 1910. In August of 1903 two Chicago Newspapers published stories claiming that Annie Oakley was arrested for stealing a Negro’s pants to fund the purchase of cocaine.¹⁶ It was quickly realized that the person arrested was not Ms. Oakley and the papers printed retractions.¹⁷ However, by the time the retractions were published, newspapers across the country had picked up the story. Ms. Oakley, with her reputation in shambles, was not content with the mere publication of the retractions and instigated 55 libel suits.¹⁸ Oakley eventually won or settled 54 of the 55 suits with awards ranging from \$900 to \$27,000.¹⁹ Yet, with the cost of attorney’s fees, court costs, travel expenses, and lost wages Oakley ultimately lost money on the suits.²⁰ However, from Oakley’s perspective she walked away with something of more value...her reputation.²¹

For a statement in a newspaper to be libelous, the statement must be a false statement of fact, as a statement of opinion is generally not construed as libelous.²² Truth is always a complete defense to a libel claim.²³ Another exception is made for statements that are

¹⁰ http://www.americanheritage.com/articles/magazine/ah/2002/4/2002_4_24.shtml

¹¹ Daniel J. Solove, The Future of Reputation: gossip, rumor, and privacy on the internet, 105 -106 (Caravan Books 2007).

¹² Daniel J. Solove, The Future of Reputation: gossip, rumor, and privacy on the internet, 105 -106 (Caravan Books 2007).

¹³ Daniel J. Solove, The Future of Reputation: gossip, rumor, and privacy on the internet, 106 (Caravan Books 2007).

¹⁴ Daniel J. Solove, The Future of Reputation: gossip, rumor, and privacy on the internet, 106 (Caravan Books 2007).

¹⁵ http://www.pbs.org/wgbh/amex/oakley/peopleevents/e_papers.html

¹⁶ http://www.pbs.org/wgbh/amex/oakley/peopleevents/e_papers.html

¹⁷ http://www.pbs.org/wgbh/amex/oakley/peopleevents/e_papers.html

¹⁸ http://www.pbs.org/wgbh/amex/oakley/peopleevents/e_papers.html

¹⁹ http://www.pbs.org/wgbh/amex/oakley/peopleevents/e_papers.html

²⁰ http://www.pbs.org/wgbh/amex/oakley/peopleevents/e_papers.html

²¹ http://www.pbs.org/wgbh/amex/oakley/peopleevents/e_papers.html

²² 22 A.L.R.6th 553 (2007).

²³ 22 A.L.R.6th 553 (2007).

clearly published as a parody or satire.²⁴

Another issue that arises with newspapers and media of a similar type is who is liable for publication of false material. With newspapers, the publisher of the story along with the author of the article can be held liable.²⁵ A doctrine of “fair comment” has been adopted in some jurisdictions, including Arizona. This doctrine is, generally, that a republisher of a defamatory statement, regardless of knowledge of falsity, is not liable if the article is a fair and accurate report of some newsworthy event or proceeding.²⁶

Newspapers continue to be a popular method for disseminating material. With the advent of the internet, newspapers less widely circulated and are now often published on the web. As a result, the Courts face ever changing situations in which to employ defamation law.

B. Radio and TV

Traditionally, there has been a question as to whether defamation by radio or television constitutes libel or slander.²⁷ Courts over the years have reached contradictory conclusions.²⁸ Courts that have found broadcasts to be libel have made the distinction based on whether the material was read from a script.²⁹ However, some courts disregard this distinction entirely, and have classified it as its own tort referred to as defamacast.³⁰

Courts that classify the material as libel do so by holding that communications whether made in printed word or orally have the same damaging effect.³¹ Whether the material is written or spoken it is disseminated in a similar fashion and people tend to accept it as the truth.³² Some courts also base the classification of libel on whether the broadcast statements came from a prepared manuscript.³³

²⁴ 22 A.L.R.6th 553 (2007).

²⁵ 50 Am. Jur. 2d Libel and Slander § 347.

²⁶ 50 Am. Jur. 2d Libel and Slander § 347.

²⁷ 50 Am. Jur. 2d Libel and Slander § 10.

²⁸ 50 Am. Jur. 2d Libel and Slander § 10.

²⁹ 50 Am. Jur. 2d Libel and Slander § 10. *See American Broadcasting-Paramount Theatres, Inc. v. Simpson*, 106 G.A. App. 203, 126 S.E. 2d 873 (1962); *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E. 2d 30 (1947).

³⁰ 50 Am. Jur. 2d Libel and Slander § 10. *See Gray v. WALA-TV*, 384 S. 2d 1062 (Ala. 1980)(disapproved on other grounds by *Nelson v. Lapeyrouse Grain Corp.*, 534 S. 2d 1085 (Ala. 1988)); *Matherson v. Marchello*, 100 A.D. 2d 233, 473 N.Y.S.2d 988 (2d Dep’t 1984). 50 A.L.R.3d 1311 (1973).

³¹ Restatement (Second) of Torts § 568A (1977).

³² Restatement (Second) of Torts § 568A (1977); *See Sorensen v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed*, 290 U.S. 599, 54 S.Ct. 209, 78 L.Ed. 527; *Coffey v. Midland Broadcasting Co.*, 8 F.Supp. 889 (W.D.Mo.1934); *Shor v. Billingsley*, 4 Misc.2d 857, 158 N.Y.S.2d 476 (1957), *affirmed*, 4 A.D.2d 1017, 169 N.Y.S.2d 416, *appeal denied*, 5 A.D.2d 768, 170 N.Y.S.2d 976.

³³ 50 A.L.R.3d 1311 (1973).

California still classifies statements made over radio or television as slander.³⁴ California justifies the classification of slander by asserting that previously (before radio or television) most information was disseminated through writings, however, in that state slander is a harder burden to prove than libel.³⁵ Now that more information is disseminated through oral but preserved communication the higher burden of slander is required.³⁶ The court felt that the media through which most defamation is attributable should have the lesser burden and that in time with the move from written to oral communication the law has self corrected.³⁷

A Georgia Court set aside the classification of slander and libel and classified the defamation over radio and television as its own tort: Defamacast.³⁸ The court felt that the issue of defamation over radio and television bore characteristics of both libel and slander cases and that a determination based on whether the information disseminated derived from a script was not adequate to address the defamation claims.³⁹ Therefore, the court adopted a new tort, in their opinion, better suited to address defamation issues that arise in radio and television.

Since, depending on the jurisdiction, the laws differ greatly in respect to defamation in radio and television, choice of which court to file in becomes extremely important. A thorough analysis of applicable law in each jurisdiction in which the case could be brought is essential as it could have a substantial effect on the outcome of the case.

C. Internet

The Internet has opened the door to a host of new issues when it comes to defamation law. Generally, internet defamation is treated nearly the same as statements published in other mediums.⁴⁰ Unlike with other more traditional mediums, the internet affords users the ability to have their message heard in many jurisdictions. Be it blogs, corporate websites, or news sites, people find themselves with the ever-increasing opportunity to publish information about third-parties that can be seen by the entire world.

However, there are two relatively new legal issues that have arisen with the advent of the internet: jurisdiction and the ability to post things on the internet anonymously.

³⁴ 50 A.L.R.3d 1311 (1973).

³⁵ 50 A.L.R.3d 1311 (1973).

³⁶ 50 A.L.R.3d 1311 (1973).

³⁷ 50 A.L.R.3d 1311 (1973).

³⁸ 50 A.L.R.3d 1311 (1973). *See American Broadcasting-Paramount Theatres, Inc. v Simpson*, 106 Ga App 230, 126 SE2d 873 (1962).

³⁹ 50 A.L.R.3d 1311 (1973). *See American Broadcasting-Paramount Theatres, Inc. v Simpson*, 106 Ga App 230, 126 SE2d 873 (1962).

⁴⁰ <http://www-cs-education.stanford.edu/classes/cs201/projects/defamation-and-the-internet/sections/worldwide/usa.html> .

In 2009, the New American Dictionary added the word “Google” as a verb – it means, “to search for information on the Internet.” As reputation management becomes more of an everyday concept, people are turning to the internet to determine what information about them is being made available to the consuming public, as well as how to control the disclosure of that information. According to a May, 2009 Wall Street Journal article, in 2007 – the most recent data available at the time of the article – “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.”⁴¹ According to the Media Law Resource Center in New York, a nonprofit clearinghouse that tracks free-speech cases, as of May, 2009, there have been about \$17.4 million in trial awards against bloggers.⁴²

a. The role of anonymity in the internet

Individuals and corporations can become the targets of internet defamation by potential defendants who have made comments anonymously on websites, in social media, or by sending comments to others without identifying themselves. An employee may find themselves attacked by an unseen and unidentified accuser. Finding the identity of the anonymous author is not as simple as it sounds.

The First Amendment protects a person’s right to speak anonymously. See, *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 342, 115 S.Ct. 1511, 1516 (1995) (“an 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”).

The resultant effect is that internet service providers, such as Yahoo, will likely refuse to hand over information regarding the true identity of an anonymous author. A subpoena is insufficient – a court order is required. In the seminal Arizona case of *Mobilisa, Inc. v. Doe*, the court held that in order to compel production of an anonymous internet speaker’s identity, the requesting party must show all of the following:

- (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 balance of the parties' competing interests favors disclosure.⁴³

Anyone seeking disclosure of an anonymous author’s identity should review this case carefully, as it provides detailed explanations about the steps a party must take when seeking to unmask an anonymous internet user.

⁴¹ <http://online.wsj.com/article/SB124287328648142113.html>

⁴² *Id.*

⁴³ *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 712 (App. 2007)

b. Jurisdiction issues in the internet

When someone is defamed on the internet, they generally want to sue where they live, but this may not be possible. The Courts continue to struggle with establishing jurisdiction in one state, where the posting occurred in another state.

Arizona Courts are empowered by Arizona's long-arm statute to exercise jurisdiction to the full extent allowable by the U.S. Constitution. *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358 (1995). One way to establish jurisdiction is to show "intentional conduct [in another state] calculated to cause injury" in the forum state. *Calder v. Jones*, 465 U.S. 783, 768-69 (1984). In *Calder*, the Supreme Court ruled that California courts had jurisdiction over Florida defendants who had written, edited, and widely distributed in California an allegedly libelous story concerning the California activities of a California resident. *Id.* at 789-91. Because "California [was] the focal point both of the story and of the harm suffered," the Court noted the defendants' intentional actions were "expressly aimed at California" and were not merely untargeted negligence (*id.*)

However, defamatory internet postings, without more, are probably not sufficient to confer jurisdiction. See, *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 274, 736 P.2d 2, 8 (1987); see, also, *Rollin v. William V. Frankel & Co., Inc.*, 196 Ariz. 350, 996 P.2d 1254 (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); and see, *Holland v. Hurley*, 221 Ariz. 552, 212 P.3d 890 (App. 2009)(out of state eBay seller of car did not subject himself to Arizona jurisdiction even he sold the car to an Arizona Buyer).

Jurisdiction issues over the internet will likely continue to be a significant source of litigation in the years to come.

c. Suing Websites and the Communications Decency Act

Under traditional media, distributors and publishers are treated quite differently from website operators. With traditional media, publishers (and authors) can be held liable for the material they publish, while distributors can not.⁴⁴

Web operators have found a significant protection under the Communications Decency Act (the "CDA")⁴⁵. The CDA provides that when a user writes and posts material on an "interactive website," the site itself cannot, in most cases, be held legally responsible for the posted material. Specifically, the CDA states "No provider or user of an interactive

⁴⁴ <http://www-cs-education.stanford.edu/classes/cs201/projects/defamation-and-the-internet/sections/worldwide/usa.html>.

⁴⁵ 47 U.S.C. § 230

computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁶ The rationale behind this law is simple. Congress recognized that websites cannot possibly monitor the accuracy of the huge volume of information which their users may choose to post. If an angry plaintiff were permitted to hold a website liable for information that the site did not create, this would stifle free speech as fewer and fewer sites would be willing to permit users to post anything at all.⁴⁷

d. Other issues

In addition to the traditional cause of action for defamation, potential plaintiffs may also sue for other torts such as invasion of privacy, intentional interference with business or even intentional infliction of emotional distress. The invasion of privacy tort in particular has the potential to throw courts for a loop with publication on the internet, although to date, very few plaintiffs have effectively litigated this claim. In *Yath v. Fairview Clinic*, the court found that posting illegitimately obtained health information to a MySpace page qualified as “publicity” for purposes of an invasion of privacy claim.⁴⁸ 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.”⁴⁹ As a result, the publication qualified as “publicity” even if the material was posted for less than 48 hours and the plaintiff could only prove that a small number of people actually viewed the content.⁵⁰

No matter what medium defamatory information is disseminated, many of the same issues arise. Traditional elements of defamation must be pled, and proven, in order for a plaintiff to prevail on its claim pertaining to statements published on the internet.

Because of the unique character of the internet, a potential defamation plaintiff must consider the “Streisand Effect” before undertaking a lawsuit.⁵¹ 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.⁵² The concept of the Streisand Effect came about when, in 2003, Barbara Streisand sued to have a photo of her home removed from the internet, because she felt that it invaded her privacy.⁵³ Before she filed the lawsuit, no one knew that the photograph existed. *After* the lawsuit was

⁴⁶ 47 U.S.C. § 230(c)(1)

⁴⁷ See generally *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003) (recognizing, “Making 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.”).

⁴⁸ *Yath v. Fairview Clinic*, 2009 WL 1751767 (Minn. App. Ct. June 23, 2009)

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ <http://www.thestreisandeffect.com/>

⁵² <http://www.citmedialaw.org/blog/2010/hello-gorgeous-streisand-effect-survives-assassination-attempt>

⁵³ <http://www.techdirt.com/articles/20030601/1910207.shtml>

filed, the photo was downloaded and viewed 420,000 times.⁵⁴ An internet commentator thereafter titled this phenomenon – “in which an attempt to censor or remove a piece of information has the unintended consequence of causing the information to be publicized widely and to a greater extent than would have occurred if no censorship had been attempted” – as the “Streisand Effect.”⁵⁵ The Electronic Frontier Foundation even maintains a database it refers to as the “Takedown Hall of Shame,” pointing out the most embarrassing requests for removal of content from online websites.⁵⁶ The lesson to be taken from this is that the simple act of trying to repress something you don’t like online is likely to make it so that something that most people would never see is now seen by many more people.⁵⁷

Unfortunately, because the internet is constantly evolving, there has not been much consistency in court decisions among state or federal courts as to the impact of online defamation. For example, a court in Texas recently found that emailing links to a third party’s defamatory blog constituted “publication” of the blog for defamation purposes.⁵⁸ 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.⁵⁹ In a third decision on a similar issue, a Kentucky court found that linking to and referencing an allegedly defamatory article was not a new publication of the original content.⁶⁰ All this means is that a potential plaintiff must be wary of the jurisdiction in which they want to litigate, because the rules change depending on which court you are in.

D. Social Media

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 that people can publish information online. Today’s “big three” are Facebook, LinkedIn, and Twitter. However, in evaluating how the court system treats social media, the “grandparents” of social media – MySpace and AOL – must also be recognized, as they laid the groundwork for today’s treatment of defamation in social media. Additionally, although not traditionally recognized as being part of “social media,” Craigslist has suffered through a litany of cases pertaining to it being used as a forum for internet defamation, as well.

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 a particular name or brand, litigation over statements made using social media will become more and

⁵⁴ <http://www.californiacoastline.org/news/sjmerc5.html>

⁵⁵ <http://www.techdirt.com/articles/20050105/0132239.shtml>

⁵⁶ <http://www.eff.org/deeplinks/2010/01/hello-streisand-effect-takedown-hall-shame-grows-f>

⁵⁷ <http://www.techdirt.com/articles/20050105/0132239.shtml>

⁵⁸ *In re Perry*, 2010 WL 374770 (Bankr. S.D. Tex. Feb. 3, 2010).

⁵⁹ *Phan v. Pham*, 2010 WL 658244 (Cal. App. Ct. Feb. 25, 2010).

⁶⁰ *Salyer v. The Southern Poverty Law Center, Inc.*, 2009 WL 4758736 (W.D. Ky. Dec. 7, 2009)

more prevalent⁶¹. A few recent examples have demonstrated that while the courts don't necessarily appreciate or understand how social media is being used, they are still comfortable with applying traditional notions of defamation for the purposes of analyzing these allegedly defamatory publications.⁶² Typically, plaintiffs get caught up with the desire to get content removed from social media, and forget that they are required to prove that the statements at issue are both false and defamatory. Because the content of social media is often based on opinion, plaintiffs may find themselves on the losing end of defamation lawsuits against users of social media.

More Americans now get their news from the Internet than from old-fashioned newspapers.⁶³ The Pew report also suggests that social media has its own significant role in the creation and dissemination of information⁶⁴:

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.

The use of social media can have significant consequences in the workplace, too. In November, 2009, a supposedly depressed woman who was on long-term sick leave lost her insurance benefits due to photos she published on Facebook showing her having a good time.⁶⁵ 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.⁶⁶ In June, 2009, a woman charged in a DUI-related crash found herself subject to increased penalties after police found online photos of her consuming alcohol on Facebook, which were dated after she was let out

⁶¹ See *Horizon Group Management v. Bonnen*, 2009L008675, Circuit Court of Cook County, Illinois, filed by a Chicago apartment management company against a tenant for a statement she made on Twitter on May 12, 2009. The case was voluntarily dismissed in January, 2010.

⁶² See *Quigley Corp. v. Karkus*, No. 09-1725, 2009 U.S. Dist. LEXIS 41296, at *16, n.3 (E.D. Pa. May 19, 2009) (“[T]he 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.”)

⁶³ <http://www.pewinternet.org/Reports/2010/Online-News.aspx?r=1>

⁶⁴ *Id.*

⁶⁵ <http://www.cbc.ca/canada/montreal/story/2009/11/19/quebec-facebook-sick-leave-benefits.html?ref=rss>

⁶⁶ <http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/8018329.stm>

on bail under the condition she would not consume alcohol or be around others who were drinking.⁶⁷

An additional concern arising out of the increased use of social media is a result of the lack of verification of users' identities. Separate from the issue of anonymous authorship, persons can *pretend* to be anyone they choose while using social media, and that can include the identity theft. Although Twitter has since instituted the "verified account," for a number of years it allowed people to create accounts posing as other individuals, including celebrities.⁶⁸ Whereas typically these accounts were obviously satirical in nature, individuals still struggled with the preservation of their personal identity through social media outlets.⁶⁹ Valid concerns still exist with regards to the protection of brand and individual names, since social media sites allow their users to register for an online identity, without any verification of whether that individual does indeed go by the name which they have registered.⁷⁰

Given that the creators of social media sites naturally consider themselves trendsetters, it is not surprising that nearly all social media sites have written policies regarding the removal of content. Generally located provided in the "terms of service" portion of the website, most social media sites provide not only policies for dealing with allegedly defamatory statements published on the site, but also provide information regarding the use of privacy features which can ensure that the user of social media protects their personal information as much as they wish.⁷¹

III. Available remedies

Historically, when a person was defamed they would challenge the defamer to a duel. One of the most famous duels involved then Secretary of the Treasury Alexander Hamilton and sitting Vice President Aaron Burr, on July 11, 1804, when Burr shot and mortally wounded Hamilton over what were said to be defamations written by Hamilton.

Today, thankfully we employ less archaic methods for settling disputes. When a person has been defamed there are many possible approaches available. Often, they may employ a combination of different methods.

Of primary importance is to learn the defamed person's goal. A very common goal is a desire to make continued publication stop. But there are related and somewhat different goals. The defamed person may want to set the record straight. They may want to protect their future reputation or they want to obtain damages because of injuries already caused. They may want vengeance, or just to prove they are right. In the employment field they most

⁶⁷ <http://www.chicagotribune.com/news/local/chi-facebook-braceletjune05,0,3973881.story>

⁶⁸ <http://twitter.com/help/verified>

⁶⁹ 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. *See* <http://www.claimsjournal.com/news/national/2009/06/11/101256.htm>.

⁷⁰ http://adage.com/digital/article?article_id=140377

⁷¹ *See*, e.g., <http://www.facebook.com/principles.php> (stating the "Facebook Principles" that all users are required to adhere to); <http://twitter.com/tos>.

likely want to protect their reputation, their job or to seek to set the record straight for future employment possibilities.

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 and issue and stop the defamations from spreading. This is by far the easiest and least expensive approach and it may work.

However, this is not always enough. People may keep doing what they are doing. And, simply stopping publishing defamatory information will not necessarily clear a person's name or reputation, and it certainly can not result in damages, if any were suffered.

B. *Get the other side of the story out?*

Another way to repair one's reputation is to tell their side of the story. This can usually be accomplished by disseminating the information to the same source that published the words in the first place. In traditional media this could mean a press conference, press release, letter to the editor, or other efforts to publicize the rest of the story.

In the workplace, this could mean responding to a memo with a like memo, addressed to the same persons as the first memo. It could mean an answering email or a grievance or any of the other methods of communication established within a particular workplace.

In the internet, it could mean finding a way to get the other side of the story posted at the same place as the original posting. Sometimes this is easy. Many websites have open blogs where the offended person can speak out fully. Many websites, like www.ripoffreports.com, allow businesses that have been bad mouthed to post their side of the story as well. In other words, the goal here is to go to the same forum in which the negative information was published and respond to it.

C. *Write a letter?*

A letter is another sometimes persuasive way for a person to stop the damage or repair their reputation without expending too much time or money. The type of letter that is written depends on the response that the person whom has been defamed seeks.

a. *Demand for Apology or Retraction Letter?*

A demand for retraction seeks for the party publishing the damaging information to stop doing so and to instead publish a statement to the opposite effect. Typically, a demand is coupled with a threat of litigation if the retraction is not issued. Here, what the party that sent the letter is looking for is similar to an apology. They want the other party to not only stop publishing the defamatory information but also to disseminate information contrary to the statements that have been previously made.

Most states have retractions statutes, but they mostly apply to media publications and likely do not apply to internet or the workplace. While Arizona has a retraction statute applicable to the media, it has been held unconstitutional⁷².

Retraction demands can have some uses beyond obtaining a retraction, as the failure to retract can be used as evidence to prove malice. See, *Ross v. Gallant, Farrow & Co.*, 27 Ariz. App. 89, 91, 551 P.2d 79, 81 (1976) and *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 489, 724 P.2d 562, 575. As a result, there may be a strategic reason to ask for a retraction.

The problem with a retraction demand is that if the other side refuses to retract, the person demanding the retraction may be forced to then file a lawsuit. If the goal was to clear one's name, then this may not be the best alternative.

b. 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 a reputation. A cease and desist letter's primary goal is to stop or discontinue a particular action or conduct.

Much could be placed in such a letter. For example, the letter could contain not only a description of what is being said and where it was said, it could also contain a complete recitation about why the statements are false in the first place.

The cease and desist letter could have even more, too. It could (and should) attach exhibits showing why the original statement is false. It could include "fluff" about the person being defamed; it could explain why the person does not deserve this, and why the person defamed has an otherwise stellar and well deserved reputation.

In other words, the cease and desist letter could be written in such a way as to refute the negative and to fully advertize the positive about the person being defamed.

Many people want a cease and desist letter simply to have it. A well crafted and well supported letter, with exhibits, could be used to show to others who may have seen or heard the original defamatory statement. Such an advertising piece can be useful in the marketplace, by having the person defamed ready with the letter to give to anyone who heard the first defamation. It could be used in the same way in the workplace – if someone does raise the issue, the defamed person can point to the lawyer's letter and share it, and in that way, offer a self contained explanation.

c. Demand for Damages?

⁷² See, *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 730 P.2d 186 (1986), cert. denied, 481 U.S. 1029, (1987), where the Court found A.R.S. §12-653 to be 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.

A third type of letter is a demand for damages letter. Here a person seeks to be compensated for their damage to their reputation. This can often be used with threat of suit. Here, the party seeking damages often asserts their claim in the form of a letter and states their demand, then follows with the threat of suit if the damages are not paid.

This type of letter is often used to open negotiations and settlement is always a possibility. Litigation likely follows if settlement does not.

D. Sue for defamation?

The most common way to protect one's reputation is to sue when a reputation has been unfairly and falsely tarnished. This is the defamation lawsuit. Defamation lawsuits can be effective and can go a long way to repairing damage to one's reputation.

a. Summary of elements

In simplest terms, the tort of defamation requires these elements: a false and defamatory statement must be made (published) which is of and concerning the plaintiff; the defendant must have some degree of fault; and the statement must cause damage.

1. *Defamatory.* The definition of "libel" in Arizona is derived from a criminal libel statute, since repealed, and is "any malicious falsehood expressed in writing, painting, or by signs or pictures which tends to bring any person to disrepute, contempt or ridicule." That definition was adopted in *Central Arizona Light & Power Co. v. Akers*,⁷³ and has been followed ever since. In determining the meaning of words, courts look at the "natural and probable effect upon the mind of an average [listener]."⁷⁴ To determine whether a communication is defamatory, it must be reviewed as a whole and not out of context.⁷⁵ The process of determining whether a communication is defamatory is different than determining whether damages can ultimately be recovered, as no actual harm is necessary to make a communication defamatory.⁷⁶ In the past the distinction between libel and slander had been made for determining damages, however, as technology changes the distinction between the two has blurred.⁷⁷

2. *Of and concerning.* The statement must be clearly recognizable as being about the complainant⁷⁸. It is not necessary that the person defamed be actually named, so long as the recipient correctly, or mistakenly but reasonably, understands that the

⁷³ 45 Ariz. 526, 535, 46 P.2d 126, 131 (1935).

⁷⁴ *Yetman v. English*, 168 Ariz. 71, 77, 811 P.2d 323, 329 (1991).

⁷⁵ *Phoenix Newspapers, Inc. v. Choisser*, 82 Ariz. 271, 275, 312 P.2d 150, 153 (1957).

⁷⁶ RESTATEMENT (SECOND) OF TORTS § 559, cmt. d (1977).

⁷⁷ 99 Am. Jur. Proof of Facts 3d 393: Proof of Facts Establishing Affirmative Defenses Against a Claim for Defamation

⁷⁸ RESTATEMENT (SECOND) OF TORTS § 617(a) (1977).

communication was intended to refer to the plaintiff.⁷⁹ On occasion, 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 can be readily ascertained, the statement is actionable even if the individuals are not identified by name.⁸⁰

3. *Falsity.* To be actionable, a defamatory statement must also be false, as truth is an absolute defense.⁸¹ Substantial truth is also a complete defense and can be determined by the court as a question of law if the facts are not in dispute.⁸² A statement can not be an opinion and must be capable of being proved true or false. *Turner v. Devlin*, 174 Ariz. 201, 848 P.2d 286 (1993) (Court affirmed a summary judgment against a police officer who had been accused of “rude and disrespectful” behavior and a manner which “bordered on police brutality.”).

4. *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 on the circumstances of the publication. A private individual’s burden is determined by state law but the burden cannot be less than negligence.⁸³ The degree of fault is “actual malice” if the plaintiff is a public official⁸⁴ or public figure,⁸⁵ or if the statement is made on a privileged occasion.⁸⁶ Actual malice is proven by showing that the party publishing the statement had knowledge of its falsity or acted with reckless disregard of the statements falsity.⁸⁷

5. *Damages.* Finally the plaintiff must prove damages and causation. The damage has to flow because of the false statement. Damages can include:

- (1) Compensatory damages for all emotional distress and bodily harm caused by the defamation.

⁷⁹ RESTATEMENT (SECOND) OF TORTS § 564 (1977).

⁸⁰ *See Hansen v. Stoll*, 130 Ariz. 454, 636 P.2d 1236 (App. 1981) (defamatory statements about seven unnamed “Federal narcotics agents” found to be actionable where law enforcement community could identify plaintiffs from those statements).

⁸¹ *Akres*, 45 Ariz. 526, 543, 46 P.2d 126, 134.

⁸² *Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 819 P.2d 939 (1984) (statement that candidate had been convicted of a misdemeanor for firing a gun when actual conviction was for displaying a weapon was substantially true); *Turner v. Devlin*, 174 Ariz. 201, 848 P.2d 286 (1993) (statement that police investigation was “bordering on police brutality” was based on subjective impressions which were not provable as false).

⁸³ In Arizona a private person must establish negligence if the content of the publication is a matter of public concern. *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216, 1222 (1977). If the plaintiff is a private person and the publication is a matter of private concern, then common law applies and plaintiff need not prove fault. *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562, 567 (1986).

⁸⁴ *Lewis v. Oliver*, 178 Ariz. 330, 873 P.2d 668 (App. 1993)

⁸⁵ *Scottsdale Publishing, Inc. v. Superior Court (Romano)*, 159 Ariz. 72, 764 P.2d 1131 (App. 1988)..

⁸⁶ *Aspell v. American Contract Bridge League*, 122 Ariz. 399, 400-01, 595 P.2d 191, 192-93 (App. 1979).

⁸⁷ *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964).

(2) General damages for any impairment of reputation and standing in the community.

(3) All special damages (financial losses) that a plaintiff has suffered with respect to the plaintiff's property, business, trade, profession, or occupation.

(4) Punitive damages, but only if there is proof that the defamer had knowledge of falsity or acted in reckless disregard of the truth. Presumably, the standards of *Linthicum v. Nationwide Life Insurance Co.* must also be met, but arguably that standard is met through a showing of actual malice.

(5) Presumed damages, so long as "actual malice" (knowing falsity or reckless disregard) is shown.⁸⁸

b. Problems with a defamation suit

Defamation suits, like any lawsuit are time-consuming, expensive, invasive and difficult.

Many people believe that just because a statement about them is false that they should win. However, most defamation cases are lost because of the failure to prove the necessary fault or to prove that the damages have been caused by a false statement⁸⁹.

Also, a suit can cause further publication of the defamatory statements. By filing suit the original information becomes part of the public record as well as can alert 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, than it can have the opposite effect desired.

Probably the largest deterrent to a defamation suit is the cost. Litigation costs and fees are obviously large in any case, but defamation cases seem to cost even more, between the First Amendment and constitutional issues and the extensive types of damages and discovery allowed. Many cases have not been pursued for lack of resources to pay to pursue them and contingency fee agreements seem rare.

Defamation suits are, however, the most common way to protect one's reputation. The mere act of filing a lawsuit is a message that a reputation has been harmed and the false statements justify a suit. Publicity can follow from the act of filing a suit or pursuing it. Your client can tell others that they have actually filed a suit and use that as a way to protect their reputation. Ultimately if successful the lawsuit can result in a victory which in and of itself should repair reputations, because that is what a jury is charged with doing.

⁸⁸ RESTATEMENT (SECOND) OF TORTS §§ 621, cmt. b, 623 (1977); *Dombey v Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562, 567; *Nelson*, 120 Ariz. 64, 69, 583 P.2d 1384, 1389; and *Scottsdale Publishing*, 150 Ariz. 326, 723 P.2d 675 (1986) (holding punitive damages not warranted without evil mind or conscious disregard).

⁸⁹ According to one study, over 70% of defamation suits are dismissed pre-trial, primarily because of the inability to prove malice by clear and convincing evidence. M. Franklin, *Winners and Losers and Why*, 1980 American Bar Foundation Research Journal 455

E. Declaratory judgments -- a new tool

Another way to clear a name is to file a declaratory judgment lawsuit. This is a controversial method and not yet widely used. However, one way to obtain vindication from a false statement is for a Court to declare it false.

This relief – a declaration of falsity - is appropriate under the Uniform Declaratory Judgments Act, A.R.S. §12-1831 *et seq.* Declaratory judgments are to be “liberally construed and administered”, A.R.S. § 12-1842, and should be “liberally given”, *Schwamm v. Superior Court*, 4 Ariz. App. 480, 421 P.2d 913 (1966).

Courts are no stranger to claims where declaratory judgment actions are combined with claims seeking a declaration of falsity. Indeed, there are many cases where such claims were combined. See, *Polk v. Koerner*, 111 Ariz. 493, 533 P.2d 660 (1975) (action for “declaratory judgment, accounting, interference with business relations, and defamation of character”); *Copper State Bank v. Saggio*, 139 Ariz. 438, 679 P.2d 84, 86 (App. 1983) (action for defamation, interference with business relations, injunction and declaratory judgment); *Henein v. Saudi Arabian Parsons Ltd.*, 818 F.2d 1508 (9th Cir. 1986) (action for declaratory judgment, breach of contract and defamation); and *Merlo v. United Way of America*, 43 F.3d 96 (4th Cir. 1994) (action for breach of contract, invasion of privacy, defamation and declaratory judgment).

For that matter, the *Restatement of Torts, Second*, specifically approves of using a declaratory judgment in defamation cases. See *Restatement of Torts, Second*, § 623, “Special Note on Remedies”, at 327:

“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”.

A.R.S. § 12-1841 specifies what parties can be properly named in a declaratory judgment action:

A. 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.

A declaratory judgment has the same effect as a defamation suit in that a court is disavowing an erroneous statement. However, unlike a defamation suit the person does not need to prove damages. Also, under a declaratory judgment the person likely does not have to prove the elements that are necessary and often hard to show in a defamation suit. Instead, the only thing that must be proven is that the statement made 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 statement declared false.

F. Lawful threats and seeking removal of offending material?

If an offending website contains defamatory matter about your client, there may be yet other ways to assist the injured client. Specifically, a request to take down might be made to either the web site or the web host, or both.

As for the website, start with its terms of use. Many websites contain, directly in their terms, prohibitions on offensive or defamatory material, and so a request directed to the website might get results. Even absent terms of use, some less sophisticated web operators may not know about CDA immunity or may wish to avoid legal difficulties and may comply just to avoid legal difficulties. Generally, the identity of the website can be found in the “contact us” portion of most websites.

As for the web host, many hosts are risk adverse and a request to them may also bring results. You should be able to locate the agent of a web host at this site, as agents are required to register there: <http://www.copyright.gov/onlinesp/>.

The point is that if adverse material is present on the web, creative actions and creative solutions may help.

One issue that plaintiffs tend to deal with is **forcibly** removing the statement from internet publication once it has been adjudicated as false and defamatory. Unlike with traditional media, statements that are published on the internet can theoretically remain publicly available into perpetuity. Depending on where the statements have been published will dramatically impact the plaintiff’s ability to remove (or suppress) the presence of those statements on the internet. In the recent case of *Blockowicz v. Williams*, an Illinois court held that an internet website host could not be compelled to remove defamatory material from the website pursuant to a permanent injunction issued in action to which the website was not a party.⁹⁰ This meant that despite the plaintiff obtaining a [default] judgment that statements authored and published by the defendants were defamatory, the plaintiff could not force the website on which the statements were published to remove those statements against the website’s stated policies.⁹¹

G. Name clearing hearings

Another way to protect one’s name only applies if the statement is made by a government body, such as by a state, county, city or agency. If a governmental agency makes a false statement of fact about a person, there may be a right to “name clearing” hearing.

The right to a hearing arises almost entirely from the employment context, and generally occurs when the agency makes a defamatory statement on terminating an employee. The right to a name clearing hearing arises if the employee has a property and

⁹⁰ *Blockowicz v. Williams*, 675 F.Supp.2d 912 (N.D.Ill. 2009)

⁹¹ *Id.*

liberty interest in their job.⁹² Therefore, like any property or liberty interest a person must be afforded due process before they are deprived of that right. “An essential principal 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.’”⁹³ Similarly, when information regarding termination is publicly disclosed, an employee has a liberty interest in clearing his name.⁹⁴ Failing to provide a name clearing hearing is a violation of due process as it is afforded under the Fourteenth Amendment.⁹⁵

In *Cox*, a public employee was not afforded a hearing prior to his termination. At the time that Cox was fired a letter was placed in his personnel file stating the reasons for termination.⁹⁶ Local media got word of the story and requested a copy the personnel file that enclosed the termination letter.⁹⁷ The County released Cox’s letter to the press after a determination that the Washington Revised Code mandated the release under the public records release requirement.⁹⁸ Subsequently, Cox filed suit claiming deprivation of his liberties and rights when the County placed the termination letter in his personnel file without first providing him notice and a right to respond.⁹⁹

The Court in *Cox* held that placing stigmatizing information into a personnel file is considered publication, requiring a name clearing hearing.¹⁰⁰ Washington law classifies a public employee’s personnel file as a public record and accordingly the public has access to it.¹⁰¹

A similar case out of the Fourth Circuit Court of Appeals further clarified when information placed in a personnel file requires a name clearing hearing. In *Sciolino v. City of Newport*,¹⁰² the Court held that mere placement of information in a personnel file does not amount to deprivation of a liberty interest unless the employee can show the likelihood that the public or prospective employers will view the file.

Ultimately, what this means is that if a government agency wishes to place stigmatizing information into an employees file it should offer the employee a hearing of some type and an employee should be advised of their right to seek such a hearing.

⁹² *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985).

⁹³ *Loudermill* at 542, 105 S.Ct. at 1493; citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313(1950).

⁹⁴ *Cox v. Roskelley*, 359 F.3d 1105 (2004).

⁹⁵ *Id.* at 1110.

⁹⁶ *Cox v. Roskelley*, 359 F.3d 1105.

⁹⁷ *Cox v. Roskelley*, 359 F.3d 1105.

⁹⁸ *Id.* at 1109.

⁹⁹ *Cox v. Roskelley*, 359 F.3d 1105.

¹⁰⁰ *Id.* at 1110.

¹⁰¹ *Id.*

¹⁰² 480 F.3d 642 (2007).

H. Search Engine Optimization (SEO)

In today's world, many people find defamatory material by using search engines on the internet, like *bing*, *google* or *yahoo*. If a client complains about how they are being defamed on the internet, another approach is to suggest having the "good stuff" about them seen first. In other words, suggest SEO.

"SEO" is an acronym for "search engine optimization" or "search engine optimizer." As an Internet marketing strategy, SEO considers how search engines work and what people search for. Optimizing a website primarily involves editing its content and HTML and associated coding to both increase its relevance to specific keywords and to remove barriers to the indexing activities of search engines. A number of companies do this. Deciding to hire an SEO company is a significant decision that can potentially improve web visibility, but it can be expensive.¹⁰³ Google offers suggestions on how to do it.¹⁰⁴

Although SEOs can provide clients with valuable services, a large number of SEOs (including many of the early adopters) have given the industry a black mark through overly aggressive marketing efforts and attempts to manipulate search engine results in ways that border on illegal or unethical. 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. Keep in mind that there are no SEO companies that have "relationships" with any of the search engines that can somehow put the content you have chosen to the front pages of search results.

I. Take down notice - Digital Millennium Copyright Act ("DMCA")

Another tool that may help is a "take down notice" under the Digital Millennium Copyright Act (DMCA). Under some circumstances, it may be possible to convince website host to remove offending material.

The DMCA was signed into law by President Clinton on October 28, 1998. As related to the Internet, Title II of the DMCA, the "Online Copyright Infringement Liability Limitation Act," creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities. You can use this limitation to your clients; advantage.

Title II of the DMCA adds a new section 512 to the Copyright Act to create four new limitations on liability for copyright infringement by online service providers. Also referred to as the Online Copyright Infringement Liability Limitation Act ("OCILLA"), 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.

¹⁰³ <http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=35291>

¹⁰⁴ http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/webmasters/docs/search-engine-optimization-starter-guide.pdf

The significance is that the provider must promptly block access to allegedly infringing material (or remove such material from their systems) if they receive a notification claiming infringement from a copyright holder or the copyright holder's agent. OCILLA also provides for subpoenas to ISPs to provide their users' identity.¹⁰⁵

The DMCA establishes procedures for proper notification, and rules as to its effect.¹⁰⁶ Under 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. Failure to comply substantially with the statutory requirements means that the notification will not be considered in determining the requisite level of knowledge by the service provider. If, upon receiving a proper notification, the service provider promptly removes or blocks access to the material identified in the notification, the provider is exempt from monetary liability. In addition, the provider is protected from any liability to any person for claims based on its having taken down the material.¹⁰⁷

There are some aspects to sending a DMCA notice that need to be considered. First, in order to obtain DMCA immunity, every website operator is required to register an agent with the U.S. Copyright office, and a list of those registered agents can be found here: <http://www.copyright.gov/onlinesp/> The failure to registrar an agent, alone, will cause a web operator to lose immunity. A second method to locate the identity of a web operator is to look in www.whois.com, although privately registered web sites may not be available there.

The resultant effect of the DMCA, and in particular, OCILLA, is that copyright holders have the incentive to monitor internet sites for offending material, and to send ISPs notifications where appropriate, of material that should be taken down. ISPs have incentive to cooperate with copyright holders and terminate the accounts of repeat infringers on pain of forfeiting the safe harbor created by OCILLA.

IV. Conclusions

With the constant advent of new technology and ways to disseminate technology defamation law continues to grow and adapt. There are many options and careful consideration needs to be given as how to address false statements in today's changing world.

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¹⁰⁵ 17 USC § 512(h)

¹⁰⁶ 17 USC § 512(c)(3)

¹⁰⁷ 17 USC § 512(g)(1)