Think Before You Click: Online Anonymity Does Not Make Defamation Legal

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Think Before You Click: Online Anonymity Does Not Make Defamation Legal

I. INTRODUCTION

The business end is an ‘old boys club’ where you can only get ahead as a woman if you will sleep with some old geezer (one woman of very average professional abilities was recently promoted to a SR. Director position. She is 29 and sleeping with a guy who had to be 62+) . . . . They have dozens of employee discrimination lawsuits against them as I write this. Most of them [from] minorities (in the business/creative offices there [are] probably 2 black people out of hundreds of white people) and [women] . . . . I only wish I had known half of what I know now before I invested money in this company (and lost a bit I might add) until the management style changes around there they will never get that stock price up.1

The company referred to in this Internet message board posting is Ralph Lauren.2 The number of people who can access this posting, endless. The possible detrimental effects of this posting, infinite. The author of this posting, unknown. What is a corporation to do when it is being defamed on the Internet by an anonymous poster?

The Internet has been the biggest technological breakthrough in recent years, and has revolutionized the manner in which we conduct our daily lives.3 The main attraction of this medium has been the ease with which online users can communicate with each other and view

2. Id.
3. A study conducted in 2000 by the Stanford Institute for the Quantitative Study of Society showed that more than one-quarter of regular United States Internet users report that the Internet has significantly changed their lives. SIQSS: Internet Use Has Social Side Effects (Feb. 17, 2000), at http://www.nua.com/surveys/index.cgi?f=VS&art_id=905355601&rel=true. They spend less time with family and friends, shopping in stores because of online purchases, and one-third report spending less time reading newspapers. Id.
information. In essence, the Internet is comprised of a global network of connected computers that exchange information through a code called TCP/IP. This worldwide network ensures that a global audience can access information that users release over the Internet. To go online, a person commonly uses a screen name, which can conceal his true identity. Internet users are able to view or transmit information, participate in live chat rooms, conduct consumer transactions and even post to message boards, all while keeping their identities a secret. Anonymity, the ability to conceal one's identity while communicating, makes the Internet desirable for the persecuted, controversial and the simply embarrassed. The ability to mask one's identity has also made the Internet a platform for employees to defame their employers.

Anonymity ensures a diversity of viewpoints in cyberspace. People who post on Internet sites are free to express their opinions, without fear of harming their reputations in the cyber or real world. Their comments will never be attributed to their real identities, or so they presume.


6. See Patrick Weston, III. First Amendment: 2. Internet Crime Status: b) Fraud: American Civil Liberties Union of Georgia v. Miller, 14 BERKELEY TECH. L.J. 403, 408 (1999) (outlining the ease with which information can be disseminated to millions of people just by having an e-mail address). Anyone with a telephone line can gain access to the Internet and an e-mail address. Id. Weston points out that once an e-mail address is established, a person can send countless messages without any additional charge from the Internet Service Provider (“ISP”). Id. The statistics for Internet use available as of 2002 are illustrative of global usage, and an educated guess based on many published surveys from 2000 to 2002 estimates that 544.2 million Internet users exist worldwide. How Many Online?, at http://www.nua.com/surveys/how_many_online/index.html (last visited Apr. 14, 2003); Suman Mirmira, Lunney v. Prodigy Services Co., 15 BERKELEY TECH. L.J. 437, 437 (2000) (stating that in 1996 there were 40 million Internet users, and at the start of 2000 there were over 240 million Internet users).

7. See Weston, supra note 6, at 409; see also Raymond Shih Ray Ku, Open Internet Access and Freedom of Speech: A First Amendment Catch-22, 75 TUL. L. REV. 87, 90 (2000) (stating that the Internet is fast becoming an important part of our commercial, political and social lives); ACLU v. Reno, 929 F. Supp. 824, 834 (E.D. Pa. 1996), aff’d, 521 U.S. 844 (1997) (defining the six most common means of Internet communication as: e-mail or messages sent to one recipient; e-mail sent by one person to several recipients or a listserv; newsgroups or bulletin boards, where messages can be sent from many participants to many other Internet users; real-time communication like chat; real-time remote computer utilization; and remote information retrieval, noting that in these instances Internet users “surf the web” for information).

8. See Weston, supra note 6, at 409.

9. See Sobel, supra note 4, para. 6 (delineating how anonymity aids free expression especially when the topics are controversial).

10. Id. para. 1.
The fact is that absolute anonymity on the Internet does not exist. Internet messages can be traced to the very computer from which they were transmitted. Every click of a mouse leaves behind a digital footprint that can be traced back to the source of the click. Yet, the illusion of anonymity is part of what drives the use of the Internet.

Moreover, the Internet acts as an agent of empowerment for the average Joe. In fact, the Internet levels the playing field. Any person can obtain a screen name without incurring any cost and use it to reach the world. The ease and minimal cost of the Internet allows individuals from less privileged backgrounds to use the electronic medium to publish their ideas and opinions on affairs of public interest. As a low cost transmitter of information, the Internet provides a “voice to the disenfranchised” and allows a “more democratic participation in public discourse.” In other words, the Internet has fostered the ability of an average Joe to become a pamphleteer or “a town crier with a voice that resonates farther than it could from any soapbox” just by having a phone line or other type of Internet connection.
The main goal in publishing is to get the word out fast. Because of high-speed modems, Internet communication can occur almost instantaneously; speed takes precedence over all other values including accuracy, grammar, spelling, punctuation, civility and prudence. Exaggeration and venting are common and the use of pseudonyms reinforces the anything goes attitude that rules discourse on the Internet. The anonymity, speed and informality of the Internet are main aspects of its appeal.

The Internet has increasingly become the forum for employees to vent, particularly on message boards commonly referred to as “bitch sites.” However, the down side of the open forum is that employees are defaming their employers under pseudonyms that keep their identities anonymous. The benefits of anonymity do not outweigh all public interest in attaching an identity to a statement floating in the realm of public discourse, particularly when the statement violates the law. The anonymity the Internet provides makes disclosure of the defamer’s identity difficult, but not impossible, to obtain.

In an effort to quell the defamatory speech, employers have utilized several strategies. Some employers have developed policies aimed at governing this type of speech. Others have implemented Cyber-surveillance or utilized litigation, incorporating the use of subpoenas, as tactics to unveil the defamer. This note examines the speech that takes

19. Lidsky, supra note 13, at 862-63.
20. Id. at 863.
21. Id.
23. But see Dendrite Int’l, Inc. v. Doe No. 3, 775 A.2d 756, 765 (N.J. Super. Ct. App. Div. 2001). There is greater public interest in having opinions spouted in the “marketplace of ideas,” without concern for the identity of the person spouting them. Id. The notion of a marketplace of ideas is derived from a laissez faire economic theory, which proposes that the average citizen should be trusted to make correct determinations about the validity of any given idea when contrasted with, other ideas. Jason Paul Saccuzzo, Bankrupting the First Amendment: Using Tort Litigation to Silence Hate Groups, 37 CAL. W. L. REV. 395, 400 (2001). According to the theory, the average citizen will be able to easily perceive the true idea, and the false idea will lend credence to the true idea and aid that citizen in the understanding of that idea. Id. The flaw in this theory is that an average citizen may not be able to accurately distinguish truth from falsehood. Id. at 400-01. In this type of situation, the citizen may believe a lie to be true, behave in accordance with that view and disseminate the lie. Id. That behavior may be harmful to third parties. Id.
24. Amy Rogers, You Got Mail But Your Employer Does Too: Electronic Communication and Privacy in the 21st Century Workplace, 5.1 J. TECH. L. & POL’Y 1, para. 7 (2001), at http://grove.ufl.edu/~techlaw. With two-thirds of America’s workforce using e-mail, it behooves employers to generate policies that govern Internet bulletin board services or message boards because posting to these sites is often damaging to the company and may precipitate litigation. Id.
place on these sites as well as employers’ responses to it, particularly when the employee’s identity is cloaked by a pseudonym. Within this context, this note will analyze the implications of anonymous employee speech under a defamation framework.

Part II discusses what bitch sites are and who maintains them. Bitch sites are posted to, maintained and monitored independently of the Internet Service Provider (“ISP”). However, ISPs can become involved when the content of a message is not in compliance with their Terms of Service. A subpart examines the language of a standard Terms of Service Agreement and the types of conduct that run afoul of it. Additionally, the subpart discusses the choices available to an ISP when comments posted on a bitch site violate its Terms of Service. It also explains ISPs’ notice procedures when a third-party seeks the identity of an anonymous poster. Then, Part II analyzes the influence that bitch sites have on their subjects. Corporate examples are provided and discussed to illustrate the far-reaching effect that bitch sites have. The balance of Part II focuses on the tort of defamation and provides a history of this cause of action.

Part III examines how courts have applied defamation law when plaintiff-corporations seek subpoenas to obtain the identity of anonymous Internet posters in support of their claims. Part III is divided into three subparts. The first subpart discusses situations where courts have granted the requested subpoenas. The next subpart reviews cases where the requested subpoenas were denied. Finally, Part III examines the rare instance where both the plaintiff-corporation and the defendant are anonymous as well as the court’s reaction to the plaintiff-corporation’s anonymity.

II. BITCH SITES

Bitch sites are websites or message boards where employees post personal accounts, feedback and complaints about their companies, working conditions, supervisors and benefits. There is no particular
profile that belongs to those who establish bitch sites. They are created and maintained by activists, dissatisfied employees, customers, whistleblowers and watchdogs. In some cases, a company’s competitor launches these sites. Internet message boards are like an “electronic water cooler” at which employees vent, gossip or just read the latest dish on the company. Bitch sites also provide job applicants with invaluable insight into the real world of their prospective employer. Prospective employees visit these sites to obtain firsthand accounts of what might be in store for them if they accept an employment offer with any particular company. In other instances, management uses these sites to initiate discussions and to monitor employee satisfaction.

Yahoo! is just one of the ISPs which hosts message boards that invite users to discuss the future prospects of companies and share information about them with others. Yahoo! maintains a message board for every publicly traded company and does not limit who posts to these message boards. Dendrite Int’l, Inc. v. Doe No. 3, 775 A.2d 756, 761 (N.J. Super. Ct. App. Div. 2001).

Vault, Disgruntled, Yahoo!

these sites so easily because “[t]hey’re not isolated bulletin boards anymore, they’re public, influential, and you [the employer] need to know what to do about them.” Id. 28. Id.
29. Id.
31. Id.
32. Id.
34. http://www.Vault.com (last visited Apr. 12, 2003). Vault.com is dubbed “the insider career network.” Id. Not only does it offer assistance in job-hunting, it also offers resume tips and interviewing skills. Id. The site boasts features such as insider guides, company profiles, message boards, firm rankings and industry specific job boards. Id. On its site, Vault.com encourages employees to post their feelings about their current and former employers. Id. In some instances, the postings consist of complaints and charges of discrimination that single out supervisors and managers by name. http://www.Vault.com (last visited Apr. 12, 2003). Posters also discuss the workplace culture and employee treatment. Id. The comments posted on the Ralph Lauren message board of Vault.com are illustrative of this type of posting. “Great product, horrible company. Rampant theft, drug use and harassment, and that is just by members of Ralph’s Management team.” Posting of Anon, to

I worked at the Ralph Lauren Corporate Offices in New York a few years back and have lots of fond memories of the company. However, I either saw, heard, and was unfortunately involved in some (not all) of the shenanigans. To name a few: During line opening when all of the sales staff fly [into] the main New York office, one Polo Sales employee found his male and female buyers copulating in his showroom prior to a meeting about to begin. Two employees, one of who [sic] was Security, had a few ‘in-house’ trysts both at the West 55th Street offices and at 650 Madison. A mailroom employee personally supplied me with cocaine. One of the top executives propositioned me directly with an invitation to meet for drinks at ‘a friend’s apartment’ close to the

http://scholarlycommons.law.hofstra.edu/hlelj/vol20/iss2/5
Finance,36 The Motley Fool,37 Raging Bull38 and Silicon Investor39 are examples of the types of Internet bitch sites that exist. One site, FuckedCompany.com,40 is an example of an extreme bitch site.41 Investors monitor this site regularly and use it as a litmus test to indicate whether technology companies are faring well.42 The site also encourages company insiders to divulge information about the company’s economic future.43 Other message boards can easily be accessed by entering the company name followed by sucks.com (e.g., HomeDepotSucks.com).44 Visitors to these websites can acquire current information on the company, post and exchange messages about issues related to the function or success of the company.45

Office. And yes—I did go. One of the top 5 executives at the time was seeing a certain doctor 3 times a week on a regular basis.

Posting of K. Weiser, to

That is nothing compared to what I know. The Company cooks the books every month to make the quarter. At this point everyone knows this and that is why the stock price is a joke. . . . They need management that can read financials not just wallpaper samples!

It's a big Shell Game to them. Company lacks upper management.

Posting of Freddie, to

"I have insider information that the EEOC (Equal Employment Opportunity Commission) is doing a 'major' investigation of the employment practices at POLO. They apparently have received an unusual amount of complaints from former as well as current employees about what goes on with this poorly run company."

Posting of Anon2, to

41. Pizzi, supra note 11.
42. Id.
43. Id. (discussing how the site tries to get insiders to reveal which companies are soon to be defunct and just how horrible conditions are at the company). A message board, labeled "The Happy Fun Slander Corner," creates a "dead pool" where posters can predict the companies that will fold, as well as the time frame and the circumstances under which they will do so. Id.
A. Who Posts to Bitch Sites?

People use anonymous screen names to post to bitch sites. Those who post to Internet message boards run the gamut from current and former employees, management and human resources employees to those unaffiliated with the company. Employees use these bitch sites as a forum to express their dissatisfaction with their co-workers or to express different views on topics like project management and expense accounts. In those instances in which the posters are not employees or affiliated with the company, the posters are often just consumers or persons with an interest in the company, utilizing the message board to voice their thoughts on an issue. In addition, college students, in the course of their job-hunting, often post specific questions on company bitch sites in the hope that current employees will answer them.

The popularity of bitch sites has increased over the past few years. This popularity is demonstrated by the large number of visitors to these sites. For example, on an average day, each of the 8,445 Yahoo! Finance message boards receives tens of thousands of postings. Similarly, Vault.com's message board has between five and seven thousand visitors utilizing its site to acquire information on any of the three thousand companies available through the site on a weekly basis.

46. King, supra note 22, at 53.
47. King, supra note 30, at 52.
48. Id.
49. Internet Critic of Atlanta Company Should Remain Anonymous, Public Citizen Tells Court: Identities of People Who Post Anonymous Messages on the Internet Should Not Be Disclosed, Dec. 15, 2000, at http://www.citizen.org/pressroom/print_release.cfm?ID=557. In one case iXL Enterprises, an Atlanta firm, sued to uncover the identity of an online poster. Id. John Doe posted comments on a Yahoo! message board speculating about why the company was losing money. Id. In its complaint, iXL alleged that John Doe was an employee and that he posted messages in violation of his employment contract; however, John Doe provided evidence that he was not an iXL employee. Id.
50. King, supra note 22, at 53. Many college students flock to the website www.wetfeet.com which offers real profiles and an insider look at up-and-coming industries. Diane E. Lewis, Online Water Cooler Applicants Check Message Boards for Word on A Workplace, BOSTON GLOBE, Sept. 17, 2000, at M1, http://www.lexis.com. In 1998, less than ten percent of all executives used the Internet as a means of job hunting. Id. As of 2000, more than sixty percent of executives use the Internet to research, evaluate opportunities and study one particular company's operating practices in their job search. Id.; see also http://www.vault.com (last visited Apr. 13, 2003) (creating a forum where prospective employees post questions to employers about salary, benefits, hiring practices and the application process).
52. Lewis, supra note 50, at M1.
Visits to the investor’s site, RagingBull.com, amount to more than two million each month.\textsuperscript{53}

On a weekly basis, one hundred twenty-four thousand Internet users log on to Fuckedcompany.com.\textsuperscript{54} Not only do visitors log on, but they average forty-five minutes of user time perusing the lists of companies plagued by employee flight, salary cuts, terminations and fiscal trouble.\textsuperscript{55} Fuckedcompany.com also enjoys a high level of posting activity. The site accepts three to four hundred news tips per day.\textsuperscript{56} In addition, the site offers an e-mail newsletter that boasts a subscription list of forty-five thousand.\textsuperscript{57} Subscribers and visitors to these websites use the information that they glean to make decisions about employment and investments. In some cases, consumers will note the information posted on the web in exercising their buying power.\textsuperscript{58}

\section*{B. Terms of Service Agreement, Member Conduct and Disclaimers on ISP Message Boards}

ISPs provide access to the Internet.\textsuperscript{59} Their service is governed by a Terms of Service Agreement that must be accepted by users prior to the
establishment of their accounts. For the most part, Terms of Service agreements are uniform among ISPs.\textsuperscript{60} For purposes of illustration, the Terms of Service Agreement of the ISP Yahoo! is examined.

Yahoo! provides its users with access to communication forums like chat rooms and message boards.\textsuperscript{61} In exchange for its service, Yahoo! requires each subscriber to agree to certain terms. The registration terms provide that the subscriber must:

(a) provide true, accurate, current and complete information about [himself] as prompted by the Service's registration form (such information being the 'Registration Data') and (b) maintain and promptly update the Registration Data to keep it true, accurate, current and complete.\textsuperscript{62}

In addition to these registration terms, Yahoo! explains the conduct with which each member is expected to comply, in its Member Conduct section. The service's users must agree that they will not "upload, post, email, transmit or otherwise make available any Content\textsuperscript{63} that is unlawful, harmful... tortious, defamatory, vulgar, obscene, libelous, [or] invasive of another's privacy."\textsuperscript{64} The section also specifically bans using the service to disseminate, in any way, content that the users do "not have a right to make available under any law or under contractual or fiduciary relationships (such as inside information, proprietary and confidential information learned or disclosed as part of employment another. Id. Lastly, the messaging or forum system provides communication with other subscribers via e-mail, forum or message board postings. Luftman, supra.

61. Yahoo! Terms of Service, supra note 60.
62. Id.
63. Content is defined as all information, data, text, photographs, graphics, video, software, music, sound messages or other materials. Id.
64. Id. AOL's terms and conditions of use provide another good example of an ISP service agreement. Use of AOL's services is contingent upon acceptance of its service agreement. AOL.com Terms and Conditions of Use, supra note 60. AOL users, by posting information in or using information available through AOL, agree that they will not:

[U]pload, post, or otherwise distribute or facilitate distribution of any content— including text, communications, software, images, sounds, data, or other information—that is unlawful, threatening, abusive, harassing, defamatory, libelous, deceptive, fraudulent, invasive of another's privacy, tortious, contains explicit or graphic descriptions or accounts of sexual acts.

relationships or under nondisclosure agreements). Yahoo! reserves the right to refuse to post, move or remove any material that it deems offensive or in violation of its Terms of Service.

Yahoo! takes measures to protect the privacy of its subscribers. However, violation of its Terms of Service may invoke action by Yahoo!. Minimally, a breach of the agreement may result in termination of service. In situations where a subpoena or a court order is issued or in the face of any other legal proceeding, Yahoo! may be forced to share personal information about a user in response to that legal process.

Yahoo! does not preview material that appears on its websites. Therefore, as a condition of use, Yahoo! subscribers agree to an Indemnity clause. The clause holds Yahoo! and any of its agents or subsidiaries harmless from any claim that arises as a result of posting, submitting, transmitting, use of the service, violation of the Terms of Service or infringement on the rights of any other party. Accordingly, ISPs like America Online ("AOL") and Yahoo! cannot be held liable for subject matter that appears on their websites, posted by third-parties.

In 1996, the Communications Decency Act ("CDA") granted portals and ISPs a shield against liability for third-party defamation.

65. Yahoo! Terms of Service, supra note 60.
66. Id. This right remains intact even though Yahoo! does not pre-screen the materials posted on its websites. Id. Yahoo! requires that its patron’s evaluate and bear any risks that are associated with use of such content. Id.
67. Id.
68. Yahoo! Privacy Policy, at http://privacy.yahoo.com (last visited Apr. 6, 2003); Privacy Policy, at http://www.aol.com/info/privacy.adp (last visited Apr. 6, 2003). Yahoo! may divulge users’ personal information in situations where it believes it is necessary to investigate, prevent or take action against violations of its Terms of Service. Yahoo! Privacy Policy, supra. In 2000, AOL received nearly 475 subpoenas, requesting the identities of anonymous posters, a forty percent increase since 1999. Aaron Elstein, AOL Sides with Anonymous Posters, Mar. 4, 2001, at http://zdnet.com.com/2100-11-528630.html?legacy=zdnn. Attorneys for defendants in suits where their identities are being sought call Yahoo!’s privacy policy a “charade” and state that Yahoo! will respond to any subpoena without considering the legal or substantive implications or their validity. Michael D. Goldhaber, Associate Is a Leading ‘Cybersmear’ Lawyer, AM. LAW. MEDIA (July 14, 2000), at http://www.law.com/ny/backpage/00/07/bp071400a2.html.
69. Yahoo! Terms of Service, supra note 60.
70. Id.
71. Id.; see also AOL.com Terms and Conditions of Use, supra note 60.
72. Yahoo! Terms of Service, supra note 60.
74. Id. The CDA became effective on February 8, 1996. Id. Section 230, in plain language, prevents ISPs from being treated as publishers or speakers in defamation cases based on posted material originating from a third-party subscriber to the service. Id. In cases that were heard after section 230 was enacted, courts interpreted the statute as the creation of federal immunity for ISPs against any cause of action that would make ISPs liable for information originating from a third-party subscriber to a service. Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (holding that
In cases where a person posts a message on a message board or bitch site, the target of the comment can only seek redress from the person who actually posted the message, not the ISP. In the grand scheme, the structure of the law is fair. It holds accountable the author of the statement, and not the service that carried it by virtue of its Terms of Service Agreement with the subscriber.

C. ISPs Providing John Doe with Adequate Notice

When a corporation files a complaint against John Doe for a defamatory statement posted on an Internet message board, it seeks a subpoena from a court to obtain identifying information about the poster from his ISP. There is no legal doctrine that requires the ISP to give notice to John Doe that his identity is being sought. Independent of legal doctrine, ISPs have developed subpoena compliance policies, but they did not always exist.

Initially, when Yahoo! was served with a subpoena, requiring it to reveal online user information, it complied by handing over the identifying information without providing notice to the user. In Xircom,

Congress intended to grant immunity to ISPs regardless of whether the ISP aggressively makes the material prepared by others available"); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (holding that an ISP was not liable for a defamatory message that was posted and the victim had no other recourse but to go after the actual poster of the message). But see Ian C. Ballon, Zeran v. AOL: Why the Fourth Circuit Is Wrong, J. INTERNET L. (1998), http://www.lexis.com (arguing that section 230 does not completely shield an ISP from liability when a third-party posts defamatory material on the Internet and that under section 230 an ISP could be held liable if it knew that the material posted was defamatory and did nothing about it).


76. Id.


78. Zelinka v. Americare Healthscan, Inc., 763 So. 2d 1173, 1173 (Fla. Dist. Ct. App. 2000) (holding that the pre-notice requirements of section 770 of the Florida's Statutes do not apply to Internet defamation defendants because they are private individuals). The statute requires that written notice be served on a defendant at least five days before any civil action for libel is brought. Fla. STAT. ANN. § 770.01 (West 1999). The notice needs to specify the statements alleged to be defamatory and the medium in which they appeared. Id. The statute "was designed to allow for the timely retraction of erroneous information in an attempt to balance the individual's right to be free from defamation against the public's 'interest in the free dissemination of news.'" Zelinka, 763 So. 2d at 1174 (quoting Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950)).

Inc. v. Doe, an anonymous poster under the pseudonym A_View_From_Within, published critical messages regarding Xircom. Xircom filed a complaint with the California Superior Court alleging defamation. The court granted Xircom an order for a subpoena. Xircom served Yahoo! with the subpoena asking it to disclose A_View_From_Within’s identifying information. Before Yahoo! could comply with the subpoena, John Doe happened to read about the case against him in the newspaper. John Doe quickly hired an attorney who filed a motion to quash the subpoena. The complaint was eventually dismissed.

In April of 2000, Yahoo! changed its no notice policy after it revealed one of its subscribers’ identities, in accordance with a civil
subpoena, without providing him with notice. The subscriber posted messages about his employer, a consulting firm named AnswerThink, under the pseudonym Aquacool_2000. AnswerThink subpoenaed Yahoo! for information that would uncover Aquacool_2000’s true identity. After Yahoo! revealed the identity of the employee, AnswerThink terminated his employment. Thereafter, Aquacool_2000 brought suit against Yahoo! claiming that it did not give him any advance notice and consequently, no opportunity to file a motion to quash the civil subpoena issued by AnswerThink. Yahoo! changed its policy to give users notice of the subpoena and fifteen days to take some form of action. Although Yahoo! has amended its notice policy, it has not changed its Terms of Service Agreement nor memorialized the change in any document.

It is insufficient to leave the issue of notice up to an ISP. An ISP’s primary interest is in minimizing cost and maximizing profit, not in protecting anonymous speech or preventing the defamation of a company. Nor does an ISP care if compliance with a subpoena might

87. Livingston, supra note 79. A civil subpoena is issued by a private attorney not by a court. It is simply a document requesting information. Id. Therefore, any company can file a lawsuit and have a private attorney file a document called a civil subpoena. Id.
88. Id. The employee posted one message that read: “one (manager) is so dull that a 5-watt bulb gives him a run for his money.” Id. Another posted message called another executive “an arrested adolescent whose favorite word is turd.” Goldhaber, supra note 68.
89. Livingston, supra note 79.
90. Id.
91. Id. Aquacool_2000 sued Yahoo! claiming invasion of privacy, false advertising, negligent misrepresentation and breach of contract. Goldhaber, supra note 68.

Upon receipt of a valid subpoena, it is AOL’s policy to promptly notify the Member(s) whose information is sought. In non-emergency circumstances, AOL will not produce the subpoenaed Member identity information until approximately two weeks after receipt of the subpoena, so that the Member whose information is sought will have adequate opportunity to move to quash the subpoena in court.

Id.

[It is AOL’s policy to release information sufficient to identify an AOL member only where the party seeking the information has filed a legal action that implicates the AOL member in some legally cognizable impropriety or wrongdoing. AOL requests a copy of the complaint and any supporting documentation to indicate how the AOL e-mail address is related to the pending litigation.

Id.

94. Livingston, supra note 79.
cost a user his job. Congress needs to address this issue and require ISPs to issue mandatory notice to anonymous posters whose identity is on the verge of being revealed. In order to provide the anonymous poster with ample opportunity to protect his identity from disclosure, he needs sufficient time to hire an attorney and file the requisite motion to quash. The mandatory notice should be the most rapid and effective notice possible under the circumstances. Notice could take the form of an e-mail to the subscriber followed by a prompt letter as confirmation.

D. The Power of Bitch Sites

The Internet has the capacity to replicate almost endlessly any defamatory message. The Internet is a medium more pervasive than print and has tremendous power to damage reputations. Even when a message is posted on a bitch site frequented by only a handful of people, one of them can republish the message. That message can be disseminated by printing and then distributing it, or by forwarding it instantly to a different discussion forum or e-mail address. The more provocative the message, the more likely it is to be republished.

The Internet poses a great threat to corporations. Corporations worry about the rapid dissemination of information to a large audience from message boards by anonymous disgruntled employees. These anonymous statements may be so damaging that they can cause a corporation’s stock price to drop.

AgriBioTech Inc., a Nevada-based firm, suffered large financial losses as a result of false information disseminated to the public. AgriBioTech was attacked by an anonymous message that appeared on a Yahoo! Finance message board. The anonymous poster claimed that one of the company’s founders was going to be indicted within two days, that there was evidence of accounting fraud and that the company

95. Lidsky, supra note 13, at 864.
96. Id. at 863. The Internet is more insidious than print because despite being written, Internet communication lacks the formal distance that is interposed by space and time, between an author and her readers in print. Id. at 862.
97. Id. at 864.
98. Id.
100. Sobel, supra note 4, para. 12.
101. Id.
102. Bell, supra note 58, at T3.
103. Id.
was about to declare bankruptcy. The claims were not true. At the time of the posting, AgriBioTech was financially sound and analyst confidence in the company was high. In fact, the company was trading at a fifty-two week high of $29.50 per share. The message board posting was a significant factor in bringing the stock price down to a mere $9.75 per share.

The woe that faced AgriBioTech is indicative of the harm that can result from false anonymous postings. Internet e-greeting card company, Blue Mountain Arts, has also had to fight false statements on the Internet. Comments alleging that the service, when accessed, infected computers with a software virus circulated on the Internet. The statements were harmful to Blue Mountain’s business because its success is dependent on a high volume of visits. Blue Mountain and other online companies need high levels of activity in order to secure advertisement on their sites. The translation amounts to dollars and cents. Companies pay higher advertising costs for high volume sites.

On April 7, 1999, visitors to a Yahoo! Finance message board received a tip that ultimately cost PairGain financially. PairGain, a telecommunications company, is based in Tustin, California. Under the heading “Buy Out News,” a message was posted asserting that PairGain was going to be taken over by an Israeli company. To make the story appear more credible, the anonymous poster provided a hyperlink to what appeared to be a Bloomberg News Service website. Once the link was accessed, the visitor’s attention was directed to a detailed article describing the events that led to the takeover. The story was false and the link provided did not route the user to the Bloomberg

104. Id.
105. Id.
106. Id.
107. Bell, supra note 58, at T3.
108. Id.
109. Id.
110. Id.
112. Id.
113. Id.
114. Id.
115. Id.
News Service. Instead, the site was a counterfeit designed to add credibility to the false posting.

News of the pending takeover quickly spread. PairGain’s publicly traded stock increased by thirty percent and the volume of stock trading multiplied seven times. The anonymous poster was arrested a week later by FBI agents, who traced the false statement to him via his IP address. Eventually, the fact that the message and the connected story were false came to light. Not only did investors who purchased the stock at the inflated price lose large sums of money, but PairGain also lost significantly when the price of its stock dropped sharply.

Incidents like these can be very costly to corporations and increase the need for monitoring the Internet. Corporations have had a difficult time monitoring what gets posted on the Internet about them because of its enormity and speed. In response to the need, scouring agencies have been established to provide monitoring services for large companies.

Ewatch, Cybercheck and Cyveillance, all Internet scouring agencies,


117. Id.

118. Id.

119. Id. An IP Address is

[a]n identifier for a computer or device on a TCP/IP network. Networks using the TCP/IP protocol route messages based on the IP address of the destination. The format of an IP address is a 32-bit numeric address written as four numbers separated by periods. Each number can be zero to 255. For example, 1.160.10.240 could be an IP address.


121. Matt Richel, Company Trolls for Scuttlebut on the Internet, N.Y. TIMES, Mar. 8, 1999, at C4 (explaining that corporations have a history of paying “clipping services” to monitor their reputations in print).

122. Id.

123. Id. Ewatch was founded in 1994 by two brothers, Alexander and Charles Lukaszewski, from their respective offices in New York and Minneapolis. Id. Alexander was a former television producer and Charles was a programmer. Id. The company flourished after the O.J. Simpson trial when the cookie company, Mrs. Fields, was accused of paying off a juror. Richel, supra note 121, at C4. As a result of the accusation, stock in Mrs. Fields dropped. Id. The company decided to hire Ewatch to monitor what was being said on the Internet, to find websites and or message boards where the rumor appeared, to conduct damage control and in some instances, to post corrective messages. Id. Ewatch combs over 4,700 online newspapers, magazines, broadcast sites and portals. Id. It also monitors over 66,000 Usenet groups and electronic mailing lists, CompuServe and AOL message boards and investor message boards like Yahoo!Finance, Motley Fool, Raging Bull and Silicon Investor. Fact Sheet, at http://www.prenewswire.com/about/factsheet/ewatch_factsheet.shtml (last visited Apr. 12, 2003).
comb the Internet’s "virtual back allies," in chat rooms and discussion forums.\textsuperscript{125}

Ewatch informs companies which news sites are writing about them and what posters are saying about their products, stocks and services.\textsuperscript{126} Utilizing one of these agencies, saves company time that would normally be spent searching online news sources, investor message boards, public discussion areas and bitch sites.\textsuperscript{127} Ewatch and its competitors are constantly trying to stay ahead of Internet posters.\textsuperscript{128} Their clients rely on them to report any damage done over the Internet so that it can be rapidly controlled. Yet the control that corporations can exert is limited; especially when the author of a posted message on the Internet is anonymous.

\textbf{E. Defamation}

The law acknowledges a corporation’s right to be free from false attacks upon its reputation.\textsuperscript{129} Defamation law dates back to the sixteenth century\textsuperscript{130} and has adapted to the technological evolution of the telegraph, telephone, radio, motion picture and television industries.\textsuperscript{131} The Internet provides a new environment in which a defamatory statement can be published.\textsuperscript{132} However, there is little new law relating to Internet defamation.\textsuperscript{133} Regardless of the medium in which it is published, a false statement still injures the reputation of the entity it disparages.

\begin{itemize}
\item 124. "Virtual back allies" refers to message boards or websites that are harder to access through well known or commonly used search engines such as www.google.com, www.yahoo.com and www.excite.com. Fact Sheet, at http://www.prnewswire.com/about/factsheet/ewatch_factsheet.shtml (last visited Apr. 12, 2003).
\item 125. Id.
\item 127. Id.
\item 128. Id. (describing the steps that Ewatch has taken to keep pace with the changing face of technology). The company has stopped manual monitoring in favor of an automated system that scour chat rooms for key words or phrases. Id. Ewatch has recently upgraded its software and server computers to increase its scanning speed four-fold. Id.
\item 129. \textsc{Restatement (Second) of Torts} § 561 (1977).
\item 131. Id.
\item 133. Id.
\end{itemize}
Defamation is a cause of action based on a false statement concerning a corporation that is damaging to its reputation.\textsuperscript{134} Defamation law is divided into libel and slander.\textsuperscript{135} The law varies from state to state, but generally, the elements needed to prove defamation are: (1) Publication;\textsuperscript{136} (2) Falsity;\textsuperscript{137} (3) Fault\textsuperscript{138} and (4) Harm.\textsuperscript{139} For a corporation to state a claim for defamation, it must show the defamatory matter tends to prejudice it in the conduct of its business, or deters others from dealing with it.\textsuperscript{140} A defamation claim is subject to the affirmative defenses of truth,\textsuperscript{141} fair comment,\textsuperscript{142} consent\textsuperscript{143} and privilege.\textsuperscript{144}
III. LAWSUITS: SUBPOENAS IN LAWSUITS THAT ALLEGED DEFAMATION

When corporations file a complaint against an anonymous Internet poster for defamation, they request that the court issue a subpoena to the ISP that hosted the message board. The purpose of the subpoena is to obtain information from the ISP that will reveal the identity of the poster. The circumstances under which courts are issuing subpoenas vary. The goal in these cases is to protect a corporation’s right to not be defamed, without empowering it to chill protected anonymous speech. The courts must balance these concerns when deciding whether to issue a subpoena.\textsuperscript{145}

A. Lawsuits: Subpoenas Granted to Disclose Poster Identity

When a corporation decides to pursue an anonymous Internet poster, it files suit against John Doe. In response to that suit, the court may issue an ex-parte order. That order permits an identification-seeking subpoena to be issued and served upon the ISP used by the defendant to post the defamatory material.\textsuperscript{146} Usually, the ISP will provide the defendant with two weeks notice of the subpoena.\textsuperscript{147} Then, the ISP, in accordance with its Terms of Service Agreement, complies with the demand and divulges the requested information.\textsuperscript{148}

\textsuperscript{144} Id. § 593. “One who publishes defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused.” Id.

An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the published, and (b) the recipient’s knowledge of the defamatory matter will be of service in the lawful protection of the interest.


\textsuperscript{146} Rosen & Rosenberg, supra note 93, at 19 (stating that sections 2510 and 2703(c)(1)(A) of the Electronic Communications Privacy Act do not prohibit an ISP from disclosing the requested information to a private third-party).

\textsuperscript{147} See supra Part II.C.

\textsuperscript{148} See supra Part II.B. Wade Cook Financial Corp., a Seattle-based financial education firm, was defamed on an Internet message board. Carl S. Kaplan, Companies Fight Anonymous Critics with Lawsuits, N.Y. TIMES ON THE WEB, at B10 (Mar. 12, 1999), at http://www.nytimes.com/library/tech/99/03/cyber/cyberlaw/12law.html#1. Wade Cook asked Yahoo! to remove the postings but its request was denied. Id. Wade Cook then proceeded to file suit on a claim of defamation. Id. General counsel of Wade Cook Financial, Kiman Lucas, stated that the suit was filed to uncover the identities of the Internet posters and to deter others from posting defamatory comments. Id. Since Wade Cook did not know the identity of the defendants, the court allowed the corporation to subpoena Yahoo! to release the users’ personal contact information. Sean Whitworth & Ethenia King, Defamation and the Internet: A Threat to Free Speech, at
1. In re Subpoena Duces Tecum to America Online, Inc.

In In re Subpoena Duces Tecum to America Online, Inc., an anonymous publicly traded company ("APTC") sued five John Does for allegedly posting defamatory remarks about it in an Internet chat room maintained by AOL. AOL filed a motion to quash the subpoena. The Circuit Court of Virginia announced a test to determine whether an ISP must divulge the identity of John Doe. The test states that a court should order an ISP to provide the identifying information of a subscriber when the court is satisfied "that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed" and "the subpoenaed identity information is centrally needed to advance that claim."

The court noted that people who misappropriate the opportunities presented by the Internet need to be held accountable for their actions. The court was concerned about the potential harm caused by defamatory material on unregulated Internet sites. It discussed the high-speed nature of the Internet and how it allows defamatory material to be circulated to an unlimited audience. The result is immeasurable harm to the subject of the message, the corporation.

The court denied AOL's motion to quash. It held that defamatory statements are not entitled to any First Amendment protection. Despite the spirit of the decision, the test set out in In re AOL fails to balance a corporation's right to not be defamed, with an employee's right to

http://gsulaw.gsu.edu/lawand/papers/fa99/whitworth_king/ (last visited Apr. 7, 2003). Yahoo! complied and gave the defendant's e-mail address to Wade Cook. Id. Armed with that information, the corporation was then able to serve the defendants with the lawsuit. Id.


150. Id. at 26.

151. Id.

152. Id. at 37.

153. Id.


155. Id. at 34.

156. Id.

157. Id. at 38. AOL subsequently appealed on the ground that APTC should not have been allowed to proceed with legal actions anonymously. Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 381 (Va. 2001). AOL did not challenge the validity or the application of the test on appeal. Id. at 379; see discussion infra Part III.C.

158. In re AOL, 52 Va. Cir. at 34 (citing Beauharnais v. Illinois, 343 U.S. 250, 266 (1992)).
anonymous speech. The test is inequitable, tipping in favor of the corporation. Although the first prong requires that the plaintiff have a good faith belief that it may be the victim of defamation.\textsuperscript{159} The plaintiff should at least submit evidence of the alleged defamatory statement(s) it was harmed by. Thereafter, the judge should consider the submission to determine whether the suit was brought in good faith.

2. Ohio State Law Allowing Discovery

In another instance, an employee of AK Steel, Jane Doe, posted several comments on a Yahoo! message board.\textsuperscript{160} The comments\textsuperscript{161} claimed that John Hritz, executive vice president and general counsel of AK Steel, was too eager to litigate.\textsuperscript{162} Hritz promptly filed a petition for discovery alleging that “John and/or Jane Doe” had made threatening, libelous and disparaging comments on the Internet.\textsuperscript{163} Hritz relied on an Ohio law\textsuperscript{164} that allows those contemplating a lawsuit to begin the process of discovery, or legal investigation, before the suit is filed.\textsuperscript{165} The Ohio court issued subpoenas to Yahoo! and AOL to identify Doe in accordance with the statute.\textsuperscript{166}

The Ohio statute applied in AK Steel allows discovery before suit.\textsuperscript{167} Groups like Public Citizen\textsuperscript{168} maintain that application of the Ohio

\textsuperscript{159}. Id. at 37.

\textsuperscript{160}. Civil Liberties Group Defends Internet Author’s Right to Remain Anonymous: Electronic Frontier Foundation Challenges Corporate Lawyer’s Effort to Silence Online Critic, Oct. 17, 2000, at http://www.eff.org/Privacy/Anonymity/Discovery_abuse/Jane_Doe_v_John_Hritz/20001017_eff_janedoe_pr.html.

\textsuperscript{161}. In his request for discovery, Hritz cited the message “Hritz will litigate the time of day. OOPS I will be in court.” Id. In her brief, Doe claims that her statement is purely opinion, and hence not actionable as libel, and that the filing of the suit seems to substantiate her criticism of Hritz. Id.

\textsuperscript{162}. Id.

\textsuperscript{163}. Id.

\textsuperscript{164}. OHIO REV. CODE ANN. § 2317.48 (Anderson 2002).

\textsuperscript{165}. The statute permits a potential plaintiff to commence an action to discover any facts, from the adverse party, that are essential to filing a complaint. Id. The statute does not allow potential litigants to use this procedure to conduct a fishing expedition. See id. A cause of action must exist prior to the use of this discovery procedure. Id.

\textsuperscript{166}. Civil Liberties Group Defends Internet Author’s Right to Remain Anonymous: Electronic Frontier Foundation Challenges Corporate Lawyer’s Effort to Silence Online Critic, supra note 160.

\textsuperscript{167}. § 2317.48.

\textsuperscript{168}. Public Citizen is a non-profit consumer advocacy organization founded by Ralph Nader to represent consumer interests in the courts. About Public Citizen, at http://www.publiccitizen.org/about/ (last visited Apr. 7, 2003).
statute will intimidate all employees.\textsuperscript{169} The end result is chilling speech and the exercise of the employees' First Amendment right to speak freely about the company on the Internet.\textsuperscript{170} Employee intimidation may be a consequence of such an action, but an employee's apprehension is also a benefit. In instances of defamation, the threat of discovery may promote careful consideration by employee-posters before the click of the mouse.

Public policy dictates that posters should not be able to use the Internet to carelessly make defamatory statements. Posters should weigh the consequences of their statements prior to the click. However, the Ohio statute is the wrong vehicle to accomplish this end. It does not provide any safeguard against frivolous suits by corporations aimed at chilling protected speech. Nor does it give the anonymous poster a chance to defend his anonymity.

3. Subpoena Granted Because of Employment Agreement

In July 2001, a New Jersey appellate court, in Immunomedics, Inc. \textit{v. Doe},\textsuperscript{171} denied Jane Doe's motion to quash a subpoena issued to Yahoo!\textsuperscript{172} The subpoena sought all personally identifiable information relating to her.\textsuperscript{173} Immunomedics is a publicly held biopharmaceutical corporation that makes signing a confidentiality agreement a condition of employment.\textsuperscript{174} That agreement prohibited employees from freely communicating information learned while working for the company.\textsuperscript{175} Jane Doe posted messages that revealed confidential proprietary information about Immunomedics.\textsuperscript{176} The comments posted claimed that Immunomedics was out of stock for diagnostic products in Europe and that there would be no more sales if the situation did not change.\textsuperscript{177} Another message reported that the chairman of the company was going to fire the European manager.\textsuperscript{178} This information was true, but violated

\textsuperscript{169} Civil Liberties Group Defends Internet Author's Right to Remain Anonymous: Electronic Frontier Foundation Challenges Corporate Lawyer's Effort to Silence Online Critic, supra note 160.
\textsuperscript{170} \textit{Id.}
\textsuperscript{172} \textit{Id.} at 778.
\textsuperscript{173} \textit{Id.} at 773.
\textsuperscript{174} \textit{Id.} at 777.
\textsuperscript{175} \textit{Id.} at 771.
\textsuperscript{176} Immunomedics, 775 A.2d at 774.
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.}
the company's confidentiality agreement and several provisions of Immunomedics' employee handbook.\textsuperscript{179} Thus, the court denied the motion to quash the subpoena.\textsuperscript{180}

In February 1999, Massachusetts-based defense contractor, Raytheon Co., sued twenty-one John Does for revealing confidential corporate information on a message board, in violation of their employment contracts and the company's employment policy.\textsuperscript{181} In a breach of contract suit, the defendant's ability to rely on a free speech defense is limited.\textsuperscript{182} The company issued court ordered subpoenas to Yahoo! and AOL demanding that the identities of the employees be revealed to it.\textsuperscript{183} Yahoo! complied and ultimately divulged the identities of the posters.\textsuperscript{184} Four of the employees quit and the rest were sent to corporate counseling.\textsuperscript{185} Once Raytheon learned the identities of the employee-posters, it withdrew the lawsuit.\textsuperscript{186}

In this case, the subpoena served Raytheon's interest. Its employees breached their contract and illegally divulged trade secrets. The company was able to identify the employee-posters and preferred to rectify the problem internally rather than in the legal arena. While many view this decision as an abuse of the legal system,\textsuperscript{187} the decision was a wise one. Raytheon prevented financial harm (i.e., a drop in its stock price) and a damaged public image that could have resulted from a court battle.

In cases involving employment agreements,\textsuperscript{188} the court does not need to consider the harm to the corporation by the comments or the defendant's free speech rights.\textsuperscript{189} These cases are purely based in contract law. The employment agreement dictates what is acceptable within the employment relationship.

\textsuperscript{179} Id. at 775.
\textsuperscript{180} Id. at 778. The court ruled that anonymous Internet posters should not be afforded an advantage based on the media in which they choose to breach a contract or because they do so anonymously. Immunomedics, 775 A.2d at 778.
\textsuperscript{182} Id. In a breach of contract case the free speech defense is limited to whistleblowers. Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{186} Sobel, supra note 4, para. 15.
\textsuperscript{187} Id.
\textsuperscript{188} For purposes of discussion, employment agreements encompass policies and rules contained in employee handbooks.
When a statement appears on the Internet that breaches an employment agreement, the court should issue a subpoena limited to divulging whether the poster is an employee. If he is an employee, the court should issue a subpoena requiring all identifying information to be given to the employer so that he may proceed with his claim. The company’s best shield against defamation is an employment agreement that clearly delineates what is appropriate employee commentary about the company on the Internet.

B. Lawsuits: Subpoena to Reveal Identity Denied

Courts have denied requests for subpoenas for various reasons. Occasionally, the decision is based on existing law and in other instances, courts have been forced to develop a rubric for analyzing these cases. In both situations, the courts must take into account the corporation’s rights and the employee’s rights.

1. Lawsuit: Subpoena to Disclose Identity Denied Because of a Broad First Amendment Right Under the State Constitution

One court has placed its state constitution in the way of subpoenas, sought by corporations, to unmask anonymous posters. In July 2001, in a case of first impression, *Dendrite International, Inc. v. John Doe No. 3*, the court set the legal test in New Jersey for divulging the identity of anonymous posters. In *Dendrite*, the defendant, John Doe No. 3, posted nine comments on the Yahoo! message board dedicated solely to discussion about Dendrite, under the pseudonym xxplrr. Three of the comments related to supposed changes in Dendrite’s revenue recognition accounting. The comments chastised Dendrite for not moving forward competitively, accused its president of trying to sell the company because it was stagnant and stated that the company was not desirable to potential purchasers. The plaintiff sought limited discovery to disclose the defendant’s identity and alleged that the message posted amounted to

191. *Id.* at 760.
192. *Id.* at 763.
193. *Id.*
194. *Id.*
defamation and had prompted a drop in stock price. The Dendrite court adopted a four-prong test to determine whether the defendant’s identity should be revealed.

The court offered that before revealing the identity of the posters, courts should conduct a comprehensive inquiry. First, the plaintiff should make efforts to notify the anonymous posters that they are the focus of a subpoena or application for an order of disclosure, and give the fictitiously named defendants a reasonable opportunity to file and serve opposition to the application. The notification should consist of a posting, on the ISP’s pertinent message board, announcing to the anonymous poster that an identity discovery request was made. Second, the plaintiff must identify and submit the exact statements made by each anonymous poster that the plaintiff claims constitutes actionable speech.

Next, the plaintiff has to produce sufficient proof in support of each element of its cause of action on a prima facie basis. Once the court has determined that the plaintiff has a prima facie case, the court must balance the defendant’s first amendment right to anonymous free speech against the weight of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity. Anonymous or disguised speech is allowed as long as those acts are not in violation of the law.

In balancing these rights, the court had to determine whether the plaintiff’s postings were defamatory as defined by the recognized proof

196. Id. at 769.
197. Id. at 760.
198. Id.
199. Id.
200. Dendrite, 755 A.2d at 760.
201. Id.
202. Id.
203. Id.
204. Id. at 760-61.
205. Dendrite, 755 A.2d at 767. The First Amendment interests of anonymous posters are protected to the extent that they “do not interfere with the underlying purposes of state tort law.” Melvin v. Doe, 49 Pa. D. & C.4th 449, 450-51 (Pa. Ct. Com. Pl. 2000). A judge brought a libel action against thirteen anonymous posters who posted messages claiming that the judge lobbied on behalf of a local attorney for a judicial appointment. Id. Although pursuing a defamation action would require speakers to lose their anonymity, no case law suggests that the First Amendment should abolish a state’s right to meaningful tort law designed to discourage the publication of defamatory statements. Id. at 455. Defamatory statements made by anonymous defendants would not be entitled to any First Amendment protection if they are untrue. In re AOL, 52 Va. Cir. 26 (2000) (citing Beauharnais v. Illinois, 343 U.S. 250 (1992)).
structure.206 The court found that they were not, and denied Dendrite's request to reveal John Doe's identity because the plaintiff failed to demonstrate that the statements caused any harm.207 In fact, the court noted that on certain days after the posting was made, Dendrite actually enjoyed an increase in its stock price.208 Toward that end, the court stated that it was impossible to create a causal link between the posting and the alleged drop in stock price.209 The court reasoned that without an expert in the field of stock valuation and analysis, that link could not be concretely made.210

Coupled with that finding, the court relied on the First Amendment of the New Jersey Constitution. In its decision, the court explained that the New Jersey Constitution provides a person's free speech with a greater degree of protection than the protection afforded by the First Amendment of the United States Constitution.211

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."212 Whereas the New Jersey Constitutional provision that governs free speech reads:

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.213

New Jersey's constitutional right to free speech is protected "not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities."214 Conversely, the First Amendment of the United States Constitution only applies to restrictions on free speech imposed by a government actor.215 Therefore,

207. *Id.* at 772.
208. *Id.*
209. *Id.* at 769.
210. *Id.*
211. *Dendrite*, 775 A.2d at 765.
212. U.S. CONST. amend. I.
215. *Id.*
the subpoena was denied in part because it infringed on the protections afforded to anonymous speech by the New Jersey Constitution.216

2. Strategic Lawsuits Against Public Participation

The term Strategic Lawsuit Against Public Participation ("SLAPP") was created in response to a plague of lawsuits brought primarily to chill constitutionally protected speech.217 SLAPPs led to the enactment of Anti-SLAPP statutes.218 Since 1989, twenty-one states219 passed Anti-SLAPP laws,220 but the scope and application of those laws are not uniform.221 Presently, only California and Louisiana's Anti-SLAPP laws are broad enough to reach defamation suits based on Internet postings.222

216. Id.
217. Jerome I. Braun, Increasing SLAPP Protection: Unburdening the Right of Petition in California, 32 U.C. Davis L. Rev. 965, 968 (1999). In 1988, George W. Pring and Penelope Canan invented the acronym, SLAPP, to define a new type of lawsuit that plagued the court system and society as a whole. Id.
To be defined as a SLAPP, a claim generally must be: 1. A civil complaint or counterclaim, 2. [f]iled against nongovernment individuals or organizations, 3. [a]leging injuries from their communications to influence government actions (communications to government officials, government bodies, or the electorate when it is voting on new laws through the initiative or referendum process), 4. [o]n a substantive issue of some public interest or concern.

Chad Baruch, "If I Had a Hammer;" Defending SLAPP Suits in Texas, 3 Tex. Wesleyan L. Rev. 55, 58 (1996) (citing George S. Pring & Penelope Canan, "SLAPPS"—"Strategic Lawsuits Against Public Participation" in Government—Diagnosis and Treatment of the Newest Civil Rights Abuse, 9 Civil Rights Litigation & Attorney's Fee Annotated Handbook 359, 359-60 (Clark et al. eds., 1993)).

The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The legislature finds and declares that it is in the public interest to encourage continuing participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

Id.


221. Id.

222. Id. Louisiana modeled its Anti-SLAPP statute after the California Anti-SLAPP statute. Id. The Washington Anti-SLAPP statute applies to defendants who in good faith communicated "a complaint or information to any agency of federal, state or local government regarding any
California’s Anti-SLAPP statute applies to “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.” The statute states that an “act in furtherance of a person’s right of . . . free speech” includes any “writing made in a . . . a public forum in connection with an issue of public interest.” The Anti-SLAPP statute entitles a defendant to file a special motion to strike, if the plaintiff proves that there is a probability that it will prevail.

Some John Does are claiming that the Internet defamation lawsuits brought against them are SLAPPs. When this situation arises, once John Doe receives notice of the complaint, he has at least 60 days to file a special motion to strike pursuant to the Anti-SLAPP statute. The court then decides whether the lawsuit is a SLAPP.

If the lawsuit is determined to be a SLAPP, then the plaintiff needs to prove that it will probably prevail on the claim. If the plaintiff fails to carry its burden of proof, then the motion to strike is granted and the complaint is dismissed. If the motion to strike is granted, then the defendant is entitled to recover attorney’s fees and costs. However, if it is determined that the special motion to strike was frivolous or was intended to cause unnecessary delay, then the court must award reasonable attorney’s fees and costs to the plaintiff.

matter reasonably of concern to that agency.” Id. Georgia’s Anti-SLAPP statute applies to statements regarding issues under governmental review; theoretically, a libel suit defendant whose comments were about a company undergoing some sort of governmental review could use the statute. Hickey, supra note 220.

224. § 425.16(e)(3).
225. § 425.16(b)(1).
227. § 425.16(f). The court has the discretion to extend the time period that the defendant has to file a special motion to strike beyond sixty days. Id. A hearing shall take place not more than thirty days after the plaintiff is notified of the motion, unless the court docket requires a later hearing. Id.
229. § 425.16(b)(1).
230. A judgment granting or denying a special motion to strike is appealable under section 904.1 of the California Code. § 425.16(j).
231. § 425.16(e).
232. Id.
a. Are Internet Defamation Lawsuits Strategic Lawsuits Against Public Participation?

Anti-SLAPP statutes apply to causes of action arising from a "writing made in a . . . a public forum in connection with an issue of public interest." First, a court needs to determine whether the Internet message board is a public forum. A public forum has traditionally been defined as "a place that is open to the public where information is freely exchanged." Websites dedicated to a publicly traded company are open and free to anyone online. Messages on these websites can be read by anyone who wants to read them. Additionally, anyone is free to post statements on these message boards. Websites that provide free access to any member of the public to read and post messages qualify as a public forum.

Second, a court needs to determine if the message posted is "in connection with an issue of public interest." In Global Telemedia International, Inc. v. Doe 1, a California district court ruled that a publicly traded company with thousands of investors is of public interest because its successes and failures potentially affect market sectors or markets as a whole. The court took into account that the company thrust itself into the media in order to gain the attention of investors. The fact that the company had a chat-room dedicated to it that generated over thirty thousand postings further indicated to the court that it was of public interest.

233. § 425.16(e)(3).
234. Id.
237. Id.
238. Id.
239. ComputerXpress, 113 Cal. Rptr. 2d at 638.
242. Id. at 1265.
243. Id. In determining that the publicly traded company was of public interest, the court took into account the fact that it had as many as eighteen thousand investors in eight months and that it had issued numerous press releases. Id.
244. Id. A California court of appeal in ComputerXpress, Inc. v. Jackson, held that Internet postings made about a publicly traded company were of public interest. ComputerXpress, 113 Cal. Rptr. 2d at 639. The court took into account the fact that the company at one time had between twelve and twenty-four million outstanding shares of stock. Id. Further, the court considered that the
b. Company's Burden to Prove that It Will Prevail on the Claim

Once the anonymous poster proves that the case against him is a SLAPP, the burden shifts to the company to prove that it will probably prevail on the claim. In *Global Telemedia International*, Global Telemedia International ("GTMI") sued several anonymous individuals for posting negative and allegedly libelous comments regarding it on Raging Bull Message Boards. The defendants filed a special motion to strike pursuant to California's Anti-SLAPP statute. The court granted the defendants' special motion to strike. The court stated that in order to prevail on the defamation claim, GTMI needed to prove that the defendants made a false statement of fact with malice that caused damage. The defendants claimed that the postings were opinions and therefore, a defense to defamation.

In order to determine whether a statement is a fact or an opinion, the court needs to examine the statement in its "broad context, which includes the general tenor of the entire work, the subject of the statement, the setting, and the format of the work." Additionally, the specific context and content of the statement needs to be examined "analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation." The court noted that GTMI's message board had about one thousand anonymous postings a week. The court stated that the general tenor, setting and format of the anonymous posters' statements strongly suggested that the postings were opinions. Further, the court declared that the postings were "full of hyperbole, invective, short-hand phrases..."
and language not generally found in fact-based documents." The court found that reasonable readers would not take the posted statements to be anything more than the sentiments of a disappointed investor who was making sarcastic remarks about the company. The court held that the defendants' postings were an exercise of free speech and that GTMI had not shown a probability of success.

In ComputerXpress, Inc. v. Jackson, ComputerXpress filed a complaint alleging that anonymous posters made numerous false and disparaging statements, causing monetary damage. The California Court of Appeals stated that the Internet postings were comparable in tone and substance to those in Global Telemedia International, and ruled that some of the postings were not statements of opinion. The court gave ComputerXpress the opportunity to prove that the statements were false and the company failed to do so. Therefore, the court held that ComputerXpress did not establish a probability that it would prevail on its claim.

The court in Global Telemedia International determined whether a statement is an opinion by examining the broad context in which it was stated, including the tone and structure of the entire work. The court was impressed by the casual nature of the Internet. It pointed to the existence of jargon, exaggeration and the lack of formality adopted by postings on Internet message boards. The court assumed that the use of linguistic informality signals to a reader that the statements are not grounded in fact. Because rules of formal communication do not

256. Id.
257. Id. at 1268.
258. Id. at 1270-71.
260. Id. at 632. The statements claimed that ComputerXpress was a stock scam and would be out of business in thirty days, officers and directors were conspiring to manipulate the stock, an officer had filed for bankruptcy and that its products were inferior. Id.
262. ComputerXpress, 113 Cal. Rptr. 2d at 642-43. The statements that "a company owned by the former president had filed for bankruptcy, or that ComputerXpress had 30 days 'to comply or revert to pink sheets'" were not opinions. Id. at 643.
263. Id. at 643-44.
264. Id.
266. Id.
267. Id. at 1267, 1269. "Importantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings." Id. at 1267. But see supra Part I.D (discussing the economic harm that false Internet postings have caused companies including a drop in stock prices); Blum, supra note 79.

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govern the Internet, the Global Telemedia International court insinuated that most comments on message boards are opinion. However, this assumption is short sighted. Under this analysis, a corporation’s claim for defamation is not actionable when disparaging statements are posted on an Internet message board. In essence, the court is saying a statement that would normally be deemed defamatory in a different context, is not defamatory when it is posted on an Internet message board. The corporation’s right to not be defamed on the Internet is being ignored.

3. Non-Party Anonymous Posters

In Doe v. 2TheMart.com Inc., the District Court of Washington raised the standards set in In re AOL and Columbia Insurance Co. v. Seescandy.com to issue subpoenas to obtain the identity of non-party anonymous Internet posters. The court’s heightened criterion consisted of the following elements: whether (1) the subpoena seeking the information was issued in good faith and not for any improper purpose; (2) the information sought relates to a core claim or defense;
(3) the identifying information is directly and materially relevant to the claim or defense; and (4) there is sufficient information available from any other source to establish the claim.273

The court in 2TheMart.com appropriately raised the standard a plaintiff corporation needs to meet in order to obtain a subpoena.274 Otherwise, anonymous free speech would be chilled. To allow a corporation to reveal the identity of any Internet poster, without imposing the above burdens on him, deters people from speaking freely. If a corporation or, for that matter, any defendant thinks that it is being defamed, then it should bring a lawsuit against the alleged tortfeasor.

C. Anonymous Plaintiff

In what appears to be the first Internet defamation case involving both an anonymous plaintiff and an anonymous defendant, the Supreme Court of Virginia denied the Anonymous Publicly Traded Company ("APTC") the right to stay anonymous.275 The court based its decision on the principle that "a trial is a public event"276 and that "the ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings."277 APTC requested anonymity because it feared economic harm.278 Justice Donald W. Lemons of the Virginia Supreme Court ruled

273. 2TheMart.com Inc., 140 F. Supp. 2d at 1095-97. Typically, the fourth element requiring that the information be unavailable from any other source will be met in these types of cases. Common sense would indicate that if a corporation could get the information elsewhere it would, and would not incur the costs and time required to litigate.

274. Id. at 1095.

275. Am. Online, Inc., v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 385 (Va. 2001). An Anonymous Publicly Traded Company ("APTC") filed a complaint claiming that five John Does, believed to be employees, made defamatory comments about it in Internet chat rooms. Id. at 379; see supra Part III.A.1. The plaintiff-company requested to stay anonymous and claimed that disclosing its identity would lead to irreparable harm. Anonymous Publicly Traded Co., 542 S.E.2d at 379. The trial court allowed APTC to remain anonymous and granted it a subpoena. Id. at 379:80. On September 3, 1999, APTC served AOL with a subpoena requesting identifying information regarding the AOL subscribers. Id. at 380. AOL contested the subpoena by filing a motion to quash in an Indiana trial court. Id. The motion to quash was denied. Id. AOL appealed claiming that the trial court erred in permitting APTC to remain anonymous. Anonymous Publicly Traded Co., 542 S.E.2d at 379.

276. Id. at 384 (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

277. Id. (quoting Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992) (citation and internal quotation marks omitted)).

278. Id. at 385.
that although fear of potential economic harm is a factor, it is not
determinative.\footnote{\textit{Id.}}

Proponents of the decision argue that to rule otherwise would create
a window of opportunity for abusive \textit{anonymous v. anonymous} cases.\footnote{\textit{Id.}} In
response, opponents of the decision argue that the courts’ recent trend
of requiring plaintiffs to show merit before issuing subpoenas to unmask
John Doe weakens the argument of potential abuse.\footnote{\textit{Id.}} APTC argued that
when a corporation makes the decision to remain anonymous as a
business judgment, courts should respect and defer to that decision.
APTC made a business judgment that if it were to reveal to the world
that its confidential information was being circulated on the Internet, that
individuals of the corporation were being defamed and that it did not
know whom the wrongdoer was, then it would be harmed.\footnote{\textit{Id.}}

Denying APTC the right to keep its identity disclosed is unjust.
APTC feared that its lawsuit against anonymous posters would attract
publicity because the company was unable to identify the posters.\footnote{\textit{Id.}} As a
result, this publicity would damage the value of the corporation.\footnote{\textit{Id.}}
Fearing the negative publicity, APTC abandoned its effort to subpoena
AOL after the court ruled that it could not keep its identity disclosed.\footnote{\textit{Id.}}
This is a double standard; the outcome is that the wrongdoer keeps his identity concealed while the victim must reveal itself.

IV. CONCLUSION

We live in an era when employers and employees are readily relying on the Internet for information and communication. The law needs to evolve with the times. Society mandates that Congress enact a law that can be applied uniformly to cases where a plaintiff-corporation is seeking the identity of anonymous Internet posters. In developing a statute, the legislature will have to balance the right of a corporation to punish its defamer against the right of a poster to anonymous expression.

The current state of the law lacks uniformity and Congress has not yet addressed this issue. Therefore, the most effective way for a corporation to ensure that it will be able to reveal the identity of a defaming anonymous employee-poster is through its employment agreement. An employment agreement circumvents the inconsistent Internet defamation law and is governed by contract law. Corporations will have to protect themselves through employment agreements until a mechanism is in place to handle the implications of the Internet in the employer-employee relationship.

Orit Goldring and Antonia L. Hamblin
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