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(www.ethanbordman.com) is an entertainment law attorney and entertainment finance consultant who represents Emmy®-award-winning producers and directors, as well as Tony®, and Drama Desk®-nominated actors, screenwriters and authors. In addition to earning a J.D. from University of Detroit School of Law and an MBA from Wayne State University, Mr. Bordman holds an LL.M. in Entertainment Law from the University of Westminster in London, England and an LL.M. in International Sports Law from Anglia University in Cambridge, England. He serves as co-chair of the Committee on Motion Pictures for the Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association.

Defamation and the Internet
Representation in the Digital Age
By Ethan Bordman

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In 2013, Tom Cruise settled a defamation suit with Bauer Publishing and two of its publications. The July 30, 2012, cover of Life & Style read “Suri in Tears, Abandoned by Her Dad” beneath a picture of Cruise’s six-year-old daughter Suri, who was being held by her mother, Katie Holmes. A few months later in the October 1 issue, the cover of In Touch magazine featured a picture of Suri above the headline “Abandoned by Daddy.”

Cruise sued the magazine for $50 million, plus punitive damages, for defamation and invasion of privacy; he claimed the headlines were false, and that “he loves his daughter dearly and would never abandon her.” Bauer Publishing later stated it “never intended to communicate that Tom Cruise had cut off all ties and abandoned his daughter, Suri, and regret if anyone drew that inference . . . .” Cruise stated that despite his busy schedule filming two movies back-to-back in 2012, he spoke with his daughter nearly every day and received frequent updates from Ms. Holmes.

In 2014, actor and former Minnesota Governor Jesse Ventura was awarded more than $1.8 million (this amount was later reduced to $1.3 million) for damages to his reputation and career as the result of a story in the book American Sniper, which was about Chris Kyle’s career as a Navy SEAL sniper. In the book, Kyle describes punching out a celebrity, identified as “Scruff Face,” after this man disparaged fallen soldiers at a war hero’s wake. Kyle confirmed that the story referred to Ventura. Ventura claimed the story was fabricated and had damaged his reputation. Kyle’s widow, Taya, is appealing the decision.

Even outrageous claims may have ramifications on a celebrity client’s image. Earlier this year, actress Mila Kunis was accused of stealing a chicken 25 years ago from her first-grade friend, singer Kristina Karo. The claim states when the two were childhood friends in Ukraine, six-year-old Kunis was so jealous of Karo’s pet chicken – named “Doggie” – that Kunis stole it. Karo is asking $5,000 for emotional distress, claiming Kunis confessed at the time of the alleged theft. According to Kunis, she has yet to be served with papers regarding this lawsuit, noting the allegation was timed to coincide with the release of Karo’s new song.

What Constitutes Defamation?
For defamation to be proven, a plaintiff must fulfill four elements: (1) the defendant made a false statement purporting to be fact; (2) the statement was published or communicated to a third person; (3) the defendant was at fault in making the statement; and (4) the statement caused damages or harm to the person who is the subject of the statement. For statements to be considered defamatory when they involve public officials or public figures, such as celebrities, the United States Supreme Court established in New York Times Co. v. Sullivan that such statements must be made with malice – knowledge that they were false or with reckless disregard for the truth. Although the defamation cases described above were successful for the plaintiffs, mostly by settlement, proving that a statement was made maliciously makes it difficult for most celebrity defamation suits to be successful in court.

New York Times Co. v. Sullivan came about because of a full-page ad that was placed in the Times in response to Martin Luther King, Jr.’s arrest, in Alabama, on two counts of felony perjury for allegedly signing fraudulent tax returns. Soon after his arrest, supporters of Dr. King formed a committee to defend him and raise money for legal fees and bought the full-page ad in the Times, which was titled “Heed Their Rising Voices.” The text stated that Dr. King had been arrested seven times and that the purpose of the current indictment was to intimidate him. It went on to describe the events of recent civil rights rallies, explaining that after students sang “My Country, ’Tis of Thee” on the Alabama state capitol steps, “truck-loads of police armed with shotguns and tear-gas ringed the Alabama State College Campus.” Although none of the respondents was mentioned by name in the ad, L.B. Sullivan, a Montgomery Commissioner (an elected supervisor of the police department), contended that the word “police” referred to him and therefore accused him of “ringing” the campus with police. Sullivan further contended that the statement “they have arrested him [Dr. King] seven times” was libelous, because the word “they” referred to the police and, therefore, to him in his capacity as Commissioner. It was acknowledged by the parties that some of the statements in the ad were not accurate. For example, the students sang the national anthem, not “My Country, ’Tis of Thee.” Further, although the police were near the campus, they did not “ring” the campus and were not called to the campus in connection with the demonstration on the state capitol steps. It was also noted that Dr. King had been arrested four times, not seven, as stated in the ad. Sullivan claimed that three of the four arrests took place prior to his election as Commissioner, and that he had nothing to do with the current indictment. But the U.S. Supreme Court noted that “the right of free public discussion of the stewardship of public officials was . . . a fundamental principle of the American form of government” and decided that the Alabama law, which allowed for libel for “criticizing the way public officials perform or fail to perform their duties,” would “threaten the very existence of an American press.” The Court concluded that under the First and Fourteenth Amendments to award damages to a public official for defamatory falsehood relating to their official conduct “actual malice” must be proven, emphasizing that “a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials.”
Using the “Truth” as Fact

Use of the truth as a defense to defamation was advocated by Alexander Hamilton in his appeal of People v. Croswell.33 Croswell, a printer, published a story claiming that then-president Thomas Jefferson had paid newspaper publisher James Callender to run negative stories about his opponents. During his six-hour closing argument to the U.S. Supreme Court, Hamilton stated: “[T]he right of giving the truth in evidence, in cases of libels, is all-important to the liberties of the people.”34 Soon after the argument, on April 6, 1805, the New York Legislature enacted chapter 90 of the N.Y. Laws of 1805, providing that the truth was a defense to a libel charge “where published with good motive and for justifiable ends.”35

Reputation Plays a Major Role

In its defense of the Tom Cruise lawsuit, Bauer Publishing filed several claims of relief with 34 affirmative defenses,49 including the following: that the headlines were the opinion of the paper, supported by the article and allowed by the First Amendment; that some or all of the statements were true or substantially true; that the statements could not be reasonably understood by a reasonable reader to be defamatory; and that Cruise could not prove he suffered any compensable damage. Other defenses made applied uniquely to individuals in the public eye, including that Bauer did not act with actual malice; and that Cruise had “impliedly assumed the risk”50 of harm. This implies that because he chose to be an actor – a profession that makes him a public figure – he risked being defamed. Neither the prosecutor nor the Common Pleas Court, where felony cases are handled, could find any record of felony prosecution.42 Moreover, the charge of felony DUI did not exist in Ohio until after 1996; Frey claimed the event occurred in 1992.43 There were other stories in the book that Frey could not substantiate.44 Frey and his publisher, Random House, Inc., later agreed to a settlement by which purchasers of the book could claim refunds.45

Frey encountered what is known as the “Streisand Effect.”46 This is a reference to a case in which singer and actress Barbra Streisand sued the California Coastal Records Project, claiming the site invaded her privacy by posting pictures of her Malibu mansion.47 Filing the law-

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model/singer Melissa Molinaro in the ad created confusion among viewers, who thought they were watching Kardashian, which therefore violated Kardashian’s rights to her name and likeness. The one-minute commercial, styled as a music video, had showcased Molinaro’s singing and dancing talents, and in preparation for the defense, Old Navy’s attorneys investigated “Kim Kardashian’s reputation as a singer and dancer.”52 Other anticipated arguments were that Kardashian is “libel-proof,” “with a reputation so stained that no injury could cause true damage,”53 and that she is neither a singer nor a dancer. Molinaro had appeared in MTV’s Making the Band 3, a reality show about forming a musical group, as well as another music-themed show54 and had recorded and released a song. The attorneys also intended to show that Kardashian’s claims had no merit, because the “lookalike” ad was a small part of the overall campaign and any profits attributed in violation of Kardashian’s rights were de minimis.55 Kardashian’s lawyers were expected to show consumer surveys showing confusion.56 The Gap, which owns Old Navy, was indemnified by the advertising agency that created the campaign.57 Several months later, Kardashian and Old Navy reached a settlement.58

Where You Say Something May Mean More Than What You Say

Though you may have the right to say something – to produce the content of your message – you may not have the right to say it where you said it. According to the American Civil Liberties Union (ACLU), “although the First Amendment gives you the right to decide where best to express yourself, your right to exercise your free-speech rights may hinge upon exactly where you choose to exercise those rights.”59 There are three free speech forums: traditional public forums, designated public forums, and private property.60 Traditional public forums include public parks, sidewalks, and any areas usually open to political speech and debate.61 These places have the strongest First Amendment protections; the government may set only reasonable, content-neutral restrictions on the time, place and manner of speech.62 A designated public forum is that which the government opens for public expression. Public auditoriums, municipal theaters, public libraries, and meeting rooms are examples. The government may limit access but may not exercise viewpoint discrimination.63 With regard to private property, the ACLU states: “Private property owners can control what happens on their property and may prevent people from protesting on their land.”64 However, adjoining public property, such as sidewalks and streets in front of private property, may provide an alternate venue.65 As many publications have an online presence, a magazine’s or newspaper’s website is considered private property because it is owned and operated by a private company.

Online Content: Providers vs. Commentators

In June 2014, a significant decision regarding defamation and the Internet was rendered by the Court of Appeals for the Sixth Circuit. Sarah Jones brought suit against the website thedirty.com in 2009, following the appearance of several posts about her.66 Thedirty.com enables users to anonymously upload comments, photographs, and video about any person – whether or not that person is a public figure. Nik Richie, the owner of the site, selects and publishes the material, adding his own editorial comments. Users of the site, referred to as “The Dirty Army,” may submit “dirt” – that is, text, photographs, or video about any individual – and may also post comments about content submitted by others. Editing by the staff consists only of deletion – there is no modification of any user-generated submissions and the staff does not create content. The staff does not fact-check submissions for accuracy. Postings of nudity, obscenity, threats of violence, profanity, and racial slurs are removed.

Jones, a member of the Cincinnati Bengals football cheerleading squad, was a teacher in Kentucky. Between October 2009 and January 2010, she was the subject of several posts on thedirty.com, along with editorial remarks made by Richie. One posting of two photographs showing Jones with a man was captioned “[Jones] slept with every other Bengal football player” with Richie adding his own comment.67 Richie refused Jones’s request to remove the post. In December 2009, another photograph of Jones appeared on the site along with claims that she had contracted several sexually transmitted diseases and had been intimate with her boyfriend in her school classroom.68 Richie commented on this as well. Additional postings about Jones appeared over the next few months, and she filed suit, alleging defamation, libel per se, false light, and intentional infliction of emotional distress. She claimed that the postings undermined her position as an educator, her membership in the Cincinnati Bengals cheerleading squad, and her personal life.69 Dirty World, LLC and Richie stated that the claims were barred under § 230(c)(1) of the Communications Decency Act (CDA),70 which, under “Protections for ‘Good Samaritan’ blocking and screening of offensive material,” states “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

The district court denied the motion, indicating that “a website owner who intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying the posts becomes a ‘creator’ or
‘developer’ of that content and is not entitled to immunity.”71 Jones was awarded $38,000 in compensatory damages and $300,000 in punitive damages. The Court of Appeals for the Sixth Circuit, however, noted that § 230 marks a departure from the common-law rule that allocates liability to publishers or distributors of tortious material written or prepared by others.72 The court stated that Congress had decided to treat Internet speech differently.73 By barring publisher-liability and notice-liability defamation claims brought against interactive computer service providers, the court said, § 230 serves three purposes:74
1. to “maintain the robust nature of Internet communication and, accordingly . . . keep government interference in the medium to a minimum”;
2. to provide immunity that “protects against the ‘hecklers veto’ that would chill free speech”; and
3. to “[encourage] interactive computer service providers to self-regulate.”

Additionally, subsection (b)(2) of § 23075 states: “It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfeathered by Federal or State regulation.” The immunity granted by § 230(c)(1) is not without limits, applying only if the interactive computer service provider is not also the “information content provider” of the content at issue.76 An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”77 The decision hinged on how narrowly or capaciously the term “development” was interpreted. The court concluded that Richie and Dirty World could not be found to have materially contributed to the content of the posts simply by selecting them for publication.78 Further, because Richie added his comments after the defamatory postings had already been displayed, they did not materially contribute; rather, they “effectively ratified and adopted the defamatory third-party post.”79 In vacating the judgment in favor of Jones, the Court of Appeals noted that the CDA does not necessarily leave persons who are objects of anonymously posted defamatory content online without remedies.80 Jones, however, “did not attempt to subpoena Richie or Dirty World to discover who authored the defamatory posts. Instead, she sued Dirty World and Richie. But, under the CDA, Jones cannot seek her recovery from the online publisher where that publisher did not materially contribute to the tortious content.”81

Anonymity Is Not Guaranteed for Bloggers

Although the courts have decided that websites themselves may not be found responsible, in cases of defamation, sites may be required to reveal the identities of anonymous posters. Model Liskula Cohen successfully sued Google in 200982 to uncover the name of the individual who made statements about her on a blog titled “Skanks of NYC.”83 The anonymous blogger had posted photographs, captions to the photographs, and commentary about Cohen. The blogger’s statements pertained to Cohen’s appearance, hygiene, and conduct, describing her as “skank,” “skanky,” “ho,” and “whoring.” Cohen claimed these comments were malicious, untrue, and impugned her chastity. She also asserted the statements negatively reflected her business as a professional full-time model and stated that she would bring suit for defamation if she could ascertain the identity of the person who created the blog and posted the remarks about her. Google refused to release the name of blogger without a court order, claiming that the statements were “non-actionable opinion and/or hyperbole” and that no reasonable viewer of the blog would conclude the statements made about Cohen convey verifiable statements of fact.84 Words like “skank” or “ho” are not statements of objective fact but rather “have become a popular form of ‘trash talk’ ubiquitous across the Internet as well as network television and should be treated no differently than ‘jerk’ or any other form of loose and vague insults that the Constitution protects.”85 Google further argued that even if the words are capable of a defamatory meaning, “the context here negates any impression that a verifiable factual assertion was intended.”86 Google emphasized that blogs “have evolved as the modern day soapbox for one’s personal opinions,” by “providing an excessively popular medium not only for conveying ideas, but also for mere venting purposes, affording the less outspoken, a protected forum for voicing gripes, leveling invective, and ranting about anything at all.”87

The court had to determine if the blogger’s statements were considered protected opinion, hyperbole, or statements of fact. The determination of whether a statement expresses fact or opinion was a question of law resolved “on the basis of what the average person hearing or reading the communication would take it to mean.”88 The court used three factors to distinguish fact from opinion:

1. whether the specific language in issue has a precise meaning which is readily understood;
2. whether the statements are capable of being proven true or false; and
3. whether either the full context of the communication in which the statement appears, or the broader social context and surrounding circumstances, are such as to “signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.”89

As for the first factor, the court stated the dictionary defines the words as follows: a “skank” is someone “considered sexually promiscuous”; “ho” is “slang” for a “prostitute”; and “whoring” is to “associate . . . with prostitutes.”90 As for the second and third factors, the court found that the statements, along with captions on certain photographs, conveyed “facts” that are capable of being proved true or false, and that the blog as a whole – by
communicating that a person is promiscuous – is defama-
tory.91 “[I]n the context of this specific blog, such words
cannot be reasonably viewed as comparable in mean-
ing and usage to the word ‘jerk’ or any other loose and
vague insult.”92 In its decision to reveal the name of the
blogger, the court noted the case of Anonymous Publicly
Traded Co. (APTC) v. Does,93 which involved a suit against
America Online, Inc., brought to learn the identity of an
individual who allegedly published certain defamatory
material misrepresentations and confidential material
concerning APTC in Internet chat rooms.94 There, the
court addressed whether the potential loss of anonymity
of the John Does could constitute an unreasonable intru-
sion on their First Amendment rights:

In that the Internet provides a virtually unlimited,
inexpensive, and almost immediate means of commu-
nication with tens, if not hundreds, of millions of peo-
ple, the dangers of its misuse cannot be ignored. The
protection of the right to communicate anonymously
must be balanced against the need to assure that those
persons who choose to abuse the opportunities pre-
sented by this medium can be made to answer for such
transgressions. Those who suffer damages as a result
of tortious or other actionable communications on the
Internet should be able to seek appropriate redress
by preventing the wrongdoers from hiding behind an
illusory shield of purported First Amendment rights.95

Google eventually revealed the blogger to be Rose-
mary Port,96 and Port stated she planned to file a $15
million lawsuit, charging that Google “breached its
fiduciary duty to protect her expectation of anonym-
ity.”97 She further said that Cohen had defamed herself
by going to the press, claiming that before the lawsuit
there were two hits on Port’s website – one from Port
and one from Cohen.98 If this claim were to be proven
true, Port could have a successful defamation defense,
because it would have been Cohen who, by filing the
lawsuit, was responsible for publishing the statements
to third persons. A similar defense was also raised by
Bauer Publishing against Tom Cruise, stating that relief
was barred “because any damages allegedly suffered by
plaintiff were the result, in whole or in part, of plaintiff’s
own legal fault . . . .”99

**Twitter + Libel = Twibel**

Courtney Love was sued for defamation after suggesting
in a tweet that one of her attorneys had been “bought off”
after she no longer represented Love.100 San Diego attor-
ney Rhonda Holmes had been hired by Love in 2008 to
investigate funds missing from the estate of her late hus-
band, Kurt Cobain, the lead singer of the band Nirvana.
In June 2010, as @CourtneyLoveUK, Love tweeted: “I was
. . . devastated when Rhonda J. Holmes Esq of San Diego
was bought off . . . .”101 Love told the jury she believed
that she had sent the message to only one person, had not
intended to post it publicly, and had deleted it quickly.

The case against Love was billed as the first “twibel,”102
or Twitter libel, case to go to trial.103 The jurors found that
although the tweet did have “a natural tendency to injure
Holmes’ business,” they did not believe Love knew the
statement was false.104

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3. Id.
4. Id.
5. Id.
6. Id.
9. TMZ Staff, Tom Cruise Files $50 Mil Lawsuit Over Mag Claiming He Aban-
10. Id.
11. Id.
13. Id.

15. Id.


18. Id.


22. Sullivan, 376 U.S. at 258.

23. Id.

24. Id.

25. Id. at 258–59.

26. Id. at 259.

27. Id.

28. Id. at 275.

29. Id. at 293–94.

30. Id. at 294.

31. Id. at 297–98.

32. Id. at 295.

33. 3 Johns. Cas. 337 (1804).


35. Id.


38. Id.

39. Id.

40. Id.

41. Id.

42. Id.

43. Id.

44. Id.


47. Id.

48. Id.


50. Id. p. 7.


52. Id.

53. Id.

54. Id.

55. Id.

56. Id.

57. Id.

