

Internet Defamation

By Frederick E. Blakelock  
and Kevin W. Weber

*One's good name can too easily be harmed through publication of false and defaming statements on the Internet.*

*W.J.A. v. D.A.*, 210 N.J.  
229, 248 (2012).

# Corporate Risks and Remedies

In today's world of anonymous blogs, Internet message boards, and freewheeling comment sections on many websites, it has become commonplace for individuals to bandy about harsh words and vitriol with near reckless

abandon. The ease with which individuals instantaneously can publish defamatory speech to a wide audience creates risks for a corporation.

The truth is that we are all "publishers" today. Every company has a website, and many companies have Facebook and LinkedIn accounts, Twitter feeds, and even YouTube channels. Some companies permit, or even encourage, third parties to post comments to these company websites and company social networking outlets. As a result, a plaintiff might sue a company for claims based on a third party's defamatory comments posted to, or linked from, the company's website. In addition, just about every company has its detractors on the Internet. For example, go to YouTube and search for any major company followed by the work "sucks."

While most of these comments are harmless opinions, false statements of "fact" can harm a company's brand considerably. This article will address the risks to corporations from third-party content posted on com-

pany websites, as well as discuss the options that companies have that can protect their interests and reputations in the face of malicious, anonymous attacks.

## Defamation Defined

Many states follow the definition of defamation in the Restatement: "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) Torts §559 (1977). The "[o]ne who publishes defamatory matter concerning a corporation is subject to liability to [the corporation]... [if] the matter tends to prejudice [the corporation] in the conduct of its business or to deter others from dealing with it." Restatement (Second) Torts §561(a) (1977).

Generally speaking, to prove a defamation claim, a plaintiff must establish (1) the assertion of a false and defamatory statement concerning the plaintiff, (2) the un-



■ Frederick E. Blakelock is a director in the Philadelphia office and Kevin W. Weber is an associate in the Newark, New Jersey, office of Gibbons PC. Mr. Blakelock practices primarily in the areas of business and commercial litigation and product liability. Mr. Weber is a business litigator practicing in both the federal and the state courts.

privileged publication of that statement to a third party, (3) fault amounting to at least negligence by the publisher, and (4) damages. And, of course, if the plaintiff is a “public figure,” the burden of proof will increase. That is, a public figure plaintiff must prove “actual malice,” and the plaintiff cannot recover damages unless it demonstrates with clear and convincing evidence that the defendant spoke “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964).

The courts have not developed a bright line rule to determine when a corporation becomes a “public figure.” However, they have noted that “[a] plaintiff becomes a general purpose public figure by attaining pervasive power and influence in society. Alternatively, he may become a limited-purpose public figure with regard to that controversy by thrusting himself into a particular public controversy to influence the resolution of the issues involved.” *P&G v. Amway Corp.*, 242 F.3d 539, 554–55 (5th Cir. 2001) (internal quotation omitted).

But, perhaps more important than whether a company becomes a “public figure” is that “commercial speech” receives less First Amendment protection than other speech. Courts have held generally that (1) commercial speech makes a “qualitatively different contribution to the exposition of ideas”; (2) commercial speech is “more durable than other speech because the speaker has an economic motivation and is less likely to be chilled in its speech”; (3) commercial speakers have “extensive knowledge of both their market and their own products” and thus “are uniquely situated to evaluate the truthfulness of their speech,” and (4) to have parity of First Amendment protection for commercial and noncommercial speech would dilute the First Amendment guarantees to noncommercial speech. *P&G*, 242 F.3d at 550 (internal quotations and citations omitted). Thus, courts have concluded that the “state’s interests in regulating false commercial speech and in providing some protection to public figures’ reputations must be balanced against the free speech interest individuals have in being able to comment freely on public issues and public figures.” *Id.* at 555. And “the way to achieve this balance, in cases of commercial speech about

a public figure, is to require that the plaintiff prove actual malice.” *Id.*

Therefore, in most cases involving corporate defamation on the Internet, a court likely will deem the comments directed toward a corporation’s product as commercial speech against a public figure and thus require a showing of “actual malice,” meaning clear and convincing evidence that the defendant spoke “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” *New York Times Co.*, 376 U.S. at 279–80. As explored in the next section, apart from proving the difficult standard of malice, crucially, whether a website was either a passive host, or an active participant in the speech, may determine whether a plaintiff can impose liability at all.

### **Safe Harbor Under Section 230 of the Communications Decency Act of 1996**

In most cases, a company cannot be held responsible for the defamatory speech of third parties that they post on, or link from, the company’s website. Section 230 of the Communications Decency Act of 1996 provides “safe harbor” immunity to a website host for third-party speech. 47 U.S.C. §230. Under §230, “[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.” “Interactive computer service,” defined in 47 U.S.C. §230(f)(2), is essentially any Internet service provider (ISP) or any owner or operator of a website that can be accessed interactively through the Internet. Liability may be imposed, however, on the “information content provider,” which is defined as “any person or entity responsible, in whole or part, for the creation or the development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. §230(f)(3). As discussed in detail below, most of the litigation in this area has involved issues relating to when an entity has become “responsible” for the “development” of content.

The Communications Decency Act was enacted in an effort to combat Internet pornography, though most of its “decency” provisions were struck down as unconstitutional. See *Reno v. ACLU*, 521 U.S. 844 (1997). Section 230 was created in response to a 1995 New York trial court decision, *Stratton Oak-*

*mont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. Lexis 229 (N.Y. Sup. Ct. May 24, 1995), arising from a lawsuit against Prodigy, an early online service provider and competitor of AOL, for defamatory content posted by third parties on one of its finance industry message boards. The trial court determined that Prodigy had become a “publisher” under state defamation law because it voluntarily

**The courts have not developed a bright line rule to determine when a corporation becomes a “public figure.”**

deleted some messages from its message boards that it considered offensive, and therefore it was legally responsible for the content of the defamatory messages that remained. The court distinguished the earlier case of *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), which held that CompuServe was not responsible for defamatory posts since it did not review the content of the messages on its boards before they were uploaded. Therefore, following the *Stratton Oakmont* decision, it was safer for an Internet company to permit content creators to publish all messages rather than to attempt selectively to limit the publication of certain, but perhaps not all offensive messages. Section 230 of the Communications Decency Act was intended to provide protection for “good Samaritan blocking,” but the courts have since interpreted it to provide broad protection from liability for Internet service providers and website operators for the content created by others.

Section 230 immunity is available to a defendant if (1) it is a “provider or user of an interactive computer service”; (2) the communication at issue is “provided by another information content provider,” that is, the defendant cannot be the “information content provider” of the harmful speech; and (3) the plaintiff’s claim would treat the defendant “as the publisher or speaker” of that harmful speech essentially by seek-

ing to hold the defendant responsible for a third party's speech simply because the speech appeared on the defendant's website. See, e.g., *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007). While defamation is the most common type of claim asserted in this area, the immunity provided by §230 applies to all types of civil claims except intellectual property claims,

■ ■ ■ ■ ■  
**Perhaps more important**  
than whether a company  
becomes a "public figure"  
is that "commercial speech"  
receives less First Amendment  
protection than other speech.

such as invasion of privacy, emotional distress, negligence, and fraud. The key is whether the claim seeks to hold the defendant liable for the content of the speech.

As one New Jersey court explained:

[W]hat matters is not the name of the cause of action, but rather whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of the content provided by another. To put it another way, courts must ask whether the duty the plaintiff alleges the defendant violated derives from the defendant's status as a 'publisher or speaker'. If it does, §230 precludes liability.

*Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113, 1121 (N.J. Super. Ct. Law Div. 2010) (holding that Communications Decency Act immunity applied to New Jersey Consumer Fraud Act claims brought by the State of New Jersey against an on-line ticket broker) (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)).

### Courts Apply Section 230 Broadly

Courts interpreting §230 have broadly applied the immunity offered by the statute. Mere notice of the unlawful nature of the information provided is not sufficient to make the Internet service provider responsible for

the speech. Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content. *Universal Commc'n Sys., Inc.*, 478 F.3d at 420 (involving claims against an operator of Internet message board arising from posts disparaging the financial condition and management of a telecommunications company). Unlike the "notice and take down" requirements in Digital Millennium Copyright Act, 17 U.S.C. 512(c), a website operator does not lose the Communications Decency Act immunity if it refuses to remove the defamatory content posted by another even after it becomes aware of the tortious nature of that content. See *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding that Communications Decency Act immunity applied to defamation claim against AOL for failing to remove offensive content from a bulletin board); *Mmubango v. Google, Inc.*, 2013 U.S. Dist. Lexis 24989, at \*8 (E.D. Pa. Feb. 22, 2013) ("Google cannot be held liable for failing to withdraw this [defamatory] statement once it has been published.").

Moreover, §230's immunity applies even if the website operator screens and deletes certain content from its site as long as the revisions do not constitute a material substantive contribution or creation of defamatory content. *Donato v. Moldow*, 865 A.2d 711, 726-27 (N.J. Super. Ct. App. Div. 2005) ("Deleting profanity, selectively deleting or allowing to remain certain postings, and commenting favorably or unfavorably on some postings, without changing the substance of the message authored by another, does not constitute 'development' within the meaning of §230(f)(3).") Likewise, a decision by an Internet service provider not to institute policies to reduce the chance that defamatory content is spread, that is, failing to police its network, will not eliminate the safe harbor offered by the Communications Decency Act. *Green v. America Online*, 318 F.3d 465, 470-71 (3d Cir. 2003).

Section 230 of the Communications Decency Act also expressly preempts all conflicting state law. 47 U.S.C. §230(e)(3). The §230 safe harbor immunity does have some important limits.

### Limitations on Immunity: What Does It Mean to "Develop" Defamatory Content?

A website operator is always responsible for its speech as a content "creator." However,

the operator will also lose immunity if it is the "developer" of content posted by a third party. 47 U.S.C. 203(f)(3). Determining when an entity is "responsible" for the "development" of such content has, of course, been hotly debated and much litigated.

In *Carfano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003), the Ninth Circuit held that the Communications Decency Act immunity applied to an online dating service, Matchmaker.com, which created a questionnaire by which an anonymous user created a fraudulent and sexually suggestive profile for an actress. Members were required to fill out a detailed questionnaire that had multiple choice options indicating personal preferences and proclivities, some of which were highly evocative. *Id.* at 1121. Someone created a sexually suggestive profile for the plaintiff and included her home address. The plaintiff began receiving threatening and explicit e-mails, faxes, and telephone messages and was forced to move out of her home for some time. *Id.* Carfano sued the website for defamation and invasion of privacy, alleging that Matchmaker.com had contributed to the defamatory content by creating the questionnaire and the choice of responses that were used to develop the false dating profile. The court disagreed and held that §230 immunity applied even though the content was formulated in response to Matchmaker's questionnaire since the content was left entirely to the user. Matchmaker was not considered to be a "content provider" because there was no content until the user provided it, and the offensive content had only a tenuous relationship to the actual questions asked. *Id.* at 1124-25. Thus, Matchmaker had not played a substantial role in creating or developing the relevant information.

A different outcome resulted in *Fair Housing Council of San Fernando Valley v. Roomates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008). While not a defamation case, the court found that the website operator was not entitled to §230 immunity because it created discriminatory questions and the choice of responses in an online form that users were required to fill out to use the service. *Id.* at 1166. Users of the service were required to disclose their sex, family status, and sexual orientation, which was unlawful under the Fair Housing Act and

California state law. Roomates.com argued that it was immune under the Communications Decency Act because it had not actually created any information—the users supplied the answers. However, the court determined that the defendant was in fact an Internet content provider because the questions themselves were illegal regardless of the responses.

A court may also deem solicitation or encouragement of defamatory speech “development” of content so that the Communications Decency Act §230 immunity will not apply. *Jones v. Dirty World Entm’t Recordings, LLC*, 840 F. Supp. 2d 1008 (E.D. Ky. 2012), involved defamation and related claims asserted by a plaintiff against a gossip website operator for defamatory posts published on the site by third parties. The defendants asserted that they were entitled to immunity under the Communications Decency Act because they were not an “information content provider” since they were not responsible for the creation or development of the offending content. *Id.* at 1010. The court rejected that argument, holding that the defendants were not entitled to immunity since the site specifically encouraged the offensive comments. *Id.* at 1012. The operator also acted as the editor of the site and selected a small percentage of submissions to be posted. In addition, the operator responded to the defamatory posts and published his own comments on the subjects under discussion. Therefore, the name and purpose of the site, the manner in which it was managed, and the personal comments of the defendant editor were factors that specifically encouraged development of what was offensive about the content of the site. *But see Shiamili v Real Estate Group of N.Y., Inc.*, 952 N.E.2d 1011, 1020 (N.Y. 2011) (holding that the defendants were not liable for the disputed content when the added headings and illustrations on user comments that did not “materially contribute to the defamatory nature of the thirdparty statements”).

Similarly, in *Doctor’s Assocs. v. QIP Holder LLC*, 2010 U.S. Dist. Lexis 14687 (D. Conn. Feb. 19, 2010), also known as the “Subway v. Quiznos case,” the defendant invited contestants to submit videos comparing Subway and Quiznos and demonstrating “why you think Quiznos is better.” *Id.* at \*3. Subway alleged that Quiznos “went

beyond the role of a traditional publisher by ‘soliciting disparaging material’ and ‘shaping the eventual content’ of the contestant videos such that they were ‘responsible’ for the creation or development of information provided through the contest website.” *Id.* at \*68. The court agreed, explaining, “[a] reasonable jury may well conclude that the defendants did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos.” *Id.* at \*70–71.

If the primary purpose of a website is to serve as a conduit for unlawful activity, Communications Decency Act immunity will likely not apply, either. *See Federal Trade Comm’n v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009) (holding that a website that advertised access to personal telephone records, which would almost inevitably require someone to violate the Telecommunications Act, was not entitled to Communications Decency Act immunity since it must have been aware that its thirdparty researchers were obtaining the information through fraud or other illegal means).

These cases instruct that in the area of third-party content, the phrase “responsible” for the “development” is amorphous, and susceptible to many meanings and results in a factsensitive, case-by-case application. The practical advice for a company that publishes third-party content is that offering any encouragement or contributing materially to the content can result in the loss of safe harbor protection, and thus it should remain extra vigilant in making sure that its editorial functions do not somehow “develop” offensive content.

### Intellectual Property Claims

The Communications Decency Act does not provide immunity to website hosts for intellectual property claims charged against them. *See* 47 U.S.C. §230(e)(2). Websites cannot publish the creative works of others, trademarks, or confidential business information, regardless of whether a third party posts the content. Safe harbor may be available under the Digital Millennium Copyright Act for copyright claims under certain conditions. *See* 17 U.S.C.

§512(c). However, website must remove copyrighted or proprietary information expeditiously upon receiving a valid “take down notice” demanding removal of the content.

The take down notice requirements are set out in 17 U.S.C. §512(c)(3)(A). The notice must be in writing and signed by the copyright owner or the owner’s agent. It must

■ ■ ■ ■ ■  
**A website operator is**  
always responsible for  
its speech as a content  
“creator.” However, the  
operator will also lose  
immunity if it is the  
“developer” of content  
posted by a third party.

also identify the copyrighted work posted material has infringed and identify the infringing material sufficient to allow the website or ISP to locate the material. The notice must include (1) the contact information for the party claiming copyright infringement, (2) a statement that the party has a good faith belief that the copyright owner has not authorized the lawbreaking use of the material, and (3) a statement that the information in the notice is accurate, and under penalty of perjury, that it is sent by the owner of an exclusive right that is being infringed, or by his or her authorized representative.

### Corporate Defamation Remedies

Companies with public reputations will always be susceptible to abrasive, and perhaps defamatory, Internet speech, which more often than not will be anonymous. If someone has defamed a corporation on the Internet, what options does it have if it believes the speech warrants taking action? As discussed above, unless the website operator created the content, actively solicited it, or encouraged the development of

the unlawful content, §230 of the Communications Decency Act likely will prohibit suing the website.

Requesting that the website voluntarily remove the content might be the first step. A request should include sufficient detail and credible proof that the content is indeed false and defamatory. However, the website is not obliged to remove the mate-

■ ■ ■ ■ ■  
**Requesting that the website voluntarily remove the content might be the first step. A request should include sufficient detail and credible proof that the content is indeed false and defamatory.**

rial unless it implicates intellectual property rights. Therefore, the only real option is to seek monetary damages or an injunction against the anonymous poster. The problem then becomes how to find that person.

### Uncovering the Identity of Anonymous Posters

First Amendment protection for anonymous speech has a long history in the United States, going back to the time of the anonymously published Federalist Papers. Applying these traditions to the new platform of the Internet, one court has stated that “[a]s with other forms of expression, the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without fear of economic or official retaliation or concern about social ostracism.” *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (alterations and quotation omitted).

In recent years, courts across the United States have struggled to adopt a uniform standard for determining when an anony-

mous speaker’s identity may be uncovered. Generally, courts interpret the Constitution as granting political speech great protection while interpreting the Constitution as granting commercial speech limited protection.

To begin the process of uncovering the identity of an anonymous poster, a plaintiff often begins a defamation action against a “John Doe” defendant. *See, e.g., Doe v. Individuals*, 561 F. Supp. 2d 249, 250 (D. Conn. 2008) (involving law students who sued 39 anonymous posters for defamation regarding message board posts). Then, the plaintiff serves some entity with a subpoena that could reveal the identity of the poster, usually an Internet service provider or web-hosting company. *See id.* (serving AT&T Internet Services with a subpoena); *Salehoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1212 (W.D. Wash. 2010) (serving GoDaddy.com, a websitehosting company, with a subpoena).

When a party applies to quash or to enforce such a subpoena, many federal and state courts have applied the five factor “Dendrite” test to assess the merits of the subpoena. Courts require that a plaintiff seeking an anonymous defendant’s identity (1) to identify the anonymous defendant with “sufficient specificity” to allow a court to determine whether the defendant “is a real person or entity” that may be sued; (2) to demonstrate a “good-faith effort to comply with the requirements of service of process”; (3) to present sufficient facts demonstrating that the lawsuit can withstand a motion to dismiss; and (4) to submit a “specific discovery” request to the court along with “a statement of reasons justifying” it and to identify “a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible.” *Dendrite Intern., Inc. v. Doe No. 3*, 775 A.2d 756, 767–68 (N.J. Super. Ct. App. Div. 2001).

These factors have not enjoyed a uniform application in courts around the United States. Two of the factors have been the most problematic for prospective plaintiffs. First, some courts have required the party seeking the discovery of an anonymous speaker’s identity to show “facts

sufficient to defeat a summary judgment motion,” rather than simply to present a prima facie case. *Best Western Int’l v. Doe*, 2006 U.S. Dist. Lexis 56014, at \*11 (D. Ariz. July 25, 2006) (quotation omitted). This is a high evidentiary threshold for a plaintiff to meet in the early stages of a case. Conclusory allegations of defamation and damages will not suffice.

Second, some courts have begun to afford greater weight to the “expectation of privacy” factor. In determining whether an anonymous poster had an expectation of privacy, one court conducted an in-depth review of the website’s “terms of service” and “privacy policy.” *McVicker v. King*, 266 F.R.D. 92, 96 (W.D. Pa. 2010). The court focused on a specific portion of the policy that stated: “[p]rotecting consumer privacy online is important to us. By taking steps to protect the privacy of our members, we also hope to increase members’ confidence in the site and as a result, increase their online activity.” *Id.* That court concluded that the privacy policy in question did create an expectation of privacy for any registered user that weighed against disclosure of the speaker’s identity.

Assuming that a court did balance the above discussed factors and found that the weight of authority would allow discovery of the anonymous poster’s personal information, a corporate plaintiff still has a long way to go in prosecuting a defamation action.

### We Found the Anonymous Poster—Now What?

Once an anonymous defamer’s identity is discovered, the corporate plaintiff still has a tough road ahead to obtain any relief. The most difficult element of a defamation case is proving damages.

In most states, plaintiffs may recover three types of damages in a defamation action: (1) compensatory or actual, which may be either general or special; (2) punitive or exemplary; and (3) nominal. *See, e.g., W.J.A.*, 210 N.J. at 239.

Actual damages, as the name implies, refers to the real losses flowing from the defamatory statement. It is not limited to out-of-pocket loss, but includes impairment to reputation and standing in the community, along with personal humiliation, mental anguish, and suf-

fering to the extent that they flow from the reputational injury.

*Id.* (quotations omitted).

But, “[c]ontained within the notion of actual damages is the doctrine of presumed damages—the losses which are normal and usual and are to be anticipated when a person’s reputation is impaired.” *Id.* (quotation omitted).

In many Internet defamation cases, a plaintiff will have difficulty proving actual damages. That is, a company will often have a hard time proving that it suffered out-of-pocket losses due to alleged Internet defamation. For example, a company will have difficulty identifying customers that would have purchased a product or service but for these defamatory statements. Rather, most corporate plaintiffs would have a better chance of showing presumed damages and reputational harm.

While the recovery of presumed damages for a corporation is difficult, it is not impossible. See generally *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (upholding an award of presumed damages in commercial a defamation action between private parties); *W.J.A. v. D.A.*, 210 N.J. 229, 248 (N.J. 2012) (“proof of compensatory damages respecting loss of reputation can be difficult if not well-nigh insurmountable”).

Notably, in *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), the jury awarded \$3 million in presumed compensatory damages, reduced to \$1 million on the appeal, in addition to punitive damages, for defamatory on-air statements suggesting that Brown & Williamson was advertising cigarettes to target young people in a way that associated cigarettes with pot, wine, beer, and sex to present them “as an initiation into the adult world,” and other statements that Brown & Williamson alleged damaged its reputation. Reviewing the jury award of \$3 million for presumed damages, the Seventh Circuit noted that “the harm to Brown & Williamson’s reputation cannot be measured easily,” and like most defamation cases “unavoidably includes an element of speculation.” *Id.* at 1139–40 (quotation omitted). Nevertheless, the Seventh Circuit upheld the award of presumed damages, though lowering it by two-thirds, upon a finding that the defamatory material had been broadcast “in one of the largest television markets in the country,” not once but

four separate times to a “total viewership of approximately 2.5 million people” by “the most popular news broadcast in Chicago.”

*Id.* at 1142. And, the court took special note that the medium was television, rather than print—a “more intense and more focused medium,” which “allows the libeler to come into peoples’ homes and deliver essentially in person a powerful libelous statement using various voice inflections to add power to the message.” *Id.*

Thus, in an Internet defamation case involving a corporation, determining the quantum of reputational damages might require proof of the number of persons who saw the content, the extent to which republishing or rebroadcasting occurred, and establishing the pervasiveness and intrusiveness of the Internet as equal to television. Assuming that a corporate plaintiff advances this far, because often a single individual acting alone will do the defaming on the Internet, a plaintiff will have difficulty recovering damages. But, a defamed corporation also should consider other practicalities.

### Is It Worth It? The Cost of Doing Nothing

Given the numerous hurdles discussed above involved in pursuing a corporate defamation action against an anonymous Internet poster, the obvious question is, “why bother?” Without question, pursuing a lawsuit against a “John Doe” Internet defamer will be expensive and time consuming. It will likely require potentially substantial ediscovery, serving Internet service providers or webhosting companies with thirdparty subpoenas, and other attendant litigation costs, all with the hope that a jury might eventually award some presumed damages for reputational harm. And, even if a corporation obtains a judgment against an anonymous defamer, in many cases the defendant will be judgment proof.

Moreover, some commentators have warned prospective corporate defamation plaintiffs to be wary of the so-called “Streisand effect.” In 2003, Barbara Streisand sued a photography website to force the removal of pictures of her seaside mansion. At that time, the pictures had only been downloaded a handful of times. Following the publicity of the lawsuit, the pictures were downloaded tens of thou-

sands of times. While that is certainly an extreme example of litigation that backfired, a potential corporate defamation plaintiff should consider whether it is better to ignore some of the malicious content on the Internet rather than to raise public awareness of the potentially defamatory speech through publicly filed litigation.

The answer to the question “is it worth

To begin the process of uncovering the identity of an anonymous poster, a plaintiff often begins a defamation action against a “John Doe” defendant.

it” depends on the case, but answering it should take more into account than an expected recovery dollar value. Corporations may choose to pursue Internet defamers aggressively when they will experience appreciable potential harm and a product is a brand name that carries considerable goodwill. While it is hard to measure the damage associated with anonymous Internet defamation, it is similarly difficult to measure a product’s goodwill and reputation—these are assets that carry real value for a company. As Benjamin Franklin said, “It takes many good deeds to build a good reputation, and only one bad one to lose it.”

### Conclusion

Whether a website, a Twitter post, a Facebook comment, or an anonymous blog entry, without question in today’s world we have more “published” content than ever before. Understanding a corporation’s rights and responsibilities can make the difference between liability and immunity, or between a successful attack on defamatory materials and a fool’s errand. You will want to understand the principles involved so that you can provide sound, valuable advice to your client about the rights and responsibilities that flow from publishing content on the Internet. 