Hastings Communications and Entertainment Law Journal

Volume 34 | Number 3 Article 5

1-1-2012

Online Business Reviews and the Public Figure Doctrine: An Advertising-Based Standard

Jenna Morton

Online Business Reviews and the Public Figure Doctrine: An Advertising-Based Standard

by
JENNA MORTON*

* Jenna Morton is a J.D. candidate who will graduate from the University of California, Hastings College of the Law in May of 2012. She received her B.A. in Legal Studies from the University of California at Berkeley in 2009. Jenna thanks Professor Ashutosh Bhagwat for his guidance as she wrote this note, and the *Hastings Communications and Entertainment Law Journal* editorial staff for their patience throughout the editing process.

I. Introduction

In 2006, Christopher Norberg visited Dr. Beigel's chiropractor office in San Francisco.[1] After the visit, Norberg posted a Yelp review in which he stated that Dr. Biegel's office employed dishonest billing practices because they had billed him four times the quoted amount.[2] Dr. Biegel sued Norberg for defamation, claiming that the Yelp review contained false statements of fact. Dr. Biegel alleged that he discussed the additional fees with Norberg, and explained that they were to compensate for additional time and effort the office spent with insurers.[3] Norberg insisted that his statements were protected as opinion.[4] Eventually, as a result of a court-mandated mediation hearing, Norberg replaced the original post with the following statement:

> A misunderstanding between both parties led us to act out of hand. I chose to ignore Dr. Biegel's initial request to discuss my posting. In hindsight, I should have remained open to his concerns. Both Dr. Biegel and I strongly believe in a person's right to express their opinions in a public forum. We both encourage the internet community to act responsibly.[5]

Today, many consumers depend on online review sites to guide their selection of restaurants, doctors, hairdressers, retail stores, and other businesses. The opinions and experiences shared on these sites have the potential to benefit both consumers and businesses; consumers are able to make more informed decisions, and popular businesses receive free marketing. However, false and dishonest reviews can hurt both businesses and consumers.[6]

The most common remedy for a false review is a defamation suit. The threshold issue in a defamation suit is whether the complaining party is a public figure or a private figure. Whereas public figures must prove that a review was posted with actual malice (knowledge of falsity or reckless disregard for the truth), private figures have a lower

1. Elinor Mills, *Lawsuit over Yelp Review Settled*, CNET.COM, (Jan 9, 2009, 4:38 PM), http://news.cnet.com/8301-1023_3-10139278-93.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Just as there is no societal value to false online reviews, the Supreme Court held in Gertz v. Welch, 418 U.S. 323, 339 (1974) that there is no constitutional value to false statements of fact.

burden of proof.[7] The status of businesses as public or private figures for the purposes of online reviews is unclear at this time. There are three notable results of this uncertainty: (1) defamation actions are less likely to be dismissed on the pleadings, (2) defamation cases settle more frequently, and (3) protected speech is more likely to be retracted. The goal of this Note is to propose a clearer distinction between businesses that are public figures, and businesses that are private figures, resulting in a test that balances the First Amendment rights of online reviewers with the right of businesses to be protected from defamation.[8]

Part II of this Note will discuss existing remedies for false and dishonest reviews, including the Communications Decency Act ("CDA"),[9] the mandatory disclosure of material connections,[10] and defamation law. Part III of this Note will discuss the public figure doctrine. Part IV of this Note will discuss the public figure doctrine as applied to businesses, and the problems and ambiguities that exist. Finally, Part V of this Note will compare the consequences of treating all businesses as public figures with the consequences of treating only some businesses as public figures, and will propose a new test based on the amount and type of online advertising in which a business engages.

II. Current Remedies for False and Misleading Reviews

In outlining the current status of the law, this Note will first discuss the prohibition of website liability under the CDA.[11] Then, this Note will discuss the FTC regulation that governs reviews posted by businesses and their competitors, referred to here as the "Material Connections" Rule.[12] Finally, this Note will discuss the current state

7. *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (public figures must show actual malice); *cf.* Gertz v. Welch, 418 U.S. 323 (1974) (where the individual is a private figure and the matter is of public concern, the figure must show negligence for compensatory damages and actual malice for punitive damages); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (indicating that there is no First Amendment right to make defamatory statements about a private figure involving a matter that does not involve public concern).

8. *See, e.g,* New York Times v. Sullivan, 376 U.S. 254 (1964); Gertz v. Welch, 418 U.S. 323 (1974); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). Each of these cases balances First Amendment rights with the right to avoid defamation.

9. 47 U.S.C. § 230 (2006) (granting website hosts statutory immunity from liability for content that they make available online but do not directly create).

10. 47 U.S.C. § 230

11. *Id.*

12. 16 C.F.R. § 255.5 (West 2010).

of defamation jurisprudence as it applies to actions brought against third party reviewers.

A. Communications Decency Act

Before discussing reviewer liability, it is helpful to explain the laws governing website liability. The CDA distinguishes between two different types of website operators: "information content providers," and "interactive computer services."[13] Information content providers, such as online newspapers, are treated as the publisher or speaker of the information contained on the site.[14] Thus, they are held liable for any defamatory statements.[15] Interactive computer services, such as online discussion sites, are not liable for content that they make available, but do not create,[16] such as content posted by users.[17] This remains true even if they perform "traditional editorial functions—such as electing to publish, withdraw, postpone, or alter the content."[18]

The reason for this distinction is articulated in the findings and policy goals found at the beginning of the CDA.[19] Interactive computer services promote unique diversity of information and opinion.[20] Furthermore, they have previously flourished in the absence of government regulation.[21] Thus, to encourage the continued development of interactive media,[22] Congress made a policy decision to avoid imposing tort liability "on companies that serve as intermediaries for other parties' potentially injurious messages."[23]

13. *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003).

14. 47 U.S.C. § 230(c)(1).

15. *Id.*

16. *See* Elizabeth A. Ritvo, Jeffrey P. Hermes & Samantha L. Gerlovin, *Online Forums and Chat Rooms in Defamation Actions*, 24 COMM. LAWYER, Summer 2006, at 1, 17 (citing 47 U.S.C. § 230).

17. *See, e.g.,* Novak v. Overture Services, Inc., 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004) (finding that Google was an "interactive computer service" and not a "information content provider" for the purposes of failing to remove allegedly objectionable content from its online discussion groups).

18. Zeran v. America Online, 129 F.3d 327, 330 (4th Cir. 1997).

19. 47 U.S.C. § 230 (2006).

20. *Id.* at (a)(3).

21. *Id.* at (a)(4).

22. *Id.* at (b)(1).

23. Zeran v. America Online, 129 F.3d 327, 330–31 (4th Cir. 1997).

Inability to sue the website host as a result of the CDA can make it difficult for defamation plaintiffs to track down online reviewers.[24] However, online review sites typically require reviewers to provide a name and email address before posting to the message board.[25] Defamation plaintiffs can then subpoena this information about particular reviewers at the onset of litigation.[26] This prevents reviewer anonymity from precluding defamation actions.

B. The "Material Connections" Rule

Potentially false or dishonest business reviews can be separated into three categories: affiliate reviews, competitor reviews, and third party reviews. Affiliate reviews include, for example, those written by a business owner, an employee, or someone paid by the business to write a positive review. These reviews are likely to be falsely positive.[27] Competitor reviews are those written by individuals affiliated with competing businesses. These reviews are likely to be falsely negative.[28] Third party reviews are those written by a neutral third party, such as a customer.

The FTC has addressed the first category (reviews by business affiliates), and potentially the second category (reviews by competitors), in its material connections rule. Pursuant to this regulation, a reviewer in an online message board must "clearly and conspicuously disclose her relationship" to the company she is reviewing because it "likely would affect the weight or credibility" of her review.[29]

The regulation targets endorsements, defined as "any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser."[30] Therefore, an employee who posts a positive review

24. Ritvo et al., *supra* note 16, at 1.

25. *See* John Wilson, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533, 544 (2002).

26. *Id.*

27. *See* Tobias J. Butler, *The Realities of Relying on Doctor-Patient Non-Disclosure Agreements for Reputational Protection*, HEALTH LAWYER, June 2010, at 23, 27 (discussing four types of posts: (1) positive and accurate, (2) negative and accurate, (3) positive and inaccurate, and (4) negative and inaccurate).

28. *See id.*

29. 16 C.F.R. § 255.5, Example 8 (West 2010) (providing that disclosure would be required where, for example, an employee of a "leading playback device" manufacturer advocates for that manufacturer's product in an "online message board designated for discussions of new music download technology").

30. *Id.* at § 255.0.

about her employer's product or service online would have to disclose her employment status because her review constitutes an endorsement.[31] Conversely, a nonaffiliated third-party consumer who writes a positive online review is not required to make any disclosures because her review is not an endorsement.[32]

Whether this regulation would require an affiliate of a competing business to disclose her employment status is unclear. While it would "materially affect the weight or credibility" of the review,[33] it is unclear whether this type of a review would constitute an endorsement. On one hand, the term "endorsement" connotes a positive review, and the examples listed all discuss positive reviews.[34] On the other, writing a negative review for a competitor could also be construed as a type of positive advertisement, which would make disclosure necessary. Regardless, even if competitor reviews were not covered by this regulation, a business could still file a defamation action. Although requiring disclosure of this relationship would be an easier way to prevent competitor reviews from misleading consumers, a business may find it easier to convince a jury that a review written by a competitor was false, or written with actual malice.[35]

While the First Amendment creates a presumption against governmental regulation of speech,[36] the Supreme Court has long recognized that the government may regulate commercial speech because it tends to be false or misleading.[37] Although there is some debate as to whether this particular regulation is overbroad,[38] most endorsements are likely to fall under the purview of commercial

31. *Id.* at § 255.5, Example 8.

32. *Id.*

33. *Id.*

34. The 9 examples discussed: (1) advertisers who fund research that supports their products; (2) a film star who endorses a food product; (3) a famous athlete who unofficially endorses a product; (4) a physician who vouches for a product; (5) spontaneous interviews of restaurant customers; (6) individuals compensated to provide a consumer endorsement of a product; (7) a blogger known as a video game expert who endorses a new game; (8) an employee participating in an online review board discussion about his or her company's products; (9) individuals compensated to advertise products on the street. *Id*. at § 255.0, Examples 1–9.

35. As would be required if the business was a public figure.

36. *See* U.S. CONST. amend. I.

37. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression . . . . The government may ban forms of communication more likely to deceive the public than to inform it" (citations omitted)).

38. *See, e.g.,* Nicholas A. Ortiz, *Consumer Speech and the Constitutional Limits of FTC Regulations of "New Media*," 10 COLUM. BUS. L. REV. 936 (2010).

speech and thus do not pose the same constitutional questions as third party consumer reviews, or other reviews that do not constitute commercial speech.

C. Defamation Law

A defamation action is the private remedy for false or misleading online reviews. To establish defamation, a business must show:[39] (1) a false and defamatory statement of fact concerning the business;[40] (2) unprivileged publication of that statement to a third party;[41] (3) the requisite degree of fault;[42] and (4) harmful nature of the statement.[43]

When a business brings a defamation action based on a negative review, the second and fourth prongs are fairly simple to establish. Posting a statement on the internet is "publication" within the meaning of defamation law.[44] Further, it is a matter of common sense that negative reviews harm a business' reputation. The ambiguities arise in establishing the first and third prongs, as they invoke First Amendment protections.

39. Although defamation is typically a matter of state tort law, the requisite elements tend to be substantially similar from state to state. *See, e.g.,* 5 WITKIN, SUMMARY TORTS § 529 (10th ed. 2005) (summarizing California defamation elements as "(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage."); *Id.* at § 535 (describing "published" as "communicated to some third person who understands its defamatory meaning and application to the plaintiff"); *Id.* at §§ 602–607 (discussing varying degrees of fault); 14 N.Y. PRACTICE, NEW YORK LAW OF TORTS § 1:42 (2010) (listing the elements of defamation as (1) a false an injurious statement of fact concerning the plaintiff, (2) publication to a third party by the defendant, (3) depending on the status of the plaintiff and defendant, made with malice, recklessness, gross negligence, or made negligently or innocently, (4) special damages or presumed harm in *per se* actionable cases).

40. *See, e.g.,* 5 WITKIN, SUMMARY TORTS § 529 (10th ed. 2005) (California law requires a statement that is false and defamatory); 14 N.Y. PRACTICE, N. Y. LAW OF TORTS § 1:42 (2010) (New York law requires a false and injurious statement of fact).

41. "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than other person defamed." RESTATAMENT (SECOND) OF TORTS § 577 (1977).

42. The Restatement discusses fault under its discussion of publication, which it defines as "communication *intentionally* or by a *negligent* act" to one other than other person defamed. RESTATEMENT (SECOND) OF TORTS § 577 (1977) (emphasis added). Discussion of the requisite degree of fault in online business reviews will be discussed *infra* in Part II. C. 2. i. and ii.

43. *Id.* at § 558.

44. A statement posted on an online message board is "published" for the purposes of defamation law. *See* Wilson, *supra* note 25, at 558 (citing Giorgio Bovenzi, *Liability of Systems Operators on the Internet*, 11 BERKELEY TECH. L.J. 93, 119 (1996)).

1. Opinion Versus Fact

Whereas a speaker can be liable for false statements of fact, the First Amendment protects statements of opinion. The Supreme Court has stated that, "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, one depends for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."[45] Therefore, only those statements that a reasonable person would interpret to state a fact can constitute defamation.[46]

The Restatement of Torts, which has incorporated First Amendment jurisprudence into its guidelines, provides that a statement may be actionable for defamation whenever a reasonable person interprets it to state a defamatory fact,[47] or to imply an undisclosed defamatory fact as the basis for an opinion.[48]

It is likely that many harmful statements made in online review sites constitute mere opinion that is not actionable.[49] Some review sites post disclaimers to this effect, warning viewers that all of their content is merely reviewer opinion.[50] Since the opinion versus fact distinction is based on a reasonable person, the existence of disclaimers and the general tone of the message board can affect whether a statement is considered defamatory.[51] However, sometimes the line between opinion and fact is difficult to draw.

Consider the following hypothetical reviews of a barber shop on an online message board. One reviewer writes that he did not like the haircut that he received, and thinks that the barber is unskilled. A second reviewer writes that he saw the barber use the same comb on two different customers, and notes that this is a health code violation.

45. Gertz v. Welch, 418 U.S. 323, 339 (1974).

46. *See* Milkovich v. Loraine Journal Co., 497 U.S. 1, 20 (1990).

47. *See* RESTATEMENT (SECOND) OF TORTS § 565 (1977).

48. *See id.* at § 566 ("A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.").

49. *See, e.g.,* Wilson, *supra* note 25, at 567 (citing Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cybersbace*, 49 DUKE L.J. 855, 919 (2000) (arguing that, in large part, the online audience views Internet discourse as mere "rhetorical hyperbole or subjective speculation rather than a sober recitation of actual facts")).

50. Wilson, *supra* note 25, at 567 (for example, Yahoo financial message boards contain the following disclaimer: "These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose.").

51. *See id.* at 559.

A third reviewer writes that the barber schedules too many appointments at once, and that as a result he was rushed and received a poor quality haircut.

The first review is clearly opinion, since it does not state or imply any defamatory fact. The second review would probably be found to state defamatory fact, since it accuses the barber of a specific action that constitutes a health code violation. However, the third review is more ambiguous. It accuses the barber of over-scheduling, which the barber may consider to be a defamatory fact. However, how much time is required for an appointment, what feels rushed, and how this affects the quality of a haircut are all likely to be considered matters of opinion that cannot be proven or disproven.

2. Establishing Fault

The level of fault required to establish defamation depends on the speaker and the nature of the statement. The Supreme Court has found that the First Amendment affords extra protection to speech about public figures and matters of public concern.[52] Therefore, the requisite degree of fault in a defamation action depends first on whether the plaintiff is classified as a "public figure"[53] or a "private figure."[54] Whereas public figures and public officials must prove that a review was made with knowledge of falsity or reckless disregard of the truth,[55] private figures are held to a lesser standard (which varies depending on the nature of the statement).[56] The level of fault that a business must show to establish defamation therefore depends on whether the business is classified as a public or a private figure.

III. The Public Figure Doctrine

First Amendment jurisprudence imposes three potential fault standards in defamation actions. For public figures, the standard is actual malice, regardless of whether the speech involves a matter of public concern.[57] For private figures, there are three possible standards. Where the speech involves a private figure, and is about a matter of public concern, the minimum standard is negligence for

52. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).
53. *Id.*
54. *See* Gertz v. Welch, 418 U.S. 323, 339 (1974).
55. *See New York Times*, 376 U.S. 254.
56. *See, e.g.*, *Gertz*, 418 U.S. 323.
57. *See New York Times,* 376 U.S. 254.

compensatory damages, and actual malice for punitive damages.[58] However, where the speech is about a private figure and does not involve a matter of public concern, First Amendment jurisprudence imposes no restraints on state tort law standards.[59] These standards are indicated in the chart below.

	Public Figure	**Private Figure**
Public Concern	Actual Malice[60]	Compensatory Damages- Negligence Punitive Damages- Actual Malice[61]
No Public Concern	Actual Malice[62]	No First Amendment Constraints[63]

A. Distinguishing Between Public and Private Figures

The Supreme Court has identified three categories of public figures.[64] In differentiating between the three different types of public figures and private figures, the two most relevant factors seem to be the individual's relationship to a public controversy,[65] and that individual's access to the media or other channels of communication.[66]

First, there are general purpose public figures, which "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[67] These figures are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events of concern to society at

58. *See Gertz,* 418 U.S. 323 (Gertz provides that states must impose *some* degree of fault, however, so strict liability is not an option).

59. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

60. *See New York Times,* 376 U.S. 254 .

61. *See Gertz,* 418 U.S. 323 .

62. *See New York Times,* 376 U.S. 254.

63. *See Dun & Bradstreet*, 472 U.S. 749.

64. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring) (note that while it is not the majority opinion in Curtis, Chief Justice Warren's concurrence is commonly cited as the emerging precedent. *See, e.g., Gertz,* 418 U.S. at 335.); *Gertz,* 418 U.S. at 345.

65. *Gertz,* 418 U.S. at 345.

66. *Curtis*, 388 U.S. at 164 (Warren, C.J., concurring).

67. *Curtis*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring) (note that while it is not the majority opinion in Curtis, Chief Justice Warren's concurrence is commonly cited as the emerging precedent. *See, e.g., Gertz*, 418 U.S. at 335.).

large."[68] Because they are prominent but politically unaccountable, society "has a legitimate and substantial interest in the conduct of such persons."[69] Therefore, these individuals must accept public scrutiny as a necessary consequence of their involvement in public affairs.[70] For example, in *Hustler v. Falwell*, Jerry Falwell, "a nationally known minister who ha[d] been active as a commentator on politics and public affairs," was a public figure for the purposes of a parody published in *Hustler* magazine.[71]

Next, there are limited-purpose public figures, which "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[72] By injecting themselves into public debate, these public figures invite attention and comment in a way that private individuals do not.[73] For example, in *Associated Press v. Walker*, the Court found that Walker, an individual who had made his career opposing physical intervention by federal marshals in political activity, was a public figure for the purposes of an article about federal military intervention in a riot.[74]

Finally, *Gertz* recognized the possibility that someone could involuntarily become a public figure "through no purposeful action of his own."[75] However, the Court cautioned that this type of public figure must be "exceedingly rare," and noted "for the most part, those who attain this status have assumed roles of special prominence in the affairs of society."[76] For example, the D.C. Circuit found an air traffic controller who was on duty during a famous crash was an involuntary public figure for the purposes of a news article covering the crash.[77] The United States Supreme Court has never recognized an involuntary public figure.

Individuals who are not public figures are private figures. Private figures have a lower burden because the Court has found a state's interest in protecting private individuals from defamatory speech

68. *Gertz,* 418 U.S. at 337.

69. *Curtis*, 388 U.S. at 163–64 (Warren, C.J., concurring).

70. *Gertz*, 418 U.S. at 344.

71. Hustler Magazine v. Falwell, 485 U.S. 46, 47 (1988).

72. *Gertz,* 418 U.S. at 345.

73. *Id.*

74. 388 U.S. 130, 136 (1967) (note that *Walker* was decided with *Curtis*, and does not have a separate citation).

75. *Gertz,* 418 U.S. at 345.

76. *Id.*

77. Dameron v. Wash. Magazine, Inc., 779 F.2d 736, 742 (D.C. Cir. 1985).

outweighs the First Amendment rights of the speaker.[78] For example, in *Gertz v. Welch*, a lawyer representing one party in a high-profile police shooting case was not a public figure for the purpose of an article falsely accusing him of being a "Lenninist" and a "Communist-fronter," among other things.[79] The Court found that even though he was "well known in some circles" as the result of his involvement in "community and professional affairs," he was a purely private figure because he did not engage the public's attention in an attempt to influence the outcome of a particular issue.[80]

In both *Curtis* and *Gertz*, the Court emphasized access to media as the primary means for public figures to address criticism.[81] In *Curtis*, the Court stated that, "as a class, these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their own views and activities."[82] Similarly, in *Gertz*, the Court found "public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[83] Therefore, private individuals are more vulnerable to injury, and "more deserving of recovery."[84]

However, media resulting from a tort cannot make the plaintiff a public figure for the purposes of that tort.[85] "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."[86] In *Hutchinson*, the Court found that when a senator gave a mock award to a federally funded researcher for demonstrating egregious and wasteful government spending, the researcher was not a limited public figure for the purpose of federal grants.[87] The researcher had not invited the necessary degree of "public attention and comment" on the issue, and he had no "regular and continuing" access to the media.[88] Furthermore, the media and controversy resulting from the award

78. *Gertz,* 418 U.S. 348.
79. *Id.* at 325–26.
80. *Id*. at 352.
81. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967); *Gertz,* 418 U.S. at 343.
82. *Curtis*, 388 U.S. at 164 (Warren, C.J., concurring).
83. *Gertz*, 418 U.S. at 343.
84. *Id.*
85. *See* Hutchinson v. Proxmire, 443 U.S. 411, 431 (1979).
86. *Id.*
87. *Id.* at 417, 431.
88. *Id.* at 432.

could not make the researcher a public figure for the purposes of that award.[89]

B. Public Versus Private Concern

In addition to considering whether the plaintiff is a public or a private figure, the Court has considered whether there exists a matter of public concern. However, the Supreme Court has recognized that "the boundaries of speech on matters of public concern are not well defined."[90] Speech is on a matter of public concern when it can "be fairly considered as relating to any matter of political, social or other concern to the community,"[91] or when it "is a subject of general interest and of value and concern to the public."[92] However, "a statement's arguably 'inappropriate or controversial character . . . is irrelevant to the question whether it deals with a matter of public concern.'"[93] The court looks to the content, form and context of the speech to determine whether it is of a matter of public or private concern.[94] No one factor is dispositive.[95]

Whereas public figure plaintiffs must prove actual malice regardless of whether the speech in question is on a matter of public concern,[96] the standard for private figure plaintiffs varies depending on whether the speech involves a matter of public concern. In *Gertz v. Welch*, where the plaintiff was a private figure, and the speech involved a matter of public concern, the Court held that actual malice was required to recover punitive damages, and some degree of fault (presumably negligence) was required to recover compensatory damages.[97] However, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, where the plaintiff was a private figure and no matter of public concern existed, the Court found that no showing of actual malice was required for the recovery of punitive damages,[98] and implied that recovery for such speech was not constrained by the First Amendment.

89. *Id.* at 431.
90. Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011).
91. *Id.* (citing Connick v. Myers, 461 U.S. 138, 145 (1983)).
92. *Id.* (citing San Diego v. Roe, 543 U.S. 77, 83–84 (2004)).
93. *Id.* (citing Rankin v. McPherson, 483 U. S. 378, 387 (1987)).
94. *Id.* (citing *Dun*, 472 U.S. at 761).
95. *Id.*
96. *See, e.g.,* New York Times v. Sullivan, 376 U.S. 254 (1964).
97. *See* Gertz v. Welch, 418 U.S. at 349.
98. 472 U.S. 749, 763 (1985).

IV. Application of the Public Figure Standard to Businesses

A. Three Case Studies

1. Bruno & Stillman, Inc. v. Globe Newspaper Co.

Bruno & Stillman, Inc. ("the corporation") manufactures and sells commercial fishing boats.[99] The *Globe* newspaper published several articles reporting defects in the boats, and attributed the sinking of two corporation-made boats to these defects.[100] The corporation filed a defamation suit against the *Globe*, alleging both negligent and intentional libel.[101]

The district court found that corporations are public figures because, first, they enjoy access to the channels of communication, and second, they "voluntarily place before the public an issue of some importance regarding the quality and integrity of their products," and "generally promote the sale of their products to the public by engaging in some form of advertising."[102]

The First Circuit reversed, finding that not all corporations are public figures for two reasons.[103] First, the court found that "to the extent that access to the channels of communication is a meaningful factor . . . corporations have no particular advantage over private individuals."[104] Second, the court found that a business does not thrust itself into a public controversy by merely selling products.[105]

The court gave three more relevant factors that courts should take into consideration in determining whether a corporation is a public figure: (1) whether the controversy that gave rise to the defamation is public or private, (2) whether the controversy preexisted the statements at issue, (3) the nature and extent of the plaintiff's participation in the controversy.[106]

In applying these factors, the court refused to extend public figure status to include all reasonably successful manufacturers, merchants, and professionals.[107] The court found "no public controversy surrounding the publication of the Globe articles" and contrasted the

99. Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980).
100. *Id.* at 585.
101. *Id.*
102. *Id.*
103. *Id.* at 589.
104. *Id.*
105. *Id.* at 589–90.
106. *Id.* at 583.
107. *Id.* at 592

situation with one where the public was actually discussing a matter.[108] The court then remanded to the district court to find whether a public controversy implicating the company existed apart from the challenged statements, and whether the "prominence, power, or involvement of the company in respect to the controversy, or its public efforts to influence the results of such controversy—were such as to merit public figure treatment."[109]

2. Vegod Corporation v. American Broadcasting Companies

Vegod Corporation closes out stores that are going out of business.[110] It ran a closing out sale for an old, well-known, and respected department store.[111] ABC broadcasted a story in which a Better Business Bureau spokesman criticized the quality of goods sold at the closeout.[112] Vegod sued for defamation, and ABC claimed that Vegod was a public figure and thus required to prove actual malice.[113]

The California Supreme Court found that while the quality of goods for sale was a matter of public interest, "criticism of commercial conduct does not deserve the special protection of the actual malice test."[114] Therefore, "a person in the business world advertising his wares does not necessarily become part of an existing public controversy."[115]

3. Gilbert v. Sykes

Dr. Sykes is a prominent professor and practitioner of plastic and reconstructive surgery at a prestigious medical institution in Sacramento, California.[116] Sykes has written numerous articles on plastic surgery, appeared in local television shows on the subject and advertised in the Sacramento media market.[117] *Top Doctors*, a Sacramento magazine, credited him as "a nationally recognized educator and leader in minimally invasive esthetic and laser surgery [,] [who] has performed over 10,000 surgical procedures, is board-

108. *Id.* at 591.
109. *Id.*
110. Vegod Corp. v. Am. Broad. Co., Inc., 25 Cal. 3d 763, 765 (1979).
111. *Id.*
112. *Id.*
113. *Id.* at 766.
114. *Id.* at 770.
115. *Id.*
116. Gilbert v. Sykes, 147 Cal. App. 4th 13, 17, 23 (2007).
117. *Id.* at 23.

certified in otolaryngology and facial plastic surgery, and has published three books and over 90 articles on facial plastic surgery."[118]

After Sykes performed a series of cosmetic facial procedures on Georgette Gilbert, she sued him for malpractice and posted negative reviews about her experience on a website she created, entitled www.mysurgerynightmare.com.[119] On this website, Gilbert included before and after photographs, and wrote "I was told by my doctor that this was a good result—that I looked better after his surgery—what do you think?"[120] She also said that Sykes told her that she would look natural after the surgery and that she was under the impression the change would be subtle, but that the "surgery was the biggest regret of [her] life."[121]

Sykes cross-complained against Gilbert for defamation. He claimed that the photographs on the website were misleading, because the "after" photographs were taken after significant additional cosmetic surgery procedures performed by someone else.[122] Furthermore, Sykes claimed that the website falsely indicated that he performed procedures that Gilbert did not need or want, misstated the content of their communications, and falsely suggested that he was compensated for the procedures "under the table."[123]

The trial court found that Sykes was a limited-purpose public figure.[124] Thus, to prevail on a defamation claim, Sykes was required to prove not only that Gilbert's claims were false, but that they were uttered with actual malice.[125]

In determining whether Sykes was a public figure, the court stated that "first, there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. Second, the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue."[126] The court found that "plastic surgery is a subject of widespread public interest and

118. *Id.* at 18.
119. *Id.* at 18–19.
120. *Id.* at 19–20.
121. *Id.* at 20.
122. *Id.* at 21.
123. *Id.*
124. *Id.* at 26.
125. *Id.*
126. *Id.* at 24.

discussion."[127] The court then held that Sykes thrust himself into that debate by: (1) appearing on local television shows, (2) writing numerous articles in medical journals and beauty magazines on the subject, (3) testifying as an expert witness in the field of plastic surgery, and (4) advertising his services in the local media.[128]

B. Problems and Ambiguities in the Public Figure Doctrine as Applied to Businesses for the Purpose of Online Business Reviews

The current public versus private figure distinction was developed for individuals, particularly those who are actively involved in political debates. Remember, for example, the case of *Associated Press v. Walker*, where an activist made a career opposing physical intervention by federal marshals into political activity, thus becoming a public figure for the purposes of an article about federal military intervention in a riot.[129] However, the two main factors that courts have considered in distinguishing between public and private figures, injection into a public debate and access to media, are not necessarily applicable to businesses.

First, the "injection into public debate" or "intimate involvement in the resolution of public affairs" formulation is difficult to apply to businesses. For Dr. Sykes, it was fairly simple, since plastic surgery is more controversial than most business activities, and he did far more than most businesses or practitioners to inject himself into that debate by writing articles, appearing on television, testifying in trials, and advertising aggressively. However, with typical businesses, it is difficult to identify a particular public controversy into which the business has injected itself. This is true even of businesses that are almost certainly public figures. For example, while Apple may not necessarily have injected itself into any particular debate, the company's notoriety would almost certainly seem to make it a limited purpose public figure for the purposes of its products, if not a general purpose public figure.

One potential counterargument is the one rejected by *Bruno & Stillman* and *Vegod Corporation*—that the quality of services or products is always a public controversy into which businesses inject themselves by offering and advertising those services or products.

127. *Id.* at 23 (noting that "Elective cosmetic surgery was the subject of the popular television series *Extreme Makeover*, in which it is portrayed as a positive, life-transforming event. Yet the widespread and indiscriminate use of plastic surgery by celebrities and the public has also generated a firestorm of negative publicity and comment.").

128. *Id.* at 25.

129. Associated Press v. Walker, 388 U.S. 130, 140 (1967).

However, this is a strained adaptation of the rule. Whereas the quality of goods and services may be a matter of public concern, it is not likely a public "controversy."

Regardless, both the stringent requirement of active injection into a public debate and the media/non-media distinction are inapposite in the case of businesses. First, businesses don't have the same privacy rights as private citizens, which is the primary purpose of the public controversy requirement.[130] Second, businesses have access to online forums and can rebut assertions, which is the core purpose of the media/non-media distinction.[131] Third, online reviews have the ability to reach a mass audience like traditional forms of media.[132]

V. A Proposed Line Based on Advertising

A. Competing Constitutional Considerations

In creating a more workable public figure standard for businesses in the context of online reviews, there appears to be four competing constitutional considerations. First, there is the right of consumers to receive truthful information.[133] Second, there is the right of individuals to share their opinion,[134] and to do so anonymously.[135] Third, there is the right of businesses to protect their reputation.[136] Finally, there is the concern that businesses will use their resources to chill harmful protected speech.[137]

130. Wilson, *supra* note 25, at 560.

131. Gertz v. Welch, 418 U.S. 323, 344 (1974) (however, the court noted that "an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood").

132. Wilson, *supra* note 25, at 560.

133. This is at the heart of the commercial speech doctrine. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (noting that for this reason, "[t]he Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression . . . . The government may ban forms of communication more likely to deceive the public than to inform it" (citations omitted)).

134. *See Gertz,* 418 U.S. at 339 ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

135. *See* Reno v. ACLU, 521 U.S. 844, 846 (1997) (finding that the CDA's "indecent transmission" and "patently offensive display" provisions violated the First Amendment).

136. Businesses, like individuals, have a right not to be defamed. This is the core of defamation law.

137. *See, e.g.,* state anti-SLAPP statutes (Strategic Lawsuit Against Public Participation). For example, in 1992 the California legislature enacted an anti-SLAPP statute "which provided broad authority to strike a complaint based on an act of free speech 'in connection with a public issue' unless the court determined the plaintiff had established, by credible evidence, 'a probability [that it would] prevail on the claim.'" Wilson, *supra* note 25, at 572.

Different scenarios present different constitutional problems. For example, where a malicious reviewer defames a small mom and pop store that relies on positive Yelp reviews, there is a concern that the business will not be able to adequately protect its reputation. However, there is little risk that the store will use its resources to chill protected speech. Conversely, where a well-meaning individual writes a negative review about service received by a large corporation, there is a concern that the corporation will threaten litigation to bully the reviewer into retracting the speech, thus infringing on the First Amendment rights of the reviewer.

B. Settlement: A Practical Consideration

In creating a more workable public versus private figure standard, it is also important to consider the impact that it may have on the settlement of future defamation actions. Because online business reviews are often not a matter on which parties want to spend large amounts of money litigating, defamation actions for these reviews often settle. The benefit of settlement is that it prevents these cases from congesting court dockets. The downside is that in a settlement, a business often has more power than a reviewer, and is more likely to bully a reviewer into retracting protected speech. The clearer the standard, the more likely that claims will be resolved on the pleadings, and the less likely that settlement of weak claims will occur.

C. A Workable Balance: The Two Options

In creating any standard, courts are often faced with the choice between drawing a bright line rule or imposing a multi-factor retroactive balancing test. Defining the public figure standard as it applies to online business reviews is no different. On one hand, courts could decide that either all businesses are public figures for the purposes of online business reviews. On the other, courts could decide that only some businesses are properly labeled as public figures whereas others are private figures, and attempt to draw a line distinguishing the two. Below, this Note will analyze the downsides and benefits of each, and propose somewhat of a hybrid—a balancing test based on advertising.

1. Bright Line Rule

Under this option, the quality of available goods and services would be treated as a public controversy, and all businesses that offer

goods and services would be seen as thrusting themselves into that controversy.

There are three main benefits to this approach. First, it is a simple and clear standard. It would produce a chain of positive results. With a clear standard, judges could more easily dismiss non-meritorious cases on the pleadings. As a result, cases involving protected speech are less likely to settle. Therefore, protected speech is less likely to be silenced. Second, finding that all businesses are public figures would prevent reviewers from being liable for negligent misstatements of fact. If viewers are concerned that they will be liable for negligent misstatements of fact, they are less likely to review businesses at all. If they do review businesses, they are more likely to refrain from sharing their entire experience. Thus, this standard would encourage honest and more frequent reviews. Finally, the higher burden would protect more speech on the border of opinion and fact.

The adoption of a bright line rule would further three of the four competing constitutional considerations: the right of consumers to receive truthful information, the right of individuals to state their opinion anonymously, and the concern that corporations will chill speech by bullying individual reviewers. However, it does little to protect the right of businesses to protect their reputation in the face of defamatory remarks. The actual malice standard would make it nearly impossible for the mom and pop store to recover for defamation, even in the face of a debilitating misstatement of fact.

2. Retroactive Balancing Test

Under this option, courts would continue to use some sort of test to distinguish between businesses that are public figures, and businesses that are private figures.

There are two main benefits to this approach. First, it arguably more fairly distinguishes between different types of businesses (the large corporation and the mom and pop store, for example). Second, it makes recovery possible for smaller local businesses who may be materially harmed by defamatory reviews. Depending on where the line was drawn and how effectively this line protected truthful speech, a balancing test could adequately protect both the rights of businesses to guard their reputations against defamatory speech, and the right of individuals to share their opinions.

However, like with any retroactive balancing test, there are downsides to this approach. It is difficult for courts to distinguish between businesses that are public and private figures, and to create a

line that accurately depicts that difference. For example, even if it were admitted that large corporations are public figures, and mom and pop stores are not, this still leaves many businesses of varying size, notoriety, wealth, and many other factors in the middle.

The likely result, as with the current test, is that parties will not know whether a business is a public figure until the matter is litigated. This wastes both time and money, and makes it more likely that cases will settle, since individual reviewers are unwilling to risk the time and money required to litigate when they can merely retract the contested statement. Therefore, this approach can increase the possibility that businesses will chill speech by bullying reviewers.

3. Compromise: A Simple Rule Based on Advertising

The ideal test would provide a clear and fair distinction between public and private figure businesses. As a result, small private businesses would not be precluded from recovering for truly harmful and defamatory speech, while reviewers would not be bullied into removing truthful or opinion speech about businesses that are public figures.

This would first require abandoning the existing formulation, which is geared towards individuals and political involvement, and does not accurately or efficiently delineate those businesses that seem like they should be public figures. Then, it requires finding a simple distinction between public and private figure businesses. Although there are many other factors about a business that a court could potentially take into consideration, an overly complicated and arbitrary test would still result in increased settlement, and thus an increased risk that protected speech would be removed.

This proposed compromise is a test based on online advertising. Where businesses advertise online, they inject themselves into the online discourse about their products and services, thereby inviting criticism. This is reminiscent of the "thrust into a public controversy" test, as advertising can be seen as a way that businesses thrust themselves into the public discourse about a particular product. However, drawing a clear line based on online advertising prevents courts from having to individually determine whether a public controversy exists, and whether a business has injected itself into that controversy.

This test also establishes a clear enough standard where non-meritorious cases brought merely to silence speech could be resolved on the pleadings before reviewers agreed to retract protected speech.

Finally, this test gives businesses a choice. If a business wants to enter the quality of its products and services into the public discourse, it can advertise them online. But in doing so, the business assumes the risk that consumers will not like its products and will either voice negative opinions, or make negligent misstatements of fact, for which the business would have no remedy. Conversely, if a business wants to remain private, it can choose not to advertise online, thereby refusing to invite any online criticism.

Targeting online advertising in particular, as opposed to all advertising, serves two main purposes. First, it protects businesses that are not online and thus unable to respond to online reviews. Second, it prevents mom and pop businesses, whose only advertising is perhaps a coupon or an ad in a local paper, from being bullied by negative reviews.

Although clarity is a valuable aspect of this test, there should probably be an exception for de minimus online advertising where it is clear that a business's presence online is minimal, and that the business is not a member of the online community such that it should be able to respond to negative reviews. For example, if a mom and pop store pays the local newspaper to post an advertisement, which appears in the online version of the paper, this may not be a sufficient online presence to trigger this public figure test.

VI. Conclusion

Modern consumers look to online business review sites to guide their selection of goods and services. As a result, online business reviews are becoming increasingly important in defining a business's reputation. When a business identifies a false consumer review, its remedy is to file a defamation suit. However, the defamation standard today is unclear insofar as it applies to businesses. If a business is a public figure, then it must show that a review was written with actual malice (reckless disregard for the truth or knowledge of falsity) before it can recover for defamation. If, however, a business is a private figure, the level of fault that it must prove is lower.

The current public figure test looks to whether the business has thrust itself into a public controversy, and whether it has access to media. However, this standard was developed for individuals and seems inapposite when evaluating businesses. Furthermore, the "access to media" aspect may no longer be relevant, given the vast availability of the internet.

As a result of these ambiguities, public figure status is somewhat arbitrary, and must be decided on a case-by-case basis. This results in

an increase in the number of cases that settle, because reviewers are unwilling to spend the time or money to litigate these issues, and would prefer to retract contested posts. However, this means that sometimes, protected speech is silenced for the sake of expediency.

This Note proposes a different test more tailored to businesses. Under this test, businesses who choose to advertise their goods and services online voluntarily invite comment and criticism about the quality of those goods and services. Therefore, they become public figures for the purposes of online business reviews. Conversely, businesses that do not advertise themselves online retain private figure status and do not have to meet the heightened standard of actual malice. The simplicity of this test allows for dismissal on the pleadings in non-meritorious cases, thus preventing businesses from bullying individuals from removing protected reviews.