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The False Light Claim:

A Tool To Challenge Internet Gossip

By Danford D. Grant

Internet gossip sites detailing the behavior of non-celebrities have recently exploded in popularity. You can post comments about a colleague on gossipreport.com, complain about a neighbor on rottenneighbor.com, and gripe about a bad date on dontdatehimgirl.com. And those are just a few.

Reasonable minds can disagree about the utility of these websites and the need to protect privacy when the gossip is true. Some argue, for example, that shaming and other reputation-shaping strategies play an important role in society. Others argue that fear of a global disclosure of minor social misbehavior threatens basic freedom. That is a privacy debate for another day. Most would agree, however, that individuals are entitled to at least some form of legal protection from Internet posts containing false and humiliating information.

Until recently, one of the most notorious Internet gossip sites was JuicyCampus.com, which went off-line on February 5. According to Juicy Campus's founder and CEO, the site closed because its "exponential growth outpaced [its] ability to muster the resources needed to survive this economic downturn."¹

Juicy Campus was reviled by many and, in fact, on the day the site "shut its virtual doors," University of Maryland Law Professor Danielle Citron celebrated that it "will no longer host anonymous postings that terrorize individuals with vile threats, ... will no longer feature posts that disclose women's home addresses with instructions that they are available for sex, [and] ... will no longer feature postings that jeopardize reputations with defamatory lies and embarrassing personal information."²

A lawyer seeking to redress the harms an Internet gossip site may cause would naturally turn to the law of defamation. In the case of a private plaintiff and a private matter, a defamation claim arises when the defendant publishes an unprivileged assertion of a false fact that damages the plaintiff in a material way.³ Thus, a defamation plaintiff must prove falsity, an unprivileged communication by the defendant to a third person, fault and damages.⁴ However, the tort of defamation is inadequate to address the full array of harms that may flow from

the publication of information on the Internet. In many cases, a better option is the tort of false light invasion of privacy. Washington follows the Restatement with regard to false light:⁵

[A] false light claim arises when someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.⁶

Defamation and false light claims have substantial overlap, but they also differ in significant ways that make a false light claim a more effective tool to redress the humiliation that arises from false or misleading Internet gossip. Perhaps most important, whereas defamation compensates for loss of reputation or esteem, false light compensates for mental distress, emotional harm and humiliation.⁷

This is particularly important because the damage in many Internet gossip cases is emotional, rather than reputation-based. Strictly speaking, Internet gossip may not even cause a direct loss of esteem in the eyes of others, and therefore may not be defamatory (obviously, it depends in large part on the nature of the gossip and the identity of the plaintiff).

Similarly, although technical truth should not be a defense to either a defamation or false light claim when the implication is false, it often gets more traction as a defense in defamation cases. For example, when an Internet gossip posts true information, but nevertheless portrays the plaintiff in a misleading manner based on context or the omission of certain important facts, a plaintiff can allege “defamation by implication,” which is recognized in Washington.⁸

But such false innuendo and implication seem to be more readily accepted as actionable in the context of false light invasion of privacy. As various courts routinely recognize, a false light claim arises if “the publication of true information creates a false implication about the individual.”⁹ Or, “[e]ven if the facts stated are facially true, a false light claim might be triggered if a false innuendo is created.”¹⁰ “[T]he element of falsity is met if the plaintiff alleges that the defendant knowingly or recklessly selected ... true statements or pictures in a manner which created a false impression.”¹¹

Finally, a false light claim has an advantage over most privacy claims — it is available even when the conduct creating the false impression occurred in public. As a general rule, activities or behaviors exposed to public view are not private, and are therefore fatal to most privacy claims.¹²

For example, most seem to accept without serious question or analysis that “the Google car” can drive past your house, take a picture of it and post it on the

Internet as part of its “street view” application. Simply put, “appearing in public necessarily involves doffing the cloak of privacy which the law protects.”¹³

In fact, however, this general rule is often erroneously overstated as absolute, and courts do protect matters that occur in public. For example, in *Nader v. General Motors* (an “intrusion upon seclusion” case), the concurrence noted that “a right to privacy may ... be invaded through extensive or exhaustive monitoring and cataloguing of acts normally disconnected and anonymous.”¹⁴

Likewise, in *Sanders v. American Broadcasting Company*,¹⁵ the California Supreme Court concluded that undercover reporters intruded upon a private matter by filming a conversation that occurred in the workplace even though others were nearby to overhear it. More important, however, this public/private distinction is not significant in the false light context, which provides an avenue to avoid the difficult question of whether the matter publicized on the Internet was previously private even though it occurred in public.

Despite these advantages of a false light claim (over both defamation and other forms of invasion of privacy), defamation may be a more appropriate vehicle to challenge a false statement in certain cases. For example, a false light claim *may* have a higher fault requirement than defamation in cases involving private parties. Specifically, the knowledge or recklessness requirement of a false light claim — even for a private plaintiff regarding a private matter — may be more burdensome and difficult to satisfy than the negligence standard available in certain circumstances under defamation law.

Another potential advantage of a defamation claim is that it requires only “publication” to a third person,¹⁶ whereas false light invasion of privacy requires “publicity” — that is, disclosure to the public generally or at least a “substantial number” of people. However, this “publicity” requirement is not a troublesome hurdle for a claim based on information posted on the Internet. Regardless, a plaintiff is generally free to bring both claims, although usually only one recovery is permitted.

And now a word of caution: Before pursuing an action for false light invasion of privacy (or defamation) arising from a post on an Internet gossip site, it is critical to recognize that it may be challenging to find an appropriate target from which to recover damages.

First, the immunity provided by the Communications Decency Act (CDA)¹⁷ protects certain websites from tort claims. Oversimplified, the CDA (for the time being at least) provides tort immunity to an interactive computer service (ICS) that accepts user postings *as long as the ICS is not the content provider*.¹⁸ Most commentators agree that it is difficult to sue a website over a comment by an individual who posts on the site.

Second, suits against individual gossipers — especially anonymous posters — are often unprofitable, especially if the poster has limited assets.

But despite some problems, a false light invasion of privacy claim is probably the most effective — and perhaps the only effective — tool available to challenge false or misleading gossip on the Internet that causes humiliation.

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1 Official JuicyCampus Blog, <http://juicycampus.blogspot.com/2009/02/juicy-shutdown.html> (February 4, 2009, 11:47 PST).

2 Posting of Danielle Citron to Concurring Opinions, http://www.concurringopinions.com/archives/2009/02/juicy_campus_on.html (February 5, 2009, 07:49 EST).

3 *Momah v. Bharti*, 144 Wn. App. 731, 739–40, 182 P.3d 455 (2008); *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 713 P.2d 736 (1986).

4 *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981).

5 See *Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 471, 722 P.2d 1295 (1986). Washington is one of at least 30 jurisdictions that have adopted the false light tort.

6 *Id.* at 470–71, citing Restatement (Second) of Torts § 652E (1977).

7 See generally, David A. Elder, *Privacy Torts*, § 4:1 (2002).

8 See *Morh v. Grant*, 153 Wn.2d 812, 823–24, 108 P.3d 768 (2005).

9 *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 787 (Ariz. 1989).

10 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 5:114 (2d ed. 2005).

11 *Larson v. Philadelphia Newspapers, Inc.*, 543 A.2d 1181, 1189 (Pa. 1988)

12 See e.g. *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935, 939 (Mass. App. Ct. 1979).

13 *Id.*

14 Nader v. General Motors Corp., 255 N.E.2d. 765, 772 (N.Y. 1970) (Breitel, J. concurring).

15 Sanders v. American Broadcasting Co., 85 Cal. Rptr. 2d. 909 (1999).

16 Fellows v. National Enquirer, Inc., 211 Cal. Rptr. 809 (Cal. App. 1985) (rev'd on other grounds).

17 47 U.S.C. § 230.

18 See, e.g., Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003), cert. denied, 541 U.S. 1085 (2004).