

YOU'VE GOT LIBEL: HOW THE CAN-SPAM ACT DELIVERS DEFAMATION LIABILITY TO SPAM-FIGHTERS AND WHY THE FIRST AMENDMENT SHOULD DELETE THE PROBLEM

INTRODUCTION

Mark Mumma operates Mummagraphics, Inc., an Internet service provider (ISP),¹ which hosts web pages, registers domain names, designs web pages and logos, and sets up computer servers.² After becoming frustrated with unwanted e-mails clogging his storage and bandwidth, he created a website called “Sue a Spammer.”³ On the site, Mumma announced companies and individuals who had sent him unsolicited commercial e-mails often referred to as “spam.”⁴ For each alleged spammer,⁵ Mumma posted on his site the offending spam⁶ and the correspondence between him and the alleged spammers in which he told them to take him off their e-mail lists.⁷ Mumma threatened lawsuits against the alleged spammers that did not immediately stop

¹ An Internet service provider offers access to the Internet for individuals and companies through its servers. See THE NEW DICTIONARY OF CULTURAL LITERACY 598 (E.D. Hirsch, Jr., et al. eds., 3d ed. 2002).

² Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348, 351 (4th Cir. 2006).

³ See SUEaSpammer.com, Home Page (2005), available at <http://web.archive.org/web/20050205152641/http://www.sueaspammer.com> (last visited Feb. 7, 2009) [hereinafter SUEaSpammer.com Home Page 2005]. The website Internet Archive Wayback Machine, <http://www.archive.org> (last visited Feb. 7, 2009), was utilized to access pertinent information because Mumma has changed and updated his website many times over the last four years. The Internet Archive Wayback Machine stores over 55 billion web pages from 1996 until a few months ago. Internet Archive Wayback Machine, <http://www.archive.org/about/faqs> (last visited Feb. 7, 2009). Over seventy-five versions of <http://www.sueaspammer.com> can be accessed. Internet Archive Wayback Machine, http://web.archive.org/web/*/http://www.sueaspammer.com (last visited Feb. 7, 2009).

⁴ See SUEaSpammer.com Home Page 2005, *supra* note 3. For discussion on the origination of the term “spam,” see *infra* Part I.A.

⁵ Mumma’s site included a “semi-important notice” that stated, “ALLEGEDLY: The defendant companies and individuals featured on this site are ‘legitimate businesspeople’ (or so they say . . .). All assertions herein are ALLEGED until proven in a court of law at some point in the very near future. Stay tuned to www.SUEaSpammer.com for complete details.” SUEaSpammer.com Home Page 2005, *supra* note 3.

⁶ See, e.g., E-mail from Cruise Deals (Feb. 9, 2005), <http://www.spamevidence.com/cruise.com/spam/text/Weekly%20Cruise%20E-deals.txt> (showing spam received from Cruise.com, which advertises cruise specials).

⁷ See, e.g., Transcript of Telephone Call Between Mark W. Mumma and Johnny Lawless (Jan. 19, 2005, 09:37 a.m. CDT), http://www.spamevidence.com/cruise.com/calls/Omega-World_Travel-01-19-2005-09-37am.pdf (transcript of phone call between Mumma and the legal representative of Cruise.com, in which the representative promises Mumma to remove him from its e-mail list).

sending him unwanted e-mails,⁸ invoking Oklahoma and federal anti-spam laws⁹ as the basis for the threatened suits.¹⁰

Mumma preferred suing spammers to other methods of trying to remove himself from their e-mail lists.¹¹ Opting out of e-mails by clicking on a link provided in the e-mail, he claimed, only leads to more spam because spammers sell their opt-out lists to other spammers.¹² Furthermore, Mumma claimed that if he spent ten seconds opting out of every unsolicited e-mail he received, he would spend twenty-three hours and forty-four minutes per day going through his spam folder and would have to hire three full-time employees to accomplish the feat.¹³ Additionally, attempting to reply directly to spam e-mails is futile most of the time because spammers often provide fraudulent “header” information concerning where the e-mail originates.¹⁴ Mumma believed lawsuits were the only way to send a message to spammers at large and to stop the flow of spam.¹⁵ Within the first two years of starting his proactive anti-spamming endeavors, Mumma obtained settlements from an entrepreneur hawking bumper stickers, the Dream Star Group, and CubCruiser.com.¹⁶

On December 29, 2004, Mumma received the first of many e-mail advertisements from Omega World Travel (Omega) promoting “e-deals” on its website, Cruise.com.¹⁷ Despite inaccurate header information on the e-deals, Mumma found the phone number for Omega and contacted a representative

⁸ *Id.*

⁹ Both state and federal laws prohibit the sending of mass-marketing and pornographic e-mails. *See, e.g., Controlling the Assault of Non-Solicited Pornography and Marketing Act*, 15 U.S.C. §§ 7701–7713 (2006); OKLA. STAT. tit. 15, § 776.1(A)(3) (2005).

¹⁰ *See* SUEaSpammer.com, *Lawsuits Filed by SUEaSpammer.com (2005)*, available at <http://web.archive.org/web/20050319061014/http://sueaspammer.com/lawsuits.html> (last visited Feb. 9, 2009).

¹¹ *See* SUEaSpammer.com, *Home Page (2004)*, available at <http://web.archive.org/web/20040803050633/http://www.sueaspammer.com/igotspammed.html> (last visited Feb. 9, 2009) [hereinafter SUEaSpammer.com Home Page 2004] (“The single biggest mistake most people make is attempting to stop the spam by opting out.”).

¹² *Id.*

¹³ Andy Greenberg, *Don't Call It Spam*, FORBES.COM, Feb. 22, 2007, http://www.forbes.com/2007/02/21/spam-lawsuit-marketing-tech-cx_ag_0222spam.html.

¹⁴ *See* SUEaSpammer.com Home Page 2004, *supra* note 11. For a discussion of header information, see *infra* Part I.B.4.

¹⁵ *See* SUEaSpammer.com Home Page 2004, *supra* note 11.

¹⁶ *See* SUEaSpammer.com Home Page 2005, *supra* note 3.

¹⁷ *See* SUEaSpammer.com, *Spam Offenders: Omega World Travel, Inc. (Feb. 8, 2005)*, <http://web.archive.org/web/20050219030013/sueaspammer.com/spammers/omega/> (last visited Feb. 9, 2009) [hereinafter SUEaSpammer.com, *Spam Offenders*].

who assured Mumma that Omega would remove him from its e-mail list.¹⁸ Mumma continued to receive e-mail advertisements from Omega and on January 27, 2005, he added Omega and Cruise.com to the “NEXT IN LINE TO BE SUED” section of his website.¹⁹ Before Mumma could sue Omega,²⁰ however, Omega sued him for defamation for calling Omega and its executives “spammers.”²¹ Mumma countersued Omega for violating both Oklahoma’s anti-spam statute²² and the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM or the Act).²³ Mumma alleged that the e-mails Omega sent to him violated state and federal law because they were unsolicited and contained incorrect header information.²⁴

The Fourth Circuit ruled that the e-mails Omega sent to Mumma did not violate CAN-SPAM.²⁵ The court also held that Mumma’s actions under state law were preempted by the federal act.²⁶ In the subsequent jury trial in the U.S. District Court for the Eastern District of Virginia (Alexandria Division), Mumma was found liable for defamation and was ordered to pay Omega \$2.5 million in damages.²⁷

In the jury trial, Judge Leonie Brinkema ruled that Mumma’s published statements—that the plaintiffs were spammers, sent spam, and violated various federal and state laws related to spam—were false.²⁸ Moreover, she ruled not only that accusing someone of violating CAN-SPAM is defamatory per se, but also that calling an individual or corporate entity a “spammer” is defamatory per se.²⁹ Judge Brinkema instructed the jury that if they found that Mumma

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Mumma received a total of twelve “spam” e-mails from Omega. SUEaSpammer.com, Spam Offenders, *supra* note 17.

²¹ Greenberg, *supra* note 13.

²² “It shall be unlawful for a person to initiate an electronic mail message that the sender knows, or has reason to know: . . . 3. Contains false, malicious, or misleading information which purposely or negligently injures a person . . .” OKLA. STAT. tit. 15, § 776.1(A)(3) (2005).

²³ 15 U.S.C. §§ 7701–7713 (2006); *see infra* Part I.B.1–2. *See generally* SUEaSpammer.com, Spam Offenders, *supra* note 17.

²⁴ Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348, 352 (4th Cir. 2006).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Transcript of Jury Trial at 464, Omega World Travel, Inc. v. Mummagraphics, Inc., No. 1:05cv122 (E.D. Va. Apr. 27, 2007) [hereinafter Omega Transcript].

²⁸ The Court also found that the particular statements published by the defendants—that the plaintiffs were spammers, sent spam, and violated various federal and state laws related to spam—were, in fact, false. *Id.* at 445.

²⁹ *Id.* at 444 (“In this case, the Court—that means me—has already found that labeling a person or a business as a spammer, stating that a person of a business engages in sending spam, and stating that a person

had acted negligently, even without malice, he should be found liable for libeling the plaintiffs.³⁰

Mumma's downfall was his reliance on the ambiguous and still novel CAN-SPAM. Now that spamming can be prosecuted criminally,³¹ Judge Brinkema interpreted the word "spammer" as asserting defamatory facts about the plaintiffs, unquestionably harming their reputations.³² Thus, CAN-SPAM actually created liability for two acts—sending out mass e-mails not in accordance with the Act's restrictions, and accusing someone of doing so. More importantly, the Act has potentially created liability for labeling businesses and individuals as spammers, even when the labeler did not accuse the alleged spammers of violating any laws.³³ Unfortunately, the weaknesses of CAN-SPAM,³⁴ combined with alleged spammers' superior litigating abilities,³⁵ result in a statute that provides little guidance and great liability for people like Mumma who try to warn the public about perceived spam threats.³⁶ Much has been written on the shortcomings of CAN-SPAM in fighting spam.³⁷ This Comment expands on existing scholarship by illustrating how the Act, by

or a business has violated various state and federal laws related to spam prejudices that person or business in their profession or trade and is therefore defamatory per se.”).

³⁰ *Id.* at 445 (“[The] key issues for you to decide are: Did one or both of the defendants know that the statements at issue were false when they were made, or believing them to be true, did the defendants lack reasonable grounds for such belief or act negligently in failing to ascertain the facts on which the false statements were based?”).

³¹ See 15 U.S.C. § 7705 (2006).

³² Omega Transcript, *supra* note 28, at 445. Similarly, judges have held that calling someone a homosexual is defamatory partly because it can insinuate that the labeled individual violates state sodomy laws. See Plumley v. Landmark Chevrolet, Inc., 122 F.3d 308, 310–11 (5th Cir. 1997) (finding that calling someone a homosexual is slander per se).

³³ See e360 Insight v. Spamhaus Project, 500 F.3d 594, 595–98 (7th Cir. 2007) (finding an Internet watchdog group, which maintained a list of known “spammers,” liable for defamation in a default judgment). For more discussion of Spamhaus, see *infra* notes 319–22 and accompanying text.

³⁴ See, e.g., Jameel Harb, White Buffalo Ventures, LLC v. University of Texas at Austin: *The CAN-SPAM Act & The Limitations of Legislative Spam Controls*, 21 BERKELEY TECH. L.J. 531 (2006) (criticizing CAN-SPAM's inability to fight spam due to spammers' ability to use the Act as a litigation tool to circumvent state laws); Daniel L. Mayer, *Attacking a Windmill: Why the CAN SPAM Act Is a Futile Waste of Time and Money*, 31 J. LEGIS. 177 (2004) (criticizing CAN-SPAM as “a superfluous, ineffective law”); Katherine Wong, *The Future of Spam Litigation After Omega World Travel v. Mummagraphics*, 20 HARV. J.L. & TECH. 459 (2007) (criticizing the Fourth Circuit's narrow interpretation of the already weak requirements of the Act).

³⁵ Sending spam is exceedingly cheap, while the arrangements to advertise the legitimate and fraudulent goods and services can be extremely lucrative. See Eric Bangeman, *Spam King May Rule Prison Cell for 11 Years After Feds Nail Him*, ARS TECHNICA, June 12, 2007, <http://arstechnica.com/news.ars/post/20070612-spam-king-may-rule-prison-cell-for-11-years-after-feds-nail-him.html> (“Moeller was caught bragging to the informant about the money he was making: as much as \$40,000 per week.”).

³⁶ See, e.g., Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348 (4th Cir. 2006).

³⁷ See *supra* note 34.

creating defamation liability for accusing people of spamming, has backfired on those it was meant to defend and why the First Amendment should protect spam-fighters.

The purpose of this Comment is not to vindicate Mark Mumma or support his actions. Rather, this Comment illustrates how the limitations on libel laws mandated by the Constitution should protect ISP owners, business owners, and frustrated e-mail recipients who exercise their First Amendment rights to discuss the very real and very serious problems that spam poses. This constitutional protection should extend to labeling entities as spammers. Part I explores the origination and common uses of the words "spam" and "spammer," the dangers that spam poses, and the passage of CAN-SPAM. Part II traces the development of constitutional limits to libel laws. Part III analyzes what facts the word "spammer" conveys and the problems with pinning down a legal definition for "spammer" in conjunction with CAN-SPAM. Last, Part IV uses the facts of *Omega* to explore how the Constitution should protect the public's accusations that certain companies or individuals are spammers.

I. SPAM AND THE SPAMMING SPAMMERS THAT SPAM

Prior to the widespread use of the Internet, the word "spam" most likely conjured up thoughts of Hormel's canned meat product.³⁸ In recent years, however, the word has taken on a completely new meaning.³⁹ Upon receiving an unwanted e-mail from a company hawking its products or services, the average Internet user would probably consider the e-mail to be "spam" and report it to his ISP as such or, more likely, delete it or move it to his personal spam filter.⁴⁰ This Part traces the development of the word "spam" in relation to Internet speech and explores the uses and effects of spam. This Part also analyzes Congress's attempts to curb spam and the definitional and legal mess Congress created by passing CAN-SPAM without including definitions for "spam" or "spammer."⁴¹

³⁸ See Welcome to SPAM.com, <http://www.spam.com> (last visited Oct. 18, 2008).

³⁹ DAVID CRYSTAL, LANGUAGE AND THE INTERNET 53 (2001).

⁴⁰ See generally David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. REV. 325 (2001) (discussing problems created by spam).

⁴¹ See generally CRYSTAL, *supra* note 39, at 53–55 (noting various types of spam).

A. *Original Spam*

Internet users utilize the term “spam” to refer to nearly all forms of excessive Internet speech, including chatroom discussions, message board postings, computer game dialogue, and e-mails.⁴² In many instances, calling someone a “spammer” would be construed as simply accusing that person of exhibiting poor “netiquette.”⁴³ Since 2003, however, calling someone a “spammer” could also be interpreted as accusing him or her of violating CAN-SPAM.⁴⁴ Using the title of this Part as an example, “spam” is a highly versatile word because it originated as slang and gradually became a common expression in American vernacular.⁴⁵ People can “spam” others by sending them large amounts of undesired text,⁴⁶ people can send “spam,”⁴⁷ and a person can be a “spammer” by spamming spam.⁴⁸

1. *From Meat to E-mail—What Is Spam?*

Generally, spamming refers to the transmission of unwanted messages.⁴⁹ “Spam” was first applied to speech in a *Monty Python* sketch from 1970 in which all the dishes at a restaurant contained Spam (the Hormel meat product).⁵⁰ The waitress in the sketch presented such dishes as the “egg, bacon, and spam,” the “spam, bacon sausage, and spam,” and the “spam, spam, spam, and spam.”⁵¹ Naturally, the interchange between the patrons and the waitress was accompanied by Vikings chanting the word “spam.”⁵²

Early users of the Internet adopted the *Monty Python* Vikings’ chanting the word “spam” and applied it to virtual speech.⁵³ Internet users first employed “spam” in instances where a single message was sent to many recipients, such as an advertisement sent via e-mail to everyone on a mailing list.⁵⁴ “Spam” was later used to describe the sending of many messages to one user, such as

⁴² *Id.* at 52–53.

⁴³ “Netiquette” refers to proper etiquette when communicating via the Internet. *Id.* at 71–73.

⁴⁴ *See infra* Part I.B.1–2.

⁴⁵ *See* CRYSTAL, *supra* note 39, at 53–54 (discussing the origins and development of “spam”).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 53.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 53–54.

⁵⁴ *Id.* at 54.

when a group of people electronically lobby a politician or attack a company's policy.⁵⁵ Nowadays, Internet users are victims of both kinds: multiple e-mails from large advertising operations utilizing the exceedingly cheap medium of e-mail to contact enormous groups of people. Spam can refer to "any unwanted e-mail,"⁵⁶ "unsolicited bulk e-mail,"⁵⁷ or "unsolicited commercial e-mail,"⁵⁸ to name but a few common variations. Spam has grown to induce ire in e-mail recipients worldwide due to the time and money required to deal with the vast amounts of unwanted, mass-distributed bulk commercial e-mails cluttering inboxes, bandwidth, and servers.⁵⁹

2. *Information Superhighwaymen—Who Sends Spam and Why?*

According to legend, the first spam was sent by two immigration lawyers advertising their services to entire newsgroups.⁶⁰ Irked recipients of the e-mails sent "a flood" of complaints to various organizations in response,⁶¹ resulting in the disbarment of one of the lawyers for his unacceptable advertising practice.⁶² The services the lawyers advertised in their spam were legitimate.⁶³ However, their novel method of sending out mass-distributed e-mails has since been emulated and employed by countless others, including large advertising operations, entrepreneurs, and con men.⁶⁴

Today, spam accounts for nearly 80% of the approximately 57 billion e-mails transmitted through the Internet each day.⁶⁵ Moreover, spam costs Americans about \$10 billion each year in lost productivity.⁶⁶ ISPs such as

⁵⁵ *Id.* This is an instance where spamming does not have a negative connotation, and instead serves a legitimate purpose.

⁵⁶ ALAN SCHWARTZ & SIMSON GARFINKEL, STOPPING SPAM 12 (1998).

⁵⁷ Sorkin, *supra* note 40, at 328.

⁵⁸ The Federal Trade Commission's definition is available at <http://www.ftc.gov/spam/> (last visited Dec. 4, 2008).

⁵⁹ See generally Sorkin, *supra* note 40.

⁶⁰ LAURENCE A. CANTER & MARTHA SIEGEL, HOW TO MAKE A FORTUNE ON THE INFORMATION SUPERHIGHWAY 21–22 (1995).

⁶¹ Ray Everett-Church, *The Spam That Started It All*, WIRED, Apr. 13, 1999, available at <http://www.wired.com/politics/law/news/1999/04/19098>.

⁶² Ashley Craddock, *Spamming Lawyer Disbarred*, WIRED, July 10, 1997, available at <http://www.wired.com/politics/law/news/1997/07/5060>.

⁶³ *Id.*

⁶⁴ See Bob Sullivan, *New Virus Spread Through Burst of Spam*, MSNBC, Aug. 9, 2004, <http://www.msnbc.msn.com/id/5652313/> (discussing the spread of computer viruses through massive amounts of spamming).

⁶⁵ Adam Hamel, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-Mail?*, 39 NEW ENG. L. REV. 961, 962 (2005).

⁶⁶ *Id.* at 967.

Mark Mumma are hit especially hard because either they or their customers bear the cost of spam transmissions.⁶⁷ Because spam is such an irritating burden to ISPs and their customers, ISPs often spend vast amounts of money and time expanding their networks and systems to deal with the large quantities of spam, implementing filtering mechanisms in their e-mail programs as a way to block spam, and hiring personnel to field subscribers' spam-related complaints.⁶⁸

The multitude of fraudulent schemes, viruses, and pornographic materials distributed via spam are even worse than the loss of money and productivity due to spam.⁶⁹ Spammers can “phish” sensitive information from unsuspecting victims by sending out mass e-mails posing as banks or credit card companies and requesting social security numbers, pin numbers, or passwords under the guise of updating systems or, ironically, implementing security and antifraud measures.⁷⁰ Though the elderly are especially at risk, all e-mail users—even the web savvy—can fall victim to spam schemes due to the ability of anonymous spammers to forge misleading header information in e-mails.⁷¹

Header information refers to “the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.”⁷² Forged header information is utilized not only by spamming scammers, but also by legitimate businesses attempting to deflect spam-related complaints by using false return e-mail addresses in the message headers.⁷³ Similarly, some spammers employ misleading header information as well as deceptive subject lines to induce recipients, including minors and people at work, to open pornographic e-mail advertisements depicting graphic sexual acts.⁷⁴

⁶⁷ “Spam is junk mail that arrives ‘postage-due.’” Lily Zhang, *The CAN-SPAM Act: An Insufficient Response to the Growing Spam Problem*, 20 BERKELEY TECH. L.J. 301, 305 (2005).

⁶⁸ *Id.* at 305–06.

⁶⁹ See Sullivan, *supra* note 64.

⁷⁰ See Brian Krebs, *Phishing Schemes Scar Victims*, WASHINGTONPOST.COM, Nov. 18, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A59349-2004Nov18.html> (“Phishing scams usually start with an e-mail that looks like it comes from a bank, Internet service provider or e-commerce company.”).

⁷¹ See Hamel, *supra* note 65, at 970.

⁷² 15 U.S.C. § 7702(8) (2006).

⁷³ See Sorkin, *supra* note 40, at 340.

⁷⁴ See Hamel, *supra* note 65, at 971.

Spammers can also cripple entire computer networks, take over computers, and destroy vast amounts of important data by sending out seemingly innocuous spam e-mails with computer viruses attached.⁷⁵ Again, false header information and deceptive subject lines induce the unsuspecting recipient to open the e-mail, whereupon a virus can immediately infiltrate the victim's computer and network.⁷⁶ Most people should and do err on the side of caution and immediately delete any suspected spam because, in most cases, spam filters cannot catch all harmful e-mails and there is no way to tell what is waiting in an e-mail.⁷⁷

B. *Congressionally Canned Spam*

State governments attempted to fight spam, and the fraudulent schemes and viruses that spammers can perpetrate and disseminate, by enacting legislation that outlawed common spamming practices such as e-mailing "false, malicious, or misleading information which purposely or negligently injures a person."⁷⁸ By 2003, thirty-six states had enacted laws directly regulating spam.⁷⁹ Eventually, the federal government addressed the growing problem by both criminalizing and creating civil liability for the more pernicious forms of spam, through the enactment of CAN-SPAM.⁸⁰

Congress found that the convenience and efficiency of e-mail are threatened by the rapid growth in the volume of unsolicited commercial e-mail; that the growth in unsolicited commercial e-mail imposes significant monetary costs on ISPs and businesses; and that many senders of unsolicited commercial e-mail purposefully disguise the source of such mail.⁸¹ Furthermore, "[s]pam has become the method of choice for those who distribute pornography, perpetrate fraudulent schemes, and introduce viruses, worms, and Trojan horses into personal and business computer systems."⁸² However, Congress's attempt to create uniform commercial e-mail regulations has done little to

⁷⁵ See Sullivan, *supra* note 64.

⁷⁶ *Id.*

⁷⁷ See Brendan I. Koerner, *Why Things Suck: Spam Filters*, WIRED, Jan. 18, 2008, available at http://www.sendio.com/other_resources/articles/Article-wired-080118.pdf ("[I]t's simply not possible to update filtering software frequently enough to catch all of the spammers' multifarious innovations . . .").

⁷⁸ OKLA. STAT. tit. 15, § 776.1(A)(3) (2005).

⁷⁹ Roger Allan Ford, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 363 (2005).

⁸⁰ See 15 U.S.C. §§ 7701–7713 (2006).

⁸¹ *Id.* § 7701.

⁸² *Id.* § 7703(c)(1).

relieve frustrated ISPs, businesses, and e-mail recipients nationwide of their spam woes.⁸³

1. CAN-SPAM's Recipe

CAN-SPAM directly prohibits forged headers,⁸⁴ deceptive subject lines,⁸⁵ and the absence of a return address⁸⁶ in "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service."⁸⁷ The Act also prohibits the continued sending of commercial e-mails to a recipient who has objected to receiving those e-mails.⁸⁸ Although the Act contains no specific prohibitions against bulk e-mails, much to the chagrin of many anti-spam advocates,⁸⁹ it does prohibit sending e-mails to addresses that were obtained through mass address gathering or generation methods.⁹⁰

In addition to criminalizing certain practices of spammers,⁹¹ Congress also granted states attorneys general and ISP owners the power to bring civil suits against violators of CAN-SPAM.⁹² Injunctive relief, monetary damages, and statutory damages are available to ISPs who initiate civil suits against CAN-SPAM violators.⁹³ However, "ISPs face disincentives to bring anti-spam suits since litigation costs are high [and] monetary recovery post-judgment is uncertain."⁹⁴ Moreover, ISPs, as in Mumma's case, now face the additional peril of retaliatory defamation suits.⁹⁵

⁸³ See *infra* Part I.C.

⁸⁴ 15 U.S.C. § 7704(a)(1).

⁸⁵ *Id.* § 7704(a)(2).

⁸⁶ *Id.* § 7704(a)(3).

⁸⁷ *Id.* § 7702(2)(A) (defining "commercial e-mail").

⁸⁸ *Id.* § 7704(a)(4).

⁸⁹ See, e.g., Chris Ulbrich, *Can Spam? Or a New Can of Worms?*, WIRED, Dec. 22, 2003, available at <http://www.wired.com/politics/law/news/2003/12/61679> ("[Many] antispam activists consider all unsolicited bulk e-mail spam, regardless of its origin or content. . . . Though the CAN-SPAM Act does prohibit certain notorious spamming tactics such as spoofing addresses, faking subject lines and ignoring recipients' opt-out requests, it doesn't ban unsolicited commercial e-mail outright.").

⁹⁰ 15 U.S.C. § 7704(b)(1).

⁹¹ *Id.* § 7706(b).

⁹² *Id.* § 7706(f)(1).

⁹³ *Id.* § 7706(f).

⁹⁴ Dominique-Chantale Alepin, "Opting-Out": A Technical, Legal and Practical Look at the CAN-Spam Act of 2003, 28 COLUM. J.L. & ARTS 41, 67 (2004).

⁹⁵ See *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 352 (4th Cir. 2006).

2. *CAN-SPAM's Missing Ingredients*

Congress left some key terms out of the definitional section of CAN-SPAM, such as definitions for “spam” and “spammer,” despite including “spam” as an acronym in the name of the Act.⁹⁶ By failing to define spam in the Act, Congress passed up the opportunity to codify a legal definition of spam, leaving it instead to the public vernacular.⁹⁷ This congressional silence has resulted in a definitional and connotative mess: some spam is fraudulent while other forms of spam are legitimate, and some methods of spamming may be illegal while others may be perfectly lawful.⁹⁸

Congress not only failed to nail down a legal definition for spam, but it also left untouched a large amount of what anti-spam advocates consider spam.⁹⁹ Some critics argue that Congress structured CAN-SPAM around the marketing industry's definition of spam by banning only spam that is pornographic, misrepresentative, or fraudulent, while essentially legalizing mass-distributed commercial e-mail that complies with the Act's requirements.¹⁰⁰ Many experts had argued that only a complete ban on bulk unsolicited commercial e-mail would effectively curb the spam problem.¹⁰¹ Unfortunately, CAN-SPAM only prohibits certain methods of gathering e-mail addresses and not the actual sending of mass e-mails.¹⁰²

3. *CAN-SPAM's Preemption Clause—A Tool for Spammers*

CAN-SPAM also contains a provision expressly preempting state laws.¹⁰³ Unfortunately, this preemption further compounds the definitional problems

⁹⁶ 15 U.S.C. § 7702.

⁹⁷ Various dictionary definitions of “spam” include the following: “email that has not been requested, sent to large numbers of internet users,” OXFORD DICTIONARY AND THESAURUS 992 (2d ed. 2007); “one or a series of uninvited e-mail messages advertising money-making schemes, pornography, or sales of any kind,” RICHARD A. SPEARS, NTC'S DICTIONARY OF AMERICAN SLANG AND COLLOQUIAL EXPRESSIONS 391 (3d ed. 2000); “Unsolicited commercial e-mail,” BLACK'S LAW DICTIONARY 1430 (Bryan A. Gardner ed., 8th ed. 2003); “Unsolicited e-mail, often of a commercial nature, sent indiscriminately to multiple mailing lists, individuals, or newsgroups; junk e-mail,” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1665 (4th ed. 2000); and “unwanted e-mail,” Dictionary.com, <http://dictionary.reference.com/browse/spam> (last visited Nov. 8, 2008).

⁹⁸ See generally 15 U.S.C. §§ 7701–7713.

⁹⁹ W. Parker Baxter, *Has Spam Been Canned? Consumers, Marketers, and the Making of the CAN-SPAM Act of 2003*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 163, 172 (2005).

¹⁰⁰ *Id.*

¹⁰¹ Ford, *supra* note 79, at 361.

¹⁰² 15 U.S.C. § 7704(b)(1).

¹⁰³ *Id.* § 7707(b).

created by the Act.¹⁰⁴ *White Buffalo Ventures v. University of Texas* was the first case to consider the preemption section of CAN-SPAM.¹⁰⁵ *White Buffalo Ventures* sought to enjoin the University of Texas (UT), both a state actor and an ISP,¹⁰⁶ from blocking unsolicited commercial e-mails sent by *White Buffalo Ventures* to UT students.¹⁰⁷ *White Buffalo Ventures* claimed that the e-mails UT blocked were not prohibited under CAN-SPAM and that the Act preempted UT's anti-spam policy.¹⁰⁸ The Fifth Circuit held that UT's anti-spam policy was not preempted by the Act and denied the injunction.¹⁰⁹

CAN-SPAM was enacted to combat spam.¹¹⁰ However, the fact that *White Buffalo Ventures*, the plaintiff and a sender of bulk unsolicited commercial e-mails, tried to use CAN-SPAM as a tool to protect its spamming illustrates the failures of the legislation.¹¹¹ Moreover, the Fifth Circuit's recognition that ISPs can define and block spam according to their customers' best interests and not solely based on what CAN-SPAM prohibits¹¹² further muddles any official definition for "spam."

While *White Buffalo Ventures* pioneered the utilization of CAN-SPAM's preemption clause as a litigation tool for spammers, *Omega* succeeded where *White Buffalo Ventures* failed.¹¹³ *Mumma* originally accused *Omega* and its executives of spamming in violation of Oklahoma anti-spam statutes and CAN-SPAM.¹¹⁴ Instead of seeking a declaratory judgment that its activities were lawful, *Omega* sued *Mumma* for millions in a libel suit.¹¹⁵ Generally, to prevail in a libel suit the plaintiff must prove the defendant's reputation-damaging communication was false.¹¹⁶ Before Judge Brinkema ruled that *Mumma's* assertions were false,¹¹⁷ the Fourth Circuit reviewed her initial grant

¹⁰⁴ See, e.g., Ford, *supra* note 79, at 363.

¹⁰⁵ Harb, *supra* note 34, at 538.

¹⁰⁶ "UT provides, free of charge, Internet access and email addresses to faculty, staff, and students at the domain 'utexas.edu.'" *White Buffalo Ventures, LLC v. Univ. of Tex.*, 420 F.3d 366, 369 (5th Cir. 2005).

¹⁰⁷ UT had a policy of blocking incoming, unsolicited commercial e-mails. *Id.* at 368-69.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 369.

¹¹⁰ See 15 U.S.C. § 7706(b) (2006).

¹¹¹ See Harb, *supra* note 34, at 545.

¹¹² See *White Buffalo Ventures*, 420 F.3d at 368.

¹¹³ See *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 353 (4th Cir. 2006).

¹¹⁴ See *supra* note 19 and accompanying text.

¹¹⁵ Greenberg, *supra* note 13.

¹¹⁶ *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). For more discussion of libel, see *infra* Parts II-III.

¹¹⁷ See *supra* note 28 and accompanying text.

of summary judgment in favor of Omega on all of Mumma's counterclaims that Omega had violated various anti-spam statutes.¹¹⁸

Judge Wilkinson, writing the opinion for the Fourth Circuit, held that CAN-SPAM's requirement that header information be "materially false"¹¹⁹ preempted the Oklahoma statute that prohibits merely "false"¹²⁰ information.¹²¹ *Omega* was the first appellate decision construing the Act's preemption clause regarding header errors.¹²² In determining that CAN-SPAM preempted the Oklahoma anti-spam statute,¹²³ the Fourth Circuit not only affirmed summary judgment against Mumma's counterclaims, but also eliminated an authoritative source Mumma could point to that supported his allegedly libelous assertions that Omega and its executives were spammers.¹²⁴

4. *When False Headers Are Not Materially False Headers*

The Fourth Circuit, in *Omega*, interpreted what constitutes "materially false" header information under CAN-SPAM.¹²⁵ Mumma pointed out that the header information in the e-mails Omega sent him contained Internet domain names with which neither Omega nor its subsidiary Cruise.com were affiliated and a return address no longer used by either company.¹²⁶ Mumma therefore claimed that the header information was materially false because the e-mails' headers falsely indicated that the e-mails were coming from sources that did not actually send them.¹²⁷

In determining if the header information was materially false, Judge Wilkinson looked not only at the header information but also at the body of the e-mail.¹²⁸ He then determined that the header information was not materially false because the body of the e-mail contained information that identified the location and identity of the company.¹²⁹ However, nowhere in CAN-SPAM

¹¹⁸ *Omega World Travel*, 469 F.3d at 350.

¹¹⁹ 15 U.S.C. § 7704(a) (2006).

¹²⁰ OKLA. STAT. tit. 15, § 776.1(A)(3) (2005).

¹²¹ *Omega World Travel*, 469 F.3d at 355.

¹²² Wong, *supra* note 34, at 476.

¹²³ *Omega World Travel*, 469 F.3d at 350.

¹²⁴ See *supra* note 28 and accompanying text.

¹²⁵ *Omega World Travel*, 469 F.3d at 357–59.

¹²⁶ *Id.* at 351. The false domain name and out-of-use return address were FLBroadcast.net and cruisedeals@cruise.com, respectively. *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 358.

¹²⁹ *Id.*

does it suggest that header information includes the body of the e-mail.¹³⁰ Furthermore, the purpose of requiring that accurate headers be used in commercial e-mails is to enable recipients to discard e-mails immediately because viruses and other harmful code can be activated upon the mere opening of an e-mail.¹³¹ Accurate headers also enable individuals and ISPs to effectively filter unwanted spam.¹³² Accordingly, Mumma's belief that "materially false headers" only pertained to header information was reasonable, albeit apparently incorrect, when he accused Omega of violating the Act.

C. *The Post-CAN-SPAM Spamscape*

In 2005, one year after the passage of CAN-SPAM, unsolicited bulk e-mail increased by 60%.¹³³ To make matters worse, spammers are constantly figuring out crafty methods with which to bypass spam filters¹³⁴ and anti-spammer blacklists.¹³⁵ Some spammers send out viruses that infect the host computer and then "zombify" it, sending out spam on the spammer's behalf and creating "bot-nets" that foil blacklists of known spammers.¹³⁶ While these developments are enormously frustrating to ISPs, businesses, and e-mail recipients, many of the new spamming methods that fool anti-spam technologies do not run afoul of CAN-SPAM.¹³⁷

Scholars have attributed spam's growth after the passage of CAN-SPAM to the Act's legitimization and legalization of most spammed messages.¹³⁸ Moreover,

the two sides in the debate over the best way to fight spam continue to use two vastly divergent definitions of what spam even is. The marketing industry argues that spam should only be defined to include fraudulent or misleading e-mail while consumer advocates

¹³⁰ Wong, *supra* note 34, at 474.

¹³¹ *Id.* at 475.

¹³² *Id.*

¹³³ Tom Zeller Jr., *Law Barring Junk E-Mail Allows a Flood Instead*, N.Y. TIMES, Feb. 1, 2005, at A1.

¹³⁴ Some spammers have started to put their messages in images embedded into e-mails, which filters cannot scan. Brad Stone, *Spam Doubles, Finding New Ways to Deliver Itself*, N.Y. TIMES, Dec. 6, 2006, at A1.

¹³⁵ *See id.* at C13; *see also* e360 Insight v. Spamhaus Project, 500 F.3d 594, 595–98 (7th Cir. 2007) (noting that spammers are also avoiding anti-spammer blacklists by suing the creators of such lists for defamation). *See infra* Part IV.B.

¹³⁶ Stone, *supra* note 134, at C13.

¹³⁷ *Id.* at A1.

¹³⁸ *See* Ford, *supra* note 79, at 381.

favor a broader definition encompassing all unsolicited commercial e-mail.¹³⁹

With such contradictory definitions and connotations of spam used by politicians, judges, government agencies, lobbyists, marketers, ISPs, businesses, consumers, anti-spam crusaders, and laypeople, calling someone a “spammer” cannot connote anything more than that individual’s perception of the word. More importantly, considering the economic problems, threats to computers, and general frustration that spam delivers, the discussion of spam and of spammers should be constitutionally protected speech.¹⁴⁰

II. THE ESTABLISHMENT OF CONSTITUTIONAL LIMITS TO LIBEL LAWS

Before analyzing the potential defamation liability created by labeling people and companies as spammers, it is necessary to understand how, why, and under what circumstances constitutional limits to libel developed. Section A provides a brief synopsis of libel. Section B then explores the Supreme Court’s interpretation of the intersection of the First Amendment and libel in the seminal case of *New York Times v. Sullivan* and its progeny.

A. *Libel*

The law of defamation embodies the notion that individuals should remain free from false, injurious attacks to their reputation.¹⁴¹ Generally, libel encompasses written defamatory statements while slander encompasses spoken defamation.¹⁴² Early English libel laws were instituted to criminalize writing that brought disrepute to the state, to established religion, or to any individual likely to “be provoked to a breach of the peace because of the words.”¹⁴³ The ratification of the First Amendment and the massive public backlash to the Sedition Act of 1798 helped bury the criminalization of libelous criticism in the United States.¹⁴⁴

Since the early days of the Republic, libel has shifted from criminal penalties to civil remedies.¹⁴⁵ Generally, the tort of libel consists of a false and

¹³⁹ Baxter, *supra* note 99, at 176–77.

¹⁴⁰ *See infra* Part III.

¹⁴¹ Fairbanks Publ’g Co. v. Francisco, 390 P.2d 784, 793 (Alaska 1964).

¹⁴² *Whitby v. Assocs. Disc. Corp.*, 207 N.E.2d 482, 484 (Ill. App. Ct. 1965).

¹⁴³ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 151 (1967).

¹⁴⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–76 (1964).

¹⁴⁵ *Curtis Publ’g*, 388 U.S. at 151.

unprivileged publication that harms the plaintiff's reputation, though the specific elements and remedies vary from state to state.¹⁴⁶ State libel laws remained undisturbed by constitutional review until the seminal case of *New York Times v. Sullivan* in 1964.¹⁴⁷

B. *Sullivan and Its Progeny*

Media vastly different from the print advertisements and newspaper and magazine articles contemplated in the cases discussed in this section now occupy the public sphere. Therefore, to understand where criticism of spam fits into constitutional limitations on libel laws, it is necessary to delve into the public policy considerations and constitutional underpinnings that drove these decisions. First, this section delineates the different classes of libel plaintiffs the Supreme Court has created and the rationales for demarcating those categories. Next, this section analyzes the Court's efforts to reconcile states' interests against the freedom of speech and the freedom of the press mandated by the First Amendment. Last, this section explores the level of intent each category of defamed plaintiff must prove the defendant possessed and the rationales and constitutional influence behind the standards the Court instituted.

1. *Public Officials, Public Figures, and Private Citizens*

The Supreme Court has grouped libel plaintiffs into three distinct classes—public officials, public figures, and private citizens—and has set different levels of intent that each class must prove the defendant possessed in order for the plaintiff to recover in the defamation suit. In *New York Times v. Sullivan*, the Court ruled that the strict liability applied by Alabama state courts¹⁴⁸ ran afoul of the First¹⁴⁹ and Fourteenth¹⁵⁰ Amendments.¹⁵¹ An elected city commissioner brought a libel action against the *New York Times* and the

¹⁴⁶ See *Stablein v. Schuster*, 455 N.W.2d 315, 317 (Mich. Ct. App. 1990); *Tindall v. Konitz Contracting, Inc.*, 783 P.2d 1376, 1382 (Mont. 1989).

¹⁴⁷ 376 U.S. 254 (1964).

¹⁴⁸ The libelous per se rule utilized by the Alabama Supreme Court allowed a defendant to be found guilty of libel if he published false allegations that injured a person's professional reputation, regardless of the defendant's intent. See *Sullivan*, 376 U.S. at 263.

¹⁴⁹ The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ." U.S. CONST. amend I.

¹⁵⁰ Section 1 of the Fourteenth Amendment extends the rights protected in the Constitution to state action. U.S. CONST. amend XIV, § 1.

¹⁵¹ *Sullivan*, 376 U.S. at 254.

purchasers of a paid advertisement that criticized his official conduct.¹⁵² Justice Brennan, writing for the majority, declared that the advertisement purchased by the defendants¹⁵³ did not forfeit its constitutional protection despite the falsity of some of its factual statements¹⁵⁴ and the alleged defamation of the respondent.¹⁵⁵ The Court's decision was rooted in the notion that allowing a civil action brought by a public official against a critic was far too similar in nature to criminalizing criticism with sanctions or fines.¹⁵⁶ Therefore, state-applied strict liability for libelous criticism of a public official was constitutionally deficient.¹⁵⁷ The Court required actual malice on the part of the defendant.¹⁵⁸

Five years later, in *Curtis Publishing v. Butts*, the Supreme Court applied the heightened-fault standard¹⁵⁹ to public figures alleging libel.¹⁶⁰ Justice Harlan, writing for the plurality, reasoned that the public interest in the news stories at issue¹⁶¹ was tantamount to the public interest in the materials and expression protected in *Sullivan*.¹⁶² In the first of the two consolidated cases decided in *Curtis Publishing*, an athletic director of a large state university, Butts, sued a magazine for libel for accusing him of fixing a football game.¹⁶³ In the second case, *Associated Press v. Walker*, a political demonstrator, Walker, sued the Associated Press for reporting that he incited a riot.¹⁶⁴ Justice

¹⁵² *Id.* at 264. The advertisement claimed the commissioner had been complicit in numerous civil rights violations. *Id.*

¹⁵³ Respondent city commissioner sued the *New York Times* and sponsors of a paid advertisement that solicited financial aid for the Civil Rights movement by describing injustices perpetrated against civil rights demonstrators in Alabama. *Id.* at 256–61.

¹⁵⁴ Several factual statements in the article were uncontrovertibly false or exaggerated, such as details about songs civil rights demonstrators sang, retaliatory actions used by Alabama police, and the number of times Dr. Martin Luther King, Jr. had been arrested. *Id.* at 256–60.

¹⁵⁵ *Id.* at 271.

¹⁵⁶ *Id.* at 277.

¹⁵⁷ *Id.* at 264.

¹⁵⁸ *Id.*; see *infra* Part II.B.2.

¹⁵⁹ The actual malice standard introduced in *Sullivan* requires plaintiffs to prove that the allegedly libelous statements were made with knowledge that they are false or with reckless disregard for whether they were false. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 134 (1967); see *infra* Part II.B.2.

¹⁶⁰ *Curtis Publ'g*, 388 U.S. at 155–57.

¹⁶¹ The Supreme Court decision in *Curtis Publishing* consolidated two cases, *Curtis Publishing v. Butts* and *Associated Press v. Walker*. *id.* at 135–45.

¹⁶² *Id.* at 149 (“The dissemination of the individual’s opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an ‘unalienable right’ that ‘governments are instituted among men to secure.’”).

¹⁶³ *Id.* at 135.

¹⁶⁴ *Id.* at 140.

Harlan concluded that both Butts and Walker qualified as public figures.¹⁶⁵ Butts attained his status by his position alone and Walker by his purposeful activity.¹⁶⁶ Though “these cases cannot be analogized to seditious libel prosecutions,” as in *Sullivan*,¹⁶⁷ the strong speech and press interest in publishing information on public issues such as fixing a college football game or inciting a riot paralleled the interest in publishing political criticism.¹⁶⁸ Justice Harlan argued for a lesser standard than actual malice, promulgating that a public figure should have to prove that the defendant engaged in “highly unreasonable conduct” or “an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”¹⁶⁹ However, five Justices rejected the lesser standard and asserted that public figures cannot recover for defamation unless they prove that the defendant acted with actual malice.¹⁷⁰

The Supreme Court next turned to the extent of constitutional privilege for publishers against liability for defamation of a private citizen.¹⁷¹ In *Gertz v. Robert Welch, Inc.*, the plaintiff, an attorney who had represented a client in a civil suit against a police officer, sued a magazine publisher for printing an article accusing him of being part of a communist plot to harass the police.¹⁷² Justice Powell held that the plaintiff did nothing to “thrust himself into the vortex of the public issue,” despite having played a role, and could not be considered a public figure.¹⁷³ Moreover, states have a significant, legitimate interest in compensating private individuals for wrongful injury to their reputation.¹⁷⁴ The correct standard of fault for defamation when brought by a private citizen was therefore at the very least negligence.¹⁷⁵

¹⁶⁵ *Id.* at 154.

¹⁶⁶ *Id.* at 155; *see infra* Part II.B.1.b.

¹⁶⁷ *Curtis Publ'g*, 388 U.S. at 146.

¹⁶⁸ *Id.* at 160.

¹⁶⁹ *Id.* at 155; *see infra* Part II.B.2.

¹⁷⁰ *See Curtis Publ'g*, 388 U.S. at 163 (Warren, C.J., Black & Brennan, JJ., concurring) (asserting that there is no logical, legal, or constitutional basis for differentiating between public officials and public figures with similar, albeit uneven, standards of fault); *id.* at 172 (Black & Brennan, JJ., dissenting) (arguing for a stronger standard, yet dissenting because the plurality upheld liability for Curtis Publishing); *id.* at 173 (Brennan & White, JJ., concurring) (criticizing lower court for authorizing jury to award punitive damages even though the jury found the *Post* had relied on information in good faith).

¹⁷¹ *See generally* *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 323 (1974).

¹⁷² *Id.*

¹⁷³ *Id.* at 352.

¹⁷⁴ *Id.* at 348.

¹⁷⁵ *Id.*

a. *The Self-Help Rationale*

The classification of libel plaintiffs into public officials, public figures, and private citizens was premised largely on their relative abilities to redress wrongs to their reputations.¹⁷⁶ Justice Powell proffered that the “first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.”¹⁷⁷

In *Sullivan*, the Court justified placing a high standard of fault on public officials seeking to redress harm to their reputations because “speech can rebut speech, propaganda will answer propaganda, [and] free debate of ideas will result in the wisest governmental policies.”¹⁷⁸ Furthermore, Justice Goldberg, in his *Sullivan* concurrence, emphasized that public officials can redress unsubstantiated criticism and deliberate misstatements by utilizing their enhanced capabilities to communicate with the public.¹⁷⁹

In *Curtis Publishing*, the Court used a similar justification for separating public figures from private individuals.¹⁸⁰ The plaintiffs, who were public figures, had “sufficient access to means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements.”¹⁸¹ Consequently, the Court held that public figures could fight speech with speech in a similar fashion to public officials, thus eliminating the need for states to abrogate free speech to protect the public figures’ reputations.¹⁸²

In *Gertz*, Justice Powell reasoned that public officials and public figures enjoy much greater access to the channels of communication and therefore have a more realistic opportunity to counteract false and injurious statements than private individuals.¹⁸³ Therefore, states have a much greater interest in protecting vulnerable private individuals from injury to their reputations.¹⁸⁴

¹⁷⁶ *Id.* at 344.

¹⁷⁷ *Id.*

¹⁷⁸ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 153 (1967).

¹⁷⁹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 304 (1964) (Goldberg & Douglas, JJ., concurring) (“Under our system of government, counterargument and education are the weapons available to expose these matters, not the abridgement . . . of free speech . . .” (quoting *Wood v. Georgia*, 370 U.S. 375, 389 (1962))).

¹⁸⁰ *Curtis Publ’g*, 388 U.S. at 154–56.

¹⁸¹ *Id.* at 155 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).

¹⁸² *See id.*

¹⁸³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

¹⁸⁴ *Id.*

b. Entering the Vortex

A second rationale the Court utilized to separate defamation plaintiffs into distinct groups was that public officials and public figures both take affirmative steps to attain their status and therefore invite attention and commentary.¹⁸⁵ The Court has characterized these affirmative steps as entering the “vortex.”¹⁸⁶ A public official runs for or accepts an appointment to office.¹⁸⁷ A public figure occupies an influential societal position or “thrust[s]” himself into the “vortex” of public affairs by freely participating in a public controversy or event.¹⁸⁸ The Court found it necessary to put public officials and public figures on roughly the same footing because “[i]ncreasingly in this country, the distinctions between governmental and private sectors are blurred. . . . ‘[P]ublic figures,’ like ‘public officials,’ often play an influential role in ordering society.”¹⁸⁹

In distinguishing public officials and public figures from private individuals, the majority in *Gertz* pointed out that people who seek office must accept the consequences of involvement in public affairs, which include close public scrutiny.¹⁹⁰ Similarly, public figures either sought the attention of the public by thrusting themselves into the vortex, entering the forefront of a public controversy, or occupying an influential societal position.¹⁹¹ Private individuals, on the other hand, have done nothing to relinquish their interest in their own good names.¹⁹² Therefore, private individuals are more deserving of protection from state libel laws.¹⁹³

2. The First Amendment

The Supreme Court, in deciding how much protection to give to various classes of plaintiffs, focused heavily on balancing state interests in protecting people from reputational harm with freedom of speech and the press.¹⁹⁴ The Court’s classifications of libel plaintiffs, and the corresponding intent that

¹⁸⁵ *Curtis Publ’g*, 388 U.S. at 155.

¹⁸⁶ *Id.*

¹⁸⁷ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

¹⁸⁸ *See Curtis Publ’g*, 388 U.S. at 155.

¹⁸⁹ *Id.* at 163–64 (Warren, C.J., concurring).

¹⁹⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

¹⁹¹ *Id.* at 345.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *See id.* at 347; *Curtis Publ’g*, 388 U.S. at 130; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964).

plaintiffs must prove the defendants harbored, were heavily influenced by the Justices' differing predictions of how libel laws affected and would affect free speech and the free press.¹⁹⁵

The majority in *Sullivan* reasoned that “erroneous statement is inevitable in free debate” and that the public requires not only protection for “discussion,” but also for “information.”¹⁹⁶ Justice Brennan explained that the harsh standard of forcing libel defendants to prove the truth of their statements as their only defense¹⁹⁷ to libelous criticism of public officials would result in constitutionally unacceptable self-censorship.¹⁹⁸ Accordingly, the First and Fourteenth Amendments require that a conditional privilege exists for honest misstatements of fact when criticizing public officials.¹⁹⁹

The plurality in *Curtis Publishing* also examined the nature of the libelous speech and the intentions of the libel defendant.²⁰⁰ Justice Harlan explained, “In defining these rules, and especially in formulating the standards for determining the degree of care to be expected in the circumstances, courts have consistently given much attention to the importance of defendants’ activities.”²⁰¹ Because the defendant journalists were covering activities of great public interest and importance, the Court once again rejected the argument that falsity alone should strip constitutional protections for exercising a valued freedom.²⁰²

In *Gertz*, the Court concluded that the state interest in compensating injury to a private citizen’s reputation outweighed any danger of media self-censorship.²⁰³ However, because the libelous statements were matters of public concern, the majority rejected strict liability for false, injurious statements for fear of self-censorship within the press corps.²⁰⁴ Justice Powell expressed confidence that allowing states to impose liability on publishers who

¹⁹⁵ See *Gertz*, 418 U.S. at 347; *Curtis Publ’g*, 388 U.S. at 130; *Sullivan*, 376 U.S. at 254.

¹⁹⁶ *Sullivan*, 376 U.S. at 271–72 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)) (internal quotation marks omitted).

¹⁹⁷ Justice Brennan likened the burden placed on libel defendants under Alabama law to the standards of the unconstitutional Sedition Act of 1789. *Id.* at 273–77.

¹⁹⁸ *Id.* at 279.

¹⁹⁹ *Id.* at 282–83.

²⁰⁰ See *Curtis Publ’g*, 388 U.S. at 154.

²⁰¹ *Id.*

²⁰² *Id.* at 152–54.

²⁰³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974).

²⁰⁴ *Id.* at 340. For discussion on when statements pertain to matters of public concern, see *infra* Part III.C.

negligently harmed a private individual's reputation would not unconstitutionally impinge on the defendants' First Amendment rights.²⁰⁵

3. *Malice, Extreme Departures, and Negligence*

After identifying a libel plaintiff's relationship to the public and examining the constitutional freedoms at stake, the Supreme Court prescribed the requisite amount of mental fault the plaintiff must prove the defendant exhibited in order for the plaintiff to recover for defamation.²⁰⁶

The majority in *Sullivan* propounded a constitutional limit on the states' power to award damages in libel actions brought by public officials against critics of their official conduct, unless the plaintiffs proves the defendants acted with actual malice.²⁰⁷ Actual malice requires that the defendant made the libelous statement with knowledge that it was false, or with reckless disregard for whether it was false.²⁰⁸ Furthermore, "the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff."²⁰⁹ Accordingly, in *Sullivan*, the Court held that the plaintiff failed to prove the defendants were aware that any of their statements were erroneous²¹⁰ and therefore failed to show actual malice.²¹¹

In *Curtis Publishing*, Justice Harlan set out a standard for liability for libeling public figures based on "highly unreasonable conduct" or "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."²¹² In utilizing the newly formulated "extreme departure" tests, the Court found that Curtis Publishing Company had defamed Butts because its usage of a single, unreliable source,²¹³ lack of fact checking,²¹⁴ and rush to publication²¹⁵ were sufficient to demonstrate "highly

²⁰⁵ See *Gertz*, 418 U.S. at 340.

²⁰⁶ See *id.* at 347; *Curtis Publ'g*, 388 U.S. at 130; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964).

²⁰⁷ *Sullivan*, 376 U.S. at 283.

²⁰⁸ *Id.* at 280.

²⁰⁹ *Id.* at 284 (quoting *Lawrence v. Fox*, 97 N.W.2d 719, 725 (Mich. 1959)).

²¹⁰ The Court also observed that the advertisement the defendants took out was "substantially correct" and the opinion they proffered was "a reasonable one." *Id.* at 286.

²¹¹ *Id.*

²¹² *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967).

²¹³ The magazine made no attempt to interview anyone else besides the one source who overheard the conversation in which Butts allegedly agreed to fix the game. *Id.* at 157.

²¹⁴ The magazine made no independent attempts to review the game footage to verify the claims that Butts had fixed the game. *Id.*

²¹⁵ The story was not "hot news" and the editors therefore should have conducted a thorough investigation. *Id.*

unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”²¹⁶ Conversely, the Court observed that the trial court in *Walker* found no evidence that would suggest anything more than negligence,²¹⁷ and thus found the Associated Press was not liable for libel.²¹⁸

The Court held in *Gertz* that as long as states did not apply liability without fault, the states could define for themselves the standard of fault applied in suits involving the defamation of private citizens.²¹⁹ A standard requiring at least negligence properly reconciled state law with First Amendment protections because it permitted states to redress harm to private individuals’ reputations while safeguarding publishers and media defendants from unpredictable and excessive jury awards.²²⁰ The Court also implemented a malice standard for the recovery of presumed and punitive damages.²²¹

III. “SPAMMER” AS A DEFAMATORY LABEL

A word is defamatory if it conveys a false factual statement that harms another’s reputation.²²² This Part analyzes the Supreme Court’s stance on whether the First Amendment precludes defamation liability for opinionated statements. This Part illustrates that because the word “spammer” means so many different things to so many different people, it is an ambiguous, general, or abusive label.²²³ Last, this Part determines which party in a defamation proceeding bears the burden of proving whether the plaintiff is actually a spammer.

A. *Opinions Are Not Categorically Protected*

Milkovich v. Lorain Journal Co. is the last decision in which the Supreme Court contemplated expanding constitutional protections against defamation liability.²²⁴ The Court determined whether libelous facts in an opinion article

²¹⁶ *Id.* at 158.

²¹⁷ Unlike *Curtis Publishing*, the information published in *Walker* came directly from a reporter on the scene. *Id.* at 158–59.

²¹⁸ *Id.* at 159.

²¹⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

²²⁰ *Id.* at 349–50.

²²¹ *Id.* at 349.

²²² *Jolliff v. NLRB*, 513 F.3d 600, 610–11 (6th Cir. 2008).

²²³ *See infra* Part III.B.

²²⁴ *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

could subject the publisher to liability.²²⁵ The article at issue suggested that Milkovich, a high school wrestling coach, had lied at a hearing.²²⁶ Chief Justice Rehnquist, rejecting dicta from *Gertz*,²²⁷ declared that there is no “wholesale defamation exemption for anything that might be labeled ‘opinion.’”²²⁸ The Chief Justice determined that the freedom of speech and the press had adequate safeguards.²²⁹ In prior cases, the Supreme Court held that the Constitution protects statements on public issues about public officials and public figures,²³⁰ statements that cannot be proven false,²³¹ and statements that cannot be reasonably interpreted as stating actual facts about an individual.²³² The majority decided that the defendant’s insinuation that the plaintiff committed perjury was a verifiable assertion that the parties could and would have to prove or disprove with hard evidence at trial.²³³ Moreover, the fact that a statement might be an “opinion” does not preclude the defendant from liability for defamation.²³⁴

Justice Brennan, in dissent, argued that the challenged statements²³⁵ could not reasonably be interpreted as implying defamatory facts about Milkovich.²³⁶ Justice Brennan pointed to the *Restatement (Second) of Torts*, which posits that

²²⁵ *Id.* at 3.

²²⁶ *Id.* at 4–6.

²²⁷ “Under the First Amendment there is no such thing as a false idea. 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.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

²²⁸ *Milkovich*, 497 U.S. at 17–18.

²²⁹ *Id.* at 19.

²³⁰ *See e.g.*, *Gertz*, 418 U.S. at 323; *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 130 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964); *see also supra* Part II.

²³¹ *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (holding that because the article discussed matters of public concern, the plaintiff had the burden of proving he did not have mafia ties).

²³² *See e.g.*, *Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 285–86 (1974) (holding that calling someone a “traitor” was mere hyperbole and not a basis for a defamation action); *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 13–14 (1970) (holding that defendant newspaper was not actually accusing a real estate developer of the crime of blackmail when it hyperbolically described his bargaining position as “blackmail”).

²³³ *Milkovich*, 497 U.S. at 21.

²³⁴ *Id.*

²³⁵ Some of the statements contained in the article were, “[A] lesson was learned (or relearned) yesterday If you get in a jam, lie your way out. . . . Anyone who attended the [wrestling] meet knows . . . that Milkovich . . . lied at the hearing” *Id.* at 4–5 (quoting *Milkovich v. News-Herald*, 545 N.E.2d 1320, 1321–22 (Ct. App. Ohio 1989)) (first alteration in original).

²³⁶ *Id.* at 25 (Brennan & Marshall, JJ., dissenting).

an opinion disclosing all non-defamatory factual predicates²³⁷ cannot be defamatory despite jumping to unwarranted conclusions.²³⁸ Because the author of the article revealed what facts he relied upon and made it clear that his conclusions were his opinion,²³⁹ Justice Brennan concluded that, read in context, the statements could not be interpreted as implying further defamatory factual assertions.²⁴⁰

B. What Does the Word “Spammer” Convey?

Although the Supreme Court, in *Milkovich*, held that labeling a statement as opinion is not sufficient to preclude defamation liability, defamatory labels must still convey factual assertions.²⁴¹ Furthermore, “in determining whether the language is defamatory, the words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances” they were uttered or published.²⁴² Ambiguous and abusive labels generally cannot carry defamatory meanings.²⁴³ Courts must also approach the interpretation of allegedly defamatory words from the standpoint of an average reader.²⁴⁴

1. Ambiguous and Abusive Words

An important factor in determining the defamatory capability of a word is “whether the language used has a precise meaning or whether it is indefinite or

²³⁷ The *Restatement* provides the following example:

A writes to B about his neighbor C: “He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.”

Id. at 27 n.3 (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977)).

²³⁸ *Id.* at 25–27.

²³⁹ The title of the column was “‘TD Says’” and it appeared on the sports page—“a traditional haven for cajoling, invective, and hyperbole.” *Id.* at 8–9 (quoting *Scott v. News-Herald*, 496 N.E.2d 699, 709 (Ohio 1986) (stating that Scott, the superintendent of the high school where Milkovich coached, brought a separate action)).

²⁴⁰ *Id.* at 25. “Furthermore, the tone and format of the piece notify readers to expect speculation and personal judgment.” *Id.* at 32.

²⁴¹ *Penn Warranty Corp. v. DiGiovanni*, 810 N.Y.S.2d 807, 815 (N.Y. 2005).

²⁴² *Tatur v. Solsrud*, 498 N.W.2d 232, 234 (Wis. 1993).

²⁴³ *See Hruby v. Kalina*, 424 N.W.2d 130, 132 (Neb. 1988) (“The words ‘[y]ou crooked bastard you’ and ‘you’re crooked’ are not actionable [for libel] per se.”).

²⁴⁴ *Norse v. Henry Holt & Co.*, 991 F.2d 563, 567 (9th Cir. 1993) (quoting *MacLeod v. Tribune Publ’g Co.*, 343 P.2d 36 (Cal. 1959)).

ambiguous.”²⁴⁵ “Loose, figurative or hyperbolic statements, even if deprecating to the plaintiff, are not actionable.”²⁴⁶

For example, the words “horse’s ass,” “jerk,” “idiot,” and “paranoid” do not constitute a basis for a libel action.²⁴⁷ Additionally, the word “racist” has been so overused in incorrect contexts that most of the time the word no longer conveys concrete defamatory facts when used as an insult.²⁴⁸

“Spammer,” on the other hand, never had a concrete meaning, but instead is utilized as an all-purpose reference to a sender of excessive or unwanted Internet speech.²⁴⁹ Moreover, “spammer,” while potentially connoting an activity that irks many Americans, does not necessarily assert that the alleged spammer committed a crime or even did anything morally wrong.²⁵⁰ CAN-SPAM’s prohibition of only some kinds of recognized spamming practices has legitimized other spamming practices.²⁵¹ Therefore, calling someone a spammer connotes that the alleged spammers sent at least one irksome e-mail to the libel defendant, but not necessarily any illegal e-mails.²⁵² Congress passed up the opportunity to codify a factual definition for spammer when it created instances in which spamming violates federal law.²⁵³ Without additional explicit reference to CAN-SPAM, the word “spammer” does not convey defamatory facts alluding to any sort of crime.²⁵⁴

2. Context

Courts have maintained that the disposition of the libel defendant must be taken into account when identifying the defamatory character of the statements the defendant used.²⁵⁵ A disgruntled consumer is more likely to express his

²⁴⁵ *Penn Warranty*, 810 N.Y.S.2d at 815.

²⁴⁶ *Id.* (citing *Dillon v. City of N.Y.*, 704 N.Y.S.2d 1 (N.Y. App. Div. 1999)).

²⁴⁷ *Blouin v. Anton*, 431 A.2d 489, 491 (Vt. 1981).

²⁴⁸ “Accusations of ‘racism’ no longer are ‘obviously and naturally harmful.’ The word has been watered down by overuse, becoming common coin in political discourse.” *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988).

²⁴⁹ *See supra* Part I.A.1.

²⁵⁰ *See supra* note 39 and accompanying text; *see also supra* Part I.A.1.

²⁵¹ *See supra* Part I.B.

²⁵² *See supra* note 97 and accompanying text.

²⁵³ *See supra* Part I.B.1–2.

²⁵⁴ *See supra* note 97 and accompanying text.

²⁵⁵ *See Penn Warranty Corp. v. DiGiovanni*, 810 N.Y.S.2d 807, 815 (N.Y. 2005) (“The analysis requires the court to look at the content of the whole communication, its tone and apparent purpose, in order to determine whether a reasonable person would view them as expressing or implying facts.”).

opinion in harsh, dissatisfied language.²⁵⁶ Accordingly, a third party reading the statements would reasonably interpret the harsh language as subjective statements of opinion that do not necessarily convey defamatory facts.²⁵⁷ Similarly, an ISP or frustrated e-mail recipient calling those responsible for sending unwanted e-mails spammers means nothing more than an expression of annoyance at receiving the e-mails.

Regardless of the specific practices that CAN-SPAM outlawed, spam-blocking software has continued identifying and blocking suspect mass-distributed e-mails; courts have allowed ISPs to define as spam and block e-mails as dictated by the best interest of their customers;²⁵⁸ and e-mail users have continued cursing spam when they see their inboxes filled with unfamiliar e-mail. “Spam is in the eye of the beholder.”²⁵⁹ Therefore, the only provable fact contained in the label “spammer” is whether the plaintiff sent the defendant an e-mail at any point in time.

C. Burden of Proof

In *Philadelphia Newspapers v. Hepps*, the Supreme Court held that private citizens bear the burden of proving an allegedly libelous statement false when the statement pertains to a matter of public concern.²⁶⁰ Public officials and public figures must also show the falsity of a statement in order to prevail in a defamation proceeding.²⁶¹ In *Hepps*, the plaintiff sued the *Philadelphia Inquirer* for libel after the newspaper published a series of articles linking the plaintiff to organized crime.²⁶² Despite the inherent difficulty of proving a lack of ties to organized crime, the majority held that the plaintiff had the burden of proving the facts asserted in the articles at issue were false.²⁶³

²⁵⁶ *Id.*

²⁵⁷ *Id.* Statements the libel defendant posted on a website accusing the plaintiff company of being “blatantly dishonest,” being “crooked,” “committing fraud on a grand scale,” and “running scams” were not actionable for libel because the statements were clearly subjective opinions made by a dissatisfied customer. *Id.* at 813.

²⁵⁸ See *supra* note 113 and accompanying text.

²⁵⁹ See Greenberg, *supra* note 13.

²⁶⁰ *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986).

²⁶¹ *Id.* at 775. Although the Court in *Hepps* specifically discussed “media defendants,” the Court has rejected any distinction between media and non-media defendants. See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 781 (1985) (Brennan, Marshall, Blackmun & Stevens, JJ., dissenting); *id.* at 773 (White, J., concurring). It is therefore unnecessary to discuss whether blogs and websites qualify as “media defendants.”

²⁶² *Hepps*, 475 U.S. at 769.

²⁶³ *Id.* at 778–79.

1. *Matters of Public Concern*

If, in a libel case, a court decides that the plaintiff is a private individual, the libel defendant will need to show that his allegedly libelous speech pertained to matters of public concern to gain the constitutional protections established in *Gertz*.²⁶⁴ For libelous statements pertaining to matters of public concern, the plaintiff must prove the statement was false to prevail.²⁶⁵

“It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’”²⁶⁶ Unfortunately, the Supreme Court has never explicitly defined which topics are matters of public concern.²⁶⁷ The Court has only offered the unhelpful clarification that the phrase generally refers to issues in which the public has a legitimate interest.²⁶⁸ In drawing the line between matters of public concern and matters of private concern, the Court focused on “the free and robust debate of public issues,” the “meaningful dialog of ideas concerning self-government,” and possible “self-censorship” by the press.²⁶⁹ In *Dun & Bradstreet v. Greenmoss Builders*, the Court held that a confidential credit report was not a matter of public concern because it was addressed to a private audience and pertained to matters in which only a select few individuals were interested.²⁷⁰ Conversely, lower courts have held that a statement about the effectiveness of a consumer product was a statement of public concern because it was of general interest to the public and was made available to the general public.²⁷¹

2. *The Public Interest in Spammers*

As mentioned in Part I, e-mail recipients bear the cost of spam transmissions.²⁷² As opposed to a traditional advertiser who purchases postage

²⁶⁴ *Dun & Bradstreet*, 472 U.S. at 761. The Supreme Court held in *Gertz* that strict liability was constitutionally deficient and that a libel plaintiff must prove the defendant acted with negligence. See *supra* note 219.

²⁶⁵ *Hepps*, 475 U.S. at 776–79.

²⁶⁶ *Dun & Bradstreet*, 472 U.S. at 758–59 (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

²⁶⁷ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1052 (3d ed. 2006).

²⁶⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (holding that a communist plot to harass the police is a matter of public concern); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 160 (1967) (holding that a coach fixing a football game and a person inciting a riot are matters of public concern); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964) (asserting that civil rights violations are matters of public concern).

²⁶⁹ *Dun & Bradstreet*, 472 U.S. at 760.

²⁷⁰ *Id.* at 761.

²⁷¹ *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir. 1990).

²⁷² *Zhang*, *supra* note 67, at 305; *supra* Part I.A.2.

and mails an advertisement, buys television airtime for a commercial, or takes out an ad in the newspaper or a magazine, those that distribute bulk commercial e-mails use the ISPs' and the recipients' bandwidth and network storage space.²⁷³ Some scholars believe that courts should consider the unauthorized use of storage capacity and bandwidth as the actionable tort of trespass of chattels.²⁷⁴ Other scholars argue that courts should view the sending of unwanted commercial e-mails as the tort of nuisance because the unwanted e-mails interfere with recipients' use and enjoyment of their real property.²⁷⁵ While courts have been reluctant to adopt these views, the enactment of CAN-SPAM indicates congressional recognition that the use and abuse of ISPs' and e-mail recipients' time and resources creates a matter of public concern.²⁷⁶

In CAN-SPAM, Congress also explicitly recognized that "spam has become the method of choice for those who distribute pornography, perpetrate fraudulent schemes, and introduce viruses, worms, and Trojan horses into personal and business computer systems."²⁷⁷ Other mediums, such as traditional junk mail, print advertisements, and television commercials, simply are incapable of perpetrating the destruction that identity thieves, virus spreaders, and pornography purveyors transmit through mass-distributed e-mail.²⁷⁸ A television commercial cannot transmit a virus that renders a television inoperable.²⁷⁹ E-mail users generally suspect unfamiliar, unwanted e-mails due to the staggering amount of fraudulent schemes and malicious programs perpetrated and spread through mass-distributed e-mails.²⁸⁰ While a suspicious e-mail may be perfectly legitimate, the recipient will probably never have the opportunity to find out because the safest course of action is to delete or filter suspect e-mails.²⁸¹ Because mass-distributed e-mails use other

²⁷³ *Id.*

²⁷⁴ Ashley L. Rogers, *Is There Judicial Recourse to Attack Spammers?*, 6 VAND. J. ENT. L. & PRAC. 338, 346-48 (2004).

²⁷⁵ Jeremiah Kelmen, *E-Nuisance: Unsolicited Bulk E-mail at the Boundaries of Common Law Property Rights*, 78 S. CAL. L. REV. 363, 387-89 (2004). "[T]he computer may properly be seen as an audio-visual window through which unwanted invasions can enter." *Id.* at 389; see also Adam Mossoff, *Spam—Oy, What a Nuisance!*, 19 BERKELEY TECH. L.J. 625 (2004).

²⁷⁶ See 15 U.S.C. § 7701 (2006) (discussing congressional findings and policy on controlling non-solicited pornography and marketing e-mails).

²⁷⁷ *Id.* § 7703(c)(1).

²⁷⁸ See *supra* Part I.A.2.

²⁷⁹ Cf. *supra* note 75 and accompanying text (noting that e-mails can contain and unleash viruses that can destroy computers and entire networks upon opening them).

²⁸⁰ See *supra* note 75 and accompanying text.

²⁸¹ See *supra* note 77 and accompanying text.

people's storage space and bandwidth, and the e-mails have the natural tendency to create anxiety, frustration, and fear within recipients, the discussion of spam is a matter of public concern. Therefore, libel plaintiffs suing for being called spammers should bear the burden of proving they are not spammers.

IV. UPGRADING CONSTITUTIONAL LIMITATIONS TO LIBEL FOR THE TWENTY-FIRST CENTURY

The purpose of this Comment is not to vindicate Mark Mumma or support his actions. In fact, Mark Mumma is hardly a desirable test subject for this novel situation and the constitutional freedoms at stake. Many of Mumma's methods of asserting his First Amendment freedoms were highly obnoxious and antagonistic to Omega's executives and those he labeled as spammers. However, the purpose of this Part is not to judge the parties to the libel suit. Instead, this Part argues that the limitations to libel laws created by the Supreme Court should protect ISPs, business owners, and other frustrated e-mail recipients who exercise their First Amendment rights to discuss the real and serious problems that spam and spammers pose.

First, section A determines whether Omega and its executives, and alleged spammers in general, should be categorized as public figures or private individuals. Next, section B considers the First Amendment freedoms at stake in holding a libel defendant, such as Mumma, liable for using the label "spammer." Section C then examines whether Mumma's accusations that Omega and its executives ("alleged spammers") were spammers and sent him spam were defamatory. Last, section D discusses the requisite intent Omega should have had to prove that Mumma possessed for Omega to have recovered.

A. Public Figures or Private Individuals?

Since the *Gertz* decision, courts have further refined the definition of public figures to include general public figures and limited-purpose public figures.²⁸² General public figures are people that have pervasive notoriety or fame, or who inject themselves into the public affairs of society.²⁸³ Limited-purpose public

²⁸² See *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980) (remarking that the Supreme Court "has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*").

²⁸³ *Id.* at 1294.

figures, on the other hand, are individuals who voluntarily inject themselves into a particular public controversy and therefore become public figures for a limited range of issues.²⁸⁴ “At all times, the judge should keep in mind the voluntariness of the plaintiff’s prominence and the availability of self-help through press coverage of responses—in other words, whether the plaintiff has assumed the risk of reputational injury and whether he has access to the media.”²⁸⁵

Alleged spammers are limited-purpose public figures because they invite attention and commentary by voluntarily using a controversial form of advertising to contact the public directly.²⁸⁶ The very act of e-mailing large amounts of potential customers suggests that alleged spammers have access to the means of communication to clear their names if erroneously labeled a spammer.²⁸⁷ More importantly, the alleged spammers entered the vortex and became limited-purpose public figures when they advertised to the public through the medium of e-mail.²⁸⁸

1. *Self-Help Rationalism*

The self-help rationale developed by *Sullivan* and its progeny supports classifying the alleged spammers as public figures.²⁸⁹ The Supreme Court insists that free debate, when possible, should render libel suits unnecessary.²⁹⁰ “Under our system of government, counterargument and education are the weapons available to expose [libelous statements as false], not the abridgement . . . of free speech.”²⁹¹

Omega and its executives had the ability and resources to engage Mumma in public debate.²⁹² The alleged spammers exhibited advanced knowledge and

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 1297.

²⁸⁶ *See supra* Part II.B.1.b.

²⁸⁷ *See supra* Part II.B.1.b.

²⁸⁸ *See supra* Part II.B.1.b.

²⁸⁹ *See supra* Part II.B.1.b.

²⁹⁰ *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967); *see also Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988) (“Where the question of truth or falsity is a close one, a court should err on the side of nonactionability.” (citing *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986))).

²⁹¹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 298 (1964) (Goldberg & Douglas, JJ., concurring).

²⁹² “Omega World Travel . . . has annual sales revenue of more than \$1 billion and employs more than 1,100 people.” Declan McCullagh, *Court Sides with Alleged ‘Vacation’ Spammer*, CNET NEWS.COM, Nov. 28, 2006, http://www.news.com/2100-1030_3-6138874.html.

ability in manipulating Internet media when they extensively e-mailed potential customers. Access to media and skill in manipulating it suggest that the alleged spammers had the ability to communicate with the public to fight falsities and redress reputational harms.²⁹³ The alleged spammers could have easily rebutted Mumma's claims through e-mail and on their own website, Cruise.com. The libel plaintiffs could have also requested time on a radio show Mumma appeared on or circulated their own press release to counter the one that Mumma released.²⁹⁴ Even if Omega could not have utilized the same media as Mumma, its sophisticated communications and advertising operation surely could have reached the same audience. Therefore, the alleged spammers possessed the means to help themselves clear their own names, which supports the classification of alleged spammers as public figures for the purposes of the libel action.²⁹⁵

Not only did Omega and its executives have access to media through which to rebut Mumma's claims, but employing counterargument and education instead of initiating a lawsuit was arguably a more practical option considering they were trying to preserve their reputations. Mumma, while obnoxious and surely a thorn in Omega's side, could not have reached more than a small audience through his little known website, press release, and local media interviews.²⁹⁶ However, Omega's libel claims against Mumma for millions of dollars received national attention, appearing in *Time* magazine²⁹⁷ and on Forbes.com²⁹⁸ in addition to various other Internet publications and blogs.²⁹⁹ Despite the fact that Omega won the jury trial, the press has not been kind to it.³⁰⁰ Instead of a small group of people thinking of Omega and its executives as alleged spammers, now a much larger group most likely thinks of the libel

²⁹³ Brake & Alignment Supply Corp. v. Post-Newsweek Stations of Fla., Inc., 7 Fla. Supp. 2d 9, 11 (Fla. Cir. Ct. 1984).

²⁹⁴ See Omega Transcript, *supra* note 28, at 422–23.

²⁹⁵ See Brake & Alignment World, 7 Fla. Supp. 2d at 11.

²⁹⁶ See Omega Transcript, *supra* note 28, at 422–23.

²⁹⁷ Reynolds Holding, *A Spammer's Revenge*, TIME, Jan. 15, 2007, at 62.

²⁹⁸ Greenberg, *supra* note 13.

²⁹⁹ See Larry Greenemeier, *Accused Spammer to Decide Fate of Anti-Spam Crusader*, INFORMATIONWEEK, June 27, 2007, <http://www.informationweek.com/news/showArticle.jhtml?articleID=200001079>; see also Posting of Bob McCarty to Bob McCarty Writes, Spam "Victim" Held Liable for \$2.5 M in Damages, BOB MCCARTY WRITES, <http://bobmccarty.com/2007/06/27/spam-victim-held-liable-for-25-m-in-damages/> (June 27, 2007) (blogging about how Cruise.com had the opportunity to decide whether to collect \$330,000 in damages for being called a spammer by Mumma).

³⁰⁰ See Holding, *supra* note 297, at 62; Greenemeier, *supra* note 299.

plaintiffs as alleged spammers who use their disproportionately large resources³⁰¹ to harshly silence critics.³⁰²

2. *Entering the E-Vortex*

Courts have ruled inconsistently in categorizing businesses and business owners as public figures simply for publicly advertising their goods and services.³⁰³ However, the more extensive a plaintiff's advertising, the more likely a court will deem the plaintiff has entered the vortex and has become a public figure.³⁰⁴ Judges reason that when companies advertise and seek the public's attention, the companies assume the risk of heightened public scrutiny.³⁰⁵ Moreover, the closer the nexus between the allegedly defamatory statement and the plaintiff's advertising practices, the more likely courts will deem the plaintiff a public figure for the purposes of the libel suit.³⁰⁶ The fact that a libel plaintiff generated the public controversy through direct solicitations and advertising does not preclude courts from finding that a public controversy exists.³⁰⁷

When libel plaintiffs sue in response to a defendant's defamatory remarks pertaining directly to the plaintiff's extensive advertising practices, courts should and often have recognized that the plaintiff has entered the public vortex regardless of the size or notoriety of the plaintiff's business.³⁰⁸ Furthermore, the alleged spammers utilize the exceedingly cheap medium of e-mail to directly contact customers in a manner that is more invasive than

³⁰¹ See McCullagh, *supra* note 292.

³⁰² See Holding, *supra* note 297, at 62.

³⁰³ Compare *Vern Sims Ford, Inc. v. Hagel*, 713 P.2d 736 (Wash. Ct. App. 1986) (holding plaintiff car dealership's local advertisements did not make it a public figure), with *Martinez v. Soignier*, 570 So. 2d 23 (La. Ct. App. 3d 1980) (holding plaintiff doctor was a public figure due to his advertisements in the Yellow Pages).

³⁰⁴ See *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 272 (3d Cir. 1980) (holding that although the plaintiff company was not yet widely known, it advertised so intensely and extensively that it gained the status of a public figure).

³⁰⁵ *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1507 (D.S.C. 1989).

³⁰⁶ See *id.* (holding that the plaintiff electronics company was a public figure because the defamatory remarks for which it sued the defendant pertained to the plaintiff's advertising practices); *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240, 1247 (N.D. Ill. 1986) (holding that the plaintiff tobacco company was a public figure in its defamation suit against a news producer because the allegedly defamatory remarks pertained to the company's advertising practices).

³⁰⁷ *Nat'l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc.*, 705 F.2d 98, 101 (4th Cir. 1983); see also *Am. Future Sys., Inc. v. Better Bus. Bureau*, 923 A.2d 389, 401-03 (Pa. 2007).

³⁰⁸ *Steaks Unlimited*, 623 F.2d at 272.

traditional postal, print, or television ads.³⁰⁹ “It is the medium that shapes and controls the scale of human association and action.”³¹⁰ Therefore, the court should have taken the medium in which Omega and its executives operated into consideration when determining whether they were public figures or private individuals. Because the alleged spammers entered the public vortex when they extensively advertised through e-mail and then sued Mumma in response to his criticism of their advertising practices, the court should have categorized Omega and its executives as public figures.

B. First Amendment Considerations

Through the passage of CAN-SPAM, Congress inadvertently created legal spam, undermining its goal to eliminate unwanted spam.³¹¹ As a result, the public bears the burden of eliminating unwanted spam. However, for the public to cope with spam, courts must recognize the First Amendment right of spam-fighters and spammer cataloguers to discuss spam and label individuals and companies as spammers. The chilling effect of potential litigation created by holding a spam-fighter like Mumma liable for labeling spammers is great, with an enormous detrimental impact on the public. Furthermore, it creates free speech considerations analogous to those recognized in *Sullivan* and its progeny.³¹²

Technological methods of blocking spam, such as programs that automatically filter and quarantine e-mails containing certain key words, possess numerous shortcomings.³¹³ Lobbyists for the marketing industry successfully ensured that Congress did not include within CAN-SPAM a provision that required commercial e-mails to include a label such as “ADV,” for “advertisement,” in e-mail headers.³¹⁴ A label requirement would have made technological spam solutions easier by enabling ISPs, companies, and other e-mail recipients to filter unwanted commercial e-mail via the label.³¹⁵ Moreover, the senders of pernicious spam, who would not have obeyed a

³⁰⁹ See *supra* Part I.A, III.B.2.

³¹⁰ MARSHALL McLUHAN, UNDERSTANDING MEDIA 9 (1964).

³¹¹ Vivek Arora, *The CAN-SPAM Act: An Inadequate Attempt to Deal with a Growing Problem*, 39 COLUM. J.L. & SOC. PROBS. 299, 320 (2006); see also *supra* Part I.B.

³¹² See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964) (Goldberg & Douglas, JJ., concurring).

³¹³ See Koerner, *supra* note 77.

³¹⁴ Jeffrey D. Sullivan & Michael B. de Leeuw, *Spam After CAN-SPAM: How Inconsistent Thinking Has Made a Hash out of Unsolicited Commercial E-Mail Policy*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 887, 896 (2004).

³¹⁵ *Id.*

labeling requirement anyway, are constantly figuring out how to get around existing technological spam filters.³¹⁶ Spammers misspell words and embed text into images that spam filters cannot read, enabling spammers to get their spam past filters and clog inboxes.³¹⁷ Spam filters that scan the contents of incoming e-mails are also known to make false positives, blocking important e-mails people want to receive.³¹⁸

To supplement programs that scan e-mails for keywords and viruses, spam-fighters need to be able to catalogue known spammers to add to spammer blacklists and filters that block e-mails from specific sources. Mumma's crusade against a few spammers was relatively small-scale compared to some other organizations that identify many more spammers much more carefully and with a lot more tact. The Spamhaus Project is one such organization that is dedicated to cataloguing spammers.³¹⁹ The Spamhaus Project uses its own definition of spam, defining it as "unsolicited bulk e-mail" to create its spammer blacklist, which it then makes freely available to any individuals or companies that want to utilize it.³²⁰ However, when the executives of e360 Insight discovered that the Spamhaus Project had placed e360 Insight on its spammer blacklist, e360 Insight sued the Spamhaus Project for libel.³²¹ The Britain-based Spamhaus Project chose not to defend itself, and U.S.-based e360 Insight received a default judgment.³²² Judges need to recognize the importance of spam-fighters' efforts in helping people avoid the negative and sometimes extremely damaging³²³ effects of receiving and opening spam.³²⁴ Courts then need to apply the necessary constitutional protections to ensure free and robust discussion of spammers.³²⁵

³¹⁶ See Stone, *supra* note 134.

³¹⁷ See *id.*

³¹⁸ See Koerner, *supra* note 77.

³¹⁹ Spamhaus, <http://www.spamhaus.org/> (last visited Nov. 9, 2008).

³²⁰ "Unsolicited means that the Recipient has not granted verifiable permission for the message to be sent. Bulk means that the message is sent as part of a larger collection of messages, all having substantively identical content." Spamhaus, The Definition of Spam, <http://www.spamhaus.org/definition.html> (last visited Nov. 9, 2008).

³²¹ e360 Insight v. Spamhaus Project, 500 F.3d 594, 595–98 (7th Cir. 2007).

³²² *Id.*

³²³ See *supra* Parts I.A.2, III.B.2.

³²⁴ See Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154 (1967); see also *supra* Part III.B.2.

³²⁵ See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964).

C. The Defamatory Character of Mumma's Statements

1. Spam and Spammer

Generally, the word “spammer” only conveys that the labeled entity sent the labeler some sort of subjectively excessive or unwanted Internet communication, most likely an e-mail.³²⁶ Mumma specifically accused Omega of “unlawful spamming” and directly referenced the prohibitions of CAN-SPAM.³²⁷ Judge Brinkema, however, held that labeling a person or a business a “spammer” or stating that a person or a business engages in sending spam was defamatory separately from accusing the same person or business of having violated CAN-SPAM.³²⁸ It is important to keep the two accusations separate. Accusing a company of *unlawful* spamming conveys different facts than simply accusing a company of spamming. For example, suppose a publisher circulates two fliers. One states, “John’s Auto Sales is crooked!” The other flier states, “John’s Auto Sales knowingly sold me a broken car!” The publisher printed two statements, one potentially defamatory and one not. Labeling a business as crooked, while disparaging, is too ambiguous to convey defamatory facts.³²⁹ However, accusing a business of knowingly selling a broken product conveys defamatory facts.³³⁰

Judge Brinkema’s ruling is troubling because it suggests that any spam-fighter that labels an entity that distributes suspect e-mails a spammer has libeled the alleged spammer.³³¹ CAN-SPAM has proven to be ineffective, and the general public has to rely on spam-fighters and spammer cataloguers to make judgment calls.³³² Therefore, it is imperative that judges not muddle the distinctions between labeling entities as “spammers” and accusing spammers of having violated CAN-SPAM.³³³ Both spam-fighters and the general public

³²⁶ See *supra* Part III.B.1–3.

³²⁷ SUEaSpammer.com, Spam Offenders: Omega World Travel, Inc. (2005), available at <http://web.archive.org/web/20050207040052/http://www.sueaspammer.com/spammers/omega/#originalspam> (last visited Feb. 7, 2009).

³²⁸ See Omega Transcript, *supra* note 28, at 422–23.

³²⁹ See *Penn Warranty Corp. v. DiGiovanni*, 810 N.Y.S.2d 807, 815 (N.Y. 2005); *supra* Part III.B.3.

³³⁰ See *id.* But see *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 (1st Cir. 1992) (accusing a company of the legal conclusion of “fraud” is not necessarily defamatory).

³³¹ Omega Transcript, *supra* note 28, at 444; see also *e360 Insight v. Spamhaus Project*, 500 F.3d 594, 595–98 (7th Cir. 2007).

³³² See *supra* Part III.B.

³³³ This Comment is more interested in “spammer” as a defamatory word in relation to CAN-SPAM than in the defamatory act of accusing individuals or entities of violating specific criminal and civil acts. However, it is worth mentioning that lower courts have held that the First Amendment protects legal conclusions,

need courts to recognize the proper constitutional protections in labeling a company a “spammer.”

2. *Libel Per Se*

Judge Brinkema held not only that calling a corporation and its executives “spammers” is defamatory, but also that it is defamatory per se.³³⁴ Libel plaintiffs do not have to show or prove any harm to recover damages if a statement is false and libelous per se.³³⁵ Factual imputations that hurt someone in his trade,³³⁶ go to the heart of someone’s business,³³⁷ or attack a person’s skill or competence in performing his or her trade or business³³⁸ are libelous per se. Judge Brinkema declared, “The Court—that means me—has already found that labeling a person or a business as a spammer [and] stating that a person or a business engages in sending spam . . . prejudices that person or business in their profession or trade and is therefore defamatory per se.”³³⁹ Calling a person or business that e-mails advertisements to potential customers a spammer, however, does not accuse the alleged spammer of performing their trade poorly or incompetently, because the act of widely advertising via e-mail is generally defined as spamming.³⁴⁰ Furthermore, Mumma was attacking the alleged spammers’ advertising practices, not the quality of their goods or services.³⁴¹ His criticism of the alleged spammers was not an attack on their e-deals, but rather on the method in which they advertised their e-deals.³⁴² Therefore Mumma calling Omega and its executives spammers should not have been libelous per se.

especially when laymen assert a legal conclusion. *See, e.g., Toledo Heart Surgeons, Inc. v. Toledo Hosp.*, 798 N.E.2d 694, 699–700 (Ohio Ct. App. 2003) (holding that a doctor’s widely circulated assertions that a hospital had violated several laws were emotional and ill-advised but nonetheless constitutionally protected).

³³⁴ Omega Transcript, *supra* note 28, at 422–23.

³³⁵ Penn Warranty Corp. v. DiGiovanni, 810 N.Y.S.2d 807, 813 (N.Y. 2005).

³³⁶ *See, e.g., Spears v. Albertson’s, Inc.*, 848 So. 2d 1176 (Fla. Dist. Ct. App. 2003).

³³⁷ *See, e.g., Swengler v. ITT Corp. Electro-Optical Prods. Div.*, 993 F.2d 1063 (4th Cir. 1993).

³³⁸ *See, e.g., Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303 (Mo. 1993).

³³⁹ Omega Transcript, *supra* note 28, at 422–23.

³⁴⁰ *See supra* note 97 and accompanying text.

³⁴¹ “I have no need to be updated on a weekly basis about cruises. Apparently this didn’t keep Omega . . . from sending me unsolicited commercial e-mail.” SUEaSpammer.com, *supra* note 327.

³⁴² *Id.*

D. Future Libel Suits Initiated by Alleged Spammers

Judge Brinkema instructed the jury, “If you find that the defendants³⁴³ did not exercise ordinary care when failing to ascertain the facts on which the false statements were based, then the defendants acted negligently.”³⁴⁴ However, alleged spammers should have to prove that libel defendants acted with actual malice to recover, due to the fact that alleged spammers should be deemed limited-purpose public figures and due to the First Amendment freedoms at stake.³⁴⁵ Also, to obtain presumed or punitive damages, alleged spammers need to show that the defendants acted with actual malice.³⁴⁶ Actual malice requires that the libel defendant made the libelous statements with knowledge that they were false, or with reckless disregard of whether they were false.³⁴⁷

In future libel suits initiated by alleged spammers against spam-fighters, courts should find that the discussion of spammers is a matter of public concern;³⁴⁸ most alleged spammers are public figures for the purposes of a libel action for calling them spammers;³⁴⁹ the First Amendment freedoms at stake for holding spam-fighters liable for using the label spammer are great;³⁵⁰ and the word “spammer” is a highly subjective and ambiguous word.³⁵¹ Accordingly, courts should place the burden of proof on the alleged spammers to prove the allegedly defamatory factual statements false³⁵² and that the defendants acted with actual malice.³⁵³

CONCLUSION

Advertisements sent via e-mail can be produced and transmitted to huge numbers of recipients at little to no cost.³⁵⁴ E-mail is drastically cheaper than most other advertising media; however, there is no such thing as a free lunch.

³⁴³ Mumma and his company, Mummagraphics, Inc., were both named as defendants. *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 2006).

³⁴⁴ Omega Transcript, *supra* note 28, at 446.

³⁴⁵ *See supra* note 170.

³⁴⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50 (1974).

³⁴⁷ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

³⁴⁸ *See supra* Part III.B.

³⁴⁹ *See supra* Part IV.A.

³⁵⁰ *See supra* Part IV.B.

³⁵¹ *See supra* Part IV.C.

³⁵² *See supra* Part III.B.

³⁵³ *See, e.g., Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 150 (1967).

³⁵⁴ *See supra* note 272 and accompanying text.

Due to the great harm e-mails can deliver to computer networks,³⁵⁵ the use of e-mail as a means of advertising is fraught with peril for the senders. The cost of e-mailing commercial advertisements is skepticism on the part of recipients; the likelihood the e-mails will be filtered, deleted, and not read; and loss of reputation, not at the hands of being labeled a spammer by a third party, but in the minds of the direct recipients. Moreover, those that advertise via commercial e-mails should realize that they voluntarily assume the risk of being labeled spammers by ISPs, IT departments, spam filters, spam-fighters, spammer cataloguers, and e-mail recipients.³⁵⁶

The judgment finding Mumma guilty of defamation is troubling because it suggests that every time a spam-fighter characterizes a company as a spammer, the spam-fighter is open to an expensive lawsuit.³⁵⁷ Even worse, without adequate constitutional protections, spam-fighters face crushing liability from unpredictable and excessive jury awards secured by the alleged spammers' expensive lawyers.³⁵⁸

The mass sending of legitimate e-mail advertisements cloaked in misleading headers to sell goods or services is comparable to selling authentic Rolexes out of a trench coat on a street corner. It is perfectly legal, but there is no reasonable basis for one that engages in such activity to be offended, much less initiate a defamation proceeding, when a consumer accuses the salesman of being annoying. Congress needs to fix the ineffective and ambiguous sections of CAN-SPAM both to alleviate the nation's inboxes of unwanted commercial e-mails and to help spam-fighters and other e-mail recipients block

³⁵⁵ See *supra* Part I.A.2.

³⁵⁶ See *supra* Part I.A.

³⁵⁷ See *supra* note 331 and accompanying text; see also ANTHONY LEWIS, MAKE NO LAW 211 (2001) ("For the surge of libel suits that so alarmed the press in the 1980s hit private citizens as well, and was if anything more chilling to those who spoke out on public issues.").

³⁵⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974) ("The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.").

unwanted e-mails. Until the legislature takes action, courts need to apply the constitutional limits to libel established in *Sullivan* and its progeny to afford spam-fighters adequate constitutional protections.

MICHAEL P. JUNGMAN*

* J.D. Candidate, Emory University School of Law, Atlanta, Georgia (2009). I would like to thank Julie Schwartz for advising me on this Comment as well as the members of the *Emory Law Journal* for their help and suggestions throughout the publication process. I would also like to thank University of Virginia Media Studies professors Phil Gochenour and David Golumbia for inspiring my interest in this subject matter.