

**MEDIA3 TECHNOLOGIES, LLC, Plaintiff, v.
MAIL ABUSE PREVENTION SYSTEM, LLC, and PAUL VIXIE, Defendants.**

00-CV-12524-MEL

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHU-
SETTS**

2001 U.S. Dist. LEXIS 1310

January 2, 2001, Decided

LASKER, D.J.

Media3 Technologies, LLC ("Media3"), sues Mail Abuse Prevention System, LLC ("MAPS"), and Paul Vixie, MAPS's Chief Executive Officer, for redress of alleged unfair business practices. Media3 contends that its reputation has been injured and that it has lost current and anticipated business as the result of defamatory remarks related to Media3 placed in certain files on MAPS's website, located at <http://mail-abuse.org/>, as well as by MAPS's recommendation to other businesses, through its Realtime Blackhole List ("blackhole list"), not to allow access to websites hosted by Media3. Media3 alleges that these acts constitute defamation, intentional interference with existing advantageous business relations, intentional interference with prospective advantageous business relations, and a violation of M.G.L. ch. 93A.

Media3 moves for a preliminary injunction requiring MAPS to remove all websites hosted by Media3 from MAPS's blackhole list. The application for a preliminary injunction is denied.

I.

Media3 is an Internet "web-hosting" company based in Pembroke, Massachusetts, that offers services in creating and maintaining websites to those who wish to conduct electronic commerce. As a "web-hosting" company, Media3 is the owner of forty-two "Class C network address blocks." Each block is capable of holding approximately 254 "Internet protocol addresses" on which websites may be placed. Media3 rents Internet protocol addresses on these Class C networks to individuals and organizations who wish to create websites. Often with Media3's help, these customers then build websites which Media3 also assists in maintaining.

Before agreeing to host a website, Media3 follows the standard industry practice of requiring its customers to sign an Acceptable Use Policy for conducting business on the Internet. This policy contains provisions which are standard in the industry, including an "anti-spam" provision.

Spam is the industry term used to describe unwanted e-mail that is often sent en masse to e-mail addresses for commercial purposes. For obvious reasons, spam is unpopular with many in the Internet community. One not so obvious, but critically important reason why spam is unpopular, is that while it is free to send it costs money to receive. Media3's Acceptable Use Policy prohibits not only the transmission of spam, but also the support of spam through the development of software which could be used to hide the origin of a person sending spam.

Although Media3's Acceptable Use Policy bars websites it hosts from supporting spam in some ways, it does not prohibit its hosted websites from providing other services which appear to be used primarily by spammers. These services include the sale of lists of hundreds of thousands and even millions of e-mail addresses and computer software programs which can "harvest" similar lists from the Internet. While the vast majority of Media3's customers do not offer such "spam support" services, a few do. *See Def's Exhibits 1-4.*

In May of 2000, the offending websites were brought to the attention of MAPS. MAPS is a non-profit Internet service provider based in California which, like other Internet service providers (such as America Online), provides Internet and e-mail access to its subscribers. While MAPS is organized like an ordinary ISP, its mission and role in the Internet community is distinct. MAPS's stated purpose is to combat spam. Its primary means for combating spam is its "Realtime Blackhole List." The blackhole list is a constantly updated list of the websites which, in MAPS's view, either send or support the sending of spam. When MAPS places a website on the blackhole list, it blocks transmission between the website and addresses in its system. MAPS has made its popular blackhole list available to

other Internet service providers, sometimes for a fee. It is a popular product and approximately 40 percent of all internet addresses, including those of several Massachusetts enterprises, use MAPS's blackhole list as a spam filter.

In May of 2000, when MAPS learned that Media3 was hosting ten websites on one of its Class C networks which allegedly "supported spam," it contacted Media3 and requested that Media3; (1) terminate its hosting agreements with the contested websites; and (2) revise its Acceptable Use Policy to expressly prohibit the provision of "spam support" services such as the harvesting of e-mail addresses described above. If Media3 did not comply, MAPS informed Media3 that it would place on the blackhole list not only the ten contested websites but also any other websites that were on the same Class C network as the contested websites. This prospect was of some concern to Media3 because, as a hosting company, one of the primary services that it provides to its customers is ensuring that their websites are freely accessible and can easily access the Internet. Inclusion on MAPS's blackhole list would threaten Media3's ability to deliver good access to the Internet. After some exchange back and forth via e-mail and telephone between MAPS, in California, and Media3, in Massachusetts, Media3 refused to comply with MAPS's requests. MAPS then listed the disputed websites and any other websites on the same Class C network on the blackhole list.

II. Personal Jurisdiction

III. Media3's Application for a Preliminary Injunction

Although it has made serious claims which may entitle it to ultimate relief, Media3 has failed to establish a likelihood of success on the merits or that it is suffering irreparable injury. Accordingly, Media3's motion for preliminary relief is denied. In the circumstances, it is unnecessary to examine in depth either how the proposed injunction would effect the public interest or burden the parties.

A. Merits

1. Defamation

Business defamation is committed when a false and defamatory statement is communicated which "prejudice[s] [the plaintiff] in the conduct of its business and deter[s] others from dealing with it." *A.F.M. Corp. v. Corporate Aircraft Mgmt.*, 626 F. Supp. 1533 (D.Mass. 1985). In all other respects, the elements of a business defamation claim are those of ordinary defamation, that is, that the defendant published "a false and defamatory written communication of and concerning the plaintiff." *McAvoy v. Shufrin*, 401 Mass. 593, 597, 518 N.E.2d 513, 517 (1987).

"A threshold issue is whether the statement is reasonably susceptible of a defamatory meaning, and that determination is a question of law for the court." *Foley v. Lowell Sun Pub. Co.*, 404 Mass. 9, 11, 533 N.E.2d 196, 197 (1989) (citation omitted). "The test is, whether, in the circumstances, the writing discredits the plaintiff in the minds of any considerable and respectable class of the community." *Smith v. Suburban Rests., Inc.*, 374 Mass. 528, 529, 373 N.E.2d 215, 217 (1978) (citations omitted). There is no dispute among the parties that calling an Internet business a "spammer," or "spam-friendly," discredits the enterprise in the minds of a considerable segment of the Internet community.

However, even if the statement is subject to a defamatory construction, truth is a complete defense. *Dulgarian v. Stone*, 420 Mass. 843, 847, 652 N.E.2d 603, 606 (1995). It is the defendant's burden to prove truth as an affirmative defense. *Maloof v. Post Publ'g Co.*, 306 Mass. 279, 280, 28 N.E.2d 458, 459 (1940). MAPS has labeled Media3 as a "spam-friendly" organization. *PI Hearing Transcript. II* 10, 16, 19. Media3 contends that the label is false. In attempting to prove the falsity of the statement, Media3 relies heavily on its "Acceptable Use Policy," which it requires all its hosted websites to sign. This "Acceptable Use Policy" contains an "anti-spam" provision.

MAPS responds that its assertion that Media3 is "spam-friendly" is true because Media3 does, in fact, host companies that provide services exclusively to spammers.

Media3 has not established a likelihood that it will prevail on the merits of its defamation claim because, on the present record, MAPS has made a strong showing that its characterization of Media3 as "spam-friendly," is true. Media3's actions may well be found to outweigh its "Acceptable Use Policy." As described above, Media3 hosts several websites which provide support services that are used either exclusively or predominantly by spammers. *See Def.'s Exhibits 1-4*. These services include the sale of hundreds of thousands and even millions of e-mail addresses which

are sold without any indication whatsoever that they are sold with the permission of the e-mail user. As the record stands, there is a serious question whether MAPS's assertion that Media3 is "spam-friendly" is defamatory because the statement appears to be accurate.

2. *Intentional Interference with Existing and Prospective Business Relations*

The torts of intentional interference with existing and prospective business relations share the same elements:

- (1) a business relationship or contemplated contract of economic benefit;
- (2) the defendant's knowledge of such relationship;
- (3) the defendant's interference with it through improper motive or means; and
- (4) the plaintiff's loss of advantage directly resulting from the defendant's conduct.

American Private Line Servs., Inc. v. Eastern Microwave, Inc., 980 F.2d 33, 35 (1st Cir. 1992) (citing *United Truck Leasing Corp. v. Geltman*, 406 Mass. 811, 551 N.E.2d 20 (1990)).

Media3 contends that MAPS has improperly and tortiously listed over 1500 websites that Media3 hosts on MAPS's blackhole list. MAPS has alleged that only seventeen of these websites actually support spam. Media3 argues that MAPS's inclusion of about 1500 websites that belong to non-spamming customers of Media3 in the blackhole list was improperly motivated by an intent to "coerce" Media3 into dropping the seventeen "spam-friendly" websites.

MAPS responds that Media3 has failed to demonstrate a likelihood of success on the merits of its intentional interference claims because Media3 has not shown that its conduct was undertaken with an improper motive or by improper means or that it has in fact suffered any actual loss of business advantage as a result of MAPS's actions.

The record to date fails to establish that Media3 is likely to prevail on the merits of its intentional interference claims because it has failed to provide any evidence of actual or imminent loss of present or future business advantage resulting from MAPS's actions and a serious question remains as to whether MAPS's motive or means were intentional and culpable.

3. *Unfair Trade Practices Under M.G.L. Ch. 93A, § 11*

B. *Irreparable Harm*

Media3 argues that MAPS's actions have damaged its reputation in the Internet community and have caused it to lose customers. Media3 relies on *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 20 and n.7 (1st Cir. 1996), for the proposition that a demonstration of substantial damage to business [*28] reputation is a sufficient showing of irreparable harm to justify preliminary injunctive relief.

The problem for Media3 however, is that it has not proven that there has been substantial damage to its business reputation. As the Court of Appeals commented in *Public Serv. Co. of New Hampshire v. Town of W. Newbury*, 835 F.2d 380, 383 (1st Cir. 1987), "speculative injury does not constitute a showing of irreparable harm." To the contrary, the evidence of record to date, introduced at the hearing by Media3, tends to demonstrate that its reputation as a web-hosting company has been, and continues to be, excellent even after MAPS began listing Media3 hosted sites on the blackhole list.

Moreover, Media3's delay in filing this application for a preliminary injunction after learning of the threatened harm is some evidence that the alleged "serious harm" to Media3's reputation has not been irreparable. The actions of MAPS of which Media3 complains commenced six months ago, when one of its "Class C Networks" (containing 254 web sites) was put on the blackhole list.

IV

For the reasons stated above, Media3's application for a preliminary injunction is denied.