

C**Motions, Pleadings and Filings**

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United States District Court, D. Massachusetts.
 MEDIA3 TECHNOLOGIES, LLC, Plaintiff,

v.

MAIL ABUSE PREVENTION SYSTEM, LLC, and
 Paul Vixie Defendants.
 No. 00-CV-12524-MEL.

Jan. 2, 2001.

MEMORANDUM AND ORDER

LASKER, J.

*1 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. [FN1] 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.

FN1. As was explained at the hearing on the application for a preliminary injunction, receiving spam is like receiving (without your permission) a collect call from a telemarketer or junk mail on which you have to pay the postage. This is because your Internet service provider pays for the costs associated with your receipt of spam and would presumably pass these costs on to its customers.

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.*

*2 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, [FN2] use MAPS's blackhole list as a spam filter.

[FN2] MAPS has sold or given a copy of the blackhole list to at least three companies in Massachusetts, Xensei Corporation, Mathworks, Inc. and Vineyard.net.

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. [FN3] MAPS then listed the disputed websites and any other websites on the same Class C network on the blackhole list.

[FN3] Specifically, it is alleged that Ms. Thompson, a representative of MAPS, phoned Media3 in May of 2000, and e-mailed Media3 on June 1, 2000, to discuss whether websites hosted by Media3 should be placed on MAPS's blackhole list.

In October and November of 2000, a similar exchange between MAPS and Media3 occurred. MAPS asserted that seven websites, on five different Class C networks hosted by Media3, were providing spam support. Once again, after several communications back and forth, Media3 refused to terminate the disputed websites and MAPS then added five more Class C networks hosted by Media3 to the blackhole list. [FN4] At present, six Class C networks, containing over 1,500 websites hosted by Media3, remain on MAPS's blackhole list.

[FN4] Media3 alleges that on in late October of 2000, it received two phone calls from MAPS representatives in which Media3 was informed of the possibility that MAPS would list more websites hosted by Media3 on the blackhole list. On November 7 and 14, 2000, Media3 also alleges that Thompson sent two e-mails to Media3 discussing this possibility. In addition, Media3 alleges that on November 14, 2000, it sent an e-mail to Thompson at MAPS.

II. Personal Jurisdiction

MAPS contends that this court does not have personal jurisdiction over it. [FN5] Massachusetts' long-arm statute, M.G.L. ch. 233A, § 3, establishes the limits of this court's personal jurisdiction. *Walsh v. National Seating Co., Inc.*, 411 F.Supp. 564, 568 (D.Mass.1976). However, a court may not exercise

jurisdiction authorized by the statute unless its application meets the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

FN5. Defendant Paul Vixie has not raised an objection to personal jurisdiction. This discussion is therefore limited to MAPS.

A. Massachusetts' Long-Arm Statute

*3 M.G.L. ch. 233A, § 3 provides, in pertinent part, that a:

- court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's:
- (a) transacting any business in this commonwealth;
- ...
- (c) causing tortious injury by an act or omission in this commonwealth;
- (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth ...

This statute has been interpreted aggressively; Massachusetts exercises jurisdiction over a wide range of people, some of whom appear, at first blush, to have minor contact with the Commonwealth. *See, e.g., Ealing Corp. v. Harrods, Ltd.*, 790 F.2d 978, 982 (1st Cir.1986) (holding that a single telex, when allegedly containing a fraudulent misrepresentation, may establish personal jurisdiction under M.G.L. ch. 233A, § 3(a) and 3(c)).

Because of the frequency of contacts MAPS has had, and continues to have, with Massachusetts, and the broad application of M.G.L. ch. 233A, § 3, I conclude that this court has personal jurisdiction over MAPS under each of the long-arm statute subsections quoted above.

1. M.G.L. ch. 233A, § 3(a)

M.G.L. ch. 233A, § 3(a) requires both that MAPS has "transacted business" in Massachusetts and that at least one of a plaintiff's causes of action arises from that transaction of business. *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 767, 625 N.E.2d 549, 551-52

(1994) (outlining the standard for M.G.L. ch. 233A, § 3(a)).

Media3 asserts that MAPS has "transacted business" in Massachusetts in accordance with M.G.L. ch. 233A, § 3(a) because the record establishes that MAPS: (1) constantly makes available to Massachusetts residents and businesses a searchable version of the blackhole list on its website; (2) offers on its website to sell the complete blackhole list to people everywhere, including, of course, people in Massachusetts; (3) has in fact sold the blackhole list, or at least given the blackhole list, to three or more people in Massachusetts; (4) has sold a "MAPS Membership" to two entities in Massachusetts earlier this year; (5) solicits contributions to its "Legal Defense Fund" on its website from people everywhere, including, of course, people in Massachusetts; and (6) engaged Media3 in a series of email and telephone conversations in connection with the placement of websites hosted by Media3 on the blackhole list. Media3 contends that its causes of action for defamation, interference with business relations, and unfair business practices arise directly from the release of information contained in the blackhole list that MAPS has sold in its business dealings.

MAPS responds that it does not directly target Massachusetts and therefore should not be subject to Massachusetts law and that the few transactions which have occurred in Massachusetts, such as the "MAPS Membership" program, were discontinued before the placement of websites hosted by Media3 on the blackhole list. MAPS denies that in the circumstances it has "transacted business" in Massachusetts.

*4 The jurisdictional grant of M.G.L. ch. 233A, § 3(a) is to be "construed broadly," *Tatro*, 416 Mass. at 767; 625 N.E.2d at 551 (citations omitted), and so construed, it encompasses MAPS's activities. Indeed, the First Circuit has held that sending a single telex to an individual in Massachusetts can establish a "business transaction" sufficient to assert personal jurisdiction over a defendant who has never been physically within the state boundaries. *Ealing*, 790 F.2d at 983 (holding that the telex was sufficient because it formed the basis of the cause of action). Here, at least

six email and telephone communications have occurred between MAPS and Media3 personnel in Massachusetts. These communications form the basis of Media3's M.G.L. ch. 93A claim and possibly its claims for interference with business relations. Under *Ealing*, M.G.L. ch. 233A, § 3(a) jurisdiction over MAPS exists as to those claims.

2. M.G.L. ch. 233A, § 3(c)

M.G.L. ch. 233A, § 3(c) permits personal jurisdiction if a defendant causes tortious injury in Massachusetts and the plaintiff's claims arise from those torts.

Media3 argues that personal jurisdiction under subsection (c) is based on the facts detailed above and the fact that all of its claims allege that MAPS has caused it tortious injury. MAPS replies that it has not acted or failed to act in Massachusetts and that the availability of its Website in Massachusetts alone is insufficient to confer jurisdiction.

M.G.L. ch. 233A, § 3(c) grants personal jurisdiction over MAPS. The allegedly defamatory remarks made in the evidence files for the blackhole list on MAPS's Website were knowingly sent into Massachusetts. MAPS "knows" that its Website reaches residents of Massachusetts who choose to access it, just as surely as it "knows" any letter or telephone call is likely to reach its destination." *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F.Supp. 456, 467 (D.Mass.1997). Moreover, as indicated above, a single fraudulent misrepresentation made by facsimile has been held to meet the requirements of M.G.L. ch. 233A, § 3(c). *Ealing*, 790 F.2d at 982. Media3 claims that there have been at least three communications (or downloads) of allegedly defamatory statements to people in Massachusetts, as well as a series of email and telephone conversations that were made to it by MAPS in violation of M.G.L. ch. 93A. MAPS does not dispute these facts, but counters that they do not constitute tortious injury in Massachusetts. However, even if the availability of MAPS's Website in Massachusetts alone were insufficient to confer personal jurisdiction, the other contacts listed above do so.

3. M.G.L. ch. 233A, § 3(d)

M.G.L. ch. 233A, § 3(d) establishes personal jurisdiction when a tort is committed in Massachusetts

based on acts committed elsewhere and the tort is joined with either the regular solicitation of business, or persistent, additional, and continuing contact with the Commonwealth, or the derivation of substantial revenue from Massachusetts." *Keds Corp. v. Renee Intern. Trading Corp.*, 888 F.2d 215, 218 (1st Cir.1989); see also *Digital*, 960 F.Supp. at 467 n. 24 (discussing the disjunctive nature of § 3(d)). Media3 asserts that, as in *Digital*, MAPS has sold, or given away through its Website, information to at least three entities in Massachusetts: The Xensei Corporation, Mathworks, Inc., and Vineyard .net. Media3 further alleges that, as in *Blumenthal v. Drudge*, 992 F.Supp. 44, 57 (D.D.C.1998), MAPS's Website is interactive in the sense that it allows users to input data and retrieve queries; the blackhole list, which is constantly available in Massachusetts, is regularly updated; and the Website solicits funds in Massachusetts.

*5 MAPS responds that the cases cited by Media3 are distinguishable. In *Digital*, for instance, MAPS points out that the plaintiff was a Massachusetts corporation which had entered into a licensing agreement with the defendant that formed the basis of its trademark infringement suit. As to *Blumenthal*, MAPS stresses the defendant's multiple contacts with the forum: the defendant traveled to the District of Columbia to promote his "Drudge Report" publication and had collected money from fifteen people in the District of Columbia. MAPS argues further that its Website does not specifically target anyone in Massachusetts, and that personal jurisdiction cannot be founded merely on the availability of the Website. See, e.g., *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F.Supp.2d 907, 922 (D.Or.1999) (holding that under Oregon law, the sale of a single compact disc within the state, in conjunction with the maintenance of a Website, did not subject the defendant to personal jurisdiction in Oregon).

MAPS's Website is interactive, that is, it allows users to access information and retrieve results of queries put to the Website. For example, the MAPS Website allows users from Massachusetts to access the blackhole list, free of charge, to search for specific Internet protocol addresses. The Website also allows Massachusetts users to download the entire blackhole list,

generally after having entered into a contract with MAPS and paying a fee. At least three entities in Massachusetts have downloaded the blackhole list. Under such circumstances, personal jurisdiction exists under M.G.L. ch. 233A, § 3(d).

B. Due Process Clause of the Fourteenth Amendment
The test for determining the constitutionality of exercising personal jurisdiction over a defendant is three-pronged. See Sawtelle v. Farrell, 70 F.3d 1381, 1388-96 (1st Cir.1995). The constitutional question is whether there are sufficient "minimum contacts" between the defendant and Massachusetts to meet the considerations of fairness imposed by the Fourteenth Amendment. International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945).

First, the plaintiff's claims must arise from, or relate to, the defendant's activities in Massachusetts. Sawtelle v. Farrell, 70 F.3d at 1389. Here, they plainly do.

Second, a defendant's activities must show "purposeful availment of the privilege of conducting activities" in Massachusetts. Sawtelle v. Farrell, 70 F.3d at 1389 (quoting United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir.1992)). This factor focuses on the question of whether MAPS voluntarily made contacts with Massachusetts and whether it was foreseeable that it would be "haled into court" here. World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

MAPS did make voluntary contacts with Massachusetts and under such circumstances it was reasonably foreseeable in today's globalized state of commerce that it might be sued in the Commonwealth. MAPS initiated contact in Massachusetts with Media3 regarding the listing of certain IP addresses on the blackhole list. Moreover, the link on its Website entitled "How to Sue MAPS" indicates a willingness, indeed an eagerness, to spark litigation in an effort to develop landmark precedent favorable to its war against spam and spamware. As that page notes:

*6 Ultimately, the board of MAPS believes that new laws will need to be created to address the problem of Internet mail abuse. One way to do this is by lobbying legislators, and our allies at CAUCE

are working on that angle. Another way to do this is with case law, as was the result of the famous Roe vs. Wade decision of 1973. It's our hope that MAPS can help bring about a similar landmark case and carry it all the way to the Supreme Court where federal case law can result.

While this statement does not itself evince an eagerness to appear in the District of Massachusetts, it does undermine MAPS's argument that it should not be chargeable with knowledge of the possibility of litigation over the placement of websites hosted by Media3 on the blackhole list. Moreover, maintaining a Website that solicits and sells information to people in Massachusetts is itself an instance of the "purposeful availment" of the commerce and benefits of Massachusetts, and soliciting contributions to a legal defense fund, with the hope or expectation that Massachusetts residents might make such contributions, is also an instance of "purposeful availment." See Digital, 960 F.Supp. at 467 (discussing the awareness of a Website owner about where a Website may be accessed).

Finally, the "exercise of jurisdiction must, in light of Gestalt factors, be reasonable." Sawtelle v. Farrell, 70 F.3d at 1389 (quoting United Elec. Workers, 960 F.2d at 1089). These "Gestalt factors" are: (1) the burden imposed on the defendant by requiring an appearance in the state; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the judiciary's interest in obtaining the most efficient resolution of the controversy; and, (5) public policy concerns. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

Here, these "Gestalt factors" weigh in favor of jurisdiction: (1) there is no "special or unusual burden" for MAPS to appear in this district; Pritzker v. Yari, 42 F.3d 53, 64 (1st Cir.1994), cert. denied, 514 U.S. 1108 (1995) (holding travel from New York to Puerto Rico insufficient to create a "special or unusual burden"); Digital, 960 F.Supp. at 471 (holding travel from California to Massachusetts insufficient to create a "special or unusual burden"); (2) Media3 is a Massachusetts corporation and therefore Massachusetts has an interest in adjudicating the dispute; (3) Media3 has chosen this district to litigate its claims;

and (4) the administration of justice is not undermined by litigating the case in this court. Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 718 (1st Cir.1996), cert. denied, 520 U.S. 1155 (1997) (holding that "[u]sually this factor is a wash.").

The issue of public policy is less clear. While there may be public policy considerations for limiting the geographical exposure of corporations to lawsuits, an equally strong argument may be made that the public may be served by requiring corporations selling and acting over the Internet to take responsibility for their actions wherever they have effect.

*7 I recognize that the assertion of jurisdiction in a case of this kind may be used to argue that MAPS and similar organizations are subject to the jurisdiction of courts without geographical limit. Such a result is troubling in a world that, in theory, still uses geography as the basis for the exercise of personal jurisdiction. Nonetheless, in the case at hand, MAPS has done more than merely setting up a Website with allegedly tortious content. It has acted purposefully and successfully to sell and distribute its product, the blackhole list, in Massachusetts. It has directed its staff to encourage Massachusetts companies, over the telephone and through email, to discontinue spam-neutral and spam-friendly websites. Accordingly, I conclude that the exercise of this court's jurisdiction over MAPS is reasonable, and is authorized by the Massachusetts long-arm statute and the United States Constitution.

III. Media3's Application for a Preliminary Injunction
Preliminary injunctive relief may be granted only upon a showing:

- (1) that plaintiff will suffer irreparable injury if the injunction is not granted;
- (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant;
- (3) that plaintiff has exhibited a likelihood of success on the merits; and
- (4) that the public interest will not be adversely affected by the granting of the injunction.

Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1008 (1st Cir.1981) (citation omitted).

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. [FN6]

FN6. However, neither of these factors clearly weighs in favor of granting the injunction. Important countervailing concerns exist regarding these factors.

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. [FN7]

FN7. Other courts have recognized that "spamming" is a practice condemned by many in the Internet community. See CompuServe, Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015, 1018 (S.D. Ohio 1997)

(describing spamming as a "much maligned practice" in the Internet community); America Online, Inc. v. LCGM, Inc., 46 F.Supp.2d 444, 446, n. 1 (E.D.Va.1998) (describing spamming as a "practice widely condemned in the Internet community").

*8 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 ele-

ments:

- (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.

*9 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

Media3's Chapter 93A claim is based on the same allegedly "sharp practice" which forms the basis of its intentional interference claims. Media3 alleges that MAPS is attempting to "coerce" Media3 into terminating seventeen accounts which allegedly provide "spam support" by placing 1500 untainted websites on the blackhole list.

MAPS asserts three defenses to Media3's Chapter 93A claim: First, that it has not engaged in any "sharp practices;" second, that because its activities were not commercial in nature, its actions do not fall within the scope of M.G.L. ch. 93A, § 11 (citing Hubert v. Melrose-Wakefield Hosp. Ass'n, 40 Mass.App.Ct. 172, 661 N.E.2d 1347 (1996)); and third, that Media3 has failed to establish that the allegedly unfair activities occurred "primarily and substantially" in Massachusetts.

Again, the present record fails to demonstrate that Media3 is likely to succeed on the merits of its Chapter 93A claim. There remain serious questions whether MAPS's behavior constitutes "sharp practices," as defined by the cases, as well as whether MAPS's actions occurred "primarily and substantially" in Massachusetts or involved "commercial activity" by MAPS.

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 (1 st Cir.1996), for the proposition that a demonstration of substantial damage to business 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 (1 st 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.

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

It is so ordered.

Not Reported in F.Supp.2d, 2001 WL 92389 (D.Mass.)

Motions, Pleadings and Filings ([Back to top](#))

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