Constitutional Protection for Non-Media Defendants: Should There Be a Distinction Between You and Larry King?

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Constitutional Protection for Nonmedia Defendants: Should There be a Distinction Between You and Larry King?

The liberty of the press is not confined to newspapers and periodicals... The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.¹

INTRODUCTION

On March 26, 2009, the notorious rocker and former lead singer of the band “Hole,” Courtney Love, was sued for libel by fashion designer Dawn Simorangkir after Love made “vile and defamatory” statements concerning Simorangkir on her Twitter account.² While Love does not fit within the typical definition of “media,” these statements by Love claiming that Simorangkir is a “thief,” an “unfit parent, a racist and homophobe,” and a “danger to society” were circulated and read by “potentially millions of people” who could simply follow Love’s Twitter feed.³ Although this suit is still pending and it is unclear how the Superior Court of California will decide, this action is indicative of what the future may hold for internet users and the statements they make that are disseminated through social networking websites such as Twitter,⁴ MySpace,⁵ and Facebook.⁶

¹ Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).
⁴ About Twitter, http://twitter.com/about#about (last visited Aug. 17, 2010) (describing the system as a privately funded, real-time, short messaging service that works over multiple networks and devices).
Take, for example, Amanda Bonnen, a non-celebrity Twitter user who did not have millions of followers – in fact, she only had twenty at the time the “tweet” at issue was made. Bonnen was sued on July 20, 2009 in a defamation action by her former landlord, Horizon Group Management LLC, after she “tweeted” about her moldy apartment. Horizon claimed that this statement damaged its good name because the web post was published “throughout the world” and sought $50,000 in damages.

Although Twitter is not the primary subject at issue, one has to wonder: do these cases have merit? With the rapid growth of technology and the popularization of internet blogs, the amount of information that is uploaded by both the traditional media and nonmedia web users is quickly increasing and with these posts, an ever-growing amount of individuals are able to read what these people are saying. While the Love case is still pending, it is clear that at least some courts find


10. The lawsuit against Amanda Bonnen was dismissed with prejudice on January 20, 2010 by Cook County Circuit Court Judge Diane Larsen based on a determination that the tweet regarding Horizon Group Management, LLC, was “really too vague.” Bonnen’s attorneys argued that the tweets posted were hyperbolic, were not statements of fact, and were therefore “reasonably susceptible of innocent construction and protected by the First Amendment.” Horizon Group’s attorneys again argued that Bonnen’s Twitter account was capable of being accessed around the world and that “Bonnen shouldn’t be shielded from responsibility because of how she views Twitter.” After considering both arguments, Judge Larsen, in dismissing the case, found that the “tweet [was] non-actionable as a matter of law.” See Jamie Loo, Judge: Tweet ‘Lacks Context’ for Court Action, MCCORMICK FREEDOM PROJECT, January 20, 2010, http://www.freedomproject.us/post-exchange/Article-Judge_dismisses_twitter_defamation_lawsuit.aspx.
defamatory web posts to have some legal merit; however, it will likely take years for the jurisprudence to catch up to technology and for courts to sort through actions, such as these, to determine how the law regarding the First Amendment should evolve to handle these situations.

If courts determine that Love's case is actionable and recovery should be granted, the next question (and focus of this comment) is: Does an individual like Love, who published information that was disseminated to "potentially millions of people,"\textsuperscript{11} deserve the same constitutional protection that United States courts give to powerhouses like Time Magazine or the Washington Post, which also publish information that is distributed throughout the world?

To answer this question, it is necessary to understand the background of defamation law and the role that media defendants have played in the interpretation of the First Amendment. The distinction between media and nonmedia defendants has served as a side-note to many cases that have come close to or have actually reached the Supreme Court of the United States, but that distinction has never been addressed as a center-stage issue. However, in light of the growing uses of technology that allow not only news outlets, but also average citizens, to post their ideas, thoughts, and opinions online for the public to view, it may be time for the courts to decide who deserves more protection: USA Today, Courtney Love, or you.

Some state courts and federal district courts have specifically recognized a distinction between media and nonmedia defendants in defamation actions, one noted that "average-joe" nonmedia defendants are given less constitutional protection than news-producing media,\textsuperscript{12} while another noted that although there is a distinction, plaintiffs suing nonmedia defendants have the same First Amendment hurdles to jump.\textsuperscript{13} Other courts have determined that the First Amendment itself


\textsuperscript{12} See Denny v. Mertz, 318 N.W.2d 141, 153 (Wis. 1981) ("While we recognize that some courts in other jurisdictions have held that the Gertz protections apply to all defamations, regardless of whether published through the media or by private persons, we do not read Gertz as requiring that the protections provided therein apply to nonmedia defendants, nor...do we consider it good public policy to so decide.").

\textsuperscript{13} See Don King Prods., Inc. v. Douglas, 742 F. Supp. 778, 782-83 n.4 (S.D.N.Y. 1990) ("[A]ll speakers, regardless of status as members of the organized press, are entitled to...First Amendment protection. Although the Supreme Court has not yet finally resolved the issue, the First Amendment itself would appear to admit of no hierarchy of speakers, nor would its ends be served by judicially valuing speech by criterion of source... . New York courts have accorded defamation protections to non-
recognizes no distinction between media outlets and nonmedia reporters who disseminate information to the public.\textsuperscript{14}

Perhaps the confusion amongst these lower courts has arisen because the United States Supreme Court has consistently used the words "media defendant" when discussing defamation actions.\textsuperscript{15} Alternatively, the confusion may be a result of the Supreme Court's active avoidance of addressing the issue.\textsuperscript{16} Or, it could be that this uncertainty has occurred on account of the high Court's decision in \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.}, in which the majority affirmed a Vermont Supreme Court decision that recognized that First Amendment protections apply only to media defendants (on different grounds), while never specifically weighing in on the distinction made by the Vermont state courts.\textsuperscript{17}
This Comment considers the current law, contemplates the rapid growth of technology and proposes an answer to the following two questions: Should there be a distinction between media and nonmedia defendants? If so, who should be offered more protection: You or Larry King? To answer these questions, Part I summarizes traditional and current defamation law and the First Amendment protections that have been meted out by the courts. Part II discusses the court decisions that have noted whether a distinction between media and nonmedia defendants is meritorious and critiques those conclusions in light of the development of defamation law. Part III addresses the evolution of the media by comparing early defamation actions with the current circumstances facing American society, where newspapers are fading away and the internet is on the rise. Additionally, this subsection explains the necessity of defining the word “media,” and theorizes how the courts might do so in light of the rapid growth of technology. Finally, Part IV contemplates whether there should be a distinction between media and nonmedia defendants, explains the benefits and downsfalls of each approach, and predicts what may happen in the future given that the ability to communicate defamatory statements now takes mere seconds and has a potentially globalized effect.

I. DEFAMATION: WHO, WHAT AND HOW?

Defamation has been defined as communication that harms the reputation of another so much that it lowers him in the eyes of his community and potentially deters third parties from associating with him. An individual may recover financially for defamation from the person who has harmed his reputation or economic status by establishing that: (1) a false and injurious statement was made against him, (2) the statement was published, and (3) harm was caused by that publication. Through the evolution of defamation cases, distinctions have been made between plaintiffs that are public officials, public figures, and private individuals.

"[s]uch a distinction is irreconcilable with the fundamental First Amendment principle that the inherent worth . . . of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual") (internal quotations omitted).


19. Id. at 227.
For a public official or public figure to recover for slander or libel, he or she must show that the injurious statement made by the defendant was made with "actual malice," which has been defined as making a statement with "knowledge that it was false or with reckless disregard of whether [the statement] was false or not." A public official typically denotes some form of government employee, whether the President, a Congressman, or a city commissioner; a public figure is one "whose views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of 'public officials' with respect to the same issues and events." Because these two types of plaintiffs have sought to become involved in the affairs of society and should expect public comments relating to their fitness, they must prove that the statement(s) they are challenging are false and have caused harm to their reputation in order to surpass free speech protections provided by the First Amendment. The courts have reasoned that because public officials and public figures enjoy greater access to channels of effective communication (i.e., they can make a responsive statement of their own to the media and have it distributed with ease) than private individuals, they must jump these additional hurdles when filing suit against those that have critiqued their conduct, capacity, or fitness to perform their official or public duties. Without such protections, it is likely that public officials and public figures would be less accountable and held to lesser standards than they should be.

20. New York Times Co. v. Sullivan, 376 U.S. 254, 280–81 (1964) (defining actual malice and stating that "[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'"); see also Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, J., concurring) ("[P]ublic figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities . . . . Therefore adhere to the New York Times standard in the case of 'public figures' as well as 'public officials.'").

23. See In re IBP Confidential Bus. Documents Litig., 797 F.2d 632, 643 (8th Cir. 1986). The Supreme Court has stated that a private individual who has not sought office or influence and, as a result, has no prominent role in society is "more vulnerable to injury" and is "more deserving of recovery." Id. at 643. Based on this, the Court has provided that a private individual may establish liability and recover actual damages by means of a simple showing of fault. However, actual malice must still be proven in order for a private individual to recover presumed or punitive damages. Id. at 643–44.

24. See id. at 643. (acknowledging that "public officials and public figures are in a better position than private individuals to attempt to rebut and reduce the harm of a defamatory statement").
because the public would fear legal liability when making valid appraisals of the actions of those in positions of power. 25

As mentioned, the courts have determined that private individuals need only provide a simple showing of fault to recover actual damages for harm to their reputation. 26 However, a distinction has been made regarding recovery by a private individual depending on whether the matter is of public or private concern. 27 If a statement relates to a purely private matter, the Constitution does not require any additional showing of malice, meaning that a private figure harmed by a statement of private concern can recover presumed and punitive damages without a showing of actual malice. 28 On the other hand, if the statement made involves a private individual and it relates to a matter of public concern, which is of extreme importance to the First Amendment, the plaintiff must present evidence of actual malice on the part of the defendant in order to recover presumed or punitive damages. 29 Whether a statement addresses a matter of public concern can be determined by the "content, form and context" of the publication and thus is a determination that courts must make on a case-by-case basis. 30

In addition to the distinctions made between plaintiffs, types of damages that are recoverable, and whether the content of the statement merits more constitutional protection, the courts have noted that the First Amendment protects statements that cannot be reasonably interpreted as stating "actual facts" about an individual. 31 As a result of this holding in Milkovich v. Lorain Journal Co., two subcategories of speech have been carved out as incapable of being interpreted as stating "actual facts" about an individual and are thus constitutionally protected.

25. See New York Times Co., 376 U.S. at 282 (regarding the need for the public to be able to comment on the activities of an official without fear of liability, the Court stated that if First Amendment protections were not available to critical defendants, "the threat of damage suits would otherwise 'inhibit the fearless, vigorous, and effective administration of policies of government' and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties'").
26. See generally Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (stating that for recovery in the context of a private individual plaintiff "[i]t is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury").
28. See id.
First, statements on matters of public concern that fail to contain a "provably false factual connotation" are protected by the First Amendment. Statements that reference issues of social or political interest to a community are statements that involve matters of public concern. The community that is effected does not have to be large, nor does the statement need be of "paramount importance or national scope" for the defendant to be protected under the Constitution.

The second category of speech that is incapable of being interpreted as stating "actual facts" about an individual is rhetorical statements that use hyperbolic or figurative language. These types of statements are protected to prevent a decrease in, or "chilling of," public debate and discussion, a hallmark of our Constitution and nation; and, because loose or figurative language is being utilized, the audience that receives this information is likely to understand that the speaker is not asserting actual facts.

With these various hurdles established, it is apparent that the First Amendment has been interpreted as providing a great deal of protection to individuals in our society who exercise their right of free speech. However, it is clear that while defamation may be a difficult cause of action to pursue, it is not impossible for a plaintiff to recover when his reputation has been harmed - our judiciary promotes free speech at the expense of some offended reputations, but once a defendant has crossed the thresholds established, the court will step in and provide a remedy to a harmed plaintiff. With this brief explanation of the law of defamation, it is obvious that courts currently handling libel and slander suits must navigate not only through decades of case law precedent, but also must adjust to our ever changing society and the new ways that we communicate information to interested parties.

II. MEDIA VS. NONMEDIA DEFENDANTS: WHAT THE COURTS HAVE SAID

The courts that have specifically addressed the distinction between media and nonmedia defendants in defamation actions have reached varying results. Some courts have noted that there is a distinction and thus two divergent standards of protection. Others, although

32. Milkovich, 497 U.S. at 20.
33. Kirby v. City of Elizabeth City, 388 F.3d 440, 446 (4th Cir. 2004).
34. Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 132 (1st Cir. 1997).
35. See Snyder, 580 F.3d at 220.
36. Id.
37. See Cioppettini, supra note 18, at 231.
recognizing a distinction between media and nonmedia defendants, have determined that both potential defendants merit the same protection. Still others have recognized that because the Constitution itself recognizes no distinction, the courts should not either. In sum, the lower courts, both state and federal, have made conflicting, inconsistent, and confusing decisions. Moreover, the Supreme Court, although presented with the opportunity to settle this controversy in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., avoided the issue of distinguishing between media and nonmedia defendants, allowing the ever-growing uncertainty to continue.

A. Two Types of Defendants: Two Standards of Protection

In Denny v. Mertz, a libel suit was brought by a stockholder against his former employer and a publishing company who had broadcast a false statement that the stockholder had been fired.38 In reaching its decision, the court found that the constitutional protections provided for media defendants when the defamatory statement involves a private person, as explained in Gertz v. Robert Welch, Inc., did not apply to nonmedia defendants.39 Thus, as the dissent by Justice Abrahamson notes, the majority in Denny v. Mertz effectively gave nonmedia defendants less protection in exercising their constitutional right of free speech than it gave the media.40

In a case that arrived at the same conclusion, the Vermont Supreme Court in Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc. acknowledged the fact that making a distinction between media and nonmedia defendants was difficult to achieve, but noted that there is a clear difference between a publication that disseminates “news” for public consumption and one that provides specialized information to a select audience.41 In justifying its holding that the media protections outlined in Gertz are inapplicable to nonmedia defamation actions,42 the court stated that in nonmedia defamation cases “[t]here is no threat to the free and robust debate of public issues,” there is no interference with the “meaningful dialogue of ideas concerning self-government,” and there is

39. Id. at 153.
40. Id. at 155 (Abrahamson, J., dissenting).
42. Id.
no possibility of censoring the press. Therefore, because the traditional constitutional values that the rules of defamation aim to protect are not present, nonmedia defendants should not receive the same level of constitutional protection.

B. Two Types of Defendants: One Standard of Protection

Despite the fact that some courts have given less protection to nonmedia defendants, others have noted that there is a distinction between the two parties, but nonmedia defendants still are entitled to the same protection as members of the media. In Don King Productions, Inc. v. Douglas, the court, in discussing what needed to be proven for the defamation action to be successful, explicitly recognized that Don King Productions was a nonmedia defendant, but stated that all speakers, regardless of status as members of the organized press, are entitled to the same amount of First Amendment protection. Recognizing that the United States Supreme Court had not yet resolved the issue, the court based its determination on the fact that the First Amendment does not, on its face, appear to have a hierarchy of speakers and its ends would not be served by valuing speech by its source.

C. One Type of Defendant: One Standard of Protection

Adding yet another layer of confusion to the media/nonmedia dilemma, other courts have determined that the First Amendment itself recognizes no distinction between media and nonmedia defendants. In a defamation action by a pilot against his former lover, the court in Ayala v. Washington provided a four factor approach to be utilized when determining how a plaintiff may prevail and noted what protection, if any, should be given to defendants. In a mere footnote, the court briefly stated that a fifth factor, whether the defendant is properly characterized as a member of the media, did not exist because the First Amendment recognized no such distinction.

43. Id. at 418 (quoting Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1362–63 (Or. 1977)).
44. Id.
46. Id.
47. Ayala v. Washington, 679 A.2d 1057, 1062 (D.C. 1996) ("There are four factors to be determined in the universe of First Amendment defamation law: the kind of speech, the facts that must be proven, the certainty of proof required, and the type of damages.").
48. Id. at 1063 n.2.
In addressing the fact that the Supreme Court, in defamation actions, tends to speak in terms of "press and broadcast media" when discussing defendants, the court in Bainhauer v. Manoukian determined that although the Court uses this language, it still reaches its decisions based on the nature of the defamatory statement and the person defamed rather than the person who made the statement.49 Agreeing with the Restatement of Torts (Second), the court held that there was no reason to distinguish between media and nonmedia defendants.50 Those courts that have specifically cited the Supreme Court as a basis for their decisions have recognized that although the Court, as stated above, consistently uses the words "media defendant" in discussing those individuals that are being sued, it has chosen to not specifically rule on the issue. Subsequent Supreme Court and lower court decisions have relied on that fact as a reason to do the same.51

D. Dun & Bradstreet: Vermont Supreme Court v. the Supreme Court of the United States

As to the United States Supreme Court's decision in Dun & Bradstreet, Inc., as previously discussed supra, the Vermont Supreme Court held that nonmedia defendants do not merit the same constitutional protection as defendants who disseminate "newsworthy" information because the First Amendment values that the laws of defamation aim to protect (i.e., free debate and press censorship) are not implicated.52 However, the Supreme Court, although affirming the decision in favor of the plaintiff, opted to rest its decision on the fact that the statement involved no matters of public concern and therefore the plaintiff need not show actual malice in order to recover presumed and punitive damages.53 This holding created yet another layer of confusion for lower courts to wade through when determining whether to provide different levels of protection to media or nonmedia defendants because rather than speaking specifically to the methodology utilized by the state court, the Supreme Court simply stated, "We now affirm, although for

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50. Id.
reasons different from those relied upon by the Vermont Supreme Court.\textsuperscript{54} Despite the elusiveness of the majority, Justice Brennan made clear in his dissent that a distinction should \textit{not} be drawn, stating that such a distinction between media and nonmedia defendants is "irreconcilable with the fundamental First Amendment principle that '\textit{the inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.}'"\textsuperscript{55}

With a brief overview of only a minute portion of the cases that have touched on the media/nonmedia distinction, it is clear that there is no consistency within our judicial system as to whether nationwide news outlets merit more or less protection than an individual who creates a newsletter and posts it on a community board. Having already set forth a multitude of factors concerning whether an action has merit (i.e., type of plaintiff, public or private concern, level of fault, type of damages), a simple statement by the high Court would resolve this vast uncertainty and establish whether the lower courts need to add one more factor (media/nonmedia defendant) to their methodology. In light of the fact that the line between members of the media and nonmedia citizens has blurred due to the expansion and globalization of the internet, it may be necessary for the Court to determine whether there should be a distinction once and for all. Knowledge of this decision would not only provide potential plaintiffs with the ability to determine if their complaint will be successful, but would also put web users on notice of whether they will be afforded the same constitutional protection as a reporter for \textit{USA Today} when they comment online or blog about their opinions on the same matter.

III. THE GREAT DEBATE: WHO IS THE "MEDIA"?

Prior to \textit{New York Times Co. v. Sullivan}, the Supreme Court consistently viewed defamatory statements as being "wholly unprotected by the First Amendment."\textsuperscript{56} However, in \textit{New York Times, Co.}, the Court began to acknowledge the importance of protecting this form of free speech and started the journey toward defending defamatory

\textsuperscript{54.} Id. at 753.

\textsuperscript{55.} Id. at 782 (Brennan, J., dissenting) (noting that it would be difficult to define the media and "the distinction would likely be born an anachronism").

communications, placing high burdens of proof on plaintiffs. As the law of defamation has evolved, the courts have meted out different standards for different plaintiffs, noted the different types of damages that may be awarded dependent upon a showing of negligence or malice, and created precedent for cases involving public and private concern. During this progression, the cases that courts have heard when creating our current law have traditionally involved news-media defendants who have disseminated information to a “community,” whether it be large or small, which has resulted in harm to the plaintiff’s reputation.

With the creation of more print newspapers, more defamation actions ultimately have resulted, but the standards, as applied to news-media, have remained consistent with the methodology prescribed by the courts. However, as technology evolves and non-news-media individuals become more capable of distributing information to a community relevant to a plaintiff, the law of defamation may need to evolve as well to account for the fact that these individuals, while stating matters that are significant to them, may harm the reputation of another intentionally or unintentionally by disseminating information that can be read online by people around the world.

The necessity of having a media/nonmedia distinction is uncertain; however, what is clear is that the courts need to make a consistent decision about whether there is a different standard for the two. With the state and federal court systems arriving at different conclusions about the requirements of the First Amendment, in light of the rise of the citizen journalist, the celebrity journalist, and the pseudo-journalist, decisions must be made regarding: (1) whether there is a distinction between media and nonmedia defendants, and (2) if there is a hierarchy of defendants, as proscribed by the Constitution, what constitutes “the media.” These decisions must be made so that it is clear who is protected when case law precedents are made.

A. Traditional Media Defined

The traditional definition of media is “the means of communication, [such] as radio and television, newspapers, and magazines, that reach or influence people widely.” While the Supreme Court has never specifically defined media in its own terms, it has referred to “publishers,” “broadcasters,” and “the press,” all of whom distribute the

57. Id. at 4–5.
above listed forms of communication, in its libel decisions, thus comporting with the dictionary and common sense definitions of what the average person would conclude that "media" encompasses.\textsuperscript{59} It has been noted that defining "media" is a difficult, if not impossible task,\textsuperscript{60} but the above two explanations offer a simple, yet compelling, starting place.

To take the definition a step further, and to combat those who have expressed doubt by stating that defining the term media is an impossible task, one can look to state "shield laws," which provide protection for media sources in governmental proceedings.\textsuperscript{61} Because legislatures have already narrowed down which media outlets merit the discretion to and privilege of protecting their sources, it is possible that the judiciary could adopt the groups (i.e., newspapers of general circulation, radio, television stations, and magazines of general circulation) protected by these laws and simply utilize that definition in their analysis and decisions. However, with seventeen states having no media protection law,\textsuperscript{62} four providing minimal protection to publishers,\textsuperscript{63} and the remaining twenty-nine states setting forth differing standards of protection,\textsuperscript{64} consistency will be hard to establish and the courts may be

\textsuperscript{59} See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974) ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual . . . [This approach] recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.").

\textsuperscript{60} Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 781–83 (1985) (Brennan, J., dissenting); see also Log Creek, LLC v. Kessler, No. 4:09cv401-RH/WCS, 2010 WL 2426612, at *10 (N.D. Fla. June 3, 2010) ("[G]iving controlling effect to a defendant's media or nonmedia status would require difficult or impossible line-drawing.").

\textsuperscript{61} See Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 770–71 (1986) (referencing the Pennsylvania shield law that states "[n]o person employed by any newspaper of general circulation or any radio or television station, or any magazine of general circulation, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit") (internal quotations omitted).


\textsuperscript{63} Id.

\textsuperscript{64} Compare N.C. GEN. STAT. § 8-53.11 (2009):

(a) Definitions. -- The following definitions apply in this section:

(1) Journalist. -- Any person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity,
forced to draw a line where they are uncomfortable doing so because of the lasting effects such a definition may have.

engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium.

(2) Legal proceeding. -- Any grand jury proceeding or grand jury investigation; any criminal prosecution, civil suit, or related proceeding in any court; and any judicial or quasi-judicial proceeding before any administrative, legislative, or regulatory board, agency, or tribunal.

(3) News medium. -- Any entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public.

(b) A journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist.

(c) In order to overcome the qualified privilege provided by subsection (b) of this section, any person seeking to compel a journalist to testify or produce information must establish by the greater weight of the evidence that the testimony or production sought:

(1) Is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought;
(2) Cannot be obtained from alternate sources; and
(3) Is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought. Any order to compel any testimony or production as to which the qualified privilege has been asserted shall be issued only after notice to the journalist and a hearing and shall include clear and specific findings as to the showing made by the person seeking the testimony or production.

(d) Notwithstanding subsections (b) and (c) of this section, a journalist has no privilege against disclosure of any information, document, or item obtained as the result of the journalist's eyewitness observations of criminal or tortious conduct, including any physical evidence or visual or audio recording of the observed conduct.

with KY. REV. STAT. ANN. § 421.100 (West 2001):

No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.
B. Defining the Media of the Future

In addition to the problems that the courts may have in defining “traditional” media, because we are now in limbo between the past and future where newspapers and magazines are fading out and the most prominent news source is now the internet, this evolution must be taken into account. Due to the ease by which individuals can publish their thoughts and opinions via blogs, social networking websites, and podcasts, the courts, if they choose to create a media/nonmedia distinction, must determine how they will treat web-users that utilize these internet options in light of the First Amendment. To do so, the court most likely will not only consider who the publisher is, but also the conduit of the publication, the community that is viewing the information, and the method of posting the statement at issue.

Adding to these initial barriers, which are substantial, the courts will also be faced with the Communications Decency Act (“CDA”), which was enacted by Congress in order to provide additional protections for speech on the internet. In ratifying the CDA, Congress attempted to prevent defamation lawsuits from “stifling the technology before it could get off the ground.” This Act presents probably the most difficult task the courts will face if these standards are established because it creates an additional obstacle for an individual attempting to recover for defamation: pinpointing who in fact made the defamatory statement. While it is fairly simple to point to the author of an article in the New York Times, the CDA provides civil immunity to Internet Service Providers (“ISPs”) for information that is posted on the internet as a result of their services. Not only is the “host website” free from liability, but it also may be difficult to determine who the defamatory poster is because of the anonymity provided by many ISPs. Based on these factors, it is clear that making a distinction between media and nonmedia defendants would have been a fairly simple task two decades ago, but in light of growth of the internet and the ease of access to the world wide web, courts face a massive hurdle if they choose to finally make a definitive decision on whether there is a distinction between these two entities.

66. See 47 U.S.C. § 230(b)(1)–(3); see also Cioppettini, supra note 18, at 231–32.
67. Cioppettini, supra note 18, at 231.
68. Id. at 241–42.
69. Id. at 242 (noting that the CDA defines an ISP as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service”).
C. Why a Defining Decision is a Necessity

The importance of making a media/nonmedia distinction (and thus defining the term media) lies in the fact that, as the judiciary hears and decides more and more defamation cases, it continues to increase (or decrease) the level of protection provided to entities that may be considered newly legitimate news sources. With the rapid growth of technology, it is difficult to determine who the term “media” encompasses and who is actually responsible for the defamatory statement published on the internet.

The rise of both the citizen and celebrity journalist, such as Amanda Bonnen and Courtney Love, both of whom disseminate information quickly via blogs and social networking websites, present difficult problems in light of the fact that most of these web users have a substantial number of “followers” who read and potentially pass on the statements that they have seen. Not only do they have the potential to report legitimate “news,” but they also have the opportunity to quickly post statements that are vicious, harmful, and false. If the courts choose to define these persons as members of the “media” or choose not to make a distinction at all, thus placing them on equal footing with the publishers of the Washington Post, they can quickly wrap themselves in the First Amendment and force a plaintiff to jump high hurdles in order to be vindicated. Although defamation by private parties has always been a problem, the ease of access to the internet has made it a more prevalent problem for plaintiffs who seek to recover for the harm done to their reputation by a defamatory statement.

IV. SHOULD THERE BE A DISTINCTION BETWEEN MEDIA AND NONMEDIA DEFENDANTS?

Based on the brief overview of the law that has been presented in this Comment, it is clear that defendants in defamation actions are wrapped tightly in the Constitution – so much so that it is hard for a plaintiff to be successful when he must navigate through the multitude of obstacles that are characteristic of our nation’s law on defamation. With this in mind, it is important to question whether a web-blog user, on Facebook, for example, who discusses her job, relationships, or take on current events should be given the same protections as a typical media defendant (i.e., a newspaper with nationwide circulation) that generates a publication that not only discusses relevant affairs affecting our country, but also includes editorial pieces critiquing our society. This Comment would suggest that the argument could go either way.
On one hand, if this Facebook user decides to make a libelous post about her employer, for the sake of consistency, she should be given the Constitutional protection that is mandated by the First Amendment and enjoyed by the traditional media. On the other hand, her post is arguably not newsworthy and probably not of public concern like a piece in the Washington Post, but still, depending on various factors such as the size of the community reading the post and the nature of the statement, the post has most likely caused reputational harm to her employer. This conundrum is why it is important for the courts to address the media/nonmedia distinction; because both arguments have merit, lower courts that are making these decisions are not right or wrong, but without a clear-cut standard, remain inconsistent.

If it is decided that media can be defined and there should be a different standard for nonmedia defendants, the next question that we are faced with is: Who deserves more protection? If the standard for filing suit against a nonmedia defendant is lower (i.e., it is not as hard to sue a nonmedia defendant and return with favorable verdict), then these web-users (who are entitled to the same First Amendment protections as the editors of the New York Post) would become very hesitant to express their right to free speech. This “chilling” effect would disserve one of the notions that defamation laws were established on: free debate. And without a greater justification than the fact that this Facebook user is not providing news on a nationwide level, one has to wonder: “Why should a non-media defendant who defames a person have any less constitutional protection than a media defendant who defames the same person?”

In addition to the chilling of free speech that would result from not providing the same constitutional protection for individuals that are not members of the news media, it is possible that individuals would attempt to disseminate their defamatory statements to a larger audience in hopes that their efforts would qualify them as “media,” thus receiving greater protection, but also causing greater harm to a plaintiff. It seems counterintuitive that an individual would attempt to make her statement more widespread when facing potential civil liability, but it is a distinct possibility that this could be done in an effort to receive the constitutional protection afforded to the “media” if the courts recognize such a distinction and a lower burden of proof.

Alternatively, if it is decided that there should be no distinction between media and nonmedia defendants, either because the definition of media is impossible to ascertain or because the First Amendment does not recognize a hierarchy of defendants in providing Constitutional

protection, it must be understood that we may be giving "average-joe" internet users a free range opportunity to be malicious in their web-postings by granting them the protection that is offered to traditional media defendants. Knowledge that their statements will be fiercely protected on the grounds of freedom of speech, freedom of debate, and prevention of censorship, nonmedia defendants may use these Constitutional protections in an inappropriate manner. With a lesser likelihood of liability, bloggers and social network users may make vicious statements about third parties online and escape scot-free from adequate punishment. With the general law currently not making a distinction between media and nonmedia defendants in defamation actions, the Courtney Love type cases are the guinea pigs that we must watch to see how this lack of differentiation will play out.

V. CONCLUSION

In December 2009, actor Rob Livingston of "Office Space" fame filed a lawsuit against an anonymous Wikipedia writer for posting on Livingston's entry that he is homosexual and in a relationship with another man. In his suit for libel, Livingston also notes that an anonymous Facebook user has created a faux profile stating that he is in a relationship with "Lee Dennison," when in fact he married a woman named Rosemarie DeWitt in 2009. Wikipedia is a "web-based, free-content encyclopedia" that can be edited and/or changed by "[a]ny one with internet access" and because the website's policy is to not require posters to provide their real name, Wikipedia provides protection to a writer's privacy unless he or she chooses to identify himself or herself. Because of these protections provided by Wikipedia, it is probable that Livingston's suit is merely a shot-in-the-dark attempt to vindicate his reputation.
In situations such as the one faced by Livingston, not only has the First Amendment impeded his attempt to get justice, but it also places a high set of burdens on other plaintiffs like him, who are attempting to recover for reputational damage caused by a vicious defendant. As is seen in this case, as well as the cases of Courtney Love and Amanda Bonnen, the internet has provided another method of defaming a person or entity because it permits illegitimate "news" sources to post information on the World Wide Web with ease and a globalized effect. Despite the fact that it may sometimes be hard to point to who exactly the defendant is, it is apparent in situations such as these that the web-users making these harmful statements tend to rashly make posts that have injurious effects without acknowledging the consequences of their actions. Perhaps determining how these defendants will be treated in a lawsuit when and if these issues are presented to the judiciary will alter the way in which we all use the internet; or perhaps it will have no effect at all.

The bottom line is that individuals using Wikipedia, Facebook, Twitter, MySpace and blogs often do not think about the repercussions of the posts they make online. If their statements are deemed to be offensive and harmful to the reputation of another, a cause of action for defamation may ensue. This is where the courts need to make a decision: Do these average citizen web-users, who are making statements to the entire world, merit the same protection granted by the First Amendment that legitimate media defendants receive? Although the courts have been able to skirt around the issue for decades, in light of the rise of citizen journalists, the time has come for a decision to be made: Is there a distinction between media and nonmedia defendants?

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