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Fading blogger-journalist distinction

By Andrew J. Thomas

Earlier this year, the 9th U.S. Circuit Court of Appeals became the first federal appellate court to hold that an Internet "citizen journalist" — a self-styled investigative blogger not affiliated with any media organization — enjoyed the same First Amendment protections in a defamation suit as a traditional reporter.

In *Obsidian Finance Group LLC v. Cox*, 740 F.3d 1284, the Court of Appeals reversed a $2.5 million defamation judgment that an Oregon bankruptcy trustee had won against individual based on statements posted on her Internet blog. Crystal Cox, a former real estate agent turned blogger, criticized the conduct of Obsidian and its principal, Kevin Padrick, in acting as court-appointed trustee for a former client that was accused of defrauding investors through a Ponzi scheme.

Finding that Cox had failed to prove she was a journalist, the district court rejected Cox's argument that the First Amendment required the plaintiffs to prove fault. Instead, the court instructed the jury that Cox could be found liable without any showing that she acted negligently in making the challenged statements.

In an opinion by Judge Andrew D. Hurwitz, the 9th Circuit held that liability for a defamatory blog post involving a matter of public concern "cannot be imposed without proof of fault." The court found that Cox's blog addressed a matter of public concern because it questioned whether the plaintiffs had failed to protect defrauded investors, and that the lower court should have instructed the jury that it could not hold Cox liable for defamation unless it found she acted negligently.

The panel relied the U.S. Supreme Court's 1974 decision in *Gertz v. Robert Welch Inc.* The high court in that case ruled that, unlike a public official or public figure, a private person suing for defamation did not have to prove that the defendant acted with "actual malice" — that is, with knowledge that a defamatory statement was false or with reckless disregard for whether it was false or not. Rather, if the statement addressed a matter of public concern, the private plaintiff was required to show negligence on the part of the defendant — a lower standard of fault than actual malice, but higher than the common law rule of strict liability. (Many states, including California, require proof of negligence for all defamation claims by private figure plaintiffs.)

While the Supreme Court in *Gertz* did not limit its holding to defamation claims against institutional media defendants, it couched its holding in those terms, observing that a fault standard was important to shield "the press and broadcast media from the rigors of strict liability for defamation." This approach is consistent with other Supreme Court decisions from that era, which ruled narrowly on claims against media defendants, while leaving for another day whether the same standard should apply to nonmedia defendants. E.g., *Philadelphia Newspapers v. Hepps* (1986) (holding that a private figure plaintiff must bear the burden of proving falsity in a defamation case against a "media defendant" when the subject of the speech is a matter of public concern).

The 9th Circuit also cited the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission* for its strong disavowal of a media-nonmedia distinction under the First Amendment, quoting the Supreme Court's pronouncement that "[w]e have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."

In defamation cases, the 9th Circuit elaborated, "[t]he protections of the First Amendment do not turn on whether the defendant was a trained journalist, [is] formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of the story."

The *Obsidian* decision was greeted with considerable fanfare, as if there had been some grave doubt about whether the First Amendment protected speech on the Internet. News outlets trumpeted headlines to the effect that "bloggers now have First Amendment rights." In actuality, a number of other federal appellate courts, including the 2nd, 3rd, 4th, 8th and 10th Circuits, already had held that the *Gertz* protections applied to nonmedia libel defendants.

More difficult questions about protecting speech online, including to what extent bloggers should be treated like traditional journalists in other contexts, remain to be answered. Perhaps the most important unresolved issue is whether bloggers and other online speakers should be able to take advantage of protections afforded to print and broadcast journalists under the First Amendment "reporter's privilege" doctrine and state statutory shield laws — rules that exist so that journalists need not face contempt or go to jail in order to protect confidential sources or other unpublished information.

In its only case to consider the reporter's privilege, the Supreme Court worried in 1972 that defining who qualified for the privilege would be difficult, in light of the "traditional doctrine" that freedom of the press is the right of the "lonely pamphleteer" as much as the "large, metropolitan publisher." *Branzburg v. Hayes*. More than three decades later, a D.C. Circuit judge raised similar, updated concerns in a concurring opinion in the case of reporter Judith Miller: "Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical 'blogger' sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not?" *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979-80 (2005) (Sentelle, J., concurring).

Content Matters

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California provided a partial answer in 2006, when the Court of Appeal held in *Grady v. Superior Court*, 139 Cal. App. 4th 1423, that the protections of the California shield law extend at least to online speakers who publish on news-oriented websites. But while some version of the journalist-source privilege is recognized in 49 states, definitions of who qualifies for reporter's privilege or shield law protection are all over the map.

Some legislatures and courts have focused on whether an individual is connected with or employed by a news organization or is acting as a "professional journalist." E.g., Cal. Evid. Code Section 1070; 735 Ill. Comp. Stat. Section 5/8-902(a); N.Y. Civil Rights Law Section 79-h. Other definitions focus on the speaker's intent — i.e., whether the speaker is engaged in gathering and processing information for the *purpose* of disseminating it to the public. E.g., *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987). The latter approach, adopted by the 2nd and 9th Circuits in applying the reporter's privilege to investigative book authors, is more inclusive of nontraditional journalists and might even protect individual bloggers like Cox.

The Supreme Court appears unlikely to answer the question anytime soon, as it repeatedly has denied certiorari in reporter's privilege cases over the past several years — including most recently last month in regard to the leak investigation subpoena served on New York Times reporter James Risen.

Congress ultimately may provide the answer, in a form that further erases the distinction between media and nonmedia speakers. Again this term, Congress is considering a bipartisan bill to enact a federal qualified journalist's privilege, called the Free Flow of Information Act. A key sticking point since the bill was first introduced in 2007 is how to define who a "journalist" is. As reported out of the Senate Judiciary Committee last year, the bill combines a functional and intent-based approach by defining a "covered journalist" to include current and some former employees, contractors or agents (whether paid or unpaid) of an entity or service that disseminates news or information to the public and who regularly gather information through directly observing events, conducting interviews, or reviewing and analyzing documents "with the primary intent … to disseminate to the public news or information concerning local, national, or international events or other matters of public interest."

The bill excludes from its protection websites like Wikileaks "whose principal function, as demonstrated by the totality of such person or entity's work, is to publish primary source documents that have been disclosed to such person or entity without authorization." But it also includes a catch-all provision that would protect other individuals, such as bloggers like Cox, where a federal court determines that to do so would be "in the interest of justice and necessary to protect lawful and legitimate news-gathering activities."

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