

WHAT IS THE MEDIA IN THE AGE OF THE INTERNET?
DEFAMATION LAW AND THE BLOGOSPHERE

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ABSTRACT

As more people turn to blogs as a source of news and information, the distinction between blogs and traditional media sources has become more complex for courts dealing with First Amendment issues. In the recent case, Obsidian Finance Group, LLC v. Cox, the United States District Court for the District of Oregon held that the defendant, a blogger, was not a member of the media for the purposes of a defamation claim. The court held that media defendants must be at least negligent to be liable for defamatory publications, but because the blogger was a non-media defendant, she was strictly liable for her defamatory comments. This controversial opinion highlights the importance of the lines courts have created around the definition of “the media.” This Article will examine how courts treat bloggers in the context of special media protections. It will consider how the definition of media is being expanded to include some forms of blogging and how this affects defamation law.

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INTRODUCTION

While blogs have become a popular source of information and commentary, the content of many blogs is subject to little oversight or accountability. When defamatory information is posted on a blog, courts must determine whether bloggers are akin to members of the media with respect to First Amendment and state law protections. Recently, the U.S. District Court for the District of Oregon ruled in *Obsidian Finance Group, LLC v. Cox* that the defendant, Crystal Cox, a self-described “investigative blogger,” was not considered a member of the media for purposes of a defamation claim.¹ Cox ran a website, www.obsidianfinancesucks.com, on which she published statements critical of plaintiffs Obsidian Finance Group and Kevin Padrick.² These statements accused the plaintiffs of theft, tax fraud, and lies. While many of her statements were seen as opinions, the court found a few to be potentially defamatory.³ When a case involves a media defendant and a plaintiff who is a private figure,⁴

¹ *Obsidian Fin. Group, LLC v. Cox*, CV-11-57-HZ, 2011 WL 5999334, at *5 (D. Or. Nov. 30, 2011).

² *Obsidian Fin. Group, LLC v. Cox*, 812 F. Supp. 2d 1220 (D. Or. 2011).

³ *Id.* at 1238.

⁴ The elements of defamation, including the distinction between public and

the plaintiff must show that the publication of defamatory material was at least negligent. However, the *Obsidian* court concluded that non-media defendants are held to a standard of strict liability for defamation. When the court found that the defendant was not part of the media, the blogger became subject to strictly liability for her statements to the cost of \$2.5 million in damages. This situation highlights the impact the definition of “media” can have on a defamation defendant.

This Article will examine how courts classify bloggers as either media or non-media entities, and the application of this distinction in defamation law. This Article will begin with a brief account of the development of blogging and how comparisons with traditional news sources create confusion for modern courts dealing with defamation claims. This Article will then describe the elements of defamation, constitutional protections for defendants, and the media/non-media distinction for standards of liability acknowledged by some courts. Looking to various legal sources for the definition of media, this Article will examine the new trend in court cases that is expanding this definition to include certain types of websites, including certain blogs. This inclusion of websites within the definition of the media is based on the general content of a website, how closely the website tracks the format of traditional print media sources, and the journalistic status of the website’s creator.

I. BLOGS COMPARED TO TRADITIONAL MEDIA

Blogs are websites that consist of a series of dated entries, called posts, which are usually displayed in reverse chronological order. Posts often contain hyperlinks that connect to other websites to support the content of the post or to provide further information on the topic. One person or a group of people can write the posts for a blog, and these writers are known as “bloggers.” Bloggers often have a personal and subjective writing style. Originally, blogs started out as online versions of a personal journal or log, and the word “blog” is actually a portmanteau of the phrase “web

private figures, are detailed later in this Article in the discussion of First Amendment protections.

log.” Now blogs cover a wide range of topics from cute animals to parenting to recent developments in technology law.⁵ Blogs provide anyone a fast and cheap way to publicly share ideas.

Blogs have also expanded to cover topics previously within the realm of traditional journalism, such as political commentary and news reporting. Many bloggers critique news coverage from other media outlets or put forth their opinionated interpretations of the news. Some of these blogs have gained public credibility by holding journalists accountable by checking facts and exposing scandals that the mainstream media later picked up.⁶ In some cases, blogs have become independent sources of news. The format of blogs allows material to be posted quickly, allowing breaking news to be published before traditional media.⁷ Bloggers at the scene of current events, such as war zones or natural disasters, are able to broadcast their experiences directly.⁸ Even the traditional press is using the blog format to reach a larger audience. Many newspapers and magazines also incorporate blogs into their online content.⁹ As 46 percent of people now regularly get news online,¹⁰ the lines between blogging and “real” journalism have blurred.

However, blogs are different from the traditional media in two important respects. First, professional journalists have long held themselves to a norm of neutrality, where as bloggers often write from a personal point of view. Second, the institutional press has traditionally performed fact checking as part of its news reporting, while bloggers do not uniformly hold themselves to this standard.

⁵ JILL WALKER RETTBERG, *BLOGGING* 17–18 (2008); *see also* JOY DEANGDEELERT CHO, *BLOG, INC.: BLOGGING FOR PASSION, PROFIT, AND TO CREATE COMMUNITY* 12 (2012); DAVID KLINE & DAN BURSTAIN, *BLOG! HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE* (2005).

⁶ ANSGARD HEINRICH, *NETWORK JOURNALISM: JOURNALISTIC PRACTICE IN INTERACTIVE SPHERES* 148–49 (2011).

⁷ CHO, *supra* note 5, at 12.

⁸ RETTBERG, *supra* note 5, at 98.

⁹ HEINRICH, *supra* note 6, at 152.

¹⁰ The Pew Research Center for the People and the Press, *Trends in News Consumption: 1991–2012: In Changing News Landscape, Even Television is Vulnerable*, 15 (Sept. 27, 2012), available at <http://www.people-press.org/files/legacy-pdf/2012%20News%20Consumption%20Report.pdf> (last visited Apr. 17, 2013).

Although some bloggers follow these standards, the open and uncensored nature of blogging allows for biased information to be posted without a factual basis. Blogging, therefore, creates a space ripe for defamation, which raises the question of whether blogs deserve the same legal protections as other forms of media.

II. THE FIRST AMENDMENT AND THE ELEMENTS OF DEFAMATION

Defamation law consists of a mixture of common law and First Amendment protections. The cases establishing the First Amendment jurisprudence focus on defamation in the traditional press. With changing technology creating new ways of distributing information, the applicability of these protections is no longer clear. The definition of “media,” therefore, has gained new legal importance.

Defamation law exists to protect an individual’s reputation from injury due to false or defamatory attacks. Actions for defamation are based on written or oral statements, which can constitute libel and slander respectively. A writing is libelous if it exposes a person to disgrace, ridicule, contempt, hatred, or shunning and avoidance by others.¹¹ Most common law actions for defamation generally require (1) a false statement made against the plaintiff (2) that was published and (3) caused harm (4) due to the publisher’s wrongful action or inaction at least amounting to negligence.¹² However, an individual’s right to have a reputation free from false attacks must also be balanced with other individuals’ freedom of speech.

For a defendant to be held liable, a defamatory statement must be false and it must be a statement of fact.¹³ The First Amendment protects “a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation.”¹⁴ Therefore, defamation must be based on a statement that is provably false; “imaginative expression,”

¹¹ 19 AM. JUR. TRIALS 499, Defamation, § 3 (1972) (updated December 2012).

¹² RESTATEMENT (SECOND) OF TORTS § 558 (1977).

¹³ RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 11.01[4] (1994).

¹⁴ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

“rhetorical hyperbole,” or “loose, figurative, or hyperbolic language” does not constitute defamation.¹⁵

Constitutional constraints on defamation law have also created liability distinctions between cases involving public officials and figures, private individuals, and matters of public concern. Beginning with the Supreme Court's 1964 decision in *New York Times v. Sullivan*, the Court held that a public official could only prevail in a defamation action where the defamatory falsehood was made “with knowledge that it was false or with reckless disregard of whether it was false or not,” a fault standard known as “actual malice.”¹⁶ The Court also required that this actual malice standard be proven by “convincing clarity,” the heightened burden of proof of clear and convincing evidence.¹⁷ The *Sullivan* decision applied to “public officials,”¹⁸ who are positioned to affect policy. But the Court later extended the actual malice standard to cover “public figures” who have gained public attention or fame through achievement, success, luck, or personal effort.¹⁹

The defamation standard for private individuals who are not public figures was established in *Gertz v. Robert Welch, Inc.*²⁰ In *Gertz*, the Court held that the actual malice standard in *Sullivan* did not extend to private individuals.²¹ The Court created this distinction between private and public figures because (1) public figures have greater access to the media to counter defamatory statements and (2) public figures seek out public acclaim and assume the risk of greater public scrutiny.²² The Court stated, “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.”²³ However, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court held that when statements about a private individual that relate to important matters of public

¹⁵ *Id.* at 19–21.

¹⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

¹⁷ *Id.* at 285–86.

¹⁸ *Id.* at 264.

¹⁹ *Curtis Publ's Co. v. Butts*, 388 U.S. 130 (1967).

²⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

²¹ *Id.* at 342–43.

²² *Id.* at 344–45.

²³ *Id.* at 347.

concern are at issue, the plaintiff must show actual malice by the defendant to recover punitive or presumed damages.²⁴

III. THE MEDIA/NON-MEDIA DISTINCTION IN DEFAMATION LAW

The distinction between “media” defendants and “non-media” defendants for defamation becomes important in cases similar to *Obsidian*, where the court finds that the plaintiff is a private individual and the defamatory statement does not deal with a matter of public concern. In this situation, some courts have held non-media defendants to stricter standards, while others have held that they should be treated the same as media defendants. Additionally, the definition of media or “the press” has not been established by the Supreme Court, so courts should look to other sources to decide which defendants qualify as media.

A. *Why the Definition of Media Matters*

Courts have reached differing conclusions on the meaning of *Gertz* and whether non-media defendants can be held strictly liable for defamatory statements. Some courts have held that media and non-media defendants are entitled to the same level of protection under the First Amendment. Therefore, all defendants must at least be negligent in the publication of defamatory material.²⁵ This conclusion is based on statements from the Supreme Court denying extra privileges for the institutional press over other speakers.²⁶ However, other courts have created liability distinctions between

²⁴ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–61 (1985).

²⁵ *See, e.g.*, *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 782–783 n.4 (S.D.N.Y. 1990); *Ayala v. Washington*, 679 A.2d 1057, 1063 n.2 (D.C. 1996); *Bainhaur v. Manoukian*, 520 A.2d 1154, 1167 n.7 (N.J. Super. Ct. App. Div. 1987).

²⁶ *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (noting that the Supreme Court has “consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers”); *Dun & Bradstreet*, 472 U.S. at 773 (“[T]he First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.”).

media and non-media defendants. Because the *Gertz* opinion uses the terms “media,” “press,” “broadcasters,” and “publishers” when discussing liability for defendants, some courts have found that its ruling allows strict liability for non-media defendants.²⁷

The distinction between media and non-media defendants played a pivotal role in *Obsidian*. The Court analyzed state common law and federal constitutional protections and held that a private individual who alleges defamation by a media defendant must show that the publication of the defamatory material was negligent.²⁸ However, the judge applied a strict liability standard for defamation by non-media entities.²⁹ Therefore, the question of whether the plaintiff had to show that Cox was negligent hinged on whether her blog was considered part of the media.

B. Sources for the Definition of Media in Defamation Law

The Supreme Court has never specifically defined media, although it has referred to “publishers,” “broadcasters,” and “the press” in the defamation context. These references seem to tie the definition of media to the definition of the press in First Amendment jurisprudence. The Supreme Court case *Branzburg v. Hayes* explains the purpose and scope of freedom of the press.³⁰ The Supreme Court stated:

Freedom of the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which

²⁷ See, e.g., *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 75, 461 A.2d 414, 417–18 (1983) (“we hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to non-media defamation actions”); *Denny v. Mertz*, 318 N.W.2d 141, 153 (Wis. 1981) (“we do not read *Gertz* as requiring that the protections provided therein apply to non-media defendants”); *Wheeler v. Green*, 286 Or. 99, 110, 593 P.2d 777, 784 (1979) (“the rules first announced in *Gertz*, applicable to cases in which the plaintiff is neither a public official nor a public figure, apply only to actions against media defendants”).

²⁸ *Obsidian Fin. Group, LLC v. Cox*, CV-11-57-HZ, 2011 WL 5999334, at *5 (D. Or. Nov. 30, 2011).

²⁹ *Id.*

³⁰ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

affords a vehicle of information and opinion.’ The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures.³¹

This points to a more expansive view on who or what can be considered part of the media. Given the lack of specificity from the Supreme Court as to the definition of media, courts can look to other sources to interpret what constitutes the media.

Definitions for media can be found in “shield laws” and state constitutional provisions that provide a reporter’s privilege. Reporters can assert this privilege to avoid disclosing the identity of their sources.³² In many states, the legislature has narrowed the definition of the eligible media and the sources of information that merit protection. While the definitions and standards of protection vary from state to state, a court can look to other courts’ interpretations of the definitions within these laws to develop the meaning of media for defamation law.

IV. RECENT INCORPORATION OF BLOGGERS AS JOURNALISTS AND MEDIA

The *Obsidian* decision is particularly notable in light of a trend among courts toward expanding the conceptual definition of the media—which traditionally has included such concepts as “the press” and “publishers”—to include certain types of blogs bearing the hallmarks of traditional journalism. The cases have involved several issues other than defamation, such as shield laws and journalist privileges, but the courts’ conclusion as to whether a blogger is a member of the media may be applicable in the defamation context. When expanding the definition of media to

³¹ *Branzburg*, 408 U.S. at 704 (quotations and citations omitted).

³² SMOLLA & NIMMER, *supra* note 14, at § 13.03[1].

include Internet sources, these courts have tended to focus on three elements: (1) the content of the blog and how closely that resembles the writing of traditional journalists; (2) the format of the blog and how closely it aligns with the traditional press; and (3) the creator of the defamatory statements, and the similarity of her credentials to those of traditional journalists or publishers.

A. Content

In *O'Grady v. Superior Court*, Apple Computer filed complaints against anonymous defendants whom it suspected of revealing trade secrets to “online news magazines” devoted to news and information about the company and its products.³³ The California Court of Appeals held that the websites’ creators were entitled to protection under the California Constitution and were precluded from compelled disclosure of the identities of their sources.³⁴ The court explained its reasoning: “there is no apparent link between the core purpose of the law, which is to shield the gathering of news for dissemination to the public, and the characteristic of appearing in traditional print, on traditional paper.”³⁵ The content of the website—the “open and deliberate publication on a news-oriented Web site of news gathered for that purpose by the site’s operators”—would control whether a blogger would be considered a journalist under this standard.³⁶

In another notable case, *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, the New Hampshire Supreme Court looked at newsgathering privilege under New Hampshire's constitution.³⁷ The court agreed with the lower courts, finding that the website was a “legitimate publisher of information” and a member of the press.³⁸ The court concluded that a website that “serves an informative function and contributes to the flow of

³³ *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (Cal. App. 6 Dist. 2006).

³⁴ *Id.*

³⁵ *Id.* at 1462.

³⁶ *Id.* at 1459.

³⁷ *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 160 N.H. 227, 999 A.2d 184 (N.H. 2010).

³⁸ *Id.* at 189.

information to the public . . . is a reporter for purposes of the newsgathering privilege.”³⁹ By focusing on the content of these websites, the courts in these cases have opened up the definition of media to include certain blogs concerned with newsgathering and publication.

B. Format

The court in *O’Grady* also looked at the format of the news-oriented websites and found them to be analogous to printed publications.⁴⁰ The phrase “newspaper, magazine, or other periodical publication” in the shield law⁴¹ was found to include news-oriented websites as ongoing and recurring news publications.⁴² These websites differed from traditional periodicals “only in their tendency, which flows directly from the advanced technology they employ, to continuously update their content.”⁴³

Comparison of bloggers to the traditional press was also important to the Supreme Court of New Jersey’s ruling in *Too Much Media, LLC v. Hale*.⁴⁴ In this case, a software company brought a claim against a website operator for defamation and false light due to posts that the operator wrote on Internet message boards. The defendant was a self-described journalist whose posts dealt with her investigation of the online adult entertainment industry.⁴⁵ The defendant sought protection under New Jersey’s shield law to prevent the disclosure of the identity of her confidential sources.⁴⁶ The court explained that New Jersey’s shield law “provides broad protection to news media and is not limited to traditional news outlets like newspapers and magazines.”⁴⁷ However, the “means of disseminating news [must] be ‘similar’ to traditional news sources to qualify for the law’s coverage,” which the court found to not include comments posted

³⁹ *Id.*

⁴⁰ *O’Grady*, 44 Cal. Rptr. 3d at 1464.

⁴¹ CAL. CONST., art. 1, §2, subd. (b).

⁴² *O’Grady*, 44 Cal. Rptr. 3d at 1466.

⁴³ *Id.*

⁴⁴ *Too Much Media, LLC v. Hale*, 206 N.J. 209 (2011).

⁴⁵ *Id.* at 216.

⁴⁶ *Id.*

⁴⁷ *Id.*

on online message boards.⁴⁸ To be covered by the statute, a person must have some nexus to “news media,” defined as “newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.”⁴⁹ While the specific defendant in this case was not included under this law, the court stated that a “single blogger might qualify for coverage under the Shield Law provided she met the statute’s criteria.”⁵⁰ These cases open up the definition of media to include blogs that have connections with, or that have formats closely resembling, traditional media sources.

C. Creator

In *O’Grady*, the California shield law only extended to a “publisher, editor, or reporter.”⁵¹ The court held that the news-oriented websites’ operators qualified for purposes of the privilege. Applicable to defamation law, the court explained that there was “no reason to doubt that the operator of a public Web site is a ‘publisher’” because the definition of “to publish” was to make information known openly to the public.⁵²

The decision in *Obsidian* primarily focused on the defendant’s journalism background as the basis for her qualification as a member of the media.⁵³ The judge described several factors that would support a finding that a defendant is a journalist:

- (1) any education in journalism;
- (2) any credentials or proof of any affiliation with any recognized news entity;
- (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest;
- (4) keeping notes of conversations and interviews conducted;
- (5) mutual understanding or agreement of

⁴⁸ *Id.*

⁴⁹ *Id.* at 229.

⁵⁰ *Id.* at 237.

⁵¹ CAL. CONST., art. 1, § 2, subd. (b).

⁵² *O’Grady*, 44 Cal. Rptr. 3d at 1459.

⁵³ *Obsidian Fin. Group, LLC v. Cox*, CV-11-57-HZ, 2011 WL 5999334 (D. Or. Nov. 30, 2011).

confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting ‘the other side’ to get both sides of a story.⁵⁴

These factors seem to limit media protections to a more traditional notion of journalism, which would exclude many bloggers.

In denying the motion for a new trial, the judge further explained that the case should not be read as holding that a blogger could never be considered part of “the media” or that a blogger had to meet the factors he listed to support one’s status as a journalist. Rather, the court found that Cox was not part of the media because she “had presented *no* evidence as to any single one of the characteristics which would tend to establish oneself as a member of the ‘media.’”⁵⁵ It seems that the decision to exclude Cox from the media had more to do with the fact that Cox offered to repair the online reputation of the plaintiffs if they were willing to pay her \$2,500 per month, which the court saw as a scam.⁵⁶ While the ruling has received significant criticism⁵⁷ for its focus on the similarities to traditional journalists, it explicitly opened the definition of media to include some bloggers.

These cases show that whether a blogger is considered part of the media may depend on the content of the blog, the format of the blog, and the creator of the blog. The more closely a blog resembles traditional media, the more likely it is that it will be considered part of the media. What is most important is not whether the website is a blog, but the whether the blog facilitates distribution of information to the public in a meaningful way that the First Amendment strives to protect.

⁵⁴ *Id.* at *5.

⁵⁵ *Id.* at *7.

⁵⁶ *Id.*

⁵⁷ See, e.g., Matt Zimmerman & Trevor Timm, *The Crystal Cox Case and Bloggers as Journalists* (2011), available at www.eff.org (last visited Apr. 17, 2013).

CONCLUSION

Whether a blogger is considered part of the media depends on the specifics of the website. The more closely a blog resembles the traditional press, the more likely a court will consider it a part of the media. Courts have expanded the definition of media to include some forms of blogging by looking at (1) the content of the website, (2) the format of the website, and (3) the journalistic credentials of the creator of the defamatory statements. The court in *Obsidian* followed the trend of defining media in terms of traditional journalists. Regardless of the outcome for the specific websites at trial, these cases, including *Obsidian*, are part of a trend of courts expanding the definition of media to include some forms of blogging.