



## Section XVI

# Internet and journalism

*“The Internet had not been invented when the Constitution of the United States was ratified. Yet no rational jurist would suggest that the right to free speech does not apply to articles, blogs, or mere musings posted on the Internet.”*

– **State ex rel. Russo v. McDonnell, 110 Ohio St. 3d 144, 2006-Ohio-3459 at 66.**

The impact of the Internet on the practice of journalism has been and continues to be dramatic and far reaching. Where television, radio, and print publications suffer from limitations on subscribers, broadcast times or printable space, the Internet operates with no such boundaries on membership, time and space. Where a journalist’s ability to quickly research and report were often dependant on physically traveling to and sifting through reams of information, the Internet offers near instantaneous access to volumes of searchable information. And more so than any other technological invention, the rise of the Internet threatens to tear down the lines between traditional journalists (employed by newspaper, radio, or television outlets) and non-traditional journalists (the average citizen having a penchant for writing). Today, anyone with computer access can write and publish articles regarding the current events in his or her corner of the world.

As we consider the many benefits and drawbacks of the Internet, it is important to understand what has and has not changed from a journalist’s perspective. This section of the Handbook aims to provide traditional journalists, non-traditional journalists, and novices an overview of the issues and nuances associated with using the Internet to research, obtain and distribute information. This section also provides some tips to avoiding legal problems and resources for obtaining additional information.

Before continuing, it is important to note that these materials are intended to provide only basic legal information on major issues. It is not intended to and does not provide an exhaustive, complete discussion of all the laws referenced. Nor does it discuss all of the relevant laws and issues. In this area, the laws change and interpretations of existing laws evolve. So, readers are cautioned not to rely on this information for anything other than an overview of certain legal issues that should be independently

verified before being relied upon in any important way.

### **The Law Applies Equally to the Internet**

The Internet is often described as a cultural and technological revolution, but in terms of the law, it’s just another medium of communication to which all the old laws still apply. If a defamatory statement is found in an online publication rather than a newspaper, it’s still a defamatory statement. Traditional copyright laws apply to anything that is published on the Internet, as does the “fair use” exception. Privacy issues also abound on the Internet; thus, posting intensely personal information on the Web is as likely to prompt legal action as printing it in the morning paper.

Even so, the characteristics of the Internet can be used to sway application of existing law in one direction or another. For example, on the heels of the Terri Schiavo fiasco, a Florida circuit court in *Thomas v. Patton* found that online discussions can play a significant role in evaluating a defamation case. In that case, Eliza Thomas sued two television stations for libel following reports that she had discussed the possibility of removing her husband’s feeding tubes. The husband was on life support stemming from an incident that was being investigated by the state. The alleged defamatory statements at issue were apparently made during a custody/guardianship battle between Mrs. Thomas and her husband’s mother. At the time of the television reports, the “traditional media” outlets had yet to report on the matter, but numerous articles had appeared on the Internet relating to the controversy. Because the controversy was of public interest (removing feeding tubes) and because there were Internet discussions, the court concluded that Mrs. Thomas was a “limited purpose public figure” and, therefore, had to meet the higher burden of proof of

actual malice in proving that the stations defamed her. She was unable to meet this burden and the case was dismissed.

On the other hand, the rapid dissemination of information through the Internet has been argued as a basis for placing limits on the disclosure of non-confidential documents filed with a court. In the I. Lewis “Scooter” Libby Jr. case, the issue was whether to release the more than 150 letters, some from former high ranking government officials like Donald Rumsfeld, John Bolton and Paul Wolfowitz, written to the judge presiding over Mr. Libby’s sentencing hearing. Mr. Libby’s attorneys argued that, if the letters were released, they likely would be published on the Internet and expose their authors to discussion and even ridicule, and that such ridicule would make it harder, in the future, for the court to get information that would assist in the sentencing process. The court rejected the arguments and released the letters. Not surprisingly, they were immediately circulated on the Internet and used by some bloggers as a basis to mock some of the authors.

Finally, the question of whether hyperlinks to libelous statements on a Web site can be considered “republication” of the statement was recently considered under California law. In *Sundance Image Technology, Inc. v. Cone Editions Press, Ltd.*, Sundance filed suit over libelous statements Cone had apparently posted on the Internet about Sundance’s products. In California, as in many states, an action for libel must be brought within one year of when the statement is first published. Under the single publication rule, any single edition of a newspaper or book gives rise to only one cause of action, regardless of how many copies are distributed. In this case, Sundance missed the initial filing deadline and attempted to argue that subsequently created links to the statements served as a “republication” by Cone and provided an entirely new cause of action with a new filing deadline. The court rejected this argument, finding that “linking is more reasonably akin to the publication of additional copies of the same edition of a book, which is a sit-

uation that does not trigger the republication rule.” It should be noted that similar arguments have been made in other cases around the nation, with and without success. In addition, as discussed below, Section 230 of the Communications Decency Act of 1996 (CDA) provides certain protections for interactive computer service providers when publishing the statements of another person.

Though the same old laws apply to the Internet, there are new laws that have been developed to protect (and restrict) certain activities typically taking place over the Internet. For example, Section 230 of the CDA states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” In *Carafino v. Metrosplash.com, Inc.*, the Ninth Circuit Court of Appeals stated that, in enacting this law, “Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.” This law overrides all laws that are inconsistent with this provision, except for criminal and intellectual property laws or the electronic communications privacy law. The CDA has been used to protect Web site operators, online publishers, and other providers of content over the Internet against defamation, negligent misrepresentation, breach of contract, intentional nuisance, violations of federal civil rights, and other claims. As a result, traditional and non-traditional journalists using the Internet are provided a level of protection previously not afforded in traditional print, television and radio outlets.

In short, the particular characteristics associated with the Internet often results in novel arguments previously not proffered. In addition, federal law affords journalists using the Internet some additional protections. However, in the end, the general rule for a journalist is as follows: Just about every substantive law previously followed when practicing journalism should followed in the context of the Internet.

## Who Is A “Journalist” & Why Does It Matter?

In the past it was easy to recognize the journalist as the anchor talking to you through your television at 6 p.m. or the person carrying a press card and wearing a fedora. Thanks, in part, to the Internet, it isn't that easy anymore. The Internet has renewed long-standing debates over whether a journalist is a journalist only if working for or connected to a traditional media outlet (e.g., newspaper, television/radio station, press association, etc.). Over the years, many not employed by the traditional news institutions (such as book authors, documentary filmmakers, academics, freelance reporters, newsletter editors and talk-show hosts) have tried, with mixed success, to qualify as journalists for legal purposes. Given the proliferation and independence of online publications, and the relative ease with which a person can publish “news” on the Internet, efforts to better define this species of professionals are underway like never before.

Why does it matter? Across the country, journalists are, to varying degrees, afforded a very important privilege over ordinary citizens: the right to choose not to disclose certain information during government proceedings. Each individual state has the right to define who should be granted that right for purposes of state law. States providing the privilege have justified doing so on the rationale that journalists are often unable to obtain relevant information unless they agree to withhold sources or agree to publish only parts of the information their sources provide. Forcing journalists to testify about or reveal their sources, or other confidential information, would have a chilling impact on the free flow of information protected under the First Amendment. Therefore, whether a practitioner in this area falls within the definition of a state's journalists' privilege statute, commonly called “shield” law, can have far-reaching impact.

Ohio's shield laws, set forth in Chapter 2739 of the *Ohio Revised Code*, generally provide that “[n]o person engaged in the work of, or connected with, or employed by” a newspaper, press

association, radio broadcasting station or television broadcasting station:

...for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information . . . obtained . . . in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.

As with many shield laws around the country, Ohio's law is somewhat dated and the text does not reflect the changing nature of journalism or current technology. This presents ambiguity and uncertainty when one attempts to apply the law in the context of the Internet. Indeed, it is unclear whether Ohio's shield law covers all Internet journalists, electronic news outlets, or if it affords any protection for those who post print blogs, video blogs, podcasts, or utilize other digital means to disseminate “news” through the Internet.

While there does not appear to be any rationale reason to extend “shield” protection to a journalist writing for *Newsweek*, while withholding the same protection from a journalist writing for online exclusive magazine like CNET News.com or Slate.com, Ohio law simply has not addressed the matter. And though the outcome of any future analysis under Ohio law might be considered a mere formality in the above example, as the type of online publication increasingly moves away from looking like an electronic version of a print newspaper or magazine, the application of Ohio's shield laws becomes much less predictable. For instance, it is unclear how Ohio law would treat someone like Josh Wolf, a blogger jailed for more than 200 days for refusing to testify about and

provide the federal government video footage taken during an anarchist demonstration. Some would argue that he does not meet the technical definition of Ohio's law because he is not employed or in any way connected with a traditional media outlet, yet advocates of protection would argue that he falls within the intent and meaning of the law because he was practicing journalism.

Recently, there have been renewed efforts to enact a federal shield law that would, with some exceptions, generally protect those persons engaged in journalism from testifying, providing documents or disclosing sources. This proposed law defines "journalism" as "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing news or information that concerns local, national, or international events or . . . matters of public interest . . . to the public." *Free Flow of Information Act* (H.R. 2102 - May 2, 2007). It is important to note that this proposed federal shield law would not override Ohio's shield laws. The proposed law would only afford an Ohio journalist protection in proceedings under federal law, but leave in place the application of Ohio's shield law in state proceedings.

In its current form, the proposed federal shield law would do what many have advocated for some time: simply define a journalist as any person engaging in journalism. So, in contrast to many state shield laws (like Ohio's) which tend to focus on the medium of communication or the employer, the federal law would focus on the actions of the individual. Any person (including bloggers, podcasters and the like) would be afforded shield protection if he or she were engaged in "journalism." In doing so, the proposed federal law would be much more adaptable to future advances in technology and would maintain some level of constant protection for journalists who choose to deliver the "news" in non-traditional ways.

The debate over who should be covered by shield laws started long before the Internet took off as a viable medium for delivering news. While the development of the Internet has served to revive these discussions, it has yet to result in either legislation or case law

conclusively resolving the issue for journalists in Ohio—nor is it likely to in the near future. In the absence of a consistent state and federal law on the subject, there simply are no legal guarantees for Ohio's traditional journalists and non-traditional journalists when it comes to protecting confidential information and sources. For this and other reasons, journalists should be extremely careful when granting confidentiality to sources.

### **What Laws Apply?**

As discussed above, using the Internet while doing something questionable will not protect a journalist from any existing relevant laws. However, the ability to widely disseminate information without regard for territorial boundaries raises some level of uncertainty as to which jurisdiction's law applies to the questioned conduct. For instance, what happens when a journalist writes an article in Ohio that is read in California and defames a California resident? Is the journalist subject to California's laws, which may be drastically different from Ohio's? If so, how can a journalist be expected to conform to every state's laws? These are questions that do not have definite answers.

When litigious material travels from one state to another, determining which state has jurisdiction (meaning where you can be sued) can be a thorny issue that stumps many a seasoned lawyer, let alone the average Internet journalist or blogger. Under traditional libel laws, a party can be sued wherever the libelous material is circulated (see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 [1984]). Thus, the Internet's accessibility could easily become its downfall if a journalist could be dragged into any court and held to any state's laws.

Under personal jurisdiction doctrine, a party can only be sued in a court where he or she has "purposefully availed" himself of that jurisdiction (for example, where a magazine has been actively marketed and sold). When applying this doctrine to the Internet, courts have tried to draw a distinction between "active" and "passive" Web sites or publication mediums. To paraphrase the Franklin County Appellate Court in

*Blue Flame Energy Corp. v. Ohio Department of Commerce:*

A passive Web site is one that does little more than display information and does not serve by itself to subject a party to a court's jurisdiction. But an interactive Web site—one through which the party engages in knowing and repeated contacts with users—may be sufficient to show “purposeful availment” to the courts and laws in that user's area. Web sites that fall in between will be judged by the level of interactivity and the commercial nature of the exchange.

Internet journalism involving news articles that do not allow for any reader interaction would seem to fall in the “passive” Web site category. But even in the context of passive Web sites, journalists can potentially be subject to another state's laws if the Web site or content is clearly directed at the residents of that state.

There are clear signs, however, that Internet journalism is trending towards increasing levels of reader interaction. Many popular national news Web sites (e.g., CNN.com, USATODAY.com, etc.) and local news Web sites (e.g., Cincinnati.com, KansasCity.com, etc.) allow readers to comment on and rate stories. With the proliferation of interactive tools, the line between passive and active Web sites may well be eroding. It is likely that something more than allowing readers to post comments would be needed for another state's court to claim jurisdiction. At this point, there is no consensus on the subject because these questions are highly fact dependant and determined on a case-by-case basis. However, there is a clear takeaway for any traditional or non-traditional journalist wishing to avoid being hauled into another state's court: Avoid responding to reader comments about stories, creating blogs to interact readers about your stories or giving readers avenues to directly communicate with you.

Keep in mind that taking the precautions recommended above doesn't mean that a

traditional or non-traditional journalist is immune from being sued by a non-Ohio resident. Rather, it reduces the likelihood that a passive operation will give rise to a claim in another state's court or under another state's laws. Residents of other states can always come to Ohio to sue the journalist.

## Things To Keep In Mind

A. *The Internet is a large slush pile of information.* For all its benefits, the relative ease with which anyone can post information on the Internet should cause every reader to question, and then question some more. Journalists have long been expected to follow a stringent code of journalistic conduct requiring them, for example, to use original sources and documents when possible, attribute information gathered to published sources, use multiple original sources of information, and to check every fact reported. When considering information derived from the Internet, upholding these standards can be daunting (how do you verify a report posted by Omar in Iraq?). However, within the context of Internet constraints, upholding these standards is more important than ever and will go a long way toward avoiding legal entanglements.

B. *So, you're a journalist and want to blog?* The debate over whether bloggers are journalists continues, but what must traditional journalists consider when deciding to create a blog? As noted above, journalists who engage readers in discussions about their stories, whether via blogs or otherwise, run the risk of being subject to another state's courts and laws. There are other potential nuances to consider.

First, journalists who blog anonymously, or under pseudonyms, may well have a right to remain anonymous in most instances, but this right is not absolute. The United State Supreme Court, in *Talley v. California*, recognized that anonymous speech deserves First Amendment protection. While the First Amendment will not shield an anonymous blogger from liability in posting defamatory statements, the issue is the ability of the law to protect a person's First Amendment right to anonymous speech while

preserving the rights of the defamed to seek redress. Though this issue has not been addressed in Ohio, the Delaware Supreme Court recently met this challenge in *Cahill v. Doe* by establishing a higher burden of proof to be met by a plaintiff before the anonymous blogger can be unmasked. In *Cahill v. Doe*, the plaintiff was attempting to force an Internet service provider (ISP) to disclose the identity of the blogger. This raises another important caution: The ability to remain anonymous is only as good as your ISP's motivation to keep you anonymous.

Second, if you are a journalist posting a blog, make sure your employer knows and approves. Though a specific case has not arisen in Ohio, cases around the nation have indicated that blogging can cost an employee his or her job. The first such publicized case involved the blogger behind Dooce.com. It gained such notoriety that it coined a new term: To be "dooiced" means to lose your job because of something you wrote in your blog. Ohio employers may well be within their legal rights to terminate bloggers who blog while on the clock or whose writing allows readers to identify the blogger's place of employment. From a practical standpoint, journalist bloggers should be aware of their company's policies on the subject; many news organizations impose the same level of pre-publication review on blogs as on published articles.

*C. Don't insult the president of Zimbabwe.* The risks associated with being subject to another state's courts and laws are discussed above. Journalists should bear in mind that jurisdictional issues come into play on an international level as well. For example, what if an Internet journalist publishes an article insulting the president of Zimbabwe. While insulting the president of the United States is a hobby for some, insulting Zimbabwe's president is apparently a criminal offense (Zimbabwe, Public Order and Security Act 2001). Under traditional methods of publishing news, the likelihood of a local newspaper article making its way to another country was somewhat remote. With the

Internet's distribution network, however, the likelihood of such a story reaching another country is hardly remote. Can a journalist who insults the president of Zimbabwe reasonably expect to end up in a Zimbabwe jail? Though international law can be a very murky area, the short answer is: probably not. Zimbabwe would have no authority to send someone to arrest the blogger in the United States for extradition back to Zimbabwe. And the United States would not likely extradite the author to Zimbabwe to face any such charges. Of course, if the author decides to travel to Zimbabwe, he or she had better beware.

*D. Beware of the Digital Millennium Copyright Act (DMCA).* Enacted in 1998, the DMCA criminalizes the production and dissemination of information that can be used to circumvent security measures intended to control access to copyrighted works. It also criminalizes the act of circumventing such controls, even when there is no infringement of copyright itself. Further, the DMCA provides a safe harbor for ISPs from copyright violation claims provided they follow certain guidelines and promptly remove infringing materials once they receive notice of the infringement from a copyright holder. Though there are many aspects of the DMCA that can potentially impact traditional and non-traditional journalists using the Internet, there are a couple that deserve to be highlighted. First, journalists should take care not to circumvent Digital Rights Management (DRM) controls in the process of gathering news, and they should be careful when writing about technology, services or products that can be used to circumvent DRM controls. For example, publishing an online news story with links to DRM circumvention technology can be risky, as can accessing an online database containing copyrighted material with a password provided by a confidential informant. Each is potentially a violation of the DMCA and subject to criminal prosecution. Second, it should be noted that fair use of copyrighted materials can be somewhat thwarted under the DMCA. ISPs, seeking safe harbor protection under the DMCA, typically do not battle or question copyright holders who claim

that their copyrighted work is being used without authorization. In other words, news articles and other postings legitimately using copyrighted information (including videos) can be pulled without any formal process or before the author even has a chance to respond. While there is a process that can be followed to challenge the removal, journalists should be aware of the DMCA's impact in this area.

## Resources

- Electronic Frontier Foundation. [www.eff.org](http://www.eff.org). "Unintended Consequences: Seven Years Under the DMCA" (v.4) (April 2006), [http://www.eff.org/IP/DMCA/DMCA\\_unintended\\_v4.pdf](http://www.eff.org/IP/DMCA/DMCA_unintended_v4.pdf).
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*The material in this section of the Handbook, including statements of opinion and commentary on legal issues, was prepared by Neal Patel, counsel in the Intellectual Property Department and the First Amendment, Media and Advertising groups of the Cincinnati law firm of Frost Brown Todd L.L.C. He was assisted by Joanna Saul, a Frost Brown Todd summer associate and law student at Georgetown University Law Center. Opinions expressed do not necessarily reflect the policies or opinions of the Ohio State Bar Association.*