

From the Wires to Wireless:  
How Mass Communications Technologies Have Affected the Libel/Slander Distinction,  
Single Publication, and Liability in Defamation Law

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## ABSTRACT

KIRSTEN M. BEATTIE: From the Wires to Wireless:  
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Single Publication, and Liability in Defamation Law

(Under the direction of Dr. Ruth Walden)

This research examined how courts have addressed the application of defamation law to new mass communications technologies—the telegraph, radio, and television—to contextualize the current application to the Internet. Three areas of defamation law were examined—the libel/slander distinction, the single publication rule, and liability. Through analyzing federal and state court cases, as well as relevant statutes, this thesis attempted to determine the extent to which our current approach to applying defamation law to the Internet fits into a historical pattern. Among the findings were that the application of the libel/slander distinction and the single publication rule to the Internet is consistent with common law developments that have arisen from other technologies; that for each technology, courts initially struggled to determine the appropriate liability to apply; and that statutes historically have played an integral role in the common law approach to liability for technologies.

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## CHAPTER I

### INTRODUCTION

The growth of the Internet in recent years has revolutionized communications, allowing messages to reach global audiences within a matter of seconds. At its best, the Internet fulfills free expression ideals, serving “as a First Amendment fantasyland where freedom of expression [can] reach its zenith.”<sup>1</sup> At its worst, the Internet abets the dissemination of obscene or libelous content. One author noted that “whether it be through ‘gripe sites,’ live chat rooms or Internet bulletin boards . . . [i]ndividuals can instantly publish gossip, accusations, opinions, complaints or misinformation to a global audience.”<sup>2</sup> The recent growth in Web content generated by individual users, such as blogs and social networking sites, prompted *Time* magazine in its annual Person of the Year issue to name “You” as its choice: “[F]or seizing the reigns of the global media, for founding and framing the new digital democracy, for working for nothing and beating the pros at their own game, *Time*’s Person of the Year for 2006 is you.”<sup>3</sup>

The ease of access to the Internet—and the number of people taking advantage of it, as *Time*’s decoration of the world’s citizen-publishers suggests—has raised some concerns

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<sup>1</sup> David L. Hudson, Jr., *The Blogosphere and the Law: Blogs and the First Amendment*, 11 NEXUS J. OP. 129, 129 (2006).

<sup>2</sup> Nicole B. Cásarez, *Dealing with Cybersmear: How to Protect Your Organization from Online Defamation*, 47 PUB. REL. Q. 40, 40 (2002).

<sup>3</sup> Lev Grossman, *TIME Person of the Year: You*, TIME, Dec. 25, 2006, at 41.

about defamation on the Internet. Defamation law seeks to balance an individual's interest in a good reputation with the right to free speech.<sup>4</sup> A communication is considered defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."<sup>5</sup> Defamation involves the intentional or negligent publication or utterance to an unprivileged third party of a false statement regarding another that causes harm to the defamed person's reputation.<sup>6</sup> Traditional mass media, like newspapers and broadcast stations, are typically businesses with the mechanisms and procedures in place to protect themselves from defamation claims. This is not necessarily the case with those who communicate via the Internet.

While the World Wide Web has been accessible for more than a decade, it is the shift in content providers from businesses to individuals that led *Time* magazine to dub the modern Internet "Web 2.0," a user-driven forum:

If the Web's first coming was all about grafting old businesses onto a new medium (pet food! on the Internet!), Web 2.0 is all about empowering individual consumers. It's not enough to find that obscure old movie; now you can make your own film, distribute it worldwide and find out what people think almost instantly.<sup>7</sup>

The instant nature of Web publication coupled with the ease of access has been noted as a significant difference from traditional mass media: "Forwarding an e-mail requires only a few keystrokes; copying to a Web page or a newsgroup only a few clicks of the mouse. In the

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<sup>4</sup> RUSSELL L. WEAVER ET AL., *THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH* 17 (2006).

<sup>5</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>6</sup> *Id.* § 558. Under current defamation law, the plaintiff has to prove that the content was published to a non-privileged third party; that the plaintiff was identified by the publication; that the content was false; that the content was capable of defamatory meaning; that the defendant acted with some level of fault, either negligence or actual malice; and that the publication caused harm or damages.

<sup>7</sup> Jeff Howe, *Your Web, Your Way*, *TIME*, Dec. 25, 2006, at 60.



traditional mass media, before a charge is aired or printed, it typically must pass the inspection of several levels of editors.”<sup>8</sup> The lack of systematic editorial discretion is likely a factor in the number of lawsuits filed over online defamation; according to a recent article in *USA Today*, in the last two years, more than 50 libel lawsuits resulting from postings on blogs and message boards have been filed.<sup>9</sup>

While the nature of the technology of the Internet plays a role in the relative ease of posting potentially defamatory content online, Congress also has contributed statutorily through its passage of section 230 of the Communications Decency Act, part of the Telecommunications Act of 1996.<sup>10</sup> Section 230 essentially guarantees all Internet service providers (ISPs) and users immunity from liability for defamatory content posted, but not produced, by the service providers or users, regardless of whether they filter or block content.<sup>11</sup> Some believe this provision allows unacceptable leeway for ISPs to overlook potentially libelous content on their sites, and many have called for revisions to the CDA itself or to court interpretations of the CDA.<sup>12</sup> Concerns over liability are also reflected in discussions of how publication on the Internet should be treated—for example, is each

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<sup>8</sup> Michael Hadley, Note, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 505 (1998).

<sup>9</sup> Laura Parker, *Courts are Asked to Crack Down on Bloggers, Websites: Those Attacked Online are Filing Libel Lawsuits*, USA TODAY, Oct. 3, 2006, at 1A.

<sup>10</sup> Communications Decency Act of 1996, 47 U.S.C. § 230(c) (2004).

<sup>11</sup> *Id.*

<sup>12</sup> See generally Hudson, *supra* note 1, at 129; Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833 (2006); Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U.L. REV. 1447 (2006).

instance in which someone views defamatory content on a Web site considered to be a separate instance of publication for the purposes of a defamation action?<sup>13</sup>

In addressing the question of how to approach regulating defamation on the Internet, many authors have alluded to the value of drawing from past experience with new technologies, such as the telegraph, radio, and television.<sup>14</sup> Most of these articles contain at most a few paragraphs describing how the regulation of a particular technology was handled. This thesis expands upon that previous research and attempts to contextualize the current treatment of defamation on the Internet by the courts through examining how the courts have adapted defamation law to other mass communication technologies.

Specifically, this thesis examines the extent to which the application and adaptation of defamation law to the Internet mirrors developments in defamation law that resulted from the growth of several mass communication technologies commonly analogized to the Internet—the telegraph, radio, and television. Through an analysis of defamation cases in which courts addressed the impact of the technology in question, the goal of this thesis is to evaluate the extent to which the courts’ application of defamation law to the Internet fits into a historical

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<sup>13</sup> See generally James P. Jenal, *When Is a User Not a “User”? Finding the Proper Role for Republication Liability on the Internet*, 24 Loy. L.A. ENT. L.J. 453 (2004); Odelia Braun, Comment, *Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply*, 32 GOLDEN GATE U.L. REV. 325 (2002); Sapna Kumar, Comment, *Website Libel and the Single Publication Rule*, 70 U. CHI. L. REV. 639 (2003); Lori A. Wood, Note, *Cyber-Defamation and the Single Publication Rule*, 81 B.U. L. REV. 895 (2001).

<sup>14</sup> JoAnne Holman & Michael A. McGregor, *The Internet as Commons: The Issue of Access*, 10 COMM. L. & POL’Y 267, 279 (2005) (discussing the development of law for the telegraph and telephone); Keith Siver, *Good Samaritans in Cyberspace*, 23 RUTGERS COMPUTER & TECH. L.J. 1, 4 (1997) (arguing courts have attempted to use comparisons between media); Jae Hong Lee, Note, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 469 (2004) (arguing that the same questions arise with new media); Douglas B. Luftman, Note, *Defamation Liability for On-Line Services: The Sky is Not Falling*, 65 GEO. WASH. L. REV. 1071 (1997) (arguing that, like the telephone and broadcast media, the Internet raises issues of editorial control and liability); Philip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147 (1993) (arguing that new media inevitably face comparisons to newspapers); Troiano, *supra* note 12, at 1451 (arguing the Internet has reached the point in its growth where it should be regulated).

pattern. While relevant statutes, such as the Communications Decency Act, offer context for court decisions, case law serves as the primary focus to identify situations in which the technology in question factored into the court's decision. The analysis sought to identify trends in how technological advancements have affected three areas of defamation law that have previously shown themselves susceptible to one technological advancement, the printing press—the libel/slander distinction, single publication, and liability.<sup>15</sup>

Part II of this chapter provides context for this research by providing a brief look at some of the developments in the libel/slander distinction, single publication, and liability in defamation law resulting from the printing press to provide historical context for the effects technological developments in mass communication can have on defamation law. Part III shifts to a present day focus on the Internet and examines relevant scholarly research that has contributed to the study of online defamation, including attempts to analogize the Internet and the telegraph, radio, and television. Finally, Part IV details the methodology and poses the research questions for the thesis.

## Part II: The Impact of the Printing Press on Publication, Liability, and Jurisdiction

This section of the chapter provides background for the thesis through a discussion of how another mass communication technology—the printing press—affected defamation law. Areas of defamation that naturally were affected included whether the publication was oral or written; how many times a defamation was published for the purposes of a defamation action; and who could be held liable and under what standards. This section discusses the impact of the printing press generally before concluding with a justification for why the

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<sup>15</sup> Part II examines facets of the libel/slander distinction, the single publication rule, and liability that will be examined in this thesis and offers a justification for their inclusion in this proposed study.

libel/slander distinction, single publication, and liability are three key areas that have been affected by mass communication technologies.

The printing press revolutionized mass communication by increasing both the potential audience for and longevity of a defamatory publication.

With the invention of the printing press, “communications technology” changed dramatically. Before the invention, people could communicate only orally or by handwriting, methods that were slow, inaccurate and confined. . . . [T]he printing press made it possible to mass produce writings (including criticisms of government) and disseminate them widely . . . .<sup>16</sup>

It was the growth in the access to and prevalence of the printed word that led to the pivotal distinction in defamation law between libel, or written defamation, and slander, spoken defamation.<sup>17</sup> Prior to the invention, the courts in England viewed slander with a certain amount of leniency,<sup>18</sup> but the printing press gave communications the potential to linger and reach a wider audience, thus increasing the likelihood of damage by libel.

The split of defamation into slander and libel held significant implications for liability as applied by the courts in assessing damages. Specifically, “[l]ibel applied to publications in permanent form, while slander applied to transient publications such as spoken words. The difference could be significant because financial damage must be shown in many cases of slander, while it need not be shown for libel.”<sup>19</sup> Slander may be seen as a “lesser” wrong because it is less likely to linger and reach as wide an audience in the same way as libel. One

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<sup>16</sup> WEAVER ET AL., *supra* note 4, at 5.

<sup>17</sup> See Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 2 COLUM. L. REV. 546, 547 (1903).

<sup>18</sup> *Id.* at 559. “The conditions and the habits of thought prevailing in early society afford some explanation why it was not imperatively necessary to provide legal redress for slanders and insults of such a nature as to injure the character or hurt the sensibility, unless they were also such as to result in legal damage to the person against whom they were directed.” *Id.*

<sup>19</sup> WEAVER ET AL., *supra* note 4, at 18.

early twentieth century scholar characterized the distinction between the two as a matter of tort versus crime: “Libel is a crime as well a tort; slander of a private individual may be a tort but is no crime. Any written words which injure one’s reputation are libelous; but many words which would be actionable if written are not actionable if merely spoken.”<sup>20</sup>

In current defamation law, part of determining what damages can be claimed by a plaintiff goes beyond the actual mode of the publication to the reach and character of the defamatory content itself. Under modern common law, “[t]he area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.”<sup>21</sup> The development of the printing press, therefore, was instrumental in shaping the modern defamation distinction between whether a publication is considered a libel or a slander.

In defamation common law, publication requires only the dissemination of a defamatory message to one other person: “Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.”<sup>22</sup> Furthermore, “One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.”<sup>23</sup> Therefore, one who is responsible for transmitting a defamatory message or for failing to remove information that is under one’s control is liable as the publisher of that message. As further improvements in technology advanced the rapid and widespread dissemination of the written word, questions arose that challenged traditional

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<sup>20</sup> Veeder, *supra* note 18, at 571.

<sup>21</sup> RESTATEMENT (SECOND) OF TORTS § 568 (1977).

<sup>22</sup> *Id.* § 577.

<sup>23</sup> *Id.*

notions of who could be liable as a publisher: The publication and distribution of newspapers, books, and periodicals, for example, raised questions of who could be held liable for publication and what constituted an act of publication.

In response to these questions, the categories of publisher, republisher, and distributor emerged. A publisher is the original source of the defamatory content; a person who repeats a defamatory statement is considered to have become a republisher of the defamation and, therefore, is as liable as the original publisher, a rule known as the republication doctrine.<sup>24</sup> In addition to publishers and republishers, common law recognizes the category of distributors of defamatory content.

Distributors are entities such as bookstores and newsstands that have no editorial control over the content of the material they distribute. Distributors are liable only if they know or have reason to know that the material they are transmitting is defamatory.<sup>25</sup> The Restatement of Torts describes the distributor's role with the following example:

The vendor or lender is not liable, if there are no facts or circumstances known to him which would suggest to him, as a reasonable man, that a particular book contains matter which upon inspection, he would recognize as defamatory. Thus, when the books of a reputable author or the publications of a reputable publishing house are offered for sale, rent or free circulation, he is not required to examine them to discover whether they contain anything of a defamatory character. If, however, a particular author or a particular publisher has frequently published notoriously sensational or scandalous books, a shop or library that offers to the public such literature may take the risk of becoming liable to any one who may be defamed by them.<sup>26</sup>

Therefore, publishers are those who have editorial control over content, and distributors simply aid in the dissemination of published content. In addition to considerations of who

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<sup>24</sup> *Id.* § 578.

<sup>25</sup> *Id.* § 581.

<sup>26</sup> *Id.* § 581.

may be held liable for the dissemination of defamatory content, the dissemination of the publication itself is taken into account.

As suggested by the republication doctrine, under common law, each separate publication of a defamatory statement to a new audience is considered a separate cause of action.<sup>27</sup>

However, under this approach, each copy of a newspaper could be considered a separate publication and, therefore, a separate cause of action. The single publication rule served as a way to ease the burden of liability on a publisher such as a newspaper or, eventually, a broadcast station, by ensuring that the statute of limitations could not be renewed each time someone viewed a copy of a newspaper, for example.<sup>28</sup> Under this rule, copies of a newspaper or a single radio or television broadcast constitutes one publication, regardless of the number of people who receive that publication; however, separate editions of a newspaper or separate broadcasts constitute new, separate publications.<sup>29</sup> More explicitly, the Restatement of Torts states:

[I]f the same defamatory statement is published in the morning and evening editions of a newspaper, each edition is a separate single publication and there are two causes of action. The same is true of a rebroadcast of the defamation over radio or television or a second run of a motion picture on the same evening. In these cases the publication reaches a new group and the repetition justifies a new cause of action.<sup>30</sup>

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<sup>27</sup> *Id.* § 577A.

<sup>28</sup> *Id.* at cmt. b.

An exceptional rule, sometimes called the ‘single publication rule,’ is applied in cases where the same communication is heard at the same time by two or more persons. In order to avoid multiplicity of actions and undue harassment of the defendant by repeated suits by new individuals, as well as excessive damages that might have been recovered in numerous separate suits, the communication to the entire group is treated as one publication, giving rise to only one cause of action. *Id.*

<sup>29</sup> *Id.* § 577A.

<sup>30</sup> *Id.* at cmt. d.

The intent of the publisher to reach a new and separate audience may be used to determine whether the publication will be considered a distinct publication under the single publication rule.<sup>31</sup>

This brief examination of some of the effects of the printing press on defamation law suggests the potential influence of the development of other mass communication technologies, including the telegraph, radio, television, and Internet. The common theme among the changes wrought by the printing press is that the ability to disseminate more information to a wider audience over a greater period of time increases the potential harm to reputation caused by defamation. Three areas of defamation, in particular, that have adapted in response to improved communications technologies are the libel/slander distinction, the single publication rule, and liability.

In this thesis, the discussion of the libel/slander distinction focuses on cases in which courts decided which form of defamation—oral or written—should apply to each of the technologies addressed in this research. Second, for each technology, cases are examined in which courts addressed whether and how to apply the single publication rule. Finally, the liability analysis focuses on who can be held legally accountable for publication of a defamation, especially the question of who is a publisher, republisher, or distributor of defamatory content.

The next section of this chapter provides a brief overview of the development of the telegraph, radio, television, and the Internet. It then discusses previous research that has addressed the libel/slander distinction, single publication, and liability relevant to Internet defamation, incorporating authors' attempts to analogize to other mass communications

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<sup>31</sup> *Id.*



technologies. The review of literature illustrates the opportunity for this thesis to both add to and synthesize previous research through examining historical trends in the courts' responses to new mass communications technologies, leading to an analysis of the extent to which the courts' current approach to regulating Internet defamation fits a historical pattern.

### Part III: New Mass Communications Technologies: Same Product, Different Package?

This section examines the scholarly literature that has addressed defamation law and the Internet, highlighting both what authors have written about online publication and liability issues and their attempts to analogize to other technologies. To contextualize the relevant literature on libel and the Internet, this section starts with a brief look at the development of the telegraph, radio, television, and Internet, leading into a discussion of various positions authors have taken in response to the Internet as a new technology. The section concludes by summarizing previous literature, leading to a justification for the research undertaken for this thesis.

While defamation law for the printed word, such as books, magazines, and newspapers, has had more than five centuries to develop, the electric dissemination of information is a phenomenon dating back a little more than a century to the mid- to late-1800s. The technology behind the telegraph took more than a decade to develop and refine, but by 1850 it had become an accepted mode of communication.<sup>32</sup> The telegraph ultimately revolutionized the news industry with its ability to send messages quickly and across long

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<sup>32</sup> LT.-COL. CHETWODE CRAWLEY, FROM TELEGRAPHY TO TELEVISION: THE STORY OF ELECTRICAL COMMUNICATIONS 47 (1931).

distances.<sup>33</sup> One author noted the role the telegraph once played in news gathering: “The telegraph companies were, in the beginning, news agencies. Operator-managers were expected to ascertain facts when requested, and even to gather and send out news of events in their own towns important enough to interest the rest of the country.”<sup>34</sup>

As telegraph technology developed and became wireless, transmitting sounds through airwaves instead of wires, the path opened for the radio to arrive on the scene in the early 1920s. Like the wireless telegraph, the radio relied on transmitting sounds through airwaves.<sup>35</sup> Another development in telegraph technology—the ability to transmit pictures via telegraph<sup>36</sup>—soon combined with sound technologies to produce the television by 1930.<sup>37</sup>

Several decades passed before the Internet arrived on the scene. The Internet initially was a military initiative called ARPANET, meant to facilitate military communications.<sup>38</sup> In 1970, the first electronic message was sent from one machine to another, a development that eventually led to the Internet as we know it today.<sup>39</sup> As interest in the Internet grew through the early 1980s, the military decided to split ARPANET into a military network and a

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<sup>33</sup> See ALVIN F. HARLOW, *HISTORY OF BROADCASTING: RADIO TO TELEVISION: OLD WIRES AND NEW WAVES* (Christopher Sterling ed., 1971) (1936).

<sup>34</sup> *Id.* at 175.

<sup>35</sup> *Id.* at 475-76.

<sup>36</sup> CRAWLEY, *supra* note 32, at 171.

<sup>37</sup> JOHN NAUGHTON, *A BRIEF HISTORY OF THE FUTURE: FROM RADIO DAYS TO INTERNET YEARS IN A LIFETIME* 178 (2000).

<sup>38</sup> *Id.* at 116.

<sup>39</sup> *Id.* at 147-50.

civilian Internet network.<sup>40</sup> The World Wide Web went public in 1991, and by 1993, the Web became the dominant use of the Internet over e-mail, which had previously been the primary function of the Internet.<sup>41</sup>

Much of the scholarship reacting to the Internet suggests a sense of awe at the possibilities presented by this new medium, although authors vary in their assessment of whether the Internet surpasses or equals previous technological developments. Legal scholar Russell L. Weaver falls into the former category, arguing that “[d]espite the significance of broadcast communication, it pales in comparison to the technological explosion that occurred at the end of the twentieth century.”<sup>42</sup> In a book detailing the history of the Internet, John Naughton argues the latter: “The Internet is one of the most remarkable things human beings have ever made. In terms of its impact on society, it ranks with print, the railways, the telegraph, the automobile, electric power, and television.”<sup>43</sup> Other authors heralded the ease of access to the Internet as an opportunity to “enable us to behave as if free exchange of information really does exist.”<sup>44</sup> As previously discussed, however, the current approach to the application of defamation law to the Internet has raised concerns.

A heated debate has arisen over the best way to apply defamation law to the Internet. In a 1995 article, legal scholar Lawrence Lessig urged patience, expressing his belief that

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<sup>40</sup> *Id.* at 167.

<sup>41</sup> *Id.* at 150.

<sup>42</sup> Russell L. Weaver, *Speech and Technology*, 110 PENN. ST. L. REV. 703, 703 (2006). Weaver also discussed the development and improvement of cell phone and satellite technologies.

<sup>43</sup> NAUGHTON, *supra* note 37, at 21.

<sup>44</sup> Holman & McGregor, *supra* note 14, at 288.

common law would be the best approach to regulating the Internet.<sup>45</sup> Because the Internet was such a new and unknown technology, it needed “a way to pace any process of regulation—a way to let the experience catch up with the technology, a way to give the ordinary language a chance to evolve, and a way to encourage new languages where the old gives out.”<sup>46</sup> Rather than immediate statutory regulation, Lessig argued that “what recommends the common law to cyberspace is not its efficiency, but its inefficiency.”<sup>47</sup> In other words, it could be better to allow the law to evolve naturally through a series of cases in different courts to arrive at a common law, rather than simply imposing a statutory law.

As it was, common law had very little opportunity to develop before the 1996 passage of the Communications Decency Act, passed as part of the Telecommunications Act.<sup>48</sup> Instead of allowing common law to accumulate to suggest a direction for regulation, Congress adopted a model intended to foster speech on the Internet while limiting the distribution of objectionable or inappropriate materials.<sup>49</sup> In the Act, Congress declared its intent to allow the Internet to develop unfettered by excessive regulation: “The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”<sup>50</sup>

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<sup>45</sup> Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1744 (1995).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1745.

<sup>48</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133-43 (1996) (codified in scattered sections of 47 U.S.C.). The CDA comprised Title V (501-509) of the Telecommunications Act of 1996. *Id.* A more in-depth analysis of this legislation will occur in Chapter 4.

<sup>49</sup> Congress enacted the CDA in response to courts having applied common-law principles to Internet Service Providers in some of the first online defamation cases. These cases will be discussed in detail in Chapter 4.

<sup>50</sup> 47 U.S.C. § 230.

The portions of the CDA relating to indecency were struck down in 1997,<sup>51</sup> but section 230 still governs interactive computer service and user liability. The section states:

(1) Treatment of publisher or speaker. No 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.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.<sup>52</sup>

The term “interactive computer service” is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”<sup>53</sup> An “information content provider” is defined 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.”<sup>54</sup> Therefore, no *provider or user* can be treated as a publisher of information provided by an *information content provider*. For the Internet, this has meant that content that is re-posted by a service provider or a user from some third-party content provider is immune from liability, even if the content is false and defamatory.

In spite of the provision’s good intentions to encourage filtering of inappropriate content on the Internet, instead the focus has largely been on the provision’s exemption of both users and interactive computer services from liability, even for defamatory content. Lack of clear definition of terms such as “user,” combined with courts’ expansive interpretations of who is

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<sup>51</sup> Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

<sup>52</sup> 47 U.S.C. § 230(c).

<sup>53</sup> *Id.* § 230(f)(2).

<sup>54</sup> *Id.* § 230(f)(3).

immune under section 230,<sup>55</sup> has led authors to criticize the CDA for failing to hold publishers or distributors of defamatory content accountable.<sup>56</sup>

While the application of section 230 has drawn a great deal of attention in the legal and academic communities, as will be discussed below, publication is an area that has received relatively limited attention from scholars.<sup>57</sup> The libel/slander distinction has not drawn any discussion, likely because the distinction between the two has eroded. As the Restatement of Torts notes, “In modern times, with the discovery of new methods of communication, many courts have condemned the distinction as harsh and unjust.”<sup>58</sup> In spite of the lack of literature addressing the libel/slander distinction as applied to the Internet, the very fact that the distinction has eroded in the last century bears investigation, particularly to determine the impact of new technologies, including broadcast, on the erosion of the distinction.

Whether and when to apply the single publication rule to the publication of defamatory content via the Internet has produced some debate. The application of the single publication rule to the Internet focuses on the initial publication so that only when the information is modified would it be considered a separate publication.<sup>59</sup> One author noted the logic behind applying the single publication rule to defamatory postings on the Internet:

Publications on general access sites pose the very problems that the single publication rule seeks to prevent—multiplicity of actions, undue harassment of defendants, possible excess recoveries of plaintiffs through multiple suits, unnecessary depletion of judicial

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<sup>55</sup> See *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997).

<sup>56</sup> See generally Andrea L Julian, *Freedom of Libel: How an Expansive Interpretation of § 230 Affects the Defamation Victim in the Ninth Circuit*, 40 IDAHO L. REV. 509 (2004).

<sup>57</sup> Wood, *supra* note 13, at 896 (noting that personal jurisdiction and third-party liability have dominated cyber-law literature.)

<sup>58</sup> RESTATEMENT (SECOND) OF TORTS § 568 cmt b (1977).

<sup>59</sup> Wood, *supra* note 13, at 895.

resources, and unnecessary exposure of the court system to stale claims in which the evidence may have been lost, and witnesses may have died, disappeared, or suffered a loss of memory.<sup>60</sup>

Generally, though, authors have disagreed with courts' applications of the single publication rule to the Internet.

Those who disagree typically focus on the perceived impact of online defamation. One student author argued: "The Internet is more like a television, radio, or motion picture exhibition, which gives material a renewed impact each time it is broadcast, or each time the defamatory material is accessed. This repeat impact justifies its exclusion from the single publication rule."<sup>61</sup> The author further contended that each time a defamatory communication is accessed on the Internet, it reaches a new audience, "making a new opportunity for injury, and should warrant a new cause of action."<sup>62</sup> Information can be removed quickly and easily from a Web page, but, "[i]f a publisher has sustained maximum liability when he first publishes, he has no motivation to limit the harm."<sup>63</sup> Therefore, the author concluded, the single publication rule should not apply to the Internet.

Another author focused on the potential harms suffered by the victims of defamatory postings on the Internet, which she argued were heightened by applying the single publication rule: "[I]n implementing this rule, courts have skewed the single publication rule to favor publishers by broadly defining when publication on the Web occurs and narrowing

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<sup>60</sup> *Id.* at 913 (citing *Gregoire v. G.P. Putnam's Sons*, 81 N.E.2d 48 (N.Y. 1948)).

<sup>61</sup> Braun, *supra* note 13, at 331.

<sup>62</sup> *Id.* at 332.

<sup>63</sup> *Id.* at 333.

the circumstances when republication can be found. As a result, courts have unnecessarily diminished the opportunity for libel victims to be compensated.”<sup>64</sup>

Another major issue concerning the application of defamation to the Internet is who can be held liable for defamatory content, which remained a question in the literature even after the passage of the Communications Decency Act. In 1997 Douglas Luftman wrote, “Just as the pioneers of previously emerging media—like the telephone, broadcast television, and cable television—confronted fundamental First Amendment and defamation issues that have come to define their very nature, commercial on-line services also face similar issues of editorial control and defamation liability.”<sup>65</sup> In particular, Luftman was concerned with where the boundary would be drawn between ISPs exercising editorial control and ISPs becoming publishers. Luftman ultimately argued that, “as long as on-line services do not have the technical capability to exert comprehensive editorial control over a continuous stream of electronic messages,”<sup>66</sup> on-line services should be treated as distributors and not publishers, liable only when they have knowledge that a communication is defamatory.

Our current perception of the nature of Internet technology—rapid dissemination of a large number of messages that makes it difficult, if not impossible, to monitor the content of each—resembles our view of the telegraph in its earlier years.<sup>67</sup> The courts struggled to determine what standard of defamation liability should apply to telegraph operators who transmitted defamatory messages, eventually settling on what is essentially a distributor

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<sup>64</sup> Kumar, *supra* note 13, at 640.

<sup>65</sup> Luftman, *supra* note 14, at 1088.

<sup>66</sup> *Id.* at 1099.

<sup>67</sup> Lee, *supra* note 14, at 486.



model.<sup>68</sup> With the development of the radio and television, an author noted that the “courts were initially distracted by the new technology” but eventually focused on the speech itself.<sup>69</sup> Another author drew a similar conclusion, noting, “The courts had difficulty fitting telegraph, radio, and television into the traditional defamation framework because their technical workings initially confounded the legal community.”<sup>70</sup>

Discussions of whether to apply publisher, republisher, or distributor liability to transmitters of defamatory messages, like newspaper editors and broadcast station producers, typically focus on people whose jobs include the responsibility of monitoring content. The Internet, however, may provide a unique challenge, as some authors have suggested, in that the users or consumers of the medium are also the transmitters, editors, and producers of Internet content and, therefore, not liable for third-party defamatory content.

One area of Internet defamation that has attracted particular attention is the extent to which bloggers, as Internet users, should be held liable as publishers, republishers, or distributors. A key question in this debate is who is included in the definition of a “provider or user of an interactive computer service.”<sup>71</sup> One author argued that bloggers, as users of interactive computer services and, therefore, potentially immune from liability for posting third-party defamation under section 230, should not be exempt from liability. “Because blogs are growing in number and resemble traditional print media more and more every day, bloggers should have to adhere to the same defamation laws as traditional print media for third-party

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<sup>68</sup> The liability for telegraph companies will be discussed in detail in Chapter 4.

<sup>69</sup> Lee, *supra* note 14, at 487.

<sup>70</sup> Troiano, *supra* note 12, at 1465.

<sup>71</sup> 47 U.S.C. § 230(c)(1).

postings.”<sup>72</sup> Writing generally about First Amendment rights for bloggers, author David Hudson proposed that the function of the blogger and not the medium of the communication should determine how the law should apply:

Bloggers is a vague, amorphous term like telephone users. Just like some telephone users are journalists and some are not, the same thing with bloggers. The medium doesn’t answer the question. It has more to do with the function that the person is performing. . . . There should be a functional analysis in addition to or instead of the current analysis of what medium you are writing in.<sup>73</sup>

Similarly, another author wrote that the application of defamation law should not “turn on the technology involved.”<sup>74</sup>

Those who argue that there should be greater liability for those who post third-party defamation tend to resort to arguments that Congress did not intend for the CDA to be interpreted to absolve ISPs or users of liability so completely. Lawyer James P. Jenal contended, “As the Conference Committee made clear in their report, the purpose of granting immunity was to protect from liability those who had taken affirmative steps to *restrict* access to objectionable material—not to shelter those who deliberately *disseminated* it.”<sup>75</sup> One author suggested that the courts have greatly misconstrued congressional intent, writing that “the courts have expanded § 230 beyond what was intended by Congress, ignoring traditional libel law and tipping the balance between protection of reputation and protection

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<sup>72</sup> Troiano, *supra* note 12, at 1463.

<sup>73</sup> Hudson, *supra* note 1, at 131.

<sup>74</sup> Jennifer L. Del Medico, Comment, *Are Talebearers Really as Bad as Talemakers?: Rethinking Republisher Liability in an Information Age*, 31 FORDHAM URB. L.J. 1409, 1412 (2004).

<sup>75</sup> Jenal, *supra* note 13, at 469 (citing H.R. Conf. Rep. No. 104-458, at 194 (1996)).

of speech even further in the direction of the latter.”<sup>76</sup> In spite of the critics of the courts’ interpretations of the CDA, some see the freedom from liability as a benefit provided by the courts, which “have created a breathing space for mass information providers, free of this specter of unlimited tort liability.”<sup>77</sup>

Another criticism of ISP and user immunity for posting third-party defamatory content is that the immunity, combined with the ease of posting anonymous defamatory speech on the Internet, may foster defamatory speech on the Internet. Author Emily Fritts painted a bleak picture of the potential harms that could be caused by the ease of posting anonymous Internet defamation: “Empowered by the Internet, an anonymous speaker of defamatory material may hide behind his screen name, pay little if any cost, and freely disseminate information to the masses.”<sup>78</sup> Because it is so easy to post on the Internet, Fritts argued, greater potential exists for people to publish without thought for consequences.<sup>79</sup>

A theme in literature addressing liability for Internet defamation reflects the desire for there to be consequences for those who knowingly post or allow to remain posted defamatory content. Author Andrea Julian pointed out discrepancies in the consequences resulting from online defamation versus print defamation: “By providing immunity for such traditionally liable actors as publishers, distributors, and those who had an active role in generating and disseminating the content, a defamation defendant may be liable in the brick and mortar

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<sup>76</sup> Emily K. Fritts, Note, *Internet Libel and the Communications Decency Act: How the Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers*, 93 KY. L.J. 765, 775 (2005).

<sup>77</sup> Joel Rothstein Wolfson, *Electronic Mass Information Providers and Section 552 of the Restatement (Second) of Torts: The First Amendment Casts a Long Shadow*, 29 RUTGERS L.J. 67, 69 (1997).

<sup>78</sup> Fritts, *supra* note 76, at 784.

<sup>79</sup> Hadley, *supra* note 8, at 506.

world while completely escaping liability in cyberspace.”<sup>80</sup> Julian concluded that ISPs and Web page operators should be treated as distributors and held liable after receiving notice of allegedly defamatory content.<sup>81</sup>

As Julian’s comparison of online and print defamation reflects, in addition to attempts to analogize new technologies to one another, whether implicit or explicit, the standard for all comparisons is that of the print model of defamation law, which was, as discussed in the previous section, developed in reaction to the printing press. Phillip Miller referred to the comparison as the “fundamental First Amendment struggle that has shaped the development of other ‘emerging’ media—including telephone, radio, broadcast television, and, more recently, cable television.”<sup>82</sup>

More specifically, at some point in their development, most of these media have sought to secure the sort of “full” First Amendment protection that is afforded to print publishers—the fullest freedom from regulation afforded by the First Amendment’s proscriptions against government restrictions on free speech and freedom of the press.<sup>83</sup>

Miller suggested that different media have had varying degrees of success in claiming the same level of First Amendment protection as print media. The immunity from liability for third-party defamation via the Internet, Julian’s article contended, has surpassed the freedoms granted to print media.

In addition to debates over the application of traditional publication and liability doctrine to the realm of Internet defamation, scholars have also questioned the extent to which it is possible to analogize the Internet to other technologies. Author Keith Siver argued that it is

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<sup>80</sup> Julian, *supra* note 55, at 530.

<sup>81</sup> *Id.* at 534.

<sup>82</sup> Miller, *supra* note 14, at 1147.

<sup>83</sup> *Id.*

impossible to draw a direct analogy between the Internet and any other communication medium:

Since the advent of the telegraph, courts and legislators have tended to treat each new communications technology like the existing technology that it most closely resembles. In the case of online service providers, initial attempts at regulating by analogy have been especially problematic, perhaps because it is not immediately clear which communications technology is most closely analogous.<sup>84</sup>

One student author did not argue that direct analogies may be drawn between new mass communications technologies but, instead, suggested that there are great similarities between different technologies in their developmental phases:

Although every new medium presents new challenges for society and the law, closer inspection uncovers a rather unflattering truth: a medium that appears completely fresh and unique in its infancy soon reveals, during adolescence, some of the same pimples and warts that have plagued other young media in the past.<sup>85</sup>

It seems likely that both authors are right in their assertions—the telegraph, radio, television, and Internet each reflected new technological developments that distinguished each from the technologies that came before it. However, even dating back to the printing press, progress in the ability to disseminate more messages to a wider audience with a greater potential for those messages to linger has forced the courts to grapple with how to apply existing libel law to each new technology.

A review of the literature concerning the Internet and defamation law, particularly the single publication rule and liability, reveals two important findings. First, there is a substantial amount of literature critical of the current approach to applying defamation law to the Internet. Specifically, the trend seems to be for authors to suggest there should be higher standards of liability—resulting in greater protection for victims—in cases involving

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<sup>84</sup> Siver, *supra* note 14, at 4.

<sup>85</sup> Lee, *supra* note 14, at 469.

defamation on the Internet. Arguments in favor of not applying the single publication rule to the Internet and opposed to the current court interpretations of the CDA reflect that desire for more accountability for defamatory content on the Internet. Second, although several authors have drawn some comparisons between the Internet and other technologies, including the telegraph, radio, and television, many of these comparisons are either limited to a specific argument the author is making or are general references to approaching the regulation of new technologies. No article was found that had as its sole purpose contextualizing the courts' current approaches to applying defamation law to the Internet through an analysis of courts' previous approaches with then-new mass communications technologies.

Based on these findings, it is worth taking an in-depth look at how the courts have approached applying defamation law to then-new mass communication technologies. Being able to establish what trends, if any, have characterized the evolution of defamation law in response to technological developments can provide insight into our current approach to defamation on the Internet. Are we simply repeating history, panicking needlessly that there is too much freedom to defame on the Internet at the expense of private individuals' reputations? Or, in the light of the history of law and old technologies, do the CDA and the courts' subsequent rulings seem to indicate that we have allowed too much freedom, too quickly, to a technology the possibilities of which we are just beginning to grasp?

### Research Questions and Methodology

In analyzing how the development of new mass communications technologies has affected defamation law, this thesis focuses on how courts have approached the

libel/slander distinction, the single publication rule, and liability both historically, with the telegraph, radio and television, and at present, with the Internet.

Five specific research questions are:

- 1) How have courts addressed the application of the libel/slander distinction—that is, how have courts decided which should apply to each technology—to the telegraph, radio, television, and Internet?
- 2) How have courts addressed whether and how to apply the single publication rule to publication via the telegraph, radio, television, and Internet?
- 3) How have courts addressed the issue of who can be held liable for defamation transmitted via the telegraph, radio, television, and Internet, that is, the question of who qualifies as a publisher, republisher, or distributor?
- 4) What trends have emerged in the approaches the courts have taken in applying the libel/slander distinction, the single publication rule, and who can be held liable, as defined above, in defamation actions involving the telegraph, radio, television, and Internet?
- 5) To what extent does the application of libel law to the Internet fit a historical trend of applying libel law to new communications technologies?

The methodology of this thesis is critical analysis of court opinions addressing issues of the libel/slander distinction, the single publication rule, and liability in cases involving defamation transmitted by the telegraph, radio, television, and Internet. Federal and state cases are examined; they were selected based on whether the technology in question factored into the courts' decisions. Cases were found through searching contemporary law review articles concerning each technology and topic, which were found on Hein Online;

through case citations in the Second Restatement of Torts; through consulting the American Jurisprudence database on Westlaw; and through case searches on Westlaw.<sup>86</sup> The thesis is organized into chapters reflecting the research questions, with questions four and five addressed in the concluding chapter.

There are limitations to the proposed research. First, technology is just one factor of many that has affected the development of libel law. This thesis does not address all changes or developments in libel law, simply those that via case analysis can be tied to technological developments. Furthermore, case law still represents just a slice of the legal reactions to new technologies: As demonstrated in this chapter in the discussion of the CDA, statutes have played an important role in the courts' applications of defamation law to new technologies. While it is beyond the scope of this thesis to thoroughly examine both statutory and common law developments in libel that arose in reaction to technological developments, some statutes are discussed as they arise in court opinions. Furthermore, it is hoped that court opinions can offer a rich source of information as many court opinions cite, in addition to statutes, relevant scholarly literature and other contemporary writings.

In addition, it is beyond the scope of this project to examine every federal and state court case to determine whether technology was a factor in the ruling. In an attempt to choose the most representative cases, cases were selected using a snowball method, with law review articles serving as the first source of relevant case law. Cases cited in those identified from articles were then used to find more relevant cases. The Second Restatement of Torts also served as a source of case law and, as indicated above, specific search terms were used in the Westlaw electronic database.

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<sup>86</sup> Searches involved the name of each technology and terms related to the topic. More precise methods are noted in the beginning of each substantive chapter.



Finally, none of the elements of defamation functions in isolation in the case law. For example, determining whether defamatory content is libel or slander typically is the first step in determining the liability of a party and, more so, the damages that need to be proved by the plaintiff. The single publication rule plays a major role in determining when the statute of limitations runs for a publication. Liability is deeply intertwined with fault for defamatory communications. Yet, in this thesis, the libel/slander distinction, the single publication rule, and who may be held liable are separated out for the purposes of the analysis. Thus, the cases provided for analysis here and the analysis itself comprise a relatively narrow view of these three issues within the much larger field of defamation law.

Chapter II of this thesis examines the libel/slander distinction as it has been addressed by the courts. Specifically, cases were selected for analysis in which the courts were required to decide whether publication via a particular technology involved libel or slander.

Chapter III examines cases in which the courts decided whether the single publication rule should apply to a particular technology and, if so, how.

Chapter IV examines liability as it has been addressed by the courts. Specifically, cases were examined to determine who may be held liable for defamation via a particular technology either as a publisher, republisher, or distributor.

Chapter V provides an analysis of the trends evident in court responses to developments in mass communications technologies and current approaches to applying defamation law to the Internet. It then discusses the extent to which application of libel law to the Internet

fits a historical pattern. The implications of the findings for future technologies are discussed, as are possibilities for future research.

## CHAPTER II

### NEW TECHNOLOGIES: BLURRING THE LINE BETWEEN LIBEL AND SLANDER

The libel/slander distinction, as discussed previously, is one area of defamation law that was affected by the earliest innovation in mass communications technologies—the printing press. The increased prevalence of the printed word led the courts to distinguish between spoken defamation, or slander, and written defamation, or libel. Slander, as a less permanent form of publication, is seen as a lesser tort than libel, which has a greater ability to linger and reach a wider audience.<sup>1</sup> The Restatement of Torts provides some additional insight into the difference between the two, most notably pointing out the somewhat arbitrary nature of the distinction, particularly in modern times.

It is impossible to define and difficult to describe with precision the two forms of defamation, slander and libel. Oral defamation is tortious if the words spoken fall within a limited class of cases in which the words are actionable per se, or if they cause special damages. Written defamation is actionable per se. For two centuries and a half the common law has treated the tort of defamation in two different ways on a basis of mere form. Yet no respectable authority has ever attempted to justify the distinction on principle; and in modern times, with the discovery of new methods of communication, many courts have condemned the distinction as harsh and unjust.<sup>2</sup>

A key point raised by this section of the Restatement is the element of damages, which proved to be an issue in several cases included in this analysis.

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<sup>1</sup> See Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 2 COLUM. L. REV. 546, 547 (1903).

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).

Under traditional common-law defamation principles, damages were presumed for a plaintiff in certain defamation actions—namely, cases involving libel and slander *per se*. The Restatement lists four categories of slander that are actionable without proof of special damages on behalf of the plaintiff: speech that “imputes to the other (a) a criminal offense, (b) a loathsome disease, (c) matter incompatible with his business, trade profession, or office, or (d) serious sexual misconduct.”<sup>3</sup> The Restatement states, “One who is liable for either a slander actionable *per se* or a libel is also liable for any special harm legally caused by the defamatory publication.”<sup>4</sup> The difference between a defamatory communication being considered slander versus slander *per se* or libel could be crucial, as a plaintiff needed to prove special damages in a slander case but damages are presumed in the latter categories of defamation. As will be revealed in the case analysis, some courts took the burden of proving special damages into consideration when deciding whether to classify the defamation as libel or slander.

The development of new mass communications technologies certainly complicated the issue. The telegraph, radio, and television all used sound technologies to transmit messages, but did that mean that defamation transmitted via those technologies should be treated as slander? One author, writing in 1956, noted the difficulty courts faced in applying the distinction based on the oral nature of the speech:

The original distinction between libel and slander was usually easy to apply. . . . But as new methods of communication were developed, the distinction, as well as its purported logical bases, became difficult to maintain. Today, oral statements may be as potentially harmful as the most widely distributed writings since they can be

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<sup>3</sup> *Id.* § 570.

<sup>4</sup> *Id.* § 622.

communicated to equally large audiences and can be put in permanent form as, for example, on phonograph records.<sup>5</sup>

The same author called upon the courts to do away with the distinction, arguing, “Judges need not sit back and await the legislative fiat abolishing the distinction between the two forms. Despite the usual cries of ‘judicial legislation,’ the judiciary should reappraise the existing rules in the light of the new methods of mass communication.”<sup>6</sup> Several years later, another author suggested the inevitability that the doctrine would need to adapt, noting that “the classic distinction between libel and slander is being shunted into legal oblivion by the conceptual challenge of radio and television.”<sup>7</sup> For those technologies, courts gained some guidance in 1977 when the Second Restatement of Torts noted, “Broadcasting of defamatory matter by means of radio or television is libel, whether or not it is read from a manuscript.”<sup>8</sup>

How did the courts react? The purpose of this chapter is to examine how, in cases involving each of those technologies and the Internet—which has the ability to transmit audio and visual content—courts have addressed the question of whether defamation transmitted via the telegraph, radio, television, and Internet should be treated as slander or as libel. The distinction between libel and slander has not played a prominent role in Internet cases, as will be discussed later in this chapter. In spite of that, an examination of how courts have applied a traditional defamation principle—distinguishing between libel and slander—

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<sup>5</sup> E.E.M. *Television Defamation—Libel or Slander?* 42 VA. L. REV. 64, 74 (1956).

<sup>6</sup> *Id.*

<sup>7</sup> Albert E. Harum, *Broadcast Defamation: A Reformation of the Common Law Concepts*, 21 FED. COMM. B. J. 73, 73 (1967) (“Perhaps a more appropriate title for this article would be: ‘Enter the Defamacast,’ Exit the Libel-Slander Distinctions,’ because the classic distinction between libel and slander is being shunted into legal oblivion by the conceptual challenge of radio and television.”)

<sup>8</sup> RESTATEMENT (SECOND) OF TORTS § 568A (1977).

may offer insight into courts' current approaches to applying other areas of defamation law to the Internet.

This section of the analysis focuses on state and federal court cases<sup>9</sup> that addressed whether an alleged defamation should be considered libel or slander based on the technology in question.<sup>10</sup> Most of the discussion focuses on broadcast defamation—via radio or television—although one telegraph case and one Internet case each were found that required the court to determine whether the defamation in question constituted libel or slander. The cases are arranged chronologically within each technology to track developments in the application of defamation law to new mass communications technologies. As the analysis reveals, courts have varied in their approaches to applying libel or slander to defamation transmitted via new technologies.

### Telegraph

The only telegraph case located by this study that explicitly addressed whether defamation transmitted via telegraph constituted libel or slander was decided by the Supreme Court of Minnesota in 1898. In an earlier decision in *Peterson v. Western Union Telegraph Co.* in 1896, the state supreme court had held that the transmission of an allegedly defamatory message by a telegraph operator in New Ulm to another telegraph operator in St. Paul constituted publication; furthermore, the court held that the message in question was

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<sup>9</sup> Common-law principles can vary from state to state, and federal courts typically apply the applicable state law. This suggests the integral role that state courts have played in developing common-law principles, including those that address the application of traditional defamation law to new communications technologies.

<sup>10</sup> Cases were found through examining cases cited in contemporary law review articles; the Restatement (Second) of Torts, particularly § 568A on broadcast defamation; the American Jurisprudence Database, particularly 50 Am. Jur. 2d § 10; and through Westlaw searches using the Terms and Connectors feature including slander, defamation, radio, television, broadcast, and Internet.

libelous.<sup>11</sup> In the 1898 appeal, Western Union attempted to claim that, because the message was transmitted via sounds over the telegraph wires, the alleged defamation should be considered slander.

The fact affirmatively appears on the second trial that the message was transmitted over the wires by sound, and the point is now made that the mode of communication was oral, and not written, and therefore there was no publication of a libel . . . . The alleged materiality of the point lies in the facts that, as defendant claims, the words complained of were not actionable in themselves unless published in writing, and that a corporation cannot be liable for slander.<sup>12</sup>

The court was not swayed by the defendant's argument, contending that, regardless of whether the message was transmitted by "sounds representing letters, or dots or dashes representing the same thing,"<sup>13</sup> the purpose and the result were the same: A written message was transmitted by one telegraph operator to another to reproduce that written message, "which he could read and understand as effectually as if the original had been placed in his possession."<sup>14</sup>

In *Peterson*, the court ruled that a defamatory communication sent via the telegraph would be considered libel and not slander.<sup>15</sup> Therefore, while an aspect of the technology of the telegraph—transmitting messages via sounds—became an issue for the court to consider in this case, the court focused on the format of the message itself, rather than the technology, in finding defamation transmitted via the telegraph to be libel. While the court, with relative ease, dismissed the claim that telegraph transmissions were slander because, in essence, the

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<sup>11</sup> 67 N.W. 646 (Minn. 1896).

<sup>12</sup> *Peterson v. W. Union Tel. Co.*, 74 N.W. 1022, 1022 (Minn. 1898).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> The court's determination of liability in this case will be discussed in Chapter 4.

message consisted of written words, the technology of the radio transmitted oral, rather than written, messages to an audience.

### Radio

The Supreme Court of Nebraska decided one of the first cases that considered whether radio defamation would be considered libel or slander. *Sorenson v. Wood* arose from an alleged defamation via radio that smeared the reputation of a political candidate.<sup>16</sup> The evening before the Nebraska primary election in 1930, Richard F. Wood made allegedly defamatory statements about C. A. Sorenson, a candidate for reelection as state attorney general, that were broadcast via radio by KFAB Broadcasting Company in Lincoln. Wood read from an article that he had written prior to the broadcast, which included the following statement:

In his (the plaintiff's) acceptance of the attorney general's office he took an oath before God and man that he would uphold the law justly and honestly. His promises to man are for naught and his oath to God is sacrilege, for he is a nonbeliever, an irreligious libertine, a mad man and a fool.<sup>17</sup>

A representative of KFAB Radio Broadcasting “introduced and vouched for Wood, was present and heard him read the article,”<sup>18</sup> which included several other allegations about Sorenson's character and fitness for office. Sorenson filed an action against both Wood and KFAB.<sup>19</sup>

In *Sorenson*, the court considered whether a defamatory statement that was originally written but read aloud for transmission over the radio constituted libel or slander. Justice

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<sup>16</sup> 243 N.W. 82 (Neb. 1932).

<sup>17</sup> *Id.* at 83.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* The trial had awarded Sorenson one dollar in damages from Wood and found in favor of KFAB.



Goss, writing for the court, emphasized the fact that Wood read from a written document in publishing the defamatory statements and used that circumstance to support the court's holding that the publication was a libel, not a slander. "We think there is nothing fundamentally new in the applicable law. . . . There can be and is little dispute that the written words charged and published constitute libel rather than slander."<sup>20</sup> Comparing radio publication to newspaper publication, Gross contended, "There is no legal reason why one should be favored over another nor why a broadcasting station should be granted special favors as against one who may be a victim of a libelous publication."<sup>21</sup>

In a 1933 case, *Miles v. Louis Wasmer, Inc.*, which involved allegations broadcast over the radio that a sheriff auctioned off confiscated home brewing equipment during Prohibition, the supreme court of Washington assumed the broadcast in question was slander, even though it was read from a script.<sup>22</sup> William Castner, who ran a local newspaper titled *Public Opinion* dedicated to anti-Prohibition causes, purchased air time from the radio station KHQ, run by Louis Wasmer, Inc., to advertise his publication. Castner submitted a typewritten script to the station's announcer, Charles Lantry, with the understanding that Lantry could edit or alter the script as he chose before reading the script on the air. Lantry made some edits and broadcast the script, which included allegations that G. G. Miles, the Spokane sheriff, "recently auctioned off its stock of confiscated stills, home brewing equipment and moonshiners accessories to the highest bidders."<sup>23</sup>

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<sup>20</sup> *Id.* at 85.

<sup>21</sup> *Id.* at 86.

<sup>22</sup> 20 P.2d 847 (Wash. 1933).

<sup>23</sup> *Id.* at 848. The broadcast continued:

What a spectacle! Arresting some moonshiner and confiscating his outfit then turn around and sell it to someone else at a great discount so they can start up cheap. Seems like a queer proposition but perhaps

In addressing the libel/slander distinction, the court simply assumed the allegedly defamatory broadcast was slander. Justice Main wrote for the court that, while there was discussion in the briefs over whether the broadcast constituted libel or slander, the court would not decide that issue: “[I]n so far as this case this case is concerned, it is immaterial. We shall assume that the words spoken, if they are actionable, must come within the rule of slander.”<sup>24</sup> Finding that the allegations were untrue, the broadcast was held to be slanderous *per se*. This case marked a departure from *Sorenson*: While both cases involved allegedly defamatory material read from scripts and broadcast over the radio, the *Sorenson* court held that the defamation was libel, whereas the *Miles* court simply assumed that, as spoken words, the broadcast was slander.

In a 1934 case involving defamation via radio, *Coffey v. Midland Broadcasting*,<sup>25</sup> a Missouri federal district court did not directly address the libel/slander distinction but simply treated the defamation as libel. In this case, which will be discussed in detail in Chapter 4 due to its focus on the station’s liability, KMBC radio station in Kansas City, Mo., broadcast a statement that falsely accused plaintiff Robert Coffey of being an ex-convict who had served time in prison.<sup>26</sup> While discussing the liability of the broadcast station for the defamatory transmission, the court compared radio stations to newspapers. Judge Otis wrote for the court, “The latter prints the libel on paper and broadcasts it to the reading world. The owner of the radio station ‘prints’ the libel on a different medium just as widely or even more

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the county needs the money. . . . But if the government sees no harm in collecting income taxes from bootleggers the sheriff can scarcely be blamed for selling moonshine still equipment. *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 8 F. Supp. 889 (W.D. Mo. 1934).

<sup>26</sup> *Id.* at 889. “The substance of the defamation was that the plaintiff was an ex-convict who had served time in the penitentiary.” *Id.*

widely ‘read.’”<sup>27</sup> To the court, whether the defamation was scripted ahead of time or resulted from extemporaneous speech, the defamation still constituted libel.<sup>28</sup>

The Pennsylvania Supreme Court ducked the question in *Weglein v. Golder* in 1936.<sup>29</sup> In *Weglein*, there were two instances of publication—one in which a transcript of an allegedly defamatory speech concerning a political candidate was delivered to newspapers and the second in which the transcript was read over the air. The court held that, in spite of the fact that the newspapers never published the speech, “this delivery of it to the papers was a technical publication of the alleged libel. In addition, the speech was read by the defendant over the radio, with the resultant widespread dissemination of the libelous article.”<sup>30</sup>

The supreme court said that the lower court had not erred in instructing the jury to consider only the libel claim and denied the defendant’s motion for a new trial. The supreme court noted that the defendant, the appellant, suffered no harm as a result of the trial judge’s instruction because the change to the filing “eliminated one possible ground of recovery against him.”<sup>31</sup> Thus, the state high court was not required to decide if the radio broadcast was libel or slander.

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<sup>27</sup> *Id.* at 890.

<sup>28</sup> *Id.*

In my thought . . . I assume even that [the publisher of the defamation] has submitted a manuscript [to the station] and that nothing in it is questionable; I assume a sudden utterance by him of defamatory words not included in the manuscript, an utterance so quickly made as to render impossible its prevention; I assume, in short, a complete absence of the slightest negligence on the part of the owner of the station.  
*Id.*

<sup>29</sup> 177 A. 47 (Pa. 1935) (per curiam).

<sup>30</sup> *Id.* at 48.

<sup>31</sup> *Id.*

The Supreme Court of New York County in 1937 considered whether an alleged defamation via radio constituted libel or slander in *Locke v. Gibbons*.<sup>32</sup> Reporter Charles Locke prepared a script for a radio broadcast by station WLW concerning recent flooding in the Ohio Valley. Locke alleged that Floyd Gibbons, during the course of broadcasting the story, added his own statements that Locke alleged were “for the purpose of creating melodramatic situations and falsely indicating that sensational happenings were occurring at and around the actual scene of the broadcasts.”<sup>33</sup> Locke further charged that the statements resulted in damage to his reputation as an accurate news reporter and loss of work for him as a radio reporter.

The court’s opinion focused largely on the question of whether radio broadcast of a defamation should be considered libel or slander. Referring to both the “relatively novel proposition” of determining whether libel or slander should apply and “the comparative infancy of the radio industry,”<sup>34</sup> Justice Pecora differentiated this case from *Sorenson* because it involved ad lib speech rather than speech read from a script.

Since the words complained in this action were not contained in the script, it is not necessary to decide whether a different ruling would follow in a case where, as in the *Sorenson* case . . . the defamatory matter is read from a prepared manuscript. . . . The extemporaneous interpolations by the defendant in this case, if actionable as defamation at all, must be considered as slander.<sup>35</sup>

Justice Pecora, therefore, emphasized the extemporaneous nature of the speech over its potential effects in determining that it was a slander. While Locke ultimately was unable to prevail for failing to specify the exact defamatory phrases or words and failing to prove

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<sup>32</sup> 299 N.Y.S. 188 (N.Y. Sup. Ct. 1937), *aff’d mem.*, 2 N.Y.S. 2d 1015 (App. Div. 1938).

<sup>33</sup> *Id.* at 189.

<sup>34</sup> *Id.* at 190.

<sup>35</sup> *Id.* at 193.

special damages, a necessary component in a slander case, this case treated defamation transmitted via radio differently based on whether the speech was read from a written script or whether the speech was extemporaneous.

A case decided by the Oregon Supreme Court in 1938, *Irwin v. Ashurst*, involved the placement of microphones in a courtroom during a murder trial that were used to broadcast the proceedings.<sup>36</sup> Josephine Irwin, who had testified during the proceedings, alleged that Judge Edward B. Ashurst and others had conspired to defame her by allowing microphones to be present during the proceedings.<sup>37</sup> While the court never resolved the libel/slander question,<sup>38</sup> it questioned the soundness of the logic behind the distinction between speech read from a manuscript and extemporaneous speech:

Assume that a person writes a speech of a defamatory nature and, after committing the same to memory, speaks over the air without referring to his manuscript. Would such broadcast be held slander and not libel? The person who hears the defamatory matter over the air ordinarily does not know whether or not the speaker is reading from a manuscript. Furthermore, what difference does it make to such person, so far as the effect is concerned?<sup>39</sup>

Therefore, while the court did not offer guidance by deciding whether the broadcast should be treated as libel or slander, it did offer an argument critical of maintaining the distinction for radio based on whether the content was scripted, instead focusing on the potential effects of the defamation.

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<sup>36</sup> 74 P.2d 1127 (Or. 1938).

<sup>37</sup> This case is discussed in greater detail in Chapter 4 as the liability of the radio station for broadcasting the content was a key issue.

<sup>38</sup> 74 P.2d at 1130. “In the instant case it is not necessary to a decision to determine whether the alleged defamatory matter constitutes libel or slander. Hence, the question will be reserved.” *Id.*

<sup>39</sup> *Id.* at 1129.

An extemporaneous remark again served as the focal point in a 1939 Pennsylvania Supreme Court case involving whether radio defamation should be considered libel or slander. In *Summit Hotel Company v. National Broadcasting Co.*,<sup>40</sup> the court sought ultimately to determine the liability of a broadcast station that had rented out its facilities to a guest broadcaster who deviated from the prepared script and uttered an allegedly defamatory remark about the Summit Hotel.<sup>41</sup> In addressing whether the extemporaneous remark should be treated as libel or slander, Justice Kephart argued that radio defamation did not fit well into traditional notions of libel or slander.

Radio broadcasting presents a new problem, so new that it may be said to be still in a state of development and experimentation. It was not conceived nor dreamed of when the law of libel and slander was being formulated. Publication by radio has physical aspects entirely different from those attending the publication of a libel or slander as the law understands them.<sup>42</sup>

The court was not satisfied by comparisons drawn between broadcast and print defamation, particularly those comparisons that presented radio defamation as the more harmful of the two.<sup>43</sup> Instead, the court viewed radio defamation as a “distinct form of action” because it possessed traits of both libel and slander but was different from each.<sup>44</sup>

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<sup>40</sup> 8 A.2d 302 (Pa. 1939).

<sup>41</sup> The facts of the case will be discussed in detail in Chapter 4, as the major issue in *Summit* was determining the liability of a broadcasting station that rents out its facilities. The analysis in this chapter focuses on the treatment of the libel/slander distinction by the court.

<sup>42</sup> *Summit Hotel*, 8 A.2d. at 310.

<sup>43</sup> *Id.*

When the radio sound reaches the human ear it is the spoken words. It is urged that the radio gives to it a power for harm even greater than the printing press gives to the printed word, but this conclusion does not consider the factor of permanency . . . or the traditional belief in the veracity of the printed word. . . . Newspaper defamations possess possibilities for real harm far greater than defamations by radio, as they constitute permanent, continuing records, which, through circulation, are constantly republished. The radio word is quickly spoken and, generally, as quickly forgotten. Because of the differences in the power of the stations from which it is sent, it may receive widely varying circulation. *Id.*

<sup>44</sup> *Id.* “[T]he pleader need not lay his cause either in slander or in libel . . . as defamation by radio possesses many attributes of both libel and slander, but differs from each.” *Id.*

In a case with few facts given, the New York Court of Appeals in *Hartmann v. Winchell* in 1947 determined that defamatory content read from a script and broadcast via radio constituted libel, not slander.<sup>45</sup> In a brief opinion, Judge Thacher wrote that it didn't matter whether the audience knew the material was written: "Visibility of the writing is without significance and we hold that the defendant's defamatory utterance was libel, not slander."<sup>46</sup> Judge Thacher acknowledged the debate over whether all radio defamation should be considered libel "because of the potentially harmful and widespread effects of such defamation" but refused to address that broader question since the existence of a written script was sufficient to categorize this as a case of libel.<sup>47</sup>

Judge Fuld, in a concurring opinion, agreed with the outcome but not with the rationale. Fuld contended that, under traditional libel doctrine, defamation read from a script and broadcast via radio would be considered slander:

Where, as here, the contents of a defamatory writing reach a third person only in the form of the spoken words. . . and with no hint of the existence of a writing, there is a publication of words, not of writing, which, *considered apart from the distinctive features of radio broadcasting*, would, by traditional standards, constitute slander rather than libel.<sup>48</sup>

Fuld went on to note that the traditional distinction between libel and slander originated from the belief that libel caused greater damage to the plaintiff through its widespread reach and permanence of form. Focusing on the damage rather than whether the message was scripted

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<sup>45</sup> 73 N.E.2d 30 (N.Y. 1947).

<sup>46</sup> *Id.* at 32.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

or not, he argued, required courts to treat radio defamation as libel based on the widespread reach of radio broadcasts.<sup>49</sup>

Since the element of damage is, historically, the basis of the common-law action for defamation, and since it is as reasonable to presume damage from the nature of the medium employed when a slander is broadcast by radio as when published by writing, both logic and policy point the conclusion that defamation by radio should be actionable *per se*.<sup>50</sup>

While all the judges agreed that the broadcast defamation in this case was libel, two perspectives were presented—one, with which the majority agreed, that the existence of a written script made this a case of libel, and the other was that radio defamation should be treated as libel, actionable *per se*, based on the harms caused.<sup>51</sup>

The libel/slander question was one of several addressed by a New Jersey trial court in 1950 in *Kelly v. Hoffman*.<sup>52</sup> In this case, which is discussed in greater detail in Chapter 4, Arthur Hoffman, managing editor of a newspaper, wrote an editorial and then broadcast it via a radio station. The editorial alleged that Lloyd Kelly, deputy to the mayor of Trenton, was engaged in underhanded tactics, including threats, to arrange the transfer of the police department's contract for vehicles from Chevrolet to Ford dealerships, motivated by Kelly's own recent purchase of a Ford.<sup>53</sup> The court noted, "The words published were defamatory *per se* as they imputed directly and by innuendos malfeasance on the part of the plaintiff as a

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<sup>49</sup> *Id.* at 34.

<sup>50</sup> *Id.* (citations omitted).

<sup>51</sup> The majority opinion, written by Judge Thacher, was joined by five other judges; Judge Fuld was the sole justice signed on to the concurring opinion.

<sup>52</sup> 74 A.2d 922 (N.J. Super. Ct. 1950).

<sup>53</sup> *Id.* at 923.



public official of the City of Trenton.”<sup>54</sup> One question before the New Jersey Superior Court was whether the trial court should have instructed the jury not to consider the defamation as slander, as the defense argued it should be treated due to its oral nature. The superior court noted:

As to the defense that the broadcast was oral and thus not libel, the court dismissed that defense also, charging that in this type of action the medium of publication is not important, that such form of action, called “radio defamation” for convenience, is *Sui generis*, in that it partakes of some, but not all, of the fundamentals of both of the common law actions of libel and slander.

Yet, beyond noting that the trial court had dismissed that defense and upholding those instructions to the jury, the superior court did not suggest whether the defamation should be treated as libel or as another “hybrid” form of defamation. Instead, as noted above, the court viewed the words as defamatory *per se*.

Taking a similar approach to the *Hoffman* court, in the 1954 case *Niehoff v. Congress Square Hotel Co.*, the Supreme Court of Maine held that it was not necessary to distinguish between libel and slander in radio defamation, but instead was sufficient to determine whether the words were actionable.<sup>55</sup> William Niehoff, an assistant attorney general, alleged that Congress Square Hotel Co. libeled him through a defamatory radio broadcast aired on one of its radio stations, WCSH. The broadcast detailed the account of a witness in a trial being prosecuted by Niehoff. In the broadcast, narrated by an unidentified party, the witness, Sahagian, alleged that he testified to committing a crime that he had not committed at the behest of Niehoff, which resulted in injury to his business and an indictment by a grand

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<sup>54</sup> *Id.* at 924.

<sup>55</sup> 103 A.2d 219 (Me. 1954).

jury.<sup>56</sup> Niehoff alleged that he had been libeled by the accusation that he had committed “the heinous crime of subornation of perjury.”<sup>57</sup>

Addressing the issue of whether the defamation should be considered libel or slander, the court stated its view that the distinction was irrelevant.

Although the plaintiff in his declaration refers to the publication as libelous and has treated the action as an action for *libel*, in the view that we take of this case we are not called upon to now determine whether defamation by words spoken over the radio, whether read from a script or not, constitute in the strict legal sense slander, libel, or a special form of defamation, liability for which his is to be measured by the standards applied to libel.<sup>58</sup>

The court noted that there was no indication in the present case whether the defamation originated in a manuscript or extemporaneous speech and that, furthermore, the words used in the broadcast were not actionable *per se*.<sup>59</sup> In explanation, the court said, “[The words] neither charge the commission of the crime of subornation of perjury nor do they charge the commission of any other crime. Nor do they accuse the plaintiff of misconduct in his office as an attorney-at-law.”<sup>60</sup> In this case, then, the Maine Supreme Court held that the

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<sup>56</sup> *Id.* at 220. The specifics of the case, including the identity and role of the people mentioned, are unclear. The text of the defamatory content as indicated in the opinion includes:

Sahagian was a key witness in the Research Committee’s hearing and later in the Portland trial. He told me that he had not wanted to admit on the stand of the Portland trial that he had committed a crime since he had not committed any. However, he said he was urged to do so by. . . Assistant Attorney General William H. Niehoff. . . . Largely on the basis of [Sahagian’s] testimony at Portland his wine company has been suspended from further business with the State Liquor Commission. Sahagian feels this is definitely unfair, since he did not commit any crime at all but was just gathering evidence with which to combat corruption in Maine. . . . [Sahagian said] “I have been made to be the goat here. They wanted me to admit a crime in Portland, then they wanted to bring me back to Augusta and convict me here.” *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 221. “Measured by the standards applicable in either libel or slander, the words set forth in the two counts in the amended declaration are not *per se* defamatory.” *Id.*

<sup>60</sup> *Id.* at 222.

Every act alleged to have been done by the plaintiff by these words might be true, yet if the plaintiff did not know of the falsity of the testimony which it is alleged by these words he instigated Sahagian to give, or if his acts were performed in good faith on his part, the words were not defamatory as accusing the

libel/slander distinction was not an issue because the words themselves were not defamatory *per se* and, therefore, were not actionable.

One year later, the Connecticut Supreme Court faced the question head-on and held that defamation read from a script and broadcast via radio constituted libel in *Charles Parker Co. v. Silver City Crystal Co.*<sup>61</sup> The Charles Parker Company alleged libel against Silver City Crystal Company, which operated radio station WMMW in Meriden, Conn., and Joseph N. DePaola, a candidate for mayor of Meriden. In a political speech broadcast from WMMW, DePaola suggested that the Parker Company was in financial trouble, saying, “This famous firm is now ninety per cent out of production and is up for sale. How many jobs will disappear? The staggering total of one thousand.”<sup>62</sup> After the Parker Company gave notice to Silver City Crystal that the broadcast contained false information, DePaolo went on air again to read a statement from a prepared manuscript, during which he said, “I stand by what I said in yesterday’s radio broadcast.”<sup>63</sup>

In deciding whether the defamation should be treated as libel or slander, the court noted that the distinction between the two forms of defamation had existed for years and that it approved the distinction.<sup>64</sup> Deliberately writing and then reading defamatory words, the court

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plaintiff of the commission of any crime or of any misconduct in his office as an attorney-at-law, nor were they capable of holding him up to hatred, ridicule, or contempt. *Id.*

<sup>61</sup> 116 A.2d 440 (Conn. 1955).

<sup>62</sup> *Id.* at 442.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 443. “A distinction between defamatory words spoken and defamatory words printed and published has prevailed for many years. We have been urged to disregard it as an anachronism. The reasons for it appeal to us as still valid.” *Id.*

argued, was far more serious than simply speaking defamatory words.<sup>65</sup> The court found the defamation in this case to constitute libel, viewing the circumstances simply as an extension of a common-law principle—that reading aloud printed defamation in the presence of others may be treated as libel—to radio technology.

The basis of the distinction between libel and slander is the written or printed word or passage. Having been reduced to permanent form and published, the written or printed word has greater capabilities of harm. We can see no difference between the reading of defamatory words from a prepared manuscript to a group of people within the presence of the reader, which constitutes libel, and reading defamatory words from a prepared manuscript to be broadcast by the facilities of a radio station. The latter simply carries the defamatory words farther because the defamer has used a medium for dissemination beyond the ordinary limits of the human voice. The law of libel is applicable to the case at bar.

The supreme court, then, applied a traditional common-law principle to the radio, resulting in a finding that defamation read from a script and broadcast by radio should be treated as libel.<sup>66</sup>

Cases involving radio defamation seemed to lapse until the late 1970s, and no viable explanation was found for that lapse. In the meantime, however, the Second Restatement of Torts in 1977 declared broadcast defamation to be libel, and later cases reflect that principle.<sup>67</sup> In 1979, the high court of Alabama addressed a radio defamation case, *First Independent Baptist Church v. Southerland*.<sup>68</sup> The court noted that this particular case was the first in which the court would decide whether the broadcast constituted libel or slander:

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<sup>65</sup> *Id.* “If one deliberately commits defamatory words to writing or printing and then publishes by reading them aloud or by circulating copies, as in a newspaper, to others, the offense is much more serious and the result much more permanent than if the words were simply spoken.” *Id.*

<sup>66</sup> The court found that the statements were not libelous *per se*, a decision it bolstered by citing political free speech concerns: “Courts must be careful not to permit the law of libel and slander to encroach unwarrantably upon the field of free public debate.” *Id.* at 445.

<sup>67</sup> RESTATEMENT (SECOND) OF TORTS § 568A (1977).

<sup>68</sup> 373 So. 2d 647 (Ala. 1979).

“This is a case of first impression for our jurisdiction. A similar case has been decided but this precise issue was not before the Court because the parties themselves considered the case as one involving slander, and so the case was reviewed from that premise.”<sup>69</sup>

In *Southerland*, the state supreme court affirmed a county circuit court ruling that radio defamation constitutes libel rather than slander. The court opinion recited few facts other than the bare essentials that a pastor taped a series of sermons at an Arab station, which were then broadcast by the station.<sup>70</sup> More than fifty years after the proliferation of radio technology, the court noted the challenges posed by applying traditional defamation law principles to new technologies, suggesting the libel/slander issue was far from decided at that point: “The expansion of communication technology has also enlarged the opportunities for dissemination of defamatory material, bringing with them difficulties in applying the original conceptions to contemporary innovations. These difficulties have led to divergent views.”<sup>71</sup>

In the court opinion, Judge Beatty quoted substantial sections from Judge Fuld’s concurring opinion in *Hartmann*,<sup>72</sup> previously discussed, emphasizing the harms caused by the widespread dissemination of radio defamation, before concluding that “if the statements

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<sup>69</sup> *Id.* at 647-48. In 1970, the Alabama Supreme Court heard a radio defamation case, *Brown v. WRMA Broadcasting Company*, 238 So. 2d 540 (Ala. 1970). The case has not been included for analysis because, as the court noted in the quote above, there was not a question of whether the defamation constituted libel or slander; it simply was treated as slander. In that case, the court noted:

It is plaintiff’s position that his complaint is an action for slander. Defendant W.R.M.A. Broadcasting Company accepts this position though it points out that radio broadcasts have been held to be libel. Since this issue is not directly presented to us on this appeal, we need not consider whether the action is libel or slander. For the purposes of this appeal, we consider the action to be slander, as the parties do. *Id.* at 541 (citations omitted).

<sup>70</sup> *Southerland*, 373 So. 2d at 647.

For the purposes of this opinion it is necessary to recite only the facts essential to our decision. These are the defendant Bailey, as pastor of the defendant church, taped a series of sermons at an Arab radio station, and each of these tapes was later broadcast over the airwaves by the station. *Id.*

<sup>71</sup> *Id.* at 648.

<sup>72</sup> 73 N.E.2d 30 (N.Y. 1947).

which were broadcast were defamatory they would constitute libel.”<sup>73</sup> In concluding the opinion, Judge Beatty cited the Restatement of Torts, writing, “We are persuaded. . . that the rule within our jurisdiction should accord with § 568A of the Restatement as it applies to radio broadcasts. Accordingly, if the statements which were broadcast were defamatory they would constitute libel.”<sup>74</sup> When confronted with the issue, then, the Alabama high court chose to treat radio defamation as libel; by focusing on the potential harms, the approach taken by this court made it irrelevant whether the defamation was scripted or extemporaneous.

Radio defamation was once again treated as libel by a New York Court in 1984 in *Matherson v. Marchello*, a case in which a rock group defamed Robert Matherson and his wife, Carolyn E. Matherson, during a live interview.<sup>75</sup> During the interview, members of the band “The Good Rats” suggested that they had sexual relations with Carolyn Matherson and that Robert Matherson had engaged in homosexual acts.<sup>76</sup> The trial court had “in effect dismissed their complaint for failure to state a cause of action.”<sup>77</sup> In this case, the Mathersons sought compensatory and punitive damages. The appellate court addressed whether the plaintiffs needed to show special damages, noting:

In large measure, this turns on which branch of the law of defamation is involved. As a result of historical accident, which, though not sensibly defensible today, is so well

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<sup>73</sup> *Southerland*, 373 So. 2d at 650.

<sup>74</sup> *Id.*

<sup>75</sup> 100 A.D.2d 233 (N.Y. App. Div. 1984).

<sup>76</sup> *Id.* at 234. Among the quotes from the transcript are, “One of us used to fool around with his wife. He wasn’t into that too much,” and “I don’t think it was his wife that he got so upset about, I think it was when somebody started messing around with his boyfriend that he really freaked out. Really.” *Id.*

<sup>77</sup> *Id.* at 233.

settled as to be beyond our ability to uproot it, there is a schism between the law governing slander and the law governing libel.<sup>78</sup>

Whereas in libel, special damages would not need to be shown,<sup>79</sup> in a slander case, unless the defamation is slanderous *per se*, special damages would need to be shown.<sup>80</sup> The court noted that the distinction between libel and slander had blurred “[w]ith the advent of mass communication.”<sup>81</sup> In spite of that blurring, the court held that broadcast defamation—by radio or by television—should be treated as libel, citing the “vast and far-flung audiences reached by the broadcasting media today” as increasing the harm of the oral means of communication found in radio and television. As did the court in *Southerland*, the appellate court cited the Restatement of Torts<sup>82</sup> and, therefore, held that broadcast defamation, regardless of whether scripted or extemporaneous, constituted libel<sup>83</sup> due to the potential harms caused by the widespread dissemination of broadcasts.

In a 2000 case, *McLaughlin v. Rosanio, Bailets & Talamo, Inc.*, a New Jersey appellate court criticized a lower court’s application of slander *per se* to an allegedly defamatory political candidate commercial, arguing that the category of defamation was inappropriate

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<sup>78</sup> *Id.* at 235.

<sup>79</sup> *Id.* at 236. “[A] plaintiff suing in libel need not plead or prove special damages if the defamatory statement ‘tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.’” *Id.* (citing *Rinaldi v. Holt, Rinehart, & Winston*, 42 N.Y.2d. 369, 379, quoting from *Sydney v. MacFadden Newspaper Pub. Corp.*, 242 N.Y. 208, 211-212).

<sup>80</sup> *Id.* Slander *per se* includes “[a]llegations (1) that the plaintiff committed a crime; (2) that tend to injure the plaintiff in his or her trade, business or profession; (3) that plaintiff has contracted a loathsome disease; and (4) that impute unchastity [*sic*] to a woman.” *Id.* (citations omitted))

<sup>81</sup> *Id.* at 239.

<sup>82</sup> *Id.* at 240.

<sup>83</sup> Because the defamation was libel, not slander, special damages did not need to be shown in this case. The court also found that the words were clearly libelous on their face. *Id.* at 241.

and outdated.<sup>84</sup> Michael McLaughlin, a police officer and Democratic candidate for sheriff of Camden County, alleged that a commercial run by his Republican opponent, William J. Simon, injured his reputation.<sup>85</sup> The commercial “accus[ed] plaintiff Michael McLaughlin, the Democratic candidate, of having leaked confidential information to the Scarfo crime family when plaintiff was a member of the State Police.”<sup>86</sup> Rosanio, Bailets & Talamo, Inc., claimed that the commercial was protected political speech and filed a motion for summary judgment, while McLaughlin “cross-moved for partial summary judgment.”<sup>87</sup> The motion judge held that the defamation was slanderous *per se*,<sup>88</sup> meaning that McLaughlin did not need to prove actual damages and, therefore, granted plaintiff’s partial summary judgment motion.<sup>89</sup>

The appellate court expressed its disapproval of the slander *per se* doctrine and suggested that it might be time to eliminate that category of defamation, a task it left to the state high court.<sup>90</sup>

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<sup>84</sup> 751 A.2d 1066 (N.J. Super. Ct. App. Div. 2000).

<sup>85</sup> *Id.* at 1068. Defendant Rosanio, Bailets & Talamo, Inc., was Simon’s media consultant for the campaign.

<sup>86</sup> *Id.* “The commercial referred to an interview that plaintiff, while still a State Police detective, had granted to a reporter, resulting in a newspaper story that revealed confidential information about the State Police investigation of Scarfo.” *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1072. “Four kinds of statements qualify as slander *per se*: accusing another (1) of having committed a criminal offense, (2) of having a loathsome disease, (3) of engaging in conduct or having a condition or trait incompatible with his or her business, (4) of having engaged in serious sexual misconduct.” *Id.* The motion judge held that the slander *per se* in this case imputed that plaintiff had committed a criminal offense.

<sup>89</sup> *Id.* at 1069.

The motion judge determined that: (1) the radio ad was “slander *per se*” and thus plaintiff need not prove actual damages; and (2) whether defendants were motivated by “actual malice” in defaming plaintiff, a public figure, was a disputed question of fact that must be decided by a jury. Accordingly, the judge granted partial summary judgment to plaintiff on the question of whether the statement constituted slander *per se*. *Id.*

<sup>90</sup> *Id.* at 1076.



This damage element of a *prima facie* case of defamation is waived if the statement is slander *per se*, because damage to reputation is presumed to flow from such statements. We decline to apply the slander *per se* doctrine here. The doctrine has been “severely criticized” as allowing compensation when there is no injury. Thus, it should not be expanded to cover a statement, such as the one here, which should be categorized as libel, rather than slander. Consequently, the motion for summary judgment should have been granted on the ground that plaintiff failed to establish any reputational injury or other special damages.<sup>91</sup>

The court argued that, “since this was a radio broadcast as opposed to an in-person verbal exchange, it was more akin to a libel than to a slander.”<sup>92</sup> Furthermore, the court said, “We are of the view that slander *per se* is on its last legs in New Jersey, and may no longer be a viable jurisprudential basis for awarding damages when there is no demonstrable harm.”<sup>93</sup> Instead, a uniform approach to libel and slander that required proof of actual reputational injury should be taken, the court held. In reaching its decision, the New Jersey court noted the “consensus elsewhere. . . that radio and television should be categorized as libel,” citing the Restatement of Torts.<sup>94</sup> Thus, this recent New Jersey case notes the eroding distinction between the two forms of defamation, insisting instead that radio defamation should be treated as libel.

The radio cases presented thus far demonstrate the different approaches courts took in applying traditional distinctions between libel and slander to radio defamation in cases decided prior to the revision of the Restatement of Torts in 1977, which stated that broadcast

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The [New Jersey Supreme] Court may well decide that this is the time and case to eliminate the slander *per se* categories. We leave that question for the Supreme Court to ponder. . . . Hence there was no need to apply the slander *per se* exception to the general rule that a plaintiff must prove actual reputational injury. At the very least, the hybrid nature of the defamatory statement dictates against invoking the presumption of damages. *Id.*

<sup>91</sup> *Id.* at 1069.

<sup>92</sup> *Id.* at 1076.

<sup>93</sup> *Id.* at 1075.

<sup>94</sup> *Id.* at 1076.

defamation was libel.<sup>95</sup> Prior to that, some courts treated defamatory broadcasts read from scripts as libel<sup>96</sup> while extemporaneous defamatory broadcasts were viewed as slander.<sup>97</sup> One court did not decide whether the defamation in question was libel or slander but, for the purposes of the case, treated it as slander.<sup>98</sup> Two courts ducked the issue since it was not necessary for the decision.<sup>99</sup> Finally, several courts viewed radio defamation as a distinct form of action that combined elements of libel and slander.<sup>100</sup>

The post-Second Restatement cases have consistently held in line with the Restatement that, regardless of whether the defamation was scripted or extemporaneous, it should be classified as libel.<sup>101</sup> Those cases have also explicitly cited the Restatement in their holdings. A similar trend was reflected by courts faced with determining whether defamation transmitted via television constituted libel or slander, a question intensified by the addition of images to the sounds transmitted via the radio.

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<sup>95</sup> RESTATEMENT (SECOND) OF TORTS § 568A (1977).

<sup>96</sup> *Charles Parker Co. v. Silver City Crystal Co.*, 116 A.2d 440 (Conn. 1955); *Sorenson v. Wood*, 243 N.W. 82 (Neb. 1932); *Hartmann v. Winchell*, 73 N.E.2d 30 (N.Y. 1947).

<sup>97</sup> *Locke v. Gibbons*, 299 N.Y.S. 188 (N.Y. Sup. Ct. 1937), *aff'd mem.*, 2 N.Y.S. 2d 1015 (App. Div. 1938). See also *Charles Parker Co. v. Silver City Crystal Co.*, 116 A.2d 440 (Conn. 1955); *Hartmann v. Winchell*, 73 N.E.2d 30 (N.Y. 1947).

<sup>98</sup> *Miles v. Louis Wasmer, Inc.*, 20 P.2d 847 (Wash. 1933).

<sup>99</sup> *Irwin v. Ashurst*, 74 P.2d 1127 (Or. 1938); *Weglein v. Golder*, 177 A. 47 (Pa. 1935) (per curiam).

<sup>100</sup> *Niehoff v. Cong. Square Hotel Co.*, 103 A.2d 219 (Me. 1954); *Kelly v. Hoffmann*, 74 A.2d 922 (N.J. Super. Ct. 1950); *Summit Hotel Co. v. Nat'l Broad. Co.*, 8 A.2d 302 (Pa. 1939).

<sup>101</sup> *First Independent Baptist Church v. Southerland*, 373 So. 2d 647 (Ala. 1979); *McLaughlin v. Rosanio, Bailets & Talamo, Inc.*, 751 A.2d 1066 (N.J. Super. Ct. App. Div. 2000); *Matherson v. Marchello*, 100 A.D.2d 233 (N.Y. App. Div. 1984).

## Television

By the time the courts heard their first television cases, the issue of defamation transmitted via the combination of sound and images presented by television technology had already been addressed in the context of motion pictures. In two early motion picture cases, *Merle v. Sociological Research Film Corp.*<sup>102</sup> and *Brown v. Paramount Publix Corp.*,<sup>103</sup> New York state courts held that defamation by motion picture constituted libel. The *Brown* court noted the novelty of applying libel law to motion pictures: “This is a comparatively new form of libel. It is not accomplished by the printed word, but by the somewhat recent invention of the talking motion picture.”<sup>104</sup> The precedent set by these cases, that defamation via motion picture was libel, served as a starting point for courts that addressed television cases specifically.

A U.S. district court in New York in 1949 heard one of the first cases to deal with defamation broadcast by television. In *Remington v. Bentley*,<sup>105</sup> the defendant, Elizabeth Bentley, appeared on the television show *Meet the Press* and made statements alleging that William R. Remington, an economist and U.S. government employee, was a Communist

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<sup>102</sup> 152 N.Y.S. 829 (Supt. Ct. 1915) (per curiam). A film titled *The Inside of the White Slave Traffic* showed several shots of the business of August Merle in the context of showing actual locations where white slave trading occurred. The court addressed whether the alleged defamation was directed toward Merle himself or his business, holding that it was directed toward the plaintiff’s business and, as such, the plaintiff needed to show special damages to prevail. The court never discussed whether the defamation could be treated as slander but, instead, treated the defamation as libel without question.

<sup>103</sup> 270 N.Y.S. 544 (App. Div. 1934). A motion picture titled *An American Tragedy* portrayed a reproduction of the murder of Grace Brown, daughter of plaintiff Minerva Brown, by Chester Gillette. Brown alleged that the film depicted her maliciously as “illiterate, unkempt, slovenly, neglectful, and low-grade . . . as poor-white-trash, and a disreputable, untidy product of the hills, without decent care for her daughter.” *Id.* at 546. The court held that the motion picture was capable of being and was actually libelous. Again, the court never questioned whether the defamation was libel, but it did note, “This is a comparatively new form of libel. It is not accomplished with the printed word, but by the somewhat recent invention of the talking motion picture.” *Id.* at 547.

<sup>104</sup> *Id.* at 547.

<sup>105</sup> 88 F. Supp. 166 (S.D.N.Y. 1949).

sympathizer.<sup>106</sup> Bentley's comments also were broadcast over the radio. The court named three categories of slander that were actionable *per se*—that is, without showing special damages—those that “impute[] a crime, a loathsome disease, or some conduct, condition, or trait tending to injure another in his trade or professions.”<sup>107</sup> The court held that calling someone, particularly a government official, a Communist, fell into the third category, and thus the words were slanderous *per se*.<sup>108</sup> The common law applied by the court was that “[s]lander is tortious if the oral defamation falls within certain classes of cases which are actionable *per se* or if it causes special damage, while libel is actionable by itself.”<sup>109</sup>

Following precedent from earlier radio broadcast cases involving extemporaneous speech and rejecting the precedent set in the motion picture cases, the court chose in this case to treat defamation via television as slander.

I accept the [radio] analogy to the extent that it applies to extemporaneous oral expression, and I feel that the additional factor of pictorial representation along with the statements adds no more to the form of defamation than would the circumstance of a great audience in a stadium or the like listening to the spoken word.<sup>110</sup>

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<sup>106</sup> *Id.* at 167.

The complaint alleges that the plaintiff, an economist by profession has been, since May, 1940, an employee of the United States Government in various capacities; that in assuming his positions he was required to, and did take an oath that he did not belong to any organization which advocated the overthrow of the Government by force and violence; that the Attorney General in the United States has consistently ruled that that the Communist Party was such an organization. *Id.*

<sup>107</sup> *Id.* at 169.

<sup>108</sup> *Id.* at 170. “[T]he complaint as heretofore indicated, charges that the defendant Bentley’s statements have greatly injured and damaged the plaintiff in his employment and profession. A slanderous statement affecting one in this respect has always been actionable *per se*.” *Id.*

<sup>109</sup> *Id.* at 168.

<sup>110</sup> *Id.* at 169.

In this first case involving defamation via television, then, in spite of the technology that might have been deemed to add impact to defamation through pictorial representations, the court held that the defamation constituted slander, not libel.

In 1954, a New York trial court decided *Landau v. Columbia Broadcasting System*,<sup>111</sup> resulting from an alleged defamation broadcast during a fictional show, *The Easy Way*.<sup>112</sup> In the show, a newspaper photographer sought to “annihilate a bookmaking ring,” which led him to an office of the ringleader.<sup>113</sup> “On the glass panel of a door leading to [the ringleader’s] private room was the legend ‘Credit Consultant, Inc.’”<sup>114</sup> Harry Landau, the plaintiff in this case, was a bill collector who operated a business named “Credit Consultants.” Landau felt that he had been defamed by being identified as the fictional ringleader character and, therefore, “delineated as a villain, a criminal, and a gangster.”<sup>115</sup> The court considered whether a fictional depiction on television would be considered libel or slander.<sup>116</sup>

In *Landau*, the court relied both on the motion picture precedents and previous holdings that broadcast defamation read from a script constituted libel. “It is held that if defamation of the plaintiff resulted from this television presentation, an action in libel would be the proper

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<sup>111</sup> 128 N.Y.S.2d 254 (Sup. Ct. 1954).

<sup>112</sup> Justice Frank, writing for the court, described the scope of the alleged defamation as reaching millions of viewers. “The number of people who saw this program, televised as it was on a major network, cannot be accurately estimated. Since ownership of television sets in this country is epidemic, the fair inference is that it was viewed by millions.” *Id.* at 256.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> The court ultimately held that Landau was not identified, there was no intention or express malice to libel him, and Landau’s reputation was not maligned. *Id.* at 259.

remedy.”<sup>117</sup> However, in addressing the elements of the defamation claim, the court contended that the technology of the television, providing visual images, actually made it less likely that Landau would be associated with the fictional criminal if there was no actual resemblance. Addressing whether Landau had been identified, Justice Frank argued that there was no actual resemblance between Landau and the character nor between the offices depicted nor between Landau’s and the fictional character’s names.<sup>118</sup> A radio defamation, on the other hand, may have allowed more room for imagination to bridge the gap between Landau and the fictional character. *Landau*, therefore, represents both a case in which television defamation was deemed libel and in which the nature of the technology served to rebut a defamation claim.

A U.S. district court in Kentucky viewed television defamation as libel in a 1957 case, *Gearhart v. WSAZ, Inc.*<sup>119</sup> Writing for the court, Judge Swinford provided a detailed account of the facts of the case. Distilled, the facts show that Calvin Gearhart, elected Boyd County attorney, ran on a reform platform and pledged the “vigorous prosecution of persons engaged in gambling, bootlegging, and vice.”<sup>120</sup> In April 1955, WSAZ broadcast news segments alleging that Gearhart had consorted with criminals and knowingly allowed witnesses to testify under false names in his zeal to crack down on crime,<sup>121</sup> summarized by the court as follows:

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<sup>117</sup> *Id.* at 257.

<sup>118</sup> *Id.* at 259.

<sup>119</sup> 150 F. Supp. 98 (E.D. Ky. 1957).

<sup>120</sup> *Id.* at 105.

<sup>121</sup> *Id.* at 105-106.

On April 12, 13, and 14, 1955, on five different occasions, the defendant, throughout this three-day period, on its regular news broadcast and telecast, from a manuscript, among other things said: “A

[T]he defendant went on the air. . . and on five different occasions in a period of three days, in lengthy broadcasts, sent forth, as news, the fact that it was said that the plaintiff was guilty of corrupt, unethical, and criminal practices as an attorney and an official of Boyd County; that he collaborated with known criminals and law violators in the organization and planning of a vicious and corrupt political machine for the purpose of exploiting his constituency and corrupting his community.<sup>122</sup>

While the bulk of the opinion focuses on jurisdictional and fault issues, at the end of the opinion, Judge Swinford tacked on a notice that television defamation was libelous, writing, “The question has not been raised so I assume there is no dispute, but I might point out that the dissemination of defamatory remarks by television is libel rather than slander.”<sup>123</sup>

Swinford pointed out that the libelous broadcast in question was read from notes but did not indicate whether extemporaneous speech might be considered slander.

In that same year, a New York state trial court held that defamation broadcast via television constituted libel, regardless of whether it was read from a prepared manuscript. In *Shor v. Billingsley*,<sup>124</sup> Sherman Billingsley, who hosted “The Stork Club Show,” allegedly libeled Bernard Shor, a restaurant owner, when he told a guest on the television program, “I wish I had as much money as he [Shor] owes.”<sup>125</sup> The court did not see how the statement could be construed innocuously but focused instead on whether “a telecast not read from a prepared script sounds in libel or in slander.”<sup>126</sup> Justice Hecht chose to follow Judge Fuld’s

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politically explosive storm is brewing in Catlettsburg, Kentucky, and in the center is the young Boyd County Attorney, Calvin Gearhart. Charges against the 33 year old Gearhart have been brought before the Kentucky State Bar Association in accusing him of having permitted a witness to testify before the grand jury under a false name with full knowledge that it was a false name.” *Id.*

<sup>122</sup> *Id.* at 108.

<sup>123</sup> *Id.* at 112.

<sup>124</sup> 158 N.Y.S.2d. 476 (Sup. Ct. 1957).

<sup>125</sup> *Id.* at 478.

<sup>126</sup> *Id.* at 479. “This precise question has not been passed upon by our appellate courts, nor apparently in any other jurisdiction.” *Id.*

concurring opinion in *Hartmann v. Winchell*.<sup>127</sup> Thus, in spite of the defendant's arguments that "the application of the law of libel to broadcasting or telecasting without a scrip [*sic*] must be made (if at all) by the legislature rather than the courts,"<sup>128</sup> the court held that broadcast defamation did not need to be scripted to constitute libel. As had Judge Fuld in *Hartmann*, Judge Hecht focused on the potential harms that could result from the widespread dissemination of broadcast defamation.

As occurred in some radio cases, some courts avoided making a distinction, instead examining whether the television broadcast was defamatory *per se*. In a 1962 case decided by the Eight Circuit, *Riss v. Anderson*,<sup>129</sup> Richard Riss, owner of two trucking corporations, defamed a former employee, Ardith Anderson,<sup>130</sup> who had testified before a Senate hearing about a questionable contract between Riss's company and Jimmy Hoffa's Teamsters Union.<sup>131</sup> Riss later appeared on a television show, "Insight," during which he alleged that Anderson had been fired for stealing truck parts<sup>132</sup> and accused Anderson of falsely testifying

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<sup>127</sup> 73 N.E.2d 30 (N.Y. 1947).

<sup>128</sup> 158 N.Y.S.2d at 486.

<sup>129</sup> 304 F.2d 188 (8th Cir. 1962).

<sup>130</sup> Anderson had reached a settlement agreement with Riss in that discontinued his employment after a dispute arose regarding who was responsible for providing new tires for a truck owned by one Riss's companies, leased to Anderson, who, in turn, leased the truck to Riss's other company.

Anderson had been a driver for Riss since March 1955. In early 1959 he was working as an owner-operator under agreements by which Transport leased to him a motor vehicle tractor and he, in turn, leased it to Riss & Company. A dispute arose at that time as to Anderson's obligation to provide new tires for the vehicle and as to his right to use for that purpose a reserve fund built up by deductions from Riss & Company's payments under its lease. *Id.* at 190.

<sup>131</sup> *Id.* at 191. Anderson testified "that the contract applied to him but that he did not vote on it and did not have an opportunity to vote on it." *Id.*

<sup>132</sup> *Id.*

Mr. Anderson is one of the two gentlemen that has been discharged from our company. Mr. Anderson, I believe, is the man that claimed he was sick and was not working on his truck. We told him to bring us a doctor's certificate to prove he was sick, or to bring the truck in. Instead of that he went down to the



before the Senate committee.<sup>133</sup> Anderson alleged that he had been libeled by Riss's comments during the program.

The court turned to the question of whether the broadcast had been libelous or slanderous. Neither party had attempted to categorize the comments as either libel or slander, but the trial court had "held that the publication by way of tape and subsequent broadcast, to the extent that it was untruthful, constituted libel."<sup>134</sup> Riss attempted to argue that if his statements were actionable at all, they were not slanderous *per se*, therefore requiring Anderson to prove actual damages; Anderson claimed the statements were libelous or, at least, slanderous *per se* so that damages were presumed.<sup>135</sup> The appellate court wrote:

We conclude that on the facts of this case, it is not necessary for us, as the parties to an extent have done, to review and wrestle with the historical development of the law of defamation and its twin torts of libel and slander, or to note the logical inconsistencies and odd results of the decided cases, or to make this case one of significance on the question of the impact of television upon the old and established principles of the law of defamation.<sup>136</sup>

The Eighth Circuit relied on the principles of Missouri law, of which it said, "There can be no dispute at this date that in Missouri defamation (whether technically it is characterized as libel or as slander) in the form of falsely accusing another of an indictable crime is actionable

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garage and took a lot of parts off of his truck. We ordered him to replace them. He didn't do it, so we let him go. *Id.*

<sup>133</sup> *Id.* at 191-92. "I don't know if Mr. Anderson was in our employ at the time that was made or not, but if he testified to the fact that he did not get a chance to vote on [the contract] he is certainly mistaken." *Id.*

<sup>134</sup> *Id.* at 193.

<sup>135</sup> *Id.* at 195.

<sup>136</sup> *Id.* at 195.

Specifically, we feel that we need not consider (a) as a matter of apparent first impression in Missouri, whether television remarks, made essentially extemporaneously and admittedly without a script, lead in the direction of libel or in the direction of slander; (b) whether the legal result is to be any different when, although extemporaneous, the program is taped or otherwise recorded before or upon the broadcast. *Id.* at 195-96.

*per se.*”<sup>137</sup> Therefore, in this case, it was not necessary to determine whether the defamation was libel or slander because it was found to be actionable *per se*. In so finding, the Eighth Circuit affirmed the trial court judgment for the plaintiff against Riss for \$2,000 actual damages and \$8,000 punitive damages.<sup>138</sup>

That same year, 1962, the Georgia Court of Appeals established an entirely new category of broadcast defamation called “defamacast.” In *American Broadcasting-Paramount Theatres, Inc. v. Simpson*,<sup>139</sup> E.L. Simpson filed a defamation action following the broadcast of an episode of *The Untouchables*, which implied that officers of the U.S. Prison Bureau had accepted bribes to help legendary gangster Al Capone escape imprisonment.<sup>140</sup> Judge Eberhardt, writing for the Georgia Court of Appeals, viewed the crux of the case as whether the alleged defamation constituted libel or slander. “Perhaps the most perplexing problem is whether defamatory material shown on television should be classified as a libel, a slander or in some third category.”<sup>141</sup>

As was the case in *Summit Hotel*, the court in *Simpson* contended that television defamation represented elements of both libel and slander in a new technology and should therefore be treated as such.

Commercial television began during the latter part of the decade beginning in 1940 and commercial radio less than forty years ago. Thus both media represent new factual situations with respect to defamation, and we have pointed out . . . some of the

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<sup>137</sup> *Id.* at 194.

<sup>138</sup> *Id.* at 190.

<sup>139</sup> 126 S.E.2d 873 (Ga. Ct. App. 1962).

<sup>140</sup> *Id.* at 874-75. Although the show was fictional, the plaintiff argued that it appeared and was presented as if it could have been factual: “It is alleged that ‘The Untouchables’ has ‘since its inception, been calculated to convey, and has conveyed, to television viewers . . . the impression that the program is an authentic and factual portrayal of actual events.’” *Id.* at 874.

<sup>141</sup> *Id.* at 876.

difficulties that the courts have had in reconciling this type of defamation with the traditional libel-slander dichotomy. In truth, these new media pose new problems which cannot realistically be solved by resort thereto.<sup>142</sup>

The court's solution was the creation of the category "defamacast," which is actionable *per se*, a development it supported by citing a Georgia statute that referred only to defamation and did not distinguish between libel and slander.<sup>143</sup> Regarding the statute, the court said, "The legislature recognized this new category in 1949 with the enactment of Code Ann. § 105-712. It is significant that the statute refers to 'defamatory statements' rather than 'libel' or 'slander.'"<sup>144</sup> The court continued its analysis of the defamation claim based on its defamacast doctrine, as will be discussed in a later chapter. Georgia's defamacast reflects the struggles of a court to apply traditional defamation doctrine to a new communications technology and represents a bold attempt to create a new doctrine, rather than simply applying an existing one.

That same year, the Supreme Court of North Carolina decided a television defamation case, *Greer v. Skyway Broadcasting Co.*<sup>145</sup> Edward Greer alleged that Skyway Broadcasting and B.P. Justice, constable in Mills River Township in Henderson County, conspired to libel and slander him. Justice invited Skyway Broadcasting to film him bringing in Greer on charges of rape and robbery: "While the plaintiff, Justice, the officers and Skyway's camera operators were in the city hall, the alleged victim was brought in, and was told by Justice to look at plaintiff, and say if she identified him as the perpetrator. . . . She failed to identify

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<sup>142</sup> *Id.* at 878.

<sup>143</sup> *Id.* at 879.

<sup>144</sup> *Id.* at 880.

<sup>145</sup> 124 S.E.2d 98 (N.C. 1962).

him.”<sup>146</sup> Greer alleged that Skyway knowingly broadcast three news segments showing images of him in handcuffs, which falsely reported that the victim had identified him,<sup>147</sup> and that “[b]oth defendants willfully and deliberately libeled and slandered plaintiff, because both defendants knew the alleged victim had failed to identify the plaintiff, and knew there was no evidence to support the charges of rape and robbery against him.”<sup>148</sup>

While the state high court addressed the defendants’ claim of a “clear and fatal misjoinder of parties and causes of actions,”<sup>149</sup> it also noted that the defamation was actionable *per se*.

Regarding whether television defamation constituted libel or slander, the court stated:

Libel can be committed by defamatory pictures. Libel, and it would seem slander, can be committed by defamatory words broadcast by radio, although it has been intimated that the distinctions between libel and slander are inapplicable to radio broadcasting. Any written or spoken words or pictures falsely imputing that a person is guilty of the crime of rape or robbery are actionable *per se*, because these crimes involve moral turpitude.<sup>150</sup>

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<sup>146</sup> *Id.* at 99.

<sup>147</sup> *Id.*

Skyway. . . showed pictures of plaintiff in handcuffs and in the custody of Justice and the officers, and its newscaster broadcast that plaintiff had been arrested for rape and robbery, and had been positively identified by the victim, but still refused to admit his guilt, which was heard throughout its listening area, though Skyway and its employees knew the alleged victim had failed to identify the plaintiff. *Id.*

<sup>148</sup> *Id.* at 100. Among Greer’s other allegations were that Justice had no warrant for the arrest and never named the alleged victim; that Justice took the alleged victim into a private room after she failed to identify Greer as the perpetrator, emerging ten minutes later to falsely report that the victim had identified Greer; and that Justice wrote several warrants charging Greer for the crimes on his knowledge, serving as the only witness on one and listing six witnesses who knew nothing of the crime on the other warrant; and that Justice willfully libeled and slandered Greer. *Id.* at 99-100.

<sup>149</sup> *Id.* at 102.

Skyway. . . contends there is a clear and fatal misjoinder of parties and causes of actions, for the reason that the complaint alleges four causes of action, which do not affect all the parties to the action. One, a cause of action against Justice as an individual for false arrest, false imprisonment, and malicious prosecution. Two, a cause of action against Justice as an individual for libel. Three, a cause of action against Skyway for libel. Four, a cause of action against both defendants for conspiracy to libel and slander plaintiff, though the allegations of conspiracy are vague and indefinite and not supported by any alleged factual basis. *Id.*

<sup>150</sup> *Id.* at 104 (citations omitted).

Therefore, the North Carolina Supreme Court did not address specifically whether television defamation should be classified as libel or slander but held that, on the facts of this case, the defamation was actionable *per se*.

A California Court of Appeals case in 1966, *Arno v. Stewart*, applied the state's civil code to hold that broadcast defamation constitutes slander.<sup>151</sup> Russ Arno, a singer, performed on Dick Stewart's television program, during the course of which Stewart allegedly called Arno an "iron-clad singing member of the Mafia."<sup>152</sup> In the present case, Arno appealed a judgment entered for the defendants, arguing that the trial court erred in failing to instruct the jury that the comment was defamatory *per se*.<sup>153</sup> The court noted that the audience had laughed in response to the comment, and the defendants argued "that 'The word 'Mafia' is frequently used as a gag by such television entertainers as Frank Sinatra, Dean Martin, Perry Como and others. . . . Such references are made and received as being humorous and nothing more.'" <sup>154</sup> The court's decision focused on whether the statement was defamatory and the instructions given the jury,<sup>155</sup> but of particular note is that the court cited California Civil

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<sup>151</sup> 254 Cal. App. 2d 955 (Ct. App. 1966).

<sup>152</sup> *Id.* at 958.

Russ Arno, a singer, at the paid invitation of Dick Stewart, appeared on the latter's television program. . . . Plaintiff Arno testified that after he had sung several songs on the program, Stewart referred to Arno, in his presence, as an 'iron-clad singing member of the Mafia.' Defendant Stewart denies this, and testified that he called Arno 'my buddy from the Mafia,' or 'the singing member of the Mafia.' Plaintiff admitted that the statement, however it was worded, was made in banter and without malice. *Id.*

<sup>153</sup> *Id.* at 958. The code states that "[s]lander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means." West's Ann.Cal.Civ.Code § 46.

<sup>154</sup> *Id.* at 959.

<sup>155</sup> *Id.* at 965.

So in this case a fair-minded man could construe the whole visual and auditory publication as a practical joke without reference to the truth of the alleged membership. It is concluded that it would have been error to disassociate the alleged derogatory phrase from its context and to give the unqualified instruction offered by plaintiff that the statement alone was defamatory *per se*. *Id.*

Code and made clear, “Defamation by radio or television broadcast is treated as slander in this state.”<sup>156</sup>

As was the situation with the radio cases, there seems to have been a lapse in cases that directly addressed whether television defamation was libel or slander, this one lasting until 1980; here, too, it is unclear why there were so few cases that addressed the libel/slander distinction in broadcast media. In 1980, though, the Alabama Supreme Court decided in *Gray v. WALA-TV* that defamation transmitted via television constituted libel, citing *First Independent Baptist Church v. Southerland* and the Restatement of Torts section 568A.<sup>157</sup> WALA-TV employee Carlton Cordell had broadcast in July 1975 that Gabriella Gray and fellow plaintiffs had used political connections to gain a contract with the city of Mobile to produce auditorium brochures and were paid for the contract but never produced the brochures.<sup>158</sup> Gray alleged that the broadcasts were defamatory, conveying “the false meaning and impression that the Plaintiffs were guilty of sharp, unethical, dishonest and/or illegal acts in the conduct of their business, and that the Plaintiffs had failed to fulfill their contracts.”<sup>159</sup>

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<sup>156</sup> *Id.* at 961.

<sup>157</sup> 384 So. 2d 1062, 1065 (Ala. 1980). “Based upon the considerations in *First Independent Baptist Church v. Southerland*, we are of the opinion that § 568A of the Restatement (Second) of Torts, as it applies to both radio and television broadcasts, should be the rule within this jurisdiction.”

<sup>158</sup> *Id.* at 1064. Cordell alleged:

That the plaintiffs had contracted with the City of Mobile for the production of auditorium brochures, that the City had made full payment to the Plaintiffs some five and one-half months before, that the Plaintiffs had failed to deliver any brochures, that no member of the auditorium board knew or had been informed of the contract, that the actions of the Plaintiffs were in violation of the laws of the State of Alabama, that the brochures had been received even though the Plaintiffs had been contracted for over a year and that none had been received even though the Plaintiffs had received \$15,000 for them, and that the Plaintiffs had handled the election campaign of the person who was Mayor at the time the contract was awarded. *Id.*

<sup>159</sup> *Id.*

The Alabama Supreme Court addressed the question of whether the television broadcast constituted libel or slander. The court noted that it was unclear whether the trial court had distinguished between the two forms, writing: “The parties do not characterize this cause of action as either libel or slander. There is nothing in the record to indicate whether the trial judge considered this to be an action in libel or slander.”<sup>160</sup> However, the distinction of libel or slander in this case was an important determination, as the court noted:

In cases of libel, if the language used exposes the plaintiff to public ridicule or contempt, though it does not embody an accusation of crime, the law presumes damages to the reputation, and pronounces it actionable *per se*. While to constitute slander *per se*, there must be an imputation of an indictable offense involving infamy or moral turpitude.<sup>161</sup>

The court held “that television broadcasts of defamatory matter must be declared upon as libel rather than slander.”<sup>162</sup> Three years after the Restatement of Torts had declared broadcast defamation constituted libel, then, the Alabama Supreme Court chose to adopt that approach.

Several years later, in 1993, the Court of Appeals of Georgia, which had established the defamacast category thirty years earlier, heard a defamation case against a television station

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1065.

This distinction, however, does not deny the right to maintain an action for slander founded on oral malicious defamation subjecting the plaintiff to disgrace, ridicule, odium, or contempt, though it falls short of imputing the commission of such crime or misdemeanor. In such case the law pronounces the words actionable *per quod* only, and the plaintiff must allege and prove special damages as an element of the cause of action. *Id.*

<sup>162</sup> *Id.*

We think it is fair to say that the words employed imputed to the plaintiffs that they had corruptly and illegally obtained, through political connections, a contract with the city and had not performed under the contract though having been paid to do so, and thereby dishonestly obtained public funds. Certainly in this day and time an accusation of political corruption would subject the plaintiffs to public ridicule and would injure their reputation, both individually and in their business. Thus, we are of the opinion that the publications if false are libelous *per se*. *Id.*

and reporter in *Brewer v. Rogers*.<sup>163</sup> Brewer, a high school football coach, was the subject of a newscast narrated by Shuler and broadcast by WAGA-TV 5. The newscast explored allegations of grade changes for a football-playing student at an Athens high school where Brewer was head coach of the team. In the course of the newscast, Shuler reported on charges against Brewer from fifteen years earlier: “Shuler related that Brewer was charged with commercial gambling, keeping a gambling place, and felony possession of a pound of marijuana, pointing out that Brewer’s was the only raided location which yielded drugs.”<sup>164</sup> Shuler failed to note that Brewer had been treated as a first-time offender, that the charges were far less severe than he made them out to be, and that the records had been sealed and Brewer exonerated; consequently he misrepresented Brewer’s criminal record.<sup>165</sup> In *Brewer*, the Georgia court again applied its defamacast category: “The count of libel against WAGA and its employee Shuler merges with the count alleging ‘defamacast’ and is constituted of defamation on television.”<sup>166</sup>

In a 1994 opinion that examined several facets of a television defamation claim, a Massachusetts U.S. district court in *Brown v. Hearst Corp.*<sup>167</sup> noted that the defamation

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<sup>163</sup> 439 S.E.2d 77 (Ga. Ct. App. 1993).

<sup>164</sup> *Id.* at 78.

<sup>165</sup> *Id.* at 79-80.

Brewer received first offender treatment and would not have a record if he complied with the court order. . . . [U]pon petition from Brewer and with the consent of the district attorney, the court ordered the clerk to seal the record and the “indictment” so that “the same will not be available to the public; however, the Clerk is required to furnish the indictment (sic) and sentence to any court when ordered to do so”. . . . Three months later, on December 9, 1975, upon the petition of the probation supervisor, the court ordered Brewer “discharged without court adjudication of guilt . . . [which] shall completely exonerate [Brewer] of any criminal purpose . . . not affect any of [Brewer’s] civil rights or liberties, and [Brewer] shall not be considered to have a criminal conviction.” *Id.* at 79-80.

<sup>166</sup> *Id.* at 80.

<sup>167</sup> 862 F. Supp. 622 (D. Mass. 1994).



should be classified as libel. Willis Brown, a pilot, alleged that Hearst Corporation, through WCVB-TV Channel 5, defamed him in an episode of *Chronicle* titled “The Other Pilot’s Wife.” The newsmagazine-style broadcast discussed the disappearance of two flight attendants, both married to pilots, from the same small town in Connecticut. One of the flight attendants was Brown’s wife, Regina; the other, Helle Crafts, had gone missing several months prior to Regina’s disappearance, but her body had been found and her husband implicated in her murder.<sup>168</sup> As the basis for his defamation claim, “Brown asserts that the juxtaposition of his wife’s disappearance with the story of Mrs. Crafts’ disappearance and murder, defames him by implying that his wife has also been murdered and that he is the killer.”<sup>169</sup> Brown specifically alleged that he had been slandered by the broadcast, to which the court responded in a footnote, “Initially, the court notes that because the allegedly offensive statements were fixed, recorded, and widely distributed in a television program, if defamation does exist in this case, it is libel and not slander.”<sup>170</sup> For a number of reasons, including the newsworthiness of the story<sup>171</sup> and the classification of some of the defamatory

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<sup>168</sup> *Id.* at 625.

The Broadcast’s title, “The Other Pilot’s Wife,” refers to the coincidence that Helle Crafts, another flight attendant married to a pilot, disappeared from the same small town just a few months before Regina’s disappearance. The Broadcast accurately reported that fragments of Mrs. Craft’s [*sic*] body were found in the Housatonic River. Her husband, Richard Crafts, had evidently put her body through a woodchipping machine. He was subsequently convicted of murder. Regina’s disappearance remains unsolved. *Id.*

<sup>169</sup> *Id.* at 626.

<sup>170</sup> *Id.* at 627 & n.6 (citing RESTATEMENT (SECOND) OF TORTS § 568A (1977)).

<sup>171</sup> *Id.* at 628.

Here, however, there was a legitimate public interest and concern with respect to the remarkable coincidence of two flight attendants who were both married to pilots disappearing from the same small Connecticut town within a few months of one another. These were legitimate news stories, in the public domain and of general public interest. Their mere juxtaposition in the same Broadcast did not, for that reason alone, defame the plaintiff. *Id.*

remarks as opinion and therefore not actionable,<sup>172</sup> the district court granted the Hearst Corporation's motion for summary judgment.

The television defamation cases reflect similar trends to the radio defamation cases in that courts took a variety of approaches in applying the traditional common-law distinction between libel and slander to television defamation prior to the Second Restatement of Torts. Early cases distinguished based on whether the content was extemporaneous, treating such a broadcast as slander,<sup>173</sup> or whether it was scripted, treating that as libel.<sup>174</sup> Television defamation was outright treated as libel by several courts<sup>175</sup> while one court, basing its decision on state law, treated broadcast defamation as slander.<sup>176</sup> Two cases were found in which the courts ducked the issue by treating the defamation in question as actionable *per se*, but one held that the defamation resembled libel<sup>177</sup> while the other noted that libel or slander could apply to television defamation.<sup>178</sup> Finally, Georgia courts adhered to the defamacast category, which they said was recognized by state statute.<sup>179</sup> Post-Second Restatement cases, on the other hand, cited section 568A in determining that broadcast defamation constituted

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<sup>172</sup> *Id.* at 619. "This court regards the allegedly offensive statements set above to be unambiguous classic expressions of opinion. . . . For this reason, they are not actionable." *Id.*

<sup>173</sup> *Remington v. Bentley*, 88 F. Supp. 166 (S.D.N.Y. 1949).

<sup>174</sup> *Landau v. Columbia Broad. Sys.*, 128 N.Y.S.2d 254 (Sup. Ct. 1954).

<sup>175</sup> *Gearhart v. WSAZ, Inc.*, 150 F. Supp. 98 (E.D. Ky. 1957); *Shor v. Billingsley*, 158 N.Y.S.2d 476 (Sup. Ct. 1957).

<sup>176</sup> *Arno v. Stewart*, 254 Cal. App. 2d 955 (Ct. App. 1966).

<sup>177</sup> *Riss v. Anderson*, 304 F.2d 188 (8th Cir. 1962).

<sup>178</sup> *Greer v. Skyway Broad.*, 124 S.E.2d 98 (N.C. 1962).

<sup>179</sup> *American Broad.-Paramount Theatres, Inc. v. Simpson*, 126 S.E.2d 873 (Ga. Ct. App. 1962); *Brewer v. Rogers*, 439 S.E.2d 77 (Ga. Ct. App. 1966).

libel.<sup>180</sup> The cases presented here indicate that courts had taken different approaches in determining whether television defamation constitutes libel or slander, but that the Restatement of Torts seemed to have proved influential in later cases.

### Internet

In spite of the technology of the Internet which, like that of television, allows for audio and visual transmission of defamatory content, only one case was found in which a court addressed whether defamation posted on the Internet constituted libel or slander. In *Varian Medical Systems, Inc., v. Delfino*, a California appeals court was asked to address whether defamatory postings to Internet bulletin board sites constituted slander, rather than libel, as the defendants argued.<sup>181</sup> In this case, two former employees of Varian, Michelangelo Delfino and Mary Day, posted thousands of derogatory messages on Internet bulletin boards about Varian and two of its executives, George Zdasiuk, vice president of VMS, and Susan B. Felch, director of a Varian research center. Zdasiuk had fired Delfino, a senior engineer, “in 1998 for complaints that he was disruptive and harassing to Felch and other co-workers.”<sup>182</sup> Day resigned two months after Delfino was fired in sympathy for his dismissal. The two began posting defamatory messages that attacked Zdasiuk’s and Felch’s professional and personal reputations.<sup>183</sup> Varian and the two executives sued, inciting the two

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<sup>180</sup> *Brown v. Hearst Corp.*, 862 F. Supp. 622 (D. Mass. 1994); *Gray v. WALA-TV*, 384 So. 2d 1062 (Ala. 1980).

<sup>181</sup> 6 Cal. Rptr. 3d 325, 333 (Ct. App. 2003). The case was appealed and reversed, 25 Cal. Rptr. 3d 298 (Cal. 2005), on grounds that the trial court lacked subject matter jurisdiction. The libel/slander question was not addressed in the appeal; therefore, it is deemed appropriate that this case can serve as an example of a court addressing whether Internet defamation constitutes libel or slander.

<sup>182</sup> *Id.* at 334.

<sup>183</sup> *Id.*

former employees to renew their efforts to post on hundreds of bulletin boards, so that “[b]y the time of trial the defendants had posted over 13,000 messages and vowed to continue posting until they died.”<sup>184</sup> A trial court found the two liable for defamation.<sup>185</sup>

On appeal, the defendants argued both that the messages were hyperbole and that, to the extent that the messages were defamatory, they were slanderous, not libelous, and therefore special damages needed to be proved.<sup>186</sup> The court quickly struck down the first of the defenses, “that Internet message boards are so filled with outrageous anonymous postings that no reasonable person would take a typical anonymous and outrageous posting as a true statement of fact.”<sup>187</sup> The court rejected that argument, noting that it was in the interest of free speech to allow some policing of Internet speech:

We would be doing a great disservice to the Internet audience if we were to conclude that all speech on the Internet is so suspect that it could not be defamatory as a matter of law. In effect, such a conclusion could extinguish any potential the forum might have for the meaningful exchange of ideas.<sup>188</sup>

Furthermore, the court argued, whether the Internet audience would believe the postings did not affect whether the words were capable of defamatory meaning.<sup>189</sup> Delfino and Day had

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[Delfino] maligned Varian products. He accused Felch of being “a neurotic hallucinatory.” He charged Zdasiuk with being mentally ill. He claimed both executives were incompetent and accused them of being chronic liars. Many of his messages contained sexual implications. One early message implied that Felch had attained her position by having sex with a supervisor. *Id.*

<sup>184</sup> *Id.* at 333.

<sup>185</sup> *Id.* “Defendants were found liable for defamation, invasion of privacy, breach of contract, and conspiracy.” *Id.* For the purposes of this analysis, the defamation action will be the focus.

<sup>186</sup> Also of note is that the defendants set up a Web site once the trial began in which they offered a narrative of the events that “typically distorted actual facts or statements or simply took statements out of context to make their meaning derogatory.” *Id.* at 334.

<sup>187</sup> *Id.* at 337.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

been found liable for libel *per se* by a jury,<sup>190</sup> which had awarded presumed and punitive damages to the plaintiffs.<sup>191</sup> The court next turned to the question of whether Internet defamation, posted on Internet bulletin boards, constituted libel or slander.

In arguing that the speech was slander, the defendants ignored the traditional distinction between libel and slander as written and oral speech, respectively, instead focusing on the element of proving damages. The distinction would be “crucial because slander requires proof of special damages and libel does not and since plaintiffs did not prove any special damages they cannot recover for defamation.”<sup>192</sup> The court noted the importance of addressing this question for Internet communications:

The issue presented here involves a question that has arisen only with the advent of Internet communications. Application of the common law to matters involving the Internet is of considerable public interest. Moreover, the distinction between libel and slander involves a practical difference in the requirements for pleading and proof so that the question is one that is likely to recur.<sup>193</sup>

The court, however, chose to retain the traditional libel/slander distinction based on whether the communication was written or spoken, holding that because the “messages were publication *by writing*. . . composed and transmitted in the form of written words just like newspapers, handbills, or notes tacked to a conventional bulletin board,” they constituted libel.<sup>194</sup> Although it is only one decision, this case represents a court applying traditional

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<sup>190</sup> *Id.* at 338. Among the type of statements that would constitute libel *per se* were those that impute a crime; injure one in one’s profession; suggest impotence, adultery, or other inappropriate sexual behavior such as sexual harassment and misconduct or sleeping with a supervisor for promotion; and suggest one is a chronic liar or has committed perjury. *Id.* at n.5.

<sup>191</sup> *Id.* at 335-36. “The jury found defendants liable for defamation (libel). . . . The jury awarded plaintiffs \$425,000 in presumed or general damages and \$350,000 in punitive damages. No special damages were awarded on any cause of action.” *Id.*

<sup>192</sup> *Id.* at 340.

<sup>193</sup> *Id.* at 341.

<sup>194</sup> *Id.* at 343.

common-law defamation principles to the Internet and finding that Internet speech could be policed and should be treated as libel, with no proof of special damages required.<sup>195</sup>

## Conclusion

The case analysis in this chapter provides some insight into the question of how courts historically have grappled with applying defamation law to new mass communication technologies. In particular, courts faced the question of whether the transmission of a defamatory statement using sound technologies via the telegraph, radio, and television constituted slander or libel. In trying to seek out a general theme that characterizes the approaches taken by the courts, one thing is clear: In working through how to treat defamation via telegraph, radio, television, and Internet, courts initially failed to reach a uniform approach; however, the publication in 1977 of section 568A in the Second Restatement of Torts, stating the broadcast defamation constitutes libel not slander, has

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They are representations “to the eye.” True, when sent out over the Internet the messages may be deleted or modified and to that extent they are not “fixed.” But in contrast with the spoken word, they are certainly “fixed.” Furthermore, the messages are just as easily preserved (as by printing them) as they are deleted or modified. In short, the only difference between the publications defendants made in this case and traditionally libelous publications is defendants’ choice to disseminate the writings electronically. *Id.*

<sup>195</sup> The defense also presented the argument that the court should treat Internet defamation as slander in the interest of free speech, an argument that the court said misapplied defamation principles:

Defendants also urge us to categorize communications over the Internet as the supposed lesser wrong of slander because, since Internet communication is the modern-day equivalent of a speech on the “village green,” it deserves the greater protection traditionally accorded slander. The argument confuses the analyses. In defamation cases we are always mindful of the balance between the defendant’s constitutional right to free speech and the plaintiff’s interest in protecting his or her good name. However, that balance is struck by weighing factors such as the plaintiff’s status (as a public or private figure) and the subject of speech itself against the defendant’s constitutional interests. Whether the speech is classified as libel or slander is an arbitrary and, some would say, archaic distinction. 6 Cal. Rptr. 3d at 342-43.

proved very influential in subsequent rulings.<sup>196</sup> This section of the chapter provides an overview of the findings from the cases presented here.

In spite of the sound technology the telegraph used to transmit messages via sound waves, defamation via the telegraph was considered libel because the message began and ended, as intended, in written form.<sup>197</sup> The radio and television cases both reveal a variety of approaches taken by courts. Some courts differentiated between libel and slander based on whether the defamation was scripted<sup>198</sup> or extemporaneous.<sup>199</sup> Several courts, particularly in recent cases, held that broadcast defamation is libel, regardless of whether a script is present.<sup>200</sup> Only two courts have held that broadcast defamation constitutes slander, and those cases both occurred prior to 1977.<sup>201</sup> Rather than determining whether the defamation constituted libel or slander, some courts viewed broadcast defamation as a distinct action that combined elements of libel and slander;<sup>202</sup> others merely considered whether the content was

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<sup>196</sup> RESTATEMENT (SECOND) OF TORTS § 568A (1977). “Broadcasting of defamatory matter by means of radio or television is libel, whether or not it is read from a manuscript.”

<sup>197</sup> Peterson v. W. Union Tel. Co., 74 N.W. 1022 (Minn. 1898).

<sup>198</sup> Gearhart v. WSAZ, Inc., 150 F. Supp. 98 (E.D. Ky. 1957); Charles Parker Co. v. Silver City Crystal Co., 116 A.2d 440 (Conn. 1955); Sorenson v. Wood, 243 N.W. 82 (Neb. 1932); Hartmann v. Winchell, 73 N.E.2d 30 (N.Y. 1947); Landau v. Columbia Broad. Sys., 128 N.Y.S.2d 254 (Sup. Ct. 1954)).

<sup>199</sup> Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949); Locke v. Gibbons, 299 N.Y.S. 188 (N.Y. Sup. Ct. 1937), *aff’d mem.*, 2 N.Y.S. 2d 1015 (App. Div. 1938).

<sup>200</sup> Gearhart v. WSAZ, Inc., 150 F. Supp. 98 (E.D. Ky. 1957); Coffey v. Midland Broad., 8 F. Supp. 889 (W.D. Mo. 1934); First Independent Baptist Church v. Southerland, 373 So. 2d 647 (Ala. 1979); Matherson v. Marchello, 100 A.D.2d 233 (N.Y. App. Div. 1984); Shor v. Billingsley, 158 N.Y.S.2d. 476 (Sup. Ct. 1957).

<sup>201</sup> Arno v. Stewart, 254 Cal. App. 2d 955 (Ct. App. 1966); Miles v. Louis Wasmer, Inc., 20 P.2d 847 (Wash. 1933).

<sup>202</sup> American Broad.-Paramount Theatres, Inc. v. Simpson, 126 S.E.2d 873 (Ga. Ct. App. 1962); Brewer v. Rogers, 439 S.E.2d 77 (Ga. Ct. App. 1993); Kelly v. Hoffman, 74 A.2d 922 (N.J. Super. Ct. 1950); Summit Hotel Co. v. Nat’l Broad. Co., 8 A.2d 302 (Pa. 1939).

actionable *per se*.<sup>203</sup> Finally, in the one Internet case found that addressed whether online defamation constituted libel or slander, the court focused on the common-law distinction between written and spoken defamation rather than the element of damages.<sup>204</sup> As the cases reveal, although the trend has been to treat defamation transmitted via each of these technologies as libel, particularly in the broadcast cases, different courts initially took a number of different approaches both in arriving at that decision and, conversely, in concluding that the defamation was slander, not libel.

Two clear examples of state courts being directed by state statutes were *Arno v. Stewart*,<sup>205</sup> in which the court applied the state's civil code to hold that broadcast defamation constitutes slander, and *American Broadcasting-Paramount Theatres, Inc. v. Simpson*,<sup>206</sup> in which a Georgia court interpreted a state statute to create a third category of defamacast in addition to libel and slander. Of note is that as recently as 1993, Georgia courts have continued to apply the defamacast category in the only post-1977 case found that did not adhere to the Restatement's recommendation that broadcast defamation constitutes libel.<sup>207</sup>

In assigning a defamatory communication into the category of libel or slander, courts have taken several approaches. A few focused solely on the nature of the message as written or spoken.<sup>208</sup> The conduct of the publisher prior to publication factored into several courts'

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<sup>203</sup> *Riss v. Anderson*, 304 F.2d 188 (8th Cir. 1962); *Niehoff v. Cong. Square Hotel Co.*, 103 A.2d 219 (Me. 1954); *Greer v. Skyway Broad. Co.*, 124 S.E.2d 98 (N.C. 1962).

<sup>204</sup> *Varian Med. Sys., Inc., v. Delfino*, 6 Cal.Rptr.3d 325, 333 (Ct. App. 2003).

<sup>205</sup> 254 Cal. App. 2d 955 (Ct. App. 1966).

<sup>206</sup> 126 S.E.2d 873 (Ga. Ct. App. 1962).

<sup>207</sup> *Brewer v. Rogers*, 439 S.E.2d 77 (Ga. Ct. App. 1993).

<sup>208</sup> *Gearhart v. WSAZ, Inc.*, 150 F. Supp. 98 (E.D. Ky. 1957); *Peterson v. W. Union Tel. Co.* 74 N.W. 1022 (Minn. 1898); *Miles v. Louis Wasmer, Inc.*, 20 P.2d 847 (Wash. 1933).



decisions, too, as the cases that determined whether libel or slander had occurred based on the presence or lack of a script demonstrate.<sup>209</sup> Several courts focused on the impact of the defamation, noting that the harms caused by the widespread dissemination of broadcast defamation exceeded those of mere slander.<sup>210</sup> An exception is *Summit Hotel Company v. National Broadcasting Co.*, in which the court viewed broadcast defamation as potentially having less impact than print media as a less permanent form with circulation dependent on the strength of the signal tower transmitting the broadcast.<sup>211</sup>

In conclusion, then, the cases in this chapter demonstrate a variety of approaches and holdings by the courts. Generally, defamation transmitted via telegraph, radio, television, and Internet has been treated as libel, in spite of the sound technologies used by the telegraph and broadcast technologies, in particular. This suggests that courts have had to move away from the traditional distinction between libel and slander based solely on the nature of the speech. It is clear, too, that the Second Restatement of Torts has unquestionably influenced courts' treatment of broadcast defamation as libel. The potential harms of the dissemination have led most courts to conclude that such defamation should be treated as the more serious of the two forms—libel.

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<sup>209</sup> *Gearhart v. WSAZ, Inc.*, 150 F. Supp. 98 (E.D. Ky. 1957); *Remington v. Bentley*, 88 F. Supp. 166 (S.D.N.Y. 1949); *Charles Parker Co. v. Silver City Crystal Co.*, 116 A.2d 440 (Conn. 1955); *Sorenson v. Wood*, 243 N.W. 82 (Neb. 1932); *Hartmann v. Winchell*, 73 N.E.2d 30 (N.Y. 1947); *Landau v. Columbia Broad. Sys.*, 128 N.Y.S.2d 254 (Sup. Ct. 1954); *Locke v. Gibbons*, 299 N.Y.S. 188 (N.Y. Sup. Ct. 1937), *aff'd mem.*, 2 N.Y.S. 2d 1015 (App. Div. 1938).

<sup>210</sup> *Coffey v. Midland Broad.*, 8 F. Supp. 889 (W.D. Mo. 1934); *First Independent Baptist Church v. Southerland*, 373 So. 2d 647 (Ala. 1979); *Matherson v. Marchello*, 100 A.D.2d 233 (N.Y. App. Div. 1984); *Shor v. Billingsley*, 158 N.Y.S.2d. 476 (Sup. Ct. 1957).

<sup>211</sup> 8 A.2d 302, 310 (Pa. 1939).

## CHAPTER III

### THE EVOLUTION OF MASS PUBLICATIONS INTO SINGLE PUBLICATION

Under traditional common-law defamation, each defamatory publication by the defamer to a third party constitutes a new publication; under a strict interpretation of this approach, a newspaper publisher, for example, would be liable for every individual copy of an edition of the newspaper in every jurisdiction to which it was delivered for an indefinite period of time. Recognizing the inherent dangers and drawbacks of this approach, in the first half of the twentieth century courts began to apply what is now known as the “single publication rule,” articulated in the Second Restatement of Torts as:

(2) A single communication heard at the same time by two or more third persons is a single publication.

(3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.

(4) As to any single publication,

(a) only one action for damages can be maintained;

(b) all damages suffered in all jurisdictions can be recovered in the one action; and

(c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.<sup>1</sup>

Therefore, the single publication rule provides that “aggregate” publications, such as copies of a newspaper or a single broadcast aired to an audience, will be treated as one publication for the purposes of the statute of limitations.

The single publication rule functions to limit the number of suits a plaintiff may file, thereby protecting both defendants and the courts. The Restatement explains:

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<sup>1</sup> RESTATEMENT (SECOND) OF TORTS § 577A (1977).

In order to avoid multiplicity of actions and undue harassment of the defendant by repeated suits by new individuals, as well as excessive damages that might have been recovered in numerous separate suits, the communication to the entire group is treated as one publication, giving rise to only one cause of action.<sup>2</sup>

In 1961, lawyer William Painter noted that “the theory that successive or concurrent republications give rise to separate causes of action places a formidable weapon in the hands of an injured party, for he can bring as many separate lawsuits as there are causes of action.”<sup>3</sup> Painter described the adoption of the single publication rule as developing from “a judicial redefinition of the term ‘publication’ to confine a single wrong to a single cause of action.”<sup>4</sup> A significant implication of the single publication rule, which factored into many of the cases discussed in this chapter, is that it is used in determining the statute of limitations for a publication: With each new instance of publication, the statute of limitations renews; however, if a publication is treated as an aggregate publication, the statute of limitations runs from the initial publication of the material. Therefore, the single publication rule has significant implications for suits in which the statute of limitations is an issue.

Courts began to adopt the single publication rule—or at least the principle of it, whether or not they used that terminology—in the early twentieth century,<sup>5</sup> and in 1952, the National Conference of Commissioners on Uniform Laws approved the Uniform Single Publication Act.<sup>6</sup> Section 1 of the Act provides:

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<sup>2</sup> *Id.* § 577A cmt. b.

<sup>3</sup> William H. Painter, *Republication Problems in the Law of Defamation*, 47 VA. L. REV. 1131, 1138 (1961).

<sup>4</sup> *Id.* at 1139.

<sup>5</sup> *Wolfson v Syracuse Newspapers, Inc.*, 4 N.Y.S.2d 640 (App. Div. 1938), a newspaper case commonly viewed as applying the rule, will be discussed in the next section of this chapter.

<sup>6</sup> UNIFORM SINGLE PUBLICATION ACT §§ 1, 2 (1952).

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.<sup>7</sup>

Many courts have adopted the single publication rule,<sup>8</sup> and seven states have adopted the Uniform Single Publication Act.<sup>9</sup>

In this chapter, the focus will be on radio, television, and Internet cases that have addressed whether and how the single publication rule should apply. Most of the case law applying the single publication rule addresses newspaper or magazine publication. Only one radio case was found and no telegraph cases were found that directly addressed the single publication rule or its principles. For television and the Internet, whether and how to apply the single publication rule proved an important question which the courts were forced to address.<sup>10</sup> Cases are arranged chronologically within each technology. As the analysis reveals, courts seem to have adopted the principles set forth in the Uniform Single Publication Act and the Restatement of Torts so that most courts treat separate publications as such and aggregate publications as single publications, as will be discussed.

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<sup>7</sup> *Id.* (cited in Andrea G. Nadel, Annotation, *What Constitutes "Single Publication" Within Meaning of Single Publication Rule Affecting Action for Libel and Slander, Violation of Privacy, or Similar Torts*, 41 A.L.R. 4th 541 (1986)).

<sup>8</sup> *Id.* § 2.

<sup>9</sup> RESTATEMENT (SECOND) OF TORTS § 577A (1977). "The Uniform Single Publication Act, promulgated in 1952 . . . has been adopted in Arizona, California, Idaho, Illinois, New Mexico, North Dakota and Pennsylvania." *Id.*

<sup>10</sup> Cases were found through examining cases cited in contemporary law review articles; the Uniform Single Publication Act on Westlaw, which included links to cases; the Restatement (Second) of Torts, particularly § 577A on the single publication rule; the American Jurisprudence Database, particularly 50 Am. Jur. 2d §§ 238, 245, 246; and through Westlaw searches using the Terms and Connectors feature including telegraph, radio, television, Internet, defamation, "single publication," multiple publication and "Uniform Single Publication Act."

### Background: *Wolfson v. Syracuse Newspapers*

The case credited with creating the single publication doctrine was a newspaper case, *Wolfson v Syracuse Newspapers, Inc.*<sup>11</sup> Although the case did not involve a new technology, it laid the groundwork for the single publication doctrine. The defamation claim in *Wolfson* centered on an allegedly defamatory article concerning William J. Wolfson published in the Syracuse newspaper on December 16, 1935. The court wrote, “If we assume that these articles then constituted actionable libel, plaintiff’s right of action expired on April 8, 1937.”<sup>12</sup> The opinion continued:

In an apparent effort to escape the bar of the statute of limitations plaintiff alleges in his amended complaint that between December 16, 1935, when the alleged libels were published, and May 7, 1937, when this action was commenced, the defendant maintained in connection with its main office a library where “the libelous news matter complained of” was made available to the general public.<sup>13</sup>

The plaintiff argued that a republication had occurred, renewing the statute of limitations, when a third party asked and was allowed to review the issue in question during March 1937. The court, in a 3-2 decision, refused to support Wolfson’s claim that the defamation had been republished when viewed in the reading room.<sup>14</sup> The court considered the publication to have

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<sup>11</sup> 4 N.Y.S.2d 640 (App. Div. 1938).

<sup>12</sup> *Id.* at 641.

<sup>13</sup> *Id.* A 1909 case, *United States v. Smith*, 173 F. 227 (D. Ct. Ind.), articulated the principles of the single publication rule but did not refer to it as such. In this case, a newspaper that was published and almost exclusively distributed in Indiana circulated 50 copies of its newspaper throughout Washington, D.C. In the opinion, Justice Anderson argued that the original publication should be the sole publication; otherwise any state, county, or territory in which the material was distributed could enable a cause of action, even if the plaintiff had already been awarded damages in another court. “I am speaking of the facts as shown by the evidence here—where people print a newspaper here, and deposit it in the post office here, for circulation throughout other states, territories, counties, and districts, there is one publication, and that is here. If that is true, then there was no publication, under the evidence, in Washington.” *Smith*, 173 F. at 232.

<sup>14</sup> *Wolfson*, 4 N.Y.S.2d at 642. “We cannot accept plaintiff’s arguments that by thus according to the public the privilege of examining bound copies of its prior issues . . . the defendant republished the alleged libels which had appeared in the single edition of that date.” *Id.*

occurred at the time of the first publication of the newspaper only,<sup>15</sup> stating, “The number of separate publications of the alleged libels and the causes of action arising therefrom [*sic*] in plaintiff’s favor were not gauged by the number of copies of the single edition in which the articles appeared and which defendant circulated by sale or otherwise.”<sup>16</sup> Through limiting a cause of action to the original publication date and treating the publication as one aggregate publication, the court thus originated the single publication rule for newspapers.

### Radio

Only one radio case was found in which the question arose regarding the initial publication of a radio broadcast or the number of actions that could be filed. *Jewell v. Capital Cities/ABC, Inc.*,<sup>17</sup> decided in 1998 by a New York federal district court, is the only case located to fit the criteria of involving radio defamation and the single publication rule.<sup>18</sup> Security guard Richard Jewell entered the public eye in July 1996 after the bombings during the Centennial Olympic Games in Atlanta on July 27. In the wake of the bombings, radio personality Michael Lebron, who went by the professional name “Lionel,” made allegedly

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<sup>15</sup> *Id.* “[I]n the publication of a defamatory article in a newspaper there is but one publication, and that at the place where the newspaper is published.” *Id.*

<sup>16</sup> *Id.*

If plaintiff had commenced this action before the statute of limitations expired, the fact that copies of the single edition which contained the alleged libels were filed and preserved for public and private record, as a matter of common business practice, and in public libraries for purposes of reference and historical data, would have been competent elements of damage by which the extent of plaintiff’s injury might have been measured. *Id.*

<sup>17</sup> No. 97 Civ. 5617 LAP, 1998 WL 702286 (Oct. 7, S.D.N.Y. 1998).

<sup>18</sup> Searches through contemporary law review articles and Westlaw turned up no additional radio defamation cases involving radio defamation and the application of the single publication rule. The Westlaw search was completed using the “Terms and Connectors” feature and the terms: “radio & ‘single publication’ & defamation” and “radio & ‘statute of limitations’ & defamation.” Many cases addressed privacy issues, but no others addressed defamation and the single publication rule.

defamatory statements regarding Jewell in three broadcasts aired July 31 to August 2, 1996.<sup>19</sup> Jewell sued Lionel, Capital Cities/ABC, Inc., and WABC-AM Radio, Inc. In *Jewell v. Capital Cities/ABC, Inc.*, the court addressed whether Jewell could amend a defamation complaint after the statute of limitations had run to add both additional allegations of defamatory statements and five individuals as defendants who had not been mentioned in the original complaint. Jewell had initially filed his complaint July 28, 1997, “shortly before the statute of limitations expired.”<sup>20</sup> The original complaint alleged the defamatory statements uttered by Lionel during the broadcast included: “i) those which directly allege plaintiff’s guilt in the Centennial Olympic bombing; and ii) those which allege that Jewell possessed personality traits and/or an employment history which imply or suggest that he committed or likely committed the bombing.”<sup>21</sup>

Less than two months later, on September 9, 1997, Jewell sought to amend his complaint by adding sixteen new defamatory statements to the two categories above: “Nine of those statements were attributable to Lionel, and the remainder were attributable to five individuals who were not identified in the original complaint but who had participated in the Lionel radio broadcasts of July 31 through August 2, 1996.”<sup>22</sup> The defense argued that the addition of the five individuals was barred under the one-year New York statute of limitations on defamation; Jewell argued that, under the Federal Rules of Civil Procedures,<sup>23</sup> he was permitted to amend the complaint.

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<sup>19</sup> *Id.* at \* 1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (citing Plaintiff’s Rely Memorandum of Law in Support of Motion to Amend Complaint).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (citing FED. R. CIV. P. 15(c)).

Jewell argued that the statements were all part of the original broadcast, a single publication, and that, in line with the single publication rule, “there ‘can only be one single defamation claim arising from a single publication,’ and that Lionel’s daily broadcast is, in its entirety, a single publication.”<sup>24</sup> The court said that, under New York law, “every distinct publication of a ... slanderous statement gives rise to a separate cause of action.”<sup>25</sup> Therefore, the court found that, while the additional statements attributed to Lionel could be added to the complaint, “[t]he statements made by individuals other than Lionel are barred by the statute of limitations.”<sup>26</sup> Thus, the court treated the words of each speaker as separate publications and consequently limited the plaintiff’s ability to amend the complaint to include additional defendants.

### Television

Ten years after the promulgation of the Uniform Single Publication Act, the First Circuit Court of Appeals addressed the application of the single publication rule to television defamation in 1962 in *Lahr v. Adell Chemical Co.*<sup>27</sup> Performer Bert Lahr filed complaints for unfair competition, invasion of privacy, and defamation after Adell Chemical Company

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<sup>24</sup> *Id.* at \*2.

<sup>25</sup> *Id.* (quoting *Barber v. Daly*, 185 A.D.2d 567, 586 N.Y.S.2d 398, 400 (3d Dept.1992)). The court also argued that the proposed amendment to the complaint was too far removed from the original:

An amendment asserting a claim will not relate back to the original complaint unless it “arose out of the conduct, transaction or occurrence attempted to be set forth in the original pleading.” . . . An amendment will not relate back if its sets forth a new set of operational facts; it can only make more specific what has already been alleged. . . . Here, although the new defamatory statements were made at the same time as those alleged in the original complaint, plaintiff alleges new defamatory statements that were made by different individuals. As such, the proposed amended complaint introduces a new set of operational facts. *Id.*

<sup>26</sup> *Id.* at \*3.

<sup>27</sup> 300 F.2d 256 (1st Cir. 1962).



advertised a product in a television commercial using a cartoon duck character with a voice that Lahr alleged imitated his voice.<sup>28</sup> Lahr, who argued that his stardom was due in large part to his distinctive voice,<sup>29</sup> rested his defamation claim on his assumption that his professional reputation had been injured, “both because it cheapened plaintiff to indicate that he was reduced to giving anonymous television commercials and because the imitation, although recognizable, was inferior in quality and suggested that his abilities had deteriorated.”<sup>30</sup> In this case, Lahr appealed the dismissal of his complaint by the district court “for failure to state a cause of action.”<sup>31</sup>

The single publication rule factored into the decision because Lahr claimed that his reputation had been damaged perhaps “throughout the land,” although the court persuaded him to limit his actions to Massachusetts and New York.<sup>32</sup> In spite of the court’s doubts about the damage to Lahr’s reputation,<sup>33</sup> it was willing to allow the single publication rule

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<sup>28</sup> *Id.* at 257. “The complaint alleges that Adell Chemical Company, in advertising its product ‘Lestoil’ on television, used as a commercial a cartoon film of a duck and, without plaintiff’s consent, ‘as the voice of the aforesaid duck, an actor who specialized in imitating the vocal sounds of the plaintiff.’” *Id.*

<sup>29</sup> *Id.*

According to the complaint the plaintiff is a professional entertainer who has achieved stardom—with commensurate financial success—on the legitimate stage, in motion pictures, on radio, on television and other entertainment media throughout the United State, Canada and elsewhere. This he has done in substantial measure because his “style of vocal comic delivery which, by reason of its distinctive and original combination of pitch, inflection, accent and comic sounds,” has caused him to become “widely known and readily recognized . . . as a unique ant [*sic*] extraordinary comic character.” *Id.*

<sup>30</sup> *Id.* at 258.

<sup>31</sup> *Id.* at 257.

<sup>32</sup> *Id.* at 258.

Although plaintiff asserts the “voice of the aforesaid duck,” alias perhaps mockingbird, was heard throughout the land, with possibly varying legal consequences, the law he cites is on no such scale. Upon our pressing, he agreed that we need consider no law except that of Massachusetts and New York. We will interpret this concession as meaning not that plaintiff does not claim injury in other states, but that for present purposes we may assume the law of those states to be in accord with one or both of the two jurisdictions specified. *Id.*

<sup>33</sup> *Id.* at 259.

and the statute of limitations to be reconsidered in this case: The commercial began to air in December 1958, but Lahr did not file an action until January 1961, well past the one year statute of limitations for libel claims in Massachusetts.<sup>34</sup> The court decided the issue should be addressed on remand:

It does not appear for how long a period the duck trespassed on plaintiff's reputation. Defendant, relying on the single publication rule, asserts that plaintiff's rights became barred by December 1960. This rule is normally applicable to continued sales and new editions of a single literary work. The statute of limitations is an affirmative defense. Whether the single publication rule should be applied to the circumstances had best be decided when we know what they were.<sup>35</sup>

The appellate court vacated the district court dismissal and remanded the case<sup>36</sup> because the First Circuit was unable to determine from the known facts of the case how long the commercial had appeared on TV and, thus, when the statute of limitations would run. This case presented a new and interesting issue: Does the single publication rule apply to a commercial that is repeated over a period of time? Is each repetition of the commercial a new publication or, as the defendant asserted, does the entire run of a commercial count as a single publication? That question, however, was apparently never answered as no additional opinions in this case could be found.

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Plaintiff's additional assertion that an inferior imitation damaged his reputation raises a more doubtful question. Even entertainers who make no claim to uniqueness have distinctive vocal characteristics and may be thought to be recognized. If every time one can allege, "Your (anonymous) commercial sounded like me, but not so good," and contend the public believed, in spite of the variance, that it was he, and at the same time believed, because of the variance, that his abilities had declined, the consequences would be too great to contemplate. *Id.*

<sup>34</sup> *Id.* at 260.

<sup>35</sup> *Id.*

<sup>36</sup> No further cases were found using the Westlaw "Full History" option.

Four years later, *Devlin v. National Broadcasting Co.*<sup>37</sup> reflected another challenge raised by the single publication rule: Because the rule had not been adopted in all jurisdictions, libel plaintiffs would naturally want to seek out those venues most likely to rule in their favor. *Devlin* was a blatant example of forum shopping. The plaintiff, Dr. Edward A. Devlin, was a California resident who also was a surgeon and attorney associated with the Oceanside Hospital in that state. In 1964, the National Broadcasting Company broadcast an episode of the popular television series *Dr. Kildare* titled “The Ungodly Act,” in which a character named Dr. Robert Devlin, a physician, lawyer, and operator of a small private hospital, refused to care for a poor, young female patient brought to his hospital by Dr. Kildare, resulting in the girl’s death. During the episode, Dr. Robert Devlin filed a defamation suit against Dr. Kildare for statements he made suggesting that Devlin’s behavior was criminal; in a fictional court proceeding that resulted, a third doctor referred to Devlin’s refusal to care for the girl as “an ungodly act.”<sup>38</sup>

Devlin and Oceanside Hospital filed libel actions in California, which had adopted the Uniform Single Publication Act, as well as in Washington, Massachusetts, and New Jersey, where the present case occurred. NBC moved to dismiss the New Jersey suit on the ground that California was “the more convenient forum,” but the trial court denied that motion.<sup>39</sup> On appeal, the New Jersey Supreme Court noted that “plaintiffs apparently have no connection with New Jersey” but chose to sue in states other than California because they feared “that the California action might ultimately be dismissed under California’s retraction statute.”<sup>40</sup>

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<sup>37</sup> 219 A.2d 523 (N.J. 1966) (per curiam).

<sup>38</sup> *Id.* at 524.

<sup>39</sup> *Id.* at 524-25.

<sup>40</sup> *Id.* at 525.

The plaintiffs argued that they should be allowed to maintain claims in both California and New Jersey because the program was broadcast from both New York to the East Coast and from Burbank, California, to the West Coast and, therefore, constituted two separate publications. Noting that New Jersey had not yet adopted the single publication rule, the plaintiffs urged the court not to do so in this case.

They point out that the New Jersey Legislature has not adopted the Uniform Single Publication Act, and that, although many states have adopted the Uniform Single Publication Act, and that, although many states have adopted a single publication rule by judicial decision, the New Jersey courts have not thus far expressly departed from the common law doctrine that each publication may give rise to a separate action at the place of communication. They urge that if the single publication rule which they label “inadequate and unfair” is to be adopted for New Jersey, it should be by legislative act rather than judicial decision.<sup>41</sup>

The New Jersey high court refused to rule on the single publication rule and instead stayed the New Jersey action pending the outcome of the California case. Once the California courts ruled, the New Jersey Supreme Court said, “many of the issues raised by the plaintiffs may have been effectively disposed of or may have become moot.”<sup>42</sup> As the plaintiff’s request suggests, however, adoption of the single publication rule had become common as state legislatures adopted the Uniform Single Publication Act or state courts adopted the single publication rule through common law rulings.

A New York court addressed the application of the single publication rule to television programs in defamation case *Municipal Training Center, Inc. v. National Broadcasting Corp.*<sup>43</sup> The facts of the case as provided in the opinion are sparse, but the Municipal

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<sup>41</sup> *Id.*

<sup>42</sup> No further proceedings were found using Westlaw history or Keycite searches, for either the California or New Jersey proceedings.

<sup>43</sup> 387 N.Y.S.2d 40 (N.Y. Sup. Ct. 1976).

Training Center alleged that National Broadcasting Corporation libeled it in television programs broadcast on August 2, 1974, and September 11, 1974.<sup>44</sup> In the present case, the Center sought to amend the complaint to include a third libel published January 21, 1975; however, more than the one year of the statute of limitations for libel had passed by the time the Center sought to amend the original complaint, which included only the 1974 broadcasts.<sup>45</sup>

The Center argued that the January 1975 libel was part of an aggregate publication of the previous libels.<sup>46</sup> The court, however, disagreed and held that each broadcast was a separate publication. In doing so, the court noted that “the law is clear with respect to libel actions . . . each publication gives rise to a separate cause of action which does not relate back to the earlier publication.”<sup>47</sup> In making its decision, the court noted *Hartmann v. Time*,<sup>48</sup> in which the Third Circuit held that the publication in a magazine of a new libel almost identical to a previous libel, one month after a complaint had been filed for the original, constituted a new

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<sup>44</sup> *Id.* at 41.

<sup>45</sup> *Id.*

This is a motion by plaintiffs for leave to serve a supplemental complaint. . . .Plaintiff’s original complaint alleges that they were libeled by defendants on two television programs broadcast on August 2, 1974 and September 11, 1974. The proposed supplemental complaint sets forth an additional cause of action for libel as a result of a further broadcast by defendants on January 21, 1975. Leave to serve this pleading was sought more than one year after the January, 1975 broadcast. *Id.*

<sup>46</sup> *Id.*

Plaintiffs argue that the alleged libel published on January 21, 1975 was in part a republication of the earlier libels, of which defendants had notice by virtue of the commencement of this lawsuit, and that the supplemental complaint relates back to the original causes of action, and is therefor [*sic*] not time-barred. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 166 F.2d 127 (3d Cir. 1947).

publication and separate cause of action.<sup>49</sup> In line with that rationale, the New York court held:

Leave to serve the supplemental complaint having been sought more than one year after the broadcast of the alleged libel set forth therein, the cause of action arising from the January 21, 1975 publication is barred by the statute of limitations and plaintiff's motion for leave to serve the supplemental complaint is therefore denied.<sup>50</sup>

The court, therefore, held that, because the January 1975 broadcast constituted a separate publication, and because more than one year had passed before the plaintiffs sought to include that publication in their complaint, the action was time-barred.

A 1987 case, *Herron v. King*, case centered around a racketeering scandal that had received wide press coverage and involved allegations against the prosecuting attorney of Pierce County, Don Herron.<sup>51</sup> Reporter Don McGaffin wrote and broadcast a story over KING TV Channel 5 on the 5:30 p.m. news on December 1, 1978, alleging that Herron was being questioned by FBI agents about bail bond procedures as a result of his connection to several people arrested by the Justice Department on racketeering charges. The story was rewritten and read again by another broadcaster on the 11 o'clock news that evening.<sup>52</sup> Finally, a variation of the story, attributed to McGaffin and distributed through the United Press International wire service, was printed the next day in the *Bremerton Sun* newspaper.

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<sup>49</sup> 387 N.Y.S.2d at 41. The court wrote of *Hartmann*:

In that case, the original complaint set forth an alleged libel published in defendant's issue of January 17, 1944. Thereafter, an amended complaint was served alleging a new libel contained in the issue of February 7, 1944. The alleged new libel was almost identical to the original one. Nevertheless, the Court held that the latest publication was "separate, distinct and apart" from the earlier one, precluding relation back to the earlier issue. *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 746 P.2d 295 (Wash. 1987) (en banc).

<sup>52</sup> "Although the content was similar, (the later) report included a statement that bail bond interests had contributed 'approximately \$50,000' to the campaign." *Id.* at 300.

Herron sued McGaffin, KING Broadcasting, and the *Bremerton Sun* for five specific statements of alleged defamation that had each appeared in the newspaper story.<sup>53</sup> After the statute of limitations had expired, Herron attempted unsuccessfully to add UPI to the claim. He also attempted to amend the complaint to add the statements made in the 11 o'clock broadcast; this request was denied by the trial court as time-barred, as the court decided that "each newscast constituted a separate cause of action for defamation."<sup>54</sup> One of the issues before the Washington Supreme Court, therefore, was considering whether and how to apply the single publication rule.

Whereas common law had traditionally treated each publication, such as the sale of a book, as a separate cause of action,<sup>55</sup> the court found "the single publication rule the better reasoned rule in the light of the modern realities of mass publication and broadcasts to wide audiences."<sup>56</sup> The court held that "[t]he 11 p.m. newscast was the result of a conscious independent act, using a new script and broadcaster, and so clearly constitutes a separate publication, even under the single publication rule."<sup>57</sup> While the court refused to amend Herron's previous complaint, it said that the second broadcast "is, however, evidence of King's actual malice."<sup>58</sup> The state supreme court, therefore, reversed the trial court's dismissal of the case. In *Herron*, then, the court examined whether the republication of a

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<sup>53</sup> *Id.* "Herron sued KING Broadcasting, McGaffin, and the Bremerton Sun for defamation. His complaint set forth five specific statements alleged to have been defamatory, all of which appeared in the printed article published by the Bremerton Sun." *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* "At common law, each publication of a defamatory utterance (e.g., each sale of a book) constituted a separate cause of action." *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

story in a second edition of the evening news involved an intentional, separate act from the original publication and found the single publication rule could not apply when that intent to produce a separate publication was evident.

A 1991 Ohio U.S. district court case, *Burt v. CBS, Inc.*, addressed whether a plaintiff could amend a complaint to include an additional allegedly defamatory broadcast under Rule 15(c) of the Federal Rules of Civil Procedure.<sup>59</sup> Part of Rule 15(c) states, “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”<sup>60</sup> In this case, plaintiff James Burt alleged that CBS defamed him with a report about his medical practice on its program *West 57th Street*, initially broadcast October 29, 1988.<sup>61</sup> The show was broadcast two additional times—November 19, 1988, and July 8, 1989.<sup>62</sup> Burt filed his complaint March 5, 1990—more than a year after the initial broadcast, thus after the one-year statute of limitations had expired. He claimed, however, that because CBS had rebroadcast the program in the year prior to his March 1990 complaint—the July 1989 publication—the complaint was not time-barred.

The court noted that Burt might be able to make a case based on the third broadcast having been aired less than a year before his complaint was filed because it viewed each broadcast as

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<sup>59</sup> 769 F. Supp. 1012 (S.D. Ohio 1991).

<sup>60</sup> *Id.* at 1015 (citing FED. R. CIV. P. 15(c)).

<sup>61</sup> In addition to CBS, Burt filed defamation actions against Vickie Samuels, the show’s producer, and Karen Burnes, a reporter.

<sup>62</sup> *Id.* at 1014.



“a distinct and separate publication and separate cause of action.”<sup>63</sup> The defense, however, argued that Burt had not included the July 1989 broadcast in his initial defamation complaint but waited until October 1990 to do so:

Defendants contend that Plaintiff did not assert a defamation claim arising out of the July 8, 1989, broadcast until he filed his second amended complaint on October 17, [1990], which was more than one year after said broadcast. Therefore, Defendant contends that the claim is barred by the statute of limitations, unless it is saved by the relation back provisions in Rule 15(c) of the Federal Rules of Civil Procedure, which, not surprisingly, Defendants argue does not apply in this case.<sup>64</sup>

The court agreed with the defendants’ approach, stating that “Courts and commentators alike have said that relation back should not apply in instances where the plaintiff is asserting a new claim for defamation based upon the separate publication of a defamatory statement.”<sup>65</sup> Because the publications were separate and distinct causes of action, and because the court held that Rule 15(c) did not apply in this case, Burt’s complaint was viewed as time-barred, having been filed after the statute of limitations had expired. Ultimately, the court treated each of the three broadcasts as separate publications. Had Burt filed within the one-year statute of limitations, he would have been able to claim three separate causes of action. As it was, after not filing a complaint specifically mentioning the final broadcast until more than a year had passed after that broadcast, and the statute of limitations had expired.

In 2004, a New York federal district court cited the Restatement of Torts in holding that the rebroadcast of a defamatory television program on The Learning Channel, part of

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<sup>63</sup> *Id.* at 1015. “It is apparent that any defamation claims that the Plaintiff might assert as a result of the first two broadcasts are barred by the statute of limitations. . . .It is equally apparent that the broadcast of July 81, 1989, occurred less than one year prior to the filing of this lawsuit on March 5, 1990.” *Id.*

<sup>64</sup> *Id.* at 1015. The original text reads that the second amended complaint was filed October 17, 1989. Not only does that not make sense given the question of the statute of limitations, but later in the opinion, the court notes: “Plaintiff sought leave to file the second amended complaint on October 12, 1990. The second amended complaint was filed on October 17, 1990.” *Id.* n.5.

<sup>65</sup> *Id.*

Discovery Communications, Inc., constituted a separate publication each time the program aired. In *Lehman v. Discovery Communications, Inc.*,<sup>66</sup> Discovery filed a motion for summary judgment. The libel action was brought by Dr. Martin A. Lehman, an orthopedic surgeon, who was arrested in 1997 on charges of insurance fraud;<sup>67</sup> his arrest was one of 20 resulting from an undercover sting operation called “Operation Backbone,” which received extensive press coverage in the wake of the arrests.<sup>68</sup> On March 3, 1999, a jury acquitted Lehman of all charges.<sup>69</sup>

A few weeks later, on March 21, 1999, Discovery aired a program called “World’s Most Outstanding Undercover Stings” on The Learning Channel, which included a segment on Operation Backbone.<sup>70</sup> Assistant District Attorney Barbara Kornblau, who had been involved in Operation Backbone, appeared on the program and spoke about the logistics of the sting operation, including her opinion that undercover video footage of the doctors led several to enter guilty pleas.<sup>71</sup> Lehman alleged that, during the course of the program, three clips of video footage were shown of him while Kornblau or the narrator spoke. During one clip, showing Lehman taking x-rays of a patient and performing other tests, the narrator said,

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<sup>66</sup> 332 F. Supp. 2d 534 (E.D.N.Y. 2004).

<sup>67</sup> *Id.* at 535. “The investigation was conducted to address growing incidences of insurance fraud by medical providers and legal representatives in the area of automobile no-fault, disability and the workers’ compensation claims.” *Id.*

<sup>68</sup> *Id.* “The operation was conducted jointly by the Special Investigations Bureau of the Office of the District Attorney, the Nassau County Police Department, and the United States Postal Inspection Services. The operation led to the arrests of 20 individuals, including the plaintiff.” *Id.*

<sup>69</sup> *Id.* (The District Attorney’s Office prosecuted the plaintiff, and on March 3, 1999, following a jury trial, he was acquitted of all charges.”) *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 536. “Kornblau also said that personnel involved in Operation Backbone videotaped doctors performing examinations of patients, and the prosecutors used the videotapes extensively during their grand jury presentations. In the televised interview, Kornblau opined that the videotapes led many defendants to enter guilty pleas.” *Id.*

“Twelve undercover agents found corruption on every level from doctors willing to spend only seconds examining a phoney [*sic*] patient.”<sup>72</sup> During another video clip of Lehman, “the narrator states, ‘With enough evidence in their possession, twenty professionals involved in billing more than two million dollars in false claims are brought to justice.’”<sup>73</sup> In the final instance of alleged defamation:

The third clip consists of pictures of three health care providers. Two of the people displayed had been convicted of insurance fraud, while the third person was the plaintiff who had been acquitted of such charges. While these three pictures were shown, the following comments were made: “Operation Backbone is a success but the fight to eliminate false insurance claims continues.”<sup>74</sup>

The program aired 17 times between March 21, 1999, and May 24, 2001. On June 21, 2001, Lehman filed an action claiming that he had been defamed in the May 24, 2001, broadcast.<sup>75</sup>

Discovery argued that the one-year statute of limitations began to run with the first publication of the episode on March 21, 1999, and urged the court to apply the single publication rule to the broadcast to consider all airings of the program as an aggregate publication.<sup>76</sup> In New York, the court noted, “the statute of limitations for libel is one year and begins to accrue at the time of the first publication which is defined as ‘the earliest date on which the work was placed on sale or became generally available to the public.’”<sup>77</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

On June 21, 2001, Dr. Lehman commenced this action, alleging that, on May 24, 2001, the defendant aired the program on The Learning Channel. The plaintiff alleges that several quotations from the program constitute libel and slander *per se* and seeks both compensatory and punitive damages in connection with only the May 24, 2001 airing of the program. *Id.*

<sup>76</sup> *Id.* at 537.

<sup>77</sup> *Id.* The court cited *Van Buskirk v. New York Times Co.*, 325 F.3d 87 (2d Cir. 2003), an Internet case that will be discussed in the next section, in applying this standard.

Discovery asked the court to apply the single publication rule—which had already been applied to books, newspapers, and Internet publishing—“to [the] rebroadcast of defamatory material on television” because courts had previously applied the single publication to television in privacy claims.<sup>78</sup>

Instead, the court cited the Restatement of Torts, stating that “Section 577A(3)(comment d) of the Restatement (Second) of Torts explicitly recognizes that a rebroadcast of defamatory material via television constitutes a separate publication.”<sup>79</sup> The court cited the intent of the television network to reach a new audience with each broadcast in holding that each broadcast was a separate publication:

Like a publication of the same defamatory statement in both a morning and evening editions [*sic*] of a newspaper, a rebroadcast of a television show is intended to reach a new audience and is therefore an additional communication. A rebroadcast has renewed impact with each viewing and creates a new opportunity for injury, thereby justifying a new cause of action.<sup>80</sup>

Finding that each airing constituted a republication, the court held that Lehman, who had commenced the defamation action within one month after the May 24, 2001, broadcast, was well within the statute of limitation in this case.<sup>81</sup> In *Lehman*, therefore, a rebroadcast of a

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<sup>78</sup> *Id.*

Courts have adopted the rule to books and newspapers and have extended it to Internet publishing. . . . According to the defendant, the single publication rule should be applied to rebroadcast of defamatory material on television. In support of its argument, DCI points out that, in relation to privacy television programming in the context of privacy claims, New York courts have applied the rule and have not treated each individual broadcast as a republication. *Id.*

<sup>79</sup> *Id.* at 538.

Rebroadcast of the defamation over radio or television or a second run of a motion picture on the same evening. . . [is a separate publication] that reaches a new group and the repetition justifies a new cause of action. The justification for this conclusion usually offered is that in these cases the second publication is intended to and does reach a new group. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 577A(3)(comment d) (1977)).

<sup>80</sup> *Id.* at 539.

<sup>81</sup> *Id.*

defamatory television program was held to constitute a republication, not part of an aggregate, single publication.

The television defamation cases in which courts addressed whether and how to apply the single publication rule are, for the most part, recent cases. No cases were found that addressed this issue prior to the 1952 Uniform Single Publication Act, but three cases were decided before the Restatement of Torts endorsed the single publication rule in 1977.<sup>82</sup> Two of those cases did not settle the issue: One court remanded the case to determine the facts of the publication dates for a television commercial for the purposes of applying the single publication rule.<sup>83</sup> In the other case, the New Jersey state court awaited the decision of a California state court and avoided having to decide whether to apply the single publication rule in New Jersey.<sup>84</sup> In the third pre-Restatement case, a New York court treated three broadcasts of a television program as a multiple publications, in line with what the Restatement would decree one year later.<sup>85</sup> The post-Restatement cases have treated separate broadcasts as distinct publications, consistent with the Restatement.<sup>86</sup>

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<sup>82</sup> *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962); *Devlin v. Nat'l Broad. Co.*, 219 A.2d 523 (N.J. 1966); *Mun. Training Ctr., Inc. v. Nat'l Broad. Corp.*, 387 N.Y.S.2d 40 (N.Y. Sup. Ct. 1976).

<sup>83</sup> *Lahr*, 300 F.2d 256 (1st Cir. 1962).

<sup>84</sup> *Devlin v. Nat'l Broad. Co.*, 219 A.2d 523 (N.J. 1966).

<sup>85</sup> *Mun. Training Ctr., Inc. v. Nat'l Broad. Corp.*, 387 N.Y.S.2d 40 (N.Y. Sup. Ct. 1976).

<sup>86</sup> *Lehman v. Discovery Commc'ns, Inc.*, 332 F. Supp. 2d 534 (E.D.N.Y. 2004); *Burt v. CBS, Inc.*, 769 F. Supp. 1012 (S.D. Ohio 1991); *Herron v. King*, 746 P.2d 295 (Wash. 1987).

## Internet

One of the defining cases in the single publication rule's application to the Internet is *Firth v. New York*.<sup>87</sup> Plaintiff George Firth was a former employee of the New York Department of Environmental Conservation (DEC) and had served as its director of the Division of Law Enforcement (DLE) for the thirteen years by 1997. During May 1992, an investigator for the Office of the Inspector General began an investigation of a DEC theft that led to an inquiry into pistol purchases by the DEC. The inspector published a report on December 16, 1996, that became the root of the action in this case. Firth alleged that the report was defamatory<sup>88</sup> and that, because the report was available on the Internet, publication included not only the initial posting on the Internet of the report but additional republication for every day the report was available on the Web.<sup>89</sup>

The court held that Firth failed to meet the statute of limitations for his claims. Firth had ninety days to notify the Attorney General that he intended to file a claim, which he did March 3, 1997, and then had one year from that date to actually file; he filed his defamation claim March 18, 1998, more than a year later. Firth, however, argued that the presence of the report on the Internet resulted in the republishing every day of the defamation. The court likened copies of a newspaper or magazine to "hits" on the Web and held that the single

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<sup>87</sup>706 N.Y.S.2d 835 (Ct. Cl. 2000), *aff'd*, 731 N.Y.S.2d 244 (App. Div. 2001), *aff'd* 775 N.E.2d 463 (N.Y. Ct. App. 2002), *aff'd* 761 N.Y.S.2d. 361 (App. Div. 2003).

<sup>88</sup> Statements in the report included allegations questioning Firth's fitness for duty and that Firth "knowingly tolerated repeated breaches of law and policy. The citizens of this state demand of our law enforcement officers the highest degree of integrity, honesty and trustworthiness. . . George Firth fall[s] short in every category." 706 N.Y.S.2d at 838.

<sup>89</sup> 706 N.Y.S.2d. at 838.

The first cause of action seeks to recover a sum of \$2,500,000 upon a defamation theory due to the alleged injury to the claimant's reputation in the Capital District. The second cause of action seeks \$2,500,000 alleging that defendant's publication of defamatory statements upon the Internet has impugned his reputation worldwide and prevented him from securing new employment within the law enforcement community. *Id.*

publication rule should apply to the Internet in the interest of avoiding a multiplicity of suits: “While the act of making the document available constitutes a publication, in the absence of some alteration or change in form its continued availability on the Internet does not constitute a republication acting to begin the Statute of Limitations anew each day.”<sup>90</sup> Because the report had been published on the Internet but not altered, therefore, the court applied the single publication rule and held that the mere presence of a defamatory publication did not constitute a separate republication for each day the material was accessible.

In 2003, one year before *Lehman v. Discovery Communications, Inc.*,<sup>91</sup> in a case on appeal from a New York federal district court, *Van Buskirk v. New York Times Co.*, the Second Circuit also held that the single publication rule applied to Internet publications.<sup>92</sup> Robert Van Buskirk alleged that he had been libeled by John L. Plaster and The New York Times Company after Plaster wrote an article of and concerning Van Buskirk, which he published on the Internet and which *The New York Times* then ran on its editorial page.<sup>93</sup> The letter concerned a CNN broadcast in which the news network, Plaster claimed, “relying primarily on Van Buskirk, [inaccurately] suggested that American forces used nerve gas during Operation Tailwind,” a U.S. military initiative that took place in Laos in 1970.<sup>94</sup> The broadcast aired June 7, 1998, and the next day, Plaster posted a letter critical of the news

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<sup>90</sup> *Id.* at 843.

<sup>91</sup> 332 F. Supp. 2d 534 (E.D.N.Y. 2004).

<sup>92</sup> 325 F.2d 87 (2d Cir. 2003).

<sup>93</sup> *Id.* at 88.

<sup>94</sup> *Id.*

segment on a Web site; *The New York Times* published the editorial June 18, 1998.<sup>95</sup> Van Buskirk subsequently filed defamation complaints against the *New York Times* and, later, against Plaster.<sup>96</sup>

The issue before the court was determining whether Van Buskirk's complaint against Plaster's Web publication was timely under the one-year New York statute of limitations.

While the suit against the Times was filed within the one-year statute of limitations New York imposes for libel actions, the suit against Plaster was not filed within one year of the date Plaster first published his letter on the Internet. Under New York's single publication rule, the statute of limitations begins to accrue on the first date of publication. Van Buskirk argued that the rule should not apply to Internet publications.<sup>97</sup>

The Second Circuit held that, in line with *Firth*, the single publication rule applied to the Internet.<sup>98</sup> Under the single publication rule in New York, "a defamation claim accrues at publication, defined as 'the earliest date on which the work was placed on sale or became generally available to the public.'"<sup>99</sup> Plaster posted his letter to the Internet on June 8, 1998, and Van Buskirk did not file an amended complaint including the letter until January 14, 2000—well past the one-year statute of limitations.<sup>100</sup> Therefore, the court held, the district court had properly dismissed Van Buskirk's claim as time-barred. *Van Buskirk*, in line with

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<sup>95</sup> *Id.* 88-89. "Plaster, a former Green Beret and author of *SOG: The Secret wars of America's Commandos in Vietnam*, wrote a letter critical of the CNN report and published that letter on a website on June 8, 1998." *Id.* at 88.

<sup>96</sup> *Id.* at 89. "Plaster made a number of statements in the Article, including (1) the CNN report alleging U.S. forces used nerve gas to attack a Laotian village during Operation Tailwind was untrue; and (2) Van Buskirk was a source for this untrue statement." *Id.*

<sup>97</sup> *Id.* at 88.

<sup>98</sup> *Id.* at 89.

<sup>99</sup> *Id.*

New York adheres to a single publication rule in determining when the statute of limitations begins to run on a defamation claim. Under this rule, the publication of a single defamatory item, such as a book or article, even if sold in multiple copies, and in numerous place, at various times, gives rise to "only one cause of action which arises when the finished product is released by the publisher for sale." *Id.*

<sup>100</sup> *Id.* at 90.



*Firth*, reinforced the application of the single publication rule to the Internet and emphasized that publication occurred when the content was first made available on the Internet.<sup>101</sup>

The single publication rule was again applied to the Internet by a federal district court in Kentucky in a 2003 case, *Mitan v. Davis*.<sup>102</sup> In 1998, Keneth Mitan had acquired a business, S & B Glass Company, from Emory and Carol Davis. After the sale of the business, the Davises alleged, “Mitan ‘raided the business by diverting accounts receivables, payments and deposits, not paying employee insurance premiums, and not paying suppliers and selling off assets.’”<sup>103</sup> The Davises created a Web site, “www.mitanaalert.com, to ‘inform others of their experiences with Mitan and to offer access to other information . . . concerning Mitan.’”<sup>104</sup> In 1999, Mitan discovered the site and filed an action to terminate the use of the Web site, which was denied, but he did not pursue any other actions concerning the site until he chose to file a defamation action on December 29, 2000.<sup>105</sup> Mitan alleged that “ten specific statements on the *mitanaalert.com* website. . . cast him in a false and defamatory light and are libelous, caused him embarrassment and mental anguish, and improperly interfered with his prospective contractual relations.”<sup>106</sup>

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<sup>101</sup> The court also addressed whether Plaster’s statements were capable of defamatory meaning and, affirming the district court, found that they were not.

The article maintains that CNN’s accusations are untrue. It also explains that the CNN report attributes those accusations to Van Buskirk. However, the article avoids speculating as to why CNN reported false accusations. It suggests neither that CNN mistakenly attributed the accusations to Van Buskirk, nor that CNN was misled, let alone that CNN was misled by Van Buskirk. 325 F.2d at 92.

<sup>102</sup> 243 F. Supp. 2d 719 (W.D. Ky. 2003).

<sup>103</sup> *Id.* 720.

<sup>104</sup> *Id.* at 721.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

The *Mitan* court addressed whether the single publication rule applied to Internet publications and, if so, whether the one-year statute of limitations had expired by the time Mitan filed his action. The Davises argued that nine of the ten defamation actions were time-barred:

Of the ten statements Mitan contends are libelous, four were present on the website on October 12, 1999. Five of the statements were added to the website when it was modified by the Davises on December 7, 1999. The final statement Mitan claims is libelous is a WXYZ Channel 7 (Detroit, Michigan) investigative report which was posted on the site on February 25, 2000.<sup>107</sup>

The district court questioned whether Kentucky, whose law it was applying, would apply the single publication rule to the Internet and, noting that Kentucky had a history of consulting the Restatement of Torts, found that it would.<sup>108</sup> The court reasoned that “the single publication rule is much better equipped to handle aggregate communication.”<sup>109</sup> It also compared Internet publications to traditional print publications, arguing that “[a] statement electronically located on a server which is called up when a web page is accessed, is no different from a statement on a paper page in a book lying on a shelf which is accessed by the reader when the book is opened.”<sup>110</sup> In applying the single publication rule to the Web, and in treating the initial posting of the comments as the initial publication, the court found that

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 722. “In light of the way information is disseminated in our modern world, along with the adoption of the single publication rule by a majority of jurisdictions, we must ask whether a Kentucky court faced with this issue today would follow the precedent established in 1899, or would instead revisit the issue and adopt the single publication rule.” *Id.*

<sup>109</sup> *Id.* “After carefully examining the issue, we can find no basis for treating defamatory communication differently than any other form of aggregate communication. Therefore, we will apply the single publication rule to the statements in this case which were published on the Internet.” *Id.* at 724.

<sup>110</sup> *Id.* at 724.

any statements posted before December 29, 1999—one year prior to Mitani’s action—were time-barred. Therefore, nine of the ten statements were not actionable.<sup>111</sup>

In 2004, a state appeals court in Georgia applied the single publication rule to a newspaper’s archival of the print edition on the Internet. In *McCandliss v. Cox Enterprises*,<sup>112</sup> Scott McCandliss appealed the dismissal by a trial court of his defamation action against Cox Enterprises based on the statute of limitations having run. McCandliss founded a club named Hipsters “to provide social gatherings that included ‘size-positive’ spectacles for persons of size and those who support them.”<sup>113</sup> McCandliss anonymously wrote and published an article about Hipsters in the magazine *Plumpers and Big Women*, including pictures of a lingerie show featuring plus-sized models without their permission. The models sued McCandliss and the magazine, and the *Atlanta-Journal Constitution* covered the story: “In an article published on September 7, 2000, the AJC wrote: ‘The Hipster party in metro Atlanta was noted on the cover [of *Plumpers and Big Women*]: 5,000 Pounds of Sex-Starved Fatties.’”<sup>114</sup> The article was also made available online. Two years later, McCandliss filed suit against the *Atlanta-Journal Constitution*, alleging that he had been libeled when the newspaper “improperly attributed the caption from the cover of the magazine to Hipsters.”<sup>115</sup>

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<sup>111</sup> *Id.* “The only libel claim which remains viable is the posting of the WXYZ Channel 7 news report.” *Id.*

<sup>112</sup> 593 S.E.2d 856 (Ga. App. 2004).

<sup>113</sup> *Id.* at 857.

<sup>114</sup> *Id.* Similar statements were made in a November 2000 article.

<sup>115</sup> *Id.* The court opinion never explicitly states what the caption is, but in the context of the opinion—the statement above is the only statement quoted from the article—it appears to have been the “5,000 Pounds of Sex-Starved Fatties” that McCandliss argued was improperly attributed to his magazine by the Atlanta newspaper.

As was the case in *Firth*, McCandliss argued that the single publication rule should not apply to the Internet, specifically to the archival of newspaper articles online.

McCandliss argues that “because a [w]eb<sup>116</sup> site may be altered at any time by its publisher or owner and because publications on the Internet are available only to those who seek them, each ‘hit’ or viewing of the [news article] should be considered a new publication that retriggers the statute of limitations.” This argument, however, lacks merit.<sup>117</sup>

The nature of the Internet as a widely accessible medium worldwide, the court contended, “implicated an even greater potential for endless retriggering of statute of limitations, multiplicity of suits, and harassment of defendants. Inevitably, there would be a seriously inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.”<sup>118</sup> Like *Firth*, the *McCandliss* case revealed the courts’ attempts to protect both defamation defendants and courts from the potentially limitless actions available if every viewing of information on the Internet constituted a republication.

A California appeals court applied the single publication rule to the Internet in the 2004 case *Traditional Cat Assn., Inc. v. Gilbreath*.<sup>119</sup> Plaintiff Diana Fineran had been president of Traditional Cat Association, an organization involved with cat breeding, in which defendants Laura Gilbreath, Lee Zimmerman, Randi Briggs, and John Herold worked as directors and officers.<sup>120</sup> However, tension arose within the organization:

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<sup>116</sup> Formatting of Web site as “[w]eb site” quoted directly from text.

<sup>117</sup> *Id.* at 858.

<sup>118</sup> *Id.*

<sup>119</sup> 13 Cal. Rptr. 3d. 353 (Ct. App. 2004).

<sup>120</sup> *Id.* at 355.

In 1998 a dispute developed between Fineran and the individual defendants with respect to criticism of Fineran's leadership of TCA. As the result of the dispute, Fineran established another organization, plaintiff and respondent The Traditional Cat Association, Inc., a Washington corporation (TTCA). TTCA then commenced a series of lawsuits against TCA and the individual defendants, alleging that they had misappropriated TCA funds and were guilty of conversion, copyright infringement, unfair competition, trademark and trade secret infringement.<sup>121</sup>

In response to Fineran's actions, Herold created a Web site called "The Diana Fineran Response Website," which was dedicated to reporting on the status of the litigation; however, "[t]he descriptions of the litigation on the Web site were highly critical of Fineran and TTCA and very favorable to TCA, Herold, and the other defendants."<sup>122</sup> On May 22, 2002, Fineran and her organization, The Traditional Cat Association, filed action against the defendants and Traditional Cat Association for statements made on the Web site, alleging defamation.<sup>123</sup>

In the case, the defendants appealed the denial of a motion to strike,<sup>124</sup> arguing that the statute of limitations had expired on Fineran's defamation claim because, Herold swore in a declaration, the Web site had not been edited since before May 21, 2001.<sup>125</sup> The court found that "the statements on the Web site were an exercise of free speech which shifted to plaintiffs the burden of establishing the merits of their defamation cause of action, including

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* "Fineran and TTCA alleged that the statements on the Web site gave rise to a cause of action for defamation. She also alleged unfair competition and conversion causes of action." *Id.*

<sup>124</sup> *Id.* at 356.

In ruling on the motion to strike, the trial court found the statements on the Web site were made in furtherance of the defendant's petition and free speech rights. . . . However, the court denied the motion to strike because it found, among other matters, the statute of limitations defenses asserted by the defendants, even if conclusive, will not support relief under the anti-SLAPP statute. *Id.*

<sup>125</sup> *Id.* "The motion to strike was directed primarily at the defamation cause of action. The demurrer challenged all three causes of action. In support of the motion to strike, Herold submitted a declaration in which he stated that he had not altered the Web site after May 21, 2001." *Id.*

its timeliness.”<sup>126</sup> Furthermore, the court noted that the single publication rule applied in California, one of the states to adopt the Uniform Single Publication Act discussed earlier in this chapter:

Under the rule, one cause of action will arise, and the statute of limitations will commence running, upon the first general publication or broadcast of a tortious statement, notwithstanding how many copies of the publication are distributed or how many people hear or see the broadcast. . . . We find the single-publication rule applies to statements published on Internet Web sites.<sup>127</sup>

In reaching its decision, the court cited *Firth*, noting that this exact issue had not been addressed in California.<sup>128</sup> Applying the single publication rule, then, because the Web site had not been altered since before May 21, 2001, and because Fineran filed her action May 22, 2002, the one-year statute of limitations had expired.<sup>129</sup> Notably, the court argued that Internet publication merited even more protection than traditional print publication, writing, “[T]he need to protect Web publishers from almost perpetual liability for statements they make available to the hundreds of millions of people who have access to the Internet is greater even than the need to protect the publishers of hard copy newspapers, magazines and books.”<sup>130</sup> Therefore, in this case, California applied the single publication rule to Internet

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<sup>126</sup> *Id.* at 358.

<sup>127</sup> *Id.* at 354-55.

<sup>128</sup> *Id.* at 362.

The parties have not cited any California authority, and we have found none, which considers whether and how the single-publication rule applies when, as here, an alleged defamatory statement has been made on an Internet Web site. However, the issue was recently discussed by the New York State Court of Appeals. *Id.* (citing *Firth*).

<sup>129</sup> *Id.*

[A]ccording to Herold the web site was not altered after May 21, 2001. In opposing the motion to strike, plaintiffs did not offer any evidence which contradicted Herold’s declaration or provide admissible evidence that statements on the Web site had been republished in other formats in the year preceding the filing of their complaint. . . . Thus for purposes of determining the motion to strike, plaintiff’s cause of action for defamation arose no later than May 21, 2001, and had expired on May 22, 2002, when plaintiffs filed their complaint. *Id.*

<sup>130</sup> *Id.*

publications, following the logic that republication had not occurred by the mere presence of content on the Web without editing or alteration.

A recent case addressed whether altering a Web site constituted a republication of allegedly defamatory matter. In *Churchill v. New Jersey*,<sup>131</sup> Scott Churchill and Michael Russo appealed the dismissal by a trial court of their defamation action based on the statute of limitations having run. The two were volunteers with a county animal cruelty prevention society that was investigated by the State Commission of Investigation as part of a statewide investigation. The Commission published a report in 2001 that Churchill and Russo alleged defamed them by “improperly accus[ing] them of dishonesty, secrecy, and fiscal irresponsibility.”<sup>132</sup> The plaintiffs filed a complaint in 2003, two years after the report’s publication, past the one-year statute of limitations. Churchill and Russo, however, argued that because the Commission updated its Web site several times, including where the report could be accessed, the single publication rule did not apply: “Plaintiffs contend that each alteration to the Web site constituted a separate publication of the report, thereby extending the limitations period and rendering their defamation claim timely.”<sup>133</sup>

Despite the arguments presented by Churchill and Russo, the court maintained that the single publication rule applied because the actual report had not been altered, only where the report was located. “The updates were merely technical changes to the Web site. They altered the means by which visitors could access the report, but they in no way altered the substance

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<sup>131</sup> 876 A.2d 311 (N.J. Super. Ct. App. Div. 2005).

<sup>132</sup> *Id.* at 314.

<sup>133</sup> *Id.* at 315.

or form of the report.”<sup>134</sup> The court rejected several arguments by the plaintiffs, including one that the Internet was a more permanent form of publication than print media because “Internet publications are available in the same manner, with the same level of prominence, throughout time, and have the potential for much greater circulation than traditional print media.”<sup>135</sup> To this, the court replied that libraries are evidence to the contrary that print media publications are less permanent or accessible than electronic media publications.<sup>136</sup> The court, therefore, concluded that an unedited or unaltered report posted on the Internet does not constitute a republication, even if the Web site itself is edited or altered.

Courts have consistently applied the single publication rule to Internet publications. The mere presence of a publication online does not constitute republication.<sup>137</sup> The initial posting of content online is considered the publication for the purposes of the statute of limitations,<sup>138</sup> but it also appears that editing content or posting new material to a Web site constitutes republication for the purposes of the statute of limitations.<sup>139</sup> The archival of newspaper articles on the Internet has been held to not constitute a republication.<sup>140</sup> Finally, a

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<sup>134</sup> *Id.* at 319.

<sup>135</sup> *Id.* at 315.

<sup>136</sup> *Id.* at 320.

<sup>137</sup> *Firth v. New York*, 706 N.Y.S.2d 835 (Ct. Cl. 2000), *aff’d*, 731 N.Y.S.2d 244 (App. Div. 2001), *aff’d* 775 N.E.2d 463 (N.Y. Ct. App. 2002), *aff’d* 761 N.Y.S.2d. 361 (App. Div. 2003).

<sup>138</sup> *Van Buskirk v. New York Times Co.*, 325 F.2d 87 (2d Cir. 2003); *Mitan v. Davis*, 243 F. Supp. 2d 719 (W.D. Ky. 2003).

<sup>139</sup> *Traditional Cat Assn., Inc. v. Gilbreath*, 13 Cal. Rptr. 3d. 353 (Ct. App. 2004).

<sup>140</sup> *McCandliss v. Cox Enters.*, 593 S.E.2d 856 (Ga. App. 2004).



court recently held that altering a Web site, including where content may be accessed, is not republication of the content unless the content itself is edited.<sup>141</sup>

### Conclusion

As the case analysis in this chapter reveals, within the parameters of this study, there have been relatively few defamation cases in which the courts have directly addressed the application of the single publication rule: No telegraph cases were found, and only radio case was found that addressed the application of the single publication rule in the context of a defamation claim. In that 1998 case, the court refused to treat three separate broadcasts aired on different days as a single publication to allow the plaintiff to amend a complaint to include additional actions and defendants.<sup>142</sup>

The television cases to a certain extent reflect some hesitancy by courts to apply the single publication rule prior to the revision of the Restatement in 1977. Of the three pre-Restatement cases, only one considered whether three separate broadcasts over a span of time would constitute single publication; using the same rationale the *Jewell* court applied 22 years later, that court held that the rebroadcast of a program constituted a republication of the initial broadcast and, as such, was a separate cause of action, barring the plaintiff from amending the complaint to include another action.<sup>143</sup> In the other two cases, the First Circuit remanded a case to determine the facts of publication for the purposes of establishing how

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<sup>141</sup> Churchill v. New Jersey, 876 A.2d 311 (N.J. Super. Ct. App. Div. 2005).

<sup>142</sup> Jewell v. Capital Cities/ABC, Inc., No. 97 Civ. 5617 LAP, 1998 WL 702286 (S.D.N.Y. Oct. 7, 1998).

<sup>143</sup> Mun. Training Ctr., Inc. v. Nat'l Broad. Corp., 387 N.Y.S.2d 40 (N.Y. Sup. Ct. 1976).

the statute of limitations would apply,<sup>144</sup> and the New Jersey Supreme Court refused to decide whether to apply the single publication rule, instead staying the action pending the outcome of the same case filed and underway in California.<sup>145</sup>

Post-Restatement, cases, on the other hand, have treated broadcasts aired at different times as separate or multiple publications, not single publications. A newscast that was edited and rebroadcast on a later edition of the evening news was treated as a separate publication resulting from “a conscious independent act” to publish a separate broadcast.<sup>146</sup> The broadcast of a television program multiple times was twice treated as constituting multiple publication rather than single publication by two different U.S. district courts. The first case reflected a situation similar to both *Jewell* and *Municipal Training Center*, in which a plaintiff was unable to amend a complaint to include an additional broadcast because the rebroadcast was considered a separate cause of action and the statute of limitations had expired.<sup>147</sup> In the second case, on the other hand, the court allowed a plaintiff to file an action on a later broadcast of a show that he would not have been able to do had the court treated each broadcast as part of an aggregate publication.<sup>148</sup> The application of the single publication rule to television defamation has, then, both served to allow and prevent plaintiffs to file defamation actions.

The Internet cases have treated Web site publications as aggregate publications. As the Georgia Court of Appeals noted, the nature of Web publication is such that, without applying

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<sup>144</sup> *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962).

<sup>145</sup> *Devlin v. Nat’l Broad. Co.*, 219 A.2d 523 (N.J. 1966).

<sup>146</sup> *Herron v. King*, 746 P.2d 295 (Wash. 1987) (en banc).

<sup>147</sup> *Burt v. CBS, Inc.*, 769 F. Supp. 1012 (S.D. Ohio 1991).

<sup>148</sup> *Lehman v. Discovery Commc’ns, Inc.*, 332 F. Supp.2d 534 (E.D.N.Y. 2004).

the single publication rule, there would be the danger of excessive lawsuits spurred by a never-ending statute of limitations and limitless opportunities for plaintiffs to file multiple causes of action: “Inevitably, there would be a seriously inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.”<sup>149</sup> Therefore, the general rule of Internet publication has been that, unless the defamatory content itself is reposted or edited in some way, the initial publication is treated as the single publication for the purposes of the statute of limitations.<sup>150</sup>

In conclusion, courts seem to have been influenced by the Restatement of Torts in applying the single publication rule in defamation cases to broadcast technologies. However, the courts have taken the lead in applying the single publication rule to the Internet. The result is that the a defamation plaintiff must file an action within whatever length of time the statute of limitations in that state mandates, dating from the initial posting of the content. The mere presence of unedited, unchanged defamatory content on the Web does not constitute republication; on the other hand, when a broadcaster rebroadcasts a defamatory segment, it is likely that such an action will be seen as an attempt to reach a new audience, a republication that will retrigger the statute of limitations.

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<sup>149</sup> *McCandliss v. Cox Enters.*, 593 S.E.2d 856, 858 (Ga. App. 2004).

<sup>150</sup> *Van Buskirk v. New York Times Co.*, 325 F.2d 87 (2d Cir. 2003); *Mitan v. Davis*, 243 F. Supp. 719 (W.D. Ky. 2003); *Traditional Cat Assn., Inc. v. Gilbreath*, 13 Cal. Rptr. 3d 353 (Ct. App. 2004); *McCandliss v. Cox Enters.*, 593 S.E.2d 856 (Ga. App. 2004); *Churchill v. New Jersey*, 876 A.2d 311 (N.J. Super. Ct. App. Div. 2005); *Firth v. New York*, 706 N.Y.S.2d 835 (Ct. Cl. 2000), *aff’d*, 731 N.Y.S.2d 244 (App. Div. 2001), *aff’d* 775 N.E.2d 463 (N.Y. Ct. App. 2002), *aff’d* 761 N.Y.S.2d. 361 (App. Div. 2003).

## CHAPTER IV

### DETERMINING LIABILITY: CATEGORIZING PUBLISHERS

Liability, as demonstrated in the first chapter, has been a hot topic for the Internet due to section 230 of the Communications Decency Act, which provides immunity for providers and users of Internet services for third-party content and, as a federal statute, supersedes state common law.<sup>1</sup> Traditionally, however, common law dictates that the publisher of a defamation is liable for any damage caused to the defamed.<sup>2</sup> A person who repeats a defamatory statement is considered to have become a republisher of the defamation and is as liable as the original publisher.<sup>3</sup> Common law also recognizes distributors of defamatory content: Distributors, such as bookstores and newsstands, have no editorial control over the content of the material they distribute and are liable only if they know or have reason to know they are distributing defamatory content.<sup>4</sup> As this chapter reveals, post-CDA cases have held that one who republishes or distributes third-party defamation via the Internet is immune from liability for that publication. But how have courts historically chosen to impose liability for third-party defamation with other new technologies?

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<sup>1</sup> 47 U.S.C. § 230 (2004). The Act is described in greater detail later in this chapter.

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 578 (1977).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* § 581.

This chapter examines cases involving the third-party transmission of defamatory messages via the telegraph, radio, television, and Internet to see how and whether courts applied these categories of publisher and distributor liability, in particular, to each technology. For the telegraph, cases typically focused on the liability of a telegraph company for transmitting a defamatory message. With radio and television broadcast technologies, questions arose over the extent to which a station's owners or agents could be held liable for comments broadcast by non-employees of the station, in particular when the station had leased its facilities to a third party. Finally, as suggested in the first chapter of this thesis, the courts' treatment of liability for third-party defamation on the Internet can be broken down into pre- and post-Communications Decency Act section 230 cases.

It is important to note that the Supreme Court abolished the standard of strict liability, initially applied to broadcast defamation, in *New York Times v. Sullivan* and its progeny, establishing fault requirements first for public official libel plaintiffs and subsequently for public figure and private figure plaintiffs.<sup>5</sup> In this chapter, it is apparent that courts in those cases prior to 1964 tended to impose either strict liability or a standard of negligence that more closely resembles the modern standard of actual malice. In post-1964 cases, it is presumed that actual malice is the applicable level of fault. As the cases in this chapter reveal, courts have taken different approaches both with and within each technology.

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<sup>5</sup> 376 U.S. 254 (1964). The actual malice standard provides that publishers cannot be held liable for statements made about public officials' conduct related to their position unless the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. Subsequent cases extended the application of the actual malice standard to public figures, *Curtis Publishing Co. v. Butts*, 388 U.S. 28 (1967); *Associated Press v. Walker* 389 U.S. 130 (1967); and a standard of at least negligence to private figures, *Gertz v. Welch*, 418 U.S. 323 (1974).

## Telegraph

In a series of *Peterson v. Western Union Telegraph Co.* cases, the telegraph company fought hard to avoid liability for transmission of a defamatory message. The lawsuit resulted in four trials and three separate appeals to the Minnesota Supreme Court.<sup>6</sup> State Senator Samuel Peterson sued over a message sent to him that read: “Slippery Sam, your name is pants. [Signed] Many Republicans.”<sup>7</sup> The first time the state supreme court heard the case, in 1896, it held the message was susceptible of a defamatory meaning because the word slippery “means, when so used, that the person to whom it is applied cannot be depended on or trusted; that he is dishonest, and apt to play one false. . . . To falsely publish of a man that he is slippery tends to render him odious and contemptible.”<sup>8</sup>

The court also held that publication had occurred when the telegraph operator in New Ulm, Minn., transmitted the message to the operator in St. Paul for delivery to Sen. Peterson. The court acknowledged, without discussion, that Western Union “was a common carrier, and was bound to transmit all proper messages delivered to it.” But the court went on to say that a telegraph company “was not bound to send indecent or libelous communications.”<sup>9</sup>

Where a proffered message is not manifestly a libel, or susceptible of a libelous meaning, on its face, and is forwarded in good faith by the operator, the defendant cannot be held to have maliciously published a libel, although the message subsequently proves to be such in fact. In such a case the operator cannot wait to consult a lawyer, or forward the message to the principal office for instructions. He must decide promptly, and forward the message without delay, if it is a proper one, and for any honest error of judgment in the premises the telegraph company cannot be held responsible. But where the message, on its face, is clearly susceptible of a libelous meaning, is not signed by any responsible person, and there is no reason to believe that it is a cipher message, and

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<sup>6</sup> 77 N.W. 985, 985 (Minn. 1899).

<sup>7</sup> *Peterson v. W. Union Tel. Co.*, 67 N.W. 646, 647 (Minn. 1896).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

it is forwarded under such circumstances as to warrant the jury in finding that the operator, in sending the message, was negligent or wanting in good faith in the premises, the company may be held to have maliciously published the libel.<sup>10</sup>

The court, however, sent the case back for a new trial because the \$5,200 in damages awarded by the jury were excessive in light of the fact that the only publication that occurred was to a Western Union agent in St. Paul.<sup>11</sup>

The second time the case reached the state supreme court was discussed in Chapter 2. In that opinion the court held that the message constituted libel, not slander, in spite of the sound technologies used to transmit the message.<sup>12</sup> Once again, though, the supreme court remanded the case for a new trial, this time because the jury had awarded punitive damages based on faulty instructions.<sup>13</sup> The third time the case reached the Minnesota Supreme Court, Western Union tried to escape liability by claiming it was not legally responsible for the act of its New Ulm agent, G.R. McHale. Applying standard agency law, the court dismissed this claim, saying, “[W]hen the master substitutes an agent or servant in his own place, and clothes him with power to act for the master's benefit in serving the public, he is not permitted to shelter himself behind the plea of nonliability for the act of the agent.”<sup>14</sup> Once again, though, the court found the damage award excessive—this time \$2,000—in light of the limited publication of the libel and ordered another new trial unless Peterson agreed to accept an award of \$1,000.<sup>15</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 74 N.W. 1022, 1022 (Minn. 1898).

<sup>13</sup> *Id.* at 1023.

<sup>14</sup> 77 N.W. at 987.

<sup>15</sup> *Id.*

Through a long and convoluted history, then, the Minnesota Supreme Court held that even though a telegraph company was a common carrier, it was only required to carry “proper messages” and could be held legally liable for transmitting a message that was defamatory on its face. Such conduct constituted negligence, and as most early courts did, the Minnesota court equated negligence with the malice necessary to find a common carrier, or distributor, liable for third-party-created content.

In 1900, in *Nye v. Western Union Telegraph Co.*, a federal district court in Minnesota followed the same pattern, describing the telegraph as a common carrier required to transmit messages as a public service and, therefore, liable only for transmitting messages that were “obscene, profane, or clearly libelous.”<sup>16</sup> In this case, though, the court concluded that there was “nothing in the language of this message likely to cause the receiving clerk to infer that the purpose was to defame the plaintiff, to whom the message was sent.”<sup>17</sup> In *Nye*, two telegrams were sent from W.H. Vanderburgh to M.H. Boutelle, an attorney who worked with Frank Nye, suggesting that Nye had been “bought.”<sup>18</sup> Nye alleged that the telegrams suggested that he had “been bribed to sell his vote and political influence for a money consideration in the year 1896, and as being corrupt and dishonest.”<sup>19</sup> Because the telegraph operator had not known Nye or any of the circumstances surrounding the telegram, Western Union was held not liable. The court described the role of the telegraph agent:

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<sup>16</sup> 104 F. 628, 630 (D.C. Minn. 1900).

<sup>17</sup> *Id.* at 631.

<sup>18</sup> *Id.* at 629. One telegram, which was similar in substance to the second, read: “Frank Nye: Judge Vanderburgh, who was elected district judge, Minneapolis, 1859, 1866, 1873, 1880, elected supreme judge 1881, 1886, stated distinctly in my presence that Charlie Pillsbury bought you up in 1896, otherwise you would have been for Bryan.” *Id.*

<sup>19</sup> *Id.*



Having no duty of censorship . . . if he acts in good faith, and the language of the message is such that a person of ordinary intelligence, knowing nothing of the parties or circumstances, would not necessarily conclude that defamation was the object and purpose of the message, it would be his duty to send it, and for his performance of that duty the telegraph company would incur no responsibility.<sup>20</sup>

The court said that imposing a stricter standard of liability on telegraph companies, requiring them to screen carefully for messages not libelous on their faces, would only cause difficulties, leading to “embarrassment and delays, and make necessary such annoying inquiries, as to greatly diminish the efficiency of the service.”<sup>21</sup>

Western Union again came under fire in 1906, when Cashman, the editor of the *Vicksburg Evening Post*, alleged that a telegram sent to him in response to an article he had run in his newspaper was defamatory. *Western Union Telegraph Co. v. Cashman*<sup>22</sup> presented a convoluted series of facts. Cashman ran a story reporting that W.V. Sullivan, an ex-senator, was prosecuting a civil case during which a witness pointed a gun at the defendant, a Miss Leeton, threatening to kill her; Miss Leeton alleged that the gun belonged to Sullivan.<sup>23</sup> Sullivan responded to the news story with the message: “Vicksburg Evening Post: Your article in issue of Thursday is a dirty lie as you know. Who is responsible? You nasty dog.

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<sup>20</sup> *Id.* at 631.

<sup>21</sup> *Id.*

<sup>22</sup> 149 F. 367 (5th Cir. 1906).

<sup>23</sup> *Id.* at 368. The article read:

A civil proceeding against Miss Leeton was being tried, and somewhat in contrast to his former attitude toward the woman, Ex-Senator was in the role of an attorney prosecuting the claim of a local drygoods firm for debt. Miss Leeton was represented by Hon. C. L. Silvey. The main point at issue was whether she was a nonresident, and therefore liable for the attachment. During the proceedings, one of the witnesses questioned the chastity of Miss Leeton, provoking some sulphurous [*sic*] language from her lips, and the witness drew a gun and threatened to kill her. Miss Leeton attempted to borrow the gun, evidently with the purpose of shooting her traducer, who had in the meantime been taken in charge by friends, and there was great excitement in the courtroom for several minutes, effectually breaking up the proceedings. Miss Leeton declared that the gun pointed at her by the witness belonged to Ex-Senator Sullivan, and of this she was positive, having kept the weapon for him for three years. *Id.*

Answer.”<sup>24</sup> Cashman proceeded to publish that telegram in his paper but then filed an action against Western Union for transmitting Sullivan’s “nasty dog” telegram, arguing that the company “did wickedly and maliciously write and publish and cause to be written and published of and concerning the plaintiff a false, scandalous, malicious, and defamatory libel.”<sup>25</sup> Judge Pardee, writing for the court, remarked that in filing an action against Western Union, Cashman sought to blame “the only innocent party in the matter.”<sup>26</sup>

The Fifth Circuit addressed several liability issues in *Cashman*, first of which was whether the copying and transmission of the telegram by various telegraph operators constituted republication. The court reasoned that the messages transmitted by the telegraph operators were copies of the original message and not separate publications:

The message as transmitted and received and written out in Memphis was not the original libelous message, but a copy of the same more or less exact. The same may be said of the message transmitted from Memphis to the agent at Vicksburg. That was a copy of a copy of Sullivan’s original message, therefore the message written out in Vicksburg, copied by the messenger boy and delivered to Cashman in a sealed envelope, was the only libelous message for which the telegraph company, if liable at all, is responsible.<sup>27</sup>

Having established that there was only one message for which Western Union might be liable as a republisher, the court then proceeded to address the extent to which the telegraph company was, in fact, liable.

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 369.

<sup>26</sup> *Id.* at 369-70. Commenting on both Sullivan’s telegram and Cashman’s subsequent publishing of it and comments upon it, Pardee wrote:

This seems to have ended the matter between the long distance belligerents, but not as to the telegraph company, whose agents Sullivan had made a tool of: for, on more deliberation, the defendant in error found that his feelings had been more wounded, because the telegraph company’s agents carried the message that Sullivan sent and which he himself had published in his newspaper. Hence this suit against the only innocent party in the matter. *Id.*

<sup>27</sup> *Id.* at 370-71.

The Fifth Circuit addressed whether the telegraph company should be treated as a common carrier. In line with *Peterson* and *Nye*, the court considered Western Union “a corporation engaged in the business of receiving and transmitting written messages for hire; and, like other common carriers, [it] is liable for the acts of its agents in conducting its business.”<sup>28</sup> The company could be liable, the court held, if its agents had acted with malice, failing to take “reasonable care, at least, not to injure others”<sup>29</sup> by transmitting material that was anonymous or libelous on its face. To prove malice, the court further explained, a plaintiff must demonstrate “that the defendant was governed by a bad motive, and that he did not act in good faith but took advantage of the occasion to injure the plaintiff in his character or standing.”<sup>30</sup> The court found that the telegraph company had not acted with malice.

[The message] was handled as a matter of routine by agents acting in the regular line of duty and business, who are shown to be bound to secrecy by the statutes of the state, and who are not shown to have had any knowledge of the parties or any particular knowledge of the contents of the message or any interest or improper motive, and from these circumstances it seems impossible to impute malice to the telegraph company.<sup>31</sup>

Absent proof of malice, Western Union was not liable for the transmission of the defamatory message. *Cashman* seemed to cement the role of telegraph companies as common carriers liable only if a plaintiff could prove an employee of the company had acted with malice in distributing a defamatory message.

The next significant development in liability for the transmission of defamatory messages via the telegraph was the creation of the “wire service defense” in the 1933 case *Layne v.*

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<sup>28</sup> *Id.* at 371.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 372.

<sup>31</sup> *Id.*

*Tribune*.<sup>32</sup> John H. Layne brought an action against the Tribune Company, publisher of *The Tampa Morning Tribune*, seeking damages for the publication of two press dispatches sent from Washington, D.C., that suggested Layne had violated national liquor laws during the Prohibition era.<sup>33</sup> The court considered the publication of a wire service article to be a “mere repetition” of the original publication.<sup>34</sup> While noting the harms that could arise from the wide distribution of an article, the court ruled that “the mere reproduction in a newspaper of outside press dispatches . . . suggests the application of no such strict rule of liability.”<sup>35</sup>

The Supreme Court of Florida chose to eliminate liability for newspapers that unknowingly printed defamatory content from reputable wire service providers. In a nod to the effects of technological developments on the news industry, the court said that, while courts are bound by *stare decisis*, “it does not follow . . . that the courts are wholly powerless to remold and reapply the ancient rules so as to fit them to modern conditions.”<sup>36</sup> The modern conditions described by the court included the demand for rapid dissemination of information.

No newspaper could afford to warrant the absolute authenticity of every item of its news, nor assume in advance the burden of specially verifying every item of news reported to it by established news gathering agencies, and continue to discharge with efficiency and promptness the demands of modern necessity for prompt publication, if publication is to be had at all.<sup>37</sup>

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<sup>32</sup> 146 So. 234 (Fla. 1933).

<sup>33</sup> *Id.* at 235-36. The first dispatch was sent by the Associated Press on June 30, 1930, and included the charge that Illinois Representative Dennison and his secretary were indicted after prohibition agents found alcohol in Dennison’s office. The second dispatch was sent by Universal Service on July 7, 1930, and identified Layne as Dennison’s secretary. *Id.*

<sup>34</sup> *Id.* at 237.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 239.

The wire service defense did not create an absolute immunity for newspapers, but it did limit liability by requiring proof of at least negligence on behalf of the publisher. The court held:

[A] declaration for libel predicated upon the alleged publication of a false news dispatch as to which neither the publisher, nor his agents, may be regarded as the author, must show either wantonness, recklessness, or carelessness in its publication, or be counted upon as a libel per quod, in order to set up a good cause of action.<sup>38</sup>

The creation of the wire service defense serves as an example of a court's attempt to adapt defamation law to the conditions created by advances in mass communications technologies.

Telegraph companies were once again treated as common carriers in *O'Brien v. Western Union Telegraph Company*.<sup>39</sup> A telegram was sent to Father Charles Coughlin disparaging the character of Thomas C. O'Brien, whom Coughlin had advised to run for the offices of U.S. senator from Massachusetts and vice president of the United States.<sup>40</sup> The First Circuit noted that the message was defamatory on its face and addressed the question of whether the telegraph company was privileged to send the message.<sup>41</sup> The court held that the telegraph company acted as a common carrier and that, because the company's agents had not known they were transmitting libelous content, the company was not liable for the transmission of the message.<sup>42</sup>

In concluding that the company was not liable, the court noted that the immunity for telegraph companies for the transmission of defamatory messages "must be broad enough to

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<sup>38</sup> *Id.*

<sup>39</sup> 113 F.2d 539 (1st Cir. 1940).

<sup>40</sup> *Id.* at 540. The telegram was purportedly sent by Robert Robinson. The court noted, "The purported interest of the sender of the message was that [as] a prominent and lifelong member of the Democratic Party he feared the adverse effect which the candidacy of Mr. O'Brien might have upon the success of the Democratic ticket." *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 541.

enable the company to render its public service efficiently and with dispatch.”<sup>43</sup> Furthermore, the court said, such immunity benefited the public:

If the telegraph companies are to handle such a volume of business expeditiously, it is obvious that their agents cannot spend much time pondering the contents of the messages with a view to determining whether they bear a defamatory meaning, and if so, whether the sender might nevertheless be privileged. The effect of putting such a burden upon the telegraph companies could only result in delayed transmission of, and in some cases refusal to transmit, messages which the courts after protracted litigation might ultimate determine to have been properly offered for transmission and which the sender was entitled to have dispatched promptly even though defamatory matter was contained therein.<sup>44</sup>

Therefore, as other courts had held before, the First Circuit held that unless the company’s agent knew the message was defamatory or acted in bad faith, telegraph companies, as common carriers, could not be held liable for the transmission of defamatory messages.<sup>45</sup>

In summary, then, cases involving liability for defamatory messages transmitted via telegraph have reflected consistent treatment of telegraph companies as common carriers. As carriers required to transmit messages and unable to censor or edit them, telegraph companies could be held liable only if an agent acted with malice in transmitting the message.<sup>46</sup> As such, telegraph companies were essentially liable as distributors. Finally, the creation of the

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<sup>43</sup> *Id.* For telegraph companies, the court said, “Speed is the essence of the service.” *Id.*

<sup>44</sup> *Id.* at 542.

<sup>45</sup> *Id.* at 543.

Our conclusion is that if the telegraph company is ever to be held liable for the routine transmission of a defamatory message, it could only be in the necessarily rare cases where the transmitting agent of the telegraph company happened to know that the message was spurious or that the sender was acting, not in the protection of any legitimate interest, but in bad faith and for the purpose of traducing another. *Id.*

<sup>46</sup> *W. Union Tel. Co. v. Cashman*, 149 F. 367 (5th Cir. 1906); *Nye v. W. Union Tel. Co.*, 104 F. 628 (D.C. Minn. 1900); *Peterson v. W. Union Tel. Co.*, 74 N.W. 1022 (Minn. 1898). *See also* *W. Union Tel. Co. v. Lesesne*, 83 F. Supp. 918 (E.D.S.C. 1948) (holding that a public utility whose duty it is to transmit messages for the public is privileged to send messages unless the agents who transmit the message should know or have reason to know he content is defamatory); *Mason v. W. Union Tel. Co.*, 125 Cal. Rptr. 3d 53 (Cal. Ct. App. 1975) (holding that Western Union was not liable to a defamed person for the transmission of a defamatory telegram).

“wire service defense” reflected the impact of telegraph technology on newspapers through the growing reliance on wire service stories.<sup>47</sup> These developments reflected efforts on the part of the courts to allow telegraph companies to function optimally without the fear of liability interfering with the public service they provided.

## Radio

*Sorenson v. Wood* was a case in which deciding the libel/slander question served as a precursor to the question of liability for Richard Wood, who uttered the defamatory comments, and KFAB Broadcasting Company, which owned and operated the station that broadcast them.<sup>48</sup> Sorenson, as previously discussed, was up for reelection as Nebraska attorney general; Wood, a candidate for railway commissioner, broadcast his defamatory statements on the eve of the primary election, disparaging Sorenson’s character. During his broadcast, Wood also promoted the candidacy of W.M. Stebbins for the U.S. Senate. KFAB claimed that, prior to the broadcast, it had not seen a script of the broadcast but knew only that Wood intended to speak on Stebbins’ behalf.<sup>49</sup>

In the 1932 case before the Nebraska Supreme Court, KFAB argued in its defense that, like a telegraph company, it was “a common carrier of intelligence by wire and wireless under the Interstate Commerce Act (49 U.S.C.A. § 1 et seq.), duly licensed and subject to the regulation of the federal radio commission.”<sup>50</sup> As such, it was also subject to Order No. 31 of the Federal Radio Commission, which provided that “in broadcasting material for candidates

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<sup>47</sup> *Layne v. Tribune*, 146 So. 234 (Fla. 1933).

<sup>48</sup> 243 N.W. 82 (Neb. 1932).

<sup>49</sup> *Id.* at 84.

<sup>50</sup> *Id.*

for public office, ‘such licensee shall have no power for censorship over the material,’ and that equal opportunities must be afforded legally qualified candidates for any public office in the use of such broadcasting station.”<sup>51</sup> KFAB argued that it was required to allow Wood, as a candidate himself endorsing a candidate, to broadcast his speech and was unable to censor the content. The court held, however, that radio stations were not common carriers<sup>52</sup> and that, furthermore, while broadcast stations could not censor political ideas, they still were obligated to block the publication of libelous statements.<sup>53</sup>

The court also addressed the standard of liability that should be applied to KFAB, holding that the instructions given to the jury during the trial erroneously asked them to consider whether the radio station had acted negligently. “[T]hey were told in effect that, if the station owner honestly and in good faith exercised due care, he is absolved from liability for transmitting unprivileged defamatory words uttered by a speaker.”<sup>54</sup> Instead, the court held, “[t]he underlying basis for liability is libel, and not negligent conduct,”<sup>55</sup> applying a standard of strict liability to KFAB’s actions. KFAB had failed, the court found, to stop the defamation as it occurred:

It was shown that, while defendant company did not require and did not have a copy of the speech in advance of the utterance, yet its employees in charge of its station did not use or attempt to use means to stop or shut off the speech, though that could have been done instantly by mechanism which was a part of the equipment.<sup>56</sup>

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<sup>51</sup> *Id.* The court also cited section 18 of the Radio Act of 1927 (47 U.S.C.A. § 98) as providing that broadcast stations could not censor political candidates. *Id.* at 85.

<sup>52</sup> *Id.* at 86.

<sup>53</sup> *Id.* at 85. “The federal radio act confers no privilege to broadcasting stations to publish defamatory utterances.” *Id.* The U.S. Supreme Court ruled otherwise in 1959 in a decision that will be discussed later in this chapter.

<sup>54</sup> *Id.* at 86.

<sup>55</sup> *Id.* at 85.

<sup>56</sup> *Id.* The case was reversed and remanded for a new trial.



The Nebraska Supreme Court, therefore, held that a broadcasting station was strictly liable as the publisher of a defamatory message, even if the original publisher was not an agent or employee of the station. *Sorenson* raised several issues that would be tested again in the courts, including the issue of the liability of broadcast stations for defamatory statements uttered by political candidates that the stations were required to broadcast but unable to censor. The standard of strict liability—treating broadcast stations as publishers with no fault requirement—applied to KFAB would also be tested in later cases.

A year later, the Supreme Court of Washington considered whether a broadcasting station could be held liable for defamatory comments in a paid advertisement in *Miles v. Louis Wasmer, Inc.*<sup>57</sup> Louis Wasmer, Inc. owned and operated radio station KHQ, where Charles Lantry was employed as an announcer. William Castner ran a Spokane newspaper called *Public Opinion*, which was dedicated to anti-Prohibition causes. Castner purchased airtime on KHQ to advertise *Public Opinion* and submitted a manuscript to Lantry, whom Castner employed for the broadcast. Lantry was to edit and correct as necessary before broadcasting the manuscript. The allegedly defamatory accusation was: “The Spokane sheriff’s office recently auctioned off its stock of confiscated stills, home brewing equipment and moonshiners accessories to the highest bidders.”<sup>58</sup> The court found the allegation to be both false and defamatory.

The court considered whether Louis Wasmer, Inc., could be held liable for defamatory content written by an advertiser who purchased the air time to broadcast the content, which

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<sup>57</sup> 20 P.2d 847 (Wash. 1933).

<sup>58</sup> *Id.* at 848.

was edited and read by one of the station's own employees.<sup>59</sup> The court held that Castner was liable as a publisher for preparing the article, paying for the time to broadcast it, and employing Lantry to read it. Lantry was liable as a publisher for both speaking the words over the air and for editing the article before it was read.<sup>60</sup>

As to the appellant Louis Wasmer, Inc., it seems to us that there is a close analogy between the words spoken over a broadcasting station and libelous words contained in a paid advertisement in a newspaper. The owner of the station furnished the means by which the defamatory words could be spoken to thousands of people. It operated the station for profit and received compensation for the time that it was being used.<sup>61</sup>

Likening the role of the broadcast station to that of a newspaper, the court held that Louis Wasmer, Inc., was liable for a publication of the defamation.<sup>62</sup> The court, therefore, followed *Sorenson's* lead by holding a radio station liable for defamatory comments broadcast by the station.

In 1934, a U.S. district court in Missouri addressed another case of defamation via radio, *Coffey v. Midland Broadcasting Co.*<sup>63</sup> Midland Broadcasting Company, a Missouri company that owned and operated station KMBC in Kansas City, Mo., had carried an allegedly

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<sup>59</sup> The broadcast clearly stated that it was an advertisement:

This talk, facts on prohibition, is broadcast every Saturday evening at 7:30 over Station K.H.Q. Spokane, Washington by Public Opinion, a monthly publication devoted entirely to the great American issue—Prohibition—Public Opinion gives you the facts. Public Opinion will be very glad to mail you a sample copy without obligation on your part, if you are interested in knowing the truth. *Id.*

<sup>60</sup> The court did not itself use the term “publisher” for Castner or Lantry. The exact language used was:

There can be no question about the individual liability of Castner who prepared the article, paid for the time over the broadcasting station, and employed Lantry to read it. Lantry likewise would be liable because he not only spoke the words over the station, but assisted in editing the article which was thus read. *Id.*

<sup>61</sup> *Id.* at 849.

<sup>62</sup> *Id.* at 850.

The fundamental principles of the law involved in publication by a newspaper and by a radio station seem to be alike. There is no legal reason why one should be favored over another nor why a broadcasting station should be granted special favors as against one who may be a victim of a libelous publication. *Id.*

<sup>63</sup> 8 F. Supp. 889 (W.D. Mo. 1934).

defamatory broadcast from Remington Rand, Inc., transmitted by Columbia Broadcasting Company from a station in New York City.<sup>64</sup> A statement in the broadcast accused Robert Coffey of being an ex-convict who had served time for his crimes. Judge Otis described the transmission:

[T]he program came to KMBC and through its instruments directly went out upon the air. The instruments of KMBC were in charge of and being operated by the employees of the Midland Company, but they had no knowledge that any defamatory words would be included in the program and no means whatever of interrupting them after they began to be spoken.<sup>65</sup>

Nonetheless, the court applied a strict liability standard, saying that, even “a complete absence of the slightest negligence on the part of the owner of the station” did not absolve the owner of liability as the publisher of the defamation.<sup>66</sup> Furthermore, Otis said, regardless of whether the defamation was broadcast from the station itself or transmitted from another station, “The mere matter of distance . . . from the broadcasting instrumentality when he speaks into it certainly cannot affect the liability of the owner of the station.”<sup>67</sup>

In the opinion, the court compared radio broadcasting and other forms of publication. Comparing a radio station to a newspaper, Otis wrote, “The latter prints the libel on paper

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<sup>64</sup> *Id.* at 889.

The defamatory words, probably requiring less than three seconds for utterance, were spoken into a receiving instrument in New York City by an employee of Remington Rand, Inc., a Delaware Corporation, as part of a radio program put out by that company through the facilities of the Columbia Broadcasting Company, a New York corporation. *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 890.

<sup>67</sup> *Id.* at 889-90.

I see no essential distinction between a situation in which the owner of a broadcasting station in Kansas City sells the privilege of speaking over the station for thirty minutes to X who, speaking in the local studio of the station, suddenly and unexpectedly offers a defamatory sentence concerning A and a situation in which the same station sells the same privilege to X, who, speaking in New York, projects his defamation by telephonic means into the identical broadcasting apparatus in the Kansas City station. *Id.* at 889.

and broadcasts it to the reading world. The owner of the radio station ‘prints’ the libel on a different medium just as widely or even more widely ‘read.’”<sup>68</sup> Absence of negligence did not relieve a newspaper, or radio station, of liability. Comparisons to telegraph companies were rejected. Although telegraph companies had been found not liable in the absence of negligence, Otis said that while a telegram is carried in a sealed envelope to an individual, a radio broadcast message is spread to the world.<sup>69</sup> *Coffey*, therefore, continued a trend of holding a broadcasting company to a standard of strict liability for a defamatory message it transmitted, regardless of where the message originated or the station’s ability to prevent dissemination of the message.

Four years later, in *Irwin v. Ashurst* the Supreme Court of Oregon applied the fair report privilege to a radio station’s coverage of a criminal proceeding.<sup>70</sup> Josephine Irwin, a witness for the state in a murder trial, was portrayed by the defendant’s attorney, David R. Vandenberg, as a drug addict who gave false testimony prepared by her husband, John Irwin, the prosecuting attorney.<sup>71</sup> Under the authority of the trial judge, Edward B. Ashurst, the

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 74 P.2d 1127 (Or. 1938).

<sup>71</sup> *Id.* at 1129.

During the argument of the defendant Vandenberg to the jury it is alleged that he made the following statement of and concerning the plaintiff, which was broadcast to the general public: “Did you watch her? Did you see how she acted? The mind of a dope fiend, she was full to it when she testified; she showed she was an addict; why, she’s a lunatic, she’s a crazy lunatic; she’s a dope fiend; how nervous she was all through her testimony; she’s a hop head; her whole testimony is imagination and delusion from taking dope; all through her testimony she showed it; that she testified she had taken dope for ten years, and you may well know that she is still taking it . . . that she is lower than a rattlesnake; that a rattlesnake gives you warning before it strikes, but this woman gives no warning . . . that all the testimony made regarding Marion Meyerle is only in her mind; that account of her being an addict, that I wouldn’t believe a word she said; that for this reason her testimony is out of the case. That her husband, Lawyer John (the husband of the plaintiff, John Irwin), knew what was necessary to convict one of the murder in the first degree, and that Lawyer John runs the bullets, and that she fired them; that Lawyer John fixed up the testimony and drilled her, and Mrs. Irwin swore to it.” *Id.*

proceedings were broadcast by KFJI Broadcasters. Writing for the Oregon Supreme Court, Justice Belt explained: “[I]f no cause of action exists against Vandenberg, it follows that the defendant broadcasting company and its manager are not liable. Otherwise stated, if the argument made by Vandenberg in a court proceeding was qualifiedly privileged, the publication thereof by the defendant broadcasting station would likewise be privileged.”<sup>72</sup> The liability of the broadcaster, therefore, depended on whether it transmitted privileged content.

Applying the fair report privilege, the court said: “In the instant case there was no comment by the radio company concerning the proceedings. All it did was to transmit to the public a true and accurate report of what was going on in the trial of the murder case.”<sup>73</sup> Irwin then had the burden of proving that the content was not privileged or, in other words, “that the alleged defamatory matter spoken of and concerning her was irrelevant and impertinent to the issues in the murder case, and that it was uttered with express or actual malice.”<sup>74</sup> The court upheld the decision of the trial court jury that Vandenberg’s statements were privileged, which meant that KFJI could not be held liable because it simply transmitted privileged information from a criminal judicial proceeding.<sup>75</sup>

The Supreme Court of Pennsylvania decided an important case involving the liability of a radio station for defamation in *Summit Hotel Company v. National Broadcasting Company*.<sup>76</sup>

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<sup>72</sup> *Id.* at 1130.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1132. “The jury by its verdict in favor of the defendants must necessarily have found that what Vandenberg said was pertinent to the issues, or, assuming that it was not pertinent, that he was not actuated by express malice.” *Id.*

<sup>76</sup> 8 A.2d 302 (Pa. 1939).

In this case, NBC rented its facilities to a commercial advertising corporation. During the program, comedian Al Jolson, who had been hired by the advertiser, deviated from a script submitted to the radio station prior to the broadcast and called the Summit Hotel “a rotten hotel.”<sup>77</sup> Noting that “the law of defamation by radio is very much in its infancy,”<sup>78</sup> Chief Justice Kephart wrote for the court that the case involved an issue never before addressed in America or England:

The important question raised is whether a radio broadcasting company which leases its facilities is liable for an impromptu defamatory statement, interjected “ad lib” into a radio broadcast by a person, hired by the lessees, and not in the employ of the broadcasting company, the words being carried to the radio listeners by the facilities.<sup>79</sup>

The Summit Hotel filed an action for defamation to recover alleged damages to the hotel’s reputation and business, and the lower court had held that the radio station was liable even though it was without fault.<sup>80</sup> The Pennsylvania Supreme Court focused much of its analysis on determining the proper standard of liability that should apply and found that absolute liability without fault was an unnecessarily harsh standard for a broadcasting company that had leased its facilities.

The court undertook an extensive discussion of the imposition of liability without fault in Pennsylvania common law. Writing that the principle behind liability without fault was that

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<sup>77</sup> *Id.* at 303.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

The court below held that defendant’s liability was absolute though it was without any fault. The fact that it rented its facilities to another to publish and disseminate a nondefamatory program, and that the defamatory interjection was spoken by lessee’s employee under circumstances which precluded anticipation or prevention by the broadcaster, was treated as immaterial. *Id.*

“every wrong must have a remedy,”<sup>81</sup> the court noted the incongruity of applying liability without fault to tort law, which is based on intentional wrongful conduct.<sup>82</sup> The court explained:

[I]t may be stated that the doctrine of liability without fault has little or no place in torts involving injuries to the person, and its extension from the law of trespass to land has rarely been looked upon favorably in this State. In all of the exceptional cases there is a common ground of either antecedent negligence, or the assumption of a known risk of harm to others by intentional conduct.<sup>83</sup>

Because strict liability without fault was originally intended to redress injuries to land, therefore, it was not properly applied to personal injury.

The court held that, while a radio station could be held liable if one of its own employees or agents made a defamatory remark that was published with malice or was unprivileged, it could not be held liable for defamatory remarks broadcast by a lessee or one of the lessee’s agents, provided the station “exercised due care in the selection of the lessee, and, having inspected and edited the script, had no reason to believe an extemporaneous defamatory remark would be made.”<sup>84</sup> In its decision, the court noted that radio differed from newspapers in that broadcasting companies required licenses from the federal government that could be revoked if federal rules were violated. Therefore, there already was a check in place to prevent stations from intentionally broadcasting defamatory statements, the court concluded.<sup>85</sup>

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<sup>81</sup> *Id.* at 304.

<sup>82</sup> *Id.* “A tort today implies fault or wrong. Tort liability must be founded upon some blameworthy conduct, or lack of due care resulting in the violation of a duty owing to others.” *Id.*

<sup>83</sup> *Id.* at 306.

<sup>84</sup> *Id.* at 312.

<sup>85</sup> *Id.* at 311. “Radio defamations have been infrequent, and governmental regulation affords a check.” *Id.*

The New Jersey Supreme Court in 1948 considered whether a broadcasting station that aired a defamatory newspaper article published or simply distributed the content in *Kelly v. Hoffman*.<sup>86</sup> In this case, Arthur Hoffman, the managing editor of a newspaper owned by the Trentonian Publishing Company, wrote an editorial that accused Lloyd Kelly, deputy to the mayor, of political corruption. Hoffman alleged that Kelly was using underhanded tactics and threats to arrange for the police department to begin using Ford models instead of Chevrolet models for vehicles. Hoffman called Kelly's tactics an attempt at a "capricious switchover to makes of cars with which [the police] are not fully familiar."<sup>87</sup> The editorial was then broadcast over radio facilities owned and controlled by the Trent Broadcasting Corporation, which periodically leased the station to the newspaper for news broadcasts. Kelly filed an action for defamation against Hoffman, the Trentonian Publishing Company, and Trent Broadcasting Corporation.<sup>88</sup> During the first trial of the case, the trial judge had struck the complaint against Trent Broadcasting because the plaintiff failed to assert in his complaint that the broadcaster had acted without due care. That decision was reversed by the N.J. Court of Errors and Appeals, which said the wording of the complaint was sufficient to encompass the due care standard.<sup>89</sup>

The appellate court agreed that the radio station was liable as a distributor or disseminator:

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<sup>86</sup> 61 A.2d 143 (N.J. 1948).

<sup>87</sup> 74 A.2d 922, 924 (N.J. Super. L. 1950).

Police here have used Chevrolets for years. . . Yet ever since Kelly obtained a Ford Station Wagon from a local Ford dealer, and City officials had their pictures taken by the press in front of City Hall with it, Kelly has been pressuring authorities to change over to Fords. *Id.*

<sup>88</sup> For the purposes of this analysis, only those aspects of the case relating to the broadcast station will be discussed.

<sup>89</sup> 61 A.2d 143, 147 (N.J. 1948).



We elect to decide this case upon the broad duty of this defendant as a disseminator. The defendant-respondent as a radio broadcasting company which leased its facilities is not liable for a defamatory statement during a radio broadcast by the person hired by the lessees and not in the employ of the radio broadcasting company, the words being carried to the radio listeners by its facilities, if it could not have prevented publication by the exercise of reasonable care.<sup>90</sup>

In reaching its decision, the court noted that “[t]he rule or terminology of absolute liability may hamper the radio in the performance of a public service,” further explaining that it viewed determining the circumstances under which radio stations should be held strictly liable for defamatory content as an issue to be resolved by the legislature.<sup>91</sup>

Having decided that Trent Broadcasting could be liable as a distributor, the appeals court sent the case back to the trial court. During the second trial, the judge asked the jury to consider whether the company, “by reason of the proved activity of its representative in control of its facilities, in editing, revising and approving the proposed broadcast script, did not so aid and abet the publication as to become itself a publisher and responsible as such.”<sup>92</sup> The jury found that Trent Broadcasting Corporation was not liable as a publisher and that, as a disseminator, it had exercised reasonable care. The jury also ruled in favor of the other defendants, Hoffman and the Trentonian Publishing Co., and the plaintiff appealed to the Law Division of the N.J. Superior Court. That court upheld the verdict regarding the

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<sup>91</sup> *Id.* at 146. The court drew this conclusion in the context of comparing radio broadcasts to newspapers:

But there is obvious distinction between a newspaper libel and defamation by radio, especially where the defamation made is an interjected extemporaneous remark. The rules of law applicable to libel are based in the main on the permanence of the defamation. There are considerations which may warrant the extension of absolute liability to radio defamation, such as the size of the radio audience, the ineffectiveness of retraction. These are questions of social policy to be resolved in the legislative forum. The rule or terminology of absolute liability may hamper the radio in the performance of a public service; on the other hand the power of the radio may be abused. The balancing of the benefits and advantage and the evils arising from the abuse of the power are questions for the Legislature. *Id.*

<sup>92</sup> 74 A.2d at 925.

broadcast station, denying Kelly a new trial on that issue.<sup>93</sup> In *Kelly*, then, the courts held that a broadcasting corporation could be deemed a disseminator if it leased its facilities to another news outlet and, as a disseminator, was not liable unless it failed to exercise reasonable care.

The radio cases reveal that the courts grappled with how to handle the liability of a radio station that had leased its facilities. Initially, radio stations were held to be absolutely liable as publishers for defamatory content spoken by someone other than an employee or agent of the station, regardless of whether they were required to transmit it, had prior knowledge, or were able to stop the transmission of the message as it occurred.<sup>94</sup> Later cases began to reflect an easing up on the broadcast stations. In one case, the court applied the fair report privilege to a radio station that broadcast court proceedings, holding that the radio station was not liable for the defamatory content in the proceeding.<sup>95</sup> In the last two cases, *Summit Hotel* and *Kelly*, the courts abandoned the strict liability standard and held that as mere disseminators or distributors of the statements of others, stations would not be liable if they exercised reasonable care.<sup>96</sup> This, in essence, was the same distributor liability standard courts were applying to telegraph companies at the turn of the century.

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<sup>93</sup> *Id.* at 927. The court held that the jury had erred in denying Kelly compensatory damages:

I determine that the verdict of the jury, as it concerned the denial of compensatory damages to the plaintiff against the defendants, Trentonian and Hoffman, was so contrary to the weight of the evidence as to indicate its basis as mistake, passion or prejudice and, therefore, that a new trial as to such issue should be granted. As to so much of the verdict as relieved the Trent Broadcasting Corporation of liability, and as acquitted all defendants of responsibility for punitive or exemplary damages, I find that the same was amply supported by the evidence and a new trial as to such issues is denied. *Id.*

<sup>94</sup> *Sorenson v. Wood*, 243 N.W. 82 (Neb. 1932); *Miles v. Louis Wasmer, Inc.*, 20 P.2d 847 (Wash. 1933); *Coffey v. Midland Broad. Co.*, 8 F. Supp. 889 (W.D. Mo. 1934).

<sup>95</sup> *Irwin v. Ashurst*, 74 P.2d 1127 (Or. 1938).

<sup>96</sup> *Summit Hotel Co. v. Nat'l Broad. Co.*, 8 A.2d 302 (Pa. 1939); *Kelly v. Hoffman*, 74 A.2d 922 (N.J. Super. Ct. 1950).

## Television

The only United States Supreme Court case to directly address the liability of a broadcast station for transmission of defamatory content was decided in 1959. In *Farmers Educational & Cooperative Union of America, North Dakota Division, v. WDAY, Inc.*,<sup>97</sup> the Court addressed whether a broadcast station could be held liable for a defamation contained in content it was required to transmit. The issue at stake was “whether § 315 of the Federal Communications Act of 1934 barred a broadcasting station from removing defamatory statements contained in speeches broadcast by legally qualified candidates for public office, and if so, whether that section granted the station a federal immunity from liability for libelous statements so broadcast.”<sup>98</sup> Section 315 requires stations to provide equal speech opportunities for political candidates for public office and prohibits stations from censoring the material broadcast.<sup>99</sup>

WDAY operated radio and television station facilities in North Dakota and had allowed candidates for the U.S. Senate to speak on its programs. During the course of a broadcast, candidate A. C. Townley uttered allegedly defamatory remarks, which WDAY did not feel it could censor under the strictures of section 315: “Townley’s speech, in substance, accused his opponents, together with petitioner, Farmers Educational and Cooperative Union of

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<sup>97</sup> 360 U.S. 525 (1959).

<sup>98</sup> *Id.* at 526.

<sup>99</sup> Section 315 provides:

- (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.

47 U.S.C. § 315(a) (2002).

America, of conspiring to ‘establish a Communist Farmers Union Soviet right here in North Dakota.’”<sup>100</sup> A North Dakota state district court heard the libel suit against WDAY and Townley and held that section 315 provided immunity for the broadcast station for the alleged defamation,<sup>101</sup> a decision affirmed by the North Dakota Supreme Court.<sup>102</sup> Justice Black delivered the majority opinion of the U.S. Supreme Court in the 5-4 decision.

The majority and dissenting opinions indicate that the justices debated whether to provide broadcasters immunity for speech under section 315 or whether the issue should remain in state courts.<sup>103</sup> Justice Black argued that stations should not be responsible for censoring political candidates’ speech: “[I]t is obvious that permitting a broadcasting station to censor allegedly libelous remarks would undermine the basic purpose for which section 315 was passed—full and unrestricted discussion of political issues by legally qualified candidates.”<sup>104</sup> If stations were obligated to censor candidates’ speech, Justice Black cited the difficulties a broadcasting station would face in determining what statements were defamatory.<sup>105</sup> Such uncertainty could lead broadcast stations to needlessly censor speech or even prevent them from carrying any political speech; furthermore, it might allow stations to

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<sup>100</sup> 306 U.S. at 526-27.

<sup>101</sup> *Id.* at 527.

<sup>102</sup> 89 N.W.2d 102 (N.D. 1958).

<sup>103</sup> Justice Frankfurter wrote the dissent, in which he argued, [D]ue regard for the principle of separation of powers limiting this Court’s functions and respect for the binding principle of federalism, leaving to the States authority not withdrawn by the Constitution or absorbed by the Congress, are more compelling considerations than avoidance of a hardship legally imposed. 306 U.S. at 536.

<sup>104</sup> *Id.* at 529.

<sup>105</sup> *Id.* at 530.

The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, consideration of various legal defenses such as ‘truth’ and the privilege of fair comment. *Id.*

inhibit a candidate's platform by intentionally blocking out portions of it under the guise of censoring for defamatory content.<sup>106</sup>

The Court held that broadcast stations must have immunity for libelous statements made by political candidates under section 315:

Petitioner alternatively argues that section 315 does not grant a station immunity from liability for defamatory statements made during a political broadcast even though the section prohibits the station from censoring allegedly libelous matter. Again, we cannot agree. For under this interpretation, unless a licensee refuses to permit any candidate to talk at all, the section would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee.<sup>107</sup>

In spite of the petitioner's arguments that broadcast stations could sufficiently protect themselves from liability through insurance, the Court feared that, without immunity, broadcast stations might deny access to all candidates: "While denying all candidates use of stations would protect broadcasters from liability, it would also effectively withdraw political discussion from the air. Instead the thrust of section 315 is to facilitate political debate over radio and television."<sup>108</sup> Therefore, *Farmers* established the precedent that broadcast stations are immune from defamation actions that arise from political candidate speech that the stations were required to transmit but unable to censor under the Communications Act of 1934. Like the CDA, this federal immunity supersedes state common law.

In response to a different question, as discussed previously, a Georgia appellate court established the category "defamacast" to describe transmission of defamation via television, which the court said possessed elements of both libel and slander, in *American Broadcasting-*

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 531.

<sup>108</sup> *Id.* at 534.

*Paramount Theatres, Inc. v. Simpson*.<sup>109</sup> While the court did not reach a decision whether the broadcast station should be held liable as a publisher, republisher, or distributor, it did not have to—the case reflects an instance in which a state law had already established the standard of liability to be applied to broadcast stations disseminating third-party content. The Georgia statute in question read:

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as part of a visual or sound radio broadcast, by one other than such owner, licensee, or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.<sup>110</sup>

The court found that the language of the statute extended to television and that the station had failed to exercise due care to prevent the transmission of defamation contained in a fictional television program.<sup>111</sup> Although the court used the term “secondary publisher” to refer to the broadcaster transmitting non-employee speech, the Georgia statute codified the distributor liability standard used by the *Summit Hotel* and *Kelly* courts in earlier radio cases.<sup>112</sup>

While few cases were found that addressed television station liability for the transmission of defamatory content, some observations may be made. First, the United States Supreme Court established a definitive precedent for the courts to follow in *Farmers Educational &*

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<sup>109</sup> 126 S.E.2d 873 (Ga. Ct. App. 1962).

<sup>110</sup> *Id.* at 877 (citing Code § 105-712, Ga.L.1949, p.1137).

<sup>111</sup> *Id.* “Although there are no decided cases in Georgia applying this provision, we think that the language ‘visual or sound radio broadcasting station’ is sufficiently broad to encompass television stations and their broadcasts. We find failure to exercise due care is sufficiently alleged.” *Id.*

<sup>112</sup> *Id.* “The legislation apparently makes at least the broadcaster’s liability comparable with that of a ‘secondary publisher’ in printed libel.”

*Cooperative Union of America, North Dakota Division, v. WDAY, Inc.*<sup>113</sup> The Court held that stations could not be held liable for defamatory content in political candidate speech that they were required to carry but unable to censor under section 315 of the Communications Act of 1934. *American Broadcasting-Paramount Theatres, Inc. v. Simpson* also suggests that some states had begun to address broadcast defamation by statute.<sup>114</sup> As the Internet cases reveal, statutory law dictates the approach courts must take in applying defamation law to a new technological medium.

### Internet

Before undertaking a review of the Internet cases, it is important to review the language of the Communications Decency Act.<sup>115</sup> While most of the Act was struck down in *Reno v. ACLU*,<sup>116</sup> the portion that remained, section 230, has played an integral role in courts' approach to liability for third-party defamation on the Internet. The language of the statute reads:

(1) Treatment of publisher or speaker. No 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.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.<sup>117</sup>

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<sup>113</sup> 360 U.S. 525 (1959).

<sup>114</sup> 126 S.E.2d 873 (Ga. Ct. App. 1962). Examples of state statutes are addressed in the concluding section of this chapter.

<sup>115</sup> Communications Decency Act of 1996, 47 U.S.C. § 230(c) (2004).

<sup>116</sup> 521 U.S. 844 (1997).

<sup>117</sup> 47 U.S.C. § 230(c).

The term “interactive computer service” was defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”<sup>118</sup> An “information content provider” was defined 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.”<sup>119</sup> Therefore, no *provider or user* can be treated as a publisher of information provided by another or third-party *information content provider*. For the Internet, this has meant that providers or users who re-post content from third-party content providers are immune from liability, even if the content is false and defamatory. The CDA was passed in reaction to two early Internet cases.

An Internet Service Provider was treated as a distributor in the earlier Internet case, *Cubby, Inc., v. CompuServe, Inc.*, decided in 1991.<sup>120</sup> As a service to its subscribers, CompuServe offered CompuServe Information Service (CIS), an online information source or “electronic library” that also provided access to special interest forums.<sup>121</sup> One such forum, the Journalism Forum, was operated and maintained by Cameron Communications, Inc. (CCI).<sup>122</sup> Don Fitzpatrick and his company, Don Fitzpatrick Associates of San Francisco, contracted with CCI to provide the content for Rumorville USA, which appeared in the Journalism Forum. The libel action arose when, in response to attempts by plaintiffs Cubby,

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<sup>118</sup> *Id.* § 230(f)(2).

<sup>119</sup> *Id.* § 230(f)(3).

<sup>120</sup> 766 F. Supp. 135 (S.D.N.Y. 1991).

<sup>121</sup> *Id.* at 137.

<sup>122</sup> *Id.* “Cameron Communications, Inc. (‘CCI’), which is independent of CompuServe, has contracted to ‘manage, review, create, delete, edit and otherwise control the contents’ of the Journalism Forum ‘in accordance with editorial and technical standards and conventions of style as established by CompuServe.’” *Id.*



Inc., and Robert Blanchard to start a competitive newsletter, Skuttlebut, Fitzpatrick published allegedly libelous statements: “The allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville ‘through some back door’; a statement that Blanchard was ‘bounced’ from his previous employer, WABC; and a description of Skuttlebut as a ‘new start-up scam.’”<sup>123</sup> In spite of the fact that CompuServe had no editorial control over the content, the plaintiffs charged that the ISP was liable for carrying the messages.

The U.S. District Court for the Southern District of New York held that CompuServe had acted as a distributor and, furthermore, that it had no knowledge of or control over the posted content. Referring to the ISP as “an electric, for-profit library,”<sup>124</sup> the court noted that CompuServe could not be expected to screen every publication:

While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication’s contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.<sup>125</sup>

In the interest of the First Amendment, CompuServe could be liable only if it knew or had reason to know of the allegedly defamatory content.<sup>126</sup>

Four years later, in 1995, Prodigy Services Company was held liable as a publisher of statements made on its *Money Talk* computer bulletin board in *Stratton Oakmont, Inc., v. Prodigy Services Co.*<sup>127</sup> Prodigy operated a series of Internet bulletin boards that were

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<sup>123</sup> *Id.* at 138.

<sup>124</sup> *Id.* at 140.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* 140-41.

<sup>127</sup> No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at \*1 (N.Y. Sup. Ct. 1995).

managed through content guidelines that encouraged appropriate postings, board leaders who were meant to enforce the guidelines and had the ability to delete postings, and a software screening program that detected offensive language.<sup>128</sup> The court described *Money Talk* as “allegedly the leading and most widely read financial computer bulletin board in the United States, where members can post statements regarding stocks, investments, and other financial matters.”<sup>129</sup> In October 1994, defamatory statements were posted by a user on the *Money Talk* bulletin board that alleged fraud and criminal activity on the part of plaintiffs Stratton Oakmont, Inc., and Daniel Porush.<sup>130</sup>

The plaintiffs claimed that Prodigy was liable as a publisher, rather than a distributor, because the company advertised itself as exercising editorial control over its content and had mechanisms in place to do so.

Plaintiffs base their claim that Prodigy is a publisher in large measure on Prodigy’s stated policy, starting in 1990, that it was a family oriented computer network . . . and held itself out as an online service that exercised editorial control over the content of the messages posted on its computer bulletin boards.<sup>131</sup>

The plaintiffs alleged this policy differentiated Prodigy from CompuServe and made Prodigy liable in the same way that a newspaper would be. The court agreed.

The key distinction between CompuServe and Prodigy is two fold. First, Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, Prodigy implemented this control through its automatic

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<sup>128</sup> 1995 N.Y. Misc. at \*5-6.

<sup>129</sup> *Id.* at \*3.

<sup>130</sup> *Id.* at \*1-2.

These statements included the following: (a) Stratton Oakmont, Inc., a securities investment banking firm, and Daniel Porush, Stratton’s president, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.; (b) the Solomon-Page offering was a “major criminal fraud” and “100% criminal fraud”; (c) Porush was “soon to be proven criminal”; and, (d) Stratton was a “cult of brokers who either lie for a living or get fired.” *Id.*

<sup>131</sup> *Id.* at \*3.

software screening program, and the Guidelines which Board Leaders are required to enforce.<sup>132</sup>

The court held that Prodigy's choice to market itself as screening its bulletin board content made it more accountable for the content that was posted and found that the ISP had acted—and was liable—as a publisher.

The conflicting results from these two cases provided an area of law that needed clarifying: When could Internet Service Providers and users be considered publishers or distributors? The irony was that an ISP that did not edit or filter content would not have to worry about liability for content on its network, whereas a network like Prodigy that made an effort to screen obscene or offensive material opened itself to liability for content that it did not catch. As discussed previously, the CDA addressed the question by absolving ISPs and users of liability for third-party content in an attempt to encourage ISPs and users to filter content without fear of liability. Courts in post-CDA cases are bound to follow federal statutory law as a matter of federal supremacy, so lower federal courts and state courts routinely conclude that neither ISPs nor users are liable for posting third-party defamatory content.<sup>133</sup>

While the CDA clearly immunizes publishers, the Fourth Circuit Court of Appeals ruled the immunity provided by section 230 extended to distributors in *Zeran v. America Online, Inc.*<sup>134</sup> Kenneth Zeran was the target of an anonymous prankster who posted on AOL

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<sup>132</sup> *Id.* at \*10.

<sup>133</sup> *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (holding that even publishers or those with editorial control over content are immune from liability under Section 230); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.C. Cir. 1998) (holding that an ISP could not be liable for making a gossip column available to its subscribers); *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997) (holding that AOL was not liable for failing to remove defamatory content even after being notified of its presence).

<sup>134</sup> 129 F.3d 327 (4th Cir. 1997).

advertisements for offensive T-Shirts about the Oklahoma City bombing starting one week after the bombing occurred.

On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising “Naughty Oklahoma T-Shirts.” The posting described the sale of the shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call “Ken” at Zeran’s home phone number in Seattle, Washington.<sup>135</sup>

Zeran began to receive threatening and harassing phone calls after the message was posted; later that day, he contacted AOL, during which conversation an AOL representative said the content would be removed. However, the next day, another message advertising additional shirts was posted, again with Zeran’s phone number, leading to more harassing phone calls. The unknown person continued to post messages with different advertisements of the same nature over the next four days. Because Zeran used his home phone as his business phone number, he could not change it. Thus, he continued to receive threatening phone calls.<sup>136</sup>

“Kenneth Zeran brought this action against America Online, Inc. (‘AOL’), arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and refused to screen for similar postings thereafter.”<sup>137</sup>

The Fourth Circuit held that, under section 230, even if a computer service provider had acted as a distributor and failed to take down defamatory content after being given notice, it

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<sup>135</sup> *Id.* at 329.

<sup>136</sup> *Id.* “During this period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported the case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.” *Id.*

<sup>137</sup> *Id.* at 328.

was immune from liability for third-party defamatory postings on the Internet.<sup>138</sup> The court pointed out that distributor is just a subcategory of a publisher and, therefore, distributors were immune under the “publisher” language used in section 230.<sup>139</sup> The court refused to be swayed by Zeran’s argument that AOL should be liable for failing to take down the defamatory content in a timely manner.

Zeran simply attaches too much importance to the presence of the distinct notice element in distributor liability. The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher.<sup>140</sup>

In other words, rather than making a computer services provider liable, notifying such a company of the defamatory content forced that company into the role of publisher by requiring the service provider to determine whether to publish, edit, or remove the content—roles traditionally played by publishers. The court’s rationale rested in the First Amendment, as the court articulated the fear that denying computer service providers immunity could have a chilling effect if those companies chose to severely limit postings rather than potentially be held liable for their third-party content.<sup>141</sup> *Zeran*, therefore, played a key role in establishing that section 230 provided immunity to distributors as a category of publishers.

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<sup>138</sup> *Id.* at 332.

<sup>139</sup> *Id.* “[Zeran] argues that distributors are left unprotected by section 230 and, therefore, his suit should be permitted to proceed against AOL. We disagree. Assuming arguendo that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher, and is therefore also foreclosed by section 230.” *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 331.

Under section 230, AOL was once again granted immunity from liability for defamatory content that it carried but did not create in *Blumenthal v. Drudge*.<sup>142</sup> Matt Drudge wrote and published the *Drudge Report*, an electronic, Web-based gossip column focusing on happenings in Hollywood and Washington, D.C.<sup>143</sup> In 1997, Drudge contracted with AOL for one year to allow AOL to make his column available to its subscribers. In August 1997, Drudge published a report with allegedly defamatory statements about Sidney Blumenthal, newly recruited to serve as an assistant to President Clinton, and his wife, Jacqueline Jordan Blumenthal, who worked in the White House as director of the President's Commission On White House Fellowships. The content read: "The Drudge Report has learned that top GOP operatives who feel there is a double-standard of only reporting [R]epublican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up. The accusations are explosive."<sup>144</sup> After being notified by the couple's attorney, Drudge retracted the story through a special edition of the Drudge Report and e-mailed his subscribers, in addition to e-mailing the retraction to AOL, which posted the retraction on its service.<sup>145</sup>

At issue in this case was whether AOL could be held liable, and like the *Zeran* court, the U.S. district court held in 1998 that section 230 conferred immunity on AOL as a computer service provider: "AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried, and Congress has said quite clearly that such a provider shall not be treated as a 'publisher or speaker' and therefore may not be held liable

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<sup>142</sup> 992 F. Supp. 44 (D.D.C. 1998).

<sup>143</sup> *Id.* at 47.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 48.

in tort.”<sup>146</sup> The court noted the challenges posed by the new Internet medium<sup>147</sup> but emphasized the role that Congress had played in immunizing computer service providers: “Whether wisely or not, it made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.”<sup>148</sup> The *Drudge* case, therefore, reinforced the *Zeran* ruling. Of particular note in this case is that, in spite of the statutory input from Congress through the CDA, the court noted that the issue was far from settled. Justice Friedman wrote for the court, “Needless to say, the legal rules that will govern this new medium are just beginning to take shape.”<sup>149</sup>

The Ninth Circuit addressed the application of section 230 in *Batzel v. Smith*, decided in 2003.<sup>150</sup> Ellen Batzel, an attorney, had hired Robert Smith to work on her house. According to Smith, during the course of a conversation, Batzel revealed that she was “the granddaughter of one of Adolf Hitler's right-hand men.”<sup>151</sup> After hearing that some of the artwork in her house was inherited, Smith began to suspect that the paintings might be stolen.<sup>152</sup> Smith resorted to the Web to search for sites about stolen artwork, where he found

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<sup>146</sup> *Id.* at 50.

<sup>147</sup> *Id.* at 49.

This information revolution has also presented unprecedented challenges relating to rights of privacy and reputational rights of individuals, to the control of obscene or pornographic materials, and to competition among journalists and news organizations for instant news, rumors, and other information that is communicated so quickly that it is too often unchecked and unverified. *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> 333 F.3d 1018 (9th Cir. 2003).

<sup>151</sup> *Id.* at 1020-21.

<sup>152</sup> *Id.* at 1021.

Smith recounted that while he was repairing Batzel's truck, Batzel told him that she was “the granddaughter of one of Adolf Hitler's right-hand men.” Smith also maintained that as he was painting the

the Museum Security Network. He sent an e-mail to the Network—read by Ton Cremers, a museum director and sole operator of the Network—sharing his belief that the artwork had been looted and stolen during World War II.<sup>153</sup> Cremers posted Smith’s e-mail to the Network Web site and sent it to the group’s listserv, later adding a message that the FBI had been notified about the e-mail. Batzel discovered the message and filed a defamation action in response.<sup>154</sup>

Writing for the court, Justice Berzon wrote that the Network, managed by Cremers, was an interactive computer service and thus immune.<sup>155</sup> The question, however, entailed who, in this case, could be considered a content provider under section 230. Cremers edited the e-mail before he distributed it, but the court said that was insufficient to make him a provider: “Because Cremers did no more than select and make minor alterations to Smith’s e-mail,

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walls of Batzel's sitting room he overheard Batzel tell her roommate that she was related to Nazi politician Heinrich Himmler. According to Smith, Batzel told him on another occasion that some of the paintings hanging in her house were inherited. To Smith, these paintings looked old and European. *Id.*

<sup>153</sup> *Id.* The content of the e-mail read:

Subject: Stolen Art. Hi there, I am a building contractor in Asheville, North Carolina, USA. A month ago, I did a remodeling job for a woman, Ellen L. Batzel who bragged to me about being the grand daughter [sic] of “one of Adolph Hitler's right-hand men.” At the time, I was concentrating on performing my tasks, but upon reflection, I believe she said she was the descendant of Heinrich Himmler. Ellen Batzel has hundreds of older European paintings on her walls, all with heavy carved wooden frames. She told me she inherited them. I believe these paintings were looted during WWII and are the rightful legacy of the Jewish people. Her address is [omitted]. I also believe that the descendants of criminals should not be persecuted for the crimes of the [sic] fathers, nor should they benefit. I do not know who to contact about this, so I start with your organization. Please contact me via email [...] if you would like to discuss this matter. Bob. *Id.*

<sup>154</sup> *Id.* at 1022.

Batzel disputes Smith's account of their conversations. She says she is not, and never said she is, a descendant of a Nazi official, and that she did not inherit any art. Smith, she charges, defamed her not because he believed her artwork stolen but out of pique, because Batzel refused to show Hollywood contacts a screenplay he had written. *Id.*

<sup>155</sup> *Id.* at 1031.

There is no dispute that the Network uses interactive computer services to distribute its on-line mailing and to post the listserv on its website. Indeed, to make its website available and to mail out the listserv, the Network *must* access the Internet through some form of ‘interactive computer service.’ Thus, both the Network website and the listserv are potentially immune under § 230. *Id.*



Cremers cannot be considered the content provider of Smith's e-mail for purposes of § 230.”<sup>156</sup> Whether Smith qualified as a content provider was also in dispute because he had not intended the message to be published on the Internet.<sup>157</sup> The court held:

[A] service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other “interactive computer service.”<sup>158</sup>

The court remanded the case to the federal district court to determine whether Cremers should “reasonably” have believed the information was for public posting. If Cremers should have recognized the message was not for posting on the listserv, the appeals court suggested, then he could not be immune under section 230.<sup>159</sup> The *Batzel* case, therefore, raised a question of who could be considered a content provider, or the third party who published the original defamation; the court concluded that the service provider or user could be immune only if it could reasonably conclude the message was intended to be republished.

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1035.

It is not entirely clear from the record whether Smith ‘provided’ the e-mail for publication on the Internet under this standard. There are facts that could have led Cremers reasonably to conclude that Smith sent him the information because he operated an Internet service. On the other hand, Smith was not a subscriber to the listserv and apparently sent the information to a different e-mail account from the one at which Cremers usually received information for publication. *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1035.

[We] remand to the district court for further proceedings to develop the facts under this newly announced standard and to evaluate what Cremers should have reasonably concluded at the time he received Smith's email. If Cremers should have reasonably concluded, for example, that because Smith's e-mail arrived via a different e-mail address it was not provided to him for possible posting on the listserv, then Cremers cannot take advantage of the § 230(c) immunities. Under that circumstance, the posted information was not “provided” by another ‘information content provider’ within the meaning of § 230. *Id.*

In November 2006, the Supreme Court of California issued a ruling in *Barrett v. Rosenthal*<sup>160</sup> that section 230 confers immunity on distributors and immunizes “individual ‘users’ of interactive computer services, and that no practical or principled distinction can be drawn between active and passive use.”<sup>161</sup> In the case, Ilena Rosenthal posted defamatory statements on the Web questioning and disparaging Dr. Stephen J. Barrett and Dr. Timothy Polevoy, who operated a Web site dedicated to exposing health frauds. Rosenthal posted content that referred to Barrett as, among other things, “sleazy, unethical, a quack, a thug, a bully, a Nazi”<sup>162</sup> and making similar charges against Polevoy. She also posted an article that accused Polevoy of stalking a Canadian radio producer, which was held to be the only actionable content:

The [trial] court determined that the only actionable statement appeared in an article Rosenthal received via e-mail from her codefendant Tim Bolen. This article, subtitled “Opinion by Tim Bolen,” accused Dr. Polevoy of stalking a Canadian radio producer. Rosenthal posted a copy of this article on the Web sites of two newsgroups devoted to alternative health issues and the politics of medicine, not on the site of her own discussion group.<sup>163</sup>

The California Court of Appeal interpreted section 230 to hold “that common law ‘distributor’ liability survived the congressional grant of immunity, so that Internet service providers and users are exposed to liability if they republish a statement with notice of its defamatory character.”<sup>164</sup> The California Supreme Court disagreed, holding that both distributors and users are immune under section 230.

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<sup>160</sup> 146 P.3d 510 (Cal. 2006).

<sup>161</sup> *Id.* at 513.

<sup>162</sup> *Id.* at 514, n.2.

<sup>163</sup> *Id.* at 514. *Id.*

<sup>164</sup> *Id.* at 513.

In reaching its decision, the state supreme court undertook a discussion of how “user” was intended to be defined under section 230 and decided that the term “user” included individuals such as Rosenthal.<sup>165</sup> Polevoy also attempted to argue that there is a difference between an active and passive Internet user in terms of who could be held liable. In Polevoy’s view, a passive user is one who simply screens and removes content, where as an active user is one who “actively post[s] or republish[es] information.”<sup>166</sup> The court rejected the relevance of the distinction.

Polevoy’s view fails to account for the statutory provision at the center of our inquiry: the prohibition in section 230(c)(1) against treating any “user” as “the publisher or speaker of any information provided by another information content provider.” A user who merely receives information on a computer without making it available to anyone else would be neither a “publisher” nor a “speaker.” Congress obviously had a broader meaning in mind. Nor is it clear how a user who removes a posting may be deemed “passive” while one who merely allows a posting to remain online is “active.”<sup>167</sup>

The court recognized that its interpretation of section 230 extended immunity beyond a distributor, such as a computer service provider like AOL, to an individual user who reposts defamatory content. The court also noted the potential drawbacks to a broad immunity for third-party defamatory content:

We share the concerns of those who have expressed reservations about the Zeran court’s broad interpretation of section 230 immunity. The prospect of blanket immunity

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<sup>165</sup> *Id.* at 526.

Section 230(a)(2) notes that such services “offer users a great degree of control over the information that they receive,” and section 230(b)(3) expresses Congress’s intent “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.” Thus, Congress consistently referred to “users” of interactive computer services, specifically including “individuals.” *Id.*

<sup>166</sup> *Id.* at 527.

Polevoy reasons that the term “user” must be construed to refer only to those who receive offensive information, and those who screen and remove such information from an Internet site. He argues that those who actively post or republish information on the Internet are “information content providers” unprotected by the statutory immunity. *Id.*

<sup>167</sup> *Id.*

for those who intentionally redistribute defamatory statements on the Internet has disturbing implications. Nevertheless, by its terms section 230 exempts Internet intermediaries from defamation liability for republication.<sup>168</sup>

Post-CDA court decisions, therefore, have continued to apply an expansive interpretation of the immunities conferred by section 230. At this point, it seems as though only those who originally publish defamation on the Internet may be held liable for that content.

The Internet cases reflect the CDA's impact on immunity for third-party defamatory content on the Internet. Although the statute clearly provides immunity for providers or users of an interactive computer service for third-party defamatory content, it has been left to the courts to interpret the precise language and definitions intended by Congress to apply. The Fourth Circuit and U.S. District Court for the District of Columbia extended immunity to distributors, concluding that distributor is simply a category of publisher and, therefore, immune.<sup>169</sup> The Ninth Circuit seemed to qualify this immunity somewhat when it held in 2003 that a service provider or user could be immune only if it could reasonably conclude the message was intended to be republished.<sup>170</sup> Most recently, the Supreme Court of California held that both distributors and individual users are immune for third-party defamatory postings.<sup>171</sup>

## Conclusion

The cases analyzed in this chapter reveal a variety of approaches taken by the courts in imposing liability for defamation transmitted via the telegraph, radio, television, and Internet.

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<sup>168</sup> *Id.* at 529.

<sup>169</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

<sup>170</sup> *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

<sup>171</sup> *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

Overall, telegraphs were, from the start, treated as common carriers, public utilities required to transmit messages but unable to edit or censor, and therefore liable only if the company knows or has reason to know the content is defamatory.<sup>172</sup> Courts initially imposed strict liability on radio stations for broadcasting defamatory content, regardless of whether the station knew of or could have prevented the transmission of the defamation.<sup>173</sup> Few television cases were found, which will be discussed later in this section. Finally, while the two pre-CDA cases differed as to whether Internet Service Providers should be treated as distributors<sup>174</sup> or as publishers,<sup>175</sup> post-CDA cases have provided blanket immunity for those who post third-party defamatory content on the Internet.<sup>176</sup>

Courts have consistently treated telegraph companies as common carriers.<sup>177</sup> As far back as 1887,<sup>178</sup> Congress had codified the duties and liabilities of common carriers although the

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<sup>172</sup> See generally *Nye v. W. Union Tel. Co.*, 104 F. 628 (D.C. Minn. 1900); *W. Union Tel. Co. v. Cashman*, 149 F. 367 (5th Cir. 1906); *Peterson v. W. Union Tel. Co.*, 74 N.W. 1022 (Minn. 1898). See also *W. Union Tel. Co. v. Lesesne*, 83 F. Supp. 918 (E.D.S.C. 1948) (holding that a public utility whose duty it is to transmit messages for the public is privileged to send messages unless the agents who transmit the message should know or have reason to know the content is defamatory); *Mason v. W. Union Tel. Co.*, 125 Cal. Rptr. 3d 53 (Cal. Ct. App. 1975) (holding that Western Union was not liable to a defamed person for the transmission of a defamatory telegram).

<sup>173</sup> See generally *Coffey v. Midland Broad. Co.*, 8 F. Supp. 889 (W.D. 1934); *Sorenson v. Wood*, 243 N.W. 82 (Neb. 1932); *Miles v. Louis Wasmer, Inc.*, 20 P.2d 847 (Wash. 1933).

<sup>174</sup> *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991).

<sup>175</sup> *Stratton Oakmont v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at \*1, (N.Y. Sup. Ct. 1995).

<sup>176</sup> *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.C. Cir. 1998); *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

<sup>177</sup> *Supra* note 166.

<sup>178</sup> Phil Nichols, Note, *Redefining "Common Carrier": The FCC's Attempt at Deregulation by Redefinition*, 1987 DUKE L.J. 501, 509 (1987).

[Congress] enact[ed] the Interstate Commerce Act in 1887, which codified the duties and liabilities of common carriers. Although the Interstate Commerce Act dealt exclusively with railways, it is integral to the history of communication common carrier law. . . . Through the Interstate Commerce Act, Congress created the Interstate Commerce Commission (ICC), and in 1888 it gave the ICC the power to regulate telegraph companies. *Id.* at 509-10.

telegraph was not specifically categorized as a common carrier until 1910.<sup>179</sup> Therefore, courts seem to have taken somewhat of a leadership role in treating telegraph companies as common carriers, at least for the purposes of defamation liability, even before Congress enacted a statute establishing the common carrier status of the telegraph.<sup>180</sup>

Early radio cases reveal that some courts attempted early on to impose strict liability for defamation transmitted by a new technology, treating the company in question as a publisher of third-party defamatory content.<sup>181</sup> However, within a few years, courts began to question whether stations should be held strictly liable. In later cases, courts began to treat broadcast stations as distributors when they carried content from non-employees—again, liable only if they transmitted defamatory content without exercising reasonable care to prevent that from happening.<sup>182</sup>

As noted above, few television cases were found addressing whether television stations should be treated as republishers or distributors of defamatory content. In fact, the television cases reflect the significant impact that statutes have had on broadcast station liability for third-party defamation. For example, Section 315 of the federal Communications Act of 1934 led to *Farmers Educational & Cooperative Union of America, North Dakota Division, v.*

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<sup>179</sup> *Id.* at 510.

The Mann-Elkins Act of 1910 resolved whether telegraphs and telephones were classified as common carriers. While working out a compromise bill completely reshaping regulation of the railroads and creating the first court that would review only agency decisions, the House gave the ICC regulatory control of telegraph and telephone services. The bill as enacted not only gave the ICC control over communications, it also decreed telegraph and telephone providers to be common carriers. *Id.*

<sup>180</sup> *Nye v. W. Union Tel. Co.*, 104 F. 628 (D.C. Minn. 1900); *W. Union Tel. Co. v. Cashman*, 149 F. 367 (5th Cir. 1906); *Peterson v. W. Union Tel. Co.*, 74 N.W. 1022 (Minn. 1898).

<sup>181</sup> *Coffey v. Midland Broad. Co.*, 8 F. Supp. 889 (W.D. 1934); *Sorenson v. Wood*, 243 N.W. 82 (Neb. 1932); *Miles v. Louis Wasmer, Inc.*, 20 P.2d 847 (Wash. 1933).

<sup>182</sup> *Summit Hotel Co. v. Nat'l Broad. Co.*, 8 A.2d 302 (Pa.1939); *Kelly v. Hoffman*, 74 A.2d 922 (N.J. Super. Ct. 1950).

*WDAY, Inc.*<sup>183</sup> In this case, the United States Supreme Court held that since the statute required stations to carry content from political candidates but did not allow the station to censor or edit that content, stations could not be held liable for defamatory content and were therefore granted immunity. In *American Broadcasting-Paramount Theatres, Inc. v. Simpson*,<sup>184</sup> a Georgia statute was used to treat television stations as distributors, not liable for defamatory content that was not produced by a station's own agents or employees, providing the station exercised due care.

Georgia was not the only state to enact a statute addressing broadcaster liability. A 1973 American Law Reports publication stated: "As of 1963, the legislatures of 22 states had adopted statutes establishing lack of due care as a necessary element of radio-television defamation. Of those states, seventeen placed the burden on the plaintiff, while six shifted the burden to the defendant to show exercise of due care."<sup>185</sup> One such statute declares that, barring evidence that the station failed to exercise due care,

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damage for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless such owner, licensee or operator shall be guilty of negligence in permitting any such defamatory statement.<sup>186</sup>

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<sup>183</sup> 360 U.S. 525 (1959).

<sup>184</sup> 126 S.E.2d 873 (Ga. Ct. App. 1962).

<sup>185</sup> Jeffrey F. Ghent, *Defamation by Radio or Television*, 50 A.L.R.3d 1311 (1973).

<sup>186</sup> Negligence in permitting defamatory statements by others essential to liability of operator, etc., of broadcasting station, N.C. Gen. Stat. § 99-5 (1949). *See also* Liability of Radio or Television Station Owner or Agent for Defamation Published or Uttered over Station or Network, ARIZ. REV. STAT. ANN. §12-652 (2006); Defamation by Radio, CAL. CIV. CODE § 48.5 (2007); Broadcasting Stations—Liability for Defamation Statements, GA. CODE ANN. § 51-5-10 (1949); Libel and Slander, IDAHO CODE ANN. tit. 6 §§ 7 (2007); Civil Liability of Station owner, Licensee, or Operator for Defamation, LA. REV. STAT. ANN. 45:1351 (2006); Liability for Defamatory Statements Published or Uttered Over Broadcasting Stations, NEV. REV. STAT. ANN. § 41.340 (2006); Radio or Television Broadcasts, N.M. STAT. ANN. § 41-7-6 (1978); Defamation by Radio and Television—Limitation of Liability, OKLA. STAT. ANN. tit. 12, § 1447.1 (1957); Radio or Television Station

Thus, within a matter of decades, many states had decided that the issue called for a statutory, rather than common law, solution. Also of note is that many states used a “due care” standard—less than the strict liability initially imposed but greater than the absolute immunity conferred by section 230 of the CDA—perhaps indicating an attempt to find a middle ground that would allow the technologies to flourish but still hold them accountable under some circumstances for the transmission of defamatory content.

The most dramatic example of a statute affecting liability is the Communications Decency Act, which, as federal law, has provided one uniform approach for the courts. Whereas the federal Communications Act of 1934 affected a specific type of speech—political candidate speech—the CDA affects all types of Internet speech. Similarly, the liability of broadcast technologies has been addressed through state statutes<sup>187</sup> and through the Restatement of Torts,<sup>188</sup> but there is no uniform approach across the states. For the Internet, the uniform standard is that, regardless of whether the courts classify Internet service providers or users as publishers or distributors, as long as the content is provided by a third party, there is blanket immunity for those who re-post defamatory messages.

In summary, an evolution in the treatment of various media for the transmission of third-party defamation can be seen. While telegraph companies were treated as common carriers

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Personnel—Liability for Defamation; OR. REV. STAT. ANN. § 31.200 (2005); Radio and Television Stations Not Liable if Due Care Exercised, S.D. CODIFIED LAWS § 20-11-6 (2006); Libel, UTAH CODE ANN. § 45-2-7 (2007).

<sup>187</sup> *Id.*

<sup>188</sup> RESTATEMENT (SECOND) OF TORTS § 581 (1977).

Although radio and television broadcasting companies are engaged in the transmission of the human voice and likeness and must to a great extent rely upon matter prepared for them by others, they are publishers more nearly analogous to a newspaper or the publisher of a book than to a telegraph company. They are not engaged solely in rendering the service of transmission to those who seek it. For their own business purposes they initiate, select and put upon the air their own programs; or by contract they permit others to make use of their facilities to do so, and they cooperate actively in the publication. *Id.* at cmt. g.



from early on, with courts imposing a distributor-like liability, with the radio, in particular, there was some attempt to impose publisher liability status for the transmission of third-party defamation. Common-law approaches then allowed for a gradual shift to distributor liability. While many states addressed broadcast liability within a few decades of the advent of those technologies, the CDA was an anomaly in that common law had very little opportunity to develop—less than a decade—before statutory intervention mandated a uniform approach that publishers were immune from liability for third-party defamatory content. The role that the courts have played has been to grant that immunity by treating distributors as a category of publishers rather than as a separate category for the purposes of liability. Furthermore, whereas with other media courts have focused on the liability of corporations or companies—media owners—the nature of Internet technology with its ease of access has allowed even individual users with access to a computer to be held immune for the transmission of third-party defamatory content.

## CHAPTER V

### CONCLUSIONS AND RECOMMENDATIONS

This thesis sought to examine how courts have applied aspects of defamation law to several new mass communications technologies—the telegraph, radio, television, and Internet. In particular, for each technology the thesis examined the development of the libel/slander distinction, whether and how courts have applied the single publication rule, and how courts have determined who can be held liable as publishers, republishers, and distributors of defamatory content. Through determining what trends have emerged in the approaches courts have taken to adapting these areas of defamation common law to new mass communications technologies, the purpose of this project was to examine the extent to which the current application of libel law to the Internet fits a historical pattern.

Federal and state court cases were found through contemporary law review articles addressing these issue and technologies; through secondary legal sources such as the Restatement (Second) of Torts and the American Jurisprudence database on Westlaw; and through Westlaw searches using keywords including the technology and the area of law to capture cases in which the technology in question factored into the courts' decisions. Three chapters focused on the libel/slander distinction, the single publication rule, and liability, tracing the case law chronologically for each technology.

This concluding chapter reviews the findings of each of the three substantive chapters but, unlike the preceding chapters, organizes the findings by each technology rather than each legal topic. In the next section, the discussion turns to two key questions. First, what trends can be identified in the development of defamation law resulting from courts decisions in the areas of the libel/slander distinction, the single publication rule, and liability? Second, to what extent does the application of libel law to the Internet fit a historical pattern? Finally, the chapter concludes with a discussion of the implications of this research and recommendations for further research.

### Telegraph

The majority of the cases in which courts applied defamation law to the telegraph involved the liability of telegraph companies for the transmission of defamatory messages. The libel/slander distinction was addressed in one case, *Peterson v. Western Union Telegraph Co.*, in which the Supreme Court of Minnesota decided that, in spite of the sound technologies used to transmit messages, transmission of defamation via telegraph constituted libel, not slander.<sup>1</sup> No cases were found in which the single publication rule was applied to the telegraph, likely because with telegraph technology, the message is transmitted to an operator rather than to a mass audience, thus negating the need to address aggregate publications.<sup>2</sup> The area of defamation law that courts addressed most was liability—that is, whether telegraph companies should be treated as publishers, republishers, or distributors.

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<sup>1</sup> 74 N.W. 1022 (Minn. 1898).

<sup>2</sup> The telegraph plays a role in single publication discussion to the extent that wire service stories in newspapers will be treated as aggregate publications for that single edition of the newspaper.

From early on, courts treated telegraph companies as common carriers, meaning that they could only be held liable for transmitting messages that were defamatory on their face, a standard of liability closely resembling distributor liability. In an earlier appeal in the *Peterson* case, the Supreme Court of Minnesota described Western Union as “a common carrier. . . bound to transmit all proper messages delivered to it.”<sup>3</sup> The court ruled, however, that a telegraph company “was not bound to send indecent or libelous communications.”<sup>4</sup> Subsequent cases affirmed that telegraph companies could be held liable essentially as distributors for transmitting messages that were clearly libelous.<sup>5</sup> A federal district court in *Nye v. Western Union Telegraph Co.* explained the role of the telegraph operator in preventing the dissemination of defamatory messages:

Having no duty of censorship . . . if he acts in good faith, and the language of the message is such that a person of ordinary intelligence, knowing nothing of the parties or circumstances, would not necessarily conclude that defamation was the object and purpose of the message, it would be his duty to send it, and for his performance of that duty the telegraph company would incur no responsibility.<sup>6</sup>

Furthermore, a telegraph company could not be held liable absent proof of malice, which required the plaintiff to demonstrate “that the defendant was governed by a bad motive, and that he did not act in good faith but took advantage of the occasion to injure the plaintiff in his character or standing.”<sup>7</sup>

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<sup>3</sup> *Peterson v. W. Union Tel. Co.*, 67 N.W. 646, 647 (Minn. 1896).

<sup>4</sup> *Id.*

<sup>5</sup> *W. Union Tel. Co. v. Cashman*, 149 F. 367 (5th Cir. 1906); *Nye v. W. Union Tel. Co.*, 104 F. 628 (D.C. Minn. 1900).

<sup>6</sup> 104 F. 628, 631 (D.C. Minn. 1900).

<sup>7</sup> *W. Union Tel. Co. v. Cashman*, 149 F. 367, 372 (5th Cir. 1906).

Therefore, although telegraph companies were treated as common carriers, functioning more like public utilities than publishers, the liability that could be imposed on a telegraph company for knowingly transmitting a defamatory telegram closely resembled distributor liability. Courts noted that the public interest was served by allowing telegraph companies to function without fear of liability should they unknowingly transmit defamatory messages. In *Nye v. Western Union Telegraph Co.*, for example, the court noted that telegraphs had become an essential communications technology:

The electric telegraph is so useful and constantly employed in the conduct of human affairs that its lines of wires cover all civilized lands, cross the great oceans, and reach every city, and nearly every hamlet. The law, recognizing the need that every one may have for its services, imposes upon it the duties of common carrier.<sup>8</sup>

Recognizing the important role that the telegraph played in communication, the courts applied defamation law, and the liability element in particular, to the technology in such a way that it could be of the greatest benefit to the public, encouraging the rapid flow of information. Finally, it is of note that telegraph companies were not recognized by statute as common carriers until 1910, but courts had already treated them as such for more than a decade.<sup>9</sup> Courts, therefore, took a leadership role in categorizing telegraph companies as common carriers in the interest of promoting the technology's use.

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<sup>8</sup> 104 F. 628, 630 (D.C. Minn. 1900).

<sup>9</sup> Phil Nichols, Note, *Redefining "Common Carrier": The FCC's Attempt at Deregulation by Redefinition*, 1987 DUKE L.J. 501, 510 (1987).

The Mann-Elkins Act of 1910 resolved whether telegraphs and telephones were classified as common carriers. While working out a compromise bill completely reshaping regulation of the railroads and creating the first court that would review only agency decisions, the House gave the ICC regulatory control of telegraph and telephone services. The bill as enacted not only gave the ICC control over communications, it also decreed telegraph and telephone providers to be common carriers. *Id.*

## Radio

Defamation via radio broadcasting is an area that eventually came to be largely directed by statute and influenced by the Second Restatement of Torts. Two key areas in which courts addressed how to apply traditional common law principles to radio defamation were whether the defamation constituted libel or slander and the liability of broadcast stations, particularly for non-employee speech. Only one case dealing with the single publication rule and radio defamation was found, and in that case the court decided in line with the principle articulated in the Second Restatement of Torts that each separate broadcast of a defamatory statement to a new audience is considered a separate cause of action.<sup>10</sup> While the single publication rule did not prove an area of defamation law widely addressed by courts applying common law to radio, both the libel/slander distinction and liability produced a number of cases.

The radio challenged the centuries-old distinction between written and spoken defamation. Whereas slander had traditionally been viewed as the lesser of the two forms of defamation as the less permanent form of publication, radio broadcasts could reach large audiences far beyond the capacity of the human voice alone. Judge Fuld noted in his dissent in *Hartmann v. Winchell* that the potential harms of radio defamation were as great as those originating from printed defamation.

Since the element of damage is, historically, the basis of the common-law action for defamation, and since it is as reasonable to presume damage from the nature of the medium employed when a slander is broadcast by radio as when published by writing, both logic and policy point the conclusion that defamation by radio should be actionable per se.<sup>11</sup>

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<sup>10</sup> RESTATEMENT (SECOND) OF TORTS § 577A (1977).

<sup>11</sup> 73 N.E.2d 30, 34 (N.Y. 1947) (citations omitted).

Courts were thus confronted with the challenge of determining how to apply this traditional doctrine to the new technology: Should the traditional distinction based on the format of the publication stand, or should courts focus on the harms and effects of the message in determining whether the defamation constituted libel or slander?

Courts initially took different approaches to this issue, but many seem to have arrived at the same conclusion, supported by the Second Restatement of Torts, that broadcast defamation constitutes libel.<sup>12</sup> One approach that some courts took early on involved differentiating based on whether written text, such as a manuscript, was involved in the publication. If the defamation was scripted, then it constituted libel,<sup>13</sup> but if it resulted from extemporaneous speech, the station could be liable for slander.<sup>14</sup> In *Irwin v. Ashurst*, the Oregon Supreme Court questioned the logic of distinguishing between libel and slander based on the presence of a script.

Assume that a person writes a speech of a defamatory nature and, after committing the same to memory, speaks over the air without referring to his manuscript. Would such broadcast be held slander and not libel? The person who hears the defamatory matter over the air ordinarily does not know whether or not the speaker is reading from a manuscript. Furthermore, what difference does it make to such person, so far as the effect is concerned?<sup>15</sup>

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<sup>12</sup> RESTATEMENT (SECOND) OF TORTS § 568A (1977).

<sup>13</sup> *Charles Parker Co. v. Silver City Crystal Co.*, 116 A.2d 440 (Conn. 1955); *Sorenson v. Wood*, 243 N.W. 82 (Neb. 1932); *Hartmann v. Winchell*, 73 N.E.2d 30 (N.Y. 1947).

<sup>14</sup> *Locke v. Gibbons*, 299 N.Y.S. 188 (N.Y. Sup. Ct. 1937), *aff'd mem.*, 2 N.Y.S. 2d 1015 (App. Div. 1938). See also *Charles Parker Co. v. Silver City Crystal Co.*, 116 A.2d 440 (Conn. 1955); *Hartmann v. Winchell*, 73 N.E.2d 30 (N.Y. 1947).

<sup>15</sup> 74 P.2d 1127, 1129 (Or. 1938).

In later cases, some courts came to view the distinction as arbitrary, categorizing radio defamation as possessing characteristics of both libel and slander.<sup>16</sup> Cases decided after the publication of the Second Restatement of Torts in 1977 have tended to agree with the principle that broadcast defamation constitutes libel, regardless of whether it is scripted, reflecting the Restatement's influence.<sup>17</sup>

Another area in which the Second Restatement and in which state statutes, in particular, have provided guidance for the courts is the liability of broadcasting stations for transmitting non-employee defamatory content. The key issue courts faced in determining the liability of a radio station for transmitting defamatory content was whether and to what extent a station should be liable when the station had leased its facilities or the defamation was uttered by a non-employee, someone not associated with or employed by the station. Initially, courts held that stations were strictly liable for defamation, whether scripted or extemporaneous, and regardless of whether the station had the means to stop the transmission.<sup>18</sup> As happened with the libel/slander distinction, courts began to question the application of defamation law to the radio: Just as courts began to question the value of the libel/slander distinction, with many eventually settling on libel, they also began to question whether it was appropriate to hold

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<sup>16</sup> Niehoff v. Cong. Square Hotel Co., 103 A.2d 219 (Me. 1954); Kelly v. Hoffmann, 74 A.2d 922 (N.J. Super. Ct. 1950); Summit Hotel Co. v. Nat'l Broad. Co., 8 A.2d 302 (Pa. 1939).

<sup>17</sup> First Independent Baptist Church v. Southerland, 373 So. 2d 647 (Ala. 1979); McLaughlin v. Rosanio, Bailets & Talamo, Inc., 751 A.2d 1066 (N.J. Super. Ct. App. Div. 2000); Matherson v. Marchello, 100 A.D.2d 233 (N.Y. App. Div. 1984).

<sup>18</sup> Sorenson v. Wood, 243 N.W. 82 (Neb. 1932); Miles v. Louis Wasmer, Inc., 20 P.2d 847 (Wash. 1933); Coffey v. Midland Broad. Co., 8 F. Supp. 889 (D. Mo. 1934).



stations strictly liable without fault. Courts began to treat stations as distributors, liable only if they failed to exercise reasonable care to prevent the broadcast of defamatory content.<sup>19</sup>

Therefore, the radio cases reveal that courts truly wrestled with applying defamation principles to the new technology at first, and particularly with whether the oral nature of the publication constituted slander or whether, due to the widespread dissemination, it should be treated as libel. Courts also held stations strictly liable at first for third-party defamation but seemed to reconsider. Although this point was not expanded upon in the liability chapter, the Communications Act of 1934 may have factored into that trend. In 1939, for example, the Pennsylvania Supreme Court in *Summit Hotel* contended that broadcasting companies already had incentive to prevent the transmission of defamation because stations required licenses from the federal government that could be revoked if federal rules were violated. Therefore, while there is nothing in the Act regarding libel, there may have been the perception that there already was a check in place to prevent stations from intentionally broadcasting defamatory statements.<sup>20</sup> The Communications Act of 1934 factored into the only United States Supreme Court to directly address broadcast station liability for defamation, as is discussed in the next section.

This research has revealed that it is difficult and, at times, somewhat arbitrary to completely separate the application of common-law defamation to radio and television because the two can both be treated as “broadcast” technologies. Therefore, some discussion of the two technologies overlaps. For example, courts were not the only bodies directing the

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<sup>19</sup> *Summit Hotel Co. v. Nat’l Broad. Co.*, 8 A.2d 302 (Pa. 1939); *Kelly v. Hoffman*, 74 A.2d 922 (N.J. Super. Ct. 1950).

<sup>20</sup> *Summit Hotel*, 8 A.2d at 311. “Radio defamations have been infrequent, and governmental regulation affords a check.” *Id.*

debate over radio and television stations' liability; state legislatures also began to weigh in, as will be discussed in the next section. What can be said specifically for the radio defamation cases is that they seem to have paved the way for discussions of defamation transmitted via both broadcast technologies, and to a certain extent, served as the forum where courts truly grappled with applying the libel/slander distinction and liability, in particular.

### Television

Compared to the radio and Internet, there were relatively few television cases, likely because courts addressed issues applicable to both technologies in radio cases. Conversely, the single publication rule gained far more attention in television cases than in radio cases. As with radio, aspects of television defamation came to be guided by state statute and the Second Restatement.

In television defamation cases prior to the publication of the Second Restatement in 1977, courts questioned whether libel or slander should apply. As courts had initially done in the radio cases, some courts attempted to base their decision on whether the defamation was scripted, holding that scripted defamation constituted libel,<sup>21</sup> but ad lib defamation constituted slander.<sup>22</sup> By the end of the 1950s, courts began to treat television defamation as

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<sup>21</sup> *Landau v. Columbia Broad. Sys.*, 128 N.Y.S.2d 254 (Sup. Ct. 1954).

<sup>22</sup> *Remington v. Bentley*, 88 F. Supp. 166 (S.D.N.Y. 1949).

libel, regardless of whether it was scripted.<sup>23</sup> Some courts avoided the issue by treating the defamation as actionable *per se*.<sup>24</sup>

The television cases reveal two trends: By the 1960s, states had begun to address broadcast defamation through statutes, and the Second Restatement was very influential in court decisions. For example, defamation transmitted via television in *Arno v. Stewart* was deemed slander based on a California statute.<sup>25</sup> Georgia developed a third category of “defamacast,” actionable *per se*, based on a state statute that referred only to defamation and did not distinguish between libel and slander.<sup>26</sup> Cases decided after 1977, when the Second Restatement stated in section 568A that broadcast defamation constitutes libel,<sup>27</sup> have cited the Restatement in holding television defamation to be libel.<sup>28</sup>

The Second Restatement again proved influential in the application of the single publication rule to the television broadcasts. Twenty-five years prior to the publication of the Second Restatement, however, courts already had some guidance through the Uniform Single Publication Act, published in 1952 by the National Conference of Commissioners on Uniform Laws.<sup>29</sup> Three courts had considered whether the single publication rule applied to

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<sup>23</sup> *Gearhart v. WSAZ, Inc.*, 150 F. Supp. 98 (E.D. Ky. 1957); *Shor v. Billingsley*, 158 N.Y.S.2d 476 (Sup. Ct. 1957).

<sup>24</sup> *Riss v. Anderson*, 304 F.2d 188 (8th Cir. 1962); *Greer v. Skyway Broad.*, 124 S.E.2d 98 (N.C. 1962).

<sup>25</sup> 254 Cal. App. 2d 955 (Ct. App. 1966).

<sup>26</sup> *American Broad.-Paramount Theatres, Inc. v. Simpson*, 126 S.E.2d 873, 879 (Ga. Ct. App. 1962).

<sup>27</sup> RESTATEMENT (SECOND) OF TORTS § 568A (1977).

<sup>28</sup> *Brown v. Hearst Corp.*, 862 F. Supp. 622 (D. Mass. 1994); *Gray v. WALA-TV*, 384 So. 2d 1062 (Ala. 1980).

<sup>29</sup> UNIFORM SINGLE PUBLICATION ACT §§ 1, 2 (1952). Section 1 of the Act provides:

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast

television broadcasts in the 25 years between the two recommendations,<sup>30</sup> but only one court decided the issue, holding that three broadcasts of a program constituted three separate publications, in line with what the Restatement would decree one year later.<sup>31</sup> Post-Second Restatement cases have treated separate broadcasts as distinct publications, in line with the Restatement.<sup>32</sup>

As was a finding in the libel/slander cases, statutes also proved key factors in cases in which courts determined the liability of broadcast stations for transmitting third-party defamatory content. In *Farmers Educational & Cooperative Union of America, North Dakota Division, v. WDAY, Inc.*,<sup>33</sup> the United States Supreme Court held that, because section 315 of the federal Communications Act of 1934 required broadcast stations to provide political candidates equal opportunities for speech but forbade stations to censor that political speech, stations could not be held liable for defamatory content uttered by political candidates.

In addition to establishing the “defamacast” category of defamation, the Georgia legislature established by statute that broadcast stations—radio and television—could be held

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over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions

<sup>30</sup> *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962) (remanding the case to determine the dates of publication for the purposes of the statute of limitations); *Devlin v. Nat’l Broad. Co.*, 219 A.2d 523 (N.J. 1966) (holding that the court would stay a decision pending the outcome of the same case in a California court); *Mun. Training Ctr., Inc. v. Nat’l Broad. Corp.*, 387 N.Y.S.2d 40 (N.Y. Sup. Ct. 1976) (holding that three broadcasts of a program constituted three separate causes of action).

<sup>31</sup> *Mun. Training Ctr., Inc. v. Nat’l Broad. Corp.*, 387 N.Y.S.2d 40 (N.Y. Sup. Ct. 1976).

<sup>32</sup> *Lehman v. Discovery Commc’ns, Inc.*, 332 F. Supp. 2d 534 (E.D.N.Y. 2004); *Burt v. CBS, Inc.*, 769 F. Supp. 1012 (S.D. Ohio 1991); *Herron v. King*, 746 P.2d 295 (Wash. 1987).

<sup>33</sup> 360 U.S. 525 (1959). (*hereinafter, Farmers.*)

liable as distributors for non-employee defamatory speech. The Georgia statute, included here, used language similar to several other state statutes:<sup>34</sup>

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as part of a visual or sound radio broadcast, by one other than such owner, licensee, or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance or such statement in such broadcast.<sup>35</sup>

States have, therefore, taken the initiative to relieve broadcast stations of absolute liability for third-party defamation. Instead, the use of a “due care” standard seemed to be a compromise between absolute liability and immunity for third-party defamation.

The story of the application of defamation law to the television is a story of courts being guided by principles articulated in the Second Restatement of Torts and by statutes, whether federal, like the Communications Act of 1934, or state, like the Georgia “defamacast” statute. Whereas early radio cases reveal an effort by courts to navigate how best to apply common-law defamation principles to the new technology, television cases reveal that, in addition to consulting the radio case precedents, courts were able to refer to the Restatement and to statutes in their decisions.

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<sup>34</sup> See Liability of Radio or Television Station Owner or Agent for Defamation Published or Uttered over Station or Network, ARIZ. REV. STAT. ANN. §12-652 (2006); Defamation by Radio, CAL. CIV. CODE § 48.5 (2007); Broadcasting Stations—Liability for Defamation Statements, GA. CODE ANN. § 51-5-10 (1949); Libel and Slander, IDAHO CODE ANN. tit. 6 §§ 7 (2007); Civil Liability of Station owner, Licensee, or Operator for Defamation, LA. REV. STAT. ANN. 45:1351 (2006); Liability for Defamatory Statements Published or Uttered Over Broadcasting Stations, NEV. REV. STAT. ANN. § 41.340 (2006); Radio or Television Broadcasts, N.M. STAT. ANN. § 41-7-6 (1978); Defamation by Radio and Television—Limitation of Liability, OKLA. STAT. ANN. tit. 12, § 1447.1 (1957); Radio or Television Station Personnel—Liability for Defamation; OR. REV. STAT. ANN. § 31.200 (2005); Radio and Television Stations Not Liable if Due Care Exercised, S.D. CODIFIED LAWS § 20-11-6 (2006); Libel, UTAH CODE ANN. § 45-2-7 (2007).

<sup>35</sup> American Broad.-Paramount Theatres, Inc. v. Simpson, 126 S.E.2d 873, 877 (Ga. Ct. App. 1962) (citing Code § 105-712, Ga.L.1949, p.1137).

## Internet

The World Wide Web is only two decades old, so it is possible that a decade from now, another author will write about this same topic but reach a completely different conclusion based on future court applications of defamation law to the Internet. For now, however, some generalizations can safely be made. Of the three areas of defamation law discussed in this thesis, the two that courts have addressed the most with Internet defamation are the single publication rule and liability. Only one case was found in which the question arose whether Internet defamation constituted libel or slander. Here, too, the cases reflect the integral role that the Second Restatement of Torts and statutes have played in courts' application of defamation law to the Internet.

In the only Internet case found to address whether Internet defamation constituted libel or slander, the claim was based on the potential harms of the defamation, and the court held that the defamation constituted libel, not slander.<sup>36</sup> The fact that the libel/slander question arose with a written publication—which traditionally would have been assumed to be libel—reflects the erosion of the libel/slander distinction based on whether the content is written or oral. This erosion can be seen both in the broadcast cases, which reveal that most courts view broadcast defamation as libel, and in the Second Restatement of Torts, which says, “The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.”<sup>37</sup>

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<sup>36</sup> *Varian Med. Sys., Inc., v. Delfino*, 6 Cal.Rptr.3d 325 (Ct. App. 2003).

<sup>37</sup> RESTATEMENT (SECOND) OF TORTS § 568 (1977).

Courts have taken the lead in applying the single publication rule to the Web. The rule has its origins in newspaper publication<sup>38</sup> and was eventually extended to individual broadcasts, several decades after the development of broadcast technologies.<sup>39</sup> The mere presence of defamatory content online does not constitute a republication; instead, a republication will occur only if the content itself is edited.<sup>40</sup> The mere presence of defamatory content online does not constitute a republication; instead, a republication will occur only if the content itself is edited.<sup>41</sup> The single publication rule also has been applied to the archival of newspaper articles online.<sup>42</sup>

In applying the single publication rule to the Internet, courts have noted the potentially limitless actions that could be filed due to the global nature of the Internet. The characteristics of the technology create “an even greater potential for endless retriggering of statute of limitations, multiplicity of suits, and harassment of defendants. Inevitably, there would be a seriously inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.”<sup>43</sup> Another court compared Web pages to pages in a book: “A statement electronically located on a server which is called up when a web page is accessed, is no different from a statement on a paper page in a book lying on a shelf which is accessed by the reader when the book is

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<sup>38</sup> *Wolfson v Syracuse Newspapers, Inc.*, 4 N.Y.S.2d 640 (App. Div. 1938).

<sup>39</sup> *See* RESTATEMENT (SECOND) OF TORTS § 577A (1977).

<sup>40</sup> *See Firth v. New York*, 706 N.Y.S.2d 835 (Ct. Cl. 2000), *aff'd*, 731 N.Y.S.2d 244 (App. Div. 2001), *aff'd* 775 N.E.2d 463 (N.Y. Ct. App. 2002).

<sup>41</sup> *Id. See Mitan v. Davis*, 243 F. Supp. 719 (W.D. Ky. 2003); *Traditional Cat Assn., Inc. v. Gilbreath*, 13 Cal. Rptr. 3d. 353 (Ct. App. 2004); *Churchill v. New Jersey*, 876 A.2d 311 (N.J. Super. Ct. App. Div. 2005).

<sup>42</sup> *McCandliss v. Cox Enters.*, 593 S.E.2d 856 (Ga.App. 2004).

<sup>43</sup> *Id.* at 858.

opened.”<sup>44</sup> Thus, while courts took the lead in applying the single publication rule to the Internet, they also simply applied traditional common law based on the potential consequences, such as a multiplicity of suits, and used analogies to older media.

Much of the furor over the current application of defamation law to the Internet relates to liability and, in particular, the broad immunity granted to providers and users of Internet computer services for third-party defamatory content.<sup>45</sup> As discussed, section 230 of the Communications Decency Act arose out of two conflicting cases, one of which held an Internet Service Provider liable as a distributor<sup>46</sup> and the other as a publisher based on the fact that the ISP, Prodigy, had advertised itself as editing content.<sup>47</sup> The passage of the CDA paved the way for providers and users of computer services to be immune for third-party defamatory content. Subsequent court decisions have maintained that, regardless of whether the re-poster of content was considered a republisher or a distributor<sup>48</sup> and regardless of whether the defendant was an Internet service provider or an individual,<sup>49</sup> the immunity covers anybody who did not generate the defamatory content.

Courts have applied common-law defamation principles and the CDA in such a way that promotes a robust speech forum. For example, one of the reasons cited for applying the

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<sup>44</sup> *Mitan v. Davis*, 243 F. Supp. 719, 724 (W.D. Ky. 2003).

<sup>45</sup> See generally David L. Hudson, Jr., *The Blogosphere and the Law: Blogs and the First Amendment*, 11 NEXUS J. OP. 129, 129 (2006); Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833 (2006); Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U.L. REV. 1447 (2006).

<sup>46</sup> *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991).

<sup>47</sup> *Stratton Oakmont v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at \*1, (N.Y. Sup. Ct. 1995).

<sup>48</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

<sup>49</sup> *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).



single publication rule to the Internet is to protect libel defendants from endless suits and harassment.<sup>50</sup> Furthermore, through the CDA, courts have allowed the creation of an environment on the Internet in which defamatory messages can be re-posted, whether intentionally or not, without liability. Both of these approaches unquestionably promote speech on the Internet by holding only those who create defamatory content liable and, through the single publication rule, limiting the time frame and number of actions in which they can be held liable.

#### Trends and Patterns: The Internet as a New Model Built on an Old Foundation

What trends, in general, can be identified for each technology? Overall, the rulings of courts over the last century have built the foundation for the current application of defamation law to the Internet. First, broadcast technologies, in particular, challenged the traditional distinction between libel and slander based on whether the speech was written or spoken. Courts went through an awkward phase of trying to adapt the distinction to radio and television. In spite of the transmission of messages using oral communication, courts were reluctant to treat defamation transmitted via broadcast as slander. Out of that challenge arose the perspective that determining libel versus slander rests on factors other than the mode of the speech, including the scope of the dissemination, its permanence, and the premeditated intent of the publisher, a principle that functions today.<sup>51</sup>

Next, the single publication rule arose out of newspaper libel—ultimately out of the printing press—but the principles have persisted and been applied to other forms of

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<sup>50</sup> *McCandliss*, 593 S.E.2d at 858.

<sup>51</sup> RESTATEMENT (SECOND) OF TORTS § 568 (1977).

publication. The rule has been applied to treat single broadcasts as aggregate publications, and it has been applied to treat editions of broadcasts aired at different times as separate republications. The single publication rule serves to ease the burden on libel defendants through limiting the number actions that can be filed and the time frame in which they can be filed. Under the rule, editions of broadcasts, for example, are treated as republications based on the assumption that the publisher intended to reach a new audience.

Whereas re-broadcasting defamatory material clearly constitutes a separate, finite publication, material on the Internet is always there, 24 hours a day, seven days a week, barring its removal from a Web page. Therefore, for defamatory content to be republished on the Web, it must be altered or edited in some way. Interestingly, the Web page hosting the content may be altered, including where the content is accessed on that page, without retriggering the statute of limitations as long as the defamatory content itself is not edited. Web publishing resembles book publishing, particularly the permanent nature of the publication. Just as editing a book and republishing it would constitute republication, so does the editing of content for publication by a Web site operator. In this area of defamation law, then, courts have relied on print principles.

Finally, courts have taken a variety of approaches in addressing liability for new mass communications technologies. From the beginning, courts viewed the telegraph as a public utility, a common carrier required to transmit messages but unable to censor them; in so doing, telegraph served the public interest through the efficient and rapid dissemination of messages. Thus, while courts viewed defamation transmitted via telegraph as libel, not slander, they imposed liability on telegraph companies in such a way that companies were

immune absent proof of malice, which was generally defined as failure to exercise due care and/or transmitting material that was libelous on its face.

While courts initially attempted to hold broadcast stations strictly liable for the transmission of defamatory content, some questioned the appropriateness of holding a company strictly liable without fault; thus emerged the due care or negligence standard of liability. Overall, courts wrestled with the best way to balance promoting the speech provided by the technologies against the individual's—and society's—interest in preserving a good name and reputation.

Courts have, for the most part, been generous in balancing speech and reputation interests in favor of speech on the Internet. As discussed, both the single publication rule and the immunity conferred by section 230 of the CDA work together to limit a defamation plaintiff's claims, both through limiting the statute of limitations through the single publication rule and through holding that only those who generate content on the Web are liable; those providers or users who disseminate information from other content providers are immune. While this approach is guided by a federal statute, courts have interpreted the statute broadly, conferring immunity even to individual users who re-post defamatory content. Courts have granted an extraordinary immunity to republishers and distributors of defamatory content online, particularly in comparison with broadcast technologies and even compared to the telegraph with its malice requirement; however, this immunity was granted by statute and did not develop out of common law.

In the light of that conclusion, the final trend identified in this thesis is that courts have been both guided by the principles articulated in the Second Restatement of Torts and by statutes. While the CDA steals the spotlight as the reigning federal statute that critics love to

criticize, states also have addressed the application of defamation law to mass communications technologies through statutes. Georgia's "defamacast" is a prime example of a state legislature interceding to take over for common-law development. Statutes determining the liability of a broadcast station for non-employee speech serve as another prime example of state legislatures mandating an approach rather than relying on common-law evolution. Therefore, while the scope of the immunity conferred for third-party defamation on the Internet certainly exceeds that of other mass communications technologies, a definite trend over the last century has been for legislative bodies to step in with statutory solutions to common-law issues and questions.

To summarize, then, the extent to which the application of libel law to the Internet fits a historical pattern is mixed. The courts have not created any new principles but have simply applied existing principles in such a way that promotes speech on the Internet. Furthermore, it is clear that statutes have played an integral role in the application of defamation law to new communications technologies, and so in that sense, the Internet is no exception. Courts relied on a centuries-old mass communications technology—the printing press—in treating Web pages like book pages for the purposes of the single publication rule.

What is different is both the timeline of the application of defamation law to the Internet and the extent of the immunity provided for third-party defamation. The telegraph came into its own in the mid-nineteenth century; in defamation cases, the telegraph was not treated as a common carrier, liable only if the agent knew or had reason to know that he was transmitting a defamatory message, until the 1890s, and its status as a common carrier was not codified

until 1910.<sup>52</sup> Thus, it took more than a half-century to establish the common-law approach to liability for defamation transmitted via telegraph.

The radio developed in the 1920s and the television in the 1930s. Courts seemed to wrestle with the libel/slander distinction at least leading into the 1950s; however, cases decided after 1977, post-Second Restatement, generally reflect the principle that broadcast defamation constitutes libel. The Uniform Single Publication Act of 1952 articulated the principles of the single publication rule, which were later adopted in the Second Restatement; again, here, a number of decades passed before courts reached a generally unified common-law approach. Liability proved another area that initially confounded courts, but, as discussed earlier, many states stepped in to legislate the issue.

The Internet, on the other hand, had less than a decade in which common law could evolve before the federal government stepped in to provide a uniform approach, one that conferred a broad immunity for third-party defamation. Certainly, the immunity conferred upon service providers and users for third-party defamatory content on the Internet exceeds that which is provided to the other technologies discussed here. However, the nature of the technology is also vastly different. To publish content via broadcast stations, for example, requires either access through ownership or employment, or it requires purchasing air time. On the Internet, all you need is an Internet connection and you can instantly publish. It is a medium of and for the people.

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<sup>52</sup> Nichols, *supra* note 9, at 510.

## Implications and Suggestions for Further Research

“The single most important source of rights for electronic communications in the United States is the First Amendment of the United States Constitution, which guarantees freedom of speech and of the press.”<sup>53</sup>

Defamation law seeks to balance an individual’s interest in a good reputation with the right to free speech.<sup>54</sup> Unquestionably, there are societal interests served by both—the preservation of one’s reputation and character certainly is a vital need for functioning in society, but a society that engages in a robust exchange of ideas, an ideal served by the user-driven content on the Web, fits a democratic ideal in which every person has a voice. To be sure, in granting a broad immunity for the re-posting of content online—including defamatory content—we are placing our faith in the technology and the people who use it that it will not be abused. Unquestionably, promoting speech at the expense of reputation results in harm to some individuals. But if a free and democratic society is our goal, then the Internet is a public forum in which anyone with access to a computer has a say.

Although Congress has provided a very broad immunity, very quickly in the lifespan of the Internet in comparison to the courts’ application of defamation law to new mass communications technologies, statutes have been used for years in place of common-law developments in defamation. Most of these statutes have been at the state level, but perhaps is it not entirely a bad thing to have one uniform approach that serves the entire U.S. Internet community.

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<sup>53</sup> Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in this New Frontier*, 59 ALB. L. REV. 1083, 1088 (1996).

<sup>54</sup> RUSSELL L. WEAVER ET AL., *THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH* 17 (2006).

While some authors have criticized Congress and the Communications Decency Act for providing too much immunity, too quickly, before common law had a real chance to evolve, perhaps the statutory solution is not all bad. Both a benefit and drawback to common law is that it is a slow process, which, as its application to previous technologies demonstrates, takes many years to develop; enacting a statute, however, can be a relatively quick process—as can repealing or amending a statute. If Congress decided that it was displeased with the way courts were interpreting the Communications Decency Act or with the consequences of it, it could potentially amend the Act within a relatively short period of time. In addition, common law is not a uniform approach and varies by state; a federal statute provides a uniform approach either within a state or across the country so that the law is clear. Furthermore, courts still have a discretionary role in interpreting statutes so that the issue is not necessarily completely set in stone by the statute.

The nature of the Internet, as a medium widely accessible and capable of allowing a robust speech forum, is best served—for now, at least—by a laissez-faire policy that promotes the use of the Internet. Should another few years or few decades reveal that speech is being promoted in such a way that it has become disruptive to society, the CDA can always be reevaluated. The Internet is a vastly different medium from the telegraph, radio, and television in the unparalleled access it provides for publication—there are no editors who must vet a story or check the facts; time or space typically does not need to be purchased. With a computer and the know-how to use it, the lonely pamphleteer has a new forum. Let us

allow time for free speech and for self-regulation of the Internet before we assume the worst in people, that the Internet will function to the detriment of reputation and, ultimately, society.

The research undertaken here is not a comprehensive guide to the application of defamation law to new mass communications technologies. Instead, it provides a brief look at three specific areas of defamation law—the libel/slander distinction, the single publication rule, and liability—and how courts have applied those areas in the light of new communications technologies. Considering the finding that statutes have long played a role in directing courts in the application of defamation law to new technologies, further research could place more emphasis on statutes, undertaking a comprehensive review of the role of statutes, thus providing more context for court decisions. In addition, exploration of other areas of defamation law, such as jurisdiction, retractions, or fault requirements, could provide a more complete picture. .

What this research does indicate is that with the libel/slander distinction and the single publication rule, courts have built a model for Internet defamation and publication based on common law that has grown out of courts’ experiences with previous technologies. While the courts had little chance to work through liability for third-party defamation before the passage of the Communications Decency Act, perhaps the statutory approach—which had been used by states and the federal government to determine how defamation law would apply to new technologies in the past—is the best fit for the Internet right now. The Internet is, more so than other mass communications technologies, a medium of, for, and by the people. Before we assume that speech freedoms will be excessively abused, let us embrace this opportunity of broad immunity to see just what the people will do with it.



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