

## **Tuning into the Fine Print: Law and Social Change in Media**

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Media regulation in the era of armchair journalism

"The printing press is either the greatest blessing or the greatest curse of modern times, sometimes one forgets which it is." J.R. Barrie

Media regulations such as libel law have traditionally focused on moderating the actions and behavior of the professional press, the dominant force in media production for centuries. Liberal libel rules that applied well to a self-regulating professional class intent on preserving its journalistic integrity and code of ethics, however, may not work with the nearly 25 million American bloggers publishing news today. The exponential growth of armchair reporters suggests that the evolution of media regulation will be driven by the increasing popularity of social media, blogs, and user-generated content.

At its outset, libel law strictly prohibited the malicious publication of injurious falsehoods. This remained virtually unchanged from the time of the enactment of the First Amendment—a period known as journalism’s “dark ages,” when the founding fathers routinely bashed one another in a partisan and scurrilous press—until the early 1960s, when the Supreme Court expanded the protections of the First Amendment over libel in the landmark case of *New York Times v. Sullivan*. In *NY Times*, the court held that when the target of the publication was a public official, a plaintiff must prove that the publisher either knew the statements in question were false or acted in reckless disregard for the truth. The court reasoned that while there is no constitutional value to false speech, some false speech from newspapers must be tolerated so as not to chill the constitutionally protected true speech. This and subsequent cases expanding First Amendment protection over false speech occurred during what could be labeled a golden age of journalism, when televised debates, the Civil Rights Movement, Watergate, and Vietnam were news. During this period, the press not only shaped but *made* public opinion, actively uncovering law-breaking and injustices instead of merely reporting from the sidelines. Under those circumstances, it made sense to give considerable legal latitude to the press, allowing them to be constrained by their sense of journalistic integrity alone.

The problem is that these weak libel rules were designed for traditional media, before the internet. Media is no longer dominated by an exclusive club of professional reporters party to a gentleman’s agreement. Meanwhile, libel has become much more harmful to the reputation or pecuniary interests of its victims because internet content endures in a way that news broadcasts and printed paper do not. Although bad information about a person can be diluted by good information, Google’s page-ranking algorithm is self-reinforcing—i.e. the older and more salacious results tend to rise to the top of search result pages. Reputations remain ruined because damaging information can perpetually lurk in the Internet’s far corners. More disturbingly, many targets of false and damaging speech are unable to sue for libel because *NY Times* makes it especially hard to prove a non-journalist knew certain damaging statements were false. (The case of Shirley

Sherrod is one recent example.) In deciding how accountable people should be held for what they say on the internet, we must ask ourselves whether we sympathize more with the blogger being sued or the target being defamed. And how can we ascertain the truth? Can we hope that it rises to the top in the marketplace of ideas, or must it be distilled in a courtroom?

The marketplace of ideas is not what it once was. The internet was initially lauded as a source of niche information. Now there is so much niche information that people are self-selecting out of a national dialogue, for instance 1/5 of Americans wrongly believe President Obama is Muslim. The marketplace of ideas is not like the commodities market, where the value of wheat is based on millions of buyers and sellers. It's more like the marketplace for restaurants, where success is not based on the food itself but on its appeal to a particular audience. Like the scurrilous and partisan press of the past, the current marketplace of ideas allows a special version of the “truth” to exist for every audience.

So what about the courtroom, then? The internet has been compared to the Wild West: a vast and unknown frontier where lawlessness and freedom have been a good thing, leading to increased capital investment by both consumers and content providers alike. With increased value from an internet-ready computer (e.g., access to free music via Napster) came increased sales of computers and internet services, and with that increased audience came more content and advertisement sales. Without quality or legal standards, however, legitimate businesses like newspapers may get undercut by news mills pumping out cheap, low quality “news,” with no libel laws to stop them. Lawlessness can't remain a good thing—even the Wild West was eventually tamed.