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# Are Talebearers Really as Bad as Talemakers?: Rethinking Republisher Liability in an Information Age

## **Cover Page Footnote**

J.D. candidate, Fordham University School of Law, 2005; B.S.J., Northwestern University, 1999. Thanks to Professor Mary-Rose Papandrea and my former employer, The Star-Ledger, for inspiration. I would also like to thank James D. Hyre his help in preparing this piece for publication. This Comment is the winner of the first annual Fordham Urban Law Journal Alumni Association Student Author Award.

# ARE TALEBEARERS REALLY AS BAD AS TALEMAKERS?: RETHINKING REPUBLISHER LIABILITY IN AN INFORMATION AGE

*Jennifer L. Del Medico\**

## INTRODUCTION

It was a spectacle that “produced without question some of the most bizarre testimony,” a district court judge commented in hindsight.<sup>1</sup> The 1982 Pulitzer divorce trial featured tales of sex, drugs, and séances that were splashed throughout magazines and newspapers across the country.<sup>2</sup> Many of the scandalous details involved Janice Nelson, the woman who served as Mrs. Pulitzer’s marriage counselor and psychic.<sup>3</sup> Nelson testified on behalf of Mr. Pulitzer because she felt that Mrs. Pulitzer should not have custody of the couple’s children.<sup>4</sup>

While the high-profile Pulitzer divorce produced juicy fodder for news reports, the media’s real gain from the case came five years after the divorce trial when Nelson sued several media organizations for defamation.<sup>5</sup> During the divorce trial, the Associated Press erroneously reported that Nelson conducted séances in the Pulitzer home where ten to fifteen people surrounded Roxanne Pulitzer, who was in bed with a trumpet and a black cape.<sup>6</sup> Both

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1. The statement of Judge J. Spellman, author of the opinion in *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1471 (S.D. Fla. 1987). Later in the opinion, Judge Spellman writes that the Pulitzer trial “elicited some of the most preposterous testimony imaginable during the 18 days it lasted.” *Id.* at 1482.

2. *Id.* at 1471. Trial testimony was filled with stories of adultery, lesbian trysts, incest, and drug use. *Id.* at 1473. Testimony indicated that Roxanne Pulitzer slept with a Palm Beach real estate salesman, a French baker, a Belgian race-car driver, and the wife of Kleenex heir James Kimberly. *Paradise Lost*, TIME, Jan. 10, 1983, at 24.

3. See *Nelson*, 667 F. Supp. at 1471. Nelson, who operated an astrology business, voluntarily left Palm Beach to avoid attention because of her association with Roxanne Pulitzer. *Id.*

4. *Id.*

5. See *id.* at 1471.

6. *Id.* at 1473-74.

The Miami Herald<sup>7</sup> and The New York Post republished this erroneous dispatch.<sup>8</sup> Knight-Ridder wire service sent out a similar story over its news wire that The Washington Post republished.<sup>9</sup> Newsweek reported the same story based on information from various newspaper and wire service reports.<sup>10</sup> After the publications of these statements, the Associated Press issued a retraction which stated that “[i]n a Pulitzer deposition made available Thursday, [Mr. Pulitzer] describes séances—unrelated to Ms. Nelson—that Mrs. Pulitzer conducted in their home.”<sup>11</sup>

The court granted summary judgment in favor of the republishers<sup>12</sup> based on a “powerful, but often neglected libel defense” called the “wire service defense.”<sup>13</sup> This defense allows the media to republish news without liability for defamation if the information passed over a news wire and the subsequent publisher did not know or have reason to know that the material was defamatory.<sup>14</sup> In certain circumstances, this privilege exempts the media from the strict common law rule that imputes independent liability to third parties who republish libelous statements.<sup>15</sup> Whether the defamed individual is a public or private figure is not a factor in determining whether the wire service defense is applicable.<sup>16</sup> Therefore, the

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7. *Id.* at 1478-79.

8. *Id.* at 1482-84.

9. *Id.* at 1481.

10. *Id.* at 1475-78.

11. *Id.* at 1473.

12. *Id.* The court granted summary judgment to the Associated Press because Nelson failed to provide notice of the suit as required under Florida law. *See infra* note 53 and accompanying text.

13. *See generally* Kyu Ho Youm, *The “Wire Service” Libel Defense*, 70 JOURNALISM Q. 682 (1993) (tracing the history and use of the wire service defense from its 1933 inception to the date of the article’s publication).

14. *See Nelson*, 667 F. Supp. at 1474 (holding that the wire service defense is law in Florida); *see also infra* notes 54-72 and accompanying text (discussing the evolution of the wire service).

15. *See Nelson*, 667 F. Supp. at 1480; *see generally*, James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 HASTINGS COMM. & ENT. L.J. 455, 457-64 (1991) (tracing the history of the wire service defense).

16. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964), the Court held that in order for a public figure to recover for defamation, the publisher must have acted with “‘actual malice’—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” *See also* *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). *But see* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual”).

media can potentially get the case dismissed on summary judgment without engaging in litigation concerning whether the defamed is a public or private figure.

Over time, spreading the news has become more of a cooperative endeavor. In 1848, the Associated Press was founded as a news cooperative for six New York papers.<sup>17</sup> Today, the Associated Press serves 1700 newspapers and 5000 radio and television stations around the country.<sup>18</sup> More than thirty other news wires, from institutions like United Press International to the two-year-old Women's Enews, relay news to media outlets around the country.<sup>19</sup> Journalists frequently rely on these services for facts or quotes to incorporate into original stories and publications often use entire wire service stories as a replacement for self-generated copy.<sup>20</sup>

The very existence—and recent proliferation and expansion—of the wire service privilege illustrates that traditional republication liability does not allow news organizations to function effectively in a society that demands rapid news dissemination.<sup>21</sup> Today, twenty-one jurisdictions currently recognize the seventy-year-old defense, the majority of them electing to do so within the last twenty years.<sup>22</sup> In the past decade, eight jurisdictions have approved the wire service privilege.<sup>23</sup>

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17. OLIVER GRAMLING, *AP: THE STORY OF NEWS 19-27* (1940) (telling the story of the founding of the Associated Press); see also Associated Press, *Facts & Figures*, at <http://www.ap.org/pages/about/about.html> (last visited Nov. 4, 2004).

18. See Associated Press, *supra* note 17.

19. Am. Journalism Review, *News/Wire Services* (2003), at [http://ajr.org/News\\_Wire\\_Services.asp?MediaType=9](http://ajr.org/News_Wire_Services.asp?MediaType=9) (last visited Nov. 4, 2004) (listing current wire service).

20. See *Howe v. Detroit Free Press*, 555 N.W.2d 738, 740-41 (Mich. Ct. App. 1996). "Such a defense is consistent with the custom and practice of the newspaper industry, in which reliance on the accuracy of wire-service articles is commonplace." *Id.* at 741.

21. See *infra* notes 84-116 and accompanying text (discussing the expansion of the wire service defense).

22. See Youm, *supra* note 13, at 688 (citing thirteen jurisdictions that rely on the wire service defense as of 1993).

23. They include Arizona (*Med. Labor Mgmt. Consultants v. Am. Broad. Co.*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996)); California (*Peper v. Gannett Co.*, No. 2002061753, 2003 WL 22457121, at \*6 (Cal. Super. Ct. Apr. 4, 2003)); Illinois (*Kapetanovic v. Stephen J. Cannell Prod.*, 97-C2224, 2002 WL 475193, at \*7 (N.D. Ill. Mar. 27, 2002)); Michigan (*Howe*, 555 N.W.2d at 738); Minnesota (*Cole v. Star Tribune*, 581 N.W.2d 364, 368-69 (Minn. Ct. App. 1998)); Texas (*Merco Joint Venture v. Kaufman*, 923 F. Supp. 924, 927 (W.D. Tex. 1996)); and Virginia (*Winn v. United Press Int'l*, 938 F. Supp. 39, 44 (D.D.C. 1996) (federal court applying Virginia law)). Some of these jurisdictions have applied the defense when the medium relied on was a television network. See *infra* note 98 and accompanying text.

The acceptance of the defense suggests that the strict common law rule burdening republishers with potential liability should be abolished if there is no showing of actual knowledge that the material was defamatory. Thus, the "actual malice" standard articulated in *New York Times v. Sullivan*, which applies to public figures, should apply to all individuals in cases involving republishers.<sup>24</sup> The *Sullivan* Court defined acting with "actual malice" as publishing material "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>25</sup> This Comment argues that the standard established by *Sullivan* is the proper standard to impose on republishers who publish material noting that it originates from another source, regardless of whether the plaintiff is a public or private figure.

Whether republishers can escape liability for defamation should not turn on the technology involved. In its traditional form, the defense is only applicable when a wire service is involved in the news distribution.<sup>26</sup> Without the wire service privilege, a news organization can face liability for defamation if it reports verbatim what has appeared in another publication, even if the item is attributed.<sup>27</sup> It is time to re-evaluate the old adage in libel law that "[t]alebearers are as bad as talemakers."<sup>28</sup>

Part I of this comment chronicles the history and expansion of the wire service defense since it first appeared in a 1933 decision.<sup>29</sup> Additionally, Part I posits that the early development of the wire service defense was likely a tool to protect technological developments that improved news distribution over the wire.<sup>30</sup> Part I also discusses the reverse wire service defense, which developed more than sixty years after the first articulation of the defense.<sup>31</sup>

Part II will examine New York's broader approach to evaluating whether a republisher should be held liable, which displaces the

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24. 376 U.S. 254, 279-80 (1964).

25. *Id.* at 280.

26. See *Layne v. Tribune Co.*, 146 So. 234, 239 (Fla. 1933) (holding that papers that act as a "local screen" and reprint news dispatches from wire service are protected from libel claims via the wire service defense).

27. See RESTATEMENT (SECOND) OF TORTS § 578(b) (1977).

28. *Houston Chronicle Publ'g Co. v. Wegner*, 182 S.W. 45, 48 (Tex. Civ. App. 1915) (holding that a newspaper can be held liable for defamation when it reported with attribution that another newspaper published a story accusing the local police chief of illegally putting his son on the city payroll).

29. See *infra* notes 54-72 and accompanying text.

30. See *infra* notes 73-83 and accompanying text.

31. See *infra* notes 104-16 and accompanying text.

need for a privilege like the wire service defense.<sup>32</sup> Under New York law, in matters involving public figures and matters of public concern involving private figures, republishers must act in a grossly irresponsible manner in order to be held liable.<sup>33</sup> Under this standard, the court must determine whether the initial publisher was a reliable source and whether the republisher acted as would a prudent journalist.<sup>34</sup>

Finally, Part III concludes that the common law rule holding republishers liable for defamation should be replaced with a presumption in favor of republication.<sup>35</sup> This presumption would allow republication of news without liability when a republisher meets certain criteria, regardless of the type of medium involved, unless the republisher acted with actual malice.<sup>36</sup> This Part also points out problems with both the traditional wire service defense and New York's broader approach.<sup>37</sup> Part III also discusses how Congress has limited traditional republication liability for Internet service providers, which illustrates that republisher liability is unsuitable in modern times.<sup>38</sup> This change supports the important goal of ensuring that speech is not chilled, a core First Amendment value, and that news is not kept from the public.<sup>39</sup> In addition, this Part will suggest that the traditional rule barring the original publisher from being held liable for third party publication of the original publisher's statements should be altered to account for truly harmed plaintiffs.<sup>40</sup>

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32. See *infra* notes 147-75 and accompanying text.

33. See *infra* notes 151-52 and accompanying text.

34. See *infra* notes 163-68 and accompanying text.

35. See *infra* notes 221-25 and accompanying text.

36. See *Tzougrakis v. Cyveillance Inc.*, 145 F. Supp. 2d 325, 329-30 (S.D.N.Y. 2001). The qualified privilege is granted to republishers in New York who have no reason to question the accuracy of the article or the good faith of the reporter. Another factor to be considered when evaluating the republisher's behavior is whether the republisher followed "sound journalistic practices" in republishing the material and whether it adhered to "normal procedures, including editorial review of the copy." *Id.*

37. See *infra* notes 191-212 and accompanying text.

38. See *infra* notes 213-20 and accompanying text.

39. See, e.g., *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . .").

40. See *infra* notes 226-29 and accompanying text.

## I. THE DEVELOPMENT OF THE WIRE SERVICE DEFENSE

Part I examines *Layne v. Tribune Co.*, the first case to articulate the wire service defense, and the policy reasons for departing from the strict common law rule that republishers are liable for defamation regardless of whether they attributed the source of the material.<sup>41</sup> This Part also hypothesizes that the court's holding was partly in response to changing technology that made wire services more efficient.<sup>42</sup> In addition, this Part discusses how courts have expanded the defense, applying it to news organizations that go beyond acting like *Layne's* "local screen."<sup>43</sup> For an understanding of why the media would benefit from the defense, it is necessary to examine the elements of defamation and republisher liability.<sup>44</sup>

### A. The Elements of Defamation

The elements of the defamation tort vary from case to case depending on several factors: the identities of the parties, the character of the alleged defamatory statement, and the law of the jurisdiction applied to the action.<sup>45</sup> The general elements are, however: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."<sup>46</sup>

The wire service privilege is a powerful tool for the media in battling some defamation lawsuits because of the continued existence of the rule that secondary publishers are subject to the same liability as the original publisher.<sup>47</sup> The common law of libel has long held that a publisher adopts the defamatory comment as its own through republication.<sup>48</sup> This rule, which aims to protect repu-

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41. See *infra* notes 54-72 and accompanying text.

42. See *infra* notes 73-83 and accompanying text.

43. See *infra* notes 84-103 and accompanying text.

44. See *infra* notes 45-53.

45. ROBERT D. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 63 (2nd ed. 1994).

46. *Id.* at 63-64 (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)).

47. RESTATEMENT (SECOND) OF TORTS § 578 (1977); see also *Short v. News-Journal Co.*, 212 A.2d 718, 719 (Del. 1965). In *Short*, the court stated in dictum that the traditional republisher liability applied and "neither good faith nor honest mistake constitutes a defense, serving only to mitigate damages." *Id.* at 719.

48. SACK, *supra* note 45, at 361 (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988)).



tations,<sup>49</sup> excludes those who are involved solely in the delivery or transmission of the defamatory material, such as a telegraph company putting through a call.<sup>50</sup> Thus, absent a privilege, a newspaper is subject to liability if it republishes a defamatory statement, “although it names the author and another newspaper in which the statement first appeared.”<sup>51</sup> Under the wire service privilege, however, the media defendant has the potential to prevail at the early summary judgment phase,<sup>52</sup> thereby destroying the plaintiff’s cause of action.<sup>53</sup>

### B. A Privilege for Republishers: *Layne v. Tribune Co.*

*Layne v. Tribune Co.*<sup>54</sup> first articulated the “wire service defense” and its rationale, although the terminology was not coined until years later.<sup>55</sup> Layne, a Congressman’s secretary, sued The

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49. See, e.g., *Times Publ’g Co. v. Carlisle Journal Co.*, 94 F. 762, 766 (8th Cir. 1899).

50. RESTATEMENT (SECOND) OF TORTS § 581 (1977).

51. *Id.* at § 578, comment b; see also *Times Publ’g Co.*, 94 F. at 767 (“[I]t is no justification for the publication of such a libel that another had spoken or written the false charge, and that the libeler simply repeated his statement, and that he gave the name of his informant.”).

52. The wire service defense does not apply differently to public or private figures, making it a tool that allows media defendants to get an early motion for summary judgment since the private/public question, which is often heavily litigated, is not an issue. See Youm, *supra* note 13, at 688 (reminding media defendants not to overlook a summary judgment motion based on the wire service defense if appropriate).

53. See *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1484-85 (S.D. Fla. 1987). Nelson could not sue the original publisher, the Associated Press, because she did not give proper notice under Florida statute. Fla. Stat. Ann. § 770.01 (West 1986) required plaintiffs in a civil action brought against the media for libel or slander to notify the defendant specifying the article and the statements that are allegedly defamatory. *Nelson*, 667 F. Supp. at 1473. Nelson notified the Associated Press that she was filing a defamation suit, but failed to point to the specific defamatory statements in specific press dispatches. *Id.* The court said that Nelson had that information available, since she sued two other newspapers the following day that reproduced copies of the offending Associated Press story. *Id.* The Florida statute requires the best notice possible. *Id.* at 1474. In addition, the wire service defense barred Nelson from recovering from Newsweek, The Miami Herald, and The New York Post. *Id.* at 1484-85. The court noted that this outcome is “ironic” and recognized that “[t]here is no question but that Plaintiff feels victimized by the nature of these proceedings and this result.” *Id.* at 1485. “The irony does not ‘smack’ of injustice in the federal courts . . . The First Amendment, unfortunately [sic] as it may be, does not otherwise protect Plaintiff’s subjective feelings.” *Id.* “Regardless, the court is adamant that First Amendment protection justifies—and demands—this result.” *Id.* The decision “must be understood as a price we pay for upholding a Bill of Rights which believes that the truth is best arrived at from ‘uninhibited, robust and wide-open’ comment.” *Id.*

54. 146 So. 234, 237-38 (Fla. 1933).

55. *Id.* at 238. *But see Okla. Publ’g Co. v. Givens*, 67 F.2d 62, 63 (10th Cir. 1933) (affirming a jury award for a woman libeled by an article stating that she was jailed on

Tampa Morning Tribune after the paper published two wire stories that said he was indicted for possession of alcohol.<sup>56</sup> The court held that when a newspaper republishes a wire story from a "generally recognized reliable source of daily news," there is no cause of action for defamation unless there is evidence that the publisher "acted in a negligent, reckless, or careless manner in reproducing it."<sup>57</sup> The court likened the republisher to a "local 'screen'" lacking authorship.<sup>58</sup> Later courts ruled that republishers do not have to use the wire service byline, nor are they confined to acting as a local screen, to be afforded the privilege.<sup>59</sup>

While the *Layne* court recognized that the wire service defense was at odds with the majority common law view of republisher liability,<sup>60</sup> the court justified its decision by relying on policy reasons and the ancient common law "to the effect that one who hears a slander has a legal right to repeat it," in the same words and with attribution.<sup>61</sup> It appears, however, that the *Layne* court erroneously interpreted the ancient common law.<sup>62</sup> The court extended

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forgery charges; the court rejected defendant's defense that they should not be liable because they based their article on an Associated Press dispatch).

56. *Layne*, 146 So. at 235-36. Both stories had a Washington dateline. *Id.*

57. *Id.* at 238.

58. *Id.* at 239.

59. See *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1482 (S.D. Fla. 1987) (stating that a newspaper does not lose the wire service defense if the article in question does not explicitly carry the wire service byline). In addition, headlines the republisher created that are based on the wire story are only actionable if information is added or subtracted, which would make the headline itself libelous. *MacGregor v. Miami Herald Publ'g Co.*, 119 So. 2d 85, 88 (Fla. Dist. Ct. App. 1960).

60. *Layne*, 146 So. at 237 (approving of the modern rule that in cases of libel and slander, one who republishes the statement "must be held liable for the publication of a libel or defamatory words in regard to another, even though he is but repeating what he has heard, and names his authority, and although the repetition is made without any design to extend circulation . . ." (citing *World Publ'g Co. v. Mullen*, 61 N.W. 108, 109 (Neb. 1894)), because one "who repeats a slander or libel is presumed by his reiteration of it, to indorse it and make it his own" (citing *Evans v. Smith*, 21 Ky. 363, 363 (1827))).

61. *Id.* at 237-39 (citing *Waters v. Jones*, 3 Port. 442 (Ala. 1836); *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539 (1877)). *Johnson* suggested, without holding, that one who repeated a slander was not liable for slander for repeating the statement if he said it in the same words and attributed the source. 65 Mo. at 541 ("That one heard another make the charge which he repeats, will not screen him unless at the time of repeating the words, he affords the plaintiff a cause of action against the original author."); see also *Nelson*, 667 F. Supp at 1476 (discussing the ancient common law and allowing slander to be repeated without liability, and concluding that "modern newspapers could not exist without a similar privilege").

62. What *Layne* refers to as the ancient common law rule allowing one to repeat a slander without liability if the source was attributed is actually inaccurate; the origin of this inaccuracy is dicta in the *Earl of Northampton* case, 12 Coke. Rep. 132 (1613).

this erroneous rationale to news organizations, recognizing that “[t]he modern daily newspaper is an institution of news dissemination that was unknown to the early common law,” and that judicial notice allowed the court to adjust common law principles to better serve society.<sup>63</sup>

The *Layne* court reasoned that adopting a wire service defense would give papers access to news from around the country and the world that would be of interest to their readers.<sup>64</sup> Without such a privilege, a newspaper would be forced to verify every news item it published, while “at the same time keep up the prompt daily service expected of present day newspapers.”<sup>65</sup> Later courts recognizing the defense explained that an obligation of independent verification “would leave only large, wealthy newspapers capable of covering multiple stories and regions.”<sup>66</sup>

Since *Layne*, courts have added several requirements which a news organization must fulfill to raise the defense:<sup>67</sup> the republisher must read the release to make sure there are no inconsistencies;<sup>68</sup> the article must not be republished if there are unexplained inconsistencies or if the news organization republishing the article knows the article is false;<sup>69</sup> and if a reasonable jury could disagree as to whether something in the article should put the newspaper on notice of a possible inaccuracy, the defense is not available and summary judgment is not appropriate.<sup>70</sup>

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See JOHN TOWNSHEND, *TOWNSHEND ON SLANDER AND LIBEL* 300-03 (4th ed. 1890) (discussing the impetus for the erroneous belief that a repetition could be justified by declaring the name of the previous publisher).

63. *Layne*, 146 So. at 238. Courts are not “wholly powerless to remold and reapply the ancient rules so as to fit them to modern conditions, where there has arisen and become involved, new factors of life and business arising from the complexities of a mechanized era of human progress.” *Id.* at 237.

64. See *Layne*, 146 So. at 237.

65. *Id.* at 239; see also *Nelson*, 667 F. Supp. at 1480 (“The wire service defense is fully consistent with the First Amendment—an amendment which tolerates occasional, non-negligent mistakes for the sake of getting out the news people want.”).

66. *Cole v. Star Tribune*, 581 N.W.2d 364, 369 (Minn. Ct. App. 1998) (recognizing the wire service defense in Minnesota and granting summary judgment for papers that relied on a story from The Associated Press “because there is no question that the AP is a reputable news service that provides accurate information”).

67. See *Howe v. Detroit Free Press, Inc.*, 555 N.W.2d 738, 740-42 (Mich. Ct. App. 1996).

68. *Id.* at 740-41.

69. *Id.*

70. *Id.* at 742. The decisions, however, lack guidance on what type of information that would be so outrageous as to put the defendant republisher on notice that the story was potentially defamatory. Examples of information that would not put the republisher on notice can be found in *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1482 (S.D. Fla. 1987) and in *O'Brien v. Williamson Daily News*, 735 F. Supp.

While using the term wire service defense for consistency, some modern courts have recognized that the defense is actually a definition of the duty a newspaper has when republishing information from a wire service.<sup>71</sup> Requiring verification of facts, these courts reason, would impose a standard of extraordinary care, not ordinary care, on the media.<sup>72</sup> These courts focus their analysis on the standard of care, not on whether the medium involved can somehow be classified as or identified with a wire service. Whether the information came from a wire can be an element used to evaluate whether a republisher demonstrated ordinary care.

### C. Defending the Media, Protecting Technology

Significantly, the *Layne* court's decision recognizing the wire service defense appeared shortly after technological advances made news dispatches via the wire quicker and more efficient.<sup>73</sup> The invention and widespread use of the teletype system changed news-gathering.<sup>74</sup> Prior to the teletype system, the telegraph system transmitted news in the form of dots and dashes, which had to be converted into words.<sup>75</sup> Telegraph technology improved marginally since its invention in 1844, and the human element plagued the

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218, 225 (E.D. Ky. 1990). The *Nelson* court said that while the statement "drugs were used and sex was had" is false and arguably defamatory, it was not enough to put The New York Post on notice. *Nelson*, 661 F. Supp. at 1482. "This is because, admittedly, the Pulitzer trial elicited some of the most preposterous testimony imaginable during the eighteen days it lasted." *Id.* In *O'Brien*, the court rejected the plaintiff's argument that the paper should have been on notice as to the defamatory nature of the statements because the article contained accusations that teachers were involved in sexual misconduct. 735 F. Supp. at 225.

Allegations of wrongdoing are published nearly every day and involve people world-wide. The plaintiff has offered no authority which holds that the mention of sexual misconduct should automatically require an independent investigation by every newspaper which wishes to publish such a story as transmitted via the AP. The burden would clearly be onerous . . . .

*Id.*

71. See *Howe*, 555 N.W.2d at 740-41; see also *O'Brien*, 735 F. Supp. at 218, 220 (stating that "the so-called 'defense' is actually a definition of ordinary care in regard to the use of wire service stories").

72. See *Brown v. Courier Herald Publ'g Co.*, 700 F. Supp. 534, 537 (S.D. Ga. 1988). Here, the federal district court, sitting in diversity, decided that the Georgia Supreme Court would have applied the wire service defense, pointing to the logic behind the defense and the fact that neighboring states had adopted it. *Id.*

73. Five years before the *Layne* court approved the wire service defense, the Associated Press replaced the telegraph with the teletype printer. See Libby Quaid, *Morse Was The Source: Telegraph Served AP for Eight Decades*, at <http://www.ap.org/anniversary/welcome4.html> (last visited Nov. 4, 2004).

74. *Id.*

75. See RICHARD SCHWARZLOSE, *THE AMERICAN WIRE SERVICES* 80-81 (1979).

system's efficiency.<sup>76</sup> Although the more efficient teletype system was introduced in 1914,<sup>77</sup> it was not until the mid-1930's, around the time of the *Layne* decision, that this new technology was in widespread use for news transmission.<sup>78</sup>

The teletype took the human element out of wire service transmission, thereby increasing its efficiency.<sup>79</sup> Transmitting news via the wire service was "ingressed deeply into the social fabric"<sup>80</sup> by the development of the teletype. Even prior to the advanced technology, the news wires were already an accepted part of society.<sup>81</sup> Increased efficiency and widespread use turned the work of the wire service into a social institution, whose international stories American newspaper readers came to expect.<sup>82</sup> It follows that courts would want to protect a valuable social institution like the wire services and promote their use and growth. In fact, a contrary decision in *Layne* could have potentially destroyed the wire service industry. Papers fearing traditional republisher liability may have forgone the use of wire news. While it is unknown if papers would have reacted this way, this potential scenario was exactly what the *Layne* court sought to avoid.<sup>83</sup> This rationale, however, does not

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76. *Id.* Although the system could transmit thirty-five words-per-minute, the words were transmitted as dots and dashes which needed to be translated by operators. *Id.* Errors in translation were frequent. In addition, wire service telegraphers, following the lead of Western Union telegraphers, unionized. *Id.* During the first fifteen years of the century, the wire service telegraphers fought with management, sometimes striking, in order to secure privileges similar to other telegraphers. *Id.* This movement impacted transmission efficiency. *Id.*

77. *Id.* (stating that the early models of the teletype were not reliable). The teletype "was simply a consolidation of a typewriter mechanism (in both sending and receiving stations) with a device for transmitting electrical impulses along connecting telegraph or telephone wires (or even through the atmosphere by radio)." *Id.*

78. *Id.*

79. *Id.* "The innovation raised transmission rates to sixty words per minute, reduced operator manpower to a single sender for each trunk or regional wire, and permitted reception of a greater volume of cleaner, more uniform, and more immediately usable news copy in the newspaper office." *Id.*

80. *Id.* at 88.

81. See generally MENAHEM BLONDHEIM, *NEWS OVER THE WIRES: THE TELEGRAPH AND THE FLOW OF PUBLIC INFORMATION IN AMERICA, 1844-1897*, at 6 (1994) ("For by the early 1850's at least two columns of Associated Press news appeared daily in nearly every major American newspaper.").

82. See SCHWARZLOSE, *supra* note 75, at 202-05, 339 (arguing that the wire services attained "the position of a social institution in the United States"). "In fact, this status increasingly appears also to accrue to them abroad by virtue of their increasing ingress into the communication processes of foreign societies." *Id.* at 203.

83. See *Layne v. Tribune Co.*, 146 So. 234, 239 (Fla. 1933) ("To hold otherwise would mean that newspapers at their peril published purported items of news, against the falsity of which no ordinary human foresight could effectually guard and at the

explain why the defense became popular in recent years, with courts opting to apply the defense more liberally.

#### D. Broadening the Scope of the Defense

The *Layne* court provided the justification for the wire service defense, but left many questions open for subsequent courts, including when the defense should apply and what the relevant standard of care should be. Courts since *Layne* have continued to recognize that the defense facilitates the quick dissemination of news,<sup>84</sup> but many courts have rejected applying the defense only to breaking news.<sup>85</sup> While the *Layne* court referred to the republishing newspaper as a "local" media outlet, the court did not define the term "local."<sup>86</sup> Later courts expanded the notion of the republisher to include national media organizations.<sup>87</sup> In addition, subsequent courts have further clarified the threshold the media has to meet in order to invoke the defense.<sup>88</sup>

Courts since *Layne* have been clear that the application of the wire service defense does not turn on whether the republished report is breaking news,<sup>89</sup> or if the republisher theoretically could have covered the story on its own without hardship.<sup>90</sup> Almost fifty years after *Layne*, the Massachusetts Supreme Court in *Appleby v. Daily Hampshire Gazette*<sup>91</sup> ruled that the wire service defense applied even when the news reported was breaking and did not take place in a remote location.<sup>92</sup> In *Appleby*, a convicted felon sued various newspapers in ninety-four actions, claiming that they defamed him in reporting information related to a criminal investigation of which he was the subject.<sup>93</sup> Thirty-three of the papers filed

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same time keep up the prompt daily service expected of present day newspapers."); see also *Nelson v. Associated Press*, 667 F. Supp. 1468, 1476-77 (S.D. Fla. 1987).

84. See generally *Ripps v. Gannett Co.*, CV 91-B-1954-S, 1993 WL 209617 (N.D. Ala. Mar. 3, 1993). "The [wire service defense] recognizes the importance of publication before news becomes stale." *Id.* at n.4.

85. See *infra* notes 119-21 and accompanying text.

86. 146 So. at 234.

87. See, e.g., *Nelson*, 667 F. Supp. at 1471.

88. See, e.g., *O'Brien v. Williamson Daily News*, 735 F. Supp. 218, 220 (E.D. Ky. 1990).

89. *Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721, 726 (Mass. 1985).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 723.

for summary judgment were based on the wire service defense.<sup>94</sup> The *Appleby* court ruled in favor of summary judgment using the same rationales as the *Layne* court, even though the papers in *Appleby* were Massachusetts-based and were published not far from Appleby's Massachusetts home, the setting of the stories.<sup>95</sup> The *Appleby* court reasoned that making a distinction between local stories and remote stories "would impose the same risks of 'apprehensive self-censorship,' as would the requirement that newspapers corroborate all wire service stories before publication."<sup>96</sup> In addition, the court rejected the "local screen" rationale from *Layne* and extended the defense to include stories that were not republished verbatim, but which instead accurately restated the substance of the wire service stories.<sup>97</sup>

While the *Layne* court did not expressly limit the defense to newspapers, it did not specifically authorize its application to other news sources. Subsequent courts, however, have extended the defense to television networks<sup>98</sup> and magazines.<sup>99</sup> One court even suggested that the defense could be extended to radio broadcasts.<sup>100</sup> The *Nelson* court allowed Newsweek, a national news-

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94. *Id.* The lower court granted summary judgment in favor of four papers that were representative of the others and delayed ruling on the rest to save time and money until appeals were exhausted in the four test cases. *Id.*

95. *Id.* at 726. The four papers were The Medford Daily Mercury, The Boston Globe, The Daily Hampshire Gazette, and The Holyoke Transcript-Telegram. The Medford Daily Mercury republished stories verbatim from the United Press International, while the rest of the papers republished stories verbatim from The Associated Press. *Id.* at 723.

96. *Id.* at 726 (quoting *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 169 (Mass. 1975)).

97. *Id.* (stating that there is no difference between reprinting verbatim and accurately restating a wire story's contents).

98. See *Med. Lab. Mgmt. Consultants v. Am. Broad. Co.*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996) (the wire service defense applies to a network affiliate that acted as a mere conduit for ABC's Prime Time Live); see also *Kapetanovic v. Stephen J. Cannell Prods., Inc.*, No. 97-C2224, 2002 WL 475193, at \*7 (N.D. Ill. Mar. 27, 2002) (stating, without concluding, that the wire service defense may extend to nonaffiliated networks); *Bryks v. Canadian Broad. Corp.*, 928 F. Supp. 381, 385 (S.D.N.Y. 1996); *Merco Joint Venture v. Kaufman*, 923 F. Supp. 924, 927 n.1 (W.D. Tex. 1996) (noting that "the wire service defense and the liability of broadcaster defense are correlative enough to be used interchangeably"); *Peper v. Gannett Co.*, No. 061753, 2003 WL 22457121, at \*6 (Cal. Super. Ct. Apr. 4, 2003) (holding that CNN's reliance on a reputable wire service story allowed them to successfully use the wire service defense).

99. See *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1477 (S.D. Fla. 1987) (holding that the wire service applies to Newsweek magazine).

100. See *Brown v. Courier Herald Publ'g Co.*, 700 F. Supp. 534, 538 n.2 (S.D. Ga. 1988) (stating that the court suspected that the radio station defendant would be granted summary judgment based on the defense should he decide to submit a motion to the Court).

weekly, to successfully assert the defense because periodicals “obviously must rely for their sources of information upon other reliable periodicals, newspapers and wire service reports.”<sup>101</sup> The court further justified the extension, adding that “[t]hese periodicals are an integral part of today’s news information services.”<sup>102</sup> It should be noted, however, that there is still a question as to whether *Layne* should be extended to other media. While some courts have applied the wire service defense to other mediums, none have discussed whether there are limits as to what type of medium the defense could be extended to cover. Some courts have taken the reasoning of the wire service defense and applied it to protect the wire service when it disseminates member-created work, rather than that of the wire service reporters.<sup>103</sup>

### E. Protecting the Wire: The Reverse Wire Service Defense

The same reasoning behind protecting republishers who rely on news wires has been used to protect “reputable news services” like The Associated Press under a “reverse wire service defense.”<sup>104</sup> A reverse wire service defense allows a wire service to escape liability for defamation if the story it distributed was the work of a reputable news source instead of the wire service’s own reporter.<sup>105</sup> In this situation, the wire service would not have the duty to independently verify the facts of the story, and could raise the defense as long as it did not know or have reason to know that the material was defamatory.<sup>106</sup>

Recently, the Massachusetts Appeals Court, in *Reilly v. Associated Press*,<sup>107</sup> upheld summary judgment in favor of The Associated Press, holding that the wire service had no independent duty to verify the facts of a story before disseminating it when the story came from a reputable source and had nothing on its face to indicate that it was defamatory.<sup>108</sup> In *Reilly*, the wire service distributed an allegedly defamatory story from The Boston Herald about

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101. *Nelson*, 667 F. Supp. at 1477.

102. *Id.*

103. See *infra* notes 104-16 and accompanying text.

104. *Reilly v. Associated Press, Inc.*, 797 N.E.2d 1204, 1217 (Mass. App. Ct. 2003); see *Mehau v. Gannett Pac. Corp.*, 658 P.2d 312, 322 (Haw. 1983); see also *Winn v. United Press Int’l*, 938 F. Supp. 39, 44-45 (D.D.C. 1996); *Winn v. Associated Press*, 903 F. Supp. 575, 579 (S.D.N.Y. 1995).

105. *Reilly*, 797 N.E.2d at 1217.

106. *Id.*

107. *Id.* at 1217-18.

108. *Id.* at 1218. But see *Mehau*, 658 P.2d at 322 (holding that defendant UPI could not rely on the reverse wire service defense when picking up a story from a new



a veterinarian under disciplinary investigation for negligent practice and the paper disseminated a condensed version of the story to Associated Press members.<sup>109</sup> The court ruled that the reasoning behind the wire service defense applied to the situation here provided that the elements needed to raise the privilege were met.<sup>110</sup>

The *Reilly* court recognized that newspapers and wire services have a “symbiotic” relationship and must be able to trust each other to disseminate news effectively.<sup>111</sup> While one of the rationales underlying *Layne v. Tribune Co.* was to allow smaller, resource-poor publications to publish news outside their communities without the fear of liability,<sup>112</sup> the court in *Reilly* decided that the ability to disseminate the news, rather than the resources available to a particular news organization, justifies the reverse defense.<sup>113</sup> It would be difficult to rely solely on *Layne’s* justifications to defend applying the defense to large, well-funded news cooperatives like The Associated Press.<sup>114</sup>

In addition, the *Reilly* court, like many courts examining the standard wire service defense, refused to draw a distinction that would allow the defense to be raised in regard to “fast-breaking” national and international news, but not “local, human interest or news features, arguably concerning ‘lesser’ events.”<sup>115</sup> The court justified this rejection, saying that it would be an “impermissible burden” on the media and the courts to identify these “subtle distinctions.”<sup>116</sup> Further, like media asserting the traditional privilege,

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“tabloid without a ‘track record’ for reliability” that was known to sensationalize the news).

109. *Reilly*, 797 N.E.2d at 1209. The court reversed summary judgment in favor of The Boston Herald, finding that there were genuine issues of material fact as to whether Reilly negligently treated the animal in question. *Id.* at 1218.

110. *See id.* at 1217 (quoting *Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721, 725 (Mass. 1985)).

111. *See id.*

112. 146 So. 234, 239 (Fla. 1933); *see also Mehau*, 658 P.2d at 323 (pointing out that should the court not apply the wire service defense, the paper “may be reduced to an organ reporting news of Hilo and the Big Island”).

113. 797 N.E.2d at 1217 (concluding that “[w]hile the AP’s resources may be greater than a small local newspaper’s, it cannot afford to verify every news item originating from every one of its member publications and still disseminate news promptly”); *see also Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1476-77 (S.D. Fla. 1987) (holding that Newsweek was entitled to a wire service defense regardless of the fact that it was a large, national, weekly publication.)

114. The Associated Press has 242 bureaus and a budgeted revenue of more than \$500 million. *See Associated Press, Facts & Figures*, at <http://www.ap.org/pages/aptoday/about/about.html> (last visited Nov. 3, 2004).

115. 797 N.E.2d at 1217.

116. *Id.*

wire services looking for protection under a reverse wire service defense must show that they relied on a trustworthy source.

### F. Determining Who Is a Reliable Source

Papers can raise the wire service defense even if they did not rely on a wire service itself, but instead relied on other local papers that republished wire copy.<sup>117</sup> In *McKinney v. Avery Journal, Inc.*,<sup>118</sup> the defendant newspaper editor relied on information from at least five area newspapers when writing a story.<sup>119</sup> The papers upon which the editor relied were state papers that were arguably local papers since none of them had a national circulation, and some did not even circulate throughout the state.<sup>120</sup> In *McKinney*, however, the court found that “[t]he sources relied upon . . . are known for their accuracy and are regularly relied upon by local newspapers without independent verification.”<sup>121</sup> Thus, smaller papers have the privilege of relying upon their larger counterparts.

Arguably, the court in *McKinney* created a hierarchy that defined “local” in relation to the size of the party that wrote the original story and the party that relied upon it. For example, the North Carolina Press Association classifies the *Avery Journal* as a community newspaper, while the papers it relied upon are all classified as daily newspapers.<sup>122</sup> Although the court did not mention this distinction, it seems that the local requirement articulated in *Layne* is not uniform, but instead is evaluated based on how the republishing paper relates in size and scope to the medium upon which it relied.

Expanding the definition of a reliable source is also illustrated in *Gay v. Williams*,<sup>123</sup> where the Alaska district court applied the principles of the wire service defense without explicitly mentioning

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117. See *McKinney v. Avery Journal, Inc.*, 393 S.E.2d 295, 297 (N.C. Ct. App. 1990). Arguably, media organizations that raise the defense do not have to be subscribers of the news wire. See *id.*

118. *Id.*

119. *Id.* The papers included The Charlotte Observer, The Winston-Salem Journal, The Asheville Citizen, The Greensboro Daily News, and The News and Observer. *Id.* The Charlotte Observer article was a reprinted Associated Press story. *Id.*

120. See N. Carolina Press Ass'n, *NCPA Member Newspapers*, at <http://www.ncpress.com/membersbytown.html> (last visited Nov. 2, 2004).

121. *McKinney*, 393 S.E.2d at 297.

122. See N. Carolina Press Ass'n, *supra* note 120.

123. 486 F. Supp. 12 (D. Alaska 1979). While the Alaska court did not invoke the wire service defense by name, it ruled that neither the wire service nor the local newspaper could be held liable for reasonably relying on IRE's published report. *Id.* at 16-17.

it by name.<sup>124</sup> There, the court granted summary judgment based on the logic of the wire service defense in favor of a local newspaper that relied upon an Associated Press story.<sup>125</sup> The court also dismissed the Associated Press from the action because its story was a summary of a report from Investigative Reporters and Editors, Inc. (“IRE”).<sup>126</sup> The IRE story reported allegations that Gay was involved with drug smuggling.<sup>127</sup> The Associated Press reporter assigned to write stories about the IRE reports chose not to feature the story written about Gay.<sup>128</sup> At the request of one of the Alaska member papers, however, the Associated Press wrote and disseminated a story that included the allegations against Gay.<sup>129</sup> The court granted summary judgment in favor of The Associated Press, despite the plaintiff’s claim that IRE was not a reputable news source on which the wire should reasonably rely.<sup>130</sup> IRE was only formed two years before the articles in question were published, which suggests that longevity is not a major factor in deter-

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124. *Id.*

125. *Id.* The court accepted the newspaper’s argument that if they did not have the ability to rely on The Associated Press as a reliable source of news, then they would only be able to publish local news. *Id.*

126. *Id.* at 13. According to IRE’s website, the group, founded two years before the stories in *Gay* were written, is a grassroots nonprofit organization dedicated to improving the quality of investigative reporting. See IRE, *History of IRE*, at <http://www.ire.org/history> (last visited Nov. 3, 2004). The AP did not conduct its own investigation about the facts in the IRE stories. *Gay*, 486 F. Supp. at 17.

127. *Gay*, 486 F. Supp. at 13. Journalists from around the country participated in IRE’s Arizona Project to investigate organized crime in Arizona after the death of Don Bolles, an investigative reporter for the Arizona Republic, who was killed by a bomb in 1976 on his way to meet an informant. *Id.* “The stories stated that ‘published accounts of a series by a team of investigative reporters’ say that Gay, ‘a wealthy Alaskan bush pilot and owner of a small Arizona boarder town,’ was a ‘mystery man of the Arizona drug corridor,’ and that the town owned by Gay is a ‘major crossing point for drug smugglers.’” *Id.* at 14.

128. *Id.* at 17.

129. *Id.* The Ketchikan Daily News and Southeast Alaska Empire both published the Associated Press story in question. *Id.* at 16.

130. *Id.* at 17. The court said that the fact that many newspapers around the country refused to cover the IRE stories, especially the one about Gay, did not mean that the stories were unreliable. *Id.* The court also said that Gay failed to show that The AP should have questioned the IRE’s reliability. *Id.* In addition, the court dismissed stories from The Chicago Tribune and The Los Angeles Times that were critical of IRE’s methods, reasoning that the stories were published after the Gay story was published, and that they did not pertain to The Associated Press’s “knowledge at the time of publication.” *Id.*

mining reliability.<sup>131</sup> Other courts, however, have suggested that longevity is indeed a factor in evaluating reliability.<sup>132</sup>

### G. Limits to the Wire Service Defense

In addition to the nature of the source relied upon, other factors limit the applicability of the wire service defense. While it is not necessary for republished text to mirror the wire service text verbatim,<sup>133</sup> adding further substantial material may bar the defense.<sup>134</sup> In *O'Brien v. Williamson Daily News*,<sup>135</sup> the wire service defense protected all but one of the newspaper defendants that republished an Associated Press story about a school meeting. Parents of high school students called the meeting in response to the expulsion of a student who fought with a teacher.<sup>136</sup> The media organizations reported that during the meeting, parents also requested that the administration investigate allegations of teachers having affairs with students.<sup>137</sup> The Associated Press story reported that while none of the speakers linked the fight between the expelled student and the teacher to the allegations of sexual misconduct, "most [of the parents] referred to 'allegations' and 'charges' surrounding the [fight] that could prove harmful to a teacher's career."<sup>138</sup> The teacher involved in the fight sued for defamation because of the implication that the reason the male student attacked him was because he was having an affair with a female student.<sup>139</sup>

The *O'Brien* court ruled that the wire service defense was not applicable to the Williamson Daily News because the reporter added a paragraph at the end of The Associated Press report that raised a negligence issue.<sup>140</sup> The lesson from cases subsequent to *O'Brien* is that strict adherence to the factual essence of the wire

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131. See IRE, *supra* note 126.

132. See *Mehau v. Gannett Pac. Corp.*, 658 P.2d 312, 317 (Haw. 1983) (referring to one of the media defendants as a tabloid without a "track record" for reliability).

133. See *Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721, 724 (Mass. 1985).

134. See *O'Brien v. Williamson Daily News*, 735 F. Supp. 218, 224 (E.D. Ky. 1990).

135. *Id.*

136. *Id.* at 221-22, 225.

137. *Id.* at 221-22.

138. *Id.* at 224.

139. *Id.* at 225.

140. *Id.* at 224. The additional paragraph stated, "[Phelps High School principal] O'Brien said last week that if 'something was going on, I want to stop it.' . . . O'Brien confirmed that he had received a complaint against [the teacher involved in the fight] from a 17-year-old female who is a senior at the school, but that she was not accompanied by a parent." *Id.* (alteration in original).

service story is necessary to benefit from the defense's liability shield.<sup>141</sup>

In addition, to successfully assert the defense, journalists must be able to point to the exact article upon which they relied.<sup>142</sup> The *Jewell* court stated that the wire service defense was not applicable to reporters who, in their affidavits, said they relied on wire service and televised reports but who could not point to the precise reports that they used.<sup>143</sup> The court rejected the defendant's argument that the reason the reporters could not identify the precise wire report was because more than a year had passed between the time they relied on the reports and when their affidavits were taken.<sup>144</sup> The result of this candid admission was a denial of a summary judgment motion based on New York's broader republication privilege.<sup>145</sup> The court reasoned that since the defendants could not point precisely to the articles upon which they relied, they could not estab-

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141. *Medure v. Vindicator Printing Co.* provides an example of when the defense cannot be used because there is a material issue of fact as to whether or not the reporter "substantially altered the words in materials that preceded her article . . ." 273 F. Supp. 2d 588, 618 (W.D. Pa. 2002). The magistrate who initially handled the case noted that there was no showing that the wire service defense was available in Pennsylvania. *Id.* The second magistrate, however, arguably recognized the defense here because, although the court noted that the defendants have cited no authority that shows the wire service defense is available in Pennsylvania, the court goes on to apply the defense to the facts and concludes that it is not applicable here. *Id.* at 618-19. In the end, the court ruled in favor of the defendants based on grounds other than the wire service defense. *Id.* at 619. Here, the reporter was writing about alleged improprieties in the Indian casino industry. She reported in November 1997 that Gaming World, the company that ran the Indian casinos, was under an FBI investigation and allegedly stole \$22 million from the casino. *See id.* at 589. The 1996 Associated Press story she allegedly relied on, however, quoted a legal advisor to the tribe saying that the FBI expected to begin an investigation in early September 1996. *See id.* at 618-19. Also, there was more than a year between that Associated Press statement and the allegedly defamatory *Vindicator* article. *See id.* Should the court find that there is a material fact as to whether the words of wire service story were altered, summary judgment based on the wire service defense is not appropriate. *See id.*

142. *See Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 371-74 (S.D.N.Y. 1998). *Jewell*, a former Olympic security guard, sued several media defendants after they linked him in stories to the July 27, 1996 bombing of Centennial Olympic Park in Atlanta during the centennial Olympics. *Id.* at 356. Here, the court comments that "curiously," the New York courts have never cited *Layne v. Tribune*, nor have they discussed the wire service defense. *Id.* at 370. Instead, New York law regarding republication is even broader than the wire service defense, recognizing "a general republication defense applicable to anyone who republishes material from any source, provided that there was no substantial reason to question the accuracy of the material or the reputation of the reporter." *Id.* at 371. But, the judge went on to discuss the wire service defense in this opinion. *Id.* at 370-74.

143. *Id.* at 371-74.

144. *See id.* at 372.

145. *See id.*

lish that they did not have substantial reason to question the accuracy of the Associated Press reports.<sup>146</sup>

## II. A DIFFERENT APPROACH TO REPUBLISHER LIABILITY

This Part discusses New York's qualified privilege for republishers as an alternative to the wire service defense.<sup>147</sup> While the New York privilege is similar in many ways to the wire service defense, the New York privilege substantially broadens the shield for republishers.<sup>148</sup> This approach is broader because its protection is not limited to media organizations; instead, it also allows non-traditional media entities like public relations companies to successfully invoke the privilege when they rely on clients as reliable sources when preparing press releases.<sup>149</sup>

### A. New York's Approach to Republisher Liability

New York offers a qualified privilege to all republishers, regardless of whether a wire service is involved. Republisher liability in New York does not hinge on whether or not news passes over a wire.<sup>150</sup> Instead, in cases involving private figures and matters of public concern,<sup>151</sup> New York plaintiffs must show that the republisher acted "in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."<sup>152</sup> This qualified privilege is granted to republishers in New York who have no reason to question the accuracy of the article or the good faith of the reporter.<sup>153</sup> When evaluating the republisher's behavior, New York courts also consider whether the publication fol-

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146. *See id.*

147. *See infra* notes 147-71 and accompanying text.

148. *See Tzougrakis v. Cyveillance, Inc.*, 145 F. Supp. 2d 325, 328 (S.D.N.Y. 2001).

149. *See id.*

150. *See Zetes v. Richman*, 447 N.Y.S.2d 778, 779 (App. Div. 1982); *see also Tzougrakis*, 145 F. Supp. 2d at 329.

151. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), defined the actual malice standard when dealing with public figures. To act with actual malice means one must have knowledge that a story is false or act with reckless disregard as to whether it was false or not. *Id.*

152. *Tzougrakis*, 145 F. Supp. 2d at 329 (noting that while the grossly negligent standard was initially used for media defendants, it has been applied to non-media defendants); *see also Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 571-72 (N.Y. 1975) (holding that getting information from two authoritative sources and having two editors check the reporter's work did not illustrate grossly negligent behavior).

153. *See Zetes*, 447 N.Y.S.2d at 779; *see also Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1307 (N.Y. 1977) (holding that a book publisher could rely on

lowed “sound journalistic practices” in republishing the material, and whether it adhered to “‘normal procedures,’ including editorial review of the copy.”<sup>154</sup>

*Zetes v. Richman* was the first New York case to apply this qualified privilege to a situation involving republication from a wire service story.<sup>155</sup> There, the defendant, Tonawanda Publishing Corp., appealed from a denial of summary judgment. Tonawanda claimed it could not be held liable for defamation for republishing a United Press International story reporting that the plaintiff was selling defective souvenir pennies commemorating the 1980 Winter Olympics in Lake Placid.<sup>156</sup> The court granted summary judgment in Tonawanda’s favor because the plaintiff failed to show that Tonawanda had reason to question either the accuracy of United Press International, or the “bona fides” of the sports editor who wrote the story.<sup>157</sup> *Zetes* did not mention the possibility of the wire service defense, even though courts in other jurisdictions had already adopted the defense.<sup>158</sup> The strict common law standard of republisher liability is only valid in cases where the elements of New York’s qualified privilege are not met.

### **B. The Privilege Is Not Limited to Traditional Media Organizations**

Over time, New York’s qualified privilege to republish developed into a more inclusive privilege than the wire service defense. In *Tzougrakis v. Cyveillance Inc.*,<sup>159</sup> the plaintiff, the owner of an online designer retail site, [www.offtherunway.com](http://www.offtherunway.com), sued Cyveillance, the magazine Inter@ctive, and PR Newswire after it included her business in a story about websites that sell counterfeit designer goods.<sup>160</sup> The article was based on a press release that defendant PR Newswire transmitted to Inter@ctive<sup>161</sup> from Cyveillance, a

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the work of a reporter based on the reporter’s credentials and there having been no reason to question the accuracy of the stories).

154. See *Tzougrakis*, 145 F. Supp. 2d at 330 (quoting *Chaiken v. VV Publ’g Corp.*, 119 F.3d 1018, 1031 (2d Cir. 1997)).

155. See 447 N.Y.S.2d at 779.

156. *Id.*

157. See *id.*

158. See *Jewell v. NYP Holdings*, 23 F. Supp. 2d 348, 370 (S.D.N.Y. 1998) (noting that the defense had never before been mentioned in a New York opinion). The defense, however, had been recognized sixty-five years earlier in Florida. See *Layne v. Tribune Co.*, 146 So. 234, 237 (Fla. 1933).

159. 145 F. Supp. 2d at 325.

160. *Id.*

161. *Ziff Davis, Inc.*, who was named in the lawsuit, owned Inter@ctive. *Id.*

company that conducts investigations of internet sites that sell counterfeit goods or real products sold without the permission of the designer.<sup>162</sup> The court granted summary judgment for PR Newswire, reasoning that the plaintiff could not establish that PR Newswire was grossly irresponsible.<sup>163</sup> The court held that PR Newswire could reasonably rely on information that its client, Cyveillance, provided.<sup>164</sup> PR Newswire knew the nature of Cyveillance's business, and the press release that it received was related to that subject.<sup>165</sup> In addition, "the source of the [press release] had previously provided accurate information and there were no facts which should have aroused the suspicions of Newswire or that would give cause for further inquiry."<sup>166</sup> While Cyveillance was not a traditional media outlet, PR Newswire still had the privilege to rely on the company's information.

In *Tzougrakis*, the court erred on the side of calling a source reputable until it proved otherwise, establishing a presumption of reliability. PR Newswire had only received two other press releases from Cyveillance prior to the one in question.<sup>167</sup> Apparently, a minimum showing—two prior press releases that did not prompt any allegations of libel—was enough for a republisher to consider a source reliable.<sup>168</sup> This standard allows republishers much more protection than the wire service defense, where republishers can only rely on publications with a substantial track record establishing credibility.

The *Cyveillance* court also granted summary judgment in favor of Inter@ctive because the plaintiff could not prove that the magazine acted grossly irresponsible.<sup>169</sup> The reasoning here was based heavily on the credentials and actions of the reporter involved.<sup>170</sup>

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162. *Tzougrakis*, 145 F. Supp. 2d at 327.

163. *Id.* at 332. Defendant PR Newswire claimed that it could not be held liable for republication because it was more like a distributor, such as a telegraph company or a printer, which would require a showing of actual knowledge of the statement's defamatory nature in order for PR Newswire to be liable. *Id.* But, the court pointed out that PR Newswire had editorial control over the press release and formatted it before distribution, which would make them more than a distributor. *Id.* The court did not rule on whether PR Newswire was a distributor or a publisher because neither would affect the outcome with regard to PR Newswire. *Id.*

164. *Id.*

165. *See id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 328.



The court noted that the reporter had fifteen years experience<sup>171</sup> and that she conducted “an adequate investigation of the facts received”<sup>172</sup> in the press release.

If New York adopted the strict interpretation of the wire service defense instead of its broader republisher qualified privilege, it is likely that neither Inter@ctive nor PR Newswire would have been able to take advantage of the defense. The issue would be whether the original publishers qualified as a traditional, reputable source of daily news. Arguably, a company sending out press releases or its client would fail to meet that standard because their primary goal is to sell a product, not disseminate news.

The elements of the wire service defense and New York’s qualified privilege for republication are similar, except for the former’s requirement that the information relied upon come from a wire or similar source of daily news. But, even that requirement of the wire service defense has been relaxed over the years. Many cases illustrate that the trend is to make the wire service defense more inclusive, with courts applying it to magazines, television stations,<sup>173</sup> and possibly radio.<sup>174</sup> This suggests that there may not be any justification for restricting the privilege to republish to certain types of media. All of these modifications imply that the traditional justifications should be replaced in favor of a rule that allows republication without liability for libel in the absence of actual malice.<sup>175</sup>

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171. *Id.*

172. *Id.* at 332.

Although [the reporter] did not actually speak with offtherunway.com, the site had no direct contact information posted. [The reporter] also was unable to discover any contact information after performing a sufficiently diligent search. It is undisputed that [the reporter] attempted to use the email link provided by offtherunway.com but that the link did not work. Furthermore, absent obvious reasons to doubt the truth of the article, Ziff-Davis was entitled to rely on . . . a trusted reporter’s representations without rechecking her assertions or retracing her sources.

*Id.*

173. *See Med. Lab. Mgmt. Consultants v. Am. Broad. Cas.*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996) (explaining that the wire service defense applies to a network affiliate that acted as a mere conduit for ABC’s Prime Time Live); *see also Bryks v. Canadian Broad. Corp.*, 928 F. Supp. 381, 384-85 (S.D.N.Y. 1996).

174. *See Brown v. Courier Herald Publ’g Co.*, 700 F. Supp. 534, 538 (S.D. Ga. 1988). In footnote 2, the court “suspects” that the radio station defendant would be granted summary judgment based on the defense should he decide to submit a motion to the Court. *Id.* at 538 n.2.

175. *See infra* notes 178-232.

### III. REWORKING REPUBLISHER LIABILITY FOR LIBEL

Before arguing that libel law should immunize republication in the absence of actual malice, Part III examines problems which make both the traditional wire service defense<sup>176</sup> and New York's approach inadequate.<sup>177</sup> This Part concludes that while the New York qualified privilege starts to address the shortcomings of the wire service defense, the New York approach does not go far enough. Part III also discusses how Congress has limited traditional republication liability for Internet service providers, which illustrates that republisher liability is unsuitable in modern times.<sup>178</sup> This Part then argues that there should be a presumption against holding republishers liable, which can be overcome only if the plaintiff shows actual malice. First, Part III.A discusses and dismisses a general critique of the negative impact republication could have on the marketplace of ideas.<sup>179</sup>

#### A. General Critique of Immunizing Republication

Critics may argue that allowing media organizations to rely on each other could have the effect of stifling the marketplace of ideas.<sup>180</sup> The court in *United States v. Associated Press* pointed out just how important the marketplace of ideas is to First Amendment jurisprudence.<sup>181</sup> There, the court noted that the newspaper industry "serves one of the most vital of all general interests: The dissemination of news from as many different facets and colors as is possible."<sup>182</sup> If a media outlet knows that it will be shielded from liability if it acts as a mere conduit of news, there is less of an incentive to find the facts on its own and construct its own story. Theoretically, one less voice on a subject creates less of a chance that the truth is reported.<sup>183</sup>

The stronger argument, however, is that rather than adversely affecting the market place of ideas, changing the traditional repub-

176. See *infra* notes 191-208.

177. See *infra* notes 209-12 and accompanying text.

178. See *infra* notes 213-20 and accompanying text.

179. See *infra* notes 180-90 and accompanying text.

180. See JOHN STUART MILL, ON LIBERTY 15-52 (Hackett Publ'g ed., 1978) (1859). Mill argued that citizens must be free to espouse false speech in order for the truth to be discovered. *Id.*

181. 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) (holding that the bylaws of The Associated Press violated anti-trust laws).

182. *Associated Press*, 52 F. Supp. at 372.

183. See MILL, *supra* note 180.

lication rule will actually increase the flow of news.<sup>184</sup> First, it strains credulity to believe that a substantial number of journalists will forego opportunities to report and write stories on their own and instead rely increasingly on another published report.<sup>185</sup> Scooping the competition is often what personally drives journalists to produce their own stories.<sup>186</sup> In addition, pressure from editors to beat the competition, or at least produce the same quality story as the competition, makes it highly unlikely that the quality of journalism would suffer should the republication rule be repealed.<sup>187</sup> Using attributed work would likely only happen when resources impede a media organization's attempt to report its own story.

In addition, seventy-five percent of entry-level daily newspaper journalists in the 1990s graduated from a college program in media or mass communications,<sup>188</sup> despite the fact that, unlike doctors or lawyers, there is no professional degree required to become a journalist.<sup>189</sup> The high rate of journalists educated specifically in communications severely undermines an argument that many journalists would rely on published work rather than reporting a story on their own. Students of journalism who have paid thousands of dollars for their degrees<sup>190</sup> and are serious about entering the profession are unlikely to envision themselves as stenographers.

## B. Problems with the Wire Service Defense

Media ownership, like the degree of journalists' education, has changed tremendously in recent years. Thus, a limited republication defense like the wire service privilege makes less sense in today's society as compared with the time when the common law

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184. See generally David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207 (1995).

185. See DAVID H. WEAVER & G. CLEVELAND WILHOIT, *THE AMERICAN JOURNALIST IN THE 1990S: U.S. NEWS PEOPLE AT THE END OF AN ERA* 217-29 (1996) (discussing factors that journalists interviewed identified as being part of their best work).

186. *Id.* at 225 (quoting a journalist who indicated that breaking news was a factor for evaluating a journalist's best work).

187. See generally DAVID J. KRAJICEK, *SCOOPED!* (1988). Krajicek recounts the pressure of having to chase a story after it appeared in a rival New York City newspaper. *Id.* at 1-5.

188. See WEAVER & WILHOIT, *supra* note 185, at 32-33.

189. *Id.* The number of journalism departments and schools has doubled from 200 in 1972 to 413 in 1992. *Id.* at 30-31.

190. See June Kronholz, *College Costs Play on Stump: Candidates Offer Promises to Needy Students, But No Solutions*, WALL ST. J., Feb. 4, 2004 at A4. In 2004, the average cost for tuition and room and board at a public university was \$10,636. *Id.*

republishing rule was first articulated.<sup>191</sup> The number of family newspapers has severely declined, as they have been absorbed into media conglomerates.<sup>192</sup> For example, in 2002 Gannett Corp. owned ninety-four daily community newspapers around the country with a paid circulation of 7.6 million.<sup>193</sup> Gannett also owns a wire service that allows its papers around the country to share news.<sup>194</sup> Many other media conglomerates also own a wire service.<sup>195</sup> Therefore, small newspapers do not enjoy the same benefit of the wire service defense.

A major problem with the wire service defense in this context is that, in terms of defamation liability, it treats the reporting of media conglomerates as a single publication, giving them a benefit similar to the single publication rule. The single publication rule states that “[a]ny 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,” and a publisher can only be held liable once.<sup>196</sup> Thus, a media defendant could not be sued twice for defamation if a statement appeared in its morning and afternoon editions.<sup>197</sup> In situations where the republishing newspaper is part of a large chain with a wire service,

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191. James V. Risser, *State of the American Newspaper: Endangered Species*, AM. JOURNALISM REV., June 1998, available at <http://www.ajr.org/Article.asp?id=3276>. Shortly after World War II, three-fourths of all newspapers were independently owned. *Id.* In the late 1990's about 300 out of 1504 dailies in the United States were independent, most of them small. *Id.* Only fifteen independents have circulations exceeding 100,000. *Id.* Twenty-five have 50,000 to 100,000 subscribers. *Id.* More than half have fewer than 10,000. *Id.*

192. See Rob Dean, *The Tenacity to Take on a Corporate Giant*, SANTA FE NEW MEXICAN, July 11, 1999, at S-69. As of April 1999, 269 newspapers out of 1477 nationwide were independent. *Id.* In 1997-98, thirty family-owned newspapers were sold to chains, according to information compiled by Dirks, Van Essen & Associates, a Santa Fe-based company that arranges the sale of newspaper companies and tracks ownership trends. *Id.*

193. Gannett Co., *2002 Annual Report* (2003), available at [http://media.corporate-ir.net/media\\_files/IROL/84/84662/reports/2002ar.pdf](http://media.corporate-ir.net/media_files/IROL/84/84662/reports/2002ar.pdf). Gannett recorded \$6.4 billion in operating revenue in 2002. *Id.*

194. *Id.*

195. For example, Advance owns thirty-one papers and two wire services, The Newhouse News Service and The Religion News Service; Dow Jones owns twenty-five papers and The Dow Jones News Service; Knight-Ridder owns fifty-five papers, Tribune Co. owns fifteen, and together the two companies own KRT Direct; Cox News owns seventeen newspapers and The Cox News Service; and The New York Times Co. owns The N.Y. Times News Service, which has forty-four newspaper sources. Columbia Journalism Review, *Who Owns What?*, at <http://www.cjr.org/tools/owners/> (last visited Oct. 2, 2004).

196. RESTATEMENT (SECOND) OF TORTS § 577A(3) (1977).

197. *Id.* at comment 3.

the work of a single entity in the company is treated similarly to a single publication across the company when the wire service defense is applied. Smaller media companies and family-owned operations that lack a wire service do not receive a similar benefit. There is no reason to believe that news that passes over a wire is more reliable and more worthy of dissemination and protection than news that is republished without going out over a wire. Courts, however, have ignored this changing landscape and have often relied on seventy-year-old justifications of the defense.<sup>198</sup>

In addition, courts have not hinted at why the wire service, as a conduit of news, warrants protection. Their decisions give little guidance on this point, only stating that it is important to allow the free dissemination of news so local media are not forced to report only on the events in their geographical area.<sup>199</sup> None of the wire service decisions discuss why news transmitted over the wire deserves preferential treatment with regard to republisher liability. While protectionism may have been an impetus for creating the wire service defense,<sup>200</sup> it does not answer the question of why more modern courts continue to apply it. Interestingly, the majority of states that recognize the defense first did so in the past twenty years,<sup>201</sup> when the wire services were already an established social institution that arguably no longer needed protection.<sup>202</sup> The proliferation of the defense illustrates the importance that the ability to republish information has in our society.

There is no justification for limiting republisher liability to instances where the original material passes through a news wire. While the imagery of the wire lends itself well to analogizing republishers to mere conduits<sup>203</sup> of information, the wire is not the only credible way to relay news without taking ownership of its creation. Instead of limiting republisher liability with the wire ser-

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198. See *supra* note 84 and accompanying text.

199. See, e.g., *Mehau v. Gannett Pac. Corp.*, 658 P.2d 312, 323 (Haw. 1983).

200. See *supra* notes 173-83 and accompanying text.

201. Fourteen jurisdictions recognized the defense in the past twenty years. See *supra* at note 23 for jurisdictions and cases since 1996. The following jurisdictions recognized the wire service defense from 1983-1996: Georgia (*Brown v. Courier Herald Publ'g Co.*, 700 F. Supp. 534, 538 (S.D. Ga. 1988)); Hawaii (*Mehau*, 658 P.2d at 323); Kentucky (*O'Brien v. Williamson Daily News*, 735 F. Supp. 218, 220 (E.D. Ky. 1990)); Massachusetts (*Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721, 726 (Mass. 1985)); North Carolina (*McKinney v. Avery Journal*, 393 S.E.2d 295, 297 (N.C. Ct. App. 1990)); and Wisconsin (*Van Straten v. Milwaukee Journal Newspaper-Publisher*, 447 N.W.2d 105, 112 (Wis. Ct. App. 1989)).

202. See *supra* note 82.

203. See, e.g., *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996).

vice defense, courts should eliminate the old common law liability for republication. The power of a privilege like the wire service defense is no match for the traditional republication rule when it comes to chilling speech.<sup>204</sup> Although media defendants overwhelmingly win defamation lawsuits, the threat of litigation often significantly impacts publication decisions, thereby chilling speech.<sup>205</sup>

In addition, the recent move of courts to recognize the reverse wire service defense illustrates the expansion of limited liability. This absolves republishers from liability for republishing material that first appeared in a newspaper, as long as that material passed through the wire.<sup>206</sup> If the reverse defense were not created, the traditional common law standard of liability would apply. Courts justify the reverse wire service defense saying, “[t]he responsibility for accurate, nondefamatory reporting lies with the newspaper that published the original story, not the wire service that ‘demonstrated ordinary care in preparing and transmitting the article.’”<sup>207</sup> A showing of ordinary care should also absolve from liability any publication that takes material from another publication and republishes it with attribution.<sup>208</sup>

### C. Why the New York Approach Is Not the Right Answer

While the New York privilege is broader in scope than the approach taken by jurisdictions using the wire service defense, New York’s qualified privilege also fails to go far enough. First, the privilege effectively allows courts to create a hierarchy of what types of publications are reliable sources.<sup>209</sup> While the court in *Tzougrakis* was quite liberal in deciding what constituted a reliable

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204. See generally Boies, *supra* note 184, at 1297 (discussing the great impact of possible litigation on the media’s publication decisions, and concluding that the chilling effect is “significant”). “[Litigation] is also expensive for the defamation defendant, and that discourages some in the media from undertaking stories (or undertaking approaches to stories) they know may engender litigation, whether they believe they can actually win that litigation.” *Id.* Boies argues that to counter the chilling effect, courts should consider applying the English fee-shifting rule to defamation cases. *Id.* at 1212.

205. See *id.*

206. See *supra* notes 104-16 and accompanying text.

207. Reilly v. Associated Press, 797 N.E.2d 1204, 1217 (Mass. App. Ct. 2003) (quoting Winn v. Associated Press, 903 F. Supp. 575, 580 (S.D.N.Y. 1995)).

208. Winn, 903 F. Supp. at 579. “[T]he wire service defense is available where, as here, a news organization reproduces an apparently accurate article by a reputable publisher, without substantial change and without actual knowledge of its falsity.” *Id.*

209. Tzougrakis v. Cyveillance Inc., 145 F. Supp. 2d 325, 328 (S.D.N.Y. 2001).

source,<sup>210</sup> there is uncertainty as to how other judges would define the concept of reliability.

This Comment argues that it is irrelevant whether or not the court believes the initial publisher was reliable. The real question is whether or not the republisher published the work with the actual malice—knowledge that there were factual errors or acting with reckless disregard of the truth or falsity of the facts alleged. Instead of looking to courts to determine which publications are reliable, media organizations should make this determination for themselves. If a media organization is going to republish with attribution something appearing in another publication, they are subtly aligning their credibility with that of the other publication. Therefore, should the initial publisher be an unreliable source, it is unlikely that the republisher will rely on that source since the republisher will not want to tarnish its own reputation. The focus must be on the behavior of the republisher.

Another problematic issue in regard to the New York approach is the court's inquiry into whether or not sound journalistic practices were followed.<sup>211</sup> There are no objective criteria that help a court make that determination. It is true that courts routinely make similar determinations with the help of expert witnesses. It is troublesome, however, to have courts involved in fashioning proper journalistic standards when one of the main functions of journalists are to keep the branches of government, including the judiciary, accountable for their actions.<sup>212</sup>

#### **D. Congressional Action Illustrates that Republisher Liability Is Incompatible with Society's Information Needs**

Congressional action with respect to republishers on the Internet illustrates the fact that neither the wire service defense nor New York's "grossly negligent" standard is adequate.<sup>213</sup> While courts had ruled that Internet service providers had First Amendment

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210. *Id.*

211. *Id.*

212. See *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (arguing that the Constitution protects press so it can "bare the secrets of government and inform the people").

213. The legislature apparently did not feel that the courts were doing enough to protect Internet speech. After *Stratton Oakmont v. Prodigy*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), the legislature overruled the decision by passing the Communications Decency Act of 1996, 47 U.S.C. § 230 (2004). The act says that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The act states that

protection,<sup>214</sup> they had also found that these publishers were subject to the traditional rules of republisher liability when they exhibited editorial control.<sup>215</sup> In response to cases like *Stratton*

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it is the policy of the United States: (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) 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; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking and harassment by means of computer.

*Id.*

214. In *Stern v. Delphi Internet Services*, 26 N.Y.S.2d 694 (1995), radio personality Howard Stern sued the electronic bulletin board owner after it advertised its service, which included a bulletin board to discuss Stern's candidacy for governor, using Stern's picture. Delphi had been in business for eleven years and had more than 100,000 subscribers. The computer network offered three types of information: hard information, such as news and stock quotes, computer games, and interactive features like bulletin boards and e-mail. *Id.* at 696. Here, the court was faced with the novel issue of whether an Internet service provider should be given First Amendment protection and be afforded the incidental use exception. *Id.* at 697. The incidental use exception was established in *Humiston v. Universal Film Manufacturing*, 189 App. Div. 467, 476 (N.Y. App. Div. 1919). *Stern*, 26 N.Y.S.2d at 697. In *Humiston*, the court "held that a news disseminator was entitled to display the name and photograph of a woman who was the subject of the defendant's newsreel for the purposes of attracting and selling the film." *Id.* at 697-98 (quoting *Humiston*, 189 App. Div. at 476). "Affording protection to on-line computer services when they are engaged in traditional news dissemination, such as in this case, is the desirable and required result." *Stern*, 26 N.Y.S.2d at 698; see also *Cubby v. CompuServe, Inc.*, 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991) (analogizing plaintiff's role as an online bulletin board host to that of a news distributor, not publisher). The court held that Delphi was an online distributor comparable to a news vendor, bookstore or library, thereby allowing it to benefit from First Amendment protection. *Stern*, 26 N.Y.S.2d at 697. When faced with new technology the courts applied traditional defamation principles to both the wire service and the Internet in order to allow the free flow of news and avoid a chilling effect. *Id.*; see also *Nelson v. Associated Press*, 667 F. Supp. 1468, 1485 (S.D. Fla. 1987).

215. In *Prodigy*, 1995 WL 323710, the court held that Prodigy was liable for defamatory messages posted on its bulletin board because the service held itself out as a family-oriented online service that edited content. In addition, Prodigy sometimes edited inappropriate content, and substantially changed posted messages. *Id.* at \*6. The court stated that it agreed with holdings in *Cubby*, 776 F. Supp. at 144, and *Auvil v. CBS*, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (holding that a television affiliate is not liable for defamation if the program came from the network because it is consistent with the general rule that there is no "conduit liability" in the absence of fault). What distinguished Prodigy from these cases is "Prodigy's own policies, technology and staffing decision which have altered the scenario and mandated the finding that it is a publisher." *Prodigy*, 1995 WL 323710, at \*5.



*Oakmont v. Prodigy*,<sup>216</sup> Congress passed the Communications Decency Act of 1996, giving Internet service providers virtual immunity from republication liability<sup>217</sup> regardless of the credibility of their source.<sup>218</sup> History has shown that when traditional republication rules threaten the expansion of technology with a potential for increasing news dissemination, either progressive judges<sup>219</sup> or Congress will become involved.<sup>220</sup>

### E. Talebearers Should Not be Treated as Talemakers

This Comment argues that the proliferation of the wire service defense and Congressional action to protect Internet republishers demonstrates that the traditional rule holding republishers liable for defamation should be replaced with a new approach. Under this new approach, republishers would be entitled to republish material so long as they did not act with actual malice, knowing the material was defamatory, or acting with a reckless disregard for the truth.<sup>221</sup> In addition, the republisher could not materially change the meaning of the information,<sup>222</sup> and must identify the source of the material, so there is no question of the material's origin. The reliability of the origin, however, must not be a factor when evaluating whether a republisher acted impermissibly.<sup>223</sup> One of the justifications for imposing republisher liability was that the repetition

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216. 1995 WL 823710.

217. It is not surprising that Congress got involved with protecting the Internet since the U.S. government had funded the Internet's development beginning in the early 1970s. See Robert E. Kahn, *The Role of Government in the Evolution of the Internet*, REVOLUTION IN THE US INFORMATION INFRASTRUCTURE (1994), available at <http://www.nap.edu/readingroom/books/newpath>. The same kind of government backing, however, was not present when Samuel Morse invented the telegraph in the early 1800s.

Before the press took an interest in telegraphic technology, Morse experienced immense difficulty in diffusing the invention. Only after years of lecturing, lobbying, and negotiating was a bill to appropriate funds for an experimental telegraph line brought before Congress, in 1843. In the course of debate, the bill was encumbered by a proposed rider, appropriating funds for experiments in mesmerism. This was perhaps less surprising than the fact that the legislators were discriminating enough to vote down the rider and uphold the original bill.

BLONDHEIM, *supra* note 81, at 32.

218. See *Blumenthal v. Drudge*, 992 F. Supp. 44, 53 (D.D.C. 1998) (holding that American Online, as a service provider under the Communications Decency Act, could not be liable for providing a gossip report to AOL subscribers).

219. See *Layne v. Tribune Co.*, 146 So. 234, 239 (Fla. 1933).

220. See *supra* note 213.

221. See *supra* notes 166-82 and accompanying text.

222. See *Jewell v. NYP Holdings*, 23 F. Supp. 2d 348, 370 (S.D.N.Y. 1998).

223. See *Tzougrakis v. Cyveillance Inc.*, 145 F. Supp. 2d 325, 330 (S.D.N.Y. 2001).

lends credibility to statement, and confirms it if there is no statement of disbelief.<sup>224</sup> This is simply untrue. This comment argues that it is paternalistic and unrealistic to conclude that people are not intelligent enough to digest information and for themselves decide if it is worthy of belief. If American Online can republish the Drudge Report under the Communications Decency Act without liability,<sup>225</sup> there is no good reason why USA Today should be barred from republishing with attribution material from a tabloid, should USA Today deem that information newsworthy.

### F. Heightening Initial Publishers' Potential Liability

Should a presumption immunizing republication exist, there still must be a chance for a worthy plaintiff to recover for damages to his reputation. Thus, the original publisher is rightly held liable for actual damages for third party publication. The traditional rule is that original publishers are not liable for republication, either as a separate cause of action or to enhance damages, unless the subsequent publication was a natural and probable consequence.<sup>226</sup> The statute of limitations begins to run from the date of the original publication, not the subsequent publication.<sup>227</sup> This rule would require adaptation to allow plaintiffs to fully recover for their damages should republisher liability be abolished in the absence of actual malice.

A bright-line rule that third parties are privileged to republish would put original publishers on notice that they may be held liable for more than just their own publication. This would give injured plaintiffs the opportunity to fully recover for their actual damages. It is likely that the heightened liability potential will induce original publishers to carefully source their stories before publication.

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224. See MARTIN L. NEWELL, *THE LAW OF LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES* 351 (2nd ed. 1898).

225. *Blumenthal v. Drudge*, 992 F. Supp. 44, 53 (D.D.C. 1998) (holding that American Online, as a service provider under the Communications Decency Act, could not be liable for providing a gossip report to AOL subscribers). "Section 230 [of the Communications Decency Act] was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Id.* at 50 (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997)).

226. See *Clifford v. Cochrane*, 10 Ill. App. 570, 577 (App. Ct. 1882) (holding that the original newspaper publisher was not liable for publication in subsequent newspapers).

227. See *Foretich v. Glamour*, 753 F. Supp. 955, 960 (D.D.C. 1990) ("[S]tatute of limitations runs from the date on which a publication was first made available to the general public.").

It is unlikely that saddling the original publisher with increased potential for liability will chill speech. In the case of private individuals,<sup>228</sup> it will often be difficult to prove actual damage to reputation outside of the plaintiff's community.<sup>229</sup> Further, it is likely that the original publisher will be a publication based in the same community. The original publisher, however, is not likely to be liable for papers outside of the community because the defamed plaintiff will not have suffered actual damage to his reputation as a result of an out-of-town publication of the offending story. In the rare case that it does actually harm the plaintiff, the injured party will have recourse for all damages suffered from the original publisher.

### CONCLUSION

While the wire service defense is an important tool to protect republishers from defamation suits, it does not go far enough to serve society's need for news.<sup>230</sup> Third parties should be free to republish material so long as they specifically state their source, do not deviate from the facts of the original source, and do not act with actual malice.<sup>231</sup> The courts and the legislature have already taken steps that have weakened republisher liability.<sup>232</sup> Courts across the country have affirmed the use of the wire service defense,<sup>233</sup> and Congress has passed the Communication Decency Act of 1996, which virtually immunizes Internet service providers from republisher liability.<sup>234</sup>

The next logical step is to extend this privilege to all publications, rather than limiting it only to wire services and Internet service providers. Thus, a presumption in favor of republication would be created that could be defeated by a showing of actual malice. Under this proposed approach, the prevailing plaintiffs

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228. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (holding that public figures must prove actual malice to recover for libel). Because public figures already have the high burden of proving the original publisher acted with actual malice, it is therefore unlikely that they could successfully sue republishers unless a republisher knew or should have known that the original material was libelous. *See id.*

229. *See generally* ROBERT H. PHELPS & E. DOUGLAS HAMILTON, *LIBEL: RIGHTS, RISKS, RESPONSIBILITIES* (1978) (stating that "chances are slim" that a local police chief would sue an out-of-town paper for libel rather than a local publication). *Id.* at 312.

230. *See supra* notes 191-208 and accompanying text.

231. *See supra* notes 221-29 and accompanying text.

232. *See supra* notes 54-72, 84-132, 147-75, and 213-20 and accompanying text.

233. *See supra* notes 54-132 and accompanying text.

234. *See supra* notes 213-20 and accompanying text.

would be able to hold the original publisher liable for subsequent publications if the plaintiff could prove damages resulting from the third party publication. In a technologically advanced society that demands current news instantly, this approach best balances a plaintiff's right to recover for defamation with the media's ability to inform the public.