Technology

U.S. Court: Bloggers Are Journalists

Even when they're libeling you

Robinson Meyer

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One of the great questions of our time came closer to resolution last week, when a federal court ruled that bloggers are journalists—at least when it comes to their First Amendment rights.

The Ninth Circuit ruled as such on Friday in *Obsidian Finance Group v. Crystal Cox*, a complicated case first decided in 2011. The court found that even though someone might not write for the "institutional press," they're entitled to all the protections the Constitution grants journalists.

Background That Is Not About Are Bloggers Journalists

In 2010, Crystal Cox—an "investigative blogger"—published a series of angry posts about Obsidian Finance Group and its partners, alleging tax fraud, money laundering, and other crimes. The posts appeared on a set of aptly (and memorably) named websites, including "obsidianfinancesucks.com." Obsidian and one of its partners, Kevin Padrick, sued Cox, alleging defamation.

Only statements of apparent fact can be ruled defamation. When the case went to trial, Oregon district court Judge Marco Hernandez ruled that most of Cox's entries were too hyperbolic to count as anything but opinion, and thus could not be considered defamation—except for one post, which the Oregon district decided was sufficiently factual. A jury awarded Obsidian and Padrick $2.5 million in damages for the libel.

The New York Times's media reporter David Carr wrote about the case that year, ruling it less about journalism than Right and Wrong: "She didn't so much report stories," he said of Cox, "as use blogging, invective and search engine optimization to create an alternative reality."

Other things were going on in the case. Cox claimed that her sources for the tax fraud claim were secret, and that Oregon's media shield law protected her from revealing them. Hernandez decided that she did not qualify for shield protection under the law, partly because she had offered to take down the offending posts for $2,500 per month.

But this new appeal ruling, the one on Friday, turned on something else—the intersection of two pre-existing piece of case law, *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.* Both dictate what kinds of speech qualify as defamation.

In the landmark 1964 *Sullivan*, the Supreme Court ruled that public figures can only seek claims for defamation if false information was published with "actual malice." That phrase—actual malice—

means that, to qualify as defamation, information must either be *known* to be false at publication or published with blatant disregard for the truth*. In 1974's *Gertz*, meanwhile, the same court ruled that false information about *private* individuals qualified as defamation if it was negligently published.

Taken together, the two cases establish a meshing precedent: To count as defamation, false information about *public* figures must be published . False information about private figures, meanwhile, must merely be published negligently.

Cox claimed that Obsidian and its partners were public figures, an assertion the Ninth Circuit nixed. Writing for the court, Judge Andrew Hurwitz said that her posts, while about private figures, covered a topic of public concern. They fell, he said, under the domain of *Gertz*. The information contained in them could not be merely wrong: It had to be negligently published.

Crucially, the jury in the 2011 trial, Hurwitz said, had never been informed of such a stipulation.

The Bloggers and Journalists Part

Cox might not qualify for *Gertz's* protections if she was not part of a media organization. If Cox is a blogger, not a journalist, and if only journalists are entitled to the protections of negligent publications, then Cox might not qualify for *Gertz* at all.

Was Cox, a self-titled blogger, in fact a journalist? On this, Hurwitz was clear.

"Although the Supreme Court has never directly held that the *Gertz* rule applies beyond the institutional press, it has repeatedly refused in non-defamation contexts to accord greater First Amendment protection to the institutional media than to other speakers," he wrote. In one case, he said, "the Court expressly noted that 'we draw no distinction between the media respondents and' a non-institutional respondent."

Hurwitz goes on, extending journalistic protections to all those liberated of their institutions:

> The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story. As the Supreme Court has accurately warned, **a First Amendment distinction between the institutional press and other speakers is unworkable: "With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred."**

So everyone—not just journalists—benefits from the First Amendment's protections, which makes bloggers (even slimy ones) legally equivalent to journalists*. Cox's case will get a new trial in Oregon's district court, and the jury will be appropriately informed of the *Gertz* rule. Perhaps the award of damages will be reduced.

And we, those following the case at home, can change into our pajamas, order pizza to our various apartments, and blog away. We will not just be bloggers—we will be, according to the law, *journalists.*

** Updated: The original version of this article made it insufficiently clear that First Amendment protections extended to all, not just bloggers or journalists. It also defined 'actual malice,' a federal*

Constitutional standard, as malign intent. Both errors have been corrected and clarified. Thanks to Alex Howard for noticing the former.

We want to hear what you think about this article. Submit a letter to the editor or write to letters@theatlantic.com.

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