The Internet and the New Public Figure

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Libel is nothing new. Since Socrates was condemned to death in 399 B.C. for ‘slanderous’ teachings against the gods, Western civilization has recognized a person’s right to a good reputation. Not surprisingly, the definition of libel has developed since Ancient Greece and even the founding of the United States. It is now more complicated than simply proving that a defamatory statement is false. Since the 1964 ruling in New York Times v. Sullivan that established the ‘actual malice’ standard and Curtis Publishing Co v. Butts and Gertz v. Robert Welch Inc. applied that standard to public figures, proving libel has become increasingly difficult for public figure plaintiffs. In Curtis, Chief Justice Warren defines a public figure as an individual with, “ready access…to mass media of communication.” This definition separated the private figure from the public figure effectively for decades, but with the advent of the widespread use of the Internet, the definition of ‘public figure’ must be considered once again. By using a social media website like Twitter, the average individual can send media directly to hundreds of people, and conceivably, to billions. Since the majority of Americans exercise this ability, the questions must be asked: Does access to the Internet and social media qualify as access to mass media? And if so, who is now considered a public figure? This paper will examine these questions in detail and offer a more accurate test to determine whether an Internet user is a public figure or not.

The Issue

As a plaintiff in a libel case, a public figure is required to prove ‘actual malice’ in order to win the suit (New York Times v. Sullivan (376 U.S. 254 (1964))). According to the Court, actual malice occurs when the publisher has knowledge that libelous statements made are false or acts with “reckless disregard” as to whether the statements made are true or false (New York
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Times v. Sullivan). A private figure on the other hand, must only prove that the publisher acted with, at a minimum, negligence, which is the failure to exercise reasonable care. The burden of proof is significantly higher on a public figure plaintiff and this is where the issue lies. It is so high in fact that only a handful of cases since the New York Times decision have proven actual malice and won (Trager, 2010, 159). If the once private figure is now considered public because of his ability to publish media on the Internet, the face of libel could completely change.

Defining ‘Public Figure’

Currently, the term ‘public figure’ is defined through the Court’s decision in Gertz v. Robert Welch, Inc. Gertz attempts to put forth a useful test to determine if a person is a public figure and must therefore prove actual malice as the plaintiff in a libel case. In order for a plaintiff to qualify as a public figure they must first fit into one of three categories. The first is an all-purpose public figure. To qualify, the individual must occupy a position of “such pervasive power and influence” that they would be considered ‘public’ in any court case (Gertz v. Robert Welch, Inc., 418 U.S. 323). The best example of an all-purpose public figure is a celebrity. Alternatively, a public figure could be a limited-purpose public figure. The Court established that these individuals “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved” (Gertz v. Robert Welch, Inc., 418 U.S. 323). A limited-purpose public figure may be only considered a public figure within a community or a particular field (Trager, 2010, 161). Gertz also suggested that there may be a third and very rare category, the involuntary public figure. This type of public figure is drawn into specific issues because of unforeseen and unintended circumstances (Gertz v. Robert Welch, Inc., 418 U.S. 323). There is no action on the part of the individual to enter the public eye.
As the next part of the determination, the Court instructed an examination as to whether the plaintiff had access to the media (Gertz v. Robert Welch, Inc.). This access must give the plaintiff the power to redress the claims made against him (Gertz v. Robert Welch, Inc.). The Court includes nothing else about access to the press nor does it require the redress to reach as many people. There is no mention of the type of medium and how many individuals the medium used must be able to reach. Even before the Internet became a pervasive medium, it was evident that determining whether an individual was a public figure or a private figure was very difficult. As one court said, it “is much like trying to nail a jellyfish to a wall” (Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859 (5th Cir.1978)).

**Does the Internet Give Individuals Access to Mass Media?**

Although the Court defined ‘public figure’ in *Gertz*, they did not define what qualifies as access to mass media or even the term mass media itself. When *Cutis Publishing Co.* and *Gertz* were decided in the 1960s and 1970s respectively, the media landscape was much different than it is today. Mass media consisted of print, television, and radio and having access to one or all of those mediums was reserved for a select few. The Court designed the test for a public figure with a specific type of plaintiff in mind, but they used the mass media of the day to create the basis for defining that plaintiff. Needless to say, since the 1960s and 1970s, nearly every aspect of the once seemingly concrete base of mass media has undergone a significant change. The introduction of the Internet changed the way print and broadcast media worked and has created a continuing democratization of media.

Before we determine whether the Internet gives individuals access to mass media, we must define the term. Mass media is defined by the Center for Media Literacy as “those media that are designed to be consumed by large audiences through the agencies of technology” (Boles,
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According to this definition, the traditional sources of print and broadcast media fit, and so does Internet. The Internet is definitely a medium of communication and is most often used to send information to large audiences through technology.

It is widely accepted that the Internet is a form of mass media, but the next question that must be asked is whether the Internet gives the average person access to mass media or not? In recent years, the Internet has become more and more interactive, immediate, and prevalent in daily life. Evolving from blogs and chat-rooms in the late 1990s and early 2000s, the Internet is now more interactive and hosts sites that allow for instant and easy communication between a number of users. Websites like YouTube, Facebook, and Twitter give users the ability to publish content for the world to see. If the user so chooses, his content can be viewed by anyone on the Internet. Even political campaigns are utilizing the same websites that the average person uses daily to post their message. In 2008, Barack Obama’s campaign for the presidency of the United States relied heavily on all three of the aforementioned websites. Obama’s staff posted videos in which he spoke directly to voters on YouTube and kept fans and followers updated on Facebook and Twitter respectively (Lissau, 2010). In addition to public officials, public figures like celebrities, athletes, and journalists use the same websites to communicate with the public daily.

Current defamation law draws no specific distinction between these traditional public figures and the average person who uses these same websites to communicate.

It is important to make a distinction here between the broad category of Internet user and the more selective term: Internet publisher. The Internet user is simply an individual who connects to the Internet using their computer. The Internet publisher, who is obviously an Internet user as well, posts content onto the web. This content can be in the form of print, images, audio, and video. It is as important to separate these two, as it is to separate the
newspaper publisher and the newspaper reader. However, most Internet users today, through the use of blogs, social networking sites, and content communities are indeed Internet publishers. One in three Internet users are on the social networking site Facebook alone (“Internet World Stats,” 2011).

**The Legal Background**

As noted earlier, defamation law was established early on in the history of the United States. But, more recent cases have led to the development of an actual malice standard for public figure plaintiffs to prove. Once the plaintiff is ruled a public figure, the plaintiff now has to prove the defendant acted with actual malice and not simply negligence in making a defamatory statement. The burden of proof is extremely high in this event and such plaintiffs rarely prevail (Trager, 2010, 158).

**New York Times v. Sullivan**

New York Times v. Sullivan (1964) first established the actual malice standard for public official plaintiffs in defamation cases. In the case, L.B. Sullivan sued the New York Times for a series of libelous statements printed in the newspaper. Sullivan claimed that the statements in a full-page advertisement harmed his image as the Montgomery city commissioner. Although the article contained a number of minor erroneous statements, the Court ruled in favor of the defendant. The ruling established that the First Amendment protects the publication of all statements, even false ones, about public officials, unless the publisher makes the statements with actual malice. Actual malice as defined by the decision, occurs when the publisher has knowledge that the statements made are false or acts with “reckless disregard” as to whether the statements made are true or false (New York Times Co. v. Sullivan).
The reasoning behind the establishment of the actual malice standard in *New York Times* is that speech concerning public officials, even if its false, deserves constitutional protection under the First Amendment (Trager, 2010, 160). This type of speech is essential to the proper workings of government and must be protected in a democratic society (*New York Times Co. v. Sullivan*). Justice Brennan even admits that this protection of speech “may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials” (*New York Times Co. v. Sullivan*). But the Court recognizes the advantage of holding such a position (Smolly, 1986). The official has a greater ability than a private citizen to redress the possibly defamatory statements.

**Curtis Publishing Company v. Butts**

*Curtis Publishing Company v. Butts* (1966) built on the decision made in *New York Times* and first applied the actual malice standard to public figures. In the case, Wallace Butts, the coach of the University of Georgia football team, sued the “Saturday Evening Post” for libel. In an article, the magazine falsely accused Butts of game fixing. Butts won the case against the Curtis Publishing Company in trial court because Butts had to only prove that the magazine’s reporting was negligent. The defendants issued a writ of certiorari to the Supreme Court and it was granted. In a decision consolidated with the case *Associated Press v. Walker*, the Court concludes that “The *New York Times* standard applies to defamation actions by ‘public figures’ as well as those by ‘public officials’ ([Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967)]).”

Justice Harlen wrote that public figures are “involved in issues in which the public has a justified and important interest” ([Curtis Pub. Co. v. Butts](#)). Harlen defined the basis of the reasoning behind the term ‘public figure’:
And surely, as a class, these ‘public figures’ have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials’. (Curtis Pub. Co. v. Butts)

Although, Harlen’s definition of ‘public figure’ relies on access to mass media, it is based on the influence that comes with this power.

**Gertz v. Robert Welch Inc.**

As discussed earlier in the paper, *Gertz* separated the term public figure into three separate categories. In *Gertz*, Elmer Gertz sued the company owning a magazine called “American Opinion” for libel. In a letter from the John Birch Society published in an issue of the magazine, Gertz is accused of being a "Leninist" and a "Communist-fronter" (Trager, 2010, 171). The allegations were made because Gertz chose to represent clients who were suing a law enforcement officer. Gertz lost his libel suit because he was deemed a public figure in the circumstances and could not prove actual malice.

In the majority opinion, Justice Powell stressed that ordinary citizens should be allowed more protection from libelous statements than individuals in the public eye. However, the actual malice standard does apply to private individuals in some cases. The most common of these cases is the limited-purpose public figure. This type of public figure must ‘thrust’ himself into a public issue in an effort to create change. The other common public figure is the all-purpose public figure. This individual is considered a public figure in all discussions because of the broad scope of their influence.
**Waldbau v. Fairchild Publications**

The United States Court of Appeals in the District of Columbia ruling in *Waldbau v. Fairchild Publications* established a three-prong rule for determining whether an individual is a limited purpose public figure or a private figure. No other courts have adopted this exact rule, but many rely on tests that do not consider the ‘access to media’ qualification. The first prong of this test is the establishment of a public controversy or dispute that received media coverage (O’Connor, 2011, 518). The second prong of this test is to establish if the individual actually “thrust” himself into the issue of public controversy (519). The third prong of the test is to consider the relationship between the defendant’s defamatory statement and his role in the controversy (519). This ruling makes no mention of the ‘access to media’ rule established in *Curtis Publishing Company* in determining if the individual is a limited-purpose public figure.

**Hutnchon v. Proximire**

In *Hutchinson v. Proximire*, the Court made the definition of a public figure more selective (443 U.S. 111 (1979)). The ruling established that a publication of the plaintiff’s response to defamatory statements does not qualify as ‘access to media’. Only “regular and continuing access to the media” satisfies the ‘access to media’ requirement for a public figure as established in *Gertz* (Hutchinson v. Proximire). The Court also requires that the statement must draw enough media attention to effectively rebut the defamatory statements.

**Analysis**

Under the current defamation law, the average Internet publisher can be considered a limited purpose public figure. Continual publishing of messages on the Internet satisfies the ‘access to media’ rule in the libel test. However, pursuant to *Hutchinson*, the individual must have “regular and continuing access to the media,” to be considered a public figure (443 U.S.)
111 (1979)). This requirement separates the Internet user from the Internet Publisher. The Internet user who has simply used the medium as a way to consume media is not a public figure. The Internet publisher who uses websites similar to Twitter, YouTube, and Facebook to repeatedly publish media relating to certain issues can be a public figure. In addition, Gertz established that these messages must command enough media attention to have the ability to effectively redress defamatory statements (O’Connor, 2011, 515). Simply because an individual has a Facebook account, does not mean their message can compete with CNN’s.

Classifying the average Internet publisher as a limited purpose public figure is contradictory to the Court’s reasoning behind the actual malice standard. The standard as defined in Gertz is meant to continue to protect the average private citizen against a more powerful traditional media organization. Even on the democratized Internet, traditional media organizations continue to have a more wide-reaching scope than the average Internet publisher. In Curtis Publishing Co., Justice Harlen described public figures as a ‘class’ of people with the power to use media to “influence policy.” This justification infers that public figures have more power than the average person to influence public issues. The average person vis-à-vis the Internet publisher does not have this power.

Although the average Internet publisher does have the power to redress defamatory statements, this should not require a higher burden in libel suits. The Internet can certainly serve as a medium of power. The Internet has given rise to famous bloggers like Perez Hilton and countless YouTube sensations who could conceivably have the power to influence public issues. However, not everyone who publishes on the Internet has gained that power. The act of creating a blog or Facebook page does not garner the attention of millions of others doing the same thing. Because you have the ability to communicate to billions, does not mean that those billions will
read your message. The power of the average individual’s message rarely can equate to that of a larger organization. Although the Internet certainly does increase the amount of individuals that can be classified as public figures, all Internet publishers simply cannot logically be called public figures.

**A New Definition of ‘Public Figure’**

In order to maintain the original motivation behind the actual malice standard and libel itself, the test for a public figure must be modified. This new test must ensure a balance between the right to a good name and uninhibited debate about public issues. Turning away from the importance of the ‘access to media’ prong in the current test is essential in accomplishing this.

The example set in *Waldbaum*, can provide an outline for a new test for a limited purpose public figure. Included in the ruling is a three-part test that simplifies the test in *Gertz*. The first step is to establish that the matter being discussed is of public concern and received media attention because of its importance to society. The second step is to determine if the plaintiff actually ‘thrust’ himself into the public controversy as established in *Gertz*. Most often, simply commenting on an issue before the defamatory statement was made via a Tweet, for example, does not satisfy this rule. Lastly, the court examines the relationship between the defamatory statement and the role the plaintiff played in the controversy.

After these three prongs are established the court can now turn to ‘access to media.’ But, instead of ruling that any individual with a Facebook or Twitter account can successfully redress a defamatory statement from a media organization like the *New York Times*, the court must analyze the power the individual has on the Internet, an equality test. If for example, the *New York Times* publishes a defamatory statement about John Doe in the Monday edition of their paper, the print copy will reach an average of 876,638 readers (‘Circulation numbers for the 25
largest newspapers,” 2010). John Doe may have repeatedly commented on the issue of public concern on his Twitter, which has 150 followers. The numbers do not have to match in order for the plaintiff to be considered a limited purpose public figure, but they must be considered. The past access to the audience has to give the plaintiff a comparable base to redress the statements made by the defendant. If all of these requirements are met, the individual is a limited purpose public figure.

**Conclusion**

As the power and prevalence of the Internet in daily life continues to grow in the United States and the world, so does the likelihood that a libel case concerning the power of the Internet will reach the Supreme Court. When this happens, the Court will have to address the role of the average person as an Internet publisher. Although this currently may qualify the Internet publisher as a limited purpose public figure, it is contradictory to do so. In *Curtis Publishing Co.*, the philosophy behind the idea of a ‘public figure’ is made clear. It is to provide for “uninhibited debate about their involvement in public issues,” while still protecting the average private figure (*Curtis Pub. Co. v. Butts*). Simply because the average person is an Internet publisher, does not mean they are a public figure and therefore must prove actual malice. By using a new test that puts less emphasis on the ‘access to media’ rule, the Court can protect the average individual’s name in an age of growing media access.
References


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