A Little Birdie Told Me, "You're a Crook": Libel in the Twittersphere and Beyond

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OJmurderer @OJmurderer 12 Jun
No one will ever convince me that OJ didn't murder Nicole & Ron. He shd rot in jail. **#OJDidIt**
Expand Reply Retweet Favorite more

The above statement could well serve as the basis for a defamation claim brought by O. J. Simpson against @OJmurderer. In defense of such a suit, @OJmurderer would undoubtedly avail himself of several alternative, and well-known, defenses. One defense would be that the statement is reasonably understood as conveying an expression of opinion based upon fully "disclosed" facts—facts well known to anyone who was alive in 1995 and 1996 when the "Dream Team" defended Simpson before Judge Lance Ito and a jury from which it obtained an acquittal. Subsequently, as is also well known, the families of Nicole Brown Simpson and Ronald Goldman obtained a civil jury verdict finding Simpson liable for their wrongful deaths. And, of course, Simpson is presently serving time in state prison in Nevada for kidnapping and robbery in Las Vegas. The writer of the above statements could also assert the defense of substantial truth, based upon the undisputed historical facts (the jury verdict of wrongful death) set forth above. Because Simpson is unquestionably a public figure, he could not recover for defamation against the writer without showing clear and convincing evidence of actual malice.

But what happens if some of the above facts are changed? What if the subject of the above comment is not O. J. Simpson but a member of a local book club, and the statement accuses him of soliciting prostitutes? What if it were, as depicted above, a tweet in a Twitter feed shared by members of the local book club?

As communications are increasingly conducted via platforms like Twitter, Instagram, Tumblr, and the like, judges are confronting the question of how to apply the law of defamation to social media. Of course, this is not the first time that courts and practitioners have applied existing doctrines of libel jurisprudence to new communications media. From the telegraph[1] and the motion picture[2] to the Internet[3] and interactive video games,[4] courts have grappled with how to fit emerging technological and social changes into the appropriate legal framework. The Supreme Court, though, has observed that "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."[5] Thus, the fact that Twitter, Tumblr, Instagram, and other yet-to-be-developed communications platforms are operated online and are subject to various technological constraints and format conventions does not alter the fundamental principles of the First Amendment or its restraints on the tort law of defamation.

The question, then, is, "How does the nature of social media affect that application of that law to allegedly libelous speech conveyed through those platforms?"

This article examines how "Twibel"—claims of libel based on speech communicated over Twitter (and other social media networking platforms)—have been addressed by the courts, and it explores how additional issues in the law of defamation that have not yet been addressed by the courts are likely to be determined in the future.

At the outset, we acknowledge that this is a preliminary assessment of an emerging area of law. Although social media sites are entering their adolescence, the jurisprudence of defamation claims arising in social media is quite clearly still in its infancy. Thus, we are forced to examine only a handful of published decisions from trial and intermediate appellate courts, some in closely analogous contexts such as consumer review and rating websites, from which we must necessarily extrapolate to chart an emerging pattern—much like astronomers label a handful of stars a constellation and analyze past planetary movements to predict their future trajectories. Second, we, like the courts, must necessarily look to analogous areas of law that pre-date the Internet as guidance to predict how the existing body of defamation law will be applied to

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new and yet-to-be-created modes of digital communication.

Traditional Elements of a Libel Claim

To set the discussion that follows in the proper context, we begin by simply identifying the elements of a successful defamation claim in the vast majority of U.S. jurisdictions: (1) publication (to a third party) (2) of a defamatory statement (3) "of and concerning" the plaintiff (4) that is false, (5) published with requisite degree of fault (negligence or actual malice), and (6) damages the plaintiff's reputation (which, in some instances, can be presumed).[6] Also, (7) the publication at issue must not be subject to any privilege, such as a "fair report" of an official governmental proceeding.[7] Furthermore, to recover punitive damages based on a publication that addresses a matter of public concern, the plaintiff must show clear and convincing evidence of actual malice, which in the defamation context means knowledge that the statement is, or probably is, false.[8]

Obviously, a tweet, or content posted on Pinterest, Vine, or Instagram, will unquestionably constitute a "publication" to third parties.[9] And, for purposes of our discussion here, we will presume that the tweet is sufficiently damaging to reputation and understood as being about an individual or business such that the person or entity identified in it may seek redress for the injuries caused by the publication.

The interesting questions with which courts have begun to wrestle include the following:

- What meanings do reasonable readers or viewers of these publications ascribe to them?
- Are they reasonably understood as conveying provably false assertions of fact, or are they discounted as merely venting and emotional griping, i.e., nonactionable statements of opinion?
- Also, if the tweet includes a link to some other website or Internet-based content, may that content serve as the basis for the published opinion or for a defense of fair report?

We turn to these questions next.

How the *Context* of Twitter Affects the Determination of Actionable Assertion of Fact v. Protected Opinion

Years before *Twitter*, *social networking*, and *microblogging* entered the popular lexicon, the courts were called upon to draw a line between actionable false statements of fact and protected "opinion." In *Milkovich v. Lorain Journal Co*.,[10] the Supreme Court rejected a categorical privilege for statements that are introduced with the phrase *In my opinion* and announced a two-part test for courts to determine when a statement may give rise to liability in defamation: the statement(s) must be both (1) "provable as false" (i.e., "verifiable") and (2) capable of "reasonably [being] interpreted as stating actual facts."[11] Thus, under *Milkovich*, a statement like "Heather is an awful singer," "Emilio's cooking is uninspired," and "Patricia needs a new hairstylist" are not capable of being proven true or false but are merely matters of subjective taste and, therefore, can never give rise to a libel claim, regardless of the medium in which they are published.

But it is the second prong of the test—whether an otherwise provably false statement (i.e., one that is verifiable) can be reasonably interpreted or understood as stating actual facts about the plaintiff—where the context of the publication comes to the fore.[12] The statement "Last night, Smith murdered Hamlet" has a completely different connotation when describing an actual gunfight between two men than when describing a tennis match between players Rolland Smith and Eugene Hamlet, or when Smith is a stage actor who performed in Shakespeare's *Hamlet*.[13] In determining whether a statement is reasonably understood as conveying an assertion of actual fact, both before and after *Milkovich*, courts have considered not only the phrasing of the particular statements at issue but also the context of the publication, including the medium in which it was transmitted and the reasonable expectations of its intended audience.[14]

It is unremarkable that the particular medium, and even the location or placement of a statement within a particular medium (e.g., a letter to the editor or a call to a radio talk show), affects whether a particular expression is capable of being reasonably understood as asserting provable facts about a plaintiff. For example, statements made in the course of a radio broadcast hosted by notorious "shock jocks"—the Howard Sterns and Don Imuses of the world—have been recognized as being much less likely to be perceived by listeners to those programs as verifiable, provable facts.[15] So, too, statements made on late-night talk shows and comedy programs are more likely to be understood as mere jokes, exaggeration, or hyperbole than if those same statements had been published on the front page of the *New York Times* or read as the top story on the nightly newscast. One court noted that "because Plaintiff's image appears in a 'fake endorsement'. . . on *The Daily Show*, a satiric program, no reasonable viewer would have believed that the challenged clip contained assertions of fact about Plaintiff."[16]

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Similarly, even though courts have made clear, post-*Milkovich*, that the context of a statement does not necessarily immunize from liability the speaker of an unequivocal factual assertion—as was the case in *Milkovich*, where a sports columnist accused a coach of perjury—numerous precedents acknowledge that various widely accepted forums for critique and evaluation (e.g., restaurant reviews or peer-reviewed scientific journals) are places where the audience reasonably expects to encounter statements of evaluative, subjective

beliefs, not provable assertions of fact.[17]

How Courts Have Construed the Context of Twitter

Several aspects of Twitter's structure and use are relevant to the context in which courts determine whether tweets should be considered fact or opinion. Twitter's most basic feature—the ability to send messages of no more than 140 characters—increases the likelihood of vague, confusing, incomplete, and ambiguous communications. Moreover, the fact that Twitter is designed and used to immediately transmit fleeting, top-of-the-head thoughts creates fertile territory for unintentional, but potentially actionable, misstatements.

Twitter's wide use by celebrities as a way to communicate directly with their fans also has figured prominently in many early Twibel cases. The first, and most notorious, example is that of Courtney Love, the rock singer and widow of Nirvana front man Kurt Cobain, who recently prevailed in what was apparently the first Twibel case to go to trial (and the second of three such suits against her).[18] Famous-for-being-famous celebrity Kim Kardashian also drew a defamation lawsuit over her tweets criticizing the "cookie diet."[19]

Only a handful of defamation cases involving Twitter have resulted in published opinions; most have been settled.[20] Courts considering such cases most often have simply applied established principles of defamation law. Although these courts have said that they consider the tweets in their entire context, what has generally been left unsaid is how the fact that the challenged statements were tweets fits into that analysis.

Judges in the cases for which opinions are available have more often than not held that allegedly defamatory tweets are expressions of opinion or otherwise not actionable. The Tennessee Court of Appeals, for example, affirmed the dismissal of a Southwest Airlines gate agent's defamation claim against a passenger who unleashed a torrent of tweets and Facebook posts after the agent refused to let the woman board the plane with her daughter, who lacked an upgraded ticket allowing for early boarding.[21] The defendant's tweets included the following: "I fly @southwestair at least 75x/year. just had WORST experience . . . Woman refused 2 let Gracie board w/ me."[22] The appellate court said that, "[c]onsidered in light of the entire circumstances, the statements attributed to Ms. Grant-Herms were expressions of frustration and complaints that she was not able to board the flight in a manner she wanted."[23]

As this case illustrates, Twitter, Facebook, and other social media are often merely venues for venting, places for tossing off tirades in the heat of the moment. But the emotional immediacy of Twitter can be one of its pitfalls, too—here, the court reversed dismissal of the plaintiff's false light claim, holding that the defendant's rants could be construed as casting the plaintiff as a "rude and bad service agent."[24]

Not all U.S. courts have found tweets to be nondefamatory, however. A federal court in the Western District of Virginia, for example, issued what appears to be the first reported opinion holding that hashtags[25] may be actionable. In *AvePoint, Inc. v. Power Tools, Inc.*, the court denied a motion to dismiss a defamation complaint by a software company against one of its competitors in the military and government market.[26] The plaintiffs alleged that the defendants defamed them by tweeting about the company using hashtags such as #RedDragon, #SinkingREDShip, and #MadeinCHINA, which implied AvePoint's software was developed in China (a particularly sensitive subject for military contractors).[27] The court held that the tweets did not express opinions but made verifiable statements or implications of fact regarding the country of origin of the plaintiffs' software.[28] Again, context and audience were key, and the fact that the plaintiff alleged that the tweets actually influenced its customers weighed against their being considered nonactionable opinion.[29]

Notably, courts in other countries, such as the United Kingdom, have been much harsher on defendants accused of sending defamatory tweets. A British court recently held that a tweet that merely asked why a retired political figure's name was "trending"[30] amounted to a defamatory allegation that he had sexually abused children who were wards of the government.[31] A few days after the BBC reported rape allegations against an unnamed former Conservative Party figure, Sally Bercow, the wife of the Speaker of the House of Commons, tweeted, "Why is Lord McAlpine trending? *innocent face*"[32] The court agreed with McAlpine that "innocent face" was meant—and understood—to be irony, and therefore the tweet should be interpreted as accusing McAlpine of being the unnamed pedophile.[33] Although a case with the same facts should be dismissed under U.S. law,[34] *McAlpine v. Bercow* serves as a cautionary tale of the pitfalls of a medium that fosters brief and ambiguous statements.

Lessons to Be Learned from Other Online Defamation Cases

From the iconic 1993 *New Yorker* cartoon with the tagline "On the Internet, nobody knows you're a dog"[35] to the recent State Farm commercial with the dorky "French model" from an online dating site,[36] a familiar pop-culture meme is that the Internet is chock-full of misinformation, puffery, and outright lies. Judges, too, understand that all but the most naïve comprehend that much of what is said online is untrustworthy. Outside the context of Twitter, courts have recognized that certain online venues—especially those that invite and/or encourage users to post reviews or ratings of consumer products or services—are the modern day equivalent of the office water cooler, local saloon, or hair salon, actual venues where individuals gather to share their inherently subjective personal opinions and beliefs and blow off steam. As a New York appellate court put it, the "freewheeling, anything-goes writing style" prevalent online means that "readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts."[37]

For example, in a widely publicized recent case, the U.S. Court of Appeals for the Sixth Circuit affirmed dismissal of defamation claims by a hotel that the travel review site TripAdvisor listed as the

"dirtiest hotel in America," based on consumers' reviews.[38] The court held that the ranking was not actionable as trade libel precisely because "'even the most careless reader must have perceived' that 'dirtiest' is simply an exaggeration and that Grand Resort is not, literally, the dirtiest hotel in the United States."[39]

Other courts have similarly recognized that comments posted by disgruntled customers and business patrons on various "gripe" or "consumer complaint" sites are more likely to be understood as conveying statements of subjective opinion, not verifiable facts.[40] The same is true for statements posted on websites devoted to exposing former lovers' alleged bad behavior and misdeeds.[41] Likewise, anonymous statements posted in the comment sections of newspaper websites are likely to be considered opinion; a New York appellate court held that such a comment calling a local political figure a "terrorist" was likely to be taken by readers as hyperbole, not fact.[42]

Similarly, courts have concluded that some social media postings should not be taken seriously. Thus, a trial court concluded that any reasonable reader of postings made to a Facebook group created by high school students would know they were facetious:

> While the posts display an utter lack of taste and propriety, they do not constitute statements of fact. An ordinary reader would not take them literally to conclude that any of these teenagers are having sex with wild or domestic animals or with male prostitutes dressed as firemen. The entire context and tone of the posts constitute evidence of adolescent insecurities and indulgences, and a vulgar attempt at humor. What they do not contain are statements of fact.[43]

Likewise, a court found that a comedian's written and video postings to her blog and MySpace page were not defamatory because they would be understood as merely her opinions regarding her "racist" in-laws.[44]

However, as with the sports column context in *Milkovich*, the fact that a statement is posted on a blog, Facebook, or Twitter will not, by itself, insulate an otherwise provably false statement from being found actionable as defamation.[45] For example, in *Sanders v. Walsh*,[46] the plaintiff had stated a claim for libel against the defendant, who had posted as "Fact" on Ripoffreport.com comments accusing the plaintiff of passing a bogus check, offering false documentary evidence, and perjuring herself. The court rejected the defendant's contention that the statements were only capable of being understood as opinion: "While courts have recognized that online posters often play fast and loose with facts, this should not be taken to mean online commentators are immune from defamation liability . . . . Where specific factual allegations are published and they cause damage, a defamation action will lie."[47]

Role of Hyperlinks in Providing Defenses to Defamation Claims

Media attorneys often advise their clients that attribution to an official government document is among the best ways to avoid being sued for defamation and also provides the earliest exit ramp from a filed claim. One reason is the common law or statutory fair report privilege shielding from defamation liability reports regarding material in government documents and proceedings. Another is that statements of opinion based on disclosed facts are more likely to be held nonactionable.[48] The Internet makes this kind of attribution enormously simple. Inserting a link to the source material in online text—whether a news article, a blog post, a Tumblr reblog, or a tweet—allows the audience to quickly and seamlessly see it for themselves rather than heading to the library to search through the stacks for a hard copy.

Courts have held that a hyperlink can establish the attribution necessary for successful invocation of the fair report privilege. The most prominent such case is *Adelson v. Harris*,[49] in which billionaire Republican donor Sheldon Adelson sued a Democratic group that posted online references to "reports" that Adelson had "personally approved" prostitution at his company's casinos in the Chinese enclave of Macau. The National Jewish Democratic Council's (NJDC) posting highlighted the phrase *personally approved* as a hyperlink that, when clicked, directed readers to an Associated Press article reporting on the source of the allegation: a declaration that a former executive filed in his lawsuit against Adelson's company.[50] After Adelson sued, the NJDC invoked Nevada's common law fair report privilege, which provides absolute immunity from defamation liability stemming from reports of judicial or other governmental proceedings.[51] A fair report must, by explicit reference or context, attribute the information to the governmental proceeding.[52] The court held that "[t]he hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law" and thus provided the required attribution for the petition to be entitled to fair report immunity.[53]

Hyperlinks to underlying source material can provide the attribution necessary for a statement to be considered an opinion based on disclosed facts.

Hyperlinks to underlying source material also can provide the attribution necessary for a statement to be considered an opinion based on disclosed facts. Since the early years of the Internet, courts have accepted that hyperlinking to the facts underlying a statement of opinion delivers the required factual disclosure, allowing the reader to easily evaluate the opinion expressed.[54] A Texas appellate court, for example, recently held that a political campaign website's links to underlying source materials provided context such that a reasonable reader would perceive statements that the defendant benefited from an official "reward[ing his] cronies" as just

"politically flavored hyperbole," not fact.[55]

Users of Twitter and other social media, therefore, may enjoy an added layer of protection from liability simply by adding links to more extensive background material. Using the fictional O. J. tweet as an example, if @OJmurderer added a link[56] to an article discussing the civil wrongful death verdict, the tweet could be protected either as a fair report, an opinion based on disclosed facts, or both. Further, when commenting on another's online postings, retweeting or otherwise including or linking to the post at issue will lessen the risk of successful litigation. Thus, if Miguel were to retweet @OJmurderer's message, commenting, "Can you believe this idiot? #LIAR," Miguel's opinion that @OJmurderer was a liar would be based on the disclosed fact of the tweet and therefore nondefamatory.

How the Republication Doctrine and Section 230 Apply to the Twittersphere

We began this article by assuming that the tweet was a publication for purposes of defamation law. Now we ask the question, "Who is the publisher of the content of the tweet and all of its elements for purposes of defamation law?"

Providing a Link to Defamatory Content of Another Is Not Republication of That Content

Suppose Mary tweets with a link to an earlier *Los Angeles Times* story, and her introduction to it reads, "Here's the truth about O. J.: [link to an *L.A. Times* story calling Simpson a murderer]." There are three potential "speakers" or "publishers" who may be legally responsible for the content of Mary's tweet: (1) Twitter.com, the publicly traded company now valued at $2 billion, which makes the tweet available to anyone who has access to the Internet; (2) Mary, for pointing her followers to the *L.A. Times* story calling Simpson a murderer; and (3) the *L.A. Times*, for its story about Simpson. Is Mary responsible as the publisher of the information that is posted at the link?

In *Doe v. Ebanks*,[57] a California state trial judge held that basketball player Devin Ebanks was not the publisher of information about the plaintiff, to whom he allegedly referred in a tweet. The plaintiff had accused the Los Angeles Lakers forward of raping her; when authorities declined to file charges against Ebanks, the celebrity news website TMZ posted an article characterizing the action as having "cleared" the player.[58] That same day, the player's friend who had introduced him to his eventual accuser tweeted to Ebanks, "glad you got cleared"; Ebanks responded, "thanks bro next time u wanna hook me up, dnt lol."[59] The player's accuser claimed that by not "clarify[ing] the inaccuracies in the article in the Twitter exchange with his friend, [Ebanks] adopted them as his own."[60] The court disagreed, holding that "[u]nder no reasonable interpretation can the Twitter comments by defendant be interpreted to adopt the content of the TMZ article by defendant."[61]

Similarly, outside the Twittersphere, there is a growing body of case law holding that a person does not "republish" the contents of another's website merely by posting or forwarding a link to that content.[62] Thus, a tweet that does nothing more than point readers to another person's or entity's website, via a hyperlink, should not be viewed as republication of the content found at the website to which the link points.[63] (However, providing a hyperlink to a website hosting unauthorized copies of a copyrighted work can, in some situations, be actionable as contributory infringement.[64])

Retweeting Another Person's Defamatory Tweet Is Likely Entitled to Immunity under § 230

But now consider Mary as a retweeter of defamatory content, not simply a tweeter of a link to such content. Suppose that Joe first tweets, "O. J. Simpson is a murderer: [Link to *L.A. Times* story]." Suppose that Mary then retweets that with her introductory comment: "This is the absolute truth." Does Mary step into Joe's shoes and become a publisher of his tweet, legally responsible for its contents? And is Twitter.com responsible for either Joe's or Mary's tweets if Simpson sues?

First, Twitter.com: Of course, if Joe's or Mary's tweet had been published in a newspaper or other offline print publication after it had been selected by the publisher or editor of the paper, the person or entity responsible for printing and distributing the publication would unquestionably be considered the speaker or publisher of the tweet under the common law's "republication doctrine." As stated in the *Restatement*, "[e]xcept as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."[65] But Twitter is different in two dispositive ways: (1) Twitter does not exercise any editorial decision making in opening up its communications platform to third-party posting, so it is essentially a "common carrier," like a phone or telegraph company;[66] and (2) tweets are transmitted exclusively online, through a web-based platform, thereby rendering Twitter entitled to the immunity from libel claims provided to "providers of interactive computer services" by § 230 of the Communications Decency Act (provided that no one at Twitter contributed in whole or in part to the generation or development of a particular tweet).[67]

But what about Mary? Is she legally responsible for Joe's statement "O. J. Simpson is a murderer" because she made the intentional decision to retweet it? Does it matter that she added her own comment, unequivocally endorsing and adopting the content of Joe's original tweet? Would that endorsement of the content to which she linked serve to render her the publisher of that content and thereby force Mary to defend the libel claim brought by Simpson? Probably not. Once again, based on existing precedent arising outside the Twittersphere, it is likely that Mary could, like Twitter.com, avail herself of the federal immunity provided by § 230 of the Communications Decency Act.

But how could that be? Mary is not the provider of an interactive computer service. No, but she is a user of it, and the immunity extends, by statute, to any "provider or user" of such a service. Thus, the U.S. Court of Appeals for the Ninth Circuit held that when a user of an

online bulletin board posted an e-mail that she had received from a third party, which allegedly defamed an art dealer, the woman who posted the e-mail message could not be held liable for the content of the e-mail that "originated from another content provider."[68] The only issue presented in that case that might have removed the immunity available to the defendant was whether the e-mail was provided to her for use on the Internet (and therefore was "provided by" another content provider). However, because Twitter is inherently a public distribution platform and its retweeting function is expressly designed and intended for one-click republishing of another's tweet, there is no question that the content is intended to be used on the Internet by others; and, therefore, a retweeter is entitled to immunity under § 230.[69]

Indeed, this is the very argument that filmmaker Spike Lee made in response to a lawsuit against him by an elderly couple whose home address Lee mistakenly retweeted as the address of Trayvon Martin's killer, George Zimmerman, in a highly publicized (and subsequently further retweeted) incident.[70] Lee, like any retweeter, should be entitled to § 230 immunity.

Other Reposting of Content via Social Media

Retweeting is just one example of a primary function that makes social media "social": the ability to quickly and easily share words, photos, and videos with friends and the rest of the world. Tumblr, for example, provides space for its users to create their own blog and post anything from cookie recipes to political polemics to short video clips—and to reblog posts from friends and others who share their interests.[71] Facebook allows its users to post messages and other content that is transmitted to those in their "friend" network; those friends can click on the "like" button to voice their approval of a specific post and share it with their friends.[72]

Although courts do not appear to have confronted the questions of whether Tumblr reblogs or Facebook "likes" can be defamatory, it is likely only a matter of time until such questions are raised. The U.S. Court of Appeals for the Fourth Circuit has held, for example, that a Facebook "like" constitutes "pure speech" and "symbolic expression" protected by the First Amendment.[73] It follows, therefore, that such social network sharing should be treated the same as retweeting for § 230 and defamation purposes.

Admittedly, these various views of "liking," linking to, or pointing to another's online content may not be completely consistent or harmonizable: linking to a website does not publish that content under the single publication doctrine or for defamation liability, but it publishes the disclosed facts to support an opinion defense. So, too, a Facebook "like" may be protected speech, yet it may be immunized by § 230 from liability for adopting the defamatory content "liked" because the "like" does not contribute, in whole or in part, to the defamatory message. As more of these cases are litigated in the future, courts will have further opportunity to address this apparent inconsistency but, as in other areas of the law, may not ultimately resolve it.

As Technology Evolves, So, Too, Shall Defamation Law

As with any new medium of communication, Twitter and other social media networking platforms present the courts with interesting, novel questions about how existing legal doctrines, including those in the field of defamation, should be applied. At this early stage in the advent of this relatively new communications medium, the courts have faithfully adhered to traditional legal doctrines in applying the brick-and-mortar rules to the virtual world. However, because certain aspects of defamation law (like those that serve as the foundation for the law of privacy)[74] require courts to consider the impact of the communication on the mind of the "average reader," as well as the mores and customs of a particular medium of expression, the courts will need to become familiar with, and cognizant of, the social norms and reasonable expectations of Twitter followers and Pinterest pinners (and whatever tomorrow's hot new social media platform today's youth migrate to next) in order to ensure that centuries-old legal doctrines are properly applied to these new, and yet-to-be-created, communications platforms.

Endnotes

1. Peterson v. Western Union Telegraph Co., 67 N.W. 646, 647 (Minn. 1896) (holding that telegraph company could be liable in defamation where proffered message is facially defamatory and unsigned). Today, the libel claim in *Peterson* would not be actionable against Twitter because of the federal immunity from such claims provided to "providers of interactive computer services" by § 230 of the Communications Decency Act of 1996. 42 U.S.C. § 230. *See infra*.

2. Burstyn v. Metro Goldwyn Mayer Corp., 343 U.S. 495, 500 (1952), *rev'g* Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230 (1915) (recognizing that "motion pictures are a significant medium for the communication of ideas . . . included within the free speech and free press guaranty of the First and Fourteenth Amendments").

3. Reno v. ACLU, 521 U.S. 844, 870 (1997) (finding "no basis for qualifying the level of First Amendment scrutiny that should be applied to" Internet speech).

4. Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2733 (2011) (holding that state restrictions on sales of certain video games to minors violate the First Amendment).

5. *Id.* at 2733 (internal quotation omitted); *cf. Burstyn*, 343 U.S. at 500 (stating that "[e]ach method [of expression] tends to present its own peculiar problems").

6. *See* Restatement (Second) of Torts § 558 (1977).

7. *Id.* § 611.

8. Gertz v. Robert Welch Co., Inc., 418 U.S. 323, 350 (1974).

9. *See, e.g.*, GetFugu, Inc. v. Patton Boggs LLP, 220 Cal. App. 4th 141, 150, 162 Cal. Rptr. 3d 831, 838 (2013), *reh'g denied* (Nov. 4, 2013) (treating a tweet as a publication for defamation purposes); *see also* Stein v. City of Philadelphia, No. CIV.A. 13-4644, 2013 WL 6408384, at *7 (E.D. Pa. Dec. 5, 2013) (holding that tweets are "mass media" statements not subject to tolling of the statute of limitations by the discovery rule).

10. 497 U.S. 1 (1990).

11. *See* NBC Subsidiary v. Living Will Ctr., 879 P.2d 6, 10 (Colo. 1994) ("Under the *Milkovich* standard, therefore, a court must determine whether the statement contains or implies a verifiable fact

about the plaintiff and second, whether the statement reasonably is susceptible to being understood as an assertion of actual fact."); Bentley v. Bunton, 94 S.W.3d 561, 580–83 (Tex. 2002) (whether a publication is an actionable statement of fact depends on its verifiability and the context in which it was made).

12. *See, e.g.*, Hogan v. Winder, No.2:12-CV-123 TS, 2012 WL 4356326, at *8 (D. Utah Sept. 24, 2012) ("To determine whether a statement is fact or opinion the Court considers the following four factors: (i) the common usage or meaning of the words used; (ii) whether the statement is capable of being objectively verified as true or false; (iii) the full context of the statement—for example, the entire article or column—in which the defamatory statement is made; and (iv) the broader setting in which the statement appears."); Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984).

13. *See, e.g.*, Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974) (finding that statements in labor union newspaper labeling scab workers "traitors" could not be understood as factual allegation of the crime of treason because "in the context of this case, no such factual representation can reasonably be inferred"); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970) (holding that newspaper report of statements uttered at a public meeting decrying plaintiff's negotiation tactics as "blackmail" could not reasonably be understood as an accusation of committing a criminal act).

14. *See, e.g.*, Underwager v. Channel 9 Australia, 69 F.3d 361 (9th Cir. 1995) (applying totality of circumstances test, considering (1) the statement in its broad context, including the tenor, the subject, the setting, and the format of the work; (2) the context and content of the statements, including the reasonable expectations of the audience; and (3) "whether the statement itself is sufficiently factual to be susceptible of being proved true or false").

15. *See, e.g.*, Glickman v. Stern, 19 Media L. Rep. 1769, 1774 (N.Y. Sup. Ct. Oct. 15, 1991) (finding that it "could not be . . . reasonably considered by viewers and listeners of the [Howard] Stern show as anything more than purely nonsensical entertainment[]"); Hobbs v. Imus, 266 A.D.2d 36, 37, 698 N.Y.S.2d 25, 26 (N.Y. App. Div., 1st Dep't 1999) ("[g]ratuitously tasteless and disparaging" remarks made about plaintiff, considered "in the context of the ribald radio 'shock talk' show in which they were made," would not have been taken by reasonable listeners as factual pronouncement).

16. Busch v. Viacom Int'l Inc., 477 F. Supp. 2d 764, 775 (N.D. Tex. 2007) (citations omitted).

17. For example, the Ohio Court of Appeals held that "[b]y its very nature, an article commenting upon the quality of a restaurant or its food, like a review of a play or movie, constitutes the opinion of the reviewer." Greer v. Columbus Monthly Publ'g Co., 448 N.E.2d 157, 161 (Ohio Ct. App. 1982); *see also* Phantom Touring, Inc. v. Affiliated Prods., 953 F.2d 724 (1st Cir. 1992) (review of theatrical production describing the show as "a rip-off, a fraud, a scandal, [and] a snake-oil job" understood as expressing opinion); Imuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270 (N.Y. 1991) (letter to editor in scientific journal stated only matters of opinion, not assertions of fact).

18. The jury found that Love's tweet, stating that her former attorney had been "bought off," was false and defamatory, but that it was not made with actual malice. Corina Knoll, *Singer-Actress Courtney Love Wins Landmark Twitter Libel Case*, Los Angeles Times (Jan. 24, 2014, 10:15 PM), http://www.latimes.com/local/la-me-love-libel-20140125,0,2561369.story#axzz2roymotgg; *see also, e.g.*, Chris Martins, *Courtney Love, Social Media Defamation Pioneer, Strikes Again*, Spin (Sept. 18, 2013, 6:56 PM), http://www.spin.com/#articles/courtney-love-defamation-lawsuit-pinterest-twitter-howard-stern.

19. Eric P. Robinson, *Cookie Twitter Lawsuit Crumbles*, Blog L. Online (Mar. 4, 2011), http://bloglawonline.blogspot.com/2011/03/cookie-twitter-lawsuit-crumbles.html.

20. *See, e.g.*, *id.*; *AP and NBA Ref Reach Settlement in Tweet Suit*, Associated Press (Jan. 10, 2012), http://www.ap.org/Content/AP-In-The-News/2011/AP-and-NBA-ref-reach-settlement-in-tweet-suit; Kara Hansen Murphey, *Blogger, Dr. Darm Settle Landmark Twitter Lawsuit*, Portland Trib. (Oct. 12, 2011, 5:00 PM), http://pamplinmedia.com/component/content/article?id=13802. For a more detailed overview of the law in this area, see RonNell Andersen Jones & Lyssa Barnett Lidsky, *Recent Developments in the Law of Social Media Communications—2013*, Comm. L. Digital Age (PLI Nov. 2013).

21. Patterson v. Grant-Herms, M2013-00287-COA-R3CV, 2013 WL 5568427, at *4 (Tenn. Ct. App. Oct. 8, 2013).

22. *Id.* at *2.

23. *Id.* at *4.

24. *Id.* at *5.

25. Hashtags are words and phrases in tweets, preceded by a "#" symbol, meant to designate how the tweet should be categorized. Twitter and third-party services track hashtags to gauge how frequently users are discussing a particular topic. *See Using Hashtags on Twitter*, Twitter Help Center, https://support.twitter.com/articles/49309-using-hashtags-on-twitter# (last visited Jan. 19, 2014).

26. AvePoint, Inc. v. Power Tools, Inc., No. 7:13CV00035, 2013 WL 5963034, at *4–8 (W.D. Va. Nov. 7, 2013).

27. *Id.* at *5–7, 17.

28. *Id.* at *5–6.

29. *Id.* at *6.

30. Twitter displays for its users a continually updated list of newly popular phrases and hashtags; a particular topic is said to be "trending" when it appears on such lists. *See FAQs About Trends on Twitter*, Twitter Help Center, https://support.twitter.com/groups/50-welcome-to-twitter/topics/203-faqs/articles/101125-faqs-about-trends-on-twitter# (last visited Jan. 19, 2014).

31. McAlpine v. Bercow, 2013 EWHC 1342 (QB).

32. *Id.* Although her husband is, like McAlpine, a member of the Conservative Party, Bercow is a member of the rival Labour Party.

33. *Id.*

34. *See, e.g.*, Secured Fin. Solutions, LLC v. Winer, No. M200900885CO-AR3CV, 2010 WL 334644, at *3 (Tenn. Ct. App. Jan. 28, 2010) (e-mail inquiring about truth of rumor that plaintiff insurance professional was "getting shut down" by regulators did not contain defamatory statement of fact); Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1094 (4th Cir. 1993) (questions are not accusations and typically are not construed as assertions of fact); Partington v. Bugliosi, 56 F.3d 1147, 1157 (9th Cir. 1995) (same); Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, 39 F.3d 191, 195 (8th Cir. 1994) (same).

35. *See* Michael Cavna, *"Nobody Knows You're a Dog": As Iconic Internet Cartoon Turns 20, Creator Peter Steiner Knows the Joke Rings as Relevant as Ever*, Wash. Post (July 31, 2013, 11:35 AM), http://www.

washingtonpost.com/blogs/comic-riffs/post/nobody-knows-youre-a-dog-as-iconic-internet-cartoon-turns-20-creator-peter-steiner-knows-the-joke-rings-as-relevant-as-ever/2013/07/31/73372600-f-98d-11e2-8e84-c56731a202fb_blog.html.

36. *See* Laura Dimon, *"French Model" Turns Heads as Hottest TV-Ad Star du Jour*, Columbus Dispatch (Feb. 22, 2013, 8:53 AM), http://www.dispatch.com/content/stories/life_and_entertainment/2013/02/22/22-french-model-turns-heads-as-hottest-tv-ad-star-du-jour.html.

37. Sandals Resorts Int'l Ltd. v. Google, Inc., 86 A.D.3d 32, 43–44, 925 N.Y.S.2d 407, 415–16 (2011) (citations omitted).

38. Seaton v. TripAdvisor LLC, 728 F.3d 592 (6th Cir. 2013).

39. *Id.* at 598 (quoting Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14 (1970)).

40. *See, e.g.*, Chaker v. Mateo, 209 Cal. App. 4th 1138, 1149–50 (2012) (postings "made on Internet Web sites which plainly invited the sort of exaggerated and insulting criticisms of businesses and individuals," such as Ripoffreport.com, would be understood as opinions); Intellect Art Multimedia, Inc. v. Milewski, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (tbl.), 2009 WL 2915273, at *5 (N.Y. Sup. Ct. 2009) (holding that "the website [Ripoffreport.com], when viewed in its full context, reveals that [defendant] is a disgruntled consumer and that his statements reflect his personal opinion based on his personal dealing with plaintiff'"). *But see* Piping Rock Partners, Inc. v. David Lerner Assocs., Inc., No. C 12-04634 SI, 2013 WL 2156279, at *6–7 (N.D. Cal. May 17, 2013) (allegedly defamatory statements posted on Ripoffreport.com were actionable because they made provably false statements of fact).

41. *See, e.g.*, Couloute v. Ryncarz, No. 11 CV 5986 HB, 2012 WL 541089, at *6 (S.D.N.Y. Feb. 17, 2012) (denying leave to amend complaint to add defamation claim based on postings to liarscheatersrus.com because "[t]he average reader would know that the comments are emotionally charged rhetoric and the opinions of disappointed lovers") (internal quotations omitted).

42. LeBlanc v. Skinner, 103 A.D.3d 202, 213, 955 N.Y.S.2d 391, 400 (2012).

43. Finkel v. Dauber, 29 Misc. 3d 325, 329–30, 906 N.Y.S.2d 697, 702 (N.Y. Sup. Ct. 2010).

44. Edelman v. Croonquist, No. CIV-A 09-1938 (MLC), 2010 WL 1816180, at *5–6 (D.N.J. May 4, 2010).

45. Some commentators have nevertheless proposed that Twitter be declared a "libel free zone" in which all tweets are afforded absolute immunity from defamation claims. *See, e.g.*, William Charron, *Twitter: A "Caveat Emptor" Exception to Libel Law?*, 1 Berkeley J. Ent. & Sports L. (2012); Thomas R. Julin & Henry R. Kaufman, *Twibel Tweak Needed for Tweeters*, CNA Pro News (Apr. 26, 2011), http://www.cnapro.com/pdf/TwibelTweakNeededforTweeters%204-26-11.pdf.

46. 219 Cal. App. 4th 855, 864–65, 162 Cal. Rptr. 3d 188, 196 (2013).

47. *Id.*

48. *See, e.g.*, Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1439–40 (9th Cir. 1995) ("A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning."); Restatement (Second) of Torts § 566, cmt. C (1977).

49. 2013 WL 5420973 (S.D.N.Y. Sept. 30, 2013).

50. *Id.* at *1.

51. *Id.* at *11.

52. *Id.*

53. *Id.* at *13.

54. *See, e.g.*, Nicosia v. DeRooy, 72 F. Supp. 2d 1093, 1103 (N.D. Cal. 1999).

55. Rehak Creative Servs., Inc. v. Witt, 404 S.W.3d 716, 732 (Tex. App. 2013); *see also* Rakofsky v. Washington Post, 39 Misc. 3d 1226(A) (tbl.), 971 N.Y.S.2d 74, 2013 WL 1975654, at *2–5 (N.Y. Sup. Ct. 2013) (blog posts criticizing lawyer were based on disclosed facts where they linked to newspaper articles describing mistrial in plaintiff's first case, a murder prosecution, in which plaintiff asked an investigator to "trick" an elderly witness into changing her testimony).

56. Because URLs (website addresses) often are far longer than 140 characters, Twitter automatically shortens hyperlinks inserted into tweets to 22 characters. *Posting Links in a Tweet*, Twitter Help Center, https://support.twitter.com/articles/78124-how-to-post-shortened-links-urls# (last visited Jan. 19, 2014). Other services such as bitly also provide shortened URLs for use in tweets and other social media postings. *See* Ben Woods, *How to Create Your Own URL Shortener,* Next Web (Oct. 8, 2013, 5:09 PM), http://thenextweb.com/lifehacks/2013/10/08/want-to-create-your-own-url-shortener-heres-how-in-2013.

57. No. BC496893 (Cal. Super. Ct. Apr. 19, 2013), *available at* http://www.scribd.com/doc/137766448/EBANKS-Jane-Doe-Ruling.

58. *Id.*

59. Eriq Gardner, *L.A. Lakers Player Beats Strange Defamation Claim over TMZ-Related Tweet*, Hollywood Rep. (Apr. 24, 2013, 10:41 AM), http://www.hollywoodreporter.com/thr-esq/la-lakers-player-beats-strange-445785.

60. Doe v. City of New York, 583 F. Supp. 2d 444 (S.D.N.Y. 2008).

61. *Id.*

62. *See, e.g.*, *In re* Philadelphia Newspapers, LLC, 690 F.3d 161, 174–75 (3d Cir. 2012); Salyer v. S. Poverty Law Ctr., Inc., No. 3:09-CV-44-H, 2009 U.S. Dist. LEXIS 113511 (W.D. Ky. Dec. 4, 2009); Haefner v. N.Y. Media, 2009 NY Slip Op. 52765U, at *12 (N.Y. Sup. Ct. 2009); Martin v. Daily News, LP, No. 103129/11, 35 Misc. 3d 1212(A) (N.Y. Sup. Ct. Feb. 10, 2012).

63. In one unreported case, however, the California Court of Appeal held that § 230 barred a defamation claim based on an e-mail's embedded link to a website containing allegedly defamatory statements. McVey v. Day, No. B205465, 2008 Cal. App. Unpub. LEXIS 10462, at *45–46 (Cal. Ct. App. Dec. 23, 2008). To be entitled to the federal immunity of § 230, the plaintiff's claims must seek to treat the defendant as "the publisher" of the content that is provided by another information content provider.

64. Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1202 n.12 (N.D. Cal. 2004) ("Although hyperlinking per se does not constitute direct copyright infringement because there is no copying, . . . in some instances there may be a tenable claim of contributory infringement or vicarious liability.").

65. Restatement (Second) of Torts § 578 (1977); *see also* Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980).

66. At common law, a common carrier such as a telegraph operator or bookstore owner was not deemed to have "published" any of the communications transmitted over its communications platform (or any of the contents of the books and magazines sold in the bookstore) unless it was put on notice of the defamatory nature of a particular publication and thereafter negligently failed to remove the publication. *See* Restatement (Second) of Torts § 581 cmt. b (1977).

But see supra note 1 (discussing liability of telegram company in *Peterson v. Western Union Telegraph Co.*, 67 N.W. 646, 647 (Minn. 1896)).

67. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc). Numerous courts have extended immunity under § 230 to consumer review website operators that have hosted negative comments and reviews submitted by third parties. *See, e.g.*, Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009); Blockowicz v. Williams, 675 F. Supp. 2d 912, 914 (N.D. Ill. 2009); Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929 (D. Ariz. 2008).

68. Batzel v. Smith, 333 F.3d 1022, 1034–35 (9th Cir. 2003) (posting accusing plaintiff of art theft was not created or developed in whole or in part by website moderator, who added a statement that "the FBI has been informed of the contents of [the] original message"); *see also* Phan v. Pham, 182 Cal. App. 4th 323 (Cal. Ct. App. 2010) (holding that person who e-mailed a link to another website, with the introductory statement "Everything will come out to the daylight," was entitled to immunity under § 230 for the allegedly defamatory content posted at the link).

69. *See* Mitan v. A. Neumann & Assocs., LLC, Case No. Civ. 08–6154, 2010 WL 4782771 (D.N.J. Nov. 17, 2010) (holding that person who forwarded an e-mail to a group of recipients, with an introductory statement, was entitled to § 230 immunity: "as the downstream Internet user who received an email containing defamatory text and 'simply hit the forward icon on [his] computer,'. . . Neumann's acts are shielded by the CDA"); Vasquez v. Buhl, No. FSTCV126012693S, 2012 WL 3641581 (Conn. Super. Ct. July 17, 2012) (holding that an editor at CNBC.com was immune from defamation liability under § 230 when he posted a link to a defamatory website with an introductory message "I don't want to steal Buhl's thunder, so click on her report for the big reveal"). *But see* Doe v. City of New York, 583 F. Supp. 2d 444, 449 (S.D.N.Y. 2008) (rejecting § 230 immunity for defendant who forwarded actionable e-mails because he "attached his own commentary [to the e-mails] . . . [and thereby] ceased to be a passive host of third-party information").

70. *See* Complaint, McClain v. Lee, No. 2013-CA-3382 (Fla. Cir. Ct. Sept. 16, 2013), *available at* http://www.thesmokinggun.com/file/spike-lee-twitter-suit?page=1. Lee had earlier apologized to the couple and paid them $10,000. *See Spike Lee Settles with Elderly Couple After Retweeting Their Address as That of Trayvon Martin Shooter George Zimmerman*, Huffington Post (Mar. 29, 2012, 10:37 PM), http://www.huffingtonpost.com/2012/03/29/spike-lee-settles--retweet-address-wrong-trayvon_n_1390193.html.

71. *See About Tumblr*, Tumblr, http://www.tumblr.com/about (last visited Jan. 19, 2014).

72. *See What Does It Mean to "Like" Something?*, Facebook, http://www.facebook.com/help/452446998120360 (last visited Jan. 19, 2014).

73. Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (amended Sept. 23, 2013).

74. *See, e.g.*, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (defining a "reasonable expectation of privacy" protected by the Constitution against unreasonable government intrusion as "that which society is prepared to recognize as 'reasonable'"); *see also* Restatement (Second) of Torts § 652B cmt. c (1977) ("The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place . . . and to the habits of his neighbors and fellow citizens."); J. Thomas McCarthy, Rights of Publicity and Privacy § 5:98 (2d ed. 2010) (recognizing that the zone of privacy "that is legally protected is dependent upon both the social customs and norms which govern a given context" (citing Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 Cal. L. Rev. 957 (1989)).

