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When Can You Shoot the Messenger? Understanding the Legal Protections for Entities Providing Information on Business Products and Services in the Digital Age

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INTRODUCTION

For at least half a century, the legal system in the United States has extended many protections to organizations that provide information about the activities of businesses and other issues of public concern. The most recognizable organizations that have historically played that role are traditional media organizations, in particular radio, television, newspaper, and magazine outlets.[1] From a standpoint of legal protection, professional reviewers of business products and services generally fall within this traditional media group.[2] However, there are many new players in the digital era challenging the role of traditional media, such as social media websites. Facebook, for instance, recently announced in January 2017 the Facebook Journalism Project to emphasize its news operations and to address skepticism about its journalistic commitment.[3]

A great variety of organizations assist consumers with obtaining information on a business's products and services. That mix includes numerous governmental agencies, nonprofit companies such as the Better Business Bureau (BBB) organizations, and for-profit companies such as private media. The information these organizations provide ultimately saves consumers many headaches because frequently consumers face great difficulty obtaining effective recourse

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[1] *See* Rebecca Phillips, Comment, *Constitutional Protection for Nonmedia Defendants: Should There Be a Distinction Between You and Larry King?*, 33 CAMPBELL L. REV. 173, 185–86 (2010).

[2] *See, e.g.*, Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 487–90, 498–501 (1984).

[3] Brian Stelter, *Facebook Unveils 'Facebook Journalism Project,'* CNNMONEY (Jan. 11, 2017, 10:07 AM), http://money.cnn.com/2017/01/11/media/facebook-journalism-project/index.html?iid=hp-stack-dom.

against a business who has wronged that consumer.[4] Avoiding the encounter with the problematic business in the first place will generally be the easier and cheaper option for the consumer.[5] On the governmental side, attorney generals, state agencies, and federal agencies such as the Federal Trade Commission play a significant role in alerting the public to unlawful and deceptive business activities.[6] In addition to pursuing legal action against businesses, these governmental bodies frequently publish guidance for consumers about business activities deemed harmful or risky to consumers.[7] While the liability scheme for governmental organizations commenting on business products and services is beyond the scope of this Article, generally speaking, they have sovereign immunity from defamation and similar claims.[8]

However, as with any situation, there are limits on what governmental organizations and the traditional media—such as professional reviewers—can do about a problem. Since the early 1900s, BBB organizations have played a large role in providing information to consumers about questionable business practices.[9] In their modern form, BBB organizations provide access online to significant information about businesses to help consumers make educated decisions about choosing to do business with a company.[10] The massive consumer use of the Internet has also opened entirely new platforms for different players to step into this consumer protection gap, in particular nontraditional media organizations, social media, and crowdsourced consumer review sites. On crowdsourced consumer review sites—such as Google, Yelp, TripAdvisor, and

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4 *See, e.g.*, Fred Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 2009 U. ILL. J.L. TECH. & POL'Y 1, 4–5 nn.12–13 (2009); Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 62 BAYLOR L. REV. 178, 200–02 (2010).

5 *See* Galves, *supra* note 4; Schmitz, *supra* note 4.

6 *See infra* Part IV(A).

7 *See, e.g.*, Kristy Holtfreter et al., *Consumer Fraud Victimization in Florida: An Empirical Study*, 18 SAINT THOMAS L. REV. 761, 764–65 (2006); Ralph E. Stone, *The Federal Trade Commission and Timeshare Resale Companies*, 24 SUFFOLK U.L. REV. 49, 68–69 (1990).

8 Kaiser v. Blue Cross of Cal., 347 F.3d 1107, 1117 (9th Cir. 2003). Likewise, in the context of constitutional claims against state actors, they cannot be liable for damages to reputation alone. *See* Paul v. Davis, 424 U.S. 693, 710–12 (1976).

9 *See infra* Part IV.

10 *See infra* text accompanying notes 303–310.

Angie's List—anyone can express their experiences with a given business.[11] Hundreds of millions of users take advantage of these platforms every month, with some data indicating that over eighty percent of consumers now read reviews for businesses and products online.[12] The level of consumer power to express dissatisfaction with a business or product has never been greater. Anyone with an internet connection can post a negative review online or on a company's social media page.[13]

Understandably, given the highly varied nature of these organizations providing information on business products and services, the legal framework governing liability for their activities is equally diverse. More particularly, it is an unusual mix of common law, constitutional restrictions, and statutory protections. This liability system—especially the protections available to these entities—will be the focus of the Article.[14] This Article will focus on how the mass use of digital platforms to access information, including about business products and services, has challenged the legal system to keep up with these technological changes.

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[11] Lucille M. Ponte, *Protecting Brand Image or Gaming the System? Consumer "Gag" Contracts in an Age of Crowdsourced Ratings and Reviews*, 7 WM. & MARY BUS. L. REV. 59, 62–63 (2016).

[12] *See id.* at 62–63 nn.5–7 (providing recent usage data for Yelp, TripAdvisor, and Angie's List); Jayson DeMers, *How Important Are Customer Reviews for Online Marketing?*, FORBES (Dec. 28, 2015, 3:01 PM), http://www.forbes.com/sites/jaysondemers/2015/12/28/how-important-are-customer-reviews-for-online-marketing/#78895a7b788c.

[13] *See, e.g.*, Bedford v. Spassoff, 485 S.W.3d 641, 651–52 (Tex. App. 2016); THE DELOITTE CONSUMER REVIEW: THE GROWING POWER OF CONSUMERS, DELOITTE 2–3, 13 (2014), https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/consumer-business/consumer-review-8-the-growing-power-of-consumers.pdf; DeMers, *supra* note 12.

[14] One important source of protection for these entities that is nonuniform among states and thus not conducive to substantial coverage in this Article is anti-SLAPP statutes. *See* Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 869–72 (2010). In approximately ten states, defendants can invoke the procedures under these statutes typically through a motion to dismiss to defeat a lawsuit involving exercise of speech rights on a matter of public concern—such as complaints about products and services. *See, e.g.*, Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 353 (Tex. App. 2013) (discussing dismissal procedures under Texas's anti-SLAAP statute and recognizing that coverage of matters of public concern under statute includes "a good, product, or service in the marketplace"); *supra*, at 845–48, 869–72; Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U.L. REV. 1235, 1237–38, 1252–70 (2007) ("However, comparatively few states have passed anti-SLAPP legislation that protects broader First Amendment interests such as freedom of speech and freedom of the press.").

Part I of this Article will discuss the changing face of the news media in the digital age and the resulting financial pressure on traditional media organizations, particularly local news organizations. Part II of this Article will cover the common law defamation system that still largely governs the liability system for defendants in this area. Part III of this Article will examine the constitutional protections in place for entities commenting on business products and services, including several unresolved issues affecting this liability system. Part IV of this Article will explore the history of BBB organizations in their consumer-protection function and the corresponding legal privilege courts have recognized for BBB entities, a privilege largely unaddressed by legal scholarship. Part V of this Article will address the Communications Decency Act, a critical protection in the digital age for defamation and related claims, that applies to websites that host statements from third parties, most notably consumers. Part VI will emphasize the continued importance of enforcing and expanding these protections for entities that comment on business products and services.

I
THE INCREASINGLY DISRUPTIVE EFFECT OF DIGITAL PLATFORMS TO TRADITIONAL MEDIA

News consumption has changed forever with the consumer transition to digital platforms (e.g., computers, smartphones, and tablets) away from traditional media platforms such as print and television. One of the only phenomena that can rival the dramatic impact digital platforms have had on the news media is the striking pace at which the transition to digital platforms has taken place. When compared to the telephone, which took over seventy years to reach ninety percent of homes and businesses, the adoption of new technologies like smartphones and tablets dwarfs that of their predecessors.[15]

Technology adoption rates certainly increased as the twentieth century progressed. Radio and television, for example, encountered

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[15] *See* Mark Bauerlein, *Introduction* to STEVEN JOHNSON ET AL., THE DIGITAL DIVIDE ix–x (Mark Bauerlein ed., 2011); Michael DeGusta, *Are Smart Phones Spreading Faster Than Any Technology in Human History?*, MIT TECH. REV. (May 9, 2012), https://www.technologyreview.com/s/427787/are-smart-phones-spreading-faster-than-any-technology-in-human-history/.

much swifter adoption rates than electricity and the telephone.[16] The adoption rate of smartphones was an impressive forty percent United States market penetration in roughly ten years after their introduction in the early 2000s, a benchmark that took computers over twenty years to reach.[17] While even computers themselves took roughly thirty-five years to reach seventy-five percent market share, United States consumer usage of smartphones in the United States was over seventy percent as of early 2015.[18] For traditional media institutions, a big concern is that advertiser interest has also followed the consumer interest in these platforms.[19] To the detriment of print, radio, and broadcast media, those advertisers use those very same digital innovations, challenging traditional media to more specifically target their audience.[20]

These dramatic changes were, in many ways, possible because of high internet usage rates, the growth of which snowballed in the 1990s. Census data show growth in internet access rates in households of 18.0% in 1997, 54.7% in 2003, and 71.7% in 2011.[21] New mediums where consumers can access news, like social media networks, have also grown exponentially with Facebook growing from a one-college social network to a titan with 500 million users in just six years.[22] The online, crowdsourced encyclopedia Wikipedia started in 2001 but has now grown to over five million English language articles.[23] Essentially feeding its own growth, the mass

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16 *See* DeGusta *supra* note 15.

17 *Id.*

18 Jacob Poushter, *Smartphone Ownership and Internet Usage Continues to Climb in Emerging Economies*, 16 (Feb. 22, 2016), http://www.pewglobal.org/2016/02/22/smartphone-ownership-and-internet-usage-continues-to-climb-in-emerging-economies/.

19 Des Freedman, *The Political Economy of the 'New' News Environment*, *in* NEW MEDIA, OLD NEWS: JOURNALISM & DEMOCRACY IN THE DIGITAL AGE 35 (Natalie Fenton ed., 2010) [hereinafter NEW MEDIA] ("They are in danger because younger audiences are deserting them for the immediacy and interactivity of the internet, because advertisers are increasingly attracted by the possibilities of more accurately targeting audiences online . . . .").

20 *See id.*

21 *See* THOM FILE, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES 1–2 (2013), https://www.census.gov/content/dam/Census/library/publications/2013/demo/p20-569.pdf.

22 Bauerlein, *supra* note 15. As of the end of 2016, Facebook had 1.86 billion users. *See* Deepa Seetharaman, *Facebook Revenue Jumps Again, Buoyed by Mobile Advertising*, WALL ST. J. (Feb. 1, 2017, 7:27 PM), https://www.wsj.com/articles/facebook-revenue-jumps-again-1485983393.

23 Bauerlein, *supra* note 15, at x; Katherine Mangu-Ward, *Wikipedia and Beyond: Jimmy Wales' Sprawling Vision*, REASON (June 2007), http://reason.com/archives/2007/05/30/wikipedia-and-beyond; Dan Fletcher, *A Brief History of Wikipedia*, TIME (Aug. 18,

availability of internet access has allowed content on digital platforms to flourish.

A. The Changing Face of the News "Media"

It is no overstatement that the dramatic growth of digital platforms and digital content has rocked traditional news organizations—especially print organizations—to their core.[24] This digital transformation has challenged "everything from basic economic models to the very definition of journalist and audience."[25] The barrier between a news organization and an individual has never been lower.[26] Traditional media organizations have faced unprecedented financial pressure from their digital counterparts, which can operate in a highly decentralized manner and generally at lower cost.[27]

Even before digital media stole enormous market share for news coverage, dramatic consolidation of traditional media outlets had already begun. In 1995, 129 newspaper owners owned eighty percent of American newspapers.[28] As the twentieth century came to a conclusion, publicly traded companies absorbed many newspapers, which ultimately subjected the papers to greater scrutiny for accounting cuts in hard times in spite of their many journalistic accomplishments.[29] In 2007, after the family who owned the *Wall Street Journal* sold the paper, few major newspaper organizations were majority owned by anyone family, with the *Washington Post*

2009), http://content.time.com/time/business/article/0,8599,1917002,00.html; James Titcomb, *Wikipedia's 5 Million Articles Still Cover Less than 5 Per Cent of All Human Knowledge*, TELEGRAPH (Nov. 2, 2015, 10:02 AM), http://www.telegraph.co.uk/technology/wikipedia/11969459/Wikipedias-5-million-articles-still-cover-less-than-5-per-cent-of-all-human-knowledge.html.

[24] *See* EDGAR SIMPSON, NEWS, PUBLIC AFFAIRS, AND THE PUBLIC SPHERE IN A DIGITAL NATION: RISE OF THE AUDIENCE 8–10 (2016) (reprt. ed. 2016).

[25] *Id.* at 9.

[26] *See id.* at 8–10.

[27] Natalie Fenton, *Drowning or Waving? New Media, Journalism and Democracy*, *in* NEW MEDIA, *supra* note 19, at 3, 8–9; *infra* text accompanying notes 33–39 and 97–101.

[28] Kristian D. Whitten, *The Economics of Actual Malice: A Proposal for Legislative Changes to the Rule of* New York Times v. Sullivan, 32 CUMB. L. REV. 519, 553 (2001).

[29] PHILIP MEYER, THE VANISHING NEWSPAPER: SAVING JOURNALISM IN THE INFORMATION AGE 168–75, 182–85 (2d ed. 2009) ("A newspaper might win Pulitzer prizes, have an appealing design, and serve as watchdog and guardian of its community, but all accountants look at is the nominal value of the money it makes.").

and *The New York Times* remaining as holdouts.[30] That consolidation trend continues to the present day with even larger news organizations, like Gannett which publishes *USA Today*, aggressively acquiring other newspapers to maintain market strength.[31] Many newspapers have felt the pressure to merge for survival or else face closure.[32]

For a historical perspective, newspaper circulation in the United States reached its peak in 1989 and then began to drop from that peak approximately three to four percentage points per year during the 1990s.[33] In the first decade of the twenty-first century, newspapers further lost twenty-five percent of their subscribers and thirty percent of their editorial capacity.[34] In 2006, daily newspaper readership dropped below fifty percent for the first time.[35] In 2007, weekday circulation of daily newspapers in the United States fell to 50.7 million, the lowest point since 1945.[36] In that same year, Sunday papers—which serve an important role for advertisers placing ad inserts in paper circulation—dropped to levels not seen since 1972.[37] Daily circulation fell from 62.3 million in 1990 to 43.4 million in 2010, representing a roughly thirty percent decline.[38] Hundreds of

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30 Rodney Benson, *Futures of the News: International Considerations and Further Reflections*, *in* NEW MEDIA, *supra* note 19, at 196.

31 *See* Mathew Ingram, *Gannett Tries to Ride the Newspaper Consolidation Wave with Tribune Bid*, FORTUNE (Apr. 25, 2016), http://fortune.com/2016/04/25/gannett-tribune/.

32 Michael Barthel, *Newspaper: Fact Sheet*, *in* PEW RESEARCH CTR., THE STATE OF THE NEWS MEDIA 2016 9, 18–19 (2016), http://assets.pewresearch.org/wpcontent/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf (discussing recent consolidation in 2015–16 timeframe).

33 SIMPSON, *supra* note 24, at 9. Newspaper readership was consistently high before 1989, for instance with eighty percent of adults reading the newspaper on a typical weekday in 1961. *See* MEYER, *supra* note 29, at 121.

34 BILL KOVARIK, REVOLUTIONS IN COMMUNICATION: MEDIA HISTORY FROM GUTENBERG TO THE DIGITAL AGE 101 (2011); *see also* PEW RESEARCH CTR., THE STATE OF THE NEWS MEDIA 2010 (2010), http://assets.pewresearch.org.s3.amazonaws.com/files/journalism/State-of-the-News-Media-Report-2010-FINAL.pdf/ (last visited Sept. 14, 2017) [hereinafter STATE OF THE NEWS MEDIA 2010].

35 MEYER, *supra* note 29, at 2. Advertisers heavily rely upon this metric in making ad placement decisions. *See id.*

36 *Id.* at 1.

37 *Id.*

38 Rick Edmonds et al., *Newspapers: Building Digital Revenues Proves Painfully Slow*, *in* PEW RESEARCH CTR., THE STATE OF THE NEWS MEDIA 2012 11 (2012), http://assets.pewresearch.org/wp-content/uploads/sites/13/2017/05/24141622/State-of-the-News-Media-Report-2012-FINAL.pdf (last visited Feb. 12, 2017).

newspapers have filed for bankruptcy in recent decades while tens of thousands of newspaper employees have lost their jobs.[39]

The Great Recession, which hit its peak in 2008 and 2009, did nothing to help the ailing newspaper industry.[40] The challenges of a severe economic recession presented an unwelcome surprise to newspapers already fending off digital competition.[41] Many are rightfully concerned that accountants are now calling the shots for newspapers, forcing cost-cutting measures that may accelerate the pace at which newspapers become obsolete.[42] The very journalism institutions that pride themselves on quality are asking their staff to produce significantly more news in the face of major cost reductions.[43]

Many have recognized that "[t]he loss of newspapers . . . translates to a disproportionately high loss of journalism."[44] Newspaper journalists have long served as one of the most important watchdogs of our governmental institutions and private-sector businesses.[45] With their financial and talent resources, newspapers have broken countless stories that have changed the path of an entire country. The *Washington Post*, for example, exposed the Watergate scandal.[46] For more recent examples, journalists covering the Trump administration were crucial in breaking the story on (1) former National Security

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39 *See* Barthel, *supra* note 32, at 9, 18–19; Stephanie Chen, *Newspapers Fold as Readers Defect and Economy Sours*, CNN (Mar. 6, 2009), http://www.cnn.com/2009/US/03/19/newspaper.decline.layoff/index.html?_s=PM:US. The *USA Today*, for instance, laid off ten percent of its staff around the time of the Great Recession. *See* MEYER, *supra* note 29, at 2.

40 *See* MEYER, *supra* note 29, at 1–2.

41 *See id.* at 188.

42 *See id.* at 2–3, 10–11 ("As this is written, the accountants appear to be guiding the transformation without much thought about the end product. If they continue to slash and burn their existing businesses, all they will end up with are slashed, burned, obsolete businesses.").

43 Freedman, *supra* note 19, at 41.

44 MILLER CTR. OF PUB. AFFAIRS, UNIV. OF VA., OLD MEDIA, NEW MEDIA AND THE CHALLENGE TO DEMOCRATIC GOVERNANCE 26 (2010), http://web1.millercenter.org/publications/mediagovt.pdf; *accord* KOVARIK, *supra* note 34, at 75–76, 101; MEYER, *supra* note 29, at 10.

45 *See* Rasmus Kleis Nielsen, *Introduction: The Uncertain Future of Local Journalism*, *in* LOCAL JOURNALISM: THE DECLINE OF NEWSPAPERS AND THE RISE OF DIGITAL MEDIA 9–10 (Rasmus Kleis Nielsen ed., 2015); MILLER CTR. OF PUB. AFFAIRS, UNIV. OF VA., *supra* note 44, at 39–40.

46 KOVARIK, *supra* note 34, at 95.

Advisor Michael Flynn's potentially improper contacts with Russia,[47] and (2) former FBI Director James Comey's memoranda documenting President's Trump's conduct that some argue amounts to obstruction of justice in connection with the Flynn investigation.[48] However, investigative journalism has suffered because of increasing pressure on journalists to never leave the newsroom, given the easy availability of information online about the very news events on which they are reporting.[49]

While television is still the most popular source where adults in the United States primarily obtain their news,[50] it is hard to ignore that the Internet will soon become the most prominent source of news in the United States and eventually the rest of the world.[51] In 2008, more U.S. adults obtained their news from the web than from newspapers.[52] The Pew Research Center conducted a survey in 2016 in which U.S. adults expressed that they received news "often" from any of the following sources: (1) fifty-seven percent−Television, (2) thirty-eight percent−Online, (3) twenty-five percent−Radio, and (4) twenty percent−Print Newspapers.[53] Fortunately for traditional media organizations, just over a third of digital news consumers surveyed in 2016 actually preferred the Internet as their primary platform for news.[54] However, it is a stark reality for newspapers that they are losing their relevance to most Americans.[55]

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47 Philip Bump, *The Fall of Michael Flynn: A Timeline*, WASH. POST (updated May 17, 2017), https://www.washingtonpost.com/news/politics/wp/2017/02/14/the-fall-of-michael-flynn-a-timeline/?utm_term=.dedbd0560b31.

48 *See* Michael S. Schmidt, *Trump Appealed to Comey to Halt Inquiry Into Aide*, N.Y. TIMES, May 17, 2017, at A1.

49 Fenton, *supra* note 27, at 3, 7–8 ("An intensification of pressure in the newsroom to produce articles in less time is claimed to have led to fewer journalists gathering information outside of the newsroom.").

50 AMY MITCHELL ET AL., THE MODERN NEWS CONSUMER 5 (2016), http://www.journalism.org/2016/07/07/the-modern-news-consumer/.

51 *See* Phillips, *supra* note 1, at 188.

52 News Release, Pew Research Ctr., Internet Overtakes Newspapers as News Outlet 1–2 (Dec. 23, 2008), http://people-press.org/report/479/internet-overtakes-newspapers-as-news-outlet.

53 MITCHELL ET AL., *supra* note 50, at 5.

54 *See id.*

55 Chen, *supra* note 39 (describing the grim situation for newspapers and explaining that "newspapers are losing their relevance in the lives of a majority of Americans, particularly younger readers").

Notably, in 1996, only twelve percent of adults in the United States obtained news online.[56] In 2016, that percentage rose to eighty-one percent.[57] Additionally, seventy-two percent of U.S. adults in 2016 received news on a mobile device.[58] Social media platforms like Facebook and Instagram have also become a powerful news source, with sixty-two percent of adults obtaining news through social media and a staggering eighty-four percent of adults between eighteen and twenty-nine years old doing so.[59] These trends among younger news consumers should particularly concern traditional media institutions.

Some have partially attributed the challenges print media have faced to their own complacency.[60] In spite of the dramatic transformations digital platforms foretold, which many print publishers could see coming, print publishers as a whole did relatively little to adapt to these changes until it was too late.[61] The desire to avoid cutting into existing profits contributed to this lack of action.[62] In fairness to newspapers, many of them have made significant investments in developing their online presence.[63] However, some scholars have observed that newspapers, in an uninspired way, "sought to invent the [w]eb in their own image by repurposing the copy, values, and temperament found in their ink-and-paper editions."[64]

Implementing pay walls for content exemplifies the struggle many print media organizations face. The vast amount of free content online has created incredible hurdles to convincing consumers to pay for content simply because it comes from a traditional print media

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56 *See* Amy Mitchell, *Key Findings on the Traits and Habits of the Modern News Consumer*, PEW RESEARCH CENTER (July 7, 2016), http://www.pewresearch.org/fact-tank/2016/07/07/modern-news-consumer/.

57 *Id.*

58 *Id.*

59 *Id.*

60 KOVARIK, *supra* note 34, at 70.

61 *See id.* at 103 ("The best that can be said of the publishing industry's response to the digital revolution is that some organizations made a very modest attempt to meet the challenge. Although many saw it coming, only a few did anything to retool and adapt the industry, since that would mean cutting into profits.").

62 *See id.*

63 Jack Shafer, *Newspaper Death Foretold by Warren Buffett!!!*, SLATE (Apr. 27, 2009, 7:06 PM), http://www.slate.com/id/2217014/.

64 Jack Shafer, *How Newspapers Tried to Invent the Web but Failed*, SLATE (Jan. 6, 2009, 12:13 AM), http://www.slate.com/articles/news_and_politics/press_box/2009/01/how_newspapers_tried_to_invent_the_web.html.

institution.[65] Many online users show a heavy reluctance to paying for news content.[66] However, various newspapers have successfully implemented pay walls, which will help them survive as the shift to digital platforms continues.[67] One consistent trend for newspapers is to provide a metered plan where readers can view a limited number of free articles before paying anything.[68] This intermediate technique helps a site keep traffic from searches, links to the articles, and social media references.[69] Data from summer 2015 indicate that local newspapers have been more aggressive in launching some form of pay wall while larger circulation newspapers have done so less frequently.[70]

There is a good argument that digital platforms simply present a unique threat that no prior competitors to newspapers could mount. From the 1920s forward, radio certainly presented a challenge to newspapers—including for advertising revenue—but never actually stopped the growth of newspaper circulation.[71] Print media had a near monopoly on news until it faced meaningful challenge from television, radio, and ultimately digital platforms.[72] Even in the face of strong non-digital competitors like radio and television, newspapers had high profit margins in the 25%–40% range compared to the average retail business in the twentieth century that survived on

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65 *See* Freedman, *supra* note 19, at 44 ("The central economic fact about online news is that users have shown a marked reluctance to pay for news content, partly because of a residual belief that all generalist online content should be free."); STATE OF THE NEWS MEDIA 2010, *supra* note 34.

66 *See* Freedman, *supra* note 19, at 44; STATE OF THE NEWS MEDIA 2010, *supra* note 34.

67 Edmonds et al., *supra* note 38.

68 *See id.*; Alex T. Williams, *How Digital Subscriptions Work at Newspapers Today*, AM. PRESSINST. (Feb. 29, 2016, 5:00 AM), https://www.americanpressinstitute.org/publications/reports/digital-subscriptions-today/. These metered plans are also referred to as "freemium" plans. *Id.*

69 *See* Edmonds et al., *supra* note 38.

70 Williams, *supra* note 68 ("Anecdotally, it has been noted that local newspapers may be best positioned to require digital subscriptions. Our data supports this, as 86% of newspapers with circulations between 50,000 to 100,000 have launched digital subscriptions, the highest percentage. . . . At the other end of the spectrum, newspapers with a circulation size over 250,000 are least likely to use a subscription model, with 64% doing so.").

71 *See* KOVARIK, *supra* note 34, at 222, 231–32.

72 *See id.*; MEYER, *supra* note 29, at 13; Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, THE NEW YORKER (Mar. 30, 2008), https://www.newyorker.com/magazine/2008/03/31/out-of-print.

single-digit profit margins.[73] Even in 2007, those margins were still close to twenty-five percent for newspapers.[74] While means of instantaneous communication such as telegraphs and telephones presented significant challenges to print media, those technological developments in many ways bolstered profit margins.[75] A sophisticated news organization could harness those resources to generate content unlike an individual.[76] Compared to television and radio, print media in particular has shown its age because it is "tethered to 20th-century industrial processes such as massive printing presses, tons of paper, and fleets of delivery trucks."[77]

While broadcast news on television has not suffered as extensively as print media,[78] television news programming has faced many of its own challenges from digital platforms. Television news, just like newspapers, has competed with digital platforms for an audience share which has led to declining profits.[79] While local and cable television long monopolized the living room, viewers are increasingly shifting their video consumption to streaming services available through digital platforms such as YouTube, Netflix, and Amazon Video.[80] At the very least, for news organizations willing to make the investment in digital resources, it is certainly possible to translate digital news content to the web, although this process is disruptive to a traditional television advertising model.[81]

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73 MEYER, *supra* note 29, at 39 ("Supermarkets can prosper with a margin of 1 to 2 percent because their buyers consume the products continually and have to keep coming back. Sellers of diamonds or yachts or luxury sedans build much higher margins into their prices to compensate for less frequent sales. Across the whole range of retail products, the average profit margin is in the neighborhood of 6 to 7 percent.").

74 *See id.*

75 *See* SIMPSON, *supra* note 24, at 8–10.

76 *See id.*

77 Dan Kennedy, *Print Is Dying, Digital Is No Savior: The Long, Ugly Decline Of The Newspaper Business Continues Apace*, WGBH NEWS (Jan. 26, 2016), http://news.wgbh.org/2016/01/26/local-news/print-dying-digital-no-savior-long-ugly-decline-newspaper-business-continues; *accord* Freedman, *supra* note 19, at 36.

78 *See, e.g.*, MITCHELL ET AL., *supra* note 50, at 4–5.

79 KOVARIK, *supra* note 34, at 262; Daniel Schiffman, *How TV Can Succeed in the Digital Age*, FORBES (Jan. 19, 2016, 3:24 PM), http://www.forbes.com/sites/onmarketing/2016/01/19/how-tv-can-succeed-in-the-digital-age/#56f369d2aed8.

80 *See Pew Study: More Viewers Choose YouTube for Breaking News*, PBS NEWSHOUR (July 16, 2012, 12:00 AM), http://www.pbs.org/newshour/bb/media-july-dec12-pewyoutube_07-16/; Schiffman, *supra* note 79.

81 *See* Christopher Williams, *How Young Viewers Are Abandoning Television*, TELEGRAPH (Oct. 8, 2014, 12:54 PM), http://www.telegraph.co.uk/finance/newsbysector

One of the most interesting phenomena arising from the transition to digital platforms is the pace at which news can spread. Now, a relatively small story can gain national attention in the span of a few hours.[82] While twenty-four-hour news channels broke down the wall of instantaneous coverage of developing issues, the Internet permits people to follow developments on countless stories on a minute-by-minute basis.[83] Furthermore, viewers can actively participate in that story by commenting on it, reposting it, or modifying it.[84] With free programs that often require little more than a basic familiarity with technology, a viewer can do anything from republish a story to another's social media page to create their own musical parody of a popular video.[85] The ease of entry to these platforms, compared to something costly and cumbersome like a printing press, has decentralized the publication process to an astonishing degree.[86]

B. The Consequences for Local Media Organizations

What is sometimes lost in the shuffle when discussing the transition to digital news platforms is the effect on local news organizations. Importantly, local journalism still accounts for the majority of the content that the journalistic profession generates.[87] Local news organizations play a key role in the frontline for news for consumers, including alerting them to notable business activities in their local economy and educating them about local consumer issues.[88] Historically, local newspapers once thrived within their

/mediatechnologyandtelecoms/media/11146439/How-young-viewers-are-abandoning-television.html.

[82] Bauerlein, *supra* note 15, at vii–viii ("By comparison, today's communication travels at light speed, and any edgy, comic, or otherwise quirky story or video can 'go viral.'").

[83] *See* SIMPSON, *supra* note 24, at 1–2; David Folkenflik, *The Power of the 24-Hour News Cycle*, NPR (May 29, 2005, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=4671485.

[84] Bauerlein, *supra* note 15, at viii.

[85] *See id.* at viii–ix.

[86] *See id.* at ix.

[87] *See* Nielsen, *supra* note 45, at 2.

[88] *See* Justin Brown, *Digital Must-Carry & the Case for Public Television*, 15 CORNELL J.L. & PUB. POL'Y 73, 84 (2005); Andrew D. Cotlar, *The Road not yet Traveled: Why the FCC Should Issue Digital Must-Carry Rules for Public Television "First,"* 57 FED. COMM. L.J. 49, 54–55 (2004); Roscoe B. Starek, III, Former Comm'r, Fed. Trade Comm'n, The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement, Address at the 1997 Korea Consumer Festival (Dec. 2, 1997), https://www.ftc.gov/public-statements/1997/12/consumer-protection-pyramid-education-self-regulation-law-enforcement (discussing role of local news organizations in disseminating information on fraudulent scholarship practices).

circulation areas, facing limited competition from regional and national media.[89] Newspapers first began reaching mass audiences around the 1820s.[90] While the challenge of competition from television broadcasters that began in the 1950s presented a serious threat to newspapers, the Internet has threatened their very survival.[91] By the 1970s, consolidation pressures left many markets with only one newspaper.[92]

Newspaper operations of all sizes have struggled to make their online platforms profitable because online growth has simply not replaced the financial damage from the drop in print circulation.[93] In 2010, print losses for advertising compared to digital gains for advertising were an unhealthy seven to one ratio, while that same ratio widened to ten to one in 2011.[94] While those dramatic drops have leveled out to some degree, it is telling that in 2014, the Newspaper Association of America simply stopped releasing industry-wide revenue data.[95]

Managing this transition is painful for news organizations but can be less damaging if they continue to find creative ways to engage their audience online, which will help attract more advertising revenue.[96] The rules of the advertising game have changed with the dominating presence of internet searches in generating advertising revenue and the increasing growth of social media advertising.[97] Social media advertising in the United States in 2015 grew fifty-five percent from $7 billion the year before to $10.9 billion.[98] Mobile platforms now drive digital ad growth which climbed to $20.7 billion

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89 *See* Nielsen, *supra* note 45, at 6.

90 SIMPSON, *supra* note 24, at 2.

91 *See* KOVARIK, *supra* note 34, at 75, 236.

92 *See id.* at 75.

93 Nielsen, *supra* note 45, at 3.

94 *See* Edmonds et al., *supra* note 38. Specifically, online advertising was up $207 million industry-wide compared to 2010 while print advertising was down $2.1 billion. *Id.*

95 Barthel, *supra* note 32, at 13–14.

96 *See* Freedman, *supra* note 19, at 43 ("The internet therefore provides news organizations with a wonderful opportunity to engage new audiences in the hope that they may somehow compensate for declining ratings and advertising.").

97 *See id.* at 45; Dan Frommer, *Google has Run Away with the Web Search Market and Almost No One is Chasing*, QUARTZ (July 25, 2014), https://qz.com/239332/google-has-run-away-with-the-web-search-market-and-almost-no-one-is-chasing/.

98 George Slefo, *Digital Ad Spending Surges to Record High as Mobile and Social Grow More than 50%*, ADAGE (Apr. 21, 2016), http://adage.com/article/digital/iab-digital-advertising-generated-60-billion-2016/303650/.

in 2015, a sixty-six percent increase from the previous year.[99] Projections for 2016 even indicate that digital advertising will surpass television advertising in revenue.[100] In particular, in the United States digital ad spending will likely reach $72.09 billion with 36.8% of total media ad spending, while TV spending will likely grow to $71.29 billion with 36.4% of total media ad spending.[101] However, these shifts do create some opportunities for local organizations to grab some of that market share.[102]

With the ease of access to comparable resources online, local and regional newspapers now struggle to maintain historically important revenue bases such as classified ads where online competitors are already dominating that market.[103] In the first decade of the twenty-first century, newspapers lost approximately half of their advertising revenue, which has dramatic implications for those institutions.[104] The fickle support of advertisers has caused many news organizations to experiment with new options such as greater reliance on citizen donations and foundation grants.[105] The logic for such changes is that reliance on other sponsors could be no worse than relying on disloyal advertisers.[106] Nonprofit models present significant potential for news organizations that do not want to make further sacrifices to owners and advertisers.[107]

Many staple newspapers with a larger footprint have taken creative steps to adapt. Overreliance on advertising as a source of revenue—eighty-two percent of newspaper revenue in 2000—tied newspapers' fate to the whims of those advertisers.[108] Newspapers have fortunately begun harvesting the benefits of replacement revenue sources such as online classifieds.[109] Traditional media organizations have also, through acquisitions or strategic partnerships, leveraged distribution of branded content through multiple platforms, both print

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99 *See id.*

100 *US Digital Ad Spending to Surpass TV this Year*, EMARKETER, https://www.emarketer.com/Article/US-Digital-Ad-Spending-Surpass-TV-this-Year/1014469 (last visited Sept 15, 2017).

101 *See id.*

102 *See id.*

103 Nielsen, *supra* note 45, at 6, 104.

104 *See* KOVARIK, *supra* note 34.

105 MEYER, *supra* note 29, at 208–10.

106 *See id.*

107 *See* Freedman, *supra* note 19, at 196–99.

108 MEYER, *supra* note 29, at 40–41, 122.

109 *See* Freedman, *supra* note 19, at 42.

and digital.[110] Some new- and old-media organizations have also partnered with their advertisers to produce "native advertising" by using the organization's resources to prepare content that appears like an article but is, in many ways, an advertisement.[111] Many other organizations have relied on their non-journalism skills for replacement revenue. For instance, the *Dallas Morning News* increased its commercial printing and commercial distribution for third parties, which made up ten percent of the paper's revenue in 2011.[112]

Radio news organizations, in comparison, have encountered less trouble adapting to challenges from digital platforms.[113] Notably, talk radio programming on AM and FM stations actually grew from approximately 400 such stations in 1990 to 3000 in the year 2010.[114] Radio news organizations have also more seamlessly incorporated satellite radio and digital platforms into their existing business models.[115] Radio has the benefit of not requiring cable infrastructure like cable television channels, which helped it maintain an adaptable market position.[116] However, in the long run, local radio news faces significant economic headwinds.[117]

The power of a community working together through crowdsourcing or other digital platforms also opens many doors for local media.[118] As the Federal Communications Commission (FCC) recognized in 2011, "independent non-profit websites are providing exciting journalistic innovation on the local level" because of the

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110 *See id.* at 42–44.

111 Lili Levi, *A "Faustian Pact"? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 655–60 (2015). Understandably, this blurring of lines between advertising and editorial content presents risks of misleading customers and additional liability potential for the involved media organization. *See id.* at 662–77.

112 News & Tech Staff, *One on One – Jim Moroney, A.H. Belo Corp.*, NEWS & TECH (June 30, 2011, 7:59 PM), http://www.newsandtech.com/news/article_09154504-a386-11e0-af5e-001cc4c03286.html (interview by Chuck Moozakis); Edmonds et al., *supra* note 38.

113 *See* KOVARIK, *supra* note 34, at 232–35.

114 *See id.* at 232.

115 *See id.* at 232–35.

116 *See id.* at 235.

117 *See, e.g.*, Suzanne Perry, *NPR's New CEO Takes Over as Radio Adjusts to the Digital Age*, CHRON. PHILANTHROPY (May 9, 2014), https://www.philanthropy.com/article/NPR-s-New-CEO-Takes-Over-as/153141.

118 *See* Nielsen, *supra* note 45, at 7.

unique possibilities that nationwide internet access provides.[119] Likewise, media firms that embrace the low-entry costs and low-operating costs that digital content provides stand in a position to gain significant national and local market share.[120] Indeed, creative media and non-media firms who take advantage of these changes to cost structure pose the biggest risk to newspapers in the twenty-first century.[121] For example, Google, Yahoo, and similar content providers generate enormous revenue at an incredibly low cost by simply aggregating content that others create.[122]

However, as the FCC observed, the void left after the displacement of local media often finds no digital substitute of any kind for that area.[123] Commercial radio and cable channels do little to assist the problem because they play a small role in reporting local news.[124] Public television offers limited local programming while public radio stations—which do perform local reporting—have limited resources, particularly in smaller markets.[125] As the FCC noted in discussing local newsbroadcasts, "too few are investing in more reporting on critical local issues and some have cut back staff."[126] While consumers commenting on and sharing news can help a story flourish, this process does not work for a local story that never exists in the first place.[127]

II
UNDERSTANDING DEFAMATION AND ITS COMMON LAW PARAMETERS

A. Defamation Elements and Common Law Vestiges

Courts have long recognized a person's reputation as an interest justifying legal protection.[128] A key protection for this reputational

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119 STEVEN WALDMAN, THE INFORMATION NEEDS OF COMMUNITIES 191 (2011), https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

120 *See* Nielsen, *supra* note 45, at 7.

121 *See* MEYER, *supra* note 29, at 210, 212.

122 *See* Freedman, *supra* note 19, at 46.

123 *See* SIMPSON, *supra* note 24, at 2, 9–10; WALDMAN, *supra* note 119, at 5.

124 *See* WALDMAN, *supra* note 119, at 5.

125 *See id.* Many have, however, cited *National Public Radio* as a model for the principle that nonprofit journalism can work. *See* MEYER, *supra* note 29, at 208.

126 WALDMAN, *supra* note 119, at 5–6.

127 SIMPSON, *supra* note 24, at 3.

128 Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1345 (2011).

interest is a claim for defamation, which protects a person's reputation against false and derogatory communications.[129] As opposed to an economic tort or a tort involving a person's physical security, defamation is sometimes referred to as a dignitary tort.[130] Other dignitary torts include (1) invasion of privacy; (2) the various claims, such as malicious abuse of process, that fall under the category of misuse of the judicial process; and (3) intentional interference with important familial relationships.[131] While there was a historical distinction between slander and libel, based on whether the speech was oral or in writing respectively, the two are effectively the same cause of action in modern times.[132]

While consisting essentially of only the first three elements in its original common law formulation, a defamation claim, in the majority of states, involves proof of all or nearly all of the following elements: (1) publication of a defamatory statement, (2) concerning the plaintiff,[133] (3) to a third person, (4) in a negligent or other faulty manner, (5) involving a false statement, and (6) damages.[134] The common law standard for defamation liability was effectively strict liability because a plaintiff did not have to prove any fault as an element of the claim.[135] It is still an open question from a constitutional standpoint whether a plaintiff must prove some fault—

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129 *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 111, 116 (5th ed. 1984).

130 *See* DAN B. DOBBS ET AL., THE LAW OF TORTS, §§ 512–14 (2d ed. 2011 & Supp. 2016).

131 *Id.* § 514, at 161.

132 *See* KEETON ET AL., *supra* note 129, §§ 111, 112.

133 Notably, criticism directed generally at a large group of people such as lawyers or car dealers is not actionable. *See id.* § 111.

134 *See* DOBBS ET AL., *supra* note 130, § 519, at 173–74. A comparable tort that is highly similar to defamation but that courts treat as distinct is a claim for injurious falsehood which has the following elements that a plaintiff must prove: (1) publication of a provably false communication, (2) of and concerning the plaintiff or the plaintiff's pecuniary interests, (3) with knowledge of the statement's falsity or recklessness as to its falsity, (4) when pecuniary harm to the defendant was intended or foreseeable, and (5) resulting pecuniary harm. *See id.* § 656, at 619–20. The same protections to defamation claims, including constitutional limits, carry over to such claims. *See id.* § 656, at 620.

135 *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755–60 (1984); DOBBS ET AL., *supra* note 130, § 557 ("That would mean that in the private person case where the issue is not of public concern, the states would also be free to presume falsehood as well as damages, and possibly even to presume that the defendant was at fault; courts could go back to the old common law of prima facie strict liability in this class of cases.").

such as negligence as to the truth or falsity of a statement—in all defamation cases, even when no public persons or issues of public concern are involved.[136] Except when the First Amendment requires actual proof of falsity,[137] various courts treat the truth of the statement as an affirmative defense for common law defamation.[138] Nevertheless, many state courts have now adopted falsity as an element of a defamation claim apart from any constitutional obligation to do so.[139]

Importantly, opinions are often not actionable because they do not contain a statement of fact, a rule that exists at common law and, in some instances, has a constitutional dimension.[140] Notably, the Supreme Court rejected the principle that opinions should receive absolute protection under the First Amendment because opinions may imply assertion of an objective fact.[141] However, when the speech involves a public figure or a matter of public concern, the opinion statement must be provably false in order to be actionable.[142] This First Amendment rule has essentially constitutionalized the common law privilege of fair comment, which protects the right of every person to fairly express opinions on matters of public interest and general concern.[143] The constitutional protection is greater than what is available at common law because the constitutional protection is absolute even if the defendant acted with actual malice because the

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136 *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986); Dombey v. Phx. Newspapers, Inc., 724 P.2d 562, 567 (Ariz. 1986); DOBBS ET AL., *supra* note 130, §§ 557–58. While it may be the case that a dispute involving a media defendant will generally involve a matter of public concern, there is a danger in simply assuming that it will—a distinction that some courts do not carefully articulate by automatically requiring a heightened standard of proof against media defendants. *See* Fawcett v. Rogers, 492 S.W.3d 18, 25 (Tex. App. 2016) (defining elements differently for "suit by a private person against a non-media defendant").

137 *See infra* Part III.

138 *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278 (1964) ("The state rule of law is not saved by its allowance of the defense of truth."); KEETON ET AL., *supra* note 129, §§ 113, 116. Notably, substantial truth is sufficient versus absolute truth. *See, e.g.*, Kevin L. Kite, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U. L. REV. 529, 535 (1998).

139 *See* DOBBS ET AL., *supra* note 130, § 519.

140 *See* RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977).

141 *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–19 (1990).

142 *See id.* at 19–20.

143 *See id.* at 13–14; RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (AM. LAW INST. 1977); Lisa K. West, Note, Milkovich v. Lorain Journal Co.*—Demise of the Opinion Privilege in Defamation*, 36 VILL. L. REV. 647, 655–59 (1991).

opinion simply cannot be proven false.[144] A few state courts have also applied the common law privilege of fair comment to statements of fact made in connection with statements of opinion—in other words, requiring proof of actual malice—although the Restatement formulation does not go that far.[145]

As it relates to the underlying proof of common law defamation, establishing liability based on an opinion also presents substantive problems. Under the Restatement's approach, an opinion can be defamatory only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.[146] Many states follow this approach.[147] Unfortunately, an extended discussion of the process for determining when an opinion can give rise to liability is a complex subject that is beyond the scope of this Article.[148] For purposes of this Article, it is helpful to understand that several recurring situations relating to statements about a business's products or services often qualify as opinions. Examples include the following: (1) a consumer's online review of a business or its product, such as a one-star rating;[149] (2) the review of an organization—such as a media organization—about a business or its product;[150] (3) a conclusion in a review or

144 *See* Lewis v. Rapp, 725 S.E.2d 597, 602 (N.C. Ct. App. 2012) ("Therefore, we must determine whether defendant's statement was merely an opinion on a matter of public concern. If it was, then defendant is not liable for defamation and the inquiry ends."); Neumann v. Liles, 369 P.3d 1117, 1122 (Or. 2016).

145 *See* Cassidy v. Merin, 582 A.2d 1039, 1045 (N.J. Super. Ct. App. Div. 1990) (requiring proof of actual malice under fair comment privilege for statements of fact); RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (AM. LAW INST. 1977). Many courts have in fact rejected that the fair comment privilege applies to statements of fact, *see* Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 75–76 (W. Va. 1981), and the Restatement drafters have done away with separate fair comment privileges on the basis that a statement of opinion otherwise covered by a fair comment privilege is no longer actionable at all. *See* RESTATEMENT (SECOND) OF TORTS §§ 606–10 (AM. LAW INST. 1977) (explaining that these sections regarding fair comment are omitted because opinions that do not imply a defamatory statement are no longer actionable).

146 RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977).

147 *See* DOBBS ET AL., *supra* note 130, § 571.

148 *See, e.g.*, Bentley v. Bunton, 94 S.W.3d 561, 579–81 (Tex. 2002) (discussing various approaches courts have used to determine whether something is an opinion). Many scholars provide helpful guidance on this issue. *See* Richard H.W. Maloy, *The Odyssey of a Supreme Court Decision about the Sanctity of Opinions Under the First Amendment*, 19 TOURO L. REV. 119, 173–76 (2002); DOBBS ET AL., *supra* note 130, §§ 68–70.

149 *See* Kimzey v. Yelp! Inc., 836 F.3d 1263, 1269–70 (9th Cir. 2016); Bedford v. Spassoff, 485 S.W.3d 641, 651–52 (Tex. App. 2016).

150 *See* Gardner v. Martino, 563 F.3d 981, 992 (9th Cir. 2009); Moldea v. N.Y. Times Co., 22 F.3d 310, 313–14 (D.C. Cir. 1994) (discussing in context of book review).

otherwise that a given service or product is not a good value;[151] and (4) a rating issued by a BBB organization reflecting the BBB's assessment of the business's customer interactions.[152] However, individual cases, in the context of determining whether a statement is a non-actionable opinion, can be difficult to predict. For instance, a statement that a product "didn't work" as part of a review could qualify as asserting implied facts.[153]

The various sources of content on the web—such as user blogs, social media sites, and crowdsourced review sites which did not have a comparable analog before the Internet—provide a whole new battleground for defamation litigation.[154] Because of dramatic differences between digital publication and other traditional forms of publication, common law defamation principles sometimes show their age in a digital world.[155] For instance, under traditional defamation rules, every repetition of a defamatory statement—including repetition of another's statement—qualifies as a publication.[156] Publication is a term of art which includes any communication, by any method, to a third person who is not the plaintiff.[157] By republishing the statement, a person is subject to the same liability as if the person had published the statement originally.[158] Until the Communications Decency Act significantly changed the liability scheme for republication online, courts would determine whether the defendant was a publisher, distributor, or common carrier, each of which have their own liability standards.[159] Under common law principles, publishers—like newspapers, book publishers, or their online counterparts—have the opportunity to exercise extensive

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151 *See* NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr., LLC, 870 P.2d 6, 13–14 (Colo. 1994) (en banc).

152 *See infra* text accompanying notes 353–354.

153 *See* Unelko Corp. v. Rooney, 912 F.2d 1049, 1052–55 (9th Cir. 1990).

154 *See* Amy Kristin Sanders & Holly Miller, *Revitalizing* Rosenbloom*: The Matter of Public Concern Standard in the Age of the Internet*, 12 FIRST AMEND. L. REV. 529, 530–31 (2014).

155 *See infra* Part V (discussing various problems identified with defamation liability in particular publication scenarios in the context of the Communications Decency Act).

156 Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997) ("In fact, every repetition of a defamatory statement is considered a publication." (citing KEETON ET AL., *supra* note 129, § 113, at 799)).

157 RESTATEMENT (SECOND) OF TORTS § 577, cmt. a (AM. LAW INST. 1977).

158 Cianci v. New Times Publ'g Co., 639 F.2d 54, 60–61 (2d Cir. 1980) (citing RESTATEMENT (SECOND) OF TORTS § 578 (AM. LAW INST. 1977)).

159 Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1104 (9th Cir. 2009) (quoting KEETON ET AL., *supra* note 129, § 113).

control over the final content they issue, which subjects them to a strict liability standard.[160] Distributors—including booksellers, newsvendors, libraries, or any digital equivalent—only distribute content and thus would be liable at common law if they acted knowingly or negligently.[161] Common carriers—like a telephone company or internet service provider—transmit information automatically with no chance to review its content, which exempted them from defamation liability.[162]

Changes to common law rules are fully appropriate, given that the Internet has completely transformed the ability of information to travel and recirculate almost instantaneously.[163] Compared to a world where it is difficult to gain access to a print, television, or radio platform, digital platforms dramatically expand a person's ability to become part of the chain of publishing a statement.[164] Everyone under the common law who takes part in a publication faces liability for the act of publishing that statement, even if that person is unaware of the contents.[165] This classification system for publishers, distributors, and common carriers is difficult to apply to persons hosting content online and yields conflicting results.[166]

In general, common law damage remedies for defamation include: (1) compensatory damages, which may be either general or special, (e.g., economic harm); and (2) punitive or exemplary damages.[167] General damages include the injury to the plaintiff's reputation and the emotional distress suffered as a result of the injury.[168] At common law, it is not necessary to prove actual harm to a person's reputation

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160 *See id.* at 1104; Paul Ehrlich, Note, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 403 (2002).

161 *See* Ehrlich, *supra* note 160.

162 Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 95–96 (1992).

163 *See* Bauerlein, *supra* note 15, at vii–ix.

164 *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997); Bauerlein, *supra* note 15, at vii–ix.

165 *See Zeran*, 129 F.3d at 332.

166 Ehrlich, *supra* note 160.

167 Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 532 n.22 (10th Cir. 1987) (quoting KEETON ET AL., *supra* note 129, § 116A) (citing RESTATEMENT (SECOND) OF TORTS §§ 621–623 (AM. LAW INST. 1977)).

168 RESTATEMENT (SECOND) OF TORTS § 621, cmt. a (AM. LAW INST. 1977); Bauerlein, *supra* note 15, at vii–ix.

to establish the underlying defamation claim.[169] The presumption of harm that arises for the plaintiff in many situations embodies this principle.[170] A prevailing plaintiff can recover nominal damages if he or she cannot otherwise prove entitlement to compensatory damages.[171] Notably, there are some significant differences between the damages that a prevailing plaintiff can recover for defamation depending on whether that plaintiff is an individual or a business.[172] In particular, courts have held that a corporation is not capable of mental suffering, although it can pursue damages for injury to its reputation.[173]

B. Defamation Privileges Recognized Under the Common Law

Our legal system recognizes privileges in many areas of tort law where there is a significant societal interest in protecting desirable conduct. Essentially, a privilege is a societal determination that conduct within the scope of the privilege is per se reasonable.[174] A privilege is much stronger than a factual defense to liability. For instance, a privilege of self-defense actually defeats liability for battery while an argument that the battery was not intentional simply operates as a factual challenge to the plaintiff's proof as to that element.[175] The defendant generally bears the burden of establishing that a privilege applies as an affirmative defense.[176] Importantly, determination of whether a privilege applies is a question of law, while determination of whether the defendant abused the privilege is generally a fact question for the jury.[177]

There are several areas related to speech involving government proceedings where there is essentially an "absolute privilege to defame," including judicial proceedings, legislative proceedings, and

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169 David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1048 (2006).

170 *See id.*

171 *Sunward Corp.*, 811 F.2d at 532 n.22.

172 Arlen W. Langvardt, *A Principled Approach to Compensatory Damages in Corporate Defamation Cases*, 27 AM. BUS. L.J. 491, 518 (1990) ("Just as corporations and natural persons are different from each other, so are their respective reputational interests.").

173 *See* Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1139 n.10 (7th Cir. 1987); KEETON ET AL., *supra* note 129, § 111.

174 *See* DOBBS ET AL., *supra* note 130, § 24.

175 *See id.*

176 *See* KEETON ET AL., *supra* note 129, § 114.

177 *See* RESTATEMENT (SECOND) OF TORTS § 619 (AM. LAW INST. 1977).

executive communications.[178] Other absolute privileges under the common law include (1) publications consented to, (2) publications between spouses, and (3) publications required by law.[179] Absolute privilege is recognized in certain situations because of the importance society places on totally free expression in these situations.[180] The Communications Decency Act, discussed in more detail later in this Article, effectively operates as an absolute privilege.[181]

There are also certain qualified privileges that a defendant may invoke in a broader range of situations than an absolute privilege.[182] One qualified privilege addressed in more detail later in this Article is the privilege unique to BBB entities and comparable entities.[183] There are several basic qualified privileges, including: (1) the public interest privilege which allows a person to publish materials to public officials on matters within their public responsibility, (2) the privilege to publish to someone who shares a common interest, (3) the privilege to publish to protect one's own interest or the interest of others, (4) the fair comment privilege discussed above,[184] and (5) the privilege to make a fair and accurate report of public proceedings.[185] Generally, a defendant can lose these qualified privileges if the publication goes outside the scope of the privilege or through proof of improper motive.[186] Defeating a privilege generally requires proof of actual malice, although a few states require only proof of negligence.[187]

As it relates to liability for entities commenting on a business's products or services, the most important of these privileges arise when the speaker makes the statement for the protection of his own

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178 O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame*, 26 AM. BUS. L.J. 305, 311 (1998); *see also* KEETON ET AL., *supra* note 129, § 114.

179 DOBBS ET AL., *supra* note 130, § 538.

180 Reed & Henkel, *supra* note 178, at 311.

181 *See infra* Part V; *see also* DOBBS ET AL., *supra* note 130, §§ 543–44.

182 *See* DOBBS ET AL., *supra* note 130, § 544; KEETON ET AL., *supra* note 129, § 115.

183 *See infra* Part IV(B).

184 *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 13–14 (1990); Lewis v. Rapp, 725 S.E.2d 597, 602 (N.C. Ct. 2012); Neumann v. Liles, 369 P.3d 1117, 1122 (Or. 2016); RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (AM. LAW INST. 1977); West, *supra* note 143.

185 DOBBS ET AL., *supra* note 130, § 544.

186 *See* KEETON ET AL., *supra* note 129, § 115.

187 *See* RESTATEMENT (SECOND) OF TORTS § 594 cmt. b (AM. LAW INST. 1977); *see also infra* text accompanying notes 344–346 (discussing these issues in more detail).

interest or the interest of another.[188] The basic parameters for these privileges appear in sections 594 and 595 of the Restatement (Second) of Torts. Any defendant can assert either privilege, although the courts treat the privileges narrowly.[189]

Under Section 594, the privilege applies in the context of a publication appropriate to effectuate the privilege when: (1) there is information that affects a sufficiently important interest of the publisher, and (2) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.[190] The privilege is not reliable because it involves frequently unpredictable weighing of the publisher's interests against the harm to others from the publication.[191] This privilege most frequently applies when a person is defending his or her own reputation against another's defamation, safeguarding a financial interest, or protecting his or her interest in their own personal safety.[192]

The privilege outlined in Section 595 applies when: (1) the information communicated impacts a sufficiently important interest of the recipient or a third person, and (2) either (a) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter, or (b) is a person to whom the statement's publication would otherwise fall within the generally accepted standards of decent conduct.[193] The "generally accepted standard of decent conduct" limitation is significant because the Restatement encourages application of that basis for protection when either (1) the publication is made in response to a request rather than when volunteered by the publisher, or (2) when a family or other preexisting relationship exists between the parties.[194] Most frequently, a court will recognize that

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188 The common interest privilege can be important but is relatively narrow and applies only to those with very close associations—for instance those associated with one another through the same business organization, joint property owners, and organizations with a shared interest. *See* RESTATEMENT (SECOND) OF TORTS § 596 (AM. LAW INST. 1977); DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE § 2:24 (2008 & Supp. 2016); KEETON ET AL., *supra* note 129, § 115.

189 *See* RESTATEMENT (SECOND) OF TORTS §§ 594–95 (AM. LAW INST. 1977).

190 *See id.* § 594.

191 *See id.* § 594 cmt. e.

192 *See id.* § 595; ELDER, *supra* note 188, § 2:23; KEETON ET AL., *supra* note 129, § 115.

193 RESTATEMENT (SECOND) OF TORTS § 595 (AM. LAW INST. 1977); ELDER, *supra* note 188, § 2:25.

194 *See* RESTATEMENT (SECOND) OF TORTS § 595 (AM. LAW INST. 1977).

the privilege applies when the publisher has a legal or fiduciary obligation to the person to whom he is making the statement.[195]

Abuse of a qualified privilege defeats that privilege. As mentioned above, the defendant bears the burden of establishing that a privilege applies, while the plaintiff normally bears the burden of proving it was abused.[196] Under the Restatement approach, abuse of the privilege occurs when (1) the publisher acts with knowledge or reckless disregard as to the falsity of the defamatory matter, (2) the defamatory matter is published for some purpose other than that for which the particular privilege is given, (3) the publication occurs to some person the speaker could not reasonably believe is necessary for the accomplishment of the privilege's purpose, or (4) the publication includes defamatory matter the speaker could not reasonably believe is necessary to accomplish the purpose for which the occasion is privileged.[197] To use a classic example, a person accusing another of theft to protect the speaker's interests could not necessarily rely on the privilege if, when the statement was made, third persons were present who were not necessary to effectuate the privilege.[198]

III
FIRST AMENDMENT PRINCIPLES GOVERNING COMMENTS ON BUSINESS PRODUCTS AND SERVICES

To fully appreciate the protections available to entities who comment on the products and services of a business, it is necessary to understand the First Amendment protections that those entities can invoke. It is better to think of these protections not as a privilege that the defendant bears the burden of proving, but rather as a true modification of the common law elements or procedures for a defamation claim.[199] Importantly, many entities who comment on a business's products and services have no other special protections

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195 *See* ELDER, *supra* note 188, § 2:25.

196 *See* KEETON ET AL., *supra* note 129, § 115.

197 *See* Moore v. Cobb-Nettleton, 889 A.2d 1262, 1271 (Pa. Super. Ct. 2005) (outlining same bases for abuse of privilege); RESTATEMENT (SECOND) OF TORTS § 599 cmt. a (AM. LAW INST. 1977).

198 *See* KEETON ET AL., *supra* note 129, § 115.

199 *See* DOBBS ET AL., *supra* note 130, § 555 ("Because the burden under the *Times-Sullivan* rule is upon the plaintiff, it is not even helpful to think of the Constitutional rule as a 'privilege.' A privilege is sustained only if the defendant carries the burden of proof and persuasion.").

from liability than those the First Amendment provides. For instance, unlike a BBB entity which has a special privilege essentially unique to it,[200] product review organizations, such as the nonprofit Consumers Union (more commonly referred to by the publication name *Consumer Reports*), generally can invoke only First Amendment protections.[201]

The Supreme Court has enforced the various constitutional restrictions required by the First Amendment on other claims challenging speech, such as a claim for intentional infliction of emotional distress[202] and a claim for publication placing the plaintiff in a false light.[203] Essentially, any tort claim based on a factual scenario similar to a defamation claim can implicate these protections.[204] Likewise, a plaintiff cannot normally circumvent these First Amendment restrictions by asserting a negligence claim.[205] A defendant may not invoke these First Amendment protections for general causes of action that do not single out speech, such as breach of contract and promissory estoppel claims.[206] As addressed previously in this Article, one class of First Amendment protection for speech includes certain protections for opinions involving a matter of public concern akin to the common law privilege of fair comment.[207]

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200 *See infra* Part IV(B).

201 Consumers Union arose primarily "because existing commercial and government institutions had failed to provide consumers with adequate information about competing products." Sarah Deutsch, Note, *Fair Use in Copyright Law and the Nonprofit Organization: A Proposal for Reform*, 34 AM. U.L. REV. 1327, 1354 (1985). This organization provides information such as reviews of various consumer products. *See, e.g.*, Emerito Estrada Rivera-Isuzu de P.R., Inc. v. Consumers Union, Inc., 233 F.3d 24, 25–26 (1st Cir. 2000). Fortunately, for entities like Consumers Union, those providing opinions about a business's products or services can invoke the opinion doctrine as an effective defense to defamation claims. *See supra* text accompanying notes 140–153.

202 *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 47–48 (1988).

203 Time, Inc. v. Hill, 385 U.S. 374, 376, 384–91 (1967).

204 DOBBS ET AL., *supra* note 130, §§ 516, 656 ("Although occasionally a plaintiff will claim emotional distress or some other tort based on defamation-type facts, the defamation rules will ordinarily control.").

205 *Id.* § 516 ("Under traditional rules, then, the plaintiff cannot ordinarily avoid the defamation rules by pleading simple negligence. Instead, she must prove the elements of defamation, and she is subject to its limits.").

206 Cohen v. Cowles Media Co., 501 U.S. 663, 670–71 (1991).

207 *See supra* text accompanying notes 140–153.

A. Regulation of Commercial Speech

One of the overarching themes in First Amendment jurisprudence is the neutral treatment of speech.[208] Without a high judicial tolerance for protecting controversial views, the government could more easily distinguish between speech it does not like and speech it prefers.[209] However, commercial speech is generally entitled to a lower degree of protection than noncommercial speech. Outside the context of speech, courts generally review state and local government's attempts to regulate economic activity under a rational basis standard.[210]

The commercial nature of speech does not exempt that speech from First Amendment protection.[211] Governmental entities have a large degree of discretion in regulating misleading commercial speech or commercial speech related to unlawful activities.[212] On the other hand, that power "is more circumscribed" when the commercial speech falls outside of those categories.[213] Specifically, the Supreme Court has applied intermediate scrutiny to restrictions of general commercial speech.[214] In applying this intermediate scrutiny, the First Amendment mandates a three-part test: (1) the government must assert a substantial interest in support of its regulation; (2) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation must be narrowly drawn.[215] In general, these more relaxed First Amendment protections give governments a good deal of flexibility in regulating misleading business advertising.[216] This flexibility allows for significant state and federal regulation of deceptive business practices—including advertising.[217] Many of these

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208 *See* Jendi Reiter, *Serial Killer Trading Cards and First Amendment Values: A Defense of Content-Based Regulation of Violent Expression*, 62 ALA. L. REV. 183, 183 (1998).

209 *See id.*

210 Carol E. Garver, Lowe v. SEC: *The First Amendment Status of Investment Advice Newsletters*, 35 AM. U.L. REV. 1253, 1262 (1986).

211 *See* Fla. Bar v. Went for It, Inc., 515 U.S. 618, 623–24 (1995); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

212 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980).

213 *See id.* at 564.

214 *Went for It*, 515 U.S. at 623–24.

215 *Id.* at 624.

216 *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563–66.

217 *See infra* Part IV(A).

restrictions provide private rights of action which litigants and, in some instances, consumer-oriented organizations like a BBB entity can enforce.[218]

The Supreme Court acknowledged that the line between commercial and noncommercial speech "will not always be easy to draw."[219] As the Court explained, "[n]ormally the purpose or motive of the speaker is not central to First Amendment protection."[220] However, the purpose "does bear on" the protected aspects of the speech in some instances such as determining whether a person is "engaged in associational activity for the advancement of beliefs and ideas" or whether the "purpose" of the speech at issue "was the advancement of his own commercial interests."[221] Many commentators have criticized the amorphous nature of these standards.[222] However, for purposes of this Article, it is not necessary to dig into these distinctions. As outlined in more detail below, more critical constitutional distinctions that come up in suits against entities that comment on business products and services involve whether (1) the plaintiff is a public or private figure, or (2) the speech relates to a matter of public concern.[223]

B. Private Versus Public Figures in Defamation Disputes

Certain limitations apply to defamation and related claims that public officials or public figures pursue. In particular, the Supreme Court has concluded that it is necessary for a public official to prove, in addition to any common law requirements, that (1) the statement was false; and (2) was made with actual malice, specifically in a knowing or reckless manner.[224] As discussed in more detail below, there are both general-purpose and limited-purpose public figures under this analysis. A plaintiff must show with convincing clarity—a standard equivalent to clear and convincing evidence—that the

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218 *See id.*

219 *In re* Primus, 436 U.S. 412, 438 n.32 (1978).

220 *Id.*

221 *Id.*

222 *See* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 83–87 (1999) (gathering commentary of various scholars who have criticized the imprecise lines governing commercial speech).

223 *See infra* Parts IV(B)–(C).

224 Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775–76 (1986); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154–55 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964).

statement was made with actual malice.[225] Most courts that have addressed the issue have held that proof of falsity must also meet the standard of clear and convincing evidence, although there is no definitive decision from the Supreme Court on this issue.[226] These heightened standards reflect a tolerance for erroneous statements as a necessary risk in a robust public debate.[227] Courts must independently review on appeal that the plaintiff met these requirements to ensure that a judgment against the defendant does not constitute a forbidden intrusion on the field of free expression.[228]

The policy basis for this distinction between public and private figures involves several practical considerations. First, a public figure has significantly greater access to channels of communication—such as media platforms—which provides a public figure with a more realistic opportunity to counteract false statements than a private figure who does not have such access.[229] Likewise, public officials necessarily run the risk of closer public scrutiny given that "the public's interest extends to anything which might touch on an official's fitness for office."[230] For private persons who are general-purpose public figures as it relates to any suit they bring, the Court has found that they are in a similar position to a public official because those who attain this status have assumed roles of special prominence in society's affairs.[231] Those general-purpose public figures have also, in many instances, voluntarily exposed themselves to increased risk of defamation.[232] The Supreme Court recognized that even if these policy rationales do not apply in every instance the media must be able to assume public officials and figures have taken these considerations into account.[233]

A key factor to determine whether a person is a limited-purpose public figure is the nature and extent of an individual's participation

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225 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 255 (1986).

226 DiBella v. Hopkins, 403 F.3d 102, 113–15 (2d Cir. 2005) (discussing authorities); *contra* Bressler v. Fortune Magazine, 971 F.2d 1226, 1242 (6th Cir. 1992).

227 *Sullivan*, 376 U.S. at 270–72.

228 Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 508 (1984).

229 Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

230 *Id.* at 344–45.

231 *Id.* at 345.

232 *Id.*

233 *Id.*

in the particular controversy giving rise to the defamation.[234] A dispositive factor is often whether the person thrust himself or herself into the vortex of a public issue or engaged the public's attention in an attempt to influence its outcome.[235] To further refine this analysis, lower courts have adopted more specific tests to apply the Supreme Court's standards.[236] A representative test adopted by the Fifth Circuit and D.C. Circuit is whether (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.[237] As this Article focuses on the liability of entities commenting on business products and services, a detailed discussion of these standards for private persons is beyond the scope of this Article.

While the U.S. Supreme Court has not squarely addressed the issue, lower courts have recognized that corporations and other entities may qualify as a general-purpose or limited-purpose public figure.[238] Most courts have resisted automatic treatment of even publically traded companies as general-purpose public figures with a preference towards assessing whether the company is a limited-purpose public figure under the circumstances of the case.[239] However, a limited number of courts have expressed skepticism that

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234 *Id.* at 352.

235 *Id.*

236 *See* WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571–72 (Tex. 1998) (discussing tests adopted by the Second Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Eleventh Circuit, and D.C. Circuit); *see also* 4 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 36:39 (2d ed. 2010 & Supp. 2016) (discussing approaches various courts across the country take including for more specific situations such as criminals and doctors).

237 Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 433 (5th Cir. 1987); Tavoulareas v. Piro, 817 F.2d 762, 772–73 (D.C. Cir. 1987). Many interesting problems can arise in trying to assess the effect of digital platforms unique to the Internet, such as what significance should a person's appearance in a popular blog post have on determining whether that individual has become a public figure. *See* Sanders & Miller, *supra* note 154, at 531.

238 *See* Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 589–90 (1st Cir. 1980); *see also* DOBBS ET AL., *supra* note 130, § 561.

239 *See, e.g.*, *Bruno & Stillman*, 633 F.2d at 589–90; Lynn B. Oberlander, *Corporate Plaintiffs: Public or Private Figures?*, 16 COMM. L. 1 (1998).

they should ever treat a business as a private person.[240] The policy rationale for not automatically classifying businesses as public figures includes the following: (1) a legal entity does not automatically have a greater advantage than an individual in accessing channels of communication to dispute statements about that entity;[241] (2) some entities are far more likely to become notorious or household names than others depending on their national or regional prominence;[242] and (3) many entities do not receive the same type of media scrutiny as others.[243] These policy concerns are consistent with the fact that many for-profit and nonprofit enterprises operating as an entity have limited operations and thus are comparable to a private person. For example, in 2012 the U.S. Census Bureau reported that enterprises with less than twenty employees employed 17.6% of the country while enterprises with twenty to ninety-nine employees employed 16.7% of the country.[244]

Courts that have questioned whether a business could ever qualify as a private person, focused instead on the inapplicability of the Supreme Court's policy rationales for protection of private persons. Specifically, those policies target uniquely human interests that corporations do not possess.[245] For example, some courts emphasize that large corporations sacrifice significant privacy by taking specific action to be in the public eye.[246] Recent First Amendment case law, in particular *Citizens United v. Federal Election Commission,* which emphasizes that corporate entities should not receive less favorable treatment under the First Amendment, indicates that the Court would not in an automatic matter treat all legal entities as public figures.[247]

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240 *See, e.g.*, Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 486–87 (Minn. 1985).

241 *Bruno & Stillman*, 633 F.2d at 589–90 ("To the extent that access to the channels of communication is a meaningful factor, we suspect that many, if not most, corporations have no particular advantage over private individuals." (footnote omitted)).

242 *See* Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1329–30 (5th Cir. 1993).

243 *See id.*

244 ANTHONY CARUSO, STATISTICS OF U.S. BUSINESSES EMPLOYMENT AND PAYROLL SUMMARY: 2012 1 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf.

245 *Jadwin*, 367 N.W.2d at 486.

246 *See* Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 273 (7th Cir. 1983).

247 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 355 (2010).

Unfortunately, there is no uniform test for determining whether an entity is a limited-purpose public figure,[248] which makes case outcomes unpredictable.[249] A comprehensive discussion of these issues is worthy of its own article and is thus beyond the scope of this one.[250] It is more predictable that an entity which actively injects itself in the public discussion of an issue, such as an advocacy organization, will qualify as a limited-purpose public figure as it relates to that advocacy issue.[251] Beyond that, cases can be much less predictable. Some courts have, for instance, held that—at least as it relates to consumer reporting on their goods and services—businesses such as restaurants that engage in commerce with the general public are limited-purpose public figures as it relates to those commercial activities.[252] Other courts encountering very similar circumstances for businesses engaging in commerce with the general public have reached the opposite conclusion, finding such businesses to be private figures.[253]

This area would greatly benefit from Supreme Court intervention to better clarify the appropriate standards. It is far simpler to compare one individual to another in terms of their public/private statuses because it is easier to measure their spheres of involvement in a given issue.[254] Legal entities, by comparison, can vary in size from an entity run by one person to a Fortune 500 company with international

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248 *See* Oberlander, *supra* note 239, at 1–5. For a variety of illustrations of this principle, see also Annotation, *Who Is "Public Figure" for Purposes of Defamation Action*, 19 A.L.R.5TH 1, §§ 138–80 (1994 & Supp. 2016).

249 *See* Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1329 (5th Cir. 1993) (acknowledging the general difficulty of determining public or private status and the greater difficulty for corporations).

250 For a good discussion of the existing standards, see generally Oberlander, *supra* note 239.

251 *See* World Wide Ass'n of Specialty Programs v. Pure, Inc., 450 F.3d 1132, 1136–37 (10th Cir. 2006).

252 *See* Journal-Gazette Co. v. Bandido's, Inc., 712 N.E.2d 446, 454 (Ind. 1999); *see also* Pegasus v. Reno Newspapers, Inc., 57 P.3d 82, 91–92 (Nev. 2002) (gathering various authorities).

253 *See, e.g.*, Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 74 (W. Va. 1981).

254 *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974); Tavoulareas v. Piro, 817 F.2d 762, 772–73 (D.C. Cir. 1987); Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 433 (5th Cir. 1987); WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571–72 (Tex. 1998) (discussing tests adopted by the Second Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Eleventh Circuit, and D.C. Circuit); 4 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 36:39 (2d ed. 2010 & Supp. 2016) (discussing approaches various courts across the country take including for more specific situations such as criminals and doctors); Sanders & Miller, *supra* note 154, at 531.

scope.[255] The lack of consistent standards makes it unpredictable to determine whether a court will treat an entity as a private figure, a limited-purpose private figure, or a general public figure.[256]

C. Speech on Matters of Public Concern

As it relates to entities who comment on the products and services of businesses, a key protection comes into play when the speech involves matters of public concern. Specifically, in those situations, the plaintiff's claim is limited in the following ways: he or she (1) must prove that the statement was false, (2) must prove that the defendant was negligent or otherwise at fault in failing to determine or state the truth, (3) must prove actual harm, and (4) cannot recover anything except actual damages absent proof of actual malice.[257] These limitations apply because limiting speech on public issues creates a threat to the free and robust debate of those issues.[258] In turn, the threat of liability creates a risk of self-censorship for those attempting to engage in that debate.[259]

These constitutional protections modify the common law rule that the defendant bears the burden of proving, as an affirmative defense, the truth of the statement.[260] Speech deals with a matter of public concern when it (1) can be fairly considered as relating to any matter of political, social, or other concern to the community; or (2) is a subject of legitimate news interest—that is, a subject of general interest and of value and concern to the public.[261] Importantly, determination of whether an issue is a matter of public concern is a

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[255] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010) (explaining that "96% of the 3 million businesses that belong to the U.S. Chamber of Commerce have fewer than 100 employees").

[256] *See, e.g.*, Jenna Morton, Note, *Online Business Reviews and the Public Figure Doctrine: An Advertising-Based Standard*, 34 HASTINGS COMM. & ENT. L.J. 403, 416–20 (2012) (discussing policy considerations that arise in drawing these lines and disparate standards applied by courts).

[257] *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777–78 (1986); *Gertz*, 418 U.S. at 347–49; DOBBS ET AL., *supra* note 130, § 556.

[258] Snyder v. Phelps, 562 U.S. 443, 452 (2011).

[259] *Id.*

[260] *Phila. Newspapers Inc.*, 475 U.S. at 776.

[261] *Snyder*, 562 U.S. at 453. "The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.* (internal quotation marks omitted).

legal question for the Court.[262] There is a good deal of authority recognizing the general proposition that a business's products and services sold to the public do relate to a matter of public concern—including customer complaints or statements that someone should not do business with a company.[263] As the Second Circuit has explained: "Indeed, the common law recognizes that publications commenting on 'persons who present[] themselves or their services or goods to the public' are matters of public concern."[264] The same principle is true for speech involving deceptive business practices such as a business unethically soliciting clients.[265]

While not expressly decided in the context of a defamation case, the Supreme Court, in its 2011 decision in *Snyder v. Phelps*, largely confirmed that non-media defendants can invoke the First Amendment's protections when the speech at issue relates to a matter of public concern.[266] Specifically, in *Snyder*, the Supreme Court held that a church could raise a First Amendment defense to an intentional infliction of emotional distress claim because its picketing activities implicated a matter of public concern.[267] Some courts have previously excluded non-media defendants from invoking these First Amendment protections.[268] Importantly, in cases involving First

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262 *See* Rankin v. McPherson, 483 U.S. 378, 384–86 (1987); D'Angelo v. Sch. Bd. of Polk Cty., Fla., 497 F.3d 1203, 1209 (11th Cir. 2007). At least as a general matter, the flexible test for whether something is a matter of public concern creates many challenges in determining whether a court will conclude that something is of public concern. *See generally* Clay Calvert, *Defining "Public Concern" After* Snyder v. Phelps: *A Pliable Standard Mingles with News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39 (2012).

263 *See* Unelko Corp. v. Rooney, 912 F.2d 1049, 1056 (9th Cir. 1990) (statements about product effectiveness aired on *60 Minutes* were a matter of public concern); Sisler v. Gannett Co., 516 A.2d 1083, 1092 (N.J. 1986) (expressing that "commercial activities or products implicat[e] a matter of legitimate public concern"); Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa., 872 A.2d 1202, 1211 (Pa. Super. Ct. 2005) (expressing that "statements at issue related to consumer complaints and, therefore, touched upon a matter of public concern"), *aff'd*, 923 A.2d 389 (Pa. 2007).

264 Flamm v. Am. Ass'n of Univ. Women, 201 F.3d 144, 149–50 (2d Cir. 2000) (quoting 1 ROBERT D. SACK, SACK ON DEFAMATION § 4.4.4 (3d ed. 1999)) (citing KEETON ET AL., *supra* note 129, § 115).

265 *See id.* at 150.

266 *Snyder*, 562 U.S. at 458.

267 *See id.* at 451–52, 458–59.

268 *See, e.g.*, Bierman v. Weier, 826 N.W.2d 436, 446 (Iowa 2013) (rejecting protection for non-media defendant); Denny v. Mertz, 318 N.W.2d 141, 152–53 (Wis. 1982) (same); *see also* Fleming v. Moore, 275 S.E.2d 632, 638 n.11 (Va. 1981) ("Lower courts are divided on whether the First Amendment protections provided media defendants in *New York Times* and *Gertz* are applicable to non-media defendants."); Phillips, *supra* note 1, at 180–84.

Amendment protection against intentional infliction of emotional distress claims for media defendants, the Supreme Court has relied on its First Amendment cases in the defamation arena as the basis for those limitations.[269] In particular, starting with *Hustler Magazine, Inc. v. Falwell*, the Supreme Court relied on its *New York Times v. Sullivan* decision to conclude that a public figure must prove actual malice to recover under an intentional infliction of emotional distress claim.[270] The Supreme Court expressly relied upon both the *Sullivan* decision and the *Hustler Magazine* decision as key cases supporting its conclusions in *Snyder*.[271] The emphasis on media defendants that appears in some prior decisions appears now here in the *Snyder* decision.[272]

Furthermore, while the Supreme Court in *Snyder* does not actually reference a distinction between media and non-media defendants, this issue was central to the case. The Fourth Circuit, whose decision the Supreme Court affirmed in *Snyder*, specifically rejected this distinction.[273] The Fourth Circuit acknowledged that the Supreme Court had not "specifically addressed the question of whether the constitutional protections afforded to statements not provably false should apply with equal force to both media and non-media defendants."[274] Hedging from the Supreme Court on this issue in older cases muddies these waters.[275] Scholarly articles immediately preceding the Court's 2011 *Snyder* decision have also noted that this question was an open one.[276] The Fourth Circuit followed the Second and Eighth Circuits in finding against such a distinction:

> Like those two circuits, we believe that the First Amendment protects non-media speech on matters of public concern that does not contain provably false factual assertions. Any effort to justify a media/non-media distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the "media."

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269 *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

270 *See id.*

271 *See Snyder*, 562 U.S. at 451–52 (quoting from *Sullivan* and *Hustler Magazine*).

272 *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776–77 (1986).

273 *See* Snyder v. Phelps, 580 F.3d 206, 219 n.13 (4th Cir. 2009).

274 *See id.*

275 *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1, 19–20 (1990) (explaining that a "statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved").

276 *See, e.g.*, Phillips, *supra* note 1, at 175–76, 183–84.

> And, more importantly, the Supreme Court has concluded that the "inherent worth of speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual."[277]

Notably, the D.C. Circuit in 1975, the Third Circuit in 1980, and the Tenth Circuit in 1985 also reached the same conclusion as these other circuits in rejecting the media/non-media distinction.[278] Subsequent to the Supreme Court's *Snyder* decision, the Ninth Circuit also joined these other circuits while also recognizing that the Supreme Court has not resolved the issue.[279]

Logically, if the Supreme Court felt any distinction between media and non-media defendants existed, it would not have been possible for the Supreme Court to reach the conclusion it did in *Snyder*.[280] However, some state court cases decided after *Snyder* still distinguish between media and non-media defendants on this issue.[281] Consequently, the Supreme Court must more emphatically clarify whether any distinction exists.

While an argument could be made that the Supreme Court has not yet extended the First Amendment protections from its defamation case law to non-media defendants, its actions in *Snyder* seriously undercut that argument. Furthermore, the Supreme Court previously invoked the *Sullivan* line of cases to invalidate a criminal statute used to convict a district attorney—clearly not a member of the media—who criticized several judges at a press conference.[282] The Supreme Court also recently emphasized that it has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[283]

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277 *Snyder*, 580 F.3d at 219 n.13 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978)).

278 *See* Garcia v. Bd. of Educ. of Socorro Consol. Sch. Dist., 777 F.2d 1403, 1410 (10th Cir. 1985); Avins v. White, 627 F.2d 637, 649 (3d Cir. 1980) (rejecting "dangerous disequilibrium between the first amendment's guarantees of freedom of speech and the press"); Davis v. Schuchat, 510 F.2d 731, 734 (D.C. Cir. 1975).

279 Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284, 1291 (9th Cir. 2014).

280 *See, e.g.*, Clay Calvert, *Public Concern and Outrageous Speech: Testing the Inconstant Boundaries of IIED and the First Amendment Three Years After* Snyder v. Phelps, 17 U. PA. J. CONST. L. 437, 477 (2014) (noting that *Snyder* applies to non-media defendants).

281 *See* Bierman v. Weier, 826 N.W.2d 436, 446–48 (Iowa 2013) (examining the need to reject a distinction in relation to matters of public concern, but continuing to maintaining the distinction).

282 Garrison v. Louisiana, 379 U.S. 64, 64–68 (1964).

283 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352 (2010).

As outlined above in the discussion of the dramatically changing face of the media, such a media and non-media distinction would be impractical in modern times.[284] To maintain such a distinction would put the courts in the position of gauging the merit and quality of the speech based on the purported media credentials of the author.[285] Putting courts in the position of drawing those lines will simply cause more problems than it will solve. The Supreme Court has fortunately demonstrated its willingness to embrace digital platforms and media, such as video games, as simply a new type of platform versus something that requires different legal treatment under the First Amendment.[286]

IV
LIABILITY OF BBB ENTITIES AND COMPARABLE ORGANIZATIONS PERFORMING CONSUMER-PROTECTION FUNCTIONS

A. History of the Better Business Bureau and Related Organizations

In the early 1900s, there was a movement that businesses largely spearheaded for truth-in-advertising regulations and industry best practices on advertising.[287] Industry advertising groups like the Association of Advertising Clubs of America arose to encourage advertisers to promote the benefits of truthful advertising and to discourage deceptive advertising practices.[288] Such organizations that promote industry regulation are now called self-regulatory organizations.[289] These advertising groups began pushing for state regulation of advertising practices, which resulted in almost every state adopting truth-in-advertising regulations by the end of the

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284 *See supra* Part I. Notably, as it relates to social media, some commentators have observed a different problem potentially created by the Supreme Court's broad standards on when an issue is a matter of public concern. *See generally* Douglas Behrens, Article, *Balancing Intentional Infliction of Emotional Distress Claims and First Amendment Protections in* Snyder v. Phelps, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 213, 216, 227–29 (2013). Specifically, there has been criticism that "the public concern test is easily satisfied and rarely would speech fail to meet this standard" which can have unintended consequences with modern social media platforms. *See id.* at 229.

285 *See* Snyder v. Phelps, 580 F.3d 206, 219 n.13; *supra* text accompanying note 277.

286 *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790–92, 799 (2011).

287 Zeynep K. Hansen & Marc T. Law, *The Political Economy of Truth-in-Advertising Regulation During the Progressive Era*, 51 J.L. & ECON. 251, 254 (2008).

288 *See id.*

289 *See, e.g.*, Levi, *supra* note 111, at 663–64.

1920s.[290] The BBB and its related local branches played a large role in this heightened focus on advertising practices, including lobbying for tighter laws on business practices and, in some instances, enforcing these legal standards against businesses.[291] Many of these advertising clubs not associated with the BBB were eventually supplanted by BBB entities.[292] BBB organizations are organized as nonprofit entities headed by the Council of Better Business Bureaus.[293]

At the federal level, these trends in advertising restrictions convinced Congress in 1938 to grant the Federal Trade Commission (FTC) broad authority to pursue cases against businesses engaging in deceptive practices.[294] Previously, at the FTC's creation in 1914, its enforcement authority was focused on unfair methods of competition in the form of anti-competitive practices.[295] These FTC powers are still in place under 15 U.S.C. § 45, which provides the FTC with enforcement authority and declares in § 45(a)(1) that: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[296] This general grant of authority is not

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290 *See* Hansen & Law, *supra* note 287, at 254–55.

291 *See id.*; Timothy Noah, *Is the Better Business Bureau a Protection Racket?*, SLATE (Dec. 7, 2010, 7:38 PM), http://www.slate.com/articles/business/the_customer/2010/12/busted_watchdog.html ("The Better Business Bureau is a national network of local nonprofit groups that evolved during the early years of the 20th century to expose fraud—initially mainly patent medicines and stock swindles—in America's burgeoning advertising industry.").

292 *See* Hansen & Law, *supra* note 287, at 254–55.

293 *See* Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa., 923 A.2d 389, 391 n.1 (Pa. 2007); David G. Mallen, Deputy Director for Legal Affairs, Nat'l Advert. Div. of the Council of Better Bus. Bureaus, C. Lee Peeler, Vice President, The Council of Better Bus. Bureaus, CEO & President, Advert. Self-Regulatory Council, & Linda Sherry, Dir. Nat'l Priorities for Consumer Action, Panel at the Seventh Annual Judicial Symposium on Civil Justice Issues: Centennial of the Council of Better Business Bureaus: The Important Role of Self-Regulatory Organizations (Nov. 12, 2012), 9 J.L. ECON. & POL'Y 443, 443–45 (2013).

294 Act of Mar. 21, 1938, ch. 49, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. §§ 41–58 (2012)).

295 Act of Sept. 26, 1914, ch. 311, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2012)); *see also* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 421–22 (1992) (Stevens, J., dissenting) (discussing how expansion of these FTC powers on unfair and deceptive practices occurred in 1938).

296 15 U.S.C. § 45(a)(1). With this authority under 15 U.S.C. § 45, Congress intended to grant the FTC with broad authority to stop unfair and deceptive business practices. *See* Atl. Ref. Co. v. Fed. Trade Comm'n, 381 U.S. 357, 367 (1965); Slough v. Fed. Trade Comm'n, 396 F.2d 870, 872 (5th Cir. 1968).

enforceable by private litigants.[297] The FTC has the power to enforce various statutes under its jurisdiction administratively, as well as through the court system.[298] The modern form of these state regulations are primarily the deceptive trade practice acts that state legislatures have enacted.[299]

The BBB and its local branches have, from the early twentieth century to the present, played a large role in (1) monitoring local advertising, (2) receiving complaints about businesses from consumers and others, (3) investigating suspicious business practices, (4) cooperating with governmental agencies who regulate business activities, and (5) in some instances, threatening enforcement and enforcing legal restrictions on deceptive business practices against businesses.[300] Besides educating businesses that deceptive practices are simply poor business, BBB entities also played a large role in educating the public about questionable business practices.[301] Given the increasingly large number of businesses throughout the United States, the BBB's role in modern times has shifted more to a service that helps formally and informally mediate and even arbitrate disputes between consumers and businesses.[302]

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297 *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988–89, 1002 (D.C. Cir. 1973). Some have argued that it would significantly increase consumer protection laws to provide a private right of action under this section. *See generally* Stephanie L. Kroeze, Note, *The FTC Won't Let Me Be: The Need for a Private Right of Action Under Section 5 of the FTC Act*, 50 VAL. U. L. REV. 227 (2015).

298 *See* 15 U.S.C. § 57b(a)–(b); Jacob Siegel Co. v. Fed. Trade Comm'n, 327 U.S. 608, 610–12 (1946) (discussing administrative powers of FTC).

299 *See* Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 373–77 (1990).

300 *See* Better Bus. Bureau of Wash., D.C. v. United States, 326 U.S. 279, 281–82 (1945) (discussing chartered functions of D.C. BBB); Antwerp Diamond Exch.v. Better Bus. Bureau of Maricopa Cty, 637 P.2d 733, 736 (Ariz. 1981) (discussing purposes of BBB); Hansen & Law, *supra* note 287, at 254–55; Richard Potomac, Comment, *Are You Sure You Want to Eat That?: U.S. Government and Private Regulation of Domestically Produced and Marketed Dietary Supplements*, 23 LOY. CONSUMER L. REV. 54, 80–82 (2010).

301 *See, e.g.*, *Better Bus. Bureau of Wash. D.C.*, 326 U.S. at 282 (describing chartered function of BBB entity as including "[e]ducation of consumers to be intelligent buyers"); Potomac, *supra* note 300, at 81–82.

302 *See* Blake Ellis & Melanie Hicken, *Slammed by the Government, A-rated by the Better Business Bureau*, CNN MONEY (Sept. 30, 2015, 10:39 AM), http://money.cnn.com /2015/09/30/news/better-business-bureau/index.html?sr=twmoney093015bbbinvestigation 1230pstory ("While many people view the BBB as a consumer watchdog or even a government agency, the BBB itself says this is a misconception. Instead, it views itself as a mediator between frustrated consumers and the companies they do business with,

Another important function that BBB entities serve is to provide ratings on businesses. The current rating system that BBB organizations use measures businesses on a scale of A+ to F.[303] Before 2009, the BBB rating system described a business as either satisfactory or unsatisfactory.[304] The current rating system evaluates, on a weighted scale, several factors, including: (1) a business's complaint history with the BBB;[305] (2) the type of business, as some types of businesses are more prone to questionable practices; (3) the length of time the business has operated; (4) lack of transparent business practices with consumers; (5) failure to honor any commitments to the BBB, such as failure to abide by a BBB mediation settlement or arbitration award; (6) any licensing or government actions known to the BBB;[306] and (7) any advertising issues known to the BBB, such as questions about the business's compliance with standards outlined in the BBB Code of Advertising.[307] The complaint history, in particular, is a large factor in the rating and takes into account actions such as the business making meaningful responses and taking efforts to resolve complaints.[308] The webpage associated with a business provides any consumer with access to much of this information, including the

receiving nearly 1 million complaints each year from consumers . . . ."); *Dispute Resolution Mediation Rules and Guide*, COUNCIL OF BETTER BUS. BUREAUS, http://www.bbb.org/bbb-dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/dispute-resolution-mediation-rules-and-guide/ (last visited Feb. 12, 2017). *See generally* William D. Henderson, *Arbitration Better Business Bureau Style*, 33 LA. B. J. 81 (1985).

303 *See* Mallen et al., *supra* note 293, at 445; *Overview of BBB Rating*, COUNCIL OF BETTER BUS. BUREAUS, https://www.bbb.org/council/overview-of-bbb-grade/ (last visited Feb. 12, 2017) [hereinafter *Overview of BBB Rating*].

304 Noah, *supra* note 291.

305 The complaint history factors in: (a) the size of the business; (b) the total number of complaints; (c) the BBB's assessment of whether the business has appropriately responded to complaints; (d) the BBB's assessment of whether the business resolved the complaints in a timely manner to the customer's satisfaction; (e) the BBB's assessment of whether the business made a good faith effort to resolve complaints even if not to customers' satisfaction; (f) the BBB's assessment of whether the business has failed to resolve the underlying causes of the pattern of complaints; and (g) the age of complaints with newer complaints carrying more negative weight. *See Overview of BBB Rating*, *supra* note 303.

306 The BBB treats it as a negative factor in the rating if the business fails to obtain appropriate licensing. *See id.* Finalized government actions that relate to a business's marketplace activities, which the BBB deems to raise questions about the business's ethics or reliability, have a negative effect on the rating. *See id.* Government actions are treated as major, moderate, or minor, and the older the action the less it negatively affects the rating. *See id.*

307 *See id.*; *see also* Potomac, *supra* note 300, at 82–83 (discussing rating system).

308 *See Overview of BBB Rating*, *supra* note 303.

business's rating, its complaint history, specific complaints about the business, and governmental actions against the business.[309] The consumer can also review the rating methodology from a business's individual webpage to assess the BBB rating.[310]

Similar to the decreasing levels of trust in media organizations, which are essentially at an all time low,[311] BBB chapters have faced criticism over allegedly inaccurate ratings of businesses and complaints that it was necessary to be a BBB member to get the highest rating.[312] Notably, the BBB network took action to remove membership as a criteria in relation to a rating[313] and expelled some BBB member organizations who have not complied with its standards.[314] BBB organizations also make an effort on a business's webpage to explain the rating methodology so that a consumer can better evaluate the available information on the business.[315]

It is also important to remember that self-regulatory agencies on business practices like the BBB, the Association of National Advertisers, and the American Advertising Federation help complement government enforcement against deceptive business practices.[316] Even if they are not perfect, such organizations help hold businesses accountable for improper business practices and promote ethical standards that many businesses adopt voluntarily.[317] Particularly in an era of virtually unlimited commercial activity online, these self-regulatory organizations play a key role in protecting consumers and educating both businesses and

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309 *See, e.g.*, *Walt Disney World Company*, BETTER BUS. BUREAU, https://www.bbb.org/central-florida/business-reviews/amusement-parks-and-places/walt-disney-world-company-in-lake-buena-vista-fl-302238 (last visited Feb. 12, 2017).

310 *See id.*

311 *See* Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx.

312 *See* Ellis & Hicken, *supra* note 302; Noah, *supra* note 291.

313 *See Overview of BBB Rating*, *supra* note 303.

314 Cindy Galli & Brian Ross, *Better Business Bureau Gives Itself an 'F' in Los Angeles*, ABC NEWS (Mar. 12, 2013), http://abcnews.go.com/Blotter/business-bureau-los-angeles/story?id=18706507.

315 *See Walt Disney World Company*, *supra* note 309 and accompanying text.

316 Mallen et al., *supra* note 293, at 443, 445; Lucille M. Ponte, *Mad Men Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics on Decreasing Deceptive Online Consumer Ratings and Reviews*, 12 J. MARSHALL REV. INTELL. PROP. L. 462, 495–97 (2013).

317 Levi, *supra* note 111, at 663–65; Mallen et al., *supra* note 293, at 445–46.

consumers.[318] These organizations can, in many instances, serve as the frontline investigator that helps alert a governmental entity about a given business's questionable activities.[319]

B. Origin and Judicial Recognition of Qualified Privilege for BBB Entities

Many courts across the country have recognized that BBB entities can invoke a qualified privilege to defamation and similar claims when commenting on "questionable business practices" or engaging in related consumer protection functions based on their historic role in doing so.[320] The rationale for this protection is the significant benefits that society and consumers receive from the information BBB organizations provide about businesses.[321] Much like the comparable First Amendment protections, courts have applied the privilege to claims beyond defamation such as interference with contractual or business relations, conspiracy, unfair competition, and malicious prosecution.[322]

However, before exploring this privilege, it is important to address who can actually assert the privilege. While the most recognizable entity that would fall within the scope of this privilege is a BBB entity, this protection is not specifically limited to that effect.[323] The same protection could also apply to a comparable organization.[324] The standard for identifying a comparable entity has previously been articulated as follows: whether the entity "is apparently nonprofit and dedicated to promoting truth in advertising and selling, to maintaining

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318 *See* Ponte, *supra* note 316, at 495–503.

319 *See id.*; Mallen et al., *supra* note 293, at 453–54.

320 *See* Haueter v. Cowles Publ'g Co., 811 P.2d 231, 240 (Wash. Ct. App. 1991); *see* Ohio State Home Servs., Inc. v. Better Bus. Bureau of Akron, Inc., 627 N.E.2d 602, 604 (Ohio Ct. App. 1993).

321 *See* Patio World v. Better Bus. Bureau, Inc., 538 N.E.2d 1098, 1102–03 (Ohio Ct. App. 1989) (recognizing role BBB entity played in providing "[r]eliability reports on businesses and stores in the Miami Valley area upon request so that customers may be served better by ethical providers"); 50 AM. JUR. 2D *Libel and Slander*, § 301 (1995 & Supp. 2016) ("In some states, for public policy reasons, Better Business Bureaus have a qualified privilege against liability for defamation.").

322 *See* Annotation, *Liability of Better Business Bureau or Similar Organization in Tort*, 50 A.L.R.4TH 745, § 2[a] (2011) [hereinafter *Liability of BBB*]; Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc., 354 S.W.3d 234, 244–46 (Mo. Ct. App. 2011) (explaining that privilege defeats claim for interference with a business expectancy).

323 *See Liability of BBB*, *supra* note 322, § 1[a].

324 *See id.* § 1[a], n.2.

an impartial attitude toward firms and individuals, and to building and preserving public confidence in legitimate business."[325]

There are two commonly recognized origins for the qualified privilege on which BBB entities rely. First, simply that the privilege is a highly specific manifestation of the general common law privilege to speak freely in the interest of third parties for the general public good—in this case, to protect consumers.[326] Second, as an offshoot of the privilege applicable to mercantile agencies and credit agencies who have a similar privilege to that of BBB entities.[327] While First Amendment precedent has shaped many aspects of defamation law, including case law related to this privilege, the qualified privilege is normally treated as a distinct protection.[328] The First Amendment may in a given case provide certain protections that the qualified privilege would not and vice versa.[329]

As some courts have recognized, this qualified privilege essentially arises from a specific application of the general privilege to speak freely in the interest of the public good.[330] Less commonly, courts have endorsed the BBB privilege pursuant to the common law privilege that a person has a right to communicate with others to effectuate an interest important to the speaker (i.e., the BBB's interest in bringing attention to questionable business practices).[331] The general parameters of those two privileges in their common law form appear in Sections 594 and 595 of the Restatement discussed

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325 *See id.*

326 *See* Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa., 872 A.2d 1202, 1210 (Pa. Super. Ct. 2005) (recognizing conditional privilege for BBB on bases that "[a] conditional privilege arises when a recognized interest of the public is involved"), *aff'd* 923 A.2d 389 (Pa. 2007); Haueter v. Cowles Publ'g Co., 811 P.2d 231, 240–41 (Wash. Ct. App. 1991).

327 *See infra* text accompanying notes 335–341.

328 *See* Trim-A-Way Figure Contouring, Ltd. v. Nat'l Better Bus. Bureau, Inc., 37 A.D.2d 43, 45 (N.Y. App. Div. 1971). Some courts have in part relied on First Amendment case law as a grounds for recognizing this qualified privilege. *See also* Patio World v. Better Bus. Bureau, Inc., 538 N.E.2d 1098, 1102–03 (Ohio Ct. App. 1989).

329 *See supra* Part III.

330 *See* Audition Div., Ltd. v. Better Bus. Bureau of Metro. Chi., Inc., 458 N.E.2d 115, 120 (Ill. App. Ct. 1983); *Trim-A-Way Figure Countouring, Ltd.*, 37 A.D.2d at 45; *Am. Future Sys., Inc.*, 872 A.2d at 1210, *aff'd* 923 A.2d 389; *Haueter*, 811 P.2d at 240–41.

331 *See* Wilson v. Am. Gen. Fin. Inc., No. 10–412, 2013 WL 967161, at *13–14 (W.D. Pa. Mar. 12, 2013); *Patio World*, 538 N.E.2d at 1102 (relying in part on this principle); Associated Tel. Directory Publishers, Inc. v. Better Bus. Bureau of Austin, Inc., 710 S.W.2d 190, 192–93 (Tex. App. 1986).

previously in this Article.[332] Whatever the origin, a distinct privilege has effectively evolved with rules that courts apply only to the BBB and similar entities.[333] Theoretically, any organization seeking to play a consumer watchdog role could seek protection under these general privileges outlined in the Restatement. However, they would not have the body of favorable case law available to a BBB entity.[334]

The privilege applicable to mercantile agencies (referred to more commonly now as credit agencies) is another source of case law that helped shape the qualified privilege applicable to BBB entities.[335] Historically, mercantile agencies collect information relating to the credit, character, responsibility, general reputation and other matters affecting persons, firms, and corporations engaged in business.[336] The mercantile agency furnishes this information to subscribers in exchange for some consideration so that the subscribers may procure information concerning the trustworthiness of others in business, thereby allowing the subscribers to safely and properly conduct business with strangers or distant customers.[337] A good example of such an agency is the company Dun & Bradstreet, which has existed since 1841 and still provides services of this nature.[338] This mercantile-agency privilege stems from the more general qualified privilege where the publisher and recipient have a common interest—here, as it relates to bad credit risks and delinquent debtors.[339] The rationale for recognizing a privilege in this context has been that these

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332 *See supra* text accompanying notes 188–195.

333 *See* Ohio State Home Servs. Inc. v. Better Bus. Bureau of Akron, Inc., 627 N.E.2d 602, 604 (Ohio Ct. App. 1993). *See generally Liability of BBB*, *supra* note 322.

334 ELDER, *supra* note 188, § 2:25; *Liability of BBB*, *supra* note 322, § 1[a] and accompanying text.

335 *See* Antwerp Diamond Exch. v. Better Bus. Bureau of Maricopa Cty., Inc., 637 P.2d 733, 738–39 (Ariz. 1981); *Patio World*, 538 N.E.2d at 1102–04; Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa., 923 A.2d 389, 397–98 (Pa. 2007) ("Finally, any privilege that the Bureau retained in this case was clearly analogous to a credit reporting agency's 'conditional privilege to publish defamatory matter' . . . ."); *Liability of BBB*, *supra* note 322, § 2[a].

336 Retail Credit Co. v. Garraway, 126 So.2d 271, 273 (Miss. 1961) (citing 36 AM. JUR. *Mercantile Agencies*, § 2 (1936)). The same basic definition applies to a credit agency at least thinking historically of a credit agency versus a modern credit reporting agency which operates nationally and largely online. *See* 15A AM. JUR. 2D *Collection and Credit Agencies* § 35 (1976 & Supp. 2016); Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 366 (2006) (discussing modern credit reporting agencies Equifax, Trans Union, and Experian).

337 *See Retail Credit, Co.*, 126 So.2d at 238.

338 *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751 (1985).

339 DOBBS ET AL., *supra* note 130, § 544; KEETON ET AL., *supra* note 129, § 115.

mercantile agencies perform a useful business service for the benefit of those who have a legitimate interest in obtaining the information and who are requesting it from the association.[340] Importantly, a BBB entity providing information on a business's activities with consumers is far more likely to involve a matter of public concern under the First Amendment than a credit report for that same business issued by a mercantile agency.[341]

As previously mentioned, a BBB entity has a qualified privilege it can invoke against a defamation or similar claim related to the BBB's consumer protection functions. Generally speaking, a BBB entity under the qualified privilege will not be liable for false factual statements made in connection with its consumer protection functions—such as statements made in connection with rating a business—unless those statements were made with actual malice akin to the Supreme Court's First Amendment case law.[342] This distinction as to the privilege extending to statements of fact is critical because there are many separate protections for opinions.[343] To defeat the privilege, the plaintiff must prove that the statement was both false and made with actual malice.[344] A limited number of cases have applied a standard of negligence versus actual malice in this context.[345] Logically, as the Restatement has recognized, if proof of negligence is required either by the state or for a constitutional reason, it would make no sense to also apply a negligence standard to the privilege, as the privilege would essentially have no meaning.[346]

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340 *See* KEETON ET AL., *supra* note 129, § 115.

341 *See Dun & Bradstreet, Inc.*, 472 U.S. at 761–62; *supra* text accompanying notes 260–265 and accompanying text.

342 *See, e.g.*, Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc., 354 S.W.3d 234, 242–43 (Mo. Ct. App. 2011); Patio World v. Better Bus. Bureau,, Inc., 538 N.E.2d 1098, 1103 (Ohio Ct. App. 1989) (relying on Supreme Court's actual malice standard); Associated Tel. Directory Publishers, Inc. v. Better Bus. Bureau of Austin, Inc., 710 S.W.2d 190, 192 (Tex. App. 1986); 50 AM. JUR. 2D *Libel and Slander* § 316 (1995 & Supp. 2016).

343 *See Castle Rock*, 354 S.W.3d at 244 (explaining this distinction and absolute privilege for opinions in some instances); *supra* text accompanying notes 140–153.

344 *See Patio World*, 538 N.E.2d at 1102.

345 *See, e.g.*, Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa., 923 A.2d 389, 394 (Pa. 2007) (applying negligence standard).

346 Section 594 of the Restatement (Second) of Torts comment b states that it would be necessary to prove recklessness or falsity to defeat this privilege if negligence is otherwise required for instance for a constitutional reason. *See* RESTATEMENT (SECOND) OF TORTS § 594 cmt. b (AM. LAW INST. 1977). While the initial drafters of the Restatement in 1977

While expressed differently by various state courts, generally speaking, the BBB privilege applies when the statement is (1) on a subject matter in which the BBB has an interest, right, or duty; (2) made to a person having a corresponding interest or duty (consumers); (3) on a proper occasion consistent with the privilege; and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest.[347]

As addressed earlier in this Article, abuse of a qualified privilege can occur when the publication is made with actual malice or when the publication is made in an excessive manner in relation to the scope of the privilege.[348] Given that the purpose of the privilege involves alerting the public to potentially questionable business practices, it would be difficult for a BBB entity to abuse the privilege for excessively publishing the information.[349] BBB entities have, for extended periods of time, brought attention to businesses engaging in such practices which takes its modern form in webpages providing information about those businesses which consumers may seek out at their option.[350] It is generally recognized that the scope of a defamation privilege in a given dispute fluctuates depending on the size of the group interested in the publication. Which means in a

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may have been overzealous in characterizing the Supreme Court as having definitively resolved the issue whether a plaintiff in all defamation disputes including those involving matters of private concern must prove fault such as negligence, see DOBBS ET AL., *supra* note 130, §§ 519, 557, the logic of the Restatement drafters is sound. Furthermore, the Restatement drafters have subsequently reaffirmed this heightened standard for defeating any qualified privilege. *See* RESTATEMENT (SECOND) OF TORTS ch. 25, Special Note on Conditional Privileges and the Constitutional Requirement of Fault (AM. LAW INST. 1977). If the state requires proof of negligence to prove defamation, any defamation privilege essentially would have no purpose if a showing of negligence could defeat it. *See id.* It makes more sense to require actual malice as many courts and the Restatement do rather than treat a privilege as "superfluous." *See Am. Future Sys.*, 923 A.2d at 398.

347 Ohio State Home Servs., Inc. v. Better Bus. Bureau of Akron, Inc., 627 N.E.2d 602, 603 (Ohio Ct. App. 1993).

348 *See* Antwerp Diamond Exch. v. Better Bus. Bureau of Maricopa Cty., Inc, 637 P.2d 733, 738–39 (Ariz. 1981) (finding fact issue as to abuse of privilege as to actual malice); Moore v. Cobb-Nettleton, 889 A.2d 1262, 1271 (Pa. Super. Ct. 2005) (outlining same bases for abuse of privilege); RESTATEMENT (SECOND) OF TORTS § 599 cmt. a (AM. LAW INST. 1977).

349 *See, e.g.*, Audition Div., Ltd. v. Better Bus. Bureau of Metro. Chi., Inc., 458 N.E.2d 115, 119 (Ill. App. Ct. 1983) ("The BBB reports are issued to consumers to provide information.").

350 *See* Patio World v. Better Bus. Bureau, Inc., 538 N.E.2d 1098, 1102–03 (Ohio Ct. App. 1989) (discussing how BBB entity provided "reliability reports on businesses and stores in the Miami Valley area upon request so that customers may be served better by ethical providers"); *supra* Part IV(A).

dispute involving a BBB entity that group would typically include consumers who may do business with a company that is unhappy about the BBB's conduct.[351]

A business attempting to sue a BBB entity, for instance about a rating or information underlying that rating, can encounter other significant obstacles besides the qualified privilege. For instance, some courts have held that the information contained in a BBB report, including complaint history and lawsuit history, was not defamatory even if it could be construed as critical of the business because the BBB entity was not directly or indirectly calling the plaintiff dishonest or stating that the plaintiff engaged in improper business activities.[352] Importantly, a BBB entity can generally invoke the argument that its rating of a business is an opinion that is not actionable without the need to invoke the qualified privilege.[353] The rationale for this opinion's treatment is that (1) the rating constitutes the BBB's judgment about the business based on subjective factors and subjective weighing of objective factors, and (2) the rating is not provably true or false.[354] Under the Communications Decency Act, the BBB would have immunity from liability for hosting online statements of customers such as complaints and reviews about a business.[355]

V

LIABILITY OF CROWDSOURCED CONSUMER REVIEW SITES AND OTHER ENTITIES COVERED BY THE COMMUNICATIONS DECENCY ACT

The Communications Decency Act of 1996 (CDA) represents a dramatic federal intervention into the liability scheme governing republication of a third party's statements online. Congress passed the act under a larger statutory enactment referred to as the

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351 *See Audition Div.*, 458 N.E.2d at 119; ELDER, *supra* note 188, § 2:34.

352 *See Audition Div.*, 458 N.E.2d at 118–19. For comparison, a plaintiff who obtained conflicting statements from the BBB entity involved as to whether the business resolved complaints was able to raise a fact issue regarding abuse of the privilege, see *Patio World*, 538 N.E.2d at 1103.

353 *See, e.g.*, Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc., 354 S.W.3d 234, 242–43 (Mo. Ct. App. 2011); Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 354, 357–58 (Tex. App. 2013).

354 *See Castle Rock*, 354 S.W.3d at 242–43.

355 *See infra* Part V.

Telecommunications Act of 1996.[356] Congress recognized tort liability as a significant risk to those operating on the Internet, a risk which could hinder the natural development of the web.[357] There was also significant concern that without some protection, content providers would face pressure to block offensive or controversial speech.[358] The CDA allocates responsibility to the person who originally made the statement, as opposed to someone who did not create it.[359] Congress preferred a deregulated sphere in this area to allow the Internet to develop its own solutions to these problems.[360] Its desire was to let websites determine what to publish and not publish through the traditional editorial process.[361] Congress wished to extinguish state precedent where online platforms could find themselves in a position that, because they performed some editing of some user content, they could become liable for other content they did not edit.[362] Additionally, Congress preferred parental choice for the online content that children view.[363]

Section 230(c) of the Act provides the key protections relevant to entities publishing statements online related to business products and services. This CDA provision mandates that: "No 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."[364] The statute provides for a corresponding protection from civil liability for any actions taken to restrict access to objectionable content or to inform users how to block objectionable content.[365]

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356 Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (codified as amended in scatted sections of 47 U.S.C. (2012)). *See also* Cecilia Ziniti, *The Optimal Liability System for Online Service Providers: How* Zeran v. America Online *Got it Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 584 (2008). The larger purpose of the Telecommunications Act of 1996 "was to reduce regulation and encourage 'the rapid deployment of new telecommunications technologies.'" Reno v. Am. Civil Liberties Union, 521 U.S. 844, 857 (1997).

357 *See* 47 U.S.C. § 230(a)(1); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

358 47 U.S.C. § 230(a)–(b); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118–19 (9th Cir. 2007).

359 *See* Johnson v. Arden, 614 F.3d 785 (8th Cir. 2010).

360 *See* 47 U.S.C. § 230(b).

361 *Zeran*, 129 F.3d at 330.

362 Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc).

363 47 U.S.C. § 230(a)(2); H.R. REP. NO. 104–458, at 194 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 10, 207–08.

364 47 U.S.C. § 230(c)(1).

365 *Id.* § 230(c)(2).

These protections are sometimes referred to as the CDA's "safe harbor."[366] The statutory references to publishing and speaking trigger protections against defamation and similar claims.[367] While not a model of clarity in statutory drafting,[368] courts consistently interpret the statute as providing broad liability protections.[369]

Section 230 significantly departed from defamation common law where a person hosting another's statement online could, under many circumstances, be liable for that statement.[370] Prior to the CDA, courts would address liability in this context by evaluating whether the defendant was a publisher, distributor, or common carrier with each having their own liability standards as discussed earlier in this Article.[371] Companies operating online under the common law faced an inconsistent liability scheme that could vary depending on how a court classified them or depending on the jurisdiction where the suit arose.[372]

The CDA's protections extend to statements originally published by a third-party "information content provider" which is statutorily defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[373] Any provider or user of an interactive computer service can invoke these protections.[374] While the protection when it comes into play is broad,

366 *See* Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1170 (9th Cir. 2009).

367 H.R. REP. NO.104–458, at 194 ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."). *See also* Michal Lavi, *Content Providers' Secondary Liability: A Social Network Perspective*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 855, 868–69 (2016).

368 Doe v. GTE Corp., 347 F.3d 655, 659–61 (7th Cir. 2003) (discussing how Section 230(c)'s language could arguably be read not to provide any liability protection).

369 Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254–55 (4th Cir. 2009) ("To further the policies underlying the CDA, courts have generally accorded § 230 immunity a broad scope.").

370 *See* Ehrlich, *supra* note 160; Ziniti, *supra* note 356, at 584–85.

371 *See* Ehrlich, *supra* note 160, at 403; *supra* text accompanying notes 160–162.

372 David R. Sheridan, Zeran v. AOL *and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 153–58 (1997).

373 47 U.S.C. § 230(f)(3) (2012).

374 *See* 47 U.S.C. § 230(c)(1); Fair Hous. Council of San Fernando Valley v. Roomates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008); Batzel v. Smith, 333 F.3d 1018, 1030–31 (9th Cir. 2003).

the CDA "only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider."[375]

Most commonly, a website will be the interactive computer service involved.[376] However, many different digital interfaces can qualify as an interactive computer service, for instance: (1) a consumer review page on a Yelp webpage,[377] (2) an online newsletter,[378] (3) an electronic listserv where users communicate with one another,[379] (4) an internet search engine,[380] and (5) a social networking website.[381] At least one court has improperly read the statute as providing immunity only to companies that provide actual access to the Internet such as America Online.[382] As various courts have recognized, because the contours of technological categories are not always clear, overly rigid approaches that determine CDA immunity based on a technology's classification into one of those categories could cause many problems.[383]

Because of CDA restrictions, a defendant protected under the CDA has no obligation to filter or censor information hosted on an

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375 Kimzey v. Yelp! Inc., 836 F.3d 1263, 1268 (9th Cir. 2016) (quoting Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009)).

376 *See id.* (quoting *Roomates.com*, 521 F.3d at 1162 n.6) ("[T]oday, the most common interactive computer services are websites.").

377 *See, e.g.*, *id.* (first quoting 47 U.S.C. § 230(f)(2); then quoting Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003)) ("Yelp is plainly a provider of an 'interactive computer service,' a term that we interpret 'expansive[ly]' under the CDA." (alteration in original)).

378 *See Batzel*, 333 F.3d at 1030–31 ("There is no dispute that the Network uses interactive computer services to distribute its on-line mailing and to post the listserv on its website. Indeed, to make its website available and to mail out the listserv, the Network must access the Internet through some form of 'interactive computer service.'") (emphasis in original).

379 *See id.* at 1030–31.

380 Baldino's Lock & Key Serv., Inc. v. Google, Inc., 88 F. Supp. 3d 543, 545–47 (E.D. Va. 2015).

381 Klayman v. Zuckerberg, 753 F.3d 1354, 1357–58 (D.C. Cir. 2014).

382 880-JR Cigar, Inc. v. GoTo.com, Inc., 437 F. Supp. 2d 273, 295 (D.N.J. 2006) (narrowly reading the definition of information content provider only to those who "provide access to the Internet like service providers such as AOL"). Many courts have specifically rejected such a limited definition. *See Batzel*, 333 F.3d at 1030.

383 *See, e.g.*, *Batzel*, 333 F.3d at 1037 n.3 (Gould, J., concurring in part and dissenting in part) ("CDA immunity should depend not on how a defendant's technology is classified, but on the defendant's conduct.").

interactive computer service that comes from third parties.[384] A plaintiff can still pursue claims against the person originally making the statement but cannot go after the content provider hosting the statement.[385] Even if the third party's statement reveals an intent to engage in unlawful activity, a defendant covered by the CDA is not liable for the statement.[386]

However, there are limits to what a defendant covered by the CDA can do with information posted by another content provider and still benefit from the CDA's liability protections. For example, a defendant can become responsible under Section 230(f)(3) for development of content "if it in some way specifically encouraged development of what is offensive about the content."[387] This limitation on coverage can be problematic for a website if not appropriately considered and can arise whenever the user is inputting information at the request of the website—such as personal information to register on a website or for the user to post material.[388] Likewise, more than one person may be responsible for the original content if that person contributes "in whole or in part" to the content.[389] Those the CDA would otherwise protect remain liable for their own speech, although notice of the unlawful nature of

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384 Green v. Am. Online, 318 F.3d 465, 471 (3d Cir. 2003) (explaining that the CDA protections "bar[] 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content'"); Ben Ezra, Weinstein & Co. v. Am. Online Inc., 206 F.3d 980, 986 (10th Cir. 2000).

385 *See* Johnson v. Arden, 614 F.3d 785 (8th Cir. 2010); Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)); *supra* Part II.

386 *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669–72 (7th Cir. 2008) ("But given § 230(c)(1) it cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination.").

387 Fed. Trade Comm'n v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009); *see also* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008).

388 *Roommates.com*, 521 F.3d at 1164 (discussing this issue in the context of claimed discrimination violations of the Fair Housing Act and California law).

389 Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) ("Under the statutory scheme, an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue.").

information provided by another is not enough to transform the speech into the provider's own speech.[390] These rules are a significant break from the common law where publication can include negligent communication of a defamatory statement or failure to remove a statement.[391]

Any online website such as Amazon or Yelp which allows customers to post reviews about business products and/or services would also fall into this same category of protected defendants.[392] While there appear to be no published cases that have dealt with this specific scenario, the same principle would apply to a BBB entity's activity of hosting consumer complaints online.[393] Social media and other crowdsourced platforms are one of the best examples of how the line has blurred between content providers and content consumers.[394] As Congress's policy goals underlying the CDA reflect, such platforms are unique resources that our society should foster by modifying the common law defamation rules.[395] These platforms that simply host content from others function only as facilitators for that content because the website is not creating it.[396] The CDA does not, however, protect these entities from content they themselves create.[397]

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390 *Universal Commc'n*, 478 F.3d at 419–20.

391 Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997) ("Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party—each alleged by Zeran here under a negligence label—constitute publication.").

392 Kimzey v. Yelp! Inc., 836 F.3d 1263, 1268 (9th Cir. 2016) ("Yelp is plainly a provider of an 'interactive computer service,' a term that we interpret 'expansive[ly]' under the CDA." (citations omitted)); Schneider v. Amazon.com, Inc., 31 P.3d 37, 41 (Wash. Ct. App. 2001) ("Under the plain language of the statute, Amazon is a provider of interactive computer services for purposes of § 230(f)(2).").

393 *See Kimzey*, 836 F.3d at 1268; Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 252, 255–56 (4th Cir. 2009) (applying CDA immunity to "website that allows consumers to comment on the quality of businesses, goods, and services"); *Schneider*, 31 P.3d at 41.

394 *See* SIMPSON, *supra* note 24, at 1; *supra* Part IV (discussing BBB complaint process).

395 *See* 47 U.S.C. § 230(a)–(b) (2012).

396 Fair Hous. Council of San Fernando Valley v. Roomates.com, LLC, 521 F.3d 1157, 1162–63 (9th Cir. 2008).

397 *See id.*

Importantly, the CDA preempts state law that is contrary to Section 230.[398] This preemptive effect applies not to just defamation claims, but also to any claim seeking to hold a person covered by the act responsible for publishing a third party's statement.[399] What matters is not the name of the cause of action but rather whether it would inherently require the court to treat the defendant as the publisher or speaker of content provided by another.[400] Courts have recognized that CDA preemption can bar numerous claims beyond typical defamation claims, including: (1) a negligence claim related to publishing third-party content,[401] (2) a statutory claim under state law for deceptive trade practices seeking to hold a provider liable for refusing to remove third-party content,[402] (3) common law misrepresentation claims such as fraud or negligent misrepresentation,[403] (4) false light claims,[404] and (5) assault.[405] As a general principle, it is logical that CDA preemption should extend at least to any cause of action besides defamation that First Amendment protections or common law privilege would also defeat.

Many plaintiffs have sought creative ways to circumvent the CDA, although courts have generally applied the CDA's protections broadly. For instance, the Eleventh Circuit rejected an attempt to hold Google responsible for bloggers' statements based on allegations "that Google manipulated its search results to prominently feature the article at issue."[406] Likewise, the Ninth Circuit did not treat minor alterations to an email by an online newsletter before the newsletter re-posted the email as sufficient development to trigger liability.[407]

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398 *See* 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."); Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006).

399 Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1104 (9th Cir. 2009) (explaining that "section 230(c)(1) precludes courts from treating internet service providers as publishers not just for the purposes of defamation law . . . .").

400 *See* Milgram v. Orbitz Worldwide, Inc., 16 A.3d 1113, 1121 (N.J. Super. Ct. Law App. Div. 2010) (citing *Barnes*, 570 F.3d at 1102).

401 *Barnes*, 570 F.3d at 1102–03, 1105–06.

402 Roca Labs, Inc. v. Consumer Opinion Corp., 140 F. Supp. 3d 1311, 1324 (M.D. Fla. 2015).

403 *Milgram*, 16 A.3d at 1121.

404 *See id.*

405 Klayman v. Zuckerberg, 753 F.3d 1354, 1358–59 (D.C. Cir. 2014).

406 Dowbenko v. Google Inc., 582 F. App'x 801, 805 (11th Cir. 2014) (unpublished).

407 Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003).

One plaintiff was able to get around the CDA by asserting a promissory estoppel claim on a theory that the website had promised the plaintiff that it would remove certain content.[408]

VI
THE CONTINUED IMPORTANCE OF SPEECH PROTECTIONS FOR ENTITIES COMMENTING ON BUSINESS PRODUCTS AND SERVICES IN THE DIGITAL AGE

While the legal system is still grappling with the implications of the shift to digital platforms in the defamation arena and countless other areas of law, society has already embraced these platforms to consume a wide variety of media and non-media content. For the legal system to treat the content on these platforms in a more hostile way than the content on non-digital platforms is shortsighted and improperly preferential to traditional media. In fact, nontraditional media entities such as Facebook and Google, with their extensive digital presence, can positively influence public discourse in a way traditional media entities cannot. One downside to digital platforms is that they have allowed people with commercial or political motives to massively circulate fake news at virtually no cost, especially through social media.[409] To counter such trends, Facebook has taken various measures to strengthen quality control, such as enlisting its user base to report fake news and implementing digital countermeasures to detect fake news.[410] Google has similarly modified its search algorithms to filter out sites known for generating fake news.[411] Traditional media organizations, in comparison, can only report on the fake news rather than limit how much it spreads.

There is an increasingly weak rationale for drawing distinctions based on media status. The Supreme Court has taken many steps to (1) emphasize that non-media defendants are entitled to the same

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408 Barnes v. Yahoo! Inc., 570 F.3d 1096, 1106–09 (9th Cir. 2009).

409 James Carson, *What Is Fake News? Its Origins and How it Grew in 2016*, TELEGRAPH (Mar. 16, 2017, 1:57 PM), http://www.telegraph.co.uk/technology/0/fake-news-origins-grew-2016/.

410 Seth Fiegerman, *Facebook's Global Fight Against Fake News*, CNN MONEY (May 9, 2017, 10:35 AM), http://money.cnn.com/2017/05/09/technology/facebook-fake-news/index.html; Ashley May, *How Facebook Plans to Crack Down on Fake News*, USA TODAY (Nov. 20, 2016, 9:27 PM), http://www.usatoday.com/story/tech/2016/11/19/how-facebook-plans-crack-down-fake-news/94123842/.

411 James Titcomb, *Google Overhauls Search Algorithm in Bid to Fight Fake News*, TELEGRAPH (Apr. 25, 2017, 3:00 PM), http://www.telegraph.co.uk/technology/2017/04/25/google-overhauls-search-algorithm-bid-fight-fake-news/.

protection as media defendants,[412] and (2) protect content unique to digital platforms to the full extent allowed under the First Amendment.[413] Nevertheless, many courts have expressed a reluctance to extend First Amendment protections to non-media defendants.[414] This situation puts courts in the role of deciding who is a media defendant when that question has never been more complex.[415] Judges are humans too, and it is sometimes human nature to treat with hostility new technologies and evolving definitions of familiar concepts, such as the definition of media.

To the extent the Supreme Court has not already resolved this issue, extending these protections to non-media defendants is, in many ways, less controversial than the Supreme Court modifying defamation rules in the first place. Many changes to the common law are controversial when they first occur,[416] but the Supreme Court has reaffirmed and expanded the First Amendment protections in the defamation arena over time because it has routinely recognized how important free speech is to our society.[417] Congress similarly did not adopt media and non-media distinctions under the CDA, treating those who simply host the statements of third parties as non-culpable.[418]

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412 *See* Citizens United v. Fed. Elections Comm'n, 558 U.S. 310 (2010).

413 *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).

414 *See supra* text accompanying notes 268–281; *see, e.g.*, Phillips, *supra* note 1, at 180–84; *supra* note 281 and accompanying text; Bierman v. Weier, 826 N.W.2d 436, 446 (Iowa 2013) (rejecting protection for non-media defendant); Denny v. Mertz, 318 N.W.2d 141, 152–53 (Wis. 1982) (same); *see also* Fleming v. Moore, 275 S.E.2d 632, 638, n.11 (Va. 1981) ("Lower courts are divided on whether the First Amendment protections provided media defendants in *New York Times* and *Gertz* are applicable to non-media defendants.").

415 *See supra* Part I; Snyder v. Phelps, 580 F.3d 206, 219 n.13 (4th Cir. 2009).

416 *See* KEETON ET AL., *supra* note 129, § 3. Many states continue to draw distinctions with non-media defendants. *See supra* text accompanying notes 136, 268, 281.

417 *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

418 *See supra* Part V.

As has occurred in numerous legal fields, including tort law,[419] the Supreme Court and legislatures have charged courts with enforcing these limitations by narrowing what cases can proceed to trial.[420] We have many available options to strongly enforce these First Amendment, common law, and statutory protections against defamation and related claims. In particular, a simple solution is to meaningfully enforce the various procedural devices through which we screen claims including: (1) motions to dismiss,[421] (2) motions for summary judgment and motions for judgment as a matter of law,[422] and (3) appeals.[423] More states could adopt generally applicable anti-SLAAP statutes that protect, through expedited motions to dismiss, any defendant exercising their free speech rights.[424] Texas, for instance, has adopted a creative approach that permits interlocutory appeal of denial of an anti-SLAAP motion.[425]

As the Supreme Court has recognized, placing judges in the position to screen these claims "lessen[s] the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers."[426] The Court, for instance, has emphasized the need for independent appellate review of many constitutional issues in the First Amendment area, including the existence of actual malice.[427] It is fully appropriate, in the early phases of a case, to apply meaningful burdens as well on motions to dismiss and motions for summary

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419 DOBBS ET AL., *supra* note 130, § 1 ("Judges may minimize or eliminate the jury's role in a different way by making a rule of law that demands a precise result or that casts the judge in the role of decision maker.").

420 *See supra* Parts IV, VI.

421 *See, e.g.*, Google, Inc. v. Hood, 822 F.3d 212, 227 n.12 (5th Cir. 2016) (discussing appropriateness of applying CDA dismissal at motion to dismiss stage); DOBBS ET AL., *supra* note 130, § 573 (discussing motion to dismiss options in enforcing defamation protections and appropriate pleading of defamation elements).

422 *See generally* Emerito Estrada Rivera-Isuzu de P.R., Inc. v. Consumers Union, Inc., 233 F.3d 24 (1st Cir. 2000) (affirming summary judgment originally granted on both First Amendment grounds and other grounds in case involving vehicle performance article authored by Consumers Union); DOBBS ET AL., *supra* note 130, § 573 (addressing summary judgment protections against defamation claim).

423 *See* Snyder v. Phelps, 562 U.S. 443, 459 (2011) (setting aside jury verdict).

424 *See* Barylak, *supra* note 14, at 869–72; Hartzler, *supra* note 14, at 1237–38, 1252–70.

425 *See* Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 352 (Tex. App. 2013).

426 Rosenblatt v. Baer, 383 U.S. 75, 88 n.15 (1966).

427 *See* Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 498–500 (1984); Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U.L. REV. 3, 47–50 (1985).

judgment.[428] As to common law causes of actions, courts can further hold plaintiffs to their burden of pleading adequate claims and raising a genuine issue of material fact on matters that can be difficult to prove such as: (1) presenting evidence that a statement was false, (2) presenting evidence of actual malice, and (3) showing a privilege was abused.

Many applicable protections for a defendant commenting on a business's products or services are questions of law for a court. These include whether any statements at issue are opinions,[429] whether those opinions are actionable,[430] whether a qualified privilege applies,[431] and whether the speech relates to a matter of public concern.[432] Importantly, under the First Amendment, the ultimate issue of whether speech is protected is often treated as a question of law.[433] Furthermore, courts have had no difficulty meaningfully enforcing the CDA immunity procedurally through legal determinations, particularly given the broad scope of the statute.[434] Courts are in the best position to strike a meaningful balance between these protections and a plaintiff's rights.

We cannot allow technological innovations to undermine the principles underlying these protections or the judicial system's willingness to enforce them. These protections involve many conflicting concerns including potential serious injury to people's reputations and perceived unfair treatment from the media. These competing values sometimes cause us to lose sight of why these protective principles exist in the first place. Those who do not like the impacts of these protections understandably seek to challenge or overturn them. For instance, President Donald Trump has reportedly discussed with former FBI Director James Comey prosecuting journalists for leaking classified information under federal espionage

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428 *See* DOBBS ET AL., *supra* note 130, § 573; Levine, *supra* note 427, at 68–77.

429 *See, e.g.*, Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1285 n.12 (4th Cir. 1987).

430 *See, e.g.*, *id.*; Milkovich v. Lorain Journal Co., 497 U.S. 1, 17–22; Slawik v. News-Journal Co., 428 A.2d 15, 17 (Del. 1981) (treating determination of actionability of opinions under state law as question of law).

431 *See* RESTATEMENT (SECOND) OF TORTS § 619 (AM. LAW INST. 1977).

432 *See* Rankin v. McPherson, 483 U.S. 378, 384–86 (1987); D'Angelo v. Sch. Bd. of Polk Cty., Fla., 497 F.3d 1203, 1209 (11th Cir. 2007).

433 *Rankin*, 483 U.S. at 386 n.9.

434 *See supra* Part V.

statutes.[435] While President Trump is not the first president to flirt with the idea of prosecuting journalists, critics point out that his efforts are extreme compared to his recent predecessors.[436]

Likewise, President Trump pledged to soften existing defamation protections during his campaign.[437] Any erosion of defamation protections would potentially apply to all defamation defendants, whether media or non-media. He will have appointed by the end of his presidency at least one, and potentially several, Supreme Court justices.[438] While hopefully these appointees will not weaken existing restrictions, this risk is not a theoretical one. Fortunately, there has been strong bipartisan support on the Court in the twenty-first century for not only upholding prior First Amendment precedent in this area but actually expanding it.[439]

Similar to the principles underlying the qualified immunity that government officials can invoke against claims for constitutional violations,[440] we grant additional protections to defamation defendants when they are advancing interests important to our society. While not as expansive as the protections underlying qualified immunity, a key goal of the safeguards for defamation defendants speaking on protected matters is to reduce the litigation they must face—the financial cost of which could suppress that speech.[441] It is important as ever to afford these protections to traditional media institutions whose continued existence we cannot take for granted with the increasing challenges to their profitability from the digital revolution.[442] Litigation is even more costly for a

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435 Chris Cillizza, *The Time Donald Trump Reportedly Urged James Comey to Jail Journalists*, CNN (updated May 17, 2017, 11:48 PM), http://www.cnn.com/2017/05/17/politics/comey-memo-press-jailed-trump/index.html.

436 *See id.* For detailed coverage on First Amendment protections to criminal prosecution for leaking classified information, see generally Derigan A. Silver, *National Security and the Press: The Government's Ability to Prosecute Journalists for the Possession or Publication of National Security Information*, 13 COMM. L. &POL'Y 447 (2008).

437 Ben Jacobs, *Donald Trump Pledges to Curb Press Freedom Through Libel Laws*, GUARDIAN (Feb. 26, 2016, 3:44 PM), https://www.theguardian.com/us-news/2016/feb/26/trump-pledges-curb-press-freedom-libel-laws-first-amendment.

438 Adam Liptak, *What the Trump Presidency Means for the Supreme Court*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/10/us/politics/trump-supreme-court.html?_r=0.

439 *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 447–59 (2011); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790–92, 799 (2011).

440 Pearson v. Callahan, 555 U.S. 223, 231 (2009).

441 *See* Levine, *supra* note 427, at 90–91.

442 *See supra* Part I.

business without many financial resources, such as a nontraditional media organization trying to make a name for itself.[443]

The law frequently recognizes that conduct, even if some might consider it faulty, does not warrant any liability.[444] It is in many ways an overarching principle in tort law that if behavior is socially reasonable, we should not punish the person engaging in that conduct.[445] The Supreme Court has expressed a strong tolerance under the First Amendment of accepting the problematic consequences that come with free speech because the alternative is far worse.[446] If it means speech will otherwise face suppression, courts have recognized that society must tolerate everything from bruised egos to even serious injury to reputation with dramatic economic consequences.[447] For some problems like maintaining a free sphere for speech, the Supreme Court has found that it is simply better to let society address the problem rather than the litigation system.[448] It is a foundational principle of tort law that the legal system cannot solve all problems because of its inherent limitations.[449]

Meaningfully enforcing these protections, and even expanding them, will not have any dramatic negative consequences that our legal system has not already taken into account. Many defamation disputes simply will not implicate these common law and constitutional protections, including those applicable to comments on business products and services, which limits abuse of these protections.[450] Likewise, the threat of a jury trial is still a significant motivating factor which traditional media institutions and others face if they are

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443 *See* Levine, *supra* note 427, at 90–91.

444 *See, e.g.*, DOBBS ET AL., *supra* note 130, §§ 2, 11 ("Sometimes this occurs when courts seem to define fault to include rather ordinary conduct. At other times, even faulty behavior does not result in liability.").

445 KEETON ET AL., *supra* note 129, § 1 ("So far as there is one central idea, it would seem that it is that liability must be based upon conduct which is socially unreasonable.").

446 *See supra* Part III.

447 *See supra* Part III; DOBBS ET AL., *supra* note 130, § 3.

448 *See supra* Part III.

449 *See* DOBBS ET AL., *supra* note 130, § 19 ("Law cannot effectively solve all problems. Even issues capable of legal resolution are sometimes resolved outside the law by community standards and practices that do not depend heavily upon formal tort law.").

450 *See, e.g.*, *id.* § 3.

not careful with how they act.[451] In spite of strong protections that are already in place, the threat of multimillion dollar lawsuits for criticizing powerful businesses, highly affluent individuals, or prominent politicians serves as a real deterrent for media and non-media entities, particularly smaller ones.[452] For those claims that proceed forward to a jury, a defamation defendant must worry about exposure not only to compensatory but punitive damages.[453] Media organizations who want to succeed in the marketplace must also pay attention to the accuracy of their reporting which serves as a self-motivated check on what they publish.[454]

CONCLUSION

The Federalist Papers prophetically recognized in discussing the importance of freedom of the press: "What is the liberty of the press? . . . [W]hatever fine declarations may be inserted in any constitution respecting it, it must altogether depend on public opinion, and on the general spirit of the people and the government."[455] Rising to this challenge, our legal system has embraced a broad definition of freedom of speech and press because an informed public is one of the greatest assets a democracy can have. It is crucial that we maintain a protective stance towards free criticism of the key components of our society—including the businesses with whom we interact as individuals and business consumers. Consumers now have more information at their disposal about business practices, products, and services than they ever have at any point in history. This wealth of information helps our economy operate more efficiently and allows consumers to make more educated decisions about with whom they do business.

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451 *See, e.g.*, *id.* § 9; Ben Sisario et al., Rolling Stone *Loses Defamation Case over Rape Story*, N.Y. TIMES (Nov. 4, 2016), https://www.nytimes.com/2016/11/05/business/media/rolling-stone-rape-story-case-guilty.html?_r=0.

452 *See, e.g.*, Timothy O'Brien, *The Lawsuits of Donald Trump*, ATLANTIC (Mar. 20, 2013), http://www.theatlantic.com/national/archive/2013/03/the-lawsuits-of-donald-trump/273819/ (discussing several multi-million and some multibillion dollar defamation disputes pursued by Donald Trump).

453 *See* Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 532 n.2 (10th Cir. 1987) (quoting KEETON ET AL., *supra* note 129, § 116A) (citing RESTATEMENT (SECOND) OF TORTS §§ 621, 622, 622A, 623 (AM LAW. INST. 1977)).

454 *See* Jeff Storey, Note, *Does Ethics Make Good Law? A Case Study*, 19 CARDOZO ARTS & ENT. L.J. 467, 489 (2001).

455 THE FEDERALIST NO. 84 (Alexander Hamilton).

We sometimes in the United States fear change will chip away at values that are important to us. But we cannot forget that the principles of intelligent journalism and the critical thinking it provokes are a fundamental part of our political system.[456] Simply because a new medium presents itself does not mean we must fear it as a threat.[457] Even in the face of resistance to technological change, society ultimately moves forward by embracing new technologies rather than clinging to the past.[458] Additionally, businesses that succeed after major technological disruptions most often do so by adapting to as opposed to resisting the technology.[459]

Disruption from new technology and resulting changes to consumer preferences have triggered dramatic transformation in many industries before.[460] For instance, the *USA Today* adapted to a market opportunity by becoming the first truly national newspaper when it recognized that many readers want an expedited summary of important national issues.[461] Quality journalism has survived in spite of dramatic changes journalism has faced since the 1900s.[462] In spite of the massive use of digital options for news, such as social media, consumers still prefer stories from traditional media organizations.[463] Newspapers with higher perceived credibility in their respective market have also fared better than their counterparts.[464] News organizations that adapt to the advantages of digital platforms will remain competitive on this still evolving frontier for journalism.[465] There is a risk that the ease of access to publication online will drown out quality journalism, but as with any major technological innovation there is no way to stop these changes.[466] We are better off making the

456 *See* Freedman, *supra* note 19, at 36; Fenton, *supra* note 27, at 3.

457 *See* Fenton, *supra* note 27, at 6.

458 *See id.* at 6–9.

459 *See id.* at 13.

460 MEYER, *supra* note 29, at 6.

461 *See id.* at 13.

462 *See id.* at 6.

463 Rick Edmonds, *When it Comes to Trust and Sharing, News Consumers have Some Surprisingly Retro Attitudes*, POYNTER (July 7, 2016), http://www.poynter.org/2016/when-it-comes-to-trust-and-sharing-news-consumers-have-some-surprisingly-retro-attitudes/420242/.

464 MEYER, *supra* note 29, at 24–37.

465 *See* Fenton, *supra* note 27, at 6–11, 13.

466 *See id.* at 8–11.

best of this digital world as opposed to living in a past that will never return.