Are Bloggers' Free Speech Rights Under Attack?

February 22, 2012 by Jesse Jenike-Godshalk

A recent legal opinion has some concerned about just how broad free speech rights may be for bloggers who are not associated with institutional media, such as newspapers and television stations. In *Obsidian Finance Group, LLC v. Cox*, No. CV-11-57-HZ, slip op. (D. Or. Nov. 30, 2011), a federal judge ruled that a self-proclaimed "investigative blogger" was not "media" and, therefore, was not entitled to certain First Amendment protections that are reserved for the media. Despite the alarm that this case has generated, it actually is not a major setback for the free speech rights of bloggers.

The Case: *Obsidian Finance Group, LLC v. Cox*

From late 2010 to early 2011, Crystal Cox made numerous blog posts in which she accused Obsidian Finance, LLC and one of the company's senior principals, Kevin Padrick, of corrupt, fraudulent, and illegal conduct. Obsidian and Padrick subsequently sued Cox for defamation. Rather than hiring an attorney, Cox chose to defend pro se.

In August 2011, before the case went to trial, the judge granted summary judgment to Cox with regard to all but one of her blog posts, because the posts were statements of opinion protected by the First Amendment. *See Obsidian Finance Group, LLC v. Cox*, No. CV-11-57-HZ, slip op. (D. Or. Aug. 23, 2011). A statement, such as a blog post, can be the basis for a defamation suit only if the statement is a provable assertion of fact. In contrast, statements of opinion are protected by the First Amendment. According to the judge, blog posts, by their very nature, are usually statements of opinion.

Prior to the trial, the judge still had several issues that he needed to resolve. Among these issues was Cox's claim that she was "media" and therefore, based on U.S. Supreme Court precedent, the plaintiffs could not recover damages from her for defamation without proof that she was at least negligent in making the allegedly defamatory statements. The judge rejected that Cox was "media," writing:

Defendant cites no cases indicating that a self-proclaimed "investigative blogger" is considered "media" . . . . Without any . . . authority on the issue, I decline to conclude that defendant in this case is "media" . . . .

Defendant fails to bring forth any evidence suggestive of her status as a journalist. For example, there is no evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting "the other side" to get both sides of a story. Without evidence of this nature, defendant is not "media."

Obsidian Finance Group, LLC v. Cox, No. CV-11-57-HZ, slip op. at 9 (D. Or. Nov. 30, 2011). Following this ruling, the case went to trial, and the jury found for the plaintiffs, awarding $2.5 million in damages.

Not a Major Setback

Despite the concern that this case has generated, the case is not a major setback for the free speech rights of bloggers, and it can even be regarded as a pro-free speech case. First, some of the judge's statements suggest that bloggers enjoy expansive First Amendment rights. In his ruling on summary judgment, the judge stated that blog posts, by their very nature, are usually "opinions" and not provable assertions of fact. Such "opinion posts" are protected under the First Amendment and are not actionable as defamation—regardless of whether the writer is "media."

Second, the judge established a very low bar for what a blogger must do to enjoy the additional free speech protections that are reserved for "media." To wit, a blogger must present some evidence that he or she is a journalist. Cox lost this issue because she presented no evidence.

The judge provided her with a list of seven types of evidence that she could have offered. This list does not create an exacting standard of proof for a blogger to meet. To be considered "media," a blogger would not need to offer all seven types of evidence. In fact, a blogger would not *necessarily* need to offer any of the seven types of evidence. The list is not exhaustive, but is merely "[f]or example." A blogger must present "evidence of this nature." Thus, a blogger could prove that he or she is "media" by presenting types of evidence not on the list. In addition, most bloggers probably would be able to present *some* evidence of the types that are on the list—e.g., "proof of editing," "keeping notes of conversations," or "creation of an independent product rather than assembling writings and postings of others."

Had Cox hired an attorney, the attorney almost surely would have been able to offer some evidence that Cox was "media." Actually, had Cox hired an attorney, she might have won the entire case on summary judgment—and she would have entirely avoided the issue of whether she was "media." Herein lies the real lesson from this case: If you are sued for defamation, get yourself an attorney.