

ACADEMIC JOURNALS AND THE MANAGEMENT OF DEFAMATION AND PLAGIARISM

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I. INTRODUCTION

Scholarly debate is integral to the Western intellectual tradition. Such debate often turns from the speculative or theoretical to the personal and political. The point at which scholars begin to make allegations or implications in their publication(s) that may cause injury or damages to other parties is the point of departure for this paper. A thorough understanding and assessment of the factors pertaining to risk of defamation charges against the publishers or editors of scholarly journals is critical to the publication of any journal.

Many colleges and universities place a mandatory journal publication requirement on college professors and instructors requiring them to publish in journals or other publicly available intellectual treatises in order to meet the qualifications for tenure and/or promotion. This publication requirement has caused an increase in the number of journals available. Many discipline based groups or organizations are exploring the creation of a journal for their specific group or expanding to more than one journal publication if that group already publishes one. The demand for more published journals and treatises is increasing because of membership demands.

II. DEFAMATION

Defamation is the act of harming the reputation of another by making a false statement to a third party,¹ including organizations such as partnerships and corporations as well as individual persons. The false statement can be written or spoken and must cause injury to a person's character or an organization's reputation. Only the written form of defamation, referred to specifically as *libel*, is considered here in assessing the risks to editors and publishers of scholarly journals. However, libel is generally referred to as defamation throughout the literature. The terms are used interchangeably in this paper.

The first and most basic requirement for the tort of defamation is that there must be a publication of a statement(s) that hold an individual up to ridicule, contempt, or hatred.² *Publication* means that the defamatory statements are communicated to persons

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¹ BLACK'S LAW DICTIONARY (Abridged 7th ed. 2000).

² KENNETH CLARKSON, ET AL., WEST'S BUSINESS LAW TEXT AND CASES 122 (THOMSON/SOUTHWESTERN 10th

other than the defamed party, absent privilege or confidentiality.³ The format or mode of publication is irrelevant to the tort itself. It only requires that a third party receive the defamatory statement.

The second requirement is damages. Once liability for making a false statement is established, general damages are presumed as a matter of law. "General damages are designated to compensate the defamed individual for nonspecific harms, such as disgrace or dishonor in the eyes of the community, humiliation, injured reputation, and emotional distress."⁴ For an individual or organization to recover damages in a defamation suit, one only needs to establish that the statement was false and that it was published, even if unintentionally, because general damages are presumed. Additionally, if it can be proven that the false statement was made maliciously or with the knowing intent of causing injury to the defamed party, punitive damages may also be awarded.⁵

III. ACADEMIC JOURNALS AND LIABILITY FOR DEFAMATION

The term *academic journal* applies to scholarly publications in all fields, whether published in print or online. Generally, within the legal context of defamation, academic journals are treated as publishers, and not distributors of information. Distributors are not liable for false statements if they exercise no control over the content.⁶ Distributors can invoke the defense of *innocent dissemination* against charges of defamation, only when they are unaware of the contents. Publishers, on the other hand, typically exercise editorial control and judgment. Peer review and editorial review are hallmarks of academic journals. Legally, by inference, reviewed or edited academic journals are publishers and are liable for defamatory statements, whether published in print or online.

In many cases, courts have been asked to decide whether electronic, for profit libraries and bulletin boards are distributors or publishers. In all cases the decisions hinged on whether editorial control was exercised in choosing what was to be published. America Online and similar Internet service providers were found to be distributors, even though some edit for pornography and other prohibited content.

All liabilities for defamation apply to the author of the article as well as the publisher. The publisher's liability depends on whether there is knowledge of the false statement in the article being printed. If the publisher has knowledge of the falsehood, the resultant liability can incur punitive damages as well as general damages. Absence of knowledge subjects the publisher only to general damages.

IV. JURISDICTION IN DEFAMATION CASES RELATED TO ACADEMIC JOURNALS

Defamation law began in common law and was not considered a federal constitutional issue involving freedom of speech until the U. S. Supreme Court heard the appeal of the *New York Times Co. v. Sullivan* in 1964. This case established the *actual*

ed., 2006).

³ *Id.*

⁴ *Id.* at 123.

⁵ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁶ *Ben Ezra-Weinstein & Co. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000); *Green v. America Online*, 318 F.3d 465 (3rd Cir. 2003).

malice burden of proof required for public figures to recover libel damages. But what characterizes a party as public or private? The U.S. Seventh Circuit Court of Appeals ruled in 1974 in *Gertz v. Robert Welch, Inc.*⁷ that newsworthy figures are not necessarily public figures. The Seventh Circuit Court upheld this ruling in 1982 after the case had been remanded by the U.S. Supreme Court to the district court for retrial.⁸ Citizens thrust into the limelight may be found to be private parties and therefore do not have to show malice to recover libel damages.

These landmark cases are discussed later in more detail. The majority of the law relating to defamation results from decisions rendered by the various state and federal appeals courts or the U.S. Supreme Court. Although freedom of speech is constitutionally protected at the federal level, the decisions of the U.S. Supreme Court establish only the minimum standards that must be applied nationwide. States may not modify federal constitutional law, but states can supplement federal standards to meet local needs and expectations. "There is nothing . . . that impairs the states' power to impose additional limitations, based on either their own constitutions or the traditions underlying their previously established common-law doctrines."⁹

Many states have enacted statutes that modify the common law definitions of defamation of character and limit the scope of circumstances that may qualify under the statutes for a viable cause of action. Editors and publishers of academic journals should be aware that a defamation case tried under state common law might be appealed and tried under state constitutional law, then appealed and tried by the U.S. Supreme Court, which shapes federal constitutional law. Thus, a series of appeals may lead to reversals or remands among several state and federal jurisdictions.

The extent of the journal's distribution may determine the number of jurisdictions that may have subject matter jurisdiction over the claim of defamation. If a journal is distributed to a party in a different state, that state will have concurrent jurisdiction with the state in which the article is published. The defamation laws of the state in which the complaint is filed will be the controlling law for the case. For example, if a journal is published in Texas and copies of the journal are distributed to a party in Maine, both states have subject matter jurisdiction to hear a claim of defamation, and the law of the state in which the case is filed will apply.

V. DEFAMATION DEFENSES RELATED TO ACADEMIC JOURNALS

A. TRUTH

Truth is perhaps the strongest defense against charges of defamation. Legally, there must be a statement of fact before truth needs to be invoked as a defense. Determining the truth only comes into play for statements that can be verified or shown to be false. In court, statements are treated as fact if they can be verified and truth if they are verified. However, the court may treat statements as substantially true even if they include errors of fact. This was the issue in *New York Times, Co v. Sullivan*, which was previously mentioned. This case set federal constitutional limits on libel law and established the *actual malice* burden of proof required for public figures to recover libel damages.

Sullivan, an elected official responsible for the police department in Montgomery, Alabama, filed suit against the *New York Times* and four clergymen for publishing an

⁷ 418 U.S. 323 (1974), *remanded for retrial*.

⁸ *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982), *decision after remand*.

⁹ *Immuno Ag. v. Moor-Jankowski*, 77 N.Y. 2d 235, 264 (1991).

advertisement that included false statements concerning police action during a civil rights demonstration. The advertisement, *Heed Their Rising Voices*, recounted the violence that had taken place during the movement and, although it did not specifically refer to Sullivan, Sullivan alleged the statements indirectly referred to him in his role as supervisor of the police department. The advertisement, which appealed for support for civil rights, did contain errors of fact. For example, Dr. Martin Luther King Jr. had been arrested four times, not seven as the ad stated. Sullivan won his case under Alabama libel law, and was awarded damages of \$500,000.¹⁰

The Alabama Supreme Court upheld this decision on appeal.¹¹ The *New York Times* then appealed to the U.S. Supreme Court. Justice Brennan delivered the opinion of the court beginning, "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct."¹² (The constitutional protection for freedom of speech resides in the First Amendment and protection for freedom of the press in the Fourteenth.)

The Court acknowledged inaccuracies in reports of events in the ad but stated that "[a] defense of erroneous statements honestly made is . . . essential here."¹³ The actual malice standard established by the Court in this case must be met in one of two ways: the statement must be made with knowledge that it is false or with reckless disregard for whether it is true or false. Applying this standard, the Court found no evidence to sustain a libel award against the *New York Times* or the civil rights leaders.¹⁴

The ruling in *New York Times v. Sullivan* held that, under the First and Fourteenth Amendments, a state cannot award damages to a public official for defamatory falsehood relating to his official conduct unless he proves actual malice.¹⁵ This ruling applies to academic journals in that various court rulings have since extended the actual malice standard from public officials to public figures.

However, editors and publishers should be aware that it might prove difficult to distinguish between private and public figures. In *Gertz v. Robert Welch, Inc.*, Gertz, a lawyer for the victims in a widely publicized police brutality case, filed a libel lawsuit in the U.S. District Court for the Northern District of Illinois against Robert Welch, Inc., the publisher of *American Opinion*, a John Birch Society monthly. *American Opinion* had published a diatribe against Gertz, claiming he was involved in a Communist conspiracy to discredit local law enforcement agencies and to create a national police force to support a Communist dictatorship. The case was eventually appealed to the U. S. Supreme Court, which found that Gertz, although a prominent figure in a public issue, was a *private person* rather than a *public figure*. In the decision, Justice William H. Rehnquist wrote that a libel defendant in a defamation suit must prove that the plaintiff possesses more than *mere newsworthiness* to be a public figure that can be held to the burden of showing *actual malice* on the part of the defendant.

The consequence of the *Sullivan* and *Gertz* rulings for editors and publishers is the need to assess the risk of defamation according to whether the subject is a public or a private figure, and to consider that newsworthiness does not necessarily make someone a public figure. Thus, a scholar who participates in a debate over a controversial issue

¹⁰ DAVID G. SAVAGE, *THE SUPREME COURT AND INDIVIDUAL RIGHTS* (Congressional Quarterly Press, Washington D.C., 4th ed., 2004).

¹¹ 144 So.2d 25 (1962).

¹² 376 U.S. 254, 256.

¹³ 376 U.S. 254, 278.

¹⁴ ELDER WITT, *CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT* (2nd ed. 1990).

¹⁵ 376 U.S. 254, 265.

that comes to public attention may still be considered a private figure, and, as such, need not show malice to successfully prevail on a claim of defamation.

B. OPINION

Statements of opinion and statements that cannot be considered factual (statements that are not susceptible to verification) are generally exempt from claims of defamation against their authors, editors, or publishers. Yet, privilege related to statements of opinion as opposed to statements of fact may not always support a defense against defamation. To separate opinion, privileged under state common law and federal constitutional law, from fact, which may be actionable, can prove to be problematic.

Editors cannot automatically assume that statements of opinion are defensible against defamation. In *Milkovich v. Lorain Journal*¹⁶ in 1990, the U.S. Supreme Court ruled that a statement might be subject to defamation charges even though labeled as opinion. In finding for Milkovich, the Court held that the reference to *opinion* in dictum in *Gertz v. Robert Welch, Inc.* was not intended to create a wholesale defamation exemption for *opinion*.

Milkovich, a high school coach, sued the *Lorain Journal* for defaming him in the newspaper's sports column. The Ohio Supreme Court had previously dismissed Milkovich's suit, writing that the newspaper column was "constitutionally protected opinion."¹⁷

In the U. S. Supreme Court's 1990 Milkovich appellate decision, Chief Justice Rehnquist wrote that "sometimes expressions of opinion . . . imply an assertion of objective fact."¹⁸ If the opinion is "sufficiently factual to be susceptible as being proved true or false,"¹⁹ it may be considered a statement of fact. In other words, statements are not necessarily opinion just because they are labeled as such.

The defendant, the *Lorain Journal*, now had to defend a publication of fact, for which the standards are higher than those for statements of opinion. Nevertheless, the plaintiff, Milkovich, still had to show that the statements were false and were printed with a reckless disregard for the truth.

Editors can generally assume that statements qualify as opinion if they cannot reasonably be interpreted as stating facts. Because editors cannot assume that statements that imply a basis in fact are defamation-proof, they must then evaluate the ethical risk of rejecting statements that, if published, could lead to useful open debate. The Milkovich ruling prompted Cathy Sears to write: "Although the decision [*Milkovich v. Lorain Journal Co.*] is based on an article in the lay press, editors of scientific journals see its impact extending to their publications as well."²⁰

C. CONSENT

Obtaining prior consent of the allegedly defamed party is almost an absolute defense against later defamation charges. Even making a good faith attempt to obtain

¹⁶ 497 U.S. 1 (1990).

¹⁷ 497 U.S. 1, at 8.

¹⁸ 497 U.S. 1, at 18.

¹⁹ 497 U.S. 1, at 21.

²⁰ Cathy Sears, *Supreme Court Ruling Could Stifle Open Debate in Journals*, 4 THE SCIENTIST 1 (Oct. 1990).

consent (e.g., by offering to publish a rebuttal from the prospectively aggrieved party) can constitute a valid, though less powerful, defense against defamation charges.

One academic journal editor's attempt to obtain consent was advocated in his defense. The editor, Jan Moor-Jankowski, offered to publish a rebuttal from Immuno Co., to the allegations made against the company in a letter to the editor. The editor waited eleven months without receiving a rebuttal from Immuno before publishing the letter, after which Immuno filed suit for defamation of character. Jan Moor-Jankowski refused to settle and eventually won his case before the New York Court of Appeals in what became a landmark decision for editors and publishers. This case further interprets aspects of *Milkovich* and pertains directly to editorial judgment and will be considered at some length here.

In December 1984, Immuno, an Austrian pharmaceutical company, filed charges of libel against the editor, publisher, and several other defendants associated with the *Journal of Medical Primatology*. In December of 1983, Jan Moor-Jankowski, co-founder and editor of the journal, published a letter from Dr. Shirley McGreal of the International Primate Protection League (IPPL) that criticized Immuno's use of primates in biomedical research.

Moor-Jankowski wrote an editorial note to readers that the letter (published in December 1983) had been received in January 1983 and forwarded to Immuno, who acknowledged receipt in February 1983 but offered no rebuttal comments and referred the matter to its attorneys. Immuno's attorneys advised the journal that the statements were "inaccurate, unfair and reckless" and threatened legal action if the letter were printed before Immuno had an opportunity to reply. Although the letter was not published until nearly a year after it was received, Immuno sued for libel and settled with all defendants except Jan Moor-Jankowski. In 1991, Moor-Jankowski won his case before the New York Court of Appeals.

Although the New York Appeals Court did not refer directly to Moor-Jankowski's attempts to obtain consent, it did refer to his editorial note to readers to inform them of his attempt to obtain consent:

Letters to the editor, unlike ordinary reporting, are not published on the authority of the newspaper or journal. In this case, for instance, defendant's prefatory Editorial Note signaled that the letter was to be given only the weight its readers chose to accord McGreal's views; such reservations may be generally understood even when letters are not accompanied by any editorial note. Thus, any damage to reputation done by a letter to the editor generally depends on its inherent persuasiveness and the credibility of the writer, not on the belief that it is true because it appears in a particular publication.²¹

The case was first heard before the New York Court of Appeals one year before, when the court first found for the defendant. Immuno appealed to the U.S. Supreme Court, which granted certiorari, vacated the judgment of the New York Court of Appeals, and remanded the case to the Court for further consideration in light of *Milkovich v. Lorain Journal Co.*²² In finding, again, for Moor-Jankowski in 1991, the New York Court of Appeals wrote that there was "nothing in *Milkovich* or any of the related cases that impairs the states' power to impose additional limitations, based on either

²¹ Immuno Ag. v. Moor-Janowski, 77 N.Y.2d 235 (1991), 253-254.

²² 497 U.S. 1.

their own constitutions or the traditions underlying their previously established common-law doctrines.”²³

D. FAIR COMMENT ON A PUBLIC MATTER

Statements found to be *fair comment* on a matter of public interest will not ordinarily support an action for defamation and are constitutionally protected. Indeed, it was the U.S. Supreme Court’s decision in *New York Times Co.* that established the precedence of federal constitutional law over the states’ common law privilege of fair comment.

Justice William Brennan, as the author of the majority opinion in *New York Times Co.* wrote that open debate on issues of public interest is a profound national commitment and must be protected by the First Amendment. In a similar case, Justice Lewis Powell, U.S. Supreme Court, wrote in 1985, “It is speech on matters of public concern that is at the heart of the First Amendment’s protection.”²⁴

What this means for editors is that balanced comments on a matter of public interest, even if the public is restricted to one field of scholars, should hold up against claims of defamation. Whether characterized as open debate on issues of public interest, speech on matters of public concern, or fair comment on public issues, such statements are protected under both constitutional law and common law. For example, if a scholar stands accused of fraudulent research, expressing (and publishing) the opinion that the allegations are credible is unlikely to support an action of defamation. Similarly, statements may be defended as non-actionable if the defamed party already has a shaky reputation in the scholarly community, as no further damages result from allegedly defamatory statements.

E. INNOCENT CONSTRUCTION

Under common law principles, *innocent construction* is another defense to the tort of defamation of character. Under the innocent construction principles, a statement that can be interpreted as innocent, even though it can also be interpreted as defamatory, is not actionable. Illinois is one of the few states that retain the innocent construction rule over a “reasonable” construction rule.²⁵

In *Tuite v. Corbitt*, even the Illinois Supreme Court seemingly placed a “reasonableness” test on the innocent construction rule in finding for Tuite, a Chicago attorney defamed in a book co-authored by Corbitt. Tuite asked the court to abandon the innocent construction rule in favor of a “reasonable” construction rule in his suit against the authors of the book, *Double Deal*, for expressing their assumptions that he made payoffs and bribes in defending alleged Chicago mob boss Joey Aiuppa. The Court rejected Tuite’s request to abandon the innocent construction rule but found for him nevertheless, saying that the allegations against him could not be innocently construed, “[w]hen a defamatory meaning was clearly intended and conveyed, this court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibelous under the innocent construction rule.”²⁶

In *Lott v. Levitt*, the defense of innocent construction was defeated. Steven Levitt, author of *Freakonomics*, allegedly made derogatory remarks in his book about fellow

²³ 77 N.Y. 2d 235, 264.

²⁴ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

²⁵ REX S. HEINKE, *MEDIA LAW* (BNA Books 1994).

²⁶ 224 Ill.2d 490, 504 (2006).

economist Lott. The Court ruled that these statements reflected nothing more than an academic controversy. However, the assertions that Levitt made in a private email about Lott's funding of a special issue of an academic journal were ruled to be defamatory, as they went beyond the purview of academic controversy.

In the email, Levitt wrote: "It was not a peer refereed edition of the Journal. For \$15,000 he [Lott] was able to buy an issue and put in only work that supported him. My best friend was the editor and was outraged the press let Lott do this."²⁷ Levitt's claim of innocent construction of this email was defeated: "no matter how rash or short-sighted Levitt was when he made them – [the defamatory assertions] cannot be reasonably interpreted as innocent or mere opinion."²⁸

VI. RECENT TRENDS IN DEFAMATION THAT AFFECT ACADEMIC JOURNALS

Information has been described as the power to surprise (i.e., to reduce the uncertainty of the persons informed). In cases of fraud or intentionally false statements that defame others, information consumers may be misled. Such disinformation reduces the value of information exchanged in good faith and hinders valid discourse. Ethically, it is a good practice for editors and publishers to avoid publishing any false or misleading statements. However, verifying the content of scholarly journal articles can take considerable time and effort. Time is the enemy of information because statements only have the power to inform if they reveal something previously unknown. Of course, timeliness is more important in some academic endeavors than others. Still, the burden of time and resources required to vouch for the accuracy of information will always tend to impede its currency. The speed with which information can be made available will become increasingly valuable as electronic communication pushes the pace of scholarly discourse.

Libel tourism is a recent term used to describe plaintiffs who file suit in a country that has laws amenable to their defamation cases. This is usually the U.K. where, for example, the uber libel tourist, Sheikh Kalid bin Mahfouz, had threatened twenty-nine authors and publishers with libel suits in U.K. courts as of March 2005.²⁹ None apparently have gone to trial because defendants settle with Mahfouz to escape long, expensive lawsuits. The authors of *Alms for Jihad*, Robert Collins and J. Millard Burr, saw all unsold copies of their book destroyed by their publisher, Cambridge University Press, which then declared the book to be out of print. These actions were precipitated by the threat of a lawsuit against Cambridge University Press by Sheikh Kalid bin Mahfouz whose charitable contributions were linked to terrorist activities in *Alms for Jihad*.

Cambridge then issued a statement on its web site that the authors' allegations against Mahfouz were defamatory and false. Cambridge further requested libraries to return or destroy copies of *Alms for Jihad* that had made it into circulation. The Office of Intellectual Freedom of the American Library Association, however, recommends that libraries keep the book due to widespread public interest.³⁰ The book has now become so popular that many librarians keep it on reserve so that it may be read only in the library. The social good of free information flow—what the American Library

²⁷ Lott v. Levitt (N.D. Ill. No. 06 C 2007), 3.

²⁸ *Id.* at 15.

²⁹ Dr. Rachel Ehrenfield, *The Saudi Buck Stops Here, Funding Evil: How Terrorism is Financed and How to Stop It* (Mar. 3, 2003), available at <http://www.frontpagemag.com/Articles/ArticleList.aspx?date=3/3/2005>.

³⁰ Andrew Albanese & Jennifer Pinkowski, *Alms for Jihad in U.S. Libraries*, 132 LIBR. J. 15 (2007).

Association refers to as intellectual freedom—has apparently preserved a book that powerful interests have tried to suppress.

“We stand by what we wrote and refused to be a party to the settlement,” Collins, co-author of *Alms for Jihad*, said, noting that Cambridge University Press “did not want to embark on a long and expensive suit which they could not win under English libel law . . . In reality, the few passages referring to Mahfouz are trivial when compared with the enormous amount of information in the book that is in demand.”³¹

Librarians, authors, editors, and publishers are needed to create and protect the free flow of information. Likewise, these professions have varying levels of legal and ethical responsibilities for exercising *due diligence* against defamation. However, especially in communities of scholars, readers also bear some of the responsibility for weighing the validity and reliability of information. Even the judiciary expects scholars to resolve controversies within their own communities of discourse. “Judges are not well equipped to resolve academic controversies . . . and scholars have their own remedies for unfair criticisms of their work —the publication of a rebuttal.”³² From the point of view of the common good, it can be argued that every community of discourse needs discerning readers. Certainly, consumers of broadcast news bear the responsibility of detecting spin and hidden agendas. Scholars and researchers can reasonably be held to the same or even higher standards of discernment as information consumers.

A similar view was expressed by John H. Lange, a reviewer and associate journal editor, in his letter of January 24, 2004, to the *British Medical Journal* urging everyone in science to be active in its process. Lange argues that the legal burden on editors and associate editors of refereed journals is too heavy. “Readers are important in the scientific process. They also have duties.”³³

In some circumstances, the ethical duty to expose fraud and the duty to avoid defamation become competing interests. Editors who unknowingly include articles based on fraudulent research in a journal may be called on later to publish a related “whistleblower” article. Editors must then choose between the risk of defaming the researchers they previously accepted as contributors and the risk of misinforming readers.

Certainly, if editors reject articles that expose problems with the journal’s previously published research, they would be called to task if evidence of fraud were later published in a related journal. The Committee on Publication Ethics provides guidelines for the editors of biomedical journals, which include the phrase “always be willing to publish corrections, clarifications, retractions, and apologies when needed.”³⁴ Counter to the need to expose fraud runs the risk of defaming the parties to the alleged misconduct. The cost to prestige of prospectively losing a defamation suit and the monetary costs of defending a suit, whatever the outcome, must be weighed in the balance. In medical research, misinformation may cost lives. The priority that editors of medical journals give these particular competing risks is a matter of some controversy.

³¹ N.D. Ill. No. 06 C 2007, at 15.

³² *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996).

³³ Letter from John H. Lange to BMJ, Everyone in Science Must be Active in Its Process, 328, 230 (2004) in response to Annabel Ferriman, *Have Editors Got Their Priorities Right?*, 327 BMJ 1113 (2003).

³⁴ Committee on Publication Ethics, *A Code of Conduct for Editors of Biomedical Journals*, <http://www.publicationethics.org.uk/guidelines/code> (last visited Dec. 1, 2007; author retains copy).

Dr. Peter Wilmschurst, a consulting cardiologist, claims that the editors of medical journals do not have their priorities straight, based on his efforts to expose medical misconduct. "Journal editors are much more frightened of being sued for libel by academics or drug companies than they are of publishing fraudulent research." Dr. Wilmschurst points out that dishonest research results can be sold at premium prices, and that editors disregard this risk at the cost of patient lives.³⁵

Although editors and publishers are frequently paired as defendants in defamation suits, ethical issues arise within the relationship as well. Editors should be independent, but their decisions can have a substantial impact on the profit of publishers or owners. A natural tension exists between editorial freedom and the financial impact of editorial decisions in assessing the risks associated with prospective allegations of defamation.

VII. PLAGIARISM

The publication of an article which contains plagiarized material in an academic journal is another area of liability concern for the editor or publisher. The legal theory for recovery related to copyright infringement is contained in the Lanham Act. In an academic context, the term *plagiarism* covers a broad spectrum of concepts, both ethical and legal. This article confines itself to a very basic and simplified discussion of the legal issues involving copyright infringement.

The authors were unable to find any case law that specifically defined legal plagiarism. Multiple and sundry definitions were found associated with universities, various educational departments, and allied organizations. All the definitions considered are based in factual conduct with little or no emphasis on theory. The following definition (as modified by the authors) appears to best fit the perspective of publishing academic journals: Plagiarism occurs when one author copies, paraphrases, or otherwise incorporates all or part of another author's work without attribution or consent.

An author who plagiarizes another author's material is definitely liable for copyright infringement under Section 43(a) of the Lanham Act.³⁶ Though no cases could be found on point, it is more than reasonable to assume that an editor or publisher that knowingly publishes a plagiarized article is also liable for copyright infringement. The question arises as to whether an editor or publisher who unknowingly publishes plagiarized material has the same liability.

One analogous case is *Princeton University Press v. Michigan Document Services*, decided in 1996 by the Sixth Circuit Court of Appeals.³⁷ Plaintiffs alleged infringement of copyright against the defendants who operated copy shops near the University of Michigan. The defendants made copies of course materials and articles and sold them to students as course packs. The defendant, Michigan Document Service, did not obtain permission from or pay royalties to the copyright owners, including professors, some journal publishers, and several academic book companies.

The defendant invoked the defense of *fair use* and claimed that the printing of the materials and the subsequent sales to students were allowed by §43 of the Lanham Act. The Court discussed the facts of the case at length and extensively reiterated the case law involving *fair use*.³⁸ The defendants claimed that copies constituted *fair use*, that

³⁵ Annabel Ferriman, *Have Editors Got Their Priorities Right?*, 327 BMJ 1113 (2003).

³⁶ See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

³⁷ 99 F.3d 1381 (6th Cir. 1996).

³⁸ *Id.* at 1391.

“numerous academic authors . . . do not write primarily for money and that they want their published writings to be freely copyable.” The Court rejected this argument. To determine market harm, the Court of Appeals applied the four-part test set forth by the Supreme Court in various decisions. The intent to publish or lack of intent is not an element in a copyright infringement court decision.³⁹ The court closely followed the logic used in *American Geophysical Union v. Texaco*: “It is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work.”⁴⁰

An editor or publisher who unknowingly publishes plagiarized material and does so without the original author’s consent, is also liable for copyright infringement. If plagiarized material is knowingly published, punitive damages can also be awarded against the editor, publisher, or both.

VIII. MATTERS FOR EDITORS TO CONSIDER TO CONTROL RISK

Editors and publishers of academic journals can reduce the risk of defamation in many ways. The following list is adapted from the advice of a media lawyer, Gregory A. Abbott, Esq., directed to newspaper editors.⁴¹ The authors have modified Abbott’s list of suggestions to meet the needs of publishers and editors of academic journals.

- Establish publication policies. Include guidelines to follow in deciding when to publish controversial material.
- Know your authors, at least to the extent that you do not publish articles from sources known to be unreliable. Look for any statements that indicate a grudge match among scholars. If authors’ statements sound controversial, investigate the facts, at least to the extent that you are reasonably sure the statements are true.
- Investigate the facts by verifying the identity of the author and by making confirmation calls to the parties named in an article submitted for publication. Further, because editors cannot assume that statements that imply a basis in fact are protected as opinion, editors must perform *due diligence* to avoid later claims of reckless disregard of the truth.
- Be aware that when publishing a previously published article, the republisher has the same liability as the original publisher. It is clear that an academic journal that republishes a defamatory statement first published in a different forum is still subject to the same liability as if it had been the original publisher of the false statement.⁴²
- Make a good faith attempt to obtain the consent of named parties, or have the author obtain the consent before publication. Editors can ask for the consent of any party who may be offended and give time for a rebuttal to be published along with the original article in which allegations are made. This course of action, if successful, will defeat any later claims of

³⁹ *Id.* at 1392.

⁴⁰ 60 F.3d 913, 929 (2nd Cir. 1994).

⁴¹ Gregory A. Abbott, Esq., *Elements of Libel and Slander*, <http://www.abbottlaw.com/defamation.html> (last visited Dec. 1, 2007; author retains copy).

⁴² Marc L. Caden & Stephanie E. Lucas, Comment, *Accidents on the Information Superhighway: On-Line Liability and Regulation*, 2 RICH. J.L. & TECH. 3 (1996), http://law.richmond.edu/jolt/v2i1/caden_lucas.html (last visited Dec. 1, 2007; author retains copy).

defamation and preserve open debate. Even if the effort to obtain consent is not successful, the good faith attempt to obtain that consent may weigh in the defense of the case (as with Jan Moor-Jankowski, the editor of the *Journal of Primatology*, as discussed earlier in connection with consent defenses to defamation).

- Review for defamatory or offensive statements. The Libel Defense Resource Center cites the following as the main red flags indicating defamatory comments: reports of immoral behavior, statements injurious to trade or business, and derogatory or defamatory language.⁴³
- If questionable defamatory statements are found, consult an independent/outside attorney (i.e., not a member of the academic community responsible for the journal's publication) to assess the risk of publishing controversial statements. The reason for using an independent/outside attorney is to allow recovery against that attorney's errors and omissions insurance if he is wrong in his assessment of the statements.
- Keep records of all investigations and good faith efforts to confirm facts, confirm identity, and give the named parties an opportunity to respond, as well as any attempts to obtain consent from named parties.
- Establish records retention policies for the journal. Consider that the statute of limitations on claims of defamation varies from state to state.
- Consider purchasing insurance against defamatory publication. When Immuno Co. sued Moor-Jankowski, the editor of the *Journal of Primatology* and the journal's publisher, Alan Liss, the case prompted many publishers of academic journals to buy insurance, according to Neil Blair Christensen, in his May 2005 Publisher's Note to the readers of the *Journal of Primatology*. Christensen stated:

Journal scientific publishing entered a new era as it was now recognized that scholarly journals had the same rights and responsibilities in regard to free expression and public debate as newspapers such as the NY Times and Washington Post, as well as the right to publish scientific opinion.⁴⁴

IX. CONCLUSION

Editors and publishers must weigh legal and ethical issues in deciding whether to publish controversial materials. Further, editors and publishers of academic journals must exercise due diligence in evaluating submissions for *red flag* statements, such as suspected plagiarism or potentially defamatory statements. Editorial responsibility for defamation has evolved through the various cases discussed in this article. Based on the outcomes of these cases, a checklist of matters for editors and publishers to consider has been prepared. This should protect not only the editors and publishers, but also the integrity and reputation of the journals for which they have publishing oversight responsibilities.

⁴³ 77 N.Y. 2d 235.

⁴⁴ Neil Blair Christensen, *A Farewell and a Welcome to the Editors*, 34 J. OF MED. PRIMATOLOGY 163 (2005).