

Should an Online Blogger Be Protected by the Illinois Reporter's Privilege?

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Abstract

The question that this paper answers is whether the Illinois Reporter's Privilege should protect an online blogger. The definitions of the terms "reporter," "news medium," and "source" quoted from 735 ILCS 5/8-902, are followed by several examples. Second, a brief history of journalism is presented, where it is demonstrated that for hundreds of years, journalists and publishers alike engaged in their profession with little formal training, but rather with a sincere desire to convey the facts and the truth to their peers. Second, the essay outlines how Illinois and federal courts have employed the reporters' privilege in case law. In answering the question, the work examines whether WikiLeaks qualifies under the Illinois Reporter's Privilege. The position taken is that the answer is yes. The idea is that if WikiLeaks qualifies under the privilege, then other online blogs also qualify. The opinion of the author is that the law is sufficient as it stands. There is no need to change its wording. Finally, some loose ends are discussed before reiterating the conclusion that the Illinois Reporters' should not be changed.

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Introduction

Should an online blogger with no formal journalism training or credentials be considered a “reporter” subject to the Illinois reporter’s law privilege against testimonial disclosures? The answer to the question revolves around whether a blogger is a “reporter,” whether the blog is a “news medium,” and whether the source of a blog article is a “source” all within the confines of 735 ILCS 5/8-902.

According to 735 ILCS 5/8-902(a), a reporter means

- “[A]ny person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis; and includes any person who was a reporter at the time the information sought was procured or obtained.”

In 735 ILCS 5/8-902(b), a news medium means

- “[A]ny newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing.”

If an individual satisfies these two definitions, then he or she is deemed to be a reporter under Illinois state law and qualifies for protection under 735 ILCS 5/8-902.

In the definition of a reporter, the key term is “regularly.” An individual may not be covered if the reporting activities are sporadic or intermittent.¹ Although Illinois courts have yet to rule on whether 735 ILCS 5/8-902(a) protects amateur or hobbyist journalists, the statute specifically states that an individual can collect news on a full-time or part-time basis.² What this means is that the law may or may not grant reporter status to amateur or hobbyist journalists.³ The answer to the question would probably revolve around whether an individual was earning income from their journalist activities.

The good news for a blogger is that 735 ILCS

5/8-902(b) defines “news medium” to include electronic media such as a blog as well as traditional new publications such as newspapers and radio and television news programs.⁴ Illinois courts have rarely elaborated on the definition of a “news medium,” particularly when the description is applied to online journalists.⁵ The definition of a news medium includes electronic periodical and electronic news services such as ABCNews.com, CBSNews.com, FoxNews.com, MSNBC.com, Reuters.com, etc.⁶ However, blogs such as BeforeItsNews.com, CorbettReport.com, GlobalResearch.ca, Rense.com, WikiLeaks.org, etc. may or may not fit within the definition of a news medium under Illinois state law.⁷ The description includes news mediums that make newsreels and motion picture news,⁸ Illinois courts have been silent regarding online documentaries, video blogs, and other video productions.⁹ The court has yet to decide whether Internet radio, Internet television, and podcasts are news mediums within the definition of the term.¹⁰

Thus, the question of whether an online blogger with no formal journalism training or credentials is considered a “reporter” subject to the Illinois Reporter’s Privilege against testimonial disclosures has merit. In attempting to answer this question, a little stroll down memory lane is needed to appreciate how journalists and publishers came into being.

A Short History of Journalism

Modernly, journalists collect, prepare, and distribute news and editorial comments via print and electronic media such as newspapers, magazines, books, radio, motion pictures, television, blogs, webcasts, podcasts, social networking, social media sites, and email.¹¹ The term “journalism” stemmed from the reporting of news events in printed form. Still, with the introduction of radio, television, and the Internet, the meaning of the term has dramatically expanded.¹² Journalism now encompasses all electronic and printed communication that convey information regarding current events.¹³

The earliest known “newspaper” was the *Acta Diurna* (i.e., “Paper”) that circulated in ancient Rome, dating from approximately 59 BCE.¹⁴ The *Acta Diurna* recorded by hand the essential events of the day, such as public speeches from members of the Roman Senate

and other public officials.¹⁵ In China beginning in the Tang dynasty, a *bao* (i.e., "report") was issued to government officials, and under various forms and names continues to the end of the Qing dynasty in 1911.¹⁶ In 1556, the government of Venice began publishing the monthly *Notizie scritte* (i.e., "Written notices"), where the cost was one gazetta, a Venetian coin in the day.¹⁷ The newspapers or gazettes appeared in German cities, such as the *Relation aller Fuernemmen und gedenckwürdigen Historien* (i.e., "Collection of all distinguished and memorable news") in Strasbourg starting in 1605.¹⁸ The first English newspaper, the *Weekly Newes*, was published in 1622, while the first daily newspaper, The Daily Courant, began publication in 1702.¹⁹ It should be remembered there were no schools teaching journalism at that time. The publishers had an idea and the desire to make the information known to the reading public.

At first, governments censored these newspapers because it was feared that an educated society would be unrulable.²⁰ Up until the late 18th Century, nations were ruled by monarchs, many of whom believed that they ruled by divine right, where their right to rule came directly from God.²¹ There was a growing demand for newspapers as the public learned to read.²² With the advent of steam followed by electrically driven printing presses, daily circulation of newspapers jumped from the thousands to the millions.²³ During the growth period of the 18th and 19th Centuries, there were no schools that trained people to become journalists. Printing became a trade, and publishing became a profession to tell the people the truth. By 1793 when the First Amendment was ratified, newspapers were well established, and the threat of government censorship was well known.

In the 1830s, relatively inexpensive magazines with mass circulation aimed at a marginally educated public started to dominate the public discourse.²⁴ The advantages of economies of scale led to news agencies selling their reporting efforts to a variety of individual newspapers and magazines.²⁵ With the invention of the telegraph and the telephone in the 19th Century, the speed of journalistic activity skyrocketed.²⁶ Newspapers and other news outlets were able to convey the news on an unheard-of mass scale.²⁷ When electronically

distributed news manifested itself in the late 20th Century, a second revolution in information occurred.²⁸ Individuals who saw information transmission as a mechanism for the elite exploited an opportunity to begin the information transmission process all over again, and thus electronic media was born.²⁹

In the 20th Century, journalism started to become a profession.³⁰ The trend revealed:

- An upsurge in working journalists;
- A need for educating journalists;
- A growing literature concerning mass communication; and A growing sense of social responsibility.³¹

In the 19th Century and earlier, journalism was a craft, where would-be journalists served apprenticeships.³² The first course in journalism was given at the University of Missouri (Columbia) in 1879-84.³³ In 1912, Columbia University in New York City created the first graduate program in journalism with an endowment from Joseph Pulitzer, a New York City editor and publisher.³⁴ With the advent of radio and television, journalism dominated the public stage.³⁵ Due to the complexity of reporting on a seemingly infinite number of issues, journalism became a pervasive profession until the 1950s when virtually every college and university had a journalism department.³⁶

The concern for social responsibility was a product of the social movements against the power elite in the past two hundred years.³⁷ As the public learned to read, newspapers mounted "crusades" to expand their readership.³⁸ Contrary to contemporary popular opinion, yellow journalism and so-called "fake news" has been ubiquitous over the years.³⁹ It was quickly understood that the public mind was fickle, where views could be manufactured almost at will.⁴⁰ By the late 20th Century, many journals were still idealistic individuals that desired to bring the facts before the public eye.⁴¹ When the Internet arrived on the scene, the journalistic yearning for truth was alive and well. The Internet allowed entrepreneurial individuals the opportunity to begin the process all over again. Printing presses were no longer essential to recording the news. A computer, a word processor, and an Internet connection were all that was

needed. But most of all, there was an aspiration that the people deserve to know the truth.⁴²

When Should Reporters Reveal Their Sources?

In reporting the news, it must come from someone. That someone is known as a "source." According to 735 ILCS 5/8-902(c), a source is a "person or means from or through which the news or information was obtained." Because sources are the staple of news reporting, a journalist must protect the identity of his or her sources.⁴³ The privilege not to reveal the source of information is deeply rooted in the First Amendment.⁴⁴ This does not mean that courts have always honoured the privilege.⁴⁵ Instead, Illinois courts have required the disclosure of confidential sources in some instances.⁴⁶ In Illinois, there are absolute and conditional privileged statements. Under the Illinois Reporter's Privilege Act, the privilege is limited or qualified.⁴⁷ The Act prevents a court from compelling an individual to disclose the source of information, but it does not prohibit reporters from being called to testify.⁴⁸ The privilege's purpose is to ensure that reporters have access to information in support of a well-informed citizenry, as stated and implied in the First Amendment.⁴⁹

Procedural Mechanisms for Divestiture

When a reporter claims the privilege, a plaintiff must expressly ask the court to divest the reporter of the privilege.⁵⁰ The application must contain:

- The name of the reporter and the name of the associated news medium;
- The specific information that is sought and why the information is relevant; and
- The public interest adversely affected if the information was not disclosed.⁵¹

For defamation cases, the plaintiff must also include a prima facie case demonstrating both the alleged slander or libel and the actual harm or injury.⁵² If the court decides that the privilege should be divested, the court enters an order that describes what information is to be disclosed.⁵³ An order must be final before a reporter is required to reveal a source, where the privilege continues in the case of an appeal.⁵⁴ If a reporter decides not to comply with a final order, the

reporter can be held in contempt of court.⁵⁵

Key Factors to Consider

When evaluating whether to divest the privilege, the court may consider the nature of the proceedings, the merits of the claim or defence, the adequacy of the available remedies, the relevance of the source(s), and whether the movant can employ other means in gathering the information.⁵⁶ The statute states that a court should divest a reporter of the privilege only if:

- The information does not need to be secret under state and federal law; and
- All other available sources of data have been exhausted.⁵⁷

In other words, divestiture serves the public interest when the need for disclosure overshadows the need for protecting a reporter's confidential sources.⁵⁸ The movant needs to offer some evidence that the desired information is not obtainable, but need not prove that specific alternatives have been exhausted.⁵⁹ The Act does not list specific public interests that justify divestiture, and the public interest does not have to be compelling.⁶⁰ Public interests that are commonly recognized include advancing a murder investigation, averting perjury, proving a material element of a plaintiff's claim, and at times impeaching a witness.⁶¹ Of course, the information must be relevant. For example, in *Pawlaczyk*, the defendant testified in front of a grand jury that they did not speak with reporters before they published of a story about the defendants. Here, the Illinois Supreme Court opined that the identity of the source was directly relevant in determining whether the defendant lied under oath.⁶² However, when the desired information is ancillary to the claims of the plaintiff, the courts are not inclined to divest a report of the privilege.⁶³ Even so, in *McKee*, the appellate overruled the decision of the lower court. The court erred when it required the reporter to reveal his or her source. The information was a collateral matter.⁶⁴ In *Palacio*, the court divested the privilege because the defendant tried to use a reporter to confirm that a defendant had a conversation with the prosecutor.⁶⁵ Finally, in *Scott*, the court rejected the implication that if a reporter revealed some sources, then he or she was obliged to reveal all his or her sources.⁶⁶

Federal Reporter's Privilege

Up until quite recently, the Seventh Circuit recognized a qualified reporter's privilege predicated on the First Amendment.⁶⁷ The Seventh Circuit accepted that the privilege extended to both the name of the confidential source and the unpublished information itself, whether or not the information was classified.⁶⁸ The court balanced the interests of the media against the relevance of the material and the information coming from a confidential source.⁶⁹ However, in *McKevitt*, the court wrote an opinion where it was uncertain whether the Seventh Circuit will continue to honor the Illinois reporter's privilege.⁷⁰

The Driver's Privacy Protection Act of 1994 ("DPPA") is a United States federal statute that addresses the privacy and disclosure of personal information that is collected by state Departments of Motor Vehicles. The DPPA prevents government officials from legally searching for or seizing documentary materials that are possessed by an individual whose intent is to disseminate the information to a newspaper, book, broadcast, or another form of public communication.⁷¹ If covered by the DPPA, the statute can protect a person from inquiries by both federal and state officials.⁷²

The Curious Case of Julian Assange and Wikileaks

Probably the most prominent individual and organization to take the Internet by storm is Julian Assange and Wikileaks, the quintessential Internet news organization. Assange, an Australian citizen, is the editor, publisher, and investigative journalist who founded Wikileaks in 2006.⁷³ Assange had initially been a well-known computer hacker who pleaded guilty to several cybercrimes in 1991, but because he was a minor, he received a nominal punishment.⁷⁴ Assange's inspiration for creating Wikileaks was Daniel Ellsberg's release of the Pentagon Papers in 1971.⁷⁵ Assange rightfully observed that it took two years from the time that Ellsberg obtained the Pentagon Papers until their publication by The Washington Post.⁷⁶ In wanting to streamline the whistleblowing process, Assange created the fundamental design of Wikileaks while he lived in Australia.⁷⁷ The original website was hosted in Australia, but Wikileaks.org was moved to servers in Sweden because the country had passed robust laws protecting

the press.⁷⁸ Wikileaks has hence obtained redundant servers in other countries.⁷⁹

Wikileaks obtained its first batch secret documents from The Onion Router ("TOR"), an encrypted network that has advertised that users can send and transmit data anonymously.⁸⁰ One of the Wikileaks volunteers mined the data being sent via TOR, collecting more than one million documents showing that the Somali rebel leader had hired assassins to kill government officials.⁸¹ The information was posted in December 2006, but the authenticity was never verified.⁸²

In March 2008, Wikileaks published internal documents from the Church of Scientology.⁸³ In November 2009, Wikileaks released 500,000 messages relating to the September 11, 2001 attacks.⁸⁴ On April 05, 2010, Wikileaks posted a classified video from the Department of Defense showing an American Apache helicopter firing on two⁸⁵ journalists and several Iraqis, killing them all in 2007. In May 2010, Chelsea Manning (formerly Bradley Manning) was arrested for leading this video to Wikileaks.⁸⁶ On July 25, 2010, Wikileaks posted more than 90,000 classified documents relating to the war in Afghanistan.⁸⁷ On October 22, 2010, Wikileaks posted about 400,000 documents dealing with the Iraqi War.⁸⁸ On November 28, 2010, Wikileaks began publishing 250,000 State Department cables that dated back to 1996.⁸⁹

Near the end of 2010, the troubles started for Wikileaks, as attempts were made by public and private entities to shut down the website. Undaunted, on September 02, 2011, Wikileaks released more than 250,000 unredacted diplomatic cables.⁹⁰ On July 02, 2012, Wikileaks began publishing more than 2.4 million emails from the Syrian government.⁹¹ On July 30, 2013, Manning was found guilty of violating the Espionage Act even though Manning first attempted to release the documents to The New York Times and The Washington Post, the same two newspapers that published documents from the Pentagon Papers.⁹²

In August 2010, the Swedish Prosecutor's Office first issued an arrest warrant for Assange.⁹³ In December 2010, the British arrested Assange.⁹⁴ In May 2012, the United Kingdom Supreme Court held that Assange should be extradited to Sweden.⁹⁵ In June

2012, Assange entered the Ecuadorian Embassy seeking political asylum, and in August 2012 he is granted asylum.⁹⁶ In February 2016, a United Nations panel ruled that Assange was arbitrarily being detained by the United Kingdom and by Sweden.⁹⁷ On April 11, 2019, and with the permission of the Ecuadorian government, British police officers entered the Ecuadorian Embassy and arrested Assange.⁹⁸ On May 23, 2019, the US Justice Department filed 17 charges against Assange, accusing him of violating the Espionage Act by publishing the classified military documents given to WikiLeaks by Manning.⁹⁹ The federal government had indicted Assange because the government claimed that Assange materially helped Manning procure the leaked reports.¹⁰⁰

Opinion Regarding the Illinois Reporter's Privilege

Does this sound familiar? Four hundred years ago, and for several hundreds of years after that, when journalism was beginning, many sovereigns claiming to rule by divine right, punished individuals who dared to print the information that they were given for all to read who could read. WikiLeaks differs from traditional news media outlets in that it publishes raw data, much like what The Washington Post did when it published the Pentagon Papers. These days, articles are mainly summaries of raw data. The readership is never allowed to see the raw data that forms the basis of an article.

The question becomes: Given its notorious history, would WikiLeaks qualify for the Illinois Reporter's Privilege? The present hysteria levied against WikiLeaks would more than likely preclude its inclusion as a news medium, even though WikiLeaks did nothing more than what The Washington Post editors and publisher did in 1971 when the Pentagon Papers were released. If Julian Assange is guilty of espionage, then so was Daniel Ellsberg, who leaked the Pentagon Papers, Benjamin Bradlee, the Post editor, and Katherine Graham, the Post owner, and publisher.¹⁰¹ It should be remembered that The Washington Post qualifies as a news medium under 735 ILCS 5/8-902.

Presuming that WikiLeaks would not qualify as a news medium under 735 ILCS 5/8-902, then what would be the characteristics of an online news outlet or blog that was not affiliated with the mainstream media that

would ensure that it would qualify as a news medium under Illinois law? This is a difficult question to answer because many Internet blogs deal with controversial subject matter in a primal way. These blogs sometimes present points of view that are anything but politically correct. If the same level of mania is directed at blogs that post edgy content, there is the possibility that a conservative and stodgy law profession will disclaim the lot of them. Hopefully, cooler minds will prevail.

In reading 735 ILCS 5/8-902(b), dispassionate understanding of the meaning of the words is in order, regardless of the political consequences. According to 735 ILCS 5/8-902(b), a news medium means:

- "[A]ny newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing."

WikiLeaks is issued periodically in an electronic format and has a general circulation or readership. It is a new service that provides the news in its original form with the absolute minimum of editing and presuming that the readership can read the original material, the information it presents is for public showing. Thus, by definition, WikiLeaks is a news medium.

Furthermore, Julian Assange is a reporter. According to 735 ILCS 5/8-902(a), a reporter means:

- "[A]ny person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis; and includes any person who was a reporter at the time the information sought was procured or obtained."

Assange is a natural person who is in the business of collecting and then publishing raw electronic data on a full-time basis. When the raw data that WikiLeaks published from its sources, Assange was actively involved in the reporting of the information. Even if one despises Assange, the indictment by the federal government accusing Assange help Manning leak

government secrets explicitly indicates that he was actively involved in the publication process. Thus, by definition, is a reporter.

Finally, according to 735 ILCS 5.8-902(c), a source means:

- “the person or means from or through which the news or information was obtained.”

Manning was a WikiLeaks source because it was Manning who leaked to WikiLeaks the secret military information that was accessible to him. Thus, by definition, Manning is a source.

As for other electronic news outlets and blogs, a similar argument would demonstrate that they are also new mediums, where the individuals who gather the news for the blogs are reporters, while the people who provide such information are sources. It is as simple as that.

Some Loose Ends

The only question that remains is whether the Illinois Reporter’s Privilege should be an absolute privilege, a qualified privilege, or no privilege at all. Based on the cases discussed above, it does not make sense to argue that the Illinois reporter’s privilege should be absolute. There are too many nuanced cases to consider in arguing that the reporter’s privilege should be absolute. It makes no sense to try to make the point.

The problem with abandoning the reporter’s privilege is that it would injure not only online news mediums, but also traditional news mediums. In other words, this alternative is too harsh. It takes too many rights away from a group of organizations that have relied on the reporter’s privilege in gathering stories for publication. The action would also violate substantive due process because it would violate the fundamental right of freedom of the press, as expressed in the First Amendment.

Thus, it seems that a qualified privilege is the appropriate middle ground. However, if the qualified privilege were granted to traditional news media while denying the same privilege to Internet news media, WikiLeaks and other organizations in the Internet world would claim that the action would violate the Equal Protection Clause. These entities would be correct because it would be pitting traditional news mediums

against online news mediums because their origins and use of mediums were different. It would be like saying that East Coasters are better than West Coasters just because the former live near the Atlantic Ocean while the latter live near the Pacific Ocean. The distinction would be petty and silly.

Conclusion

Should an online blogger with no formal journalism training or credentials be considered a “reporter” subject to state shield law privileges against testimonial disclosures? The short answer is yes. The journalists of yesteryear had no formal education in journalism; these individuals were visionaries who not only had a sense of social responsibility but also wanted people to know the truth. In their pursuit of facts, they created news mediums, just like the publishers living hundreds of years ago. The times and technology have changed, but the inner spirit has remained the same. Both traditional news mediums and online news mediums desire to have the stories that the public should and ought to know be told. The Illinois Reporter’s Privilege recognizes that the best within humanity deserves to be protected from the possibility of repressive government action independent of whether an act is intentional or coincidental. As long as the works of reporters are consonant with the law, there is no reason to alter the definition. If anything, every reporter and every new medium should be treated fairly, equally, and equitably. It is the way it should and ought to be.

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