Re-Pressing the Internet: Journalists Battle for Equal Access

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RE-PRESSING THE INTERNET:  
JOURNALISTS BATTLE FOR EQUAL ACCESS

I. INTRODUCTION

Welcome to football town. This is the place where residents of all ages eat, live and breathe the game of football. Families huddle together from Friday through Sunday, cheering on their teams. The fans make a difference; the fans sometimes make the game. More recently though, this is a place where cherished traditions, freedom and sport, are clashing with a new weapon, the Internet.\(^1\) This is now a place where the government denies access to Internet sites dedicated to the game, its players and fans.

The First Amendment’s freedom of the press is a long-standing source of protection in American jurisprudence.\(^2\) Courts stand ready to protect the press from prior restraint,\(^3\) prohibiting the government from differentiating among media.\(^4\) At times, they grant journalists access where the public cannot go, and shield them from tortious claims.\(^5\) Traditional media sources like newspapers and television fought for these rights years ago and won.\(^6\) A new medium is now facing the battle. The Internet has emerged as a powerful source of information; information that conveys news to the public in a low cost medium.

The Department of Defense originated the Internet in the late 1960’s as an experimental network of four computers designed to

\(^3\) Id.
\(^4\) See discussion infra Part II.B.
\(^5\) See Dyk, supra note 2.
help officials share information. Over time, computers became cheaper and the technology easier to use. This paved the way for the Internet’s boom in the early 1990’s with the creation of the World Wide Web. Now, millions of people log on to the Internet daily.

Congress saw the Internet as a forum for “true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” It wanted to “encourage the unfettered and unregulated development of free speech” on the Internet and stayed away from regulation. Newspapers and broadcast stations caught on quickly and experimented with websites of their own. Often their activities only included posting traditional news stories online with little more in the way of extra content. Nevertheless, people slowly turned to the Internet to get their news.

These affiliate websites now face competition from a new crop of journalists. These Internet journalists are not associated with traditional media, are unregulated and remain mainly anonymous. They have the freedom to publish on their websites the information they want in the manner they see fit. The government’s policy of unregulated development created a

8. Id.
9. Id.
12. Id.
14. Id.
15. Id.
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universe of voices shouting at each other, materials prepared with varying degrees of care, and access to information that is not always reliable.  

However, some Internet journalists have broken through the cluster, offering practical information, critical analysis and a forum for discussion.

Recently, Internet journalists have started to ask for special protections under the press clause. Courts are reluctant to grant special protection to them because they do not have a test to turn to in determining whether Internet journalists qualify as members of the press for First Amendment purposes. Courts have, however, decided which entities are eligible as representatives of the press using a government regulation. This regulation looks to the specific activities traditionally found in the press process and could readily be applied in the new Internet medium.

This Note suggests extending a traditional press inquiry to journalists publishing on the Internet. Part II provides a general overview of the First Amendment press protections and the importance of classifying press accurately. It also examines how courts have looked at issues raised in Internet-related lawsuits. Further, it introduces a sample case of an Internet journalist seeking press credentials. Part III proposes a solution to define members of the press. Part IV looks to the possible impact of such a solution. The Note concludes that application of the solution accurately defines a member of the press without violating journalists' constitutional rights.

II. BACKGROUND

A. Freedom of the Press

Freedom of the press is a matter of intense concern. In fact, the framers were more concerned with protecting the press than

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18. See Allen, supra note 7.
19. See discussion infra Part II.D.
20. Id.
21. See Dyk, supra note 2, at 932.
they were with protecting speech when writing the First Amendment. As a result, there is a potential for infringement whenever the government prohibits or restrains free publication. Damage can be particularly great when a “prior restraint falls upon the communication of news and commentary on current events.”

However, this right against prior restraints does not carry with it the unrestrained right to gather information. The Constitution does protect the right to receive information and ideas within limits. Journalists have the right to gather news by any legal means, of course, but there is no basis for a claim that the First Amendment compels others to supply information.

In the centuries since the framers, the Supreme Court has discussed numerous times the nexus between freedom of expression and newsgathering. The Court has vastly extended this protection and has afforded a broad range of freedom from restraints on publication. The press enjoys greater protection against prior restraint than do other speakers, including: the protection from some defamation claims; the protection from government imposed access requirements; and the protection from taxation schemes that single out the media or specific segments of the media. Such Supreme Court rulings are evidence of the Court’s attempt to build on general principles embodied in the Amendment.

B. Differentiating Among Members of the Media

Discriminatory access to information generally violates the First

22. *See id.*
24. *Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976).*
27. *Houchins v. KQED, 438 U.S. 1, 11 (1978).*
29. *See id.* at 928.
30. *Id.* at 927-28.
31. *Id.* at 934.
Amendment. This discrimination among press organizations is "particularly important because such discrimination is often motivated by a government desire to control publication." The government, therefore, may not grant favorable treatment to certain members of the media. Otherwise, it could influence the type of substantive media coverage public events receive and "[n]either the courts nor any other branch of government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information." Consequently, once information is generally available to the news media, the government may not arbitrarily differentiate among members of the media.

The continuous discussion of differential treatment among forms of media in the Supreme Court is nearly a century old. As early as 1936, in *Grosjean v. American Press Co., Inc.*, the Court declared unconstitutional a Louisiana statute that taxed advertisers who placed ads in publications with a certain weekly circulation. Of the more than 120 newspapers published in the state at the time, only 17 had a circulation greater than was allotted under the tax.

The Court found that the tax served as a restraint in two ways – curtailing the amount of revenue realized from advertising and restricting circulation. In addition, the Court declared it "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." Free press no longer existed; the tax’s discriminatory impact fettered the press’ interpretation

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33. See Dyk, supra note 2, at 946.
34. *Anderson*, 805 F. 2d at 9.
35. *Id.*
38. *Id.* at 240-41.
39. *Id.* at 244-45.
40. *Id.* at 250.
between the government and the people.\footnote{41. See id.}

The Court again ruled on a constitutional challenge surrounding a tax scheme some fifty years later in \textit{Leathers v. Medlock}.\footnote{42. \textit{Leathers v. Medlock}, 499 U.S. 439 (1991).} A cable television subscriber, a cable television operator and the Arkansas Cable Television Association brought a class action suit challenging the extension of the Arkansas sales tax to cable television services.\footnote{43. \textit{Id.} at 442.} The cable companies argued that the state tax applied differently depending on the type of media in question.\footnote{44. \textit{Id.} at 442-43.} Exempting newspapers, magazines and satellite broadcast services from the tax violated their constitutional rights under the First Amendment.\footnote{45. \textit{Id.} at 447.}

The Court reaffirmed its holding in \textit{Grosjean} and limited its reach to cases where clear discrimination is present.\footnote{46. \textit{Id.} at 447.} It held that the First Amendment is violated only where the tax is “directed at, or presents the danger of suppressing, particular ideas.”\footnote{47. \textit{Id.} at 453.} The Court found nothing to suggest an interest on the state’s part in censoring the expressive activities of cable television or anything to indicate that the sales tax was likely to stifle the exchange of ideas.\footnote{48. \textit{Leathers}, 499 U.S. at 453.} It concluded that the Arkansas tax generally applied and its extension to cable television services, while exempting the print media, did not violate the First Amendment.\footnote{49. \textit{Id.} at 447-53.}

A number of lower court decisions have extended \textit{Grosjean} beyond the line of tax-scheme cases. For example, in \textit{American Broadcasting Companies, Inc. v. Cuomo} the Second Circuit disallowed the exclusion of one television network from post-election activities at campaign headquarters attended by other members of the press.\footnote{50. 570 F.2d 1080, 1082 (2nd Cir. 1977).} The court saw this differentiation among

\textit{American Broadcasting Company} ("ABC") was in an ongoing collective bargaining dispute with the National
media as a clear case of discrimination in violation of the First Amendment.\textsuperscript{51} It held that "once there is a public function, public comment and participation by some of the media, the First Amendment requires equal access to all of the media."\textsuperscript{52}

Following the Second Circuit, the First Circuit applied \textit{American Broadcasting} in \textit{Anderson v. Cryovac, Inc.}, where it considered the effect of a court’s restriction on media access to certain court documents.\textsuperscript{53} A district court order denying access to discovery materials excepted public health and environmental officials, the parties’ experts and the producers of a television program from the court order.\textsuperscript{54} The producers, from WGBH Education Fund, sought access to the protected information for production of a documentary for the "NOVA" television series.\textsuperscript{55} The district

\begin{itemize}
\item Association of Broadcast Engineers and Technicians ("NABET") at the time. \textit{Id.} Members of NABET picketed outside several headquarters of Democratic mayoral candidates, causing the ousting of several ABC crews from the campaign facilities. \textit{Id.} Subsequently, crews from other networks allegedly threatened to leave any headquarters where ABC had access. \textit{Id.} The mayoral runoff candidates then refused access to ABC under the threat of arrest. \textit{Id.} at 1083.
\item \textit{Id.} at 1083. The court also ordered a restraining order preventing the arrest of the ABC crew on the condition that the other networks also participate simultaneously in the broadcasts. \textit{Id.} at 1084.
\item \textit{Id.} at 1084.
\item \textit{Id.} at 1.
\item \textit{Id.} at 3. The appellate court was concerned only with the orders made by the district court rather than the merits of the tort action in the suit. \textit{See generally id.} A number of residents of Woburn, Massachusetts sued several companies for allegedly contaminating their drinking water by discharging toxic chemicals in the ground. \textit{Id.} After more than three years of discovery, the district court issued the protective order. \textit{Id.} The court was concerned that the publicity surrounding the trial would make it difficult to obtain an impartial jury and conduct a fair trial. \textit{Id.} However, the court did not draft the orders to prevent those granted access to discovery materials from releasing this information. \textit{Id.} It “did not care if the information reached the newspapers as long as it was the environmental or health officials” who released it. \textit{Id.} at 8.
\item \textit{Id.} at 4. The court granted WGBH access to discovery materials and permitted the station to conduct interviews with the parties’ attorneys, consultants and experts. \textit{Id.} However, the court prohibited the station from revealing the information until after jury selection. The program aired
\end{itemize}
court refused such access to other media outlets, including the Globe Newspaper Company, which in turn intervened in the civil suit.56

The First Circuit concluded that the district court’s grant of access to one media entity over another violated the First Amendment.57 The exception, as ordered, gave “WGBH the exclusive ability among the media to gather information and release it to the public.”58 It became a “privileged media” with the ability to “review otherwise confidential information and shape the form and content of the initial presentation of the material to the public.”59 Selectively excluding news media from access, the court reasoned, brought with it a danger of government influence over the substantive media coverage public events receive – a practice at odds with the First Amendment.60

Most recently, a California District Court followed the Second Circuit’s American Broadcasting Company holding in Telemundo of Los Angeles v. City of Los Angeles.61 Television network Telemundo attempted to secure from the City of Los Angeles equal access to a celebration at City Hall.62 A competing station, KMEX-TV, originated the celebration marking the beginning of the Mexican War of Independence against Spain, and had broadcast it exclusively for 22 years.63

The district court granted Telemundo’s request for a preliminary

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56. Id. at 1, 6.
57. Id. at 9. The First Circuit suggested a rare situation could arise when a court may grant one media entity access but not another. Id. However, the court could not “think of one.” Id.
59. Id.
60. Id.
62. Id. at 4.
63. Id. at 2. KMEX planned to delay its broadcast by one hour and intended to provide other news outlets access to a video feed. Id. However, KMEX placed conditions on the feed because its affiliates would broadcast on a one-hour delay as well and did not want them scooped. Id.
injunction to broadcast 15 minutes of the reenactment. The City had no apparent reason for initially granting only one media’s cameras access to the official ceremony while the others used a feed. Because the court found no reasonable basis for the classification among media, the City’s actions violated the First Amendment.

Since Grosjean, courts have developed standards for limiting the differential treatment principle only to cases involving arbitrary classification. That is, where courts find arbitrary classification, they find violation of the First Amendment. Courts look to a number of different standards in determining the classification. Like the district court in Telemundo, some look to a reasonable basis test, while others look to the rational basis of the exclusionary regulation, and still other courts look to a compelling state interest.

In Jersawitz v. Hanberry, the Eleventh Circuit applied the rational basis test while considering the First Amendment protections of the producer of a public access television show. Plaintiff, Jack Jersawitz, requested permission from a penitentiary

64. Id. at 21.
65. Telemundo, 2003 U.S. Dist. LEXIS 16637, 17. The City argued its later decision on access was required for public safety reasons pursuant to fire department procedures for outdoor concerts. Id. The court established occupancy restrictions would not preclude Telemundo’s cameras or trucks and found the basis unreasonable. Id. at 18.
66. Id. at 16-19.
67. See infra notes 70-72.
68. See id.
69. See Los Angeles Free Press, Inc. v. City of Los Angeles, 9 Cal. App. 3d 448 (1970) (the distinction among media in the access to crime scenes is reasonable under the government’s police power).
70. See Watson v. Cronin, 384 F. Supp. 652 (D.C. Co. 1974) (the distinction between ex-offenders and others seeking press passes is not based on content of the ideas but is rationally related to ensuring those given special privileges can be trusted not to abuse them).
72. 783 F.2d 1532 (11th Cir. 1986).
warden to interview a prisoner and to replay the interview on his program.\textsuperscript{73} The warden denied him access to the penitentiary because "he was not a representative of the news media" as required by the Bureau of Prisons.\textsuperscript{74} Jersawitz claimed that this regulation was unconstitutional because it discriminated among the media arbitrarily.\textsuperscript{75}

The court used a rational basis inquiry to deny Jersawitz’s request for relief.\textsuperscript{76} Jersawitz argued that the regulation’s purpose was to allow the Bureau of Prisons to deny access to representatives it decided would report fairly and objectively.\textsuperscript{77} The court called this a "slanted premise."\textsuperscript{78} It accepted the Bureau’s position that the regulation’s goal was to maintain security and order within the prison, without having to conduct extensive individual investigations of each applicant.\textsuperscript{79} Therefore, the challenged regulation did not violate Jersawitz’s rights; it did not create an arbitrary classification, but bore a rational relationship to its purpose of maintaining order and security.\textsuperscript{80}

\textbf{C. Who is the Press?}

The Eleventh Circuit’s decision in Jersawitz was not based on

\textsuperscript{73} \textit{Id.} at 1533. Jersawitz produced an editorial type television program shown on a public access channel. \textit{Id.} He was not an employee of the station itself. \textit{Id.} The station was independent from major media organizations and people regularly utilized its facilities free of charge. \textit{Id.}

\textsuperscript{74} \textit{Id.} The federal regulations defined representatives of the news media as "persons whose principal employment is to gather or report news for, . . a radio or television news program of a station holding" a federal license. \textit{Id.} Jersawitz conceded that he did not fall under the definition according to the regulation. \textit{Id.} His attack on the constitutionality of the regulation rested on its failure to give "even-handed" treatment to journalists – if the Bureau of Prisons allowed one journalist to interview inmates; all journalists should have the opportunity to do so. \textit{Id.}

\textsuperscript{75} \textit{Jersawitz}, 783 F.2d at 1533.

\textsuperscript{76} \textit{Id.} at 1534.

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} at 1535.
the classification of media, rather the status of the distinction among members of the media.\textsuperscript{81} However, other courts hold that differential treatment does depend on which entities are included in the definition of "the press."\textsuperscript{82} The distinction is especially important in the immediate Internet inquiry because the First Amendment protections in question cover only "the press."\textsuperscript{83} As such, the press clause does not expressly protect all forms of media and their respective representatives.\textsuperscript{84}

The District of Columbia Circuit detailed the government's definition of entities that qualify as press in \textit{National Security Archive v. Department of Defense}.\textsuperscript{85} National Security Archive ("Archive") requested the Department of Defense classify it as a member of the press in order to pay reduced fees under the Freedom of Information Act ("FOIA").\textsuperscript{86} Archive based this request on its "collection and dissemination of comprehensive government documentation."\textsuperscript{87} It planned to publish a number of document sets devoted to particular topics of interest, and sell the sets to the public via microform.\textsuperscript{88}

The court looked to the legislative history of the FOIA for guidance in deciding whether this activity qualified Archive as a representative of the press.\textsuperscript{89} It determined that courts must

\begin{itemize}
  \item \textsuperscript{81} Jersawitz, 783 F.2d at 1534.
  \item \textsuperscript{82} See discussion \textit{infra} Part II.C.
  \item \textsuperscript{83} U.S. CONST. amend. I. Therefore, if an entity does not fall within the meaning of the press, differential treatment by the government does not violate the Constitution.
  \item \textsuperscript{84} See generally Berger, \textit{supra} note 16.
  \item \textsuperscript{85} 880 F.2d 1381 (D.C. Cir. 1989). The court here uses the term "news media" rather than "the press." These two terms are interchangeable in this case because the court specifically looks to the publishing activities of the news media. \textit{Id.} at 1386. This activity is the same as that found in "the press." For clarity reasons, I will continue to use "the press."
  \item \textsuperscript{86} \textit{Id.} at 1382. The Freedom of Information Act requires fees be paid by agencies requesting information. \textit{Id.} Regulations make an exception for requests by educational institutions, scientific organizations and representatives of the press. \textit{Id.}
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} \textit{Nat'l Sec. Archive}, 880 F.2d at 1386.
  \item \textsuperscript{89} \textit{Id.} at 1385.
\end{itemize}
construe the phrase broadly. The court held that a representative of the press is "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work and distributes that work to an audience."

The court concluded that the Archive did qualify as a representative of the press under this definition. Its application focused on the Archive's role in publishing the document sets. Staff members gathered documents from the raw materials the Archive obtained and supplemented them with indices, finding aids and a computerized retrieval system to make it more accessible. The court found these activities and Archive's intended distribution of the sets entailed "the kind of initiative...associate[d] with publishing or otherwise disseminating that information."

The District Court of the District of Columbia extended this definition of the press to activities on the Internet in early 2003 in Electronic Privacy Information Center v. Department of Defense. Electronic Privacy Information Center ("EPIC") published and distributed books regarding a broad range of privacy, civil liberties

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90. Id. at 1386. Senator Leahy, a sponsor of the amendment in question, stated that "it is critical that the phrase 'representative of the news media' be broadly interpreted is the act is to work as expected...In fact, any person or organization which regularly publishes or disseminates information to the public...should qualify for waivers as a representative of the media." Id. (citing 132 Cong.Rec. S14298 (daily ed. Sept. 30, 1986) (statements of Sen. Leahy)). Representatives English and Kindness agreed with Sen. Leahy adding that the traditional media and "any other entity that is in the business of publishing or otherwise disseminating information to the public qualifies." Id. (citing 132 Cong.Rec. H9463 (daily ed. Oct. 8, 1986) (statement of Rep. English and Rep. Kindness)).

91. Id. at 1386.
92. Id. at 1388.
93. Id. at 1386.
94. Nat'l Sec. Archive, 880 F.2d at 1386.
95. Id. (However, the court warned that it might not find the same outcome in the event that Archive's intention to publish these sets did not come to fruition).
and technological issues. It also published a biweekly newsletter on the World Wide Web accessed by more than 15,000 readers.

EPIC relied on FOIA requests, courts, government agencies and other news sources for the information it published.

The Department of Defense denied EPIC’s request for preferred fee status as a representative of the press. It based this denial on EPIC’s organization as a public interest research center rather than as a conduit for dissemination of information and on EPIC’s tax-exempt status. The court invalidated both of these arguments using principles in Archive. It determined that the description of an organization and its corporate structure are not crucial. Only an organization’s activities are determinative in the press analysis.

EPIC’s activities of gathering information of potential interest to the public, use of editorial skills to turn raw work into distinct work and distribution of that work to an audience qualified it as a representative of the press.

The court further found that EPIC qualified as a representative because it published a periodical on the Internet. The Department of Defense regulation clearly listed publishers of periodicals as acceptable press entities. EPIC’s newsletter reported on the “latest news concerning privacy and civil liberties issues,” featured news items reflecting EPIC’s editorial judgment concerning newsworthiness, and “included EPIC’s analysis of information derived from a variety of sources.”

The fact that

97. Id. at 11.
98. Id. at 12.
99. Id. at 11.
100. Id. at 5.
101. Id. at 12.
103. Id.
104. Id.
105. Id.
106. Id.
107. Id. “Examples. . .include television and radio stations broadcasting to the public at large, and publishers of periodicals. . .who make their products available” to the general public. Id.
EPIC disseminated its newsletter via the Internet rather than through mailboxes made no difference to the court in the press analysis. In fact, the regulation itself anticipated evolution of news delivery and its inclusion in the press category.

**D. The Internet**

The Internet is undoubtedly a "unique and wholly new" communication medium. Tens of millions of people around the world can communicate with each other through the network of interconnected computers known as cyberspace. Cyberspace is "located in no particular geographical location" but is potentially available to "anyone, anywhere in the world." Packages of services that enable anyone to publish a website on the Internet are readily available. People can communicate through a number of online tools, including websites, e-mail, news groups, message boards and chat rooms.

Today, many government agencies, corporations and most traditional media have online operations, some of which bring in substantial revenue or other benefits. News organizations are starting to realize the significance of the Internet "has little to do with pornography or the so-called dumbing down of the young." Like newspapers or television, they see the Internet as "a powerful

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109. *Id.* at 14.
110. *Id.*
112. *Id.* at 851; *Zeran*, 129 F.3d at 334.
114. See Doe v. GTE Corp., No. 02-4323 2003 U.S. App. LEXIS 21345, at 4 (7th Cir. 2003). The usual package consists of three principle components: static addresses through which users reach the web site; a high-speed physical connection through which information passes between the Internet's transmission lines and web sites; and storage space on a server. *Id.*
vehicle for transmitting a new story to a wide audience." 118 This allows the American public to "pick and choose from among seemingly infinite information sources on the Internet." 119 Congress, in turn, has been careful to encourage the unfettered and unregulated development of free speech on the Internet. 120 Consequently, the differential analysis courts sometimes use in determining Internet issues, is an attempt to achieve a unifying effect among the new and traditional media. 121

In *Reno v. American Civil Liberties Union*, the Supreme Court struck down two provisions of the Communications Decency Act of 1996 that sought to protect minors from harmful materials on

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118. *Id.* The Dallas Morning News decided to use the Internet to report breaking news rather than waiting for its next issue to be printed. In doing so, it made sure that no other news organization would scoop the story and it "forestalled the kind of protracted and censorious legal struggle" fought by newspaper publications in the past. *Id.*

119. *See Beger, supra* note 16, at 1382. By 2000, more than half of all U.S. residents reported sometimes going online to get information or news. *Id.* More than three-fourths of those surveyed in 2001 said "the Internet should have the same First Amendment protection as books and newspapers." *Id.*

120. *Batzel*, 333 F.3d at 1027 (9th Cir. 2003). Congressional findings highlight that the Internet has flourished with a minimum amount of government regulation. *Id.* It offers "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.*

121. *See generally* Reno v. ACLU, 521 U.S. 844. "The medium specific approach to mass communication examines the underlying technology of the communication to find the proper fit between First Amendment values and competing interests." *Id.* at 873. The Internet's underlying technology has enabled private people to reap the benefits it offers. *Id.* at 877; *see Zeran*, 129 F.3d 327 (4th Cir. 1997). When Congress enacted the Communications Decency Act of 1996 ("CDA"), it considered the vast amount of speech available, and its possible weight when deciding to allow for special protection. *Zeran* at 328; *see GTE Corp.*, 2003 U.S. App. LEXIS 21345 at 9 (7th Cir. 2003). The Seventh Circuit determined that GTE, an ISP, did not satisfy an ordinary understanding of culpable assistance to a wrongdoer, because ISPs serve an intermediary function and are normally indifferent to the content they transmit. The court likened an ISP's actions to those of a newspaper that carries advertisements and is not liable for any illegal activity advertised within. *GTE Corp.*, 2003 U.S. App. LEXIS 21345 at 9.
the Internet. It confirmed that case law provided no basis for such a decision because one medium’s special justifications were not necessarily applicable to other speakers. However, the Court concluded that governmental regulation of the content of speech on the Internet might be more likely to “interfere with the free exchange of ideas than to encourage it.”

The Ninth Circuit discussed possible legal implications inherent in the technological features of cyberspace and the First Amendment in Batzel v. Smith. Batzel concerned a posting found on the Museum Security Network (“Network”), a website dedicated to museum security and stolen art. Robert Smith wrote an e-mail to the operator of the Network stating a woman he knew, Ellen Batzel, may have stolen World War II paintings in her home. The operator then published that message on the Network message board. Batzel sued Smith, the operator of the Network and others for injuries to her reputation because of the posting.

In its discussion of the defamation issue, the court recognized Congress’ intent to allow certain far-reaching freedoms regarding the Internet with the hopes of encouraging free speech.

122. Reno v. ACLU, 521 U.S. 844 at 849.
123. Id. at 870.
124. Id. at 868 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); FCC v. Pacifica Fund., 438 U.S. 726 (1978)). The Court detailed several characteristics that separate the Internet from other forms of media: communication does not invade an individual’s home or appear on a screen by itself; specific warnings precede questionable content; it is not a scarce commodity; its content is as diverse “as human thought.” Id. at 869-870.
125. Id. at 885.
126. 333 F.3d 1018, 1020 (9th Cir. 2003).
127. Id. at 1020-22.
128. Id. at 1021.
129. Id. at 1022.
130. Id. at 1022. Batzel, an attorney, claimed she lost several prominent clients in California and was investigated by the North Carolina Bar Association. Id. She further claimed that her social reputation suffered. Id.
131. Id. at 1027 (discussing § 230 of the Communications Decency Act of 1996).
Congress found that the “Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development and myriad avenues for intellectual activity.” Courts have further found that such freedoms help maintain “the robust nature of Internet communication” and limit government interference in the medium. However, web-based writers continue to face opposition with a relatively short and sparse history to support their press claims.

132. Batzel, 333 F.3d at 1027.
133. Id. (citing Zeran, 129 F.3d at 330).

In Zeran, an Internet user sued America Online (“AOL”) for unreasonable delay in removing defamatory messages posted by a third party. Zeran, 129 F.3d at 330. The district court granted judgment to AOL. Id. The Fourth Circuit affirmed based on the legislative purpose of § 230 of the Communications Decency Act of 1996. Id. It held that § 230 created a “federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” Id. at 330. Congress’ purpose in enacting such broad protection was the threat that “tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.” Id.

The court further found that AOL fell within the traditional definition of a publisher. Id. It was in the business of making its facilities “available to disseminate the writings composed, the speeches made, and the information gathered by others.” Zeran, 129 F.3d at 330. As a result, the court considered Internet service providers legal publishers, placing the Internet in the same position as books, newspapers and magazines regarding the use of their. Id. at 332.


In Schreibman, the District Court for the District of Columbia faced another Congressional determination of the Internet’s direct relationship with the press protection of the First Amendment. Id. Vigdor Schreibman owned, published and wrote for the Federal Information News Syndicate (“FINS”), a biweekly Internet news publication reporting on federal legislation and governmental policies. Id. at 5.
The Executive Committee of Correspondents denied Schreibman’s request for admission to the Congressional Periodical Press Galleries “on the grounds that the FINS publication failed to meet Press Gallery Rules 1 and 2.” Id. at 5. According to its rules, the Periodical Gallery admitted only “bona fide resident correspondents of reputable standing, giving chief attention to the gathering and reporting of news.” Id. (citing Rule 1 of the Press Gallery rules). The rules further stated that applicants must be “employed by a periodical that is published for profit and is supported chiefly by advertising or by subscription.” Id. (citing Rule 2 of the Press Gallery rules). The committee concluded that FINS was more of sideline hobby than a press worthy venture. Michael Wines, An Internet Service is Denied Access to the Capitol, N.Y. TIMES, Feb. 26, 1996, at D7. (Schreibman used to work for the Electronic Public Information Newsletter but had lost those credentials. He financed his current venture with his retirement pay). Because the district court granted Defendant’s Motion to Dismiss on immunity grounds, it did not discuss the soundness of these rules or the manner in which the Committee of Correspondents applied them.

The Congressional Gallery approves only certain Internet-based publications. See Juliet Eilperin, Denied Press Credentials, Internet Journalist May Sue, ROLL CALL (Roll Call, Inc.), April 1, 1996; Lindsay Sobel, Slate Gets Credentials Despite Lawsuit, THE HILL (Capitol Hill Publishing Corp.) April 23, 1997. Prior to Schreibman’s suit, the Periodical Gallery granted credentials to only one website site, HotWired, the online version of Wired magazine. Eilperin. In addition, the Standing Committee of Correspondents, which oversees the daily gallery, had admitted an online member, PoliticsUSA. Id. Following the filing of the suit, the gallery admitted another publication, online magazine Slate. Sobel. The Committee of Correspondents held these websites to the same rules as other periodicals in determining their access. Id.

Internet writers are also stumbling over terminology used in bringing these suits. See Smith v. Plati, 258 F.3d 1167 (10th Cir. 2001). In Smith, the operator of a website providing information, pictures, chat rooms and message boards covering athletic teams at the University of Colorado at Boulder, sued the University’s Assistant Athletic Director, Plati, for not providing him with information about athletic teams. Id. at 1172. Smith generally alleged that the First Amendment protected “some sort of right to newsgathering.” Id. at 1177. The Tenth Circuit concluded there was no such absolute right in any of its or the Supreme Court’s jurisprudence. Id. at 1178. Overall, the court found that Smith had not alleged any violation of the Constitution and as such, relief was not available to him. Id. at 1171.

Smith did seek an order of mandamus under Colorado law which would have required the University to give him equal access to all information given to the media. Id. In denying this order however, the court did not look to the claim’s substance rather it looked to the relief sought. Smith, 258 F.3d at 1179. The
The First Amendment, the press and the Internet came to a head in the StruttingWolf.com case.\textsuperscript{135} The StruttingWolf.com is a website dedicated to North Carolina collegiate athletic news and events.\textsuperscript{136} The StruttingWolf.com merged with a similar site and is now the largest North Carolina-themed media site on the World Wide Web in terms of traffic and content.\textsuperscript{137}

Plaintiff Jerry Cornwell, the operator of the website, requested press credentials for the Fall 2003 football season from North Carolina State University ("N.C. State") and University of North Carolina at Chapel Hill ("UNC-CH").\textsuperscript{138} Both institutions denied his request.\textsuperscript{139} Press credentials provide unprecedented access to coaches and players, as well as up-to-the-minute statistical analysis.\textsuperscript{140} The refusal meant that Cornwell’s website would be able to provide only second hand and after the fact information at best.\textsuperscript{141}

Athletic directors at N.C. State and UNC-CH regularly issue media credentials for athletic events to print, radio and television media within North Carolina and outside the state.\textsuperscript{142} They also issue credentials to “official” school websites and websites affiliated with various opposing colleges in athletic events.\textsuperscript{143} N.C. State further issues press credentials to “media entities that

\begin{itemize}
\item court ruled an order of mandamus was not appropriate. \textit{Id.}
\item It refused to “control and regulate the general course of Plati’s official conduct… for a series of continuous acts performed under varying conditions.” \textit{Id.}
\item 135. Cornwell v. Bd. of Governors of the Univ. of N.C., No. 03 CVS (Superior Ct. N.C. filed May 15, 2003). Plaintiff’s counsel has since dismissed this case on non-substantive grounds when the North Carolina office of the Institute for Justice closed.
\item 136. Hood, \textit{supra} note 1.
\item 137. Plaintiff’s Complaint at 2, \textit{Cornwell} (No. 03 CVS).
\item 138. \textit{Id.}
\item 139. Plaintiff’s Complaint at 7, 13, \textit{Cornwell} (No. 03 CVS).
\item 140. Hood, \textit{supra} note 1, at 11.
\item 141. \textit{Id.}
\item 142. Plaintiff’s Complaint at 6, 13, \textit{Cornwell} (No. 03 CVS).
\item 143. \textit{Id.}
\end{itemize}
include, among the services offered to their patrons or subscribers, message boards or other mediums" by which visitors can submit opinions or discuss athletic events at N.C. State and elsewhere.144

The North Carolina Chapter of the Institute for Justice, on behalf of Cornwell, sued the universities and their respective athletic directors for, *inter alia*, violation of the First Amendment right to a free press.145 Cornwell claimed that the policies at the schools constituted a prior restraint of the press.146 The activities of and ideas expressed on the website were “fully within the protection of the First Amendment . . . and reflect the exercise of fundamental right to freedom” of the press.147 There was no rational relationship between the restriction and any important government interest in refusing credentials merely because a medium was online and not “official.”148 Cornwell sought a declaratory injunction to end the policy of “refusing to grant media credentials to non-official online media entities and their representatives, and to issue such credentials to online media without prejudice to their status as online, unofficial media and with equal treatment for all media seeking such credentials.”149

III. ANALYSIS

The Supreme Court has not yet ruled on what activities categorize an entity as press in terms of constitutional protection.150 At the time press began receiving preferred treatment under the First Amendment, it consisted of little more than newsprint newspapers.151 Through the years, technology has helped to bring about magazines, the radio, television and most recently, the

144. Id. at 6.
145. Id.
147. Id.
148. Plaintiff’s Complaint at 10, 15, 19, *Cornwell* (No. 03 CVS).
149. Id. at 10, 16.
151. See id. at 438.
Each of these media, at one point or another had to fight to establish itself as press and persuade courts and legislatures to afford it the preferred treatment enjoyed by "the press." While radio and television broadcasters have been successful, Internet journalists face several roadblocks in their attempt to persuade courts to accord them the same perquisites of press to which others are entitled. The First Amendment includes protections for Internet journalists affiliated with traditional media within its scope. However, protection for independent Internet journalists is easily obtained. The courts' concern is obvious – barriers to entry are low. It is possible for any number of people to transmit information, much of it unfiltered and possibly dangerous. This is how the digital culture gained its reputation as "de-civilizing, sexually degenerate, chaotic and irresponsible." However, the growth of the medium has also cultivated journalism that is not a threat to "the coherent flow of information, but potentially its greatest champion." The decision before the courts then, is to determine a workable definition of the press in order to allow for the free flow of information while, at the same time, protecting the public from potential abuse.

A. Proposed Tests for the Internet Age

The outcome in the StruttingWolf.com case, like other Internet suits with similar circumstances, largely depends on whether

152. Id.
153. Id.
154. See discussion supra Part II.D.
155. Id.
156. Id.
157. See supra note 115.
158. See supra note 118.
159. Id.
160. Id.
161. See generally Berger, supra note 16.
Cornwell's website activities fit within the definition of the press.\textsuperscript{162} If so, the Universities' refusal to grant him press credentials would fall under the courts' prior analysis regarding differentiation among media.\textsuperscript{163} The Universities' simultaneous grant to other Internet sites could constitute an invalid governmental treatment of substantive press coverage through an arbitrary classification.\textsuperscript{164}

Since there is no single test promulgated by any court regarding the definition of "the press," I propose using the District of Columbia Circuit's decision in National Security Archive as the basis for determining the activities required to qualify an entity as a member of the press.\textsuperscript{165} While that test will help determine if StruttingWolf.com falls under the definition of the press in general, I further propose to supplement the Archive test with one suggested by Professor Linda Berger to determine whether Cromwell is an Internet journalist with press protections.\textsuperscript{166}

In order for an entity to be a representative of the press under the National Security Archive model, the entity must "gather information of potential interest to a segment of the public, use its editorial skills to turn the raw materials into a distinct work, and distribute the work to an audience."\textsuperscript{167} Legislative history shows Congress intended a broad definition.\textsuperscript{168} The organization's activities are determinative, not its corporate structure, profit-seeking intent, or any other labels or titles associated with it.\textsuperscript{169}

\begin{itemize}
  \item \textsuperscript{162} See discussion supra Part II.C.
  \item \textsuperscript{163} See discussion supra Part II.B.
  \item \textsuperscript{164} Id. Whether or not this classification would be arbitrary is beyond the scope of this note and, as such, I will not discuss its role in this specific case.
  \item \textsuperscript{165} See discussion supra Part II.C. Of the court decision regarding activities associated with the press, I believe this is the one most useful because it discusses government regulations and legislative history that directly pertain to StruttingWolf.com. While this regulation was used to define press in the FOIA context, a similar regulation could be generalized used throughout government entities, of which public universities are a part.
  \item \textsuperscript{166} See Berger, supra note 16.
  \item \textsuperscript{167} See discussion supra Part II.C.
  \item \textsuperscript{168} See supra note 91 and accompanying text.
  \item \textsuperscript{169} See discussion supra Part. II.C.; see also Elec. Privacy Info. Ctr. v.
Professor Berger adopts a functional definition of the press in terms of the author's level of engagement in the process of journalism. She suggests courts should decide an individual is engaged in Internet journalism if he is "involved in a process that is intended to generate and disseminate truthful information to the public on a regular basis." Berger developed this definition through several Circuits' analysis of journalist privileges. For these courts, the ultimate exploration was the individual's purpose, process and product rather than his employment status or the medium used.

**B. Application Under the National Security Archive Test**

1. **Does Cornwell gather information of potential interest to a segment of the public?**

Cornwell gathers information on the University of North Carolina system athletic teams and their Conference. Thousands of people log on to the website in search of this information. In fact, more people look to Cornwell for athletics news on the Internet than to the official school websites. This shows the public's interest in the information Cornwell gathers. In addition,
fans unable to access news of their favorite teams through traditional media such as local newspapers and television are even more interested in Internet provided information.  

2. Does Cornwell use editorial skills to turn the raw materials into a distinct work?

Courts may find the editorial skills required under Archive in a number of ways on websites. Because the Internet is a purely visual medium, Cornwell decides not only what information should be included in a particular segment, but also the way that segment will look. Internet journalists decide which colors and graphics to use, which way to organize the separate segments on one “page” of the site and the links that can take readers to other sites with further information. His editorial function is much like that of a magazine publisher, who insures that the information on the pages is interesting and accurate, and that it is visually pleasant and logically situated.

3. Does Cornwell distribute the work to an audience?

The Internet’s general function is to store information and, through individual websites, to disseminate that information to users. Cornwell’s distribution through StruttingWolf.com is nearly infinite as people from around the world can log on to access its information. Additionally, Cornwell’s choice to open his site to all Internet users rather than restrict it to a limited few allows for distribution to the widest potential audience.  

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177. See discussion supra Part II.D.
178. See supra text accompanying note 109.
179. See Am. Civil Liberties Union, 929 F. Supp at 836.
181. See supra note 134.
182. See discussion supra Part II.D.; see also Am. Civil Liberties Union, 929 F. Supp at 836.
183. See discussion supra Part II.D.
184. See Am. Civil Liberties Union, 929 F. Supp at 837.
that Cornwell disseminates the information through the Internet rather than a more traditional medium “does not change the analysis.”

StruttingWolf.com satisfies the Archive test. Cornwell gathers athletic information, including game play-by-plays, player statistics and feature news stories, of interest to the University of North Carolina system sports fans. He uses editorial skills to turn that information into a distinct, appealing and informative website. He disseminates that information through the website, which allows access to an audience that can potentially amount to millions of readers.

C. The Journalism Test

Berger’s test asks whether the Internet journalist intends to generate and disseminate truthful information to the public on a regular basis. Looking to his purpose, process and product Cornwell’s activities qualify him as an Internet journalist. Cornwell’s purpose is to promote the University of North Carolina system’s athletic teams and provide fans with information and a forum for discussion. In his research process, Cornwell searches out information regarding the University’s teams and players, goings on in the Conference and other news associated with local athletics. He selects which information to include and how to present it, and then disseminates it through the Internet on a regular basis. Cornwell is free to update this information as frequently as he chooses; there is no need to wait to publish.

185. See supra note 110 and accompanying text.
186. See discussion supra Part II.E; see also discussion supra Part III.B.1.
187. See discussion supra Part III.B.2.
188. See discussion supra Part III.B.3; see also supra, note 99 and accompanying text.
189. See supra note 172 and accompanying text.
190. See discussion supra Part III.A.
191. See discussion supra Part II.E.
192. Id.; see also http://www.struttingwolf.com.
193. See discussion supra Part III.A.
194. See supra note 118.
Cornwell’s publication is similar to that found in newspapers and magazines.\textsuperscript{195} Struttingswolf.com includes team schedules, game scores, player features and recruiting news, amongst others.\textsuperscript{196} Cornwell’s desire for press credentials further demonstrates his intent to disseminate truthful information.\textsuperscript{197} Without the credentials, he must rely on second hand information.\textsuperscript{198} His indirect access to coaches and players results in second-hand information, denying Internet user’s up to the minute statistical analysis.\textsuperscript{199} Granting Cornwell access the other media enjoy would remedy these limitations and expand his disseminated product.\textsuperscript{200}

IV. IMPACT

Congress has been vocal about the freedoms it chooses to grant the Internet.\textsuperscript{201} It sees the Internet as a source of true diversity of political discourse, of cultural development and of intellectual activity.\textsuperscript{202} As such, its mission is to encourage the development of unregulated free speech on the Internet.\textsuperscript{203} An accurate analysis of Internet journalists as press promotes this broad grant of freedom to individuals.\textsuperscript{204} The Internet’s communication is only as strong as the individual users who choose it as their medium of expression. Allowing those individuals who qualify as Internet journalists equal protections of the press assures that Congress’ intention of limited government interference retains real influence.\textsuperscript{205}

Courts are also beginning to declare their intentions in terms of

\begin{itemize}
\item \textsuperscript{195} See generally http://www.struttingswolf.com.
\item \textsuperscript{196} See id.
\item \textsuperscript{197} See supra notes 139-142 and accompanying text.
\item \textsuperscript{198} See discussion supra Part II.E.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} See discussion supra Part II.B.
\item \textsuperscript{201} See discussion supra Part II.D.
\item \textsuperscript{202} See supra note 134 and accompanying text.
\item \textsuperscript{203} See supra note 121 and accompanying text.
\item \textsuperscript{204} See discussion supra Part III.
\item \textsuperscript{205} See supra note 135 and accompanying text.
\end{itemize}
the effect of the Internet and its role as a powerful vehicle for transmitting communication between millions of people.\textsuperscript{206} Courts consider Internet service providers legal publishers and grant special protections in an effort to place them in the same position as books, newspapers and magazines.\textsuperscript{207} If they were to consider Internet journalists in the same light, those journalists would also be in the same position as authors of books, newspapers and magazines. Courts’ practice of looking at media in general, rather than a specific medium used, furthers this analysis and supports its outcome.\textsuperscript{208}

Using the \textit{National Security Archive} analysis in determining Internet journalists’ position as members of the press, the government would grant the rights due to journalists while weeding out other Internet publishers.\textsuperscript{209} Internet journalists would receive more credibility and would be more readily able to gather and disseminate news. This would help the Internet to remain a source of true diversity and exchange of ideas.\textsuperscript{210} People would have a real choice.\textsuperscript{211} By granting journalists not affiliated with traditional media equal access, Internet users who prefer to receive their news from cyberspace will have available more thorough news stories and discussions.\textsuperscript{212}

At first look, this analysis may seem to open the door too wide for people calling themselves Internet journalists. This is, however, just the first step in the overall issue of equal access.\textsuperscript{213} The \textit{National Security Archive} test looks to determine who qualifies as press.\textsuperscript{214} This distinction, by itself, only means that the First Amendment protects that particular Internet journalist from a government action that differentiates it from others through an

\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{See supra} note 110 and accompanying text.
\textsuperscript{209} \textit{See} discussion \textit{supra} Part III.A.
\textsuperscript{210} \textit{See} discussion \textit{supra} Part II.D.
\textsuperscript{211} \textit{See supra} note 120 and accompanying text.
\textsuperscript{212} \textit{See supra} note 118.
\textsuperscript{213} \textit{See} discussion \textit{supra} Part II.B.
\textsuperscript{214} \textit{See} discussion \textit{supra} Part II.C.
arbitrary classification. That distinction alone does not create an umbrella of per se protections for all Internet journalists.

The government cannot grant favorable treatment to certain members of the press without influencing the substantive coverage of public events. It can however, enact exclusionary regulations that are not arbitrary. To satisfy this limitation, Courts have recognized that regulations with a rational relationship to any important government interest are not arbitrary. If the government meets this test, it may differentiate, through exclusionary regulations, among members of the press, including Internet journalists.

This First Amendment analysis balances the interests of Internet journalists and the government, and in the end, the public wins. Where an Internet journalist qualifies as press under the Archive test, and the government cannot show the classification is not arbitrary, the Internet journalist is afforded rights equivalent to those of traditional media, providing unfettered newsgathering to the Internet audience. The audience therefore, has a choice as to the manner in which it acquires news. On the other hand, where an Internet journalist qualifies under the Archive test and the government can show its regulation does not arbitrarily classify among the media, the Internet journalist is not denied based on the medium of expression. Courts have held this a constitutional denial of access to members of the traditional press as well. This practice is well within First Amendment press protections.

V. CONCLUSION

The First Amendment’s press clause provides the press protection against prior restraint by the government, including any

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215. Id.
216. See discussion supra Part II.B.
217. See supra notes 35-36 and accompanying text.
218. See supra notes 70-72.
219. See supra notes 68-72 and accompanying text.
220. Id.
221. See supra notes 68-72 and accompanying text.
differentiation among members of the media.\textsuperscript{222} Once information is generally available to the news media, the government may not arbitrarily grant access to one representative over another.\textsuperscript{223} During its relatively young life, the Internet has attracted a number of journalists with its publishing freedoms, and with its accessibility and convenience has attracted a number of users.\textsuperscript{224} The Internet is decidedly a different type of medium, but journalists’ activities within the medium are not.\textsuperscript{225} How these journalists fit with other, more traditional, members of the press is a question courts have not yet directly addressed.\textsuperscript{226}

With the \textit{National Security Archive} test, defining Internet journalists as members of the press by standards required of traditional media allows for unification of the old and the new. This analysis does not consider any special circumstances of the Internet and does not bestow special treatment.\textsuperscript{227} It merely looks to the activities of journalists who seek protection under the press clause.\textsuperscript{228} If the Internet journalist’s newsgathering and editorial activities are the same as those of print or broadcast journalists, the medium of its dissemination should not eliminate, per se, First Amendment rights.\textsuperscript{229}

\textit{Zrinka Rukavina}

\begin{footnotes}
\footnote{222}{See discussion supra Part II.A.}
\footnote{223}{See discussion supra Part II.B.}
\footnote{224}{See discussion supra Part II.D.}
\footnote{225}{See supra note 125.}
\footnote{226}{See discussion supra Part II.C and Part III.}
\footnote{227}{See discussion supra Part III.A.}
\footnote{228}{Id.}
\footnote{229}{See supra note 110 and accompanying text.}
\end{footnotes}