

# A (Key) Stroke of Bad Luck

**When ‘Correcting’ an  
Online Publication Can Hurt You**

**by Lauren James-Weir and Charlotte M. Howells**



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ew Jersey courts, both state and federal, have consistently stood on the frontier of free speech jurisprudence, and their position remains unchanged with respect to the emerging law concerning online publication. In May 2018, the New Jersey Supreme Court issued a landmark decision regarding what constitutes “republishing” on the internet, in *Petro-Lubricant Testing Laboratories, Inc. v. Adelman*.<sup>1</sup> This decision has made waves for online publishers and their counsel, as it impacts when the short one-year statute of limitations for defamation actions is re-triggered. Given the scope of online publication—which encompasses a multitude of authors, ranging from Twitter novices to salaried journalists, and an

simply pop up. An enormous amount of content is free, in part because the financial barrier to entry for publishers is so low.

With the rise of online publication, the legal landscape has also changed. Defamation law in particular has adapted to technological advances. The majority of jurisdictions, including New Jersey, have adopted the single publication rule for internet publication. Specifically, in New Jersey, actions for defamation must be brought within one year of the publication of the allegedly defamatory material.<sup>2</sup> Generally, each communication of the same defamatory material made by the same publisher is a separate publication, for which a separate cause of action arises.

The single publication rule is an exception to this general rule. In New Jersey, the single publication rule applies to mass publications for which there is a single cause of action for defamation

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unending stream of content, from memes to 3,000-word articles to online-only published books—the questions left unanswered by the *Petro* Court must influence the editorial process.

### Defamation on the Internet

As internet use becomes more prevalent, so does online publishing. The internet has become the new platform to spread content on an unprecedented scale, and has altered the landscape for authors and consumers of information. Anyone with an internet connection can now transmit information to a mass audience. In turn, a consumer of content need not seek out a particular article or piece of information; content may

that arises at the first publication, regardless of the number of copies distributed or sold.<sup>3</sup> For example, the single publication rule would bar the resetting of the statute of limitations when multiple copies of a printed article are widely distributed and read.<sup>4</sup> The single publication rule was designed to mitigate the harshness and unfairness of the general rule by preventing the constant tolling of the statute of limitations and by providing that all damages suffered by a defamation plaintiff be consolidated in a single case, which prevents potential harassment of defendants through a multiplicity of suits.<sup>5</sup>

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cable, re-triggers the statute of limitations. Republication occurs upon a separate aggregate publication on a different occasion.<sup>6</sup> For example, unlike the mass publication of one issue of a magazine or one edition of a book, the reprinting of an article in the next issue of a magazine, the delivery of the second edition of a book, or the substantial modification of a publication is deemed a republication, which gives rise to a new cause of action and re-triggers the statute of limitations.<sup>7</sup>

New Jersey first applied the single publication rule to internet publications in 2005, when the state Supreme Court noted that other jurisdictions almost unanimously held the single publication rule should be applied to internet publications.<sup>8</sup> In following these other jurisdictions, the Court keenly observed that the internet is “particularly suited to application of the single publication rule because it is rapidly becoming (if it has not yet already become) the current

standard for the mass production, distribution and archival storage of print data and other forms of media.”<sup>9</sup>

Following this development, New Jersey has endeavored to treat publication, whether online or in print, equally under the law. Generally, the medium of publication does not bear on an author’s potential tort liability, nor on protection of speech afforded to a speaker.<sup>10</sup> Thus, New Jersey has adopted a balanced approach to defamation on the internet; however, as further detailed below, as more users publish online, and as online publications reach ever-increasing audiences, the law has continued to adapt, particularly with respect to what constitutes ‘republication’ online.

### Is Hyperlinking Republication?

Online publication possesses certain characteristics absent in print publication. For example, online publications may be revised or re-posted instantaneously. Online authors may permit their audience to instantly comment on their work. Overall, online publication is inherently capable of reaching a wider, more diverse audience because in many instances, content posted online is free to read and susceptible to virtually unlimited distribution. As relevant to defamation law, courts have addressed whether simply hyperlinking to other content constitutes a republication of that previously published material. The Third Circuit has answered this question in the negative, holding that simply linking to another article does not constitute a republication of that material.<sup>11</sup> The Third Circuit reasoned that, while a link and reference may bring readers’ attention to the existence of an article, they do not republish the article.<sup>12</sup> In essence, the link does not alter the substance of the original publication, as does the release of a new edition of a book. This approach protects the First Amendment rights of online authors, who could otherwise face exposure any-

time a website is linked or updated, or some minor technical change is made. Accordingly, there is a legal distinction between linking, adding unrelated content, or making other minor changes to a website and adding substantive content or making significant alterations to previously published material.<sup>13</sup>

Of course, from an author’s perspective, it may be difficult to assess what level of manipulation of linked material triggers republication. For example, an author who not only references previously published material through hyperlinking, but also *restates* the defamatory material, may trigger republication.<sup>14</sup> Accordingly, authors bear the burden to determine whether the text of hyperlinks or commentary to previously published material could put them at risk for defamatory content, even though they did not directly author the defamatory content. Making publication even more complicated, determinations as to whether hyperlinking constitutes republication are made on a case-by-case basis. Thus, online publishers must exercise caution, in spite of the fast-paced online publication cycle.

### ***Petro-Lubricant Testing Labs v. Adelman***

The New Jersey Supreme Court recently addressed the issue of what constitutes republication on the internet in *Petro*. The case involved edits made to an existing online article subsequent to the expiration of the one-year statute of limitations for defamation. In a 4-3 opinion, the majority set forth a two-pronged test, holding that republication occurs to an online article if an author makes a material and substantive change to the original defamatory article. According to the majority:

- A *material change* is one that relates to the defamatory content of the article at issue. It is not a technical website modification or the posting on the

website of another article with no connection to the original defamatory article.

- A *substantive change* is one that alters the meaning of the original defamatory article or is essentially a new defamatory statement incorporated into the original article. It is not the mere reconfiguring of sentences or substitution of words that are not susceptible of conveying a new defamatory meaning to the article.

Applying this test to the case before it, the majority found that a number of the changes made to the article at issue were minor and, consequently, did not constitute a republication. The Court reached a different conclusion with respect to one edit—the replacement of the phrase “[Wintermute] also allegedly forced workers to listen to and read white supremacist materials” with “John Wintermute also allegedly regularly subjected his employees to ‘anti-religion, anti-minority, anti-Jewish, anti-[C]atholic, anti-gay rants.’” The majority concluded there was a genuine issue of fact as to whether this modification was substantive—that is, whether it injected a wholly new defamatory statement into the article.

Justice Lee Solomon, in a concurring opinion joined by Chief Justice Stuart Rabner and Justice Walter Timpono, disagreed that changes further delineating the term ‘white supremacist’ created a question of fact as to whether there had been a republication. He also noted the chilling effect the majority’s opinion will have on the media, due to the threat of a trial on the merits in the event a court determines there is a question of fact as to whether a change is material and substantive.

The majority’s opinion raises the unanswered question of *what statements* in a ‘republished’ article are subject to a new statute of limitations. For example, the Court found that many of the modi-

fications made to the article at issue were minor and not substantively different from the original statements. However, the majority's holding that there was a question of material fact as to whether the modification to the white supremacist statement constituted a republication renders it unclear whether: 1) a new statute of limitations may be triggered as to *all* of the defamatory statements in the *entire article*, even though the defamatory meaning of the majority of those statements remained substantively the same since the original publication date; or 2) any re-triggering of the statute of limitations would be limited to *only* the newly inserted defamatory statement, which seems to be an issue of original publication of a new defamatory statement, not a republication.

The test established by the majority in *Petro* increases the likelihood that a trial court faced with the question of whether or not there has been a republication will deny summary judgment motions, holding that the question is one for the jury. The practical effect of this will be far fewer corrections or modifications made by authors to their online publications, for fear of reviving or extending the applicable statute of limitations. In today's internet world, where news is disseminated at lightning speed, often by authors who lack formal journalistic training, it could be argued that the *Petro* decision may result in an increase in the spread of 'fake news' on the internet, as authors will be hesitant to fix inaccuracies discovered in their publications for fear of extending or re-triggering the statute of limitations for a claim of defamation as to those publications. ¶

4. *Petro-Lubricant Testing Labs., Inc. v. Adelman*, 233 N.J. at 243.
5. *Churchill v. State*, 378 N.J. Super. at 478-79.
6. Restatement (Second) of Torts, 577A(3) cmt. d.
7. *Petro-Lubricant Testing Labs., Inc. v. Adelman*, 233 N.J. at 251.
8. *Churchill v. State*, 378 N.J. Super. at 479.
9. *Id.* at 483.
10. *Too Much Media, LLC v. Hale*, 206 N.J. 209, 234 (2011).
11. *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012), as corrected (Oct. 25, 2012).
12. *Id.*
13. *Compare Churchill v. State*, 378 N.J. Super. 471 (App. Div. 2005) with *In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (3d Cir. 2012).
14. *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 278 (S.D.N.Y. 2016).

This article was originally published in the April 2019 issue of New Jersey Lawyer, a publication of the New Jersey State Bar Association, and is reprinted here with permission.

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## Endnotes

1. *Petro-Lubricant Testing Labs., Inc. v. Adelman*, 233 N.J. 236 (2018).
2. N.J.S.A. 2A:14-3.
3. *Churchill v. State*, 378 N.J. Super. 471, 478 (App. Div. 2005).