

5-1-2014

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Recommended Citation

Galdieri, Patrick Francis, "Protecting Bloggers: The Federal Media Shield is Actually a Sword" (2014). *Law School Student Scholarship*. 468.

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Protecting Bloggers: The Federal Media Shield is Actually a Sword

Section I

Introduction

In recent years, various federal media shield bills encountered inevitable criticism which ultimately led to their demise. That criticism has largely centered on definitional concerns in light of evolving online entities, perhaps most notably blogs. While internet premised arguments against a federal media shield once held merit, they are no longer convincing, as Congress has modified the legislation.

The particular issue discussed in this paper is that the Free Flow of Information Act of 2013 (hereinafter, “FFIA”) appropriately protects bloggers’ confidentiality right for their sources. This subject is particularly germane following the Senate Judiciary Committee’s recent FFIA amendment approval which delineates the bill’s scope of coverage. That decision elicited conflicting responses from the internet community, ranging from staunch disapproval to ardent support. This paper takes the position that the FFIA as amended overcomes prior concerns, protecting bloggers and the online community alike.

This paper will address the various topics demonstrating the FFIA’s protection of bloggers in the following order: Section II will discuss the historical progression towards a federal media shield, Section III will discuss arguments purporting definitional concerns regarding coverage of bloggers with rebuttals to those arguments, Section IV will discuss recent examples of unprotected bloggers with arguments that the FFIA would have provided protection, and Section V will discuss media shield laws’ impact on bloggers at the state level.

Section II

The Progression towards a Federal Media Shield

There is no federal statute to protect a reporter's qualified or conditional right to refuse to reveal confidential sources.¹ Consequently, the First Amendment governs the extent of the reporters' privilege under federal law.² The Supreme Court of the United States has confronted the issue of "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment."³ In *Branzburg*, a reporter wrote a detailed article involving observations of two drug dealers manufacturing drugs.⁴ The reporter was then subpoenaed by a grand jury and refused to identify the two drug dealers discussed in the article.⁵ The Supreme Court rejected the reporter's argument of privilege under state law and required that he appear before the grand jury and answer questioning.⁶ Still, *Branzburg* suggested federal enactment of a reporters' privilege, specifically providing that:

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.⁷

Branzburg noted that there is "merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas."⁸ Moreover,

¹ See *Too Much Media, LLC v. Hale*, 206 N.J. 209, 226 (2011).

² *Id.*

³ See *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

⁴ *Id.*

⁵ *Id.* at 667-668.

⁶ *Id.* at 709.

⁷ *Id.* at 706.

⁸ *Id.*

Branzburg recognized that the First Amendment “comprehends every sort of publication which affords a vehicle of information and opinion.”⁹

Following *Branzburg*, several federal appeals courts acknowledged a conditional reporters’ privilege in varying contexts such as libel suits and civil actions to which the reporter was not a party.¹⁰ However, the turn of the century paralleled federal courts’ growing apprehension to identify a constitutionally based reporters’ privilege.¹¹ Representative of such apprehension was Seventh Circuit Judge Richard A. Posner’s opinion in which he provided that “[w]e do not see why there needs to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.”¹² That 2003 opinion signified the federal courts’ transition to reject a constitutionally based reporters’ privilege.¹³ So, the news media turned to Congress for a reporters’ shield law as federal actions increasingly imposed fines and jail time.¹⁴

Over the last ten years, several media shield bills have died in Congress.¹⁵ But there is presently a media shield bill, the Free Flow of Information Act of 2013 (hereinafter “FFIA”), which recently passed the Senate Judiciary Committee and now awaits a full vote in the Senate.¹⁶

The FFIA’s stated purpose is “[t]o maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons

⁹ *Id.* at 704.

¹⁰ See Jane E. Kirtley, *Mask, Shield, and Sword: Should the Journalist's Privilege Protect the Identity of Anonymous Posters to News Media Websites?*, 94 Minn. L. Rev. 1478, 1500 (2010).

¹¹ *Id.* at 1501.

¹² *Id.* (quoting *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003)).

¹³ *Id.*

¹⁴ *Id.* at 1502.

¹⁵ See Emily Bazelon, *Better Than No Shield At All*, Slate.com (Sep. 24, 2013, 1:23 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/09/media_shield_law_matt_drudge_is_wrong_the_senate_bill_is_pretty_good.html.

¹⁶ See Bazelon, *supra* note 15.

connected with the news media.”¹⁷ The FFIA prohibits any entity or employee of the judicial or executive branch or an administrative agency of the federal government, in any matter arising under federal law, from compelling a covered person to testify or produce any document related to information obtained or created as part of engaging in journalism unless a court makes specified determinations.¹⁸

In both criminal and civil cases, to overcome the prohibition the court is required to make a determination by a preponderance of the evidence that “the party seeking to compel disclosure of the protected information has exhausted all reasonable alternative sources of the protected information.”¹⁹

Unique to civil cases, the court must additionally determine by a preponderance of the evidence that “the protected information sought is essential to the resolution of the matter” and that “the interest in compelling disclosure clearly outweighs the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information.”²⁰

Unique to criminal cases, the court must additionally determine by a preponderance of the evidence that “there are reasonable grounds to believe that a crime has occurred” and that “there are reasonable grounds to believe that the protected information sought is essential to the investigation or prosecution or to the defense against the prosecution.”²¹ Such a determination shifts the burden to the covered person to show “by clear and convincing evidence that disclosure of the protected information would be contrary to the public interest, taking into

¹⁷ See *Tracking the U.S. Congress*, GovTrack.us (May 16, 2013), <https://www.govtrack.us/congress/bills/113/s987/text>.

¹⁸ See *Tracking the U.S. Congress* (May 16, 2013).

¹⁹ See *Tracking the U.S. Congress* (May 16, 2013).

²⁰ See *Tracking the U.S. Congress* (May 16, 2013).

²¹ See *Tracking the U.S. Congress* (May 16, 2013).

account both the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information and the public interest in compelling disclosure.”²²

Furthermore, the prohibition does not apply to information “necessary to stop, prevent, or mitigate a specific case of death, kidnapping, substantial bodily harm, conduct that constitutes a criminal offense that is a specified offense against a minor, and incapacitation or destruction of critical infrastructure.”²³ Finally, the FFIA includes a national security exception. So the prohibition does not apply if the court determines by a preponderance of the evidence that the classified information sought would “materially assist the federal government in preventing or mitigating an act of terrorism or other acts that are reasonably likely to cause significant and articulable harm to national security.”²⁴

The compromise amendment of the FFIA, which passed the Senate Judiciary Committee in September 2013, establishes the bill’s definition of “journalist” and “covered journalist.”²⁵ In other words, the amendment delineates who is protected by the shield. Congress has faced a great deal of criticism in the past in defining who is covered by the bill in light of modern internet reporting. This paper will address the arguments against a federal shield law in the context of internet entities and will show why the supporting arguments are more persuasive. Specifically, this paper takes the position that the FFIA, as recently amended, appropriately protects online entities. Section III will detail that the FFIA’s “covered journalist” definition provides appropriate protection to bloggers.

²² See *Tracking the U.S. Congress* (May 16, 2013).

²³ See *Tracking the U.S. Congress* (May 16, 2013).

²⁴ See *Tracking the U.S. Congress* (May 16, 2013).

²⁵ See Bazelon, *supra* note 15.

Section III

Bloggers are Protected by the FFIA’s “Covered Journalist” Definition

With respect to the implementation of a federal media shield law, judges, senators, and witnesses alike have expressed concerns about federal courts defining “journalist” in light of new avenues of reporting via the internet.²⁶ District of Columbia Circuit Judge Sentelle articulated the conundrum federal courts face in defining “journalist,” stating that:

Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical ‘blogger’ sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? How could one draw a distinction consistent with the court's vision of a broadly granted personal right?²⁷

Other critics of a federal media shield argue that “faced with this technological moving target... the doctrine is destined to be mired in definitional difficulties in at least some cases, and likely in a growing number of them.”²⁸ Those opinions are premised on inconsistent findings of reporters’ privilege in federal courts varying from broad to narrow classifications of protected journalists.²⁹ Although the wide spectrum of individuals in the blogosphere poses an obstacle to federal courts, it is overcome by enacting legislation that focuses on whether the newsgathering function is performed.

The foregoing reservations about defining “journalist” in light of the amorphous blogosphere are “unfounded for a federal shield law.”³⁰ Whereas definitional concerns are

²⁶ See James Thomas Tucker & Stephen Wermiel, *Enacting A Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 Am. U. L. Rev. 1291, 1312 (2008).

²⁷ See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1156-1157 (D.C. Cir. 2006) (Sentelle, J., concurring).

²⁸ See RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 Mich. L. Rev. 1221, 1241-1242 (2013).

²⁹ *Id.* at 1241.

³⁰ See Tucker & Wermiel, *supra* note 26, at 1312.

understandable, they are inconsequential here if Congress' definition of covered journalists focuses on the function being performed.³¹ Gregg Leslie, Legal Director for the Reporters Committee for Freedom of the Press, has stated that Congress should concentrate on functionality, specifically explaining that “[t]he medium doesn't answer the question. It has to do more with the function that the person is performing... If the Bloggers' involvement is to report information to the public and to gather information for that purpose openly then they should be treated like a journalist.”³² Accordingly, in consideration of continually changing means spawned by the internet like blogs, Congress can address definitional concerns by delineating “what the person seeking coverage as a journalist was doing when he or she received the information being subpoenaed, and not on the medium of communication they used for their stories, such as blogging.”³³

First, the plain language of the FFIA's definition of “covered journalist” shows such a focus on the newsgathering function. The September 12, 2013 amendment to the FFIA defines “covered journalist” as an employee, independent contractor, or agent of an entity that disseminates news or information “by means of... news website, mobile application, or other news or information service... with the primary intent to investigate events and procure material... in the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing on such matters.”³⁴

As such, “covered journalist” embraces the functional approach suggested by Gregg Leslie, overcoming concerns that bloggers are not appropriately protected. Importantly, the

³¹ *Id.*

³² *Id.* (quoting FixYourThinking.com, *Are Bloggers Journalists?*, <http://jackwhispers.blogspot.com/2006/03/are-bloggers-journalists-courts-seem.html> (Mar. 28, 2006)).

³³ *Id.* at 1313.

³⁴ See *United States Senate: Committee on the Judiciary*, Judiciary.Senate.gov (Sep. 12, 2013), <http://www.judiciary.senate.gov/legislation/mediashield/Feinstein/ALB13767.pdf>.

bill's plain language explicitly requires that to qualify for protection, a "covered journalist" must possess intent to gather news or information and disseminate it to the public.³⁵ Recognizing that the FFIA's focus on newsgathering provides protection to deserving bloggers, Kurt Wimmer, general counsel for the Newspaper Association of America, wrote "[t]rue, the blogger at issue would have to be practicing journalism – which is the test that bloggers seem to prefer."³⁶ The focus on newsgathering is beneficial for bloggers because it is likely that the circumstances under which a blogger seeks FFIA protection of confidential sources also entail gathering, recording, or publishing news or information.³⁷

Next, the FFIA contains another avenue to qualify as a "covered journalist" which likewise applies the functional standard. Under this section, a "covered journalist" is a person who "at the inception of the process of gathering the news or information sought had the primary intent to investigate issues or events and procure material in order to disseminate to the public news or information" and "was an employee, independent contractor, or agent of an entity or service that disseminates news or information... for any continuous one-year period within the 20 years prior to the relevant date or any continuous three-month period within the 5 years prior to the relevant date."³⁸ Additionally, "a student participating in a journalistic medium at an institution of higher education on the relevant date" is covered.³⁹

This section's plain language ensures coverage to parties who gather and disseminate news with reasonably recent and sufficient experience in so doing. For purposes of protecting freelance and independent bloggers this section crucially allows for the prior experience to be as

³⁵ See Bazelon, *supra* note 15.

³⁶ See Kurt Wimmer, *The Senate's media shield bill protects bloggers and they should support it*, GigaOM.com (Sep. 21, 2013, 3:00 PM), <http://gigaom.com/2013/09/21/the-senates-media-shield-bill-protects-bloggers-and-they-should-support-it/>; See Bazelon, *supra* note 15.

³⁷ See Wimmer, *supra* note 36.

³⁸ See *United States Senate: Committee on the Judiciary* (Sep. 12, 2013).

³⁹ See *United States Senate: Committee on the Judiciary* (Sep. 12, 2013).

an independent contractor. Just as important to the blogosphere, this section covers only those who intend to carry out the newsgathering function. Accordingly, by not tethering this section's coverage to just established media outlets, Congress has authorized federal courts to protect bloggers who have informal but effective work experience performing the newsgathering function.

The FFIA's "covered journalist" provision nevertheless has generated polarizing assessments. For instance, Matt Drudge, creator and editor of news aggregator the Drudge Report, took to Twitter with sharp criticism of the bill's amendment, writing that "[g]ov't declaring who qualifies for freedom of press in digital age is ridiculous! It belongs to anyone for any reason. No amendment necessary."⁴⁰ Drudge further noted that a "[f]ederal judge once ruled Drudge 'is not a journalist, a reporter, or a newsgatherer.' Millions of readers come a day for cooking recipes?!"⁴¹ Finally, Drudge pointedly disparaged Senator Dianne Feinstein for her remarks supporting the amendment, writing that "[c]omments from Sen. Feinstein yesterday on who's a reporter were disgusting. 17-year old 'blogger' is as important as Wolf Blitzer. Fascist!"⁴²

Matt Drudge's ridicule of the government defining "covered journalist" is likely derived from his experience in federal court. In *Blumenthal v. Drudge*, the United States District Court was confronted with a defamation action involving statements Drudge published on the internet.⁴³ There, Blumenthal alleged that Drudge made defamatory remarks on America Online through his electronic publication, the Drudge Report, a gossip column "focusing on gossip from Hollywood and Washington D.C."⁴⁴ Drudge's purported defamatory statements provided that Blumenthal, recently appointed Assistant to President Obama, had previously abused his

⁴⁰ See Matt Drudge, *Twitter* (Sep. 13, 2013), <https://twitter.com/DRUDGE>.

⁴¹ See Drudge, *Twitter* (Sep. 13, 2013).

⁴² See Drudge, *Twitter* (Sep. 13, 2013).

⁴³ See *Blumenthal v. Drudge*, 992 F. Supp. 44, 46 (D.D.C. 1998).

⁴⁴ *Id.* at 46-47.

spouse.⁴⁵ America Online, Inc. filed a motion for summary judgment and Drudge filed a motion to dismiss or transfer for lack of personal jurisdiction.⁴⁶

The United States District Court granted America Online's motion and denied Drudge's motion.⁴⁷ In granting America Online's motion for summary judgment, the court determined that Congress intended for the Communications Decency Act to provide immunity for the internet service provider "even where the [ISP] has an active, even aggressive role in making available content prepared by others."⁴⁸ The court noted that such immunity was intended to promote self-policing of internet service providers and extends "even where the self-policing is unsuccessful or not even attempted."⁴⁹ Further, in denying Drudge's motion to dismiss or transfer for lack of personal jurisdiction, the court found that Drudge satisfied the District of Columbia Long-Arm statute.⁵⁰

More significantly, the court found that Drudge did not qualify under the news gathering exception of the Long-Arm statute, noting that "Drudge is not a reporter, journalist or newsgatherer. He is, as he himself admits, simply a purveyor of gossip."⁵¹ Drudge referenced that determination in his aforementioned tweet where he criticized the FFIA's amended definition of "covered journalist." But, upon motions by both parties to compel discovery including information regarding Drudge's sources, the District Court assumed that Drudge qualified for the reporters' privilege under the First Amendment.⁵² That assumption is evidenced

⁴⁵ *Id.* at 46.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 52.

⁴⁹ *Id.*

⁵⁰ *Id.* at 57.

⁵¹ *Id.*

⁵² See *Blumenthal v. Drudge*, 186 F.R.D. 236, 244-245 (D.D.C. 1999).

in the finding that Blumenthal failed to meet his burden to compel Drudge’s disclosure by not exhausting all reasonable alternative sources of the information.⁵³

The court’s review of Drudge’s reporters’ privilege claim “without questioning or discussing Drudge’s qualifications” demonstrates that Drudge was a newsperson for purposes of the First Amendment despite not meeting the news gathering exception of the Long-Arm statute.⁵⁴ Ultimately the parties reached a settlement in which Blumenthal paid Drudge a sum of money for travel costs.⁵⁵ Additionally, the New Jersey Supreme Court found “the Drudge Report has evolved into a forum that shares similarities to traditional media” and used it as an example of reporting that would satisfy the state’s shield law.⁵⁶ Therefore it is clear that Drudge’s tweets in which he infers he was deemed not a journalist are misguided in the context of reporters’ privilege.

Reactions to Drudge’s criticism from those within legal and online communities show that the FFIA provides reasonable protection to bloggers. Soon after Drudge’s comments, several proponents of the bill’s impact on bloggers candidly responded.⁵⁷ For example, Emily Bazelon, Senior Research Fellow at Yale Law School and Senior Editor at online magazine Slate, explained that protection under the bill’s recent amendment does not require work for pay.⁵⁸ While the precise word “blog” is not written in the bill, bloggers likely will be protected as state shield laws with similar broad language to the FFIA’s have afforded such protection.⁵⁹ Next, Wimmer also directly addressed Drudge’s mistaken insinuations that the bill would have a

⁵³ *Id.* at 245.

⁵⁴ See Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 Yale L. & Pol’y Rev. 97, 136 (2002).

⁵⁵ *Id.*

⁵⁶ See *Too Much Media*, 206 N.J. at 237.

⁵⁷ See Wimmer, *supra* note 36.

⁵⁸ See Bazelon, *supra* note 15.

⁵⁹ See Bazelon, *supra* note 15.

negative impact on bloggers, stating “[w]ell, no. The bill does protect bloggers, which is why the Online News Association supports it.”⁶⁰

Furthermore, the FFIA’s judicial discretion provision resolves any lingering concerns that the bill does not protect bloggers. This equitable provision states that a federal judge “may exercise discretion to avail the person of the protections of this Act if... the judge determines that such protections would be in the interest of justice and necessary to protect lawful and legitimate news-gathering activities under the specific circumstances of the case.”⁶¹ Thus, even assuming a blogger unfairly falls outside the scope of the aforementioned “covered journalist” provision, fairness principles dictate that the judge provide protection. Stated differently, the amendment’s broad judicial discretion provision allows a federal court to carry out justice when appropriate. Wimmer suggested that implementing this safety valve in conjunction with the functional approach provides reasonable protection to bloggers, writing that:

Some claim that anyone at all should be considered a journalist. But under this bill, anyone *can* be covered as a journalist, as long as the writer is actually committing journalism. Those who claim anyone at all must be covered are really suggesting a poison pill to kill any privilege. It’s naïve to suggest that Congress would pass a privilege that applies to everyone.⁶²

Even some past skeptics have acknowledged the judicial discretion provision’s positive impact on the protection afforded bloggers. For instance, David Greene, Senior Staff Attorney to digital rights group Electronic Frontier Foundation, argued that the amendment’s judicial discretion provision extends greater protection to bloggers than any previous federal shield bill, arguing that:

The importance of this provision cannot be overstated. It provides an avenue for non-mainstream and citizen journalists to demonstrate that they are deserving of the shield, even if they otherwise fall outside the law’s strict definition of

⁶⁰ See Wimmer, *supra* note 36.

⁶¹ See *United States Senate: Committee on the Judiciary* (Sep. 12, 2013).

⁶² See Wimmer, *supra* note 36.

“covered journalist.” Thus, those journalists who may not have been covered by the 2009 law, such as first-time freelancers or self-publishers who cannot prove a connection to an “entity,” are not automatically excluded.⁶³

The judicial discretion section is an avenue vital to the reasonable coverage of the blogosphere. It specifically empowers a federal judge to protect the legitimate newsgathering performance. In conjunction with the “covered journalist” definition, the judicial discretion provision authorizes a federal judge to achieve Congress’ intention of protecting the gathering and transmission of news. Federal courts are provided flexibility to cover the array of independent and freelance bloggers who do not satisfy the plain language of a “covered journalist” but nonetheless deserve protection pursuant to Congress’ intent. Accordingly, the judicial discretion provision allows for elastic application of Congress’ intent within the blogosphere.

In sum, the FFIA’s focus on the newsgathering function in its “covered journalist” definition empowers a federal court to reasonably and accurately protect bloggers. The FFIA’s judicial discretion provision furthers the bill’s flexible application to the blogosphere. Therefore, Congress has effectively legislated to allow the judiciary’s appropriate protection of online entities. Section IV will show that the FFIA likely would have covered bloggers who have been left unprotected in the past without it.

Section IV

Bloggers have no Protection Absent the FFIA

Past instances involving bloggers unsuccessfully asserting reporters’ privilege indicate that online entities would be better protected with the FFIA than without it. In a well-known example, blogger and freelance video journalist Joshua Wolf was jailed for 226 days, the longest

⁶³ See David Greene, *Senate Revises Media Shield Law for the Better, But It’s Still Imperfect*, EFF.org (Sep. 20, 2013), <https://www.eff.org/deeplinks/2013/09/senate-revises-media-shield-law-better-its-still-imperfect>.

incarceration of an American journalist in a contempt case.⁶⁴ There, Wolf videotaped an anti-capitalist protest in San Francisco and posted some of the footage on his website.⁶⁵ Wolf was subpoenaed by a federal grand jury to testify and to produce unreleased portions of the videotape.⁶⁶ The grand jury believed that Wolf's unpublished footage might reveal the perpetrators who allegedly set fire to a police car during the protest.⁶⁷

In filing a motion to quash the subpoena, Wolf argued that the First Amendment afforded him a shield to his newsgathering materials.⁶⁸ The Ninth Circuit denied Wolf's motion and refused to "alter the long-established obligation of a reporter to comply with grand jury subpoenas."⁶⁹ Notably, the court's decision focused on privilege lacking under *Branzburg*, not on whether Wolf was a journalist.⁷⁰ Wolf still refused to produce the videotape and was jailed, becoming the first blogger to be jailed for failing to comply with a grand jury subpoena.⁷¹ Wolf spent eight months in jail until his release once he provided the unpublished footage.⁷²

Following his release, Joshua Wolf stated the government abandoning their demand that he testify was essential to his compliance in turning over the unreleased videotape.⁷³ Wolf spoke to the importance of protecting journalists from being compelled to testify, reasoning that "[j]ournalists absolutely have to remain independent of law enforcement. Otherwise, people will

⁶⁴ See Stephanie B. Turner, *Protecting Citizen Journalists: Why Congress Should Adopt A Broad Federal Shield Law*, 30 Yale L. & Pol'y Rev. 503 (2012).

⁶⁵ See Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of A Reporter's Privilege*, 24 Cardozo Arts & Ent. L.J. 385, 446 (2006).

⁶⁶ See *In re Grand Jury Subpoena*, 201 F. App'x 430, 431 (9th Cir. 2006).

⁶⁷ *Id.*

⁶⁸ *Id.* at 432.

⁶⁹ *Id.* at 433.

⁷⁰ See Eliason, *supra* note 65, at 446.

⁷¹ *Id.*

⁷² See Turner, *supra* note 64, at 503.

⁷³ See Bob Egelko & Jim Herron Zamora, *The Josh Wolf Case: Blogger Freed after Giving Video to Feds*, www.SFgate.com (Apr. 4, 2007), <http://www.sfgate.com/bayarea/article/THE-JOSH-WOLF-CASE-Blogger-freed-after-giving-2576757.php>.

never trust journalists.”⁷⁴ Wolf further explained “[a]bsolutely this was worth it. I would do it again if I had to” and he expressed “the need for a federal shield law that would protect journalists, including bloggers, from having to disclose confidential sources or unpublished material.”⁷⁵

Wolf would have been provided such federal protection had the FFIA been in existence at the time he was subpoenaed. A federal shield law covering those who “engage in journalist activities such as gathering and disseminating news” would have protected Wolf’s right of confidentiality to his sources and videotape.⁷⁶ Moreover, the “mainstream media” has defended Wolf, contending that “he is a journalist entitled to the protections of any applicable reporters’ privilege” and The Reporter’s Committee for Freedom of the Press even “filed an amicus brief on Wolf’s behalf.”⁷⁷ Judith Miller, a journalist for the New York Times who likewise was held in contempt for refusing to comply with a subpoena, “expressed [her] solidarity as a fellow journalist” in support of Wolf.⁷⁸ Accordingly, the FFIA’s focus on intent to perform the newsgathering function clearly places Wolf’s investigative footage and dissemination on his website within its scope, irrespective of Wolf’s status as an independent freelance video journalist and blogger.

Because the investigation of the protestors for which Wolf was subpoenaed involved a criminal case,⁷⁹ under the FFIA the government would have been required to make three showings by a preponderance of the evidence.⁸⁰ The prosecution would have had to show they “exhausted all reasonable alternative sources” for the unpublished footage, that there were

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Turner, *supra* note 64, at 517.

⁷⁷ See Eliason, *supra* note 65, at 446.

⁷⁸ *Id.*

⁷⁹ See *In re Grand Jury Subpoena*, 201 F. App’x at 433.

⁸⁰ See *Tracking the U.S. Congress* (May 16, 2013).

“reasonable grounds to believe a crime occurred,” and that there were “reasonable grounds to believe” the unpublished footage was “essential to the resolution of the matter.”⁸¹ If successfully proven, the burden would have shifted to Wolf to show by “clear and convincing evidence that disclosure” of the unpublished footage “would be contrary to the public interest, taking into account both the public interest in gathering and disseminating the news and maintaining the free flow of information and the public interest in compelling disclosure” of the unpublished footage.⁸² Rather, the prosecution was actually required to show by “clear and convincing evidence that there was an authorized request for information by the grand jury, the information sought was relevant to the proceeding, the information sought was not already in the government’s possession, and Wolf failed to comply with the request.”⁸³ The prosecution met its burden to issue a grand jury subpoena to Wolf.⁸⁴

Critically, the FFIA would have permitted Wolf to show that compelling disclosure of his unpublished footage was contrary to the public interest.⁸⁵ Wolf was unable to assert any such statutory privilege absent the FFIA and was relegated to making constitutionally based arguments which federal courts have routinely rejected since *Branzburg*.⁸⁶ As such, Wolf’s right of confidentiality in his unpublished recordings as a freelance video journalist and blogger would have been better served under the FFIA. In that case, even after the government met its burden it would have shifted to Wolf and provided an opportunity for him to argue a position not customarily denied in federal court. In other words, the blogger who was jailed under a contempt order longer than any other American journalist to date may have avoided going to jail

⁸¹ See *Tracking the U.S. Congress* (May 16, 2013).

⁸² See *Tracking the U.S. Congress* (May 16, 2013).

⁸³ See *In re Grand Jury Subpoena*, 201 F. App’x at 432.

⁸⁴ *Id.*

⁸⁵ See *Tracking the U.S. Congress* (May 16, 2013).

⁸⁶ See *In re Grand Jury Subpoena*, 201 F. App’x at 433.

altogether had the FFIA been enacted. Wolf at least would have been more vindicated under the FFIA by a court's order in favor of the government and might have complied with the subpoena at an earlier date.

However, the FFIA is not all encompassing as it “bites as WikiLeaks.”⁸⁷ WikiLeaks was launched in 2006 by Julian Assange and has “released hundreds of thousands of confidential government documents relating to a wide variety of subject.”⁸⁸ WikiLeaks releases have involved “U.S. standard operating procedure in Guantanamo Bay, secret Scientology ‘bibles,’ Sarah Palin’s Yahoo! Account, footage of a July 2007 Baghdad airstrike that killed Iraqi journalists, and over 75,000 previously unpublished documents about the war in Afghanistan.”⁸⁹

WikiLeaks entry “into the national consciousness has introduced a new sense of urgency to the debate about the proper scope of blogger protection.”⁹⁰ The FFIA has resolved that debate with a section that directly addresses online entities like WikiLeaks. Specifically, that section of the FFIA excludes from its coverage “any person or entity whose principal function... is to publish primary source documents that have been disclosed to such person or entity without authorization.”⁹¹ Critics of this section contend that WikiLeaks “has played a big watchdog role” but acknowledge “it’s not worth killing the bill over this clause.”⁹² WikiLeaks “actually could be covered, by doing more editing, so that it’s not just about document dumps.”⁹³ Accordingly, entering the realm of investigative journalism may allow WikiLeaks to invoke privilege under the FFIA.

⁸⁷ See Bazelon, *supra* note 15.

⁸⁸ See John P. Borger, Patrick L. Groshong, Ashley Kissinger, Joseph R. Larsen, et. al., *Recent Developments in Media, Privacy, and Defamation Law*, 48 Tort Trial & Ins. Prac. L.J. 359, 389 (2012).

⁸⁹ *Id.*

⁹⁰ See Benjamin J. Wischnowski, *Bloggers with Shields: Reconciling the Blogosphere's Intrinsic Editorial Process with Traditional Concepts of Media Accountability*, 97 Iowa L. Rev. 327, 332 (2011).

⁹¹ See *United States Senate: Committee on the Judiciary* (Sep. 12, 2013).

⁹² See Bazelon, *supra* note 15.

⁹³ *Id.*

In conclusion, Josh Wolf epitomizes the blogosphere's need for the FFIA. Wolf's right of confidentiality is vindicated under the FFIA and a federal court would have been practically authorized to quash the subpoena. Also while WikiLeaks is pointedly excluded from the bill's scope, there is a clear opportunity for WikiLeaks to conform to the newsgathering function requirement. These prior instances represent the need for the FFIA to protect online entities. Next, Section V contends that similarly constructed state shield laws suggest the FFIA would appropriately protect bloggers.

Section V

Similarly Constructed State Shield Laws Sufficiently Protect Bloggers

Several state courts have afforded online entities coverage under state shield statutes. Prior to the *Branzburg* decision, media shield laws had already been instituted in seventeen states across the country.⁹⁴ This section will examine state court interpretations of media shield laws and will argue that bloggers' would be afforded similar protection under the FFIA in federal court.

The initial case addressing whether a state shield law considered bloggers as journalists was adjudicated in California.⁹⁵ There, in *O'Grady v. Superior Court*, Jason O'Grady provided news and information about software and hardware for Apple computers via "O'Grady's PowerPage," his owned and operated online news magazine.⁹⁶ Apple claimed that O'Grady was liable for misappropriation of trade secrets after he posted four articles to the website which discussed "a rumored new product that Apple was about to release which would facilitate the

⁹⁴ See Wischnowski, *supra* note 90, at 332.

⁹⁵ *Id.* at 333.

⁹⁶ See *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 77 (Ct. App. 2006).

recording of digital live sound on Apple computers.”⁹⁷ Apple sought a subpoena compelling O’Grady to reveal his sources but the court denied Apple’s application, finding that O’Grady had a right of confidentiality in his sources.⁹⁸

The court addressed that the state legislature contemplated protection of websites such as O’Grady’s PowerPage, since the website was “highly analogous to printed publications” which were protected under the shield law.⁹⁹ The court was persuaded that websites such as O’Grady’s employed “a kind and degree of editorial control” akin to printed publications which were already protected under the statute.¹⁰⁰ For instance, only O’Grady, not anonymous posters, was capable of posting the four articles at issue to O’Grady’s PowerPage.¹⁰¹

The state court’s decision in *O’Grady* shows that a statutory concentration on functionality empowers a court to protect bloggers’ right of confidentiality. The court found no “colorable ground for declaring [O’Grady’s] activities not to be legitimate newsgathering and dissemination.” Further, the court explained “[i]f [O’Grady’s] activities and social function differ at all from those of traditional print and broadcast journalists, the distinctions are minute, subtle, and constitutionally immaterial.”¹⁰² Even Randall D. Eliason, who opposes enactment of a federal media shield, postulated that “[a] functional approach to determining who qualifies as a journalist, similar to the approach followed by the court in *O’Grady*, is the solution most consistent with the values purportedly protected by the privilege.”¹⁰³ *O’Grady’s* evaluation under California’s shield law of functional analogues between bloggers and traditional media

⁹⁷ *Id.*

⁹⁸ *Id.* at 92.

⁹⁹ *Id.* at 103.

¹⁰⁰ See Wischnowski, *supra* note 90, at 332.

¹⁰¹ See *O’Grady*, 44 Cal. Rptr. 3d at 91.

¹⁰² *Id.* at 106.

¹⁰³ See Eliason, *supra* note 65, at 433.

outlets, such as editorial control, parallels an analysis under the FFIA of one's intent to gather and disseminate news. Accordingly, the *O'Grady* court's finding suggests that had those identical facts been adjudicated in federal court pursuant to the FFIA his right of confidentiality would have likewise been preserved.

Next, the New Jersey Supreme Court's decision in *Too Much Media, LLC v. Hale* similarly indicates that the FFIA would reasonably provide federal protection of bloggers' right of confidentiality. *Too Much Media* considered the scope of online speakers covered by New Jersey's shield law.¹⁰⁴ The court specifically decided "whether the newsmen's privilege extends to a self-described journalist who posted comments on an internet message board."¹⁰⁵ Hale made allegedly defamatory statements on Oprano.com, an online platform where anyone with internet access could post unfiltered comments about the adult entertainment industry.¹⁰⁶ Hale decided to investigate "criminal activity in the online adult entertainment industry" after she was exposed to "cyber flashers" while working as a life coach.¹⁰⁷ Her investigation focused on a security breach of Too Much Media's database.¹⁰⁸ Hale's detailed probe of the breach consisted of interviewing people in the adult entertainment industry, collecting information from porn blogs, speaking with the offices of the Washington State Attorney General, and attending six adult industry trade shows.¹⁰⁹ Hale then posted the statements at issue on Oprano's message board and Too Much Media filed suit, demanding information about the sources upon which Hale relied.¹¹⁰

¹⁰⁴ See *Too Much Media*, 206 N.J. at 216.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 218.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 219,

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 220.

The New Jersey Supreme Court found that Hale did not fall within the state shield law's scope of coverage.¹¹¹ New Jersey's shield law protected "a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing, or disseminating news for the general public."¹¹² The court recognized that the statute's application was not limited to traditional news sources, though it required the means of disseminating news to be similar to "newspapers, magazines, and the like."¹¹³ As such, the court concluded that Hale's sources were not protected because her postings to the Oprano message board were "not the functional equivalent of the types of news media outlets outlined in the shield law."¹¹⁴ The court explained that "message boards are little more than forums for conversation" and "[n]either writing a letter to the editor nor posting comment on an online message board establishes the connection with "news media" required by the statute."¹¹⁵

While Hale was not covered by New Jersey's shield law, *Too Much Media* nonetheless provided that digital media providers may qualify for protection. The court recognized "[c]ertain online sites could satisfy the law's standards."¹¹⁶ Specifically, the court explained that "[a] single blogger might qualify for coverage under the Shield Law provided [that blogger meets] the statute's criteria" but determined that Hale's circumstances did not meet the statute's required nexus to "news media."¹¹⁷ In delineating the types of online sites that would satisfy New Jersey shield law's standards, the court used California's decision in *O'Grady v. Superior Court* as an

¹¹¹ *Id.* at 243.

¹¹² *Id.* at 229.

¹¹³ *Id.* at 233.

¹¹⁴ *Id.* at 235.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 236.

¹¹⁷ *Id.* at 237.

example.¹¹⁸ The court explained that *O’Grady* protected comments by a website operator on an open and deliberate publication of his news oriented website, rendering the website “conceptually indistinguishable from publishing a newspaper” under California’s shield law.¹¹⁹ The court further clarified that *O’Grady* “pointedly contrasted the site with the deposit of information, opinion, or fabrication by a casual visitor to an open forum such as a newsgroup, chat room, bulletin board system, or discussion group.”¹²⁰ *Too Much Media*’s recognition of those distinctions in *O’Grady* exemplifies that protection under either state shield law depended on whether the blogger performed the journalistic function, like editorial control of the news’ dissemination.

Accordingly, the FFIA is similar in construction and application to the shield laws examined in *Too Much Media* and *O’Grady*. The *Too Much Media* court’s example of *O’Grady* as a blogger who would have satisfied New Jersey’s shield law shows similar statutory interpretations in both states. Both shield laws “resemble the functional approach in that they cover individuals who engage in journalist activities.”¹²¹ *Too Much Media* was not convinced that Hale exercised “editorial control over Oprano” and deemed “her contributions were like letters to the editor that simply comment on articles.”¹²² Those courts’ concentration under the shield laws on editorial control parallels the FFIA’s intent to perform the newsgathering function addressed in Section III of this paper.

Importantly, it is unreasonable to expect all online entities to be protected by a state or federal shield law. As Bazelon and Wimmer have posited, it’s unrealistic to visualize a shield

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 236.

¹²⁰ *Id.*

¹²¹ *See* Turner, *supra* note 64, at 516.

¹²² *Id.*

law which grants anyone a blanket exemption from court orders.¹²³ The New Jersey shield law in *Too Much Media* protected bloggers who performed the newsgathering function and appropriately found that Hale did not satisfy that requirement. On that note, Editor-in-Chief of Loyola Law School's law review Joshua Rich explained that:

A blogger who follows these standards should fall under the definition of a journalist who merits shield-law protection. But a message-board commenter like Shellee Hale, who fails to give his or her subject the opportunity to respond to attacks-- among other journalistic failures--should not qualify for the privilege.¹²⁴

Further, *Too Much Media* identified that the shield law's "similarity standard" requiring the blog's dissemination of information to be similar to the dissemination of information by traditional news media "would cover many other citizen journalists."¹²⁵ Consequently, a shield law's concentration on performing the newsgathering function permits a wide enough scope of coverage to protect deserving online entities.

The state shield laws application in *Too Much Media* and *O'Grady* demonstrate that the FFIA would cover online entities deserving of protection. *Too Much Media* would have likely been decided the same on the merits in federal court under the FFIA because posts to a message board do not rise to the standard of "primary intent to investigate events and procure materials."¹²⁶ Blogs over which editorial control is exerted "do not facilitate the journalistic function in the same way" as "message boards and other online media through which citizen journalists might disseminate information--such as chat rooms, instant messaging platforms, and Facebook." The *Too Much Media* court expressed concern that "anyone with a Facebook

¹²³ See Bazelon, *supra* note 15; See Wimmer, *supra* note 36.

¹²⁴ See Joshua Rich, *New Media and the News Media: Too Much Media, LLC v. Hale and the Reporter's Privilege in the Digital Age*, 45 Loy. L.A. L. Rev. 963, 981 (2012).

¹²⁵ See Turner, *supra* note 64, at 516.

¹²⁶ See *United States Senate: Committee on the Judiciary* (Sep. 12, 2013).

account could try to assert the privilege.”¹²⁷ The distinction pursuant to a functional standard between blogging and merely posting content would operate no differently in federal court under the FFIA’s intent requirement. Thus, those who satisfy the FFIA’s requirement would abide by journalistic standards in turn fostering efficient newsgathering.

Last, the New Hampshire Supreme Court’s decision in *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.* signifies judicial willingness to protect online entities and users. There, the court considered an online entity’s constitutionally based argument for qualified reporters’ privilege.¹²⁸ Plaintiff Mortgage Specialists, Inc. (“Mortgage Specialists”) was a mortgage lender and Defendant Implode-Explode Heavy Industries, Inc. (“Implode”) operated a website which ranked businesses in the mortgage industry.¹²⁹ Implode’s website, www.ml-implode.com, categorized “at risk” companies and permitted registered users “to post publicly viewable comments about lenders.”¹³⁰ Implode published an article in 2008 which discussed actions taken by the New Hampshire Banking Department against Mortgage Specialists and incorporated a link purporting to represent Mortgage Specialists’ 2007 loan figures.¹³¹ An anonymous user registered to the website, “Brianbattersby,” responded to the publication with two comments about Mortgage Specialists and its President.¹³²

Mortgage Specialists filed for injunctive relief and alleged that the comments by “Brianbattersby” were defamatory and false.¹³³ After the trial court granted Mortgage Specialists’ relief, Implode argued on appeal that “ordering it to disclose the identities of the

¹²⁷ See *Too Much Media, LLC v. Hale*, 206 N.J. 209, 242 (2011).

¹²⁸ See *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 160 N.H. 227, 235 (2010).

¹²⁹ *Id.* at 231.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 232.

Loan Chart source and Brianbattersby's postings” infringed both the First Amendment to the Federal Constitution and New Hampshire’s Constitution.¹³⁴ In vacating and remanding the trial court’s ordered disclosure of the Loan Chart’s source, the Supreme Court of New Hampshire found that the trial court failed to consider the applicability of the qualified newsgathering privilege.¹³⁵ The court determined that Implode was a reporter for purposes of the newsgathering privilege as “Implode’s website serves an informative function and contributes to the flow of information to the public.”¹³⁶ Thus, Implode was a “legitimate publisher of information” and “[t]he fact that Implode operates a website makes it no less a member of the press.”¹³⁷

Additionally, the court vacated and remanded the trial court’s order requiring the disclosure of Brianbattersby’s identity.¹³⁸ The court espoused “a standard for trial courts to apply when a plaintiff requests disclosure of the identity of an anonymous defendant who has posted allegedly defamatory material on the Internet.”¹³⁹ That test requires the trial court to “balance the defendant’s First Amendment right of anonymous free speech” against “the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.”¹⁴⁰

This case shows the judiciary’s readiness to enforce a newsgathering privilege. While *Mortgage Specialists* was not decided on the merits, the court nonetheless concentrated on Implode’s legitimate newsgathering performance and directly found its status as a website was

¹³⁴ *Id.*

¹³⁵ *Id.* at 237.

¹³⁶ *Id.* at 233.

¹³⁷ *Id.* at 233-234.

¹³⁸ *Id.* at 239.

¹³⁹ *Id.* at 237.

¹⁴⁰ *Id.* at 239.

immaterial. There was not even a statutory basis for the court's finding as the newsgathering privilege was invoked pursuant to the Constitution.¹⁴¹ Moreover, the court even found it within their power to extend the privilege to a third party poster "Brianbattersby" upon remand.¹⁴² It is likely that under the FFIA Implode's right of confidentiality in the Loan Chart source and Brianbattersby's identity would have been preserved as Implode performed according to journalistic standards by exhibiting editorial control.

Overall, the foregoing state decisions suggest that the internet community should embrace the FFIA. The courts' findings in New Jersey and California exemplify the blogosphere's protection under similarly constructed state shield laws. The New Hampshire court's analysis of reporters' privilege under constitutional parameters shows judicial readiness to preserve journalists' right of confidentiality even without a shield law. These cases make it reasonably foreseeable that the FFIA will protect bloggers in federal court.

Section VI

Conclusion

The purpose of this paper has been to support the position that online entities within the blogosphere would be appropriately protected under the FFIA. As previously discussed, the news media's unsuccessful litigation in federal courts over recent years has prompted resort to Congress for protection. The FFIA's plain language overcomes reservations about enacting a federal media shield and thus affords protection to deserving bloggers. Previous instances in which bloggers have futilely asserted reporters' privilege would have been more meritorious

¹⁴¹ *Id.* at 232.

¹⁴² *Id.*

under the FFIA. Finally, similarly constructed state shield laws that were found to protect deserving bloggers suggest the FFIA would be interpreted no differently in federal courts. Therefore, the online community should excuse the FFIA's negligible flaws and support its institution.