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Relegating New Jersey To a Wallflower in the Information Revolution

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BODY:

I n every aspect of my career - as an academic, an attorney and a technology evangelist - I've been proud to declare my Jersey roots. New Jersey played a vital role in shaping every aspect of 20th century communications systems, from telephony to radio to television to the Internet.

On June 7, however, the New Jersey Supreme Court unwittingly turned New Jersey into a 21st century media backwater.

In *Too Much Media v. Hale*, the Court held that online message boards are not "similar to the types of news entities listed" in the New Jersey Shield Law and that the defendant "was not entitled to claim the privilege in this defamation case that is grounded in comments she posted on an Internet message board."

In so holding, the unanimous Court failed to recognize the ways in which news is likely to be gathered, harnessed, curated and distributed in an Internetenabled world.

The decision doesn't obliterate the Shield Law for new media. Many online sites and many journalists' postings will satisfy the Court's test. The holding, however, will give journalists pause about where and how to disseminate information. The Court gives no guidance on how to draw the ever-blurrier line between news entities and online message boards, and between bona fide journalists and commenters.

The holding will deter would-be pioneers in new media from exploring content distribution vehicles that look too dissimilar from 20th century big media. Imagine if a court in 1911 held that all transit systems, in order to satisfy hygienic community standards, must include diapers on the horses pulling the carriages. Would horseless carriages have had to jerry-rig vestigial diapers in order to be acceptable modes of urban transit?

The Shield Law and its interpreters cannot anticipate what media outlets of tomorrow will look like. Now the law and its definitions will always be one step behind. Some might suggest that the Legislature amend the Shield Law to better anticipate the types of outlets that might be construed as news entities. I have even less faith in any legislature, captive to the lobbying muscle of old media, to develop standards capable of keeping pace with media evolution. Perhaps the better default would be to compel a plaintiff to overcome a strong presumption that any online media outlet is a news entity and any posting thereto is subject to Shield Law protection.

The New Jersey Supreme Court has served as a model judiciary in large part because its justices were always determined to ensure that the law was flexible enough to enable the evolution of better public policy. In the case of *Too MuchMedia*, the Supreme Court has failed to anticipate the logical evolution of media in the digital, Internet-enabled world.

As media become more collaborative and mutable in real time, news entities might look increasingly more like loosely curated assemblages of usergenerated comments on online message boards. It shouldn't matter where a journalist posts comments. All that should matter is the intent of the commenter to expect protection as a journalist.

Now that the 21st century individual possesses the tools to be as powerful as a 20th century media empire, the courts should not solely protect media outlets and journalists who appear similar to their pre-Internet antecedents.

What if a commenter to an online message board was a path-breaking NPR journalist/Tweeter like Andy Carvin, giving us real-time reports about the Arab Spring? Would his sources be protected by New Jersey's Shield Law? If reported over the radio, in print, or even through the Twitter-verse, presumably his comments would be protected.

If posted to something resembling an online message board, his comments might not be protected by New Jersey's Shield Law. The pioneers of new media should not be deterred from posting comments to whatever site they deem most capable of harnessing and disseminating information.

What brought so many pioneers of communications, most notably Bell Labs and Thomas Edison, from New York to New Jersey? In part, it was New Jersey's reputation as a fertile haven for innovation and entrepreneurship. After the *TooMuch Media* opinion, however, New Jersey might no longer be the haven for pioneers on the cutting edge of media and communications. I now suspect that the new pioneers of communications and media will head to jurisdictions that embrace the evolving nature of media and communications.

Askin is an associate professor at Brooklyn Law School, where he teaches Internet and telecommunications law.

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