

# DOJ DOESN'T THINK BLOGGERS ARE MEDIA EITHER-AND IT MAY USE NSLS TO GET MEDIA CALL RECORDS

A number of bloggers are pointing, with concern, to an Oregon case in which a blogger got hit with a \$2.5 million defamation judgement.

Oregon law provides special legal protections against defamation lawsuits to journalists associated with traditional media outlets. Such publications are immune from defamation suits unless the defamed individual first requests a retraction. Journalists at recognized media outlets are also protected from revealing confidential sources. Cox argued that she was eligible for protection under both provisions and asked the judge to set aside the verdict.

But Judge Marco Hernandez disagreed. "Although defendant is a self-proclaimed 'investigative blogger' and defines herself as 'media,' the record fails to show that she is affiliated with any newspaper, magazine, periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system," the judge wrote. "Thus, she is not entitled to the protections of the [Oregon journalist shield] law."

That result was apparently dictated by the text of the Oregon shield statute, which singles out those specific media technologies for legal protection.

But as Kashmir Hill notes, even aside from the

outdated terms of Oregon's law, the woman in question had set up a series of websites pretty much designed to hurt the reputation (and especially the Google searches) of the firm in question, and then sent an email asking for \$2,500 a month for "reputation management" services to undo her work.

The Oregon case, in other words, is more complicated than it has been portrayed.

### **DOJ Doesn't Consider Many Bloggers News Media**

But while we're talking about whether bloggers are protected under media guidelines, we probably ought to be looking at DOJ's recently changed Domestic Investigation and Operations Guide, which also don't consider bloggers to be protected as media (I wrote about these changes here, but the guidelines themselves have been released, in heavily redacted form). Unlike Oregon, DIOG does include online news in its definition of media (PDF 157).

"News media" includes persons and organizations that gather, report or publish news, whether through traditional means (e.g., newspapers, radio, magazines, news service) or the on-line or wireless equivalent. A "member of the media" is a person who gathers, reports, or publishes news through the news media.

But then it goes on to exclude bloggers from those included in the term "news media."

The definition does not, however, include a person or entity who posts information or opinion on the Internet in blogs, chat rooms or social networking sites, such as YouTube, Facebook, or MySpace, unless that person or entity falls within the definition of a member of the media or a news organization under the other provisions within this section (e.g., a national news reporter who posts on his/her

personal blog).

Then it goes on to lay out what I will call the “WikiLeaks exception.”

As the term is used in the DIOG, “news media” is not intended to include persons and entities that simply make information available. Instead, it is intended to apply to a person or entity that gathers information of potential interest to a segment of the general public, uses editorial skills to turn raw materials into a distinct work, and distributes that work to an audience, as a journalism professional.

The definition does warn that if there is any doubt, the person should be treated as media. Nevertheless, the definition seems to exclude a whole bunch of people (including, probably, me), who are engaged in journalism.

#### **DOJ Has Made It Easier To Investigate Journalists’ Contacts**

Though to some degree, it doesn’t matter, because the new DIOG treats the media so poorly in any case. It considers investigations sensitive (and therefore requiring special approvals) only if the member of the news media (or religious or political organization, or academic institution) is the **subject** of the investigation, not if they are a witness, as media almost always will be in leak investigations.

Just as troubling, the new DIOG seems to make it a lot easier to get news media contact records in national security investigations. A heavily-redacted section (PDF 166) suggests that in investigations with a national security nexus (so international terrorism or espionage, as many leak cases have been treated) DOJ need not comply with existing restrictions requiring Attorney General approval before getting the phone records of a journalist. The reason?

Because NSLs aren't subpoenas, and that restriction only applies to subpoenas.

Department of Justice policy with regard to the issuances of subpoenas for telephone toll records of members of the news media is found at 28 C.F.R. § 50.10. **The regulation concerns only grand jury subpoenas, not National Security Letters (NSLs) or administrative subpoenas.** (The regulation requires Attorney General approval prior to the issuance of a grand jury subpoena for telephone toll records of a member of the news media, and when such a subpoena is issued, notice must be given to the news media either before or soon after such records are obtained.) The following approval requirements and specific procedures apply for the issuance of an NSL for telephone toll records of members of the news media or news organizations. [my emphasis]

So DOJ can use NSLs—with no court oversight—to get journalists' call (and email) records rather than actually getting a subpoena.

The section includes four different approval requirement scenarios for issuing such NSLs, almost all of which are redacted. Though one only partly redacted passage makes it clear there are some circumstances where the approval process is the same as for anyone else DOJ wants to get an NSL on:

If the NSL is seeking telephone toll records of an individual who is a member of the news media or news organization [2 lines redacted] there are no additional approval requirements other than those set out in DI0G Section 18.6.6.1.3 [half line redacted]

And the section on NSL use (see PDF 100) makes

it clear that a long list of people can approve such NSLs:

- Deputy Director
- Executive Assistant Director
- Associate EAD for the National Security Branch
- Assistant Directors and all DADs for CT/CD/Cyber
- General Counsel
- Deputy General Counsel for the National Security Law Branch
- Assistant Directors in Charge in NY, Washington Field Office, and LA
- All Special Agents in Charge

In other words, while DOJ does seem to offer members of the news media—which is itself a somewhat limited group—some protection from subpoena, it also seems to include loopholes for precisely the kinds of cases, like leaks, where source protection is so important.

The Oregon case is important because it reminds us how little protection is accorded those of us working on line. But it's probably not the biggest threat to bloggers, or even other online media professionals.