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Kristin Decker

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LOOKING FOR LAGNIAPPE:¹
PUBLICITY AS A CULPRIT TO SOCIAL NETWORKING WEBSITES

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I. The Self-Proclaimed “Qualified” Journalist

The Big Apple is to the Big Easy,² as the *New Yorker* is to the *Times Picayune*.³ Style, in life and prose, sways in tandem with geographic appetite. The hustle and bustle of New York City finds a necessity in swift sound bytes as fiery as a Red Delicious, as balanced as a Fuji, or even as juicy as a Granny Smith. New Orleans, on the other hand, relishes the alluring aroma of French gumbo slowly rising from a page. Although distinct, both news providers are able to find neutral ground⁴ in a shared area of interest in satisfying the public’s hunger for news and entertainment.

¹ Lagniappe is a noun with southern Louisiana roots denoting “an extra or unexpected gift or benefit.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 980 (4th ed. 2009) (defining “lagniappe”), available at <http://dictionary.reference.com/browse/lagniappe>. A recent article says that Mark Zuckerberg, founder and CEO of Facebook.com, believes that “[t]he rise of social networking online means that people no longer have an expectation of privacy.” Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN.CO.UK, Jan. 11, 2010, <http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy> (paraphrasing Zuckerberg’s views)). Thus internet users are left searching for the extra benefit of privacy once perceived to have been attached to use of networking websites.

² See generally Barry Popik, *The Big Apple: Big Easy* (Mar. 1, 2005), http://www.barrypopik.com/index.php/new_york_city/entry/big_easy/ (explaining the origin of the “Big Easy” as a nickname given to New Orleans by Betty Guillaud, a *Times-Picayune* columnist who “compared the laid-back style of New Orleans to the hurry-up pace of New York, the Big Apple”).

³ See generally *The Times-Picayune: A Brief History*, <http://www.timespicayune.com/tphistory.html> (last visited Jan. 4, 2010) (detailing the history of the *Times-Picayune*, a New Orleans newspaper).

⁴ See generally *Local Words of the Year*, CITYDICTIONARY.COM, Dec. 29, 2009, <http://www.citydictionary.com/Press/2009-Words-of-the-Year.aspx> (acknowledging the term “neutral ground arose in New Orleans’ colonial days when the French and the Spanish met in the middle (and ‘neutral’) part of the street to trade”).

Tulane University, which can be found nestled in the New Orleans Garden District, offers an annual expository writing course.⁵ In the spring of 2008, for three and a half months,⁶ two and a half hours a week, fifty minutes a day,⁷ students were asked to disregard the creative Mecca that laid beyond the stone steps of the classroom doors and dive into the required textbook, a current issue of the *New Yorker*.⁸ Although there was no “Introduction to Theater” pre-requisite to the course, in each writing assignment there was a hidden role-playing component. Each student, invisibly cloaked as a *New Yorker* columnist, set out to decipher the true technique and talent behind a final published piece. Scrutiny over words, length, style, and connotation resulted in final drafts, colored in personal pride.

Each journalistic piece was eventually posted on a website created by the professor. The underlying rationale behind the website was that although an actual *New Yorker* columnist may have to go through extrinsic feats to be published in an edition of the famous magazine, each student was his or her own qualified journalist in the online community. A whimsical notion unknowingly inundated with tangible significance.

The transition of university to publishing institution and professor to editor occurred through *education blogging*, a form of student expression enhanced by the use of the internet, but confined in an education setting.⁹ Inherent to the concept, placement of material online (“posting”) is generally done with an actively involved chaperone—like a professor or a parent.¹⁰ However, MySpace.com (“MySpace”) popularized the use of social networking sites

⁵ Tulane University, Course Descriptions and Requirements, <http://www.tulane.edu/~writing/policies.htm> (follow “course descriptions and requirements” hyperlink) (last visited Nov. 3, 2009).

⁶ Tulane University, Academic Calendar <http://www.tulane.edu/~admincat/2007/pdfs/10Academic%20Calendars%202007.pdf> (last visited Nov. 3, 2009).

⁷ Tulane University, Spring 2008 English Department Course Descriptions (2008) (on file with Tulane University).

⁸ The description of class activities for this course is taken from the author’s own observations as a participant.

⁹ See Lorrie Jackson, Education World Blogging Basics: Creating Student Journals on the Web, http://www.educationworld.com/a_tech/techtorial/techtorial037print.shtml (last visited May 11, 2010) (discussing the use of blogging in the classroom).

¹⁰ *Id.*

(“networking sites”),¹¹ websites which allow registered users to create “visible profiles”¹² that are displayed to “an articulated list of friends”¹³ sans the supervision of Tulane, a professor, or any other external regulator. With the initial screening component relinquished, many individuals are seizing the opportunity to post personal and private information and are concurrently underestimating the need to venture prudently into the realm of networking sites.¹⁴

Yath v. Fairview Clinics exemplifies a situation of concern for both a MySpace user who posted another’s private information on the internet and Minnesota courts, which are in debate over the proper way to apply the publicity element in an invasion of privacy claim.¹⁵ Courts routinely analyze publicity by first designating a medium of communication as either private or public.¹⁶ Though suitable for earlier approaches to mass communication, this approach is much too broad for assessment of the internet, and more specifically, networking sites. In the past, mass communication was essentially an exclusive monopoly dominated by professional news sources, like the *New Yorker* and the *Times-Picayune*.¹⁷ However, networking sites are allowing the general public to effortlessly access an infinite amount of people without possessing the awareness of possible legal consequences, a quality alternatively inherent in specialty news sources.¹⁸ To designate all networking sites as strictly public mediums of communication would be to ignore the intrinsic features of a networking site availing to its users the ability to determine the extent of information released into cyberspace. Moreover, a purely private characterization of

¹¹ Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, J.COMPUTER-MEDIATED COMM., Oct. 2007, <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

¹² *Id.*

¹³ *Id.*

¹⁴ See Karen Barth Menzies, *Perils and Possibilities of Online Social Networks*, TRIAL, July 2008, at 58, 60 (acknowledging the freedom and attitude to let “personal information remain public” associated with social networking sites).

¹⁵ *Yath v. Fairview Clinics*, N.P., 767 N.W.2d 34, 40 (Minn. Ct. App. 2009).

¹⁶ RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

¹⁷ Chris Lapham, *The Evolution of the Newspaper of the Future*, CMC MAG., July 1, 1995, at 7.

¹⁸ See generally *id.* (discussing the shift of “power to the people” by way of the internet).

networking sites would overlook the immeasurable impact of a website void of restrictive safeguards.

A preliminary dual prong inquiry should be used to establish the characterization of a social networking site as a public or private medium on a case-by-case basis in order to prevent future problems in establishing publicity resulting from a static label placed on networking sites as a whole. A modern theory of publicity as applicable to networking sites, should depend on whether a website has safeguards available for its users which allow the restricting of information viewed by the cyberspace community *and* to what extent the protective tools are individually employed by those users.

This note analyzes the traditional application of the publicity element of invasion of privacy to MySpace in *Yath v. Fairview Clinics*. Part II provides an overview of MySpace and its harmful effects. Part III introduces *Yath* and discusses its procedural history. Part IV briefly presents the history of the invasion of privacy tort. Part V addresses the conflict between the District Court of Hennepin County and the Court of Appeals of Minnesota in *Yath* and explores the lack of fluidity in both courts' opinions. Part VI recommends a dual prong solution to assessing the publicity of a social networking site and illustrates how it is applicable to *Yath*. Part VII concludes this note.

II. MySpace: A Place for Friends

“MySpace is a place for friends... MySpace is your place... MySpace keeps you connected.”¹⁹ Found on MySpace’s homepage, this general, yet fetching characterization, conceals problematic legal consequences behind a so called “protected space.”

¹⁹ MySpace.com, Home Page, <http://www.myspace.com/> (last visited Sept. 30, 2009).

A. MySpace: Effortless Communication

The ease of transition into the compound world of MySpace counteracts the security a user believes to be present. A single click serves as a gateway to the creation of an individual's webpage, sans the extra bells and whistles, with a base set-up time of three (3) minutes.²⁰ Use of the site may be free, but agreement to MySpace's terms and privacy policy is mandatory.²¹ Though no actual viewing of the policy is required; a fine print on the bottom of the page simply informs the user of the resulting agreement upon pressing the "Sign-up" button.²² By failing to read the policy, a user may overlook a "disclaimer where MySpace absolves itself from liability for any activity that a user engages in through its service which could result in MySpace being liable."²³

B. MySpace: Effortless Harm

A simple registration process²⁴ along with a "No Questions Asked" approach contributed to the death of a thirteen year old girl named Megan Meier.²⁵ Megan's old friend, the friend's mother, and the mother's employee created a fake MySpace webpage for a fictional boy named "Josh."²⁶ By means of harmful tactics and comments, the small group tormented Megan, eventually resulting in Megan's suicide.²⁷

²⁰ *Id.*

²¹ MySpace.com, Sign up for MySpace, <http://signups.myspace.com/index.cfm?fuseaction=signup> (last visited Apr. 10, 2010) (displaying the phrase "It's Free" under the heading "Why Signup for MySpace?").

²² *Id.* ("By clicking Sign up, you agree to MySpace Terms of Use and Privacy Policy.").

²³ Eric Danowitz, *MySpace Invasion: Privacy Rights, Libel, and Liability*, 28 J. JUV. L. 30, 34 (2007).

²⁴ See generally T. BRIAN CHATFIELD, THE MYSPACE.COM HANDBOOK: THE COMPLETE GUIDE FOR MEMBERS AND PARENTS 48-50 (2007) (discussing the simple steps required to create a Myspace webpage).

²⁵ *Mom: MySpace Hoax Led to Daughter's Suicide*, FOXNEWS.COM, Nov. 16, 2007, <http://www.foxnews.com/story/0,2933,312018> [hereinafter *MySpace Hoax*].

²⁶ *Id.*

²⁷ *Id.*

A greater amount of people are becoming targets of the “free flow” of unprotected information found on networking sites.²⁸ Due to the span of the “world-wide audience,” there is now a high likelihood that a minimal act, when available by internet, may “define you for the rest of your life.”²⁹ For individuals seeking a job, thirty percent may be denied a position solely based on the posted information employers find on them.³⁰ Megan’s bullies partook in a form of harassment known as “cyber-bullying.”³¹ Victims of this internet pestering suffer immense trepidation,³² and costs associated with pursuing and/or protecting themselves from the harasser.³³ In Megan’s case, it meant her life. Would more stringent procedures and regulations of networking sites have spared the life of this “bubbly, goofy girl?”³⁴

The situation in *Yath v. Fairview Clinics* is one of many emerging examples of malicious acts through networking sites. *Yath* sprang from the increasing accessibility of the internet, which among other things “allows virtually anyone to become a publisher.”³⁵

III. *Yath v. Fairview Clinics* Procedural History

Out of concern of possible contraction of a sexually transmitted disease (“STD”), Candace Yath (“Yath”) made her way to Fairview Cedar Ridge Clinic (“Fairview”) to be tested.³⁶ The test results, which were positive, and Yath’s disclosure of personal information to

²⁸ Peter A. Winn, *Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law*, 33 RUTGERS L.J. 617, 636 (2006).

²⁹ Jamuna D. Kelley, Note, *A Computer with a View*, 74 BROOK. L. REV. 187, 198 (2008).

³⁰ Linda S. Crawford, *Medical Providers and Social Networking Sites: There Are New Frontiers in Confidentiality and Professionalism to Explore*, MED. MALPRACTICE L. & STRATEGY, Aug. 2009, at 1.

³¹ See Megan Meier Foundation, <http://www.meganmeierfoundation.org> (last visited Apr. 10, 2010) (explaining Megan Meier’s full story as well as its connection with cyber-bullying as portrayed by her mother, Tina Meier).

³² Sarah Jameson, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMMLAW CONSPECTUS 231, 235 (2008).

³³ See Awareness Is the Answer, <http://www.awarenessistheanswer.com/modules/content/index.php?id=18> (last visited Apr. 10, 2010) (acknowledging the expensive nature of “tak[ing] legal action”).

³⁴ MySpace Hoax, *supra* note 25.

³⁵ Allison E. Horton, Note, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1267 (2009).

³⁶ *Yath v. Fairview Clinics*, N.P., 767 N.W.2d 34, 38 (Minn. Ct. App. 2009).

the doctor, including the origin of Yath's STD fears--a new sexual partner--were recorded in Yath's medical file as required by Fairview procedures.³⁷

Seemingly unknown to Yath at the time, was Navy Tek's ("Tek") awareness of Yath's presence at the clinic.³⁸ Tek, a Fairview medical assistant and coincidentally the sister-in law of Yath's husband, was very much intrigued by Yath's appointment at the clinic and dually learned of her sister-in laws new STD and sexual partner by pulling up Yath's electronic medical record at work.³⁹

Tek proceeded to spread Yath's confidential information to Net Phat ("Phat"). Phat, the sister of Yath's husband at the time, eventually told her brother the contents of Yath's Fairview file, as revealed to her by Tek.⁴⁰

Not long after, Yath learned of Tek's actions involving Yath's records and family members.⁴¹ And upon knowledge of the situation, Yath's grandmother called the manager of Fairview Clinic to complain.⁴² In the days that followed, Fairview investigated and discovered Tek accessed Yath's files without authorization five different times within a span of about two weeks.⁴³ Fairview had trouble getting Tek to confess to her computer usage and whether she conveyed the information to a third party.⁴⁴ Fairview eventually fired Tek for unauthorized access of Yath's medical records.⁴⁵

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 39.

⁴⁵ *Id.*

A more extensive problem surfaced when Fairview received a second e-mail from Yath's grandmother.⁴⁶ The e-mail pointed Fairview's attention toward a MySpace webpage depicting the private medical information which belonged to Yath's Fairview file.⁴⁷ The webpage, titled "Rotten Candy," contained a picture of Yath and sensitive information pertaining to her STD, cheating, and addiction to plastic surgery.⁴⁸ Upon investigation by the police, it was discovered through the use of an internet protocol address that the webpage, which was only active for "24-48 hours,"⁴⁹ was created at the workplace of Tek's sister.⁵⁰

On its face, *Yath v. Fairview Clinics* inquires into six claims as potential redress for illegally obtaining another's medical records and subsequently posting them on the internet.⁵¹ Selectively, one such claim is applicable to this note: "Does an internet posting constitute 'publicity' and, if so," what facts allow for an invasion of privacy claim?⁵²

The District Court of Hennepin dismissed all six of the aforementioned claims.⁵³ On appeal, Yath's invasion of privacy claim was yet again unsuccessful.⁵⁴ Although the Minnesota Court of Appeals ruled that publishing information on MySpace does constitute publicity, Yath "failed to produce any [of the required] evidence."⁵⁵

IV. Invasion of Privacy Tort History

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 45.

⁵⁰ *Id.* at 39.

⁵¹ *Id.* at 40.

⁵² *Id.* at 38.

⁵³ *Id.*

⁵⁴ *Id.* at 45.

⁵⁵ *Id.*

Most states use a combination of common law torts and state statutes to establish an invasion of privacy tort claim,⁵⁶ a claim which originated in the right of the individual “to be let alone.”⁵⁷

In 1890, Samuel D. Warren and Louis D. Brandeis, two new law partners and Harvard Law School graduates, wrote an academic piece titled *The Right to Privacy*, which was published in the *Harvard Law Review*.⁵⁸ A concern for “the protection of the person” plagued both graduates because new technological advances in newspaper and photography centered on the opinion that “what is whispered in the closet shall be proclaimed from the house-tops.”⁵⁹ The foundation of their article broached the idea that there is a distinct tort claim for the invasion of one’s privacy.⁶⁰

The duo placed four restrictions on their right to privacy claim with the intent to find a balance between a person’s privacy right and freedom of the press (free speech).⁶¹ A privacy right violation claim would *not* hold up if: (1) the information published was of “public or general interest,” (2) under slander and libel law was considered privileged communication, (3) publication was oral and had no special damage claim, or (4) the “victim” of the right to privacy violation gave consent or published the facts himself.⁶² Although apprehensive at first, the Supreme Court of Georgia applied the ideas of Brandeis and Warren in its decision in *Pavesich v. New England Life Ins. Co.*⁶³ *Pavesich* established a precedent that was followed by a great

⁵⁶ David A. Cathcart, *Privacy in the Workplace: Emerging Claims and Defenses*, C983 A.L.I.-A.B.A. 451, 492 (1995).

⁵⁷ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

⁵⁸ *See id.*

⁵⁹ *Id.*

⁶⁰ Cathcart, *supra* note 56.

⁶¹ Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 714 (1990).

⁶² *Id.* at 715.

⁶³ *Id.* at 717.

number of courts and the “right of privacy” was eventually included in the Restatement of Torts by the American Law Institute (“ALI”).⁶⁴

The Restatement initially stated, “[a] person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.”⁶⁵ In 1977, the ALI released the Second Restatement of Torts, which adopted a great extent of William L. Prosser’s ideas from his California Law Review article titled *Privacy*,⁶⁶ wherein Prosser distinguished four categories of the privacy tort.⁶⁷ The Second Restatement of Torts reworked the privacy right of an individual and established four areas of separation: (1) “unreasonable intrusion upon the seclusion of another,” (2) “appropriation of the other’s name or likeness,” (3) “unreasonable publicity given to the other’s private life,” and (4) “publicity that unreasonably places the other in a false light before the public.”⁶⁸

Yath v. Fairview focused on the “unreasonable publicity given to another’s private life.”⁶⁹ To establish a successful claim under the Restatement (Second) of Torts, there are four parts that must be satisfied: “(1) public disclosure; (2) of a private fact; (3) which would be offensive and objectionable to the reasonable person; and (4) which is not of legitimate public concern.”⁷⁰ *Publicity*, another term for the “public disclosure” element, is distinct from the phrase *publication*, which is often related to defamation cases.⁷¹ The Second Restatement of Torts differentiates between each word. *Publication*, as explained by section 577, encompasses any information conveyed to another party, i.e. a third person.⁷² Whereas *publicity* defines

⁶⁴ *Id.* at 718.

⁶⁵ *Id.*

⁶⁶ See RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

⁶⁷ Cathcart, *supra* note 56, at 492.

⁶⁸ Kramer, *supra* note 61, at 719.

⁶⁹ *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 42-45 (Minn. Ct. App. 2009)

⁷⁰ Cathcart, *supra* note 56, at 493.

⁷¹ RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

⁷² *Id.*

communication to “the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.”⁷³

Comment a of the Restatement⁷⁴ provides a way to measure whether a medium constitutes publicity. It states, “Any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section.”⁷⁵ The question left unanswered applies to networking sites as a medium. Is it sufficient to place the networking sites within the genre of a newspaper, broadcast, or even a speech given to a large group of people?

V. Traditional Approach, Modern Problem

As previously stated, an invasion of privacy claim automatically compels an inquiry into four factors which must each be met to succeed in court.⁷⁶ Of those factors, publicity entails further scrutiny to determine whether networking sites, specifically MySpace, can adequately be declared the equivalent of a newspaper, magazine, handbill, or even a broadcast.⁷⁷

A. MySpace as a Medium- The Differing Opinions in *Yath*

Among the many inconsistencies between the opinions of the District Court of Hennepin County and the Court of Appeals of Minnesota in *Yath v. Fairview Clinics* lies an agreement that two individual avenues can equally satisfy the publicity sub-element requirement.⁷⁸ The Second Restatement of Torts reiterates these avenues in section 652D *comment a*, which states publicity occurs when a “matter is made public” either by “communicating it to the public at large or to so

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Cathcart, *supra* note 56, at 492.

⁷⁷ RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.

⁷⁸ *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 43-44 (Minn. Ct. App. 2009).

many persons that the matter must be regarded as substantially certain to become one of public knowledge.”⁷⁹ Simply stated, publicity is analyzed by first determining if the instrument used to communicate the disputed information is a private or public medium.⁸⁰ Communication by a private medium then considers the number of individuals contacted through the medium.⁸¹ While, a public medium will look to whether a sole transfer of information to the “public at large” occurred.⁸²

Application of this branch in publicity theory to networking sites produced tension between the district court and the court of appeals, and causes further confusion in the management of cyberspace by the law. In its opinion, the district court applied the method of analysis used for a private medium by focusing on the amount of people who saw the webpage.⁸³ The court deemed publicity to be unmet “because Yath proved only a small number of people actually viewed the MySpace.com webpage.”⁸⁴ Though, the court of appeals felt that because the district court did not explicitly designate the webpage as a private medium, it must have used the private medium analysis *by mistake*.⁸⁵ Apparent by its rationale of the district court’s opinion, the court of appeals firmly ascertained the public disposition of the MySpace webpage.⁸⁶ The court did acknowledge that e-mail is a private medium, as determined by *Bodah v. Lakeville Motor Express, Inc.*⁸⁷ But rationalized that a MySpace webpage is similar to a newspaper, store window posting, and radio

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 43.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* (citing *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W. 2d 550, 553 (Minn. 2003)).

broadcast, because each one speaks to the public at large, i.e. they can be described as “public forums.”⁸⁸

B. Newspapers Should Be Black and White, Internet Publicity Should Not

The underlying belief found in both courts’ arguments is the necessity of establishing a specific label for each medium of communication.⁸⁹ A label is simply black or white, private or public, and thought to be a definitive brand. Such a system has served to be adequate for mediums where a filter mechanism is in place. Social networking websites, on the other hand, speak in unsuppressed technicolor with masses of people *green* with envy, *red* faced and furious, and *blue* with sadness, who have easy access to a powerful tool vacant of publisher, producer, or even reputation constraints.⁹⁰ Consequently, a two-fold problem arises between the need to protect the millions of people within the networking communities who are unaware of legal consequences associated with posting information, and the obligation to regulate the harmful products which result from a user’s posts.⁹¹

The rigid disposition in designating a medium as only public or private is not conducive to networking sites, or the internet in general. There should be fluidity in characterizing MySpace as a communication medium.⁹² Depending on the available restrictions, MySpace can easily transform from a public medium, open for all to see, to an exceptionally secure area,

⁸⁸ *Id.*

⁸⁹ *See id.* (providing a discussion of the courts’ differing views of the website as either a private or public medium).

⁹⁰ *See generally* Sajai Singh, *Anti-Social Networking: Learning the Art of Making Enemies in Web 2.0*, J. INTERNET L., Dec. 2008, at 3 (providing examples of the variety of networking sites useful according to a user’s mood).

⁹¹ *See, e.g.*, Daniel Findlay, *Tag! Now You’re Really “It” What Photographs on Social Networking Sites Mean for the Fourth Amendment*, 10 N.C. J. L. & TECH. 171, 171 (2008) (presenting an example of a young man in legal trouble because someone posted pictures of underage drinking on a networking site and discussing the growth of technology leading to his lack of protection).

⁹² Sharon D. Nelson, Esq. & John W. Simek, *Capturing Quicksilver: Records Management for Blogs, Twittering and Social Networks*, WYO. LAW., June 2009, at 56, 59 (“emerging technologies are fluid (comments on blogs, ever-expanding discussions on wikis, changes on social networking sites, etc.)”).

observable by a select few and comparable to an e-mail.⁹³ Through the use of e-mail, an individual retains the authority to decide who directly receives the information, as well as how much to which a person has access. The same can be said for a MySpace webpage when the creator of the webpage shapes the communication produced by the site by employing security settings and regulating the people able to view the site.

However, if restrictive tools are not used, a MySpace webpage may transform into a “public forum” similar to a newspaper or radio broadcast. A site such as this has the ability to reach an unlimited audience and could potentially create a medium where a “small leak can become a flood.”⁹⁴ The lack of a filter remains to be a dissimilarity between a networking site and a traditional public medium. Unlike publishers, amateur persons are unskilled in the risk and benefit analysis associated with publishing material, be it a newspaper, magazine, or the like.⁹⁵ The extensive process of employee selection, adherence to applicable regulations, editing, reviewing, and audience and profit management cannot be properly compared to the ease and lack of supervision which comes with the “one click of a button technique” to upload information onto the internet.⁹⁶ Information which could be “extremely embarrassing, erroneous, or even libelous” to users.⁹⁷ Moreover, internet posting holds minute risks of financial loss in relation to professional companies when transmitting private information to the public.⁹⁸

⁹³ See James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1196 (2009) (showing the dually private and public function of Facebook.com).

⁹⁴ Horton, *supra* note 35, at 1268.

⁹⁵ See generally Margo E. K. Reder & Christine Neylon O’Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 MICH. TELECOMM. & TECH. L. REV. 195, 196 (2002) (“newspapers have a responsibility regarding the veracity of the content that they print”).

⁹⁶ *Id.* at 196 (“The culture of online communications is vastly different from traditional discourse, in that the former tolerates and even encourages the use of hyperbole, crudeness, acronyms, misspellings, and misuse of language. It is a fast and loose atmosphere, emphasizing speed rather than accuracy.”).

⁹⁷ Ruben Rodrigues, *You’ve Been Poked: Privacy in the ERA of Facebook*, SCITECH LAW., Summer 2008, at 18, 18.

⁹⁸ See Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3, 5 (2001).

C. Problematic Application of Traditional Publicity Analysis

The appellate court in *Yath* provides a proper analysis of a public forum, but may have been too quick to adhere such label to the MySpace webpage without first paying a greater focus to the privacy settings it utilized. The court refutes any possibility and adheres to its opinion that MySpace is absent “password protection and restrictive safeguards,”⁹⁹ a conclusion easily dispelled when one visits the MySpace webpage.

Yath illustrates the concerns of new advances in the electronic age as applicable to the legal world. Legislatures are struggling to keep up with the growth of the internet,¹⁰⁰ making it inferable the inconsistency present among the judicial system.¹⁰¹ The difficulty found in applying previously established statutes and case law to the context of networking sites can partially be attributed to the legislative walls which were enacted prior to modern technology, and the swift advances which have gone beyond traditional boundaries, those which were at one time unsurpassable.¹⁰²

There are three ways courts can adjust to the rapid pace set by cyberspace by (1) allowing “technology to develop its own self-regulation,” (2) pre-strategizing an appropriate plan before technological situations occur, or (3) creating a comprehensive set of regulations with knowledge of the application of traditional laws.¹⁰³ Depending on relevance, each option may be harnessed at varying times. There will be circumstances when it is necessary for the internet to regulate itself through laws, social norms, markets and architecture,¹⁰⁴ as well as occasions which require

⁹⁹ *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 44 (Minn. Ct. App. 2009).

¹⁰⁰ Horton, *supra* note 35, at 1267.

¹⁰¹ *Id.* at 1269.

¹⁰² *Id.* at 1301 (“[T]he law struggles to keep pace with technology . . .”).

¹⁰³ *Id.* at 1269.

¹⁰⁴ Joseph Reagle, Why the Internet Is Good, <http://cyber.law.harvard.edu/people/reagle/regulation-19990326.html> (last visited Oct. 31, 2009) (stating the “four things that regulate cyberspace,” as established by Lawrence Lessing).

government intervention to establish liability where there is lack thereof.¹⁰⁵ In *Yath*, the court chose the third approach, stepping with caution and applying the traditional invasion of privacy action.¹⁰⁶ However, the split opinions between the district court and the court of appeals in determining the applicability of publicity serves as a red flag signaling the need to update publicity standards that conform to social networking sites, and more broadly, the internet.

VI. The Solution – Case Specific Medium Labeling By Dual Level Inquiry

Instead of an absolute grouping of networking sites as strictly a public or private medium, à la the court of appeals and the district court in *Yath*,¹⁰⁷ a possible solution to the United States launch into the digital age is to modify the publicity factor of the long-established invasion of privacy tort into a multi-part inquiry. Prong one essentially identifies the person whom posted the problematic information and locates where the information was posted. It also provides for either an early designation of a public medium or the need for further analysis. Prong two further analyzes whether a posting on one's own site is done on a private or public medium, by accessing the poster's use of provided privacy settings.

A. Publicity Test: Prong One

Under this prong, it must first be established who the poster is and where the disputed material was posted. After gathering these facts, there are two branches which determine the progression of the analysis. First, if the person who posted the information was not the creator or present possessor of the webpage¹⁰⁸ where the information was posted, then the webpage should be designated as a public medium under the invasion of privacy tort. If the individual who posted

¹⁰⁵ *See id.*

¹⁰⁶ *See Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 42-45 (Minn. Ct. App. 2009).

¹⁰⁷ *See id.* (showing the court of appeals viewed a MySpace webpage as a public medium, akin to the private medium analysis applied by the district court).

¹⁰⁸ *See generally MySpace Cofounder to Stepdown 'By Mutual Agreement,'* FRANC.24.COM, Apr. 23, 2009, <http://www.france24.com/en/20090423-myspace-cofounder-step-down-mutual-agreement-> (acknowledging News Corporation as a proprietor and Tom Anderson as President of MySpace, although a proprietor or president is not the same as the creator of the webpage).

the information was the creator or present possessor of the webpage of which the information was posted, then a further examination should be conducted in the second prong to distinguish if the website would constitute a public or private medium.

The MySpace “Terms and Use Agreement” specifically states that the poster is “solely responsible for the content” posted or transmitted through use of “*any* of the MySpace Services.”¹⁰⁹ The agreement also allows for MySpace to obtain a limited license¹¹⁰ to a poster’s content, only ending distribution of that content once a webpage owner has changed the “content’s privacy setting to ‘private.’”¹¹¹ All users of MySpace have agreed to these terms in order to create a MySpace account, thus all users *should* be aware that their actions through the MySpace network are their foremost responsibility.¹¹² However, the ability to use privacy settings gives some leeway for mistake, by providing protection to people who utilize them properly.¹¹³

Such privacy settings are accessible *only* to the webpage owner, not third-party posters.¹¹⁴ An individual who posts on another’s webpage is not aware which, if any, of the privacy settings the webpage creator has instated in regard to the content on his or her webpage.¹¹⁵ Critics may

¹⁰⁹ MySpace.com, Terms and Use Agreement § 7.2, <http://www.myspace.com/index.cfm?fuseaction=misc.terms> (last visited Jan. 15, 2009) (emphasis added).

¹¹⁰ See generally *id.* § 6.1 (describing how a limited license allows MySpace “to use, modify, delete from, add to, publicly perform, publicly display, reproduce, and distribute such content solely on, through or in connection with the MySpace Services,” but does not give MySpace ownership rights to your posted material or actions within the MySpace realm).

¹¹¹ *Id.*

¹¹² See generally Carly Brandenburg, Note, *The Newest Way to Screen Job Applicants: A Social Networker’s Nightmare*, 60 FED. COMM. L. J. 597, 603-04 (2008) (discussing the Facebook.com’s application of privacy settings in its user agreement).

¹¹³ See Emergency Management and Response Information Sharing and Analysis Center, Security and Privacy on Social Networking Sites, http://www.usfa.dhs.gov/downloads/pdf/infograms/bulletins/cip_bulletin_2_10.pdf (last visited Apr. 20, 2010) (noting the importance of privacy settings within the section listing helpful precautions for networking site “security and privacy”).

¹¹⁴ See generally MySpace.com, Home Page, *supra* note 19 (allowing use of “privacy settings” only after logging into one’s account).

¹¹⁵ Wash. Educ. Ass’n, Social Networking Websites, http://www.washingtonea.org/index.php?option=com_content&view=article&id=944:social-networking-websites&catid=140:legal-publications&Itemid=86 (last visited Apr. 10, 2010) (“Even if your students don’t have

argue the poster *knows* a webpage has specific privacy settings in place.¹¹⁶ Although seemingly persuasive, knowledge is not enough to generate immunity from this analysis, because *control*, not *knowledge* is the crucial factor. Errors and falsehoods are commonalities in a person's knowledge when obtained through word of mouth. The owner controls the actual privacy of a webpage's content, with the ability to change his or her mind at a given moment.¹¹⁷ Information that was once protected may be available to the public in a minutes span.¹¹⁸ Thus a third party's post can instantaneously change from private to public based on the creator's whim.¹¹⁹

This prong's initial separation between an automatically public medium and a medium which needs further investigation makes it possible for the same webpage to be both a private *and* public medium independently based on the status of an individual poster. This puts significance to the theory that "a person who attempts to protect and secure their privacy and information is more deserving of that privacy than one who does not care about protecting privacy" of the information in which he or she posts.¹²⁰

B. Publicity Test: Prong Two

Under this prong, privacy settings should be explored further. The availability of privacy setting tools and factors relating to the use of the tools by the individual should be balanced to determine if the poster substantially protected the information he or she posted from the public's view. Generally, networking sites install privacy settings to benefit its users. To assist in the inquiry of the networking site's contribution to provide privacy protection, a court may weigh

access to your page because you have changed your privacy settings, comments you post on other peoples Myspace or Facebook pages might be accessible to your students if those peoples pages are not restricted.”).

¹¹⁶ Alison Driscoll, *Facebook Fail: How to Use Facebook Privacy Settings and Avoid Disaster*, MASHABLE, Apr. 29, 2009, <http://mashable.com/2009/04/28/facebook-privacy-settings/> (“No one will know you’ve changed settings, either for them or in general . . .”).

¹¹⁷ MySpace.com, *How Do You Control Your Privacy on Profile 2.0?*, http://faq.myspace.com/app/answers/detail/a_id/290 (last visited Apr. 10, 2010).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Brandenburg*, *supra* note 112, at 608.

factors such as the amount of privacy settings it avails to the site users, the accessibility of such settings, and the coverage such settings provide if used properly.¹²¹

To provide a precise set of factors to examine a poster's use of available privacy settings would be impractical. Principally, analysis should begin with factors such as: (1) "whether the social networker attempted to or did enable the [available] privacy settings;" (2) "the level of privacy the networker attempted to or was able to set;" (3) the amount of difficulty in applying the available privacy settings; (4) the public's knowledge of the availability of such settings- basically, were settings available privately, or known to user; (5) "the kinds of people and groups to whom that networker chose to disclose the information he or she later claims to be sensitive and private;" and (6) "whether the unwanted or unauthorized person who accessed the networker's information was able to happen upon the information or had to hack through security measures to find the information."¹²²

By allowing the comparison of efforts taken by both the networking site and the creator off the webpage, a basis is established to provide some relief for users who substantially undertook to protect the information they posted. Upon determination that a poster applied substantial effort, given the entirety of provided tools, to protect his or her posts, a networking webpage should be ascertained as a private medium. Therefore, a poster who is determined to have not imparted this level of effort should be determined to have posted on a public medium.

Once this characterization of the networking webpage is established as either private or public, the analysis of the publicity element should proceed as customarily established by the

¹²¹ See generally Richard Goettke & Joseph Christiana, Privacy and Online Social Networking Websites (May 14, 2007), available at <http://www.eecs.harvard.edu/cs199r/fp/RichJoe.pdf> (providing a "privacy protection" scale of four major networking sites).

¹²² Brandenburg, *supra* note 112, at 612 (providing a number of factors in establishing publication in a defamation case, some of which apply to publicity in an invasion of privacy claim involving the internet).

Second Restatement of Torts.¹²³ Henceforth, a private medium will be scrutinized by amount of people, thus fulfilling the publicity requirement if communication of the information on the webpage reached “so many persons that the matter must be regarded as substantially certain to become one of public knowledge.”¹²⁴ Alternatively, a public medium will constitute publicity for an invasion of privacy claim if it communicated to “the public at large.”¹²⁵

C. Publicity Test as Applied to *Yath*

Yath provides no “evidence” which specifically pinpoints the publisher of the “Rotten Candy” website,¹²⁶ although the facts do offer helpful clues. The details given by the court in *Yath* do not lend a hand to easy interpretation within prong one. Essential facts unnecessary to *Yath*’s invasion of privacy analysis, but imperative here, may have been left out of the record.

Accordingly the identity of both the MySpace webpage creator and the individual who posted the private information of Candace Yath on the respective webpage are unknown, however there are two particular details which lead to a presumption that the creator and the poster are the same person.

First, the webpage was online for a maximum time of “24-48 hours.”¹²⁷ This limited time period in which the webpage was displayed is supplemented by opportune points of origination and termination. The webpage was established during Fairview’s investigation, seemingly out of spite, and deleted when Fairview took action to view the webpage during its second investigation.¹²⁸ Hence, the webpage was actually in motion for no more than two days, meaning the likelihood of the creation of a webpage to specifically display Yath’s information is higher

¹²³ RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 45 (Minn. Ct. App. 2009).

¹²⁷ *Id.* at 43.

¹²⁸ *Id.* at 39.

than the notion that Yath's information was posted by a third person on an already existing webpage.

Second, the webpage displayed Yath's picture and private information.¹²⁹ While the court did not say the webpage held *only* Yath's information,¹³⁰ it would be irrational to assume the webpage was *not* created in a motive against Yath. It can be inferred from the record¹³¹ that the information was the center of the webpage. The name of the entire webpage, *Rotten Candy*, infers relations to Yath herself and also the intent of the webpage creator.¹³²

Although the viewers of this webpage could provide a better foundation for determination, the conclusion that the person who created the webpage was also the person who posted Yath's personal information is a concrete observation. Thus a prong two analysis should commence to determine whether the creator/poster substantially protected the information in which he or she posted.

An evaluation of the effort on the part of both MySpace and the anonymous webpage creator to regulate the public's access to the "Rotten Candy" webpage is instigated at the onset of the second prong. The court of appeals in *Yath* described the MySpace webpage as presenting Yath's personal information for anyone to view.¹³³ Accurate as this statement may be, this prong acknowledges the many factors affixed to a webpage recognized as fully open to the cyber-world.

Initially, an inner look into MySpace through examination of privacy settings should ensue, followed by an equivalent assessment of the factors applicable to the webpage creator's regulation endeavors. However, due to the intrinsic nature of the factors, *Yath* provides

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 45.

problematic when submitted to a prong two analysis. The lack of facts documented in the record pertaining to the webpage, created difficulty under prong one, but two sparse facts were able to provide a backbone for a few strong inferences. Here, the factors go far more in-depth than the two clarifying questions found in the preceding prong. Thus, devoid of supplementary information, a prong two analysis cannot progress forward in the study of *Yath*.

VII. Conclusion

To be “qualified” within the professional sphere has taken on new meaning within the online cyber-world. An individual’s previous struggle to gain access to the traditionally exclusive channel of mass communication no longer exists and may too easily be achieved with the emergence of internet tools such as education blogging and forums like social networking websites.

MySpace, and other similar networking sites, are recognized as having an effortless sign-up process and no initial fees, two characteristics of many, which facilitate a large and boundless network of people. Though along with the tremendous success of such sites, lies an influx in cyber-bullying. Each registered user is provided with the capability to make harmful contact with virtually anyone due to the infinite reach provided by access to an internet connection, along with the miniscule restrictions enforced upon users by networking sites. The stories of Megan Meier and Candace Yath illustrate the impending potential for harm looming in the hands of each site user, and the irrevocable nature of the end result.

Apparent is the need to regulate harassment on networking sites, but problematic is the volume of people who partake on some level in this type of act. *Yath v. Fairview* addresses specifically the posting of another’s private information on MySpace, thus invoking an Invasion of Privacy claim. The customary method for evaluating “publicity” as presently stated by the

Second Restatement of Torts has proved to be a valuable test when applied to traditional methods of mass communication, but serves to be inadequate in the context of networking sites.

A user's webpage on a networking site is fluid, holding the ability to be as private as an e-mail or more availing to the public than a newspaper. Both the district court and the court of appeals in *Yath* applied the Restatement's long standing test for publicity, by trying to affix a specific label to networking sites as wholly private or public mediums of communication. But with little attention paid to the availability and use of privacy settings, the test overlooked the individuality of each webpage on a networking site, which depends on a user's employment of available security and privacy tools.

Proposed in this note is a solution to the complexity of accessing the publicity element in the invasion of privacy claim when applied to networking sites. A two prong inquiry evaluating the webpage containing the suspect posting will provide a substantial, yet realistic, assessment of the webpage's availability of information to the network's community.

Investigation under prong one entails an initial clarification of the identity of the poster, as well as the webpage creator, where the information was posted. Upon determination, the webpage either (1) becomes automatically designated as a public medium, if the poster is a third person party, or (2) proceeds to prong two for further probing upon confirming that the creator and the poster are the same person.

Prong two presents factors useful in weighing the contribution of both the networking site and the webpage creator in mitigating against unlimited and unhindered access of the public to the specified webpage. A lack of effort on the part of the creator to apply available privacy settings to his or her webpage would likely result in a designation of the individual webpage as a public medium. In contrast, a private medium example is a webpage in which the creator

employs the most restrictive and exclusive privacy settings, given that such protective means are available. The factors stated earlier are thus to serve as a way to measure all that is in between.

Upon conclusion of the second prong, or the first prong if the person who posted the information is a third party, the traditional analysis as provided by the Restatement will commence to determine if publicity is met for the public or private webpage.

Although the use of the dual prong test as applied here to *Yath* is problematic due to lack of necessary facts in the record, setbacks in future application of this test can be readily averted if a focus is placed on understanding and uncovering the restrictions which are accessible and in operation on the webpage.

A renovation of publicity, this is not. Consider New Orleans and New York; the Big Easy and the Big Apple, similar names, but vastly different cultures. A Sunday morning newspaper on a Louisiana porch is equivalent, though distinct from concise, quick news columns read while riding the subway. Both are admirable locations, but the appeal of each city depends on the benefit one can provide over the other. Akin to these two cities, are the long established publicity test and the internet focused publicity test; both of which are capable of providing adequate analysis, although applicability of each one hinges on the mode of communication. A professional newspaper produced by a trained staff compared to a temporary MySpace webpage displaying personal and private information, dually alike as portals of information, but measurably different in virtually all else. North or South, traditional or progressive, all lack qualities the other may possess.