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What is a Newspaper under California's Retraction Statute - Enquiring Minds Want to Know

Catherine M. Bump

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What is a "Newspaper" under California’s Retraction Statute? Enquiring Minds Want to Know

by CATHERINE M. BUMP*

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* B.A., Stanford University; Member, Third Year Class. The author wishes to dedicate this Note to her mother, Liselotte Weidenkopf Bump. The author also thanks Bob Stumpf of Bronson, Bronson & McKinnon, Tim Redmond of the San Francisco Bay Guardian and Professor David I. Levine for their assistance.
Introduction

California Civil Code section 48a\(^1\) limits recovery in defamation suits against newspapers or radio broadcasters to special damages\(^2\) unless the plaintiff has unsuccessfully demanded a

1. The full text of the statute reads as follows:

   **Section 48a. Libel in newspaper; slander by radio broadcast.**

   1. **Special damages; notice and demand for correction.** In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

   2. **General, special and exemplary damages.** If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.

   3. **Correction prior to demand.** A correction published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.

   4. **Definitions.** As used herein, the terms "general damages," "special damages," "exemplary damages" and "actual malice," are defined as follows:
   (a) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings;
   (b) "Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other;
   (c) "Exemplary damages" are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice;
   (d) "Actual malice" is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast shall not constitute actual malice.

   CAL. CIV. CODE § 48a (West 1988).

2. Special damages are those which the plaintiff pleads and proves that he has actually suffered. *Id.* § 48a(4)(b).
retraction from the media defendant. The effect of section 48a is to preclude both general and exemplary damages if the requisite criteria of the statute are met.

Because the term "newspaper" is not defined in the statute, the scope of protection offered to the print media has been delineated in a series of state court decisions. Although magazines and other periodicals apparently do not qualify for the statute's protection, the exact breadth of the term "newspaper" for section 48a purposes is still in dispute.

The primary purpose of section 48a is to protect media which, by focusing on speedy dissemination of the news, may unwittingly publish inaccurate information; accordingly, an important element in determining newspaper status is a publication's "lead time." Lead time is defined as "the shortest period of time between completion of an article and the time it is published." In other words, a publication which reports events immediately after they happen may have little or no time in which to verify the accuracy of its stories. By ascertaining how long a publication has between its news deadline and the time it goes to the printer, a court can determine whether a publication in fact merits the protection offered by section 48a.

The landmark case on this issue is Burnett v. National Enquirer, Inc., designating the National Enquirer a non-newspaper for purposes of section 48a. Burnett involved a defamation suit brought by entertainer Carol Burnett, alleging that an item in the Enquirer's weekly gossip column was false
and libelous. The *Enquirer* claimed protection under section 48a, but both trial and appellate courts found that it was not a newspaper and therefore fell outside the scope of the statute's protection. Although both courts mentioned other factors, each ultimately rested its decision on the loose time constraints under which the *Enquirer* operated.

*Burnett* is the only reported case to analyze an assertion of section 48a coverage by a publication which would popularly be considered a newspaper. Unfortunately, however, the decision does not provide a clear test of what constitutes newspaper status under the statute. As a result, the precise indicia necessary for section 48a newspaper status are still debated, and extraneous factors of doubtful relevance under *Burnett* have been introduced into this debate.

*Kronemyer v. The Reader,* recently filed in San Diego County Superior Court, provides an illustrative example. In challenging the status of the San Diego *Reader* (*The Reader*) as a newspaper under section 48a, the plaintiff in this defamation suit relied on a host of factors, most of them of questionable relevance under *Burnett.* These included the fact that *The Reader* is published weekly, that it subscribes to no wire services, that it does not identify itself as a newspaper, and that it is distributed free of charge and derives its revenues solely from advertising. Furthermore, plaintiff Kronemyer attempted to argue that *The Reader's* content did not entitle it to newspaper status.

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13. *Burnett,* 7 Media L. Rep. (BNA) at 1322; *Burnett,* 144 Cal. App. 3d at 1001, 193 Cal. Rptr. at 211. See infra notes 104-21 and accompanying text.
14. See infra notes 92-131 and accompanying text.
16. See infra notes 153-70 and accompanying text.
18. *Id.* at 10.
19. *Id.*
20. *Id.* at 9-10.
21. *Id.* at 9.
Although the case was eventually settled out of court and *The Reader's* status as a newspaper never adjudicated, the case illustrates the potential chilling effect exerted under the current state of the law on smaller, non-daily California print media such as *The Reader*. Failure to extend the shield of section 48a to publications such as *The Reader* severely limits the statute's applicability and undermines its effectiveness. The sound policy underpinnings of the statute, namely, encouraging the speedy publication of news, are ill-served when publications which do in fact quickly disseminate the news are excluded from its coverage.

Accordingly, this Note will argue that the shield of section 48a should extend to a broad category of media — not simply to a limited group of traditional, daily newspapers. Section 48a should be amended to eradicate the questionable distinction, for purposes of the statute, between newspapers and magazines. Rather, section 48a coverage should depend only on how often a publication is regularly published. While an alternative solution might be to base protection on a publication's lead time, formulating an absolute maximum lead time standard would arguably lead to even more avoidable litigation than currently occurs.

In reaching the above conclusion, this Note first discusses the legislative history of section 48a. Second, it traces the statute’s case history, including affirmation of the statute's constitutionality, the scope of protection offered to newspapers and radio broadcasts, the minimum standards for an adequate retraction, the statute's possible use in non-defamation actions, and its applicability to non-newspaper/radio media. The next section examines California case law on the definition of “newspaper” under section 48a. It is then argued that a chilling effect on media has resulted from uncertainty as to this definition, and, furthermore, that modern libel law often fails to provide plaintiffs with an adequate remedy. Finally, the Note proposes amending section 48a to provide broader and more definite applicability to print media in California.


23. See infra notes 90-131 and accompanying text. While it can certainly be argued that section 48a protection should also be extended to cover television, that subject is beyond the scope of this Note.
I
The Legislative History and Public Policy Goals of Section 48a

As originally promulgated in 1931, California Civil Code section 48a applied only to "newspapers." Under its terms, the plaintiff in a libel suit against a newspaper defendant could recover no more than "actual damages" unless the plaintiff had demanded and been refused a retraction. To warrant protection, a newspaper had to show lack of malice and publish a sufficient retraction within two weeks of the request therefor.

In 1945, section 48a was revised and amended to include radio broadcasters in addition to newspapers. Under the revised statute, which remains unchanged today, plaintiffs are limited to "special damages" unless they demand and are refused a

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24. 1931 Cal. Stat. 1018 (amended 1945). In its entirety, the statute read:

In any action for damages for the publication of a libel in a newspaper, if the defendant can show that such libelous matter was published through misinformation or mistake, the plaintiff shall recover no more than actual damages, unless a retraction be demanded and refused as hereinafter provided. Plaintiff shall serve upon the publisher at the place of publication a notice specifying the statements claimed to be libelous, and requesting that the same be withdrawn.

If a retraction or correction thereof be not published in as conspicuous a place and type in said newspaper as were the statements complained of, in a regular issue thereof published within two weeks after such service, plaintiff may allege such notice, demand, and failure to retract in his complaint and may recover both actual, special and exemplary damages if his cause of action be maintained. If such retraction be so published, he may still recover such actual, special, and exemplary damages, unless the defendant shall show that the libelous publication was made in good faith, without malice, and under a mistake as to the facts.

Id.

25. Although actual damages are not defined in the 1931 statute, a generally accepted definition is "[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury." Black's Law Dictionary 352 (5th ed. 1979). Actual damages are generally considered synonymous with compensatory damages, or those damages compensating for injury actually sustained, often economically. Id. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (defining actual damages as "only such damages as are sufficient to compensate the plaintiff for actual injury").


28. Although the 1931 Statute potentially limits plaintiffs to "actual" damages, while the present statute refers to "special" damages, the terms are used synonymously. Special damages and actual damages may both be equated with compensatory damages — damages for actual, economic injury, as compared to "general" damages, which compensate for lost of reputation and other related injuries.
"correction."29 Plaintiffs now have a time limit — twenty days after "knowledge of the publication"30 — within which they must demand the correction,31 and the defendant is given three instead of two weeks to comply.32 Furthermore, defendants need no longer show good faith error in order to qualify for the statute's protection.33

As committee hearings and other legislative discussion of the statute were not recorded in 1931,34 state courts have been forced to speculate as to the original legislative intent of section 48a.35

The statute provides newspapers and radio broadcasters with protections available neither to other media nor to private defamation defendants. Its effect is to grant a modified protection to two classes of media which typically provide timely coverage of the news. Conversely, slower-paced media, such as magazines and books, are excluded from the shield of section 48a.36

In the absence of clear legislative intent, the most significant rationale advanced by the courts for this protection is the unavoidable danger that some media, in quickly gathering and disseminating news, will make mistakes due to their inability to check sources for accuracy and verification prior to publication. As the California Supreme Court stated in 1950: "In view of . . .

29. When the legislature amended the statute, it substituted the word "correction" for "retraction." "A 'retraction' implies that the publisher take back the original story and say it was untrue. A 'correction' seemingly would require a correct statement of the facts as well." Simon, Libel: Retraction: Effect of Recent California Legislation, 38 CALIF. L. REV. 951, 960 n.52 (1950). Apparently something more than a mere retraction is now required.

As "correction" and "retraction" are often used synonymously, and, indeed, most subsequent California cases refer to section 48a's "retraction requirement," this Note will use the two words interchangeably. But see Cendali, Of Things to Come — The Actual Impact of Herbert v. Lando and a Proposed National Correction Statute, 22 HARV. J. ON LEGIS. 441, 495 (1985) (arguing that "retraction" has a more antagonistic connotation than does "correction").

30. CAL. CIV. CODE § 48a(1) (West 1988).
31. Id.
32. Id.
33. Id.
34. The Archives of the Secretary of State of California has collected nineteen pages of material referred to by the governor before signing the 1945 amendment. However, the material, consisting primarily of letters from legislative analysts and lobbyists, contains no information on the original statute and focuses exclusively on the justifications for including radio broadcasters within the statute's coverage. This material is on file at COMM/ENT, Hastings College of the Law, 200 McAllister, San Francisco, CA 94102.
35. See infra notes 44-51 and accompanying text.
36. See infra notes 66-88 and accompanying text.
the necessity of publishing news while it is new, newspapers and radio stations may in good faith publicize items that are untrue but whose falsity they have neither the time nor the opportunity to ascertain."

Almost twenty years later, the California Supreme Court succinctly restated its position as to legislative intent, although without hurried reporting of the news as an explicit rationale: "The Legislature enacted Civil Code section 48a to encourage a more active press by means of an increased insulation of newspapers from liability arising from erroneous published statements."

In addition to suggesting legislative intent to minimize generally the chilling effect on the press of libel suits, the California Supreme Court has noted specific public policies furthered by the precise limitations of section 48a. The legislature may simply have decided that "defamation suits against newspapers and radio stations constituted the most conspicuous example of the danger it sought to preclude." It may have concluded that, "because of the business they are engaged in, newspapers and radio stations are the most frequent objects of defamation actions," and, furthermore, "that the danger of excessive damages in actions against them is greatest because of their reputed ability to pay." Also, in considering the sufficiency of the remedy being granted, the legislature may have "take[n] into consideration the fact that a retraction widely circulated by a newspaper or radio station would have greater effectiveness than a retraction by an individual."


39. Werner, 35 Cal. 2d at 121, 216 P.2d at 825.
40. Id. at 132, 216 P.2d at 832.
41. Id. at 133, 216 P.2d at 832.
42. Id.
43. Id.
II
Background Case Law

A. Constitutionality

Section 48a was found to meet both federal and state constitutional standards in *Werner v. Southern California Associated Newspapers*. In addressing appellant's equal protection claim in that case, the court examined a number of rationales on which the legislature could reasonably have relied in circumscribing the scope of the statute as it did. The court found that classifying newspapers and radio stations apart from other media bore a reasonable relationship to the objectives the legislature sought to further in enacting section 48a, namely, limiting excessive defamation suits against those particular media.

Those groups could be singled out, the court held, because "newspapers and radio stations constituted the most conspicuous example of the danger [of excessive suits]."

According to the court, the Legislature could reasonably have concluded that "because of the business they are engaged in, newspapers and radio stations are the most frequent objects of defamation actions and . . . the danger of excessive damages in actions against them is greatest because of their reputed ability to pay." Further, in balancing protection of defendants with ensuring plaintiffs an adequate remedy, "the Legislature could properly take into consideration the fact that a retraction widely circulated by a newspaper or radio station would have

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It should be noted that right-to-reply statutes, giving plaintiffs a statutory right to a retraction instead of merely providing special privileges for defendants who voluntarily retract, have been held unconstitutional by the United States Supreme Court. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). For a discussion of whether the Court's holding could be construed to apply to all retraction statutes, see Cendall, *supra* note 29, at 493-94.

45. *Id.* at 132, 216 P.2d at 832.

46. *Id.*

47. *Id.* at 133, 216 P.2d at 833.
greater effectiveness than a retraction by an individual."\textsuperscript{48}

The court noted that, despite the statute's protection extending even "to those who may deliberately and maliciously disseminate libels, the Legislature could reasonably conclude that it was necessary to go so far [to] effectively . . . protect those who in good faith and without malice inadvertently publish defamatory statements."\textsuperscript{49}

In concurrently holding that section 48a did not violate the plaintiff's due process rights by depriving him of damages, the court found that due process does not preclude legislative abolition of common law rights, so long as the ultimate objective is a permissible legislative goal.\textsuperscript{50} The court stated that there existed at least two legitimate bases for the statute: "the danger of excessive recoveries of general damages in libel actions and the public interest in the free dissemination of news."\textsuperscript{51}

### B. The Sufficiency of a Retraction Demand under Section 48a

Once the constitutionality of section 48a was established, the statute's various limitations and requirements were gradually delineated by the courts. One of the first issues litigated was the standards a prospective plaintiff must meet in making a retraction demand under the statute.\textsuperscript{52}

In \textit{Larrick v. Gilloon},\textsuperscript{53} the court narrowly read the statute as requiring that demand be made on the publisher, whether or not the plaintiff named him as a defendant. The court reasoned that, "Reporters, columnists, authors, critics, editors, and the

\textsuperscript{48} Id.
\textsuperscript{49} Id. at 134, 216 P.2d at 833.
\textsuperscript{50} Werner, 35 Cal. 2d at 125-26, 216 P.2d at 828. For a discussion of this holding, see Simon, supra note 29, at 956-57.
\textsuperscript{51} Werner, 35 Cal. 2d at 126, 216 P.2d at 828.
\textsuperscript{52} The relevant portion of section 48a states:
Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

\textbf{CAL. CIV. CODE § 48a(1) (West 1988).}
\textsuperscript{53} 176 Cal. App. 2d 408, 1 Cal. Rptr. 360 (1959). There, a libel defendant whose statements had been published in various newspapers claimed that a retraction demand should have been served on him, and not on the various publishers. Id.
publisher are all participants in newspaper publications. When error is made, however, it is the publisher who has power to make correction."

In Kapellas v. Kofman, the California Supreme Court further delineated the requirements of an effective retraction demand. Finding that the retraction requirement "did not intend to build technical barricades to recovery," the court stated that the sufficiency of a retraction demand "turns on whether the publisher should reasonably have comprehended which statements plaintiff protested and wished corrected."

Finally, in Di Giorgio Corp. v. Valley Labor Citizen, the plaintiff's duty in the case of numerous republications was considered. An appellate court concluded that, where a defendant's article is published in several newspapers without his authorization or consent, to qualify under section 48a a plaintiff must serve a retraction on the publisher of each publication.

C. The Scope of Protection Offered by Section 48a, within the Context of Newspaper and Radio

Although section 48a requires that a demand for correction be served "upon the publisher ... or broadcaster," the California Supreme Court has extended the statutory shield to cover others involved in the disseminating process. According to the court, "It does not follow ... that because the person upon whom the notice to retract must be served is the publisher of the newspaper, the statute applies to him alone. Reporters, columnists, authors, critics, editors, and the publisher are all participants in newspaper publications."

Courts have limited the statute's coverage, however, to those actually engaged in the business of disseminating news. For example, it has been held the statute does not shield a person who

56. Id. at 31, 459 P.2d at 918, 81 Cal. Rptr. at 366.
57. Id. (citing MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 554, 343 P.2d 36, 46 (1959)).
59. Id. at 274-75, 67 Cal. Rptr. at 87-88.
60. CAL. CIV. CODE § 48a(1) (West 1988).
62. Pridonoff, 36 Cal. 2d at 791, 228 P.2d at 8.
makes a libelous statement to a reporter, even if the statement is eventually published in a newspaper.\textsuperscript{63} Neither does it protect individuals holding press conferences.\textsuperscript{64} In justifying the restrictive application of section 48a, the California Supreme Court stated:

There is a significant difference ... between one who occasionally discovers and makes public an item that is newsworthy, and one who, as a daily occupation or business, collects, collates, evaluates, reduces to communicable form, and communicates the news. It is these latter activities that the Legislature sought to protect through section 48a.\textsuperscript{65}

D. The Applicability of Section 48a in Non-Defamation Cases

False light and defamation actions are, in substance, approximately equivalent,\textsuperscript{66} and in fact often overlap.\textsuperscript{67} However, plaintiffs may not evade the requirements of section 48a by alleging false light instead of defamation, as California courts have held that a false light claim must fulfill the requirements of section 48a, including its notice and demand provisions.\textsuperscript{68}

Invasion of privacy suits, however, are not subject to section 48a.\textsuperscript{69} Because such actions rest not on the inaccuracy of a statement, but on the violation of a plaintiff's privacy,\textsuperscript{70} a re-


\textsuperscript{64} Field Research Corp., 71 Cal. 2d at 114 n.4, 453 P.2d at 750 n.4, 77 Cal. Rptr. at 246 n.4 (disapproving, to the extent they would "extend the application of Section 48a to non-participants in publishing and broadcasting enterprises," Larrick v. Gilloon, 178 Cal. App. 2d 408, 1 Cal. Rptr. 360 (1959) (applying section 48a to press releases and political advertisements); Farr v. Bramblett, 132 Cal. App. 2d 36, 281 P.2d 372 (1955) (holding that section 48a applies to advertisements); and Howard v. Southern Cal. Assoc. Newspapers, 95 Cal. App. 2d 580, 213 P.2d 399 (1950)).

\textsuperscript{65} Field Research Corp., 71 Cal. 2d at 115-16, 453 P.2d at 751, 77 Cal. Rptr. at 247.

\textsuperscript{66} PRACTISING LAW INSTITUTE, COMMUNICATIONS LAW 59 (1986). False light is a somewhat broader tort and such a claim may succeed where a defamation one would not. It is primarily intended to redress injury to feelings, whereas defamation is intended to compensate for damage to reputation. Id.


\textsuperscript{69} Kapellas v. Kofman, 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969).

\textsuperscript{70} See Prosser, Privacy, 48 CALIF. L. REV. 383 (1960).
traction would serve only to exacerbate his injury by repeating the publication.  

E. The Applicability of Section 48a to Magazines

The most thoughtful analysis to date of the applicability of section 48a to magazines appears in Montandon v. Triangle Publications, a 1975 appellate court case. In holding that the statute did not apply to magazines, the court cited numerous precedents, but was also forced to explain a four-year-old California Supreme Court decision which implied that the statute did apply. In that case, Briscoe v. Reader's Digest Association, the California Supreme Court had dismissed a false light action on the grounds that the plaintiff failed to comply with the notice and demand requirements of section 48a.

However, as noted in Montandon, the opinion in Briscoe contained no discussion of the status of Reader's Digest as a magazine, and offered no basis for the finding that it was protected. Furthermore, despite the fact that lower courts had routinely held that the statute did not apply to magazines, the Briscoe court failed to discuss those prior cases. In Werner v. South-
ern California Associated Newspapers, for example, the court, addressing a purported due process violation, had upheld "the classification of newspapers and radio stations apart from others."79 Furthermore, Morris v. National Federation of the Blind,80 the first California case to specifically address the issue, held that section 48a did not apply to magazines.81 The court stated:

On full review of the statute, we conclude that it applies only to a publication in a newspaper or by radio. Its terms are clear. The Legislature conspicuously failed to include magazines in the protected group. We are bound by this apparently intended omission. Extension of the statute requires amendment rather than interpretation.82

The Morris court also noted that "the exculpatory effect of a retraction is limited to one published within three weeks of demand therefor, a requirement which would often be impossible of fulfillment by a magazine published monthly."83 If applied to magazines, therefore, the statute would discriminate against those not published often enough to comply with the retraction time limits.84 Lending additional credibility to the holding in Morris, the court in Montandon pointed out that the legislature had never amended section 48a to include magazines, leading one to believe that magazines are intentionally excluded under the statute.85

In light of the holding in Morris, the criticism in Montandon of Briscoe, and the fact that the California Supreme Court has declined to review Montandon,86 subsequent lower courts, although without explicitly addressing the issue, have tended to assume the exclusion of magazines from section 48a.87

79. 35 Cal. 2d 121, 132, 216 P.2d 825, 832 (1950).
81. Id. at 165-66, 13 Cal. Rptr. at 338-39.
82. Id. at 166, 13 Cal. Rptr. at 338.
83. Id. at 165-66, 13 Cal. Rptr. at 338.
84. Id. See also Montandon, 45 Cal. App. 3d at 951, 120 Cal. Rptr. at 194 (a statute "which completely ignores all magazines could not be construed to apply to certain magazines and not to others").
85. Montandon, 45 Cal. App. 3d at 952, 120 Cal. Rptr. at 195.
87. See, e.g., Selleck v. Globe Int'l, 166 Cal. App. 3d 1123, 1134 n.7, 212 Cal. Rptr. 838, 846 n.7 (1985) ("Inasmuch as defendant's publication . . . allegedly is a weekly magazine, not a newspaper, plaintiff was not required to plead compliance with the requirements of Section 48a."); Shumate v. Johnson Publishing Co., 139 Cal. App. 2d 121, 129-30, 293 P.2d 531, 537-38 (1956) (assuming that, once plaintiff had conceded its
tion, Montandon was cited with approval by a 1975 federal appellate court, which concluded that the California Supreme Court, were it to address the issue again, would hold that section 48a does not apply to magazines.88

III

Case Law on the Definition of a "Newspaper" for Purposes of Section 48a: Burnett v. National Enquirer, Inc.

For purposes of section 48a, whether or not a publication is a newspaper is a question of law.89 In Montandon, the court dismissed the defendant's contention that it was for a jury to determine, as a matter of fact, whether TV Guide is a magazine or a newspaper. Rather, the court stated, "[t]hat determination is one of law to be made by the court."90

Several California courts have described section 48a's underlying purpose as the providing of special protection to those engaged in "publishing news while it is new."91 However, the only case to actually establish legal standards for defining a newspaper under the statute is Burnett v. National Enquirer, Inc.,92 holding that the National Enquirer (Enquirer) is not a section 48a "newspaper."93

Burnett involved a libel suit by actress/comedienne Carol

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89. Montandon, 45 Cal. App. 3d at 953, 120 Cal. Rptr. at 195-96. But see Shumate v. Johnson Publishing Co., 139 Cal. App. 2d 121, 293 P.2d 531 (1956). The question of whether Jet was a newspaper was tried as a question of fact; however, the defendant had tried the case on this theory, without objection by the plaintiff, and the appellate court disallowed defendant's subsequent motion to reverse on the theory that the issue was one of law. The court simply stated, "The theory on which the case was tried in the court below must be followed on review." Id. at 130, 293 P.2d at 538.
90. Montandon, 45 Cal. App. 3d at 953, 120 Cal. Rptr. at 195-96.
93. Id. at 999-1005, 193 Cal. Rptr. at 210-14.
Burnett against the *National Enquirer*, a weekly publication, concerning an item in the *Enquirer*'s gossip column. The piece, entitled "Carol Burnett and Henry K. in Row," described Burnett's allegedly "boisterous" behavior in a Washington, D.C. restaurant. At Burnett's request, the *Enquirer* eventually printed a retraction. However, Burnett maintained that the retraction was insufficient, and that in any case the *Enquirer* was not a newspaper and therefore was not protected by section 48a.

In addressing whether the *Enquirer* in fact qualified as a newspaper under section 48a, the court first examined the publication's own self-classification, as well as that of outside parties. The court noted that the *Enquirer* was a member of the American Newspaper Publishers Association, that its insurance applications and county assessor filings described it as a newspaper, that both the U.S. Department of Labor and a state revenue department had labelled it a newspaper, and that its masthead claimed the "Largest Circulation Of Any Paper in America." The court further noted, however, that the *Enquirer* was designated as a magazine or periodical in eight mass media directories, and that it had itself previously requested the Audit Bureau of Circulation to change its classification from newspaper to magazine.

The court noted in passing that the *Enquirer*'s 1960 request to the Audit Bureau was based on its general manager's written representation that its "feature content and general appearance

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94. The column stated:
At a Washington restaurant, a boisterous Carol Burnett had a loud argument with another diner, Henry Kissinger. Then she traipsed around the place offering everyone a bite of her dessert. But Carol really raised eyebrows when she accidentally knocked a glass of water over one diner — and started giggling instead of apologizing. The guy wasn't amused and "accidentally" spilled a glass of water over Carol's dress.


95. The retraction, also printed in the *Enquirer*'s gossip column, stated:
An item in this column on March 2 erroneously reported that Carol Burnett had an argument with Henry Kissinger at a Washington restaurant and became boisterous, disturbing other guests. We understand these events did not occur and we are sorry for any embarrassment our report may have caused Miss Burnett.

*Id.*, April 13, 1976, at 12, col. 4.


98. *Id.*
... differ markedly from those of a newspaper." It further commented that, although the newspaper subscribed to the Reuters News Service, it did not subscribe to the Associated Press or United Press International news services. The court also noted that the Enquirer's staff "call themselves newspaper reporters."

The court continued with a general description of the publication's content:

According to a statement by its Senior Editor it is not a newspaper and its content is based on a consistent formula of "how to" stories, celebrity or medical or personal improvement stories, gossip items and TV column items, together with material from certain other subjects. It provides little or no current coverage of subjects such as politics, sports or crime, does not attribute content to wire services, and in general does not make reference to time.

Finally, in a brief two sentences, the court addressed the Enquirer's failure to routinely disseminate news quickly: "Normal 'lead time' for its subject matter is one to three weeks. Its owner allowed it did not generate stories 'day to day as a daily newspaper does.'"

As noted by the appellate court, the trial court focused on the Enquirer's loose time restrictions in concluding that it was not a newspaper. Although the trial court took into account

99. *Id.* at 1000, 193 Cal. Rptr. at 210. It is unclear whether the court intended a publication's "general appearance" to be independently relevant, or whether it considered this merely as additional evidence of the Enquirer's own self-designation. On the relevance of self-classification, see also *Montandon*, 45 Cal. App. 3d at 953, 120 Cal. Rptr. at 195-96 ("As the publication calls itself a magazine and its regional manager for Northern California testified that it called itself America's Television Magazine, the [trial] court did not err in making the determination that it is a magazine . . . .")

100. *Burnett*, 144 Cal. App. 3d at 999, 193 Cal. Rptr. at 210.
101. *Id.* at 1000, 193 Cal. Rptr. at 210.
102. *Id.* at 998, 193 Cal. Rptr. at 210.
103. *Id.* at 1000, 193 Cal. Rptr. at 210.
104. See *supra* note 9 and accompanying text for *Burnett's* definition of "lead time."
105. "Conventional newspapers, on the other hand, generate many stories on a day-to-day basis, and often measure lead times for articles in terms of hours, rather than weeks or days." R. Smolla, *supra* note 96, at 109-10.
106. *Burnett*, 144 Cal. App. 3d at 1000, 193 Cal. Rptr. at 210 (footnote omitted).
108. The appellate court capsulized the lower court's analysis as follows: [W]hile [the court] took into account the indicia relating to status detailed above, it relied upon the most fundamental of those considerations which have been deemed sufficient to justify the designation of that particular class
the *Enquirer's* status within the publishing industry, it based its holding on the undisputed fact that timeliness was not an integral constraint on its publication process.\(^{109}\)

Insofar as the appellate court took notice of the *Enquirer's* content and news-gathering procedures, as articulated by the trial court, it did so only to the extent that such factors diminished time constraints.\(^{110}\) The appellate court clearly felt that content "based on a consistent formula of 'how to' stories, celebrity or medical or personal improvement stories, gossip items and TV column items, [with] little or no current coverage of subjects such as politics, sports or crime," does not necessitate publishing of "news while it is new."\(^{111}\) Such content explains the *Enquirer's* admission that it "did not generate stories 'day to day as a daily newspaper does,'"\(^{112}\) it also accounts for the *Enquirer's* "[n]ormal lead time [of] one to three weeks."\(^{113}\) There is a crucial distinction, however, between analyzing content for its own sake and taking note of it as an indicator of the kind of deadlines a publication normally operates under; clearly, the court in *Burnett* was doing the latter.\(^{114}\)

Accordingly, as the court did not consider content in and of itself to be a criterion for section 48a coverage,\(^{115}\) the fact that the *Enquirer* "does not attribute content to wire services"\(^{116}\) was evidently not used as an indication of the class of news cov-

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\(^{109}\) *Burnett*, 144 Cal. App. 3d at 1001, 193 Cal. Rptr. at 211 (citing Werner v. Southern Cal. Assoc. Newspapers, 35 Cal. 2d 121, 128, 216 P.2d 825, 830 (1950)).

\(^{110}\) *Burnett*, 7 Media L. Rep. (BNA) at 1322. See *Burnett*, 144 Cal. App. 3d at 1001, 193 Cal. Rptr. at 211.

\(^{111}\) *Burnett*, 144 Cal. App. 3d at 1000, 193 Cal. Rptr. at 210.

\(^{112}\) *Id.* (citing *Werner*, 35 Cal. 2d at 128, 216 P.2d at 830; *Burnett*, 7 Media L. Rep. (BNA) at 1322).

\(^{113}\) *Id.* (quoting the owner of the National *Enquirer*).

\(^{114}\) *Id.*

\(^{115}\) While the court in *Burnett* focused on content only as an indicator of the *Enquirer's* lead time, the plaintiff in *Kronemyer v. The Reader*, for example, apparently alleged that certain kinds of news should per se not qualify for section 48a protection. See Plaintiff's Memorandum in Opposition to Summary Adjudication, *supra* note 17, at 9-11. See infra notes 152-54 and accompanying text.

\(^{116}\) *Burnett*, 144 Cal. App. 3d at 1000, 193 Cal. Rptr. at 210.
ered. Rather, it was considered relevant only insofar as it demonstrated a lack of dependence on "the complex and far-flung activities of the news services upon which newspapers and radio stations must largely rely."\textsuperscript{117} A newspaper under time pressure may find itself unable to adequately verify information received from such sources,\textsuperscript{118} thereby demonstrating a twofold justification for protection under section 48a.\textsuperscript{119}

The appellate court concluded that the trial court had correctly focused "on the element of time as that element was related to appellant's publication process,"\textsuperscript{120} and that section 48a newspaper status should be found only where the constraints of time associated with production determine the final content of the publication.\textsuperscript{121} The stated reason for the Enquirer failing to merit preferred status under section 48a, then, was the element of time — not content, not appearance, not failure to utilize wire services, not self-designation or classification by others as a magazine.

The style and content of the Enquirer, however, probably influenced both the outcome of the case and the public's acceptance of the final decision. Although the court ultimately appeared to rely only on the time factor, it actually devoted much more space to other possible determinants than it did to time.\textsuperscript{122} According to some commentators, the court in fact focused on the Enquirer's content. Professor Rodney Smolla, for example, charges that the court's distinction between newspapers and magazines was "a thin rationalization masking what was in fact open judicial antagonism for the Enquirer and its failure to print real news."\textsuperscript{123} "[O]ne gets the feeling," he states, "[that the National Enquirer] is a second-class First Amendment citizen, unworthy of the special legal treatment afforded 'serious' news outlets."\textsuperscript{124} This view has been reiterated by others, notably Journalism Professor Ben Cunnin-
ham, an expert witness for the Enquirer during the trial: "The judge had contempt for the National Enquirer, and I think that's what we saw in the ruling." Cunningham suggests that the Enquirer's questionable reputation may have deterred California's major newspapers and journalistic organizations from concerning themselves with the case or its outcome.

Whatever the true rationale for the holding of Burnett, the precedent we are left with is confined to the written opinion of the appellate court. Although the case was appealed to the United States Supreme Court, review was denied on jurisdictional grounds. Based on Burnett, the rule appears to be that section 48a protection will depend on the time constraints under which a publication operates. But Burnett provides no bright line as to exactly how burdensome those time constraints must be — in other words, how short a lead time a publication must have to qualify for newspaper status. Much more troubling, however, are the numerous other factors discussed in Burnett. While the court apparently did not regard indicia other than time constraints as relevant in themselves, their presence in the decision is nevertheless an enticement to defamation plaintiffs to use them.

While Burnett failed to establish a clear test for determining section 48a newspaper status, it represents the only reported attempt by a California court to develop such a standard. As no court has subsequently applied Burnett to a similar case, Burnett's test for newspaper status under section 48a remains unclarified.

IV
Problems Arising from the Current State of the Law

A. The Chilling Effect of Uncertainty: Kronemyer v. The Reader

The failure of section 48a to define what constitutes a "newspaper" forces us to rely on California case law; however, the

126. Id. at 8, col. 3.
128. See supra notes 107-21 and accompanying text.
129. See supra notes 107-11 and accompanying text.
130. See infra notes 154-70 and accompanying text.
cases offer no definitive standard and leave uncertain the precise scope of section 48a.

Case law pertaining to the scope of section 48a is inconclusive, both as to “magazines” and as to “newspapers.” While it appeared, until 1971, that magazines were not shielded by section 48a, in Briscoe v. Reader’s Digest Association the California Supreme Court in fact applied the statute to what would popularly be considered a magazine.132 Although there is general agreement today, under Morris v. National Federation of the Blind133 and its progeny, that magazines are not shielded by the statute,134 Briscoe has never been explicitly overruled.

A state of confusion also exists as to newspapers. While newspapers clearly are covered under the statute, what actually constitutes a “newspaper” is unclear. Burnett v. National Enquirer, Inc.,135 while ostensibly setting forth a publication’s time constraints as determinative of newspaper status, unfortunately includes a lengthy discussion of other factors, including content.136 As a result, subsequent debate may well be diverted by such tangential factors as content and self-designation, at the expense of focusing exclusively on a publication’s time constraints.

This is precisely what occurred in a recent California libel case, Kronemyer v. The Reader.137 Plaintiff David Kronemyer sued the San Diego Reader over a story which accused him of unethical and illegal conduct as an attorney in a multi-million-dollar probate case.138 Despite The Reader’s subsequent partial

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132. See Briscoe v. Reader’s Digest Ass’n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).
134. See supra notes 66-88 and accompanying text.
136. See supra notes 97-131.
138. The story, entitled “Baily’s Million,” stated that the district attorney’s office had been investigating allegations that the late millionaire Joshua T. Baily’s attorneys, “the father/son team of Robert and David Kronemyer, had embezzled $645,000 from the Baily estate and written themselves into the Baily will for a share of the remaining $425,000.” According to the column, criminal charges were being considered. Furthermore, the article stated that “a local attorney will soon file a lawsuit alleging that [the Kronemeyers] misappropriated $114,000 from the estate of Helen Thomas, a San Diegan who willed her estate to nine elderly nursing home patients.” San Diego Reader, April 15, 1982, at 2, col. 5. See also San Francisco Bay Guardian, Nov. 26, 1986, at 7, col. 1.
retraction and correction, printed one week later. David Kronemyer filed suit against The Reader. His complaint declared that, "[o]n the unproven hypothesis that 'The Reader' was a newspaper," he had served on the defendant a retraction demand. However, the ensuing correction was allegedly not published "in substantially as conspicuous a manner" as the original column, and furthermore "failed to retract and correct all of the matters which the plaintiff had pointed out were false and libelous in his [retraction demand] letter." Kronemyer therefore claimed damages for libel, slander and invasion of privacy. In response, The Reader moved for summary adjudication of two issues: that it was a newspaper and that the correction had been adequate.

To support its assertion of newspaper status under the statute, The Reader outlined the policies underlying section 48a and the criteria enumerated in Burnett. The Reader argued that, unlike the Enquirer, under those standards it was clearly

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139. The correction read as follows:
CORRECTION
In an article published last week . . ., David Kronemyer was incorrectly reported to be an attorney for the late Joshua L. Baily and author of Baily's will. Though he is listed as an "alternate executor" of the Baily will, David Kronemyer was not named as a beneficiary in the Baily will, nor is he under investigation for allegedly embezzling any portion of the Baily estate. The Reader regrets these errors.
San Diego Reader, April 22, 1982, at 3, col. 5.


142. Id. See CAL. CIV. CODE § 48a(2) (West 1988).

143. Plaintiff's Complaint, supra note 141, at 6-7.

144. Id. at 6.


Under Montandon v. Triangle Publications, 45 Cal. App. 3d 938, 120 Cal. Rptr. 186 (1975), The Reader maintained, such an adjudication is one of law for the court to decide. See Defendants' Memorandum in Support of Summary Adjudication, supra, at 11-12. See also infra note 171 and accompanying text.

146. Defendants' Memorandum in Support of Summary Adjudication, supra note 145, at 12.

147. Defendants' Memorandum in Support of Summary Adjudication, supra note 145, at 12-14. See supra notes 104-21 and accompanying text.
a newspaper.\textsuperscript{148}

In support of its standing as a newspaper, \textit{The Reader} focused on its very short lead time — a matter of hours for some parts of the paper, including the section containing the allegedly defamatory material at issue here.\textsuperscript{149} \textit{The Reader} also noted that it publishes stories of a timely nature, including current coverage of political topics and entertainment events,\textsuperscript{150} and presented evidence of the many stories on which it had "scooped" other papers because of its speedy publication of breaking stories.\textsuperscript{151} Finally, \textit{The Reader} pointed out that within the publishing industry it is widely perceived as a newspaper in the same sense of the word as are the major dailies.\textsuperscript{152}

In response to \textit{The Reader}'s motion for summary adjudication, Kronemyer submitted that, under \textit{Burnett}, \textit{The Reader} was not a newspaper for section 48a purposes, and, furthermore, that the published correction was inadequate under the statute.\textsuperscript{153} He based the former claim on several alleged characteristics of \textit{The Reader}, some of them of questionable relevance under \textit{Burnett}.

First, he argued that \textit{The Reader} does not engage in the immediate dissemination of "hot" or time-sensitive news, but that it consists "primarily of feature articles, advice columns, letters to the editor, entertainment and restaurant reviews and classified ads."\textsuperscript{154} However, \textit{Burnett} considered content relevant only to the extent that it influences the time constraints under which a publication operates.\textsuperscript{155} As was subsequently stated by the defendant, "A publication may be serious, witty, pornographic, muckracking [sic], etc. None of this matters except insofar as the style or format of the publication may factor into

\begin{footnotes}
\item[148.] Defendants' Memorandum in Support of Summary Adjudication, supra note 145, at 14-17.
\item[149.] \textit{Id.} at 8-9, 16-17. The publication at the root of the litigation was an item in \textit{The Reader}'s weekly "City Lights" column. \textit{Id.} at 4. "Feature Stories" was the section of the paper with the longest lead time — between 48 and 72 hours. \textit{Id.} at 8-9.
\item[150.] \textit{Id.} at 14-15.
\item[151.] \textit{Id.} at 15-17 and appended summary chart.
\item[152.] \textit{Id.} at 17 (referring to declarations to that effect by editors from the \textit{San Diego Tribune}, \textit{San Diego Union} and \textit{Los Angeles Times}).
\item[153.] Plaintiff's Memorandum in Opposition to Summary Adjudication, supra note 17, at 1, 8.
\item[154.] \textit{Id.} at 9. Although recognizing that content in and of itself was not relevant under \textit{Burnett}, \textit{The Reader} nevertheless presented evidence of its routine, sometimes exclusive, coverage of current news events. Defendant's Motion for Summary Adjudication, supra note 145, at 4-7 and appended summary chart.
\item[155.] \textit{See supra} notes 104-21 and accompanying text.
\end{footnotes}
the publication's production process."\textsuperscript{156}

Plaintiff Kronemyer also noted that \textit{The Reader} is published weekly, that it subscribes to no wire services, and that it does not "identify itself as a newspaper."\textsuperscript{157} However, these factors are also not determinative under \textit{Burnett}. Although the \textit{National Enquirer} happened to be a weekly, the \textit{Burnett} decision is not based on this fact, but rather on the \textit{Enquirer's lead time}\.\textsuperscript{158} Lead time varies widely among weeklies; for example, while the \textit{Enquirer}'s lead time ranged from one to three weeks,\textsuperscript{159} \textit{The Reader}'s varied from a few hours to three days, depending on the section of the paper.\textsuperscript{160}

As for the pertinence of a wire service subscription, this too was considered by the \textit{Burnett} court only insofar as it affected time constraints.\textsuperscript{161} Subscription to a wire service, with its resulting reliance on outside sources, combined with time pressures, could well force a paper to publish without thoroughly verifying all its facts, thereby justifying protection under section 48a.\textsuperscript{162} However, in itself, subscription to a wire service is not a determinant factor; in fact, the \textit{Enquirer} did subscribe to one.\textsuperscript{163} Clearly, a wire service requirement would discriminate against local newspapers, which have no use for wire service material — a discrimination which it has never been suggested section 48a was intended to foster.\textsuperscript{164}

That \textit{The Reader} "does not identify itself as a newspaper"\textsuperscript{165} is also not a deciding factor under \textit{Burnett}. Although the \textit{Burnett} court summarized the \textit{Enquirer}'s labeling both as a newspaper and a non-newspaper, in its final determination it disregarded such categorizations, whether by the \textit{Enquirer} or


\textsuperscript{157} Plaintiff's Memorandum in Opposition to Summary Adjudication, supra note 17, at 10.

\textsuperscript{158} See supra notes 9 and 104-21 and accompanying text.

\textsuperscript{159} See supra notes 104-06 and accompanying text.

\textsuperscript{160} Defendants' Motion for Summary Adjudication, supra note 145, at 8-9.

\textsuperscript{161} See supra notes 115-16 and accompanying text.

\textsuperscript{162} See supra notes 117-19 and accompanying text.

\textsuperscript{163} See supra note 100 and accompanying text.

\textsuperscript{164} See supra note 110 and infra notes 216-18 and accompanying text.

\textsuperscript{165} See supra note 157 and accompanying text.
by outsiders. 166

Finally, plaintiff Kronemyer argued that because The Reader is distributed free of charge and derives its revenues solely from advertising, its editorial content is incidental to the primary function of serving as a vehicle for advertising. 167 According to plaintiff's brief, under Burnett, The Reader therefore did not qualify as a newspaper. 168 However, no such rule can be derived from Burnett. 169 Furthermore, plaintiff's argument overlooked the fact that all newspapers generate at least part of their income in a manner similar to The Reader. 170

On December 10, 1986, The Reader's motion for summary adjudication of its status as a newspaper was denied without prejudice, the judge ruling only that there was a "triable issue of fact" as to the question of newspaper status which could not be summarily dismissed. 171 While the case was eventually settled out of court and The Reader's status as a newspaper under section 48a never judicially determined, 172 the experience was clearly a protracted, expensive and undesirable one for The Reader. 173

In contrast, The Reader's experience as a media defamation
defendant might have been quite different if section 48a clearly and broadly delineated the scope of its protection of newspapers. If such were the case, The Reader's motion for summary adjudication as to its eligibility for protection under the statute could have been quickly granted and the chilling effect of the ordeal minimized.\textsuperscript{174}

B. Failure to Provide Plaintiffs with an Adequate Remedy

Broadening and clarifying the scope of section 48a would not only result in better protection of media defamation defendants, but could also enable the statute to better meet the needs of defamation plaintiffs.

Studies have shown that defamation plaintiffs do not sue solely to obtain a formal judicial remedy, nor with the express goal of obtaining money damages; rather, most of them sue to correct the record.\textsuperscript{175} If a potential defendant is sufficiently motivated to cooperate in printing a requested correction, therefore, the threatened lawsuit might never materialize.\textsuperscript{176}

According to a 1984 study of defamation plaintiffs who sued media defendants,\textsuperscript{177} their primary motivation for suing was to vindicate their reputations\textsuperscript{178} and most felt they accomplished this simply by filing suit — whether or not they eventually

\textsuperscript{174} For a summary of materials suggesting that the risks of defamation suits are particularly chilling for small media, see Levine, \textit{Preliminary Procedural Protection for the Press from Jurisdiction in Distant Forums After Calder and Keeton}, 1984 \textsc{Ariz. St. L. J.} 459, 463 n.21. For a discussion of the time, expense, and jeopardization of libel insurance coverage resulting from defamation suits in general, as well as its possible chilling effect on the press, see Note, \textit{We're Mad as Hell and We Aren't Going to Take It Anymore}: The Press Responds to Meritless Libel Suits, 20 \textsc{Loyola of L.A.L. Rev.} 45 (1986).


\textsuperscript{176} \textit{See, e.g.,} R. Bezanson, G. Cranberg & J. Soloski, \textit{supra} note 175, at 24 (71% of defamation plaintiffs surveyed would have been satisfied with a retraction by the media defendant); \textit{see also} Bezanson, Cranberg & Soloski, \textit{supra} note 175, at 221-25.

\textsuperscript{177} As part of the Iowa Libel Research Project, all defamation cases against the media decided between May 1980 and April 1984 were collected, using \textit{Media Law Reporter} and the Libel Defense Resource Center's \textit{50-State Survey}. Of the 323 cases, 164 plaintiffs (representing 50.8% of the cases selected for study) were available and agreed to be interviewed. R. Bezanson, G. Cranberg & J. Soloski, \textit{supra} note 175, at 241-42.

\textsuperscript{178} \textit{Id.} at 93, 111-12.
Apparently, plaintiffs view their filing of a defamation suit as an expression of indignance and public denial of a story's truthfulness; the suit itself, regardless of its outcome, is seen as legitimizing their claims of falsity.

A second factor often motivating plaintiffs is apparently a desire to punish the media. Many plaintiffs who would originally have been satisfied with a retraction became so infuriated with the media's unresponsiveness that they resolved to sue despite their original intention not to seek monetary recovery.

From this survey it appears that, for most defamation plaintiffs, filing suit is more an emotional decision than one based on a calculation of the chances of actually prevailing. Since plaintiffs consider their goals — vindication of reputation, expression of public denial, punishment of the media — to be accomplished simply by bringing suit, they feel they have won regardless of the outcome in court. For them, it appears, suing is symbolic, and unrelated to a legal ruling. This may explain why so many plaintiffs continue to sue despite the extraordinary success rate of defamation defendants, particularly media defendants. Furthermore, even losing plaintiffs usually maintain that they would sue again if they had it to do over again. But regardless of whether they would sue again, plaintiffs express dissatisfaction with the system, viewing it as indifferent to their needs.

179. Id. at 73-74, 154-67.
180. Id. at 93, 111-12, 138, 161.
181. Id. at 161.
182. Id. at 93-94.
183. Seventy-one percent stated they would have been satisfied with a retraction. Id. at 24.
184. Ninety percent contacted the media before suing, 88% said that the media's response influenced their decision to sue, and 78% sued for reasons unrelated to money damages. Id. at 25, 73-74, 94.
185. Id. at 142.
186. Id. at 93-94, 111-12, 138, 161.
187. Of cases finally resolved, only 11% of defamation plaintiffs succeeded against media defendants. Id. at 121-22. (Against non-media defendants, defamation plaintiffs succeeded 18% of the time. Id. at 120, 122.) Another study of recent defamation trials found that, although 83% of juries found for the plaintiff, news organizations won over 70% of the cases which they appealed. New York Times, March 10, 1984, at 29, col. 1. Clearly, plaintiffs who sue solely to win face long odds.
188. Roughly 84% of losing plaintiffs would sue again. Id. at 162.
189. Id. at 155-56. "Plaintiffs express a clear interest in a process that is directed straightforwardly to the truth issue, and that is directed toward correction rather than money." Id. at 169. See also Cendali, supra note 29, at 490 (noting the failure of
While most plaintiffs desire to clear their reputations by ascertaining the truth or falsity of a story, defamation cases usually address quite different issues — the existence of constitutional privileges and the defendant's state of mind, for example. As any determination of truth or falsity is foreclosed by disposition of a case on constitutional grounds, litigation rarely addresses the gravamen of a plaintiff's complaint. Nevertheless, this is presently the only way for a plaintiff to publicly respond to a perceived libel, and plaintiffs sue for lack of any other available course of action.

Although this system is the result of a conscious priority of protecting the media, it should be noted that the media's constitutional privileges may not truly provide protection. If plaintiffs sue regardless of whether they anticipate winning, a defendant's privileges may protect against losing — but they will not protect against the ordeal of the lawsuit itself. As a

modern libel litigation to meet either plaintiffs' or defendants' needs and proposing a national "Correction Statute" as a solution).

190. Beginning with New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the United States Supreme Court has upheld a constitutional privilege for good faith criticism of public officials, requiring that a public official plaintiff must demonstrate "actual malice" on the part of the defendant in order to prevail in a defamation suit. Actual malice is defined as publication of a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." R. Bezanson, G. Cranberg & J. Soloski, supra note 175, at 280.

The Court later extended this protection to all cases involving public figures or matters of public concern. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), however, the Court held that private individuals need not prove "actual malice" to recover damages. Finally, in Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985), the Court held that only speech on matters of public concern deserves such protection.

191. Of defamation cases between 1974 and 1984, constitutional privileges were the most important issue in 84%, while only 16% focused primarily on the issue of truth or falsity. R. Bezanson, G. Cranberg & J. Soloski, supra note 175, at 106.

192. Id. at 107, 184-5.

193. Id. at 94.

194. Id. at 142. Both state and federal legislation has recently been introduced in an attempt to return the focus of libel litigation to the issues of truth and falsity. One bill would have allowed public officials to sue for a declaratory judgment that they had been portrayed in a false and defamatory manner. No showing of malice was required, but neither would damages have been recoverable. A winning plaintiff could, however, have received attorney's fees. H.R. 2846, 99th Cong., 1st Sess. (1985). Another bill, introduced in California, would have freed media from paying even a plaintiff's costs if it either could establish that it had made a reasonable effort to verify what was published or published a correction or retraction within ten days after the judgment. S.B. 1979, 1985-86 Regular Session. See Eberhard, There's Got to be a Better Way: Alternatives to the High Cost of Libel, 38 Mercer L. Rev. 819, 822-25 (1987).
result, while our system may protect the media against the chilling impact of liability, it fails to protect against the chilling impact of undergoing a lawsuit.195

V

Proposal

What is needed is a system which better serves the needs of defamation plaintiffs without diminishing the media’s present constitutional protections.196 While a retraction statute such as section 48a does not provide a perfect or comprehensive solution, broad application of such a statute appears to be a step in the right direction.

Retraction statutes like section 48a encourage the disseminator of an allegedly libelous publication to retroactively examine the publication’s truth or falsity. If on reexamination the story is discovered to be false, a retraction statute provides the publisher with an incentive to publish an appropriate correction. Where no retraction statute applies, however, a publisher has no such motivation; in fact, if the case goes to trial, a retraction could, if presented as evidence of falsity, actually increase a media defendant’s liability.

Retraction statutes, then, prompt the media to react to a complainant’s allegations of falsity and to itself examine the truthfulness of its stories. As a result, plaintiffs who would otherwise be prompted to sue by the media’s failure to react may instead be satisfied by a resolution short of litigation, particularly since their desire for a determination of truth or falsity is at least preliminarily addressed by the media itself.

In addition, publication of an adequate retraction will shield a protected media defendant as a matter of law;197 the chances of avoiding a trial altogether are thereby increased. Retraction statutes therefore not only increase the likelihood that a defamation plaintiff’s concerns will be addressed, but also potentially provide the media defendant with protection not effectively provided even by constitutional privileges.

As many other states have already concluded, the rationale

195. Id. at 194-95.
196. See supra note 190 and accompanying text.
197. See supra note 171 and accompanying text. While a retraction statute may preclude a plaintiff from claiming punitive or general damages, he may of course allege special damages in any case, provided he has suffered actual economic harm. See CAL. CIV. CODE § 48a (West 1988); C. MORRIS & R. MORRIS, supra note 237, at 381.
of encouraging speedy dissemination of the news today applies as properly to magazines and other periodicals as it does to the traditional daily newspaper. Including California, thirty-three states have promulgated defamation retraction statutes, with ten of these specifically applying only to newspapers. The majority of retraction statutes apply to a broad combination of "newspapers," "magazines," and "periodicals," while some decline to specify any limitation.

198. See supra notes 90-131 and accompanying text.


201. The retraction statutes of California, Idaho, Indiana, Kentucky, Minnesota, Mississippi, Nevada, North Dakota, South Dakota, and Utah apply only to "newspapers." See supra note 200.

202. Arizona ("newspaper or magazine"), Florida ("newspaper, periodical, or other medium"), Georgia ("newspaper or other publication"), Iowa ("newspaper, free newspaper or shopping guide"), Montana ("newspaper, magazine [or] periodical"), New Jersey ("newspaper, magazine, periodical, serial or other publication"), North Carolina ("newspaper or periodical"), Ohio ("newspaper, magazine, or other periodical sold or offered for sale"), Oklahoma ("newspaper or periodical"), Oregon ("newspaper, magazine [or] other printed periodical"), Tennessee ("newspaper or periodical"), Virginia ("newspaper, magazine or periodical"), Washington (book, newspaper or serial"), and Wisconsin ("newspaper, magazine or periodical"). See supra note 200.

Of the statutes which limit protection to particular media, only two define the terms used. Arizona defines "magazine" or "newspaper" to mean "any publication which may be mailed at the second-class rates established by the United States post office," and Oklahoma defines "newspapers" and "periodicals" in the same way.
RETRACTION STATUTE

whatsoever. 203

In the wake of Kronemyer, two different amendments to section 48a were in fact introduced in the California Legislature by Assembly Member Stirling of San Diego. 204 The first draft of the bill amended section 48a to include coverage of “magazines,” although without defining the term. 205 When this failed to gain sufficient support, a second amendment, defining the term “newspaper” but without extending the statute’s coverage, was proposed.206 This amendment was withdrawn pending a resolution of Kronemyer, but there are no immediate plans to reintroduce either amendment.207

In order to benefit as many defamation plaintiffs and defendants as possible — thereby serving public policy and also fulfilling what courts have found to be its original broad legislative intent208 — section 48a should be amended so as to eliminate the distinction between “newspapers” per se and other print media. Clearly, the two factors most critical to the effectiveness of a retraction are speedy dissemination and dissemination to the same forum as received the original publication. Accordingly, the only prerequisite for section 48a protection should be that a publication routinely be published at least weekly, and to a regular audience. Because of the diminished effectiveness of any retraction not published fairly soon after the original defamatory story, the present requirement that a valid retraction be published within three weeks209 should be retained.

Conclusion

In originally declaring section 48a constitutional in Werner v. Southern California Associated Newspapers,210 the intent of the legislature, as the California Supreme Court viewed it, was that “newspaper” be interpreted broadly so as to further the

205. Id. (amended April 6, 1987).
206. Id. (amended May 19, 1987).
207. Conversation with Assembly Member Larry Stirling’s office (Feb. 10, 1988).
208. See supra notes 44-59 and accompanying text.
209. CAL. CIV. CODE § 48a(3) (West 1988).
"public interest in the free dissemination of news."\textsuperscript{211}

Clearly, the public interest in the free dissemination of news is not limited to news published by a narrow category of "news-papers." So long as a publication is frequently and regularly distributed and has a reasonably consistent circulation, its exclusion from section 48a coverage is arbitrary and without sound basis. As has been noted by the California Supreme Court, "[t]he Legislature enacted Civil Code Section 48a to encourage a more active press\textsuperscript{212} — not to encourage a more active daily press which subscribes to wire services;\textsuperscript{213} the statute was enacted in light of "the public interest in the free dissemination of news\textsuperscript{214} — not in light of the public interest in the free dissemination of daily news."

In contrast, the narrow "newspaper" criteria suggested in \textit{Burnett}\textsuperscript{215} creates a second-class category of media in California — media which most of us would consider newspapers. Publications apparently unprotected by section 48a tend to be non-dailies; those not subscribing to AP or UPI news services, i.e. local papers; and publications with longer lead times,\textsuperscript{216} which may be a function of how often the publication is issued, or of the content of material being published, but which could also depend on the sophistication of printing technology available.

In addition to the stigma of an implication that their content merits less protection than does that of apparently more "worthy" media, these publications suffer increased financial burdens in defending against defamation suits. Not only are they forced to bear the expense of unlimited liability in each defamation suit, but they also attract more defamation suits because of their potentially greater liability.

Timely media retractions, which are encouraged by statutes such as section 48a, serve two purposes: they often forestall expensive and time-consuming litigation, and they restore a dam-

\begin{footnotesize}
\begin{enumerate}
\item[211.] Id. at 126, 216 P.2d at 828. See \textit{supra} notes 44-59 and accompanying text.
\item[212.] Kapellas v. Kofman, 1 Cal. 3d 20, 30, 459 P.2d 912, 917, 81 Cal. Rptr. 360, 365 (1969) (emphasis added).
\item[213.] This was addressed as a possible criterion by the court in \textit{Burnett}, 144 Cal. App. 3d at 1000, 193 Cal. Rptr. at 210, as well as by the plaintiff in \textit{Kronemyer}. Defendants' Memorandum in Rebuttal, \textit{supra} note 156, at 9-10.
\item[214.] Werner v. Southern Cal. Assoc. Newspapers, 35 Cal. 2d at 126, 216 P.2d at 828 (emphasis added). See \textit{supra} notes 50-51 and accompanying text.
\item[215.] \textit{See supra} notes 89-131.
\item[216.] \textit{See supra} note 9 and accompanying text.
\end{enumerate}
\end{footnotesize}
aged reputation more effectively than would delayed judicial vindication.217

Expansion of the shield of section 48a would not only grant these publications the protection they merit, but would also correspondingly expand its protection of plaintiffs. Judicial decisions in defamation cases rarely reflect a fair or complete determination of either the truth or the reputational harm suffered. As a result, rather than rely on the actual judicial decision and the ultimate verdict, defamation plaintiffs tend to view the suit itself as a form of vindication and an opportunity to air their side of the story.

By rewarding potential media defendants for publishing adequate and timely retractions of defamatory material, section 48a affords defamed individuals an efficient, effective and inexpensive remedy. As a result, expensive and protracted litigation may often be avoided. It follows that the broader the category of media covered by section 48a, the greater the number of potential defamation plaintiffs who, satisfied with a retraction, may not pursue litigation at all.

Section 48a protects eligible media from paying a high price for arguably unavoidable mistakes and, concomitantly, encourages prompt retractions of defamatory publications. If permitted to do so, section 48a will serve these purposes more comprehensively than it does now, thereby sparing more plaintiffs and defendants the expense, hostility and wasted resources inherent in a protracted defamation suit.

Section 48a should accordingly be amended to explicitly extend coverage to all weekly publications. In granting such protection, section 48a would better promote efficient and effective remedies for injury and encourage investigation of the truth.

217. See Morris, supra note 199, at 38 ([A] retraction often will do more to clear a man’s name than the ‘quiet entry of a judgment on the musty rolls of a court.’


