

The protection of a particular expression of views should involve a determination that the expression has some reasonable relation to conditions of employment, but also that the interests of management and the public are not thereby unreasonably encroached upon. So formulated, the *Phoenix* test would focus the attention of the Board and the courts upon the economic and social bases of that case's doctrine, thus assuring the development of a beneficial application of the mutual aid or protection clause.

## LIBEL

### APPLICATION OF SINGLE PUBLICATION RULE TO PUBLISHER OF BOOKS

There is an obvious potentiality for conflict between the rule that each publication of a libel is a separate tort and the policy of the statute of limitations that all actionable wrongs must eventually be put in repose. In cases involving libelous periodicals, some modern courts have resolved the conflict in favor of the policy of the statute of limitations. Resolution has been effected by resort to a legal fiction, the "single publication rule." This rule, which regards all the steps attendant on the mass distribution of periodicals as but a single act, a single publication, has heretofore been limited in application to cases dealing with newspapers and magazines. In a case of first impression,<sup>1</sup> the New York Court of Appeals has extended the single publication rule and applied it to the distribution of books.

*Total Espionage*, a book containing an alleged libel of Gregoire, reached the market in 1941, and in several subsequent printings sold some 12,300 copies. In March 1944, its publisher, G. P. Putnam's Sons, began distribution of an eighth printing. Sales diminished to a point where only 60 copies were distributed from stock in the year immediately preceding July 1946, when Gregoire instituted suit in New York complaining of the sale of a single copy of the book dur-

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1. *Cf. Lewisohn v. Dial Press, Inc.*, 264 App. Div. 370, 35 N. Y. S.2d 551, 552 (1942) involving a libel action upon a book wherein defendant pleaded the statute of limitations. There the court was not applying the single publication rule to books, but merely held that plaintiff's cause of action did not accrue until the defamatory statement became false.

ing the preceding month. The trial court held that by virtue of the single publication rule, Gregoire's cause of action accrued in March 1944, when distribution of the printing began, and that the action was barred by the one-year statute of limitations.<sup>2</sup> The Appellate Division<sup>3</sup> reversed on the ground that the single publication rule was not applicable to books. The statute of limitations was held effective only to bar considering as an element of damages any sales which had not occurred within one year of the time the action was brought. The Court of Appeals reversed this judgment of the Appellate Division, saying that proper respect for the statute of limitations required the application of the single publication rule; therefore the action was barred. *Gregoire v. G. P. Putnam's Sons et al.*, 81 N. E.2d 45 (N. Y. 1948).

Designed to meet changing circumstances,<sup>4</sup> to prevent a multiplicity of actions,<sup>5</sup> and to give effect to the statute of limitations,<sup>6</sup> the single publication rule allows but one cause of action to one defamed by magazine or newspaper, no matter how wide the circulation of the defamatory matter may be.<sup>7</sup> For, under the unmitigated rigor of the common law, a publisher was liable to as many causes of action as there were readers of his publication,<sup>8</sup> and in as many jurisdictions

2. N. Y. CIV. PRAC. ACT § 51 (3).

3. *Gregoire v. G. P. Putnam's Sons*, 272 App. Div. 591, 74 N. Y. S.2d 238 (1947).

4. See e.g., *Hartmann v. Time*, 166 F.2d 127, 132 (C. C. A. 3d 1947); *Winrod v. McFadden Publications*, 62 F. Supp. 249, 250 (N. D. Ill. 1945).

5. See e.g., *Age-Herald Publishing Co. v. Huddleston*, 207 Ala. 40, 42, 92 So. 193, 195 (1921); *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 107, 14 So.2d 344, 347 (1943); *Julian v. Kansas City Star Co.*, 209 Mo. 35, 69, 107 S. W. 496, 500 (1907); *Licht Publishing Co. v. Wurzbach*, 266 S. W. 188, 189 (Tex. 1924).

6. See e.g., *Hartmann v. Time*, 166 F.2d 127, 132 (C. C. A. 3d 1947); *McGlue v. Weekly Publications, Inc.*, 63 F. Supp. 744 (D. C. Mass. 1946); *Winrod v. McFadden Publications*, 62 F. Supp. 249, 252 (N. D. Ill. 1945); *Backus v. Look*, 39 F. Supp. 662, 663 (S. D. N. Y. 1941); *Cannon v. Time*, 39 F. Supp. 660, 661 (S. D. N. Y. 1939); *Means v. McFadden Publications*, 25 F. Supp. 993, 995 (S. D. N. Y. 1939); *Winrod v. Time*, 334 Ill. App. 59, 61, 78 N. E.2d 708, 709 (1948); *Wolfson v. Syracuse Newspapers*, 254 App. Div. 211, 4 N. Y. S.2d 640, 642 (1938).

7. See note 6 *supra*.

8. *Cook v. Conners*, 215 N. Y. 175, 109 N. E. 78 (1915); *Woods v. Pangborn*, 75 N. Y. 495 (1878); *Mack Miller Candle Co. v. Macmillan Co.*, 239 App. Div. 738, 269 N. Y. Supp. 33 (1934); *Woodhouse v. New York Evening Post*, 201 App. Div. 9, 193 N. Y. Supp. 705 (1922); *Underwood v. Smith*, 93 Tenn. 687, 27 S. W. 1008 (1894); *Renfro Drug Co. v. Lawson*, 138 Tex. 434, 160 S. W.2d 246 (1942); ODGERS ON LIBEL & SLANDER, 132, 483 (6th ed, 1929); RESTATEMENT, TORTS § 578, comment b (1938).

as that publication reached.<sup>9</sup> Each fresh perusal of his libel started the statute of limitations running anew,<sup>10</sup> whether the distribution was by the publisher from his stock<sup>11</sup> or from a reprinting,<sup>12</sup> or was the result of hand-to-hand circulation among individuals of material printed in the distant past.<sup>13</sup> The statute of limitations was of little or no effect as a statute of repose designed to "spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared and evidence has been lost."<sup>14</sup>

The single publication rule<sup>15</sup> as a practical exception to the common law of libel represents the judicial adaptation of old law to modern sale and distribution methods in the publication of periodical literature. Whether an exception created to accord protection to the business methods of publication of matter essentially ephemeral in nature should be extended to protect publishers of a more permanent medium, books, depends upon a consideration of two interests. The interest of book publishers in freedom from multiple civil actions over a long period of time must be balanced against the interest in reputation of those who are the subjects of defamation. A realistic balancing of these interests requires that proper account be taken of the facts of the business

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9. *Hartmann v. Time*, 166 F.2d 127 (C. C. A. 3d 1947), 61 HARV. L. REV. 1460 (1948); *Tingley v. Times Mirror Co.*, 144 Cal. 205, 77 Pac. 918 (1904); *Louisville Press Co. v. Tennyly*, 105 Ky. 365, 49 S. W. 15 (1899); *Vicknoir v. Daily States Publishing Co.*, 144 La. 809, 81 So. 324 (1919); *Oklahoma Publishing Co. v. Kendall*, 96 Okla. 194, 221 Pac. 762 (1923).
  10. *Duke of Brunswick v. Harmer*, 14 Q. B. 185, 117 Eng. Rep. 75 (1849).
  11. *Hartmann v. Time*, 166 F.2d 127 (C. C. A. 3d 1947); *Winrod v. Time*, 334 Ill. App. 59, 78 N. E.2d 708 (1948).
  12. *Ott v. Murphy*, 160 Iowa 730, 141 N. W. 463 (1913); *Sharpe v. Larson*, 70 Minn. 209, 72 N. W. 961 (1897); *Cook v. Conners*, 215 N. Y. 175, 109 N. E. 78 (1915); *Mack Miller Candle Co. v. Macmillan Co.*, 239 App. Div. 738, 269 N. Y. Supp. 33 (1934); *Woodhouse v. New York Evening Post*, 201 App. Div. 9, 193 N. Y. Supp. 705 (1922); *Underwood v. Smith*, 93 Tenn. 687, 27 S. W. 1008 (1894). *But cf.* *Murray v. Galbraith*, 86 Ark. 50, 109 S. W. 1011 (1908); *Calligan v. Sun Printing & Publishing Ass'n.*, 54 N. Y. Supp. 471 (1898).
  13. *Winrod v. McFadden Publications*, 62 F. Supp. 249 (N. D. Ill. 1945).
  14. *Gregoire v. Putnam's Sons*, 81 N. E.2d 45, 48 (N. Y. 1948).
  15. The courts of Indiana have not passed on the single publication rule; no civil libel cases have arisen that would warrant its application.

of book publishing to determine whether the application of the single publication rule to that business grants disproportionate protection to either interest.

It is apparent that any publisher might well be satisfied with the legal fiction which, so far as the state in which printing and distribution occur is concerned,<sup>16</sup> consolidates all the steps from printing to distribution of printed matter into one legal act of publication,<sup>17</sup> creating only one possible cause of action<sup>18</sup> and starting the immediate running of the statute of limitations.<sup>19</sup> If only the interests of publishers be considered, there is no apparent difference between the publisher of a periodical and the publisher of a book; each will desire equally to be free from the expense and inconvenience of litigation.

But of necessity consideration must be given to him who is libeled. It is at this point that the distinction between the publication of a periodical and the publication of a book becomes apparent. For not only does the very nature of a book, designed as it is to be permanently retained, differ from that of a magazine or a newspaper; methods of distribution and of sales vary greatly and materially between these two media of communication.

In the magazine and newspaper industries the process

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16. For the serious problem of conflict of laws which arises in the area of the single publication rule, see *Hartmann v. Time, Inc.*, 166 F.2d 127 (C. C. A. 3rd 1948), *cert. denied*, 334 U. S. 838 (1948), 61 HARV. L. REV. 1460 (1948).
  17. The extent to which the single publication rule has been used to protect publishers of periodicals is illustrated in "replacement issue" cases. It is the practice of publishers to mail replacement issues of periodicals for damaged or non-delivered copies, usually within a period of about a month subsequent to the original distribution. In actions brought within the statutory period of the date of mailing these replacement issues but not within the statutory period of the date of original distribution, the majority of the courts, applying the single publication rule, held that the subsequent distributions were a part of the original act of publication. The statute of limitations thus barred the injured party's action. See *Hartmann v. Time*, 166 F.2d 127 (C. C. A. 3d 1947); *Backus v. Look*, 39 F. Supp. 662 (S. D. N. Y. 1941); *Cannon v. Time*, 39 F. Supp. 660 (S. D. N. Y. 1939); *Means v. McFadden Publications*, 25 F. Supp. 993 (S. D. N. Y. 1939); *Winrod v. Time*, 334 Ill. App. 59, 78 N. E.2d 709 (1948). *Contra*: *Winrod v. McFadden Publications*, 62 F. Supp. 249 (N. D. Ill. 1945).
  18. *Winrod v. McFadden Publications*, 62 F. Supp. 249 (N. D. Ill. 1945); *Winrod v. Time*, 334 Ill. App. 59, 78 N. E.2d 709 (1948); *Wolfson v. Syracuse Newspapers*, 254 App. Div. 211, 4 N. Y. S.2d 640 (1938).
  19. See note 5 *supra*.

of distribution is effected within a matter of hours and any sale "at a date long after the date of issue is incidental and inconsequential."<sup>20</sup> It is not altogether irrational to regard the brief period consumed in the printing and distribution of such publications as giving rise to but a single act. The opposite is true of books. Their normal distribution process is not a matter of days, but as the *Gregoire* case illustrates, continues until stock is depleted, often for years.<sup>21</sup> There is little reason in considering this protracted distribution as but a single act.

Further, the sales methods of periodical and book publishers are markedly different. Recognizing that the utility of his publication is largely in its current interest to the public and that his readers will discard the publication shortly after the original dissemination, the publisher of periodicals concentrates his efforts upon selling subscriptions. His purpose is ordinarily to sell many issues over a period of time. There is seldom a concentrated campaign bent upon sustaining public interest in a single issue or reawakening that interest in an issue printed in the past. In contrast the very purpose of the book publisher is to prevent the waning of public interest in his book. He realizes that if it is to be successful a book must get and hold public attention.<sup>22</sup> To this end he spends large sums annually in advertis-

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20. See Judge Desmond dissenting in instant case, 81 N. E.2d 45, 49 (N. Y. 1948). For discussions of application of single publication rule to magazine and newspaper industries see Notes, 24 CHI-KENT REV. 278 (1946); 52 HARV. L. REV. 167 (1938); 59 HARV. L. REV. 136 (1945); 16 N. Y. U. L. Q. REV. 658 (1939); 13 ST. JOHN'S L. REV. 401 (1939); 19 SO. CALIF. L. REV. 287 (1946); 94 U. OF PA. L. REV. 335 (1946).

21. "The book (same edition and same printing) may be on the market for years; it may descend the scale into the 'remainder' or 'bargain' class. It may sell only a few copies at first, then, more than a year later, leap into the best seller class. Unlike a newspaper, the book may grow in popularity and effectiveness with the passage of time, with each new sale a fresh and damaging assault on the reputation of the victim." Judge Desmond dissenting in instant case, 81 N. E.2d 45, 49 (N. Y. 1948).

22. It is important that authors be built up through publicity and advertising. Publishers are ready to support to the utmost extent books which give evidence of becoming good sellers. See *How to Sell a Book: A Symposium*, 151 PUB. WEEKLY 2692 (May 1947). A recent advertisement of Little, Brown and Co., addressed to book dealers states:

"Your customers will be asking for the 'new Marquand novel'

... BECAUSE: It will *not* be distributed as a selection of any book club. If, as is likely, it is used

ing and promoting sales of books already on the market.<sup>23</sup> When a market becomes depleted at one price level he introduces cheaper editions in an effort to maintain sales volume.<sup>24</sup> That he is successful in his efforts is illustrated by the facts that many books have continued to sell for an indefinite period of years<sup>25</sup> and that the publication of cheap paper-backed reprints has been attended with such success in modern times.<sup>26</sup>

Courts which developed the single publication rule and applied it to periodicals justified the exception they were creating by pointing to the transitory nature of magazines and newspapers. Damages wane as the public interest wanes, they reasoned, so the exception does no injury to the libeled party. The possibility of renewed injury to his reputation lasts no longer than does the currency of the periodical.<sup>27</sup> Regardless of the accuracy of that reasoning, it is altogether

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as a book dividend, no copies will be distributed until at least three months after publication.

BECAUSE: It will be announced and kept before the reading public with an advertising campaign of five figures."

154 PUBLISHERS' WEEKLY inside front cover (Dec. 4, 1948).

23. In 1946, 135 firms spent 8 million dollars on advertising. 151 PUB. WEEKLY 2679 (May 1947). In 1947 83 firms spent better than 6¼ million dollars. 153 PUB. WEEKLY 2531 (June 1948).
24. Sometimes books achieve a much wider distribution than when they first were introduced by being made available in bantam (25¢) size. Standard books are sold in about 2000 bookstores. The possible outlets for bantam size reprints number some 90,000. See *Reprint v. Trade Books*, 115 NEW REPUBLIC 237 (Aug. 26, 1946).
25. Good illustrations are the works of Shakespeare. Some books reach best seller lists by a meteoric rise in from 3 to 12 months before going into "backlists" or "durable reprints"; other best sellers accumulate readers over the years. Of the latter good examples are ROBINSON CRUSOE, GULLIVER'S TRAVELS, THE PATH-FINDER, OLIVER TWIST, and VANITY FAIR. Breit, *Best Sellers: How They Are Made*, N. Y. TIMES, Jan. 4, 1948, § 7, p. 1, cols. 2 and 3.
26. For the year 1945 the Bureau of Census figures show that 83,000,000 paper-bound reprints and 49,000,000 hard-bound reprints were sold, as compared with 71,000,000 original editions and 26,000,000 book club editions. 153 PUB. WEEKLY 1220 (Mar. 1948). Broken down into specific examples the pocket book entitled GOD'S LITTLE ACRE sold 3,500,000 copies over a two-year period; DUEL IN THE SUN sold 2,300,000 over a like period; and Earl Stanley Gardiner's mysteries sold over 2,000,000 copies over a one-year period. 153 PUB. WEEKLY 614 (Jan. 1948).
27. See *Hartmann v. Time*, 166 F.2d 127 (C. C. A. 3d 1947); *Gregoire v. G. P. Putnam's Sons*, 272 App. Div. 591, 74 N. Y. S.2d 238 (1947), noted in 48 COL. L. REV. 475 (1948); *Wolfson v. Syracuse Newspapers*, 254 App. Div. 211, 4 N. Y. S.2d 640 (1938).

inapplicable as a justification for the extension of the single publication rule to books.

The emphasis given by the Court of Appeals in the *Gregoire* case to effectuating the statute of limitations seems to disregard the interest of the party libeled. By applying the single publication rule, and hence the statute of limitations, to the distribution of books, the court did not simply outlaw stale claims; it outlawed claims which may be as fresh as the popularity of a book is sudden. If the majority decision is carried to its logical conclusion, a libelous book could achieve popularity more than a year after publication, thousands of copies could be sold, and the libeled party who had suffered little or no damage on the original date of distribution would be forced to stand without remedy.<sup>28</sup>

The solution to the *Gregoire* problem worked out by the Appellate Division seems eminently more suited to balancing the interests of the publisher and the defamed, and at the same time preserving the reason lying behind the single publication rule. If *Gregoire's* damages were limited to include only those books distributed during the one year prior to the bringing of his action, G. P. Putnam's Sons would in effect be free from action upon stale claims. *Gregoire* would be compensated for current injuries to his reputation, nor would he need fear that a sudden rekindling of public interest in *Total Espionage* and a renewal of damage to his reputation would go uncompensated. It is to be hoped that other jurisdictions will follow the reasoning of the Appellate Division when the situation of the *Gregoire* case is presented to them. As for New York, a particularly important jurisdiction because much of the nation's book publishing industry is centered there, it would seem desirable that the New York legislature amend the statute of limitations so as to protect the interests of parties libeled in books.

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28. The classic example of a book which achieved popularity some time after it first appeared on the market is KING'S ROW. Sales of the book had dwindled to 25 copies a week or less when through an advertising campaign more than 150,000 regular copies were sold in addition to those sold through the Dollar Book Club. See Macel, *Book Clubs and Booksellers*, 151 PUB. WEEKLY 2596, 2598 (May 1947).