

**BLOGGING, THE FIRST AMENDMENT, AND OTHER
PUBLISHING ISSUES FOR WEBSITE OPERATORS**

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LSI BLOGGING

I. Introduction

Blogs—online journals or diaries to which individuals post regularly—are becoming part of daily life. Nearly every second, someone creates a blog, adding to the over 40 million in existence. See Steve Yahn and Jake Whitney, *Defending Blogs*, Editor & Pub., Aug. 2006, at 20 (available at http://www.dwt.com/practc/privacy/bulletins/08-06_DefendingBlogs.pdf). And someone is usually reading, as studies show over one-fourth of Americans visit blogs. David L. Hudson Jr., *Blogging*, First Amendment Center, last updated Feb. 6, 2006, at <http://www.firstamendmentcenter.org//press/topic.aspx?topic=blogging&SearchString=blogging>. Teens are partially responsible for this trend, but adults, too, constitute a growing audience for the medium, which comprises material ranging from news to pop culture reviews. Blogs shape social culture, and effect political change.

With this growth, legal issues have emerged, with one group surveying more than 40 cases against bloggers. See Eric P. Robinson, *Libel and Related Lawsuits Against Bloggers*, last updated Aug. 10, 2006, at <http://www.medialaw.org/Template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=4463>. Some cases present old questions in a new context, whereas others pose novel dilemmas.

II. Section 230: Near-Absolute Immunity for Third-Party Content

Suppose a newspaper falsely publishes a story that a private individual committed a murder. This would likely satisfy the elements of libel—false statement of fact, made of or concerning another, subjecting that person to hatred, contempt or ridicule, or tending to do so. Imagine instead someone writes the same story and posts it, anonymously, on a blog. While, this, too, likely satisfies the elements of libel, the potential plaintiff may have difficulty successfully suing the website operator for posting the defamatory comments. The defendant would rely most heavily, not on the First Amendment, but on one of the few surviving provisions of the Communications Decency Act—Section 230.

Section 230 states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). “Interactive computer service” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.” *Id.* § 230(f)(2). Section 230 further immunizes such entities when they “in good faith [] restrict access to or availability of material” they consider “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” *Id.* § 230(c)(2)(A).

Congress appears to have had at least three goals in mind when enacting Section 230. First, it sought generally to promote development of the internet and “other interactive computer services” without government intrusion. 47 U.S.C. §§ 230(b)(1),(2). Second, it aimed to encourage technology development that would maximize user control over information, and in the same vein, “remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” *Id.* §§(3), (4). Finally, Congress explicitly intended to “overrule *Stratton Oakmont v. Prodigy* and other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.” *See* S. Conf. Rep. No. 104-230 (1996).

The statute grants broad sweeping immunity to website operators for third-party content. A leading case, decided nearly ten years ago by the Fourth Circuit, found that Section 230 “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.... [L]awsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.” *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Specifically, the court found that the plaintiff, the subject of a hoax in a web posting, could not recover from the internet service provider because of Section 230. *Id.*

Later courts have confirmed the expansive nature of the statute’s protections, and have specifically applied the provision to bloggers. In *DiMeo v. Tucker*, a party promoter brought suit against notorious blogger Tucker Max for third-party postings arising from a failed New Year’s Eve bash. *DiMeo v. Max*, Civ. No. 06-1544, at *1 (E.D. Pa. May 26, 2006). DiMeo did not claim Max authored the defamatory comments but nonetheless sued him for libel. *Id.* The court, finding that Section 230 applied, dismissed the claim. *Id.* at 14.

In another recent decision, the California Supreme Court specifically considered case where an individual, warned that she would be reposting defamatory information, chose to do so nonetheless. *Barrett v. Rosenthal*, No. S122953, at *2-3 (Cal. Nov. 20, 2006). Although the trial court found the defendant was a “distributor” for common law purposes, the court found in favor of Section 230 immunity. *Id.* at 2.

But the *Barrett* court, like many others, acknowledged that Section 230 has had unintended and perhaps undesirable consequences. *Id.* at 2. It stated: “We acknowledge that recognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an internet posing may only seek recovery from the original source of the statements.” *Id.* Specifically, the overwhelming success of defendants suggests they have no duty to monitor content on their websites. Moreover, if they fear that exercising

editorial control over content—by editing or removing it—could subject them to liability, they have little incentive to do so. One judge came to this conclusion early on.

In *Doe v. America Online*, the Florida Supreme Court found that Section 230 blocked a plaintiff's attempt to hold liable a defendant for child pornography occurring in its chat rooms. 783 So.2d 1010 (Fla. 2001). A dissenting Judge Lewis criticized the outcome, writing,

“[O]ne goal of the CDA is... to promote “decency” on the Internet. What conceivable good could a statute purporting to promote ISP self-policing efforts do if, by virtue of the courts’ interpretation of that statute, an ISP which is specifically made aware of child pornography being distributed by an identified customer through solicitation occurring on its service, may, with impunity, do absolutely nothing, and reap the economic benefits flowing from that activity?”

Id. at 1024-25 (Lewis, J., dissenting).

Despite this sentiment, cases have continued to find in favor of website operators. In another recent case, a Chicago civil rights group sued Craigslist for discriminatory housing advertisements posted by third parties. *Chicago Lawyer’s Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, Case No. 06 C 0657 (N.D. Ill. Nov. 14, 2006). Judge Eve expressed frustration over the broad interpretation of Section 230 but still found it immunized Craigslist from liability. *Id.* The court noted that if an internet provider alters content, the information may no longer be from “another content provider” for purposes of the statute.

This distinction seems to make sense; a rule that would allow content providers to take down libelous material, what we might call “passive editing,” would give incentives to screen material, as Congress sought, but prevent website operators from editing statements to make them potentially more libelous, through “active editing.” Still, it appears that courts will require legislative action before they change the liability rules for website operators.

III. Blogging and the First Amendment

Section 230 does not immunize content providers themselves, implicating the First Amendment risks associated with blogging. For example, New York state may enact a law that would classify blogs as ads. Leigh Jones, *Will Law Firm Blogs Be Regulated as Advertising?*, *The Nat’l L. J.*, Oct. 11, 2006, available at <http://www.law.com/jsp/article.jsp?id=1160471119300>. Under current case law, most courts assume that commercial speech commands less protection under the First Amendment, so the new regulations would effectively allow the state bar to aggressively regulate legal blogs, even if they do not serve purely commercial aims. *See id.*

There are several other First Amendment issues surrounding blogs.

A. Bloggers as Journalists: Reporter's Shield Laws and the *Apple* Case

For example, a growing debate exists as to whether bloggers are journalists under the First Amendment. This inheres partly in the difficulties of deciding what constitutes news. The First Amendment demands that courts make these judgments, if at all, extremely carefully. Some categorize the work of bloggers as meaningless drivel lacking accountability; most blogs, unlike printed news, do not subject stories to editorial scrutiny. But web posts have broken some big news stories in the last few years, including those on Senator Trent Lott's praiseworthy comments of the late Senator Strom Thurmond; the attempted discrediting of CBS's story on President George W. Bush's National Guard Service; the granting of White House press credentials to James Guckert (also known as Jeff Gannon); the resignation of CNN news executive Eason Jordan after his remarks at the World Economic Forum; and the scandal surrounding the Swift Boat Veterans for Truth advertisements. Hudson, *Blogging* (citing Opsahl).

Although the public generally has the same rights as journalists, one area where the law makes a distinction has become the subject of heated debate: reporter's shield statutes. Most states have enacted shield laws, which protect a journalist's right to keep her sources confidential. The federal government has not enacted one, in part due to the difficulty in defining the term "journalist." The Supreme Court faced the same obstacle when it decided *Branzburg v. Hayes*, a case denying a reporter the privilege to keep his sources confidential before a grand jury proceeding. 408 U.S. 665 (1972). The *Branzburg* Court noted:

Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

Id. at 704.

Although definitional difficulties preceded blogging, they have come to the forefront with their growth. Consider the California case *Apple Computer, Inc. v. Doe*, where Apple sought to uncover the identity of individuals who allegedly misappropriated and distributed trade secrets on the web. See *O'Grady v. Superior Court*, 139 Cal.App.4th 1423, 1436 (2006). Several websites published information about an unreleased product codenamed "Asteroid." Robinson, *Libel and Related Lawsuits Against Bloggers*. Although a lower court found for Apple, the appellate court reversed on three grounds. *O'Grady*, 129 Cal.App.4th at 1432.

Two grounds rested on a finding that the bloggers were in fact journalists. Specifically, the court ruled that they qualified under the California shield law and the state constitutional privilege against compulsory disclosure of confidential sources. *Id.* The court wrote: "Like any

newspaper or magazine, [defendants] operated enterprises whose *raison d'être* was the dissemination of a particular kind of information to an interested readership.... If their activities and social function differ at all from those of traditional print and broadcast journalists, the distinctions are minute, subtle, and constitutionally immaterial.” *Id.* at 1458, 1468.

The *Apple* case is just one of many to come that considers the role of bloggers as news reporters and distributors. As the internet increasingly becomes a major source of daily information, such questions will continue to arise.

B. Anonymous Publication

The concept of anonymity is important in another way: The First Amendment protects anonymous speech. Hudson, *Blogging, citing Talley v. California*, 362 U.S. 60, 64 (1960) (“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”) This precedent recognizes the important and historic role of anonymous speech in fostering open discussion about social and political issues. Most notably, Alexander Hamilton, John Jay, and James Madison published *The Federalist Papers* under the pseudonym “Publius.” *Id.* Similarly, today, the ability to criticize publicly is invaluable. However, some anonymous speech is defamatory. And some defamation plaintiffs have noble intentions while others engage in lawsuits aimed to silence individuals; these latter cases are termed SLAPP suits—Strategic Lawsuits Against Public Participation.

The Web has increased exponentially the ability of ordinary individuals to participate in public discussion. Many have no alternatives to the internet and have a greater expectation of privacy, than, for example, pamphleteers. *Id.* How courts will treat this growing body of valuable yet potentially libelous information is an open question.

One prominent case suggests courts will afford web posts generous protection. In *Doe I v. Cahill*, a city council member and his wife wanted to compel the identity of someone who posted criticism of the member’s leadership skills. *Doe v. Cahill*, 884 A.2d 451, 454 (Del. 2005). The lower court denied a motion for a protective order using a “good-faith” standard. *Id.* at 456. But the Delaware Supreme Court reversed, finding the internet to be the “modern equivalent of political pamphleteering.” *Id.* at 456. As a result, the court found that the plaintiffs must demonstrate sufficient evidence to defeat a summary judgment motion. *Id.* at 560. The ruling also requires plaintiffs to try to notify the anonymous poster that he is the subject of a subpoena and allow him a reasonable opportunity to file an opposition. *Id.* at 461. Not all courts are in agreement. For example, in *In Re Baxter*, a federal judge decided that the plaintiffs, to compel a website operator to reveal the author of a blog, need only prove a “reasonable possibility... of recovery on the defamation claim.” *In re Baxter*, U.S. Dist. Lexis 26001, at *38 (W.D. La. Dec. 19, 2001).

These cases may greatly affect defamation law as applied to the web. If other courts follow the lead of the Delaware Supreme Court, it may be even more difficult for plaintiffs to successfully adjudicate libel claims.

IV. Other Publishing Issues for Website Operators

A. Transitioning Newspapers Online

Just as bloggers and web site hosts must consider the risks they face from unedited blogs, newspapers, too, must revamp their operations as they go online. In the last decade, nearly every major media outlet has developed an online branch. In addition to stories, they post blogs and allow users to provide feedback. These new activities create increased legal risks that some newspapers have not considered.

For example, many newspapers subscribe to outdated insurance policies. *See* Yahn and Whitney, *Defending Blogs*. These policies may not protect them from libel lawsuits brought against freelance artists. *Id.* at 21. They do not consider risks posed by technology-driven media such as podcasts, RSS feeds, and wireless dispatches to mobile devices. *Id.* at 27. As a result, they leave newspapers in a precarious position.

In addition, many newspapers have outdated internal policies. For example, they do not account for the activities of journalists online. Reporters often maintain blogs at home and at work; a newspaper faces liability, as an employer, for the actions its reporters commit in the scope of employment. *Id.* at 22. Moreover, from a practical standpoint, newspapers may wish to monitor the behavior of those who post feedback on their websites; some already post non-binding “user behavior” statements, allow viewers to notify a newspaper about errors, or have implemented programs that screen for certain kinds of postings, such as profanity. *Id.* at 25. Finally, internal policies often do not consider the possible risks of security breaches; if newspapers collect personal information from subscribers, they face risks of liability if those records are leaked.

B. Retractions and Corrections

Consider another issue newspapers face every day: the need to correct or retract a statement to avoid a defamation lawsuit. This risk applies equally to all online publishers. Most states have laws governing corrections to allegedly defamatory statements. Thomas R. Burke, *Online Correction Policies: Reducing Defamation Exposure*, First Amendment Law Letter, Summer 1997. Specifically, many impose restrictions on defamation liability when a plaintiff has not timely demanded a correction or retraction in writing. *Id.* These statutes also set out the time period when a correction must run, what it should say, and where in the publication it must appear. *Id.* Moreover, at common law, published corrections could help mitigate damages and demonstrate an absence of actual malice. *Id.* Finally, and perhaps more importantly, a

publisher's decision whether to retract or correct a statement undoubtedly affects a plaintiff's choice to file a lawsuit. *Id.*

Most state statutes do not contemplate online publishing. *Id.* But to think courts, legislatures, and especially plaintiffs will turn a blind eye to this fact forever would be naive. Many online publishers appear to realize this, but they often publish corrections in inconspicuous places that readers rarely visit; for example, they might place a link to a correction on the same page as the allegedly erroneous assertion. As a result, readers are not informed of the correction, and a record can attest to this fact, exposing the publisher to more liability. Instead, website operators ought to post the text of the retraction or correction in a place as prominent as the story itself—be it on the home page of the publication, the page the story ran, or both.

C. Privacy

Although the internet normalizes anonymity, the web also has the opposite effect: exposure to a wide audience of sometimes intensely personal facts. Those who make disclosures of this sort may be subject to claims for invasion of privacy and public disclosure of private facts. Invasion of privacy occurs when someone intentionally intrudes into another's private affairs if that intrusion would be highly offensive to a reasonable person. Public disclosure of private facts occurs when someone intentionally discloses private facts about a person if those facts would be highly offensive to a reasonable person and do not concern the public.

A high profile case provides an example. In May 2004, Jessica Cutler, a staff member for Ohio Senator Michael DeWine, met Robert Steinbuch, the senator's counsel on the Senate Judiciary Committee. Bruce Johnson, *Steinbuch v. Cutler: When is a Personal Blog Considered Publicity?*, Privacy and Sec. Blog, Mar. 29, 2006, at <http://www.privsecblog.com/archives/blogging-steinbuch-v-cutler-when-is-a-personal-blog-considered-publicity.html>. The two had a fling that Cutler wrote about on her blog, using sexually explicit language. *Id.* Although Cutler did not name Steinbuch, she revealed enough information for many to guess his identity. *Id.* At the time, Cutler's blog was little known, but it catapulted to popularity when another blog named Wonkette posted a link. Steinbuch sued Cutler for invasion of privacy, and bloggers keenly await the decision. *Id.*

In April 2006, a district court judge denied Cutler's motion to dismiss while recognizing that much of Steinbuch's claim was time-barred. Bruce Johnson, *Sex Blogger Motion Denied*, Privacy & Sec. Blog, <http://www.privsecblog.com/archives/blogging-sex-blogger-motion-denied.html>. In addition, in October, the court reluctantly allowed Steinbuch to amend his complaint to add Wonkette writer Anna Marie Cox to the lawsuit. *See Steinbuch v. Cutler*, 2006 U.S. Dist. LEXIS 78462 (D.D.C.).

Although much of Steinbuch's case may in fact be time-barred, the events surrounding the matter, and the possibility of future suits along the same lines, have some bloggers thinking carefully about what details they reveal on the web.

D. Blogging and the Workplace: The Rights of Employers and Employees

As a growing number of individuals post blogs, employers are becoming increasingly worried about the effects. Employees may intentionally or inadvertently disclose confidential information, undermine the employer's public image, attempt to sabotage the employer's business, create a hostile work environment, or expose the employer to vicarious liability on a variety of claims. Robert Blackstone and Anne E. Denecke, *Blogging and Text/Instant Messaging in the Workplace*, Sept. 2006 (http://www.dwt.com/practc/empservices/publications/11-06_WorkplaceBlogging.pdf). Whether an employer may discipline an employee depends largely on whether the government or a private company employs the individual. Generally, public employees are entitled to greater protection than private employees.

The First Amendment binds public employers, as government entities. The Supreme Court has found that employee speech in the workplace merits special protection when it concerns public matters. Hudson, *Blogging*, (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983)). In cases involving such speech, courts apply a balancing test, weighing the employee's interest in free expression against the employer's interests in efficiency. *Id.* The latter involves considering the disruption caused to the workplace. *Id.* Applying this to the context of blogs, if an employee blogs about a matter of public concern while at work, an employer seeking to discipline the employee must show efficiency outweighs the employee's free speech interest. What constitutes a matter of public concern will undoubtedly play an important role in decisions. As for off-duty blogs, the rule varies by jurisdiction; some states, for example, protect off-duty conduct with statutes.

Private employees receive no protection under the First Amendment. Instead, their protection derives from state statutes and the National Labor Relations Act ("NLRA"). The latter protects an employee's right to engage in "concerted activity for the purposes of... mutual aid and protection." *Id.* In addition, state and federal whistleblower statutes protect employees and former employees who make a complaint or raise a concern with somebody outside the company about the employer's business or safety practices. *Id.* Finally, some states—including California, Colorado, Connecticut, and New York—protect employees' off-duty activities. *Id.* Some enumerate participation in "political activities." *Id.* Aside from these pockets of protection, however, employers largely may regulate the speech of private employees.

E. Compliance with the Americans with Disabilities Act

In February of this year, the National Federation of the Blind sued Target, alleging that the company's website violates the Americans with Disabilities Act. *Nat'l Fed. of the Blind v. Target Corp.*, No. C 06-01802 (N.D. Cal. Sept. 5, 2006). Although Target filed a motion to dismiss the claim for failure to state a claim upon which relief could be granted, a federal judge denied that motion and ruled that the case could proceed. *Id.* This should serve as a wake-up call to businesses creating and revamping websites. In the future, a court or the legislature might decide that websites should comply with the ADA. As a result, publishers creating or revamping their websites ought to make them compliant before a lawsuit arises.

V. Mash-Ups

The term mash-up originated in pop music; it describes the historical practice of creating songs from two or more different existing tracks. Robert S. Gerber, *Mixing It Up On the Web: Legal Issues Arising from Internet "Mashups,"* 18 *Intell. Prop. & Tech. L. J.* 8 (Aug. 2006). In the context of the internet, the concept is similar; a "mash-up" website combines two or more content sources available on the internet. *Id.* Although this may seem unfamiliar, most people have, in fact, used mash-ups—whether by checking real-time traffic on local highways, examining news sites that pull content from different websites, or looking at a map from one provider with superimposed local crime statistics. *See id.* But more unusual applications are emerging. For example, consumers can now sign up for a service where they dial the UPC or ISBN code of a compact disc or book into their mobile phones and immediately receive data from Amazon.com on prices, ratings, and similar items. *Id.* Another site provides maps for pedestrians. *See* <http://www.programmableweb.com/popular/recent>.

Despite the fledgling nature of the industry, legal scholars have already begun writing about mash-ups. However, even if lawsuits emerge over the associated legal issues—copyright and trademark infringement, contract claims, unfair competition, obscenity, and the rights of publicity and privacy—they will likely disappear over the long term. Take, for instance, the case of Napster. The embattled music file-sharing service popularized the ease of downloading music on the internet; and while Napster eventually failed, market substitutes emerged, most notably Apple Computer's iTunes service. Here, too, if illegal mash-ups emerge, service providers will begin legally creating them.

In the meantime, mash-ups face a variety of legal issues requiring attention to compliance. Most notable are potential contract disputes. Gerber, *Mixing It Up On the Web*. To create a mash-up, someone generally has to use the application programming interface ("API") from each website. Some APIs are proprietary and carry restrictions; most common are restrictions to use of an API for non-commercial uses, a tactic used by Google. *Id.* In addition, the trademark and copyright risks are evident. *Id.* Also, patent law can protect mathematical algorithms used to create information databases; if someone "borrows" these databases to create a new product, they may face patent infringement claims. *Id.* Like most publishers, mash-up

creators face risks of false advertising, publication of obscenity, invasion of privacy, and rights of publicity. *Id.*

V. Conclusion

Blogs and online content are here to stay. Legal issues—related to the First Amendment, but a host of others as well—will continue to emerge. Bloggers, their publishers, and their employers thus face a growing burden to consider the implications of their actions. Be it copyright protection or privacy concerns, plaintiffs, too, will continue to monitor such innovations as personal blogs and mash-ups. As a result, attorneys must be prepared to meet these issues head-on, by considering the widespread legal implications of online publishing.