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LENGTH: 21761 words**RECENT DEVELOPMENT:** Defamed by a Blogger: Legal Protections, Self-Regulation and Other Failures**NAME:** Jennifer Meredith Liebman*

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LEXISNEXIS SUMMARY:

... In the new millennium, Americans increasingly rely on a particular type of Web-based content for their interactive media fill: Web logs, also known as "blogs." ... Although the creator of a Web site with original content could be held akin to an author and even a publisher, courts treaded into murkier waters when trying to decide whether online providers such as America Online, CompuServ, or Prodigy were in fact publishers of online content or were merely distributors of such content. ... In this way, traditional print media entities may be advised against publishing certain content in order to avoid liability, while the individual blogger will likely not have access to similar legal advice. ... While unmasking the identity of an anonymous blogger comes with its own particular challenges, victims of defamatory blog content face greater obstacles in instances where harmful speech comes from a third party. ... A party defamed by content found on a blog can effectively remedy its harm by contacting the blogger or posting a comment countering the defamatory speech. ... In addition to one blog's re-posting the speech of another blog, which would preserve the contents of the original blog, the Internet Archive Project works to preserve online content in general. ... Moreover, even defamatory blog content that has been corrected or removed from the blog will still exist online via the Internet Archive Project. ...

TEXT:

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I. Introduction: Welcome to the Blogosphere, Where Would You Like to Go Today?

A decade ago, Congress declared that "increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services."¹ When Congress made this pronouncement, however, it was referring to the World Wide Web in general. In the new millennium, Americans increasingly rely on a particular type of Web-based content for their interactive media fill: Web logs, also known as "blogs." Despite their relative youth, blogs have begun to supplant older forms of print media, personal correspondence, and even "traditional" Web-based media.

Bloggers come from all corners of society, from serious journalists and academics seeking out a means of immediate and interactive communication, to teenagers seeking tacit networks of interpersonal communication. In

between the most public of speech about public figures and the most private of speech, ordinary citizens use blogs as a means of self-expression, social networking, and providing and receiving information. In other words, legal precedent regarding bloggers has the potential to affect countless users and purveyors of online interactive media.

Despite staking out new territory, blogs, like older forms of communicative and interactive media, have the capacity to defame. Bloggers regularly engage in speech that likely meets the requirements of the tort of defamation.ⁿ² Because blogs are an especially effective form of interactive communication, a thorough examination of the law in relation to online libel is essential.

[*344] Part II of this Recent Development provides a brief history of libel law, including cases seminal to the interpretation of the Communications Decency Act of 1996 ("CDA"). Part III compares blogs to both traditional print media and older forms of online media. The goal of this section is to identify the similarities and differences between blogs and older forms of communication. Specifically, Part III examines the practical aspects of blogging, including availability of editorial filters, cost of production, and access to the legal system. Next, Part IV examines recent cases involving defamatory postings on the Internet. Part V discusses various ways parties harmed by a blog's content can seek remedies that are within the spirit of the law. Finally, Part VI analyzes the discrepancies between the rights of bloggers in comparison to the legal solutions available to those defamed by blog content. This section ultimately reaches an imperfect reconciliation between the need for unrestricted online speech and the need for those harmed by such speech to seek effective redress for alleged wrongs. Fortunately, interactive media continues to evolve. If the law can keep pace, this Recent Development's laundry list of potential solutions may become obsolete.

II. The Evolution of Libel Law

The advent of interactive media via the Internet has altered how we interpret the common law tort of defamation. This Part begins by discussing basic elements of this tort and then analyzes how the advent of the CDA changed the application of the law of defamation with regards to online medial cases.

A. The Tort

The law governing defamation walks a narrow line between repairing the injuries of the defamed party and protecting the right of free speech belonging to the speaker. For this reason, a party that feels that it has been harmed by some form of speech must prove certain facts in order to bring a successful claim of defamation.ⁿ³ Otherwise, the speaker's First Amendment right to free speech prevails.ⁿ⁴ The factors one must consider when bringing a defamation suit include the truth of the allegedly defamatory statement, whether the statement is factual or figurative, privileged, or a matter of public or private concern, and whether the plaintiff is a public figure.ⁿ⁵ Each of these factors contributes to whether a plaintiff will be successful in bringing a claim of defamation.

The Restatement of Torts identifies the following essential elements of the tort of defamation:

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(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.ⁿ⁶

These general elements apply to some degree in each potential libel case.

1. True or False Statements of Fact

As a general rule, true statements are not defamatory. If a blog entry, for instance, states that a local politician who recently held up a bank is a crook, that politician would have a very difficult time bringing a successful defamation

case. "An essential element of defamation is that the publication in question must contain a false statement of fact."ⁿ⁷ In order to determine whether a statement is false, the courts look to the specific fact that the plaintiff claims has been misrepresented by the speaker.ⁿ⁸ In examining the truthfulness of the fact in question, courts also consider the perspective of the speaker.ⁿ⁹ Does the individual who created the defamatory speech have special knowledge of the fact, which would make it more likely that this individual would purposely misrepresent that fact? For instance, if a blogger was intimate with the local politician, and knew the politician to be a law-abiding citizen who had never robbed a bank in his life, that blogger would have specific knowledge of one aspect of the politician's life. On the other hand, if the blogger had no intimate knowledge of the politician's criminal record, had never even met the politician in question, and was just using his blog as a platform to speculate about the potential crookedness of public figures, then courts would determine that the blogger made the statement with no special knowledge of its falsity. If the speaker does not have special knowledge of the fact, and still makes a false statement, the court then considers whether the false statement was made negligently.ⁿ¹⁰

In addition, the perspective of the speaker is a useful tool for courts to determine whether the speaker made the defamatory statement knowing that publishing such a statement would cause special harm to the defamed party.ⁿ¹¹ For instance, a blogger who posts long ranting paragraphs about a local politician's honesty might know that the politician in question relied on having a public reputation as a [*346] trustworthy person, and thus would be especially harmed by having doubts cast on his honesty.ⁿ¹²

A final element used to determine the falsity of a statement is the degree to which a reasonable reader would believe that the statement was in fact true.ⁿ¹³ A plaintiff will have a harder time successfully bringing a libel claim against a statement so hyperbolic that the reasonable reader would assume the statement to be false.ⁿ¹⁴ *Hustler Magazine v. Falwell* provides the most famous example of this principle, in which the Supreme Court determined that magazine publisher Larry Flint's First Amendment right to free speech precluded plaintiff Jerry Falwell's recovery from the harm caused by a parody published in *Hustler Magazine* describing the plaintiff having sex with his mother in an outhouse.ⁿ¹⁵ The Court determined that the harm brought by this content was minimal because the speech at issue "could not reasonably have been interpreted as stating actual facts about the public figure involved."ⁿ¹⁶ While courts have not produced a bright line rule on the matter of when outrageous statements lose sufficient credibility to be considered defamatory, statements that consist of "rhetorical hyperbole," "vigorous epithets," "lusty and imaginative expressions of ... contempt," and language used "in a loose, figurative sense" are less likely to be found defamatory.ⁿ¹⁷

Determining where specific speech falls on the continuum between absolute truth to patent falsehood is a form of art, and will therefore likely vary from jurisdiction to jurisdiction. Important to making the judgment as to whether speech would be considered false by a reasonable person, however, is the context in which the speech appears.ⁿ¹⁸ In the context of the blogosphere, for example, speech tends towards the hyperbolic.ⁿ¹⁹

2. Public Figures

The Restatement further emphasizes that the false and defamatory statement must concern "another."ⁿ²⁰ According to the Court in *New York Times Co. v. Sullivan*, allegedly defamatory statements about a public figure are less likely to constitute a tort.ⁿ²¹ The defamed party must show that the creator of the defamatory content created the content with [*347] "actual malice," as opposed to just garden-variety negligence.ⁿ²² On the other hand, the Court in *Gertz* held that if the defamed party is not a public figure, that party only need show that the defamatory statement was created with scienter (i.e. negligence, recklessness, or malicious intention, but not strict liability).ⁿ²³ The Court in *Gertz* did, however, deal with a matter of public concern.ⁿ²⁴ Therefore, while the standard of protection varies depending on the plaintiff's public or private status, speech of a public concern is protected.

The Court in *Dun & Bradstreet* considered contextual factors, such as "[the expression's] content, form, and context ... as revealed by the whole record" to differentiate between a matter of public and private concern.ⁿ²⁵ The Court thereby determined that a credit report regarding a specific business within a specific industry, which was distributed to only five people, was not a matter of public concern.ⁿ²⁶ Thus, the speaker in *Dun & Bradstreet* was held liable for

libelous speech. ⁿ²⁷

3. Publishers and Distributors

Traditionally, the law of libel also distinguished between publishers and distributors of allegedly defamatory content. Publishers of defamatory content were considered liable under the theory that a typical publisher retained editorial control over what was presented to the general public. ⁿ²⁸ By contrast, distributors (including bookstores, newsstands, and libraries) did not incur liability for the contents of the media that they distributed, under the theory that the distributor did not exercise editorial control over the content. ⁿ²⁹

B. Libel on the Internet

Prior to 1996, U.S. courts grappled with whether to classify the purveyors of online forums and Web pages as distributors or publishers. Although the creator of a Web site with original content could be held akin to an author and even a publisher, courts treaded into murkier waters when trying to decide whether online providers such as America Online, CompuServ, or Prodigy were in fact publishers of online content or were merely distributors of such content.

In the early days of widespread Internet usage, an Internet Service Provider ("ISP"), which provides consumers access to the Internet and [*348] related services, ⁿ³⁰ could arguably have had sufficiently few subscribers to exercise actual editorial control. On the other hand, many ISPs did not operate under the assumption that all content would come under editorial control before being published, and the rapid growth in Internet usage and content creation made implementing such an assumption increasingly difficult.

In 1995, a New York trial court in *Stratton Oakmont v. Prodigy* held an ISP, Prodigy, liable for information posted on a Web board operated by the provider. ⁿ³¹ Subscribers had access to bulletin boards, among other things, run by Prodigy. ⁿ³² Prodigy exercised editorial control over the content of these Web boards via a "bot," ⁿ³³ which scanned the board for inappropriate content. ⁿ³⁴ The court determined that use of this bot was sufficient to consider Prodigy a publisher, and thus liable for libelous content posted on its Web boards. ⁿ³⁵ The court reasoned that because Prodigy had made this editorial control public to its users, it could be considered a publisher. ⁿ³⁶

In 1996, Congress passed the Communications Decency Act as a means to address the predicted changes in communications brought by the Internet. In part as a response to the potential chilling effects brought on by the decision in *Stratton*, §230 of the CDA ("§230") provides that "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." ⁿ³⁷ Congress argued that by freeing ISPs of potential liability, ISPs would be free not only to permit a wide array of content online, but also to self-regulate and monitor content. ⁿ³⁸ In other words, Congress gave ISPs the freedom to monitor content as they saw fit.

As a practical result, §230 erased the distinction between publishers and distributors for courts trying to determine liability for defamatory content. Under §230, those deemed publishers of online content are as free of liability for defamatory content as distributors. Thus, the only parties that could be held liable for defamatory online content are the primary creators of that content. ⁿ³⁹

Section 230(f)(2) defines an interactive computer service as "any information service, system, or access software provider that provides or [*349] enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet." ⁿ⁴⁰ Examples of an interactive computer service include America Online ("AOL"), CompuServ, listservs, Web-based bulletin boards, Web page guestbooks, and blog comments sections.

In 1997, the Forth Circuit in *Zeran v. Am. Online, Inc.* solidified the interpretation of §230, determining that the ISP, AOL, in question was not liable for defamatory content posted on one of its Web boards. ⁿ⁴¹ The court determined

that ISPs were publishers under defamation law and therefore protected by the CDA.ⁿ⁴²

After Zeran, plaintiffs unsuccessfully tried to place ISPs and third parties in the original content creator category for purposes of §230. In 1998, the District Court for the District of Columbia in *Blumenthal v. Drudge* determined that the operator of a Web site was immune from liability for posting defamatory information.ⁿ⁴³ The Web site in question, the Drudge Report, considered an online gossip column at the time, operates similarly to a blog in that information is updated frequently.ⁿ⁴⁴ At the time of the posting, the Drudge Report's proprietor, Matt Drudge, provided his columns to AOL subscribers pursuant to a contract with AOL.ⁿ⁴⁵ Thus, AOL was a co-defendant with Drudge. Drudge allegedly wrote and posted a missive accusing Sydney Blumenthal, an aid of then-President Clinton, of spousal abuse.ⁿ⁴⁶ The court, relying on the holding in Zeran, determined that AOL was a publisher of the Drudge Report, and thus immune from liability under §230.ⁿ⁴⁷

The court in *Blumenthal* reached this conclusion despite the fact that AOL had explicitly contracted with Drudge to provide the content in question. This situation is distinct from Zeran, where an anonymous AOL user had posted the harmful content in question on an AOL chat board. While AOL contracts with all of its users, those contracts are not designed to provide a specific type of information in the way that AOL's contract with Drudge to publish his gossip column was. Therefore, under §230, an ISP remains immune from liability regardless of whether that ISP contracted with an original content creator to publish a specific form of content.

In 2000, the Tenth Circuit in *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.* refined the position outlined in *Blumenthal* by further holding that an ISP is immune from liability even if the ISP controlled content by responding to the defamed party's request to delete harmful [*350] information from a Web page.ⁿ⁴⁸ In *Ben Ezra*, AOL worked closely with two third parties to create stock information about companies, including the plaintiff company.ⁿ⁴⁹ AOL posted inaccurate stock information about the plaintiff.ⁿ⁵⁰ Despite the plaintiff's claims that AOL had control over the content of the defamatory stock information, the only evidence that the plaintiff provided to support this claim were e-mails between the plaintiff and AOL to remove the inaccurate information.ⁿ⁵¹ In response to this communication, AOL removed the information, but did not create new content.ⁿ⁵² The court concluded that AOL did not play a significant role in creating online content, and thus retained immunity under §230.ⁿ⁵³

Despite the progress courts have made in interpreting where §230's distinctions between publishers' and authors' lies, the nature of online content creation continues to change, leading to situations in which a publisher has closer control over content posted on a Web site than AOL ever had during the 1990s.

III. What About Blogs?

A. Blogs and Traditional Print Media

Until recently, forms of traditional print media served as the only means to provide people with a written source of news and information. Like traditional print media, blogs rely on words and images, suggesting that the law has the potential to treat blogs similarly to newspapers and magazines. While blogs appear to invite more reader interaction than traditional print media, both blogs and traditional print media invite reader commentary and criticism. Blogs rely on comments sections after entries, while newspapers and magazines invite letters to the editor. According to a recent study by the Pew Research Center, nine out of ten bloggers allow readers to post comments in response to specific posts.ⁿ⁵⁴ These comments are often visible to not just the blogger, but also anyone who reads the blog. Between the blogger who allows all comments to be immediately published, and the blogger who does not provide readers with the option to comment at all, there is a spectrum of options in terms of editorial review open to the blogger. Blogging software and interfaces [*351] permit the blogger to limit the types of comments posted.ⁿ⁵⁵ For instance, a blogger can review all comments before they are posted.ⁿ⁵⁶ The blogger can also choose to block comments from anonymous posters or from specific users,ⁿ⁵⁷ or use the Completely Automated Public Turing test to tell Computers and Humans Apart, or CAPTCHA, technology to automatically screen users and block spammers from posting in comments sections.ⁿ⁵⁸

Finally, bloggers have the option to respond to reader comments. The blogger can do this in the comments section or, if the comment is sufficiently inflammatory, the blogger can address it in a new entry. Moreover, such an interaction can occur within the hour. Bloggers who require commenters to leave an e-mail address can contact commenters privately. Bloggers may also delete individual comments or entire discussion threads that they find offensive. In other words, the actual blogger has the option of exercising close editorial control over his or her comments section.

In an interesting twist, many forms of traditional print media now sponsor blogs, indicating the overall compatibility of the two mediums.ⁿ⁵⁹ But despite the compatibility of blogs with traditional print media, and despite their functional similarities, blogs are different from traditional print media in several significant ways, including cost, editorial filters, and available legal counsel and protections. First, the barriers to entry are significantly lower because a blog can be started and maintained for free. Any person can sign up for a free account with commercial entities such as Blogger, livejournal, Myspace, or Typepad and begin creating content.ⁿ⁶⁰ In contrast, the costs of traditional print media include supplies required to print and distribute information, namely paper and ink. It costs more for a newspaper to reach 5000 readers than it would to reach five readers, but blogs are accessible to the masses for the same cost as they would be to the few.

Another significant difference between traditional print media and blogs is that the latter often publish content without significant editing.ⁿ⁶¹ For instance, a major national newspaper, such as the New York Times, goes through numerous editorial stages between any one journalist's [*352] original draft and the published piece.ⁿ⁶² On the other hand, no such standard or expectation exists in the blogosphere. Most blog content is drafted and published without intermediate stages of editing.ⁿ⁶³ A minority of bloggers reported "spending extra time verifying facts included in a posting, and including links to original source material that has been cited or in some way used in a post."ⁿ⁶⁴ In addition, just 11% of bloggers report "posting corrections on their blog."ⁿ⁶⁵ This research indicates that different bloggers approach creating online content differently. While just over a third of bloggers engage in activities similar to those of print journalists, many other bloggers are not quoting information obtained from third parties, linking to other Web pages, or verifying the information that they post.ⁿ⁶⁶

While a minority of blogs have the potential to supplant traditional newspapers, a higher percentage of bloggers do not apply journalistic standards to their postings.ⁿ⁶⁷ In practical terms, this means that the average blogger does not run postings through an editorial filter prior to publishing. Nor does the blogger verify information or sources prior to posting. From the standpoint of a plaintiff interested in bringing a defamation suit against a blogger, a blogger who does not apply rigorous journalistic standards runs a higher risk of being deemed, at the very least, negligent in publishing false statements about the plaintiff.ⁿ⁶⁸

Finally, many individual bloggers do not have the advantage of readily available legal counsel or protection. Traditional print media is produced under the umbrella of larger media and corporate conglomerations. This means that traditional print media's access to legal representation and advice is greater than the access an individual blogger will have. In this way, traditional print media entities may be advised against publishing certain content in order to avoid liability, while the individual blogger will likely not have access to similar legal advice. Similarly, a newspaper will have the capital to hire a comprehensive legal team, while the individual blogger may not have adequate financial resources to hire legal counsel, and may have to proceed pro se.

B. Blogs and Other Forms of Cybermedia

Cybermedia has been accessible since the late 1980s and prevalent in the popular imagination since the mid-1990s. In addition to blogs, the [*353] term "cybermedia" encompasses online content such as standard Web pages, Web boards, and chat rooms.

Like other forms of cybermedia, blogs are accessible via the Internet. Like chat rooms and bulletin boards,ⁿ⁶⁹ blogs have an interactive component, as evidenced by the use of the comments section. Moreover, blogs, like other online content, are usually published without excessive editing. On the other hand, if the blogger does not permit the

ability to comment, then the blog resembles a traditional Web page with its absence of interactive features, and exists instead merely to inform.

Fundamentally, blogs differ from static Web pages in that many blogs retain readership by frequently altering and updating their content. Individual readers are more likely to visit a blog repeatedly than a static site in order to access new content. In addition, whereas the producer of a Web page removes older content when changing the page's content, the blogger often alters content while leaving old content accessible to the reader in the form of archives.ⁿ⁷⁰ Blogs differ from bulletin boards and chat rooms in that the creation of the majority of content rests in the hands of the few.ⁿ⁷¹ Moreover, the blog author acts as a strong moderator of any interactive content provided by readers by being in a position to disallow or delete objectionable comments.ⁿ⁷²

IV. Blogs Take the Stand: Recent Cases Involving Internet Defamation

The rise of the blogosphere has come with lawsuits pointing out blog speech's capacity for harm. For instance, Capitol Hill staffer Jessica Cutler blogged her way into court after her anonymous blog, *Washingtonienne*, was featured on the gossip site *Wonkette*.ⁿ⁷³ Cutler devoted her blog to describing her sexual escapades with assorted Capitol Hill employees and those higher up in the political scene. Cutler's attempts at disguising the identities of her sexual partners were perfunctory at best. The content of *Washingtonienne* remains at the center of *Steinbuch v. Cutler*, a lawsuit centered on claims of defamation and invasion of privacy.ⁿ⁷⁴

This Part examines particular elements of blogging in relation to the lawsuits brought against bloggers. *Steinbuch v. Cutler* is the most recent defamation case brought against a blogger. Cutler is perhaps unique, in that she openly created original defamatory content for her blog. Many [*354] other bloggers at the heart of recent cases have blogged anonymously or have been sued over content created by a third party that the blogger either reposted, or permitted to be included in the blog's comments section. In the case of anonymous bloggers, the Delaware Supreme Court in *Doe v. Cahill* set a stringent standard of pleading for defamed parties wishing to compel ISPs to release the identity of anonymous bloggers.ⁿ⁷⁵

While unmasking the identity of an anonymous blogger comes with its own particular challenges, victims of defamatory blog content face greater obstacles in instances where harmful speech comes from a third party. While the holdings in cases brought in the 1990s provided protection to ISPs,ⁿ⁷⁶ courts more recently have grappled with the issue of bloggers posting, or permitting the posting of, third party created content. Several cases of note, including *Batzel v. Smith*,ⁿ⁷⁷ *DiMeo v. Max*,ⁿ⁷⁸ and *Barrett v. Rosenthal*ⁿ⁷⁹ attempted to apply §230 immunity to individual bloggers and Web site administrators who provided defamatory content created by a third party. Finally, a series of cases brought in the California court system draws upon the similarities between blogs and traditional print media in the context of applying a state reporter's shield law.ⁿ⁸⁰

A. The Clever Libeler and Other Hurdles Plaintiffs Face in Bringing Online Defamation Suits

Blog entries often consist of original content created by the blogger.ⁿ⁸¹ On occasion, the blogger will publish content created by a third party.ⁿ⁸² In terms of third party created content posted by the blogger, §230 and its predominant interpretation has made it clear that such a blogger is to be treated as a publisher and is thus precluded from liability.ⁿ⁸³ Moreover, the party defamed by a blog entry is also precluded from suing blog servers, such as *livejournal.com* or *blogger.com*, under the theory first presented in *Stratton*, where a secondary conduit of online content was held to be immune from liability under §230 of the CDA.ⁿ⁸⁴

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1. *Doe v. Cahill*: Anonymous Bloggers and ISPs Caught in the Middle

Doe v. Cahill was one of the first cases to address libelous blog postings.ⁿ⁸⁵ The case, brought before the Delaware

Supreme Court, focused on the plaintiff's attempt to compel an ISP to reveal the identity of an anonymous blogger.ⁿ⁸⁶ Because many bloggers blog anonymously, parties defamed by blog content are likely to confront similar issues that the court in *Doe* addressed. The case is thus an early and important precedent to examine.

The facts of the case were as follows: an anonymous blogger, identified only as Proud Citizen, posted content on the Smyrna/Clayton Issues Blog that allegedly defamed plaintiff Cahill, a Smyrna, Delaware, city councilman.ⁿ⁸⁷ Cahill moved to compel Comcast, the ISP, to reveal the true identity of Proud Citizen, known as John Doe No. 1.ⁿ⁸⁸ The trial court denied this motion, and Cahill appealed.ⁿ⁸⁹ The court determined that, in order for defamed parties to be able to access the identity of an anonymous speaker, they need to establish: "(1) that they had a legitimate, good faith basis upon which to bring the underlying claim; (2) that the identifying information sought was directly and materially related to their claim; and (3) that the information could not be obtained from any other source."ⁿ⁹⁰ In other words, Cahill needed to show that Proud Citizen had been negligent in posting the objectionable blog entries, and that the contents of those entries were not true. Specifically, Cahill had to demonstrate that John Doe No. 1 had specific knowledge that would preclude any truth to the purportedly libelous content of the blog entries. In other words, how did John Doe know that the posted statements were false? Following *New York Times Co. v. Sullivan*, a public figure bringing a defamation claim needs to demonstrate that the defamer spoke with actual malice.ⁿ⁹¹ Under this standard, Cahill needed to show that Proud Citizen knew of the statement's falsity or recklessly disregarded the truth. Thus, in order to prove this element of the tort, Cahill needed to know John Doe No. 1's identity.

Based on these standards, the court denied *Doe*'s motion to prevent Comcast from revealing Proud Citizen's identity.ⁿ⁹² John Doe No. 1 subsequently appealed to the Delaware Supreme Court.ⁿ⁹³ In assessing Cahill's motion to unmask *Doe*, the court identified the conflict between [*356] *Doe*'s First Amendment right to be protected as an anonymous speakerⁿ⁹⁴ and the weaker First Amendment protection generally afforded to defamatory speech.ⁿ⁹⁵ The court also included Cahill's status as a public figure in its analysis.ⁿ⁹⁶

The Delaware Supreme Court in *Doe* ultimately determined that, in order for a defamed plaintiff to obtain the identity of an anonymous blogger, the claim must first survive a motion to dismiss.ⁿ⁹⁷ Second, the plaintiff must take efforts to notify the anonymous defendant that he is subject to a subpoena or application for order of disclosure.ⁿ⁹⁸ In the online context, the plaintiff must also post notice of the action on the same interactive Web site where the original defamatory message was posted.ⁿ⁹⁹

The Philadelphia County Court relied on *Doe* when determining that defamatory content posted in a Web page's guestpage was defamatory per se.ⁿ¹⁰⁰ In *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, the court determined that the identity of the party that anonymously posted defamatory information in a Web page's guestbook was not protected from discovery under the First Amendment.ⁿ¹⁰¹ The *Klehr* court further concluded that such discovery would not prove burdensome to the defendants.ⁿ¹⁰² Specifically, the court explained that

many of the statements set forth in the "Guestbook" constitute defamation per se. And, while the posters are undeniably entitled to First Amendment rights, the defamatory per se statements are not entitled to First Amendment protection. This court finds that defendants' [sic] are not unreasonably burdened by this court's order denying defendants' request that the identities of the anonymous posters not be revealed.ⁿ¹⁰³

The *Klehr* court concluded that online defamatory speech's potential harm outweighed the speaker's right to remain anonymous.ⁿ¹⁰⁴

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2. *Batzel v. Smith*: Bloggers and Third Party Content

The opinion in *Batzel v. Smith* begins with Judge Marsha Berzon's observation that

there is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world. Congress, however, has chosen for policy reasons to immunize from liability for defamatory or obscene speech "providers and users of interactive computer services" when the defamatory or obscene material is "provided" by someone else.ⁿ¹⁰⁵

Recognizing this limitation in assigning liability, the Ninth Circuit proceeded to determine that an operator of a Web site who posts the contents of an allegedly defamatory e-mail provided by a third party cannot be held liable if that Web site operator reasonably believed that the provider of the third party content intended the information for publication.ⁿ¹⁰⁶

The facts of *Batzel* are as follows: the plaintiff employed one of the named defendants, a handyman, to perform odd jobs around her house.ⁿ¹⁰⁷ During the course of this relationship, the defendant concluded, based on conversations with the plaintiff and observations of the plaintiff's home, that the plaintiff possessed stolen artwork procured by members of the Nazi Party.ⁿ¹⁰⁸ Upon reaching this conclusion, the defendant drafted and sent an e-mail to the second named defendant, a proprietor of a Web site devoted to tracking down stolen art.ⁿ¹⁰⁹ In this e-mail, the first defendant named the plaintiff and claimed that she was the granddaughter of a high-ranking member in the Nazi Party during World War II.ⁿ¹¹⁰ The second defendant in turn published the e-mail on a listserv.ⁿ¹¹¹ Upon learning of this publication, the first defendant sent an e-mail to a subscriber of the listserv, claiming that he never intended the e-mail to be distributed to the public via the listserv.ⁿ¹¹²

Despite the second defendant's degree of decision-making autonomy in distributing the alleged defamatory e-mail, and the first defendant's intention that the e-mail not be viewed by anyone other than the intended recipient, the court concluded that the second defendant was immune from liability by operation of §230.ⁿ¹¹³ The court reasoned **[*358]** that because the second defendant did not develop a substantial portion of the information distributed on the listserv, §230 immunity applied.ⁿ¹¹⁴

The dissent argued that ordinary citizens will find this reasonableness standard impossible to understand, and argued instead that an analysis should not focus on the author's intent, but on the defendant's actions.ⁿ¹¹⁵ The logic behind this was that the average recipient of an e-mail will not consider the author's intentions with regards to publication.ⁿ¹¹⁶ Moreover, the recipient of an e-mail message can assume that the author intended the message for distribution by virtue of clicking on the send button.ⁿ¹¹⁷ In a sense, the dissent believed that sending an e-mail acts as the author's endorsement of the recipient's right to change and distribute the e-mail as that recipient sees fit.ⁿ¹¹⁸ Based on this reasoning, the dissent argued that courts should only evaluate a defendant's actions in relation to distributing defamatory content on the Internet.ⁿ¹¹⁹ The dissent supported this conclusion by positing that Congress, in drafting §230, intended to focus on the actions of the distributor, as opposed to the intentions of the original content creator.ⁿ¹²⁰

The dissent reasoned that, by focusing on a defendant's actions, the issue of whether the defendant screened or altered content thus became a relevant inquiry.ⁿ¹²¹ By focusing on how a defendant conducted himself within the context of §230's goal of self-policing the Internet, the dissent surmised that defendants who have actively taken steps to prevent or block the dissemination of obscene or defamatory information on the Internet should receive immunity from liability under §230.ⁿ¹²² This ultimately is a case-by-case analysis, which, in focusing on the editorial control the defendant exercises over the contents and distribution of the original material, could treat some distributors as creators of original content under the law. If the dissent's position had prevailed, courts would need to evaluate the degree the defendant worked to keep offensive material from Internet-based distribution before granting §230 immunity.

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3. DiMeo v. Max: The Comments Section

In 2006, the Eastern District of Pennsylvania reinforced prior holdings regarding online content and the CDA, determining that a party who runs a Web site with an interactive component such as a bulletin board or a blog comments section is precluded from liability for third party defamatory statements under the provisions of §230.ⁿ¹²³ In *DiMeo v. Max*, the plaintiff challenged prior holdings, arguing that the proprietor of a Web site should be held liable for defamatory statements that appeared on that site, under the theory that because the proprietor of a specific Web site "can select which posts to publish and edits their content, he exercises a degree of editorial control that rises to the development of information."ⁿ¹²⁴

The defendant, Tucker Max, ran a site with an active bulletin board that allowed Internet users to post anonymous comments on different topics,ⁿ¹²⁵ where DiMeo found defamatory statements about himself. While Max had not created the defamatory content, DiMeo sued Max under the theory that Max, as proprietor, was also the publisher of content posted on his bulletin boards.ⁿ¹²⁶ Moreover, DiMeo argued that the courts should treat Max as the original content creator.ⁿ¹²⁷

The court grappled with the issue of whether §230 barred DiMeo from bringing defamation claims against Max.ⁿ¹²⁸ The court used three elements to analyze whether Max was entitled to §230 immunity. First, the court determined that Max's site provided an "interactive computer service" because the bulletin board was a "'service' that 'enables computer access' by multiple users to a computer server."ⁿ¹²⁹ Second, the court determined that, in his claim against Max, DiMeo treated Max as the publisher of such defamatory information.ⁿ¹³⁰ Finally, the court determined that the defamatory posts "constituted 'information provided by another information content provider,'" as opposed to information provided by Max himself.ⁿ¹³¹

The court further determined that DiMeo's argument that Max's editorial control over the postings made him akin to an original content provider went against the spirit of §230.ⁿ¹³² The court, relying on the holding in *Batzel*, explained that "one of Congress's goals in enacting §230 was to promote this kind of self-regulation. Thus, 'development of [*360] information' must mean 'something more substantial than merely editing portions of [content] and selecting material for publication.'"ⁿ¹³³

B. Barrett v. Rosenthal: Upending a Decade of §230 Immunity

The case of *Barrett v. Rosenthal* wound up the California state court system during the first few years of the twenty-first century. The case arose when the defendant posted defamatory statements against the plaintiffs on two different newsgroups.ⁿ¹³⁴ The defendant was characterized as a distributor, as opposed to a publisher, of the defamatory content.ⁿ¹³⁵ The trial court found the defendant immune from liability under §230 "because the distributor did not originate but merely republished the defamatory statement."ⁿ¹³⁶ On appeal, most courts would have confirmed this holding. The plaintiff's appeal, however, went the other way, as the California Court of Appeals attempted to refine the broad scope of §230.

1. Refining Zeran's Holding

The decision handed down by the California Court of Appeals in *Barrett v. Rosenthal* deviated radically from prior cases involving cybermedia and §230.ⁿ¹³⁷ Essentially, the California Court of Appeals attempted to undo the holding in *Zeran*, arguing that Zeran's characterization of the term "publisher" to cover distributors was faulty.ⁿ¹³⁸ The court also found problematic for several reasons the contention that the purposes of §230 would not be accomplished if publishers were held liable.ⁿ¹³⁹ First, the court argued that the common law principle of distributor liability continued to exist despite §230 because the CDA did not address the common law's separation of publisher and distributor.ⁿ¹⁴⁰ Instead, the Court of Appeals determined that the distributor category was a subset of the publisher category for the purposes of §230.ⁿ¹⁴¹ The Court of Appeals maintained that §230 did not address the liability of distributors as a wholly separate category of tortfeasors separate from publishers.ⁿ¹⁴² In other words, the common law definition of distributor liability

should be taken into consideration in determining the scope of §230's definition of publisher. The court advanced the following argument to reach this conclusion:

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Section 230 does not explicitly absolve providers or users from all liability. The statement that they "shall not incur liability as publishers or speakers of information provided by other content providers" ... does not expressly or even by necessary implication foreclose the possibility of holding them liable as distributors. "Indeed, one could argue from the enumeration of publisher and speaker in §230(c)(1) that distributor was deliberately omitted." ⁿ¹⁴³

Clinging to this line of reasoning, the Barrett court proceeded to argue that providing absolute immunity for a distributor of information undermines the purpose of libel law, this purpose being to prevent the distribution of harmful information via channels of communication. ⁿ¹⁴⁴

Next, the Court of Appeals relied on §230's legislative history, arguing that the authors of the CDA intended to prevent only those who exercised control over online content from being liable for defamatory material. ⁿ¹⁴⁵ In theory, by removing the threat of liability from those parties that generally exercised control over content, online content providers would be less likely to self-censor material posted online. On the other hand, because distributors did not exercise control over online content, they could be liable for defamatory material. ⁿ¹⁴⁶ In other words, precluding distributors from liability under §230 fell outside of the CDA's intended purpose of removing disincentives for ISPs to develop and utilize blocking and filtering technologies in order to facilitate the screening of objectionable material displayed over the Internet. ⁿ¹⁴⁷ The court argued that if ISPs do not face the threat of liability for distributing objectionable third parties' content, there would be little incentive for those distributors to self-censor, thus frustrating the CDA's purpose of keeping the Internet clean. ⁿ¹⁴⁸

2. Reversing the Court of Appeals and Restoring Zeran

Despite the California Court of Appeals' attempt to reinterpret §230 and distinguish Zeran, the California Supreme Court reversed the lower court's decision two years later. The California Supreme Court was concerned over the appellate court's unconventional distinction made between distributors and publishers. ⁿ¹⁴⁹ Specifically, the court determined that the reinterpretation of Zeran placed a heavy burden on **[*362]** creators and publishers of Internet speech, leading to a chilling effect. ⁿ¹⁵⁰ The risks of chilling online speech by imposing liability, the court argued, went directly against the purpose of §230. ⁿ¹⁵¹ Whereas the California Court of Appeals made a stark distinction between publisher and distributors, the California Supreme Court found that the interpretation of §230 articulated in Zeran made sense in light of the fact that publishers would traditionally incur more liability than distributors. ⁿ¹⁵²

C. O'Grady v. Superior Court: Applying Rules of Traditional Print Media to Blogs

Commentator Glenn Reynolds observed recently that:

Blogs doing reporting ... are journalistic outlets every bit as much as newspapers. They're simply using a different technological platform, and to the extent that they're to be treated differently it must be because of that technology. So does that different technology make a difference? ⁿ¹⁵³

While many producers and providers of interactive online media are protected as publishers under §230, a recent case brought in the California court system determined that, in certain circumstances, the technology used to disseminate information does not make a difference. Despite §230's power to separate the legal treatment of online media from the legal treatment of traditional print media, O'Grady v. Superior Court blurred the distinction between the two mediums. ⁿ¹⁵⁴ At issue was a Web site that posted trade secret information from the Apple Computer Company. ⁿ¹⁵⁵ The provider

of the site, Jason O'Grady, refused to reveal the source of the trade secret information, claiming that he had immunity under California's reporter's shield laws.ⁿ¹⁵⁶ In other words, O'Grady demanded that the law treat his blog as it would treat traditional forms of print media for the purposes of reporter's shield laws.

The California Court of Appeals in *O'Grady v. Superior Court* determined that online content creators were protected by a California reporter's shield law, which precluded them from being compelled to disclose the source of the information posted on their sites.ⁿ¹⁵⁷ Specifically, the court determined that the defendants were covered by [*363] the shield law as "publishers."ⁿ¹⁵⁸ While the court grappled with whether individuals that posted information online could be placed in the same class as newspapers and other periodicals, the court determined that there was no significant difference between print and online content for the purposes of the shield law.ⁿ¹⁵⁹

Furthermore, the court classified online publications as "other periodical publications" for the purposes of California's reporter shield law.ⁿ¹⁶⁰ This term covered publications that were neither newspapers nor magazines. Instead, the court surmised that the legislature intended the term "periodical publication" to "include all ongoing, recurring news publications while excluding nonrecurring publications such as books, pamphlets, flyers, and monographs."ⁿ¹⁶¹

In classifying the Web site at issue as periodical material, the court further relied on the facts of the case, noting that the Web site, while updated periodically, was not updated at regular intervals.ⁿ¹⁶² While this concerned the court, it ultimately decided that many publications classified as other "periodical publications" do not update at regular intervals, but are nonetheless covered under the statute.ⁿ¹⁶³

In reaching this conclusion, the court noted that shield laws had been developed with the intention of protecting news-gatherers in a variety of situations, including print media, radio, and television.ⁿ¹⁶⁴ In other words, the legislative intent behind shield laws, such as the one at issue in California, was to protect those who gathered news and disseminated it to the public. The court also noted that the Web site at issue in *O'Grady* bore a closer resemblance to traditional print media than to radio and television, explaining that

petitioners' Web sites are highly analogous to printed publications: they consist predominantly of text on "pages" which the reader "opens," reads at his own pace, and "closes." The chief distinction between these pages and those of traditional print media is that the reader generally gains access to their content not by taking physical possession of sheets of paper bearing ink, but by retrieving electromagnetic impulses that cause images to appear on an electronic display.ⁿ¹⁶⁵

Finally, the court concluded that nothing in California's statute excluded online publications.ⁿ¹⁶⁶

[*364] In terms of libel law and §230 immunity, the California Court of Appeals concluded in *Barrett* that the holding in *O'Grady* did not reinterpret the CDA to distinguish between publishers and mere distributors of online content.ⁿ¹⁶⁷ Nonetheless, the conclusion reached by the *O'Grady* court is significant to parties that have been libeled by information provided by anonymous sources on blogs. Following the *O'Grady* holding, parties libeled by information provided by anonymous sources will find it difficult to compel disclosure of the source of information, even if the blogger responsible for posting the information is identified.

To summarize, parties bringing claims of defamation against bloggers face several formidable obstacles. If the blogger is anonymous, the plaintiff will face the steep burden of proof outlined in *Doe v. Cahill*.ⁿ¹⁶⁸ If the blogger posts information provided by a third party, or permits defamatory third party postings in a comments section or bulletin board, the harmed party runs up against §230 immunity.ⁿ¹⁶⁹ Finally, if the plaintiff seeks to discover a blogger's anonymous source, the *O'Grady* holding demonstrates that laws designed to protect print media journalists can have the potential to apply to online content providers as well.

D. Fitting the Blogosphere into Libel Law

One final obstacle for parties harmed by allegedly defamatory blog speech is the disconnect between the spirit of traditional libel law and the nature of the blogosphere.ⁿ¹⁷⁰ Specifically, as some commentators have noted, classic libel cases such as *New York Times Co. v. Sullivan* were decided on the theory that the tort of libel protected a weaker victim of defamation from a powerful defamer.ⁿ¹⁷¹ In terms of online media, on the other hand, the defamer is not necessarily the more powerful party. Because the blogosphere's barriers to entry are significantly lower than those of traditional print media, the party producing the defamatory speech may be in a weaker position financially than the harmed party.ⁿ¹⁷² In such situations, laws designed to protect what is assumed to be the weaker, injured party, from the powerful defamer may not serve their purposes when financial resources of the parties are taken into consideration. Therefore, determining which party has greater power in terms of financial resources must be done on a case-by-case basis.

For example, as in *New York Times Co. v. Sullivan*, the standard of care applied in determining whether content is defamatory depends on [*365] whether the person defamed is a public or private figure.ⁿ¹⁷³ However, one commentator recently noted that "a private individual who happens to be a widely-read blogger ... may bring a defamation claim based on false and defamatory statements made by another in response to the blog."ⁿ¹⁷⁴ While the aggrieved blogger is not a public figure outside of the blogosphere, within the context of the blog world, individuals such as Heather B. Armstrong,ⁿ¹⁷⁵ Joshua Micah Marshall,ⁿ¹⁷⁶ and Atriosⁿ¹⁷⁷ are important figures. Their blogs have proven influential within the medium, and continue to shape the genre of blogging in significant ways.

Moreover, because both traditionally public figures and private individuals have the same opportunity to enter the debate within the blogosphere, the spirit of *New York Times Co. v. Sullivan*, in which the Court argued that public figures have an advantage over private individuals in being able to access the media to refute libelous claims made against them, no longer applies.ⁿ¹⁷⁸ Because the blogosphere has lower barriers to entry, and anyone defamed on a blog can refute such a claim, keeping within the spirit of *Sullivan* may require less protection under the law.ⁿ¹⁷⁹ However, the self-help remedy of producing counterspeech to refute a defamatory blog entry may not serve as a satisfactory solution for those who have been harmed by a blog's defamatory content.ⁿ¹⁸⁰ In such cases, parties harmed by online speech may turn to legal remedies. Whether these parties are successful in applying such legal remedies as cease and desist letters, preliminary injunctions, or suits for money damages depends on which party has more financial resources and legal knowledge. In some instances, the harmed party will be the one with the resources necessary to persevere in the legal arena. In other cases, the blogger may be the party with the legal savvy and financial resources to challenge a defamation claim.

Because each blogger and defamation victim is different with respect to financial resources when defamation occurs in online media, deciding cases based on broad policy decisions may not take into consideration the circumstances unique to each case. While the desire to use libel law as a means of assisting parties harmed by online media is a powerful one, many individuals harmed by blog speech have turned to self-help remedies and legal methods designed to chill the speech of bloggers not equipped to carry out protracted legal battles.

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V. So What If a Blogger Defames You? The Divorce Between Law and Realistic Considerations

Case and statutory law tell just one side of the story of defamation in the blogosphere. The CDA's purpose of leaving the online content to the whims of user self-governance has led to an interesting array of self-help remedies. While some of these remedies use, and possibly misuse, the legal justice system, other remedies rely on the ingenuity and verbosity of content creators, publishers, and harmed parties.

A. Self-Help Remedies

In the spirit of the CDA, courts continue to rely on the idea that those who communicate online are capable of effective self-governance. A party defamed by content found on a blog can effectively remedy its harm by contacting the blogger or posting a comment countering the defamatory speech. Even if the blogger is anonymous, a defamed party is free to contact that anonymous party and request that the defamatory information be removed. Without the participation of the legal justice system, those participating in online communication need not unmask actual identities.ⁿ¹⁸¹ Courts and lawyers need not be involved.

1. Counterspeech: Effective or an Invitation to an Ugly Flame War?

Counterspeech is based on the notion that one harmed by speech can react with additional speech. Counterspeech functions as an attempt to right the wrongs promulgated by the original speech. Traditional print media throws up a variety of barriers to counterspeech. Specifically, parties interested in countering speech found in traditional print media face barriers to entry, including cost, time, and being able to convince an opinions page editor that their counterspeech is worthy of publication. In the face of these barriers, parties defamed by content found in traditional print media are more likely to turn to the legal system for relief.

On the other hand, the blogosphere's near lack of barriers to entry increases the likelihood that a party harmed by a blog's content will be able to engage in a form of counterspeech. As the court in *Doe* explained, the Internet provides a means of communication where a person wronged by the statements of an anonymous poster can respond to the allegedly defamatory statements on the same site instantly, and thus can almost "contemporaneously respond to the same audience that initially read the allegedly defamatory statements."ⁿ¹⁸² As a result, the [*367] harmed party can readily right the wrongs promulgated by the original harmful speech.ⁿ¹⁸³

Despite the ease of counterspeech, this form of online self-governance comes with its own risks. Namely, counterspeech online runs the risk of turning into a "flame war."ⁿ¹⁸⁴ The act of flaming is described as "the act of sending or posting messages that are deliberately hostile and insulting, usually in the social context of a discussion board on the Internet."ⁿ¹⁸⁵ A flame war consists of at least two online users flaming each other. The speech used in flame wars is more hostile than useful in countering harmful speech. Bloggers and readers engaging in counterspeech and ongoing debates regarding blog content can find themselves embroiled in unending flame wars, during which few issues are resolved. Furthermore, participants in flame wars run the risk of creating additional defamatory speech. Parties harmed by the initial speech may try to remedy the situation with earnest counterspeech. However, if the creators of the original speech or other blog readers interpret the counterspeech as an attack, a flame war may commence. In this instance, the harmed party will not only miss an opportunity to effectively end the harm created by the original speech, but may fall victim to additional harmful speech.

2. Do Retractions Work in Cyberspace?

a. General Considerations

Retraction of the harmful speech serves as a potentially viable alternative to counterspeech. The mechanics of a retraction operate as such: the blogger learns that specific speech was found harmful by a third party. The blogger, in turn, either takes down the entry containing the harmful speech by "removing, or disabling access to, the material,"ⁿ¹⁸⁶ or, in the alternative, devotes a new blog entry apologizing for the harmful speech.

Retractions and apologies have several advantages over counterspeech. First, the creator or publisher of the harmful speech must act, which indicates to the harmed party that the speech has been recognized as harmful. Second, in cyberspace, the cost of retracting speech is as low as the cost of producing any other form of online [*368] speech.ⁿ¹⁸⁷ Finally, retracting speech via a takedown ensures that the harmful speech will not be readily accessible to a blog's readers.ⁿ¹⁸⁸

Retractions in cyberspace, however, may not be particularly effective due to the nature of the Internet. The

Internet's low barriers to entry, for example, mean that a speaker spends less money and effort retracting speech or publishing an apology. If the purpose of forcing a speaker to retract speech is to cause the speaker inconvenience and financial hardship, the effect of such a request in cyberspace will hold less weight. Along with low barriers to entry, online speech is very easy to preserve permanently. In addition to one blog's re-posting the speech of another blog, which would preserve the contents of the original blog, the Internet Archive Project works to preserve online content in general.ⁿ¹⁸⁹ As a result, even if defamatory speech is no longer readily accessible to a blog's reader, the defamatory speech is still accessible to those who know where to look.

b. Enforceability: *Mathis v. Canon*

The case of *Mathis v. Canon* addresses the issue of whether retractions in cyberspace are as legally effective as retractions in print media.ⁿ¹⁹⁰ In *Mathis*, the plaintiff sued the defendant for punitive damages over allegedly libelous postings on a public bulletin board.ⁿ¹⁹¹ In determining whether the plaintiff could collect damages, the Georgia Supreme Court had to determine whether online communications were covered under a Georgia statute that stated:

In any civil action for libel which charges the publication of an erroneous statement alleged to be libelous, it shall be relevant and competent evidence for either party to prove that the plaintiff requested retraction in writing at least seven days prior to the filing of the action or omitted to request retraction in this manner.ⁿ¹⁹²

At issue in *Mathis* was whether Georgia's libel retraction statute covered online publications. In reaching the conclusion that online publications were to be treated similarly to newspapers in instances of parties seeking punitive damages for libelous speech, the court considered whether retractions in cyberspace would be any less effective than retractions in other forms of communicative media.ⁿ¹⁹³ The court's conclusion that online media should be covered under the retraction statute rested on the argument that a speaker should be given an opportunity to retract or [*369] correct potentially harmful speech before being punished for such speech.ⁿ¹⁹⁴ The court explained that from a practical standpoint, a retraction in cyberspace would likely reach the same audience that had read the libelous speech, similar to "a retraction printed in a newspaper or spoken on a broadcast."ⁿ¹⁹⁵ In explaining its decision to prohibit the plaintiff from collecting punitive damages due to his failure to request a retraction, the court hoped to "encourage[] defamation victims to seek self-help, their first remedy, by "using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."ⁿ¹⁹⁶ The court, in encouraging such a self-help remedy in cyberspace, hoped to "strike[] a balance in favor of "uninhibited, robust, and wide-open' debate in an age of communications when "anyone, anywhere in the world, with access to the Internet' can address a worldwide audience of readers in cyberspace."ⁿ¹⁹⁷

B. Other Remedies

Despite the *Mathis* court's ringing endorsement of self-help remedies for blog libel, parties harmed by blog speech may not find such self-help remedies satisfying. If the party harmed by blog speech has the resources, the legal system can be used to persuade specific bloggers to remove the harmful speech and refrain from engaging in such defamatory speech in the future. For instance, injured parties may opt to have an attorney send a cease and desist letter on their behalf to the blogger. Other harmed parties may attempt to curtail harmful blog speech by seeking preliminary injunctions or by suing bloggers for equitable damages in the millions. While parties engaging in these types of remedies have generally been unsuccessful, commentators have noted that such maneuvers have been successful in impeding the First Amendment rights of bloggers.ⁿ¹⁹⁸ Increasingly, legal advocacy groups, such as the Electronic Frontier Foundation, recognize that while bloggers have a right to produce any manner of speech, bloggers must also be aware of legal pitfalls that await them if they engage in speech that is perceived as defamatory.

1. The Cease and Desist Letter: It Shouldn't Work but Does (Why?)

Cara Davis, author of the blog *janauryone.com*, and an avid knitter, received a cease and desist letter from counsel representing a company whose brand of yarn she had disparaged in a blog entry.ⁿ¹⁹⁹ Like many [*370] bloggers, Davis engaged in an irreverent monologue about her day-to-day life, which included her knitting hobby. Yet Davis received a cease and desist letter threatening further legal action if she continued "libeling" the company's name.ⁿ²⁰⁰ In response to the threat of legal action, Davis stopped using full trademarks and brand names on her blog.ⁿ²⁰¹

Despite the distinct possibility that she could have defended her blog in court, Davis chose not to continue exercising her right to free speech online. While Davis could afford to maintain a blog, she may not have been able to engage in a protracted legal battle to protect her right to speak freely. The defamed company's attorneys recognized that an ordinary citizen with limited financial resources would likely respond to the threat of legal action by removing the content in question. Many bloggers, particularly those whose content reaches out to a niche audience, do not engage in news reporting and commentary, are not themselves lawyers, and do not have sufficient knowledge of the law to do anything except comply with a corporation or wealthier party's request to remove or otherwise alter allegedly defamatory blog postings.

2. Preliminary Injunctions

While a party defamed by blog content may be eager to seek a preliminary injunction to take down the offending material, the burden of persuasion is sufficiently high in most jurisdictions so as to make a motion for a preliminary injunction unsuccessful. This extremely high burden of persuasion is based on the argument that the speaker has a right to speak freely under the First Amendment, and the theory that making it easy for parties to remove speech from the public sphere ultimately chills such speech.

Bynog v. SL Green Realty Corp. involved a former employee who, over the course of suing her former employer for wrongful termination, maintained a personal Web site discussing her experience working for, and being terminated by, the defendant company.ⁿ²⁰² The blog included viewer comments, a timeline of the events leading up to the plaintiff's termination, and testimonials from clients of the defendant's company.ⁿ²⁰³ The defendant sought a preliminary injunction on the theory that the plaintiff's Web site was "a malicious campaign to harm [the defendant company], damage [the defendant company's] professional reputations [*371] and to interfere with their present and prospective business relationships."ⁿ²⁰⁴

The Southern District of New York denied this injunction, concluding that the defendant failed to meet the extremely high burden of persuasion set by the Second Circuit for defamation cases.ⁿ²⁰⁵ Specifically, while the defendant claimed that the plaintiff's blog had harmed its business, the defendant could not demonstrate to the court that the harm it anticipated arising from the allegedly defamatory content of the Web site was either "looming or tangible."ⁿ²⁰⁶ In other words, the defendant could not demonstrate that the plaintiff's blog would cause irreparable harm if it were permitted to remain online.ⁿ²⁰⁷

The court's decision to deny the harmed party a preliminary injunction is based on the idea that an injunction imposes a prior restraint on speech and is thus presumed unconstitutional.ⁿ²⁰⁸ The court reasoned that a threat of civil action would likely chill future speech.ⁿ²⁰⁹

C. Damages

Suing for monetary damages to compensate parties harmed by defamatory speech is another way parties can seek remedy. For example, in October 2006, a Florida jury awarded a plaintiff \$ 11.3 million in damages over defamatory blog posts.ⁿ²¹⁰ This case represents a growing trend where parties harmed by blog content have brought on lawsuits as a means of chilling online speech.ⁿ²¹¹ One commentator observed that "the goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him."ⁿ²¹² Plaintiffs do not bring suits against bloggers with the hope of recovering monetary damages, nor are these cases brought with the singular hope that the libelous speech will be removed or corrected.ⁿ²¹³ Instead, many plaintiffs who bring cases against bloggers do so as

a means of discouraging all bloggers from engaging in speech that could potentially be construed as libelous. As Davis' experience with her blog shows, even a blogger who could potentially be successful in defending a libel charge in court may not be able to afford to do so. As is the case with many lawsuits brought to chill speech, the plaintiffs in these cases hope that lawsuits against bloggers will encourage other bloggers to avoid writing about [*372] controversial topics. At the very least, the threat of a lengthy lawsuit with the potential for money damages will put a damper on the free flow of poetic hyperbole that populates the blogosphere. More importantly, such cases erode the First Amendment right to free speech that bloggers currently enjoy. Such suits deviate from the CDA's spirit of encouraging self-governance amongst creators of online interactive content.

D. The Electronic Frontier Foundation and the Case for Bloggers' Rights

In response to the growing problem of bloggers in relation to the legal liabilities associated with producing publicly read media, the Electronic Frontier Foundation ("EFF"), which emphasizes that bloggers in the United States have the freedom to blog, developed a guide to bloggers' legal rights.ⁿ²¹⁴ In light of this freedom, however, the EFF proceeds to explain how bloggers can avoid being sued for a variety of harms, including libel.ⁿ²¹⁵ For example, the EFF's guide to §230 identifies situations where the blogger will not be liable for speech perceived by potential plaintiffs as defamatory.ⁿ²¹⁶ In other words, bloggers confronted with cease and desist letters, or other legal threats, will have an easier time determining whether they are actually guilty of the alleged harm. Finally, the EFF, in its role as a public interest legal organization, fights for the rights of bloggers who have been sued.ⁿ²¹⁷ For example, the EFF defended John Doe No. 1 in O'Grady.ⁿ²¹⁸ Bloggers whose cases are selected for representation by the EFF and similar cyberlaw public interest organizations are spared the costs associated with defending a defamation case. As a broader policy initiative, the EFF continues to bring cases that challenge existing law in light of the peculiarities of the Internet.

VI. Recommendations: Where Do We Go From Here?

The state of libel law in relation to blogging and interactive media in general is an uneasy one. This unease stems from two competing interests. On the one hand, bloggers are interested in using the Internet to speak freely. Section 230 precludes many purveyors of online interactive media from liability for defamation in order to protect the free flow of information on the Internet.ⁿ²¹⁹ Nonetheless, this first interest [*373] competes with the interest that victims of defamatory online content have in seeking remedies. Many victims of defamatory online speech seek both injunctive relief, in the form of removing the harmful content, and relief in the form of damage awards. However, the defamed party's search for legal redress has the effect of chilling online speech. Taking these basic conflicts into account with the way courts have decided recent online speech cases, along with additional methods of self-help remedies, this Recent Development recommends leaving the current legal and self-help regimes in place.

By no means is this an answer that completely preserves the interests of bloggers, or, for that matter, of parties harmed by blog speech. Nonetheless, this is preferable to solutions that curtail §230's purpose of promoting the free flow of speech online, or solutions that prevent parties harmed by defamatory speech from seeking any sort of remedy whatsoever.

Currently, online content providers are able to avoid liability for defamatory content either under Doe, which protects many anonymous bloggers from being discovered, or by using §230 protection.ⁿ²²⁰ Despite several attempts in recent years to upend Zeran's interpretation of §230, parties defamed by blog content have formidable obstacles to overcome in seeking recourse.ⁿ²²¹

The holding in Zeran continues to compel courts to deny victims of libelous speech recourse in order to promote the CDA's purpose of encouraging self-governance amongst online content providers.ⁿ²²² Several courts have emphasized that parties harmed by online content can readily respond to libelous speech because the barriers to entry online are so low. While bloggers enjoy immunity from liability under §230 if the content at issue is provided by a third party, and immunity from discovery if the content is posted anonymously, the harm caused by libelous speech is real to the injured parties.

Two trends in blogging magnify the effect of libelous online speech: blogs that use journalistic standards akin to traditional print mediaⁿ²²³ and blogs that are created without journalistic standards, and slip into hyperbolic speech for comedic effect.ⁿ²²⁴ Members of the first group, similar to their counterparts working in print journalism, do not post information without engaging in fact checking and editorial review.ⁿ²²⁵ In part because this group of bloggers maintains stringent journalistic standards, and may even affiliate themselves with a print media outlet, their readership may be higher and may consist of readers interested in factual information. While such blogs may not run a high risk of posting [*374] defamatory content, when such defamatory content is posted, chances are that the information will be disseminated to a larger audience due to the blog's higher readership. The second kind of blog, which makes up the majority of blogs, has not built a readership based on providing facts reviewed via journalistic standards.ⁿ²²⁶ Because bloggers of this second type do not employ editorial filters or check facts, they are at a higher risk for, at the very least, negligently posting defamatory information.ⁿ²²⁷

Parties harmed by defamatory online content continue to seek legal recourse.ⁿ²²⁸ In the 1990s, parties, such as the plaintiffs in *Zeran*, *Stratton Oakmont*, and *Blumenthal*, brought actions against ISPs.ⁿ²²⁹ In recent years, cases have been brought against individual bloggers who have posted defamatory content created by third parties.ⁿ²³⁰ Nonetheless, the spirit of the CDA continues to prevail.ⁿ²³¹ Procedural maneuvers, such as preliminary injunctions, similarly have not provided harmed parties with relief.ⁿ²³² Nor has suing bloggers for monetary damages provided immediate redress for parties harmed by defamatory blog content.ⁿ²³³ Instead, such actions run the risk of chilling online speech.ⁿ²³⁴ The only ways in which defamed parties have made legal inroads against bloggers have been in situations where bloggers have limited financial or legal resources. Defamed parties with greater wealth and access to legal counsel have taken advantage of this position, and threatened legal action against bloggers via cease and desist letters.ⁿ²³⁵ For now, such bloggers who find themselves at the receiving end of a cease and desist letter often take down the offending content and avoid posting such content in the future.ⁿ²³⁶ Despite the success of cease and desist letters, many defamed parties may not be in a financial position to threaten legal action.ⁿ²³⁷ Yet as bloggers grow more sophisticated and more aware of their legal rights and duties when creating online content, defamed parties may have a more difficult time using legal action to intimidate and coerce bloggers.ⁿ²³⁸

While interpretations of §230 have protected the interests of creators of online content, self-help remedies celebrated by courts following §230 are the best option for defamed parties. The Internet's low barriers to entry make self-help remedies such as counterspeech and [*375] online retractions both accessible to defamed parties and cost effective to online speakers.ⁿ²³⁹ It is open to debate whether a blogger's online apology or retraction holds sufficient weight to redress the original wrong.ⁿ²⁴⁰ Moreover, even defamatory blog content that has been corrected or removed from the blog will still exist online via the Internet Archive Project.ⁿ²⁴¹ Finally, a victim of defamation who responds to defamatory content with counterspeech runs the risk of escalating the situation into a useless flame war.ⁿ²⁴²

Despite these drawbacks, self-help remedies encouraged by §230 are the best solution for parties defamed by blog content. Several courts that have addressed claims brought against bloggers encourage this solution.ⁿ²⁴³ A party defamed by blog content, thus, runs up against precedents that encourage self-help remedies. Self-help may also represent a wiser option because litigation may be an expense that only the wealthiest of defamed parties can afford. While many bloggers are at a disadvantage financially in relation to the parties that they defame, this is not always the case. Moreover, the risk of losing a claim against a blogger is sufficient to suggest that a harmed party will not benefit from bringing suit.

Second, self-help remedies preserve the rights of all online speakers, including bloggers and the parties they defame, by allowing both parties equal access to the same tools for creating online speech. On the other hand, legal actions against online speakers run the risk of chilling future online speech of not only bloggers, but also those readers interested in responding to those bloggers using more online speech. By not bringing actions that risk chilling online speech, defamed parties protect their right to address defamatory blog speech via counterspeech.

Self-help remedies brought in the spirit of the CDA are not perfect in redressing the harm felt by victims of online defamatory speech. Nonetheless, bringing legal claims against bloggers is costly and may not adequately redress the

wrong of defamatory speech. Finally, self-help remedies avoid the problem of chilling online speech, a solution that ultimately benefits both bloggers and those who they defame by preserving their right to speak freely online.

VII. Conclusion: Where We Have Been

The Internet is not going away, nor are the many blogs that exist. This newer version of interactive online communication has caught the attention of Americans seeking information and entertainment. Along with this capacity to inform and entertain, blogs also possess the capacity [*376] to defame. While certain tenets of common tort law apply in the case of online libel, the Communications Decency Act in 1996 merged publisher liability with the rights and immunities traditionally granted to distributors. For over a decade, parties harmed by allegedly defamatory speech have fought this common interpretation of §230 in an attempt to make parties that are considered publishers of online content liable for libelous speech. The common law tort of defamation was developed with the particularities and limitations of traditional print media, whereas law pertaining to online media encouraged providers and readers of interactive online media to engage in counterspeech and other such self-help remedies. While blogs share characteristics with both traditional print media and older cybermedia, the courts have placed formidable obstacles for plaintiffs to bring successful defamation claims against bloggers. Because of these obstacles, combined with the need to preserve the right to speak freely online, this Recent Development endorses the prevailing interpretation of the law and encourages defamed parties to engage in self-help remedies. These remedies are not perfect, but they go further in preserving the CDA's purpose of allowing interactive online users the freedom to create and respond to content than the chilling alternatives. Ultimately, by continuing to engender a regime of self-help remedies to defamatory speech online, bloggers and their readers will continue to enjoy blogs as sources of information, entertainment, and communication.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law
Civil Actions
Defamation
Torts
Intentional Torts
Defamation
Defenses
Exaggerations & Imaginative Commentary
Torts
Intentional Torts
Defamation
Public Figures
Voluntary Public Figures

FOOTNOTES:

n1. Communications Decency Act, 47 U.S.C. §230(a)(5) (1996).

n2. See generally Restatement (Second) of Torts §558 (1976) (discussing elements of defamation).

n3. See, e.g., Barrett v. Rosenthal, 146 P.3d 510, 525 (Cal. 2006).

n4. Id.

n5. *Id.*

n6. Restatement (Second) of Torts §558.

n7. *Batzel v. Smith*, 333 F.3d 1018, 1031 n.17 (9th Cir. 2003).

n8. Restatement (Second) of Torts §581A cmt. F.

n9. *Id.* §§580A, 580B.

n10. *Id.*

n11. See *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

n12. See *id.*

n13. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

n14. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

n15. *Id.* at 48-49.

n16. *Id.* at 46.

n17. *Ferlauto v. Hamsher*, 88 Cal. Rptr. 2d 843, 849 (Ct. App. 1999) (citing *Greenbelt Pub. Ass'n. v. Bresler*, 398 U.S. 6, 14 (1970)); *Letter Carriers v. Austin*, 418 U.S. 264, 284, 286 (1974).

n18. See *supra* notes 7-12 and accompanying text.

n19. LyriSSa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 *Duke L.J.* 855, 862-63 (2000).

n20. *Restatement (Second) of Torts* §558 (1976).

n21. 376 U.S. 254, 284 (1964).

n22. *Id.* at 279-81; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 395 (1974).

n23. *Gertz*, 418 U.S. at 339.

n24. *Id.* at 325-27.

n25. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-62 (1985).

n26. *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

n27. *Id.* at 763.

n28. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, at 3 (N.Y. Sup. Ct. May 24, 1995).

n29. *Id.*

n30. Internet Service Provider, Wikipedia, The Free Encyclopedia (Mar. 9, 2007), http://en.wikipedia.org/wiki/Internet_Service_Provider.

n31. *Stratton*, 1995 WL 323710, at 3.

n32. *Id.*

n33. See Internet Bot, Wikipedia: The Free Encyclopedia (Mar. 10, 2007), http://en.wikipedia.org/wiki/Internet_bot.

n34. Stratton, 1995 WL 323710, at 4.

n35. Id.

n36. Id..

n37. Communications Decency Act, 47 U.S.C. §230(c)(1) (1996).

n38. Id. §230(a).

n39. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

n40. 47 U.S.C. §230(f)(2).

n41. *Zeran*, 129 F.3d at 331.

n42. Id. at 332.

n43. *Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998).

n44. Id.

n45. Id.

n46. Id. at 50.

n47. Id.

n48. Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000).

n49. Id. at 983.

n50. Id.

n51. Id. at 985.

n52. Id. at 985-86.

n53. Id. at 986.

n54. Amanda Lenhart & Susannah Fox, Pew Internet & Am. Life Project, *Bloggers: A Portrait of the Internet's New Storytellers* 1, 28 (July 19, 2006), <http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf>.

n55. See, e.g., Blogger, *Blogger Tour: Get Feedback*, http://www.blogger.com/tour_con.g (last visited Mar. 10, 2007); TypePad, *Professional Features of Our Business Blogging, Blog Network, and Blogger Services at TypePad*, <http://www.sixapart.com/typepad/features> (last visited Mar. 10, 2007).

n56. See, e.g., TypePad, *supra* note 55.

n57. See, e.g., *id.*

n58. CAPTCHA, *Wikipedia: The Free Encyclopedia* (Mar. 10, 2007), <http://en.wikipedia.org/wiki/CAPTCHA>.

n59. See, e.g., *The Wall Street Journal*, *WSJ.com Blogs*, http://online.wsj.com/public/page/8_0019.html (last visited Mar. 11, 2007) (listing a number of blogs sponsored and hosted by the Wall Street Journal).

n60. Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, 79 *Wis. Law.* 8, 8-10 (2006).

n61. *Doe v. Cahill*, 884 A.2d 451, 466 (Del. 2005); Jennifer O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 *Fordham L. Rev.* 2745, 2765 (2002).

n62. Glenn Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts* 10 (Apr. 27, 2006) (unpublished manuscript, on file with the Harvard Law School).

n63. Doe, 884 A.2d at 466.

n64. Lenhart & Fox, *supra* note 54, at 10-11.

n65. *Id.* at 11.

n66. *Id.* at 10-11.

n67. *Id.*

n68. See Restatement (Second) of Torts §558(a), (c) (1976).

n69. *Batzel v. Smith*, 333 F.3d 1018, 1027 n.9 (9th Cir. 2003) (explaining the features of a Web bulletin board).

n70. See, e.g., *TypePad*, *supra* note 55.

n71. Lenhart & Fox, *supra* note 54, at 10.

n72. See *supra* notes 55-58 and accompanying text.

n73. Wonkette, The Lost Washingtonienne (WONKETTE EXCLUSIVE, ETC., ETC.), <http://www.wonkette.com/archives/the-lost-washingtonienne-wonkette-exclusive-etc-etc-004162.php> (last visited Mar. 10, 2007).

n74. 463 F. Supp. 2d 1 (D.D.C. 2006).

n75. See *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

n76. See *supra* Part II.B.

n77. 333 F.3d 1018 (9th Cir. 2003).

n78. 433 F. Supp. 2d 523 (E.D. Pa. 2006).

n79. 40 Cal. 4th 33 (Cal. 2006).

n80. See *infra* Part IV.B.

n81. See Peterson, *supra* note 60, at 44-46.

n82. *Id.*

n83. See generally *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

n84. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *supra* Part II.B.

n85. *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

n86. *Id.* at 455.

n87. *Id.* at 454.

n88. *Id.* at 455.

n89. *Id.*

n90. *Id.*

n91. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-81 (1964).

n92. *Doe*, 844 A.2d at 455.

n93. Id.

n94. Id. at 456 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)) (likening blogging anonymously to political pamphleteering).

n95. Id. (citing *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942)).

n96. Id. at 457-58.

n97. Id. at 458.

n98. Id. at 461.

n99. Id.

n100. See generally *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425, 2006 Phila. Ct. Com. Pl. LEXIS 1, at 31-32 (C.P. Ct. Phila. County, Pa. Jan 4, 2006).

n101. Id. at 31-32.

n102. Id.

n103. Id. at 32 n.22.

n104. Id.

n105. Batzel v. Smith, 333 F.3d 1018, 1020 (9th Cir. 2003) (internal quotations omitted).

n106. Id. at 1034.

n107. Id. at 1020.

n108. Id. at 1020-21.

n109. Id. at 1021.

n110. Id.

n111. Id. at 1021-22 n.2 (describing a listserv as an automatic mailing list service similar to an e-mail discussion group).

n112. Id. at 1022.

n113. Id. at 1031.

n114. Id.

n115. Id. at 1037-38 (Gould, J., dissenting).

n116. Id. at 1038 (Gould, J., dissenting).

n117. Id. at 1038-39 (Gould, J., dissenting) (pointing out that a "recipient of information that has been selected by another person for distribution understands that the information has been deemed worthy of dissemination by the sender").

n118. Id. (Gould, J., dissenting).

n119. Id. at 1038 (Gould, J., dissenting).

n120. Id. (Gould, J., dissenting).

n121. Id. at 1040 (Gould, J., dissenting).

n122. Id.

n123. DiMeo v. Max, 433 F. Supp. 2d 523 (E.D. Pa. 2006).

n124. Id. at 529-30 (internal quotations omitted).

n125. Id. at 524.

n126. Id. at 527.

n127. Id.

n128. Id. at 527-28.

n129. Id. at 529-30 (quoting 47 U.S.C. §230(f)(2)).

n130. Id.

n131. Id. (quoting 47 U.S.C. §230(e)(1)).

n132. Id.

n133. Id. (internal quotations omitted).

n134. Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 144 n.16 (Ct. App. 2004).

n135. Id. at 144.

n136. Id. at 150.

n137. Id. at 152, 166-67.

n138. Id. at 155 (discussing Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997)).

n139. Id.

n140. Id.

n141. Id. at 155-56.

n142. Id.

n143. Id. at 156 (quoting 47 U.S.C. §230(c)(1); David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147, 162 (1997)).

n144. Id. "Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation." Id.

n145. Id. at 158-59.

n146. Id.

n147. Id. at 161.

n148. Id.

n149. *Barrett v. Rosenthal*, 146 P.3d 510, 515 (Cal. 2006).

n150. Id. at 517.

n151. Id.

n152. *Id.* at 519.

n153. Reynolds, *supra* note 62, at 7-8.

n154. See O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006). For a complete case history, see Electronic Frontier Foundation, EFF: Apple v. Does, http://www.eff.org/Censorship/Apple_v_Does (last visited Mar. 10, 2007) [hereinafter EFF: Apple v. Does].

n155. See O'Grady, 44 Cal. Rptr. 3d at 77-82.

n156. See *id.*

n157. *Id.* at 96 (citing Cal. Const. art. I, §2(b) (West 2002); Cal. Evid. Code §1070(a) (1995)).

n158. *Id.* at 100.

n159. *Id.*

n160. *Id.* at 101-02.

n161. *Id.* at 104.

n162. *Id.* at 100, 104-05.

n163. *Id.* at 104-05.

n164. *Id.* at 100-01.

n165. *Id.* at 103.

n166. *Id.* at 101-02.

n167. See generally *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416 (Ct. App. 2004).

n168. See *supra* Part IV.A.1.

n169. See *supra* Parts IV.A.2, IV.A.3.

n170. Peterson, *supra* note 60, at 10.

n171. *Id.*

n172. Id.

n173. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

n174. Peterson, supra note 60, at 10.

n175. See generally dooce, <http://www.dooce.com> (last visited Mar. 10, 2007).

n176. See generally Talking Points Memo, <http://www.talkingpointsmemo.com> (last visited Mar. 10, 2007).

n177. See generally Eschaton, <http://atrios.blogspot.com> (last visited Mar. 10, 2007).

n178. Peterson, supra note 60, at 10.

n179. Id.

n180. See infra Part V.A.

n181. Doe v. Cahill, 884 A.2d 451, 464 (Del. 2005).

n182. Id. at 464.

n183. Reynolds, supra note 62, at 5. "When errors of fact are pointed out, most bloggers correct them immediately (something that is easy with blogging software as it is not for newspapers, television broadcasters, or book publishers) and generally do so with the same degree of prominence as the original error." Id.

n184. See Flaming, Wikipedia: The Free Encyclopedia (Mar. 6, 2007), http://en.wikipedia.org/wiki/Flame_war.

n185. Id.

n186. Digital Millennium Copyright Act, 17 U.S.C. §512(c)(1)(C) (2006).

n187. Reynolds, supra note 62, at 5.

n188. Id.

n189. Internet Archive, <http://www.archive.org/index.php> (last visited Mar. 10, 2007).

n190. Mathis v. Canon, 573 S.E.2d 376 (Ga. 2002).

n191. See generally *id.*

n192. Ga. Code Ann. §51-5-11 (2006).

n193. *Mathis*, 573 S.E.2d at 384-85.

n194. *Id.* at 385.

n195. *Id.*

n196. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974)).

n197. *Id.* at 385-86 (quoting *Reno v. ACLU*, 521 U.S. 844, 851-53 (1997); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

n198. See, e.g., *Lidsky*, *supra* note 19, at 862-63.

n199. January One, http://www.januaryone.com/archives/2006/12/cease_and_desist.php. (Dec. 21, 2006, 9:09 EST).

n200. *Id.*

n201. Id.

n202. Bynog v. SL Green Realty Corp., 2005 WL 3497821, at 1 (S.D.N.Y. Dec. 22, 2005).

n203. Id.

n204. Id.

n205. Id. at 4.

n206. Id.

n207. Id. 2.

n208. Id.

n209. Id.

n210. Laura Parker, Jury Awards \$ 11.3M over Defamatory Internet Posts, USA TODAY, Oct. 10, 2006, at 4A, available at http://www.usatoday.com/news/nation/2006-10-10-Internet-defamation-case_x.htm?csp=1.

n211. Lidsky, *supra* note 19, at 860.

n212. *Id.*

n213. *Id.*

n214. Electronic Frontier Foundation, EFF: Bloggers, <http://www.eff.org/bloggers> (last visited Mar. 10, 2007); Electronic Frontier Foundation, EFF: Legal Guide for Bloggers, <http://www.eff.org/bloggers/lg> (last visited Mar. 10, 2007).

n215. Electronic Frontier Foundation, EFF: Bloggers' FAQ: Section 230 Protections, <http://www.eff.org/bloggers/lg/faq-230.php> (last visited Mar. 10, 2007).

n216. *Id.*

n217. See Electronic Frontier Foundation, EFF: About, <http://www.eff.org/about> (last visited Mar. 10, 2007).

n218. See EFF: *Apple v. Does*, *supra* note 154.

n219. Communications Decency Act, 47 U.S.C. §230(c)(1) (1996).

n220. See *supra* Parts II.B.1, IV.A.1.

n221. See generally *supra* Part IV.A.

n222. See *supra* Part II.B.1.

n223. Lenhart & Fox, *supra* note 54, at 10-11.

n224. Lidsky, *supra* note 19, at 862-63.

n225. Lenhart & Fox, *supra* note 54, at 10-11.

n226. *Id.*

n227. See *supra* Part III.B.

n228. See *supra* Part IV.

n229. See *supra* Part II.B.

n230. See *supra* Part IV.

n231. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003); *DiMeo v. Max*, 433 F. Supp. 2d 523, 529-30 (E.D. Pa. 2006); *Barrett v. Rosenthal*, 146 P.3d 510, 517 (Cal. 2006).

n232. *Bynog v. SL Green Realty Corp.* 2005 WL 3497821, at 1 (S.D.N.Y. Dec. 22, 2005).

n233. *Parker*, supra note 210.

n234. *Lidsky*, supra note 19, at 860.

n235. See supra Part V.B.1.

n236. *Id.*

n237. See supra Part IV.D.

n238. See supra Part V.D.

n239. See supra Parts III.A, V.B.

n240. See supra Parts V.A.1-2.

n241. See supra note 189 and accompanying text.

n242. See supra Part V.A.1.

n243. See supra notes 196-97 and accompanying text.