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## Initial Reflections on the Law and Economics of Blogging

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# Initial Reflections on the Law and Economics of Blogging

Larry E. Ribstein

#### **Abstract**

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April 4, 2005

#### Abstract

Weblogs, or blogs, have proliferated and developed rapidly in recent years, and have attracted significant attention. Moreover, blogs have started to generate significant legal issues. Yet there is so far no coherent economic framework for addressing those issues. This article begins to develop such a framework. Building on blogs' technical features, it identifies the unique aspects of blogs that should have legal ramifications. It then briefly applies this framework to a variety of legal issues.

<sup>\*</sup> I am indebted to comments on the initial blog version of this paper posted on <a href="www.ideoblog.org">www.ideoblog.org</a> March 21, 2005, and to comments at a workshop at the University of Illinois College of Law, March 29, 2005.

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According to a survey in March, 2005,¹ there are approximately 8 million weblogs, or blogs. Weblogs have been discussed prominently in the media, particularly

<sup>&</sup>lt;sup>1</sup> Sifry's Alerts, *State of The Blogosphere, March 2005, Part 1: Growth of Blogs*, March 14, 2005, available at <a href="http://www.sifry.com/alerts/archives/000298.html">http://www.sifry.com/alerts/archives/000298.html</a>.

since their prominent role in the 2004 US presidential election. Moreover, blogs have started to generate significant legal issues. This article begins to develop an economic framework for addressing those issues. It begins by identifying the unique legally relevant aspects of weblogs, and then briefly applies this framework to a variety of legal issues.

In general, blogs can be characterized as a new form of journalism. Old journalism relies on significant investments in physical equipment, technology, office space, personnel and goodwill. The advantage of the old journalism model is that media firms' capital and reputational assets provide a kind of bonding mechanism. A broadcast or print media company can be expected to protect its reputation by carefully monitoring its output. The downside of this model is that the need for capital is a barrier to entry that inherently limits access to mass audiences. This can filter out divergent views, and prevent some markets and viewpoints from being served.

By contrast, the new journalism represented in its current manifestation by blogging permits anybody to be a journalist. Anybody with a computer, an internet connection, and a cheap or free blogging program can post stories that are immediately disseminated internationally on the Worldwide Web. This open access reduces the power of potentially biased gatekeepers and ensures coverage of every corner of the market. It also provides a check on misinformation by exposing falsehoods to scrutiny by millions of bloggers, each with her own specialized information. On the other hand, the low entry costs and lack of conventional intermediaries or filtering mechanisms reduces the quality of each individual blog as compared with traditional media, and can make it hard for readers to find the accurate blogs or identify the inaccurate ones.

This overview of costs and benefits of old and new journalism suggests a stand-off between the benefits of open-access and the costs of foregoing intermediation. However, there is a way to reconcile the advantages and disadvantages of the new journalism. While anyone can enter the web, not everybody can get noticed. The process of attracting attention, particularly through Google and other search engines, provides a neutral mechanism for establishing credibility that avoids old journalism's potentially biased filtering.

This paper shows how this perspective on blogs helps guide the resolution of several legal issues related to blogs that have arisen or that can be expected to arise in the near future.

#### I. THE TECHNOLOGY OF BLOGGING

Before developing the economic framework, it would be useful to review some salient technical features of blogs. A blog is essentially a web page. Dave Winer, who posted the first blog in 1996, provides the following definition:<sup>2</sup>

A weblog is a hierarchy of text, images, media objects and data, arranged chronologically, that can be viewed in an HTML browser.

The following is a summary of some important technical aspects of blogs, most of which are covered in Winer's article:

<sup>&</sup>lt;sup>2</sup> What Makes a Weblog a Weblog. May 23, 2003, available at <a href="http://blogs.law.harvard.edu/whatMakesAWeblogAWeblog">http://blogs.law.harvard.edu/whatMakesAWeblogAWeblog</a>.

- Each blog post has a title, date and permalink that gives its web address.
- The home page has the most recent posts.
- Archives include the rest of the posts, usually organized by category.
- If enabled by the author, readers can insert comments below each post.
- RSS feeds let people who use "news aggregators" such as "Bloglines," subscribe" to the blog. This is one way blog posts are disseminated quickly across the web.
- Each blog post "pings," or notifies, change-aggregators such as "blo.gs" to signal the web that the post has been made.
- A trackback address enables other blogs to ping the blog when they refer to it. The blog author can then track who is referring to him, and the blog itself includes a running record of trackbacks under each post.
- There are various tools for recording hits and ranking blogs by popularity.
- Blogs have blogrolls that establish the blog in communities of other blogs.

At a deeper level, blogging is enabled by three technologies: the Internet, the Worldwide Web, and Google and other sophisticated search engines. Google's technology is particularly important. Consider how easy it would be without search engines for a blog post to be lost in the near infinity of the Web. Google not only finds the post but, more importantly, gives top ranking in searches to the more "important" posts.

Google and other search engines provide a kind of spontaneous filtering mechanism.<sup>4</sup> Google ranks search results by popularity determined by the number of sites that link to the result and the importance of each linking site as measured by its links. Links are "votes" by the linking web pages for the quality and accuracy of the blog. Blogs have an incentive to link only to high-quality blogs because their own readers judge them by, among other things, the quality of their links. The votes themselves are weighted according to the importance of the voters as measured their own popularity, which is in turn at least partly a function of their quality and accuracy. Google also provides a way of distinguishing professionals from amateurs. The more frequently a blog updates, the more Google visits the site, and the more the blog will tend to come up in searches. This gives an edge to those who are willing to spend more time on blogging.

In general, therefore, blog authors<sup>5</sup> build readership by establishing their credibility and therefore encouraging links by other blogs. A blog's readership represents

<sup>&</sup>lt;sup>3</sup> www.bloglines.com.

<sup>&</sup>lt;sup>4</sup> See John Hiller, Google Loves Blogs, Microcontent News, February 26, 2002, available at <a href="http://www.microcontentnews.com/articles/googleblogs.htm">http://www.microcontentnews.com/articles/googleblogs.htm</a>.

<sup>&</sup>lt;sup>5</sup> Authorship distinguishes blogs differ from "wikis," which grow by unmanaged accretion. *See* Wiki Wiki Web Faq, available at <a href="http://c2.com/cgi/wiki?WikiWikiWebFaq">http://c2.com/cgi/wiki?WikiWikiWebFaq</a>.

a kind of capital investment analogous to that made by the conventional media. The difference is that, while entry to "old journalism" is limited by the need to make an upfront capital investment, entry to new journalism is unlimited but also without value until the blog author makes the additional investments in time and credibility necessary to build readership. Although investments may be required in both cases, the fact that no upfront investment is necessary for entry into new journalism is significant. As discussed in the next part, blog authors have "self-expression" incentives that encourage entry even without the investment necessary to gain an audience. In this way, blogging allows any individual to test her skills and marketability rather than applying an initial screen in the form of the need to get a job for one of a limited number of media firms.

#### II. THE ECONOMICS OF BLOGGING

The above description of technology provides a basis for examining the economics of blogging. The following discussion looks at costs and benefits first for the individual blogger, and then for society. Subpart E examines the problem of aligning private and social costs and benefits. Subpart F discusses the public choice economics of blogs.

#### A. PRIVATE COSTS

Blogs are a classic example of "cheap speech." Blogging requires no more than a computer, internet access, and a blogging program such as Typepad. One does not need permission or financing to enter the blogosphere. This ease of access means nearly infinite diversity and nearly zero intermediation, either directly or indirectly through entry costs.

#### **B. PRIVATE BENEFITS**

While capital outlays are minimal, time costs may not be. The following are some reasons why people have been willing to commit time to writing blogs.

#### 1. Self-expression

The original motive for blogging was a desire to make observations, often about personal matters. The most important subgenre is "poliblogging," where the writers express political views. Poliblogging was spurred by the coincidence of the invention of blogging technologies and the 2004 presidential election, which elicited strong views on both sides.

The self-expression motive is important because it explains why blogs would start up with no audience or tangible hope of conventional economic benefit. Self-expression is also important to blogs that have developed an audience. In the absence of a strong expressive motive, one might expect successful blogs to merge with mainstream media. This exit strategy could carry over to the start-up period as a motivation for blogs. This suggests that, over the long term, blogs would be more a bottom rung on the "old journalism" ladder than the harbinger of a new medium. But a significant self-expression motive would help maintain the distinctiveness of the blogging medium.

<sup>&</sup>lt;sup>6</sup> The significance of this phenomenon was anticipated in Eugene Volokh's prescient article, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805 (1995).

#### 2. Reputation and marketing

Blogs increasingly are used to market paid services, most prominently by lawyers and other professionals. Professionals sell "credence goods" that buyers can evaluate only by experiencing the quality of the advice over time.<sup>7</sup> Blogs enable professionals to demonstrate the quality of their advice. A blog therefore can be viewed as a kind of "loss-leader," where giving away the free service sells the paid service.

Similarly, academics can use blogs as a medium for presenting and publicizing scholarship. Blogs may become particularly important in academia because scholars generally do not have to account for their time, which is blogs' major private cost. Also, scholars have increasing incentives to publicize their work, as rankings such as those by U.S. News & World Reports have focused attention on objective measures for evaluating academic performance. One emerging measure is downloads on the Social Science Research Network. Scholars can increase downloads through links on a widely read blog, and their schools can thereby rise in the rankings. This suggests that schools might subsidize blogs and other ways of improving statistical measures of faculty performance in order to succeed in the increasingly market-driven academic environment.

#### 3. Blogging as for-profit ventures

The business model is evolving. Bloggers can offer "blogads," or do public-broadcasting-type "pledge drives." Because blogs are so cheap, they can be started with no initial investment and no ads, and become more commercial if they become popular. This evolution may happen not only for individual blogs, but for blogs generally.

Obviously ads may affect the content of blogs. Mainstream advertisers may be shy of blogads. One article suggests that "many companies are wary of putting their brand on such a new and unpredictable medium." The article says, for example, that Cendant pulled ads from Gawker, possibly because the site had gotten "too naughty" for the sponsor. Sponsors might also be offended by politics and political incorrectness.

Even if advertising affects the content of individual blogs, that is not likely to significantly reduce the diversity of the blogging medium. As noted above, the low cost

<sup>&</sup>lt;sup>7</sup> See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. L. & Econ. 67, 68-69 (1973).

<sup>&</sup>lt;sup>8</sup> See Lawrence A. Cunningham, Scholarly Profit Margins and the Legal Scholarship Network: Reflections on the Web, Boston College Legal Studies Research Paper No. 67 (March 30, 2005), available at <a href="http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=695283">http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=695283</a>.

<sup>&</sup>lt;sup>9</sup> This is evident from a recent report of performance on legal academics' performance in terms of SSRN downloads showing, among other things, that three of the top seven law schools – UCLA, Texas and George Mason – all had prominent bloggers on their faculty, and all had SSRN ranks that differed substantially from their US News & World Reports ranks. [cite].

<sup>&</sup>lt;sup>10</sup> Jessica Mintz, *Many Advertisers Find Blogging Frontier Is Still Too Wild*, Wall St. J., March 25, 2005 at B1, available at <a href="http://online.wsj.com/public/article/0,,SB111170694414889227-LZ2pCeOYYnOV8nO8I7PVH">http://online.wsj.com/public/article/0,,SB111170694414889227-LZ2pCeOYYnOV8nO8I7PVH</a> B6m0g 20050424,00.html?mod=blogs.

of blogging facilitates niche marketing. Blogs, like television, might also sort between those that do and do not offer advertising. Advertising support could strengthen blogging as a whole and thereby this medium's ability to provide viable counterpart to the mainstream media. And with or without advertising, bloggers have an incentive to maintain a distinctive voice so they do not lose their audience to mainstream outlets.

#### C. SOCIAL BENEFITS: BLOGGING AS DECENTRALIZED KNOWLEDGE

Blogs may have significant benefits not only to bloggers themselves, but also to society. Blogs provide a mechanism for millions of people to contribute to the general store of knowledge. In this way they enhance the benefits of decentralized decision-making and planning that are prominently featured in the writings of Friedrich A. Hayek. Rather than relying on an elite group of officials or large media corporations, blogging makes it feasible to exploit the information and learning of millions of individuals. While no one of these individuals may know as much as an expert government official or traditional journalist, all of them as a group are likely to have more information than any one expert. James Surowiecki calls this "the wisdom of crowds. Surowiecki shows how "crowds" can make better decisions than individuals or small groups if they meet the qualifications of diversity, independence, and decentralization. Because of the technology and economics discussed above, particularly including low private costs, blogging potentially satisfies all of these conditions.

One reason why blogs can succeed in this way is that the costs of mass media can be recouped only through economies of scale. This requires catering to a substantial market, which can leave service gaps. The low costs of blogging, on the other hand, permits authors and advertisers to focus on small niche markets.

Individual bloggers may be able to fill significant gaps in media coverage by focusing on categories of specialty knowledge that would be too narrow for a conventional source. Specialty blogs build an audience by staying "on message," thereby forfeiting some self-expression benefits. For example, Law Professor Blogs, a network of specialty blogs, says:

Our blogs are not a collection of personal ruminations about the Presidential campaign, the war in Iraq, or what the editor had for dinner last night. Neither do our editors offer their personal views on every policy issue in the news or every new court decision. We leave that terrain to the many existing blogs with that mission. Instead, our editors focus their efforts, in both the permanent resources & links and daily news & information, on the scholarly and teaching needs of law professors. Our hope is that law professors will visit the Law Professor Blog in their area (or areas) as part of their daily routine.<sup>13</sup>

One form of individual expertise that blogging can facilitate is vetting or "fisking" more mainstream sources. As Wikipedia defines it:

Fisking, or to Fisk, refers to the act of critiquing, often in minute detail, an article,

<sup>11 [</sup>cites]

<sup>12</sup> James Surowiecki, THE WISDOM OF CROWDS (2004).

<sup>13</sup> www.lawprofessorblogs.com.

essay, argument, etc. with the intent of challenging its conclusion or theses by highlighting supposed logical fallacies and incorrect facts. The practice was named after British journalist Robert Fisk after he issued a dispatch from Pakistan describing his savage beating at the hands of Afghan refugees.<sup>14</sup>

Probably the most famous example of fisking, aside from the exposure of the Fisk story that gave it its name, is bloggers' role in uncovering the CBS/Texas Air National Guard fraud.

This function of blogs suggests a possible long-term equilibrium in the relationship between blogging and the mainstream media. Bloggers can be analogized to remora fish, who clean parasites from host fish such as sharks. The remora get food, and the sharks are healthier.

This also illustrates the comparative advantages of blogging and conventional expertise. While there is a value to expertise, experts do not always know everything. Fisk was an award-winning journalist, and CBS was a major news organization with significant resources. While an expert probably knows more than the average amateur blogger, he does not necessarily know more than the entire universe of bloggers whose expertise is aggregated on the Web.

#### D. SOCIAL COSTS

While blog authors may incur only minimal costs, they may inflict significant damage on other individuals and on society.

#### 1. Low-quality information

Like all speech, blogs can cause emotional harm, reputational damage, mislead and defraud. The particular problem with blogs is that they are not intermediated – they are simply individuals talking, amplified by the megaphone of the Internet. Because blogs need not invest in infrastructure, they also have no capital investments to bond their statements. As Jonathan Klein, now president of CNN, famously said, "[b]loggers have no checks and balances . . . [it's] a guy sitting in his living room in his pajamas." Low-quality blogs may harm not only individuals but other blogs by creating a lemons market. If blogs earn a reputation for untruthfulness, people may shun all blogs because they cannot distinguish the good from the bad. Moreover, a large quantity of bad information might obscure the good information from blogs and other web sources.

#### 2. Political and social discourse

Cass Sunstein has expressed a concern that the Internet may weaken general interest intermediaries and increase people's ability to "wall themselves off" from

<sup>14</sup> http://en.wikipedia.org/wiki/Fisking.

<sup>15 [</sup>cite]

<sup>&</sup>lt;sup>16</sup> See George Akerlof, The Market for `Lemons': Qualitative Uncertainty and the Market Mechanism, 84 Q.J.ECON.488 (1970).

opinions they do not like.<sup>17</sup> A recent study provided some evidence of this by showing that, during the 2004 election, conservative and liberal blogs did tend to link more within their separate communities, and focused on different news articles, topics, and political figures.<sup>18</sup>

James D. Miller, responding to Sunstein, argues that the Internet has the potential to stimulate interaction because filters can encourage people to read specific material in journals that they generally disagree with.

Assume that on average I would enjoy reading fifty percent of the articles in TCS but only one percent of those in *The Nation*, which unlike TCS is an anti-free market magazine inconsistent with my beliefs. Absent any filters I would not find it worthwhile to read any of *The Nation's* articles because it wouldn't be worth my time to comb through the magazine to find the very few articles I will like. Similarly, I will at least have to start reading most of TCS's articles to find the one-half I enjoy. But a perfectly effective news filter would find me the tiny fraction of The Nation's articles that I should read and eliminate the half of TCS's I shouldn't.<sup>19</sup>

#### E. ALIGNING SOCIAL AND PRIVATE VALUE

The above analysis suggests that the private and social net value of blogs may not perfectly align. Because bloggers incur little cost in starting and maintaining blogs, they may have little incentive to avoid inflicting significant damage on others. And the business model is not sufficiently developed to ensure that bloggers will have adequate incentives to maintain socially valuable blogs.

However, before resorting to public remedies, it is important to consider both the potential costs of these remedies and the availability of private solutions. First, even without legal regulation and liability, many individual bloggers have incentives to avoid harming others. While it is cheap to create a blog, getting noticed may require a significant time investment in developing a reputation that will cause others to link to them. Bloggers have an incentive to avoid forfeiting this investment through inaccurate or otherwise low-quality posts.

Second, the relevant perspective from which to analyze regulation of blogging may be the blogosphere as a whole rather than individual blogs. Blogging aggregates the expertise and arcane knowledge of millions of people. Each blogger may know less than the average person employed in the mainstream media, and some bloggers may be careless or ignorant, but the truth eventually emerges from the universe of bloggers. That is particularly the case given that organizational or professional biases may limit the vision even of large and sophisticated firms.

To be sure, there may be some mismatch between private and social costs and

<sup>&</sup>lt;sup>17</sup> *Republic.com* (2001).

<sup>&</sup>lt;sup>18</sup> Lada Adamic and Nathalie Glance, *The Political Blogosphere and the 2004 U.S. Election:* Divided They Blog, available at http://www.blogpulse.com/papers/2005/AdamicGlanceBlogWWW.pdf.

<sup>&</sup>lt;sup>19</sup> *The Depolarizing Power of the Blogosphere*, Tech Central Station, January 17, 2005, available at <a href="http://techcentralstation.com/011705C.html">http://techcentralstation.com/011705C.html</a>.

benefits that warrants regulation. For example, the blogosphere provides no apparent remedy for true speech that causes injury by interfering with property rights in information. Also, many bloggers may cause harm yet suffer no reputational penalty or loss of profits.

However, it is important to design sanctions so that they do not deter socially valuable blogs. For many bloggers, the expressive benefits of blogging, particularly when they begin the blog, may only just barely outweigh the necessary time investment. Even minimal regulation may be enough to reduce the richness and diversity of the blogosphere.

#### F. THE PUBLIC CHOICE OF BLOGGING

A discussion of the law and economics of blogging would not be complete without an examination of the politics of regulating blogs. Any new type of business or technology threatens jobs and status associated with existing businesses and technologies. That is certainly the case for the "new journalism" represented by millions of pajamaclad moonlighters who are giving away what "old journalists" have been charging for. With this threat comes political opposition.

James Miller has discussed three areas covered below in Part III in which blogging is particularly vulnerable to attack by incumbent professionals— campaign finance reform, libel law and copyright.<sup>20</sup> In each area, mainstream journalists can be expected to line up politically against bloggers in order to protect their competitive advantage by lobbying for distinctions between "professional" journalists and "non-professional" bloggers. A similar point applies to other types of professionals, who might fear competition from unlicensed amateurs. Journalists also might argue for more liability under copyright and libel laws. Although both journalists and bloggers theoretically would be exposed to this liability, mainstream journalists have more legal and financial resources to defend themselves.

Journalists are a particularly potent political force because they can lobby not only by financially supporting politicians who advocate for them, but also by criticizing bloggers in their writing and thereby molding public opinion. Indeed, bloggers frequently have been portrayed in negative terms. For example, one writer says, "[n]ot only are most bloggers not journalists; increasingly they are also partisan operatives whose agendas are as ideological as they come." This political characterization of bloggers might carry particular weight by persuading Democrats to ally with the mainstream media against bloggers.

#### III. SPECIFIC LEGAL ISSUES

The following discussion applies the above analysis to some specific legal issues regarding blogs.<sup>22</sup> In general, it focuses on the tradeoff between, on the one hand, the lack

<sup>&</sup>lt;sup>20</sup> The Coming War on Blogs, Tech Central Station, March 25, 2005, available at http://www.techcentralstation.com/032505B.html.

<sup>&</sup>lt;sup>21</sup> Garance Franke-Ruta, *Blog Rolled*, The American Prospect, vol. 16, April, 2005 at 39.

<sup>&</sup>lt;sup>22</sup> This very preliminary analysis focuses on US law. Obviously the Internet is international and there are some interesting choice of law issues that will have to be addressed. For a discussion of some of

of intermediation and market checks on harmful blogs compared to the mainstream media and, on the other hand, the desirability of maintaining open access to the blogosphere, the risk of over-deterrence, and bloggers' need to establish and maintain a reputation to gain attention on the Web.

#### A. THE JOURNALISTS' PRIVILEGE

Mainstream journalists have a privilege against being compelled in court to name sources of stories. This encourages sources to come forward, and thereby bolsters the role of the free press in serving as a check on government abuse. The question is the extent to which this privilege should be applied to bloggers.

Apple Computer Inc. v. Doe 1<sup>23</sup> denied a protective order sought by a blogger to protect him from having to disclose sources in a trade secret suit brought by Apple. The blogger claimed he was privileged as a journalist. The court denied the motion, noting that "defining what is a "journalist" has become more complicated as the variety of media has expanded." It quoted the Merriam-Webster online dictionary definition:

jour-nal-ist Function: noun 1a: a person engaged in journalism; especially: a writer or editor for a news medium b: a writer who aims at a mass audience 2: a person who keeps a journal jour-nal-ism Function: noun 1a: the collection and editing of news for presentation through the media b: the public press c: an academic study concerned with the collection and editing of news or the management of a news medium 2a: writing designed for publication in a newspaper or magazine b: writing characterized by a direct presentation of facts or description of events without an attempt at interpretation c: writing designed to appeal to current popular taste or public interest \* \* \*

The court said that whether the blogger "fits the definition of a journalist, reporter, blogger, or anything else need not be decided at this juncture for this fundamental reason: there is no license conferred on anyone to violate valid criminal laws." It also observed:

The right to keep and maintain proprietary information as such is a right which the California legislature and courts have long affirmed and which is essential to the future of technology and innovation generally. The Court sees no reason to abandon that right even if it were to assume, arguendo, movants are "journalists" as they claim they are.

If the court had recognized a journalist privilege under these facts, it is not clear the movant would have been a journalist. The blogger was described in his brief as having, "co-founded the first dedicated Apple Power Book User Group ... in the United States ... has contributed articles to MacWEEK, MacWorld, MacAddict, MacPower(Japan) ... [and] written chapters for The Macintosh Bible." Some elements of the definition quoted above suggest the need for a "mass" or "public" audience. The movant was certainly more than a casual contributor. But the privilege arguably should be available to someone who blogs only to express himself.

these issues, and a recommendation that they be solved through enforcement of contractual choice of law, see Bruce H. Kobayashi & Larry E. Ribstein, State Regulation of Electronic Commerce, 51 Emory L.J. 1 (2002).

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<sup>&</sup>lt;sup>23</sup> 2005 WL 578641 (Cal. Super. March 11, 2005).

From a policy standpoint, opening up the journalist privilege too far would make blogging an end-run around laws such as the one involved in the Apple case that are designed to protect against harmful speech. Because such speech is harmful without being false, permitting more of it will not necessarily reduce social harm by correcting error. Instead, encouraging more disclosure of proprietary information will increase the harm to the owners of information. Also, in this case the harm can be done by any blogger, not just one who has garnered special access through trustworthiness, since a broad privilege would permit laundering of information. Thus, courts arguably might distinguish between "professional" and non-"professional" bloggers in the specific intellectual property context.

On the other hand, it is not clear that a professional/non-professional distinction is justified even in this context. If more disclosure of proprietary information by bloggers is not socially beneficial, it is not clear why the disclosure becomes socially beneficial if it is by a mainstream journalist. The distinction between the two categories involves the mainstream journalists' need to protect their investments in reputation by monitoring for inaccuracy. But because disclosure of proprietary information would not have the same effect on journalists' reputation, there is no reason to believe that mainstream journalists would have the same incentive to monitor such reporting. It may be that mainstream journalists have more access to proprietary information than bloggers, but this does not justify giving these journalists more leeway to abet their informants' breach of trust to the owner of the information.

#### B. APPLICATION OF THE ELECTION LAWS

The application of the election laws to bloggers has been a particularly controversial issue since the 2004 election because of the perception that bloggers as a group were particularly friendly to the Republicans and affiliated causes. Democrats have been concerned that the Republicans have been able to skirt campaign finance restrictions by coordinating with legions of sympathetic bloggers. On the other hand, application of the election laws to millions of bloggers raises the spectre of invasive regulation that could constrain access to the blogosphere.

The Federal Election Commission attempted to avoid the issue by broadly exempting Internet activities. But these exemptions were invalidated in *Shays v. FEC*, <sup>24</sup> sending the FEC back to the drawing board. FEC Commissioner Bradley Smith triggered a strong reaction when he suggested that political bloggers may be subject to McCain-Feingold.<sup>25</sup>

The main issue here concerns the "media exemption" from the definition of "expenditure" in the Federal Election Campaign Act:

The term 'expenditure' does not include--(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication . . . . 26

<sup>24 337</sup> F.Supp.2d 28 (D.D.C. 2004).

<sup>&</sup>lt;sup>25</sup> See Declan McCullagh, *The Coming Crackdown on Blogging*, C/NET News, March 3, 2005, available at <a href="http://news.com.com/The+coming+crackdown+on+blogging/2008-1028\_3-5597079.html">http://news.com.com/The+coming+crackdown+on+blogging/2008-1028\_3-5597079.html</a>.

<sup>&</sup>lt;sup>26</sup> Federal Election Campaign Act (2 USC) §431(9)(B).

Blogs may or may not be included in this definition depending on how much one wants to emphasize regularity in defining "periodical." Blogs raises at least three regulatory issues. First, political campaigns might coordinate with bloggers who link to campaign websites, thereby increasing the power of campaign expenditures. Second, corporations might establish and fund blogs and attempt to argue that the expenditures are excluded under the above provision. Third, voters may not be able to determine when a blogger is being paid for his opinion, and therefore to evaluate this opinion. Armstrong Williams and similar cases show that this can also happen in the mainstream media. Millions of blogs make the problem much harder to solve. One election law expert has suggested that bloggers "should have to include on each blog page view a statement that the writing was paid for by the applicable candidate or committee." 27

As a matter of election law policy, blogs can be seen as part of the solution to the supposed problem of "corruption" of the political process the election laws are supposed to address, rather than as part of the problem.<sup>28</sup> Bloggers' free access to the political debate makes it harder for money to dominate the debate. It is therefore necessary to ensure that any regulation does not discourage true political blogging. Requiring disclosures or imposing other restrictions under the threat of sanctions easily could reduce the number and diversity of the poliblogging community given bloggers' low-powered incentives. In particular, such regulation may cause an adverse selection problem. Most polibloggers will tend to be in the self-expression category, rather than making money through advertising or selling expertise. They generally will not want to take a significant chance of liability, or to pay for legal advice. Those who do are likely to be in a self-selected group with particularly strong views or links to campaigns. Thus, the threat of liability might reduce the diversity, independence and decentralization that contributes to the social value of blogging.

It is also important to keep in mind that open blogging can solve some of the specific problems noted above of coordination and bias even without regulation. Given the large number of bloggers and the low entry barriers to blogging, biased bloggers can be exposed by other bloggers. The risk of reputational harm may be enough to constrain the more influential bloggers, who also have the most reputation to lose, from excessive or secret connections with political campaigns.

These general considerations enable an evaluation of the FEC's recently proposed regulations applying to Internet activities, including blogging.<sup>29</sup> The main problem with the regulations for purposes of the present analysis concerns their application to "corporate" blogging. In general, I have argued that there is little justification for restricting corporate contributions based on the need to constrain corporate "corruption" of the political process or agency costs within the firm, and that the real reason for regulating corporate campaign contributions is to protect corporations from

<sup>&</sup>lt;sup>27</sup> See Richard Hasen, Should the FEC Regulate Political Blogging, Personal Democracy Forum, March 7, 2005, available at http://www.personaldemocracy.com/node/416/#hasen.

<sup>&</sup>lt;sup>28</sup> I discuss this policy as applied to corporate contributions in *Corporate Political Speech*, 49 Wash. & Lee L. Rev. 109 (1992).

<sup>&</sup>lt;sup>29</sup> See Federal Election Commission, Draft Notice of Proposed Rulemaking, March 23, 2005, available at <a href="http://www.fec.gov/agenda/2005/mtgdoc05-16.pdf">http://www.fec.gov/agenda/2005/mtgdoc05-16.pdf</a>.

"shakedowns."30

The advent of blogging further complicates issues concerning regulation of corporate campaign activities. In particular, how do you decide which behavior is attributable to the "corporation"? The corporation is an artificial construct of individuals, each with her own objectives. When political activity required big money it was relatively easy to identify what the "corporation" was doing. Blogging democratizes the process and makes each person in the firm a potential campaign node.

In its proposed regulations, the FEC decided that it had to determine whether a blogger is working "independently," and who owns his computer.<sup>31</sup> But suppose the blogger buys the machine with a little raise he gets from the corporation? Suppose he is "not receiving compensation" for the work (to use the words of the proposed regulations) but is told or he understands that this is his best way to advancement in the firm? And of course there are all kinds of corporations, big and small. Suppose group bloggers are themselves a corporation? Suppose they form a partnership? Will choice of business form matter here?

These questions suggest that one result of the "cheap speech" enabled by blogging is that it could make regulating "corporate" speech nearly intractable. For the reasons discussed above, this may be a good thing. But even if potential "corruption" of the political process by corporations is a significant problem, blogging is part of the solution because it provides an alternative to big money in exercising political voice. Regulating "corporate" blogging could silence these voices and thereby give more power to the large non-profit groups and corporate activity that so far are outside the regulation.

#### C. COPYRIGHT AND FAIR USE

As discussed in Part I, blogging inherently involves links between blogs and with other websites. In particular, as discussed above in subpart II.C., blogs can serve as "remora fish" in adding value to mainstream media stories by checking on their accuracy and completeness. But links and references raise issues concerning potential abuse of intellectual property rights to copyrighted materials. *LA Times v. Free Republic*,<sup>32</sup> brought these issues to a head by holding that posting on websites articles from the L.A. Times and Washington Post constituted copyright infringement and was not protected as "fair use."

This case illustrates the need to reach some accommodation with the property rights of the mainstream press. The "remora fish" function of blogging assumes the existence of mass media whose importance justifies commentary. In other words, remora fish need sharks. In order to achieve the necessary distribution, the sharks have to make capital investments in their intellectual property. They will not make these investments without some sort of legal protection.

A reasonable compromise is possible. Rather than reproducing the full article, the blogger can simply link to the article, which is the accepted practice. The mainstream

<sup>&</sup>lt;sup>30</sup> See Ribstein, supra note 28.

<sup>&</sup>lt;sup>31</sup> See Notice of Proposed Rulemaking, supra note 29, 11 C.F.R. §§100.94, 100.155.

<sup>32 54</sup> U.S.P.Q.2d 1453 (C.D. Cal. 2000).

media thereby can control and charge for access to the actual article. To be sure, this does not resolve all questions and problems. Some outlets, such as the Wall Street Journal, charge for access, and even free registration can be burdensome (as by opening the registrant to spam). Also, there may be questions about what constitutes fair use, and there are even constraints on linking.<sup>33</sup> Moreover, the copyright process burdens links and use even of material from blogs and other informal material, as to which there is less clearly a need to provide protection in order to encourage production.<sup>34</sup>

Assuming linking is enough in most cases, mainstream media can decide whether or not the commentary or remora fish function of blogging is worth encouraging by making the source material freely available. If bloggers add value, and controlling or charging for access to the original material reduces that added value, the mainstream media will have a incentive to allow free linking or pasting. For more informal media, the best solution may be a Creative Commons license.<sup>35</sup>

This analysis suggests that some revisions to copyright law, specifically including the fair use doctrine, may be appropriate to accommodate blogs.

#### D. MEDIA OWNERSHIP RESTRICTIONS

FCC limits on media ownership are intended to prevent undue industry concentration and ensure a diversity of viewpoints in every market. Even without the Internet, this goal is questionable.<sup>36</sup> The FCC recently tried to rationalize these rules, but ran into a roadblock in *Prometheus Radio Project v. FCC.*<sup>37</sup>

Regulation of media ownership is especially questionable given the multiplicity of alternative voices now available on the Internet. That is particularly true given the rise of blogs. This was noted in Judge Scirica's dissenting opinion in *Prometheus*:<sup>38</sup>

[I]n the coming years, the Internet will present challenges for the Commission. In future quadrennial reviews, the FCC may want to reconsider how the Internet fits into the traditional concepts of measuring viewpoint diversity, especially the emphasis on local news. By nature, the Internet is uniform everywhere. Its content is not dependent on geographic or metropolitan boundaries. This fact should not undervalue this critical media as an important source for the dissemination of diverse information. In this respect, new modes to characterize diversity may be required. The Internet allows a dentist in Iraq to post a weblog with daily entries and photos from Baghdad for viewing anywhere in the world. See http://healingiraq.blogspot.com (last visited May 23, 2004).

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<sup>&</sup>lt;sup>33</sup> See, generally, Chilling Effects Clearinghouse, http://www.chillingeffects.org/.

<sup>&</sup>lt;sup>34</sup> See Christopher Sprigman, Reform(aliz)ing Copyright, 57 Stan. L. Rev. 485 (2004).

<sup>35</sup> See http://creativecommons.org.

<sup>&</sup>lt;sup>36</sup> See Jonathan A. Knee, Should We Fear Media Cross-Ownership, Regulation, Summer 2003 at 16, available at <a href="http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=505602">http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=505602</a>.

<sup>37 373</sup> F.3d 372 (3d Cir. 2004).

<sup>&</sup>lt;sup>38</sup> *Id.* at 469.

In other words, blogs can provide a solution to the perceived problem of big money corrupting public discourse – provided that blogs are not excessively regulated as discussed elsewhere in this Part.

#### E. DEFAMATION LAW

Gertz v. Robert Welch, Inc., <sup>39</sup> held that states may permit defamation actions by a "private individual" on a negligence or other fault-based standard, while public officials or public figures must prove "actual malice." The Court reasoned:

[P]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater. . . .

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. . . .

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

The advent of blogging may require rethinking this distinction or how to apply it. Under *Gertz*, the more widely disseminated bloggers might be public figures open to attack under an actual malice standard. But, through blogging, everybody potentially has access to a public forum to "counteract false statements." Moreover, any blogger, like a public figure, may have 'thrust [himself] to the forefront" of a controversy, thereby inviting response. And *Gertz* could leave "private" bloggers free to inflict reputational damage on public figures, while their own reputations are relatively protected.

Thus, blogging could pose a new threat to reputation by facilitating potentially wide dissemination of harmful falsehoods by those who are under no market constraints to speak the truth. On the other hand, blogging is itself an antidote to false speech. A false attack on a public figure, and even a false attack by a private figure if made by a public blogger, is likely to be exposed given the multitude of bloggers who will see and can comment on the story. Moreover, as discussed above in Part I, access depends partly on having passed the informal screening process of Google and other search engines. In short, the implications of blogging for defamation law are unclear.

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<sup>&</sup>lt;sup>39</sup> 418 U.S. 323, 344-47 (1974).

#### F. LICENSING LAWS

Blogging might be characterized as professional advice, and therefore subject to regulation. The regulation might, for example, prohibit the rendition of even accurate legal advice by those who are not licensed to practice law in the state where the advice is deemed to have been given. Similar rules might apply, for example, to medical and investment advice. As to legal advice, the courts have distinguished between individualized legal advice and general self help kits.<sup>40</sup>

Prior to blogging, people may have been unlikely to give away "legal" advice. But blogging facilitates cheap and wide dissemination of all kinds of speech, including speech that might be deemed to be legal advice. Thus, licensing laws might become an issue here. Lawyer bloggers commonly disclaim that that they are giving legal advice, but the legal effect of such blog disclaimers may not be perfectly clear.

Lawyer licensing is arguably a poor way to ensure the quality of legal speech.<sup>41</sup> Blogging arguably further weakens the case for licensing by enabling consumers to cheaply access a broad range of opinions on legal issues. Licensing laws can deter not only amateurs, but also professionals concerned that they may be practicing in states where they are not licensed. Indeed, applying licensing laws to blogging might lead to an adverse selection problem in that the bloggers who have the least to lose will venture into gray areas, while high-level professionals most concerned about potential liability will stay away. Even if some sort of quality-assurance is necessary, this might be done by letting bloggers submit to voluntary certification by competing organizations, and requiring accurate disclosure of any certification.

An alternative justification for lawyer licensing is to give lawyers the incentive to participate in the development of the law of the state in which they are licensed.<sup>42</sup> Accordingly, there is arguably a justification for continuing with lawyer licensing and prohibiting unlicensed legal advice. Blogging actually increases lawyers' ability to participate in such law-development activities, and therefore bolsters this rationale for licensing laws. As discussed in subpart II.B.2, lawyers may have an incentive to engage in such activities as a way of marketing their services.

On the other hand, overly vigorous application of state licensing laws to bloggers may discourage such activities. Moreover, this application would seem unnecessary to protect lawyers' franchise since lawyer bloggers are probably just marketing their main business in the state where they are licensed, while non-lawyer bloggers are just engaging in "cheap speech" that does not threaten lawyers' business.

#### G. BUSINESS ORGANIZATION ISSUES

A group blog may be a partnership unless the bloggers have explicitly selected some other form. This means that the default rules of partnership would apply. In

<sup>&</sup>lt;sup>40</sup> See Larry E. Ribstein, Lawyers as Lawmakers: A Theory of Lawyer Licensing, 69 Mo. L. Rev. 299, \_\_ (2004).

<sup>41</sup> See id.

<sup>42</sup> Id.

particular, a blogger may be personally liable for the wrongful acts of a co-blogger.<sup>43</sup> That is especially true if the blog is a "business," which is part of the definition of partnership under the partnership laws.<sup>44</sup> That, in turn, may depend on whether the blog takes ads. Any vicarious liability would be limited to blogging-type activities that are associated with the partnership. But it might include intentional torts -- such as malicious defamation.<sup>45</sup>

Given the social value of blogging, the opportunities that blogging presents for self-correction and informal filtering, and bloggers' relatively low-powered incentives, we should be wary about creating broad vicarious liability for co-bloggers. This is not the sort of business in the conventional sense that generally gives rise to partnership-type liability, even if the blogger does take ads. Thus, even if blogs are subjected to the types of liability discussed elsewhere in this Part, a blog might be considered a hybrid business/non-business so that co-bloggers are subject to a lower level of vicarious liability than other partners.

Apart from vicarious liability, there are other potential issues concerning the internal governance of the blogging partnership. One issue is compensation of cobloggers. Partnership default rules provide for equal profit and loss sharing.<sup>46</sup> If a coblogger drops out, the partnership would dissolve.<sup>47</sup> Questions would then arise as to what happens to the blog's trade name. Though the name is a partnership asset, the value of which is shared among the partners, it may not be clear what happens when multiple partners attempt to use the same name – that is, whether one partner can enjoin the others.<sup>48</sup> As for vicarious liability, blogging may be considered a distinct sort of hybrid business for which it is necessary to develop new types of default rules are necessary.

#### IV. CONCLUSION

Blogging is a relatively new and potentially important type of Internet-based activity that could have significant ramifications for several areas of the law. In resolving these issues, it is important to consider the distinct technical and economic aspects of blogging. This paper is a modest beginning.

It is important to keep in mind that the technology of the Internet and the Web in general and of blogging in particular is evolving rapidly. In as little as a few months blogs and related devices could be very different than they are today. For example, authored blogs and authorless wikis might co-evolve into a hybrid that combines spontaneity and authorship. This could have implications for the reputational bonding

<sup>43</sup> See UPA §15 (1914); RUPA §§306-307 (1997).

<sup>44</sup> See UPA §6(1) (1914); RUPA §101(6), 202 (1997).

<sup>&</sup>lt;sup>45</sup> See generally, Alan R. Bromberg & Larry E. Ribstein, BROMBERG & RIBSTEIN ON PARTNERSHIP, §4.07(D).

<sup>46</sup> See UPA §18 (1914); RUPA §401 (1997); Bromberg & Ribstein, §6.02(g).

<sup>47</sup> See UPA §31, 38; RUPA §801.

<sup>&</sup>lt;sup>48</sup> See generally, Bromberg & Ribstein, § 7.12; Larry E. Ribstein, A Theoretical Analysis of Professional Partnership Goodwill, 70 NEB. L. REV. 36 (1991).

mechanisms emphasized in this paper.

Because of the rapidly evolving nature of the technology, it is important to focus on core principles. The principle emphasized in this paper is that of an open access model replacing the closed access model of domination by media firms. Open access has both benefits and risks that need to be taken into account in future regulation. Moreover, in evaluating the risks, it is important to keep in mind that open access itself may serve as a self-corrective mechanism. Blogs, or whatever replaces them, may be more an opportunity and a solution than a problem.