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## From Bricks to Pajamas: The Law and Economics of Amateur Journalism

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## FROM BRICKS TO PAJAMAS: THE LAW AND ECONOMICS OF AMATEUR JOURNALISM

LARRY E. RIBSTEIN\*

### ABSTRACT

*Weblogs have proliferated rapidly in recent years, attracting significant attention and generating important legal issues. Yet so far no coherent economic framework for addressing these issues exists. This Article begins to develop such a framework. It views blogs as the vanguard of what might be called "amateur journalism." Because the Web and related technology have enabled low entry barriers, blogs can be an important source of specialized knowledge. However, bloggers do not work within a monitoring structure as in large news organizations, and individual blogs may be less accurate than conventional news sources. On the other hand, blogs as a whole are subject to strong self-correction mechanisms, including rapid feedback through comments on posts and by other blogs. Also, because most bloggers have low-powered incentives, regulation can easily deter them and thereby reduce the value of these self-correction and market mechanisms. The Article applies these insights to a variety of legal issues, including the journalist's privilege, election laws, defamation and licensing laws, media ownership restrictions, copyright laws, and vicarious liability.*

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\* Mildred Van Vorhees Chair in Law, University of Illinois College of Law. I am indebted to feedback on the initial blog version of this paper posted on [www.ideo blog.org](http://www.ideo blog.org) March 21, 2005, valuable comments from Eric Goldman, Bill Sjostrom, Dan Solove and Larry Solum, and discussion at workshop presentations at the University of Illinois College of Law, March 29, 2005 and the Canadian Law & Economics Annual Meeting, September 24, 2005.

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## INTRODUCTION

Journalism traditionally has been a full-time job. Because printing and broadcasting require assets to reach an audience, conventional journalists have to work for newspapers or broadcasters. In this “bricks-and-mortar” model of journalism, practitioners make significant investments in physical equipment, technology, office space, personnel, and goodwill. Media firms’ capital and reputational assets provide a kind of bonding mechanism.<sup>1</sup> A broadcast or print media company can be expected to protect its significant investments by putting structures in place to carefully monitor its output. The downside is that the need for capital restricts entry to firms that can attract a mass audience. This restriction can filter out divergent views and prevent some markets and viewpoints from being served.

This model of journalism started to change with the rise of the Internet and the World Wide Web. Journalism was no longer exclusively the province of professionals. Anybody with a computer could launch a post to a website maintained on a server connected to the Internet and, potentially, a large audience. Viewers, however, had to find posts in the rapidly expanding heap. Some independent journalists, such as Matt Drudge, managed to be heard above the din, but most popular Internet news sites were those of professional newspapers and broadcasters.

The technology of amateur journalism has continued to develop. Amateur journalists<sup>2</sup> now not only can post their thoughts cheaply on the Web, but also can get the attention of significant numbers of readers. They use devices called “weblogs” or, more popularly, “blogs.” These are, in general, series of web posts from a single web address with a common author or set of authors, often integrated with commentary on the post itself or on other blogs. According to

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1. For discussion of reputational bonding, see generally Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981); Oliver E. Williamson, *Credible Commitments: Using Hostages To Support Exchange*, 83 AM. ECON. REV. 519 (1983).

2. For an early use of this term, see J.D. Lasica, *Blogging as a Form of Journalism* (May 24, 2001), <http://www.ojr.org/ojr/workplace/1017958873.php>.

one survey,<sup>3</sup> there are over 35.3 million blogs, with the number doubling every six months.

Blogs have started to generate significant legal issues. This Article develops an economic framework for addressing those issues, as well as those that are likely to arise as amateur journalism continues to evolve. The central legal question concerning blogs is how to balance the need for regulation against the risk that regulation will reduce the benefits of individuals' unfiltered participation in the public debate. Critics of blogs, including many professional journalists, see blogs' low entry costs and lack of conventional intermediaries as a threat to responsible reporting. As Jonathan Klein, now president of CNN, famously said, "bloggers have no checks and balances.... You couldn't have a starker contrast between the multiple layers of checks and balances and a guy sitting in his living room in his pajamas writing."<sup>4</sup> It arguably follows that bloggers should be regulated to ensure accuracy and fairness, perhaps even more heavily than conventional journalists.

This argument erroneously views the checks-and-balances issues from the perspective of a single blogger rather than what has been referred to as the "blogosphere."<sup>5</sup> Although 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 conventional journalism's potentially biased filtering.<sup>6</sup>

Moreover, any benefits of regulation must be balanced against the cost of over deterring speech by bloggers, who usually have weaker incentives to speak than career journalists. Regulation may sharply reduce amateur journalism's comparative advantage over professional journalism in allowing the expression of diverse views and the dissemination of specialized information.

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3. State of the Blogosphere, April 2006 Part 1: On Blogosphere Growth, <http://www.sifry.com/alerts/archives/000432.html> (Apr. 17, 2006, 2:26 A.M.).

4. Howard Kurtz, *After Blogs Got Hits, CBS Got a Black Eye*, WASH. POST, Sept. 20, 2004, at C1 (quoting Jonathan Klein).

5. See Carl Bialik, *Measuring the Impact of Blogs Requires More than Counting*, WALL ST. J. ONLINE, May 26, 2005, <http://online.wsj.com/public/article/SB111685593903640572.html> (discussing the aggregate of blogs on the Internet as the "blogosphere").

6. See *infra* notes 14-19 and accompanying text.

The limited benefits and high costs of regulating amateur journalism apply most directly to regulation designed to ensure accuracy. However, blogs also present distinct problems of confidentiality and infringement of property rights that are not necessarily constrained by market mechanisms. Professionals may be more subject than amateurs to regulatory and extraregulatory sanctions for disclosing private information or disseminating copyrighted materials.

This Article focuses on the basic economics of amateur journalism rather than on a particular format or technology. The Article covers the subset of bloggers who are engaged in “journalism” in the sense that, like conventional newspaper and magazine reporters, they broadly distribute relatively short pieces that are intended to report or reflect on current events. In other words, the Article does not deal with the many people who use their blogs essentially as diaries, which usually are not intended for readers other than themselves and close friends and family.<sup>7</sup> Much of this Article’s analysis applies to those who seek to contribute in some way to public debate rather than engage in personal reflection. Though bloggers tend to focus more on analysis or opinion than reporting of facts,<sup>8</sup> they are no less “journalists” in the broad sense of the term. In any event, many bloggers do report facts or present expert analysis, whereas many conventional journalists write opinion columns.<sup>9</sup>

In this Article, an “amateur journalist” is one who either is not employed at all, or writes as a sideline to some other business. Thus, an amateur journalist may be a professional in some line of work, including a professional journalist who blogs separately from her main job.<sup>10</sup> This distinction reflects the different incentives of one who is not engaged in the relevant work as if it were a paid career. Although the professional-amateur distinction does not

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7. See Bialik, *supra* note 5.

8. See Lasica, *supra* note 2.

9. See *id.*

10. Distinguishing a blogger’s “sideline” and main business may be difficult for those people, like academics, who have significant discretion to define their jobs. But even in these situations blogging is not the writer’s main job—the blogger does not have a clearly articulated “main” job. Thus, the principal basis of distinguishing amateurs and professionals still holds.

depend on whether the work is done on the Web, amateur journalism is currently enabled by technologies that are specific to the Web.

Although the Article discusses the amateur-professional distinction from the perspective of recent technological developments, the same general issues will remain even as these technologies and formats evolve. Conversely, the economics of blogging may change even if formats remain the same. For example, web pages that mimic blogs' format may involve very different issues if, like traditional journalism, they are written and managed by professionals as an adjunct to professional media. These products are interesting for present purposes mainly to the extent that they illustrate the interaction between, and potential convergence of, professional and amateur journalism.

The Article proceeds as follows. Part I describes the technology of blogs, currently the leading form of amateur journalism. This description provides the basis for Part II's discussion of the economics of blogs. Part III then applies these general considerations to specific legal issues. Part IV concludes discussion of these issues.

## I. THE TECHNOLOGY OF BLOGGING

Before developing the economic framework, a review of some salient technical features of blogs is useful. A blog is built on a web page. Dave Winer, one of the first bloggers, provides the following definition: "A [blog] is a hierarchy of text, images, media objects and data, arranged chronologically, that can be viewed in an HTML browser."<sup>11</sup> Winer summarizes some important technical features shared by many blogs:<sup>12</sup>

1. Each blog post has a title, date, and "permalink" that gives its web address.
2. The home page has the most recent posts.

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11. Dave Winer, What Makes a Weblog a Weblog (May 23, 2003), <http://blogs.law.harvard.edu/whatMakesAWeblogAWeblog>.

12. *Id.*

3. Archives include the remaining posts, usually organized by category.
4. The author may permit comments below each post.
5. Really Simple Syndication (RSS) feeds let people who use “news aggregators” such as “Bloglines”<sup>13</sup> to “subscribe” to the blog and thereby disseminate posts quickly across the Web.
6. Each blog post “pings,” or notifies, change-aggregators such as “blo.gs” to signal the Web that the post has been made.
7. A “trackback” linked to the blog post enables other blogs to ping blogs they link. The blog author can then track and respond to others who cite her, and readers of the linked blog can refer to the record of trackbacks under each blog post.
8. Tools for recording hits and ranking blogs by popularity allow blog authors to increase or focus their audiences.
9. A blog’s “blogroll” establishes the blog in a community of other blogs, as well as publicizing these blogs.

At a deeper level, blogs are enabled by three technologies: the Internet, the Web, and Google and other sophisticated search engines. The Internet’s and Web’s roles are obvious, but that of search engines may not be. The key to understanding the importance of search engines is considering how easy it otherwise would be for a blog post to be lost among many millions of Web pages. Google and other search engines provide a spontaneous filtering mechanism by not only finding the post but, more importantly, giving top ranking in searches to the more “important” posts.<sup>14</sup> Google ranks search results according to the number of sites that link to the result and the importance of each linking site, so that links are “votes” by the linking web pages for the blog’s quality and

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13. See Bloglines Home Page, <http://www.bloglines.com> (last visited Sept. 24, 2006).

14. See John Hiller, Google Loves Blogs: How Weblogs Influence a Billion Google Searches a Week (Feb. 26, 2002), <http://www.microcontentnews.com/articles/googleblogs.htm>. For a more detailed look at Internet search technology, and particularly at the importance of keywords, see Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507 (2005).

accuracy.<sup>15</sup> Bloggers have an incentive to link only to high-quality blogs because their own readers judge them by, among other things, their link's quality. The votes themselves are weighted according to the voter's importance, which is apparently a function of the voter's quality and accuracy.<sup>16</sup> Moreover, Google distinguishes more active journalists by visiting their sites, and therefore spotting them in searches, depending on how frequently they update.<sup>17</sup>

In general, therefore, blog authors<sup>18</sup> build readership by establishing their credibility and encouraging links by other blogs. A blog's readership represents a kind of goodwill asset analogous to the audience of the conventional media. The difference is that, whereas professional media companies must make upfront capital investments, entry to amateur journalism is free but without value until the author makes the additional investments in time and credibility necessary to build readership.<sup>19</sup> Although investments may be required in both cases, the fact that no upfront investment is necessary to blog 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. Blogs thereby allow individuals to test their skills and marketability

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15. See Hiller, *supra* note 14.

16. Google is vague about the precise formula it uses to determine the "importance" of linking sites. Here is the relevant portion of Google's description of its PageRank system:

PageRank relies on the uniquely democratic nature of the web by using its vast link structure as an indicator of an individual page's value. In essence, Google interprets a link from page A to page B as a vote, by page A, for page B. But, Google looks at more than the sheer volume of votes, or links a page receives; it also analyzes the page that casts the vote. Votes cast by pages that are themselves "important" weigh more heavily and help to make other pages "important."

Important, high-quality sites receive a higher PageRank, which Google remembers each time it conducts a search.

Google Technology, <http://www.google.com/technology/> (last visited Sept. 24, 2006).

17. Hiller, *supra* note 14.

18. Authorship distinguishes blogs from "wikis," which grow by unmanaged accretion. See Wiki Getting Started Faq, <http://c2.com/cgi/wiki?WikiGettingStartedFaq> (last visited Sept. 24, 2006) (defining a "wiki" as "[a] collection of Web pages which can be edited by anyone").

19. Like a blogger, an individual freelance professional writer can work without an upfront investment. However, while a blogger develops her own market, the professional is hired by a firm that has invested in the development of a market. I am indebted to Eric Goldman for pointing out this distinction.

rather than have to get a job from one of a limited number of media firms.

This overview, of course, is only a snapshot of rapidly evolving technology. But though the technology may look very different in a few years, certain underlying characteristics, particularly interactivity, are likely not only to remain but to develop. Thus, this peek at the technology is useful in specifying the assumptions that underlie the following analysis.

## II. THE ECONOMICS OF BLOGGING

The above description of blogging technology provides a basis for examining the economics of blogging. Parts II.A-D examine costs and benefits from the perspectives of both the individual journalist and society. Part II.E discusses potential alternatives to regulation. Part II.F discusses the politics of regulating blogs.

### *A. Private Costs of Amateur Journalism*

Blogs are a classic example of “cheap speech.”<sup>20</sup> In terms of capital investment, blogging requires no more than a computer, Internet access, and, perhaps, a blogging program such as Typepad. This ease of access means significant diversity and nearly zero intermediation, either directly or indirectly through entry costs.

However, blogging involves significant potential noncapital costs. Expert bloggers with relatively high opportunity costs likely would make the investment only with some expectation of a tangible return, including reputation enhancement. Also, inaccurate or harmful posts could damage readership or the author’s main business, particularly in reputation-intensive businesses such as professional practice.

The costs incurred by amateurs depend on whether, in their nonblogging lives, they are self-employed or work for others. A self-employed blogger obviously has an incentive to refrain from

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20. Eugene Volokh’s prescient article, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806-33 (1995), anticipated the significance of this phenomenon.

expressing very unpopular opinions, irresponsible or untrue statements, or statements that disparage his own skills.

A blogger who works for others may be less concerned with the reputation costs his blog inflicts because they are incurred by his employer, unless the blogger faces firing, demotion, or other employer constraints on nonwork activities. This discipline may reduce agency costs by aligning the employed author's incentives with those of his employer, thereby making his activities similar to those of the self-employed. But employers also might seek to discipline bloggers who disagree with them but do not injure the business.<sup>21</sup> This discipline might itself be an agency cost in a large firm to the extent that supervisors create an unpleasant work environment or repel productive workers who value freedom of expression. In a small sole proprietorship such discipline may be a consumption activity by the proprietor. Any risk of excessive employer discipline of bloggers is mitigated by the fact that bloggers are often knowledgeable workers with special skills that give them some bargaining leverage with their employers.<sup>22</sup>

Amateur journalists, including many, if not most, who work for others, can reduce these private costs by not identifying themselves.<sup>23</sup> Indeed, current technology probably allows bloggers who are willing to pay the costs of total anonymity to avoid any

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21. A few states have laws that may limit the extent to which employers can discipline employees for expression of political beliefs in blogs. See, e.g., CAL. LAB. CODE § 1101 (West 2003) (providing that "[n]o employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office. (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees"); S.C. CODE ANN. § 16-17-560 (2003) (making it "unlawful for a person to assault or intimidate a citizen, discharge a citizen from employment or occupation, or eject a citizen from a rented house, land, or other property because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State"); Melanie Robin Gallberry, Note, *Employers Beware: South Carolina's Public Policy Exception to the At-Will Employment Doctrine Is Likely To Keep Expanding*, 51 S.C. L. REV. 406, 411-12 (2000) (discussing S.C. Code § 16-17-560 and the public policy exception); see also Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 388-89, 416-20 (2003) (discussing various restrictions in other states).

22. See Lasica, *supra* note 2.

23. See Elec. Frontier Found., *How to Blog Safely (About Work or Anything Else)* (May 31, 2005), <http://www EFF.org/Privacy/Anonymity/blog-anonymously.php> (providing guidelines for blogging anonymously).

constraints on their activities, including the reputational constraints discussed in Part II.D. However, anonymity also reduces the private benefits discussed in Part II.B and therefore the incentive to blog that most amateur journalists have. This suggests that the constraints on bloggers are to some extent built into their incentives to blog.

### *B. Incentives*

Blogs' private costs and minimal tangible benefits to their authors raise a question why so many millions of people find the activity worthwhile. The following are some reasons why people have been willing to commit time to amateur journalism. As discussed throughout this Article, one must understand the nature of these incentives in order to be able to evaluate regulation's potential deterrent effect.

#### *1. Self-expression and Communication*

The original bloggers sought mainly to reflect on personal matters as they would in a diary, or communicate with friends or family.<sup>24</sup> Political blogs intended for broader distribution were spurred by the coinciding development of blogging technologies and the 2004 presidential election, which elicited strong views on both sides.<sup>25</sup> Amateur journalism has developed to include many bloggers who write on particular areas of expertise rather than general personal or political views.<sup>26</sup> These writers derive consumption value from expressing their views and communicating them to others.

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

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24. See Mallory Jensen, *A Brief History of Weblogs*, COLUM. JOURNALISM REV., Sept./Oct. 2003, <http://www.cjr.org/issues/2003/5/blog-jensen.asp>.

25. See Jennifer Lash, *Washington Posts: Members Slow to Catch on to Blogging Phenomenon*, ROLL CALL, Sept. 12, 2005, at 1.

26. See Matt Welch, *Blogworld: The New Amateur Journalists Weigh In*, COLUM. JOURNALISM REV., Sept./Oct. 2003, <http://www.cjr.org/issues/2003/5/blog-welch.asp>.

that have developed an audience. Without a strong expressive motive, one might expect successful blogs to merge with professional media. This exit strategy could then motivate blog startups. Over the long term, therefore, blogs might be more a way to enter conventional journalism than a new medium. But a significant self-expression motive would preserve the distinctiveness of blogs.

## 2. Cross-promotion

Blogs increasingly are used to promote paid services, most prominently by lawyers and other professionals.<sup>27</sup> Blogs not only advertise the related product, but help establish its quality.<sup>28</sup> Professionals sell “credence qualities” that buyers can evaluate only by experiencing the quality of the advice over time.<sup>29</sup> Blogs let professionals demonstrate the quality of their advice for potential customers or clients. A blog therefore can be viewed as a kind of “loss-leader,” in which giving away the free service sells the paid service.

Blogs also can be used to promote business firms. The blog can be run by the firm, with individuals acting explicitly as agents. Such a blog would not fit this Article’s definition of “amateur journalism.”<sup>30</sup> In professional firms and schools, individuals more likely write blogs for themselves with spillover benefits to their employers. In either case the firms have incentives to reward their employees’ blogging activities.

Many academics use blogs as a medium for presenting and publicizing scholarship.<sup>31</sup> Blogs may become particularly important in academia because scholars generally need not account for their

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27. See Keith Griffin, *Solo Aims To Blog His Way to New Clients*, N.J.L.J., Aug. 15, 2005, at 580.

28. See *id.*

29. See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68-69 (1973) (defining and discussing “credence” qualities”).

30. See *supra* Introduction and *infra* note 38 and accompanying text.

31. The implications of blogging for law scholars was discussed at two conferences. See Bloggership: How Blogs Are Transforming Legal Scholarship, <http://cyber.law.harvard.edu/home/bloggership> (Apr. 28, 2006) (web page for conference on blogging by legal scholars); Blogging: Scholarship or Distraction?, [http://taxprof.typepad.com/taxprof\\_blog/2006/01/blogging\\_schola.html](http://taxprof.typepad.com/taxprof_blog/2006/01/blogging_schola.html) (Jan. 8, 2006) (reporting on a panel discussion at the Association of American Law Schools’ annual meeting).

time, which is blogs' major private cost. Scholars have significant incentives to publicize their work. For example, rankings such as those by *U.S. News & World Report* have focused attention on objective measures for evaluating academic performance.<sup>32</sup> One emerging measure is downloads on the Social Science Research Network (SSRN).<sup>33</sup> Scholars can increase downloads by linking their articles 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. They also might run blogs themselves and invite faculty to participate.<sup>34</sup>

### 3. Advertising Revenue

Amateur journalism's business model is evolving. Bloggers can follow the conventional media and offer advertising. This practice was first institutionalized by Blogads, an intermediary that sells advertising on individual blogs.<sup>35</sup> Advertisers can choose specific blogs and thereby engage in cost-effective micromarketing.

Several different advertising models for blogs are available. Bloggers can sign up for a service like Google's AdSense that chooses the ads that appear on the site, one like BlogAds that acts as an intermediary to sell advertisements for specific blogs, or an "affiliate network" that enables ad sales to groups of bloggers but allows the blogs to choose which advertisements they carry.<sup>36</sup> Firms like Gawker and Weblogs, Inc. aggregate writers on a single blog that sells advertisements.<sup>37</sup> This format resembles a conventional

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32. See Paul L. Caron & Rafael Gely, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L.J. 1, 8 (2006).

33. See Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN To Measure Scholarly Performance*, 81 IND. L.J. 83, 95-106 (2006) (discussing SSRN-based rankings); Lawrence A. Cunningham, *Scholarly Profit Margins: Reflections on the Web*, 81 IND. L.J. 271, 275-82 (2006) (discussing SSRN).

34. See, e.g., The University of Chicago Law School Faculty Blog Home Page, <http://uchicagolaw.typepad.com> (last visited Sept. 24, 2006).

35. See Blogads Home Page, <http://www.blogads.com> (last visited Sept. 24, 2006).

36. See Louise Story, *As Corporate Ad Money Flows Their Way, Bloggers Risk Their Rebel Reputation*, N.Y. TIMES, Nov. 26, 2005, at C4 (discussing blogs and advertising).

37. *Id.*

newspaper except that the writers are more like independent contractors than employees.<sup>38</sup> Pajamas Media,<sup>39</sup> a network of leading right-leaning blogs, commits bloggers to advertising for an extended period and frees them from shaping content to attract advertising during the commitment period.<sup>40</sup>

Group blogs that sell advertising can be hybrids of professional and amateur journalism. The bloggers in some ways resemble reporters employed by a newspaper, which in turn produces and sells their work. Unlike newspaper reporters, however, the participating bloggers do not work full-time under the newspaper's supervision. Although newspapers also get content from those who are not full-time employees, such as freelancers, wire services and readers, publication of this material is more likely to be subject to final review by the publisher than is the work of co-bloggers. The legal implications of these various relationships are explored below.<sup>41</sup>

Advertising may affect blogs' content. News reports indicate that "many companies are wary of putting their brand on such a new and unpredictable medium."<sup>42</sup> For example, Cendant pulled ads from Gawker, possibly because the site had gotten "too naughty" for the sponsor.<sup>43</sup> Sponsors also might be offended by politics and political incorrectness.

Amateur journalists, in effect, may be able to capitalize their advertising revenue by selling their blogs.<sup>44</sup> The important question

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38. See *infra* Part III.H (discussing the legal significance of this characterization). Corporate "blogs" written by the corporation's full-time employees more closely resemble conventional websites than the sort of amateur journalism that is the focus of this paper. Although the format of a corporate blog may be similar to that of an amateur blog, the writers' incentives differ. This difference matters for the economic analysis in Part II.

39. See Pajamas Media Home Page, [www.pajamasmedia.com](http://www.pajamasmedia.com) (last visited Sept. 24, 2006).

40. See Stephen M. Bainbridge, Pajamas Media: The Law and Economics Quiz (Nov. 17, 2005), [http://www.professorbainbridge.com/2005/11/pajamas\\_media\\_t.html](http://www.professorbainbridge.com/2005/11/pajamas_media_t.html) (discussing these tradeoffs).

41. See *infra* Part III.H.

42. Jessica Mintz, *Many Advertisers Find Blogging Frontier Is Still Too Wild*, WALL ST. J., Mar. 25, 2005, at B1.

43. *Id.* (internal quotation marks omitted).

44. See Greg Lindsay, *Blogs Finally Get Business Savvy: Flurry of Big Deals in Recent Weeks Provide Many New Ways for Web Logs To Turn a Profit*, BUSINESS 2.0, Nov. 23, 2005, available at [http://money.cnn.com/2005/11/21/technology/media\\_biz20\\_1205/index.htm](http://money.cnn.com/2005/11/21/technology/media_biz20_1205/index.htm) (discussing blogging business models).

in such transactions is whether the seller will continue to write for the blog or retain editorial control. If the original blog author continues in place after a sale of or investment in the blog, the blog's value would depend partly on the present value of past revenues, discounted for such risks to future revenues as the author's health and reputation for quality. The blog's value also would depend partly on projected expenses, consisting mostly of wages to the author.

Given the small capital investment necessary for a blog, the question becomes what a purchaser or investor could contribute other than authorship that might justify a return on investment. The buyer might sell its promotion and back office services in exchange for a share in the profits. The buyer may also assume some risks of the author's health or market uncertainty in exchange for a profit share. The buyer in this scenario is a type of risk arbitrageur who offers the seller the difference between what the risk costs the blogger and what it costs the specialist, who is in a better position to diversify risk. The buyer or investor, however, must find some way to enforce the deal given the inherent mobility of human capital, because when the original author has sold his equity stake he may be tempted to quit or shirk. More importantly, the contract has to be designed to provide incentives as it lifts the fear of failure.

The sale or investment scenario is more complicated if the buyer expects the seller to leave the blog. The seller might not be able to deliver anything to the buyer in this situation other than a trade name and web address. Although the seller can license rights to any copyrighted content, the material is unlikely to be worth much on this basis because it has been available for free and is time-sensitive. However, the blog's web address and back blog posts may have some continuing value as they will continue to attract viewers and therefore potential advertising revenue.

Similar issues arise in the sale of any service business such as a professional firm, including the constructive sale of the business that occurs when a partner retires. The retiring partner arguably should be entitled to a share of the value that inheres in physical assets, client lists, and the organization of the firm, but not the

continuing partners' personal reputations.<sup>45</sup> Courts traditionally have assumed that a continuing professional firm has little, if any, value.<sup>46</sup> Although this assumption may make little sense as applied to modern, heavily institutionalized, professional firms,<sup>47</sup> it makes more sense for a blog that is little more than the writer's individual contributions. A substitute blogger might expect to capture something like the same audience if he had been introduced and vetted by the previous owner and mimics his writing style. But the buyer gains little advantage over other mimics from having bought the blog.

In addition to selling advertising, amateur journalists can do public broadcasting-type "pledge drives." Blog donors may resemble contributors to nonprofits who would want some assurance that their donations would be used for the intended purpose—that is, to support the blog's particular views or specialty.<sup>48</sup> Unlike a typical large bureaucratic nonprofit, which may need to enlist state investigation and enforcement powers, the individual blogger's reputation might provide adequate incentives for quality and honesty. On the other hand, the donations may resemble commercial advertising to the extent that the donors are seeking a more tangible return, such as links to their blogs.

This Article's analysis shows that amateur journalists have incentives that range widely across the commercial-noncommercial spectrum, and that these incentives are changing as new business opportunities become available. Even if blogging becomes more commercial, the supply side of blogging is likely to remain diverse. Some amateurs may be able to compete effectively with professional media. Others may value their self-expression more highly and either refuse to sell advertising or carefully screen advertisers for compatibility with their content. All bloggers are likely to have some incentive and, via their "day" jobs, the ability to maintain a voice that differs from that of professionals. Moreover, blogs are

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45. Larry E. Ribstein, *A Theoretical Analysis of Professional Partnership Goodwill*, 70 NEB. L. REV. 38, 48-49 (1991).

46. See, e.g., *In re Brown*, 150 N.E. 581, 582-85 (N.Y. 1926).

47. See Ribstein, *supra* note 45, at 49-51.

48. See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 846-47, 862-68, 872-73 (1980).

likely to continue to capitalize on the medium's inherently low startup costs by beginning modestly with no clear business objectives, and then adapting to changing circumstances, including the blog's popularity. This likelihood suggests that, though the business model is evolving, amateur and professional journalism are unlikely to merge.

### *C. Social Benefits: Blogging as Decentralized Knowledge*

Blogs may have significant social benefits by enabling millions of people to contribute to the general store of knowledge in ways they could not do with higher costs of public access. The following subsections summarize these benefits.

#### *1. Exploiting Individual Expertise*

Blogs provide a way to gather what F.A. Hayek referred to as individuals' "knowledge of the particular circumstances of time and place."<sup>49</sup> As Part II.C.2 discusses, Hayek viewed market prices as the mechanism for communicating this dispersed information. But blogs can make individuals' special information available to decision makers in a way that Hayek did not envision—without a price mechanism and able to inform nonmarket political decisions by government agents and voters.<sup>50</sup>

Blogs facilitate a new relationship between experts and the public. Bloggers can communicate their expertise directly to the public rather than simply by filling in quotes in articles basically shaped by mainstream journalists who are experts as writers but usually not in their subjects.<sup>51</sup> Moreover, blogs can focus on categories of specialty knowledge that would be too narrow for a conventional source. The expertise can be as small as the working conditions at a particular firm, users' experience with a particular

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49. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524 (1945).

50. For example, D. Calvin Andrus, *The Wiki and the Blog: Toward a Complex Adaptive Intelligence Community*, 49 STUD. INTELLIGENCE, Sept. 2005, available at <http://ssrn.com/abstract=755904>, suggests the use of blogs by the intelligence community.

51. See Lasica, *supra* note 2.

product, or, as in the CBS News "Rathergate" incident, the capabilities of particular typewriters.<sup>52</sup>

## *2. Google as a Price Mechanism*

The communication of information through blogs differs from the price mechanism that Hayek and Adam Smith emphasized. Blogs are deliberate expressions of opinion by individuals that can be aggregated technologically and used by voters and centralized decision makers. By contrast, markets provide a decentralized coordinating mechanism that operates without individuals' conscious intervention.<sup>53</sup> People give this mechanism the information it needs not by expressing opinions deliberately, as with blogs, but unintentionally by trying to buy as low and sell as high as they can.<sup>54</sup>

Blogs, however, also operate in part through a market-type mechanism. As discussed in Part I, search engines make blogs accessible in the Web's vastness.<sup>55</sup> A search on a popular subject might retrieve thousands of results, of which the researcher can read only a few. As also discussed in Part I, Google and other search engines solve this problem by ranking search results according to how many other web pages have linked the result.<sup>56</sup> This ranking resembles an unconscious market mechanism in which the "price" is links. Like buyers and sellers in the market, the linkers, though simply seeking to maximize their own welfare, unintentionally inform the market of the web posts that are most "valuable"—that is, most worthy of being ranked high in a search result.

## *3. Bloggers as Benevolent Parasites*

Blogs provide a benefit through their symbiotic relationship with conventional forms of mass communication. For example, a common

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52. See Kurtz, *supra* note 4.

53. See Hayek, *supra* note 49, at 524-28.

54. See *id.*

55. See *supra* note 14 and accompanying text.

56. See *supra* notes 12-17 and accompanying text.

blogging practice is “fisking” articles in the professional media. As Internet FAQ Archives defines it, “fisking” means

[a] point-by-point refutation of a blog entry or ... news story. A really stylish fisking is witty, logical, sarcastic and ruthlessly factual .... Named after Robert Fiske, a British journalist who was a frequent (and deserving) early target of such treatment.<sup>57</sup>

As this definition’s reference to “ruthlessly factual” indicates, fisking often refers to a detailed dissection of a work. This practice has significant ramifications for the application of copyright law.<sup>58</sup> Probably the most famous example of fisking, aside from the exposure of the Fiske story, is bloggers’ role in uncovering the CBS News fraud regarding the Texas Air National Guard service of President George W. Bush.<sup>59</sup>

Blogs’ commentary role includes not only detailed “fisking,” but also posting on specific aspects of the subject work. This “parasitic” function of blogs suggests a possible long-term equilibrium in the relationship between amateur and professional journalists. Bloggers can be analogized to remora, a type of fish that cleans host fish such as sharks.<sup>60</sup> Professional media sources, by acting as “sharks,” help aggregate as well as present information. Major media sources like the *New York Times* are worthwhile targets for fisking bloggers.<sup>61</sup>

Professional media sources therefore may be more accurate than individual blogs not just because their own resources make them trustworthy, but also for the information their blog “following” provides. This outcome is comparable to the market efficiency function of securities analysts: because more widely traded stocks are followed by more analysts, their prices reflect more information, and so are more efficient, than less actively traded stocks.<sup>62</sup> Blogs

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57. Internet FAQ Archives, *Fisking*, <http://www.faqs.org/docs/jargon/F/fisking.html> (last visited Sept. 24, 2006).

58. See *infra* notes 241-47 and accompanying text.

59. See Kurtz, *supra* note 4.

60. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 989 (10th ed. 1993) (defining “remora”).

61. The most popular blogs also are attractive fisking targets, suggesting that a continuum between blogs and the professional media exists in this and other respects.

62. See generally Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 732-55 (2006) (discussing the important role of securities

ironically may actually increase the value of at least some conventional media sources rather than just siphon audience share.

The "remora" function of blogs also might create a network effect that could affect competition among professional media sources. The largest conventional media sources may acquire extra value by attracting networks of bloggers. Some smaller organizations that do not attract networks, on the other hand, may be unable to compete effectively with either their larger rivals or low-cost bloggers.<sup>63</sup>

A more skeptical view of blogs would question the "benevolence" of their parasitic action. Given the political antagonism among bloggers and between amateur and professional journalists, bloggers often may seem to be merely attacking rather than fleshing out information. But such attacks can be useful in at least indicating the existence of another perspective. Also, if the attack contains misinformation, other bloggers more politically aligned with the original journalist can correct it through blog posts, comments, and trackbacks. In other words, bloggers have their own "remora." Thus, even the most opinionated blogs have an information function.

To be sure, opinionated blogs may be less useful than more objective blogs, other things being equal. But other things may not be equal because blogs' points of view may affect the supply. To the extent that self-expression is an important motivator of blogs,<sup>64</sup> it might be seen as part of the "price" readers pay for the service. If blogs could somehow be made more objective, the remaining blogs might individually be more valuable, but we might have less aggregate information available.

#### *4. Interactivity*

Web-only distribution enables blogs to be interactive with their readers through the comment and trackback features.<sup>65</sup> Each entry can therefore generate a surrounding body of correcting and

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analysts in efficient markets).

63. This type of effect was a key component of the antitrust case against Microsoft. See STAN J. LIEBOWITZ & STEPHEN E. MARGOLIS, *WINNERS, LOSERS & MICROSOFT: COMPETITION AND ANTITRUST IN HIGH TECHNOLOGY* 67-75, 218-19, 228 (1999).

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

65. See *supra* notes 12-13 and accompanying text.

extending commentary and references. Professional media also are moving in this direction by offering blogs on their websites.<sup>66</sup> However, professional media's potential for interactivity is limited by their need to prevent free web products from cannibalizing sales of print and fee-based web products.<sup>67</sup> Amateur blogs do not usually have related products whose market they must protect.

Blogs might come to interact not only with each other, but also with professional journalists as part of their symbiotic "remora" relationship discussed earlier. Professional media can use their investigative resources to assemble stories that would be out of amateurs' reach. Amateur journalists can flesh out the story with additional information and points of view.<sup>68</sup>

The challenge in promoting cooperation between professional and amateur journalists is that this cooperation requires some tradeoff of the strong property rights necessary to justify large investments in information against opportunities to leverage the value of the information by networking with amateurs. For example, professionals could promote collaboration with amateurs by disclosing their sources, analogous to the disclosure of code by the authors of open source software. The professional press might post transcripts of interviews on their websites, thereby enabling amateurs to offer alternative interpretations. They also might give up some ability to sell access to archives by keeping their stories live on their websites, while enhancing amateur researchers' ability to interact with their information.<sup>69</sup>

### 5. *Lack of Professional Constraints or Biases*

Although amateur journalists have been disparaged for the lack of "bricks-and-mortar" operations,<sup>70</sup> these investments involve potential costs as well as benefits. On the benefit side, investments

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66. See, e.g., Wall Street Journal Online Law Blog, <http://blogs.wsj.com/law/> (last visited Sept. 24, 2006).

67. See *infra* notes 240-42 and accompanying text.

68. See Katharine Q. Seelye, *Take That, Mr. Newsman!; Answering Back to the News Media, Using the Internet*, N.Y. TIMES, Jan. 2, 2006, at C1 (discussing the increasing collaboration between conventional news media and its audience).

69. See *id.* (noting the difference between professional journalism and weblogs regarding the durability of web postings).

70. See *supra* note 4 and accompanying text.

in hard assets can be viewed as a kind of "bond" in the sense that the assets' value depends on the firm's ability to sell its products, which in turn depends on the firm's reputation. A newspaper that becomes unreliable may, in effect, forfeit this bond. The firm therefore has an incentive to hire staff and develop internal norms that help ensure the accuracy of the product.

On the other hand, a potential cost of the bricks-and-mortar model is that the staff the firm hires to ensure quality and accuracy may seek to impose its own views both in what they write and the subjects they choose to cover or emphasize, even if these choices do not serve the organization's interest.<sup>71</sup> In other words, the professional media is subject to the agency costs, or conflict between nonowner agents and principals, that afflict all firms.<sup>72</sup> For example, the controversial *New York Times* reporter Judith Miller described the "convent of The New York Times, a convent with its own theology and its own catechism."<sup>73</sup>

Professional journalists may have common biases because of similarities of training and predilection, as well as a desire to wield influence.<sup>74</sup> Although surveys indicate that these biases reduce demand for professional journalism by consumers seeking greater accuracy, competition does not reduce the biases because agents of other professional news organizations share the same biases.<sup>75</sup> Moreover, media firms' costs of reducing journalists' discretion or otherwise monitoring them may exceed the benefits in terms of greater accuracy. Amateur journalists, therefore, may improve accuracy simply because they are amateurs and do not share professionals' biases.

This reality does not mean individual amateurs themselves are unbiased. Indeed they may be more biased and shrill than

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71. For discussions of the existence of and reasons for media bias, see David P. Baron, *Persistent Media Bias* 4-6, 17-20 (Stanford Graduate Sch. of Bus., Research Paper No. 1845, 2004), available at <http://ssrn.com/abstract=516006>; Larry E. Ribstein, *The Public Face of Scholarship* (Univ. of Ill. Law and Econ., Research Paper No. LE06-01, 2006), available at <http://ssrn.com/abstract=897590>.

72. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-10 (1976) (defining agency costs).

73. Katherine Q. Seelye, *Times Reporter Agrees To Leave the Paper*, N.Y. TIMES, Nov. 10, 2005, at A20 (quoting Judith Miller).

74. See Baron, *supra* note 71, at 4; Ribstein, *supra* note 71.

75. See Baron, *supra* note 71, at 2-3.

professionals, who at least are constrained by professional norms of objectivity.<sup>76</sup> But amateur journalism's advantage is in providing many disparate views and a distinct alternative to professional journalism.<sup>77</sup> Whether amateur journalism as a whole is slanted toward the political right, no hierarchy filters out opposing views. Moreover, if amateur journalism is tilted right,<sup>78</sup> this condition may be because left-leaning amateurs have, in general, less incentive to express themselves because their views already are appearing in professional media. This explanation would mesh with the notion of amateur journalism offering an alternative perspective.

#### *D. Social Costs*

Blogs may have social costs as well as social benefits. Like all speech, blogs can cause emotional harm, cause reputational damage, infringe property and privacy rights, and defraud. The particular problem with blogs is that they are not intermediated—they are simply individuals talking, amplified by the megaphone of the Web.

Regulation, however, also has potential social costs. Amateur journalists' private benefits discussed earlier are tenuous enough that even minimal regulation could significantly reduce the diversity and social benefits of blogs.<sup>79</sup> Because individual bloggers do not internalize the social benefits of their work, the amount of amateur journalism may be socially suboptimal even in the absence of regulation. Moreover, as discussed in Part II.E, markets and extralegal constraints can address many problems of blogs. Finally, even if some regulation of amateur journalism is theoretically warranted, the regulation that is actually adopted may be inefficient because of the public choice considerations discussed in Part II.F. This Article will consider some categories of social costs and how regulation might balance the costs and benefits of regulating amateur journalism.

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76. See Lasica, *supra* note 2.

77. See *id.*

78. See Garance Franke-Ruta, *Blog Rolled*, AM. PROSPECT, Apr. 2005, at 39-40, available at <http://www.prospect.org/web/page/ww?section=root&name=ViewPrint&articleId=9363>.

79. See *supra* Part II.B.

### 1. Noise

The absence of “checks and balances” increases the dissemination of low-quality information, or “noise.” Misinformation might cause misallocation of resources. Also, if readers cannot easily distinguish the good from the bad, readers may shun all blogs.<sup>80</sup> This potential reaction suggests that even some amateur journalists might welcome blog regulation.

Amateur speech is not, however, necessarily less accurate than professional speech for lack of intermediation. First, the individual working in his pajamas that Jonathan Klein envisions<sup>81</sup> can possibly produce high-quality reporting without internal monitors and fact-checkers. The Internet and Google now make a vast array of information easily available even to lone amateurs. More importantly, many bloggers have an advantage as specialists in competing with the generalist journalists who work for conventional media.<sup>82</sup> Journalists are generally trained mainly in getting facts and analysis from others who are either direct observers or experts. In fields like law or finance that require special training, journalists often have to call on experts. But bloggers are themselves the experts—indeed, they may be the ones the professional journalists call for information. Unlike professional journalists, amateurs can focus on the stories they know rather than reporting on everything that is newsworthy.

Second, the relevant perspective from which to analyze regulation of blogging is not an individual offending blog, but the general set of blogs—either all blogs intended for general distribution, or blogs within particular communities or specialties. Thus, Richard Posner questions whether the risk of bad information is greater for blogs as a whole than for the professional media.<sup>83</sup> Even if bloggers individually are not as accurate as a professional media source,

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80. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488-90 (1970) (discussing markets and quality).

81. See *supra* note 4 and accompanying text.

82. See Lasica, *supra* note 2.

83. See Richard A. Posner, *Bad News*, N.Y. TIMES, July 31, 2005, § 7 (book review), at 11.

they can be easily corrected by other blogs and by comments and trackbacks.<sup>84</sup>

The accuracy difference between the professional media and blogs, then, might be viewed as the difference between “horizontal” checking by other bloggers and “vertical” checking within the hierarchy of the conventional media firm. But even this distinction blurs at the edges. The “remora” function of blogs discussed earlier<sup>85</sup> adds a horizontal dimension to the professional media. Conversely, group blogs<sup>86</sup> arguably add a vertical dimension to amateur journalism. Although uncoordinated horizontal checking may leave mistakes, widely followed blogs will tend to be corrected quickly and completely. On the other hand, vertical checking by professional media may be constrained by biases that pervade a particular organization or profession,<sup>87</sup> or by individuals who have important roles in the hierarchy. For example, the desire to get an important story to the public, and the strong belief in the story and reporters by key people in the editorial process, may have contributed to CBS News’ embarrassing failure to spot seemingly obvious problems in the “Rathergate” affair.<sup>88</sup>

## *2. Effect on Professional Journalists*

Competition by amateurs also arguably might reduce responsible reporting by the professional media. Ben Bradlee would no longer have the luxury of insisting that Woodward and Bernstein carefully check their facts before going public with Watergate if he risked being “scooped” by amateurs.<sup>89</sup> When “pajama bloggers” who need not answer to an editor can rush stories onto millions of computer screens, professionals might abandon their standards in order to compete. This suggests that the investments necessary to produce

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84. See *supra* note 12 and accompanying text.

85. See *supra* Part II.C.3.

86. See *supra* Part II.B.3; *infra* Part III.H.

87. See *supra* notes 70-75 and accompanying text.

88. See DICK THORNBURGH & LOUIS D. BOCCARDI, REPORT OF THE INDEPENDENT REVIEW PANEL ON THE SEPTEMBER 8, 2004 60 MINUTES WEDNESDAY SEGMENT “FOR THE RECORD” CONCERNING PRESIDENT BUSH’S TEXAS AIR NATIONAL GUARD SERVICE 1-19 (2005), [http://www.cbsnews.com/htdocs/pdf/complete\\_report/CBS\\_Report.pdf](http://www.cbsnews.com/htdocs/pdf/complete_report/CBS_Report.pdf) (detailing the defects in the program’s reporting and production).

89. See BOB WOODWARD & CARL BERNSTEIN, *ALL THE PRESIDENT’S MEN* 33-34 (1976).

high-quality news entail positive social externalities that a democratic society needs for its political well-being but that the market will not support given intense competition by zero-overhead bloggers.

Richard Posner responds that "when competition is intense, providers of a service are forced to give the consumer what he or she wants, not what they, as proud professionals, think the consumer should want, or more bluntly, what *they* want."<sup>90</sup> In other words, journalists' demand for professionalism may be no more than any guild or cartel's effort to, as Adam Smith pointed out, keep wages artificially high and output artificially low.<sup>91</sup>

This Article's analysis suggests that news organizations will be able to internalize the costs of high-quality news coverage in an environment of low-cost competitors—that is, a market for high-quality journalism will remain. The network aspect of amateur journalism's "remora" function<sup>92</sup> suggests that the largest news organizations will have an advantage in a world in which professional and amateur journalists coexist. In order to differentiate themselves, professional media would have stronger reasons than ever to provide a high-quality, well-researched product in order to offer some value over that which amateurs provide for free.

### 3. *Harmful True Information*

The self-correcting characteristic of blogs does not mitigate the effect of harmful true information. Readers may reward rather than punish amateur journalists for disseminating copyrighted information or infringing privacy rights, and such information may be amplified rather than disparaged for its harmful characteristics. Even an obscure blogger can cause significant damage by placing harmful information in the public domain. Legal remedies may be necessary to constrain amateur journalists in these situations.

Amateur journalists, of course, are subject to general laws protecting privacy and property and restricting pornography. The question is whether the rise of blogs and amateur journalism

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90. Posner, *supra* note 83.

91. See 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 58-62 (Kathryn Sutherland ed., Oxford Univ. Press 1993) (1776).

92. See *supra* note 63 and accompanying text.

requires special regulation. Special regulation perhaps is not necessary for amateurs as distinguished from professional journalists and media organizations. Although the professional media may be more subject to extralegal sanctions such as reputational penalties, it also may be less likely to be deterred by fines, damages, or the extralegal sanctions discussed in Part II.E.

Regulation of amateur journalists thus requires identifying specific contexts in which (1) existing legal and extralegal constraints are likely to be significantly less effective for amateur journalists than for professional journalists and other actors; and (2) regulating amateurs does not present a risk of over-detering socially beneficial conduct. The test might be satisfied by conduct that clearly abuses property or privacy rights and yet is not disciplined by social norms or future dealings between the bloggers and the victims or victim class. For example, the blogger who allegedly revealed Apple trade secrets<sup>93</sup> may have gained credibility and readers by revealing the secrets. On the other hand, regulating the conduct would not likely deter speech by ensnaring unsuspecting lawbreakers.

#### *4. 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 opinions they do not like.<sup>94</sup> Indeed, a recent study showed that during the 2004 election conservative and liberal blogs tended to link more within their separate communities and focused on different news articles, topics, and political figures.<sup>95</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

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93. See *Apple Computers, Inc. v. Doe 1*, No. 1-04-CV-032178, 2005 WL 578641, at \*\*5-8 (Cal. Super. Mar. 11, 2005).

94. See CASS SUNSTEIN, *REPUBLIC.COM* 53-88 (2001).

95. LADA ADAMIC & NATALIE GLANCE, *THE POLITICAL BLOGOSPHERE AND THE 2004 U.S. ELECTION: DIVIDED THEY BLOG* 2-3, 8, 12, 14-15 (2005), <http://www.blogpulse.com/papers/2005/AdamicGlanceBlogWWW.pdf>.

generally disagree with.<sup>96</sup> In other words, the Internet may decrease the costs *both* of accessing and filtering diverse viewpoints.

The Internet's overall effect on political discourse therefore is unclear. Moreover, even if the Internet currently does have a "walling off" effect, regulation does not necessarily solve the problem in a way that prevents inhibition of efficient technological evolution.

### *E. Alternatives to Regulation*

Even if some amateur journalism is socially harmful and not amenable to self-correction, the need for legal regulation depends on the effectiveness of extralegal sanctions in controlling misconduct.

First, individual bloggers have strong reputational incentives to report carefully and truthfully. As discussed in Part I, although creating a blog is cheap, getting noticed may require bloggers to invest in developing a reputation that will cause others to link to them. They may spend significant time posting stories that gradually work their way up the Internet's attention span, finally being linked by major portal blogs. Given low entry costs, many blogs will be competing for attention in every reporting niche. Accordingly, a few careless posts that erode the blogger's reputation for fairness and accuracy could abruptly drop the blog back into obscurity.

Second, bloggers can be constrained by informal conduct norms enforced by social disapprobation<sup>97</sup> and psychological sanctions of shame or guilt and the desire for esteem.<sup>98</sup> Norms have been described as social ordering arising outside the legal system.<sup>99</sup> Because bloggers generally derive little direct financial reward from their activity, the reputational effects of norm violations can be

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96. James D. Miller, *The Depolarizing Power of the Blogosphere* (Jan. 17, 2005), <http://www.tcsdaily.com/article.aspx?id=011705C>.

97. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 207-29 (1991).

98. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 372-75 (1997).

99. See ELLICKSON, *supra* note 97, at 207-08; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 132-35 (1992).

significant. Law arguably can encourage the development of norms through its focal point, expressive, signaling, or similar effects.<sup>100</sup>

Developing norms that control amateur journalists' behavior may not be easy. These journalists by definition comprise a vast group of millions of diverse people rather than a well-defined profession. It may be difficult to find a set of principles that amateur journalists generally can agree on and internalize as norms. Moreover, the self-expression motives of amateur journalists<sup>101</sup> suggest that they will tend to have libertarian views, or at least views incompatible with externally imposed order.<sup>102</sup> The impulses that cause someone to value freedom of expression enough to publish to a small audience without direct compensation are also likely to make these writers resist external constraints. Bloggers' diversity and unruliness could make them especially resistant to efforts to impose norms through law that they have not otherwise internalized.<sup>103</sup>

These considerations are especially relevant given the logistics of regulating the Internet. Individual states cannot easily impose their will on this international medium. U.S. federal law might have some effect, but its legitimacy in imposing norms is undermined by the public choice considerations discussed in the next subpart. Accordingly, the legal system may be unable to devise a coherent set of rules that would have the effect of establishing Internet norms.

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100. See Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 597-606 (1998) (discussing how law provides a focal point for social punishment of norm-deviators or facilitates changes in individuals' preferences); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2185-89 (1996) (showing how law defines "social meaning" of behavior); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1654-72 (2000) (explaining how law's expressive effects can cause behavior to converge on a focal point); Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 778-89 (1998) (showing how law can change behavior by altering what it signals about people); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024-25 (1996) (discussing the function of law in "making statements" rather than controlling behavior directly).

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

102. See Posting of Warren Meyer to Coyote Blog, [http://www.coyoteblog.com/coyote\\_blog/2005/05/why\\_do\\_so\\_many\\_.html](http://www.coyoteblog.com/coyote_blog/2005/05/why_do_so_many_.html) (May 10, 2005, 11:46 EST) ("The Internet today is perhaps the single most libertarian institution on the planet. It is utterly without hierarchy, being essentially just one layer deep and a billion URL's wide. Even those who try to impose order, such as Google, do so with no mandate beyond their utility to individual users.").

103. See Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 564-67 (2001) (discussing the complex relationship between law and norms).

Individuals might attempt to spur the development of extralegal norms by proposing informal codes of ethics. Given bloggers' diversity and libertarian tendencies, it is not surprising that they widely rebuked<sup>104</sup> a *New York Times* writer who suggested that bloggers needed a code of ethics.<sup>105</sup>

Even if it were feasible to develop norms for amateur journalists, it may not be desirable. An important social benefit of amateur journalists is that they are not subject to professional norms and constraints.<sup>106</sup> In devising extralegal constraints, as with legal regulation, one must control the costs of amateur journalism in a way that does not sacrifice its benefits.

Examining an attempt to define a code of ethics indicates the relevant problems. A proposed "Bloggers' Code of Ethics" resembles a Boy Scout's laundry list of seemingly unobjectionable principles, including accuracy, honesty, "never" plagiarizing, respecting privacy and avoiding harm to subjects, and disclosing conflicts.<sup>107</sup> Some objectives, like honesty and accuracy, can be achieved through blogs' inherent capacity to self-correct. Others, like respecting subjects' privacy, are generally admirable, but also hint at the sort of self-indulgent, guild-like "professionalism" that Posner criticized.<sup>108</sup> This might constrain amateur journalism's socially beneficial role in supplementing more constrained professionals.<sup>109</sup> Many of the remaining principles are not easily adapted to blogs. For example, amateurs who see themselves as spreading news and views rather than seeking academic or financial credit may see little reason not to plagiarize professionals. Those who take advertising and other compensation from sponsors with similar views may not be able to see the sort of clear conflict-of-interest line that can be applied to the supposedly neutral professional press.

More fundamentally, the sort of standards that apply to the professional press may not be relevant to millions of bloggers

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104. See, e.g., Posting of Ann Althouse to Althouse, <http://althouse.blogspot.com/2005/05/we-dont-need-your-code-of-ethics.html> (May 8, 2005, 07:01 EST).

105. See Adam Cohen, Op-Ed., *The Latest Rumbling in the Blogosphere: Questions About Ethics*, N.Y. TIMES, May 8, 2005, § 4, at 11.

106. See *supra* Part II.C.5.

107. See Cyberjournalist.net, A Bloggers' Code of Ethics, <http://www.cyberjournalist.net/news/000215.php> (last visited Sept. 24, 2006).

108. See *supra* note 83 and accompanying text.

109. See *supra* Part II.C.5.

publicizing their personal views and information. An attempt to apply such a standard to bloggers therefore may seem to be nothing more than an effort to limit the professionals' competition. This may explain some of the negative reaction to a call for blogging ethics in the *New York Times*,<sup>110</sup> particularly given the general political antipathy between bloggers and the professional media discussed in Part II.F.

Although a single law or ethics code may not create blogging norms, some types of norms might arise in the same Hayekian way that blogs produce accurate information. Amateurs can publish criticisms and alternative proposals, which can achieve ranking dominance in search engines, or individual proposals can evolve through comments and amendments, analogous to a wiki.<sup>111</sup> Given blogs' diversity, multiple codes likely will develop for particular categories, such as for academics and lawyers. Some specific rules might develop to suit blogs generally. Norms might develop against deleting or editing posts in a way that discourages discussion, or against blocking comments and trackbacks in a manner that defeats the interactivity benefits inherent in amateur journalism.<sup>112</sup> Evolution likely will produce better-fitting rules than one-size-fits-all federal regulation, particularly at this early stage in the development of amateur journalism.

#### *F. The Public Choice of Blogging*

An analysis of efficient regulation of amateur journalism requires an understanding of the political forces that might subvert even the best-intentioned regulatory initiatives. In particular, any new type of business or technology threatens jobs and status that depend on existing businesses and technologies. The threat is obvious when millions of moonlighters can give away what the conventional media has been charging for, and without being subject to professional constraints.

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110. See *supra* notes 104-05 and accompanying text.

111. See Wiki Getting Started Faq, *supra* note 18 (distinguishing blogs and wikis).

112. Such norms might be bolstered by hinging legal protection on compliance. See *infra* notes 143-45 and accompanying text (discussing suggestion for an "institutional" interpretation of the Press Clause that might depend, among other things, on compliance with blogging norms).

James Miller has discussed three areas, covered later in Part III, in which blogs are particularly vulnerable to attack by incumbent professionals—campaign finance reform, libel law, and copyright.<sup>113</sup> In each area, professional journalists can be expected to align politically against bloggers in order to protect their competitive advantage by lobbying for distinctions between “professional” journalists and “nonprofessional” bloggers. Professional journalists also might argue for more liability under copyright and libel laws. Although such liability would apply to both professionals and amateurs, professionals are likely to have more legal and financial resources to defend themselves against infringement claims, and more intellectual property to protect.

Professional journalists are likely to be able to out-lobby bloggers even if the latter are numerically a larger group. The professional media raises lobbying funds as a byproduct of its business activities.<sup>114</sup> Moreover, professional journalists are a particularly potent political force because they can lobby not only by financially supporting politicians who advocate for them, but also by directly molding public opinion.<sup>115</sup> Indeed, the professional media frequently have portrayed bloggers in negative terms. For example, in addition to the famous “pajamas” quote,<sup>116</sup> bloggers have been characterized as “partisan operatives whose agendas are as ideological as they come.”<sup>117</sup>

This characterization of bloggers as having a conservative political orientation obviously may be significant in encouraging Democrats to support limitations on blogs. This was evident in a vote on a proposed “Online Freedom of Speech Act” that would have excluded “communications over the Internet” from the definition of “public communication” in the Federal Election Campaign Act.<sup>118</sup> The House was attempting to act prior to the release of final

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113. James D. Miller, *The Coming War on Blogs* (Mar. 25, 2005), <http://www.tcsdaily.com/article.aspx?id=032505B>.

114. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 132-48 (2d ed. 1971) (discussing political power of those who are able to lobby as “byproduct” of other business activities).

115. See Baron, *supra* note 71, at 17-20.

116. See *supra* note 4 and accompanying text.

117. Franke-Ruta, *supra* note 78, at 39.

118. See H.R. 1606, 109th Cong. (2005) (amending the Federal Election Campaign Act of 1971, 2 U.S.C. § 431(22) (Supp. 2002)).

regulations that threatened to regulate Internet speech, including blogs.<sup>119</sup> The measure needed a two-thirds vote to get accelerated consideration by the Senate but fell short because three-quarters of Democrats opposed it.<sup>120</sup> Although Democrats might have been generally inclined to support a free-speech measure, liberal interest groups and a strong *New York Times* editorial opposed this one.<sup>121</sup>

The interest group aspects of distinguishing amateur and professional journalism also apply to constitutional law. In particular, the depth of constitutional protection might depend on its breadth. Professional journalists thus stand to lose not only business, but also legal leverage, by the advent of the amateurs. As Frederick Schauer has pointed out, “[a] Supreme Court unwilling to distinguish among the lone pamphleteer, the blogger, and the full-time reporter for the *New York Times* is far less likely to grant special privileges to pamphleteers and bloggers than it is, as it has, to grant privileges to no one.”<sup>122</sup> In other words, legal privileges for journalists may be a zero-sum game—the broader the availability, the weaker the protection.

### G. Summary

Parts I and II have outlined technological and economic aspects of amateur journalism that should be taken into account when deciding how to regulate this new and developing activity. Several features of this activity should be emphasized.

First, this Article applies to low-cost Internet postings rather than to print or more costly media. The ease of entry into amateur journalism implies a diversity and breadth of information and views that provides significant balance and accuracy at the aggregate level, even if individual actors may be careless or biased.

Second, the analysis concerns reporting or expression of opinions that is not the reporter’s main income-producing activity. Amateur

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119. See *infra* Part III.B.

120. Posting of Declan McCullagh to CNET News.com, [http://news.com.com/Democrats+defeat+election-law+aid+for+blogger/2100-1028\\_3-5929587.html](http://news.com.com/Democrats+defeat+election-law+aid+for+blogger/2100-1028_3-5929587.html) (Nov. 2, 2005, 22:55 EST).

121. See Op-Ed., *The Digital Money Mill*, N.Y. TIMES, Nov. 1, 2005, at A26.

122. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1272 (2005).

journalists typically have weaker incentives to engage in the activity than professionals, and therefore may be more easily deterred by regulation.

Third, amateur journalism involves one or more of several types of interactivity such as comments, links, and trackbacks, and is subject to the page-ranking mechanisms of modern search engines. Like the ease of entry, this provides self-correction, and therefore accuracy, at the aggregate level. Although blog features also can be adopted by professional journalists, they may be constrained by the need to protect investments in intellectual property.

Fourth, even if some regulation of blogs might theoretically be warranted, any laws that are actually adopted will be the product of interest group pressure. Professional journalists have a strong incentive to protect themselves against this powerful and emerging competition, and therefore to lobby against laws that relegate amateur journalists to a lower regulatory status. This counsels caution in proposing regulatory reforms of amateur journalism.

### III. REGULATION OF AMATEUR JOURNALISM

This Part applies the above analysis to specific legal issues regarding amateur journalism.<sup>123</sup> It focuses on the tradeoff between the social costs and benefits of regulation. On the one hand, amateur journalism raises concerns about lack of intermediation and market checks on harmful blogs. On the other hand, regulators should recognize the desirability of maintaining amateurs' easy access to the public sphere, the risk of overdeterrence because of amateurs' low-powered incentives, and the constraints inherent in bloggers' need to establish and maintain a reputation to gain attention on the Web.

The considerations discussed in this Part apply mainly when the regulatory concern is with the accuracy or balance of information. Given the attributes of amateur journalism discussed in Parts I and II, extensive regulation may be both unnecessary and counterpro-

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123. This analysis focuses on U.S. law. The Internet is international, and some interesting choice-of-law issues will have to be addressed. For a discussion of some of these issues, and a recommendation that they be solved through enforcement of contractual choice of law, see Larry E. Ribstein & Bruce H. Kobayashi, *State Regulation of Electronic Commerce*, 51 EMORY L.J. 1, 41-62 (2002).

ductive because the proliferation and freedom of amateur journalists itself addresses inaccuracy and bias. Part III.I discusses the special considerations that apply to protection of property rights, privacy, and other areas in which the constraints on inaccuracy are less important.

Throughout this Part, the objective is not to recommend specific laws or approaches. That would require not only significantly more analysis than is possible in this overview, but also more detailed assumptions about the nature of amateur journalism than are warranted at this early stage. Instead, this article recommends some considerations that should matter in addressing the legal issues amateur journalism raises based on the above general analysis of this activity.

#### *A. Application of Special Press Privileges*

Professional journalists have a privilege under some state laws and, possibly, under the First Amendment, against being compelled in court to name sources.<sup>124</sup> This privilege helps journalists to get information, and thereby bolsters the free press as a check on government abuse. The privilege was widely discussed in connection with a special prosecutor seeking testimony from reporters in his investigation of the leak of classified information that Valerie Plame was a CIA agent.<sup>125</sup>

The question for present purposes is the extent to which amateur journalists should have any such privilege. This issue goes to the heart of the distinction between amateur and professional journalists. If amateurs are likely to contribute inaccurate or otherwise low-value speech, society should not encourage their activities by

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124. See Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism To Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1384-86 (2003) (discussing the journalist's privilege, its general scope, and its possible application to bloggers). The existence of any journalist's privilege under the First Amendment remains uncertain. *Branzburg v. Hayes*, 408 U.S. 665, 702-09 (1972), found no such privilege, though Justice Powell's concurring opinion suggested a privilege may exist under some circumstances. *Id.* at 709-10 (Powell, J., concurring). Although U.S. Courts of Appeals nevertheless generally applied Justice Powell's concurrence in recognizing a privilege, Judge Posner strongly questioned this tendency in *McKevitt v. Pallasch*, 339 F.3d 530, 531-32 (7th Cir. 2003).

125. See Op-Ed., *Shielding Reporters*, N.Y. POST, July 21, 2005, at 30.

making it easier for them to get information. On the other hand, if, as argued earlier, amateurs are subject to reputational and other sanctions and supplement the information and views of professional journalists,<sup>126</sup> the law should encourage their activities by giving them privileges and protections similar to those of professional journalists.

The journalist's privilege directly implicates the public choice considerations discussed earlier.<sup>127</sup> Extending the privilege to include amateurs would arguably weaken it as to both professionals and amateurs. This applies both to constitutional arguments and to efforts to enact a federal journalist's privilege. Journalists' only political hope for an absolute privilege may be a bright line between amateurs and the professional media, even if the better policy result is a weaker privilege that extends to both categories.

A leading case on this issue is *Apple Computer, Inc. v. Doe 1*, which denied a blogger a protective order that would have prevented him from having to disclose sources in a trade secret suit brought by Apple.<sup>128</sup> The blogger claimed he was privileged as a journalist.<sup>129</sup> The court denied the motion, noting that "[d]efining what is a 'journalist' has become more complicated as the variety of media has expanded."<sup>130</sup> It quoted a dictionary definition of "journalist" as "a writer who aims at a mass audience."<sup>131</sup> The court, however, said it need not decide whether the blogger "fits the definition of a journalist, reporter, blogger, or anything else" because "there is no license conferred on anyone to violate valid criminal laws."<sup>132</sup>

If the court had recognized a journalist's privilege under these facts, the movant may have been held entitled to its protection. The blogger described himself 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*

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126. See *supra* Part II.E.

127. See *supra* Part II.F.

128. No. 1-04-CV-032178, 2005 WL 578641 (Cal. Super. Mar. 11, 2005), at \*8.

129. *Id.* at \*1.

130. *Id.* at \*5.

131. *Id.* at \*5 n.6.

132. *Id.* at \*7.

*Bible*.”<sup>133</sup> Some elements of the definition quoted above suggest the need for a “mass” or “public” audience.<sup>134</sup> The movant was certainly more than a casual contributor.<sup>135</sup> But this case leaves the question whether the privilege should be available to someone who blogs only to express himself.

Spurred largely by the Plame controversy, Congress is considering a federal shield law, the Free Flow of Information Act,<sup>136</sup> that would protect journalists from revealing sources except under designated circumstances. The bill would apply to

a person who, for financial gain or livelihood, is engaged in gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing news or information as a salaried employee of or independent contractor for a newspaper, news journal, news agency, book publisher, press association, wire service, radio or television station, network, magazine, Internet news service, or other professional medium or agency which has as 1 of its regular functions the processing and researching of news or information intended for dissemination to the public.<sup>137</sup>

Congressmen have expressed reservations about applying the bill to bloggers. Senator John Cornyn said he doubted “whether the proposed shield law should apply to the ‘Internet blogger who has a cell phone with a camera, and maybe a laptop computer, and can publish with equal ease as a journalist,’”<sup>138</sup> and Senator Richard Lugar, the bill’s primary sponsor, said “bloggers should ‘probably not’ be considered journalists.”<sup>139</sup>

The most important question in deciding whether to apply the journalist’s privilege to bloggers is whether bloggers should be deemed to serve an information function similar to that of journalists. As stressed throughout this Article, although individual

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133. *Id.* (quoting Movant’s Opening Brief) (brackets and ellipses in original).

134. *See id.* at \*5.

135. *See id.* at \*7.

136. S. 2831, 109th Cong. (2006).

137. *Id.* § 3(3).

138. Posting of Anne Broache to CNET News.com, [http://news.com.com/Senators+Bloggers+may+not+be+true+journalists/2100-1047\\_3-5902539.html](http://news.com.com/Senators+Bloggers+may+not+be+true+journalists/2100-1047_3-5902539.html) (Oct. 19, 2005, 15:00 EST) (quoting Senator Cornyn).

139. *Id.* (quoting Senator Lugar).

bloggers lack the checks and balances of journalists, amateur journalism as a whole is capable of self-correction that can produce equivalent accuracy. Moreover, the openness of blogs avoids the biases that can infect professional journalism.

On the other hand, these considerations might not support the extraordinary protection of shield laws and constitutional privileges. Indeed, they may cut the other way. As long as amateur journalism thrives, it may be unnecessary to offer privileges to individual bloggers. Indeed, even a professional journalist's privilege may be unnecessary in a world that includes bloggers. Moreover, extending the journalist's privilege too broadly may involve the special danger of broadly disabling investigation of harmful or criminal behavior. Thus, it may be necessary to ensure that the privilege is available only to those who are subject to strong professional norms and reputational sanctions, even if this distinction risks reinforcing professional biases.<sup>140</sup>

Shield law politics also matters in evaluating potential legal approaches. Republicans, though apparently reluctant to protect them through a shield law, have urged strong protection of bloggers from the election laws.<sup>141</sup> In the case of the election laws, the relevant speech may favor a particular viewpoint. However, with respect to the shield laws no one can know who might be called on to provide information to prosecutors. This disparity of treatment indicates that the regulation of amateur journalists may be at least partly content-oriented rather than based on the method of speech. Whether this disparity raises First Amendment concerns, one should keep in mind these public choice considerations when considering how to approach legal regulation of amateur journalism.

These political and policy considerations suggest that the best result would be no federal law, leaving any protection to the laboratory of state law. Most states already have shield laws,

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140. The context in which disclosure is sought also may matter. The *Apple* case implicated proprietary rights in information rather than the problem of inaccurate or harmful reporting. As discussed in Part II.D.3 and Part III.I, it may be necessary to regulate amateurs regarding this type of accurate but harmful activity because the self-corrective mechanisms of blogs may not apply.

141. *Cf. supra* notes 118-21 (discussing political split on Online Freedom of Speech Act).

which may or may not apply to blogs.<sup>142</sup> National uniformity is unnecessary. The applicable state shield law can supply a default contractual term in dealings between the media and the source. A source who wants anonymity can go to journalists who work in a state with a strong state shield law. Without federal statutory law or constitutional constraints, states can decide on their preferred tradeoffs between the accuracy costs of protecting sources and the increased information that results from protection. Because the Internet facilitates quick dissemination of news from any source, the national interest in whether a particular state has a shield law is minimal except to the extent that newspapers based in a particular jurisdiction have a special role in gathering and disseminating particular news.

A related question is whether amateur journalists are entitled to any extra constitutional protection afforded by the "Press Clause" of the First Amendment.<sup>143</sup> Paul Horwitz argues for protecting blogs under an "institutional" approach to the First Amendment that asks whether blogs play a role in furthering democracy that is comparable to that of the "Fourth Estate" of professional journalism.<sup>144</sup> Horwitz reasons that this approach calls for an examination of the norms and characteristics of blogging as an institution.<sup>145</sup> The courts might give bloggers an extra journalist-type level of constitutional protection only to the extent that they participate in the collective accuracy-producing process discussed earlier in Part II, as by enabling comments and trackbacks, and adhere to the evolving accuracy-related norms of blogging. This approach might, however, encourage the development of professional-type constraints on the activities of amateur journalists that reduce the benefits of amateur journalism in avoiding the professionals' biases.

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142. See Berger, *supra* note 124, at 1384-86 (discussing appropriate scope of reporter's privilege); James C. Goodale et al., *Reporter's Privilege*, 580 PLI/PAT 27, 37, 189-424 (1999) (reviewing state shield laws and constitutional privileges in all fifty states).

143. The Press Clause is the phrase "or of the press" in the First Amendment. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

144. See Paul Horwitz, *Or of the [Blog]*, 11 NEXUS 45, 58-62 (2005).

145. See *id.*

This discussion is intended only to indicate considerations that should be brought to bear in regulating blogs—in this case, determining whether amateurs should have the same privileges as professional journalists. These considerations involve balancing the lack of constraints on individual blogs against the information function of blogs in the aggregate. The difficulty of arriving at the proper balance across the vast range of blogs, together with the politics of regulating amateur journalism, suggest the propriety of a state rather than federal solution to the problem.

### *B. Election Laws*

Campaign finance and other election laws may implicate considerations closely related to accuracy of information in assuring presentation of a diversity of views. Just as truth more likely emerges from many sources than from a single outlet, political decisions more likely reflect voters' preferences if voters and candidates can speak freely. Ability to speak, in turn, often depends on the ability to finance dissemination of one's views.

The application of the election laws to bloggers has been particularly controversial since the 2004 U.S. presidential election because of the perception that most bloggers supported the Republicans and affiliated causes.<sup>146</sup> Candidates might skirt campaign finance restrictions by coordinating with sympathetic bloggers. On the other hand, applying the election laws to millions of amateur journalists may require invasive regulation that could constrain amateurs' public access.

The Federal Election Commission (FEC) attempted to avoid the issue by broadly exempting Internet activities. These exemptions were invalidated in *Shays v. FEC*.<sup>147</sup> FEC Commissioner Bradley Smith then elicited a strong reaction when he suggested that political bloggers may be subject to the McCain-Feingold campaign finance law.<sup>148</sup>

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146. See Kurtz, *supra* note 4.

147. 337 F. Supp. 2d 28, 130-31 (D.D.C. 2004).

148. Posting of Declan McCullagh to CNET News.com, [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) (Mar. 3, 2005, 07:00 EST) (recounting an interview with Bradley Smith).

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

- (B) 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 ....<sup>149</sup>

Blogs may or may not be included in this definition depending on the emphasis on regularity in defining “periodical.”

Blogs raise at least three issues for regulation of campaign finance. First, political campaigns might coordinate with bloggers who link to campaign websites, thereby increasing the leverage of campaign expenditures. Second, corporations might establish and fund blogs and argue that the expenditures are excluded under the above provision. Third, voters may not be able to determine when bloggers are paid for their opinions. Though this issue is potentially a problem in the professional media, it is harder to solve when readers must sort through millions of blogs. One election law expert suggests 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.”<sup>150</sup>

As a policy matter, the election laws are supposed to address “corruption” of the political process by those with easy access to money.<sup>151</sup> As a potential conduit of political money, blogs arguably are part of this problem. However, amateur journalists also can be viewed as part of the solution. When viewed on an aggregate rather than individual basis, the participation of many amateurs in political debate makes it harder for money to dominate.

From this standpoint, any regulation must not discourage the proliferation of true political blogs. Requiring disclosures or imposing other restrictions and sanctions easily could reduce both the number and the diversity of political bloggers. Most political bloggers are motivated by the desire to express themselves rather

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149. Federal Election Campaign Act, 2 U.S.C. § 431(9)(B) (2000).

150. Posting of Richard Hasen to Personal Democracy Forum, <http://www.personaldemocracy.com/node/416> (Mar. 7, 2005, 11:37 EST).

151. See Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 116 (1992) (internal quotation marks omitted) (discussing the corruption policy as applied to corporate contributions).

than to make money through advertising or by selling their expertise. They therefore generally may prefer not blogging to taking a significant risk of liability, paying for legal advice, or spending significant time complying with the law. Those who are not deterred may be a self-selected group with particularly strong views or links to campaigns.

The market can solve some specific problems of coordination and bias even without regulation. The large number of bloggers and low entry barriers to amateur journalism will guarantee that there are bloggers on all sides of political issues with significant self-expression incentives to expose cheaters. The risk of reputational harm may be enough to constrain the more influential bloggers, who also have the most reputation to lose, from damaging their credibility by maintaining excessive or secret connections with political campaigns.

These general considerations enable an evaluation of the FEC's recently proposed regulations of Internet activities, including blogging.<sup>152</sup> An important issue the FEC grappled with is how the regulations should apply to corporate blogs. In general, little justification exists for restricting corporate contributions based on the need to constrain corporate "corruption" of the political process or agency costs within the firm. Indeed, the real reason for regulating corporate campaign contributions is to protect corporations from "shakedowns."<sup>153</sup> Blogs further complicate regulation of corporate campaign activities. Given the low-level incentives of many political bloggers, regulating "corporate" blogs could silence these voices and thereby give more power to, for example, large nonprofit groups that so far are unregulated.

The FEC's final rules indicate a recognition of these costs of regulating blogs. The rules clearly exempt Internet campaign activities that involve "uncompensated personal services," "regardless of who owns the equipment and services" that the individual

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152. See Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110, 114), available at <http://www.fec.gov/agenda/2006/mtgdoc06-20.pdf>.

153. See Ribstein, *supra* note 151, at 144-59; see also Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1105 (2002) (contending that the only nonagency rationale for the different treatment of corporate and political speech is the fear that management will engage in corporate rent seeking).

uses.<sup>154</sup> This broad exemption avoids several questions that were raised by proposed rules that turned on whether the blogger was working “independently” and on who owned the computer on which she worked.<sup>155</sup>

As with the other issues discussed in this Part, this analysis is intended only to indicate the considerations relevant to regulating amateur journalism. In particular, with respect to the campaign finance laws, one must keep in mind that proliferation of blogs may be part of the solution to any supposed “corruption” rather than part of the problem.

### C. Media Ownership Restrictions

FCC limits on media ownership are intended to prevent undue industry concentration and ensure a diversity of viewpoints in every market.<sup>156</sup> The FCC recently tried to rationalize these rules, but ran into a roadblock in *Prometheus Radio Project v. FCC*.<sup>157</sup>

Regulation of media ownership in local markets is questionable,<sup>158</sup> particularly given the many specialized information sources now available on the Internet, including the rise of blogs. As Judge Scirica, dissenting in *Prometheus*, noted:

[T]he 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

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154. See Internet Communications, 71 Fed. Reg. at 18,613 (to be codified at 11 C.F.R. §§ 100.94(a)(1)-(2), 100.155(a)(1)-(2)).

155. See Internet Communications, 70 Fed. Reg. 16,967 (proposed Mar. 23, 2005) (to be codified at 11 C.F.R. pts. 100, 110, 114), available at <http://www.fec.gov/agenda/2005/mtgdoc 05-16.pdf>.

156. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 383 (3d Cir. 2004).

157. *Id.*

158. See Jonathan A. Knee, *Should We Fear Media Cross-Ownership?*, REGULATION, Summer 2003, at 16.

to post a weblog with daily entries and photos from Baghdad for viewing anywhere in the world.<sup>159</sup>

As with the campaign finance laws,<sup>160</sup> blogs therefore can provide a solution to the perceived problem of big money corrupting public discourse, as long as they are not discouraged by excessive regulation.

#### *D. Defamation Law*

Amateur journalists, like other speakers, may be held liable for reputational injuries. The main question in this respect concerns the extent to which the First Amendment and laws protecting free speech insulate bloggers from liability and permit them to sue for defamation.

The most important case on many free speech issues relating to bloggers is *Gertz v. Robert Welch, Inc.*, in which the Supreme Court held that states may permit defamation actions by a "private individual" based on negligence or other fault-based standards, whereas public officials or public figures must prove "actual malice."<sup>161</sup> The Court reasoned:

Public 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 than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

... 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.... 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,

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159. *Prometheus*, 373 F.3d at 469 (Scirica, J., dissenting).

160. See *supra* Part III.B.

161. 418 U.S. 323, 334, 344-47 (1974).

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.<sup>162</sup>

Amateur journalism may force rethinking of this distinction. For example, *Gertz* indicates that a blogger who is prominent among amateur journalists, even if not generally in society, would be deemed as a result of his blogging activities to have “thrust [himself] to the forefront” of a controversy.<sup>163</sup> One who defamed the blogger would then be judged under the lax actual malice standard. Also, the blogger may be deemed to have “effective opportunities for rebuttal” through his blog.<sup>164</sup> Even amateurs arguably have access to a public forum to “counteract false statements” and have opened themselves up for attack by publicly posting comments.<sup>165</sup>

The availability of self-help was emphasized in the leading case on defamation specifically in the blogging context, *Doe v. Cahill*.<sup>166</sup> The Delaware Supreme Court held that an Internet service provider need not disclose a blogger’s identity in a defamation case, stressing the access for rebuttal discussed in *Gertz*:

The internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The plaintiff can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight. This unique feature of internet communications allows a potential plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a result of an anonymous defendant’s allegedly defamatory statements made on an internet blog or in a chat room.<sup>167</sup>

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162. *Id.* at 344-45.

163. *See id.* at 345.

164. *See id.* at 344.

165. *See id.*

166. 884 A.2d 451 (Del. 2005).

167. *Id.* at 464. More recently, *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Development, Inc.*, No. 0425, 2006 WL 37020 (Pa. Com. Pl. Jan. 4, 2006), after discussing

Bloggers' public access, however, may be more apparent than real because it depends not just on being able to plug into the Internet, but also on the informal screening of Google and other search engines that enable readers to find the blog.<sup>168</sup> The courts might take blog rankings into account for purposes of determining public figure status and damages, or emphasize the blog's importance within a subcommunity that is relevant for reputation purposes.

Additional questions remain concerning the extent to which amateur journalists are entitled to the same level of protection from defamation actions that professional journalists receive. The Press Clause of the First Amendment supports special treatment for the "press," but whether amateur journalists would qualify remains unclear.<sup>169</sup>

*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>170</sup> raised questions about a possible distinction between the journalists and other reporters that might be relevant to blogs. The Court held that a private individual could recover for defamation in a credit report, applying *Gertz* to a statement that was not a "matter[] of public concern."<sup>171</sup> Justice White, concurring in the judgment, clarified that "the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech."<sup>172</sup> On the other hand, Justice Powell's plurality opinion noted that

the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental

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*Cahill* and other authorities, ordered a website owner to reveal the identities of anonymous posters, holding that, because statements about the plaintiff law firm on the site were defamation per se, they were not entitled to First Amendment protection. *Id.* at \*\*4-8, \*10.

168. *See supra* Part II.C.2.

169. *See supra* notes 143-45 and accompanying text.

170. 472 U.S. 749 (1985) (plurality opinion).

171. *Id.* at 762-63.

172. *Id.* at 773 (White, J., concurring in the judgment).

“chilling” effect of libel suits would be of decreased significance.<sup>173</sup>

This reasoning suggests that the Court might give a higher level of First Amendment protection to amateur than to professional journalists because the former have less robust self-expression motives for speaking.<sup>174</sup>

Distinguishing professional and amateur journalists for purposes of defamation actions may be particularly important in applying state statutes that provide protection from defamation lawsuits if the publisher retracts the allegedly defamatory statement.<sup>175</sup> For example, in *Mathis v. Cannon*, the Georgia Supreme Court applied the Georgia retraction statute to a posting on an Internet bulletin board.<sup>176</sup> The statute covered a statement “in a regular issue of the newspaper or other publication.”<sup>177</sup> A lower-level Georgia court had held that the statute applied only to print media.<sup>178</sup> The *Cannon* court noted that the legislature had amended the statute to substitute “other publication” for “magazine or periodical.”<sup>179</sup> The court held that a “distinction between media and nonmedia defendants ... is difficult to apply and makes little sense when the speech is about matters of public concern” and “fails to accommodate changes in communications and the publishing industry due to the computer and the Internet.”<sup>180</sup> The court also observed that a broad reading of the statute would avoid having to make difficult distinctions about covered publications “at a time when any individual with a computer can become a publisher.”<sup>181</sup> The court

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173. *Id.* at 762-63 (plurality opinion) (internal citations omitted).

174. *But see supra* Part II.B (discussing amateur journalists’ strong self-expression motives).

175. *See* Elec. Frontier Found., Bloggers’ FAQ: Online Defamation Law, <http://www.eff.org/bloggers/lg/faq-defamation.php> (last visited Sept. 24, 2006) (discussing retractions).

176. 573 S.E.2d 376, 385 (Ga. 2002).

177. *Id.* at 383-84 (quoting GA. CODE ANN. § 51-5-11 (b)(1)(B) (2000)).

178. *Williamson v. Lucas*, 320 S.E.2d 800, 802 (Ga. Ct. App. 1984).

179. *Mathis*, 573 S.E.2d at 384 (internal quotation marks omitted).

180. *Id.* at 384-85.

181. *Id.* at 385. The court cited the U.S. Supreme Court’s decision striking down the Communications Decency Act, *Reno v. ACLU*, 521 U.S. 844, 885 (1997). The Supreme Court observed that “thousands of individual users and small community organizations are using the Web to publish their own personal ‘home pages,’ the equivalent of individualized newsletters about that person or organization, which are available to everyone on the Web.” *Id.* at 853 n.9.

cited Justice White's concurring opinion in *Dun & Bradstreet* as to the inappropriateness of distinguishing among types of speakers.<sup>182</sup> The court concluded that its ruling "strikes a balance in favor of 'uninhibited, robust, and wide-open' debate."<sup>183</sup>

Although the above reasoning generally would support giving full protection to all Internet speakers, including bloggers, some of the court's reasoning applies specifically to the retraction context. The court noted that punitive damages may be fairer against the media than against an individual, who may reach only a small audience and whose retraction would likely target the same small audience.<sup>184</sup>

Finally, the extent of bloggers' liability for comments placed by others on their blogs is unclear. As discussed in Part II, an advantage of blogs is interactivity, particularly blog posts' ability to evolve through comments and trackbacks.<sup>185</sup> Although professional journalism on the Internet has incorporated similar features,<sup>186</sup> professionals' need to protect intellectual property rights might limit how much interactivity they can provide.<sup>187</sup> Blogs' interactivity, however, may decline if amateurs are held liable for statements by others.

Bloggers and other journalists may have federal protection under section 230 of the Communications Decency Act<sup>188</sup> against defamation liability for publishing material written by others. This provision has been held, for example, to protect America Online (AOL) from liability for statements by others it disseminates.<sup>189</sup> A

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182. See *Mathis*, 573 S.E.2d at 385 & n.32.

183. *Id.* at 386. For an earlier decision reaching a contrary result as to a message posted to a bulletin board, see *It's in the Cards v. Fuschetto*, 193 Wis. 2d 429, 436-37, 535 N.W. 2d 11, 14 (Wis. Ct. App. 1995) (holding that a bulletin board "is a random communication of computerized messages analogous to posting a written notice on a public bulletin board, not a publication that appears at regular intervals," and that the retraction statute was intended to relate only to the print media and not to broadcast media or computer networks or services).

184. *Id.* at 385.

185. See *supra* Part II.C.4 and notes 12-13.

186. See *supra* notes 66-67 and accompanying text.

187. See *supra* Part II.C.4.

188. 47 U.S.C. § 230 (2000).

189. *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 984-86 (10th Cir. 2000); *Zeran v. Am. Online Inc.*, 129 F.3d 327, 330-32 (4th Cir. 1997). For an extensive inventory of cases applying § 230, see Eric Goldman, *Selected Cases Regarding Online Service Provider Liability*, <http://www.ericgoldman.org/Resources/osliability.htm> (last visited Sept. 24, 2006).

blog author may be a “provider or user of an interactive computer service” under the Act who is insulated from liability for a comment on her blog on the ground that the comment is “information provided by another information content provider.”<sup>190</sup> The Act defines an “interactive computer service” as

any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.<sup>191</sup>

A blog that enables comments might fall within this definition as an “information service” or, through the blogging front-end, “access software provider” equivalent to an Internet hosting service.<sup>192</sup> In either case, the blog would be “provid[ing] or enabl[ing] computer access by multiple users to a computer server.”<sup>193</sup> If a blog is within the definition, the author would be insulated from liability irrespective of knowledge or notice of defamatory content or other facts.<sup>194</sup>

The provision mainly has been applied to AOL-type internet service providers (ISPs) that provide a neutral medium. Broadening the application significantly beyond ISPs raises many questions about the law’s potential breadth, and could make significant inroads on state defamation law. On the other hand, broad application to websites that incorporate comments or postings from third parties arguably would comport with Congress’s stated purpose “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.”<sup>195</sup> Congress clearly sought to prevent this medium from being strangled by the potential for open-ended liability. Imposing extensive responsibility for the accuracy of Internet posts could force firms like AOL, which serve millions of users, to sharply reduce the Internet’s freedom. Bloggers who enable comments would not seem to face an equivalent mass-liability problem. But

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190. 47 U.S.C. § 230(c)(1).

191. *Id.* § 230(f)(2).

192. *Id.*

193. *Id.*

194. *See Zeran*, 129 F.3d at 330.

195. 47 U.S.C. § 230(b)(2).

here again one must consider bloggers' low-level incentives. Although bloggers derive enough value from self-expression to risk liability for their own statements, they may not want to take responsibility for others' statements. If bloggers are not protected, they thus might decline to take the liability risk of enabling comments.<sup>196</sup> This outcome would reduce blogs' interactivity and perhaps even blogs' accuracy because comments enable corrections by disinterested readers. As with application to AOL, this would thwart the Internet's potential as a free and open market for information.

A case applying section 230 to bloggers' liability for comments, *DiMeo v. Max*,<sup>197</sup> is consistent with this analysis. The court dismissed a suit alleging that the plaintiff was defamed by comments written by others on defendant's website. The court held that the website fit the definition of an "interactive computer service."<sup>198</sup> The court also held that defendant did not lose his protection by exercising editorial control over comments on his site because such a result "would deter the very behavior that Congress sought to encourage."<sup>199</sup>

The point here as elsewhere in this Article is not to draw definitive conclusions as to the extent of amateur journalists' liability, but to suggest the considerations that courts should bring to bear in adjudicating legal issues concerning amateur journalists. Most importantly, courts should take into account the low-level incentives of amateur journalists, and therefore the significant potential deterrent effect of liability. They should also evaluate accuracy in light of the self-corrective and interactive nature of amateur journalism. Finally, courts should assess bloggers' ability to self-protect based on whether they are likely to be noticed and not simply on their access to the Web.

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196. This risk might include being deemed to have knowledge of the comment's falsity based on an e-mail from the subject of the comment. See *Zeran*, 129 F.3d at 333 (discussing potential chilling effect of such notice-based liability on Internet service providers).

197. No. CIV.A.06-1544, 2006 WL 1490098 (E.D.Pa. May 26, 2006).

198. *Id.* at \*5.

199. *Id.* at \*6.

*E. Professional Regulation*

Blogs may be subject to regulation as professional practice or advice. Although the following discussion focuses on lawyer licensing, it is generally applicable to other professions, such as medicine or investment advice. Blogs on legal subjects raise potential issues as to whether they (1) constitute unauthorized law practice by a nonlawyer; (2) might be unauthorized practice in a state other than where the lawyer is licensed; and (3) may be regulated as impermissible lawyer advertising.

The first two types of problems seem remote with respect to the sort of amateur journalism that is the focus of this Article. In the Internet context, the courts have defined legal advice for purposes of unauthorized practice of law as involving individualized legal services rather than generalized information such as self-help kits.<sup>200</sup> This suggests that an answer to a specific legal query on a listserve might constitute practicing law, but a website that includes general legal discussions probably would not.

Even if courts extend unauthorized practice laws beyond individualized legal services, they should hesitate to cover general statements in lawyer blogs. This conclusion follows from the policies underlying lawyer licensing. The classic argument in favor of lawyer licensing is that the law should address information asymmetries between lay people and professionals in the rendition of professional services.<sup>201</sup> States accordingly prescribe standards as to who is qualified to give this advice, and regulate the conduct

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200. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. 3:97-CV-2859H, 1999 WL 47235, at \*6 (N.D. Tex. Jan. 22, 1999) (holding that "Quicken Family Lawyer" CD-ROM that enabled consumers to prepare wills and other legal documents violated Texas's prohibition against the unauthorized practice of law because it "purports to select" the appropriate legal document, "customizes the documents," and "creates an air of reliability about the documents"), *vacated*, 179 F.3d 956, 956 (5th Cir. 1999) (*per curiam*) (reaching a contrary conclusion after Texas legislature amended the law to provide "that the practice of law does not include the design, creation, publication, distribution, display, or sale ... [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney" (quoting TEX. GOV'T CODE ANN. § 81.101 (Vernon 1998)) (brackets and ellipsis in original) (internal quotation marks omitted)); see also Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 357-58 (2004) (summarizing professional rules on Internet and other computerized legal services).

201. See Ribstein, *supra* note 200, at 304.

of those who are licensed to give it. Licensing standards are only rough proxies for the quality of legal services and might skeptically be viewed as the product of the lawyer's cartel, serving mainly to hinder access to legal services by low-income people.<sup>202</sup> Even if some licensing laws are defensible, these laws should not be designed so as to deter speech that would alleviate information asymmetries in professional advice. Lawyer blogs can enable consumers of legal services to evaluate legal advice or inform them as to whether they need to see a lawyer.

To be sure, there is a danger that blogs might contain incorrect legal advice. This risk might be reduced by screening out those who do not have certain minimum professional credentials. As discussed in Part II, however, blogs are subject to correction by other blogs and by commentary. Moreover, applying licensing laws to blogs might lead to an adverse selection problem: practicing lawyers, whose blogs may be most valuable, are most likely to be deterred by the threat of unauthorized practice liability outside their home state, whereas nonlawyers, whose legal advice is least valuable, are least likely to be deterred by these laws.

An alternative justification for lawyer licensing is to give lawyers the incentive to invest in the development of law by giving them a quasi-property right in the law of the state in which they are licensed.<sup>203</sup> Applying licensing laws to blogs, however, is unnecessary to protect this investment. Lawyer bloggers are mainly concerned with marketing their main business in the states where they are licensed, whereas nonlawyer bloggers' offhand legal-type statements are seriously unlikely to threaten lawyers' businesses.

An important aspect of applying professional licensing statutes to lawyer blogs concerns advertising restrictions. For example, Kentucky attempted to apply a rule charging fees for lawyer advertising to lawyer blogs.<sup>204</sup> Whether or when blogs that do not directly advertise a lawyer or firm will be deemed to be advertising remains unclear.<sup>205</sup> As with the application of unauthorized practice

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202. See *id.* at 309-13.

203. See *id.* at 331-32.

204. See KY. RULES OF PROF'L CONDUCT R. 7.02(1) (defining "[a]dvertise" and "advertisement"); *id.* R. 7.05(2) (imposing a \$50 fee for advertisements).

205. See Fred C. Zacharias, *What Direction Should Legal Advertising Take?*, 2005 PROF. LAW. SYMP. (forthcoming 2006) (manuscript at 18-19), available at <http://ssrn.com/>

laws to blogs, applying restrictions on professional advertising would be inconsistent with the analysis in Part II. Restrictions on lawyer advertising, like licensing laws in general, address laymen's inability to assess the quality of legal services. But enabling proliferation of blogs and comments, and the reputational constraints on bloggers, also can effectively address this asymmetry. For example, a law firm's blog that discusses a legal issue in order to encourage readers to use the firm's services will expose the firm to commentary and refutation if its advice is erroneous. This exposure gives the firm an incentive to be careful about what it says.

As in the other legal areas discussed in this Part, the application of professional licensing rules to amateur journalism should take account of economics of blogging discussed in this Article. To the extent that licensing laws are intended to address information asymmetry, courts and regulators should consider blogs' aggregate information value and not just the potential inaccuracy of individual blogs.

#### *F. Blogs as Commercial Speech*

Regulation of blogs may involve significant First Amendment problems. For example, Kentucky's attempt to charge fees for lawyer advertising on blogs<sup>206</sup> was criticized on this basis.<sup>207</sup> The Supreme Court has applied the First Amendment in striking down overbroad regulation of attorney advertising, citing the information

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abstract=829305 (noting that "[m]uch of what [legal web]sites contain is designed to be informational and useful to a variety of correspondents.... At the same time, however, lawyer web sites routinely add self-laudatory components that clearly constitute advertising designed to attract customers"); see also Vanessa S. Browne-Barbour, *Lawyer and Law Firm Web Pages as Advertising: Proposed Guidelines*, 28 RUTGERS COMPUTER & TECH. L.J. 275, 302 (2002) (discussing the lack of uniformity in laws governing lawyer communications on the Internet). The Model Rules provide that advertising is "communication about the lawyer or the lawyer's services." MODEL RULES OF PROF'L CONDUCT R. 7.1 (2004). Some jurisdictions characterize communications as advertising depending on their motives to attract customers. See, e.g., CAL. BUS. & PROF. CODE § 6157(c) (West 2005) ("'Advertise' or 'advertisement' means any communication ... that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney.").

206. See *supra* note 204 and accompanying text.

207. See Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1118200009.shtml> (June 7, 2005, 23:06 EST).

functions of these communications.<sup>208</sup> For the reasons discussed earlier, this concern is particularly applicable to blogs.

The main First Amendment question regarding blogs is whether and under what circumstances they might be entitled only to the lower level of constitutional protection given "commercial speech."<sup>209</sup> A blog might be "commercial" if it cross-promotes another business and thereby directly proposes commercial transactions, but not if it is primarily devoted to the author's personal opinions on politics and culture.<sup>210</sup> The commercial speech doctrine provides little theoretical basis for drawing a line in marginal cases that have some commercial aspects. Indeed, the market for ideas arguably is constitutionally indistinguishable from other markets.<sup>211</sup>

One feature of blogs ultimately may persuade the courts to take many of them out of the commercial speech category. As discussed in Part II.B, bloggers generally have low-powered reputational-type incentives rather than a strong profit motive, and therefore may be more deterred by regulation and the threat of penalties than conventional commercial speakers. The Court's current distinction in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>212</sup> between commercial and noncommercial speech is based at least partly on the theory that profit-motivated speech is less likely to be chilled by regulation.<sup>213</sup> This argument makes general economic sense.<sup>214</sup> However, it may not be useful in all

208. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643 (1985) ("The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights."); *Bates v. State Bar*, 433 U.S. 350, 374 (1977) (noting that "it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision"); Zacharias, *supra* note 205 (manuscript at 8 n.31).

209. For a discussion of the commercial speech doctrine, see generally Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KAN. L. REV. 163 (1994). The Supreme Court recently avoided the opportunity to decide the scope of the commercial speech doctrine. See *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. dismissed as improvidently granted*, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

210. See Butler & Ribstein, *supra* note 209, at 165-66 (describing commercial speech generally as speech that proposes commercial transactions).

211. See R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 1-5 (1977); R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 384-85 (1974); Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 5-6 (1964).

212. 425 U.S. 748 (1976).

213. See *id.* at 771 n.24.

214. See Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L.

cases, because many political speakers may have robust incentives, whereas many commercial speakers are agents who lack strong incentives to promote their firms' interests.<sup>215</sup> But the chilling effect argument does apply generally to amateur journalists, who by definition lack strong economic incentives to speak and therefore may be easily deterred by regulation.

The fact that a blog carries advertising should not be enough to put it in the commercial speech category. Although the advertisements themselves are likely to be commercial speech, one who merely publishes the advertisements is not thereby proposing commercial transactions. Applying the commercial speech doctrine to all publications that carry advertising, including most newspapers and magazines, would swallow most First Amendment protection.<sup>216</sup> Indeed, the media's ability to get paid to support its activities is arguably itself an important First Amendment right. Thus, Judge (now Justice) Alito held for the Third Circuit Court of Appeals that Pennsylvania's attempt to bar alcoholic beverages ads in school publications was unconstitutional, reasoning in part that "[i]f government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment."<sup>217</sup>

Whether the blog carries advertising, however, may affect its level of First Amendment protection apart from the commercial speech issue. The potential chilling effect of regulation may matter on its own rather than as a rationale for applying the commercial speech doctrine. The Court's plurality opinion in *Dun & Bradstreet* cited as a reason for applying the lower level of *Gertz* protection to a credit report the argument from *Virginia State Board of Pharmacy* that for-profit speech is less likely to be deterred.<sup>218</sup> The credit report did not itself propose a commercial transaction, but merely had a commercial incentive.<sup>219</sup> Following this reasoning, the Court may hold in a marginal case that, other things being equal, a

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REV. 1, 19-24, 39-40 (1986) (discussing the market-speech relationship).

215. See *Butler & Ribstein*, *supra* note 209, 177-78 (critiquing the chilling effect distinction between commercial and noncommercial speech).

216. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964).

217. *Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004).

218. See *supra* note 213 and accompanying text.

219. See *Dun & Bradstreet, Inc. v. Greenhouse Builders, Inc.*, 472 U.S. 749, 762-63 (1985).

blogger who sells ads is less likely to be deterred by speech regulation than one who blogs without direct monetary reward.

Distinguishing blogs based solely on whether they carry ads, however, may not be a sufficiently nuanced way to assess bloggers' incentives. Even nonadvertising bloggers may reap financial rewards from cross-promoting their main businesses.<sup>220</sup> Less directly, academic bloggers who do not have any "businesses" may receive tangible career rewards from blogging.<sup>221</sup> Also, bloggers who are not currently selling ads may be exploring the market in preparation for doing so, or may eventually capitalize on their audience by selling their blogs.<sup>222</sup>

In general, the extent of constitutional protection of amateur journalism is a good example of how the regulation of blogs may depend on an understanding of the economics of blogging, particularly including bloggers' financial and nonfinancial incentives.

### *G. Fraud Liability*

Misrepresentations on blogs may be subject to fraud liability, general consumer fraud statutes, or federal or state securities laws. The hybrid expressive/commercial nature of many blogs may raise reliance, materiality, and intent to defraud issues under these statutes. In other words, did the plaintiff, or would a reasonable person, rely on a statement casually made in a blog, and is it likely that the blogger intended to defraud? As with the commercial speech issue, the blogger's incentives may matter. For example, a reader may assume that a blogger who sells advertisements or is cross-promoting her main business is more motivated, and therefore should be taken more seriously, than a blogger whose postings are intended solely for self-expression purposes. Even if a statement in an individual blog satisfies the usual tests for fraud, the interactive nature of amateur journalism may matter to the scope of liability. A statement that is false in isolation may not be *materially* false, or may not have triggered reliance, given immediate correction through comments and trackbacks and by other blogs.<sup>223</sup>

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220. See *supra* Part II.B.2.

221. See *supra* notes 31-34 and accompanying text.

222. See *supra* note 44 and accompanying text.

223. See *United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190, 1198-1200 (2d

Again, the technology and economics of blogs should determine the extent of regulation. As has been the case for the other issues this Part addresses, this analysis is not intended to state a definitive rule, but rather to indicate some relevant considerations.

### *H. Vicarious Liability*

A blogger might be vicariously liable for a statement of a co-blogger on a group blog.<sup>224</sup> In particular, a group blog may be a partnership unless the bloggers have explicitly selected some other form. This categorization means that partnership default rules would apply to the relationship, including partners' personal liability for their copartners' wrongful acts.<sup>225</sup> Liability for blog posts on the partnership's behalf might extend to intentional torts such as defamation.<sup>226</sup> Such liability is significant to the extent that it may deter bloggers who have relatively weak self-expression incentives.

The resolution of this issue may partly depend on whether the blog is a "business," which is part of the definition of partnership under the partnership laws.<sup>227</sup> That issue, in turn, may depend on whether the blog carries advertisements. Bloggers who generate a

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Cir. 1993) (determining how other available information affected the "total mix" of information" and therefore liability under the federal proxy rules).

224. For a more extensive general analysis of co-bloggers' liability under several theories for a variety of different harms, see Eric Goldman, Co-Blogging Law (Berkman Center for Internet & Society-Bloggership: How Blogs Are Transforming Legal Scholarship Conference, Santa Clara Univ. Sch. of Law Legal Studies Research Paper Series No. 06-04, Marquette Law Sch. Legal Studies Paper No. 06-22, 2006), available at <http://ssrn.com/abstract=898048>.

225. See Revised Uniform Partnership Act §§ 306-307 (1997) [hereinafter RUPA]; Uniform Partnership Act § 15 (1914) [hereinafter UPA]. Other partnership default rules also would apply, such as equal profit and loss sharing. See RUPA § 401 (1997); UPA § 18 (1914); 2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.02(g). Also, the firm would dissolve if a co-blogger dropped out. See RUPA § 801 (1997); UPA §§ 31, 38 (1914). Questions would then arise as to what happens to the blog's trade name. Though the name is a partnership asset whose value the partners share, it may not be clear whether one partner can enjoin or sue for damages when a former co-blogger attempts to use the same name—that is, whether one partner can enjoin the others. See generally BROMBERG & RIBSTEIN, *supra*, at § 7.12(a); Ribstein, *supra* note 45.

226. See generally BROMBERG & RIBSTEIN, *supra* note 225, § 4.07(d) (Supp. 2006).

227. See RUPA §§ 101(6), 202 (1997); UPA § 6(1) (1914). Other issues may depend on whether the blog is a business. For example, the business-blogger may not be covered under a home insurance policy. See Posting of Eugene Volokh to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2005\\_02\\_06-2005\\_02\\_12.shtml](http://volokh.com/archives/archive_2005_02_06-2005_02_12.shtml) (Feb. 8, 2005, 14:53 EST).

little income stream to help cover expenses probably lack the sort of high-powered incentives to maximize revenues and minimize costs that induce conventional partners to monitor each other. Instead they may recognize that they have strong self-expressive reasons for blogging and therefore hesitate to interfere with each other's activities. Thus, even if courts characterize some group blogs as partnerships for vicarious liability purposes, they might require more evidence of control and other partnership indicia to compensate for the weaker profit motive.

A group blog whose writers share revenue from advertisements and expenses might be viewed as a profit-sharing relationship that is at least presumptively a partnership.<sup>228</sup> On the other hand, the blog might be considered only a loose association created solely for promotional reasons, analogous to sole-practitioner lawyers who share a receptionist and office space.<sup>229</sup> Even this situation may create a liability depending on how the relationship was represented to clients.<sup>230</sup> But given blogs' novelty and evolving nature and the lack of a common understanding as to the relationship among co-bloggers, it may be difficult to determine how co-blogging relationships are "represented" to the public.

Group bloggers may argue that they had no interest in reviewing each other's posts and may even have a stated policy of not blocking posts they disagreed with. A court, however, might assume that the likely rationale for a group blog is to drive more readers toward each blogger's posts. This rationale requires some quality control, even if not in the strict hierarchical sense of a newspaper. If the blog also accepts advertising, it starts to look like a conventional profit-maximizing business. Courts therefore may deem group bloggers to have enough interest in co-bloggers' posts to have partner-like control.

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228. See RUPA § 202 (1997); UPA § 7 (1914).

229. See *Hartwick v. Hartley*, 598 So.2d 1241, 1242-43 (La. Ct. App. 1992) (finding no partnership among individual practitioners sharing office space and splitting fees for referrals); *Farmer v. State Tax Comm'n.*, 535 N.Y.S.2d 453, 456 (N.Y. App. Div. 1988) (finding New York and Washington offices of law firm listed together in Martindale-Hubbell and sharing referrals were not in single firm for purposes of New York nonresident taxes).

230. See, e.g., *Andrews v. Elwell*, 367 F. Supp. 2d 35, 43 (D. Mass. 2005) (denying motion to dismiss partnership and partnership-by-estoppel claims against lawyer who shared office space with lawyer accused of malpractice).

A group blog also might be an agency relationship, as when a separate firm hires the bloggers and acts as the principal. This is probably the case for "corporate" blogs that have a blog-type format but in which, unlike the amateurs on whom this paper focuses, the bloggers are full-time employees. In this situation the employing firm is liable for the bloggers' acts in the scope of employment.<sup>231</sup>

Liability is more ambiguous when a separate firm such as Gawker or Weblogs aggregates previously independent bloggers into a group blog.<sup>232</sup> These writers may not regard themselves as colleagues with common interests and may simply want to maximize their joint advertising revenue. They therefore may be only a loose federation of independent writers who have hired a common agent to sell advertising, similar to the group of lawyers that hires a common receptionist and shares office space discussed above.<sup>233</sup> The network also might be considered a separate employer, in which case the bloggers probably would be independent contractors rather than "servants" for whose acts the employer would be liable.<sup>234</sup> That classification depends on whether, instead of the employer supervising the details of the writer's work, the blogger "commits himself to providing a specified output, and the principal monitors the contractor's performance ... by inspecting the contractually specified output to make sure it conforms to the specifications."<sup>235</sup> This description seems to fit a blogger who agrees only to contribute a general type of commentary but does not submit to detailed monitoring.

The argument for agency in the latter scenario is that the blogging network or aggregator is analogous to a newspaper, with the writers analogous to reporters for whose acts the employer would be liable. Although the reporters resemble servant agents because they are employed and paid full-time rather than by the article, the problems inherent in a principal's supervising the work arguably are similar in both cases.

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231. See RESTATEMENT (SECOND) OF AGENCY § 228 (1958) (defining acts that are within the scope of employment).

232. See *supra* note 37 and accompanying text (discussing such networks).

233. See *supra* note 229 and accompanying text.

234. See RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (stating test for determining whether an agent is a "servant").

235. *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 938 (7th Cir. 1986).

From an economics standpoint, the partnership and agency issues arguably depend on whether a blogger should be deemed to be in a good position as owner to monitor his or her co-bloggers.<sup>236</sup> This general economic analysis of agency relationships, however, may not be appropriate in the context of blogging. The agency analysis assumes that the relevant monitoring occurs in the “vertical” or hierarchical relationship among the parties to the firm. But as stressed throughout this Article, blogs are monitored by other blogs through such interactive mechanisms as comments and trackbacks. Courts should take this characteristic into account in determining whether group bloggers should be liable for inaccuracies in each other’s posts.

The extent to which vicarious liability may deter blogging depends on how easily bloggers may avoid this liability. They, of course, could simply decline to take on co-bloggers. But group blogs may be useful in attracting more readers to the posts of all group members. Group bloggers also might attempt to avoid liability by contracting explicitly that their relationship is not a partnership. But courts may hold in favor of partnership despite such provisions in which other indicia of partnership are present.<sup>237</sup> The group may deal with the above ambiguities and reduce the risk that their personal assets will be exposed to liability by purchasing insurance. However, insurance may not protect them from all liability, including liability for intentional torts.

The bloggers might incorporate or form some other type of limited liability business association—a limited liability company, limited partnership, or limited liability partnership. The quality of the liability shield depends on whether the bloggers have maintained the appropriate formalities and facts that would support veil-piercing, including separation of business and personal affairs.<sup>238</sup> Even if the bloggers successfully limit their liability to the firm’s assets, they may incur other costs from forming a limited liability

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236. See generally BROMBERG & RIBSTEIN, *supra* note 225, § 2.07(a) nn.5-7 (Supp. 2006); Alan Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1232 (1984) (explaining vicarious liability of principals for their agents).

237. See BROMBERG & RIBSTEIN, *supra* note 225, § 2.05(b) n.5 (Supp. 2006) (reviewing cases).

238. See generally LARRY E. RIBSTEIN & ROBERT KEATINGE, RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES, 2003-1 Update § 12:3 (discussing rules for veil-piercing in limited liability companies).

firm, such as triggering the application of inappropriate partnership-type default rules.<sup>239</sup> Thus, the availability of limited liability is not a complete solution to the risk of vicarious liability.

In general, as throughout this Part, this discussion is not intended to reach definitive conclusions on the law of amateur journalism, but only to show the considerations that courts should bring to bear based on the economics and technology of blogging. Given the social value of blogs, the opportunities that blogs present for self-correction and informal filtering, and bloggers' relatively low-powered incentives, courts should be wary about creating broad vicarious liability for co-bloggers. Even if a blog is technically a "business," its moonlighting and self-expressive nature mean that it should not be treated as the sort of business for which partnership-type vicarious liability is appropriate. Also, application of vicarious liability may constrain governance, as by deterring some types of monitoring that courts might view as partner-like conduct.

### *I. Harmful but Accurate Speech*

Regulation of blogs that is intended to protect against harms other than those involving inaccurate speech may present problems distinct from rules intended to ensure accuracy. Speech that is obscene or infringes privacy or property rights in information can be harmful without being false. Permitting more of this type of speech will not necessarily reduce social harm by correcting error. Also, the harm in these situations can be done by any blogger, not just one who has garnered special access through trustworthiness.

This reality suggests that, for some types of harm, courts and regulators should distinguish nonprofessional bloggers from professionals. To be sure, professional journalists, like amateurs, care more about forfeiting their reputations for accuracy, which is an important value for many readers, than they would about other types of harm, such as invasions of privacy or abuse of proprietary

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239. Legislatures might enable creation of contractual limited liability that does not entail adoption of any particular default rules. This approach would have the advantage of facilitating evolution through private contracts of new standard forms, perhaps including one for group blogs. See Larry E. Ribstein, *Limited Liability Unlimited*, 24 DEL. J. CORP. L. 407, 433-35 (1999). No legislature, however, has yet adopted such a statute.

information. But professionals also must be concerned about their and their employers' reputations for respecting confidentiality and privacy in order to continue to have access to sources. Professionals and their employers thus have special incentives to protect their investments in information and to generally defend intellectual property rights. Amateur journalists, by contrast, rely on commentary or on their own special sources of information. They are consumers, rather than producers, of the costliest and most valuable forms of intellectual property.

Conversely, as discussed throughout this paper, the costs of regulating amateur journalists may exceed those of regulating professionals. Because of their weaker economic incentives, amateurs may be more easily deterred than professionals by sanctions for infringing property rights and other harmful speech. For example, a professional journalist could stifle criticism by amateurs by threatening to strictly enforce copyright against critics who excerpt or parody its work.

Special issues are raised by the application of copyright and trademark law to amateur journalists. As discussed above, blogs can serve as "remora" in adding value to professional media stories by checking on their accuracy and completeness.<sup>240</sup> Yet links and references to professional media raise questions concerning violation of copyright law. *Los Angeles Times v. Free Republic* held that posting *Los Angeles Times* and *Washington Post* articles on websites constituted copyright infringement and was not protected as "fair use."<sup>241</sup> This case illustrates the need to reach some accommodation with the professional press's property rights.<sup>242</sup> Although blogs may improve the health of the professional media, they also need the investigative reporting and other services that robust professional media provide. In other words, remora need sharks that are willing to invest in intellectual property. Professional media's incentive to invest depends on some legal protection from free-riding blogs.

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240. See *supra* Part II.C.3.

241. 54 U.S.P.Q.2d 1453, 1472 (C.D. Cal. 2000).

242. See *supra* Part II.C.4. For a discussion of how copyright law may inhibit blogs, see Posting of Daniel J. Solove to Concurring Opinions, [http://www.concurringopinions.com/archives/2005/12/what\\_if\\_copyrig.html](http://www.concurringopinions.com/archives/2005/12/what_if_copyrig.html) (Dec. 15, 2005, 11:53 EST).

A reasonable compromise may be possible. Rather than reproduce the full article, the blogger can simply link to the article, which is the accepted practice. The source thereby can control and charge for access to the actual article. To be sure, linking may not be equivalent to copying. In particular, a writer who wants to “fisk” an article or photo<sup>243</sup> may find no substitute for reproducing the entire document in the blog. Moreover, some outlets, such as the *Wall Street Journal*, charge for access, even free registration can be burdensome (as by opening the registrant to spam), and there are some copyright constraints on linking.<sup>244</sup>

Professional media can decide whether blogs’ parasitic function is worth encouraging by making the source material freely available. If blogs add value, and controlling or charging for access to the original material reduces that added value, professional media has an incentive to allow free linking or pasting. Larger media sources may have strong incentives to obtain competitive advantage by becoming nodes for networks of blogs.<sup>245</sup> Blogs and other websites that are motivated more by self-expression than commercial objectives may be willing to adopt Creative Commons licenses.<sup>246</sup>

Some sites, however, may not adopt a formal policy. They may not be able to capitalize on the network advantages of blog commentary, or otherwise internalize the social benefits of making their material freely available. For these sites the private benefits of strict copyright protection may exceed the private costs. This balance may leave a significant amount of intellectual property on the Web subject to the restrictions and uncertainties of copyright law. Because of their weaker profit incentives, amateur journalists may be reluctant to push the margins of copyright laws, particularly if they have substantial personal wealth and reputations to protect. This reluctance may significantly reduce the potential information advantages of blogs.

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243. See *supra* note 57 and accompanying text.

244. See Chilling Effects Clearinghouse Home Page, <http://www.chillingeffects.org> (last visited Sept. 24, 2006).

245. See *supra* note 63 and accompanying text.

246. See Creative Commons Home Page, <http://creativecommons.org> (last visited Sept. 24, 2006).

One possible solution is to raise the bar for default copyright protection.<sup>247</sup> Alternatively, Congress might revise the fair use doctrine to better accommodate blogs, as by specifying that linking is not a violation unless the copyright owner clearly reserves linking rights. Either approach would place burdens on copyright owners to obtain strict protection. This condition would help ensure at least that this protection is reserved only for those owners who obtain the largest private benefits from protection.

As with the discussion of other legal issues in this Part, this analysis is intended to outline relevant considerations rather than to prescribe definitive rules. In particular, the interactivity of amateur journalism depends significantly on the ability to link and copy from other sources. This interactivity may require an accommodation of speech rights with protection of intellectual property. The relevant actors themselves may be able to work out the necessary rules. To the extent they cannot, the courts and Congress should do so, guided by the economics and technology of amateur journalism.

## CONCLUSION

Blogs are a relatively new medium that could have significant ramifications for several areas of the law. In resolving these legal issues, it is important to consider the distinct technical and economic aspects of blogging. This Article is a modest beginning.

It is important to keep in mind that the technology of the Internet and the Web in general and of blogs in particular is evolving rapidly. Amateur journalism may soon be very different from what it is today. For example, authored blogs and authorless wikis might coevolve into a hybrid that combines spontaneity and authorship. This potential development could have implications for the reputational bonding mechanisms emphasized in this paper. Professional and amateur journalism might converge in ways that cannot now be predicted.

Thus, this Article can provide only a snapshot of amateur journalism's current phase of development. In order to be useful, an

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247. See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 554-55 (2004).

analysis of amateur journalism must focus on core principles that will continue to be relevant even if the technology changes. The core of amateur journalism is open access and interactivity, in contrast to the more closed model of conventional bricks-and-mortar media firms.

Open access has both benefits and risks that need to be taken into account in future regulation. In evaluating the risks, one must keep in mind that open access itself may serve as a self-corrective mechanism. Blogs, or whatever replaces them, therefore may be more an opportunity and a solution to the problems of bricks-and-mortar journalism than the problem Joel Klein's "pajamas" image suggests.