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BLOGGERS AS PUBLIC FIGURES

ANTHONY CIOLLI*

An increasing number of commentators have proclaimed a “blogging revolution”¹ which they purport is changing not only journalism,² but also politics,³ business,⁴ academia,⁵ and other aspects of everyday life. Blogging, these commentators argue, is a unique medium that requires a host of non-traditional legal protections in order to survive.⁶ Activists behind the revolution distinguish blogs from both “traditional” news organizations, such as magazines and newspapers, and online web magazines.⁷ Such individuals state that, unlike mainstream news services, blogs are highly personal in nature⁸ and usually lack a

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¹ See Andrew Sullivan, *The Blogging Revolution*, WIRED, May 2002, available at <http://www.wired.com/wired/archive/10.05/mustread.html?pg=2> (identifying the qualities that distinguish blogs from newspapers, magazines, and Web magazines).

² See Victor Keegan, *Blogging On*, THE GUARDIAN, Sept. 22, 2004, <http://www.guardian.co.uk/comment/story/0,3604,1309708,00.html> (“Blogs have battered off newspapers and many newspapers, including the Guardian, have launched their own blogs.”).

³ See David Kline, BlogRevolt, http://web.archive.org/web/20051013073921/http://www.blogrevolt.com/archives/2005/10/the_future_of_p.htm (Oct. 6, 2005, 10:42 EST) (“Blogs are to politics today what TV was to the Nixon-Kennedy campaign of 1960.”).

⁴ See, e.g., Shankar Gupta, *Dell Computer to Respond to Bloggers’ Complaints*, ONLINE MEDIA DAILY, Aug. 23, 2005, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=33396 (“[Dell’s] public relations department monitors blogs, looking for commentaries and complaints—and, starting about a month ago, began forwarding complaints with personally identifiable information to the customer service department so that representatives can contact dissatisfied consumers directly . . .”).

⁵ See Posting of Douglas Berman to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2005/08/how_might_we_im.html (Aug. 1, 2005, 13:47) (discussing how blogs can be used as an academic medium). But see Leigh Jones, *Blogging Law Profs Assault Ivory Tower*, NAT’L L.J., Feb. 27, 2006, at 1, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1140775513856> (“[Blogs] have nothing to do with scholarship,” said Katherine Litvak, a professor at the University of Texas School of Law.”).

⁶ See discussion *infra* Part III.C.

⁷ See, e.g., Sullivan, *supra* note 1.

⁸ See, e.g., Ann Althouse, *Why a Narrowly Defined Legal Scholarship Blog is Not What I*

profit motive.⁹ Thus, they argue that it is inappropriate for courts and other institutions to hold bloggers to the same standards as print and television content providers.

Bloggers and other activists have successfully persuaded Congress that internet interactive content providers need special legal protections not only to thrive, but to even remain a viable medium.¹⁰ Section 230 of the Communications Decency Act immunizes interactive content providers, including bloggers, from liability for speech-related torts committed by third parties.¹¹ Courts have broadly interpreted Section 230 with respect to bloggers and internet service providers,¹² perhaps providing bloggers with stronger legal protections than Congress originally intended.¹³ Though some issues remain unresolved,¹⁴ rulings by both federal and state courts¹⁵ have sheltered bloggers from lawsuits filed by disgruntled individuals

Want: An Argument in Pseudo-Blog Form 9 (Univ. of Wis. Law Sch. Legal Studies Research Paper Series, Paper No. 1021, 2006) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898171.

⁹ Though most bloggers are not motivated by profit, "the potential for actual profits does exist in the blogosphere" through advertising, commercial sponsorship, and other practices. See Christine Hurt & Tung Yin, *Bloggng While Untenured and Other Extreme Sports* 12 n.38 (Apr. 2006) (working paper, on file with the Berkman Center for Internet & Society—Bloggership: How Blogs are Transforming Legal Scholarship Conference), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898046.

¹⁰ See 47 U.S.C. § 230 (2000); See also Michael Martinez, *A 'Shield' For Washington Bloggers*, republished on BeltwayBlogroll, (April 30 2007, 11:07), http://beltwayblogroll.nationaljournal.com/archives/2007/04/a_shield_for_wa.php; Bob Egelko & Jim Herron Zamora, *The Josh Wolf Case: Blogger Freed After Giving Video to Feds*, S.F. GATE, (April 4, 2007), available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/04/BAGLRPOPAP28.DTL>.

¹¹ 47 U.S.C. § 230 (2000).

¹² See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1034 (9th Cir. 2003) (granting interactive content providers immunity from liability for libel for manually relaying information provided by others); *Zeran v. America Online, Inc.*, 129 F.3d 327, 331, 332 (4th Cir. 1997) (immunizing interactive content providers from liability for defamatory postings made by third parties).

¹³ See discussion *infra* Part III.C.

¹⁴ For example, it is unclear whether legal privileges and protections available to professional journalists also apply to bloggers. Cf. Larry E. Ribstein, *The Public Face of Scholarship* 10 (Ill. Law & Econ. Working Papers Series, Paper No. LE06-010, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=897590 ("Professional journalists may have, or seek, special protections under the press clause of the First Amendment, are shielded under state law from revealing sources, and are protected from defamation liability by state retraction laws."). Another example is ambiguity about how co-blogging arrangements, which are often informal, affect liability for copyright and trademark infringement and ownership of assets such as domain names. See generally Eric Goldman, *Co-Blogging Law* 5–13 (Marquette Law Sch. Legal Studies Research Paper Series, Paper No. 06-22), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898048.

¹⁵ See, e.g., *Batzel*, 333 F.3d at 1034; *Zeran*, 129 F.3d at 331, 332; *Doe v. Cahill*, 884 A.2d 451, 467 (Del. 2005).

and corporations.¹⁶

Although courts have ruled in favor of bloggers and similar interactive content providers as defendants,¹⁷ courts are not likely to grant bloggers such great deference as plaintiffs bringing their own defamation lawsuits.¹⁸ Given the rising prominence of blogging, the growing fame of individual bloggers, and concerns about incivility in the blogosphere,¹⁹ some bloggers will inevitably file defamation or invasion of privacy lawsuits, either against other bloggers or against mainstream news organizations.²⁰ In these suits, the same arguments that bloggers use to justify a limitation on liability can be used to restrict a blogger's ability to recover damages for defamation or invasion of privacy.

This essay argues that courts should treat bloggers as limited purpose public figures, which would require blogger-plaintiffs to meet higher standards when seeking recovery for torts like defamation or public disclosure of private fact. The very act of blogging requires individuals to "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."²¹ It would be difficult, if not impossible, for most bloggers to argue that they are mere private citizens, particularly because prominent journalists, many of whom are bloggers themselves, promote blogs—or at least certain blogs, such as those run by mainstream media outlets—as legitimate media outlets.²² Part I briefly summarizes the various definitions of "blog" and adopts a definition for the purposes of this paper. Part II provides an overview of the public figure doctrine established by the U.S. Supreme Court and lower courts, particularly emphasizing how courts have applied the doctrine in defamation law cases. Part III applies

¹⁶ Nonetheless, reporting correct information about an individual or a company on a blog can still provoke lawsuits. See, e.g., Declan McCullagh, *Apple Pushes to Unmask Product Leaker*, CNET NEWS, Apr. 20, 2006, http://news.com.com/2100-1047_3-6063042.html (reporting lawsuits by Apple Computer against bloggers related to the unauthorized posting of confidential information about forthcoming products).

¹⁷ Of the 34 defamation lawsuits filed against bloggers as of April 30, 2006, only one, *Banks v. Milum*, (Ga. Super. Ct. Jan. 27, 2006), *aff'd sub nom.* *Milum v. Banks*,—S.E.2d—, 2007 Ga. App. LEXIS 217, at *18 (Ga. Ct. App. Mar. 5, 2007), has resulted in a verdict for the plaintiff. See ERIC P. ROBINSON, MEDIA LAW RES. CTR., LIBEL AND RELATED LAWSUITS AGAINST BLOGGERS (2006), <http://www.medialaw.org/bloggerlawsuits>.

¹⁸ See discussion *infra* Part III.C.

¹⁹ "Blogosphere" is defined as "[t]he set of all weblogs on the Internet" or "[t]he total universe of blogs." Answers.com, <http://www.answers.com/topic/blogosphere?cat=technology> (last visited June 20, 2007).

²⁰ Some bloggers have already begun to threaten other bloggers with defamation lawsuits for allegedly defamatory statements posted on their blogs. See, e.g., Pejman Yousefzadeh, *The Next Litigation Battleground*, TCS DAILY, Nov. 26, 2003, <http://www.tcsdaily.com/article.aspx?id=112603D> (summarizing a feud between two bloggers that culminated with a cease-and-desist letter threatening a defamation lawsuit).

²¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

²² See, e.g., Noah Shachtman, *Blogging Goes Legit, Sort Of*, WIRED NEWS, June 6, 2006, <http://www.wired.com/news/school/0,1383,52992,00.html> (observing that "the media establishment is starting to warm up to" blogs).

public figure jurisprudence to the blogging context and examines the policy implications of classifying bloggers as limited purpose public figures. The essay concludes that, despite possible chilling effects, it is inappropriate for legislatures or courts to alter the limited purpose public figure framework to protect bloggers.

I. WHAT ARE BLOGS?

Although many articles about blogs have appeared in both popular media²³ and scholarly journals,²⁴ there is still surprisingly little consensus on what the term “blog” really means.²⁵ While some have used extremely broad definitions that would classify any webpage updated more than once as a blog,²⁶ others have more narrowly defined blogs as online diaries²⁷ whose themes can range from the author’s favorite musicians to what the author ate for dinner last night. Professor Larry Ribstein takes a rather vague position, characterizing blogs as a new form of journalism.²⁸ This section examines these three definitions of “blog,” creates a working definition of the term, and then distinguishes blogs from other forms of interactive content media commonly found on the internet.

A. Three Definitions of “Blog”

1. The Chronological Definition

The chronological definition of a blog states that “[e]very website that is updated at least once . . . can be considered a weblog because it contains two entries.”²⁹ Even if the website does not overtly organize itself by time or even attach a date to the updates, proponents of the chronological definition argue that updates are “tacitly organized by time. . . . One item is earlier than the other; the other was published later than the first one.”³⁰

²³ See, e.g., *id.*

²⁴ See, e.g., Symposium, *Bloggership: How Blogs are Transforming Legal Scholarship*, THE BERKMAN CTR. FOR INTERNET & SOC’Y AT HARVARD LAW SCH. (2006), available at http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=890371.

²⁵ For example, some newspaper and magazine articles have labeled websites “blogs” even when the webpage owners themselves claim that the website is not a blog. See, e.g., Nichole Graham, ‘Oompa Loompa’ Gets Perfect 180 on LSAT, NAT’L JURIST, Oct. 2005, at 11 (quoting a “blogger” from the AutoAdmit.com website, even though AutoAdmit is a discussion board and not a blog).

²⁶ Russ Lipton, *What is a Weblog?*, RADIODOCS, June 11, 2002, <http://radio.weblogs.com/0107019/stories/2002/02/12/whatIsAWeblog.html>.

²⁷ *Blog*, MARKETING TERMS, 2007, <http://www.marketingterms.com/dictionary/blog/>.

²⁸ Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 187 (2006).

²⁹ Lipton, *supra* note 26.

³⁰ *Id.*

This definition has little utility. Virtually every webpage is updated at least once, so adopting the chronological definition does nothing but make “blog” effectively synonymous with “webpage.” Under such a broad definition, there is no significant difference between CNN.com and ConfirmThem.com.³¹ Both CNN.com and ConfirmThem.com claim that there *are* significant differences; ConfirmThem labels itself a blog,³² while CNN does not.³³ Thus, a more narrow definition of the term “blog” is appropriate.

2. The Diary Definition

A somewhat narrower definition defines blogs as online diaries. Proponents of this definition argue that blogs are distinct from regular webpages in that, like a personal diary, the voice of the author or authors comes through.³⁴ Authors need not adhere to a strict diary structure. Bloggers often structure blogs as a hybrid of diaries and guidebooks³⁵ and, in some cases, even in the form of regular webpages that lack the bells and whistles of commercial blog software.³⁶ Neither the structure nor the frequency of updates is relevant; according to this definition, a webpage is a blog as long as the personality of the writers comes through.³⁷ Even webpages edited by third parties can satisfy this definition of a blog, as long as the editing has not interfered with the original author’s style or voice.³⁸

3. The Amateur Journalist Definition

The amateur (or citizen) journalist definition promoted by Professor Ribstein³⁹ and others gives a significantly narrower meaning to the term “blog.” Ribstein characterizes blogs as a new form of journalism because, unlike conventional journalism, blogs do not require “significant investments in physical equipment,

³¹ ConfirmThem is a “collaborative weblog organized by RedState.org dedicated to providing not only the most up-to-date news and analysis of the judicial confirmation battles in the United States Senate—but also giving every American the opportunity to let their voice be heard in Washington.” ConfirmThem, About Us, <http://www.confirmthem.com/about> (last visited Apr. 28, 2006).

³² *See id.*

³³ *See* CNN.com, About CNN.com, <http://www.cnn.com/about> (last visited Apr. 8, 2007).

³⁴ Dave Winer, *What Makes a Weblog a Weblog?*, WEBLOGS AT HARVARD LAW, May 23, 2003, <http://web.archive.org/web/20041116085413/http://blogs.law.harvard.edu/whatMakesAWeblogAWeblog>.

³⁵ *Blog*, *supra* note 27.

³⁶ *See, e.g., Reporters’ Log: Final Thoughts*, BBC NEWS, http://news.bbc.co.uk/2/hi/in_depth/world/2003/reporters_log/default.stm (Apr. 19, 2003, 07:38 GMT).

³⁷ Winer, *supra* note 34.

³⁸ *Id.* But *see* Michael Conniff, *Just What is a Blog Anyway?*, USC ANNENBERG ONLINE JOURNALISM REV., <http://www.ojr.org/ojr/stories/050929/index.cfm> (“[T]he second somebody filters or edits the author it’s no longer a blog.”) (quoting Jason Calcanis, chief executive officer of Weblogics, Inc.).

³⁹ Ribstein, *supra* note 28, at 189.

technology, office space, personnel and goodwill.”⁴⁰ As a result, anybody with a computer, an internet connection, and a cheap or free blogging program can become an amateur journalist and immediately have access to an international audience.⁴¹ While those with alternative views find it hard to break into the traditional media due to the significant capital restrictions involved, they can easily create blogs and provide a decentralized and personal alternative to mainstream news sources.⁴² Although those who subscribe to the amateur journalist definition recognize the importance of author voice, voice and style alone do not determine whether a website is considered a blog. For instance, a website using commercial blog software, such as Typepad, that solely focuses on the author’s personal life may not be considered a blog under the amateur journalist definition even though it would under the diary definition.⁴³ Similarly, webpages such as www.drudgereport.com or www.JD2B.com that primarily provide an amalgamation of links to news stories would meet the amateur journalist definition of a blog, but would probably not be considered blogs using the diary definition because they lack an author voice.⁴⁴

B. *Blogs: Medium or Genre?*

The population of those who self-identify as bloggers consists of more than just individuals who identify themselves as “amateur journalists.”⁴⁵ Though the authors of many of the largest and most popular blogs likely fit the “amateur journalist” label,⁴⁶ the overwhelming majority of the estimated eight to thirty million blogs on the internet⁴⁷ appear to more closely resemble personal homepages than Fox News or the L.A. Times.⁴⁸ Supporters of the amateur journalist definition, though likely

⁴⁰ *Id.*

⁴¹ *Id.* at 193.

⁴² *Id.*

⁴³ *Id.* at 189.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See, e.g., RedState, <http://www.redstate.com> (last visited Apr. 1, 2007) (an “amateur journalist” blog reporting on political events from a conservative perspective).

⁴⁷ See Carl Bialik, *Measuring the Impact of Blogs Requires More than Counting*, WALL ST. J. ONLINE, May 26, 2005, <http://online.wsj.com/article/SB111685593903640572.html> (estimating that there are between 10 and 30 million blogs, though many are inactive); David Sifrey, *Sifrey’s Alerts*, <http://www.sifrey.com/alerts/> (Mar. 14, 2005, 00:54 EST) (estimating the number of blogs at 8 million). Given that livejournal.com, one of the largest free blog providers that “lets you express yourself, share your life, and connect with friends online,” alone hosts more than 8.5 million blogs, the total number of blogs is likely closer to the former figure than the latter. See Live Journal Quick Tour, <http://www.livejournal.com/tour/index.bml> (last visited July 6, 2007).

⁴⁸ For example, livejournal.com has more than 1.3 million blogs at least somewhat related to music, while only slightly more than 86,000 are related to politics. LiveJournal, *Popular Interests*, <http://www.livejournal.com/interests.bml?view=popular&mode=text> (last visited Feb. 6, 2006).

aware that political and news bloggers, while vocal, are a minority of those who consider themselves bloggers, continue to argue that the amateur journalist definition, rather than the diary definition, is the “true” definition of a blog.⁴⁹

The dispute between the diary definition and the amateur journalist definition ultimately comes down to a conflict over whether blogs are a medium or a genre. Those favoring the diary definition consider blogs a medium, simply another method of mass communication, like television or radio.⁵⁰ The ideas or thoughts conveyed in the blog do not matter; as long as the author’s personal voice comes through, it is irrelevant whether the author writes about Supreme Court decisions or fly-fishing.⁵¹ In contrast, those favoring the amateur journalist definition consider blogs a genre rather than a medium.⁵² Although blog software is “a tool that lets you do anything from change the world to share your shopping list,”⁵³ the amateur journalist definition distinguishes between individuals who write primarily about their personal lives and those who write to disseminate news.⁵⁴ Some may argue that this distinction is necessary to avoid redundancy. If blogs are a medium, then the overlap between blogs and webpages, already established as a medium, is too great.⁵⁵ In fact, this ever-growing overlap has caused some proponents of the diary definition to reconsider their position.⁵⁶

C. *Distinguishing Blogs from Other New Media*

There is no consensus yet on whether blogs are a medium or a genre, nor on how one should define the term “blog;” in fact, authors continue to propose additional or alternate definitions.⁵⁷ This essay, however, adopts the amateur journalist definition and assumes that blogs are a genre rather than a medium. Although the

⁴⁹ See, e.g., http://busmovie.typepad.com/ideoblog/2006/02/will_amateur_jo.html

⁵⁰ See, e.g., <http://davidsirota.com/index.php/2007/06/26/note-to-paul-campos-the-medium-is-not-the-message-here/> (“A blog, like the phone, or a newsletter or the radio, is just a medium—nothing more, nothing less.”). But see Conniff, *supra* note 38 (quoting Jeff Jarvis).

⁵¹ Conniff, *supra* note 38.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See generally Ribstein, *supra* note 28.

⁵⁵ Most “blogs” that do not meet the amateur journalist definition greatly resemble personal webpages from the mid-1990s. It is generally believed that many personal webpages “morphed” into blogs after blog software became widely disseminated. *Id.* at 187.

⁵⁶ For example, Howard Kaushansky, Chief Executive Officer of the blogging market research firm Umbria Communications, believes that the “definition of a blog is a changing” because widespread use of blogging software has led to “companies . . . us[ing] a blog rather than a website” for their online presence. Conniff, *supra* note 38.

⁵⁷ See, e.g., Orin S. Kerr, *Blogs and the Legal Academy* 4–5 (George Washington Univ. Pub. Law & Legal Theory, Working Paper No. 203, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896994 (promoting a definition of the term “blog” similar to the chronological definition, but also requiring that updates are listed in reverse chronological order on the blog’s main page).

amateur journalist definition may be under-inclusive because it excludes a large number of websites on LiveJournal, MySpace, and other providers that are promoted as “blogs,” the “blog as medium” definitions are over-inclusive to the point where it would be difficult, if not impossible, to differentiate blogs not only from regular websites, but even from mailing lists, discussion boards, UseNet groups, wikis, and other forms of new media.

Furthermore, and perhaps most importantly in the context of this paper, virtually all the websites considered blogs under the amateur journalist definition are in a legal grey area where certain aspects of the law are ambiguous or unresolved.⁵⁸ These legal ambiguities, however, do not extend to all “chronological” blogs or “diary” blogs. For instance, a 19-year-old college sophomore who only uses his MySpace diary for writing about his pet lizard and does nothing else to draw public attention or scrutiny would not likely be treated as a private figure if he were a plaintiff in a defamation lawsuit. It is unclear, however, whether a court would treat a 19-year-old college sophomore who uses his MySpace diary to constantly attack the Bush administration’s policies as a private or public figure in a defamation lawsuit. Similarly, a construction worker who uses his LiveJournal account to provide daily local news reports in his spare time may or may not qualify for journalist privileges that allow him to not reveal his sources, whereas a construction worker who uses his LiveJournal to discuss his dating problems would not face this legal ambiguity.

Where diary bloggers might share some unresolved legal issues with amateur journalist bloggers, these issues rarely, if ever, apply exclusively to “blogs.” For example, it may be unclear how a court would resolve a dispute between two co-bloggers over ownership of intellectual property rights in the absence of a formal agreement, but these same legal ambiguities would also apply to disputes between co-owners of a website or discussion forum. Nonetheless, since amateur journalist bloggers exist in an uncertain legal environment in the public figure context, it makes practical sense to limit the term “bloggers” to members of this group for purposes of this essay.

II. PUBLIC FIGURES & DEFAMATION LAW: A BRIEF HISTORY

A. Early History

Prior to 1964, state law entirely governed defamation law without concern for the First Amendment.⁵⁹ In general, plaintiffs only had to show “that false statements were published which subjected them to hatred, contempt, or ridicule.”⁶⁰ The Supreme Court began to change this framework in *New York Times Co. v.*

⁵⁸ See Ribstein, *supra* note 28, at 219.

⁵⁹ Eric Walker, Note, *Defamation Law: Public Figures – Who Are They?*, 45 BAYLOR L. REV. 955, 956 (1993). See also RESTATEMENT OF TORTS § 553 (1938).

⁶⁰ *Id.*

Sullivan.⁶¹ In this landmark decision, the Court reversed a lower court decision holding the *New York Times* liable for publishing an editorial advertisement accusing the Montgomery Police Department of racial harassment.⁶² The majority found that the previous framework had a chilling effect that would strongly encourage self-censorship.⁶³ Newspapers, fearing potential lawsuits, would not publish negative or critical information about public officials even if they believed their sources were reliable, for if the allegations false, they would be subject to liability.⁶⁴ Due to the public's overriding interest in the conduct of public officials, it is preferable to tolerate the occasional erroneous statement in order to prevent newspapers and other content providers from self-censoring truthful statements.⁶⁵ However, the Court acknowledged that situations exist in which public officials should recover for defamatory statements, specifically when he or she can prove actual malice.⁶⁶ Actual malice requires that the defendant either knew the statement was false or recklessly disregarded the statement's truth.⁶⁷

In applying the *New York Times Co. v. Sullivan* framework in subsequent defamation cases, the Supreme Court was markedly divided. In *Curtis Publishing Co. v. Butts*,⁶⁸ the University of Georgia's athletic director and the University of Alabama's football coach sued the *Saturday Evening Post* for printing an article stating that they fixed a football game. Although the Court "acknowledged that heightened First Amendment protection is appropriate for public figures as well as public officials,"⁶⁹ it applied the lesser gross negligence standard rather than the actual malice standard of *New York Times v. Sullivan*.⁷⁰ To recover for defamation, the *Butts* Court held that a public figure only had to prove "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."⁷¹ The Court did not provide a concrete definition of the term "public figure."⁷²

In *Rosenbloom v. Metromedia, Inc.*,⁷³ the Court took a different approach from *Sullivan* or *Butts*. In *Rosenbloom*, a plurality of the Court attempted to eliminate the distinction between public and private figures when the speech involved a matter of public or general concern.⁷⁴ In such cases, the plurality believed the

⁶¹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁶² *Id.* at 264.

⁶³ *Id.* at 279.

⁶⁴ *Id.*

⁶⁵ *Id.* at 271-72.

⁶⁶ *Id.* at 279.

⁶⁷ *Id.* at 279-80.

⁶⁸ *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

⁶⁹ Walker, *supra* note 59, at 957.

⁷⁰ *Curtis Publ'g Co.*, 388 U.S. at 155.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

⁷⁴ *Id.* at 43-44.

actual malice requirement should always apply.⁷⁵ The plurality opinion did not provide a definition of “matter of public or general concern,”⁷⁶ and, as Justice Marshall observed in his dissent, such an ambiguous standard would have a chilling effect on speech as individuals would not know whether their statements involved a matter of “public or general concern” until after the fact.⁷⁷

B. *The Gertz Decision*

The Supreme Court established the modern definition of the term “public figure,” as well as the extent of the actual malice requirement, in *Gertz v. Robert Welch, Inc.*⁷⁸ In *Gertz*, the Court rejected the public concern standard established in *Rosenbloom*, finding that the nature of one’s speech should not impact whether a court should apply the actual malice standard because “ad hoc evaluations by appellate courts” would “chill the free exchange of ideas.”⁷⁹ Instead, the Court stated that the actual malice standard hinged on whether the plaintiff was a public or private figure.⁸⁰

The Court defined public figures as individuals who “assumed roles of especial prominence in the affairs of society,”⁸¹ finding that two different categories of public figures exist. One type, general purpose public figures, consists of individuals who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”⁸² The Court defined the more common second category, limited purpose public figures, as individuals who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”⁸³ Limited purpose public figures, according to the *Gertz* Court, do not become public figures for all aspects of their lives,⁸⁴ rather, courts must treat limited purpose public figures as public figures only “with respect to statements concerning the limited range of issues for which they are prominent.”⁸⁵

⁷⁵ *Id.* at 52.

⁷⁶ *See id.* at 48 n.17 & 79 (Marshall, J., dissenting).

⁷⁷ *Id.* at 84 (Marshall, J., dissenting).

⁷⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁷⁹ Walker, *supra* note 59, at 959 (citing *Gertz*, 418 U.S. at 346).

⁸⁰ *Id.*

⁸¹ *Gertz*, 418 U.S. at 345.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See id.* at 352 (“Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.”).

⁸⁵ Walker, *supra* note 59, at 960 (citing *Gertz*, 418 U.S. at 351–52).

C. Contemporary Interpretations of Gertz

1. Subsequent Supreme Court Decisions

Since *Gertz*, the Supreme Court has decided few cases that address an individual's status as a public or private figure. Furthermore, these cases have done very little to clarify the Court's definition of a public figure. In *Time, Inc. v. Firestone*,⁸⁶ the Court held that Mary Alice Firestone was not a limited purpose public figure because "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."⁸⁷ The Court added that treating Firestone as a limited purpose public figure would "equate 'public controversy' with all controversies of interest to the public."⁸⁸ Though the Court held that divorce proceedings were not a public controversy because "[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court,"⁸⁹ the Court did not define "public controversy" nor provide a framework for distinguishing between a "public controversy" and a controversy of interest to the public.⁹⁰ Although Firestone held multiple press conferences about her divorce proceedings, the Court believed that these conferences did not make her a limited purpose public figure because they "should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial, and . . . there is no indication that she sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution."⁹¹ Though the press conferences did not seek to influence the divorce proceedings, little doubt exists that they sought to influence "the perceptions and beliefs the public had about why the couple was getting a divorce" so that the public would believe "her husband's actions, not hers, were the cause of the divorce."⁹² By failing to address this issue, the Court further confused its public figure jurisprudence.

The Court revisited the public figure doctrine in *Hutchinson v. Proxmire*.⁹³ The *Hutchinson* majority clarified precedent by stating that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."⁹⁴ Additionally, the Court held that Hutchinson was not a limited purpose public figure because he "did not have the regular and continuing

⁸⁶ *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

⁸⁷ *Id.* at 454.

⁸⁸ *Id.*

⁸⁹ *Id.* (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376–77 (1971)).

⁹⁰ Walker, *supra* note 59, at 963.

⁹¹ *Time, Inc.*, 424 U.S. at 455 n.3.

⁹² Walker, *supra* note 59, at 963.

⁹³ *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

⁹⁴ *Id.* at 135.

access to the media that is one of the accouterments of having become a public figure.”⁹⁵ The Court’s conclusion marks a significant departure from *Gertz*, which did not include media access as part of its public figure analysis, except to the extent that a public figure’s “greater access to the channels of effective communication” would allow him or her to reduce a defamatory statement’s “adverse impact on reputation.”⁹⁶ Because the *Hutchinson* Court did not define “regular and continuing access to the media,” the distinction between a private figure and a limited purpose public figure became even less clear.⁹⁷

Wolston v. Reader’s Digest Ass’n, Inc.,⁹⁸ a case decided concurrently with *Hutchinson*, held that individuals who engage in criminal conduct do not automatically become public figures, for “[t]o hold otherwise would create an ‘open season’ for all who sought to defame persons convicted of a crime.”⁹⁹ Notably, the *Wolston* majority also failed to clarify whether an individual’s limited purpose public figure status can ever expire.¹⁰⁰ Although Justice Blackmun states in his concurrence that “the lapse of 16 years between petitioner’s participation in the espionage controversy and respondents’ defamatory reference to it was sufficient to erase whatever public-figure attributes petitioner once may have possessed,”¹⁰¹ the majority opinion does not address this subject, providing no guidance for lower courts.¹⁰²

The Court’s decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹⁰³ unsuccessfully attempted to provide lower courts with some guidance for identifying a public controversy or “matter of public concern.”¹⁰⁴ Justice Powell, writing for the majority, stated that courts should examine the “content, form and context” of an expression “as revealed by the whole record.”¹⁰⁵ As late as 2001, multiple Supreme Court justices believed this standard was “amorphous.”¹⁰⁶

2. Lower Court Decisions

Because the Supreme Court’s most recent public figure decisions have failed to clarify the *Gertz* framework, lower courts have developed most of contemporary public figure doctrine.¹⁰⁷ Lower courts have generally used a four step analysis to determine whether a plaintiff is a limited purpose public figure: “(1) isolat[ing] the

⁹⁵ *Id.* at 136.

⁹⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

⁹⁷ Walker, *supra* note 59, at 965.

⁹⁸ *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157 (1979).

⁹⁹ *Id.* at 169.

¹⁰⁰ *Id.* at 166 n.7. See also Walker, *supra* note 59, at 967.

¹⁰¹ *Wolston* 443 U.S. at 171 (Blackmun, J., concurring).

¹⁰² Walker, *supra* note 59, at 967.

¹⁰³ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

¹⁰⁴ *Id.* at 761.

¹⁰⁵ *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)).

¹⁰⁶ *Bartnicki v. Vopper*, 532 U.S. 514, 542 (2001) (Rehnquist, C.J., dissenting).

¹⁰⁷ Walker, *supra* note 59, at 977.

controversy and determin[ing] the scope of the public's interest; (2) examin[ing] the plaintiff's role in the controversy; (3) determin[ing] if the defamatory statement is germane to the plaintiff's role in the controversy; and (4) analyz[ing] the extent of the plaintiff's access to channels of media communication."¹⁰⁸ However, different circuits have used different standards as part of this analysis.

a. Isolating the Public Controversy

Because of the inconsistencies between *Gertz* and subsequent precedent, lower courts have had difficulty creating a uniform definition of "public controversy." Some circuits, such as the Third Circuit,¹⁰⁹ "have concluded that a public controversy is present merely if the events in question have generated widespread public interest."¹¹⁰ Other circuits, such as the D.C. Circuit,¹¹¹ have held that "a public controversy is a real dispute which affects members of the public other than the litigants in the instant case;" in other words, "newsworthiness alone is insufficient to establish a public controversy."¹¹² As a result of this divide, some courts have held that consumer product sales are public controversies¹¹³ while others have held that they are not.¹¹⁴ Courts have similarly split over other possible public controversies as well.¹¹⁵

b. Examining the Plaintiff's Role

Lower courts have also applied different tests when determining whether a plaintiff "voluntarily [rose] to the forefront of a public controversy."¹¹⁶ Some courts have adopted liberal tests to determine whether plaintiffs have met this element. For instance, both the Third¹¹⁷ and Fifth¹¹⁸ Circuits have held that certain

¹⁰⁸ *Id.* at 968–69.

¹⁰⁹ *See, e.g.,* Chuy v. Phila. Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (holding that a football player's ability is a public controversy).

¹¹⁰ Walker, *supra* note 59, at 969.

¹¹¹ *See, e.g.,* Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1292 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980) (stating that a public controversy is "a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.").

¹¹² Walker, *supra* note 59, at 970.

¹¹³ *See, e.g.,* Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980); Continental Cablevision, Inc. v. Storer Broad. Co., 653 F. Supp. 451 (D. Mass. 1986).

¹¹⁴ *See, e.g.,* Gen. Prod. Co. v. Meredith Corp., 526 F. Supp. 546 (E.D. Va. 1981); Vegod Corp. v. Am. Broad. Co., 603 P.2d 14 (Cal. 1979), *cert. denied*, 449 U.S. 886 (1980).

¹¹⁵ *Compare* Rancho La Costa, Inc. v. Superior Court, 165 Cal. Rptr. 347 (Cal. Ct. App. 1980) (holding that organized crime is not a public controversy), *with* Rosanova v. Playboy Enter., Inc., 580 F.2d 859 (5th Cir. 1978) (holding that organized crime is a public controversy).

¹¹⁶ Walker, *supra* note 59, at 972.

¹¹⁷ Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1083 (3d Cir. 1985),

individuals are limited purpose public figures merely because they engaged in behavior that would receive attention and comment—whether the individual desired attention is not relevant. Other courts, however, have required evidence that an individual took affirmative steps to attract the public's attention. The Fourth Circuit, for example, found that a police informant was not a limited purpose public figure because he did not attempt to create or attract the public attention he received.¹¹⁹ The Oklahoma Supreme Court reached a similar decision in a case involving a store owner, who the Court did not deem a limited purpose public figure because he did not seek publicity even though there was an ongoing public controversy related to his store.¹²⁰

c. Determining if the Defamatory Statement is Germane

Most courts are liberal when deciding whether a defamatory statement is relevant to a public controversy in which the plaintiff is a limited purpose public figure. If a public controversy exists, courts generally “[find] a relationship between the defamatory statement and the plaintiff's role in the controversy.”¹²¹ The D.C. Circuit, for example, found that an allegation of nepotism in an oil firm was germane to a public controversy about the integrity of the oil industry.¹²² When courts find that statements relate to purely private matters, public controversies generally do not exist.¹²³

d. Analyzing the Plaintiff's Media Access

Like the Supreme Court, lower courts have not created a workable framework for determining whether a plaintiff has sufficient access to media outlets to be considered a limited purpose public figure.¹²⁴ While the Supreme Court in *Hutchinson* required that public figures have “regular and continuing” media access,¹²⁵ lower courts have generally established a rather low threshold for meeting this requirement. The Fourth Circuit, for instance, found that a scientist fulfilled the media access requirement because he “had access to scientific publications” and thus “was able to reach the audience which held him in esteem.”¹²⁶ Similarly, the Third Circuit held that a business was a limited purpose

cert denied, 474 U.S. 864 (1985).

¹¹⁸ *Rosanova*, 580 F.2d at 861.

¹¹⁹ *Jenoff v. Hearst Corp.*, 644 F.2d 1004, 1007–08 (4th Cir. 1981).

¹²⁰ *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 89 (Okla. 1976).

¹²¹ *Walker*, *supra* note 59, at 974.

¹²² *Tavoulareas v. Piro*, 817 F.2d 762, 774 (D.C. Cir. 1987), *cert denied*, 484 U.S. 870 (1987).

¹²³ *See, e.g., Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1092 (5th Cir. 1984); *Mead Corp. v. Hicks*, 448 So. 2d 308, 311 (Ala. 1983).

¹²⁴ *Walker*, *supra* note 59, at 975, 976.

¹²⁵ *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979).

¹²⁶ *Walker*, *supra* note 59, at 976 (citing *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703,

public figure because the court considered its ongoing advertisements to be “sufficient media access.”¹²⁷

Virtually all Supreme Court and lower court public figure and defamation law precedents, however, were established prior to the dawn of the internet. Widespread internet use causes some scholars to question how courts will apply the limited purpose public figure doctrine to bloggers and other internet personalities. The following section examines how courts have applied the public figure doctrine to the online environment and how courts would likely apply existing precedent when faced with a case involving a blogger as a defamation plaintiff.

III. SHOULD BLOGGERS BE PUBLIC FIGURES?

Very few defamation cases involving bloggers have been litigated. In each of these few cases, a non-blogger plaintiff sought to recover for allegedly false statements published on the defendant’s blog.¹²⁸ To date, no blogger has sued another individual or entity—whether a traditional media outlet or a fellow blogger—for defamation; however, as blogging grows in popularity and the traditional media increases its coverage of events in the “blogosphere,”¹²⁹ such lawsuits are inevitable.¹³⁰ If courts continue to apply precedent, however, many bloggers will likely meet the definition of a limited purpose public figure.

A. *The Internet and Public Figures Generally*

Although no bloggers have been plaintiffs in defamation cases, courts have decided a small number of cases in which the plaintiff’s internet presence factored into the public figure analysis. The Ninth Circuit, for instance, held that an individual engaged in a trademark dispute “voluntarily placed herself in the center of the public controversy by making various media appearances, by commenting on the controversy in the media and on her website, and by listing articles on her website regarding the metatag issue.”¹³¹ While the Ninth Circuit found the

708 (4th Cir. 1991)).

¹²⁷ *Id.* (citing *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980)).

¹²⁸ *See, e.g., Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (involving a town councilman suing an anonymous blogger for defamation).

¹²⁹ *See, e.g., Jessica Berthold, Anonymous Lawyer is the Satirical Story of a Fictional Jerk*, THE MORNING CALL (Allentown, Pa.), Feb. 24, 2006, at E3 (profiling blogger Jeremy Blachman and his “Anonymous Lawyer” blog).

¹³⁰ *See Jennifer L. Peterson, The Shifting Legal Landscape of Blogging*, WIS. LAW., Mar. 2006, at 10, available at http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=56211 (“For example, since blogs often discuss other blogs and bloggers, a widely-read blogger may bring a defamation claim based on false and defamatory statements made by another in response to the blog.”).

¹³¹ *Playboy Enters., Inc. v. Welles*, 30 Fed. Appx. 734, 735 (9th Cir. 2002).

plaintiff's website relevant towards deciding her status as a public figure,¹³² it did not provide any reasoning for this decision or guidelines for establishing the role a website should play when making future determinations.¹³³ The court's opinion does not establish how much weight website statements should have in determining limited purpose public figure status relative to statements appearing in traditional media outlets.¹³⁴ Specifically, the court did not indicate whether the plaintiff would still be a limited purpose public figure if she had only made statements on her website and had not made appearances in other media.¹³⁵

The Ninth Circuit revisited this issue in *Tipton v. Warshavsky*.¹³⁶ In *Tipton*, the owner of an internet sex website sued his web hosting provider for defamatory statements related to his motivations for running his website and for an accusation that the owner intended to steal millions of dollars.¹³⁷ The court found that Tipton was a limited purpose figure "because he voluntarily involved himself in public life by inviting attention and comment on ourfirsttime.com."¹³⁸ The court relied on both *Gertz and Stolz v. KSFM 102 FM*¹³⁹ in making this determination.¹⁴⁰ In *Stolz*, a California appellate court held that the owner of a media outlet is a limited purpose public figure, even if he or she as an individual does not have public notoriety.¹⁴¹ Through its reliance on the *Stolz* holding, the Ninth Circuit clearly considers websites media outlets. The court did not explain, however, whether mere publication of a website is sufficient to makes its owner a limited purpose public figure or if the website must have a certain threshold of popularity or influence. The website in *Tipton* received a "large number of hits."¹⁴² Would courts find that the owner of a website that receives only a handful of hits per day is also a limited purpose public figure? The court is silent on this issue.

The few other courts that have decided cases involving websites do not differ significantly from the Ninth Circuit's decisions. In *Nehls v. Hillsdale College*,¹⁴³ a district court judge found that the plaintiff was not a limited purpose public figure because an affair between a college president and his daughter-in-law was not a public controversy.¹⁴⁴ Even if it were, the plaintiff would still not have been a limited purpose public figure even though he had "invited public attention to his views" by putting his story on a website because the plaintiff did not assume a

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Tipton v. Warshavsky*, 32 Fed. Appx. 293 (9th Cir. 2002).

¹³⁷ *Id.* at 295.

¹³⁸ *Id.*

¹³⁹ *Stolz v. KSFM 102 FM*, 35 Cal. Rptr. 2d 740 (Cal. Ct. App. 1995).

¹⁴⁰ *Tipton*, 32 Fed. Appx. at 295.

¹⁴¹ *Stolz*, 35 Cal. Rptr. 2d at 746.

¹⁴² *Tipton*, 32 Fed. Appx. at 295.

¹⁴³ *Nehls v. Hillsdale Coll.*, 178 F. Supp. 2d 771 (E.D. Mich. 2001).

¹⁴⁴ *Id.* at 778.

position of prominence within the controversy.¹⁴⁵ A California court also determined that a company became a limited purpose public figure when it inserted itself into a controversy by posting letters on its website.¹⁴⁶

B. *Are Bloggers Limited Purpose Public Figures?*

Defamation law and public figure jurisprudence differs widely by jurisdiction.¹⁴⁷ Furthermore, certain critical elements in the limited purpose public figure test, such as whether a public controversy exists and whether a defamatory statement is germane to that controversy, depend heavily on the particular facts of a case. If these two elements are met, however, courts would almost certainly consider amateur-journalist bloggers limited purpose public figures based on existing precedents, even in jurisdictions that narrowly define the term “limited purpose public figure.”

If a court finds that a public controversy exists, it must determine whether the plaintiff voluntarily rose to the forefront of that controversy.¹⁴⁸ A defendant could prove this element against a blogger-plaintiff with little difficulty in liberal jurisdictions, such as the Third and Fifth Circuits. These courts have held that this element is met if an individual engages in behavior that will receive attention and comment, regardless of whether the individual wants that attention.¹⁴⁹ Therefore, it would be difficult for a blogger to argue that she did not expect to receive any attention when she put her thoughts about a controversy on a publicly-accessible website, particularly when thirty-two million people read blogs on a regular basis.¹⁵⁰

Similarly, it is not likely that a blogger would prevail even under tests adopted by more conservative courts, which require the plaintiff to seek attention or publicity.¹⁵¹ Unlike the plaintiffs in *Jenoff v. Hearst Corp.* and *Martin v. Griffin Television, Inc.*, who became involved in public controversies against their will and did not otherwise seek publicity or try to influence a public debate,¹⁵² a blogger-plaintiff, through the very act of blogging, seeks both influence and attention. Chief Justice Steele of the Delaware Supreme Court, writing for the majority in *Doe v. Cahill*,¹⁵³ observed that “blogs . . . can become the modern equivalent of

¹⁴⁵ *Id.*

¹⁴⁶ *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863, 870 (Cal. Ct. App. 2005).

¹⁴⁷ See discussion *supra* Part II.C.2.

¹⁴⁸ Walker, *supra* note 59, at 972.

¹⁴⁹ *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir. 1985); *Rosanova v. Playboy Enter., Inc.*, 580 F.2d 859, 861 (5th Cir. 1978).

¹⁵⁰ Carl Bialik, *Measuring the Impact of Blogs Requires More than Counting*, WALL ST. J. ONLINE, May 26, 2005, <http://online.wsj.com/article/SB111685593903640572.html>.

¹⁵¹ See *Jenoff v. Hearst Corp.*, 644 F.2d 1004, 1007–08 (4th Cir. 1981); *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 89 (Okla. 1976).

¹⁵² *Jenoff*, 644 F.2d at 1007; *Martin*, 549 P.2d at 89.

¹⁵³ *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

political pamphleteering.”¹⁵⁴ Blogs also “provide a . . . running debate about subjects of public interest and concern.”¹⁵⁵ Thus, the very definition of amateur-journalist blogging requires that a blogger seek to influence a public controversy. The mere act of creating a blog draws public attention to the author and his or her views. Individuals who simply wish to share their thoughts on a public controversy with a small group of family and friends have other options available, such as e-mail or a password-protected or “friends-only” webpage, which allow private dissemination of their writings without inviting the general public’s attention or scrutiny.¹⁵⁶ By creating a blog, especially a blog that enables comments or web syndication feeds, individuals seek both attention and influence in public debate, and thus fulfill one of the elements of a limited purpose public figure.

The “regular and continuing” media access requirement first established by the Supreme Court in *Hutchinson*¹⁵⁷ also is not difficult for a blogger-plaintiff to meet, particularly if other courts rely on the Ninth Circuit’s reasoning in *Tipton*, which found that owners of media outlets, including websites, fulfill the media access requirement and are limited purpose public figures.¹⁵⁸ Given the relatively low thresholds established by other courts,¹⁵⁹ however, most courts would find that a blogger has sufficient media access even if they do not fully embrace the Ninth Circuit’s reasoning. In *Gertz*, the Supreme Court found that a public figure’s media access allows him or her to reduce a defamatory statement’s “adverse impact on reputation.”¹⁶⁰ Lower courts interpreted *Hutchinson*’s media access requirement to mean that a limited purpose public figure must have the ability to “reach the audience which held him in esteem.”¹⁶¹ Thus, a scientist fulfills the media access requirement even though the scientific journals he publishes in have a small circulation because those who hold the scientist in esteem read those publications.¹⁶² A blogger, by the same reasoning, has the ability to mitigate damage to her reputation through her own blog—whether that blog has a large or small audience—since those who hold the blogger in esteem can visit her blog to obtain her side of the story.¹⁶³

¹⁵⁴ *Id.* at 456.

¹⁵⁵ Peterson, *supra* note 130, at 8.

¹⁵⁶ See Sarah Kellogg, *Do you Blog?*, WASH. LAW., Apr. 2005, at 24 (“Unlike e-mail . . . , blogs archive disparate thoughts and ideas of their authors and fans. Every posting can be chronicled for posterity . . .”).

¹⁵⁷ *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979).

¹⁵⁸ *Tipton v. Warshavsky*, 32 Fed. Appx. 293, 295 (9th Cir. 2002).

¹⁵⁹ See, e.g., *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708 (4th Cir. 1991); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980).

¹⁶⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

¹⁶¹ Walker, *supra* note 59, at 976 (citing *Reuber*, 925 F.2d at 708).

¹⁶² *Id.* See also *Colson v. Stieg*, 433 N.E.2d 246 (Ill. 1982) (holding that a professor defamed in a statement to a faculty committee fulfilled the access requirement because he could tell his side of the story to those exposed to the defamatory statement).

¹⁶³ This would be true based on the precedent established by the 4th Circuit in *Reuber*; dicta in *Colson*, however, indicates that the Illinois Supreme Court might have ruled

Although classifying bloggers as limited purpose public figures does not entirely prevent bloggers from suing to recover damages for harm that untrue statements caused their reputations, it makes recovery significantly harder. Actual malice is a high standard and often difficult to prove. Even before widespread internet use, some scholars argued that courts should revisit the limited purpose public figure doctrine and either eliminate this class of individuals or replace the actual malice requirement with a professional negligence requirement.¹⁶⁴ Now, as blogs and other forms of internet communication become more popular, some believe certain aspects of defamation law should be changed, either through Congressional intervention or by courts modifying precedent to take into account recent technological advancements.¹⁶⁵ The following section will examine the policy implications of bloggers as public figures and explore whether courts or legislatures should modify the public figure doctrine in light of these implications.

C. Should Courts Re-Examine Public Figure Jurisprudence?

1. Previous Departure from Precedent: Communications Decency Act

Courts and legislatures have altered common law precedents in the past when new developments, including technological advances, made following precedent impractical or undesirable. Most recently, Congress passed Section 230 of the Communications Decency Act¹⁶⁶ to overturn the holding of *Stratton Oakmont, Inc. v. Prodigy Services Co.*,¹⁶⁷ fearing that the *Stratton Oakmont* precedent would have

differently if the defamatory statement had been disseminated to the “public in general” because “it is possible that plaintiff would not have had sufficient access to the channels of communication to overcome or offset the damaging effect of defendant’s statements.” *Colson*, 433 N.E.2d at 249. If other courts adopt this reasoning, the size of a blog’s audience might determine whether courts classify a blogger as a limited purpose public figure in a given situation. For example, courts might treat a blogger who receives 100 hits per week as a limited purpose public figure if defamed by another blogger who receives 75 hits per week, but as a private figure if defamed by the *New York Times*, even if all other facts are identical.

¹⁶⁴ See, e.g., John L. Diamond, *Rethinking Media Liability for Defamation of Public Figures*, 5 CORNELL J.L. & PUB. POL’Y 289, 301 (1996) (“[Negligence] ideally punishes only inefficient behavior which fails to take proper but not excessive precautions. In the context of First Amendment values, requiring only negligence to recover damage but limiting recovery to special damages if a retraction is made after a judicial determination of falsity would more effectively serve the purpose of defamation law than requiring intentional or reckless culpability to obtain unlimited damages.”).

¹⁶⁵ See David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 172 (1997).

¹⁶⁶ 47 U.S.C. § 230 (2000).

¹⁶⁷ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

a chilling effect on the growth of the internet.¹⁶⁸

In *Cubby v. CompuServe*,¹⁶⁹ the first defamation case against an internet service provider to reach a final judgment, a federal district court judge rejected the plaintiff's claim that CompuServe fulfilled the requirements of a publisher of defamatory statements because CompuServe, like a bookstore owner, did not exercise editorial control over its content.¹⁷⁰ "While CompuServe may decline to carry a given publication altogether," the court reasoned, "in reality, once it does decide to carry a publication, it will have little or no editorial control over the publication's contents," particularly when "CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe."¹⁷¹ Because it "would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so," the court treated CompuServe as a distributor rather than a publisher and dismissed the plaintiff's case since it was undisputed that CompuServe "had neither knowledge nor reason to know of the allegedly defamatory . . . statements."¹⁷²

In contrast, a New York state court held in *Stratton Oakmont* that Prodigy, an internet service provider, liable for defamatory statements that its users made because Prodigy did not remove the defamatory postings despite having the capability.¹⁷³ Because Prodigy advertised to its members and the general public that it moderates the content of its message boards, and "actively utiliz[ed] technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste,'" the court found that Prodigy was "clearly making decisions as to content."¹⁷⁴ Even though Prodigy did not always exercise its editorial discretion to remove offensive or inappropriate messages, the court believed that Prodigy "uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards," and thus "Prodigy is a publisher rather than a distributor."¹⁷⁵ The court did not wrongly decide this case, though in tension with the ruling in *Cubby*,¹⁷⁶ because the ruling was not a departure from defamation law precedents, which attached defamation liability to publishers who assumed an editorial role.¹⁷⁷

¹⁶⁸ See H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own . . .").

¹⁶⁹ *Cubby, Inc., v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 140.

¹⁷² *Id.* at 141.

¹⁷³ *Stratton Oakmont*, 1995 WL 323710, at *7.

¹⁷⁴ *Id.* at *4.

¹⁷⁵ *Id.*

¹⁷⁶ *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

¹⁷⁷ MADELINE SCHACHTER, *LAW OF INTERNET SPEECH* 275 (2d ed. 2002).

a. Rationale for Departure from Precedent

Many internet businesses, users, and legislators felt that the *Stratton Oakmont* decision would result in a chilling effect on internet speech. Internet service providers, such as Prodigy and America Online, if held liable for defamatory messages posted by their users, would have a strong incentive to avoid defamation lawsuits either by censoring allegedly defamatory postings or by not editing or removing any user-generated messages, under any circumstances.¹⁷⁸ The latter incentive derives from fear that exercising editorial discretion under some circumstances would lead to lawsuits in other situations in which the service provider did not take similar action.¹⁷⁹

To prevent internet service providers from either over-censoring or under-censoring their users, Congress included Section 230 in the Communications Decency Act of 1996, which states, among other things, that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”¹⁸⁰ and that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”¹⁸¹

b. Impact

Multiple federal courts, beginning with the Fourth Circuit in *Zeran v. America Online*,¹⁸² have interpreted the statute very broadly, finding that the statute conveys broad immunity to internet service providers, website hosting services, mailing list operators, discussion board owners, and other electronic services covered by the statute.¹⁸³ Although *Zeran* and its progeny have come under criticism by some

¹⁷⁸ See 141 CONG. REC. H8470 (stating that Congressman Cox’s proposed amendment would “protect [intermediaries] from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve the [indecent] problem.”).

¹⁷⁹ See H.R. REP. NO. 104-458, at 194 (providing protections from civil liability of internet service providers for restricting access to objectionable material).

¹⁸⁰ 47 U.S.C. § 230(c)(1) (2000).

¹⁸¹ *Id.* § 230(e)(3).

¹⁸² *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). The plaintiff in *Zeran* filed a lawsuit against America Online, alleging that America Online was liable for defamatory message board postings made by an America Online user. *Id.* at 328.

¹⁸³ See, e.g., *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Green v. America Online, Inc.*, 318 F.3d 465 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co., Inc. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Prickett v. infoUSA, Inc.*, No. 4:05-CV-10, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006); *Ramey v. Darkside Prods., Inc.*, No. 02-730, 2004 U.S. Dist. LEXIS 10107 (D.D.C. May 17, 2004); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772 (Cal. Ct. App. 2001); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001).

courts¹⁸⁴ and scholars,¹⁸⁵ few scholars or practitioners believe that the potential negative impact of broad Section 230 immunity outweighs the benefits of “promot[ing] the continued development of the Internet and other interactive computer services . . .”¹⁸⁶ and “preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services . . .”¹⁸⁷

2. Potential Policy Implications of Bloggers as Public Figures

Some may argue that courts should not classify bloggers as limited purpose public figures, for such a classification would result in negative policy outcomes. In particular, some may believe that classifying bloggers as public figures would have a chilling effect on internet speech, as well as promote the dissemination of imperfect information in the marketplace of ideas. This sub-section will briefly summarize these arguments.

a. Possible Chilling Effect on Internet Speech

Although some bloggers have become so popular that they are able to earn substantial advertising revenues from blogging¹⁸⁸ or use their blogs to start professional writing careers,¹⁸⁹ most bloggers have very little to gain financially from blogging.¹⁹⁰ As Professor Ribstein observes, self-expression and

¹⁸⁴ See, e.g., *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142 (Cal. Ct. App. 2004), *rev'd* *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

¹⁸⁵ See, e.g., Sheridan, *supra* note 165, at 172. (“Regardless of Congressional intent, there is a question whether it is sound public policy to immunize interactive computer services from distributor liability. Stratton Oakmont and Zeran demonstrate the power of users of interactive computer services to inflict severe damage on the reputations of those who may have limited ability to defend themselves.”); Anita Ramasastry, *Is an Online Encyclopedia, such as Wikipedia, Immune from Libel Suits?*, FINDLAW, Dec. 12, 2005, <http://writ.news.findlaw.com/ramasastry/20051212.html> (“At a minimum, it may be time for Congress to revisit the Communications Decency Act and Section 230.”).

¹⁸⁶ 47 U.S.C. § 230(b)(1).

¹⁸⁷ *Id.* § 230(b)(2). See Sheridan, *supra* note 165, at 176–77.

¹⁸⁸ A premium ad on the Daily Kos blog, for example, costs \$30,000 a month. Daily Kos, Advertising, <http://www.dailykos.com/special/advertising> (follow “Premium Slot” hyperlink; then check “1 month”) (last visited Feb. 22, 2007).

¹⁸⁹ For instance, Jeremy Blachman was able to parlay his “Anonymous Lawyer” blog’s popularity into a book deal. See Margie Kelley, *Student’s Blog Strikes Chord, Generates Book Deal*, HARV. L. TODAY, Apr. 2005, at 3.

¹⁹⁰ Although most bloggers may have little to gain from blogging, certain subsets of bloggers may gain professional recognition or notoriety from blogging that may help advance their careers. See Hurt & Yin, *supra* note 9, at 2 (“Depending on the kind of exposure and support available to a junior professor at her home school, blogging may be the best way to gain exposure for one’s work, find mentors and engage in iterative discussions on relevant topics.”).

communication is the main incentive for most bloggers.¹⁹¹ Bloggers, according to Ribstein, “derive consumption value from both expressing their views and communicating them to others,”¹⁹² which is why “blogs would start up with no audience or tangible hope of conventional economic benefit.”¹⁹³ However, the current low costs of blogging overcome the low financial incentives to blog.¹⁹⁴ Because “blogging requires no more than a computer, Internet access . . . a blogging program,” and time to write,¹⁹⁵ blogs are a form of “cheap speech.”¹⁹⁶ Furthermore, blogs provide a social benefit 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.”¹⁹⁷

Treating bloggers as limited purpose public figures would raise the costs of blogging, which may produce a chilling effect.¹⁹⁸ If individuals knew that blogging would significantly diminish their chances of recovering damages for others’ defamatory statements, some may conclude the potential costs of blogging exceed the potential benefits, and choose not to blog. Defamatory statements “can ruin a person’s career or social life”¹⁹⁹ if they are widely disseminated, and “once the false accusations are made, there is practically no turning back,”²⁰⁰ even if the victim denies the accusations or the original publisher posts a retraction.²⁰¹

If the social benefits of blogging exceed the social costs, society would be harmed if treating bloggers as limited purpose public figures caused a significant number of individuals to avoid blogging because the individual costs have become too much to bear. Thus, some may believe that courts should rework the current limited purpose public figure framework to encourage the proliferation of blogs.

b. Imperfect Information in the Marketplace of Ideas

An additional argument against treating bloggers as limited purpose public figures focuses on the impact such rulings would have on the quality of information in the marketplace of ideas. The actual malice standard places a “premium on [the publisher’s] ignorance,”²⁰² as “[f]ailure to investigate does not in itself establish bad

¹⁹¹ Ribstein, *supra* note 28, at 195.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 193.

¹⁹⁶ *Id.* (quoting Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806–33 (1995)).

¹⁹⁷ Ribstein, *supra* note 28, at 201.

¹⁹⁸ See Edward T. Fenno, *Public Figure Libel: The Premium on Ignorance and the Race to the Bottom*, 4 S. CAL. INTERDISC. L.J. 253, 270 (1995).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

faith.”²⁰³ Because a publisher’s investigation “might lead to subjective awareness of the probable falsity of the story,”²⁰⁴ publishers have an incentive to not investigate whether a statement is true prior to publication, as “a publisher who never investigates the truth of his publication cannot be held liable for defamation because he never developed ‘serious doubts as to the truth of his publication.’”²⁰⁵ Although the Supreme Court has held that “purposeful avoidance of the truth” proves actual malice,²⁰⁶ an individual does not purposefully avoid the truth if she receives information from an informant and, in the rush to report the story, does not have the time to determine whether the informant is a credible source.²⁰⁷

If courts require blogger-plaintiffs to meet the high actual malice standard to succeed on a defamation claim, a significant amount of false statements and other misinformation about bloggers may become commonplace on the internet, thereby undermining the internet as a “marketplace of ideas.” Bloggers, knowing that they can escape liability for posting defamatory statements about a fellow blogger by not investigating their source’s credibility, will post potentially untrue statements with impunity. Like traditional publishers, bloggers have an “incentive to publish scandalous statements, whether they are true or not.”²⁰⁸ Though they may receive little or no financial gain, a blogger who uncovers scandalous or sensational information about another blogger has the potential to increase readership and other non-monetary rewards. Because false statements often “provid[e] consumers with information that outwardly appears to be objectively true fact,”²⁰⁹ it may become more difficult for blog readers to distinguish between true and false statements, reducing the usefulness of blogs as an information source.

3. Is Change Necessary?

Neither the possible chilling effect nor the potential proliferation of imperfect information justifies departing from precedent to prevent bloggers from being classified as limited purpose public figures.

a. The Chilling Effect Rationale: Distinguishing Bloggers as Limited Purpose Public Figures from ISPs as Publishers

Some may attempt to draw an analogy between bloggers as limited purpose public figures and internet service providers (and other interactive computer services) as publishers. Just as allowing the core holding of *Stratton Oakmont, Inc.*

²⁰³ *Id.* at 733.

²⁰⁴ Fenno, *supra* note 198, at 266.

²⁰⁵ *Id.* at 267.

²⁰⁶ *Harte-Hanks v. Connaughton*, 491 U.S. 657, 692 (1989).

²⁰⁷ See Fenno, *supra* note 198, at 267 (explaining that the Supreme Court’s decision in *Harte-Hanks* “does not substantially affect the incentive on publishers not to investigate”).

²⁰⁸ *Id.* at 273.

²⁰⁹ *Id.*

*v. Prodigy Services Co.*²¹⁰ to stand would have had an undesirable chilling effect on internet speech, some may argue that classifying bloggers as limited purpose public figures would hurt the growth of the blogosphere. These situations are not, however, analogous.

The chilling effect Congress sought to avoid through Section 230 of the Communications Decency Act did not involve authors' self-censorship of their own writings, but rather censorship imposed by non-author third parties motivated solely by fear of costly litigation.²¹¹ Lawmakers feared that service providers, to avoid lawsuits, would remove legitimate message board postings, websites, etc. without the original authors' consent, upon notification that someone believed the postings were defamatory, regardless of the merits of the complaint.²¹² Interactive computer service providers, though publishers as defined by precedent,²¹³ do not perform the same screening and editing functions as print publishers. As a result, a perfectly acceptable rule suddenly became a significant burden when applied to a new technology, and those changing circumstances required alterations to it.

Application of the public figure doctrine to bloggers does not have the same effect as applying publisher liability to service providers. Although classifying bloggers as limited purpose public figures might cause some prospective and current bloggers to reconsider their decision to blog, any chilling effect on blogging would be due to the blogger's individual calculations of the costs and benefits of blogging and decision that blogging is simply not worth the burden. Such a classification would not provide any third party, such as a service provider, with an incentive to censor the blogosphere or discourage the use of blogs. Any reduction in the total number of bloggers or any change in blog content would result only from prospective and current bloggers performing cost-benefit analyses and determining that the costs of running a blog (or blogging about certain topics) outweigh the benefits.

Some may incorrectly argue that there is no practical difference between ex post censorship by an internet service provider and ex ante self-censorship by a blogger. Although both forms of censorship will result in suppression of at least some speech, ex post censorship by non-author third parties has a profound negative impact on the market for certain types of speech that does not result from ex ante self-censorship by individual authors.²¹⁴ Legal precedents that provide incentives for ex post censorship by third parties, such as the holding of *Stratton Oakmont*, promote extremist behavior on the part of those third parties that leads to highly

²¹⁰ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

²¹¹ 141 CONG. REC. H8470. See discussion *supra* Part III.C.1.a.

²¹² See discussion *supra* Part III.C.1.a.

²¹³ *Stratton Oakmont*, 1995 WL 323710 at *1.

²¹⁴ Because "[r]emoving the message immediately is quick, simple, and relatively risk-free in the short run," service providers have a strong incentive to censor protected speech regardless of the factual circumstances, whereas individuals who choose to self-censor will be able to take such circumstances into account. Sheridan, *supra* note 165, at 176.

inefficient outcomes.²¹⁵ Service providers, in the absence of Section 230, would create a significant, negative externality in the market for internet speech by virtually eliminating the supply of websites, discussion boards, and other online venues for potentially defamatory communication because failure to remove such speech could result in legal and financial penalties.²¹⁶ Because service providers would constantly delete websites or comments upon receiving a complaint from a user, the demand for such websites would always outstrip the supply by a very large margin.

In contrast, ex ante self-censorship would have little impact on the market for such speech. Individuals have varying levels of risk tolerance, and a market for services free of artificial caps on supply and demand will take risk tolerance levels into account when determining the selling price of those services. If judicial treatment of bloggers as limited purpose public figures raises the costs of blogging to the point where some individuals no longer wish to blog, the market for blogging services will adjust by providing increased rewards for those who do blog. For example, those who continue to blog or start new blogs will likely receive more visitors than they would have otherwise, which they can then translate into higher esteem, greater advertising revenue, or whatever the individual blogger is seeking to maximize through blogging. As the increased rewards for blogging become publicized, many individuals would redo their cost-benefit analyses and decide to become bloggers. Though the market for bloggers may not be at its ideal equilibrium point, any inefficiency created by ex ante author censorship pales in comparison to the inefficiencies of ex post non-author censorship.

Such a cost-benefit analysis on the part of a blogger would not represent a significant change in circumstances. In fact, this type of behavior is exactly what the Supreme Court intended in *Gertz* and its progeny. Individuals must make a trade-off between their ability to influence the outcome of a public debate or controversy and their ability to stay out of the public spotlight. Individuals who value their privacy highly can maintain their private figure status only by making sure they do not “thrust themselves to the forefront of particular public controversies;”²¹⁷ however, individuals who strongly desire to “influence the resolution”²¹⁸ of public issues can do so if they allow public attention and comment.²¹⁹ Bloggers have the same options available to them as all voluntary limited purpose public figures have had in the past. That bloggers attempt to influence the resolution of debates in an online environment is irrelevant, as the underlying trade-off between influence and privacy is the same whether one attempts to influence public debate through newspaper opinion columns, speeches in the town square, or blog posts.²²⁰

²¹⁵ *Id.*

²¹⁶ *Id.* at 176–77.

²¹⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ In addition, bloggers not being treated as limited purpose public figures would lead to

Furthermore, individuals who do not wish to bear this additional cost of blogging have other means of expressing themselves on the internet that would likely not result in a limited purpose public figure classification. For example, an individual wishing to avoid becoming a limited purpose public figure can post her opinions on Usenet, a mailing list, a message board, or another decentralized method of communication.²²¹ Though it is possible that social benefits from blogging may decrease if there is a decrease in the number of bloggers, the movement of displaced bloggers to message boards and similar services would increase the social benefits gained from those services, maintaining the current equilibrium of social benefits derived from the internet.

b. The Marketplace of Ideas Rationale

Similarly, it is doubtful that classifying bloggers as limited purpose public figures would have a negative impact on the quality of information found on the internet. Critics of the actual malice standard are correct that, in general, this high standard encourages publishers to not investigate scandalous or sensational stories about public figures before publishing them.²²² Given the existing statutory benefits Congress has already conferred on internet publishers, however, requiring bloggers to prove actual malice to recover damages for defamation would *not* provide bloggers or other internet writers with an additional, non-trivial incentive to publish defamatory or untrue statements about bloggers.

Requiring actual malice in public figure defamation cases considerably lowered expected legal costs and thus altered the cost-benefit analysis for print publishers by giving them greater incentive to report potentially defamatory material. Such a requirement for internet writers, however, would not change their cost-benefit analysis very much. Section 230 already significantly lowered the costs of publishing defamatory or untrue statements on the internet, and multiple courts interpreted the statute's immunity provision to encompass situations that Congress might not have originally contemplated. The Ninth Circuit, for instance, granted Section 230 immunity to a mailing list moderator who had chosen to distribute to his mailing list an email containing defamatory information about an individual, even though the moderator made edits to the email prior to distribution.²²³ This ruling, along with others,²²⁴ has virtually eliminated costs of posting defamatory

an even less equitable outcome, since bloggers would be able to defame others by reprinting/reporting defamatory information they receive from third parties (e.g. commentators) and be immune due to Section 230, but would have strong protection against being defamed themselves.

²²¹ See Thomas D. Brooks, Note, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461 (1995) (arguing that a plaintiff who posted about a public controversy on an internet message board or Usenet would not be deemed a public figure by a court).

²²² See, e.g., Diamond, *supra* note 164; Fenno, *supra* note 198.

²²³ Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).

²²⁴ See Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003); Green v.

information about a public or private figure on the internet. As Glenn Reynolds observes, a significant portion of defamatory and libelous statements on blogs originate either in blog comment sections or through emails from readers to the blogger.²²⁵ An individual who wishes to harm a blogger's reputation on a website, blog, discussion board, or mailing list can avoid any liability for defamation by not making defamatory statements herself, but by simply reposting third parties' defamatory statements, an action protected by Section 230.²²⁶ Although the defamed blogger would have recourse against the third party who submitted the defamatory statement to the internet publisher, the original defamer is often anonymous and unidentifiable.²²⁷ Thus, altering the public figure doctrine would likely not have a noticeable impact on the frequency of internet defamation suits unless Section 230 was repealed.

In addition, the marketplace of ideas rationale presupposes that most individuals currently believe internet sources are authoritative, or at least generally reliable. It is unclear that this is the case; in fact, it is likely that many individuals take information they obtain from online sources, including blogs, with a grain of salt,²²⁸ for even sources generally considered reliable may have significant inaccuracies or misrepresentations.²²⁹ If this is true, treating bloggers as limited purpose public figures and the accompanying increase of defamatory statements would not have a significant negative impact on how individuals perceive the internet, since many individuals do not believe the internet is a highly reliable source of information and are already highly skeptical of such remarks.

America Online, Inc., 318 F.3d 465 (3d Cir. 2003); Ben Ezra, Weinstein, & Co., Inc. v. America Online, Inc., 206 F.3d 980 (10th Cir. 2000); Prickett v. infoUSA, Inc., No. 4:05-CV-10, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006); Ramey v. Darkside Prods., Inc., No. 02-730, 2004 U.S. Dist. LEXIS 10107 (D.D.C. May 17, 2004); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772 (Cal. Ct. App. 2001); Schneider v. Amazon.com, Inc., 31 P.3d 37 (Wash. Ct. App. 2001).

²²⁵ Glenn Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts* 4 (Apr. 2006) (working paper, on file with the Berkman Center for Internet & Society—Bloggership: How Blogs are Transforming Legal Scholarship Conference), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898013 (“[G]iven the volume, and often intemperate tone, of many blogs’ comment sections . . . eliminating those as a source of liability does much to cut down on bloggers’ exposure.”).

²²⁶ *Id.* at 3–4.

²²⁷ The original defamers in *Zeran*, for instance, were never identified. *Zeran v. America Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

²²⁸ See Reynolds, *supra* note 225, at 5–10 (observing that blogs, and the internet in general, exist in a “low-trust culture” and that it is very unlikely that an individual would change his or her opinion of another person due to something posted on a blog).

²²⁹ Compare Jim Giles, *Internet Encyclopaedias Go Head to Head*, 438 NATURE 900 (2005), with Posting of Daniel J. Solove to Concurring Opinions, http://www.concurringopinions.com/archives/2005/12/fake_biographie.html (Dec. 1, 2005, 11:24 EST) and Posting of Daniel J. Solove to Concurring Opinions, http://www.concurringopinions.com/archives/2005/12/wikipedia_vanda.html (Dec. 18, 2005, 15:15 EST).

V. CONCLUDING REMARKS

Although the advent of blogging “has sparked an exciting new era of Internet communications”²³⁰ that will likely have a significant impact on several sectors of society, bloggers and their supporters must acknowledge that with power comes responsibility. As blogs continue to grow in importance, bloggers must increase their awareness of the impact their blogging may have on their ability to recover damages as plaintiffs in defamation lawsuits. Though courts and legislatures have shown a willingness to alter long-standing common law principles in order to avoid “unexpected or counterintuitive rulings that could . . . destabilize the blogging community,”²³¹ bloggers should not expect Congress or the courts to alter the public figure doctrine for the convenience of the blogging community. Though bloggers may still desire official recognition as journalists and legitimate media outlets, they should not lose sight of the fact that recognition of their importance and their ability to influence public controversies may result in unintended consequences, such as significantly impaired ability to recover damages for harm to their reputations.

²³⁰ Goldman, *supra* note 14, at 12.

²³¹ *Id.*

