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Insta-Famous: Challenges and Obstacles Facing Bloggers and Social Media Personalities in Defamation Cases

**Insta-Famous: Challenges and Obstacles
Facing Bloggers and Social Media
Personalities in Defamation Cases**

Maureen T. DeSimone*

I. Abstract

The Supreme Court has established a test for determining which label applies to each individual plaintiff, but this test was developed in 1974, in the context of newspapers and physical print. A new test is needed in the context of the Internet.

Libel is of interest in the age of the Internet since blog posts, Instagram posts, Facebook posts, etc. are, for the most part, written statements (videos posted on such providers can also be oral, so slander could also be of issue). There is a different standard for proving defamation cases if the plaintiff is a private individual versus a public figure, a limited public figure, or a public official. Today, Internet personas face challenges when faced with cyberbullying by Internet trolls. The first obstacle for social media providers is determining whether they qualify as a public figure, a limited public figure, or a private figure. The second obstacle they face is that under classic

defamation law, an opinion is a defense to defamation. The third obstacle they face is that they cannot sue the Internet service provider, which is provided immunity under Section 230 of the Communications Decency Act (CDA). Since the CDA was first enacted in 1996, the need to encourage growth and development of Internet service providers no longer exists in the same way that it did at that time. As a result, defamation law needs to be updated to provide recourse and protection for those whose reputation is damaged on the Internet. This note will discuss the challenges facing Internet personas under current defamation law by way of example. To illustrate the challenges Internet personas face in a legal action, this note will explore obstacles that two fashion bloggers, Chiara Ferragni of “The Blonde Salad” and Leandra Medine of “The Man Repeller,” could face in an imagined defamation suit.

II. Does the Average User of Social Media Open Themselves to

Liability for Defamatory Statements Made on the Internet?

In recent years, an increasing number of people are using social media platforms.¹ Today, there are over 2.3 billion active social media users worldwide.² The number of worldwide users is expected to increase to 2.95 billion by 2020.³ In the United States, 60% of the population has a social media account; in fact, the United States has the fastest growing use of social media worldwide.⁴ Further, in the United States, even if someone does not have a social media account such as Twitter, Instagram, Snapchat, or Facebook, more often than not, they at least have a social media professional networking account, such as LinkedIn.⁵ In 2014, there was a 333% increase in social media defamation cases in the U.K. alone; however, this rise was only from 6 to 26, showing that defamation lawsuits may be difficult to bring for the average individual.⁶ In the United States, most social media cases seem to take the

form of cyberbullying; in fact, in 2015, it was reported that approximately 52% of adolescents have experienced cyberbullying according to the Department of Health and Human Services, Bureau of Justice Statistics and Research Center.⁷

Traditionally, publishers such as magazines and newspapers were defendants in defamation cases, not the average citizen.⁸ Today, with the Internet, the potential reach of one post is infinite, and to make matters worse, it can be further shared by anyone who views the original publication.⁹ As a result, a defamation case could be very damaging to a person's reputation due to the potential reach; however, the amount a person can recover is drastically limited by Section 230 of the Communications Decency Act ("CDA").¹⁰ Also problematic, the Internet provides laymen, who are not well-versed in the law, a platform to open themselves to lawsuits—

and they are likely ill-equipped to defend themselves.¹¹

The Internet provides a platform for anyone to publish his/her own speech, thoughts, talents, and ideas. One no longer needs a formal publisher's assistance to put forth their work; one can simply self-publish using a social media or blog platform.

Today, a new commerce of attention exists in these social media platforms. Social media personas now have the opportunity to make money with their posts if their social media feeds garner enough attention.

Cooking bloggers now have hard copy, published cookbooks, all as a result of their Internet attention. Fashion bloggers have transitioned themselves into mainstream fashion.

While the Internet fosters a lot of ingenuity and creativity, it can also produce negativity. Many Instagram personas and Internet bloggers have been attacked by Internet trolls.¹² In the brick and mortar

world, there is a different standard for proving defamation cases if the plaintiff is a private individual, public figure, limited public figure, or public official. The Supreme Court has established a test for determining which label applies to each individual plaintiff, but this test was developed in 1974 in the context of newspapers and physical print. This test is no longer appropriate in the virtual world. An Internet blogger or Instagram persona files (collectively referred to as "Internet personas") a defamation lawsuit against one of these trolls, what are the legal implications? Are Internet personas, who are well known in certain fields, considered limited public figures? In order to answer these questions, which are addressed below, it will be important to look at methods in which Internet personas attempt to achieve notoriety.

III. Historical Background of Defamation Cases

A. Defamation Defined

*Different Categories of
Plaintiffs in Defamation Law*

Defamation is a false statement that causes damage to a person's reputation.¹³ While different jurisdictions have varying elements necessary to prove defamation, in general, a plaintiff must prove:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.¹⁴

Defenses against defamation include statements that are true,¹⁵ express one's opinion,¹⁶ or are made with consent, invitation, or request.¹⁷ When analyzing a defamation claim, it is essential to categorize the plaintiff as a public figure, limited public figure, public official, or private person, as there is a different standard of proof for each.¹⁸

*B. Establishing Different
Standards of Proof for*

In 1964, in *New York Times v. Sullivan*,¹⁹ the Supreme Court looked at the interplay between constitutional protections for speech and press, and a state's ability to award damages to a public official in a libel action.²⁰ The action arose out of statements allegedly made about L.B. Sullivan, the Commissioner of Public Affairs in Montgomery Alabama who oversaw the police, in a full-page advertisement in the *New York Times* on March 29, 1960.²¹ The alleged libelous statements, which Sullivan claimed referred to him, actually referenced the police, and not him by name.²² However, Sullivan, as Police Commissioner, believed that the advertisement contained false statements about the police, and by extension, the Commissioner himself.²³ Sullivan alleges that even though neither statement referred to him by name, it referred to the police who were accused of "ringing" the campus police and padlocking

the dining hall in response to the protest of Dr. Martin Luther King, Jr.'s arrests.²⁴ The Supreme Court admitted that some of the statements made with respect to the events, which occurred in Montgomery, were inaccurate.²⁵ Further, three of Dr. King's four arrests took place before the Commissioner was even in office.²⁶ Neither the individuals who paid for advertisement space, nor the New York Times checked the accuracy of the statements made.²⁷

While *Sullivan* involves a civil action where the defendant is a publisher and not a state actor, it still implicates First Amendment protections and thus provides a Constitutional defense to defamation actions.²⁸ Further, Sullivan is a public official and the Supreme Court recognized the importance of establishing a wide-open space for critique and debate on public issues.²⁹ The Court held that Sullivan, as a public official, was only able to recover from a defamatory statement involving his

public duty if he could prove that the statement was made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."³⁰ The reason for a higher standard for public officials is that there is a legitimate governmental interest in protecting the public's freedom to criticize public officials, and this outweighs the officials' interests when the statements deal with their public duties.³¹

The Supreme Court first discussed whether *Sullivan* applied to public figures (in addition to public officials) in the 1967 decisions of *Curtis Publishing Co. v. Butts* and its companion case *Associated Press v. Walker*.³² In *Curtis*, Curtis Publishing Co. ("Curtis") published an article entitled "the Story of a College Football Fix" stating that Butts, an athletic director of the University of Georgia, gave his playbook to the University of Alabama head coach before the big game, which Curtis claimed was

inadvertently overheard by a third party.³³

In *Associated Press*, a news dispatch gave an eyewitness account of a massive riot as a result of an effort to enforce a recent order to enroll a black student, James Meredith, claiming that Walker, a private citizen at the time of the riot/publication, had incited the riot.³⁴ The Supreme Court concluded that both Walker and Butts enjoyed a substantial amount of attention at the time of the publications and the subject of the publications served the public interest.³⁵ The Court held that Walker, under this standard, was not entitled to compensation due to the necessity to immediately disseminate the information.³⁶ However, the Court concluded that Butts was entitled to compensation because there was no need to rush the publication of the defamatory statements about Butts and no attempt was made to see if the information was accurate.³⁷

In 1974, in *Gertz v. Robert Welch*,

Inc., the Court expanded on the distinctions outlined in *Sullivan*, *Curtis*, and *Associated Press* by further establishing a higher standard of proof for not only public officials and public figures, but also for *limited* public figures, along with a lower standard for *private* individuals.³⁸ Elmer Gertz was an attorney who represented the Nelson family in a civil suit against a police officer, Officer Nuccio, who murdered their son.³⁹ Robert Welch, Inc., publisher of *American Opinion*, which outlines views of the John Birch Society, published an article about the officer's criminal murder trial entitled "FRAME-UP: Richard Nuccio and the War on Police," which "portrayed [Gertz] as an architect of the 'frame-up.'"⁴⁰

The article further stated that Gertz was an official of the Marxist League for Industrial Democracy, a Leninist, a Communist-fronter, a criminal, and an officer of the National Lawyers Guild.⁴¹ The evidence proved quite the opposite: not

only was Gertz not affiliated with Marxist League for Industrial Democracy, but he did not have a criminal record, there was no evidence he was planning an attack, and, further, he never even spoke to the press about the matter.⁴² Gertz sued for libel, stating that the article included false statements that “injured his reputation as a lawyer and a citizen.”⁴³ But the court found no evidence that the managing editor of American Opinion knew of the falsity of the statements.⁴⁴ On review, the Supreme Court affirmed and stated that the lower court correctly determined that mere proof of failure to investigate cannot alone establish reckless disregard for the truth.⁴⁵

In *Gertz*, the Supreme Court reiterated the holding in *Sullivan* that there is no constitutional value in false statements of fact, since “[n]either the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”⁴⁶ The

Supreme Court further discussed that while there is no societal value in false statements, it is inevitable in free debate.⁴⁷ The Court defined a public person as someone “by reason of notoriety of their achievements or the vigor and success with which they seek the public’s attention.”⁴⁸ The purpose for this distinction between public figures, public officials, and private citizens was because public figures and public officials have greater resources to improve their reputations, and thus the state interest in protecting public figures’ and public officials’ reputations is lower.⁴⁹ This triggered the emergence of the requirement to prove actual malice by clear and convincing evidence.⁵⁰

Private individuals, unlike public officials and public figures, do not purposefully thrust themselves into the public sphere, which comes with a certain acceptance of the possibility of scrutiny.⁵¹ The Court stressed that private individuals

should enjoy a lower standard of proof for defamation than the standard outlined in *Sullivan*; a private individual-plaintiff need only prove that the statements were made with either a knowledge of falsity or a reckless disregard for the truth.⁵² Here, Gertz was not a public figure for all purposes and contexts, rather he voluntarily only inserted himself in the public sphere merely in the context of being an active member of the community and in his professional affairs, such as being an officer of local groups and professional organizations, and published articles and books on legal topics.⁵³ Additionally, while he was well known in some aspects of the community, he was not a generally known individual.⁵⁴ The Court was unwilling to characterize Gertz as a general public figure, and at best he could qualify as a *limited* public figure.⁵⁵ But even in this context, the Court concluded that he did not qualify because he did not actively participate in the

criminal proceedings of Officer Nuccio, and he never discussed either the criminal or civil proceedings with the press.⁵⁶

Therefore, he only had to prove that Robert Welch, Inc. either published the article with knowing it was false, or with reckless disregard for the truth.⁵⁷

*C. The Importance of Opinion
and Public Concern in Defamation Cases*

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Supreme Court clarified that a private figure needed to only show negligence to recover in defamation cases as long as the matter did not involve public concern.⁵⁸ *Dun & Bradstreet*, a credit reporting agency, issued a false report, which misrepresented assets and liabilities held by Greenmoss Builders, Inc.⁵⁹ Greenmoss Builders, Inc. called and requested a correction when it learned of the error, but *Dun & Bradstreet* refused.⁶⁰ The case went up to the Supreme Court, which reasoned that there is a reduced value placed

on speech that is purely private in nature, resulting in less constitutional protection and a greater state interest in protecting individuals in their private affairs.⁶¹

The *Dun* Court further explained that the purpose of the protection under the First Amendment was to protect the exchange of ideas in order to encourage social and political change.⁶² When there is no threat to free public debate, challenges to the government, or censorship of the press, the protection over the speech is less strict.⁶³ If the alleged defamatory statements are made about a private figure involving a matter of public concern, then actual malice could be required; however, if the statements about a private figure are solely about private matters there is less constitutional protection.⁶⁴

In *Milkovich v. Lorain Journal Co.*, the Supreme Court clarified the opinion defense to allegedly defamatory statements.⁶⁵ Michael Milkovich, a high

school wrestling coach, testified during a suit, which ultimately overturned a ruling by the Ohio High School Athletic Association, causing his entire team to be on probation following an altercation.⁶⁶ Lorain Journal Company (“Lorain”) published an article in Theodore Diadiun’s column “TD says” implying that Milkovich perjured himself at the court proceeding.⁶⁷ Milkovich brought suit and alleged that by implying that he committed the crime of perjury, Lorain damaged his professional reputation as a teacher and coach.⁶⁸ Lorain argued, and the Ohio Supreme Court agreed, that the column was constitutionally protected opinion, and that this was clear by the caption, which read “TD Says,” which clearly indicated that it was merely Diadiun’s opinion.⁶⁹ Additionally it was on a sports page, which they argued was traditionally an outlet for hyperbolic speech.⁷⁰

Overruling the Ohio Supreme Court, *Milkovich* held that an opinion can imply a

statement of fact and thus is not always protected by First Amendment privilege.⁷¹ Specifically, there was an implication in Diadiun's statement that could be proved either true or false pertaining to whether or not Milkovich perjured himself, thus the statement could not be protected under the Constitution.⁷² The Court refused to establish a requirement in every defamation case to first determine a threshold issue as to whether a statement is that of an opinion or that of a fact.⁷³ But in clarifying the Supreme Court's discussion in *Philadelphia Newspapers, Inc. v. Hepps*,⁷⁴ the *Milkovich* Court explained that a statement on matters of public concern in a defamation suit must be provable as false before you establish liability in situations where the defendant is a media provider.⁷⁵ This means that a statement relating to opinion regarding matters that are of public concern, that do not contain a provable false fact, is protected under the Constitution.⁷⁶

IV. Exploring Challenges Facing Internet Personas

A. First Challenge: Classifying Internet Personas

1. Attention Economy and Internet Personas

Today, social media has become a platform for individuals to self-publish and to become entrepreneurs in a way that no other generation has been capable of doing. Further, one of the most important commodities today is other people's attention; the Internet, especially social media, has provided users the opportunity to grab attention and to mold their ability to garner attention, and then transform that attention into a career.⁷⁷ Attention Economy is the commodity of seeking out attention.⁷⁸ While a lot of Internet use is on an interpersonal level, many Internet users gain notoriety, and many even seek notoriety, through the use of these platforms.⁷⁹ Internet personas gain an audience through various methods, including push and pull methods.⁸⁰

In the pull method, the audience seeks out media and ultimately finds the content providing user. The audience forms when their search results in their signing up for blog updates or “follow” or “friend” the content providing Internet user.⁸¹ The pull method may be successful for those who already have a somewhat established following, but it is not likely the best method for new users to obtain an audience.⁸² For instance, a blogger may use search term optimization, which uses key words to drive traffic to their blogs.⁸³ More effective, however, is the push method, where the Internet persona actively seeks the audience through advertisement or by soliciting views, ‘follow,’ or ‘friend’ requests.⁸⁴ Ordinarily, an Internet persona will implement both push and pull methods in an effort to establish an audience.⁸⁵

Online advertisement and marketing has been an important function of social media, even as early as the beginning stages

of its development.⁸⁶ In 2013, eMarketer⁸⁷ estimated that companies would spend more than \$9 million dollars that year in social media advertising and marketing.⁸⁸ Further, eMarketer estimated that a 10.5% annual growth could continue through 2017.⁸⁹ RBC Capital Markets and Advertising Age found in September 2016, that 30% of businesses that responded to their poll, advertised on Instagram, an increase from the 27% recorded from a survey conducted in February 2016.⁹⁰ It was also reported that the amount spent by Nanigans’s⁹¹ customers increased by 29% from February to April of 2016.⁹² Internet personas, sometimes called “life style bloggers,” have started capitalizing on businesses’ desires to advertise on blogs and social media, and some have created very successful careers as a result.⁹³

2. Blogging as a Business: Employing Methods of Attention Economy

to Transform Internet Blogging into a Money Machine

Harvard Business School recently explored the business model of Chiara Ferragni,⁹⁴ a fashion blogger of the world famous blog “The Blonde Salad,” as a case study for the Harvard Business School MBA program.⁹⁵ Ferragni, while still in school, began posting pictures of her ‘outfit of the day’.⁹⁶ Riccardo Pozzoli, her boyfriend and co-founder, recalled that her posts always seemed to garner reactions, and each day gained popularity.⁹⁷ Further, Pozzoli notes that although Flickr was a professional photography site, Ferragni was receiving ten times the comments that a professional photographer would receive.⁹⁸ Pozzoli and Ferragni realized that by merely posting her ‘outfit of the day’, she was engaging people.⁹⁹

Ferragni started to realize that bloggers in the United States, such as Tevi Gevinson (StyleRookie.com) and Michele Phan (makeup tutorial blogger) were

channeling their blogs into a career.¹⁰⁰ This inspired Ferragni and Pozzoli to create the Blonde Salad “organized around the different ingredients of the golden-haired Ferragni’s salad of interests: fashion, photography, travel and lifestyle.”¹⁰¹ Pozzoli, who was a finance student at Bocconi and moved to Chicago to intern, advised Ferragni to post a daily entry at 9AM to establish loyalty amongst her followers.¹⁰² By posting at 9AM every morning, Ferragni was becoming part of people’s daily breakfast routine, and after a month she had 30,000 visitors daily.¹⁰³ Three months after starting her blog, Ferragni was invited to Milan Fashion Week, a rare opportunity, and possibly one of the first such opportunities extended to a fashion blogger.¹⁰⁴ In fact, once journalists realized that a fashion blogger was present at the show, they started interviewing *her*.¹⁰⁵

While Ferragni was offered a few jobs on Italian television shortly after

attending her first fashion week, she turned them down because she and Pozzoli “knew that if [they] wanted to work in fashion, [they] could not sell Chiara as a show girl.”¹⁰⁶ They decided to concentrate their efforts on building international awareness, and even sought invitations from fashion weeks in New York, Paris, London, and Stockholm so that Ferragni could post about the new trends in each of these cities.¹⁰⁷ In 2011, Ferragni and Pozzoli decided to turn the Blonde Salad into their full-time jobs, and in order to increase their daily visits even further, they decided to hire an Italian digital strategy agency to update the appearance of the website and create a mobile version.¹⁰⁸ Additionally, they signed a contract with an advertising company, which specialized in marketing in Italy.¹⁰⁹

In the beginning, most of their business came from selling advertisement banners on the blog, but then they realized that product placement and content

engagement would be even more lucrative.¹¹⁰ Ferragni would post stories about her day and/or her travels and would show a photograph of the outfit she was wearing and provide a link to the brand’s website.¹¹¹ These methods successfully in provided The Blonde Salad with partnerships with Burberry, Dior, and Louis Vuitton, just to name a few.¹¹² Ferragni started to become a celebrity herself, and was invited to attend events for which she requested fees between \$30,000 and \$50,000 for her appearance.¹¹³ Ferragni now has her own line of shoes, which she advertises nearly exclusively on the blog.¹¹⁴ In mid-2013, the duo noticed that the blog’s daily views of 140,000 were starting to slowly decline due to the increased popularity of Instagram, and they decided to sync her personal Instagram account with the blog’s contents.¹¹⁵ Soon after, she reached 2 million followers in 2013, and 3 million in 2014—numbers she had never reached

previously.¹¹⁶

Similar to Ferragni's experience, Leandra Medine of "The Manrepeller" transformed her personal passion project into a successful business.¹¹⁷ In 2011, when Medine was in college, she started writing a blog about women like herself, who dressed for themselves and not for men. She titled one of her blog posts as "stuff that men don't like."¹¹⁸ Five years later, her blog is a successful business that employs a marketing and sales team to help her find sponsors for posts.¹¹⁹ Medine establishes loyalty with her followers by focusing on transparency; she believes that people value authenticity, so she is honest when a post is sponsored, and does not aim to "trick" her followers.¹²⁰ While Medine allows brands to view her content collaboration posts prior to them being posted, she maintains her creative freedom, and frequently says "no" to companies that do not fit her brand.¹²¹ In addition to content collaborations,

Manrepeller has banner advertisements; like Ferragni, however, Medine notes that these are not as lucrative as content collaborations.¹²² While Manrepeller posts are often paid, they are only brands that Medine and her company are truly excited about; Medine and her co-writer Amelia Diamond, are very clear that they do not write paid reviews, but will post stories about brands they truly care about.¹²³ Medine, like Ferragni, has also been invited to fashion week and posts blogs reporting on the upcoming trends.¹²⁴ Both Ferragni and Medine, were able to use the theories of attention economy to establish successful businesses through the use of blogs and Instagram.

B. Second Obstacle: Opinion Defense

Due to their notoriety, Internet personas such as Medine and Ferragni are susceptible to being defamed, harassed, and publically ridiculed by individuals known as Internet "trolls."¹²⁵ Internet trolls take

advantage of the anonymity and lack of face-to-face interaction provided by the Internet in order to post cruel comments about bloggers and social media personalities.¹²⁶ Bloggers are harassed and defamed online, and in particular, many have are body-shamed or criticized for their appearance.¹²⁷ These Internet trolls feel empowered by the veil of the Internet and brazenly criticize by offering their unwanted and unsolicited “opinions.”¹²⁸ As discussed above, opinions are considered a defense in defamation cases.¹²⁹ Under current law, an Internet troll’s opinion would be protected as long as it did not include or imply a false fact.¹³⁰ This protection was initially provided for matters that were considered public concern such as opinions made about our government or governmental leaders.¹³¹ Internet trolls are being protected when their comments are not a matter of public concern simply because comments about someone’s looks are not false facts and are “merely

opinion.”¹³²

C. Third Obstacle: Section 230

Immunity to Internet Service

Providers

In order to file a defamation case, Medine and Ferragni would be faced with many challenges, including incurring significant costs, without the ability to recover significant monetary damages, since they are unable to sue the Internet service provider and only the poster of the defamatory statement.¹³³ Internet service providers (websites and social media providers) are immune from defamation suits under Section 230 of the Communications Decency Act (“CDA”).¹³⁴ Unlike in the physical print media world, in Internet defamation cases, plaintiffs cannot seek damages from the publisher.¹³⁵ In fact, Section 230 specifically immunizes Internet service providers from civil liability:

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or

speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)¹³⁶

Section 230's protection of Internet service providers from civil liability regarding posts made by third parties severely limits the monetary damages available to a blogger or social media user in the United States, and, as a result, the United States offers little protection to those defamed on the Internet.¹³⁷

In *Zeran v. America Online, Inc.*, the U.S. Court of Appeals for the Seventh Circuit first examined the CDA as a defense

to defamation law.¹³⁸ Kenneth Zeran brought an action against America Online, Inc. ("AOL") arguing that it unreasonably delayed removing defamatory messages posted by an anonymous third party, neglected to screen for additional posts, and refused to post retractions.¹³⁹ Zeran not only received a high volume of phone calls, but also death threats as a result of this posting.¹⁴⁰ Affirming the lower court, the Seventh Circuit held that Section 230 of the CDA provides Internet service providers protection from liability. They cannot be treated as publishers of the content in the same way that a newspaper is considered a publisher in print media.¹⁴¹ The court explained that the purpose of the CDA's protection for Internet service providers is to encourage and maintain online discourse and competition in the free market, free from federal and state regulation.¹⁴² The court further held that Section 230 eliminates both publisher and distributor

liability, since distributors are also considered publishers according to defamation law.¹⁴³ Publishing the statement is a necessary element in defamation law, so only one who publishes such statements are liable for defamation.¹⁴⁴

Without the protections provided by Section 230, Internet service providers would potentially be subject to liability for every defamatory statement made on their sites.¹⁴⁵ Each post would subject the provider to an investigation if the posting party made a defamatory remark; this, in turn, could cause a “chilling effect,” and discourage new Internet service providers from entering the marketplace.¹⁴⁶ The court recognized that Zeran had only sued AOL because the individual poster was anonymous, and only AOL had the ability to locate this individual.¹⁴⁷

While on the Internet anyone can become a “publisher” of content, the Society of Professional Journalists has a code of

ethics, which, while not legally enforceable, is a standard followed by thousands of journalists.¹⁴⁸ This code encourages journalists to avoid stereotyping individuals based on race, age, gender, religion, ethnicity, sexual orientation, physical appearance, and so forth.¹⁴⁹ Further, the code states that “[e]thical journalists treat sources, subjects, and colleagues as human beings deserving of respect,” thus, recognizing a person’s right to their privacy and stating that journalists should use good taste and “[a]void pandering to lurid curiosity.”¹⁵⁰ While most journalists follow a code of ethics, posters on social media do not follow any standards of ethics, moral, or otherwise.

V. Analysis of the Obstacles Facing Internet Personas and Why Revision to Defamation Law is Necessary in the Current Climate of the Internet

Bloggers and social media personalities face many obstacles if they try to sue posters of harassing and cruel comments made about them on the Internet.

The first obstacle for social media providers is determining whether they qualify as a public figure, a limited public figure, or a private figure.¹⁵¹ The second obstacle they face is that, under classic defamation law, an opinion is a defense to defamation.¹⁵² The third obstacle they face is that they cannot sue the Internet service provider, which is provided immunity under Section 230 of the CDA, limiting potential recovery.¹⁵³

A. Identifying Internet Personas as Limited Public Figures for the Purpose of Defamation Law

Internet personas should only be considered limited public figures under defamation law if they employ theories of attention economy.¹⁵⁴ By doing so, Internet personas such as Ferragni and Medine set themselves apart from recreational Internet users and make it clear that their intended use is to make money.¹⁵⁵ In the physical, non-virtual world, limited public figures only thrust themselves into the public sphere

for a limited purpose, usually in some business capacity.¹⁵⁶ While it is not necessary for Internet personas to make a profit to become a limited public figure, the efforts made by Ferragni and Medine to promote their businesses show that they are voluntarily entering into the public sphere, at the very least, for the purpose of promoting their businesses.¹⁵⁷ It seems that individuals like Gertz, Medine, and Ferragni are not public figures for all purposes and contexts because they voluntarily entered the public sphere for professional reasons and are not widely known.¹⁵⁸ While it seems that most bloggers would not be generally known public figures (since they are known in a limited capacity for the subject matter of their blogs or social media profiles to a selective demographic of the Internet users), it seems that some could become so famous that they become generally known.¹⁵⁹ Further complicating their role as limited public figures is that

Medine, Ferragni, and others not only discuss fashion, but also their day-to-day activities and personal lives.¹⁶⁰ However, by utilizing advertising and marketing techniques, they make it clear that even the aspects of their personal lives that they share are part of their overall business plan—they are creating an image and using their interests and likeability in order to create a sense of friendship with their followers.¹⁶¹

Lifestyle bloggers are creating a business by marketing themselves, and for that reason, the mere sharing of personal information about their day-to-day lives does not transform them from limited public figures into general public figures.¹⁶² However, this is argued with one caveat: in the physical, non virtual world, the distinction between limited public figures and public figures lies in distinguishing each group's access to media to rebuild their reputations following defamatory statements.¹⁶³ With the Internet, bloggers

who are defamed can instantly refute any attacks on their reputations with a click of a button, which further complicates the use of traditional defamation law in those cases.¹⁶⁴

In traditional defamation law, both public figures and limited public figures need to prove that defamatory statements were made with actual malice.¹⁶⁵ Therefore, if traditional defamation law is applied to Internet personas, Medine and Ferragni would have to prove that the defamatory statements were made with actual knowledge that they were false or with reckless disregard for the truth.¹⁶⁶ While the distinction between limited public figure and public figure has little significance when defamatory statements pertain to areas into which the individuals voluntarily thrust themselves, it *is* significant when the defamatory statements are made about aspects of their personal lives.¹⁶⁷ In the physical, non-virtual world, Medine and Ferragni would enjoy the lower standard of

proof, that of negligence, with respect to the truth if the statements were made about their personal and private life, and not, for instance, about their careers in fashion or otherwise related to one of their posts.¹⁶⁸

*B. Opinion Should Not be a
Defense in Internet
Defamations Cases*

One of the greatest obstacles for Internet personas such as Medine and Ferragni is overcoming the opinion defense when making a defamation claim.¹⁶⁹ Under traditional defamation law, the alleged defamer was usually a professional publisher such as a newspaper, journal, or magazine, and professional journalists usually wrote the defamatory statements.¹⁷⁰ Professional publishers are less likely to be careless with the truth, and while not required, many follow ethical rules which encourage journalists to not “pander to lurid curiosity,” to respect people as human beings, and to not characterize individuals

based on physical appearance, race, gender, weight, etc.¹⁷¹ Traditionally, professional journalists and publishers have also had the pressure from society to publish articles with integrity.¹⁷² By contrast, anyone online can publish free of such pressures.¹⁷³ Further, while journalists are known by name, the same is not true for defamers, trolls, and cyberbullies who can post anything without any repercussions due to anonymity.¹⁷⁴

When suing for defamation, the most damaging and cruel things that are written about Internet personas can be characterized as mere opinion, and they frequently come from the trolls and cyberbullies who are difficult to identify.¹⁷⁵ Not only that, but calling someone “fat,” “ugly,” “stupid,” and so forth is not something that can be proved in fact, and thus is typically a protected opinion under the rules of traditional defamation law.¹⁷⁶ The Internet allows the average user to become a publisher without being hired by a publishing company, or

even undergoing any sort of vetting and editing process—they become a publisher instantaneously, the moment they make a post, which can be made with rage, hate, jealousy, and/or ignorance, without any perceived repercussions.¹⁷⁷

There should be no First Amendment protection for speech on the Internet that lacks value—that is, speech with the main purpose of hurting others—such as criticizing someone’s physical appearance, nationality, race, or gender.¹⁷⁸ In determining whether statements are entitled to First Amendment protection in the non-virtual world, courts weigh the interest in protecting the speech by determining if it is a statement of false facts, since there is no societal value in false statements made *in reckless disregard* for their veracity and/or false statements made with *actual malice*.¹⁷⁹ Likewise, because there is no value in derogatory statements about a person’s physical characteristics, which are matters of

private concern, such statements should not be entitled to protection under the First Amendment.¹⁸⁰

The purpose of defamation law is to allow individuals to not only revive their reputation, but to also remedy the harm, as well as deter others from making similar statements.¹⁸¹ Further, the purpose behind the First Amendment protection for speech was to protect the exchange of ideas in order to encourage social and political change.¹⁸² Derogatory statements about a person’s physical characteristics should not be protected.¹⁸³ Because the Internet allows anyone to publish harmful speech, there needs to be some government regulation and protection in order to discourage reckless, harmful speech.¹⁸⁴

C. The Communications Decency Act Immunizes Internet Service Providers from Liability Resulting from Third-Party Posts

The CDA immunizes Internet service providers (including websites and social

media sites and applications) from liability, as they are not considered “publishers” of third-party posts, a requirement of defamation law.¹⁸⁵ Thus, if Ferragni and Medine were to sue a third-party for defamatory or harassing statements, not only would they face the difficulty of having to locate an anonymous source, but the potential recovery is severely limited if the Internet service provider is given immunity.¹⁸⁶ The CDA was enacted in 1996 with the purpose of protecting Internet service providers from potential liability so that new Internet service providers would not be discouraged from entering the marketplace in the great new world of the Internet.¹⁸⁷ While promoting Internet growth was an important economic and social concern in 1996, there is no longer the same need to protect Internet service providers today when there are currently 2.3 billion social media users worldwide, and approximately 60% of United States citizens

use social media.¹⁸⁸ Today, the government interest in promoting Internet growth should no longer outweigh the need for recovery from defamation and harassment on the Internet. Internet trolling has become a troubling and dangerous problem, which requires some exceptions to the blanket protections given to Internet service providers from liability from third-party posts.¹⁸⁹

VI. Conclusion

Traditional defamation law needs to be reformed in order to provide protection to social media personalities or bloggers on the Internet. If traditional defamation law is applied to Internet cases, a social media personality or blogger such as Ferragni or Medine would face many challenges, so many so that it would discourage them from protecting their reputations in court. Further, if a social media personality or blogger utilizes methods of attention economy in order to self-promote, then they

could be considered limited public figures for the purposes of defamation law. If a social media personality actively pursues notoriety, they should still be considered a limited public figure under a revised defamation law, since they have only willingly entered the public sphere for a limited purpose. However, this does not mean that they should be subjected to endless criticism and derogatory comments made by Internet trolls hiding behind the defense of opinion. There is no social utility in derogatory and cruel statements.

It is inappropriate to apply an opinion defense, which was traditionally given to journalists and professional publishers, as there is no vetting process in

submitting comments on the Internet, and no semblance of any integrity required prior to posting comments. Internet personas are further crippled in their attempts to protect themselves from Internet trolls, because Section 230 of the CDA protects Internet service providers from liability from third-party posts. Since the CDA was first enacted in 1996, the need to encourage growth and development of Internet service providers no longer exists in the same way that it did at that time. As a result, there is a need to reform defamation law as applied to individuals on the Internet as there is no recourse against Internet trolls as the law currently stands.

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¹ See Dave Chaffey, *Global Social Media Research Summary 2016*, SMART INSIGHTS (Aug. 8, 2016), available at <https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/>, archived at <https://perma.cc/CS22-FJ8H> (listing statistics of growing global social media use).

² See *Statistics and facts about Social Networks*, STATISTA, available at

<https://www.statista.com/topics/1164/social-networks/>, archived at <https://perma.cc/59YC-ZRVF> [“Statistics”] (outlining number of social media users globally).

³ See *id.* (estimating increase in global use of social media in 2016).

⁴ See *id.* (identifying statistics of the prevalent social media use in the United States).

⁵ See *id.* (noting 78% of the United States population uses at least a social networking website).

⁶ See Ian Burrell, *Libel Cases Prompted by Social Media Posts Rise 300% in a Year*, INDEPENDENT

(Oct. 14, 2014), available at <https://www.independent.co.uk/news/uk/home-news/libel-cases-prompted-by-social-media-posts-rise-300-in-a-year-9805004.html>, archived at <https://perma.cc/8LRL-HQ4Z> (describing the increase in libel suits based on users' misunderstanding of legal ramifications for statement made on social media sites). See also Harry Guinness, *Think Before You Post: Can You Be Sued for Libelous Tweets and Facebook Posts?*, MAKE USE OF (June 11, 2015), available at <https://www.makeuseof.com/tag/think-tweet-can-sued-libelous-tweets/>, archived at <https://perma.cc/N9Z5-85PW> (stating that defamation lawsuits may be too expensive for average Internet users).

⁷ See *Bullying Definitions, Bullying Facts, Bullying Laws, Bullying Statistics: The Status of Cyber bullying in America Today*, NO BULLYING (May 21, 2015), available at <http://www.bullyingstatistics.org/content/cyber-bullying-statistics.html>, archived at <https://perma.cc/8HE4-WT7N> ["*Bullying Definitions*"] (discussing the number of times students have been victims of cyberbullying).

⁸ See generally Burrell, *supra* note 6 (discussing how the Internet has changed defamation law allowing the average Internet user to become a publisher). See also Guinness, *supra* note 6 (noting that the increase in number of defamation cases may be a result of users' lack of understanding of the law).

⁹ See Guinness, *supra* note 6 (stating that a tweet or Facebook post could potentially reach every Internet user).

¹⁰ See *id.* (proposing potential for laymen to be involved in expensive lawsuits involving social media); Communications Decency Act, 47 U.S.C. § 230 (1998) ["CDA"] (providing immunity to Internet service providers from acts of third parties).

¹¹ See Guinness, *supra* note 6 (discussing the opportunity for individuals to inadvertently expose themselves to liability on the Internet).

¹² See Joel Stein, *How Trolls are Ruining the Internet*, TIME (Aug. 18, 2016), available at <http://time.com/4457110/internet-trolls/>, archived at <https://perma.cc/34VR-L9J8> (describing the pervasiveness of Internet trolls and their perceived power through anonymity).

¹³ See generally Defamation: A Lawyer's Guide § 1:7 (discussing requirements for establishing a prima facie case for defamation).

¹⁴ Restatement (Second) of Torts § 558 (Am. Law Inst. 1977).

¹⁵ See 50 Am. Jur. 2d Libel and Slander § 252 (2nd ed. 2016) (explaining that truth is an absolute defense to defamation claims).

¹⁶ See 50 Am. Jur. 2d Libel and Slander § 105 (2nd ed. 2016) (commenting that while an opinion is a defense to defamation, it still cannot imply a false fact).

¹⁷ See 50 Am. Jur. 2d Libel and Slander § 256 (2nd ed. 2016) (illustrating how a statement is privileged if the plaintiff is proved to have consented, requested, or invited the statement for the purpose to which the consent was obtained).

¹⁸ See 50 Am. Jur. 2d Libel and Slander § 31 (2nd ed. 2016) (explaining different standards for proof depending on status of plaintiff).

¹⁹ 376 U.S. 254 (1964).

²⁰ See *id.* at 256 (1964) (examining whether a state providing damages to a public official violates the constitution).

²¹ See *id.* at 256-57 (establishing background for the first libel suit).

²² See *id.* at 257-58 (outlining the alleged defamatory statements). The alleged defamatory statements are as follows:

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

Id. at 257. Further, Sullivan alleged the following statement referred to him:

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times -- for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury" -- a *felony* under which they could imprison him for *ten years*

Id. at 257-58.

²³ See *id.* at 258 (describing Sullivan’s allegations that the statements made about the police were implicitly defamatory statements about him as a result of his role as police commissioner).

²⁴ See *id.* (describing Sullivan’s contention that every time police was mentioned in the statements it was actually referring to him in his role as Police Commissioner).

²⁵ See *Sullivan*, 376 U.S. at 258-59 (acknowledging inaccuracies in the statements at issue). Specifically, the trial court found: the students at the demonstration sang the National Anthem not “My Country, Tis of Thee;” while nine students were expelled it was not as a result of the demonstration; the cafeteria was never padlocked; and it stated that Dr. King was arrested seven times, when in fact he was arrested four times, just to name a few. *Id.*

²⁶ See *id.* at 259 (outlining additional mistakes in the advertisement, and stating that Sullivan was not even the police commissioner when some of the events occurred).

²⁷ See *id.* at 261 (stating that the manager of the Advertising Acceptability Department testified that he approved of the publication without confirming the accuracy, even though he could have verified it with recent New York Times articles).

²⁸ See *id.* at 265 (explaining that a state court providing damages under state common law satisfies state actor requirement for First Amendment defense).

²⁹ See *id.* at 270-71 (discussing importance of First Amendment protection on civilian’s rights to criticize those in positions of authority).

³⁰ See *id.* at 279-80 (outlining standard of proof for public officials).

³¹ See *Sullivan*, 376 U.S. at 279 (discussing the fear that if individuals could be liable for defamation suits at a lesser standard of proof that they would be deterred from voicing their criticism).

³² See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (expanding the *Sullivan* standard of actual malice to public figures).

³³ See *id.* at 135-37 (establishing the background of the defamation claim).

³⁴ See *id.* at 140-41 (outlining background of Walker’s defamation claims).

³⁵ See *id.* at 154-55 (discussing the extent to which Butts and Walker thrust themselves into the public sphere).

³⁶ See *id.* at 156-59 (holding that the information about Walker was important to public interest and thus it was necessary to immediately disseminate it).

³⁷ See *id.* (comparing differences between the Curtis Publishing Co. and The Associated Press’s publications).

³⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974) (establishing criteria for defining someone as a limited public figure).

³⁹ See *id.* at 325 (outlining preliminary case background).

⁴⁰ See *id.* at 325-26 (explaining context of article on Gertz).

⁴¹ See *id.* at 326 (describing alleged defamatory statements at issue). The alleged defamatory statements claimed that the National Lawyers Guild helped plan the Communist attack on the Chicago police during 1968 Democratic Convention. *Id.*

⁴² See *id.* (acknowledging the gravity of the misstatements and inaccuracies in the article on Gertz).

⁴³ See *id.* at 327 (listing Gertz allegations against Robert Welch, Inc.).

⁴⁴ See *Gertz*, 418 U.S. at 327 (describing Gertz’s allegations against Robert Welch, Inc.).

⁴⁵ See *id.* at 331 (qualifying the standard for determining reckless disregard for truth).

⁴⁶ See *id.* at 339-40 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964)). The Court explained the lack of constitutional protection for false statements of fact. *Id.*

⁴⁷ See *id.* (stressing that inadvertent misstatements are an unavoidable downside to free debate protection).

⁴⁸ See *id.* at 342 (describing which individuals qualify as public figures for purpose of defamation law).

⁴⁹ See *id.* (emphasizing importance of characterizing plaintiffs based on their varying ability to change public opinion).

⁵⁰ See *id.* at 344 (recognizing a greater state interest in protecting private citizens who are more vulnerable to defamation).

⁵¹ See *Gertz*, 418 U.S. at 344-45 (highlighting the inevitability of public scrutiny when in the public sphere).

⁵² See *id.* at 349 (discussing the lower standard of proof for private individuals).

⁵³ See *id.* at 351-52 (identifying the limited scope of Gertz’s public persona).

⁵⁴ See *id.* (stressing that Gertz was not enjoying general notoriety in the community rendering him a general public figure).

⁵⁵ See *id.* (distinguishing limited public figures from a general public figure).

⁵⁶ See *id.* (recognizing the significance of the fact that Gertz did not project himself into the public debate of the criminal proceeding).

⁵⁷ See *Gertz*, 418 U.S. at 353 (reversing the decision and remanding for further proceeding to see if Gertz could prove that Robert Welch, Inc. was liable under the lesser standard).

⁵⁸ See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 749 (1985) [“Dun”] (determining actual malice is not required in matters of private concern).

⁵⁹ See *id.* at 751 (outlining background of alleged defamatory statements).

⁶⁰ See *id.* (discussing the Supreme Court’s reasoning). The report incorrectly stated that Greenmoss Builders, Inc. had filed a voluntary petition for bankruptcy. *Id.*

⁶¹ See *id.* at 749-50 (recognizing less Constitutional protection for speech on purely private matters).

⁶² See *id.* at 759 (examining purpose of Constitutional protections for public speech).

⁶³ See *id.* at 760 (recognizing lesser protections for private speech).

⁶⁴ See *Dun*, 472 U.S. at 761-63 (holding that the creditor report was not a public concern, but a personal one, and thus the statements were provided the lesser standard). The court treated the company as a private figure. *Id.* See also Robert E. Drechsel, *Defining “Public Concern” in Defamation Cases Since Dun & Bradstreet v. Greenmoss Builders*, 43 FED. COMM. L.J. 1, 1 (1990) (discussing lesser First Amendment protection provided to defendants in defamation cases involving matters of private concern).

⁶⁵ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (establishing criteria for the opinion defense). The headline for the article was “Maple beat the law with the ‘big lie.’” *Id.* at 4. The alleged defamatory sentences were as follows:

[A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8 . . . A lesson which, sadly in view of the events of the past year, is well they learned early . . . It is simply this: If you get in a jam, lie your way out . . . If you’re successful enough, and powerful enough, and can sound sincere enough, you can stand an excellent chance of making the lie stand up, regardless of what happened . . . The teachers

responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott . . . Anyone who attended the meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth . . . But they got away with it. *Id.* at 4-5 (alteration in original).

⁶⁶ See *id.* at 3-4 (discussing initial facts of the case).

⁶⁷ See *id.* (providing background information).

⁶⁸ See *id.* (outlining allegations against Diadiun and the newspaper).

⁶⁹ See *id.* (finding that the caption “TD Says” indicates that it was Diadiun’s opinion).

⁷⁰ See *id.* at 9 (discussing argument of the respondents for qualifying the statements as protected opinion).

⁷¹ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (stating that opinions can also imply an “assertion of objective fact”). The Court used the example “Jones is a liar” to explain that this sentence implies that the speaker has additional knowledge on which he relies in order to establish this opinion. *Id.* at 19.

⁷² See *id.* at 21 (explaining that transcripts and witnesses could be used to prove whether or not Milkovich did perjure himself, and thus there was an implied fact in the statement). Further, the statement was not a parody or hyperbole that would “negate the impression that the writer was seriously maintaining that the petitioner committed the crime of perjury.” *Id.*

⁷³ See *id.* (refusing to require the Plaintiff to prove the statement is a fact, not an opinion as a threshold issue in defamation cases). The Court found that the current tests for proving defamation were adequate without further establishing some “artificial dichotomy between ‘opinion’ and fact.” *Id.*

⁷⁴ 475 U.S. 767 (1986) (discussing the difference between public and private concern in defamation law).

⁷⁵ See *Milkovich*, 497 U.S. at 19 (clarifying opinion in *Hepps* with respect to proving that an opinion cannot imply a false fact and still be considered privileged opinion).

⁷⁶ See *id.* at 20 (stating that an opinion is a defense in defamation matters when it is mere opinion and does not contain or imply a false fact).

⁷⁷ See James G. Webster, *THE MARKETPLACE OF ATTENTION: HOW AUDIENCES TAKE SHAPE IN A DIGITAL AGE* 6 (2014) (discussing the significance of attention in the new millennium).

⁷⁸ See John Rouse, *The Economy of Attention*, in 22 ENGLISH EDUCATION, No. 2, 83 (May 1990) (stating that attention is so important to us because we are educated to be selfless—to give attention to others rather than to receive attention ourselves).

⁷⁹ See Webster, *supra* note 77, at 15 (examining the Internet as a platform for garnering attention).

⁸⁰ See *id.* at 16 (identifying methods for obtaining an audience in the digital age).

⁸¹ See *id.*

⁸² See *id.* (discussing the difficulties of using the pull method to seek attention).

⁸³ See *id.* (illustrating an effective use of the push method).

⁸⁴ See *id.*, at 16 (establishing the push method of seeking attention as the preferable method for Internet users).

⁸⁵ See *id.* (discussing how using both push and pull methods in conjunction with each other is most common).

⁸⁶ See Jeremy Harris Lipschultz, SOCIAL MEDIA COMMUNICATION: CONCEPTS, PRACTICES, LAW AND ETHICS 17 (2015) (discussing the growth of online advertising and marketing on social media).

⁸⁷ See Our Story & Mission, EMARKETER (Feb. 26, 2017), *archived at* <https://perma.cc/YP3S-559A> (marketing itself as one of the world's most frequently cited media research providers).

⁸⁸ See Lipschultz, *supra* note 86 (illustrating the amount of money spent on advertising on social media platforms).

⁸⁹ See *id.* (discussing potential growth in advertising on social media sites).

⁹⁰ See *Instagram's Ad Business is on a Rapid Trajectory: Facebook's decision to integrate Instagram into its ad system has helped boost revenues*, EMARKETER (Nov. 8, 2016), *archived at* <https://perma.cc/9628-YY4Q> [*"Instagram's Ad Business"*] (showing growth ads marketed on Instagram).

⁹¹ See Overview, NANIGANS (Feb. 26, 2017), *archived at* <https://perma.cc/6672-47CT> (explaining that Nanigans is an ad automation firm that uses software, which filters metadata tags in order to optimize on advertising on the Internet).

⁹² See *Instagram's Ad Business*, *supra* note 90 (highlighting growth of the use of Instagram in advertising since it was acquired by Facebook).

⁹³ See Annika Darling, *The 10 Top Earning Bloggers in the World*, THE RICHEST (Feb. 12, 2014), *archived at* <https://perma.cc/X3NM-MZLZ> (listing Ewdison

Then, "Slash Gear," as the highest earning blogger at \$60,000 - \$80,000 per month).

⁹⁴ See Anat Keinan, et al., *The Blonde Salad*, CASE 9-515-074, 2 (Jan. 2015) (explaining that Ferragni went from her second year of International Law at Bocconi University in Milan in 2009, to being named one of Forbes' 30 under 30 for Arts & Style in 2015). See also *30 Under 30*, FORBES (2015), *archived at* <https://perma.cc/GV47-4GLB> (estimating that Ferragni, at 27, would make approximately \$8 million dollars in 2015).

⁹⁵ See Keinan, *supra* note 94 (examining how Chiara Ferragni turned her blog into a successful career); Chiara Ferragni, *Harvard*, THE BLOND SALAD BLOG (Feb. 23, 2015), *archived at* <https://perma.cc/MYZ7-TXBB> (describing being contacted by Harvard for a case study written about her successful business plan).

⁹⁶ See Keinan, *supra* note 94, at 2 (discussing how Ferragni started her blog merely to share her daily outfit choices).

⁹⁷ See *id.* (describing Ferragni's popularity on social media platforms such as Flickr and Lookbook.nu).

⁹⁸ See *id.* (establishing Ferragni's initial success on platforms usually used by professional photographers).

⁹⁹ See *id.* (commenting on Ferragni's ability to reach people and gain attention through her blog).

¹⁰⁰ See *id.* at 2-3 (demonstrating success for bloggers in the United States). The pair began recognizing that they were creating a brand through Ferragni's social media image. *Id.*

¹⁰¹ See *id.* (noting how the blog became a "salad" of Ferragni's many interests).

¹⁰² See *id.* (describing Ferragni and Pozzoli's plan to establish dedicated followers).

¹⁰³ See Keinan, *supra* note 94, at 3 (recognizing Ferragni's method to establish loyalty garnered instant popularity).

¹⁰⁴ See Keinan, *supra* note 94, at 3 (discussing Ferragni's invitation to fashion week along with other press).

¹⁰⁵ See Keinan, *supra* note 94, at 3 (noting that Ferragni's presence at fashion week gained her even more attention).

¹⁰⁶ See Keinan, *supra* note 94, at 3 (recognizing that they were "selling" Ferragni as a fashion girl to the public).

¹⁰⁷ See Keinan, *supra* note 94, at 4 (examining Ferragni and Pozzoli's plan to garner international attention).

¹⁰⁸ See Keinan, *supra* note 94, at 4 (discussing efforts to actively pursue business development).

¹⁰⁹ See Keinan, *supra* note 94, at 4 (describing additional measures taken to gain attention).

¹¹⁰ See Keinan, *supra* note 94, at 4 (describing the new business model used in order to gain more advertisers and recognition).

¹¹¹ See Keinan, *supra* note 94, at 5 (illustrating how Pozzoli and Ferragni combined Ferragni's interests in order to gain sponsors in addition to attention from followers).

¹¹² See Keinan, *supra* note 94, at 5-6 (noting successful partnerships with luxury brands).

¹¹³ See Keinan, *supra* note 94, at 6 (stating that Ferragni was becoming the most internationally famous blogger in the world).

¹¹⁴ See Keinan, *supra* note 94, at 7 (showing that Ferragni has used her notoriety in order to not only be an observer of fashion, but now a creator as well).

¹¹⁵ See Keinan, *supra* note 94, at 8 (utilizing the social media platform to keep her business relevant in the evolving Internet in order to maintain her attention economy).

¹¹⁶ See Keinan, *supra* note 94, at 5 (indicating the nearly immediate increase in daily views as a result of using Instagram).

¹¹⁷ See Leandra Medine, *MR Round Table: How Man Repeller Makes Money*, MANREPELLER (June 17, 2016), archived at <https://perma.cc/HSG4-VB62t> (illustrating how Medine transformed her personal blog into a business).

¹¹⁸ See Medine, *supra* note 117 (stating that Medine initially blogged for herself and her friends while in college).

¹¹⁹ See Medine, *supra* note 117 (examining how Medine turned her personal blog into a fulltime business).

¹²⁰ See Medine, *supra* note 117 (discussing the importance of being honest with followers to keep their attention).

¹²¹ See Medine, *supra* note 117 (establishing the importance of maintaining your brand vision while posting sponsored posts).

¹²² See Medine, *supra* note 117 (stating that more money is made from their content posts about specific brands and not banner advertisements).

¹²³ See Medine, *supra* note 117 (reiterating the importance of keeping paid posts "on brand").

¹²⁴ See Leandra Medine, *Leandra's NYFW Diary: 16 Hours of Krispy Kremes and Nudity*, MANREPELLER (Sept. 13, 2016), archived at [9WEH \(providing a 16 hour chronicle of Medine's observations and experience at New York Fashion Week 2016\).](https://perma.cc/5S2N-</p></div><div data-bbox=)

¹²⁵ See Stein, *supra* note 12 (discussing the growing number of Internet trolls who feed on the attention provided by the Internet).

¹²⁶ See Stein, *supra* note 12 (analyzing factors attributing to the prevalence of Internet trolls).

¹²⁷ See Marie Southhard Ospina, *13 Most Absurd Comments from Internet Trolls that These Positive Bloggers, Activists, & Models Have Received*, BUSTLE (Aug. 10, 2015), available at <https://www.bustle.com/articles/103308-13-most-absurd-comments-from-internet-trolls-that-these-body-positive-bloggers-activists-models-have>, archived at <https://perma.cc/PGR8-2NJD> (listing derogatory and harassing comments made about bloggers weight and appearance).

¹²⁸ See Stein, *supra* note 12 (acknowledging anonymity felt by the mask of the Internet leading to a rise in Internet trolling).

¹²⁹ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (discussing the protection provided to opinions in defamation law).

¹³⁰ See *id.* (establishing that opinion, which does not imply a false fact is provided full Constitutional protection under defamation law).

¹³¹ See *id.* (highlighting the need for the public and media defendants to be able to have the freedom to publish discontent of our leaders).

¹³² See *id.* (distinguishing the requirement for media defendant's to prove that an opinion is a false fact); see also *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-63 (1985) (stating that matters of public concern are protected).

¹³³ See Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 148 (2008) (demonstrating the lack of censorship to speech on the Internet).

¹³⁴ See CDA, *supra* note 10 (protecting Internet service providers from civil liability from acts of third parties). See generally *Terms of Use*, INSTAGRAM, <https://help.instagram.com/478745558852511> (Jan. 19, 2013) (stating that if you do not opt-out of arbitration you are agreeing to waive your right to a jury trial and noting that this arbitration clause is common for many different social media platforms).

¹³⁵ See Eugene Volokh, *TheDirty.com not Liable for Defamatory Posts on the Site*, THE WASHINGTON POST (June 16, 2014),

https://www.washingtonpost.com/news/voikh-conspiracy/wp/2014/06/16/thedirty-com-not-liable-for-defamatory-posts-on-the-site/?utm_term=.d3aaba12b571 (providing immunity for Internet service providers from third party posting of defamatory speech).

¹³⁶ See Joanna Schorr, *Malicious Content on the Internet: Narrowing Immunity Under the Communications Decency Act*, 87 ST. JOHN'S L. REV. 733, 744 (2013) (extending immunization for Internet service providers to harassing content whether or not it is covered by constitutional protections).

¹³⁷ See Ciolli, *supra* note 133, at 153 (finding that the CDA's immunity for publishers and distributors can be damaging for victims of online defamation).

¹³⁸ See *Zeran v. American Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (recognizing CDA as a defense to defamatory message posted by third-party).

¹³⁹ See *id.* at 329 (noting that this matter involved an anonymous postings on an AOL message bulletin board alleging to advertise "Naughty Oklahoma T-Shirts" (referencing the Oklahoma bombing)).

¹⁴⁰ See *id.* at 328-29 (claiming that although Zeran called AOL to remove these messages and was told that the account which posted these messages would be closed, a news radio got a copy of the first posting and Zeran continued to receive death threats; thus he felt that AOL did not take enough action to remove or monitor postings).

¹⁴¹ See *Zeran*, 129 F. 3d at 328 (1997) (outlining protection provided to Internet services providers and the significance of not treating them as publishers of third party posted content).

¹⁴² See *id.* at 330 (stating that Section 230 was enacted because "[i]t also found that the Internet and interactive computer services 'have flourished, to the benefit of all Americans, with a minimum of government regulation'" (quoting CDA §230(a)(4) (emphasis in original)).

¹⁴³ See *id.* at 332 (comparing AOL to publishers such as books or magazines and thus finding that AOL is protected by §230).

¹⁴⁴ See *id.* (stating that although publishers and distributors are examined differently, a distributor is still a type of publisher).

¹⁴⁵ See *id.* at 333 (recognizing the potential colossal implications of liability for Internet service providers without the protection of the CDA).

¹⁴⁶ See *id.* at 328-33 (highlighting the risks to the development of the Internet if Internet service

providers were subject to liability for third party postings).

¹⁴⁷ See *Zeran*, 129 F. 3d at 332 (acknowledging that Zeran only filed suit against AOL as the publisher of the post). See also *Dendrite Intern., Inc. v. Doe No. 3*, 775 A.2d 756, 756 (N.J. Super. Ct. App. Div. 2001) (outlining the needed to get a court order requesting the identification of an anonymous poster).

¹⁴⁸ CODE OF ETHICS OF SOCIETY OF PROFESSIONAL JOURNALISTS (1996), <https://www.spj.org/pdf/ethicscode.pdf> [hereinafter "Code of Ethics"] (suggesting a code of ethics for journalists and publishers to follow).

¹⁴⁹ See *id.* (addressing a need for journalistic integrity).

¹⁵⁰ See *id.* (outlining journalistic ethical standards intended to minimize harm).

¹⁵¹ See 50 Am. Jur. 2d Libel and Slander § 105 (2nd ed. 2016) (distinguishing between different categories of plaintiffs in defamation law).

¹⁵² See *Thompson v. Lee*, 880 So.2d 300, 304 (La. App. 2d Cir 2004)(finding that the First Amendment allows a person's subjective opinion about another individual to be a defense to defamation).

¹⁵³ See Communications Decency Act, 47 U.S.C. § 230 (1998) (providing immunity to Internet service providers to posts by third parties).

¹⁵⁴ See Webster, *supra* note 77 at 49 (discussing the use of attention economy in social media).

¹⁵⁵ See Medine, *supra* note 117 (establishing how Medine transformed her personal blog into a business enterprise); see also Keinan, *supra* note 94, at 2-4 (demonstrating how Ferragni and Pozzoli used Pozzoli's knowledge from business school in order to attract more followers).

¹⁵⁶ See *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974) (defining limited public figure for the purpose of defamation law).

¹⁵⁷ See *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 154-55 (identifying how a person can thrust themselves into the public sphere for a limited purpose).

¹⁵⁸ See *Gertz*, 418 U.S. at 351-52 (examining the extent to which Gertz has voluntarily entered into public sphere); see also Medine, *supra* note 117 (explaining how Medine started her fashion blog for other like-minded "manrepellers"). See also Keinan, *supra* note 94, at 2-3 (establishing how Ferragni blogs about her interests in fashion, travel, and photography).

¹⁵⁹ See *Gertz*, 418 U.S. at 351-52 (comparing general public figure with limited public figure).

¹⁶⁰ See Rachel Strugatz, *The Blonde Salad's Chiara Ferragni Talks Fifth Anniversary and Footwear Launch*, WWD (Sept. 9, 2014),

<http://wwd.com/business-news/media/the-blonde-salads-chiara-ferragni-talks-fifth-anniversary-and-footwear-launch-7888047/> (commenting on how Ferragni posts about her daily life) (commenting on how Ferragni posts about her daily life).

¹⁶¹ See Medine, *supra* note 117 (stating how Medine established her business based on “transparency” and does not want to trick her followers); Keinan, *supra* note 94, at 3 (explaining how Pozzoli and Ferragni were marketing Ferragni as a “fashion girl” in order to gain followers).

¹⁶² See *Gertz*, 418 U.S. at 351-52 (concluding a person who voluntarily enters the public sphere for a limited purpose is different than one that is a generally known figure).

¹⁶³ See *id.* at 342 (evaluating lessened protection needed for public figures due to their access to resources to reestablish their reputations).

¹⁶⁴ See *id.* at 342-43 (recognizing that public figures and public officials have greater access to media to refute statements made against them).

¹⁶⁵ See *id.* at 334 (establishing that both public figures and limited public figures must prove alleged statements were made with actual malice).

¹⁶⁶ See *id.* at 328 (defining actual malice as knowledge of the falsehood of statements made or reckless disregard for whether the statement was false or not).

¹⁶⁷ See *id.* at 343 (determining that certain areas of a limited public figure’s life are not part of the public sphere).

¹⁶⁸ See *id.* at 348-49 (treating private lives of limited public figures as not part of the public sphere).

¹⁶⁹ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 7 (1990) (identifying that there are four elements of the opinion defense in defamation cases and the factors are analyzed under the totality of the circumstances approach).

¹⁷⁰ See *supra* part III. See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964) (stating that Sullivan filed a defamation case against New York Times); *Gertz*, 418 U.S. at 323 (stating that Gertz sued publisher Robert Welch, Inc. for defamatory statements made against him).

¹⁷¹ See CODE OF ETHICS, *supra* note 148 (suggesting a code of ethics for journalists to adopt).

¹⁷² See *id.* (noting that journalists owe the public professionalism).

¹⁷³ See *id.* (encouraging journalistic integrity).

¹⁷⁴ See Burrell, *supra* note 6 (discussing how ordinary users do not fully understand the legal ramifications of what they post on the Internet); *Bullying Definitions*, *supra* note 7 (analyzing how the Internet creates an arena for cyberbullying).

¹⁷⁵ See *Bullying Definitions*, *supra* note 7 (recognizing that cyberbullies may not recognize the effect of their actions since their actions take place online).

¹⁷⁶ See *Milkovich*, 497 U.S. at 21 (articulating that an alleged defamatory statement is an opinion when it is not a fact that can be proved to be true).

¹⁷⁷ See Burrell, *supra* note 6 (demonstrating how the Internet allows anyone to become a publisher of thoughts and ideas and the problems this fact can cause).

¹⁷⁸ See *Milkovich*, 497 U.S. at 14 (establishing the need to provide retribution for harm done to citizens “wrought by invidious or irresponsible speech”).

¹⁷⁹ See *id.* (stating that there is no societal value for false statements made with actual malice or reckless disregard).

¹⁸⁰ See *id.* at 18-19 (relying on *Gertz* dictum in defining opinion). See also *Dun*, 472 U.S. at 760 (quoting *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977)) (recognizing that there is no threat to “free and robust debate of public issues” when the matter is purely of private concern). This, the Court reasoned, was because there was no interference with the public’s ability to self-govern, nor censorship of the press. *Id.*

¹⁸¹ See *Milkovich*, 497 U.S. at 12 (addressing purpose for defamation law as a means for repairing wrong done to an individual).

¹⁸² See *Dun*, 472 U.S. at 758 (examining the need to protect speech that promotes political and social change).

¹⁸³ See Burrell, *supra* note 6 (stating that there is a prevalence of bullying based on an individual’s appearance on the Internet).

¹⁸⁴ See Burrell, *supra* note 6 (recognizing the harm that can be created on the Internet when any ordinary user becomes a publisher of speech).

¹⁸⁵ See *Zeran*, 129 F. 3d at 327-28 (discussing the protection available to Internet service providers under the CDA).

¹⁸⁶ See *id.* (stating that CDA does not recognize Internet service providers as publishers of the third-party posts). See also *Dendrite*, 342 N.J. Super. at 134 (providing instructions to trial courts when a

court order is required to obtain the identification of an anonymous source).

¹⁸⁷ See *Zeran*, 129 F. 3d at 330 (asserting that the purpose of the CDA was to allow Internet service providers to grow and enter the marketplace with limited government regulation).

¹⁸⁸ See *Statistics*, *supra* note 2 (recognizing the potential rise of social media users worldwide to rise to 2.95 billion by 2020).

¹⁸⁹ See *Bullying Definitions*, *supra* note 7 (commenting on rise of cyberbullying in school aged children); Stein, *supra* note 12 (determining that anonymity on the Internet creates Internet trolls).