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The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs

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The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs

Keywords

New Journalism, Defamation, Internet blogs, Communications Decency Act ("CDA"), First Amendment

COMMENTS

THE NEW JOURNALISM? WHY TRADITIONAL DEFAMATION LAWS SHOULD APPLY TO INTERNET BLOGS

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“Defamation laws should be sufficiently flexible to apply to all media. A balance will always need to be struck between freedom of expression and reputation, whether the publication is a cave drawing or a rapid electronic communication.”¹

INTRODUCTION

Over the past few years, blogs have become an extremely popular form of electronic communication. In fact, blogs have become so popular that Merriam-Webster chose “blog” as the word of the year for 2004.² Merriam-Webster defines blog, short for “weblog,” as “a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.”³ While many blogs concern an individual’s life or perspective on a variety of issues,⁴ blogs range in scope from small on-line diaries targeting personal groups of friends to large, frequently updated Web sites that aim their content at worldwide audiences.⁵ It is estimated that there are over sixty million blogs currently on the Internet, and this number is growing at a tremendous rate every day.⁶

1. DAVID PRICE & KORIEH DUODO, DEFAMATION LAW: PROCEDURE AND PRACTICE 415 (3d ed. 2003).

2. See Merriam-Webster Online, Merriam-Webster’s Words of the Year 2004, <http://www.m-w.com/info/04words.htm> (last visited Nov. 3, 2005) (declaring that in 2004 more Merriam-Webster users searched for the word “blog” than any other word).

3. *Id.*; see Patrick Beeson, *Blogging: What is it? And How Has it Affected the Media?*, THE QUILL, Mar. 2005, at 16 (quoting Rebecca Blood, an authority on blogs, describing blogs as Web sites with a “continuous, chronological series of posts—some inviting comments from readers—on any topic imaginable, often containing links to sites throughout the Internet”); see also Danielle M. Conway-Jones, *Defamation in the Digital Age: Liability in Chat Rooms, on Electronic Bulletin Boards, and in the Blogosphere*, 29 ALI-ABA BUS. L.J. 17, 21-22 (2005) (discussing the variety of services that three leading blog sites, www.xanga.com, www.blogspot.com, and www.livejournal.com, provide to their users). For example, these three blog sites offer free space and user-friendly features such as archiving, link capabilities, html-based templates that people can easily modify for personal preference, easy publishing mechanisms, picture uploading, and service-wide searching. *Id.*

4. Conway-Jones, *supra* note 3, at 21-22.

5. See *id.* (explaining how individuals utilize blogs mainly to disseminate personal opinions, while large companies often maintain blogs to gain strong reputations for their companies through posting information about company policies, profits, and news).

6. See Carl Bialik, *Measuring the Impact of Blogs Requires More Than Counting*, WALL ST. J. ONLINE, May 26, 2005, <http://online.wsj.com/public/article/SB1116855939>

Especially over the past year, bloggers have placed the traditional mainstream media⁷ in a precarious situation as bloggers have been able to fully cover numerous news stories⁸ of great public interest in a humanistic voice⁹ before the mainstream media had even begun reporting on the situations.¹⁰ While the mainstream media struggled to cover these stories, blog posts quickly appeared online, bringing thousands of first-hand accounts into homes across the globe.¹¹ Due

03640572-DoCm_P_b1HHSOXRla2QEob6bw8w_20060525.html?mod=blogs (citing a study of "The Blog Herald," but qualifying that study by noting that different online services throughout the world have come up with varying estimates of the number of blogs available online).

7. See Lev Grossman, *Blogs Have Their Day*, TIME, Dec. 27, 2004, at 109 (describing the mainstream media as traditional print, radio, and television journalistic news services).

8. One of the biggest factors underlying the ability of bloggers to cover many news stories is that blogs are very easy to use. See Wendy N. Davis, *Fear of Blogging*, 91 ABA J. 16, 16 (2005) (analyzing how due to the inexpensive cost of blogging, every citizen with a computer can have "a printing press at their fingertips that costs less than \$1,000"); see also Simon Waldman, *Arriving at the Digital News Age*, 59 NIEMAN REP. 78, 78 (2005), available at <http://www.nieman.harvard.edu/reports/05-1NRspring/V59N1.pdf> ("As viewer or reader, one [cannot] fail to be moved nor impressed by how [such an] enormous amount and range of content [can be] created, disseminated, and consumed instantly and effortlessly by people living in every region of the world.").

9. See Grossman, *supra* note 7 (noting that many people turn to blogs for news coverage because they are fed up with the mainstream media for not having a humanistic voice). The popularity of blogs stems largely from the fact that blogs are not objective, but instead are often "biased and openly partisan in exactly the way that most mainstream news sources [are not]." *Id.* Consequently, when a person reads a blog, the person feels like part of a community of like-minded individuals. *Id.*

10. For instance, many experts consider the 2005 South-East Asia tsunami story to be the seminal marker for introducing citizen journalism into the realm of professional journalism due to the expeditious and extensive coverage that blogs provided to the public. Waldman, *supra* note 8. Additionally, a few weeks before the 2004 Presidential Election, 60 Minutes II ran a news story based on four memos of unknown origin alleging that President George W. Bush received preferential treatment while he served in the Texas Air National Guard. Corey Pein, *Blog-Gate*, 43 COLUM. JOURNALISM REV. 30, 30 (2005), available at <http://www.cjr.org/issues/2005/1/pein-blog.asp>. In what many refer to as "Memogate," after CBS posted the memos online, many bloggers doubted the veracity of the documents and as a result collectively proved that they were forged. *Id.* Not only did this lead to the resignation of one of America's most well-known mainstream journalists, Dan Rather, it also garnered support and credibility for bloggers. *Id.* In another situation demonstrating the power of blogs, a man from Arizona, Russ Kick, used the Freedom of Information Act to gain access to photographs of American soldiers' coffins returning from Iraq, posted them on his blog, and the very next day they were on the front cover of various newspapers worldwide. Grossman, *supra* note 7. Kick's unique display of these pictures, never before seen on the mainstream media, demonstrated the professionalism bloggers can have and earned invitations for many bloggers to officially cover the political conventions in the summer of 2004. *Id.*

11. See Waldman, *supra* note 8, at 78 (noting that in regards to the tsunami, while the traditional media had difficulty in quickly transporting reporters to such a devastated part of the globe, text messages, photographs, and video clips instantly appeared on blogs, bringing information of the devastation instantly to Internet-connected homes around the world).

to their widespread coverage of such important news events, many bloggers consider themselves citizen journalists¹² who target their sites to vast audiences.¹³

Because their content can reach a worldwide audience almost instantaneously, Internet bloggers, who serve in traditional journalistic roles on the Internet and who purposefully allow third-party postings on their sites to attract a large public audience, should be subject to the same defamation laws as traditional journalists. Ordinarily, "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."¹⁴ However, because Congress wanted to foster the growth of the Internet and promote self-regulation of obscene Internet content, Congress passed the "Good Samaritan" provision of the Communications Decency Act ("CDA") of 1996.¹⁵ The CDA entitles Internet Service Providers ("ISPs")¹⁶ to virtually complete immunity for third-party defamatory postings.¹⁷ Recently, some courts have gone even further, extending this broad immunity beyond ISP providers to individual Web site operators.¹⁸ Following this trend, it is

12. See Paul O'Grady, *A New Medium Comes of Age*, NEW STATESMAN, Jan. 10, 2005, at 14, available at <http://www.newstatesman.com/Ideas/200501100006> (defining "citizen journalism" as "the creation of news stream by a large number of everyday Internet users working independently").

13. See Randy Dotinga, *Journalistic Status of Bloggers Contemplated*, USA TODAY ONLINE, Feb. 2, 2005, http://www.usatoday.com/tech/news/techpolicy/2005-02-02-about-a-blog_x.htm (quoting New York University journalism professor Jay Rosen as stating, "I describe my blog as my own personal magazine available to the entire reading public.").

14. RESTATEMENT (SECOND) OF TORTS § 578 (1977); see *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (adopting the language of § 578); see also ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 87 (1980) ("[A] publisher who merely reports in a news story or advertisement an allegation by a third party may find himself liable although he did not indicate his own belief in the truth of the statement.").

15. Telecommunications Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133-43 (1996) (codified in scattered sections of 47 U.S.C.). The CDA is located in Title V the Telecommunications Act of 1996, which amended the Communications Act of 1934. *Id.*

16. See WEBOPEDIA: ONLINE COMPUTER DICTIONARY FOR COMPUTER AND INTERNET TERMS, <http://www.webopedia.com> (go to the "search field" and type in "ISP"; then follow the "go" hyperlink) (last visited Nov. 3, 2005) [hereinafter WEBOPEDIA] (describing an ISP as a company that provides access to the Internet through the use of a monthly fee, providing customers with a software package, username, and password to access the Internet, browse the World Wide Web, and send and receive e-mail).

17. See generally Jae Hong Lee, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 471 (2004) (condemning the current trend in the courts to interpret the CDA as affording complete immunity to many users or providers of interactive computer services).

18. See *Batzel v. Smith* (*Batzel I*), 333 F.3d 1018 (9th Cir. 2003) (expanding the scope of CDA immunity to an Internet bulletin board operator and webmaster who posted defamatory third-party statements on his site).

likely that this sweeping immunity under the CDA will also extend to bloggers.

Because the Internet is no longer in its infancy, it is time to amend the CDA to adapt to the times and to strike a better balance between Congress' desire to promote self-regulation of Internet content and an individual's right to be free from defamatory Internet statements. Therefore, this Comment suggests an amendment to the CDA that will hold bloggers who maintain sites that serve the journalistic function of sharing news with the public to the same standard of liability for third-party postings as traditional media defendants. First, this Comment examines the development of defamation law, focusing on the application of traditional defamation laws to new media technologies and the Internet. Next, this Comment argues that because of the vast potential for blogs to spread defamatory statements to a worldwide audience, because the development of the Internet mirrors the development of other new media technologies, and because affording bloggers immunity for third-party postings is against congressional intent in passing the CDA, traditional defamation laws should apply to Internet bloggers. Finally, this Comment proposes an amendment to the CDA that will provide for a stronger balance between protecting the flow of ideas on the Internet and the rights of defamed individuals.

I. BACKGROUND

A. *The Law of Defamation*

Harm to reputation is one of the earliest injuries recognized by most legal systems.¹⁹ Early societies worried that if defamed individuals had no legal recourse against their injuries, they would engage in violence against those who defamed them.²⁰ Modern American law has preserved the tort of defamation because lawmakers believe that it is essential to protect an individual's good name.²¹ Even in light of the First Amendment's guarantee that

19. T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA* 85 (8th ed. 2001); see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("[T]he individual's right to protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring))).

20. CARTER ET AL., *supra* note 19, at 85. See generally Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903) (discussing the origins of the tort of defamation).

21. CARTER ET AL., *supra* note 19, at 85. William Shakespeare astutely noted, "Who steals my purse steals trash; . . . But he that filches from me my good name/

“Congress shall make no law . . . abridging the freedom of speech or freedom of the press,”²² the tort of defamation remains crucial in protecting the reputation of American citizens.²³

A communication is defamatory if it “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”²⁴ A defamatory statement is actionable if it is a false and unprivileged statement of fact²⁵ that is “of and concerning” the plaintiff,²⁶ and that is published.²⁷ It is not only the author or originator of a defamatory statement that may be liable for the publication of that statement; rather, defamation law ensures that anyone who plays a significant role in the act of publication or

Robs me of that which not enriches him/ And makes me poor indeed.” WILLIAM SHAKESPEARE, *OTHELLO THE MOOR OF VENICE*, Act III, sc. 3 (Gerald Eades Bentley ed., Penguin Books 1970) (1622). *But see* *New York Times v. Sullivan*, 376 U.S. 254, 270, 280 (1964) (stating that “debate on public issues should be uninhibited, robust, and wide-open,” and holding that public officials cannot recover for a defamatory falsehood relating to their official conduct unless they prove that the publisher made the statement with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”).

22. U.S. CONST. amend. I.

23. CARTER ET AL., *supra* note 19, at 86.

24. RESTATEMENT (SECOND) OF TORTS § 559 (1977); *see* Stephanie Blumstein, Note, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous “Re-Poster,”* 9 B.U.J. SCI. & TECH. L. 407, 409 (2003) (explaining that defamatory statements deemed to harm a person’s reputation within his community include accusations of untruthfulness or criminal conduct, however, crudeness or mockery will usually not be actionable claims); MICHAEL F. MAYER, *THE LIBEL REVOLUTION: A NEW LOOK AT DEFAMATION AND PRIVACY* 36 (1987) (noting that defamatory statements include accusations that an attorney is a swindler or crook, that a minister is unethical, and that a businessman charges excessive prices for low-quality products). The publisher’s intent is not relevant to determining whether a statement is defamatory since a statement is defamatory merely if a third party reasonably understands it as libel. Blumstein, *supra* note 24, at 409. In determining whether a statement is defamatory, “[f]orm is not important: defamatory communication can occur directly or indirectly, by question or insinuation, on the face of the statement or by context, so long as the message conveys a defamatory meaning.” *Id.* at 409 n.10 (quoting Neil Fried, *Dodging the Communications Decency Act When Analyzing Libel Liability of On-line Services: Lunney v. Prodigy Treats Service Provider Like Common Carrier Rather Than Address Retroactivity Issue*, 1 COLUM. SCI. & TECH. L. REV. 1, 10 (1999)).

25. *See* Electronic Frontier Found., Bloggers’ FAQ: Online Defamation Law, <http://www.eff.org> (follow “Bloggers’ Rights” hyperlink; then follow “Legal Guide for Bloggers” hyperlink; then follow “Defamation” hyperlink) (last visited Oct. 26, 2005) [hereinafter EFF] (finding that while this definition applies generally, state laws often have more specific defamation definitions).

26. *See* CARTER ET AL., *supra* note 19, at 91 (acknowledging that while the defamatory message need not expressly name the plaintiff, the third-party receiving the defamatory message must realize that it “concerns” the plaintiff).

27. *See* PRICE & DUODO, *supra* note 1, at 23 (defining a “publication” as “the communication of a defamatory matter by the defendant to at least one person other than the claimant”). A defamatory statement “need not be published in the traditional sense of the word—it could be spoken, broadcast, sent electronically or in smoke signals.” *Id.*

distribution of a defamatory message will be held responsible for that message.²⁸

To determine the level of fault for the transmission or republication of a third-party defamatory statement, courts determine whether the transmitter acted as a primary publisher, distributor, or common carrier.²⁹ Primary publishers, such as authors or traditional newspaper editors, are strictly liable for the publication of defamatory statements because of the editorial control they possess over content.³⁰ Distributors, such as bookstores or newsstands, however, do not have much, if any, editorial control over the content they circulate, so they are liable for statements only if they knew or had reason to know of the defamation prior to publication.³¹ Finally, common carriers, such as telephone companies, serve merely as conduits for the flow of information, so they are not generally liable for defamatory content.³² These three levels of liability for the publication of third-party statements apply not only to print media, but also to a variety of other information technologies such as television and radio.³³

B. The Inconsistent Application of Traditional Defamation Law to the Internet

1. The application of defamation liability in pre-CDA decisions

Despite the eventual application of the three standards of defamation liability to many new media technologies, the courts have struggled to apply them to the Internet context. Before the enactment of the CDA, a split between two courts arose regarding what level of liability should apply to ISPs in Internet defamation claims.³⁴ In both cases, the courts tried to fit ISPs into one of the

28. See RESTATEMENT (SECOND) OF TORTS § 578 (1977) ("Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.").

29. See Lee, *supra* note 17, at 471 (analyzing the application of publisher, distributor, and conduit liability to a variety of different communications technologies such as the telegraph, television, radio, and the Internet).

30. GERALD R. FERRERA ET AL., CYBERLAW: YOUR RIGHTS IN CYBERSPACE 185 (2001).

31. *Id.*; see Smith v. California, 361 U.S. 147, 152 (1959) (reversing the conviction of a bookstore owner found guilty of distributing an obscene book when he did not know its contents).

32. FERRERA ET AL., *supra* note 30, at 185.

33. See *infra* text accompanying notes 99-113 (discussing how after an initial struggle, courts have decided to apply traditional defamation laws to information sent through telegraph, radio, and television).

34. Compare *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991) (finding that CompuServe was not liable as a distributor for the defamatory words of

three categories of distributors, publishers, or conduits.

In *Cubby, Inc. v. CompuServe*,³⁵ the plaintiffs claimed that the defendants wrote false and defamatory statements about them on the *Rumorville* forum, a daily online newsletter available through CompuServe, a popular ISP at the time.³⁶ The U.S. District Court for the Southern District of New York concluded that CompuServe's online discussion forums were in essence electronic, for-profit libraries that carried a large array of publications available to subscribers.³⁷ Therefore, the court ruled that CompuServe acted as a distributor, as CompuServe had no more editorial control over *Rumorville* than public libraries or newsstands have over the printed materials they lend or sell.³⁸ Since CompuServe did not know or have reason to know of the defamatory nature of the messages, they did not face distributor liability for them.³⁹

In *Stratton Oakmont, Inc. v. Prodigy Services, Co.*,⁴⁰ an investment-banking firm filed a defamation suit against Prodigy, another prominent ISP.⁴¹ Stratton claimed that an anonymous party posted defamatory statements about their company on Prodigy's *Money Talk* bulletin board⁴²—a financial information board that attracted widespread readership.⁴³ The posting alleged that Stratton committed fraudulent acts during an initial public offering and included derogatory characterizations of the company and its employees.⁴⁴ Distinguishing the facts from those in *Cubby*, the New

a third-party user of one of its online forums), *with* *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (holding Prodigy liable as a publisher for third-party postings on its online forums because Prodigy had certain editorial rights concerning the contents of the forums).

35. 776 F. Supp. 135.

36. *See id.* at 137-38 (describing how in exchange for a membership fee, CompuServe allowed customers to access thousands of information sources on CompuServe's server, including special interest "forums," which allowed users to obtain information on topics that interested them).

37. *See id.* at 140 (reasoning that CompuServe resembled a traditional bookstore because CompuServe allowed certain companies to subscribe to the service to provide their columns to CompuServe customers, but CompuServe itself had no editorial control over the content of the columns themselves). While CompuServe selected the companies that it would allow to place their publications on *Rumorville*, CompuServe had no editorial control over the information published on *Rumorville*. *Id.*

38. *Id.*

39. *Id.*

40. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

41. *Id.* at *1.

42. *See* WEBOPEDIA, *supra* note 16 (go to the "Search Field" and type in "bulletin board system"; then follow the "go" hyperlink) (describing a "bulletin board system" as an electronic message center, usually serving specific interest groups, that allows users to review messages left by others and to author their own messages).

43. *Stratton*, 1995 WL 323710, at *1-*2.

44. *Id.* at *1.

York Supreme Court, Nassau County, held that Prodigy acted as more than a mere distributor of information since the company utilized content screening programs to remove objectionable material, issued guidelines in regard to offensive comments, and hired bulletin board moderators to enforce the guidelines.⁴⁵ The court determined that Prodigy acted as a traditional publisher by making important content decisions about what information to allow on its bulletin boards.⁴⁶ Despite the fact that *Cubby* and *Stratton* contained factual distinctions, these decisions created much uncertainty in Internet defamation law since the courts came to such different conclusions regarding the level of defamation liability to apply to ISPs.

2. *The "Good Samaritan" provision of the CDA*

Worried that the decision in *Stratton* would create a disincentive for ISPs to regulate obscene content on their sites, and concerned that the decision would have a chilling effect on Internet speech and growth, Congress passed the CDA in 1996.⁴⁷ Recognizing the Internet's increasing popularity and capabilities, Congress worried about the growing problem of obscenity on the Internet and its accessibility to minors.⁴⁸ Congress believed that the only reason the *Stratton* court held Prodigy liable for the defamatory statements placed on *Money Talk* was because of Prodigy's policy of monitoring and removing obscene content placed on its servers.⁴⁹ Congress

45. *Id.* at *4-5; *cf. Cubby, Inc. v. CompuServe*, 776 F. Supp. 135, 137-40 (S.D.N.Y. 1991) (finding that CompuServe did not exhibit any editorial control over the information that third parties disseminated on its online forums). Instead, those who wished to have an online forum on CompuServe's services would pay a fee in exchange for which CompuServe would allow them to set up their online forum. *Id.* After the creation of the forum, third parties exclusively controlled the content available on the forums, and CompuServe did not contribute to the editing process in any way. *Id.*

46. *See Stratton*, 1995 WL 323710, at *4 (holding that because Prodigy told the public that it regulated content, and because it used a content screening program, Prodigy clearly exhibited editorial control over content and thus acted as a publisher).

47. *See* 141 CONG. REC. 22047 (Aug. 4, 1995) (statement of Rep. Goodlatte) ("There is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content."); *see also Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997) ("[The CDA] was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.").

48. *See* 47 U.S.C. § 230(b)(4) (2000) (stating that one of the purposes of the CDA was to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material").

49. *See* S. CONF. REP. NO. 104-230, at 194 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10 ("One of the specific purposes of this section [of the CDA] 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 because they have

thought it was counterproductive to punish ISPs for attempting to regulate their content as this regulation provided a check on the amount of obscene content on the Internet.⁵⁰

Congress also intended the CDA to promote the continued development of the Internet by ensuring that the medium remained largely free from federal or state regulation.⁵¹ Congress believed that the Internet created an extraordinary advance in the availability of educational and informational resources for U.S. citizens.⁵² Because Congress wanted the Internet's informational function to further develop, and in recognition of the speed with which the Internet could disseminate enormous amounts of information, Congress thought that it would be nearly impossible for ISPs to review all content that passed through their servers for defamatory messages.⁵³ Therefore, if Congress did not provide some sort of protection to ISPs, the courts, following *Stratton*, could hold ISPs liable for all defamatory messages on their servers. Congress feared that these sorts of decisions would result in a chilling effect on Internet speech because the potential to face publisher liability would create a disincentive for ISPs to function.⁵⁴

To advance these two objectives, Congress drafted § 203(c), the "Good Samaritan" provision of the CDA, to state: "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

restricted access to objectionable material.").

50. See Justin Nackley, "Oh, What a Tangled [World Wide] Web We Weave," *The Dangers Facing Internet Service Providers and Their Available Protections*, 2005 SYRACUSE SCI. & TECH. L. REP. 2, 3 (2005), available at <http://www.law.syr.edu/students/publications/sstlr/framesets/archive/arcset/htm> (observing that Congress provided the "Good Samaritan" exception of the CDA to ISPs who removed offensive content from their sites because Congress did not believe that those ISPs should be penalized for their efforts by being treated as publishers, and hence subject to liability for defamation).

51. See 47 U.S.C. § 230(b)(1)-(2) (emphasizing "the policy of the United States to promote the continued development of the Internet and other interactive computer services . . . unfettered by Federal or State regulation").

52. See 47 U.S.C. § 230(a)(5) ("Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.").

53. See Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 59 (1996) (discussing Congress's agreement with Internet lobbyists who argued that ISPs should not be liable for third-party defamatory postings on their servers because of the sheer number of daily postings on the Internet, the difficulty of monitoring all those postings, and the impossibility of knowing what the postings would say before publication).

54. See FERRERA ET AL., *supra* note 30, at 187 (noting Congress's reasoning that ISPs would be reluctant to develop blocking and filtering devices after the decision in *Stratton* because ISPs would believe that such devices would afford them more content control and thus make them more vulnerable to publisher liability).

provider.”⁵⁵ Congress defined “interactive computer service” as “any information service, system, or access software that provides or enables computer access by multiple users to a computer server.”⁵⁶ Congress additionally defined “information content provider” as “any person or entity . . . responsible . . . for the creation or development of information provided through the Internet or any other interactive computer service.”⁵⁷

In effect, the “Good Samaritan” provision created an artificial distinction between users and providers of interactive computer services who post third-party defamatory messages and traditional print newspaper editors who engage in the same conduct.⁵⁸ While newspaper editors receive strict liability for this sort of behavior, the CDA ensured that interactive computer services would receive no liability at all.

3. *The troubling expansion of immunity in post-CDA decisions*

Following the enactment of the CDA, ISPs and other Internet users and providers have received almost complete immunity from suit for third-party defamatory postings.⁵⁹ In *Zeran v. America Online*,⁶⁰ the first post-CDA decision, Zeran filed suit against America Online (“AOL”) for wrongly delaying the removal of defamatory messages posted by an anonymous third party on an AOL bulletin board.⁶¹ The trial

55. 47 U.S.C. § 230(c)(1) (emphasis added).

56. See 47 U.S.C. § 230(f)(2) (elaborating that this definition includes services or systems that provide Internet access and services or systems operated by libraries or other educational institutions). The courts have additionally interpreted “interactive computer services” to include a variety of online services such as online bookstores, *Schneider v. Amazon.com*, 31 P.3d 37, 41 (Wash. App. Div. 2001), online auctions, *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 n.7 (2002), and online bulletin boards, *Zeran v. Am. Online*, 129 F.3d 327, 330 n.2 (4th Cir. 1997). The courts have also come to many different determinations concerning what services are considered “providers” of “access computer servers.” Compare *Grace v. eBay, Inc.*, 16 Cal. Rptr. 3d 192, 197 (2004) (finding that only ISPs are included in the meaning of “providers of interactive computer services” because the service provided by ISPs is “a service or system that provides access to the Internet”), with *Gentry*, 99 Cal. App. 4th at 831 n.7 (holding that Web site operators are also providers of interactive computer services under the CDA), and *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1066 (C.D. Cal. 2002) (same).

57. 47 U.S.C. § 230(f)(3).

58. See *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) (“Whether wisely or not, [Congress] made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them and created by others.”).

59. See generally Blumstein, *supra* note 24, at 417-18 (criticizing the courts for expanding the scope of CDA immunity well beyond what Congress intended, creating a gap in Internet accountability for third-party defamatory postings).

60. 129 F.3d 327.

61. See *id.* at 329 (describing how the anonymous poster falsely claimed that Zeran made a living by selling T-shirts that praised the Oklahoma City bombing).

court granted judgment for AOL on the grounds that the CDA barred Zeran's claim.⁶² The Court of Appeals for the Fourth Circuit affirmed, agreeing with the district court that ISPs could not realistically screen thousands of postings for possible defamatory content.⁶³ The Fourth Circuit reasoned that enforcing a screening requirement would chill Internet speech because it would deter ISPs from hosting third-party content.⁶⁴

In *Blumenthal v. Drudge*,⁶⁵ AOL allowed Drudge to provide his "Drudge Report" Web site through AOL's services.⁶⁶ Drudge authored defamatory statements on his report alleging that Blumenthal, a man who worked in the White House as an assistant to the President, had a history of spousal abuse.⁶⁷ In response, Blumenthal and his wife sued Drudge and AOL.⁶⁸ While the United States District Court for the District of Columbia ultimately found that the CDA shielded AOL from liability, the court cautioned that "if it were writing on a clean slate," it would have found AOL liable for Drudge's defamatory comments.⁶⁹ The court reasoned that AOL acted as a publisher under the traditional defamation framework since AOL had certain editorial rights with respect to the content provided by Drudge, including the rights to change and remove content.⁷⁰ However, the court found that the CDA trumped state law and ruled in favor of AOL.⁷¹

The only post-CDA decision where a court decided that the CDA did not abrogate common law defamation liability for redistributing false statements in the Internet context is *Barrett v. Rosenthal*.⁷² In *Rosenthal*, the plaintiff-physicians operated Web sites to combat the

62. *Id.* at 330.

63. *Id.* at 330-31.

64. *See id.* (noting that if ISPs faced potential liability for each message they republished on their servers, they would likely severely restrict the number and type of messages posted).

65. 992 F. Supp. 44 (D.D.C. 1998).

66. *See id.* at 47 (describing the "Drudge Report" as an electronic gossip column highlighting rumors from Hollywood and Washington, D.C.).

67. *Id.* at 46.

68. *Id.*

69. *See id.* at 51 (observing that because AOL's role in relation to the Drudge Report was analogous to the role of a traditional newspaper editor, if Congress had not afforded ISPs immunity through the CDA, AOL would have been liable as a publisher or distributor).

70. *See id.* at 51-52 (reasoning that since AOL has a right to exercise editorial control over third-party content, AOL is not a passive conduit like a telephone company, but more like a publisher, similar to Prodigy in *Stratton*).

71. *See id.* at 53 (holding AOL immune from suit under the CDA); *see also* 47 U.S.C. § 230(e)(3) (2000) (purporting that "no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with [the Communications Decency Act]").

72. 9 Cal. Rptr. 3d 142 (Cal. Ct. App. 2004).

use of alternative healthcare practices and products.⁷³ Rosenthal, the defendant, participated in USENET groups⁷⁴ that promoted the use of alternative medicines.⁷⁵ Angered by the plaintiffs' derogatory remarks about alternative medicines, Rosenthal posted over two hundred messages about the plaintiffs, including defamatory messages authored by third parties, on her Web site.⁷⁶ Even after the plaintiffs informed Rosenthal of the false and defamatory nature of the statements, she still refused to remove them.⁷⁷ In deciding what level of liability to apply to Rosenthal, the court reasoned that the language of the CDA only provided immunity to primary publishers on the Internet.⁷⁸ Consequently, after finding that Rosenthal acted as a distributor and not a publisher, the court found her liable for the third-party postings on her site under the distributor theory of liability.⁷⁹

As the only major post-CDA ruling where a court has limited the scope of CDA immunity, the *Rosenthal* decision appears to be an anomaly.⁸⁰ In a frequently cited decision, *Batzel v. Smith (Batzel I)*,⁸¹

73. See *id.* at 144 (recounting how through their Web sites, the plaintiffs received national renown for exposing healthcare frauds and for providing consumers with guidelines to make intelligent healthcare decisions).

74. See WEBOPEDIA.COM, *What Is USENET*, <http://www.webopedia.com/TERM/U/USENET.html> (last visited Mar. 23, 2006) (defining "USENET" as "a worldwide bulletin board system" containing "more than 14,000 forums, called newsgroups" that millions of people use daily).

75. See *Rosenthal*, 9 Cal. Rptr. 3d at 144-45 (noting that Rosenthal is a very active distributor of information on the Internet, posting over 10,900 messages to the USENET newsgroups during a two-year period).

76. See *id.* at 145-46 (explaining that, among others, Rosenthal posted third-party messages claiming that one of the plaintiffs enjoyed stalking women and alleging that the plaintiffs' health advice organization was a scam).

77. See *id.* at 146 (noting also that Rosenthal posted additional messages in response to the request for withdrawal).

78. See *id.* at 155-58 (arguing that the *Zeran* decision swept too broadly since Congress only intended the CDA to provide immunity to those who acted in traditional publishing roles on the Internet). The *Rosenthal* court believed that because the statutory language of the CDA specifically articulated immunity for those who served as "speakers" or "publishers" on the Internet, but did not mention those who act as "distributors," Congress must not have wanted to abrogate traditional distributor liability in the Internet context. *Id.* This debate over whether the CDA meant only to immunize publishers and not distributors has continued, with most scholars agreeing that Congress did not mean to immunize distributors from liability as well. See, e.g., Blumstein, *supra* note 24, at 422 (agreeing with many legal experts that Congress only expressly used the word "publisher" in the wording of the CDA because Congress wanted to maintain the traditional distinction between publishers and distributors).

79. See *Rosenthal*, 9 Cal. Rptr. 3d at 167 (subjecting Rosenthal to distributor liability because even after the plaintiffs notified her of the defamatory information on her site, she still refused to remove the offensive messages).

80. See Lee, *supra* note 17, at 484 (observing that all of the other major decisions regarding defamation liability on the Internet in the post-CDA era have followed a trend of providing broad immunity to ISPs, contrary to the decision in *Rosenthal*).

81. 333 F.3d 1018 (9th Cir. 2003).

the Ninth Circuit expanded CDA immunity beyond ISPs and other Internet providers to Internet *users*.⁸² In *Batzel I*, the court held that a moderator of a listserv⁸³ and webmaster⁸⁴ who posted an allegedly defamatory e-mail authored by a third party was entitled to CDA immunity as a *user* of an interactive computer service.⁸⁵ Batzel alleged that the defendant Smith, her handyman, defamed her by writing and sending an e-mail to a listserv moderator, Cremers, claiming that Batzel had inherited stolen artwork.⁸⁶ In ruling for the defendants, the court admitted that had it not been for the CDA's language providing immunity to *users* of interactive computer services, Batzel would have demonstrated a probability of success on the merits to find both Smith and Cremers liable for the damage they caused to her reputation.⁸⁷

C. Courts Are Likely to Apply CDA Immunity to Bloggers

Although the courts have yet to hear a case specifically addressing defamation on blogs, *Batzel I* illustrates the recent trend in providing almost complete immunity for the posting of third-party Internet

82. See *id.* at 1030-31 (interpreting 47 U.S.C. § 230(c)(1) to confer immunity on both providers and users of Internet services).

83. See WEBOPEDIA.COM, *What is LISTSERV?*, <http://www.webopedia.com/TERM/L/Listserv.html> (last visited Mar. 23, 2006) (defining a "LISTSERV" as "an automatic mailing list server" that "automatically broadcast[s] messages] to everyone on the list" and also noting that it is incorrect to use the term generally to refer to any mailing list server). But see *Batzel I*, 333 F.3d at 1021 (using the term in a general sense).

84. See WEBOPEDIA.COM, *What is Webmaster?*, <http://www.webopedia.com/TERM/W/Webmaster.html> (last visited Mar. 23, 2006) (defining a "webmaster" as "an individual who manages a Web site"). A webmaster typically monitors the site and also updates the site when necessary. *Id.*

85. See *Batzel I*, 333 F.3d at 1030.

86. See *id.* at 1020-21 (noting that Smith's e-mail to Cremers additionally defamed Batzel by alleging that she was related to one of Hitler's right-hand men). Cremers maintained both a Web site and an electronic newsletter about museum security and stolen art. *Id.* at 1021. Cremers exercised some degree of editorial control over the information he distributed to the group from e-mails he received. *Id.* Since he believed that the group would find Smith's e-mail informative and interesting, Cremers published the message, with some minor wording changes, on the Web site and by e-mail. *Id.*

87. *Id.* at 1026. The trial court found that Cremers should not receive immunity under the CDA because his role as a Web site moderator did not make him "an Internet service provider." *Id.* The appellate court, however, disagreed with this interpretation of the CDA and said that Congress intended the act to cover both users and providers of interactive computer services. *Id.* The court further articulated that it did not even have to determine whether a Web site operator could be viewed as a "provider" under the CDA since the language of the CDA also confers immunity to "users" of such services. *Id.* at 1030; see also *Grace v. eBay, Inc.*, 16 Cal. Rptr. 3d 192, 197-98 (Cal. Ct. App. 2004) (finding that the question of whether or not eBay could be considered the provider of an interactive computer service through the use of its widespread auction site did not need to be answered because the CDA also provides immunity to users of interactive computer services).

messages.⁸⁸ Following this trend, there are many reasons why the courts will also likely extend CDA immunity to bloggers.

First, though the *Batzel I* court exhibited extreme reluctance to extend CDA immunity to webmasters as users of interactive computer services,⁸⁹ the court ultimately deferred to the CDA's controlling precedent.⁹⁰ This demonstrates how likely it is that other courts will follow this analysis in determining fault for third-party postings on blogs, especially since *Batzel I* is one of the very few precedents that exists.⁹¹ Following the analysis employed in *Batzel I*, the courts will also likely view bloggers as "users of interactive computer services" in the same way as the webmaster in *Batzel I*. The court in *Batzel I* interpreted the CDA as containing three requirements to receive immunity for third-party postings: "(1) the defendant must be a provider or user of an 'interactive computer service'; (2) the asserted claims must treat the defendant as a publisher or speaker of information; and (3) the challenged communication must be 'information provided by another information content provider.'"⁹² Bloggers who post third-party messages fit into this framework. They

88. See Lee, *supra* note 17, at 484 (arguing that the *Batzel I* decision will have the effect of driving the common law tort of defamation "further into the legal background" in the Internet context).

89. See *Batzel I*, 333 F.3d at 1020 ("[T]here is no reason inherent in the technological features of the Internet why the First Amendment and defamation law should apply any differently in cyberspace than in the brick and mortar world.").

90. See *id.* at 1026 (noting that absent the CDA, the court would have agreed with the lower court that Cremers should be liable for the defamatory statements he published about Batzel). Despite this conclusion, the court reiterated its loyalty to Congress' policy decision to implement the CDA and said it was bound to the CDA's authority. *Id.*

91. See *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005) (holding that CDA immunity extended to the operator of an electronic community bulletin board devoted to discussion of local activities when the operator posted defamatory third-party postings on the bulletin board). Because *Donato* presented a case of first impression in New Jersey on the issue of CDA immunity for defamatory Internet statements, the court relied heavily on the ruling in *Batzel I* to come to its conclusion. *Id.* at 718-19. In *Donato*, the plaintiffs were two elected members of the Emerson Borough Council who became angry because of an anonymous posting of defamatory messages on defendant Moldow's electronic bulletin board site. *Id.* at 713. The messages alleged misconduct in the discharge of the plaintiffs' official duties and included numerous personal attacks on the plaintiffs. *Id.* at 713-14. Moldow controlled the content of the bulletin board by various methods, including selectively deleting offensive messages, banning disruptive users, and actively editing messages before publication. *Id.* at 716. Despite the great harm that these messages caused to the plaintiffs' reputations on both personal and professional levels, the court found that Moldow acted as both a user of an interactive computer service and a publisher under the CDA and therefore could not be held liable for the statements. *Id.* at 725. The role that Moldow played in selecting the content to publish on his site and in editing that content is virtually identical to the role that bloggers play in regards to publishing third-party postings on their blogs.

92. *Batzel I*, 333 F.3d at 1037 (Gould, J., dissenting) (articulating the majority's requirements for receiving immunity under the CDA).

are “users” of interactive computer services because they must access some form of ISP to maintain their blogs.⁹³ Bloggers also act as “publishers” by controlling what information to circulate on their sites and by performing some editorial roles.⁹⁴ Finally, when bloggers place third-party postings on their blogs, they are posting information provided by other content providers.

Second, courts are likely to find *Batzel I*'s analysis persuasive because the bulletin boards in *Batzel I* are technologically similar to blogs. For instance, both types of Web sites are typically operated by one or a few people who control all published content,⁹⁵ both must utilize interactive computer services in order to operate,⁹⁶ and both serve as transmitters of news and information to the public.⁹⁷ The greatest difference between blogs and bulletin boards is that many bulletin boards require membership to log in, whereas most blogs are freely open to the public.⁹⁸ This difference gives blogs the potential to reach an even larger audience. Given the similarities between blogs and bulletin boards and the tendency of the courts to defer to the CDA's authority, it is likely that the courts will also extend CDA immunity for third-party postings to Internet bloggers.

II. DISCUSSION

If the trend toward affording broad immunity to Internet users continues, bloggers will have the ability to post even malicious third-party messages on their sites with impunity. This Discussion analyzes

93. Cf. *id.* at 1031 (reasoning that moderators of Internet Web sites and networks are users of interactive computer services because in order to make their Web sites available to the public, they “must access” ISPs or other services that provide connections to the Internet). As Web site moderators themselves, bloggers also must connect to the Internet through an ISP before they are able to build their sites.

94. See *infra* notes 130-147 and accompanying text (describing how bloggers aim at mass dissemination of their information to the public and exhibit much editorial control over content).

95. See Conway-Jones, *supra* note 3, at 67-68 (explaining that typically a small number of users of an Internet message board are given moderator privileges, which include the ability to delete messages, edit messages, and monitor content).

96. See *supra* text accompanying note 93 (explaining how bloggers and bulletin board operators alike have to access the Internet through ISPs to use their Web sites).

97. Conway-Jones, *supra* note 3, at 68.

98. See *id.* at 68-69 (highlighting the fact that Internet message boards are divided between those groups requiring registration and those that allow anonymous postings). On bulletin board sites that require registration, users choose a username and password and submit their e-mail address for confirmation. *Id.* In this way, the operator of a message board is able to control membership and limit public access to the site. *Id.* In contrast, bloggers tend to share their thoughts with a wide public audience and refrain from using password protection. See *infra* text accompanying note 200 (demonstrating that the ability to use password protection on a blog is a decision for the blogger and not a mandated policy).

several reasons why this trend should be reversed. First, the rise of blogs resembles the growth of other new media technologies to which the courts have ultimately applied traditional defamation laws. Second, affording immunity to bloggers for publishing defamatory statements extends well beyond congressional intent in passing the CDA. Finally, because blogs are growing in number and resemble traditional print media more and more every day, bloggers should have to adhere to the same defamation laws as traditional print media for third-party postings.

A. *The New Medias Trend*

Analogous to other aged technologies before it, the Internet is no longer a new medium that needs special protections from the law, and therefore defamation laws must adapt to protect the rights of those defamed on the Internet. Throughout the twentieth century, whenever new media have emerged, Congress and the courts have initially struggled to apply traditional defamation laws to those new media.⁹⁹ This difficulty often resulted from lobbyists for new technologies claiming that the uniqueness of their medium warranted special protections from the courts.¹⁰⁰ However, as these new media expanded and began spreading the same damaging defamatory messages as traditional print media, courts reapplied the old laws.¹⁰¹

For example, the courts struggled for years over what standard of liability to apply to defamatory messages transmitted through telegraphs.¹⁰² Eventually, as defamatory messages began to appear on telegraph transmissions, the courts decided to apply traditional defamation laws to telegraph services.¹⁰³ The courts reasoned that

99. See generally Lee, *supra* note 17, at 485-88 (discussing the difficulty courts had in applying traditional defamation laws to new technologies such as the telegraph, television, and radio).

100. See *id.* at 486-87 (noting that the passage of the CDA did not mark the first time that lobbyist groups for a new media technology lobbied for broad protection from liability for third party defamatory content). For example, in the 1940s, the National Association of Broadcasters ("NAB") argued that since the unique ability of radio and television to spread important information to the public outweighed the potential for the new media to cause harm, the courts should not apply traditional defamation laws to radio and television. *Id.*

101. See *id.* (articulating that that courts eventually applied the traditional defamation categories of publisher, distributor, and mere conduit to telegraph, radio, and television).

102. See Finley P. Maxson, *A Pothole on the Information Superhighway: BBS Operator Liability for Defamatory Statements*, 75 WASH. U. L.Q. 673, 676 (1997) (discussing how it was not until 1950, in *W. Union Tel. Co. v. Lesesne*, 182 F.2d 135 (4th Cir. 1950), that the courts developed a standard of distributor liability for defamation involving telegraph services).

103. See *W. Union Tel. Co.*, 182 F.2d at 136-37 (affirming the district court's

because telegraph services have virtually no editorial control over the information they transmit, telegraph services fit into the distributor category of liability and are liable for third-party defamatory telegraphs if they either knew or had reason to know of the defamation prior to transmission.¹⁰⁴

Similarly, due to the confusing nature of how televisions and radios would function, courts initially struggled to apply defamation laws for third-party content to television and radio broadcasts. While the *Restatement of Torts* claims that “one who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher,”¹⁰⁵ some state courts,¹⁰⁶ as well as the National Association of Broadcasters (“NAB”), took the opposite view, and the NAB drafted legislation that would relieve radio broadcasters for third-party defamatory content on their stations.¹⁰⁷ Despite the NAB’s

decision that telegraph services serve as distributors of third-party information); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 812 (5th ed. 1984) (noting that *The Restatement (Second) of Torts* formally adopted this theory of distributor liability for telegraph services in 1966).

104. See *W. Union Tel. Co.*, 182 F.2d at 137 (“The duty imposed upon a telegraph company . . . requires it to forward messages for any who requests the service; and it has been pointed out in a number of decisions that the large number of messages which a telegraph company is required to transmit, the speed expected in the transmission of the messages, the number and character of the minor employees needed in the business, and the difficulty of the legal questions involved, make it impractical for the company to withhold or deliver messages until it can make an investigation as to their truth or privileged character. Hence it is only when the company has knowledge or reason to know that the messages are [defamatory] that it becomes liable for libelous matter contained therein.”).

105. See RESTATEMENT (SECOND) OF TORTS § 581(2) (1977) (stating that although radio and television serve to transmit human voice and not written words, they are more analogous to publishers of newspapers and books than to telegraph distributors).

106. For instance, the Georgia State Appellate Court tried to relieve radio and television broadcasters from strict publisher liability altogether by following a completely original approach to radio and television defamation by applying a new defamation category called “defamacast,” which provided for different levels of defamation liability for radio and television. See *Am. Broad. Paramount Theaters, Inc. v. Simpson*, 126 S.E.2d 873, 879 (Ga. Ct. App. 1962) (determining that since “the common law must adapt, and classically has adapted, to meet new situations, we now make a ‘frank recognition’ . . . that defamation by radio and television falls into a new category . . . [i]n this category, defamation by broadcast or ‘defamacast’ is actionable per se”). Despite its creativity, no other courts have ever used this “defamacast” liability standard. Lee, *supra* note 17, at 486.

107. See Donald H. Remmers, *Recent Legislative Trends in Defamation By Radio*, 64 HARV. L. REV. 727, 740-41 (1951) (introducing the NAB’s suggested “Act Relating to Defamation By Radio” as an illustration of a trend in the 1940s to relieve radio station operators of liability for third-party defamatory messages). The “Act Relating to Defamation By Radio” stated:

the owner . . . or operator of a visual or sound broadcasting station or network . . . shall not be liable for any damages for any defamatory statement published or uttered in or as part of a visual or sound radio broadcast, by one other than such owner . . . unless . . . that such owner . . . has failed to exercise due care to prevent the publication or utterance of such statement

attempts, the legal community eventually recognized that radio and television were especially prone to spreading defamation¹⁰⁸ because both could be taped and retained forever.¹⁰⁹ As a result, the courts applied the traditional rules, holding radio and television broadcasters to the same standard of liability for third-party content as traditional publishers.¹¹⁰ The courts noted that while traditional publishers “print libel on paper and broadcast it to the reading world, [television and radio stations] ‘print’ the libel on a different medium just as widely or even more widely ‘read.’”¹¹¹

In the above examples, the courts had difficulty fitting telegraph, radio, and television into the traditional defamation framework because their technical workings initially confounded the legal community. Eventually, however, the laws changed to focus on the impact of the transmitted speech and not the utilized medium when evaluating defamation claims.¹¹² This new focus is much more sound as defamatory speech should not be protected in some instances just because the defamer disseminated the message through one medium, but then not protected when the same speech is transmitted through a different medium.¹¹³

In promulgating the CDA, Congress regressed from this prudent focus on the impact of a defamatory message rather than the medium through which the message is transmitted, by affording a higher level of immunity from defamation suits to Internet users than to users of any other medium.¹¹⁴ This broad immunity must be abolished

in such broadcast.

Id.

108. See Lee, *supra* note 17, at 469-70 (emphasizing Newton N. Minow’s lamentation that television had become a “vast wasteland” because while television has the ability to enrich people’s lives, it also has the ability to debase them).

109. See LAURENCE H. ELDREDGE, *THE LAW OF DEFAMATION* 86 (1978) (insisting that if the reason the law applies publisher liability to newspapers is due to the permanence of the written word, then clearly publisher liability should also apply to taped radio and television broadcasts, which can always be replayed).

110. See, e.g., *Coffey v. Midland Broad. Co.*, 8 F. Supp. 889, 890 (W.D. Mo. 1934) (holding that even though a radio station operator had no prior knowledge that defamatory statements would be transmitted through a radio broadcast, the radio station was absolutely liable for the transmission of defamatory statements through the airwaves). The *Coffey* court noted a close analogy between the transmission of defamation through radios and the publication of libel in a newspaper. *Id.*; see also KEETON ET AL., *supra* note 103, at 812 (describing many decisions applying traditional publisher liability to radio and television broadcasters).

111. *Coffey*, 8 F. Supp. at 890.

112. See ELDREDGE, *supra* note 109, at 81 (applauding the legal community’s eventual realization that the particular form in which defamatory content is published should have nothing to do with a defamed person’s right to recover damages and to publicly vindicate his or her good name).

113. Conway-Jones, *supra* note 3, at 66-67.

114. See Lee, *supra* note 17, at 487-88 (explaining that in passing the CDA Congress blatantly rejected the earlier approach of enforcing government

because, like other aged technologies before it, the Internet has matured from its infancy and is no longer a new medium that needs help to grow.¹¹⁵ And, similar to radio and television, Internet blogs can spread debilitating rumors and lies.¹¹⁶ Indeed, a defamatory message posted on a blog has the potential to harm an even wider audience than defamation published by other information sources.¹¹⁷ If someone posts a defamatory statement somewhere on the Internet, that statement can be instantly read by others, copied and pasted somewhere else on the Internet, and then read by thousands more.¹¹⁸ Because the resulting damage inflicted upon the defamed person or entity cannot be contained in one area on the Internet, issuing an effective reply or retraction statement would be nearly impossible, making the damage even more severe.¹¹⁹

Thus, if the CDA continues to afford immunity to those who post third-party defamatory content on the Internet, it is likely that many bloggers will knowingly allow harmful, defamatory statements on their blogs in order to attract wide audiences.¹²⁰ Therefore, Congress

regulations for new media and instead allowed for the users and providers of Internet content to police themselves).

115. See *infra* text accompanying notes 122-127 (illustrating the vast growth of the Internet in the past ten years).

116. See, e.g., Jonathan Krim, *Subway Fracas Escalates Into Test of the Internet's Power to Shame*, WASH. POST, July 7, 2005, at D01 (relaying the story of a South Korean woman who, after allowing her dog to make a mess on the subway without cleaning up after him, faced vast public humiliation as bloggers posted many derogatory and untrue remarks about her personal life on Web sites viewed by a worldwide audience); Milford Prewitt, *Restauranters File Lawsuits to Battle Blog-Based Cybersmearing*, NATION'S RESTAURANT NEWS, May 23, 2005, at 8 (detailing the harm that many "amateur restaurant critic" Web sites have caused to the reputations of numerous restaurants by allowing the posting of derogatory statements about various restaurant chains' food, waitstaff, and management); Mark Thompson, *Law Offers Internet Publishers Scant Guidance on Libel*, U.S.C. ANNENBERG ONLINE JOURNALISM R., June 16, 2004, <http://ojr.org/ojr/law/1087423868.php> (examining a failed online defamation claim whereby one anonymous blogger significantly harmed the reputation of a *National Review Online* editor by publishing stories alleging that he was a stalker).

117. See *Batzel v. Smith (Batzel II)*, 351 F.3d 904, 910 (9th Cir. 2003) (Gould, J., dissenting) (anticipating the problem of defamatory statements posted on blogs and arguing that by simply placing a message on his or her site, a blogger changes the message in a subtle but important way by adding a personal endorsement to that message, making the message more credible to the reading public).

118. See J.D. Lasica, *Benefits Blogging Brings to News Outlets*, NIEMAN REP., Fall 2003, at 72 (arguing that blogs have a sense of permanence and evolution to them that the mainstream media does not since blogs keep stories alive by "re-circulating them and regurgitating them with new angles, insights, and even newsworthy revelations").

119. See Thompson, *supra* note 116 (illustrating a situation where the request for a retraction of a defamatory statement on a blog actually worsened the situation for the defamed person because once the blogger published the retraction, many readers of the blog saw the original statement as juicy gossip and reposted it on other sites).

120. *Batzel I*, 351 F.3d at 910 (Gould, J., dissenting) (noting that both history and the *Batzel I* case demonstrate that malicious persons would seek an audience for defamatory matter).

should apply the traditional defamation laws to Internet bloggers in the same way that the courts and Congress applied traditional defamation laws to other new information technologies after realizing their ability to spread harmful messages.

B. Providing Immunity to Individual Bloggers for Third-Party Defamatory Content is Beyond the Scope of Congressional Intent in Promulgating the CDA

As previously discussed, Congress had two main justifications for passing the CDA: (1) to facilitate the growth of the Internet; and (2) to provide ISPs with an incentive to self-regulate obscene content on their servers.¹²¹ Applying the immunity that Congress intended to apply to large ISPs to bloggers who individually select and publish statements on their blogs would sweep well beyond congressional intent in passing the CDA. As opposed to the situation in 1996, the Internet is no longer in its infancy. Additionally, bloggers are better able to monitor the content on their sites than are ISPs, and Congress has recently controlled obscenity in more effective ways.

First, when Congress enacted the CDA in 1996, Congress wanted to foster the growth of the then nascent Internet.¹²² At that point, Congress could never have envisioned how broad the scope of services on the Internet would become or how many various people would use the Internet.¹²³ Today, the Internet can be described as ubiquitous—over one billion people worldwide currently use the Internet, with approximately 225 million users in North America alone.¹²⁴ Among Internet users in the United States, twenty-five percent reportedly read blogs and nine percent have created their own blogs.¹²⁵ These numbers continue to grow every day.¹²⁶ The

121. See *supra* text accompanying notes 47-54 (discussing these two congressional goals in promulgating the CDA).

122. See *supra* text accompanying notes 51-54 (explaining how in 1996, when the Internet was still a new medium, Congress wanted to ensure that the Internet's potential would be fully realized and thus wanted to shield the Internet from too much state or federal regulation).

123. See Ryan W. King, *Online Defamation: Bringing the Communications Decency Act of 1996 in Line With Sound Public Policy*, 2003 DUKE L. & TECH. REV. 24, ¶ 10 (2003), available at <http://www.law.duke.edu/journals/dltr/articles/PDF/2003DLTR0024.pdf> (noting that because of the vast scope of Internet services and the ability of anyone with computer access to place information on the Internet today, the "1996 balance between the harm caused by electronic defamatory statements and the goals of the CDA is at best suspect").

124. INTERNET WORLD STATS, INTERNET USAGE STATISTICS—THE BIG PICTURE (2006), <http://www.internetworldstats.com/stats.htm>.

125. See Lee Raine, PIP Director, PEW Internet & American Life Project, Data Memo: The State of Blogging (2005), http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf (reporting that by the end of 2004, 32 million Americans accessed and read blogs).

dramatic increase in Internet use from the mid-nineties¹²⁷ demonstrates that the Internet is no longer a burgeoning medium that needs special protections in order to grow.

Second, in promulgating the CDA, Congress wanted to ensure that the Internet would continue to serve as an important informational and educational service for the public.¹²⁸ Congress recognized that large ISPs do not individually select the content that will appear on their servers and instead merely serve as portals by which others may access the Internet and display their own content.¹²⁹ Thus, Congress worried that if the *Stratton* decision stood, the possibility of incurring publisher liability for actively monitoring content would deter ISPs from allowing third parties to place any content on their servers, creating a chilling effect on Internet speech.¹³⁰

While Congress recognized the need to shield ISPs from publisher liability due to the difficulty they faced in monitoring the voluminous third-party information placed on their servers,¹³¹ it is highly unlikely that Congress intended CDA immunity to also extend to bloggers who act as traditional publishers by individually selecting content for publication on their blogs.¹³² If this were the case, then Congress would have been allowing information that could not be published in

126. See *id.* (explaining that although the PEW survey highlights the most recent data on blog readership, the number of blog users is likely even higher now as the number of blog users continues to grow every day).

127. See BUREAU OF STATISTICS, STATISTICAL ABSTRACT OF THE UNITED STATES, 2002, COMPUTERS AND INTERNET USE BY INDIVIDUALS: 1997 AND 2001 713 (2002) (reporting that by the end of 1997, only fifty-seven million Americans used the Internet). Over 225 million Americans currently use the Internet, illustrating the vast growth of the medium. INTERNET WORLD STATS, *supra* note 124.

128. See 47 U.S.C. § 230(a)-(b) (2000) (noting that the Internet offers a “forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity”).

129. See Nackley, *supra* note 50, at 1 (discussing how, especially upon the initial emergence of ISPs, Congress and the courts viewed ISPs as inactive telecommunications providers that allowed others to actively transmit messages through their servers).

130. See *Batzel v. Smith (Batzel I)*, 333 F.3d 1018, 1039 (9th Cir. 2003) (Gould, J., dissenting) (recognizing that since millions of communications are sent daily through ISPs, the threat of such great tort liability would deter free speech on the Internet).

131. See Emily Fritts, Note, *Internet Libel and the Communications Decency Act: How the Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers*, 93 Ky. L.J. 765, 774 (2004) (“There is no way that . . . [ISPs] can take the responsibility to edit out information that is going to be coming in to them. . . . We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day.”).

132. See *Batzel I*, 333 F.3d at 1040 (Gould, J., dissenting) (“Congress did not want [the Internet] to be like the Old West: a lawless zone governed by retribution and mob justice . . . [An individual’s] decision to disseminate the rankest rumor or most blatant falsehood should not escape legal redress merely because the person chose to disseminate it through the Internet . . .”).

a newspaper to be purposefully placed on a blog with no repercussions.¹³³ This seems implausible since the unregulated dissemination of defamatory information on the Internet will not only harm those whose reputations are attacked, but also negatively impact the “potential of the Internet as a reliable, easily accessible, and inexpensive means of communication.”¹³⁴ This result would be entirely inconsistent with Congress’s vision of having the Internet provide important information to the public because there would be no check on the veracity of Internet content, resulting in a news source lacking any regulation or public trust.¹³⁵ While it may be difficult for ISPs to monitor every comment placed on their servers, it is not difficult for bloggers who personally choose every third-party message to post on their sites to responsibly check that content for defamation.¹³⁶

Finally, Congress believed that that CDA would encourage ISPs to self-monitor their content and thus would create an effective way to combat the ever-growing problem of Internet obscenity.¹³⁷ Knowing that ISPs had more resources to monitor content than the third parties who placed content on ISP servers,¹³⁸ Congress wanted to provide an incentive for ISPs to monitor third-party content for obscenity without fear of incurring publisher liability in return.¹³⁹

133. See Christopher Butler, Note, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers*, 6 MICH. TELECOMM. & TECH. L. REV. 247, 252 (2000) (noting that in passing the CDA, Congress’s clear intent was to protect ISPs that take active steps to monitor their content, not to protect anyone from liability for knowingly placing objectionable content on the Internet that they could not place in traditional print media).

134. See *id.* at 248 (discussing how the development of a more inexpensive and accessible print media has been one of the Internet’s greatest contributions, but also one that can lead to the most harm if unregulated).

135. See Larry Ribstein, *The Law and Economics of Blogging: The Economics of Blogging*, Presentation at University of Illinois College of Law (Apr. 4, 2005), in *Ideoblog*, www.ideoblog.org (Mar. 22, 2005, 19:34 CST) (click “Archives,” then follow links to March 22, 2005) (arguing that “[l]ow-quality blogs may harm not only individuals but also other blogs by creating a lemons market.”). Ribstein predicted that if blogs gain a reputation for untruthfulness, people may shun not only blogs, but also all Internet information. *Id.*

136. See Michael L. Rustard & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 382 (2005) (declaring that when interactive computer services have the ability to individually monitor content, they should not be relieved of all liability for the publication of that defamatory content).

137. See Butler, *supra* note 133, at 252 (explaining that Congress had hoped that the CDA’s provision prohibiting “knowing transmission” of obscene material to minors would encourage ISPs to self-regulate the content of those who stored information on their servers).

138. See Nackley, *supra* note 50, at 2 (noting that Congress believed that because ISPs are the “gateway to the Internet super-highway,” they are in the best position to “detect, block, and remove offensive or infringing material”).

139. See S. CONF. REP. NO. 104-230, at 194 (1996), reprinted in 1996 U.S.C.C.A.N.

This incentive, however, has not proved effective. As the CDA currently stands, ISPs and other online computer services do not face any repercussions for failing to censor obscene content; instead, they rest assured that the courts will not treat them as publishers or speakers of messages provided by third parties in any circumstance, not just in those circumstances where they attempted to regulate obscene content.¹⁴⁰ Therefore, there is no real incentive for ISPs or others to monitor their content for obscenity because they still receive CDA immunity for defamatory postings even if they fail to monitor.

Moreover, because the section of the CDA specifically aimed at regulating obscenity¹⁴¹ did not pass constitutional muster,¹⁴² it does not make sense to leave the "Good Samaritan"¹⁴³ section of the CDA intact. Ever since the Supreme Court struck down § 233 of the CDA in *Reno v. ACLU*,¹⁴⁴ Congress has created many new laws aimed at combating obscenity on the Internet.¹⁴⁵ While the Supreme Court

10 (concluding that ISPs should not be liable for restricting user access to obscene material because society should encourage these restrictions).

140. See *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (worrying that in passing the CDA, "Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is *unsuccessful or not even attempted*." (emphasis added)). Within Section 230 itself, there is no requirement that ISPs affirmatively begin monitoring content for obscenity. 47 U.S.C. § 230 (2000). Therefore, as the CDA currently stands, ISPs and other online computer services can ultimately still allow obscene material and defamatory content on their servers without punishment.

141. See 47 U.S.C. § 223(a) (Supp. II 1996) ("Whoever . . . by means of a telecommunications device, knowingly makes, creates, or solicits, and initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, knowing that the recipient of the communication is under 18 years of age . . . shall be fined under title 18 or imprisoned not more than two years or both."). Additionally, part (d) of the section criminalizes the actions of anyone who

knowingly uses an interactive computer service to send . . . or . . . display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . .

§ 223(d).

142. See *Reno v. ACLU*, 521 U.S. 844, 845 (1997) (declaring that Section 223 of the CDA violates the First Amendment because of ambiguity concerning its "indecent" and "patently offensive" language and because of the government's failure to show that the CDA provided the least restrictive means for controlling Internet obscenity).

143. 47 U.S.C. § 230(c).

144. *ACLU*, 521 U.S. at 845.

145. See, e.g., The Child Pornography Prevention Act ("CPPA"), 18 U.S.C. §§ 2252, 2256 (Supp. III 1997) (banning the distribution of child pornography and defining child pornography to include any depiction of sexually explicit conduct involving minors or conveying the impression "that the material is or contains a visual

has upheld some of these laws and denied others,¹⁴⁶ the Court has noted that the best way to control obscenity on the Internet is through narrowly tailored congressional legislation that strikes a balance between adults' freedom of speech and children's protection from indecent material, not through providing Internet providers and users immunity from defamation liability.¹⁴⁷

Because the Internet is no longer in need of growth, because court interpretations of the CDA have expanded its scope well beyond providing immunity for ISPs, and because Congress's goal of regulating obscenity has been dealt with in other ways, the CDA is no longer in line with Congress's original intent. As the *Blumenthal* court admonished, the trend in allowing broad immunity to Internet users and providers under the CDA allows them to take "advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended"¹⁴⁸

C. Blogs as Journalism

As blogs become more like traditional print and broadcast

depiction of a minor engaging in sexually explicit conduct"; The Child Online Protection Act ("COPA"), 47 U.S.C. § 231 (2000) (prohibiting obscene material on the World Wide Web only for communications for commercial purposes available to children under the age of seventeen); The Children's Internet Protection Act ("CIPA"), 47 U.S.C.A. § 254(h) (Supp. 2004) (requiring that libraries wishing to receive federal subsidies implement certain Internet safety policies that protect both minors and adults from obscene depictions, but also requiring that libraries ensure that these protections were reversible in case an adult wished to view objectionable content).

146. See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 257-58 (2002) (overruling the CPPA due to the legislation's overbroad and unconstitutional language stating that it applies to someone who "appears to be a minor"); *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004) (rejecting the constitutionality of the COPA for not creating the least restrictive means for controlling obscenity on the Internet); *United States v. Am. Library Ass'n*, 539 U.S. 194, 212 (2003) (upholding the constitutionality of CIPA because CIPA does not ban libraries from providing unfiltered content to patrons, rather it prevents the government from subsidizing this practice).

147. See generally Ann Mota, *Protecting Minors From Sexually Explicit Materials on the Net: COPA Likely Violates the First Amendment According to the Supreme Court*, 7 TUL. J. TECH. & INTELL. PROP. 95, 110 (2005) (noting that despite the fact that the Supreme Court has struck down many obscenity regulations, the Court has repeatedly stated that Congress should continue to pass further legislation to prevent minors from accessing obscene content). For instance, the Court in *Ashcroft v. ACLU* articulated that blocking and filtering software is not only a less restrictive means to prevent minors from accessing harmful material, but is also a more effective alternative since it provides protection from obscene materials in both foreign and domestic jurisdictions. *Id.* at 103. Mota additionally proposes some means to regulate obscenity on the Internet, such as abolishing "free teaser" pornography ads on the Internet and creating special domain names that would clearly delineate a pornography site from a children's site, thus bolstering the effectiveness of filtering software. *Id.* at 111.

148. *Blumenthal v. Drudge*, 992 F. Supp. 44, 52-53 (D.D.C. 1998).

journalism outlets by publishing vast amounts of information aimed at wide public readership, bloggers should be held to the same standards of professional responsibility in regard to implementing defamation background checks as traditional journalists. One expert has noted, "News organizations are no longer the gatekeepers of stories—the Web has flung the gates wide open."¹⁴⁹

While the courts have yet to formally answer the question of whether bloggers are journalists, in one recent case, *Apple Computer, Inc. v. Doe*,¹⁵⁰ bloggers claimed a journalistic privilege against the disclosure of their confidential sources for an online story.¹⁵¹ During discovery, Apple sought to uncover the names of the unidentified bloggers who had leaked Apple's secret information about new products to several online Web sites.¹⁵² In response, the anonymous bloggers, who claimed to be journalists, filed a protective order under California's "shield law," a law that protects journalists from having to disclose their confidential sources for stories.¹⁵³

Although it resolved the case on other grounds,¹⁵⁴ the *Apple* court pointed out that "defining what is a 'journalist' has become more

149. Sheila Lennon, *Blogging Journalists Invite Outsiders' Reporting In*, NIEMAN REP., Fall 2003, at 78. Lennon made this observation after recounting her experiences as a features and interactive producer of *The Providence Journal's* online Web site, on which Lennon created and maintained an interactive blog in addition to the site's regular features. *Id.*

150. No. 1-04-CV-032178, 2005 WL 578641 (Cal. Sup. Mar. 11, 2005).

151. *Id.* at *4.

152. *See id.* at *1 (noting that these Web sites included AppleInsider and PowerPage).

153. *Id.* at *2. The California shield law states:

a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication . . . cannot be adjudged in contempt . . . for refusing to disclose . . . the source of any information procured while so connected or employed for publication . . . or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing . . . for communication to the public.

CAL. EVID. CODE § 1070(a)-(b) (2005) (emphasis added).

154. *See Apple*, 2005 WL 578641, at *4 (refraining from answering the question of whether the bloggers qualified as journalists under the shield law and instead deciding the case on the fact that the bloggers violated trade secret laws). The court noted that "the First Amendment does not prohibit courts from incidentally enjoining speech in order to protect a legitimate property right." *Id.* at *5 (citing *DVD Copy Control Ass'n v. Burner*, 4 Cal. Rptr. 3d 69, 84 (Cal. 2003)). The court applied this rule to journalists by reasoning that while journalists do have certain privileges, these privileges are not absolute and journalists do not have a license to violate criminal laws. *Id.* For example, journalists cannot refuse to disclose information when it relates to a crime. *Id.* Therefore, the court ruled that no one, regardless of their profession, is immune from liability for violating trade secret laws. *Id.* Since the bloggers had in fact violated trade secret laws by publishing Apple's confidential information online, a fair trial demanded the unveiling of their identifications. *Id.* The case is currently on appeal in the California Court of Appeals. Electric Frontier Found., Hearing Set for Appeal in Key Bloggers' Rights Case (Mar. 30, 2006), <http://www.eff.org/deeplinks/archives/004513.php>.

complicated as the variety of media has expanded.”¹⁵⁵ Even though the court did not officially rule as to whether a blogger is a journalist, the aftermath of the decision demonstrates that bloggers do fit into the traditional definition of “journalist.”¹⁵⁶ On appeal, for example, several media and journalist organizations¹⁵⁷ have submitted amicus briefs in support of the bloggers, arguing that the court should equate bloggers with journalists.¹⁵⁸ These organizations argue that the journalistic privilege is not limited to persons who graduated with a journalism degree, as evidenced by the fact that the statutory language¹⁵⁹ defining the California shield law does not explicitly exclude bloggers who publish regularly to provide information to the

155. *Apple*, 2005 WL 578641 at *5.

156. *See id.* The court makes particular use of the Merriam-Webster Online Dictionary for defining “journalist” as “1a: a person engaged in *journalism*; *especially*: a writer or editor for a news medium b: a writer who aims at a mass audience 2: a person who keeps a *journal*” and “journalism” as

1a: the collection and editing of news for presentation through the media b: the public press c: an academic study concerned with the collection and editing of news or the management of a news medium 2a: writing designed for publication in a newspaper or magazine b: writing characterized by a direct presentation of facts or a description of events without an attempt at interpretation c: writing designed to appeal to current popular taste or public interest.

Id. (quoting the Merriam-Webster Online, <http://www.m-w.com> (go to the “Merriam-Webster Online Dictionary” field and type in “journalist” or “journalism”; then follow the “go” hyperlink) (last visited Apr. 24, 2006)).

157. *See* Brief Amicus Curiae of the Reporters Committee for Freedom of the Press et al. at 2-4, *O’Grady v. Apple Computer*, No. H028579 (Cal. App., Mar. 22, 2005), available at http://www.eff.org/Censorship/Apple_v_Does/ (citing recognition that the bloggers are journalists from organizations such as the Hearst Corporation, the Society of Professional Journalists, and the Associated Press). The fact that such well-known journalist organizations agree that bloggers are journalists adds substantial support to the bloggers’ claim. [Rule 10.8.3 says that if a decision has not yet been made on a case, to put the filing date in parenthesis . . . not to omit the date altogether. I went through and changed all of these dates to the filing dates].

158. *See id.* at 12 (arguing that a vast array of professional journalism societies believe that the trial court erred in not affording the bloggers protection under the California shield laws); *see also* Application to File Amicus Brief and Proposed Amicus Brief of Bear Flag League at 6-7, *O’Grady*, No. H028579 (Cal. App., Mar. 22, 2005), available at http://www.eff.org/Censorship/Apple_v_Does/ (insisting that bloggers who gather news with the intent to disseminate such news to the public are entitled to the same protections as the sources of traditional journalists). *But see* Brief of Amicus Genetech, Inc. at 8-10, *O’Grady v. Apple Computer*, No. H028579 (Cal. App., Mar. 22, 2005), available at http://www.eff.org/Censorship/Apple_v_Does/ (agreeing with the trial court’s decision that the California shield law does not trump liability for a criminal violation but not taking a stance on whether or not bloggers are journalists).

159. *See* CAL. EVID. CODE § 1070(a)-(b) (2005) (articulating that the shield law is not limited to protecting those who serve as publishers, editors, or reporters on traditional newspapers or magazines, but also that it applies to those people who are connected to or employed by *other periodical publications*). Clearly, a blog would fall into the category of “other periodical publications.” Brief of Bear Flag, *supra* note 158, at 9-12.

public.¹⁶⁰

Moreover, in their *writ for mandate*, the petitioners pointed to several reasons why bloggers are journalists.¹⁶¹ First, the petitioners provided an expert opinion concluding that “what bloggers do is journalism—[they seek] out accurate information and [present] it to their audiences.”¹⁶² Second, the petitioners noted that while Apple claimed that the bloggers were not journalists, Apple did not provide any contrary evidence, expert or otherwise, to prove that bloggers are not journalists.¹⁶³ Finally, the petitioners referenced various cases holding that the “constitutional guarantees of a free press do not discriminate based on medium.”¹⁶⁴

In addition to the *Apple* case analysis, there are many other reasons why both journalists and legal scholars believe that bloggers are journalists and therefore should be required to adhere to the same defamation laws as traditional newspapers and magazines. First, many bloggers purport to have trustworthy information on their sites and are strongly competing with traditional news services to provide timely and credible news to the public.¹⁶⁵ Second, because bloggers

160. See Brief of Bear Flag, *supra* note 158, at 9-12 (listing the many ways in which courts have defined journalistic terms to demonstrate that bloggers who publish regularly fit into these definitions). According to the Brief of Bear Flag, WEBSTER defines a “periodical” as “a magazine or other publication which appears at stated or regular intervals;” the CENTURY DICTIONARY defines a “periodical” as “a publication issued at regular intervals . . . each of which (properly) contains matter on a variety of topics;” and the Supreme Court in *Houghton v. Payne*, 194 U.S. 88 (1904), defined “magazine” as “[a] pamphlet published periodically containing miscellaneous papers, especially critical and descriptive articles, stories, poems, etc., designed for the entertainment of the general reader.” *Id.*

161. See Petition for Writ of Mandate at 29, *O’Grady v. Apple Computer*, No. H028579 (Cal. App., Mar. 22, 2005), available at http://www.eff.org/Censorship/Apple_v_Does/ (highlighting the “undisputed evidence in the record” to show that the bloggers are journalists engaged in newsgathering).

162. See *id.* at 29-31 (quoting Professor Thomas Goldstein who concluded that PowerPage and Apple Insider, the blog sites involved in the case, are both “online publications that are the functional equivalent of print publications such as newspapers or magazines”).

163. *Id.* at 30.

164. *Id.* at 30-31 (quoting *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987)). The *von Bulow* court held that it does not matter whether “[t]he intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like, for ‘[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.’” 811 F.2d at 144 (internal citation omitted). But see Adam L. Penenberg, *No Protection for Bloggers*, WIRED NEWS, Feb. 17, 2005, <http://www.wired.com/news/culture/0,1284,66630,00.html> (noting how many state statutes such as Arizona and Alaska specifically require that to be a “journalist” or “reporter,” one must be officially employed at a traditional media outlet such as a newspaper, magazine, or television station).

165. See Dottinga, *supra* note 13 (demonstrating the competitiveness of blogs with newspapers by pointing out that the daily readership of the two most powerful political blogs is comprised of over 150,000 people combined, which is larger than

typically read every posting sent to them to determine what information should appear on their sites and what information should not, and since they personally edit that information, they act in traditional editorial and publisher roles.¹⁶⁶

Because many bloggers utilize their blogs to attract a large public audience in a way that resembles the function of traditional print journalism, bloggers should not be immune from suit simply because they publish their work on the Internet. Instead, bloggers who choose to share their views with the public, and who individually monitor their content, should be responsible for ensuring the legality of their content prior to publication.

III. SOLUTION: A PROPOSED AMENDMENT TO THE CDA AND ITS EFFECT ON LIABILITY FOR INTERNET DEFAMATION

In order to strike a balance between promoting self-regulation of Internet content and providing recourse to those who have been defamed on the Internet, Congress should amend § 230(c)(1) of the CDA to contain the following italicized and bracketed clause:

230(c)(1) Treatment of Publisher or Speaker: No provider or user of an interactive computer service shall be treated as the publisher or speaker of statements provided by another information content provider, *[unless the provider or user actively selected those third-party statements for publication]*.¹⁶⁷

Additionally, Congress should amend the CDA to include the following clarifying statement in the “definitions” section 230(f)(5)

the paid circulation of all but seventy-five American newspapers). Bolstering the credibility and attractiveness of blogs, many famous individuals—scholars, professionals, and traditional journalists alike—are turning to online fora to disseminate their views to the public. See Lasica, *supra* note 118, at 73-74 (discussing the trend of many known independent journalists who have turned to online fora to disseminate their stories in recognition that on blogs, they can make their stories more transparent and accessible to readers).

Less well-known bloggers, on the other hand, are able to post resumes on their blogs and provide links to their other publications in order to make themselves appear more trustworthy in the eyes of the public. See, e.g., Pein, *supra* note 10 (discussing how the “Memogate” blogger gained credibility by posting his resume, which boasted his Ph.D. in computer science and background in creating electronic type-setting).

166. See Blumstein, *supra* note 24, at 421 (comparing the *user* of an interactive computer service with substantial control over the publishing of third-party messages to a traditional newspaper editor who has the ability to publish third-party messages in letter-to-the-editor columns, columns that are held to a publisher standard of liability for defamation). In most instances, newspapers and magazines are held liable for defamatory statements in letter-to-the-editor columns, even though the views represent those of the writer, not of the publisher. SACK, *supra* note 14, at 87.

167. The current provision of the CDA is: “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.” 47 U.S.C. § 230(c)(1) (2000).

The term “publisher” shall remain distinct from the term “distributor.”

This proposed amendment looks at the role of the provider or user of a computer service on a publication-by-publication basis. Instead of leaving ambiguous the question of whether the overall role of the provider or user emulates that of a traditional editor, the proposed rule instead focuses on whether the provider or user actively decided to publish a specific message.¹⁶⁸ In interpreting the proposed amended version of the CDA, the courts need not analyze whether a blogger generally monitors the blog for obscenity to determine whether the blogger is a publisher. Instead, the courts could only hold a blogger liable as a publisher if they find that the blogger actively chose to publish a specific and defamatory third-party message. Therefore, the proposed amendment would place strict publisher liability only on those bloggers who act in traditional editorial roles.

Because there are numerous ways in which people can utilize the Internet, one standard of liability for defamation should not apply to the Internet as a whole. Therefore, the proposed amendment allows for the application of both publisher and distributor liability to Internet users and providers depending on the way they choose to disseminate information to the public. Because the courts have debated whether Congress intended the term “publisher” in the CDA to also encompass traditional “distributors,”¹⁶⁹ the proposal eliminates

168. In contrast, most of the pre-CDA courts that analyzed defamation claims focused on whether an Internet user or provider held an *overall* monitoring role on their site or service, not whether they choose to publish a *specific message*. Compare *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (holding Prodigy liable for a defamatory third-party message since Prodigy held some editorial control in regards to omitting and editing content on its services, even though Prodigy’s only role was to monitor obscene content and not to screen for defamation), with *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (finding that CompuServe was not liable for third-party defamatory statements placed on its services because CompuServe did not engage in *any* monitoring roles on its services).

169. Compare *Zeran v. Am. Online*, 129 F.3d 327, 333 (4th Cir. 1997) (holding that Congress must have intended to include distributor liability within the scope of publisher liability in enacting the CDA because Internet speech would still be chilled if the courts held ISPs liable as distributors under the CDA), with *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142, 155 (Cal. Ct. App. 2004) (ruling that Congress did not intend for the CDA to immunize distributors of information because in order for Congress to abrogate a common law principle by statute, the statute must “speak directly to the question addressed by the common law”), and *Grace v. eBay*, 16 Cal. Rptr. 3d 192, 199-201 (Cal. Ct. App. 2004) (determining that Congress expressly used the word “publisher” in the CDA because Congress intended to exclude the word “distributor”). Congressional intent regarding distributor liability for ISPs and Web site hosts remains controversial. See *Lee*, *supra* note 17, at 477 (noting how the *Blumenthal* court could not comprehend why Congress did not make a distinction between publishers and distributors in the language of the CDA and pondered over

this ambiguity altogether by specifying that the word “publisher” remains distinct from the word “distributor.” Under the proposed amendment, the courts could hold bloggers liable for defamatory third-party postings as either publishers or distributors, depending on the way their blog functions.

For example, if a blogger actively chooses to publish a third-party message that is either sent to the blogger or that the blogger republishes from another source, then the blogger would be strictly responsible for ensuring that the message is not defamatory. This is consistent with traditional defamation laws that hold those who act as publishers strictly liable for defamatory comments that they publish because of the editorial control they possess over content.¹⁷⁰ Likewise, if a blogger maintains a comment section¹⁷¹ that allows viewers to submit a message for posting, but that first allows the blogger to review the message before publication,¹⁷² then that blogger also acts as a traditional publisher by actively choosing to either allow or disallow the message.

In contrast, a blogger who allows third parties to automatically post defamatory statements on the blogger’s comment section without review would be liable as a distributor if a court found that the blogger either knew of or had reason to know of the defamatory statements.¹⁷³ For instance, some bloggers allow viewers to write a message to their comment section, press a submit button, and have that message instantly conveyed to all readers of the blog without the

whether imposing distributor liability on an ISP would be contrary to congressional intent). However, even web services and sites that contain a vast amount of information and messages should at least receive distributor liability for posting defamatory messages if they knew of the defamation prior to publication. See *Batzel v. Smith* (*Batzel I*), 333 F.3d 1018, 1039 (9th Cir. 2003) (Gould, J., dissenting) (arguing that one should not be able to knowingly allow the continued posting of hurtful third-party messages on the Internet because this seems beyond Congress’s intent in passing the CDA).

170. See FERRERA ET AL., *supra* note 30, at 185 (discussing the application of publisher liability to newspaper editors).

171. See Emma Scanlan, *Bigger Fish, Deeper Pockets: Business Blogs, Defamation and the Communications Decency Act*, 2 SHIDLER J.L. COM. & TECH. ¶ 1 (Aug. 12, 2005), <http://www.lctjournal.washington.edu/> (follow “back issues” hyperlink; then follow “Bigger Fish, Deeper Pockets: Business Blogs, Defamation and the Communications Decency Act” hyperlink) (discussing how many blogs give viewers the ability to post a comment, viewable on the blog site, in response to entries made by the blogger).

172. See Blogger.com, *How Do I Moderate Comments on My Blog?*, <http://www.blogger.com> (follow “comment moderation” hyperlink) (last visited Nov. 13, 2005) (explaining that many bloggers choose to utilize a blogging function that allows them to monitor third-party content before publishing it on their blog).

173. This type of blog is analogous to traditional bookstores or newsstands. See Lee, *supra* note 17, at 472-73 (explaining that bookstores allow third-parties to submit publications for them to sell, but the bookstores do not review the content that third parties place in those publications).

bloggers' express permission.¹⁷⁴

Bloggers who allow for these automatic comments would fall under traditional distributor liability because they are analogous to telegraph services and bookstores. In *Western Union Telegraph Co. v. Lessne*,¹⁷⁵ the Fourth Circuit reasoned that because telegraph services do not have control over the many messages transmitted through their services, they should only be held liable for the transmission of defamatory messages that they knew or should have known were defamatory.¹⁷⁶ In the same way, while a blogger with an automatic comment section might have many thousands of comments placed on the blog, if the blogger either knows beforehand that a message is defamatory or is notified that someone posted a defamatory comment on the site, the blogger should have the responsibility to remove that comment altogether.

This proposal is similar to Justice Gould's recommendation in his dissent in *Batzel I*, although it varies slightly in application.¹⁷⁷ In interpreting the CDA, the *Batzel I* court agreed that a provider or user of an interactive computer service surrenders CDA immunity when that person becomes an "information content provider" by "developing" the statements of another information content provider.¹⁷⁸ However, the majority and the dissent came to different conclusions about what constitutes "development." Writing for the dissent, Justice Gould argued that based on common definitions of the word "development,"¹⁷⁹ a publisher who makes an "affirmative

174. See *Blogger.com*, *supra* note 172 (pointing out that the decision to monitor third-party comments before publication is not mandatory, but instead a decision for the blogger to make).

175. 182 F.2d 135 (4th Cir. 1950).

176. *Id.* at 137.

177. See *Batzel v. Smith (Batzel I)*, 333 F.3d 1018, 1038 (9th Cir. 2003) (Gould, J., dissenting) (arguing that the focus of the inquiry should be "not on the *author's intent*, but on the *defendant's acts*" in the development process).

178. *Batzel v. Smith (Batzel II)*, 351 F.3d 904 (9th Cir. 2003) (Gould, J., dissenting). The panel in *Batzel II* recognized that in order to receive immunity under the CDA, the accused individual had to have published information provided by another information content provider. *Id.* The court reiterated that an information content provider is "any person or entity that is responsible in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* (quoting 47 U.S.C. § 230(e)(3) (2000)). Therefore, the panel agreed that if a person who posted third-party content on the Internet further "developed" that content by adding additional information to it, that person would also become an information content provider and would lose CDA immunity. *Id.*

179. See *id.* at 905-06 ("[T]he ordinary usage of [the word] 'development' . . . suggests change in, addition to, or novel presentation of, the information."). Justice Gould quoted one dictionary that defined development as "a change in the course of action or events or in conditions; a state of advancement; an addition; an elaboration." *Id.* at 905 (quoting THE NEW SHORTER OXFORD ENGLISH DICTIONARY 654 (Thumb Index ed., 1993)).

choice to select certain information for publication for the first time on the Internet ‘develops’ that information.”¹⁸⁰ Justice Gould contended that since the CDA identifies an “information content provider” as someone who either creates *or* develops information,¹⁸¹ development must mean “adding to or improving the information initially created by another”¹⁸² The majority in *Batzel I*, however, came to a different conclusion about the meaning of the word “develop,” and it ultimately held that mere selection and minimal editing of a message does not constitute development.¹⁸³

Although Justice Gould’s interpretation focused on active selection of a defamatory comment, it still placed the focus of a defamation suit under the CDA on the “information content provider” of a defamatory statement “developing” that statement.¹⁸⁴ Because the word “develop” has so many different meanings, however, this focus creates an ambiguous standard by which to evaluate Internet defamation claims. The proposed amendment, by contrast, creates a bright-line rule because it looks solely at whether someone actively selected a message for Internet publication, and thus had the ability to delete or alter the message. Therefore, the subjectivity in deciding who is a “developer” disappears. Instead of having to determine at what moment one becomes a “developer,”¹⁸⁵ the courts would have an objective standard by which to decide blog defamation cases—only determining whether the blogger actively chose to publish that specific message, or if not, whether the blogger had knowledge of the defamatory nature of the message prior to publication or shortly thereafter.

Asking a blogger who personally controls his or her blog to assume the responsibility to properly monitor the information on the blog is not a burdensome task because determining what is and what is not a

180. *Id.* at 906.

181. 47 U.S.C. § 230 (f) (3) (Supp. II 1996).

182. *Batzel II*, 351 F.3d at 905 (Gould, J., dissenting).

183. See *Batzel v. Smith (Batzel I)*, 333 F.3d 1018, 1031 (9th Cir. 2003) (finding that the “development of information” involves “something more substantial than merely editing portions of an e-mail and selecting material for publication”); see also *Donato v. Moldow*, 865 A.2d 711, 726-27 (N.J. Super. Ct. App. Div. 2005) (alleging that “development” requires “material substantive contribution to the information that is ultimately published. Deleting profanity, selectively deleting or allowing certain postings to remain, and commenting favorably or unfavorably on some postings, without changing the substance of the message authored by another, does not constitute development within the meaning of [the CDA].”).

184. *Batzel II*, 351 F.3d at 905 (Gould, J., dissenting).

185. See *Batzel I*, 333 F.3d at 1031-32 (discussing such ambiguities including whether a developer is someone who merely posts the comments of another for the first time or whether a developer is someone who significantly edits the content of another before publication).

defamatory statement is mainly a matter of common sense.¹⁸⁶ Because bloggers individually choose what information to publish on their blogs, bloggers could easily control what information to omit based on a message's defamatory nature.¹⁸⁷ Similarly, asking a blogger to remove defamatory content from the blogger's comment section is also not burdensome, for a blogger should not knowingly allow defamatory content on his site, even if the blogger did not initially select the content for publication.¹⁸⁸ Any burden that bloggers would bear as a result of this proposal would be minimal in comparison to the social costs that would be avoided, as a blogger who desires widespread readership should have the responsibility of ensuring the veracity of posted statements.¹⁸⁹ If a blogger uses proper screening techniques before publishing a message, this would greatly reduce the immense social costs caused by the spread of defamatory messages.¹⁹⁰ Because many blog-building sites provide users with a special feature to monitor incoming comments before publication, this is not a difficult task.¹⁹¹

Critics may argue that traditional defamation rules should not apply to small-time bloggers who are not aiming their blogs at a wide audience. However, even a blogger who does not intend for their blog to reach a mass audience could still place a defamatory message on his or her site that could result in just as much harm as a blog aimed at a wide audience.¹⁹² But, just as courts in traditional

186. See *id.* at 1039 (Gould, J., dissenting) (noting that it would be very easy for a Web site operator with some familiarity with the Internet and with elementary knowledge of defamation to tell what statements could tend to harm another's reputation).

187. Cf. *id.* (asserting that it would be relatively easy and inexpensive for an individual content screener to conduct a reasonable investigation before posting messages to ensure that those messages are not defamatory). However, if it proves difficult for a blogger to determine defamatory statements from truthful or opinion statements, Congress could draft guidelines for bloggers regarding what is and what is not defamatory. Maxson, *supra* note 102, at 693-94. The major blog interface sites such as myspace.com and xanga.com could then distribute these guidelines to bloggers.

188. See *supra* text accompanying notes 131-136 (noting that Congress never intended the CDA to convey immunity upon those who knowingly allow defamatory information on their services).

189. Cf. Maxson, *supra* note 102, at 693-94 (noting that an Internet bulletin board moderator should have a duty to monitor the statements appearing on the bulletin board and that this duty is not burdensome, for a moderator should have knowledge of what is occurring on the moderator's site).

190. See Scanlan, *supra* note 171, ¶ 13 (noting that "careful monitoring, balanced against the spontaneity needed to give the blog genuine texture," can greatly reduce the risk of costly lawsuits and the spread of defamation).

191. See, e.g., Blogger.com, *supra* note 172 (providing an easy way for bloggers who utilize blogger.com to create their blogs to control the comments that people post to their blogs).

192. See Blumstein, *supra* note 24, at 422 (refuting the argument that defamatory

defamation claims currently analyze the seriousness of the defamatory comment, the role that the publisher plays in publishing the message, the form in which the message appears, the popularity of the medium, and the message's probable effect on the defamed person before imposing liability on the defamer,¹⁹³ under the proposed amendment, the courts can also determine on a case-by-case basis what liabilities a blogger should bear in defamation claims.¹⁹⁴

For instance, under the proposed amendment, bloggers can still claim the traditional defamation defenses of truth,¹⁹⁵ opinion,¹⁹⁶ public/private figure distinctions,¹⁹⁷ and reports from public proceedings.¹⁹⁸ Some states even have retraction statutes that afford protection from defamation lawsuits to publishers who formally retract defamatory statements upon notice of their defamatory nature.¹⁹⁹ If an individual blogger wants a broader liability shield, then the blogger could install a password protection lock on the site, making it more like a private journal where only those people approved by the blogger can view it.²⁰⁰ This password protection

statements placed in obscure parts of the Internet cannot cause widespread harm to reputation by illustrating how real harm occurs when someone finds the comment on an obscure newsgroup and begins posting it throughout the Internet); *see also supra* note 116 and accompanying text (providing examples of obscure Internet stories that spread rapidly and caused substantial harm to the story's target).

193. *See* ELDREDGE, *supra* note 109, at 81 (summarizing these factors as the most prominent in any defamation suit).

194. *See* EFF, *supra* note 25 (discussing how a court analyzing a blog defamation case would look at the nature and format of the blog, the specific content of the blog entry, the reasonable expectations of the blog audience, and the overall context in which the message is displayed).

195. *See id.* (noting that while truth is an absolute defense to the tort of defamation, it is often difficult and expensive to prove).

196. In determining whether a statement is an opinion, courts look at whether a reasonable reader would understand the statement as an opinion and not as a statement of verifiable fact. *Id.* For instance, stating, "I really hated movie 'X,'" is a protected opinion, whereas stating, "It's my opinion that 'Y' is the hacker who broke into the company database" is really an assertion of fact. *Id.*

197. *See id.* (clarifying that if a blogger publishes a defamatory statement about a private individual, the private figure only has to prove that the blogger acted negligently in posting the defamatory statement, but if a blogger publishes a defamatory statement about a public figure, the public figure must show that the blogger acted with actual malice—that the blogger published the statement while knowing it to be false or with reckless disregard for the truth).

198. *See id.* (discussing how some states protect individuals who make defamatory comments about a judicial or legislative proceeding).

199. *See id.* (describing California's law that a plaintiff who fails to demand a retraction of a defamatory statement made against him or her, or who demands and receives a retraction, is limited to receiving "special damages" for that statement); *see also* Mathis v. Cannon, 573 S.E.2d 376, 386 (Ga. 2002) (denying punitive damages to a plaintiff who did not request a retraction of a defamatory statement placed on an Internet bulletin board by defendant).

200. *See* Xanga.com, *Xanga Help: Can I Protect My Posts So That Only Certain Viewers*

would help mitigate a blogger's damages, or quash a lawsuit altogether, since the resulting harm caused by the message would be much less severe. Therefore, the proposed amendment would allow courts to apply the same traditional, flexible defamation framework to the Internet and thus create uniform defamation laws across all media.

Critics may also argue that under the proposed amendment, Internet users and providers would no longer regulate their content for obscenity.²⁰¹ As discussed above, however, the CDA as it currently stands has not achieved this goal.²⁰² Additionally, under the proposed amendment, ISPs and bloggers alike would still have the ability to self-censor obscene material if they choose, without the fear of facing publisher liability in response to these censoring acts.²⁰³ This is because the proposed amendment does not focus on whether a blogger holds an overall editorial role on the site, but rather what role the blogger took in regard to a specific message. For example, bloggers who remove obscene content from their blog, or those who employ filtering software on their sites would still be immune from suit as long as they did not actively select defamatory messages for publication. In other words, removal of a defamatory message or denial of publication altogether would not equate to active selection.

The proposed amendment serves to shield individuals' reputations from defamatory content placed on the Internet while also ensuring that the courts will not punish those Internet users and providers who choose to self-monitor their own sites for obscene content. The amendment allows for application of the traditional defamation rubric to the Internet context, including the current flexibility that the courts have in interpreting the merits of defamation claims and the ability of defamers to invoke absolute and mitigating defenses.

Can Read It?, <http://www.xanga.com> (follow "help" link at the bottom of the page; then follow "protected postings" link; then follow "Can I protect my posts so that only certain viewers can read it?" link) (last visited Mar. 20, 2005) (explaining that all Xanga.com users can use a "protected postings" feature whereby only certain viewers can see the blog, thereby ensuring the blogger's privacy).

201. See Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647, 661-62 (2000) (postulating that Congress purposefully intended for the courts to broadly interpret CDA immunity since the "existing legal system [before the enactment of the CDA] provide[d] a massive disincentive for the people who might best [regulate obscenity on the Internet] to do so").

202. See *supra* text accompanying notes 137-147 (asserting that the CDA did not provide an incentive for ISPs to self-regulate for obscenity and describing how more recent legislation has battled obscene material on the Internet).

203. Cf. *Batzel v. Smith (Batzel I)*, 333 F.3d 1018, 1039 (9th Cir. 2003) (Gould, J., dissenting) (surmising that it is entirely possible to impose liability on users or providers of interactive computer services for publishing defamatory content while still allowing them to regulate obscene content).

CONCLUSION

Because of the potential for blogs to spread defamatory messages to a worldwide audience, bloggers should be subject to the same defamation laws as traditional print media for the posting of third-party content on their sites. However, the current judicial trend in providing broad immunity to users and providers of Internet services is likely to apply to individual bloggers as well, even those who have full control over the content on their sites and who should be liable for not fully investigating the validity of their sources. The only way to reverse this trend is by amending the CDA to eliminate its controlling precedent in the courts. The Internet is no longer in its infancy; therefore, publishers of defamatory content should not be able to turn to the Internet for refuge from liability.