MODERN DIFFICULTIES IN RESOLVING OLD PROBLEMS: DOES THE ACTUAL MALICE STANDARD APPLY TO CELEBRITY GOSSIP BLOGS?

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INTRODUCTION

> Lindsay Lohan's former best friend, Samantha Ronson, filed a. . .defamation lawsuit against Perez and this little ol' website. The DJ's suit had no merit and a Los Angeles judge agreed with us on Thursday. Not only did Ronson lose her case, BUT she also has

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> to pay all of our attorney fees. We did not back down from her intimidation tactics. We did not settle it. We fought this and won. . .[1]

On May 26, 2007, Lindsay Lohan crashed her Mercedes-Benz convertible on Sunset Boulevard in Beverly Hills, California.[2] As a result of the accident, police arrested Lohan on suspicion of drunk-driving and cocaine possession.[3] Also in the car with Lohan was her friend Samantha Ronson, a well-known disc-jockey in the Los Angeles area.[4] Within hours of Lohan's accident and arrest, online sources reported the story with varying degrees of accuracy; some sources printed the facts, while others formed personal conjectures about what happened that night. "Perez Hilton," the Internet weblog alter-ego of Mario Lavandeira, was one such commentator.[5] He expressed an opinion on the incident and surmised what actually occurred that night, including Ronson's supposed role in the incident, on his online celebrity gossip blog, perezhilton.com.[6] He described Ronson as "toxic," commenting that "the cocaine that was found in Lohan's car after the crash may have been RONSON'S!" and "[w]ith friends like Samantha Ronson, Lindsay doesn't need any enemies."[7] Later in June 2007, Hilton posted another blog

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1. Perez Hilton, *Victory! Freedom Of Speech Prevails*, Nov. 1, 2007, http://www.perezhilton.com/2007-11-01-victory-freedom-of-speech-prevails.

2. Stephen Smith, *Drunk-driving charge; LI native Lohan cited after early morning accident in Beverly Hills; cops say cocaine also found at scene*, NEWSDAY (NEW YORK), May 27, 2007 at A.08.

3. *Id.*

4. *Blogger Perez Hilton wins $85,000 in lawsuit*, ASSOCIATED PRESS, Jan. 23, 2008, *available at* http://www.msnbc.msn.com/id/22813115/ (last visited Nov. 13, 2008).

5. *See generally* PerezHilton.com (Hilton proclaims himself as "The Queen of All Media" while describing his blog as "celebrity juice, not from concentrate").

6. Ben Widdicombe, *Lohan Buddy Sues 2 Blogs, Claiming Libel*, DAILY NEWS (NEW YORK), July 15, 2007 at p. 3.

7. Although the original internet posting was removed from Hilton's blog, Ronson's filed complaint contains the alleged statements. Complaint at 4, Ronson v. Sunset Photo and News, No. BC374174 (Cal. Super. Ct. filed July 12, 2007), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2007-06-26-Ronson%20Complaint.pdf (last visited Nov. 13, 2008). The complaint further alleged that blogger Hilton reproduced on his website an article originally posted by Celebritybabylon.com which stated:

> Celebrity Babylon has learned that while DJ Samantha Ronson, 29, looks like she's there to help her pal through thick and thin, she's really making a tidy profit on the side, shilling Lohan, 20, out to photographers eager to get her photo looking passed out and wasted. While an "out of it" Lohan thought she was just going home after a night out at Teddy's in Hollywood on May 27,

entry entitled "Blame Samantha!" in which he speculated, "[w]as Lindsay Lohan betrayed by her lezbot DJ pal Samantha Ronson? Australia's *NW* magazine seems to think so. And we wouldn't disagree!"[8] Ronson claimed injuries stemming from these and other similar Internet posts, declaring that the statements were false and defamatory.[9]

In response, Ronson filed a reported $20 million defamation lawsuit against the blogger in July of 2007.[10] After hearing the statements, Ronson declared to the media "I am not now and have never been a drug user," and "I have never handled or touched cocaine. I did not ever place any cocaine at any place at any time."[11] Obviously, Ronson believed the statements to be complete fabrications; nonetheless, the trial judge dismissed Ronson's claim. The judge found that Ronson qualified as a public figure, that Hilton's blogging website was a public forum, and that the statements were of public interest.[12] Therefore, a heightened showing of malice applied, and the judge ruled that Ronson did not meet that burden, and thus, granted blogger Hilton's motion to strike Ronson's complaint.[13] Furthermore, not only did the court reject Ronson's claim, but it ordered her to pay Hilton's attorneys' fees to the sum of over $85,000.[14]

Ronson made a side trip to a gas station. A source tells Celebrity Babylon "The car was only down a quarter of a tank, and yet Samantha stopped for gas. She has a side deal with a photo agency and they paid her to make the pit stop!" If that wasn't shocking enough, sources says it was Ronson who was holding the cocaine later found in Lindsay's car. "There were three of them crammed into the Mercedes sports car and Samantha was the one that had the cocaine with her. Lindsay later questioned her about leaving it in the car for the cops to find and Samantha blew her off." Ronson, who makes anywhere from $2,000 to $3,000 a night deejaying clubs for private parties, has accumulated a substantial side income taking her pal in front of paparazzi cameras for money. *Id.* at 3.

8. *Id.* at 4-5.

9. *See generally*, *id.*

10. *Id*; *see also* Chris Francescani, *Hollywood Celeb Web Sites Hit With $20M Libel Suit*, July 17, 2007, http://abcnews.go.com/TheLaw/story?id=3385802 (last visited Nov. 13, 2008).

11. *Blogger Summoned to Court*, NEWSDAY (NEW YORK), Oct. 12, 2007 at A.10.

12. Transcript of Motion to Strike Complaint at 12-13, Ronson v. Sunset Photo, No. BC374174 (Cal. Super. Ct. Nov. 1, 2007), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2007-11-01-Transcript%20of%20Proceedings%20-%20Ronson%20v.%20Lavandeira.pdf (last visited Nov. 13, 2008).

13. *Id.* at 16; Francescani, *supra* note 10.

14. *See supra* note 4.

Thus, by barring Ronson from recovery without even reaching the merits of the case, the court insulated Hilton from any legal liability for his unsubstantiated assertions.[15] Instead, the judge embraced the high level of protection afforded to free speech by allowing the comments to skirt legal scrutiny. Does this outcome seem just? Have free speech protections gone too far in the context of Internet weblogs, excluding celebrities from any possibility of recovery for defamatory statements potentially injurious to their reputations?

American society highly values the First Amendment right of free speech and all the privileges that follow.[16] However, freedom of speech comes with a price—a cost that society must bear in order to maintain the broader social and political benefits presumed to ultimately flow from this constitutionally-protected right. Few know these costs better than "public figures," who, by virtue of their public stature, subject themselves openly to public criticism.[17] In our increasingly media and celebrity-soaked culture, movie, music and other popular personalities are routinely considered to be "public figures" who must bear the burden of maintaining First Amendment "breathing space." But just how much free speech can and should be permitted where such speech may falsely injure the reputation of a public figure who worked hard to create that reputation? The courts have struggled for decades to balance the public's right to freedom of expression

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15. This decision protects more than just Hilton's personal free speech rights; it aids other bloggers in deflecting similar lawsuits. Lavandeira's counsel, Bryan J. Freedman, noted the importance of this decision for the blogging community, asserting "[i]t's a huge victory for not only Perez Hilton, but also for everyone who uses the Internet to comment on celebrities of public interest. We are thrilled this judge ruled the correct way and found the lawsuit to be frivolous." CBS Broadcasting, Inc., *Judge Dismisses Suit Against Perez Hilton*, Nov. 1, 2007, http://cbs2.com/local/Perez.Hilton.Defamation.2.537448.html (last visited Nov. 13, 2008).

16. Free speech became deeply rooted in our society over a period of centuries and the right is essential to American society "(1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in society." Thomas Emerson, *Toward A General Theory of First Amendment*, 72 YALE L.J. 877, 878-79 (1963).

17. *See* Gertz v. Welch, 418 U.S. 323, 345 (1974) ("Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies.").

with the private right of protecting one's reputation.[18] Courts are periodically confronted with new challenges and additional obstacles and must constantly adjust, expand or redefine legal standards to provide remedies for harms suffered by public figures resulting from defamation in order to properly balance both interests.

Recently, courts have been handed yet another new twist on this age-old balancing act: the Internet "weblog" or as it is now routinely called, "blog."[19] This advent of technology, referred to as the "next great communications medium,"[20] provides society with a new speech forum where ideas can be posted, discussed and exchanged worldwide with unprecedented accessibility and speed. As with any technological advance, any legal problems surrounding the medium must be tackled by the court system;[21] the potential for defamation through a blog is one such legal challenge.

Using the freedom and access that blogs afford, millions of Americans have created an interactive free speech forum by creating their own blogs.[22] Some individuals take advantage of this ability by publishing blogs dedicated to pressing national or worldwide news topics and political issues.[23] Other bloggers construct forums directed towards hurtful gossip, rumors and other antagonizing speech regarding subjects such as Britney Spears' lackluster MTV Video Music Award performance[24] or Lindsay Lohan's partying and weight

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18. *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

19. Webster's Online defines a "blog" as "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer." Merriam-Webster's Online Dictionary, Blog, http://www.m-w.com/dictionary/blog (last visited Nov. 13, 2008).

20. Denise Kasper, *Hello: Blog Gets Conversation Under Way*, WINSTON-SALEM JOURNAL, May 12, 2005.

21. Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998) ("This information revolution has also presented unprecedented challenges relating to rights of privacy and reputational rights of individuals").

22. In 2005, over 12 million Americans reportedly blogged and about 82% of those persons believed they would still be blogging a year later. Amanda Lenhart & Susannah Fox, *Bloggers: A Portrait of the Internet's New Story Tellers*, PEW INTERNET & AMERICAN LIFE PROJECT, July 19, 2006, *available at* http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf (last visited Nov. 13, 2008).

23. *See generally* Andrew Sullivan, *The Daily Dish*, http://andrewsullivan.theatlantic.com/ (personal blog dedicated to reflection on, discussion of, and analysis of various political hot topics) (last visited Nov. 13, 2008).

24. Perez Hilton, *An Open Letter to Britney Spears*, Sept. 10, 2007,

problems.[25] Blogs provide a vast, unchecked and unregulated speech forum which allows for completely open and instantaneous communication around the world on almost any topic. In such an environment, can a celebrity overcome the protective free speech hurdles posed by the Internet and the actual malice standard in order to recover under a defamation theory of liability against offending bloggers?

In answering this question, this Comment will compare the legal proofs necessary for print and Internet defamation claims in order to determine whether the underlying policy rationales of the actual malice standard apply to celebrity gossip blogs. Furthermore, this Comment will identify and explore the additional free speech hurdles faced by celebrities in establishing defamation claims for blog statements to determine whether these protective measures coincide with the purposes behind the actual malice doctrine. Part I discusses traditional defamation law and claims brought by celebrities in the print media context. Part II theorizes how similar defamation claims may work in the context of blogs, identifies the additional hurdles placed in the way of celebrities maintaining such claims, and evaluates whether the policies justification of the actual malice standard apply to blogs. Finally, Part III identifies other potential problems faced by celebrities in bringing defamation claims against bloggers.

I. PRINT MEDIA, DEFAMATION CLAIMS AND CELEBRITIES

The common law tort of defamation is defined as communication that "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."[26] Therefore, defamation involves an intangible injury to one's reputation. Financial recovery for this tort turns upon the ridicule, hatred and contempt an injured person endures as a

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http://www.perezhilton.com/?p=5263 (asserting that Britney Spears was "probably still drunk or high during [her] performance" at the 2007 MTV Video Music Awards) (last visited Nov. 13, 2008).

25. Tyler Durden, *Lindsay Is Almost Back*, Oct. 19, 2007, http://www.wwtdd.com/post.phtml?pk=3030 (observing that "Lindsays [sic] weakness include forming sentences, saying no and standing upright, but her strengths include never eating yet retaining an awesome rack") (last visited Nov. 13, 2008).

26. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

result of defamatory communications.[27] In order to establish a claim for defamation, a plaintiff usually must demonstrate: (1) a false, injurious statement made against him; (2) publication of such statement by another; (3) which was at least negligent; and (4) harm caused by the publication.[28] Such statements may cause injury to one's personal reputation or economic status, but either injury suffices for defamation recovery.[29] Typically, private individuals can recover for defamation after demonstrating actual injury from false statements such as loss of business revenue.[30]

Public figures, on the other hand, face an extra hurdle when attempting to recover damages for injuries to their reputations caused by defamatory remarks. As a result of the Supreme Court's decision in *New York Times v. Sullivan*,[31] public officials must demonstrate that a defendant acted with "actual malice" in order to recover reputational damages from allegedly defamatory statements. The actual malice standard requires more than actual falsity, mere negligence in reporting, or departure from professional journalistic standards;[32] rather, it limits public officials' recovery to those statements made with known falsity or reckless disregard for the truth.[33] Thus, the actual malice standard makes it far less likely for celebrities or other public figures to recuperate for injuries caused by offensive assertions, even when the published statement is completely false.

Originally intended to apply to political figures or "public officials,"[34] the actual malice standard has been since expanded to other attention-seeking or publicity-garnering

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27. *Id.* at cmt. b. "Communications are often defamatory because they tend to expose another to hatred, ridicule or contempt. A defamatory communication may tend to disparage another by reflecting unfavorably upon his personal morality or integrity or it may consist of imputations which, while not affecting another's personal reputation, tend to discredit his financial standing in the community, and this is so whether or not the other is engaged in business or industry."

28. *Id.* at § 558.

29. *Id.* at § 559 cmt. b.

30. *Id.*

31. 376 U.S. 254 (1964).

32. Newton v. Nat'l Broadcasting Co., 930 F.2d 662, 669 (9th Cir. 1990) (acknowledging that "[e]xtreme departure from professional standard of journalism will not suffice to establish actual malice; nor will any other departure from reasonable prudent conduct, including the failure to investigate before publishing").

33. *Id.* at 280.

34. *Sullivan*, 376 U.S. at 283.

groups called "public figures"[35] and "limited purpose public figures."[36] A "public figure" is defined as one who gains public attention or fame through achievement, luck, success or pure personal effort.[37] Celebrities fall into this category because, by their very nature, they inject themselves into the spotlight and thus become household names who invite attention or comment.[38] Consequently, celebrities must prove actual malice to prevail in defamation claims.[39] In other words, the court system requires celebrities to endure a certain amount of public criticism in exchange for their fame without the ability to recover damages from potentially injurious assertions.

A problem occurs, though, when this criticism turns into blatant falsehoods. In a society so completely star-struck and celebrity-obsessed as America, juicy gossip and hot stories concerning celebrities are in high demand.[40] Thus, the risk of celebrities being defamed, rather than merely discussed, is a reality. In such circumstances, is it possible for a celebrity to overcome the heightened actual malice standard in order to recover for hurtful, injurious and perhaps completely fabricated articles about them? The answer is yes, but the claim can be difficult to prove since more must be shown than false reporting. Instead, the actual malice standard insulates many possible defamers from liability because of the high burden of proof placed on plaintiff celebrities.

Many celebrities have been unsuccessful in pursuing their defamation claims against newspapers or tabloid publishers. Recently, a libel suit brought by Britney Spears against tabloid magazine *Us Weekly* for an article, which reported that Spears and ex-husband Kevin Federline wanted to

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

36. Waldbaum v. Fairchild Publ'ns, 627 F.2d 1287, 1292 (D.C. Cir. 1980) ("a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants").

37. *Curtis Publ'g Co.*, 388 U.S. at 130.

38. *Waldbaum*, 627 F.2d at 1292.

39. *Id.*

40. In New York City, as one example, the *Daily News* and *New York Post* constantly compete over readership by attempting to get the hottest stories and most salacious celebrity photographs out to the public first. Jesse Oxford, *Reasons to Love New York: Because Where Other Cities Are Losing Their Papers, New York Still Has A Tabloid War*, NEW YORK MAGAZINE, Dec. 25, 2006.

distribute a tape of themselves having sex, was dismissed before reaching the merits.[41] In rejecting the claim, the judge decided that since Spears "put her modern sexuality squarely, and profitably, before the public eye," the *Us Weekly* article could not be considered defamatory regardless of whether the publication was true or false.[42] Thus, even if the story was later proven to be a complete fabrication, Spears had no recourse against *Us Weekly* under the California libel laws.

On the other hand, Carol Burnett[43] and Clint Eastwood[44] were both successful in proving defamation claims under the actual malice standard and recovering damages against the tabloid magazine *National Enquirer*. In Burnett's case, the tabloid reported that Burnett initiated a drunken fight with a patron at a restaurant.[45] Burnett filed suit against the magazine claiming that no fight ever occurred, and that the article injured her professional reputation.[46] The court awarded her $50,000 in compensatory damages and $750,000 in punitive damages.[47] Burnett convinced the court that the tabloid acted with actual malice because the story went forward even though the *Enquirer* received it from a highly untrustworthy source, knew that at least part of the story was fabricated, and refused to verify the incident in any manner.[48] This level of disregard for the truth persuaded the court that the article was published with actual malice, and thus, the court ruled in Burnett's favor.[49]

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41. The magazine article's headline reported, "Brit & Kev: Secret Sex Tape? New Parents Have a New Worry: Racy Footage from 2004." Natalie Finn, *Judge Tosses Britney's Libel Suit*, E! News Online, Nov. 6, 2006, http://www.eonline.com/uberblog/b53705_Judge_Tosses_Britney_s_Libel_Suit.html (last visited Nov. 13, 2008).

42. *Judge Dismisses Britney Spears' Libel Suit: Pop Star Had Accused US Weekly of Fabricating Story About Sex Video*, ASSOCIATED PRESS, Nov. 7, 2006, *available at* http://www.msnbc.msn.com/id/15595990/ (last visited Nov. 13, 2008).

43. Burnett v. Nat'l Enquirer, 144 Cal. App. 3d 991 (Cal. Ct. App. 1983).

44. Eastwood v. Nat'l Enquirer, 123 F.3d 1249 (9th Cir. 1997).

45. *Burnett*, 144 Cal. App. 3d at 996.

46. *Id.*

47. *Id.* at 997.

48. *Id.* at 999.

49. *Id.* at 1011 (determining that "we are persuaded the evidence fairly showed that while appellant's representatives knew that part of the publication complained of was probably false and that the remainder of it in substance might very well be, appellant was nevertheless determined to present to a vast national audience in printed form statements which in their precise import and clear implication were defamatory, thereby exposing respondent to contempt, ridicule and obloquy and tending

Similarly, Clint Eastwood recovered damages from the *National Enquirer* stemming from injuries to his reputation caused by one of the tabloid's articles.[50] Specifically, the *Enquirer* claimed to have procured an exclusive interview with Eastwood concerning his new baby and love interest which featured quotes from Eastwood himself.[51] In fact, Eastwood never spoke to anyone at the magazine nor gave anyone else such an interview.[52] He sued the tabloid claiming reputational damage from the exaggerated article and was awarded $150,000 in damages plus attorneys fees.[53] However, proving the fallacy of the story was not enough to establish his claim; instead, Eastwood probed further into the publishers' motives and knowledge regarding the fictional article.[54] After a factually intensive examination, the court found that the tabloid's lack of investigation and corroboration, failure to check any sources, refusal to review the story before its publication, and the editors' failure to double check any information was enough to support a finding of actual malice.[55] Therefore, the court barred the magazine from turning a blind eye to the truth by conducting just enough investigation to show any grounds for believing the story when any reasonable inquiry made by the magazine would have proven that the article was a complete fabrication.[56]

Although it is possible for celebrities to recover for defamation injuries, it is more likely that they will fail to substantiate the claim because of the high factual burden placed upon them by the actual malice standard. Many filed cases are dismissed[57] or settled out of court[58] in order to avoid

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to injure her in her occupation").

50. *Eastwood*, 123 F.3d at 1249.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Eastwood*, 123 F.3d at 1249.

56. *Id.*

57. *See e.g.*, *supra* notes 41-2.

58. For instance, Paris Hilton settled a $10 million libel lawsuit filed against her by Zeta Graff. The suit stemmed from an article published in the *New York Post* accusing Graff of attacking Hilton in a London nightclub and attempting to steal her diamond jewelry. The *Post* claimed Hilton was the source of the story. Eventually, the parties reached a resolution outside of the courtroom for an undisclosed amount. Caris Davis, *Paris Hilton Settles $10 Million Defamation Suit*, PEOPLE MAGAZINE ONLINE,

expensive and protracted litigation. The system, then, promotes free speech rights at the expense of occasional offended reputations or reported untruths. However, when disseminated information crosses the allowable threshold of free speech, courts possess the power to step in and remedy the particular situation. The practical obstacles in the blogging context, however, are more numerous than in other media outlets. This creates heightened difficulties for celebrities in bringing a successful defamation claim. As a result, the possibility of dismissal or settlement of a celebrity's claim, rather than successful litigation, is more likely in the blog context.

II. INTERNET BLOGS, DEFAMATION AND CELEBRITIES

The Internet's role in enhancing human communications is undeniable.[59] However, the possibility of legal controversies on the Internet has been discussed and debated ever since the technology came into the mainstream.[60] Confronted with the possibility of lawsuits destroying the new medium, Congress enacted the Communications Decency Act ("CDA") in order to provide additional protections for speech on the Internet.[61] The main reasons that Congress enacted the CDA were to prevent a flood of lawsuits based on defamation from stifling the technology before it could get off the ground, and to grant the Internet extra protections as a conduit for free speech and open discussion.[62] Consequently, an individual attempting to recover damages for libelous postings on the web faces

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Aug. 23, 2007, http://www.people.com/people/article/0,,20052993,00.html (last visited Nov. 13, 2008).

59. The Supreme Court recognized the Internet as "a unique and wholly new medium of worldwide human communication." ACLU v. Reno, 521 U.S. 844, 850 (1997). Congress also acknowledged the importance of the Internet as an "advance in the availability of education and [an] informational resource to our citizens." 47 U.S.C. § 230 (a)(1) (2008).

60. *See generally* 47 U.S.C. § 230.

61. Congress rationalized such additional protections over the Internet in order to, among other things, "promote the continued development of the Internet and other interactive computer services and other interactive media," "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services," and "encourage the development of technologies which maximize user control over what information is received by individuals." 47 U.S.C. § 230(b)(1)-(3).

62. *Id.*

additional obstacles when proving his claim, which are not present in the world of print media.

In particular, these impediments become more problematic when the possible defamation occurs in comments pertaining to a celebrity. Not only do famous persons have all the legal problems and hurdles presented by the Internet to deal with, but they must overcome the actual malice standard as well. This raises the question: are the policies underlying the actual malice standard as outlined in *New York Times v. Sullivan*[63] still applicable in the context of blogs? So far, no case directly addresses this question.

A. Defining Blogs

No one can agree to a single definition for a "blog"; in fact, there are as many ways to describe a blog as there are people who create them.[64] Several common features of blogs have emerged, however, which set them apart from traditional websites. The main characteristics include: (1) postings in reverse chronological order, (2) unfiltered content, (3) comments from third parties, (4) hyperlinks to outside websites and (5) a "flip, informal, ironic tone."[65] This amorphous framework creates a simple, easy and inexpensive model that bloggers can apply to any topic of interest, particularly, criticism, commentary, and dissent. In fact, blogs have cropped up on almost any subject matter in various forms, ranging from personal diaries to amateur journalism.[66]

Celebrity gossipers have taken advantage of this framework. Traditionally, the public could get its "fix" of celebrity chatter only from television programs, magazine articles and tabloids. Nowadays, individuals such as Mario Lavandeira, also known as "Perez Hilton," create their own

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63. 376 U.S. 967 (1964).

64. For example, one blogger defined the medium as "a tool that lets you do anything from change the world to share your shopping list. People will use it however they wish...it is a means of sharing information and also of interacting; It's more about conversation than content." Jeff Jarvis as quoted by Michael Connif, *Just What Is a Blog, Anyway?*, Sept. 29, 2005, http://www.ojr.org/ojr/stories/050929/ (last visited Nov. 13, 2008).

65. *Id.*

66. Anthony Ciolli, *Bloggers as Public Figures*, 16 B.U. Pub. Int. L. J. 255 (Spring 2007).

celebrity gossip blogs that the public can view in vast numbers, for free, at all hours of the day and night.[67] Not only are these websites continually updated and interactive, but the anonymous nature of blogs, combined with their sarcastic narration, creates an environment that can be highly critical of almost anyone, especially celebrities. As a result, many blogs become popular by constantly analyzing, patronizing and scrutinizing celebrities' every move, reporting that they: suffer from drug or alcohol problems,[68] fight with other celebrities,[69] have eating disorders,[70] get plastic surgery,[71] participate in extra-marital affairs[72] or hide pregnancies.[73]

Consequently, it is not surprising that many of these comments easily could turn from allowable commentary to harmful, false and injurious statements—the very basis of a defamation claim. Fortunately, recovery for defamation has not been limited to traditional print media such as newspapers or magazines. On the contrary, courts expanded the theory of defamation liability to conduct,[74] radio

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67. *See supra* note 5.

68. Perez Hilton, *Drug Paranoia*, Oct. 8, 2007, http://perezhilton.com/?p=6790 (claiming that Britney Spears suffered a paranoia attack induced by drug use) (last visited Nov. 13, 2008).

69. Anticlown Media, *Star Jones and Barbara Walters Hate Each Other*, June 29, 2006, http://thesuperficial.com/2006/06/star_jones_and_barbara_walters.php (last visited Nov. 13, 2008).

70. Anticlown Media, *Keira Knightley Sues Paper For Saying She's Thin*, Jan. 23, 2007, http://thesuperficial.com/2007/01/keira_knightley_sues_paper_for.php (observing "[m]aybe Keira Knightley doesn't know what anorexia means. She probably thinks it's some kind of dinosaur. That would explain a lot of things, like how she's so very anorexic but thinks she isn't") (last visited Nov. 13, 2008).

71. Tyler Durden, *Demi Moore Has the Right Idea*, Sept. 13, 2007, http://www.wwtdd.com/post.phtml?pk=2876 (commenting on Demi Moore's alleged plastic surgery valued at over $500,000) (last visited Nov. 13, 2008).

72. Perez Hilton, *The Wedding is Off!*, July 28, 2007, http://perezhilton.com/2007-07-28-the-wedding-is-off (claiming that Usher's wedding was canceled because of infidelities) (last visited Nov. 13, 2008).

73. Perez Hilton, *That Pregnancy Glow*, Sept. 25, 2007, http://perezhilton.com/?p=6143 (reporting that Jennifer Lopez was pregnant with twins) (last visited Nov. 13, 2008).

74. *See, e.g.*, Bennett v. Norban, 151 A. 2d 476, 478 (Pa. 1959) (determining that the unfounded rummaging and searching of customer's pockets as if she had been shoplifting could be actionable under a defamation theory); Berg v. Consolidated Freightways, Inc., 421 A. 2d 831, 833 (Pa. Super. Ct. 1980) (finding that the conduct of

broadcasts[75] and television shows,[76] among other areas. Such an expansion in the context of the Internet weblog, however, has yet to be clearly outlined. Courts acknowledge the difficulty in applying defamation concepts to the Internet.[77] Thus, no clear-cut legal framework has been created to deal with the problem of injurious reports published by bloggers.

In particular, a celebrity's ability to overcome the actual malice standard when maintaining a defamation claim against a blogger has not been examined and no published case grants recovery to a celebrity for injurious statements posted through a blog. Nevertheless, a few cases have been filed against bloggers. For example, as outlined earlier, Samantha Ronson filed an extremely public defamation lawsuit against Perez Hilton in 2007, but the court never reached the factual assertions and legal arguments particular to that case since it was dismissed before these issues could be confronted.[78] Thus, the question remains whether the current legal framework regarding defamation and the actual malice standard should be applied to blogs when the requisite libel case presents itself.

B. Actual Malice Policy Rationales As Applied to Blogs

To determine where application of the actual malice standard as outlined in *Sullivan* makes sense for blogs, it is necessary to explore the current policy rationales underlying the actual malice standard and how they operate in the environment of celebrity gossip blogs. Such policy justifications include: (1) a public figure's active pursuit of the spotlight;[79] (2) a public figure's access to the media through which she may correct wrongly reported information;[80] (3) the

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firing an employee during the course of a criminal investigation at his place of work could demonstrate a slander cause of action against the employer).

75. *See, e.g.*, Shor v. Billingsley, 158 N.Y.S.2d 476, 481 (N.Y. Sup. Ct. 1956), *aff'd* 2 N.Y.S.2d at 1017 (N.Y. App. Div. 1957) (holding that statements made during a radio broadcast could be defamatory).

76. "Broadcasting of defamatory matter by means of radio or television is libel, whether or not it is read from a manuscript." RESTATEMENT (SECOND) OF TORTS § 568A (1977).

77. *See Blumenthal*, 992 F. Supp. at 49 (noting that "the legal rules that will govern this new medium are just beginning to take shape").

78. *See supra* notes 1-15 and accompanying text.

79. *Gertz*, 418 U.S. at 345.

80. *Sullivan*, 376 U.S. at 304-5 ("[t]he public official certainly has equal if not

possible "chilling effect" that results from the over-regulation of speech;[81] (4) the importance of disseminating even false statements because of the potential value they may have in society;[82] and (5) the inevitability of falsehoods in a democratic and open society.[83]

1. Pursuit of the Spotlight

Traditionally, courts point to a celebrity's active pursuit of fame as one rationale for allowing extra protection for public criticism of them.[84] Courts reason that, because celebrities thrust themselves into the media forefront through their talent, work or pure luck, they should be subject to public critique.[85] As consistently reinforced by the courts after *Sullivan*, public figures' active pursuit of the spotlight creates an obligation for them to tolerate a certain amount of criticism as a price for the benefits of fame.[86] Not only do courts use this rationale to impose higher protections on speech concerning public figures, but they also use it as one factor in determining if a person legally qualifies as a public figure.[87] In other words, it is the person's voluntary interjection into media scrutiny which determines her classification as a public figure and a court's application of the actual malice standard.[88]

With celebrities, this determination is, by definition, a non-issue since their fame, notoriety and pursuit of success in the entertainment industry demonstrate a self-interjection

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greater access than most private citizens to media of communication").

81. *Id.* at 299 ("every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious").

82. *Id.* at fn 19 ("[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error' ").

83. *Id.* at 272. (recognizing that "[e]rrors of fact...are inevitable...[in] the field of free debate").

84. *Gertz*, 418 U.S. at 345.

85. *See generally Curtis Publ'g Co.*, 388 U.S. at 130.

86. *See id.*

87. RESTATEMENT (SECOND) OF TORTS § 580A cmt. c (1977); *see also* Jan Christie, *The Public Figure Plaintiff v. The Nonmedia Defendant in Defamation Law: Balancing the Respective Interests*, 68 Iowa L. Rev. 517, 526 (1983).

88. *Id.*

into the spotlight.[89] A celebrity not only profits from becoming popular in the media through her work, but she also needs the media to publicize her current entertainment project. In order to take advantage of the benefits of media coverage, then, courts require celebrities to deal with the negative comments and critiques that come along with fame.[90] Therefore, the reasons for a celebrity's fame are important aspects in examining whether comments made about him or her in a newspaper or magazine are justifiable.

For instance, in the lawsuit concerning Britney Spears' and Kevin Federline's alleged sex-tape referenced above, the presiding judge determined that Spears' overt display of sexuality in the media to garner recognition made her sexuality a proper subject for public comment.[91] As the trial judge noted, Spears "publicly portrayed herself in a sexual way in her performances, in published photographs and in a reality show."[92] In other words, because Spears interjected herself into the public eye and gained notoriety through her sexuality, the falsity of statements concerning her sexuality—such as the sex tape allegations—was not enough to allow Spears' claim to survive summary judgment.[93]

This rationale plays out no differently in the context of blogs. Celebrities put themselves in the forefront, so public commentary and critique regarding their behaviors should not be inhibited. Under this rationale, the requirement of proving actual malice is a result of the celebrity's own actions, talent, fame or notoriety. Thus, the star unavoidably opens himself up to criticism concerning his status as a famous person. Once again, under this rationale, Britney Spears would be unsuccessful in claiming defamation damages stemming from blog comments made on topics such as her disappointing MTV Video Music Award performance in 2007.[94] In that circumstance, the bloggers' comments pertained to the exact reason for Spears' fame: her musical performances. Therefore, it would only make sense to allow

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89. *See Curtis Publ'g Co.*, 388 U.S. at 130.

90. *Gertz*, 418 U.S. at 345.

91. *See supra* notes 41-42 and accompanying text.

92. *Judge Dismisses Britney Spears' Libel Suit: Pop Star Had Accused US Weekly of Fabricating Story About Sex Video*, ASSOCIATED PRESS, Nov. 7, 2006, *available at* http://www.msnbc.msn.com/id/15595990/ (last visited Nov. 13, 2008).

93. *Id.*

94. *See supra* note 24.

persons to comment on such nationally-televised public displays. Consequently, a public figure's active pursuit of the spotlight continues to support the policy of holding such figures to the actual malice standard in the blogging context.

2. Disparate Media Access

Another policy rationale for protecting speech aimed against public figures is their access to the media to correct misinformation or possibly defamatory statements.[95] According to the *Sullivan* decision, such individuals have the greatest capacity to call the media together in order to correct possibly libelous information reported by newspapers or magazines.[96] Thus, celebrities have less need to use the court system for remediation of harm caused by slanderous publications because they can do so without court assistance.[97] Additionally, the media's responsibility to provide the public with adequate information on topics of public interest justifies additional protections when reporting on persons who are of public concern.[98] Therefore, society encourages critique and criticism from the media on these issues in order to further public debate and discussion, as long as the comments are not made with actual malice.[99]

In the print context, this rationale makes perfect sense given the limited number of newspapers and magazines that publish stories to a vast number of readers. Because of the limitations of these forums, the papers can report only stories concerning noteworthy sources or topics. Therefore, the ordinary citizen is very unlikely to find himself in the media, and if so, to gain enough attention to his cause for the media to respond to him or hear his counter-argument. In other words, not everyone can expect to voice his opinion in *The New York Times* if a reporter has libeled him in that publication. Public figures, on the other hand, are noteworthy enough to be able to correct mistakes much more easily

95. *Sullivan*, 376 U.S. at 304-05; RESTATEMENT (SECOND) OF TORTS § 580A cmt. a (1977).

96. *See Sullivan*, 376 U.S. at 304-05.

97. *See Gertz*, 418 U.S. at 342.

98. *See, e.g.*, Jan Christie, *The Public Figure Plaintiff v. The Nonmedia Defendant in Defamation Law: Balancing the Respective Interests*, 68 IOWA L. REV. 517, 522-25 (1983).

99. *See id.*; *see also Gertz*, 418 U.S. at 342.

through a variety of outlets.

In the blogging world, the disparate media access rationale appears applicable because of celebrities' ability to draw large media attention more quickly and with more force than any private person could. Therefore, correcting mistakes or false reporting, even from a blog, is much easier for a celebrity than for the common citizen. However, the ease, accessibility, low cost and wide dissemination of information through blogs creates the capability for almost anyone to voice his opinion in this completely open public forum.[100] Nowadays, every person has the ability to respond to negative or incorrect criticism through his own blog or by correcting the information on the offending blog itself. Therefore, the media access argument may not be as strong in validating the disparity in treatment between celebrities and private citizens in the context of blog defamation. At the same time, celebrities have a greater ability to have their messages and corrections displayed in *other* media outlets with ease and in a timely fashion, a feat only the most popular bloggers, perhaps celebrities in their own right,[101] could accomplish.

As a result, this policy rationale is not as strong in the blogging context because anyone can create an outlet to voice his opinion in this open forum which can be read by vast numbers of people. Therefore, celebrities have an advantage over the ordinary citizen since more attention will be paid to them as a result of their fame, but this advantage diminishes in the context of blogs because of the ease and accessibility blogs afford to all members of society.

3. Chilling Effect of Speech Over-regulation

Another policy rationale for protecting free speech is that over-regulation of these liberties stifles those freedoms from being exercised in a democracy.[102] Particularly in the

100. *See supra* note 22 and accompanying text.

101. *See generally* Ciolli, *supra* note 66.

102. "Those who won our independence believed...that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed

defamation context, the threat of "chilling" speech through legal actions and the interjection of the legal system into the media's role of reporting have been limited.[103]

Chilling occurs through self-censorship—the reluctance to report on certain issues or topics out of fear of legal retribution.[104] The *Sullivan* decision acknowledged this fear of media self-censorship[105] and thus adopted the actual malice standard, in part, to guard against this possibility.[106] Some scholars argue that the actual malice standard does little to prevent self-censorship because newspapers must still defend against filed lawsuits.[107] Others believe that completely unregulated speech is the only solution.[108] However, the actual malice standard protects newspapers and other media outlets from paying large damage awards resulting from defamation suits.

The blogging world should be no exception to this long-held belief in free speech and the necessary breathing room given to public commentary, debate and critique. The risk of harm to individuals for possibly false or misleading statements is small compared to the great harm in silencing a voice that fears legal repercussions. Therefore, courts would likely be even more hesitant to allow self-censorship in the blogging context. In fact, given the extra speech protections already granted to the Internet, the rationale for preventing self-censorship becomes more striking. Moreover, in cases where a blatant injury and harm to a celebrity occurs, defamation lawsuits may allow for recovery.[109]

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remedies; and that the fitting remedy for evil counsels is goods ones...they eschewed silence coerced by law." *Sullivan*, 376 U.S. at 269-70 (quoting Whitney v. California, 274 U.S. 357, 375-76 (1927)) (Brandeis, J., concurring).

103. *Id.*

104. David Andersons, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 425 (1975).

105. *Sullivan*, 376 U.S. at 270 ("debate on public issues should be uninhibited, robust, and wide-open").

106. *See supra* note 104.

107. *Id.*

108. "The only truly adequate protection for criticism is an absolute privilege to say whatever one wishes...without being called to account in any governmental forum." Paul A. LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Legal Framework*, 66 NEB. L. REV. 249, 293 (1987).

109. *See supra* notes 43-56 and accompanying text.

C. Value of False Ideas and Inevitability of Falsehoods

Another free speech value embraced by society is the attainment of truth through the confrontation of falsity with fact.[110] The theory dictates that sound decision-making can be made only through careful consideration of relevant facts while acknowledging and including all sides of the debate.[111] Thus, through constant confrontation of believed opinions with supposed falsities, a higher level of knowledge and truth can be achieved.[112] As Justice Brennan acknowledged, "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks."[113] As a result, in a society that places such high value on the ability to speak freely and comment openly without harsh repercussion, falsehoods and misstatements inevitably circulate.[114] Courts embrace these individual falsehoods in society in order to uphold the higher value of free speech generally, recognizing that to accept the positive aspects of free speech some negatives must be tolerated.[115]

This policy plays out no differently in the context of blogs because the values of free speech in print do not somehow transform when placed in a new technological forum. In fact, the ability to confront fiction with fact and ferret out the higher truth can be done more quickly, efficiently, and openly on the Internet through blogs than through print. The spontaneity provided by the Internet allows for access to information in a fast and efficient manner. Thus, this policy rationale is even stronger in the blogging context since the forum presents an ideal medium for open commentary,

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110. Emerson, *supra* note 16, at 881 (framing freedom of speech as "the best process for advancing knowledge and discovering truth").

111. *Id.*

112. *Id.* at 881-2. ("The theory demands that discussion must be kept open no matter how certainly true an accepted opinion may seem to be...or pernicious the new opinion appears to be. For the unaccepted opinion may be true or partially true. And there is no way of suppressing the false without suppressing the true. Furthermore, even if the new opinion is wholly false, its presentation and open discussion serves a vital social purpose. It compels a rethinking and retesting of the accepted opinion. It results in a deeper understanding of the reasons for holding the opinion and a fuller appreciation of its meaning").

113. *Sullivan*, 376 U.S. at 270.

114. *Id.* fn. 19.

115. *Id.* at 272.

submission of ideas and confrontation between conflicting arguments, opinions and facts. As such, the forum is perfectly situated to parse truth from fiction in order to determine what is the best solution for or reality of any given situation.

Consequently, the actual malice standard adequately addresses the problems associated with defamation regulation in celebrity gossip blogs. The policies outlined in *Sullivan* and later cases—such as fear of chilling free speech, disparate access of public figures to the media, and a public figure's interjection into the spotlight—pertain to the modern, technological age of the Internet weblog. As a result, changing, altering or revoking the standard is unnecessary; rather, the courts should marry this new media outlet with the preexisting legal standard on a case-by-case basis to resolve the individual factual issues when they reach the court system.

III. PROTECTIVE SPEECH HURDLES POSED TO CELEBRITIES CLAIMING BLOG DEFAMATION

If the actual malice standard can be satisfied by a celebrity bringing a defamation claim, such public figures still face other difficulties in proving their allegations and recovering damages against a gossip blogger. Two issues particular to the blogging world include: identifying the possible defamer and separating facts from opinions in blogs. Once again, these issues have been examined in similar contexts, but, as of yet, no clear-cut answers regarding the application to gossip blogs have been reached by the courts. These additional hurdles provide another layer of protection to bloggers' free speech rights and insulate such commentators from legal responsibility. This Section will explore these issues and their impact on free speech rights in order to assess whether the protections have gone too far in fostering free speech through blogs.

A. Anonymity: Who Can You Sue?

The first issue presented to celebrities in bringing a defamation claim for the content of a blog post is, who can be held responsible for the statements. In answering this inquiry, there are four main problems to overcome: the veil of anonymity on the Internet; the Communications Decency

Act's ("CDA") heightened protection standards; a blogger's lack of legal responsibility for postings of third parties on his websites; and the inability to "unmask" a blogger.

First of all, individuals "surfing the net" are not interacting face-to-face, so one can create any name, identity or persona she wishes when maintaining a personal blog. Furthermore, there is little to no regulation on the Internet—people are free to post, speak and read as they wish.[116] Bloggers run the full gamut from honest journalists to fabricated characters, and therefore, it is almost impossible to know who is blogging on the other end of your computer. As a result, tracing a particular post to one identifiable entity or person in order to file a lawsuit against him can be painstakingly difficult.

Furthermore, Congress reduced the ability of defamed parties to recover damages from bloggers through its enactment of the CDA.[117] The CDA provides civil immunity to any "information content provider," more commonly known as an Internet Service Provider ("ISP"), for liability flowing from information made available on the Internet as a result of the provider's services.[118] The statute defines an ISP as "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."[119] Because of this provision, defamed celebrities are unable to hold an ISP liable as a co-defendant in a civil suit for defamation damages; thus, the deep pockets of such companies as an avenue of recovery are cut off, making it less likely that a celebrity would be fully compensated for her injuries. Finally, the statute prohibits any state or local regulation of the Internet which does not comply with the provisions of the CDA.[120] Thus, the CDA preempts state law

116. *See* Bruce W. Sanford and Michael J. Lorenger, *Teaching An Old Dog New Tricks: The First Amendment in An Online World*, 28 CONN. L. REV. 1137, 1139-43 (1996) (acknowledging that the "Internet has no 'gatekeepers' —no publishers or editors controlling the distribution of information...the users of Internet information are also its producers").

117. *See generally* 47 U.S.C. § 230 (2008).

118. *Id.* at § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speech of any information provided by another information content provider.").

119. *Id.* at § 230(f)(3).

120. *Id.* at § 230(d)(3).

of defamation, libel or slander for the rules for the Internet and blogs specifically.

The Fourth Circuit interpreted the immunity for ISPs regarding blogs and other postings in *Zeran v. America Online*.[121] In that case, Zeran sued America Online ("AOL") for damages to his reputation resulting from posts placed on one of the ISP's message boards.[122] The post was an apparent advertisement for "Naughty Oklahoma T-Shirts" containing offensive slogans about the Oklahoma City bombing which directed parties interested in purchasing the shirts to contact "Ken" at Zeran's home phone number.[123] As a result of the fabricated post, Zeran was repeatedly harassed by angry phone callers who, at one point, contacted his house approximately every two minutes.[124] He sued AOL for not promptly removing the posts and for damages flowing from the harassment.[125]

The Court determined that Zeran's suit was superseded by the CDA, ruling that § 230 "plainly immunizes computer service providers like AOL from liability for information that originates with third parties"[126] and that the statute "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[127] Thus, the court interpreted the CDA to grant an ISP complete immunity for libelous or defamatory messages posted by others through the ISPs' services. In reaching this conclusion, the court distinguished ISPs from publishers or editors of print media who have control over the messages and statements contained in their mediums.[128] Unlike newspaper or magazines editors, the court found that ISPs are merely a passive conduit of information, and should not be held liable for information posted by third parties through their services.[129] Although this legal argument is convincing—one should not and cannot be held legally responsible for the actions of third parties over

121. 129 F.3d 327 (4th Cir. 1997).
122. *Id.* at 328.
123. *Id.* at 329.
124. *Id.*
125. *Id.*
126. *Zeran*, 129 F.3d at 329.
127. *Id.* at 330.
128. *Id.*
129. *Id.*

whom they have no control—it is very troubling from the perspective of a defamed individual. The inability to hold the ISP responsible for illegal actions allows offending individuals to avoid litigation and promulgate offensive posting without retribution.

This analysis was furthered by the District Court of the District of Columbia in *Blumenthal v. Drudge*.[130] In that case, the Blumenthals sued AOL for defamation contained in statements published by Matt Drudge in his *Drudge Report*, a gossip column concerning Hollywood and Washington D.C. public figures.[131] In the report at issue, Drudge claimed that Sidney Blumenthal was involved in spousal abuse.[132] Once again, the court held that AOL could not be held responsible for Drudge's post because AOL was not the developer or creator of the information at issue.[133] Therefore, this court found that in enacting the CDA, Congress completely eliminated the potential for ISPs to be held liable as co-defendants in defamation suits.

Similarly, then, a celebrity would not be able to hold the disseminating ISP of a gossip blog responsible for any libelous information distributed through that ISP's services. As a result, the celebrity's legal recourse would be limited to the individual blogger himself. Although this limitation seems harsh, it makes sense in the free speech context since only the person who made the comment should be held responsible for his potentially offensive assertions and suffer the legal repercussions. This way, third parties are not held responsible for comments which they had no control over and opinions they may or may not hold themselves.

Furthermore, the Eastern District of Pennsylvania recently addressed issues concerning bloggers and defamation in *DiMeo v. Tucker Max*.[134] In that case, DiMeo sued Tucker Max for allegedly defamatory statements concerning DiMeo and a 2005 New Year's Eve party that were posted on his blog.[135] His complaint was dismissed because of the immunity

130. 992 F. Supp. 44 (D.D.C. 1998).

131. *Id.* at 46-47.

132. *Id.* at 48 fn.4.

133. *Id.* at 50.

134. 433 F. Supp. 2d 523 (E.D. Pa. 2006), *aff'd*, 2007 U.S. App. LEXIS 22467 (3d Cir. Sept. 19, 2007).

135. *Id.* at 524. *See* TuckerMax.com, http://www.tuckermax.com/ (last visited Nov. 13, 2008). Max describes himself as "an a--hole" who drinks excessively, ignores the

granted to Internet providers from the CDA, as Max was merely the conduit for the allegedly defamatory statements (the post in question was placed upon the site by an unknown third party).[136] Although dismissing this action for failure to state a claim, the court implied that the outcome might have been different had the complaint been brought against the actual author of the statement or if Max himself had been the originator of the defamatory content.[137] However, the highly protective provisions of the CDA granted Max immunity over the statements posted through his blog.[138] Thus, this ruling holds that a person may be able to post anonymous defamatory statement on another's blog in order to circumvent legal liability. Conversely, this ruling reinforces the legal recognition that parties can be held responsible only for their own speech rather than that of third parties over whom they have no control. Therefore, by limiting the legal culpability of defamatory speech to the party from whom the statement originated, courts embrace speech rights generally while limiting recovery to the person directly accountable.

Although both *Zeran* and *Blumenthal* indicate that the original parties who post offensive messages in blogs may be held liable for slander or defamation,[139] courts allow ISPs to conceal the identities of those persons using their services, which lowers the possibility of identifying a potential defamer.[140] This ability bars injured persons from filing suit directly against the offending party and may jeopardize legitimate recovery abilities. The rationale behind this rule is that revealing the source "will discourage legitimate speech because internet speakers don't have enough money to defend against a possible libel suit;"[141] a modern twist on the infamous "chilling effect" fear.[142]

The possibility of actually "unmasking" a blogger was

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consequences of his actions, and "mocks idiots," but contributes to society by sharing his adventures with the world through his website and blog).

136. *Id.* at 523-25.

137. *Id.*

138. *Id.*

139. *Zeran*, 129 F.3d at 330 ("[n]one of the means, of course, that the original culpable party who posts defamatory messages would escape accountability").

140. Lyrissa B. Lidsky, *Silencing John Doe: Defamation & Disclosure in Cyberspace*, 49 DUKE L.J. 855, 861 (2000).

141. *Id.*

142. *See Sullivan*, 376 U.S. at 299.

realized in *Doe v. Cahill*.[143] In that case, Patrick and Julia Cahill claimed defamation from an anonymous post contained on the "Smyrna/Clayton Issues Blog" about Cahill's performance as City Councilman.[144] Because the post was submitted anonymously, Cahill could trace the information only to a Comcast Corporation IP address, and she sued Comcast in order to obtain a court order for the poster's identity.[145] The claim was initially denied, and Cahill appealed to the Supreme Court of Delaware,[146] which found that the right to anonymous speech on the Internet through weblogs was protected by the First Amendment. However, when such anonymous speech is defamation, the protections may be eliminated.[147] Because of this, the court adopted a test to determine when a public figure's attempt to unmask an anonymous blogger is appropriate: if the plaintiff survives summary judgment for the substantive defamation claim, the identity of the anonymous blogger must be revealed.[148] The court deemed this standard, as opposed to a good faith demonstration, appropriate in balancing the right to anonymous speech with that of a public figure's right to protect her reputation.[149] Therefore, once again, the court subjected a public figure to a heightened standard when bringing a defamation claim against a blogger.

This protective measure in the context of blogs is extreme. Although recognition of anonymous speech dates back to America's founding,[150] such speech must yield to the right of defamation recovery in some circumstances. Otherwise, all citizens would be able to damage each others' reputations and avoid legal culpability simply by refusing to assign their identity or signature to the offensive statement. This would extinguish recovery for defamation and create a completely

143. 884 A.2d 451 (Del. 2005).
144. *Id.* at 454.
145. *Id.* at 454-55.
146. Cahill, 844 A.2d at 455.
147. *Id.* at 456.
148. *Id.* at 457.
149. *Id.*
150. *See generally* The Federalist Nos. 1, 6-9, 11-13, 15-36, 59-61, 65-85 (Alexander Hamilton), Nos. 2-5, 64 (John Jay), Nos. 10, 14, 37-48, 58 (James Madison), Nos. 49-57, 62-63 (Alexander Hamilton or James Madison) (discussing the strengths of the Constitution and advocating for its adoption by the states; originally penned by the anonymous "Publius" even though the papers were written by Alexander Hamilton, James Madison and John Jay).

unregulated speech forum.

Additionally, bloggers are not required to take on the role of a publisher in regulating, editing, censoring or removing offensive postings from their blogs.[151] Therefore, ISPs and blogs themselves do not have to delete offensive blog posts written by third parties, and instead, may use their discretion in editing such statements.[152]

However, in some jurisdictions such as California,[153] the "republication rule" may impose or extend defamation liability to every person who hyperlinks to, quotes from, or in other ways further disseminates the original libelous statement.[154] Because of the speed and accessibility of blogging, and the habit of bloggers to include hyperlinks to sources discussed on their blog entries, the scope and reach of a defamatory statement could span a vast quantity of websites in a short amount of time. Accordingly, the republication rule would not only substantially increase the number of potential defendants, but could implicate completely innocent persons who have inadvertently linked their blog to a slanderous or libelous statement. In effect, the application of such a theory would be a boon for plaintiffs as it would create more avenues of recovery for their injuries, but a nightmare for defendants who may be hesitant to comment on particular messages out of fear of legal liability. Therefore, such an extension of the republication rule should not be granted to blogs because of the unfathomable number of parties it could implicate and the impossibility of properly tracing blog republication on the Internet through the practice of hyperlinking.

B. Opinion v. Fact

Another problem confronted in defamation is determining whether the statement contains an opinion, a fact, or an opinion that implies false facts. The importance of this determination is crucial in defending a defamation claim. A

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151. *See Zeran*, 129 F.3d at 330-34; *see also* 47 U.S.C. § 230(b)(4).

152. *Id.* at 332-33.

153. *See* Ringler Assocs. v. Md. Cas. Co., 96 Cal. Rptr. 2d 136 (Cal. Ct. App. 1st Dist. 2000); *see also*, 5 Witkin, Summary 9th (1988) Torts, §§ 471-478.

154. The republication rule allows a person to sue all who restate the falsehood even if the republisher discloses the original source. *Ringler*, 96 Cal. Rptr. 2d at 148-149; Flowers v. Carville, 310 F.3d 118 (9th Cir. 2002).

statement of pure opinion is always immune from defamation liability because of First Amendment protections, while false statements of fact are not.[155] In between these extremes are opinions which imply false facts; such statements may subject the author to claims of libel or defamation because the implied facts can be proven false.[156] In print media, the line between fact and opinion is relatively clearly defined and easily recognized; conversely, when it comes to blogs, the line between fact and opinion blurs, especially when the posting takes the form of a personal Internet journal or diary.

In a traditional newspaper or magazine, for example, stories are presented as either factual recitations of past events or clearly marked "Op/Ed" stories which represent an individual's point of view on a particular topic. With these distinct lines set out by the print speech forum itself, libelous information reported as facts can be clearly separated from pure opinions on a given subject matter. In a blog, though, such lines are not clearly drawn by the blogger himself or by the framework used by the typical blogger to present his information to the world. A celebrity gossip blog tends to come from the viewpoint of one particular person with the reported stories skewed by personal bias or opinion. Many times, the forum appears to be a personal journal but also "reports" on stories as if they are true, when in fact they may be gossip, rumor, hearsay or pure conjecture. Because of this intermingling of fact, opinion and accusation, it is difficult for the reader to distinguish pure opinion from fact and opinion implying false facts. It is in this gray area where problems concerning whether to treat information contained in blogs as defamatory runs into significant legal obstacles.

The Southern District of New York grappled with this

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155. *Gertz*, 418 U.S. at 340 ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."); RESTATEMENT (SECOND) OF TORTS § 565 (1977).

156. *See* Rodriguez v. Panayiotou, 314 F.3d 979 (providing a cause of action in California for statements which contain "provable false assertions of fact"); *see also* RESTATEMENT (SECOND) OF TORTS § 566 (1977) ("A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion").

issue in *Condit v. Dunner*.[157] In that case, Dunner posted an allegedly defamatory statement on an *Entertainment Tonight Online* forum concerning the infamous Chandra Levy disappearance and investigation.[158] The posted statements included, "Gary Condit rides with The Hell's Angels as a motorcyclist," and reiterated Dunne's original "theory" that Levy "was taken away on the back of a motorcycle as a favor to [Condit]."[159] Dunner claimed that the postings were opinions and that the gossip atmosphere of the online forum further demonstrated that the statements were only his personal opinions.[160] The court found that the statements posted on the site implied false facts, and therefore, were not protected by the First Amendment as pure opinions.[161] Moreover, the court concluded that the statements were not privileged simply because they were posted on a gossip column and refused to recognize that the gossip-inclined-forum automatically characterized the statements as opinions.[162] Instead, the court found that the statement's context could influence the public's belief about the statements, but the context of the gossip forum in itself could not save these statements from being defamatory.[163]

Similarly, then, a celebrity gossip blogger would be barred from using this legal theory in defending a defamation suit. The rumor-filled and opinionated nature of blogs is not enough to safeguard the blogger from a defamation claim against comments that assert false facts or imply falsity through a veneer of opinion. Therefore, blogs' ultimate free speech power yields to reputational damages in this scenario. As a result, this policy comports with free speech rights generally because it promotes commentary, opinion and dissent, while drawing a line where such statements cross over to pure falsity.

The line between opinions and implication of false facts may be blurred in a blog because of the personal nature of many postings. However, not every post is a pure opinion and

157. 317 F. Supp. 2d 344 (S.D.N.Y. 2004).
158. *Id.*
159. *Id.* at 367.
160. *Id.*
161. *Id.*
162. *Condit*, 317 F. Supp. 2d at 367.
163. *Id.*

an individual cannot be immunized from defamation liability simply by posting his comments or accusations in a gossip forum. As a result, blogs present a place where opinions and facts collide in a forum that is open to public commentary and critique. It is this benefit of the blog that gives it such powerful free speech strength and allows the public a place to voice opinions concerning factual occurrences. Simultaneously, it is this feature of celebrity gossip blogs which may provide the avenue for potential recovery under a defamation theory if the allowable commentary crosses over to implication of false assertions. However, there must be limitations on opinion speech which implies false facts, and the Southern District of New York draws a helpful line in determining that point.

CONCLUSION

In the end, the best solution to so-called "bad speech" like potential defamation has always been more speech. As so eloquently expressed by Justice Brandeis, "[i]f there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence."[164] Therefore, even with all the pitfalls and hurdles posed by blogs to celebrities in proving a defamation claim, the heightened standards and protections are worth the potential problems in order to allow free speech to flourish. Just as in any speech context, an "erroneous statement is inevitable in free debate" and it "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[165] Therefore, in order to preserve these overarching speech safeguards, a certain amount of falsity or inaccuracy must be tolerated in the blogging context. Bloggers themselves have substantiated the high protections afforded to them by the ease and accessibility of responding to possibly defamatory statements through the creation of one's own blog.[166]

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164. Whitney v. California, 274 U.S. 357, 377 (1927).

165. *Sullivan*, 376 U.S. at 272.

166. Andrew A. Green, *Anonymous Blogger Gets Under Skin of Democrats*, THE BALTIMORE SUN, July 21, 2007 at Local 1B ("The remedy for defamatory speech on the Internet is not lawsuits, it is more speech...The answer is, 'Get a blog of your own' or if the site that defames you is a bulletin board, post your response. Self-help is the name of the game, which I think is disconcerting to a lot of people.").

In fact, many celebrities have done just that. As blogging surfaces as a mainstream media outlet, it becomes more popular for celebrities to directly respond to inaccurate posts either through an official blog or by posting directly on the offending site. Paris Hilton,[167] Kanye West,[168] Rosie O'Donnell,[169] Pamela Anderson,[170] David Beckham[171] and Britney Spears,[172] among others, all maintain blogs, and some public figures have directly addressed and corrected wrongfully reported information through these blogs.[173] Furthermore, celebrity gossip bloggers themselves will link their posts to celebrities' responsive postings on their official blog to promote more discussion on the topics at hand.[174] In fact, with the ease and speed of information dissemination on the web, responding in this manner is not only cheaper than a lawsuit but usually more effective, as the offending blogger can hyperlink to the response directly which can ameliorate the problem almost as soon as it is recognized.

Perhaps, then, the celebrity gossip blog is not as evil or threatening in nature as first suspected. On the contrary, blogs create an open free speech forum where ideas can sink or swim based upon their merits and the public's acceptance. The exposure and accessibility of blogs help to ferret out falsities while the engagement of bloggers in self-correction keeps information constantly discussed and accurate. Thus, all the pitfalls for defamation—which flow from the unregulated arena of cyberspace, the heightened protections

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167. Paris Hilton - Myspace Blog, http://blog.myspace.com/index.cfm?fuseaction=blog.ListAll&friendID=6459682.

168. Kanye West: blog, http://www.kanyeuniversecity.com/blog/?em3106=191789_-1__0_~0_-1_1_2008_0_0&em3281=&em3161=.

169. R Blog, http://www.rosie.com/blog/.

170. Stacked, http://pamelaanderson.blogs.friendster.com/.

171. The Official David Beckham Website, http://www.davidbeckham.com/blog.php.

172. MySpace.com – Britney Spears, http://www.myspace.com/britneyspears.

173. Jada Yuan, *Lance Bass Not Hooked on NYC; Thinks we have no taste*, NEW YORK MAGAZINE, Sept. 3, 2007 (As one example, former boy band member, Lance Bass, attempted to correct supposed misquotes and other misstatements contained in a *New York Magazine* article written about him through his personal weblog. The magazine reported that Bass was "not sure he likes New York so much" and quoted the celebrity as stating "I don't think anyone here has any style."). *See also*, Perez Hilton, *When Celebrities Blog*, August 28, 2007, http://perezhilton.com/2007-08-28-when-celebrities-blog-9 (commenting on the Bass controversy, linking to Bass' response to the article and polling blog readers as to whom they believed more: *New York Magazine* or Lance Bass).

174. *See e.g.*, *id.*

granted by the CDA and the actual malice standard—do not significantly harm celebrities' interests. In that rare case when a clearly defamatory statement has been posted with actual malice by a blogger which results in reputational injuries to a public figure, society allows for an avenue of recovery—though rare and limited—through proper litigation.

In the end, the celebrity gossip blog is a small price for society to pay in order to maintain open communication without the constant threat of lawsuits interrupting commentary on public figures. Thus, the Court's rationales in adopting the actual malice standard in *Sullivan* still holds up through time, changes in technology, and growth in society. Consequently, there is no need to change, alter or reconfigure the standard in order to accommodate this new form of free speech, but rather it is up to the court system and time to determine exactly how to employ the standard against each new factual background.