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The Blogger's Cliché: The Imperative Demand for Blogging Regulations

By: Latecia Thomas

I. Introduction

*“Extra! Extra! Read all about it!”*¹ This catchy phrase seems to illuminate the growing trend of the “blogosphere” – a popular term used to describe today’s world of blogs.² In the old days – before the modern day of the Internet – the media had a pretty good grip on selling information, whether it was via newspapers or magazines. Although some popular newspaper and magazine companies are still surviving, there is no longer a *pressing* need for the press (emphasis added).³ Why should we pay for information we can “read all about” on the Internet?

In particular, this article will focus on the rapid trend of blogging and its necessity for governmental regulation. Many blog users, formally known as “bloggers,” discuss a variety of topics, anywhere from the political arena to the latest fashion trends. Bloggers are essentially free to speak on any topic of choice, with barely any regulation imposed upon them. Similar to other mediums used to give information or express one’s opinion, the developing trend of blogs should have some form of regulations put upon them in order to prevent the legal issues that will evolve if blogs are not regulated.

The blogosphere brings many legal issues to the forefront. Some of the crucial issues considered in relation to blogs include First Amendment issues,⁴ defamation of character disputes,⁵ copyright matters,⁶ and employment issues.⁷ This article will address these legal matters, which will lead to the discussion of the demand for increasing rules and regulations for bloggers.

II. The Blogosphere from Past to Present

It can easily be said that blogs are the “it” form of the Internet for the 21st century – especially since so many web users have blogs – however it is interesting to examine the rise of the blog and to assess the transformation of blogs.

A. The Creation of Blogs

Blogs, commonly known as web logs,⁸ originated in the mid- 1990s and began to develop towards the end of the 1990s.⁹ The creation of blogs originated from the Internet and Usenet newsgroups, a discussion board allowing users to discuss a variety of topics similar to a town meeting.¹⁰ These Usenet newsgroups and message boards transfigured into the Internet being used by members of the Web to voice their opinions on whatever topics they were inclined to discuss.¹¹ “By the end of 1997, over two million people participated in Usenet discussions.”¹²

This growth quickly transferred into the popularity of blogs. By 1999 the blogosphere continued to evolve and numerous blogs were created.¹³ Some blogs began as personal diaries for bloggers to express their opinions and voice their personal thoughts (similar to the Usenet newsgroup) to interested online users.¹⁴ One blogger describes the early formation of blogs as “filters... websites devoted to classifying and annotating online information.”¹⁵ These types of blogs were ultimately used to help users surf the web by directing them to websites that would be helpful in finding specific information.¹⁶ In 1999, when the ultimate trend of blogging began, the Internet provided free tools allowing users to easily create blogs.¹⁷ These tools included hypertext links to lead users to other websites, other blogs, or to specific content on other websites and

blogs.¹⁸ “The hypertext linking capability creates a viral community, in which blogs link to other blogs through ‘permalinks,’ allowing information and opinions to be shared worldwide across the Internet.”¹⁹ One study shows that by 2005, 32 million Americans were reading blogs.²⁰

B. The Developing Trend of “Web Logs”

As time evolved, the blogosphere rapidly developed. The initial trend of using blogs to guide readers to other sites quickly faded. During the late 90s a large number of Web users used blogs as their personal online diaries to share their personal thoughts and daily experiences with family and friends.²¹ As time progressed, bloggers used their weblogs for “personal publishing,” a concept involving a number of projects focusing on a specific interest in which bloggers used their blogs “for creative writing and artistic design.”²² This idea rapidly emerged in the 21st century; some bloggers continue to use their blogs as personal platforms to express their thoughts and ideas, while others chose to discuss specific topics (i.e. politics, fashion, news, etc.) by linking users to sites that relate to their topic of choice.²³ As the virtual environment of blogging surfaced, bloggers began to use their blogs to market themselves, with the hope of becoming writers.²⁴

In early 2008, Technorati²⁵ reported over 112.8 million blogs on the Web.²⁶ Currently, Tumblr reports 208.4 million blogs with 94.4 billion posts.²⁷ WordPress, another popular website known for helping Web users create blogs, boasts over 409 million people viewing over 16.3 billion pages each month, and approximately 61.8 million new posts being published each month.²⁸ These are just two of the several websites that bloggers use to create their weblogs, which both illustrate the tremendous development and popularity of having a blog.

As blogs have developed in the 21st century, some viewers have described blogs “as the vanguard of a new information revolution.”²⁹ In 2011, the District Court of Maryland described blogs as bulletin boards, which contain “whatever material its sponsor decides to post.”³⁰ This notion of blogging seems pretty accurate as bloggers seem to post whatever they want to discuss with their readers. However, at certain times in history, blogging became an even bigger trend than normal. Bloggers became interested in discussing topics that were being heavily discussed or debated in the media, such as the war in Iraq after the events of 9/11, or the 2004 presidential election.³¹ While serving the war in Iraq, soldiers created “warblogs” for their readers at home, which gave viewers personal insight into the war and allowed soldiers the opportunity to express their personal feelings and thoughts while experiencing their battle voyages.³² Only a few years later, the blogosphere was at its peak again in 2004 as users became curious for political information.³³ Political blogs played a significant role in the 2004 elections, as bloggers provided readers with daily updates and personal thoughts on the election.³⁴ “During the critical months leading up to the election, the ten most popular political blogs collectively had 28 million visits from readers.”³⁵ These are just a few examples of the impact blogs have had on the American society.³⁶

In addition to providing readers with essential news reports and having the opportunity to publicly voice their opinions, bloggers enjoy many benefits besides personal satisfaction. For starters, blogging is very economical for Internet users since creating a blog is usually inexpensive.³⁷ To begin blogging, all one needs is a computer, Internet access, and maybe a blogging platform to help launch his/her blogs, otherwise, a blogger does not have to spend outside of his/her budget.³⁸ Furthermore, some bloggers

have received job offers and publication offers by attaining name recognition because of their blogs, and some bloggers have begun professional writing careers based off of their blogs.³⁹ Moreover, many popular bloggers receive a substantial amount of income from selling advertisements on their blogs.⁴⁰ Other benefits of blogging include the possibility of starting a new business (some blogs have turned into actual businesses), receiving feedback and ideas from readers, building a network, and even becoming an expert on the topic of one's blog.⁴¹

With the combination of benefits received from blogging and the ease and low cost of creating a blog, it is easy to understand why so many people have created blogs in the 21st century. Nonetheless, as blogs become the modern day trend of Internet use, a variety of legal issues have emerged regarding the regulation of blogs.⁴² The array of legal concerns created from blogging (i.e. First Amendment speech, defamation issues, copyright infringement, employees who blog, etc.) has caused some courts to decide whether bloggers are considered journalists. ⁴³ Determining whether bloggers and journalists share the same rights and protections will be the first step necessary for blogging regulations. The increasing number of blogs that have been created and the legal concerns that have been deliberated in regards to the blogosphere illustrates the imperative demand for national regulation upon the blogosphere.

III. Legal Concerns of the Blogosphere

As previously stated, most bloggers enjoy having a blog for their own personal use, whether it is to advance their careers or just express their personal thoughts and opinions. However, most bloggers are not aware of the legal implications that generate

from blogs. This is due to the fact that there are no requirements for creating a blog; therefore, anyone can create a blog without being aware of copyright infringement or defamation issues. As one Professor opined, “the average blogger is a 14- year old girl writing about her cat.”⁴⁴ Although this does not realistically describe the average blogger, it is an example of how young a blogger may be and how insignificant a blog topic can be. The next section of this article will discuss the primary legal concerns relative to the blogosphere as a paradigm of the blogosphere’s need for rules and regulations.

A. First Amendment Protection in the Blogosphere

The First Amendment of the U.S. Constitution provides that “Congress shall make no law... abridging the freedom of speech, or of the press.”⁴⁵ The Supreme Court has explained, “the purpose of the constitutional protections for speech and press were fashioned to assure unfettered interchange of ideas for bringing about political and social changes desired by the people.”⁴⁶ Those exact words describe the current style of blogging – bringing political and social changes and interchanging ideas between bloggers and readers.

Given the nature of modern day blogs, one would assume that blogs are provided First Amendment protection. However, many cases have surfaced which question the extent to which blogs are afforded First Amendment protection.⁴⁷ Some of the issues raised regarding First Amendment speech include cases pertaining to blog comments (from readers), employees who blog negatively about their employers or discuss employer information and/or trade secrets, and students blogging about their schools.⁴⁸

1. Defamation Suits

One aspect of the First Amendment protection issues claimed against bloggers relate to defamation lawsuits brought by plaintiffs who allege injury from the comments written on a blogger's site or by the blog owner. A main feature of blogging is the inclusion of a comments area, where readers may post their thoughts and views on another's blog. On some blogs, viewers have the option of posting comments anonymously.⁴⁹ Although the commenting feature provides bloggers the benefit of connecting with their readers, it has also resulted in lawsuits from plaintiffs who have been "allegedly defamed by bloggers or blog postings" as an attempt to find the person who posted the alleged defamatory remarks.⁵⁰

In 2007, a hospital sued ten John Does for allegedly posting negative comments on a blog.⁵¹ The Texas Court of Appeals held that the hospital had to support its defamation claim with sufficient facts before obtaining the identity of the bloggers.⁵² The court explained that the First Amendment protects speech over the Internet, including "the protection of anonymous electronic speech."⁵³ However, the court explained that anonymous speech is subject to limitations since libelous statements are not within the scope of constitutionally protected speech.⁵⁴ This is a prime example of third party comments raising legal issues on First Amendment speech and defamation matters.

Prior to 1964, courts decided defamation suits without any regard to the First Amendment.⁵⁵ This changed after the decision in *New York Times Co. v. Sullivan*, where the majority realized that the previous framework of deciding defamatory cases "had a chilling effect that would strongly encourage self-censorship."⁵⁶ In reversing the lower court's decision that the New York Times was liable for accusing the Montgomery Police Department of racial harassment in an editorial advertisement, the Supreme Court feared

newspapers “would not publish negative or critical information about public officials even if they believed their sources were reliable.”⁵⁷ Thus, the Court held that the rule of law applied “was constitutionally deficient for failure to provide” the New York Times the right to freedom of speech and the press which it was warranted by the First Amendment.⁵⁸

Despite the turn of events regarding the legal review of defamation suits, concerns with First Amendment speech and defamation suits continue to persevere. However, this does not come as a shock since WordPress has reported an estimate of 4 million new comments each month.⁵⁹ In 2011, a lawsuit was filed by an attorney for defamatory and false statements made by multiple bloggers and anonymous third- party commenters that allegedly damaged his career.⁶⁰ Ultimately, the lawsuit settled and the blog owner disabled third- party comments.⁶¹ Another case occurred in 2012 when a blogger was accused of attacking someone on his blog site and Twitter account.⁶² The plaintiff alleged that the blogger was using his blog to encourage others to attack him and accuse him of “deplorable acts and other false criminal acts.”⁶³ This led the state court judge to enter a peace order against the blogger; however, the peace order was vacated on a *de novo* appeal, in which the court concluded the blogger’s Internet activity was not considered harassment.⁶⁴

As a defense to the numerous lawsuits filed against bloggers for third- party comments, Congress established Section 230 of the Communications Decency Act (CDA).⁶⁵ In particular, Section 230(c)(1) provides that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider.”⁶⁶ This section prevents bloggers from

“either over- censoring or under- censoring their users” comments and content.⁶⁷

Although bloggers benefit from Section 230 of the CDA by providing immunity from any tort claims that may arise from third party comments (i.e. defamation suits), the CDA does not afford bloggers with immunity from third party comments that infringe on another’s intellectual property rights or violate federal criminal laws.⁶⁸

An additional defense used to protect bloggers and commenters are State anti- SLAPP laws.⁶⁹ Anti- SLAPP laws (acronym for strategic lawsuits against public participation) were “designed to protect people from being sued in connection with their participation in matters of public concern.”⁷⁰ One example of an anti- SLAPP law is Section 425.16(b) of the California law, which provides that a cause of action arising from a defendant’s “right of petition or free speech... in connection with a public issue’ is subject to a special motion to strike,” unless the court finds that the plaintiff is likely to prevail.⁷¹ The California statute further states that written or oral statements made in a public setting are considered speech relating to a public issue.⁷²

A California appellate court applied Section 425.16 in a case involving anonymous comments written on a website in *Ampex Corp. v. Cargle*.⁷³ Plaintiff filed a defamation action against the anonymous blogger for comments written on an Internet financial message board concerning Plaintiff’s business practices.⁷⁴ The court decided that any website that was free of charge to the public and gave users the ability to view and post information (or their own opinions), were considered a public forum for purposes of Section 425.16.⁷⁵ Furthermore, the court ruled that the comments written on the message board were matters of public concern; therefore, the defendant enjoyed the benefit of California’s anti- SLAPP statute.⁷⁶

It is critical that bloggers are aware of these protection tools in order to avoid costly legal battles. It is also essential for bloggers to take precautionary messages when allowing public commenting on their blogs, especially anonymous public commenting. In addition to the defenses afforded to bloggers, the First Amendment also protects bloggers from harassing or threatening comments written on blogs.⁷⁷ This was illustrated in *Brandenburg v. Ohio*; where the court held that “a state actor cannot ‘forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite such action.’”⁷⁸ Thus, *Brandenburg* gave bloggers some protection relating to harmful or threatening comments, but a later case illustrated the lack of protection the First Amendment may provide to bloggers.⁷⁹ In 2005, a California court provided an employee of an animal testing laboratory with a temporary restraining order against a website operated by the Defendant.⁸⁰ The court reasoned that the anonymous comments written on the website – including threats to harass the employee, identification of the employee’s home address and comments accusing her of being a “puppy killer and animal abuser” – were “credible threats of violence” which called for a restraining order.⁸¹

The cases previously mentioned, along with many other defamation issues, are prime examples of the legal concerns created within the blogosphere. These legal matters will continue to ascend into Courtrooms until regulations and blogging rules are put into place to protect bloggers from facing legal damages. Blogs have emerged as a personal hobby for most Web users, but can undoubtedly become a big concern for bloggers. Without the necessary blogosphere regulations, bloggers will continue to blindly post content to their blogs that they deem appropriate, when in fact the content may be harmful to others.

2. Employee Blogging

An additional, but common legal discussion relative to blogging is the topic of employees who blog, specifically about their employers. The First Amendment protection afforded by government employees depends on whether the subject matter is a public concern or a private matter.⁸² Courts have concluded that government employees do not lose their First Amendment protection to public speech just because of their employment.⁸³ However, their First Amendment protection may be limited if it is not a public concern.⁸⁴ This notion derives from the *Pickering* balancing test.⁸⁵ In *Pickering v. Board of Education*, a high school teacher was fired for expressing his view to a local newspaper about the manner in which the school board handled proposals to raise money.⁸⁶ The U.S. Supreme Court weighed the teacher's interest in commenting on matters of public concern versus the State's interest "in promoting the efficiency of the public services it performs through its employees."⁸⁷ The Court found that the statements made by a public employee on "a matter of public concern" was insufficient to fire an employee unless the statements "contained knowing or reckless falsehoods or caused a substantial interference with the employee's ability to perform his or her job."⁸⁸ The *Pickering* balancing test has also been applied in cases involving government workers' blog posts about employers. For example, the Washington District Court decided a case in which an employer had negative statements displayed on her blog pertaining to her employer.⁸⁹ The court ruled that the employee's statements were not of public concern because she not only breached confidentiality, but her blog was also vulgar, racist and sexist.⁹⁰

Notwithstanding the *Pickering* balancing test, federal and state employees enjoy more protection for blog statements than private sector employees.⁹¹ This is because “the actions of private employers are substantially limited by statutory provisions enacted by Congress;” thus, a private employer *may* discharge an employee for freely expressing their opinions (whether it is on a blog or to a newspaper company) (emphasis added).⁹²

This is an emerging issue because the blogosphere has “created a new space... where employees may communicate about workplace issues and... where employers have become interested in communicating with employees as well.”⁹³ As the blogosphere expands, concerns between the employer’s interest and the employee’s interest clash.⁹⁴ Out of fear that an employee will blog about critical information (such as trade secrets) or criticize an employer’s work ethics, some companies have taken harsh actions to ensure misuse of blogging does not occur with their employees.⁹⁵

Many companies have reported terminating their employees due to their use of blogging.⁹⁶ The reasons for these employee discharges relating to blogs range from “obvious lack of employee discretion to questionable employer paranoia.”⁹⁷ As an example a flight attendant was fired for taking inappropriate photographs of herself in her airline uniform, and later posting them to her blog.⁹⁸ Another employee was let go for “blogging about his past addictions to nicotine, alcohol, and marijuana.”⁹⁹ A woman was fired from her job after posting the statement “I really hate my place of employment” on her blog, accompanied with other comments that were critical of her employer.¹⁰⁰

A critical document that allows employers to terminate employees at any time, with or without cause, is the employment- at- will doctrine.¹⁰¹ Although the employment- at- will doctrine is relatively straightforward, it does not allow employers “blanket immunity

from liability.”¹⁰² Courts will not find an “offer of continuous employment” where the employee’s handbook includes explicit terms that state employment is at will.¹⁰³

However, exceptions to the at- will doctrine “have been evolving in the past few decades, both at common law and through state legislation.”¹⁰⁴

The most common exceptions to the employment- at- will doctrine are based on implied contract and public policy.¹⁰⁵ Some courts have also created exceptions to the at- will doctrine “based on promissory estoppel, the covenant of good faith and fair dealing, intentional infliction of emotional distress, and privacy.”¹⁰⁶ Thus, while many bloggers can possibly risk their employment, there are still a few exceptions available to employees who blog. However, the best option for employees who blog is to have an understanding of their employer policies as well as an understanding of regulations that protect them from losing their jobs.

Unfortunately, most states do not provide much protection to employees who blog off the clock.¹⁰⁷ A few states, such as Colorado and North Dakota, provide employees who blog off the clock with statutory protection “against adverse employment action because of their blogging.”¹⁰⁸ These statutes will provide protection to the extent that the blog does not create any conflict of interest with the employer.¹⁰⁹ This should not be an issue since most employment contracts require that employees do not participate in any activity that may conflict with the interest of the company, such as having another job at a competing company.¹¹⁰

Although employees have a restricted expectation of privacy at work, courts have recognized that an employee’s termination may be unlawful if an employer obtained information through an invasion of privacy.¹¹¹ In order for an employee to claim an

invasion of privacy, the employee must first find that the information found by the employer was actually private.¹¹² Thus, if an employee's blog is available for anyone in the public to view and comment on, it is certainly not private.

As time progresses and the Internet advances, companies will become aware of the policies that they should adopt to determine a clear line between personal blogging and blogging that interferes with the workplace. Although it may seem obvious to most employees that blog, discussing one's employment is off limits, there are still some blurred lines addressing what is considered problematic for the workplace and what is not. For instance, the blogger who commented on hating her employment in a very general manner set a high standard for bloggers. That situation illustrated the awareness that bloggers should have on blogging about their place of employment at all. Although some companies may be a bit more lenient on blogging topics, it is unclear as to what is accepted on one's blog and what may be an issue.

3. Student Bloggers

In addition to the cases pertaining to First Amendment protection, cases involving students who blog about their school administrators are also an issue in the blogosphere.¹¹³ Students who post inappropriate content on their blogs may be subject to punitive action.¹¹⁴ In one case, the Second Circuit held that a high school student who called her school administrators "douchebags" and encouraged students to contact the superintendent "to piss her off more" was not afforded First Amendment protection.¹¹⁵ The court explained that school administrators were allowed to prohibit certain student expression that would "substantially disrupt the work and discipline of the school."¹¹⁶ Therefore, the court reasoned that a student could be punished for conduct occurring

away from the schoolhouse if the expressed conduct “would foreseeably create a risk of substantial disruption” on school property.¹¹⁷ Thus, the student was not afforded First Amendment protection since the content on her blog – calling the school faculty “douchebags” and telling other students to call the superintendent – exemplified the type of language that could create a substantial disruption on school grounds.¹¹⁸

This is not to say that students are not afforded First Amendment protection for blog statements made outside of school. In *C.N. v. Wolf* the Court addressed the content on a student’s blog that described the unlawful punishment the student received from her principal because she was openly gay at school.¹¹⁹ Since the student was punished “for expressive conduct that was not similarly punished when engaged in by heterosexual students,” the court held that the student had a clear constitutional right for the alleged discriminatory treatment she received and discussed on her blogs.¹²⁰

4. Freedom of the Press

Decades before the blogosphere was created, Chief Justice Hughes stated that “the liberty of the press is not confined to newspapers and periodicals... the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”¹²¹ By making such a statement, Justice Hughes was including blogs to be considered the press long before they were even created. One could easily define a blog as a source of information and opinion since bloggers provide their readers with a variety of information. Bloggers and other nonprofit news sources enjoy the freedom “to cover unpopular topics in unconventional ways, but the underlying motivation is still to disseminate information to an audience.”¹²² Therefore, it should be no question that the First Amendment’s Freedom of the Press Clause¹²³ applies to blogs

as well. Yet, there is no actual government determination that states blogs are apart of the press.

Journalists are afforded the privilege of both the freedom of the press clause and a shield law to protect their sources by keeping them confidential and anonymous.¹²⁴ However, since bloggers have not technically been titled journalists, it is unclear what laws protect bloggers who similarly provide news and information.¹²⁵ This is understandable since all bloggers are not the same. “Bloggers is a vague amorphous term;” so, while millions of blogs are created, it does not mean that because one decides to create a blog he/she has instantly become a blogger in the traditional sense.¹²⁶ Terming a blogger as a journalist would require a more narrow definition of a blogger, which would depend on the function of the blogger and the content that he/she puts on his/her blog.¹²⁷ One blogger could have a fashion blog, providing its viewers with the latest fashion trends and tips, while another blogger could provide its readers with the latest news stories relating to Fortune 500 companies.¹²⁸ Thus, in that situation the latter would be considered a blogger in the journalist sense more than the fashion blogger would be. Likewise, if a blogger’s role in blogging “is to report information to the public and to gather information for that purpose openly then they should be treated like a journalist.¹²⁹

In 2006, a California court addressed this issue on treating bloggers as journalists.¹³⁰ The court found in favor of bloggers, ruling that bloggers have the same journalistic protections that traditional journalist in print and broadcast media enjoy through the First Amendment’s Free Press Clause and the state shield law.¹³¹ The suit commenced because the blogger petitioners allegedly posted information on their websites about an Apple

product that was not yet released.¹³² The court addressed three main issues to decide the case: “(1) whether blogs constitute journalism; (2) whether bloggers should be treated as journalists and thus be afforded protection under the state shield law; and (3) whether blogs are a covered medium, such as magazines and newspapers.”¹³³ The court reasoned that there was no noticeable difference between the blogger petitioners and a traditional reporter, editor or publisher that provides the public with news via print and broadcast media.¹³⁴ Furthermore, the court explained that bloggers perform the same tasks as journalists by gathering, selecting and preparing their work to present the public with information on current events and other public concerns.¹³⁵

Since this decision, the discussion of whether bloggers are considered journalists has been kept to a minimum. Prior to the California Court’s determination of bloggers having the same privileges as journalists, the Second Circuit provided a test for determining whether a person has reporter privileges and protection.¹³⁶ In *Von Bulow v. Von Bulow*, the court held that in order to claim reporter privileges, an individual “must demonstrate, through competent evidence, the intent to use material – sought, gathered or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process.”¹³⁷ The court stated that the “intended manner of dissemination” could be through “newspaper, magazine, book, public or private broadcast medium, handbill or the like.”¹³⁸ In addition to naming the types of news sources used to receive reporter privileges, the court explained that the individual seeking reporter privileges did not have to be associated with the press in a traditional sense, rather, the individual could be a novelist, academic researcher, lecturer, political pollster or dramatists – all representatives that play a role in providing information to the public.¹³⁹ Thus, it is safe to

assume that the court in *Von Bulow* would include informative bloggers as individuals who could seek reporter privileges.

It is quite evident that bloggers need a clear understanding of their rights and protections relative to the First Amendment. Technology will continue to advance, and more information will become available on the Internet – whether it is from a traditional broadcasting company or via a blog site. As one article states, “the utility of receiving and disseminating information requires that any free press protections evolve with the technology to facilitate it,” thus, as blogging becomes apart of the press as a source of information, the privileges of the press should expand to include bloggers who play a part in the “marketplace of ideas.”¹⁴⁰ This would be beneficial to bloggers since they’d have more access to important events and information and would receive “immunity from newsroom searches and grand jury subpoenas.”¹⁴¹ Therefore, it is essential for the law to determine informative bloggers as individuals who receive press privileges so they may rightly receive protection under the First Amendment’s Freedom of the Press Clause.

5. The Overall Effect of the First Amendment on Bloggers

In order to prevent the array of lawsuits that will continue to generate First Amendment issues, a clear regulation needs to be put in place to allow bloggers with the necessary knowledge of what can and cannot be discussed on their blogs. As one article states, “the First Amendment values behind blogging become more and more pertinent as we move into a technological and interconnected society.”¹⁴² As the blogosphere evolves it becomes more like *the* “marketplace of ideas,” which is one of the core values of the First Amendment (emphasis added).¹⁴³ Thus, the blurred line between what is protected speech and what is not protected in one’s blog is an important basis for bloggers to have

when creating a blog. Although most speech is protected, it is important for bloggers to be mindful of the content they are planting on the Web especially since their status', such as government workers or students, may have an effect on the extent to which their speech is protected. Additionally, bloggers have to be aware of the lack of protection given to them when it relates to their speech *and* their sources (emphasis added).

Eventually courts will be forced to include the web and its blogs as sources similar to the traditional medium used for providing the public with information, consequentially, providing bloggers with the requisite protection and privileges afforded to most journalists. Until then, bloggers must be aware of the laws that may provide them protection in even the smallest of ways.

B. Intellectual Property Infringement

Another issue that effects bloggers who blog for their own personal enjoyment, is the use of others' protected properties, such as photos and videos, or protected trademarks. The Web continues to expand across the nation and users are able to access tons of photos, videos, articles and websites. As the Web expands, increasing amounts of blogs are created, which gives Web users greater access to photos, videos and music. Since the Web is so widely distributed across the world and millions of websites (including blogs) have been created, it is difficult to control the use of another's property rights. Thus, it is ultimately up to the copyright or trademark owner to ensure others are not infringing upon their property rights; but, as one could imagine, this is a very difficult task for property owners to catch *all* of the bad guys (emphasis added). It is increasingly difficult because once readers disseminate copyright information or infringe on another's privacy rights, it becomes even more public, essentially harming the property owners.¹⁴⁴

It is apparent that an intellectual property mechanism needs to be put in place to stop bloggers from infringing on others' property rights. One way to put an end to this is by having bloggers become aware of these legal implications. Thus bloggers should possess a basic understanding of the following intellectual property matters: copyright infringement, trademark infringement, libel issues (previously mentioned with defamation) and privacy rights.

1. Copyright Infringement

“As the number of blogs increases and the competition for traffic (and the advertising dollars that follow) heats up, many blogs are increasingly relying on infringement of third-party copyrights and trademarks in order to attract interest and gain a following.”¹⁴⁵ Since it is easier for one to copy another's work rather than spend the money, time and effort it takes to create one's own content, many blogs are “recycled, or simply stolen, from established competitors that spend money to create appealing content.”¹⁴⁶ However, bloggers may be unaware of the fact that the content they are posting on their blogs are lawfully owned by another due to the copyright laws that protect the original creator of a work.

Copyright laws were created to protect “original works of authorship” such as literary works, musical works, graphic works, motion pictures and sound recordings.¹⁴⁷ Under 17 U.S.C. § 106, a copyright owner is granted several exclusive rights.¹⁴⁸ These rights include the right to perform, distribute, reproduce and display the copyrighted work; the right to “prepare derivative works based upon the copyrighted work” and the right to perform the copyrighted work “by means of a digital audio transmission.”¹⁴⁹ A plaintiff may file an infringement claim against a blogger for violating any of these six exclusive

rights granted to a copyright holder. Thus, bloggers must not copy any “original works of authorship” such as images, videos, music, or written text, onto their blogs – unless these rights were assigned to them.

In order for a plaintiff to prove copyright infringement, plaintiff must prove “1) ownership of a valid copyright; and 2) copying of constituent elements of the work that are original.”¹⁵⁰ In *Millennium TGA, Inc. v. Leon*, the plaintiff alleged in his complaint that the defendant stole and copied Millennium’s copyrighted works (images and videos), and then distributed them onto his own blog and other Internet websites.¹⁵¹ The district court found that these facts alleged in the Complaint satisfied the second element required to prove copyright infringement.¹⁵² Similarly, in *Art of Living Found. v. Does*, the District Court concluded that the plaintiff successfully made a prima facie claim of copyright infringement by proving it was the copyright holder of the manual at issue and that one of the defendants published the manual “on the WordPress Blog without obtaining permission to do so.”¹⁵³

The most common remedies available to a plaintiff who succeeds on a copyright infringement case include injunctive relief, monetary damages, attorneys’ fees and other costs.¹⁵⁴ In particular, Section 504(b) of the Copyright Act allows copyright holders to recover the actual damages suffered from the infringement *and* “any profits of the infringer that are attributable to the infringement” (emphasis added).¹⁵⁵ These damages will certainly add up to quite an expense for a blogger found liable for infringement, therefore, it should be the crucial reason a blogger strays away from illicitly using another’s copyrighted material.

However, a few options are available to bloggers who would like to use copyrighted material. For example, Section 201(d)(2) of the Copyright Act authorizes copyright licenses.¹⁵⁶ These licenses are available to users who would like to use images and other copyrighted content on their blogs.¹⁵⁷ Essentially, a copyright license is a contract giving someone the authority to use a copyright owner's work for a limited period of time for limited purposes.¹⁵⁸ "As a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work," thereby giving it the quid pro quo feel of a contract.¹⁵⁹ While a licensing agreement to use another's copyrighted work may sound like the easy answer, it is important for licensees to stay within their licensing boundaries. In one instance, the District Court held in favor of a Licensor who brought suit against a textbook publisher for copyright infringement.¹⁶⁰ Plaintiff, "a company that licenses stock image photographs" granted defendant numerous limited licenses – with clearly specified terms – to use its images.¹⁶¹ The court held that the published- defendant was granted a retroactive license, in which there was no evidence of an implied license granting defendant unlimited use of the images agreed upon.¹⁶²

A common defense used in copyright infringement cases is the affirmative defense of fair use. The fair use defense allows a blogger to argue that he/she used a copyright holders work for a particular purpose such as criticism, news reporting, teaching or researching.¹⁶³ Courts will consider four nonexclusive factors when determining whether a blogger used another's copyrighted material as fair use; these factors include 1) the purpose/character of the use, 2) the nature of the work, 3) the amount used relative to the copyrighted content as a whole, and 4) "the effect of the use upon the potential market for

or value of the copyrighted work.”¹⁶⁴ If a court finds that a copyrighted work was used as fair use than technically there is no infringement.¹⁶⁵

In *Perfect 10, Inc. v. Amazon.com, Inc.*, the Court of Appeals held that Google’s use of Perfect 10’s thumbnail images was fair use.¹⁶⁶ In this suit (consolidated actions), Perfect 10, the copyright owner of certain images, filed a copyright infringement claim against Google and Amazon.com.¹⁶⁷ Plaintiff argued that Google infringed upon its rights by displaying their images as thumbnail images, which linked to websites that provided “the full-size infringing versions of Perfect 10’s photographs.”¹⁶⁸ Although the plaintiff established a case of direct infringement, the court reasoned that Google benefitted the public by using plaintiff’s thumbnail images for a different purpose than the use Perfect 10 intended the images be used for.¹⁶⁹

While fair use is a great defense for a blogger to use in a copyright infringement case, it is only one of the few defenses a blogger may use once they are already in a nasty legal battle. Thus, it is important for bloggers to have an understanding of the copyright laws so they can prevent themselves from using the fair use defense. As blogging expert Susan Gunelius expresses, it is not only important, but also helpful, for bloggers to attach citations to their sources, with a link back to that source, when posting content to their blogs.¹⁷⁰ This is the least effort a blogger may have to put into his/her blog to ensure he/she is not infringing upon another’s rights.

2. Trademark Infringement

Trademark infringement is another legal aspect of intellectual property that bloggers should have a basic understanding of. “A trademark is generally a word, phrase, symbol, or design, or a combination thereof, that identifies and distinguishes the source of the

goods of one party from those of others.”¹⁷¹ The purpose of trademark law is to ensure consumers that the products or services they are purchasing with a certain trademark or service mark comes from the same seller connected to that mark.¹⁷²

Since trademarks are typically used for the purpose of commerce, it is not a major issue in the blogosphere. However, trademark issues may come to surface if a blogger confuses or deceives a consumer to believe their blog is affiliated with a trademark owner or seller. A trademark infringement claim is generally brought under the federal Trademark Act, known as the Lanham Act.¹⁷³ The Lanham Act provides trademark owners the right to file a claim for trademark infringement when someone uses their registered mark for commerce without their consent and such use will cause confusion or deception upon consumers.¹⁷⁴ If the mark is unregistered it may still be infringed upon, which is referred to as unfair competition under the federal Trademark Act.¹⁷⁵

Typically courts will apply a two-prong test to determine whether one’s trademark has been infringed upon.¹⁷⁶ The first step the Court will analyze is the validity of the trademark; a federal registration is usually prima facie evidence of the validity of the mark.¹⁷⁷ Second, the Court must consider the likelihood of confusion between the marks used – this is the “core element of trademark infringement.”¹⁷⁸

Several defenses are available to defendants who in trademark litigation. A defendant blogger may use the defense of an incontestable mark, thus, arguing one of several defenses: 1) the mark was fraudulently registered, 2) the mark was abandoned by the trademark owner, 3) the mark was being used with the permission of the registrant, 4) the mark is apart of the blogger’s individual business name, 5) the mark was adopted without knowledge of the trademark owner’s prior use, 6) the mark was used prior to registration

of the mark, 7) the mark is/has violated the U.S. antitrust laws, 8) the mark is functional, or 9) the equitable principles of laches, estoppel and acquiescence can be applied.¹⁷⁹ Otherwise, a defendant may use another person as a defense to raise legal or equitable issues that may be asserted if the mark was not registered.¹⁸⁰ A defendant may refuse an unregistered mark in several ways: showing that the mark is immoral or deceptive, showing that the mark is a name, portrait or signature of an actual living person or a deceased President, showing that the mark is “geographically descriptive,” or by showing that the mark is a surname.

However, as previously stated, trademark infringement is not necessarily a major issue in the blogosphere, but it is worth having awareness of as a blogger. Bloggers must always ensure that their content does not confuse consumers to believe their blog is connected to a specific trademark owner. Specifically, bloggers must not deceive their audience into believing their blog is connected to another’s, who may have a registered trademark.

3. Rights of Privacy

An additional matter in the blogosphere realm of intellectual property matters is the issue of privacy. Privacy is a tort concern covered in Section 652A of the Restatement (Second) of Torts, which states that any person who invades the right of privacy afforded to another is subject to liability for the resulting harm done to the affected individual.¹⁸¹ There are four ways the right of privacy may be invaded: 1) by unreasonable intrusion upon another’s privacy, 2) by appropriation of the victim’s name or likeness, 3) by unreasonable publicity given to another’s private life, or 4) by publicity that unreasonably places the victim in a false light in the public.¹⁸² Of course a defendant cannot be liable if

the plaintiff left a fact or characteristic out in the view of the public; the private facts must have been disclosed in a manner that would certainly become public knowledge.¹⁸³

However, to bring an invasion of privacy suit due to statements made on someone's blog, one would have to satisfy the element of the public disclosure tort.¹⁸⁴ The public disclosure tort is described as "unreasonable publicity given to another's private life."¹⁸⁵ One may be found liable for the public disclosure tort if the matter publicized, "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."¹⁸⁶ The Restatement further states that publicity means "the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."¹⁸⁷ The restatement recognizes that stating a fact concerning someone's private life to a small group of individuals is not considered an invasion of privacy, but, once that fact is shared on any publications – newspaper, magazine, blogs – than the writer becomes liable for the public disclosure tort.¹⁸⁸ However, bloggers may get around this matter by ensuring a password is required for their blogs, rather than having the blog open for the public to view – but of course, this is not the best route a blogger would like to use. In assessing an invasion of privacy matter, a Court will likely apply the standard of an ordinary reasonable person.¹⁸⁹ Furthermore, a Court will only consider the protection given to a plaintiff who alleges an invasion of privacy, if the invasion is "relative to the customs of the time and place, to the plaintiff's occupation, and to the habits of his neighbors and fellow citizens."¹⁹⁰

Many courts have addressed invasion of privacy claims by an Internet or Web site posting regarding countless issues such as invasion of privacy by posting someone's

image, by posting adult advertisements, by posting the name and likeness of an individual, by posting pornography in the form of images or videos, and by posting someone's personal information – such as a medical patient, a prisoner, or a sex offender.¹⁹¹

In *U.S. v. Gines- Perez*, the Court found that the government did not violate the defendant's privacy rights by downloading a photo from the Internet.¹⁹² The Court applied a two-prong test, in which the Court considered whether the person had an actual expectation of privacy and whether society recognized that expectation of privacy as "reasonable."¹⁹³ In its reasoning, the Court stated, that it was "obvious that a claim to privacy is unavailable to someone who places information on an indisputably, public medium, such as the Internet, without taking any measure to protect the information."¹⁹⁴

Each case varies with a different set of facts and circumstances, in which courts base their holdings upon. In addition to the facts of the case, privacy rights vary based on the state's tort system, state statute and/or common law.¹⁹⁵ Therefore, it is essential for bloggers to have an understanding of their state's tort system.

In addition to protecting the parties who are mentioned in one's blog, bloggers must also be aware of the privacy rights of their audience. Privacy laws protect the blogger's readers from harm or unsafe activity regarding his/her personal information. A blogger cannot collect private information about his/her readers to sell or share with a third party and a blogger must not collect the email addresses of his/her readers to send mass emails to them.¹⁹⁶ Bloggers must first give their readers the option to receive emails from the blogger and if a reader agrees to receive emails from the blogger, the blogger must also provide the reader with the option of opting out of future emails.¹⁹⁷

IV. Bloggers Need More Protection

It is clear that bloggers have been left in a gray area of the law, in which they have been protected in some instances but generally, have been left clueless on the regulations relative to their blogs. As previously mentioned, bloggers need more protections, similar to the protections afforded to other sources of media such as newspapers and magazines. One option to give bloggers more protection within the blogosphere is to provide awareness of the legal issues that arise relative to blogs. Many websites such as Tumblr and WordPress provide bloggers with the opportunity to create a blog within minutes, free of charge, but they do not give bloggers full awareness of the “do’s and don’ts” of blogging. Like everything else in technology that started as nothing but became apart of America’s lifestyle, rules and regulations must be imposed upon the blogosphere as a safeguard for bloggers to dodge legal battles.

These blog providers that provide a foundation for Internet users to create blogs are more protected than the bloggers. For example, the Digital Millennium Copyright Act was enacted in 1998 to protect Internet service providers from liability of copyright infringement in certain cases where their users have infringed upon another’s rights.¹⁹⁸ It is seemingly unfair for the Internet Service Provider to remove itself from liability, but not provide its bloggers with basic knowledge of the legal risks that may be created while blogging.

Additionally, state shield laws have been enacted in 39 states (as of 2014) to protect journalists from disclosing certain information.¹⁹⁹ Although each state’s shield statues may vary, some solely protect journalists from identifying their sources, while others “expressly extend the privilege beyond sources to cover information obtained in

the course of journalistic activities.”²⁰⁰ These shield laws seem to be adopted because the state governments obviously believe that a journalists’ sources are trusted sources, thereby giving journalists an extended amount of credit on the information they broadcast to the public. However, such laws are not provided to bloggers, which are solely for the protection and prevention of legal suits against bloggers. Thus, bloggers are still being forced to make a name for themselves and prove to the public and the government that bloggers provide reputable information to the public and should be protected like other news sources. This is nonsensical since blogging has been a developing trend for nearly two decades, and have provided readers with an extensive amount of news and information, which should be respected in the same manner that journalists for other news publications are respected. The two main examples of how informative blogging has become in our nations was illustrated during two peaks of blogging when blogs were popular during the War in Iraq and later again became popular during the 2004 Presidential Election.

Furthermore, the plummeting trend of traditional media is another reason why bloggers should be granted more protection via rules and regulations. In 2012, one writer expressed, “the use of the Internet as a dissemination tool for news is in its infancy.”²⁰¹ Without looking at the statistics on earnings received by major newspaper and magazine publications, it is evident that the traditional form of media has declined while most Americans are reaching to the Internet for its news and information – mainly from newspaper and magazine websites as well as the blogosphere. So, while the traditional media trend is declining, online sources of information have accelerated. Thus, the need for bloggers and other Internet users to provide the public with news and information

clearly identifies the imperative need for the Internet and its blogs to have more regulation upon them.

V. Conclusion

Over the past few years, the blogosphere has developed from a personal hobby to an informational source for Internet users. As time progresses this modern trend will continue to soar and continue to cause legal issues and concerns to develop in courts. To slow down the increasing trend of legal battles filed for statements and content posted in the blogosphere, the courts need to interfere and set ground rules and regulations to protect and regulate bloggers. Otherwise, the court system will become overwhelmed with lawsuits relating to bloggers and their blogs. When news publications became popular, the courts became aware of the imperative need for regulations, which has now led to protection for journalists who write for those news publications. Now as the trend shifts to the blogosphere, it is time for the courts to shift and create rules and regulations for the blogosphere.

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- ³ See Rick Edmonds, *Newspapers – Intro*, State of the Media, <http://stateofthemediamedia.org/2004/newspapers-intro/> (noting the continuous decrease in Americans reading newspaper).
- ⁴ See *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1248, 1287 (9th Cir. 2014) (addressing defamatory statements written by blogger and questioning bloggers 1st Amendment protection regarding statements made); Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 Am. Bus. L.J. 127 (2007)
- ⁵ See *Matter of Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 425 (Sup. Ct. 2009) (discussing defamatory statements made on defendants website by an a nonymous blogger).
- ⁶ See *Katz v. Chevaldina*, 2014 U.S. Dist. LEXIS 88085, at *1 (S.D. Fla. June 17,2014).
- ⁷ See Henry Hoang Pham, Note & Comment, *Bloggers and the Workplace: The Search for a Legal Solution to the Conflict Between Employee Blogging and Employers*, 26 Loy. L.A. Ent. L. Rev. 207 (2005/2006)
- ⁸ See Robert Sprague, *supra* note 4 at 127.
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- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *Id.* at 230
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- ¹⁷ See Bradley M. Bakker, *supra* note 9.
- ¹⁸ See Robert Sprague, *supra* note 4 at 129.
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- ²⁴ *Id.*

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- ²⁷ See Tumblr, www.Tumblr.com/about (last visited Oct. 24, 2014) (Tumblr provides a platform for users to create blogs with ease by sharing photos, videos, music, links, etc.)
- ²⁸ See WordPress, <http://en.wordpress.com/stats/> (last visited Oct. 24, 2014) (“WordPress is the most popular online publishing platform, currently powering more than 20% of the web,” See *About Us*, WordPress, <https://wordpress.com/about/> (last visited Oct. 24, 2014)
- ²⁹ See Julien Pain, *Bloggers, The New Heralds of Free Expression*, in Handbook for Bloggers and Cyber-Dissidents Reporters Without Borders, 4, 5 (2005), available at http://www.rsf.org/IMG/pdf/handbook_bloggers_cyberdissidents-GB.pdf.
- ³⁰ *United States v. Cassidy*, 814 F. Supp. 2d 574, 576 (D. Md. 2011)
- ³¹ See Robert Sprague, *supra* note 4 at 130; See Sunny Woan, *supra* note 26 at 483.
- ³² See Sunny Woan, *supra* note 26 at 483; See also *Warblog*, Wikipedia, <http://en.wikipedia.org/wiki/Warblog> (Last updated June 23, 2014) (defining a warblog as a blog used to cover “news events concerning an ongoing war,” which began in 2001 when Matt Welch launched his warblog. Warblogs have also been termed “milblogs,” which also began in 2001 when JP of milblogging.com created his blog while in Iraq.)
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- ³⁵ *Id.*
- ³⁶ See Robert Sprague, *supra* note 4 at 130.
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- ⁴³ See Sunny Woan, *supra* note 26 at 487-88.
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- ⁴⁵ U.S. Const. amend. I.
- ⁴⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
- ⁴⁷ 35 A.L.R.6th 407 (Originally published in 2008)
- ⁴⁸ *Id.* at § 2.
- ⁴⁹ *Id.*
- ⁵⁰ *Id.* at § 4.
- ⁵¹ *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.2007)

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- ⁵⁷ *Id.* at 263.
- ⁵⁸ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964)
- ⁵⁹ See WebPress, supra note 28 (Last visited Oct. 25, 2014).
- ⁶⁰ Todd C. Taylor, *Blogger's Liability for Third- Party Comments and Content: A Growing Legal Threat for Bloggers or Plaintiffs' Lingerin Ignorance of the Law?*, 30 Westlaw Journal Computer and Internet 1 (2012)
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- ⁶³ *Id.*
- ⁶⁴ *Id.* (noting unlawful harassment as one of the many claims a plaintiff can file suit against a blogger for in regards to third party comments at *2)
- ⁶⁵ *Id.* at 2
- ⁶⁶ 47 USCS § 230(c)(1)
- ⁶⁷ See Anthony Ciollo, supra note 55 at 275.
- ⁶⁸ See Todd c. Taylor, supra note 60 at 3.
- ⁶⁹ *Id.* at 4.
- ⁷⁰ *Id.*
- ⁷¹ *Id.*
- ⁷² *Id.*
- ⁷³ *Id.*
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- ⁷⁵ *Id.*
- ⁷⁶ *Id.*
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- ⁸³ ALR, supra note 47 At § 9.
- ⁸⁴ *Id.*
- ⁸⁵ See Scott R. Grubman, supra note 82 at 639.
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- ⁸⁷ *Id.*
- ⁸⁸ See Scott R. Grubman, supra note 82 at 637.
- ⁸⁹ ALR, supra note 47 at § 9.
- ⁹⁰ Richerson v. Beckon, No. C07-5590 JKA, 2008 WL 833076, at *4 (W.D. Wash. Mar. 27, 2008).
- ⁹¹ See Scott R. Grubman, supra note 82 at 639.

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- ⁹³ *Blogs Raise Privacy Concerns But Can be Managerial Tool as Well*, Issue No. 626, 2006 WL 7349720
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- ⁹⁵ See Henry Hoang Pham, *supra* note 7 at 207.
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- ¹⁰⁵ *Id.* at 361.
- ¹⁰⁶ *Id.*
- ¹⁰⁷ See *supra* note 93.
- ¹⁰⁸ *Id.*
- ¹⁰⁹ *Id.*
- ¹¹⁰ *Id.*
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- ¹¹⁴ *Id.*
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- ¹¹⁶ *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).
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- ¹¹⁹ *Id.* at § 7.
- ¹²⁰ *Id.*
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- ¹²⁴ See Sunny Woan, *supra* note 26 at 486.
- ¹²⁵ *Id.*
- ¹²⁶ *Id.* at 487.
- ¹²⁷ *Id.*
- ¹²⁸ See Fortune, <http://fortune.com/fortune500/> (providing news on this year's top 500 companies based on a number of factors including revenue)
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- ¹³⁰ *Id.* (referring to *O' Grady v. Superior Court*, 44 Cal. Rpt. 3d 72 (Ct. App. 2006))

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132 *Id.*
133 *Id.*
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¹⁶⁸ *Id.* at 1157.

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¹⁷² 84 Am. Jur. Proof of Facts 3d 371 § 2 (Originally published in 2005).

¹⁷³ 84 Am. Jur. Proof of Facts 3d 371 § 4 (Originally published in 2005).

¹⁷⁴ 15 U.S.C.A. § 1114(1)(a).

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¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at §§ 4-5.

¹⁷⁸ Official Airline Guides, Inc. v. Goss, 6 F.3d 1385, 1391 (9th Cir.1993) (quoting E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1290 (9th Cir.1992)).

¹⁷⁹ 84 Am. Jur. Proof of Facts 3d 371 § 11 (Originally published in 2005).

¹⁸⁰ 84 Am. Jur. Proof of Facts 3d 371 § 12 (Originally published in 2005).

¹⁸¹ Restatement (Second) of Torts § 652A(1) (1977).

¹⁸² *Id.* at § 652(a)(2).

¹⁸³ Restatement (Second) of Torts § 652D (1977).

¹⁸⁴ See Autumn E. Love, supra note 142 at 365.

¹⁸⁵ Restatement (Second) of Torts § 652A(2)(c) (1977).

¹⁸⁶ See supra note 183.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See Autumn E. Love, supra note 142 at 365.

¹⁹⁰ *Id.*

¹⁹¹ 54 A.L.R.6th 99 § 2 (Originally published in 2010).

¹⁹² United States v. Gines-Perez, 214 F. Supp. 2d 205, 226 (D.P.R. 2002)

¹⁹³ *Id.* at 225.

¹⁹⁴ *Id.*

¹⁹⁵ supra note 191.

¹⁹⁶ See Susan Gunelius, supra note 157.

¹⁹⁷ *Id.*

¹⁹⁸ 179 A.L.R. Fed. 319 (Originally published in 2002).

¹⁹⁹ 2 Testimonial Privileges § 8:6 (3d ed.).

²⁰⁰ *Id.*

²⁰¹ John J. Dougherty, *Obsidian Financial Group, LLC v. Cox and Reformulating Shield Laws to Protect Digital Journalism in an Evolving Media World*, 13 N.C.J.L. & Tech. On. 287, 293 (2012).