

BLOGGERS' LIBEL LIABILITY: A COMPARATIVE ANALYSIS OF SOUTH KOREA AND THE UNITED STATES

YOONMO SANG & JONATHAN ANDERSON¹

The influence of bloggers has increased to the degree that they are more and more frequently becoming involved in defamation and invasion-of-privacy suits. Bloggers threatened with legal action often remove potentially libelous content rather than deal with the difficulty and expense of litigation. This paper aims to trace the strains of controversy surrounding the application of journalistic standards of liability to bloggers. This study furthermore analyzes court cases and relevant statutes regarding bloggers' liability in South Korea and the United States and suggests a more reasonable approach to holding bloggers liable for libel.

Keywords: blog, libel, liability, comparative analysis, Internet

Blogs are a popular means for expressing, online, one's ideas and opinions. Their rise in popularity has been attended by increased scrutiny as well as power. Blogs can be defined as "online publications that typically present contents in inverse chronological order, time-stamped, and with hyperlink pointing at original sources online that bloggers refer to."¹ Individuals who produce, contribute, or publish content found on blogs are known as bloggers. Some bloggers reach a wide enough audience and appear to wield enough power over public opinion that they can find themselves in court. In the United States, bloggers are increasingly being sued for defamation and invasion of privacy.² In July 2008, the Media Law Resource Center reported that 159 civil and criminal court lawsuits had been filed against bloggers since 2004.³ The number of reported cases involving bloggers' libel liability has, in recent years, sharply

¹ Ari Heinonen, *Blogger*, in THE INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION 339 (Wolfgang Donsbach ed., 2008).

² M. P. Mcqueen, *Bloggers, Beware: What You Write Can Get You Sued*, WALL ST. J., May 21, 2009, at D1.

³ Huma Yusuf, *Lawsuits Against Bloggers Seen Rising*, ABC NEWS, July 20, 2008, available at <http://abcnews.go.com/Technology/story?id=5406538> (last visited June 6, 2012).

increased.⁴

Who exactly is being affected? Bloggers come from “all corners of society, from serious journalists ... to teenagers seeking tacit networks of interpersonal communication.”⁵ Hence, legal judgments regarding their libel liability affect innumerable Internet users, as well as the suppliers of online interactive media. Bloggers facing legal threats will often simply remove potentially libelous content rather than deal with the difficulty and expense of litigation.

If bloggers were held legally responsible for their comments, quite arguably the Internet would soon be rid of a great deal of offensive or irresponsible content. On the other hand, such a policy could have a chilling effect on freedom of political, cultural, or societal, expression. All in all, as one scholar indicated, “Any benefits of regulation must be balanced against the cost of over deterring speech by bloggers, who usually have weaker incentives to speak than career journalists.”⁶

With this in mind, this paper seeks to identify notable controversies about bloggers' legal responsibilities. It specifically analyzes court cases and relevant statutes regarding bloggers' liability in South Korea and the United States. This article tries to resolve two questions: 1) How has the libel liability of bloggers been applied in South Korea and in the United States, and 2) What kind of legal approach is more reasonable for Internet blogs regarding libel liability?

Background

Though the Internet is a globally shared space utilizing the same technology worldwide, the legal approaches to dealing with content on the Internet have developed differently within individual countries. In the United States, under Section 230 of the Communications Decency Act (hereinafter “CDA”),⁷ the party who provides an “interactive computer service”⁸ is not responsible as the “publisher” or “speaker.”⁹ Courts have interpreted and applied

⁴ Available at <http://www.foxnews.com/us/2011/12/22/bloggers-not-journalists> (last visited June 6, 2012).

⁵ Jennifer Meredith Liebman, *Defamed by A Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. ILL. J. L. TECH. & POL'Y 343 (2006).

⁶ Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 188 (2006).

⁷ In 1997, in *Reno v. American Civil Liberties Union*, the U.S. Supreme Court invalidated two sections of the CDA that were enacted to protect minors from “indecent” and “patently offensive” communications on the Internet. Those two sections are Section 223(a) and Section 223(d). Section 230, however, survived and has functioned as a crucial defense for ISPs ever since.

⁸ H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 374-75 (2008).

⁹ Communications Decency Act, 47 U.S.C. §230(c)(1) (1996).

the CDA broadly.¹⁰

In South Korea, by contrast, courts recognize no difference, in terms of libel liability, between traditional forms of media and Internet Service Providers (hereinafter "ISPs"). Hence, bloggers can be sued for any potentially offensive content.¹¹ To what extent, then, should ISPs and bloggers be held accountable? It may behoove one here to reflect on policy considerations and not rely solely on legal logic. A country's libel laws reveal, to a large extent, how it values the interest of reputation and freedom of the press.¹² Depending on the particular sociocultural situations they face, countries enact significantly different libel laws. Such differences are on display in a review of the approaches taken by South Korea and the United States to online libel. Both countries have developed their own libel laws, and the differences embedded in their traditional libel laws affect the legal approach to libelous content on the Internet.

A significant body of research has dealt generally with ISPs' libel liability. Relatively few studies, however, have addressed this issue as it pertains to anonymous blog posts.¹³ At a global level, bloggers' libel liability is a critical, though still emerging, issue. The case of *Doe v. Cahill*,¹⁴ reported in 2005, was one of the earliest cases that brought the issue of bloggers' libel liability to the surface.

Currently, the characteristics of the "blogosphere" resist a unified understanding.¹⁵ One commentator asserts that the usual bloggers are more akin to "diarists" or gossip-creators than to serious citizen journalists.¹⁶ However, it is also true that a large number of citizen journalists are playing an important role in society.¹⁷ Therefore, a distinction needs to be drawn between frivolous blogs with few visitors and blogs that connect to a broader audience. Some scholars cite

¹⁰ YONG S. PARK, LIBEL LAW 1381-1384 (2008).

¹¹ See, e.g., Supreme Court [S. Ct.], 2007Do8155, February 14, 2008.

¹² Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 1, 3 (1980).

¹³ See, e.g., Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L. J. 320 (2008); S. Elizabeth Malloy, *Anonymous Blogging and Defamation: Balancing Interests of the Internet*, 84 WASH. U. L. REV. 1187 (2006); Daniel Haier, *In the Matter of Ottinger v. Non-Party The Journal News*, 54 N.Y.L. SCH. L. REV. 603 (2009/10); Jessica L. Chilson, *Note, Unmasking John Doe: Setting a Standard for Discovery in Anonymous Internet Defamation Cases*, 95 VA. L. REV. 389 (2009).

¹⁴ *Doe v. Cahill*, 884 A.2d 451 (Del. Sup. 2005).

¹⁵ Anthony Ciolli, *Defamatory Internet Speech: A Defense of the Status Quo*, 25 QUINNIPIAC L. REV. 853, 855 (2007).

¹⁶ Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195 (2006).

¹⁷ See, e.g., <http://www.cnn.com/exchange/blogs>.

evidence of blogs' important roles in American politics.¹⁸ A minority of bloggers are communicating with other bloggers and readers in a serious, positive and productive way.¹⁹ Thus, any discussion of blogs and their ramifications for public discourse calls for a cautious approach.²⁰

Blogs and bloggers have varying degrees of importance in society. Journalists have historically taken a pivotal role in bringing to the light of day needed information, playing a "watchdog" role over government and public officials. The conventional wisdom is that a thriving free press is critical to sustaining a participatory democracy. In the twenty-first century, some bloggers are doing what traditional journalists have long been doing. This raises the question of whether common-law-originated privileges for journalists should be applied to bloggers. Another question, conversely, is whether a blogger's content should be treated like other traditional media content in terms of legal responsibilities. In many cases, bloggers exercise "editorial control" over their content. Indeed, such unresolved issues reflect a need for more attention to be given to bloggers' legal rights and liabilities for their activities in cyberspace.

Internet Libel: A Comparative Review

Conventional wisdom holds that a person who defames another is legally responsible for the defamation. In the process of Internet communication, however, many parties — the publisher, distributor, and common carrier — are involved. In many cases, a defamed person does not know who the anonymous commenter (e.g., anonymous blogger) is. Consequently, the defamed person may ask an ISP to disclose the identity of the anonymous commenter or directly sue the ISP.

At this point, legal discussions arise regarding the ISPs' libel liability. Here, U.S. courts have classified the businesses related to the distribution of information on the Internet as publishers, distributors, or common carriers.²¹ As against these actors, victims of libel have received negligible protection, and criticism against providing "blanket immunity" is increasing steadily in the United States.²² Interestingly, controversy is also stirred up when some countries,

¹⁸Daniel W. Drezner & Henry Farrell, *The Power and Politics of Blogs*, available at <http://www.cs.duke.edu/courses/spring05/cps182s/readings/blogpowerpolitics.pdf>; See also Cass R. Sunstein, *REPUBLIC.COM 2.0* 138-150 (2007).

¹⁹ See <http://jcmc.indiana.edu/vol12/issue4/schmidt.html>.

²⁰ Axel Bruns & Joanne Jacobs, *Introduction*, in *USES OF BLOGS* 1, 3 (A. Bruns & J. Jacobs ed., 2006).

²¹ See, e.g., Paul Ehrlich, *Communication Decency Act 230*, 17 *BERKELEY TECH. L. J.* 401 (2002).

²² Robert G. Magee & Tae H. Lee, *Information Conduits or Content Developers? Determining Whether News Portals Should Enjoy Blanket Immunity from Defamation Suits*, 12 *COMM. L. & POL'Y* 369, 402 (2007).

such as South Korea, impose the same level of responsibility on ISPs as is imposed on traditional media. Critics claim that the policy “could be possibly abused to suppress legitimate online freedom of speech.”²³ The discussions of libel on the Internet have mainly developed out of a focus on ISPs’ liability.

Although the issues surrounding ISP’s libel liability differ from that of bloggers, a person claiming to be defamed is likely to bring a lawsuit against an ISP as a means of obtaining the anonymous blogger’s identity. There is in most circumstances an inseparable relation between the two liabilities. Thus it is appropriate to review, before examining bloggers’ libel liability, ISPs’ libel liability.

Internet libel in South Korea

In South Korea, several laws regulate ISPs, including Internet portals or blogs. Among those laws, the most important are the Telecommunications Business Act (hereafter “Telecom Act”),²⁴ and the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (hereafter “Information Act”).²⁵ Article 44 of the Information Act provides:

1. No user may circulate any information violative of another person’s rights, including intrusion on privacy and defamation, through an information and communications network.
2. Every provider of information and communications services shall make efforts to prevent any information under paragraph (1) from being circulated through the information and communications network operated and managed by it.

²³ Tong H. Kim, *Web Portals Alert over Libel Suits*, SOUTH KOREA TIMES, August 7, 2009, available at http://www.SouthKoreatimes.co.kr/www/news/nation/2009/08/123_49782.html.

²⁴ See JUNGITONGSINSAUPBOP [TELECOMMUNICATIONS BUSINESS ACT] [HEREINAFTER “TELECOM ACT”], Law No. 4394 of 1991, amended by Law No. 9705 of 2009. The translated version of this law is *available at* <http://elaw.klri.re.kr>.

²⁵ See JUNGBOTONGSINMANG-LEEYONGCHOKJIN-MEET-JUNGBOBOHO-DEUNGE-GUANHANBOP [ACT ON PROMOTION OF INFORMATION AND COMMUNICATIONS NETWORK UTILIZATION AND INFORMATION PROTECTION, ETC.] [HEREINAFTER “INFORMATION ACT”], Law No. 6360 of 2001, amended by Law No. 10465 of 2011. The translated version of this law is *available at* <http://elaw.klri.re.kr>.

3. The Korea Communications Commission may prepare a policy on development of technology, education, public relations activities, and other activities to prevent violation of another person's rights by information circulated through information and communications networks, including intrusion on privacy and defamation, and may recommend providers of information and communications services to adopt the policy.²⁶

According to the Information Act, the following legal provisions apply to ISPs' libel liability: request for deletion of information (Article 44.2),²⁷

²⁶ INFORMATION ACT, art. 44.

²⁷ *Id.*, art. 44.2 (“(1) Where information provided through an information and communications network purposely to make it public intrudes on other persons’ privacy, defames other persons, or violates other persons’ right otherwise, the victim of such violation may request the provider of information and communication services who handled the information to delete the information or publish a rebuttable statement (hereinafter referred to as “deletion or rebuttal”), presenting it materials supporting the alleged violation. (2) A provider of information and communications services shall, upon receiving a request for deletion or rebuttal of the information under paragraph (1), delete the information, take a temporary measure, or any other necessary measure, and shall notify the applicant and the publisher of the information immediately. In such cases, the provider of information and communications services shall make it known to users that it has taken necessary measures by posting a public notice on the relevant open messages board or in any other way. (3) A provider of information and communications services shall, if there is any unwholesome medium for juvenile published in violation of the labeling method under Article 42 in the information and communications network operated and managed by it or network without any measures to restrict access by juvenile under Article 42.2, delete such content without delay. (4) A provider of information and communications services may, if it is difficult to judge whether information violates any right or it is anticipated that there will probably be a dispute between interested parties, take a measure to block access to the information temporarily (hereinafter referred to as “temporary measures”), irrespective of a request for deletion of the information under paragraph (1). In such cases, the period of time for the temporary measure shall not exceed 30 days. (5) Every provider of information and communications services shall clearly state the details, procedure, and other matters concerning necessary measures in its standardized agreement in advance. (6) A provider of information and communications services may if it takes necessary measures under paragraph (2) for the informations circulated through the information and communications network operated

discretionary temporary measures (Article 44.3), self regulation (Article 44.4), verification of identity of users of open message boards (Article 44.5), claim to furnish user's information (Article 44.6), prohibition on circulation of unlawful information (Article 44.7), and defamation dispute conciliation division (Article 44.10). Other laws, such as the Civil Code, Criminal Code, and the Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reporters (hereafter "Press Arbitration Act"),²⁸ are applied to the ISPs' activities if those activities fall into the realm of relevant laws.

In 2009, the South Korean Supreme Court ruled that Internet portals are responsible for content on their websites because the portals recognized the specific defamatory content and actively chose and distributed them.²⁹ The Supreme Court also held that Internet portals are jointly liable with original content creators for defamatory content.³⁰

According to the majority opinion, ISPs, including Internet portals, have legal responsibilities, under certain conditions, for the content that appears on their sites. That is, the Supreme Court ruled that ISPs have an obligation to respond to a request from an allegedly defamed person asking for the deletion of information or blocking access to the content in question.³¹ The Court also ruled that regardless of whether the request for deletion is received, ISPs may be held liable if they knew or if it was clear on its face that they could have known about the existence of the content on their site. Enforcement of this requirement assumes it is technically and economically manageable for them to control the content.³²

Many perspectives on ISP liability have come forward. These range from the view that Internet portals are simply non-journalistic mediators or transmitters to the view that Internet portals assume the role of journalist and should thus be considered as a realm where important societal discourse occurs. The controversy still exists, however, as to whether or not Internet portals can be treated as traditional media in terms of libel liability. South Korea has concluded that no difference exists between traditional media and ISPs, including Internet portals.

and managed by it, have its liability for damages caused by such informations mitigated or discharged.").

²⁸ERONJUNGAEMEETPIHAEGUJAEDEUNGAEGUANHANBOPYUL [ACT ON PRESS ARBITRATION AND REMEDIES, ETC. FOR DAMAGE CAUSED BY PRESS REPORTS] [HEREINAFTER PRESS ARBITRATION ACT], Law No. 7370 of 2005, amended by Law No. 10587 of 2011. The translated version of this law is available at <http://elaw.klri.re.kr>.

²⁹ Supreme Court [S. Ct.] 2008Da53812, April 16, 2009 (en banc), available at <http://eng.scourt.go.kr/eng/crtcdcsns/NewDecisionsView.work?seq=286¤tPage=0&mode=6&searchWord=2008Da53812>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

In the current legal system, when libel results from news coverage, remedies may take the form of regulating the autonomy of the press and other media. Money damages may be obtained through the Criminal Code and the Civil Code. The Information Act also provides detailed remedies. It provides for the establishment of a defamation dispute conciliation division to handle allegations that information on communication networks – which include ISPs – infringe on others' rights.

Most importantly, the Press Arbitration Act, which was recently revised in South Korea, also applies to Internet libel.³³ The Press Arbitration Act covers ISPs,³⁴ who are responsible for the news reports that appear on their sites and who must respond to the right-of-reply requests like traditional forms of media do.³⁵ The Act, however, does not regulate damage caused by bloggers' reports.

Internet Libel in the United States

Congress passed the CDA as a way of addressing anticipated problematic situations on the Internet. Among other things, the act immunized interactive computer services from liability for defamatory content from third-party content providers. Before the passage of that law, courts mainly relied on the classification of publishers, distributors, and common carriers when making legal judgments regarding the libel liability of ISPs.³⁶ According to that model, which was applied in the common law tradition, distributors who did not exercise

³³ PRESS ARBITRATION ACT, art. 1 (“The purpose of this Act is to make the freedom of the press compatible with public responsibilities thereof, by establishing any effective remedial system, including conciliation or arbitration, to settle disputes, if any, concerning reputation, rights or other legal interests violated through any press report or medium by any press organization, etc.”); See also PRESS ARBITRATION ACT, art. 5 (“(1) The press, any Internet news service, or any Internet multimedia broadcasting (hereinafter referred to as ‘the press, etc.’) shall not infringe other person’s life, liberty, body, health, reputation, privacy, portrait, name, voice, dialogue, works, personal documents, any other personal worth, etc. (hereinafter referred to as the ‘personality right’) and, where the press, etc. has violated other person’s personality right, such damage shall be remedied promptly in accordance with the procedure prescribed by this Act.”).

³⁴ *Id.*

³⁵ PRESS ARBITRATION ACT, art 17.2.

³⁶ For a discussion of the distinction between “publisher” and “distributor” under the common law tradition, see *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006) (“We conclude that section 230 prohibits ‘distributor’ liability for Internet publications. We further hold that section 230(c)(1) immunizes individual ‘users’ of interactive computer services, and that no practical or principled distinction can be drawn between active and passive use.” *Id.* at 513.).

editorial control were exempt from liability for the allegedly defamatory content.

In the case of *Cubby v. CompuServe*, the U.S. District Court for the Southern District of New York ruled that ISPs could be subject to traditional defamation law for the content that appeared on their sites.³⁷ But the court considered CompuServe a mere distributor, rather than a publisher. In this case, CompuServe “neither knew nor had reason to know of the allegedly defamatory [online newsletter] statements,”³⁸ and it maintained no more editorial control other than that of a library, bookstore, or newsstand. It was thus exempt from liability for defamatory content.³⁹

A few years later, in the case of *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the New York State Supreme Court agreed that ISPs could be held liable for the defamatory postings provided by their users.⁴⁰ In this case, however, Prodigy maintained editorial control over the materials on its bulletin boards; Prodigy suggested content guidelines for users, enforced those guidelines with “Board Leaders,” and utilized filtering software designed to eliminate offensive language.⁴¹ Based on the reasoning that these activities could be considered editorial control, the court regarded Prodigy as a publisher of the allegedly defamatory content.⁴² According to the reasoning of this case, if ISPs made a good faith effort to remove offensive content by monitoring or filtering it, they exposed themselves to greater risk of liability. This ironic situation led Congress to enact Section 230 of the CDA in 1996.⁴³

In *Zeran v. America Online, Inc.*, the first post-CDA decision, Zeran alleged that America Online (“AOL”) delayed the deletion of defamatory content provided by an anonymous person on an AOL Web board.⁴⁴ The U.S. Court of Appeals for the Fourth Circuit ruled that AOL was not liable for defamatory content posted on its bulletin board.⁴⁵ The court explained that Congress’s rationale in adopting §230 was to prevent a filtering obligation from causing a chilling effect, deterring ISPs from delivering third-party content to the public.⁴⁶

The U.S. District Court for the District of Columbia in *Blumenthal v. Drudge* also ruled that the operator of a web site was immune from liability for the libelous content posted on its web site.⁴⁷ In this case, AOL was the publisher

³⁷ *Cubby Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

³⁸ *Id.* at 139.

³⁹ *Id.*

⁴⁰ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

⁴¹ *Id.* at 4.

⁴² *Id.*

⁴³ *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir., 1997).

⁴⁴ *Id.* at 329.

⁴⁵ *Id.* at 331.

⁴⁶ *Id.*

⁴⁷ *Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998).

of the allegedly defamatory content while exercising editorial control.⁴⁸ The court determined, however, that AOL was exempt from liability, relying on the same reasoning used in the *Zeran* case.⁴⁹

In *Barrett v. Rosenthal*, the California Supreme Court followed *Zeran*, holding that Rosenthal was a “user of interactive computer services” and thus immune from libel liability under CDA §230. A lower court ruling in the case had initially opined that the CDA did not repeal common law defamation liability regarding the distribution of defamatory content on the Internet.⁵⁰

Overall, CDA §230 “erased the distinction between publishers and distributors for courts trying to determine liability ... Thus, the only parties that could be held liable for defamatory online content are the primary creators of that content.”⁵¹ The original intent of CDA was not letting offensive and untruthful information flow freely on the Internet but “[maintaining] the robust nature of Internet communication.”⁵²

Accordingly, scholars have gradually argued that applying §230 should not provide the same immunity to ISPs regardless of their actions.⁵³ Some of those who are against extended immunity have claimed that a determination of immunity should be based on ISPs' involvement with third-party content.⁵⁴

A few courts have recently taken a position against blanket immunity under CDA §230.⁵⁵ In *Grace v. eBay Inc.*, for example, a California state appellate court ruled that CDA §230's immunity does not exclude web operators' liability as a distributor of defamatory content,⁵⁶ and that if the operator knew or had reason to know that the information was defamatory and distributed the information anyway, the operator would not be exempt from liability.⁵⁷ In the instant case, however, eBay was relieved from liability because a clause in the User Agreement between Grace and eBay exempted eBay from disputes between service users.⁵⁸

Grace had bought a few items from another individual on eBay's online

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Barrett v. Rosenthal*, 40 Cal. 4th 33, 146 P. 3d 510, 51 Cal. Rptr. 3d 55 (Cal. Sup. Ct. 2006).

⁵¹ Liebman, *supra* note 5, at 348. In *Batzel v. Smith*, the U.S. Court of Appeals for the Ninth Circuit also endorsed the argument that courts have applied CDA §230 too broadly. 333 F.3d 1018 (2003).

⁵² *Zeran*, 129 F. 3d at 330.

⁵³ See Magee & Lee, *supra* note 22, at 370.

⁵⁴ *Id.*

⁵⁵ Min Jeong Kim, *Liability of Internet Service Providers (ISPs) in the Age of Web2.0: Examination of Recent Cases Changing §230 Immunity of the Communications Decency Act*, 12(1) J. KOREA INFO. L., 135, 145 (2008); See *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 418 F. Supp.2d 1142, 1149 (D.Ariz. 2005).

⁵⁶ *Grace v. eBay Inc.*, 16 Cal. Rptr.3d 192 (Cal. App. 2004).

⁵⁷ *Id.* at 195.

⁵⁸ *Id.*

auction site and then left negative comments about the seller in regard to some of the transactions.⁵⁹ These comments resulted in the seller's posting defamatory comments about Grace on the website.⁶⁰ Because other users could see those offensive comments, Grace notified eBay that the comments from the seller were defamatory, but eBay did not take any action.⁶¹ Grace filed a lawsuit against eBay, asserting that eBay was not immunized from libel liability under the CDA §230.⁶²

The court found eBay to be immunized from publisher or speaker liability as either a provider or user of an interactive computer service.⁶³ Under CDA §230, "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁶⁴ The court opined in dicta, however, that Congress did not intend to exclude distributor's liability through CDA §230.⁶⁵

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the U.S. Court of Appeals for the Ninth Circuit ruled that CDA immunity "did not apply to acts of operator in posting questionnaire and requiring answers to it...."⁶⁶ Roommates.com managed a website designed to match people searching for roommates or housemates.⁶⁷ Users of the site were expected to create a profile consisting of answers, such as sex, sexual orientation, and whether the user would bring children to a household, before use of the site would be permitted. Roommates.com also encouraged users to write an "additional comment" on the site. The Ninth Circuit reversed the lower court's decision and found Roommates.com could be regarded as an information content provider. The court found that the operator conducted more than a passive role in delivering the information because it created the discriminatory questions and used the answers in regard to its service. This case did not deal with libel liability, however, and remains one of only a few cases that did not apply CDA §230's immunity to all ISPs.

Libel and Related Lawsuits against Bloggers

South Korea

In 2008, the South Korean Supreme Court overturned a lower court

⁵⁹ *Id.* at 196.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 197.

⁶⁴ See 47 U.S.C. §230(c)(1) (1996).

⁶⁵ *Grace*, 16 Cal. Rptr.3d at 198-99.

⁶⁶ *Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

⁶⁷ *Roommates.com*, 521 F.3d at 1161.

decision and ruled that a person-to-person secret dialogue on a blog can constitute libel.⁶⁸ Whether a libelous statement has the characteristic of being publicly stated is an important factor in deciding a libel case. Under the Criminal Code and Information Act of Korea, libel liability requires “[defaming] another by publicly alleging facts or false facts.”⁶⁹

When courts decide whether a given libel case meets this condition, they largely rely on the following criterion: whether or not a libelous statement occurs in a situation where people with a specific relationship to the speaker, and who may or may not have been meant to be exposed to the information, hear the libelous statement and subsequently disseminate it, or where a large number of people are exposed to the allegedly libelous statement.⁷⁰ According to the South Korean courts' reasoning, an important consideration is the recipient's potential for further disseminating the statement from the speaker or publisher.⁷¹ Thus, if a person sends a letter that defames a third party to a recipient who can further disseminate the content of that letter, the sender is guilty of criminal libel.⁷²

In 2006, one person (a defendant) wrote a story titled “gold-digger” on his blog.⁷³ The story was about a woman who had been receiving monetary compensation from a company's director as payment for reporting on another manager's private life. The defendant described the woman in the story as a blogger the defendant knew. When a visitor asked, in a person-to-person dialogue on the blog, about the heroine's real identity, the defendant gave the heroine's pen name used in the blogosphere, suggesting that the woman was a real gold-digger. The defendant did this only after receiving a promise from the visitor that he would not tell anyone. In the blog, the defendant wrote that the real names and pictures of the characters in the story were available upon request by e-mail or private message.

The question in this case was whether this amounted to online libel. In South Korea, whether libelous content comes from a third party or not makes no difference in constituting online libel.⁷⁴ ISPs are expected to make every effort to prevent illegal content infringing another's rights from being posted on their sites. They are legally responsible for deleting potentially illegal content that may infringe another's rights, publish a rebuttal statement upon request from the allegedly defamed person, or take temporary measures such as blocking access the content in question.⁷⁵ If they fail to carry out this duty, they are risking legal

⁶⁸ Supreme Court [S.Ct.], 2007Do8155, Feb. 14, 2008.

⁶⁹ CRIMINAL CODE, art. 307.

⁷⁰ PARK, *supra* note 10, at 1187.

⁷¹ *Id.*

⁷² *Id.*

⁷³ 2007Do8155.

⁷⁴ INFORMATION ACT, art. 44.

⁷⁵ *See* Kim, *supra* note 25.

disputes raised by the defamed person.⁷⁶ In the “gold-digger” case, the creator of the defamatory content was the blogger himself, so third party content and its legal treatment do not figure in to it. The issue, again, is whether the defendant, alleging false facts, defamed the plaintiff publicly.

A lower court ruled that since the allegedly libelous statement occurred in a blog's person-to-person secret dialogue, the defendant did not “publicly” defame the other.⁷⁷ However, the Supreme Court vacated and remanded the lower court's decision, asserting that the lower court failed to thoroughly look over the case to determine whether the recipient had the possibility of further disseminating the statement.⁷⁸

One thing is clear: According to the Supreme Court's reasoning, a private dialogue, online or offline, can constitute libel, if the recipient can disseminate the statement. That is, South Korea recognizes no difference, in terms of legal treatment, between online libel and offline libel.⁷⁹

In 2010, in determining a blogger's libel liability, one district court of South Korea addressed the distinction between a matter of private concern and public concern upheld by South Korea's Supreme Court.⁸⁰ In that case, the defendant posted a message on a blog falsely accusing the plaintiff, a famous instructor at an online academic institution, of faking a final diploma. After considering the blogger's intention to write the statement, circumstances and background, the overall structure of the writing, and the level and means of expression, the court ruled the blogger was not liable. According to the court, despite trivial factual errors and exaggeration, if the statement, as a whole, was made for public interest, the defendant's act shall not be punishable. The court also considered the fact that it was difficult to determine whether the defendant knew the allegation was not true.

The United States

American courts have broadly applied CDA §230, exempting individual website operators from libel liability regarding a third party posting.⁸¹ And of late, courts have been applying this exemption to bloggers.⁸² In *Batzel v. Smith*, the

⁷⁶ *Id.*

⁷⁷ Uijeongbu District Court [Dist. Ct.], 2007No579, Aug. 30, 2007.

⁷⁸ 2007Do8155.

⁷⁹ South Korea's Supreme Court runs an official website that offers a comprehensive search for archived legal cases. The authors of this paper performed keyword searches (blog, blogger, libel, and combination of these words) and could find only two cases in regard to bloggers' libel liability.

⁸⁰ Incheon District Court [Dist. Ct.], 2010No3208, Dec. 24, 2010.

⁸¹ *See, e.g.*, *Batzel v. Smith*, 333 F. 3d 1018 (9th Cir. 2003).

⁸² Melissa A. Troiano, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1450 (2006).

United States Court of Appeals for the Ninth Circuit exempted from libel liability a blogger who republished an allegedly defamatory e-mail provided to him by a third party.⁸³ The court opined that immunity granted by CDA §230 could not be allowed if “providers and users of ‘interactive computer service[s]’ knew or had reason to know that the information provided was not intended for publication on the Internet.”⁸⁴

In 1999, Ellen Batzel, the plaintiff, employed a handyman, Robert Smith, the defendant, to do odd jobs around her house.⁸⁵ While he worked for the plaintiff, he was told that her grandfather had a close relationship with Adolf Hitler and that some of the artworks in her house had been inherited.⁸⁶ Based on his conversations and experience with the plaintiff, Smith concluded that the plaintiff was a granddaughter of a key player in the Nazi Party during World War II. He emailed another defendant, Ton Cremers, a proprietor of a web site committed to finding stolen art.⁸⁷ After communicating with Smith, Cremers posted Smith’s e-mail on his web site.⁸⁸ The e-mail’s message was opened to the public by Cremers’s posting on the web site’s listserv.⁸⁹ In this case, Smith argued that if he knew that his e-mail would be exposed to the public, he would not have sent it.⁹⁰

The court ruled that “because Cremers did no more than select and make alterations to Smith’s e-mail, Cremers cannot be considered the content provider of Smith’s e-mail for the purposes of CDA §230.”⁹¹ According to the court’s reasoning, the second defendant did not perform the “development of information,” which requires “something more substantial than merely editing portions of an e-mail and selecting material for publication.”⁹² Based on that reasoning, the court applied CDA §230’s immunity to the second defendant.⁹³

The dissenting opinion argued that the judgment as to whether CDA immunity applies to a defendant should not be based on whether the creator of allegedly defamatory content intended that content to be disseminated on the Internet.⁹⁴ Rather, the dissent argued that the legal judgment regarding a defendant as a distributor of the defamatory content should be determined by the

⁸³ *Batzel*, 333 F. 3d at 1034.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1021.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1022.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1031.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

defendant's actions, not by the author's intent.⁹⁵

According to the dissent's reasoning, whether the defendant took responsibility as a distributor of the content should be determined based on the defendant's specific activity.⁹⁶ Referring to the objective of CDA §230, the dissent said that if a defendant actively took a role in screening or blocking the defamatory content or obscene information, then it should receive exemption from liability.⁹⁷ However, if the defendant exercised editorial control over the dissemination of the original content and chose to distribute the harmful or offensive content, he could be considered a creator on a case-by-case basis.⁹⁸

Bloggers often post content anonymously, which makes it difficult for a person defamed by an anonymous blog posting to identify who posted the content. In *Doe v. Cahill*, the Supreme Court of Delaware held that a defamed plaintiff who wants to identify an anonymous defendant must meet a stricter standard than "good faith."⁹⁹ Among other requirements, the Court ruled that the plaintiff must try to let the anonymous defendant know that he is subject to a subpoena or discovery request.¹⁰⁰ Specifically, the plaintiff should post a notice about the plaintiff's discovery request on the same web site where the original defamatory content was posted.¹⁰¹

In that case, an anonymous commenter, using the pseudonym "Proud Citizen," posted allegedly libelous statements on the website supported by the *Delaware State News*, "Smyrna/Clayton Issues Blog."¹⁰² An elected town councilman, Patrick Cahill and his wife filed a lawsuit against four John Doe defendants, arguing that the libelous statements on the site damaged their reputation and infringed their privacy.¹⁰³ The Plaintiffs demanded that Comcast, the ISP, disclose the identity of Proud Citizen, known as John Doe No.1.¹⁰⁴ The defendant "filed an 'Emergency Motion for a Protective Order' seeking to prevent the [plaintiffs] from obtaining his identity from Comcast."¹⁰⁵ However, applying the good faith standard,¹⁰⁶ the trial court refused this motion, so the defendant

⁹⁵ *Id.* at 1037-38.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1039-40.

⁹⁸ *Id.* at 1040.

⁹⁹ *Doe*, 844 A. 2d at 458.

¹⁰⁰ *Id.* at 461.

¹⁰¹ *Id.*

¹⁰² *Id.* at 454.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 455.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 455 ("Under the good faith standard, the Superior Court required the Cahills to establish: (1) that they had a legitimate, good faith basis upon which to bring the underlying claim; (2) that the identifying information sought was directly and materially related to their claim; and (3) that the information could not be obtained from any other source.").

filed an appeal.¹⁰⁷ The Supreme Court of Delaware reversed the decision of the trial court, dismissing the plaintiff's claim with prejudice, focusing on the fact that Doe's comments were considered "no more than unfounded and unconvincing opinion."¹⁰⁸ In this case, the "Guidelines," at the top of the blog, stated "[t]his is your hometown forum for opinions about public issues."¹⁰⁹ While this case addressed criteria for disclosure of an anonymous blogger's identity, it did not deal with the applicability of §CDA 230.

In the 2006 case of *DiMeo v. Max*, the Eastern District Court of Pennsylvania held that a party who manages a web site with an interactive element such as a bulletin board or a blog comments section is exempt from libel liability for third party content under the provisions of CDA §230.¹¹⁰ In this case, the defendant, Tucker Max, ran a web site that had a bulletin board, in which Internet users could comment anonymously regarding various topics.

After finding defamatory content against him, DiMeo sued Max. DiMeo argued that though Max did not write the defamatory comments himself, he was responsible for them "because [he] can select which posts to publish and edits their content ... exercis[ing] a degree of editorial control that rises to the development of information."¹¹¹ However, the court denied the plaintiff's claim, holding that "development of information" must involve "something more substantial than merely editing portions of content and selecting material for publication."¹¹² Later, the plaintiff appealed, and the United States Court of Appeals for the Third Circuit affirmed the district court decision, applying the same reasoning.¹¹³

Discussion of blogger libel liability

Perspective 1: Traditional libel laws should apply to blogs

The upheaval in communication technology has made defining journalism and a journalist more difficult. Judges are facing the tough question of whether Internet newspapers, Internet portals, or blogs could be considered "news media." No consensus has emerged regarding whether libel laws applied to traditional journalists should be applied to citizen journalists or to bloggers. Indeed, there seems no right or wrong answer to this question. Some scholars argue that traditional libel laws should be applied to blogs and bloggers, focusing

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 468.

¹⁰⁹ *Id.* at 454.

¹¹⁰ *DiMeo v. Max*, 433 F. Supp.2d 523 (E.D. Pa. 2006).

¹¹¹ *DiMeo*, 433 F. Supp.2d at 530 (inner quotes omitted).

¹¹² *Id.*

¹¹³ *DiMeo v. Max*, 248 Fed. Appx. 280 (3d Cir. 2007).

on the fact that some bloggers are performing journalistic roles within society.¹¹⁴ Because blogs are partially responsible for the deterioration of responsible and credible reporting, they should be regulated as traditional media is. That is, proponents of this view believe that the offensive and illegal content that pervades the Internet today should be regulated, allowing more people to enjoy the full potential of the Internet.¹¹⁵

One scholar argues that traditional libel laws should be applied to bloggers for two principal reasons.¹¹⁶ First, general bloggers read all information provided to them and then decide whether to post it, acting the same as a traditional editor or publisher.¹¹⁷ Second, many bloggers insist that their sites have credible and important information and compete with traditional media in terms of providing people with timely and credible news.¹¹⁸

Perspective 2: Exemption from liability using various remedies for the defamed

Some scholars argue that traditional libel laws are not suitable for the blogosphere.¹¹⁹ They argue for implementing various remedies for a defamed person while exempting blogs and bloggers.¹²⁰ One scholar notes, "the Internet's low barriers to entry make self help remedies such as counterspeech and online retractions both accessible to defamed parties and cost effective to online speakers."¹²¹ The original intent of CDA §230 and the broad immunity it has awarded Internet services was to facilitate the Internet's free flow of information. Given this understanding, some commentators, including Jennifer Meredith Liebman, support setting up difficult requirements for requests to disclose anonymous commenters and applying CDA §230 broadly.¹²²

While some bloggers adhere to journalistic standards, most bloggers use "hyperbolic speech for comedic effect" aimed at attracting more attention.¹²³ These common blogs are not expected to screen illegal content or conduct a high-

¹¹⁴ See, e.g., Troiano, *supra* note 82.

¹¹⁵ See Matthew G. Jeweler, *The Communications Decency Act of 1996: Why §230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3 (2007).

¹¹⁶ Troiano, *supra* note 82, at 1474.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See, e.g., Liebman, *supra* note 5; Matt C. Sanchez, *The Web Difference: A Legal and Normative Rationale against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 HARV. J. L. & TECH. 301 (2008) (The author's discussion is not limited to bloggers' liability, but his arguments could be applied to bloggers' liability cases.).

¹²⁰ Liebman, *supra* note 5.

¹²¹ *Id.* at 374-75.

¹²² *Id.* at 374.

¹²³ *Id.*

level of verification.¹²⁴ Given this reality, blogs are at a higher risk for committing libel through their postings. Nevertheless, one scholar argues that it is important for people to consider a self-corrective mechanism of the blogosphere in evaluating the risk that attends blogs' irresponsible content.¹²⁵

According to Ribstein, bloggers' amateur journalism includes several forms of interactivity such as links, comments, and trackbacks, and is subject to the page-ranking mechanisms of modern search engines.¹²⁶ Although bloggers can access the Internet and post their thoughts, ideas, or feelings, not all bloggers can secure the attention of the public at large. As Ribstein notes, the process of attracting attention, particularly through Google and other search engines, "provides a neutral mechanism for establishing credibility that avoids conventional journalism's potentially biased filtering."¹²⁷ After all, in a broad sense, the blogosphere is self-corrective, and therefore tends toward accuracy.¹²⁸ The scholars who support this idea contend that adopting self-help-based remedies to defamatory content, while ensuring the CDA's immunity to interactive online users, is the optimal solution to this the digital era issue.¹²⁹

Perspective 3: Applying slander laws to blogs

One scholar argues that the libel liability of bloggers should be treated as slander, not libel.¹³⁰ In the common law tradition, one defamed by slander, the spoken form of defaming another, is subject to an enhanced burden of proof and the amount of money for remedies is limited to some extent.¹³¹ Glenn Reynolds supports the notion of regulating defamatory content on blogs as slander for the following reasons: In the blogosphere, erroneous information can be fixed within a few minutes, so the destructive power of false information is temporary; the distribution range of that information is limited to the people who know the existence of those blogs; people pay little attention to blogs' content because blogs belong to a low-trust culture; and the parties defamed by blogs' postings could easily refute them at a low cost.¹³² Due to the development of search technology, he argues, the blogosphere has its own self-correcting function, and the fact that victims of defamatory content could easily rebut the content by themselves should provide bloggers with different legal treatment compared to

¹²⁴ *Id.*

¹²⁵ Ribstein, *supra* note 6, at 249.

¹²⁶ *Id.* at 218.

¹²⁷ *Id.* at 188.

¹²⁸ *Id.* at 218.

¹²⁹ Liebman, *supra* note 5, at 376.

¹³⁰ Glenn H. Reynolds, *Libel in the Blogosphere: Some preliminary Thoughts*, 84 WASH. U. L. REV. 1157 (2006).

¹³¹ PARK, *supra* note 10, at 1331.

¹³² Reynolds, *supra* note 130.

that of traditional media, such as newspapers and television or radio broadcasters.¹³³

However, finding anonymous bloggers is not always successful and removing all defamatory messages from blogs is virtually impossible. Also, as Anthony Ciolli noted, "if defamatory blog speech is treated as slander rather than libel, the victim would have to prove special damages in order to recover any damages unless the defamatory statement fell into one of the slander per se categories."¹³⁴

Comparative analysis and review

As noted earlier, some scholars argue that significant differences between digital libel and traditional libel allow the public to worry less about digital libel.¹³⁵ To support this argument, they suggest that the Internet has its own self-corrective function.¹³⁶ The overflow of information on the Internet makes people seek more credible and reliable sources. Because people do not take the credibility of information at face value, they filter the information selectively depending on their own judgment criteria. So, libelous material might lose significance while passing through this filtration, and, the theory goes, people eventually arrive at the truth.

However, it seems naïve to suppose that this self-correcting mechanism will always work. Due to the user-friendly technical characteristics of the Internet, damage caused by Internet media can be duplicated perpetually through "linking" and "dragging and dropping" regardless of time and location. Once damage occurs, it is virtually impossible to completely delete the problematic material from the Internet. Also, there is no established rule for screening untrustworthy content or correcting information. As one commentator said, "the extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that 'the truth rarely catches up with a lie.'"¹³⁷

Some scholars, including Hall, argue that the victim of digital libel could easily refute the libelous content by posting rebuttals.¹³⁸ Some people believe that this accessibility to the problematic content helps differentiate between digital libel and traditional libel. Though a defamed person can access and rebut the

¹³³ *Id.*

¹³⁴ Ciolli, *supra* note 15, at 865.

¹³⁵ See, e.g., Caitlin Hall, Note, *A Regulatory Proposal for Digital Defamation: Conditioning §230 Safe Harbor on the Provision of a Site "Rating,"* 2008 STAN. TECH. L. REV. 1, 2 (2008); see also Ciolli, *supra* note 15, at 860.

¹³⁶ *Id.* at 11.

¹³⁷ Lyrisa B. Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L. J. 855, 864 (2000).

¹³⁸ See, e.g., Hall, *supra* note 135; see also Reynolds, *supra* note 130.

untruthful and distorted information on the Internet, the necessity of remedies might not always decrease.

First of all, because of the speedy and free dissemination of information on the Internet, finding the alleged defamatory materials can be quite difficult. Also, as of now, the "right of reply" does not apply to ISPs in the United States. Courts have been reluctant to adopt the "right of reply," because they think it might conflict with freedom of speech. In addition, disparities still exist in accessibility to computers and the Internet.

There is no "one-size-fits-all" solution to the problem of digital libel. So, various approaches, which have been developed by each country, need to be explored and compared. In the United States, under the CDA §230, ISPs have not been considered publishers of content provided by third parties and are indemnified against libel claims. On the other hand, the South Korea's Supreme Court ruled that ISPs are responsible for the content that appear on their websites.¹³⁹ South Korea recognizes no difference between traditional forms of media and ISPs in terms of legal responsibility for libel.

South Korea and the United States over-emphasize either reputational right or freedom of expression, both of which must be protected. Each country's different approaches to regulating Internet libel fail to strike a balance between two indispensable interests. As one scholar has pointed out, the differences in relative value placed upon reputational right and freedom of expression are quite common across countries, since each country has developed its libel laws according to their own sociocultural milieu.¹⁴⁰

However, the characteristics and potential of the Internet sphere, including the blogosphere, as a public forum should be considered. This potential should not be neglected due to the excessive emphasis on the justification for the regulation of illegal content that appear on the Internet. Thus, the original intent of CDA §230's immunity should generally be applied to blogs. However, courts should reconsider the "blanket immunity" currently granted to ISPs. Courts should no longer neglect the regulation of illegal content or proper remedies to defamed parties.

In the absence of clear standards defining a journalist in today's shifting media environment, U.S. courts have struggled with outdated state shield laws directed at traditional journalists. In 2011, a U.S. District Court judge ruled that the self-proclaimed "investigative blogger," was not a journalist in the case of *Obsidian Financial Group, LLC v. Cox*.¹⁴¹ In that case, the district court judge drew a line between bloggers and journalists. For the purposes of journalistic privileges or libel protection, the judge employed a seven-factor test to decide a blogger's status as a journalist:

¹³⁹ See *supra* note 29.

¹⁴⁰ Jae Jin Lee, Freedom of the Press and Right of Reply under the Contemporary Korean Libel Laws: A Comparative Analysis, 16 UCLA PAC. BASIN L. J. 155, 196 (1998).

¹⁴¹ No. CV-11-57-HZ, 2011 WL 5999334 (D. Or. Nov. 30, 2011).

(1) [A]ny education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the [blogger] and his/her sources; (6) creation of an independent product rather than assembling writing and posting of others; or (7) contacting “the other side” to get both sides of a story. Without evidence of this nature, a [blogger] is not “media.”¹⁴²

These elements are subject to some debate. Little doubt exists that some of the requirements he suggested are essential to defining a journalist. It seems clear, however, that a significant determining factor cannot be whether a blogger has a journalism degree or any certificates. Indeed, not all journalists have an official journalism degree. Also, the second requirement to be a journalist seems controversial though it can be a seemingly clear standard in determining a blogger’s status as a journalist. Finally, as to the last requirement—contacting “the other side” to get both sides of a story—some current journalists fail to even meet this requirement while reporting.

Journalism scholar Jason Shepard suggested instead the following criteria: 1) whether news-gathering and dissemination is one of the blogger’s stated main purposes, 2) whether, as mainstream media do, news-gathering and editorial decision-making processes are employed on a regular basis, and 3) whether the blogger’s publication was sufficiently useful to invigorate public discourse within the context of public interest.¹⁴³ One thing is clear; society as a whole needs more rigorous discussion about what defines a journalism and journalist.

Over the past few years, Congress has tried to pass legislation defining a “journalism,” as well as legislation that would apply state shield laws to non-traditional journalists. According to the “Free Flow of Information Act of 2011,” introduced by Republican congressman Mike Pence, “journalism” is defined as the “gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.”¹⁴⁴ Such efforts deserve more attention since the issue is closely related to the question of whether bloggers can claim journalistic privileges and under what circumstances.

Not all bloggers are the same. Some bloggers performing journalistic

¹⁴² *Id.* at 9.

¹⁴³ Jason M. Shepard, *Bloggers after the Shield: Defining Journalism in Privilege Law*, 1 (3/4) *J. MEDIA L. & ETHICS* 186 (2009).

¹⁴⁴ See <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.2932.IH>:

functions deserve journalistic privileges. And with such privileges must come the legal responsibilities that traditional forms of media are burdened with. If a blogger is actively engaged in the gathering and spreading of information to the public, the blogger needs to take responsibility, on a "publication-by-publication basis," for what appears on his or her blog.¹⁴⁵ It seems reasonable to state that traditional libel laws should be applied to bloggers' liability when such bloggers are functioning as journalists. In that case, the distinctions among publishers, distributors, and common carriers needs to be sustained in the digital era. Blogs are different from ISPs in that some blogs perform journalistic functions as mainstream media does and bloggers are able to monitor problematic comments before they publish them on their sites.¹⁴⁶

Conclusion

Online defamation is a matter too long neglected. As one scholar noted, "It is important not to silence communication on the Internet, but it is just as important not to silence victims of defamation."¹⁴⁷ Thus, what matters most is striking a balance between the necessity of prohibiting illegal acts and maintaining the free flow of information.¹⁴⁸ Bloggers are generally powerful in that they can block or remove offensive comments provided by a third party on their web sites.¹⁴⁹ This ability differs from that of ISPs. It is possible for bloggers, unlike ISPs, to monitor all content.¹⁵⁰

Imposing severe monitoring responsibilities on ISPs, including bloggers, however, calls for a cautious approach because such a burden might lead "interactive computer services" to wholly remove potentially problematic content rather than take any kind of legal risk.¹⁵¹ The quantity and quality of online information generation would be severely diminished, if not wholly stymied.

Applying common law distinctions among publishers, distributors, and common carriers to bloggers is reasonable. Considering the original intent of CDA §230, which was designed to facilitate the free flow of information on the Internet, bloggers who act as mere distributors of comments should be exempted from liability. This immunity should be given to bloggers who do not perform much editorial control over the content they post.¹⁵² Most importantly, CDA

¹⁴⁵ Troiano, *supra* note 82, at 1476.

¹⁴⁶ See also Troiano, *supra* note 82, at 1469-75.

¹⁴⁷ S. Elizabeth Malloy, *Bloggership: How Blogs Are Transforming Legal Scholarship: Anonymous Bloggers and Defamation: Balancing Interests on the Internet*, 84 WASH. U. L. REV. 1187, 1193 (2006).

¹⁴⁸ Assaf Hamdani, *Who's Liable for Cyberwrongs?* 87 CORNELL L. REV. 901, 956 (2002).

¹⁴⁹ Liebman, *supra* note 5, at 353.

¹⁵⁰ See Troiano, *supra* note 82, at 1479-80.

¹⁵¹ See *Batzel*, 333 F. 3d 1018, 1039 (9th Cir. 2003).

¹⁵² Barry J. Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet*, A

§230's immunity should be limited to interactive communication services that perform "good faith efforts" to block or screen illegal content on their web territories. In deciding liability, a court must consider whether those interactive communication services, including ISPs and blogs, exercised such efforts.

On the other hand, bloggers should not be exempt from liability if they exercise control over their content or know or have reason to know that defamatory content exists on their blog and still fail to take any action. As one court ruled, if bloggers conducted the "development of information," which requires "something more substantial than merely editing portions of [the content] and selecting material for publication,"¹⁵³ they would have assumed legal responsibility regarding the content. Whether it is through the legislation of new laws or the revision of existing laws, applicable laws need to reflect the characteristics of blogs and bloggers sufficiently. Individual rights, including personal reputation, should not be considered a lower priority than or overshadowed by freedom of expression.

ⁱ Yoonmo Sang is a doctoral student at the University of Texas-Austin, Department of Radio-Television-Film (ysang@utexas.edu); Jonathan Anderson is a master of arts student at the University of Wisconsin-Milwaukee, Department of Journalism, Advertising, and Media Studies (jca3@uwm.edu). The authors are grateful to Drs. David Allen, David Pritchard, Jeffery Smith, Minjeong Kim, and the editor and anonymous reviewers for their suggestions during the development of this article.moro

Suggested Approach, 6 RICH. J. L. & TECH. 9, 33 (1999); *See also* Jeweler, *supra* note 115.

¹⁵³ *Batzel*, 333 F.3d at 1031.