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Business Blogging In the Fog of Law: Traditional Agency Liability Principles and Less-Than-Traditional Section 230 Immunity in the Context of Blogs About Businesses

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Businesses of every size and type are involved in blogging – a novel and changing form of corporate communication that resides in an unsettled legal world. These blogs come in different varieties. Some are written by CEOs or other C-suite executives. Some are written by employees with a particular expertise. Some are directly supported, even hosted on the web, by the corporation. Some claim to be independent of any corporate influence, control or editing. Some are simply silent on those questions. Practitioners of businesses and public relations cannot safely treat any of these corporate blogs as fully-protected First Amendment speech. This study examines the legal issues stemming from various kinds of corporate blogs, analyzes the impact of legal issues on corporate and public relations blogging, and suggests a methodology for classifying various blogs and evaluating the risks presented by each.

Introduction

The role and scope of commercially driven Internet activity continues to grow as businesses and their public relations (PR) firms enter the Internet Age and advocate their positions through the Internet and specifically blogs.¹ In October 2006 it was estimated that 8% of Fortune 500 companies had active public blogs hosted by

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¹ The term blog is short for Web log. It is fitting to refer to one of the most popular of web-based general-interest sites for a definition of such a popular web term: Wikipedia defines a blog as “a user-generated site where entries are made in journal style and displayed in reverse chronological order. A typical blog combines text, images, and links to other blogs, Web pages, and other media related to its topic.” See <http://en.wikipedia.org/wiki/Blog>. One popular content aggregator, Technorati, currently tracks 69 million blogs. See <http://technorati.com/about/>.

company employees and directed at the company and its products or services; that number rose to 10.8% by February 2008 (Fortune 500 Business Blogging Wiki, 2006 & 2008). At one such corporation, Sun Microsystems, more than 3,000 of its employees publish company-related blogs (Gordon 2006). Corporate public relations interests, independent PR consultants, educational institutions teaching PR, and professional PR organizations have also launched a wide array of blogs (Basturea 2007). This increased activity has the potential to increase the legal exposure of both public relations practitioners and corporations. This article analyzes the potential legal problems associated with Internet blogging that is sponsored by or connected to a business.

Public relations missteps with blogs have attracted considerable, and generally unfavorable, media attention. One of the public relations firms that has led the way in Internet-based strategies, including blogging, is Edelman Public Relations Worldwide. Unfortunately, Edelman also led the pack by becoming one of the first public relations firms formally criticized by the industry when it used undisclosed employees to blog for Wal-Mart, a major client. In its October 23, 2006, issue, PRWeek reported that even Edelman had acknowledged mistakes in the matter. The crux of the problem was the lack of transparency in a blog (walmartingacrossamerica.com) funded by Working Families for Wal-Mart, which was established to portray the company favorably. PRWeek reported that Edelman CEO Richard Edelman conceded that though disclosure “is implicit in everything we do,” his employees failed to “do so in this case” (Nolan, 2006; Sullivan 2006).

Three months later, PRWeek reported a second problem for Edelman. This time the agency had offered 90 computer-industry bloggers free high-end laptop computers loaded with Microsoft’s Vista operating system. (Microsoft hired Edelman to lead the January 30, 2007 launch of Vista through Edelman’s Me2Revolution office.) Although Edelman “covered all disclosure bases,” the outcry in the blogosphere was fast and furious with bloggers criticizing the tactic as an attempt to influence bloggers to post positive reviews of the operating system (O’Brien, 2007; Are Freebies A Blogosphere Taboo, 2007). Another corporate blogging problem occurred in December 2006 when it was revealed that a blog featuring posts from a supposedly cool hip-hop artist who desperately wanted a Sony PSP for Christmas was actually a viral marketing campaign undertaken on behalf of Sony Computer Entertainment America (Gupta 2007). Even a city government entered this ignominious picture when an official engaged in “flogging” or fake blogging. Peter Ragone, the director of communications for embattled San Francisco Mayor Gavin Newsom, admitted to using a false identity to attack the mayor’s critics in local blogs (Altus, 2007). There is also a burgeoning pay-to-blog niche business developing on the Web. For a fee, these online services will connect advertisers with bloggers who are paid to post reviews of the company’s products or services, sometimes without notification of the paid nature of the post (Kaye, 2006). The potential backlash against these paid posts is obvious.

The potential legal risks of corporate or business blogging for public relations purposes are as undeniable as the risks of public criticism for unethical or at least

questionable conduct. In both of the Edelman instances, critics (be they specialist bloggers, the news media or consumers) concluded that a public relations entity (a firm in this case) employed a strategy by which readers would either think that they were reading real, independent blogs written by actual shoppers visiting Wal-Mart (not Wal-Mart's employees or representatives) or think that they were getting unbiased reviews of the Vista operating system. Aside from the interesting ethical issues involved with the sponsorship or support of blogs that do not disclose a potential bias, there is the question of potential legal liability. Is there some liability for deception or error – real or perceived? Is this corporate free speech? What are the lines that distinguish blogs for which the corporation or public relations firm may be responsible (legally as well as ethically) and those that are truly independent and for which the corporation or firm has no liability? Does adoption of a policy on employee or agent blogging solve the problem or make it more complicated and potentially worse?

As two commentators recently observed, “[n]o laws specifically regulate ‘blogging,’ and there is virtually no case law to provide guidance” (Gordon & Franklin, 2006). This represents an interesting observation because even in the possible absence of directly applicable statutes or regulations, there is in fact a body of statutes, regulations, and case law that is potentially relevant. The problem is that not all blogs present the same legal risks. The threshold question in any liability analysis must determine the identity of the publisher of the problematic statements – be they part of blog or a more traditional print or broadcast form of communication. This article examines that crucial question in four sections. First the article sets forth a method for categorizing business blogs based on their content and relationships, if any, to their business subjects. Second, the article surveys the law of agency and vicarious liability as the foundation for any assignment of publisher status to a business that did not identify itself as a publisher of a blog. Third, the article examines Section 230 of the Communications Decency Act of 1996² in the context of defamation liability for a blog. Finally, the article concludes by evaluating the tension, if any, between traditional agency analysis and Section 230 analysis and by noting that though some businesses might be tempted to assert that under that section they are off the liability hook for blogs that don't bear the corporate name as publisher, the question is not so simple.³

Classification of Corporate-Reflective Blogs

Corporate-reflective blogs can be generally classified as shown below in Table 1. Any chart or table purporting to delineate legal risks in any activity must of necessity be general. Legal risks are fact-sensitive and rarely fall neatly into boxes in a diagram, but generally fall somewhere along a continuum from higher risks to lower risks.

² 47 USCS § 230 (2007).

³ For the sake of simplicity the article uses the term “corporation” to refer, unless otherwise specifically noted, business entities generally.

Nonetheless, aids such Table 1 can visually provide some guidance if used with those caveats in mind.

Corporate-reflective is used to describe these blogs because the distinction between them and all other blogs turns on their relationship to or content about or affecting a particular business or enterprise. These blogs raise issues of *corporate control and responsibility* because they may reflect, positively or negatively, upon the enterprise, its products or services, its competitors or its business environment and thus influence customers, shareholders, and the public generally. A corporate actor has varying degrees of potential legal exposure and responsibility for any blog that affects the business of the corporate actor and is somehow supported, operated or, perhaps, at least tolerated by a corporate actor directly or through its agents. Not all corporate-reflective blogs are necessarily the same when it comes to attaching liability or responsibility to the business about which the blog relates. The place to begin, therefore, is the classification of the various types of these blogs.

Table 1 Classification of Corporate-Reflective Blogs based on Content and on Blog's connection, if any, to Corporation. Based on Agency Law Principles, potential corporate liability for the blog is assessed. Legend: L = Liability for Blog; VLL= Very Likely Liability; LL= Likely Liability; PL=Possible Liability; UL= Unlikely Liability; NL= No Liability					
	Content: Directly Favorable to Corp.	Content: Indirectly Favorable to Corp.	Content: Directly Unfavorable to Corp.	Content: Indirectly Unfavorable to Corp.	Content: Unrelated to Corp.
Corporate Directed & Controlled Blog: Internet/ Intranet	L LL	L LL	L LL	L LL	L LL
Corporate Supported, But Not Directed or Controlled: Internet/Intranet	VLL LL	VLL LL	VLL LL	VLL LL	LL PL
Corporate Employee or Agent w/o Corporate Support, but with Acquiescence: Internet/ Intranet	PL PL	PL PL	PL PL	PL PL	UL PL
Known to Corp., but Unrelated Outsider (i.e., Third Party)	UL	UL	UL	UL	NL
Unknown to Corp. or Opposed by Corp. * (*Any liability for manner of opposition is beyond the scope of this article.)	NL	NL	NL	NL	NL

Although questions of degree and emphasis suggest a continuum rather than discrete boxes or groupings, corporate-reflective blogs may be classified generally according to two key criteria that form the axes of the graph shown in Table 1 above. First, there is the *corporate control, resource or sponsorship criterion*, which is divided into five levels, though three of those levels consist of two subcategories – one for Internet-based blogs and one for Intranet-based blogs. This is the “y” or vertical axis of Table 1. Second, there is *the nature of the content of the blog generally or of a particular statement or post in a blog*. This is the “x” or horizontal axis. Taken together these criteria classify blogs into 40 groupings (including the sub-categories that distinguish between Internet-based blogs and Intranet-based blogs, which by definition can exist only when a corporate Intranet is available). These groupings have varying risk levels in terms of corporate liability (which would include the liability of a client corporation or business or the public relations firm depending on which is the subject or beneficiary of the blog).

On the high end, **corporate control**, we have the blogs that are written and posted by employees or agents (e.g., public relations firms) for the corporation and at its expense (within the scope of the employment, agency or contract and for payment of some form of compensation). Corporations may identify themselves as the publishers on the face of these blogs, but that will not be the case with all of the blogs. The next level, **corporate support**, includes blogs written and posted by employees or agents without actual compensation or direction by the corporation, but with the support and use of corporate resources (e.g., information and information technology, time, encouragement and use of trademarks or other intellectual property of the corporation). This could include, for example, the hosting of the blog on a company server. On the third level, **corporate acquiescence**, are blogs that are neither directly nor indirectly supported by the corporation, but are known and at least tolerated by the corporation and operated by an employee or agent who may have access to corporate information and, more importantly, may be seen as authoritative by the reading public as a result of his or her connection to the corporation. On the fourth level are blogs **known** to and tolerated by the corporation, but operated by someone with no present connection to the corporation and without the use of corporate resources or support. Finally, there are the **unknown (to the corporation) or actively opposed** blogs (opposition could come, for example, in the form of legal action, non-cooperation, or public statements or other actions that distance the corporation from the blog). These five categories form the “y” axis of Table 1.

The second key criterion, or “x” axis in Table 1, is content. This looks at the information conveyed, or omitted, by the blog generally or by a particular post on the blog. First, there is content that is **directly positive** about the corporation, including, for example, its products or services, financial stability, future prospects, environmental record, and labor practices. Second, there is content that is **indirectly positive** in that it favorably reflects upon a matter of interest to or relevant to the corporation without directly involving or mentioning the corporation. Third, there is content that is **directly**

unfavorable to the corporation's interests. Fourth, there is content that is **indirectly unfavorable** to the corporation or that reflects poorly on some matter of interest or relevance to the corporation. Fifth, there is content that is or appears **unrelated** to the corporation or its interests. Including negative and unrelated information might strike one as needless until one considers the potential exposure a corporation may have both for incorrect negative information that drives a stock price downward or for defamation liability generally.⁴

Two related matters deserve consideration. One is the distinction between Internet-based and Intranet-based blogs. This is an important distinction that is really a matter of accessibility to the blog. One could argue that a limited-access, password-protected Intranet site intended only for employees or some other limited class of users, should not subject the corporation to liability for broader public distribution or consumption of the information any more than the theft and subsequent publication of corporate secrets should subject the corporation to liability. This is perfectly logical in the abstract, *provided access is truly controlled and limited* — and the number of corporate agents, employees or insiders with access is not so large that secrecy is all but impossible. The distinction provides less protection, however, when the essence of the complaint against the corporation is that relevant information (perhaps negative information about financial performance, sales or test results) was shared with a select number of people, but denied to the public at large.⁵ For example, DaimlerChrysler AG operates a by-invitation only blog used to brief journalists on the back-story about the company (Carroll, 2006). The distinction between internal and external blogs is further

⁴ For example, a blog that opined on a regulatory matter that might affect the assets or prospects of business and did so to manipulate the market or public opinion for the benefit of a business or investors would be a blog worthy of inquiry even if it did not mention or even allude to the corporation by name. Similarly, a blog that defames a competitor may benefit a corporation even if the beneficiary corporation is not identified. This is not included to suggest that corporations and public relations firms must become the police of all blogs, books, newspapers or other forms of communication. But, in light of the reach and speed of the Internet and the potential for anonymous communications or communications attributed to others when in fact they may be directed or motivated by an otherwise unseen and undisclosed corporate agent, these issues may take on greater importance in future litigation and regulatory activity.

⁵ Interesting examples from the field of securities law and regulation abound in this regard. Regulation FD (meaning "Fair disclosure") became effective in October 2000 to address selective disclosure of relevant business information to a favored few investors and analysts to the disadvantage of the larger public. The regulation provides that when a securities issuer (which could be any number of publicly traded corporations, or person acting on its behalf, discloses material nonpublic information to certain persons (*e.g.*, securities market professionals and holders of the issuer's securities who may trade based on the information) the company must make public disclosure of that same information simultaneously (for intentional disclosure) or promptly (for non-intentional disclosure). *See* 17 C.F.R. § 243.100-103 (2000). The potential applicability of these and other related regulations to blogging is obvious. And, whether the corporation releases, or fails to release, the information itself through its own blog, through an Intranet-based form of communication (as opposed to a more open Internet-based tool) or does so more surreptitiously through blogs that might not be readily identified with the corporation will likely be a difficult, if not outright poor, defense stratagem. Courts and investigators will, and should, quickly pierce any digital veil obscuring corporate misdeeds.

blurred with the recent introduction of software that allows blog owners to install variable access control to individual blog elements they publish (Fadner, 2006). This explains in part the need to consider both positive and negative content and the three subcategories shown in Table 1 for Corporate Directed & Controlled, Corporate Supported, and Corporate Employee/Agent blogs.

The other consideration is essentially the source of the content. However, the source question is what this entire inquiry is designed to resolve and not a separate inquiry in itself. Absent special circumstances, a corporation is responsible legally for statements of which it is the source – whether through the oral or written statements of or made through its agents (e.g., public relations personnel) or its employee-spokespeople.⁶ The statements can be, for example, press releases, advertisements, annual reports or information provided to news reporters and others.⁷ This is already black-letter law and not controversial. The inquiry here asks when blogs and other similar Internet-based forms of new communications are likely or unlikely to be attributed to the corporation or, in other words, viewed as communications for which the corporation will be deemed the source for liability purposes. The easiest to evaluate fall, as one would expect, on the two extremes of Table 1: the Corporate-Directed & Controlled (clear liability) and the Unknown & Unrelated Blogs (no liability). The definition of the different levels is a fact-sensitive inquiry specific to each blog.

The Law of Agency and Vicarious Liability

The law of agency or vicarious liability is central to any effort to determine when a business or any other third-party might be liable for the communications actually published by another person or entity. When a corporation directly publishes a blog, or anything else for that matter, it should come as no surprise that the corporation has liability for that which it publishes – as it would for any of its other forms of expression, from press releases to advertising.⁸ When the corporation retains an outside public relations firm or consultant to prepare and publish its corporate blog, the only difference may be the availability of two potential litigation targets or defendants (the corporate client *and* the public relations firm) in the potential legal action by the private plaintiff or government regulator. The two parties may by contract shift the risk or liability between them through an indemnification clause, insurance or other device (assuming the liability shift does not violate public policy), but that is purely a matter

⁶ *See, e.g.*, *TSC Industries v. Northway*, 426 U.S. 438 (1976); *FTC v. Colgate-Palmolive*, 380 U.S. 374 (1965).

⁷ *See, e.g.*, *Central Hudson Gas & Electric v. PSC of New York*, 447 U.S. 557 (1980); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

⁸ The terms “published” and “publication” are used herein to indicate speech by the corporation through its spokespersons, agents, executives, employees and anyone else for whom the corporation may bear legal responsibility and it assumes that it was read or heard by at least one person other than the corporate author or speaker. These terms are also legal terms of art in some contexts, including the law of defamation. *See generally* *Ostrowe v. Lee*, 175 N.E. 505 (N.Y. 1931).

between them (Vraa & Sitek, 2006). Generally, no agreement between them will affect the rights of the aggrieved private party or the action by a regulator, though it might affect who ultimately pays what to whom if there is litigation.

The interesting problems, and occasional surprises, come when the corporation did not itself publish the blog in question (or any other form of communication), but is held responsible for the publications and words of someone else under the law of agency or respondent superior – often known as the *doctrine of vicarious liability*.⁹ This doctrine determines when a principal is liable for the acts of someone deemed to be the agent or legal servant of the principal (Fleming, 1954). These doctrines have the practical impact of making the business responsible for the costs (e.g., liability for defamation, copyright infringement, and regulatory violations) associated with the business by first deciding who is acting as an agent for that business and then determining if that agent's acts should be ascribed to the business because the acts were within scope of the agency or employment (Dalley, 2002; Whitmore, 2006). Vicarious liability imposes legal liability on a party other than the actor (e.g., the publisher or speaker) based on the relationship between the parties (Kadish, 1985).

The three key elements of any agency relationship include (1) *consent by the principal and agent*, (2) *control by the principal of what the agent is doing*, and (3) *conduct by the agent on behalf of the principal within the scope of the relationship*.¹⁰ Consent may be shown by an agreement or by mutual benefit to the two parties – though the benefit need not be the same or even monetary – and often by proof of intent (Kadish, 1985). Control – often described as the essence of the test for an agency relationship – can be shown by actual direction of the means of accomplishing the work or by the right to control, even if it was not exercised in a specific instance (Dalley, 2002). Conduct within the scope of employment or the agency relationship requires that the action be deemed part of the general purpose for which one is serving the principal (formerly known as the master), though scope is often a broader term than one might assume.¹¹

The dividing line between corporate liability and non-liability for any communication published by someone else (i.e., a third party) is complicated by the

⁹ See RESTATEMENT (SECOND) OF AGENCY §§20, 220 (1958). The term has been defined as “[i]ndirect legal responsibility; for example, the liability of an employer for the acts of employee, or a principal for torts and contracts of an agent.” BLACK’S LAW DICTIONARY 1404 (5th ed. 1979).

¹⁰ See RESTATEMENT, *supra*, note 9, at §§ 1, 225.

¹¹ See RESTATEMENT, *supra* note 9, at §§ 228-229. For example, the conduct must be of the kind for which the agent or employee was engaged, must occur substantially in the time and place authorized, and must be actuated at least in part to serve the principal (*i.e.*, the corporation). If the conduct has the same general nature of what was authorized or incidental to or commonly part of what was authorized, then the conduct will be held within the scope. For example, if a corporation uses an employee or agent to blog, even a defamatory entry – though not what the corporation wanted – will be likely deemed within the scope of that activity.

fact that these third parties may fall into one of three different categories. One type of third party is entirely unrelated and perhaps even unknown to the corporation. The corporation is least likely to be liable for this type of blogger, though as shown below one cannot necessarily assume there will never be any liability.

A second type is the independent contractor of the corporation. Here the corporation generally would not have liability beyond its own actions or its use of the results of the independent contractor's work (DeCarlo, 1997). These relationships generally limit corporate liability for the contractor's actions, but a truly independent contractor is essential to the legal shield and true independence can be elusive. Furthermore, if the end result for which the corporation contracted with the independent contractor is a blog or public relations work in general, then the likelihood of the corporation escaping liability for the blog or related public relations effort is substantially reduced, particularly if the blog or published statements bear the corporation's name.

The third type is the agent or inside person (though not necessarily an insider in the technical sense used in the securities laws) such as an employee or agent acting within the scope of employment or the agency relationship with the corporation. It is the factual line dividing true independent contractors from agents or employees that is often most difficult for courts and businesses to discern (DeCarlo, 1997). Although many tests exist for determining whether an entity is an independent contractor or an employee (or agent), the central issue is generally the degree of control or right to control by the principal or corporation. Control or right to control (even if not exercised) of the manner and means as well as the results of the work of the contractor is a hallmark of an employment or agency relationship for which the corporation will have liability.

Other factors are also important. For example, *performance of the work* (e.g., blog writing) *at the direction of the principal or corporation* (as opposed to work done without direction or supervision) *and contributions to the blog or work done with tools, office space, supplies or other resources provided by the corporation* would weigh in favor of holding the corporation responsible for the blog of an agent or employee (Goldman, 2006). Bloggers not engaged in an occupation or business distinct from the business of the corporation would be more likely deemed the employees or agents of the corporation as well. In effect, these questions seek to determine who should have the responsibility for the costs associated with what business. In summary, the liability exception for independent contractors is meant to exclude from the liability of the corporation those risks that are not an integral part of its business (Fleming, 1954). And, while one might quibble that a false or otherwise problematic blog posting could never be part of an employee's or agent's scope of employment or agency with the corporation, the law is not so neat. If the blog is deemed within the scope of the employment or agency, then even false, illegal or otherwise problematic postings by that employee or agent may be deemed within the scope of expected activity on behalf of the corporation and there will be potential liability.

In practical terms, this means that corporations and their public relations firms must examine the totality of circumstances surrounding a particular blog to assess potential liability. For example, these factors include:

1. Control or the right to control (e.g., edit, review, or hold) a blog;
2. Other factors suggesting control of, contributions to or support of the blog (e.g., use of corporate computers, time, office space, servers, information, and other resources);
3. The retention and acts of a public relations firm and its agents regarding the blog;
4. Terms of any corporate policies as well as training programs;
5. Evidence of past practices in compliance with or contradiction of those policies;
6. Evidence of cooperation with the blog through interviews or other special access; and,
7. Any benefit to the corporation of a blog, even if the benefit was not solicited by the corporation.

The easiest case should be the blog of the unrelated third party (neither an employee nor an agent or contractor of the corporation) – the blogger who doesn't use any corporate resources. One may typically assume there is no "employment" or contractual agency relationship and, therefore, no control by the corporation. The facts may warrant a closer examination, however, particularly with regard to the questions of consent and benefit.

If one could show that corporation (through its executives or responsible agents) had no knowledge of a blog (unlikely as that may be in an age of electronic clipping services and search engines), then any argument for corporate liability for that blog would defy common sense and fundamental fairness. If the corporation in fact had knowledge of the blog, however, and the blog somehow benefited the corporation, then other questions might arise. For example, did corporate representatives grant interviews, provide access and information, otherwise assist or feature the blog in its internal employee or external public relations materials? Is the corporation an advertiser on the blog? Positive answers to any or a combination of those questions might lead to the argument that the corporation is exercising sufficient *de facto* control over the blog or at least a sufficiently close relationship to result in liability. The mere act of responding to interview requests by a blogger, without more evidence of a strong connection, would be a thin basis for corporate liability. Significant advertising

purchases and special access to information coupled with a benefit to the corporation may, however, change the liability equation by making the third-party blogger seem more related than unrelated to the corporation's interests. In this situation, the independence of the blog from the corporation generally will be an important factor. Just as under the independent contractor tests and the vicarious liability doctrine courts will often look at the contractor to see if his or her business is real (e.g., it has significant other customers as well as its own investment, capital, employees and facilities), the courts will likely look at the evidence of independence for the blog. *Time* magazine, for example, and its blogs will almost certainly be viewed as independent of General Motors no matter how much advertising the automobile maker buys. The same cannot necessarily be said about much smaller publishers or bloggers for whom an advertising purchase from one company might mean the difference between continuing to function and folding. Even the apparently unrelated blog is, therefore, potentially a matter worthy of a careful evaluation.

If one cannot dismiss out-of-hand potential liability for even the unrelated third-party blog, then one must be particularly vigilant with blogs by related parties – be they independent contractors, agents or employees. Again, this is a fact-intensive inquiry and a question of degree. An employee blog may not be a risk if the employee publishes the blog on his or her own time and computer and for his or her own reasons (i.e., not because a manager or executive encouraged it or because it fits into his or her bonus goals or job description). In other words, the employee publishes the blog beyond corporate control and for his own benefit or amusement and not specifically for the benefit of the corporation, though the two may overlap. A key question in this context will be the apparent authority or relationship of the blogger with regard to the corporation. If on the face of the blog, the reasonable reader might conclude the blogger is writing from position of corporate authority or knowledge and might thus rely on the blog, then there may be potential liability if the corporation had knowledge and did nothing to counteract the appearance of authority.

Assuming the corporation is deemed to have knowledge of the employee's independent blog, one must then consider the issues of consent and benefit (even if indirect). One might argue that acquiescence by the corporation to the employee's blog is indicated by a failure to take any action against the employee, though frankly this would seem contrary to fundamental free expression values (though it might well be permissible) absent some direct consequence of the blog for the corporation (Gutman, 2003). The consequence could come in the form of a benefit (e.g., pumping the stock market or endorsing products) or even a detriment (e.g., criticism of customers or products).

In either case, one key question will be the terms of any applicable corporate policy or code of conduct. Whether the very existence of such a policy or code increases or decreases the likelihood of corporate liability for the blog will depend on its terms and the particular factual scenario in which it is applied. A policy that requires or permits prior review of a blog before publication or corporate post-publication

removal of the blog would tend to support corporate liability because it would tend to indicate corporate control. Similarly, any policy directing or attempting to direct the content of the blog would be ill advised if the corporation is not prepared to risk liability for control. So, too, would a policy or compensation plan that assigned a blog to or rewarded an employee or agent for publishing a blog because that would suggest the corporation is the real publisher.

Different policies would tend to reduce the likelihood of a finding of corporate control and liability. A policy providing that if employees blog about the corporation, or anything else, they must do so on their own time and with their own resources and without suggesting any role or endorsement by the corporation would tend to argue against corporate control. So, too, would a policy requiring that employees take specific and reasonable steps to inform readers they are not speaking on behalf of or with the endorsement of the corporation. Policies stating that employees are expected in any blog, as they are in matters generally, to respect all applicable laws and the rights of others would seem to state a rather unobjectionable goal. One might even include specific examples, including, without limitation, intellectual property rights, reputational and privacy rights, the securities laws, antitrust laws and consumer protection laws. One might also expect to see a policy stating that the employee agrees that he or she is not blogging at the request of, under the direction or control of, or for the specific benefit and purpose of the corporation.

This leaves the question of corporate-supported blogs (beyond those deemed actually controlled or published by the corporation). Is the corporate client always on the legal hook for these blogs because the bloggers use company computers, time, financial support or other resources? The not-so-simple answer is yes and no – depending on the context of the legal claim. The essential question here is whether the corporation, if it supports or facilitates a blog, is better off staying out of the content-control business or accept liability and just jump into content control to limit liability by presumably fixing problems before they are published. Again, corporate policies will be very relevant, as shown above in the context of unsupported employee-agent blogs. Here one would expect to find more expansive and detailed policies might be advisable – in part as a condition of allowing the employee-agent to use corporate resources. For example, the policies (as well as training) might demand more explicit disclaimers and content standards to protect the rights of others as well as the corporation. Topics might even be limited to those not likely to generate damages or losses to third parties.

A contrary approach would keep the corporation out of any such control over content (beyond reserving the right to suspend access or postings) and argue the corporation is simply playing the role of access provider, while insisting the blogger in no manner associate the blog with the corporation. This approach is essentially aimed at invoking the protection of Section 230 of the Communications Decency Act of 1996 for Internet service providers who are not acting as publishers of content. This gambit may have its risks, however, as shown below.

Corporate Blogging, Defamation Law and Section 230

A key example of the substantive liability that can arise from any corporate communication, including a blog, is the law of defamation. This section applies the methodology of the previous section and the general agency law principles to this specific legal context and examines a specific statutory defense that may apply in some cases – not only in the context of defamation claims, but in any claim whatsoever if the corporation or public relations firm is deemed the equivalent of an interactive computer service provider and not the publisher of the information.

Although a thorough examination of the elements of and defenses to defamation claims is beyond the scope of this paper, a summary of the essence of these claims will be useful. To win a defamation claim, a plaintiff must, at a minimum, identify the defendant (i.e., the publisher) and establish that the defendant:

1. published, uttered or disclosed to at least one third person
2. a false statement
3. of fact
4. concerning the plaintiff (an individual or business) that
5. defamed or, in other words, injured the reputation of the plaintiff
6. causing actual injury (i.e., losses) to the plaintiff
7. under circumstances that were not privileged or, in other words, protected by law and
8. that demonstrated the fault of the publisher defendant.¹²

¹² The precise elements of a defamation claims can vary to some degree from state to state and case to case, but the essence of the claim is publication of a false and defamatory fact about another person, though the nature of the person or subject of the defamatory statement may affect the fault standard applicable to the claim. *See* REX S. HEINKE, *MEDIA LAW* §§ 2.1-2.16 (1994); ROBERT D. SACK, *SACK ON DEFAMATION* §§ 3-1-- 3-5 (3d. ed. 2006); *see generally* *New York Times v. Sullivan*, 376 U.S. 254 (1976).

Jurisdictional questions (i.e., what courts – state or federal, homegrown or foreign) are among the most interesting and vexing when dealing with Internet-based communications, but those are largely beyond the scope of this article.¹³

The defamation element at issue in this inquiry is the basic or threshold element: **Identification of the publisher or defendant.** The methodology of section one and the basic laws of agency show this is a fact-sensitive inquiry. Defamatory content published on corporate directed and controlled blogs (that is, with corporate control and sponsorship) will generally trigger liability, at least for content authored by either a company employee or agent, such as a CEO or an employee of a contracted PR firm. Potential liability would likely extend to both blogs published on the Internet and on the company's Intranet, even though in the latter case actual publication may not be as widespread and thus may affect damages. If access to the Intranet is so narrow that one could argue that communication was not in fact published beyond the corporate actors protected by a legal privilege to communicate amongst themselves on matters

¹³ Given the ubiquitous nature of the Internet, it is not always clear how the site of publication is determined or which state or country should hold jurisdiction. Once the jurisdictional issue is settled it must then be determined which state or country's law should be applied in the case. Jurisdictional cases without the Internet complication have often asked if the publisher targeted a plaintiff or readers in a particular state before deciding to allow jurisdiction in that state even though the publisher had no or very limited physical contacts with the state. *See, e.g.,* *Calder v. Jones*, 465 U.S. 783 (1994); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). The same rationale has been employed in Internet cases. *See, e.g.,* *EDIAS Software Int'l v. Basis Int'l. Ltd.*, 947 F.Supp. 413 (D. Ariz. 1996); *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998). Other courts have held that posting on the Internet is reason enough to know the information would be received or the harm felt in another state and thus would be a basis for jurisdiction in that state. *See* *Panavision Int'l. v. Toepfen*, 141 F.3d 1316 (9th Cir. 1998); *Telco Comm. v. An Apple A Day*, 977 F.Supp. 404 (E.D. Va., 1997). Of course, jurisdiction might be defeated if the court concludes there was insufficient evidence of targeting or focusing on residents in some distant jurisdiction. *See, e.g.,* *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002); *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). Or, one could be hauled into a very distant court as happened to Dow Jones over the online content of *Barron's* magazine in a decision of the High Court of Australia in *Dow Jones & Co. v. Gutnik*, [2002] HCA 56 (10 December 2002)(found at <http://www.4law.co.il/582.htm>)(the case subsequently settled during an out-of-court mediation).

of mutual interest related to the enterprise, then liability may possibly be avoided altogether.¹⁴

Liability for the corporation in the second classification—where the company deploys its resources but does not actually direct or control the blogs written by its employees or agents (corporate supported blogs)—presents a more complicated, and often closer, case. Nevertheless, making corporate resources available to facilitate business-related blogging efforts by employees or contracted agents should trigger closer scrutiny. As the amount of corporate support for such blogging efforts increases, the more likely the corporation will be deemed the publisher of the allegedly defamatory statements under agency law. Hosting business-related employee blogs on company-operated or controlled servers may alone be sufficient to trigger liability, but additional company actions would bolster the case for liability. For example, encouraging employees to set up blogs about the company, providing technical assistance, and publishing codes of conduct for those engaged in blogging activities would all suggest company responsibility for the publication of allegedly defamatory material by an employee or agent. These factors, alone or in some combination, could suggest both some degree of corporate control as well as consent and benefit.

The third category of blogs, those published by an employee or agent but neither directly nor indirectly supported by the corporation (corporate acquiescence), presents a murkier situation. In this case, several factors are likely to be taken into consideration by the courts. Assuming that the company was at least aware that the private employee blog existed and discussed company matters, whether the company encouraged or merely acquiesced to the employee's blogging may be of some decisional significance. Businesses encouraging employees or agents to establish private blogs in an attempt to reach out to business associates or the general public could face liability. Additionally, if the blogger could be seen by readers as an authoritative representative of the corporation (a determination that may be influenced by the employee's position in the corporate hierarchy or inferred by the blogger's access to corporate information reflected in the postings) the corporation might have

¹⁴ The common law and a number of state statutes provide specific defenses or privileges that protect certain communications from defamation liability, including, for example, those privileges that protect members of a common enterprise, association or business who are communicating amongst themselves, provided generally they are doing so in good faith and only on matters of interest to the enterprise. *See* RESTATEMENT (SECOND) OF TORTS § 596 (1977); SACK, *supra* note 13, at §9.2.3. In addition, many states protect good faith communications from a past employer to a prospective employer (i.e., reference checking) about an employee's work performance and credentials. *See* RESTATEMENT (SECOND) OF TORTS §594 (1977); SACK, *supra* note 12 at 9.2.2.1; *see, e.g.*, In addition, many states protect good faith communications from a past employer to a prospective employer (i.e., reference checking) about an employee's work performance and credentials. *See* RESTATEMENT (SECOND) OF TORTS §594 (1977); SACK, *supra* note 12 at 9.2.2.1; *see, e.g.*, § 768.095 Florida Statutes (2007)(the Florida statute, like many others, provides civil immunity to the employer responding to inquiries from a prospective employer (or the employee) for references “unless it is shown by clear and convincing evidence that the information disclosed by the former or current employer was knowingly false or violated any civil right of the former or current employee” under state law).

liability for the blog. While defamatory comments posted on a loading dock worker's private blog about a shipper's deficient on-time performance may not extend to the corporation, the same comments on a private blog by an executive vice-president for shipping operations could trigger primary publisher liability.

Liability is unlikely to exist in the last two classification categories. Defamatory comments published by a person unrelated to the business, even if the person and the private blog are known to the business, will not meet the publication requirement required in a libel action. For example, the corporation could not be held responsible for the comments of a former employee made on that person's private blog. Of course, if a corporate representative responds to an interview request and is quoted, there may be liability depending on the comment, but that is liability flowing from the comment. Further, if the corporation so involved itself in this otherwise unrelated blog (perhaps, by granting special access, by promoting the blog, by purchasing significant advertising, or otherwise assisting the blogger), then the blog would appear less an unrelated blog and possibly more of a blog that is somehow connected to the corporation. The easiest case would be the fifth classification (unknown or opposed by the corporation), where the blogger is unknown to the corporation and any liability for it would defy common sense.¹⁵

Another source of potential liability with corporate blogs, and one of the reasons for paying particular attention to each of the categories set forth above, is the potentially defamatory comment posted by a third party responding to the blog (Blumstein, 2003). Many corporate blogs allow readers to post reply comments that are automatically published and appended to the appropriate thread on the blog. Because interactivity and linking are the hallmarks of blogging, the third-party post may also quickly replicate itself on other servers via RSS feeds or even cutting and pasting.¹⁶ Even though a defamatory comment may be removed from a company's server (and access blocked), the information may nevertheless remain prominent in the blogosphere.

¹⁵A related issue with a twist concerns the anonymous blogs or postings to blogs. To some degree this question is little different from anonymous publications generally. Before any plaintiff can sue for defamation (or anything else) he or she must determine who published the offending statements. Although the Web and various software tools provide means of concealing one's identity, the Web also provides search clues and technological strategies that will be useful depending on the relative sophistication of both the publisher and the potential plaintiff. New software products that could be used to authenticate the identity of posters are now being developed. If such digital identity products become available and sufficiently functional, corporate-reflective blogs might consider requiring that posters verify their identities before being allowed to publish comments.

¹⁶ An RSS feed is essentially a series of various formats for feeding or publishing on the Web frequently updated contents such as blogs or podcasts. The differences between the various formats are beyond the scope of this article.

In traditional defamation cases, publishers of defamatory comments by third parties are liable for damages, reflecting the old adage that tale bearers are as bad as tale makers.¹⁷ For example, a newspaper's publication of defamatory quotations attributed to a third party does not absolve the paper from potential liability, even if the publication was in the form of a signed letter to the editor.¹⁸ A comparable situation exists, but only in part, for the blogosphere. If a blog publisher affirmatively places the defamatory comments of a third party as part of his or her own posting, the publisher (and company at least in the circumstance where the blog had sufficient linkages to establish company involvement) would face potential liability. However, if the blog functions in such a manner that third-party readers may independently post their defamatory replies or comments on the blog, then there is a substantial argument under current federal law that the publisher (including the company) would likely escape liability.

This broad protection against primary publisher liability appears to apply even in cases where the blog owner exercises some editorial discretion by deciding to publish, withdraw, or make minor alterations in third-party content. This broad based immunity has evolved through judicial decisions interpreting section 230 of the Communications Decency Act of 1996 (CDA).¹⁹

The U.S. Supreme Court struck down the indecency provisions of the CDA in *Reno v. ACLU*,²⁰ and heralded the Internet as “a wholly new medium of worldwide human communication,”²¹ concluding that prior decisions “provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”²² However, left untouched by the Court was section 230(c) of the law, the so-called “Good Samaritan” rules that protect publishers who screen and block offensive material on the World Wide Web. The law states that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any

¹⁷ This is commonly known as the law of republication under which the republisher of a defamatory statement is as liable as the original publisher absent a legal privilege protecting the republication. *See, e.g.,* *Liberty Lobby v. Dow Jones & Co.*, 838 F.2d 1287 (D.C. Cir. 1988)(republication liability generally); *Edwards v. National Audobon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977)(media neutral reporting privilege for matters of public importance).

¹⁸ *See, e.g.,* *Madsen v. Buie*, 454 So. 2d 727 (Fla. Dist. Ct. App. 1984)(letter to editor questioning qualifications of psychologist, including statements of fact, held possible basis for defamation suit against newspaper republisher); *see generally* Donna R. Euben, *Comment: An Argument for an Absolute Privilege for Letters to the Editor After Immuno AG v. Moor-Janknonski*, 58 BROOKLYN L. REV. 1439 (1993).

¹⁹ Public L. No. 104-104, § Sec. 502, 110 Stat. 133 (codified at 47 U.S.C. § 223).

²⁰ 521 U.S. 844 (1997).

²¹ *Id.* at 850 (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

²² *Id.* at 870.

information provided by another information content provider.”²³ It would appear that the owners of business blogs that provide for interactivity would fall under the law’s definition of an interactive computer service and, similar to Internet Service Providers, chat rooms, bulletin boards, listservs, and newsgroups, be immune from liability for third party content.²⁴ The key to the availability of this immunity will be keeping the corporation or PR firm from being deemed a publisher of the content – essentially the same analysis one would perform under the agency doctrine explained above.

A long line of case law has been generated by an expansive judicial interpretation of section 230 to Internet Service Providers (ISPs)²⁵ and other types of information service providers that post third-party content.²⁶ Nonetheless, a number of judges and commentators have argued that the law should not be read to support immunity in cases where the interactive computer service provider has knowledge (i.e., corporate sponsored, assisted or acquiesced)—acquired by a complaint or independently—that material posted on their service contains defamatory content (Julian, 2004). Their core argument is that Congress never intended to extend

²³ 47 U.S.C. § 230(c)(1).

²⁴ 47 U.S.C. § 230(f)(2) defines “interactive computer service” as “Any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”

²⁵ *See*, *Zeran v. American Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)(America Online not liable for delay in taking down allegedly libelous postings of a third party); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D. C. 1998)(same); *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000)(AOL’s e-mail requests to third-party content providers to correct stock quotation errors insufficient to overcome section 230 immunity); *Green v. America Online*, 318 F.3d 465 (3rd Cir. 2003)(ISP immune from tort claims under section 230 for defamation occurring in chat room);

²⁶ *Dimeo v. Tucker*, 433 F. Supp. 2d 523 (E.D. Pa. 2006)(Allegedly defamatory posting by a third party on operator’s Web site’s message board protected by section 230); *Carafano v. Metrosplash.com, Inc.* 339 F.3d 1119 (9th Cir. 2003)(Web based Internet matchmaking service an interactive computer service provider immune from liability under section 230); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003)(Museum Security Network Web site immune under section 230 for third party posting); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (2002)(online auction Web site an interactive computer service immunized by section 230 against claims under California law for negligent misrepresentation when eBay did not sell or offer to sell sports collectibles); *Schneider v. Amazon.com*, 31 P.3d 37 (Wash.. Ct. App. 2001)(Online Web site operator and bookseller is interactive computer service provider and not liable under section 230 for allegedly defamatory comments in book review supplied by third party or breach of contract for failing to remove comments from its site); *Patentwizard, Inc. v. Kinko’s, Inc.*, 163 F. Supp. 2d 1069 (S.D.S.D. 2001)(Copy center serving as interactive computer service provider not liable under section 230 for allegedly defamatory comments made in chat room by customer using copy center computer); *Barrett v. Rosenthal*, 146 P.3d 510 (Ca. 2006) (Operators of Web sites devoted to exposing health frauds not liable under section 230 for defamatory comments posted by third party on Web site and in email).

immunity to entities acting essentially as distributors who, under the common law traditions of defamation law, would be held responsible for failing to act once they know that potentially libelous material may be contained in publications they are distributing (Blumstein, 2003; Friedman & Buono, 2000; Wiener, 1999). As the Seventh Circuit Court of Appeals put it: “Why should a law designed to eliminate ISPs’ liability to the creators of offensive material end up defeating claims by the victims of tortuous or criminal conduct?”²⁷ It may be that the current interpretation of section 230 is on a collision course with the U.S. Supreme Court, the Congress, or both.

Conclusion

Corporate use of blogs for public relations and other purposes is certainly a development that can be neither denied nor reversed. This article does not argue that it should be denied, reversed or even resisted. The liability and risks that come with blogs also cannot be denied, however, and for that reason corporate subjects, bloggers, public relations firms, courts and litigants must take a close and fact-sensitive look at the different types of blogs based on content and ties to any subject corporation. This article sets forth a methodology and system of classifying blogs as a matter of both convenience and heightened sensitivity to the relevant considerations, but the world of the Internet, as with communications generally, does not always fall into neat categories or boxes on a chart and it is constantly changing as well. Therefore, the interplay of the legal doctrines forming the foundation of that methodology – the law of agency or vicarious liability and more recently Section 230 – must be understood because those underlying legal doctrines may move a blog from one category to another.

The fact that a newspaper publisher in the world of traditional print media often has liability for publishing a letter to the editor, but an online provider of Internet access does not under Section 230 have liability for the responsive posts of its readers does not necessarily amount to a substantive conflict between the traditional law of agency as well as traditional defamation law and Section 230. The threshold question under each is the identification of the publisher of the defamatory or otherwise problematic statements. One’s legal status as publisher is not a mere title. Rather, it involves underlying responsibility for the act of uttering or furthering the statement. By examining such questions as the scope of the relationship, consent, and control, the law of agency seeks to assign to liability for acts to the person or business that ought to have taken responsibility for mitigating or preventing the acts. In the context of a business blog, agency law seeks go beyond the titles to identify the real publisher. When a newspaper has republication liability for a letter to the editor, the newspaper has made an affirmative decision to re-publish defamatory statements uttered by another, though it had time to verify the allegations before printing. The law of defamation thus takes notice of the real world setting of newspapers: There is time and there is a choice in newspaper publishing.

²⁷ John Doe v. GTE Corporation, 347 F.3d 655, 658 (7th Cir. 2003).

The Internet is different. Unlike traditional media, the Internet and blogs allow conversations to proceed online without mediation by editors or interconnectivity providers. A comment posted to a blog entry is no more the legal or practical responsibility of the blog publisher or Internet Service Provider than the comments of readers to other readers about articles they happened to read in the morning newspaper. This immunity is not waived when the blogger or ISP reserves the right to take down or limit offensive postings. To hold otherwise would imply some legal obligation to host and participate in a conversation against one's own will. Aside from discouraging any responsible behavior by bloggers or other access providers, such a rule would compel speech contrary to fundamental First Amendment tenets.

The issue becomes clouded when the blogger or an entity providing Internet connectivity to or otherwise supporting the blog takes action that suggests the blogger or entity is doing more than hosting a forum or declining to participate in communications it finds objectionable. Here again, the law of agency comes into play, whether the context be traditional media or the Internet. Courts will look at the factual evidence regarding scope of employment or contractual relationships, consent to actions, and control of the means and content not to determine whether Section 230 is applicable, but who is, under Section 230, the real publisher of the content.

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