

2008

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### Recommended Citation

Woan, Sunny (2008) "The Blogosphere: Past, Present, and Future. Preserving the Unfettered Development of Alternative Journalism," *California Western Law Review*. Vol. 44 : No. 2 , Article 4.  
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol44/iss2/4>

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**THE BLOGOSPHERE: PAST, PRESENT, AND FUTURE.  
PRESERVING THE UNFETTERED DEVELOPMENT OF  
ALTERNATIVE JOURNALISM**

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I. INTRODUCTION

The world of the Internet has become a parallel universe to the actual world, where an e-version of any commodity in physical reality may exist. While news reporting and commentary materialize in the actual world in traditional broadcast or periodical formats, news reporting and commentary in the virtual world often transpires via web logs, or blogs.<sup>1</sup> Some courts define blogs as “internet website[s]

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\* J.D., Santa Clara University School of Law, 2007; B.A., Binghamton University, 2003. All my gratitude to Professor Catherine Sandoval, who guided me throughout the research and writing of this Article. She made every course she taught a worthwhile and memorable experience. Also, many thanks to the editors of the California Western Law Review who worked with me on this Article.

1. See generally Wikipedia.org, Blog, <http://en.wikipedia.org/wiki/Blogs> (last visited Jan. 15, 2008) [hereinafter Blog]. “Wikipedia” is an online collaborative encyclopedia that anyone on the Internet may edit. Wikipedia’s open-source nature raises issues of reliability and accuracy, and academic use of it should be done with caution. See Carleton College, Using Wikipedia, [http://apps.carleton.edu/campus/library/for\\_faculty/faculty\\_find/wikipedia](http://apps.carleton.edu/campus/library/for_faculty/faculty_find/wikipedia) (last visited Feb. 8, 2008). Nonetheless, Wikipedia has proven to be a vanguard in covering of current events and new technology. *Id.*; see also ANDREW LIH, THE FOUNDATIONS OF PARTICIPATORY JOURNALISM AND THE WIKIPEDIA PROJECT 26 (2004), <http://jmsc.hku.hk/faculty/alih/publications/aejmc-2004-final-forpub-3.pdf> (“Wikis are often mentioned in conjunction with web logs as examples of modern participatory journalism.”). Furthermore, research suggests Wikipedia is accurate. See, e.g., Thomas Chesney, *An Empirical Examination of Wikipedia’s Credibility*, FIRST MONDAY, Nov. 2006, [http://firstmonday.org/issues/issue11\\_11/chesney/](http://firstmonday.org/issues/issue11_11/chesney/) (noting research results indicate “the accuracy of Wikipedia’s information is high”); *Wikipedia Survives Research*

where users interested in a particular topic can post messages for other users interested in the same topic to read and answer.”<sup>2</sup> More than that, blogs in the twenty-first century have become the “vanguard of a new information revolution” which “rock[] the foundations” of traditional reporting and commentary.<sup>3</sup>

Especially pertinent in countries where traditional media forms are heavily censored, blogging provides perhaps the only means by which journalists may exercise free expression of ideas.<sup>4</sup> As for the United States, the blogging phenomenon has grown quickly into a compelling force in American politics.<sup>5</sup> Political op-ed bloggers have been said to serve as “the new ‘powerbrokers in American politics and culture,’ primed to unseat ‘old media.’”<sup>6</sup>

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*Test*, BBC NEWS, Dec. 15, 2005, <http://news.bbc.co.uk/2/hi/technology/4530930.stm> (suggesting Wikipedia is as accurate as the Encyclopedia Britannica with respect to science entries).

2. See, e.g., *Cahill v. Doe*, 879 A.2d 943, 945 n.1 (Del. Super. Ct. 2005), *rev'd*, 884 A.2d 452 (Del. 2005). Additionally, the Merriam-Webster Dictionary defines a blog as a “[w]eb site that contains an online personal journal with reflections, comments, and often hyperlinks.” Merriam-Webster Online, Blog, <http://www.merriam-webster.com/dictionary/blog> (last visited Feb. 10, 2008). The term “weblog” was first used by Jorn Barger in 1997; the shorter version, “blog,” was coined by Peter Merholz in 1999. Blog, *supra* note 1. An even more comprehensive definition of a “blog” may be found at Wikipedia.org:

[A] website where entries are commonly displayed in reverse chronological order. . . . Many blogs provide commentary or news on a particular subject; others function as more personal online diaries. A typical blog combines text, images, and links to other blogs, web pages, and other media related to its topic.

*Id.*

3. See Julien Pain, *Bloggers, The New Heralds of Free Expression*, in HANDBOOK FOR BLOGGERS AND CYBER-DISSIDENTS 4, 5 (2005), available at [http://www.rsrf.org/IMG/pdf/handbook\\_bloggers\\_cyberdissidents-GB.pdf](http://www.rsrf.org/IMG/pdf/handbook_bloggers_cyberdissidents-GB.pdf).

4. See *id.* For example, in 2000 the Iranian regime “shut down almost all independent newspapers,” making online blogging the only alternative for political expression by many journalists. See *Blogs Lauded in ‘Freedom Awards,’* BBC NEWS, June 17, 2005, <http://news.bbc.co.uk/2/hi/technology/4099802.stm>. Julien Pain confirms that “[b]logs are great a tool [sic] in repressive regimes. In countries like China and Nepal, setting up a blog is the only way to be a real journalist.” *Id.*

5. Matthew Fagan, Comment, *The Federal Election Commission and Individual Internet Sites After Shays and Meehan v. FEC*, 12 B.U. J. SCI. & TECH. L. 159, 160 (2006).

6. Eric Engberg, Op-Ed., *Blogging as Typing, Not Journalism*, CBS NEWS,

Some bloggers<sup>7</sup> perform the same functions as journalists: checking facts, interviewing sources, and raising public issue awareness.<sup>8</sup> This Article examines the role blogs have taken in society, both in the U.S. and in the world at large, and the legal development of blog regulation. Many governments try to control the blogosphere,<sup>9</sup> some more vigorously than others. Part II lays the foundation of the blogosphere, contextualizing the discussion. Part III reviews some of the measures various countries have taken to police bloggers.<sup>10</sup> Parts IV and V examine the impact of blogosphere regulation on the “marketplace of ideas,”<sup>11</sup> reaching the proposition that the blogosphere should be left to regulate itself.<sup>12</sup> Many States have proposed laws for policing cyberspace that treat it like actual space.<sup>13</sup> However, the blogosphere cannot be sectioned off by shared geography like actual space; rather, the blogosphere partitions itself by

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Nov. 8, 2004, <http://www.cbsnews.com/stories/2004/11/08/opinion/main654285.shtml> (quoting political commentator and blogger Andrew Sullivan, from a 2004 newspaper article).

7. “The term ‘blogger’ refers to anyone who posts opinions or information on an Internet website known as a ‘blog.’” Fagan, *supra* note 5, at 160 n.6.

8. *Id.* at 160. However, at present, bloggers functioning as journalists still remain in the minority. AMANDA LENHART & SUSANNAH FOX, PEW INTERNET & AMERICAN LIFE PROJECT, BLOGGERS: A PORTRAIT OF THE INTERNET’S NEW STORYTELLERS iii (2006), available at <http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf> (reporting that a majority of bloggers are primarily interested in expressing creativity, documenting individual experiences, sharing practical knowledge, or just keeping in touch with friends and family). Thus, most bloggers are “non-journalists” writing about their personal lives. *See id.* at 7.

9. “Blogosphere is a collective term encompassing all blogs and their interconnections.” Wikipedia.org, Blogosphere, <http://en.wikipedia.org/wiki/Blogosphere> (last visited Jan. 16, 2008) [hereinafter Blogosphere]. Brad L. Graham has been credited as the first to coin the term “blogosphere” back in 1999. *Id.* However, the term did not gain popular use until 2002, when William Quick re-coined the term. *Id.*

10. *See infra* Part III.

11. The “marketplace of ideas” concept is attributed to Justice Oliver Wendell Holmes Jr.’s dissenting opinion in *Abrams v. United States*. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

12. *See infra* Parts IV, V.

13. *See* Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COMM. L.J. 117, 120-23 (1997).

shared interests.<sup>14</sup> This Article proposes adoption of the United Nation's Universal Declaration of Human Rights as the foundation of international blogosphere regulation. All member states of the United Nation would be compelled to adopt the Declaration. Member states of the United Nations that continue to suppress Internet liberties would be required to abide by the Declaration or be subjected to mandatory sanctions.<sup>15</sup> Thus, while most articles on blog regulation address regulation at the domestic level, this Article seeks to expand that perspective to a world view.

## II. FOUNDATIONS OF THE BLOGOSPHERE

A blog has been characterized as “bugged water cooler conversation,” or a “gathering place that is openly and clearly outfitted with a giant microphone.”<sup>16</sup> The most popular blogs become online forums where people not only exchange ideas and opinions, but also network and socialize.<sup>17</sup> The Internet provides an opportunity to reach a wide audience when expressions might not otherwise be given the opportunity for publication.<sup>18</sup> Any idea at all may be posted on a blog and public opinion immediately gathered for critiquing the legitimacy of the idea through open comment.<sup>19</sup> Blogging fosters the purest demonstration of participatory democracy.<sup>20</sup>

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14. See A. Michael Froomkin, *Habermas@Discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 860 (2003).

15. See *infra* Part V.

16. Kate Litvak, *Blog as a Bugged Water Cooler*, 84 WASH. U. L.R. 1061, 1066 (2006).

17. A study of 2000 individuals by the Center for the Digital Future found that forty-three percent of U.S. online networkers felt their online social network was just as important as their real-life friends. *Virtual Pals 'Soar in Importance'*, BBC NEWS, Nov. 30, 2006, <http://news.bbc.co.uk/2/hi/technology/6158935.stm>.

18. See Lindsey Powell, Note, *Getting Around Circumvention: A Proposal for Taking FECA Online*, 58 STAN. L. REV. 1499, 1500 (2006).

19. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (noting how the “dynamic, multi-faceted” character of Internet communication enables “any person . . . [to] become a town crier” and maintenance of webpages allows any person to “become a pamphleteer”).

The Internet is distinct from other media in that the low cost of entry and continued use makes speech possible for a broad cross-section of the general public. . . . Whereas the opportunity to be heard in television, radio, or print news must generally be purchased at substantial cost,

This section of the Article encapsulates the main features that make up the foundations of the blogosphere. It discusses how blogs are generally used,<sup>21</sup> who the typical blogger is,<sup>22</sup> and how blogs compare to traditional media forms.<sup>23</sup> Also, this section provides a brief history of the blogging trend.<sup>24</sup>

### A. A Brief History of Blogging

Before the advent of blogging, digital communities took form as bulletin board systems (“BBS”),<sup>25</sup> Usenet,<sup>26</sup> and electronic mail listings. However, online journals and logs of web links have existed since the early days of public Internet use.<sup>27</sup> These sites gained a cult

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anyone with access to a computer and a phone line can express her views online.

Powell, *supra* note 18, at 1500.

20. Fagan, *supra* note 5, at 159 (“Online advertising and political commentary provide for convenient democratic participation among those who would not otherwise have a voice in the process.”).

21. *See infra* Part II.B.

22. *See infra* Part II.D.

23. *See infra* Part II.C.

24. *See infra* Part II.A., D-E.

25. Whatis.com, Bulletin Board System, [http://searchcio-midmarket.techtarget.com/sDefinition/0,,sid183\\_gci213807,00.html](http://searchcio-midmarket.techtarget.com/sDefinition/0,,sid183_gci213807,00.html) (last visited Jan. 17, 2008).

A bulletin board system (BBS) is a computer or an application dedicated to the sharing or exchange of messages or other files on a network. Originally an electronic version of the type of bulletin board found on the wall in many kitchens and work places, the BBS was used to post simple messages between users. The BBS became the primary kind of online community through the 1980s and early 1990s, before the World Wide Web arrived.

*Id.*

26. A user network, or Usenet, is an Internet discussion system developed by Duke graduate students Tom Truscott and Jim Ellis in 1979. Wikipedia.org, Usenet, <http://en.wikipedia.org/wiki/Usenet> (last visited Jan. 17, 2008). Articles or messages are posted by users and distributed to newsgroups. *Id.* For the most part, the concept is similar to bulletin board systems. *Id.* Individual users download and post messages to a single server, usually operated by their ISP, and the servers exchange the messages between each other. *Id.*

27. Mallory Jensen, *Killer Apps: A Brief History of Weblogs*, COLUM. JOURNALISM REV., Sept.-Oct. 2003, at 22, available at <http://cjrarchives.org/issues/2003/5/blog-jensen.asp>.

following of tech-savvy blog pioneers,<sup>28</sup> who then developed web tools to make creating and maintaining such web logs user-friendly.<sup>29</sup>

In July 1999, Toronto programmer, Andrew Smales, became the first to launch a “do-it-yourself blog tool” at Pitas.com.<sup>30</sup> Smales was inspired to create an “online diary community.”<sup>31</sup> One month later, Evan Williams, Paul Bausch, and Meg Hourihan launched Blogger.com,<sup>32</sup> which quickly became the largest and best-known blogging website.<sup>33</sup>

Back in 1999, only a few dozen blogs existed.<sup>34</sup> According to Technorati, as of January 2008, that number has increased exponentially to over 112.8 million blogs; every day over 175,000 blogs are created.<sup>35</sup> Blogging’s popularity continues to increase rapidly to the point where the phenomenon can no longer be ignored by academia. Smales offers his insight on why blogging has exploded as it has: “people like to peek into others’ lives.”<sup>36</sup> Browsing someone

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28. *See id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* Blogger.com was later purchased by Google from Pyra Labs for an undisclosed sum. *Id.*

33. *Id.*

34. *Id.* *See also* Blog, *supra* note 1.

35. Technorati, About Us, <http://technorati.com/about/> (last visited Jan. 16, 2008) [hereinafter Technorati] (“Technorati is the recognized authority on what’s happening on the World Live Web, right now.”); *see also* Jensen, *supra* note 27, at 22.

36. Jensen, *supra* note 27, at 22. The blogging phenomenon may be likened to the soaring popularity of reality television in the twenty-first century. Reality television is “a genre of television programming which presents purportedly unscripted . . . situations, documents actual events, and features ordinary people instead of professional actors.” Wikipedia.org, Reality Television, [http://en.wikipedia.org/wiki/Reality\\_television](http://en.wikipedia.org/wiki/Reality_television) (last visited Jan. 15, 2008) [hereinafter Reality Television]. The reasons psychologists suggest to explain the popularity of reality television parallel the reasons for the popularity of blogging:

Viewers identify with the ordinary people who are chosen as participants and then become famous; viewers are titillated by the voyeuristic thrill they get from “peeking in”; and they enjoy the competitive nature of the shows—there are always winners and losers. Participants, on the other hand, are attracted to the instant fame that highly rated reality TV shows offer. As one potential participant said, “I just want to get on television.

else's blog provides the "voyeuristic thrill" of reading another's private diary, even if the blog's content is mundane.<sup>37</sup>

### *B. How Blogs Are Generally Used*

As of 2006, approximately twelve million adults in the United States maintain blogs, most of whom blog as "a mode of creative expression."<sup>38</sup> Only eleven percent of blogs focus on politics.<sup>39</sup> The motivation to blog seems to "come from within . . . [and is] very personal," according to one observer of the blogging phenomenon; also, bloggers are generally "not out to change the world."<sup>40</sup>

Nonetheless, the diversity in uses for blogs should not be devalued. Blogs have been used as important forums for political candidates hoping to gain supporters.<sup>41</sup> For example, during Howard Dean's 2004 candidacy for the Democratic Party presidential nomination, Dean's campaign team utilized blogs to mobilize supporters, organize activities and, most notably, to raise campaign finances.<sup>42</sup>

The second Iraq war revealed yet another important function of the blogosphere.<sup>43</sup> "Warblogs,"<sup>44</sup> created by soldiers serving in the Iraq war, provided readers at home an insider, humanist perspective

I've had a desire to be famous all my life."

Karen F. Balkin, *Introduction to REALITY TV* (Karen F. Balkin, ed., 2004), available at <http://www.enotes.com/reality-tv-article/>.

37. Jensen, *supra* note 27, at 22.

38. Kim Hart, *Portrait of a Blogger: Under 30 and Sociable*, WASH. POST, July 20, 2006, at D5, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/19/AR2006071901900.html>.

39. *Id.*

40. *Id.* (quoting Amanda Lenhart, director of a Pew Internet & American Life Project survey of bloggers).

41. See Wikipedia.org, Howard Dean, [http://en.wikipedia.org/wiki/Howard\\_Dean](http://en.wikipedia.org/wiki/Howard_Dean) (last visited Jan. 17, 2008) [hereinafter Howard Dean].

42. See *id.*; see also ALEXIS RICE, CAMPAIGNSONLINE.ORG, THE USE OF BLOGS IN THE 2004 PRESIDENTIAL ELECTION 4 (2003), <http://www.campaignsonline.org/reports/blog.pdf> (noting Howard Dean as the first Presidential candidate to create a blog, <http://www.blogforamerica.com>).

43. Blog, *supra* note 1.

44. The term "warblog" was first coined in 2001 by Matt Welch, one of the first recognized warbloggers. Wikipedia.org, Warblog, <http://en.wikipedia.org/wiki/Warblog> (last visited Jan. 17, 2008) [hereinafter Warblog].



on the war, which often differed greatly from the “official news sources.”<sup>45</sup> Recently, the U.S. Department of Defense (DOD) established a Virginia National Guard team to monitor U.S. Service men and women’s online warblogs.<sup>46</sup> Thus, no matter how much critics demean the value of blogging, at least the DOD is taking blogs seriously.

Despite the wide-ranging possibilities blogging can achieve, the strongest criticism against the credibility of blogs is the typical Joe Blogger’s lack of professionalism.<sup>47</sup> Most blogs function as diaries rather than hosts for news articles, opinion columns, or scholarship.<sup>48</sup> One critic of blogging described it as an outlet for “angry, semi-employed losers who are too untalented or too lazy to get real jobs in journalism.”<sup>49</sup> In fact, a study conducted by The Pew Internet and American Life Project found that most bloggers do not consider blogging a form of journalism, with only thirty-three percent attesting otherwise.<sup>50</sup> According to Professor Alexander Halavais of Quinnipiac University, “[t]he average blogger is a 14-year-old girl writing about her cat.”<sup>51</sup> Thus, at present, the mainstream purpose of blogging is to maintain an online social network, and not necessarily to pen meaningful socio-political commentary or literature.<sup>52</sup>

### C. Comparing Blogs to Traditional Media Forms

Americans are ignoring traditional news sources, such as network news or the morning paper, and instead are reading blogs on the

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45. Blog, *supra* note 1.

46. Warblog, *supra* note 44.

47. See, e.g., Paul Horwitz, “Or of the [Blog],” 11 NEXUS 45, 45 (2006) (discussing blogs and the blogosphere as First Amendment institutions); cf. Potter Stewart, “Or of the Press,” 26 HASTINGS L.J. 631 (1975) (discussing the role of the traditional press in terms of the Constitution).

48. Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195, 1196-97 (2006).

49. Horwitz, *supra* note 47, at 45 (quoting Garry Trudeau, *Doonesbury*, July 3, 2005).

50. Hart, *supra* note 38.

51. *Id.*

52. See *id.*

Internet.<sup>53</sup> Newfound reliance on “new media” for information and increased blogging activity bring attention to the need for Internet speech regulation and protection.<sup>54</sup> Some bloggers boldly predict that blogging will someday be recognized as a legitimate news source interchangeable with traditional print and broadcasting media.<sup>55</sup> On the other hand, critics such as former CBS correspondent, Eric Engberg, believe that, “given their lack of expertise, standards and, yes, humility, the chances of the bloggers replacing mainstream journalism are about as good as the parasite replacing the dog it fastens on.”<sup>56</sup> This sentiment shows the unwillingness of traditional news media members to welcome bloggers into the news community.

Traditional journalism unilaterally feeds information to the reader, but other than letters to the editor, the reader’s ability to give feedback to the journalist is limited.<sup>57</sup> Blogging, however, allows both feedback and reciprocity in information feeding.<sup>58</sup> Blogging truly is the “exchange of information.”<sup>59</sup>

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53. PROJECT FOR EXCELLENCE IN JOURNALISM, ONLINE AUDIENCE 2006 ANNUAL REPORT: IS THE NET CANNIBALIZING TRADITIONAL MEDIA? (2006), <http://www.journalism.org/node/1257> (noting “evidence that online news use was beginning to chip away at overall television news consumption” along with evidence of online news substituting traditional print newspapers). *But see* Steven Levy, *Will the Blogs Kill Old Media?*, NEWSWEEK, May 20, 2002, at 52, 52 (“Blogs are a terrific addition to the media universe. But they pose no threat to the established order.”).

54. *See* Nathan Fennessy, Comment, *Bringing Bloggers Into the Journalistic Privilege Fold*, 55 CATH. U. L. REV. 1059, 1061 (2006).

55. Engberg, *supra* note 6.

56. *Id.*

57. *See Yesterday’s Papers: The Future of Journalism*, ECONOMIST, Apr. 23, 2005, available at [http://www.economist.com/business/displaystory.cfm?story\\_id=E1\\_PRJGDPJ](http://www.economist.com/business/displaystory.cfm?story_id=E1_PRJGDPJ) (commenting on how blogs have evolved to become legitimate forms of communication of fact and opinion, and thus becoming more and more like its traditional media counterparts).

58. *See* Froomkin, *supra* note 14, at 860.

59. *Id.* at 777.

#### D. *Who is Joe Blogger?*

The average blogger is likely to be male, under the age of thirty, and using broadband at home.<sup>60</sup> Bloggers also tend to be well-off financially, with an annual income of \$50,000 or more, and hold college or graduate degrees.<sup>61</sup> Compared to the general Internet-using population, bloggers are less likely to be Caucasian and more than half of bloggers live in the suburbs.<sup>62</sup> Generally, bloggers are young and “they’re more apt to dish about the drama at last night’s party than the president’s latest faux pas.”<sup>63</sup>

#### E. *Joe Blogger: Journalist or Pamphleteer?*

Both the First Amendment’s freedom of the press clause,<sup>64</sup> and a shield law affording a reporter’s privilege,<sup>65</sup> may allow a journalist to keep her sources anonymous and confidential. However, the law is not

60. Memorandum from Lee Rainie, Director, Pew Internet and American Life Project, on *The State of Blogging*, (Jan. 2005), *available at* [http://www.pewinternet.org/pdfs/PIP\\_blogging\\_data.pdf](http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf) [hereinafter *Pew Data Memo*] (finding that: 57% of bloggers are male; 48% are under age thirty; 70% have broadband access at home; and 82% are Internet veterans who have been online for six or more years). *Cf.* Solove, *supra* note 48, at 1196-97 (“According to one estimate, over fifty percent of blogs are written by children and teenagers under age nineteen. . . . The most common blogger is a teenage girl.”); *see supra* note 51 and accompanying text.

61. *Pew Data Memo*, *supra* note 60. Forty-two percent of bloggers live in households earning over \$50,000. *Id.* Thirty-nine percent have college or graduate degrees. *Id.*

62. Hart, *supra* note 38.

63. *Id.*

64. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the . . . freedom . . . of the press . . .”).

65. REPORTERS WITHOUT BORDERS, *FREEDOM OF THE PRESS WORLDWIDE IN 2008*, at 56 (2008), *available at* [http://www.rsff.org/IMG/pdf/rapport\\_en-3.pdf](http://www.rsff.org/IMG/pdf/rapport_en-3.pdf) [hereinafter *FREEDOM OF THE PRESS WORLDWIDE IN 2008*] (discussing American federal shield law); *see also* Wikipedia.org, *Shield laws in the United States*, [http://en.wikipedia.org/wiki/Shield\\_law](http://en.wikipedia.org/wiki/Shield_law) (last visited Feb. 3, 2008) (defining shield laws as “legislation designed to provide a news reporter with the right to refuse to testify as to information and/or sources of information obtained during the newsgathering and dissemination process”).

as clear regarding what protections are afforded to the “twenty-first century version of the ‘lone[ly] pamphleteer.’”<sup>66</sup>

Gregg Leslie, legal defense director for The Reporters Committee for Freedom of the Press, believes it is misleading to simply ask whether bloggers are journalists; rather, the appropriate question to ask is: What function is this particular blogger performing?<sup>67</sup> As Leslie notes:

*Bloggers* is a vague amorphous term like *telephone users* . . . . Just like some telephone users are journalists and some are not; the same thing with Bloggers. The medium doesn’t answer the question. It has to do more with the function that the person is performing. . . . If the Bloggers’ involvement is to report information to the public and to gather information for that purpose openly then they should be treated like a journalist.<sup>68</sup>

In May of 2006, a California court of appeal judgment granted bloggers the same journalistic privileges afforded traditional print and broadcast media through both the state shield law and federal Free Press protections.<sup>69</sup> In *O’Grady v. Superior Court*, the blogger petitioners maintained websites on which they allegedly posted information about an unreleased Apple Computer product.<sup>70</sup> The court tackled three main issues in the *O’Grady* case: (1) whether blogs constitute journalism; (2) whether bloggers should be treated as journalists and thus be afforded protection under the state shield law; and (3) whether blogs are a covered medium, such as magazines and newspapers.<sup>71</sup> Apple argued that the petitioners were not protected by

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66. See Fennessy, *supra* note 54, at 1060 (quoting Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1272 (2005)).

67. Posting of JackWhispers! to FIXYOURTHINKING.com, <http://jackwhispers.blogspot.com/2006/03/are-bloggers-journalists-courts-seem.html> (Mar. 28, 2006).

68. *Id.* (quoting Gregg Leslie, legal defense director for the Reporters Committee for Freedom of the Press).

69. *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 105-06 (Ct. App. 2006). More particularly, the court recognized that bloggers can qualify in principle for state and federal constitutional free-press protections, as well as protection under California’s reporter’s shield law. *Id.*

70. *Id.* at 77-81.

71. *Id.* at 99-100.

the state's shield law and were not engaged in "legitimate journalistic activities."<sup>72</sup> However, the court held in favor of the bloggers:

[W]e can see no sustainable basis to distinguish petitioners from the reporters, editors, and publishers who provide news to the public through traditional print and broadcast media. It is established without contradiction that they gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience.<sup>73</sup>

Despite the success California bloggers enjoyed in *O'Grady*, few other jurisdictions have addressed whether the reporter's privilege should be extended to those beyond the traditional media.<sup>74</sup> The Second Circuit has set forth a test, however, to determine whether an individual qualifies for protection under the reporter's privilege: an individual must prove (1) "the intent to use [the] material . . . to disseminate information to the public" and (2) "that such intent existed at the inception of the newsgathering process."<sup>75</sup> This language seems to suggest that a blogger could fall within the scope of the law, as long as he or she meets the two elements. The Third Circuit adopted the Second Circuit's test, although it emphasized that the test "does not grant status to any person with a manuscript, a web page or a film" without the requisite intent.<sup>76</sup>

Many contend that the reporter's privilege is justified by the journalist's role of providing information that the public would otherwise be unable to acquire.<sup>77</sup> Unfettered availability of

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72. *Id.* at 96.

73. *Id.* at 106. California is currently the only state to provide a reporter's privilege under its state constitution. Joseph S. Alonzo, Note, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 751, 752 (2006). Nevertheless, virtually all states, including several federal circuits, recognize the privilege in some form. *Id.*

74. See *Titan Sports, Inc. v. Turner Broad. Sys., Inc. (In re Madden)*, 151 F.3d 125, 128 (3d Cir. 1998). As of this writing, forty-nine states recognize some form of reporter's privilege. See Fennessy, *supra* note 54, at 1073.

75. *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987).

76. *Titan Sports, Inc.*, 151 F.3d at 129-30.

77. Alonzo, *supra* note 73, at 752-53. See also *Branzburg v. Hayes et al.*, 408 U.S. 665, 704 (1972) (quoting *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938)) ("Freedom of the press is a 'fundamental personal right' which 'is not confined to

information is essential to fostering a strong democracy.<sup>78</sup> The benefit of concomitant information that blogs provide might “outweigh[] the cost of the lost testimonial evidence when journalists claim the privilege and refuse to testify.”<sup>79</sup> Additionally, “bloggers benefit society by providing increased access to the marketplace of ideas and thereby combat the effects of media consolidation.”<sup>80</sup> Thus, public policy favors the broadest scope possible for a shield law protecting bloggers.<sup>81</sup>

#### F. Landmark Events in the Blogosphere

This section looks at two recent events that have helped bring legitimacy to blogging as a valuable form of news gathering in the twenty-first century. The first landmark event occurred when bloggers picked up on a news story that the mainstream media outlets had neglected.<sup>82</sup> Only after blogs ignited the public’s anger at the unscrutinized racism of a senate majority leader did newspapers, magazines, and broadcasts pick up on the Trent Lott story.<sup>83</sup> The second landmark event had affiliates of traditional media eating their own words: after constantly criticizing bloggers for being amateurs who fail to authenticate the facts before publication, media giant CBS Broadcasting Inc. (CBS), aired a story about President Bush without first authenticating the facts.<sup>84</sup> “Rathergate,” as the scandal quickly became known, showed not only that bloggers rely on traditional journalists for information, but also that traditional journalists rely on bloggers to investigate the validity of news stories.<sup>85</sup>

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newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”).

78. Alonzo, *supra* note 73, at 752.

79. *See id.*

80. *Id.*

81. *See* O’Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 97-98 (Ct. App. 2006).

82. *See infra* Part II.F.1.

83. *See infra* Part II.F.1.

84. *See infra* Part II.F.2.

85. *See infra* Part II.F.2.

### 1. *Exposing a Senator's Racism: The Trent Lott Story*

In 2002, Senate Majority Leader Trent Lott (R, Miss.) praised Strom Thurmond, a Dixiecrat candidate in the 1948 presidential race who openly supported racial segregation.<sup>86</sup> Lott remarked on how “we wouldn’t of [sic] had all these problems . . . if Thurmond had won the presidency.”<sup>87</sup> Initially, the mainstream media ignored the remark.<sup>88</sup> Few would have become aware of Lott’s subtle, yet inescapably racist message, had bloggers not picked up on the story and exposed it to the public consciousness.<sup>89</sup> In particular, bloggers Josh Marshall, Andrew Sullivan, and David Frum broke the story in the blogosphere.<sup>90</sup> The Internet bloggers outcry in response to the news became so heated that print and broadcasting media could not ignore the controversy and finally reported on it as well.<sup>91</sup> The backlash against Lott ultimately forced the majority leader to step down.<sup>92</sup> The impact of the Trent Lott story helped give blogs credibility as a “medium of news dissemination.”<sup>93</sup>

### 2. *Blogging the Rathergate Scandal*

Rathergate, or the Killian Documents controversy, deeply embarrassed CBS.<sup>94</sup> Simultaneously, blogs became a tour de force for

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86. Mark Glaser, *Trent Lott Gets Blogged: Free Finance Sites Spoofed by WSJ.com Ads*, ONLINE JOURNALISM REV., Dec. 17, 2002, <http://www.ojr.org/ojr/glaser/1040145065.php>.

87. *Id.*

88. *See id.*

89. *Id.*

90. *Id.* See Talking Points Memo, <http://www.talkingpointsmemo.com/> (last visited Jan. 18, 2008), for Marshall’s blog. Andrew Sullivan is most noted for being a political conservative who advocates for gay rights. See The Daily Dish, <http://andrewsullivan.theatlantic.com/> (last visited Jan. 18, 2008) for Sullivan’s blog. David Frum, also a political conservative, now blogs at The Huffington Post. See The Huffington Post, <http://www.huffingtonpost.com/david-frum> (last visited Jan. 18, 2008) for Frum’s blog.

91. Glaser, *supra* note 86 (quoting Dan Goodgame & Karen Tumulty, *Tripped Up By History*, TIME, Dec. 15, 2002, at 22).

92. Blog, *supra* note 1.

93. *Id.*

94. Wikipedia.org, Killian Documents, <http://en.wikipedia.org/wiki/Rathergate>

exposing truths that traditional media giants like CBS overlooked.<sup>95</sup> On September 8, 2004, CBS's *60 Minutes* aired a story reported by Dan Rather on a number of documents supposedly taken from Colonel Jerry B. Killian's personal files and authenticated by CBS.<sup>96</sup> These documents criticized President George W. Bush's service in the National Guard.<sup>97</sup> The rest of the traditional media realm seemed to accept the story as presented.<sup>98</sup>

Within hours of the broadcast, however, bloggers questioned the authenticity of the Killian Documents.<sup>99</sup> Initially, CBS maintained its position that the documents had been authenticated, while Rather brushed off critics as merely "partisan political operatives."<sup>100</sup> Even so, bloggers remained relentless and public scrutiny remained pinned on the story.<sup>101</sup> Finally, after two weeks, Dan Rather stepped forward and apologized, with CBS issuing a statement acknowledging a possible mistake in using the documents prematurely.<sup>102</sup> Bloggers emerged from Rathergate triumphantly, having successfully discredited a major media outlet for careless fact-checking—ironically, an accusation traditional media outlets often level against bloggers.<sup>103</sup>

Both the Trent Lott story and "Rathergate" demonstrate the dialectic relationship between the blogosphere and traditional media. When a controversial issue arises in one media sphere, the other becomes a reactionary, often oppositional force, as both sides strive to

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(last visited Jan. 15, 2008) [hereinafter Killian Documents].

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.*

99. *Id.*

100. *Id.*

101. *See id.*

102. *See id.*

103. Corey Pein, *Blog-Gate*, COLUM. JOURNALISM REV., Jan.-Feb. 2005, at 30, 31, available at <http://cjrarchives.org/issues/2005/1/pein-blog.asp> ("Bloggers have claimed the attack on CBS News as their Boston Tea Party, a triumph of the democratic rabble over the lazy elites of the MSM (that's mainstream media to you)"). *See also* Jon Garfunkel, *Was It the Blogosphere That Exposed the 60 Minutes Memo Forgeries?*, CIVILITIES, Jan. 6, 2005, <http://civilities.net/BlogosphereVsCBS>; Posting of Rebecca MacKinnon to Blogging, Journalism, and Credibility, <http://cyber.law.harvard.edu/webcred/?p=15> (Jan. 11, 2005, 18:52 EST).



arrive at the truth by exchanging contradictory ideas and propositions. Traditional media only picked up the Trent Lott story after the incident became a headline in the blogosphere. Conversely, when traditional media reported on the Killian Documents, the blogosphere reacted and challenged the traditional media's reliability. Thus, in this manner, the blogosphere adds a dimension to news reporting that did not exist when only traditional media dominated.

### III. HANDLING CONTROVERSIAL BLOGGING

Ideas have consequences.<sup>104</sup> The blogosphere enables virtually any idea to be granted at least its own fifteen seconds of fame and, fearing what subversive consequences may occur, many governments have taken measures to control and regulate bloggers.<sup>105</sup> This section discusses the various ways governments around the world approach blogging and the law.

#### *A. U.S. Claims a Hands-Off and Passive-Aggressive Approach*

While the U.S. has been relatively lenient toward blog regulation compared to other countries, whether the U.S. should regulate the blogosphere at all is still a hotly contested issue. Presently, Congress seems reluctant to impose heavy regulation,<sup>106</sup> and currently there is no federal regulatory scheme proposed for the blogosphere.

Since the Internet's beginning, the U.S. government has expressed a relatively hands-off policy of policing it.<sup>107</sup> For example, the Telecommunications Act of 1996 expresses "the policy of the United States to promote the continued development of the Internet . . . [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."<sup>108</sup>

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104. See generally RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (Univ. Chi. Press 1984) (1948) (recognizing an absolute reality that ideas like actions have consequences).

105. See *infra* Part III.B-D.

106. See Powell, *supra* note 18, at 1505.

107. *Id.*

108. Telecommunications Act of 1996, 47 U.S.C. § 230 (2006). There have been other efforts in Congress which suggest hesitance to regulate the Internet. See,

1. *When the FEC Tried to Regulate the Blogosphere*

In 2005, the United States Court of Appeals for the District of Columbia instructed the Federal Election Commission (FEC) to draft regulations extending campaign finance and spending limits to the Internet.<sup>109</sup> Noting that \$14 million has been spent on Internet ads during the 2004 campaign, FEC commissioner Scott E. Thomas strongly favored regulation.<sup>110</sup> However, bloggers and other opponents to regulation believed that regulations, including Internet advertising regulations, would have a chilling effect on free speech.<sup>111</sup> FEC chairman Michael Toner “argued that political activity on the Internet fails to meet the campaign finance law’s threshold to stop corruption or the appearance of corruption,” and thus extending the law to the Internet was unnecessary.<sup>112</sup> In the end, the proposed FEC rules left online political blogging activity largely unregulated.<sup>113</sup>

2. *Protecting Anonymity: The 2005 Apple Case*

The first case to involve bloggers claiming a journalistic privilege arose when trade secrets from Apple Computer technology were disclosed in the blogosphere and Apple Corporation (Apple) tried to

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*e.g.*, Online Freedom of Speech Act, H.R. 1606, 109th Cong. (2005) (seeking to exclude Internet communications from the definition of “public communication” in the Federal Election Campaign Act of 1971); S. 678, 109th Cong. (2005) (seeking to exclude Internet communications from the definition of “public communication” in the Federal Election Campaign Act of 1971); *but see* H.R. 4900, 109th Cong. (2005) (seeking to exclude from definition only certain internet communications).

109. *Shays v. F.E.C.*, 337 F. Supp. 2d 28, 65-71 (D.D.C. 2004), *aff’d* 414 F.3d 76, 79 (D.C. Cir. 2005).

110. Donna Cassatam, *Political Bloggers Say FEC Shouldn’t Regulate Their Speech*, USA TODAY, Sept. 22, 2005, [http://www.usatoday.com/tech/news/techpolicy/2005-09-22-political-blogger\\_x.htm](http://www.usatoday.com/tech/news/techpolicy/2005-09-22-political-blogger_x.htm).

111. *Id.*

112. *Id.*

113. Internet Communications, 70 Fed. Reg. 16,967-79 (Apr. 4, 2005) (to be codified at 11 C.F.R. pts. 100, 110, 114). However, some local governments are moving toward blog regulation. For example, San Francisco’s Board of Supervisors considered an ordinance that would require local bloggers to register with the city’s Ethics Commission. Posting of Michael Bassik to <http://www.personaldemocracy.com/node/501> (Mar. 31, 2005, 14:15 PST).

uncover the source of that leak.<sup>114</sup> Specifically, Apple had subpoenaed a number of e-mail service providers in an attempt to identify the individuals responsible for the leak.<sup>115</sup> In response, several anonymous bloggers (not parties to the case) claimed protection under California's reporters' shield laws and moved to block Apple's subpoena.<sup>116</sup> Finding the bloggers guilty of violating criminal trade secret laws, the California Superior Court did not have to address the issue of blogger protection under state reporters' shield laws.<sup>117</sup>

Although bloggers' status as journalists was not directly addressed by the court, the case suggests that it probably would not have qualified bloggers as journalists.<sup>118</sup> It further indicated that bloggers seeking status as journalists must "disseminate something more than reproduced information obtained from others," which is what the bloggers in *Apple Computer, Inc. v. Doe* were found to have done.<sup>119</sup>

Another recent case involving anonymous blogging has attracted considerable attention.<sup>120</sup> On August 1, 2006, police arrested and jailed Josh Wolf, a blogger, for refusing to provide a grand jury with video footage he shot during a protest rally in San Francisco.<sup>121</sup> Wolf was held in what his supporters called "coercive custody" at the Federal Detention Facility in Dublin, California.<sup>122</sup> Not charged with a crime, Wolf was imprisoned for civil contempt.<sup>123</sup> Wolf's

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114. See Marc L. Greenwald & Emily B. Costello, *Intersection of Trade Secret Protection, Reporter's Privilege in N.Y.*, 231 N.Y. L.J. 4 (2005).

115. *Apple Computer, Inc. v. Doe*, No. 1-04-CV-032178, 2005 WL 578641, at \*1-2 (Cal. Super. Ct. Mar. 11, 2005); see also Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 408-09 (2006); Fennessy, *supra* note 54, at 1077.

116. *Apple Computer*, 2005 WL 578641, at \*2.

117. *Id.* at \*6-7.

118. See *id.* at \*7 n.7; Fennessy, *supra* note 54, at 1077-78.

119. Fennessy, *supra* note 54, at 1078.

120. Eliason, *supra* note 115, at 411 n.153.

121. *Id.* See also *In re Grand Jury Subpoena, Joshua Wolf*, 201 F. App'x 430 (9th Cir. 2006) (affirming the district court's civil contempt order). Josh maintained a blog from prison. See JoshWolf.net, *The Revolution Will Be Televised*, <http://joshwolf.net/blog/> (last visited Jan. 25, 2008) for Wolf's blog.

122. JoshWolf.net, *Free Journalist Josh Wolf*, <http://joshwolf.net/freejosh/> (last visited Jan. 23, 2008) [hereinafter *Free Wolf*].

123. *Id.*

incarceration was virtually unprecedented, and on February 6, 2007, Wolf became the longest incarcerated journalist in U.S. history for refusing to comply with a subpoena in order to protect his sources' confidentiality.<sup>124</sup>

The U.S. government has not been as "hands-off" about Internet regulation as generally perceived. Attempts by the FEC to monitor blogging, and the numerous U.S. cases that have arisen with regard to the blogosphere,<sup>125</sup> show that the government has been passive-aggressive—not regulating upfront by statute, yet nonetheless detaining individuals like Josh Wolf. Ultimately, anonymity in the blogosphere needs to be vigorously protected, especially when bloggers are characterized as modern-day pamphleteers. As stated in *John Doe 1 v. Cahill*,<sup>126</sup> "[a]nonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering."<sup>127</sup>

### B. EU Proposes Legislation to Regulate Video Blogs

In December of 2005, the European Commission proposed a revision of the Audiovisual Directive that would require websites featuring video images to conform to standards set forth by the European Union.<sup>128</sup> Implementation of the Audiovisual Directive will mean that amateur video bloggers be licensed as a television-like

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124. *Id.*; see also The Free Josh Wolf Wiki, A Celebration of Freedom, <http://freejosh.pbwiki.com/> (last visited Jan. 23, 2008) (chronicling John Wolf's story from incarceration through his April 3, 2007 prison release).

125. See *supra* Part III.A.1–2.

126. *John Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005) (involving an anonymous blogger who posted defamatory statements about the plaintiff in a blog).

127. *Id.* at 456.

128. See Adam Sherwin, *Amateur 'Video Bloggers' Under Threat From EU Broadcast Rules*, *TIMES* (London), Oct. 17, 2006, at 32, available at <http://www.timesonline.co.uk/tol/news/world/europe/article603123.ece>. See also European Commission, Audiovisual and Media Policies, [http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/proposal\\_2005/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm) (last visited Jan. 23, 2008) [hereinafter Audiovisual Directive]. The Audiovisual Directive is also known as the Television Without Frontiers Directive. *EU 'Threat' to Internet Freedom*, *BBC NEWS*, Oct. 16, 2006, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/6056942.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/6056942.stm) [hereinafter *EU 'Threat'*].

service.<sup>129</sup> On November 13, 2006, the Parliamentary Committee reached a general approach on the Commission's proposal and one month later, on December 13, 2006, the Parliament adopted the first reading by a majority vote.<sup>130</sup> The Audiovisual Directive seeks not only to regulate traditional broadcasting media such as television or radio, but also audiovisual media services on the Internet, such as video blogs, or "vlogs."<sup>131</sup> Opponents to the Audiovisual Directive claim that if the revision passes, then websites such as YouTube.com may become subject to censorship.<sup>132</sup>

Opponents of the Audiovisual Directive argue the original legislation, Television Without Frontiers, even with the amendments, will not be able to regulate fast-changing technology such as online services.<sup>133</sup> Furthermore, imposing these new regulations on audiovisual Internet providers, such as the YouTube site, could deter entry of new broadcasters and would-be Internet entrepreneurs.<sup>134</sup>

Proponents of the Audiovisual Directive believe the new regulations of video blogging will "allow better 'pluralism of content.'"<sup>135</sup> However, Wes Himes, Director of the European Digital Media Association, strongly disagrees.<sup>136</sup> Instead, he argues that, in its

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129. See Sherwin, *supra* note 128.

130. Audiovisual Directive, *supra* note 128 ("On 13 December 2006 the first reading of Ms. Hieronymi's Report was adopted by a large majority in the European Parliament.").

131. *Commission Proposal for a Directive of the European Parliament and of the Council to Audiovisual Media Services*, at 1, COM (2007) (Mar. 7, 2007), available at [http://publicaffairs.linx.net/public/eu/audiovisual/avmsd\\_cons\\_amend\\_0307\\_en.pdf](http://publicaffairs.linx.net/public/eu/audiovisual/avmsd_cons_amend_0307_en.pdf) ("Directive 89/552/EEC coordinates certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities. However, new technologies in the transmission of audiovisual media services call for the adaptation of the regulatory framework . . .").

132. See Posting of Patricia Moll to Google Public Policy Blog, <http://googlepublicpolicy.blogspot.com/2007/07/european-content-regulationandhtml> (July 16, 2007, 07:57 PST).

133. *Id.*

134. *Id.*

135. *EU 'Threat,' supra* note 128 (quoting director of the European Digital Media Association Wes Himes).

136. See *id.* Himes stated, "I can find more content online than I will find in the biggest 'offline' store out there." *Id.*

current state, video blogging already provides more diverse content than any of its traditional broadcasting components.<sup>137</sup> Moreover, the head of the Confederation of British Industry's E-Business group, Jeremy Beale, believes imposing additional online regulations will stunt the development of British and European internet services.<sup>138</sup> Shaun Woodward, Broadcasting Minister of Great Britain, also foresees the Audiovisual Directive hurting multimedia businesses.<sup>139</sup> Woodward fears the added regulations will prevent creation of websites like Myspace because of the costs of complying with excessive regulations.<sup>140</sup>

Yet supporters insist that the purpose of the Audiovisual Directive is "simply to set minimum standards on areas such as advertising, hate speech and the protection of children."<sup>141</sup> Television Without Frontiers introduced these standards to traditional mediums of broadcasting and the Audiovisual Directive extends those same standards to Internet broadcasting.<sup>142</sup> The legislation would set regulations on video blogs that serve to protect minors, prohibit inciting racial and religious hatred, and force commercial communications, such as online ads, to be clearly represented as commercial communications.<sup>143</sup>

The likelihood of the Audiovisual Directive adversely affecting the development of internet services in Europe is slim. Opponents of the Audiovisual Directive who contend this legislation will stifle competition in the world arena<sup>144</sup> largely exaggerate the scope and effects of the Audiovisual Directive. Most video blogs do not contain communications targeted by the Audiovisual Directive. Under the Audiovisual Directive, a video blogger could still freely communicate as he or she wishes so long as the communications do not constitute

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137. *See id.*

138. *Id.*

139. *See* Sherwin, *supra* note 128.

140. *Id.* Woodward believes MySpace and YouTube should not be regulated. *Id.*

141. *Id.*

142. *See id.*

143. Audiovisual Directive, *supra* note 128, art. 3 (d)-(e), (g).

144. *See, e.g.,* Sherwin, *supra* note 128.

hate speech<sup>145</sup> or harm minors.<sup>146</sup> Only when a company produces a video blog with the sole purpose of advertising its product or service, would it be bound to clearly indicate that its video blog was for commercial purposes.<sup>147</sup> Thus, the overwhelming majority of video blogs would still be free to broadcast freely without constraints.<sup>148</sup>

Himes, nonetheless, argues that additional regulation such as the Audiovisual Directive is not needed for monitoring Internet content since these interests may be readily addressed through self-regulation.<sup>149</sup> Himes presented evidence to the European Commission on the Internet Content Rating Association,<sup>150</sup> an independent, non-profit organization based in Europe and North America.<sup>151</sup> The organization includes Internet experts from the world's leading Internet and communications companies who are working to develop a self-regulating rating system, which would make the Internet safer for children.<sup>152</sup> Additionally, business owners believe that the new

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145. Audiovisual Directive, *supra* note 128, art. 3 (d)-(e), (g).

146. *See Commission Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC*, at 3, 5, 11 COM (2005) 646 final (Dec. 13, 2005), available at [http://www.ebu.ch/CMSimages/en/leg\\_am\\_sd\\_ec\\_draftdirective\\_131205\\_tcm6-46582.pdf](http://www.ebu.ch/CMSimages/en/leg_am_sd_ec_draftdirective_131205_tcm6-46582.pdf) (discussing the "protection of minors" as one of the directive's main objectives).

147. Audiovisual Directive, *supra* note 128, art. 3 (d)-(e), (g).

148. A search of vlogs through the Technorati website shows that most vlogs do not involve minors, vlogs for the sole purpose of advertising commercial products or services, or broadcasting of hate speech. *See generally* Technorati, *supra* note 35 (follow "Blogger Central" hyperlink; then follow "Popular" hyperlink). Thus, opponents of the Audiovisual Directive, in large part, exaggerate the scope of the Audiovisual Directive, because it would in effect apply to a very small percentage of vlogs.

149. *EU 'Threat,' supra* note 128.

150. *Id.*

151. Family Online Safety Institute, About ICRA, <http://www.fosi.org/icra/> (last visited Jan. 25, 2008) (noting that the Internet Content Rating Association (ICRA) is an international, non-profit organization of internet experts working to develop a self-regulated internet); Family Online Safety Institute, ICRA Launches New System to Make the Internet Safer for Children, [http://www.fosi.org/press/en\\_lauch/](http://www.fosi.org/press/en_lauch/) (last visited Jan. 24, 2008) [hereinafter ICRC Launches New System].

152. ICRA Launches New System, *supra* note 151. ICRA's board includes leaders from the world's leading Internet and communication companies, such as AOL, British Telecom, IBM, Microsoft, Novell, ONdigital and The Bertelsmann Foundation. *Id.* This cooperation between competitors illustrates the Internet

regulations could stifle growth and create confusion as to which regulations apply.<sup>153</sup>

In theory, the application of the Audiovisual Directive, if passed, means that even a college student who uploads homemade digital videos onto her personal video blog could be subject to penalty if the videos contained, for instance, hate speech.<sup>154</sup>

Presently, only two member countries of the European Union oppose the proposed legislation: the United Kingdom and Slovakia,<sup>155</sup> both of which are renowned for their liberal approach toward free speech.<sup>156</sup> Therefore, the Audio Audiovisual Directive is likely to pass. This means that Internet broadcasters will be held to the same standards and regulations as traditional media broadcasters. However, the implications of the Audiovisual Directive and the European Union's enforcement of its standards on amateur video bloggers remain to be seen.

### C. *China's Iron Fist on the Blogosphere*

Modern-day China might be best known for its government's repressive censorship of the media. Its regulation of the blogosphere has been no exception.<sup>157</sup> Around a hundred journalists, Internet users and bloggers are currently behind bars in China.<sup>158</sup> This section examines the extent of censorship on bloggers in China and the possible effects this may have on the nature or quality of blog content.

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industry's own acknowledgement that teamwork is imperative to responsibly monitor the development of the Internet. *See id.* ICRA seems to suggest that the industry can effectively regulate itself based on ICRA's rating system. *See id.*

153. *EU 'Threat,' supra* note 128.

154. *See Sherwin, supra* note 128.

155. European Publishers Council, Press Centre, <http://www.epceurope.org/presscentre/updates/200605.shtml> (last visited Jan. 24, 2008).

156. Press Release, Reporters Without Borders, Worldwide Press Freedom Index 2007 4 (Oct. 16, 2007) (listing that Slovakia and the United Kingdom rank third and twenty-fourth respectively in the world in terms of least restraints on freedom of press), available at [http://www.rsf.org/IMG/pdf/index\\_2007\\_en.pdf](http://www.rsf.org/IMG/pdf/index_2007_en.pdf).

157. *See, e.g.,* Alexa Olesen, *Group: China Has Jailed Most Journalists*, RED ORBIT, Dec. 8, 2006, [http://www.redorbit.com/news/international/759685/group\\_china\\_has\\_most\\_jailed\\_journalists/index.html](http://www.redorbit.com/news/international/759685/group_china_has_most_jailed_journalists/index.html) (noting that China, which has incarcerated more journalists than any other nation, is trying to control the Internet).

158. FREEDOM OF THE PRESS WORLDWIDE IN 2008, *supra* note 65, at 4.



In 2001, Yang Zili, a computer specialist with a Master's degree from Beijing University, published several political theory articles on his website criticizing the Chinese government.<sup>159</sup> His articles pushed for political liberalism and criticized the Communist Party.<sup>160</sup> The Chinese government incarcerated Yang and detained his wife.<sup>161</sup> Yang's wife was released after forty-eight hours, but only after the police forced her to sign a written agreement to never reveal any information about her detainment.<sup>162</sup> Yang, on the other hand, was formally charged with subversion and remains behind bars.<sup>163</sup>

Hu Jintao, the current Head of the Communist Party and army, has intensified the restraints and prosecution of cyber-dissidents since his ascent to power in 2002.<sup>164</sup> He has sanctioned, if not personally ordered, the secret police to arrest and jail dozens of political bloggers.<sup>165</sup> With Hu in power, China's censorship of the blogosphere is not likely to wane. In fact, there are several Chinese movements promoting laws that would require all bloggers in China to register their real names, thus completely eliminating a Chinese blogger's option of anonymity.<sup>166</sup>

#### *D. Controlling the International Marketplace of Ideas*

##### *1. How the World Regulates the Blogosphere*

Almost a third of the journalists imprisoned around the world in 2006 had published their writings on the Internet, many of which were

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159. Reporters Without Borders, Yang Zili, <http://www.rsf.org/article.php3?idarticle=1868> (last visited Jan. 24, 2008) [hereinafter Yang Zili].

160. *See id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Reporters Without Borders, Hu Jintao, [http://www.rsf.org/article.php3?id\\_article=6696](http://www.rsf.org/article.php3?id_article=6696) (last visited Jan. 24, 2008) [hereinafter Hu Jintao].

165. *See id.* Hu ordered the arrest of Zhao Yan, a New York Times journalist, and Ching Cheong, an investigative reporter from the Strait Times. *Id.*

166. Tao Dongfeng, *Commentary: 'Real Name Rule' Will Block Truth on the Internet*, UPI ASIA ONLINE, July 13, 2007, [http://www.upiasiaonline.com/Society\\_Culture/2007/07/13/commentary\\_real\\_name\\_rule\\_will\\_block\\_truth\\_on\\_the\\_internet/4703/](http://www.upiasiaonline.com/Society_Culture/2007/07/13/commentary_real_name_rule_will_block_truth_on_the_internet/4703/) (reporting that several regions in China have promulgated regulation banning the use of online pseudonyms).

in the form of blogs.<sup>167</sup> Presently, the governments considered the harshest regulators of the free speech in the world are: Belarus, Burma, China, Cuba, Iran, Libya, the Maldives, Nepal, North Korea, Saudi Arabia, Syria, Tunisia, Turkmenistan, Uzbekistan, and Vietnam.<sup>168</sup> Following in the footsteps of these countries, other authoritarian states are beginning to contemplate tougher Internet laws to control bloggers within their own borders.<sup>169</sup> Malaysia,<sup>170</sup> for example, has voiced such considerations, along with Libya, Russia, Cambodia, and Vietnam.<sup>171</sup> Iran and China have jailed a multitude of bloggers, with a heightened crackdown on the blogosphere seen between the fall of 2004 and the summer of 2005.<sup>172</sup> In February 2005, Iran sentenced Mojtaba Saminejad, a 23-year-old blogger, to two years of prison for insulting the Supreme Guide on his blog.<sup>173</sup> Arash Sigarchi, whose personal account is featured in the *Handbook*

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167. Rukmini Callimachi, *Study: More Internet Journalists Jailed*, SFGATE.COM, Dec. 7, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/12/07/national/a174318S15.DTL>.

168. REPORTERS WITHOUT BORDERS, *PRESS FREEDOM IN 2005*, at 7 (2006) [hereinafter *PRESS FREEDOM IN 2005*], available at [http://www.rsf.org/IMG/pdf/Roundup\\_2005\\_Eng.pdf](http://www.rsf.org/IMG/pdf/Roundup_2005_Eng.pdf). See also *The 15 Enemies of the Internet and Other Countries to Watch*, REPORTERS WITHOUT BORDERS, Nov. 11, 2005, [http://www.rsf.org/article.php?id\\_article=15613](http://www.rsf.org/article.php?id_article=15613) [hereinafter *The 15 Enemies*]. On the other hand, the ten most liberal countries on press freedom in 2007 were Iceland, Norway, Estonia, Slovakia, Belgium, Finland, Sweden, Denmark, Ireland, and Portugal. Reporters Without Borders, *Worldwide Press Freedom Index 2007*, [http://www.rsf.org/article.php?id\\_article=24025](http://www.rsf.org/article.php?id_article=24025) (last visited Feb. 22, 2008). The United States was ranked at forty-eight. *Id.*

169. See Dharmendra Yadav, *Time For Bloggers To Self-Regulate*, TODAY (Singapore), Dec. 5, 2006, available at <http://singabloodypore.wordpress.com/2006/12/05/time-for-bloggers-to-self-regulate-2/>. "In Tunisia, for example, the family of President Zine el-Abidine Ben Ali controls national access to the Internet and he has built up very effective censorship, with the websites of all opposition publications and many news sites blocked. The regime also dissuades people from using webmail, which is harder to monitor than standard e-mail such as Outlook. The Reporters Without Borders website also cannot be seen inside Tunisia. The authorities imprison Internet users who defy them and pro-democracy lawyer Mohammed Abbou was given a three-and-a-half-year jail sentence in April 2005 for criticising the president online." *PRESS FREEDOM IN 2005*, *supra* note 168, at 7.

170. Yadav, *supra* note 169.

171. See *The 15 Enemies*, *supra* note 168.

172. *PRESS FREEDOM IN 2005*, *supra* note 168, at 7.

173. *Id.*

for *Bloggers and Cyber-Dissidents*,<sup>174</sup> was imprisoned for fourteen years for blogging criticisms of the Iranian regime.<sup>175</sup>

Singapore's government heavily regulates political content of blogs and bans the podcasting of politically controversial videos.<sup>176</sup> After Martyn See, a documentary filmmaker, released a twenty-six minute videocast on civil disobedience entitled *Singapore Rebel*, the government placed him under investigation and banned the videocasting of his work.<sup>177</sup> A Singaporean blogger wrote, "[t]here is possibly zero chance for Opposition Parties to be heard on local radio and TV, and Podcasting (and Blogging) is the best way . . . to be heard."<sup>178</sup>

*2. Understanding the Importance of Protecting Anonymity by  
Observing the Impact it Has on the Dissemination of Dissident Ideas  
in Authoritarian States*

The seriousness with which many governments have approached blogging suggests that bloggers wield a power that these governments fear. As of January 1, 2006, there were seventy cyber-dissidents imprisoned for their writings posted on the Internet.<sup>179</sup> Anonymous blogging has become a powerful means for a growing wave of young Arabs to bypass their countries' restrictions on speech.<sup>180</sup> In politically

174. See Arash Sigarchi, *We Can Write Freely in Blogs*, in HANDBOOK FOR BLOGGERS AND CYBER-DISSIDENTS 49, 49-51 (2005), available at [http://www.rsf.org/IMG/pdf/handbook\\_bloggers\\_cyberdissidents-GB.pdf](http://www.rsf.org/IMG/pdf/handbook_bloggers_cyberdissidents-GB.pdf), for Sigarchi's personal account.

175. Pain, *supra* note 3, at 5. Sigarchi saw his blogging as "a duty and a necessity, not just a hobby." *Id.*

176. See Connie Veneracion, *Podcast Ban and Regulation of Blogs in Singapore*, GLOBAL VOICES, Apr. 10, 2006, <http://www.globalvoicesonline.org/2006/04/10/podcast-ban-and-regulation-of-blogs-in-singapore>.

177. *Id.*

178. Atypical Singaporean, <http://atypicalsingaporean.blogspot.com/2005/08/possibly-first-singaporean-political.html> (Aug. 5, 2005, 12:05).

179. See PRESS FREEDOM IN 2005, *supra* note 168, at 2. In January of 2008 the Reporters Without Borders reported that 64 "cyberdissidents" were currently imprisoned. Reporters Without Borders, *Press Freedom Day By Day*, [http://www.rsf.org/rubrique.php3?id\\_rubrique=119](http://www.rsf.org/rubrique.php3?id_rubrique=119) (last visited Jan. 26, 2008).

180. Faiza Saleh Ambah, *New Clicks in the Arab World: Bloggers Challenge Longtime Cultural, Political Restrictions*, WASH. POST, Nov. 12, 2006, at A13, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/11/>

conservative and authoritarian regions of the world, anonymous blogging serves as the only means for dissenting or subversive opinions to be expressed and disseminated.<sup>181</sup> Anonymous blogging then, plays a revolutionary role in allowing an underground, yet free, marketplace of ideas to flourish.

### 3. *Who Controls the Internet?*

Not long ago, the Internet was regarded as “a new medium that could never be controlled.”<sup>182</sup> Now, governments around the world are recognizing that the Internet must be controlled in order to control information.<sup>183</sup> In 2005, the struggle over who would in fact control the Internet began.<sup>184</sup> The domain name system (DNS) is the Internet’s address structure and is managed by the Internet Corporation for Assigned Names and Numbers (ICANN).<sup>185</sup> This system allows computers around the world to communicate with other computers.<sup>186</sup> The U.S. insists on retaining its control of the DNS, while other countries are demanding more control over the Internet, or in the alternative, are intending to start managing their own versions of the Internet.<sup>187</sup> If that happens, then the “ubiquity” that makes the Internet such a success will diminish.<sup>188</sup>

Regulating blogs is not a domestic problem.<sup>189</sup> Cyberspace regulation needs to be addressed on the international front because of cyberspace’s lack of clear-cut borders.<sup>190</sup> The Internet’s globalization

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AR2006111100886.html.

181. *See id.*

182. Callimachi, *supra* note 167 (quoting Joel Simon, Executive Director, Committee to Protect Journalists).

183. *Id.*

184. Richard Wray, *EU Says Internet Could Fall Apart*, GUARDIAN (London), Oct. 12, 2005, at 27, available at <http://www.guardian.co.uk/business/2005/oct/12/newmedia.media>.

185. *Id.* The ICANN, which is based in California, is overseen by the U.S. Department of Commerce. *Id.*

186. *Id.*

187. *See id.* These other countries include China, Russia, Brazil, and some Arab states. *Id.*

188. *See id.*

189. *See supra* Part III.B-D.

190. *Cf.* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?:

of the exchange of information requires a global perspective in its regulation.

#### IV. (IN)FEASIBILITY OF BLOG REGULATION

The *O'Grady* case sought to apply reporter shield laws intended for real space (print media) to cyberspace (blogs).<sup>191</sup> Although striking similarities exist between journalists employed by traditional media forms and citizen bloggers, controlling access to their respective mediums is starkly different.<sup>192</sup> A staff writer at *The New York Times*, for example, normally cannot hide her real name from the byline. If a defamation suit is brought, the author's identity and jurisdiction will be easily determined. Internet speech differs greatly, however. The blogger's identity is easily made anonymous, making jurisdiction extremely difficult to determine. Laws created for real space do not readily fit into the context of cyberspace as it was initially designed.

In *Zoning Speech on the Internet: A Legal and Technical Model*, Professors Lawrence Lessig and Paul Resnick discuss various frameworks for regulating internet speech and the related costs of each.<sup>193</sup> They are primarily concerned with situations where the particular speech in question is prohibited in some instances but not others. The challenge is identifying where to place liability when speech is accessed in those prohibited instances: on the viewer, speaker, intermediary (such as the Internet service provider) or some combination. Of importance here are the consequences of regulating the speaker.<sup>194</sup>

Assuming regulation of the speaker, here the blogger, Lessig and Resnick recognize two alternative ways to impose liability: (1) a

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ILLUSIONS OF A BORDERLESS WORLD (2006) (arguing that national governments will continue to maintain their sovereignty in the age of the Internet).

191. See *supra* Part II.E.

192. See Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395, 396 (1999) (contending "real space laws do not readily translate into the context of cyberspace").

193. *Id.* at 395-98.

194. While Lessig and Resnick develop their analysis in the context of "explicit" internet speech, their observations are certainly relevant to blogging. Indeed, they note the relevance of their observations to information access control generally and apply their regulatory model to other contexts, such as "spam email." See *id.* at 397, 427-29.

prohibited-unless-permitted rule, or (2) a permitted-unless-prohibited rule.<sup>195</sup>

A prohibited-unless-permitted rule imposes liability when the blogger posts the content in question “without reliable indicators that the transaction was in fact legal.”<sup>196</sup> Thus, every blogger would assume the responsibility to observe a reasonable standard of care in ensuring legitimacy of her content. An obvious drawback to such a rule would be its potential chilling effect on cyberspace speech.<sup>197</sup> For example, a blogger of moderate means who felt unsure about whether posting a particular expression would bring on a costly lawsuit, because she was unsure whether she had “reliable indicators,” might err on caution’s side and opt not to post. This would defeat the spirit of blogging, which is the freedom of any amateur writer to comment freely on any topic of her choosing. Compared to the alternative, the prohibited-unless-permitted rule is a step towards a more repressive policy like China’s.<sup>198</sup>

In contrast, a permitted-unless-prohibited rule imposes liability only if the blogger posts despite indications that the posting is illegal.<sup>199</sup> Essentially, such a rule “punish[es] a specific intent to violate the law.”<sup>200</sup> Incorporating specific intent as an element sounds intuitively reasonable and even appears to be good public policy—penalize intentional wrongdoers. Of course even with this rule, a challenge still lies in determining what should be prohibited. Thus, although *facially* less restrictive than a prohibited-unless-permitted rule, a permitted-unless-prohibited rule might be equally restrictive where speech is broadly prohibited. Furthermore, even where only narrow categories of speech are prohibited, the permitted-unless-prohibited rule might still be repressive. In a repressive regime where criticizing the government is illegal, for example, a blog intended to criticize the government would violate the rule, offering little improvement on current laws.

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195. *Id.* at 402.

196. *See id.* at 402.

197. *Id.* at 405.

198. *See supra* Part III.C.

199. Lessig & Resnick, *supra* note 192, at 402.

200. *Id.*

A related challenge posed by imposing speaker liability results from the difficulty a blogger may face in gathering information necessary to determine whether she is complying with a regulation.<sup>201</sup> This is common where the speech is prohibited based on the viewer's identity or location; it may be difficult or impossible for the blogger to determine either.<sup>202</sup> As a solution, Lessig and Resnick propose mandatory digital certificates that would accompany each viewer's IP,<sup>203</sup> what they call the credentialing solution.<sup>204</sup> These digital certificates might contain information about the viewer's age and location, as well as other identifying information.<sup>205</sup> To gain access to a site containing regulated content, viewers first send their digital certificates to demonstrate they may legally view such content. Users would no longer need to input long, cumbersome credit card numbers to prove their age.<sup>206</sup> Also, comprehensive records could be maintained in the event that future litigation arises and identity or jurisdiction needs to be determined. Thus, digital certificates are extremely cost-efficient compared to existing alternatives.<sup>207</sup>

However, privacy issues become an alarming concern when digital certificates are used. Lessig and Resnick briefly acknowledge this,<sup>208</sup> but offer little means of assuaging the concern. Their model for

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201. *See id.* at 406-07.

202. *See id.* at 395-96, 406-07.

203. *Id.* at 406-407.

204. *Id.*

205. *See id.* at 406.

206. *Cf. id.* at 407 (noting that a certificate system would be less burdensome than a credit card or other identification system). Xanga.com, a blog-hosting site, is an example of a web page that currently monitors the ages of bloggers and blog viewers by requiring bloggers on one end to mark "explicit" content, and on the other end, requiring blog viewers to input their credit card numbers and certify their ages before they may access blogs containing "explicit" content. *See* Xanga.com, How Does Age Verification Work for D and EX Content?, <http://help.xanga.com/ageverification.htm> (last visited Feb. 29, 2008). *See* generally Xanga.com, Terms of Use, <http://help.xanga.com/about/termsfuse.htm> (last visited Feb. 29, 2008), for Xanga.com's terms of use and links to related FAQs.

207. *See* Lessig & Resnick, *supra* note 192, at 406.

208. *See id.* at 408 (noting that execution of an IP-to-geography mapping solution "raises obvious privacy concerns"). An IP mapping system, which roughly approximates the receiver's location, might be an alternative way to identify the receiver's jurisdiction. *Id.* at 407. IP mapping systems present privacy risks, which might be reduced by limiting use of the information generated by the mapping

regulation of blogs is feasible, if bloggers and blog viewers are willing to surrender some privacy.

The United States' current approach to regulation of the blogosphere is libertarian precisely because bloggers value their privacy. Any regulatory scheme for the Internet that requires web users to waive their privacy will not likely gain public support, not to mention raising alarming constitutional concerns. Yet one is hard-pressed to find better alternatives than those Lessig and Resnick identify. Thus, at least for now, regulation of the blogosphere seems infeasible. Even if it were feasible, for the sake of preserving open colloquia that finally bring marginalized ideas to the masses, accessible at their fingertips, regulation of the blogosphere is not desirable. Additionally, one of the greatest values of Internet broadcasting has been the introduction of an alternative avenue of uncensored political speech from bloggers who reside in or criticize oppressive regimes.

#### V. FOR THE UNFETTERED DEVELOPMENT OF BLOGS, OR ALTERNATIVE JOURNALISM: APPLYING THE UNIVERSAL DECLARATION OF HUMAN RIGHTS TO BLOGOSPHERE REGULATION

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>209</sup>

Leaders in the international community must guide the world away from regulating the blogosphere, the world's source for alternative journalism. Blogging "represent[s] one of the latest examples of the Internet's democratization of publishing."<sup>210</sup> Blogging

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system. *Id.* at 408-09. Limiting such use, however, would be admittedly difficult. *Id.* at 409.

209. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

210. Froomkin, *supra* note 14, at 857.



also provides a true participatory marketplace of ideas in ways that traditional media forms of print and broadcasting cannot. Constraints on blogs are like constraints on the democratization of ideas. This Article proposes that an internationally uniform guideline for blogosphere regulation be adopted, using the Universal Declaration of Human Rights as a foundation. This could be achieved by compelling all United Nation member states to comply with this Declaration.

Article 19 of the Universal Declaration of Human Rights (“Declaration”) states that everyone has “the right to freedom of opinion and expression” and the right to “seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>211</sup>

Although the Declaration is not binding on U.N. members,<sup>212</sup> it has nonetheless inspired bills of rights for numerous constitutions since its inception after World War II.<sup>213</sup> In particular, the rights enumerated in Article 19 of the Declaration resonate in various charters and declarations worldwide,<sup>214</sup> reflecting the tacit sense of social responsibility nations feel for upholding the Declaration.

The Declaration is self-described as a “common standard”<sup>215</sup> toward which every person and every organ of society should “strive.”<sup>216</sup> Professor Mary Ann Glendon describes the Declaration as “a yardstick by which nations and peoples can measure their own and each other’s progress.”<sup>217</sup> She notes the words of Eleanor Roosevelt,

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211. Universal Declaration of Human Rights, G.A. Res. 217A, at 74-75, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), *available at* <http://www.un.org/Overview/rights.html>. In Europe, this right is included in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. *See generally* Convention for the Protection of Human Rights and Fundamental art. 14, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* <http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>.

212. Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. U. J. INT’L HUM. RTS. 5, ¶ 9 (2004), *available at* <http://www.law.northwestern.edu/journals/jihr/v2/5/5.pdf>.

213. *See id.*

214. Wikipedia.org, Reporters Without Borders, [http://en.wikipedia.org/wiki/Reporters\\_Without\\_Borders](http://en.wikipedia.org/wiki/Reporters_Without_Borders) (last visited Jan. 30, 2008).

215. G.A. Res. 217A, *supra* note 211, at 72.

216. *Id.*

217. Glendon, *supra* note 212, ¶ 8.

who said of the Declaration when presenting it to the General Assembly for its approval:

[I]t is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms . . . to serve as a common standard of achievement for all peoples of all nations.<sup>218</sup>

Even though the Declaration is non-binding, its principles have been widely observed.<sup>219</sup> This is due, in part to a desire by most governments to “avoid being blacklisted as notorious violators.”<sup>220</sup>

Today, the Declaration should guide any regulation of the blogosphere. In contemplating how the blogosphere should be regulated, governments should observe Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to . . . seek, receive and impart information and ideas through *any media* and regardless of frontiers.”<sup>221</sup> A libertarian approach to blogging regulation best preserves the free marketplace of ideas and best promotes the principle of Article 19. Therefore, if the issue of blogging regulation is analyzed through the Universal Declaration of Human Rights, then greater credence will be given to the value of the unfettered growth of blogs.

## VI. CONCLUSION

The Internet is “the most ubiquitous communications medium in history,”<sup>222</sup> and blogs are certainly no exception. Public online diaries offer ordinary people a forum to broadcast their thoughts and at the same time, often provide web surfers with a fascinating view inside the minds of thinkers whom might otherwise go unheard. The

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218. *Id.* See U.S. Dep’t of State, *Bull. No. 494*, 19 DEP’T ST. BULL. 749, 751 (1948), for the statement by Eleanor Roosevelt, Chairman of the Commission on Human Rights, in its entirety.

219. See Glendon, *supra* note 212, ¶ 9.

220. *Id.* ¶ 26.

221. G.A. Res. 217A, *supra* note 211, at 74-75 (emphasis added).

222. Fagan, *supra* note 5, at 159.

blogosphere is a sanctuary for subversive ideas, and therefore expands the breadth of information accessible to the world, which had previously been controlled by the discretion of traditional mediums. Under oppressive government regimes which censor communications, blogs assume a more important role than ever—blogs become the only means of disseminating painful, controversial truths.

Traditional print and broadcasting mediums are motivated by capital, and therefore cater to the mainstream audience. The news, opinions, concerns, and points of view of minority groups become marginalized, if not altogether pushed to invisibility.<sup>223</sup> However, blogging changes that dynamic. Paper, ink, and available spectrum may be limited, but the Internet is not. Because a blogger only needs access to a computer and the Internet, every motivated voice is given a fair opportunity to be heard.

Any attempt to regulate the blogosphere should be an internationally collective effort because the Internet cannot be partitioned by geography. Thus, in context of the current global situation, the U.N. is best suited to mediate unitary guidelines. Furthermore, with the U.N.'s Universal Declaration of Human Rights as a guide, any regulatory scheme that is adopted should follow Article 19 and make paramount those rights "of opinion and expression . . . and to seek, receive and impart information and ideas through any media and regardless of frontiers."<sup>224</sup>

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223. See, e.g., Blog, *supra* note 1 (noting that Blogs have influence minority languages by "bringing together scattered speakers and learners"). "[T]his is particularly so with blogs in Gaelic languages, whose creators can be found . . . far away from traditional Gaelic areas. . . . Minority language publishing (which may lack economic feasibility) can find its audience through inexpensive blogging." *Id.*

224. G.A. Res. 217A, *supra* note 211, at 74-75.