

LIBEL IN THE BLOGOSPHERE: SOME PRELIMINARY THOUGHTS

GLENN HARLAN REYNOLDS*

Nothing is so unsettling to a social order as the presence of a mass of scribes without suitable employment and an acknowledged status.

—Eric Hoffer¹

People have been talking about libel and bloggers since the blogosphere was new, but the big news at this point is that, so far at least, there's more talk than action—despite the millions of blogs,² and probable billions of blog entries to date, there haven't really been any major blog-related libel cases, and the number in total is quite small.³ People are still talking about *Blumenthal v. Drudge*,⁴ a case that predates the blogosphere, when they talk about blogs and libel, and no major new case has emerged to take its place.

The absence of a major blog-related libel case in the United States after so much blogging is itself a pretty interesting phenomenon. In this short Essay, I will offer some suggestions as to why blog-related litigation has been relatively scarce, along with some observations on what law has developed, and some thoughts on the ways in which, and the extent to which, questions of blog-related libel should be treated differently than libel in newspapers, books, or television broadcasts.

I. THE LEGAL LANDSCAPE TODAY

Weblogs are, of course, just another medium of communication. Weblog software makes it easy and cheap for individuals to publish online, reaching an audience that may range from a handful of readers to

* Beauchamp Brogan Distinguished Professor of Law, University of Tennessee. Blog: InstaPundit, <http://www.instupundit.com>. Thanks to Matt Lindsay for research assistance.

1. ERIC HOFFER, *THE ORDEAL OF CHANGE* 109 (1963).

2. At the time of this writing, Technorati.com reports that it's indexing 34.2 million weblogs and 2.3 billion links. Technorati Weblog, <http://technorati.com> (last visited Apr. 12, 2006).

3. The Media Law Resource Center maintains a list at <http://www.medialaw.org> (last visited Apr. 18, 2006); only one case has gone to trial, resulting in a \$50,000 judgement against the blogger—significant, but not earthshaking. See Jeff Jarvis, *When Free Speech Isn't*, *THE GUARDIAN*, Mar. 24, 2006, available at http://commentisfree.guardian.co.uk/jeff_jarvis/2006/03/when_free_speech_isnt.html (last visited Apr. 18, 2006).

4. 992 F. Supp. 44 (D.D.C. 1998). For a discussion of the *Drudge* case, see Mike Godwin, *The Drudge Retort*, REASON ONLINE, Feb. 1998, <http://reason.com/news/show/30526.html>.

millions. This is part of a more general phenomenon of technological empowerment, in which capabilities once reserved to large concerns are now available to ordinary people, to people with considerably less-than-ordinary resources, and even to those without homes.

Most bloggers aren't as impecunious as The Homeless Guy, but few make tempting financial targets. Steven Hatfill's libel suit against the *New York Times*⁵ will produce considerable financial returns if it succeeds; most bloggers are likely to lack sufficient resources even to fight such a suit, much less to pay damages if they lose. Few bloggers, thus, are likely to engender lawsuits by those whose chief motivation is money. Nonetheless, though I've heard people claim that libel law doesn't apply on the Internet, blogs and bloggers are no more immune to libel suits than are other publications. Should they commit libel, publishing false and defamatory statements of fact (with, where public figures are concerned, "actual malice"), their Internet character will not shield them.

That Internet character does, however, pose certain difficulties for plaintiffs. Some libel plaintiffs have had difficulty obtaining personal jurisdiction over out-of-state Internet defendants. The mere posting of content viewable in a particular state is often not sufficient to support jurisdiction.⁶ More significantly, much—experience would tend to make me say most—potentially defamatory content on weblogs is not put there by their publishers/authors, but by readers via blog-comments. Under these circumstances, however, the blog operator is rendered immune from liability under the Communications Decency Act. This act provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁷ As a result, libelous matter contained in comments posted on blogs by their readers,⁸ or e-mailed to blog publishers and subsequently reprinted,⁹ cannot give rise to a libel action against the blogger—though of course the original source enjoys no such immunity.

Still, given the volume, and often intemperate tone, of many blogs' comment sections, eliminating those as a source of liability does much to

5. *Court Rebuffs Times on Libel Suit*, N.Y. TIMES, Mar. 28, 2006, at A14.

6. *See, e.g., Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (Columbia University and professor did not have sufficient contacts with Texas, where plaintiff resided, to support personal jurisdiction in defamation suit).

7. 47 U.S.C. § 230(c)(1) (2000).

8. *See Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003) (dating website not liable for defamatory content posted by users).

9. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (publisher immune for publishing defamatory e-mail if sender could reasonably have anticipated publication).

cut down on bloggers' exposure. Likewise, blog passages that quote published material from newspapers, or other blogs, would likewise seem to be "information provided by another information content provider." Since many blogs consist largely of links to news stories and other blogs entries, rather than original reporting, this statutory immunity vastly shrinks the realm of potentially litigable blog writing. The ideal defendant, from a libel plaintiff's standpoint, would be a rich blogger who has done significant original reporting.¹⁰ Such individuals are now quite rare. Most bloggers focus on opinion, and most bloggers are not wealthy. This may change over time, however, as the blogosphere matures.

II. THE CULTURAL LANDSCAPE TODAY

Another reason why blog libel lawsuits may be rare has to do with culture. First, bloggers generally blog about public figures, so a plaintiff would have to show "actual malice"—the publication of defamatory matter with knowledge of its falsity, or with reckless disregard as to whether it is true or false.¹¹ This is a difficult hurdle. In addition, blog culture expects that statements of fact will be supported by authority—such as links to other sites—or firsthand reporting, preferably supported by photos, video, or other records. Ordinarily, bloggers' factual statements will be supported by other sources, which may be in error, but whose mere existence, if they are at all credible, tends to undercut any claim of malice. Firsthand reporting without supporting records does occur, but—particularly given that most blogs lack an editorial chain that can introduce confusion or imprecision between the reporter and the reader—grossly false reporting would only be likely to happen in the context of passing along rumors without any investigation, or outright deception on the part of the blogger. The blogosphere, like the Internet as a whole, is a low-trust culture. This tends to encourage, among those who want to be credible, a belt-and-suspenders attitude toward factual assertions that makes claims of recklessness harder to maintain. (Newspapers, on the other hand, used to operating in a higher-trust environment, more commonly require readers to take their word regarding factual assertions.)

10. Mere statements of personal opinion, of course, cannot give rise to libel. *See, e.g.*, *Penn Warranty Corp. v. DiGiovanni*, 810 N.Y.S.2d 807, 814 (2005) (“[S]tatements that merely express opinion are not actionable as defamation, no matter how offensive, vituperative, or unreasonable they may be.”).

11. *See* RESTATEMENT (SECOND) OF TORTS § 580A (1977) (setting forth rule).

Blog-culture also frowns on libel suits, and threats of libel suits. Anyone threatening a blogger with legal action—even if that person is a blogger as well—can expect a generally hostile response from many, many other bloggers. This is what happened, for example, when economist-blogger Donald Luskin threatened then-anonymous blogger “Atrios” (since self-unmasked as Duncan Black). Many bloggers, including myself, urged Luskin to withdraw his threat, as he finally did.¹²

When a non-blogger threatens such a suit, the result is usually even more fierce, resulting in far more bad publicity than the original statement is likely to have produced (publicity that, because of blogs’ strong representation in the Google ranking scheme, will be prominently displayed to anyone researching the threatener).¹³ In addition, bloggers and blog readers tend to do their best to discover any other embarrassing matter regarding the threatener, adding an “Army of Davids” effect to the old lawyers’ saying that if you sue someone for libel, they’re “liable to prove it.”

Finally, speedy correction of factual errors is another cultural value of the blogosphere. When errors of fact are pointed out, most bloggers correct them immediately (something that is easy with blogging software as it is not for newspapers, television broadcasters, or book publishers) and generally do so with the same degree of prominence as the original error. This practice makes libel suits less likely, of course, and would arguably serve as evidence of absence of malice.

These legal and cultural factors have tended to militate against libel lawsuits involving the blogosphere. That may or may not last, however, and I’d like to offer a few thoughts on the (limited) extent to which blogs and blogging might come to be treated differently, for better and for worse, as blogs change and as the law of libel continues to develop.

III. THE CHANGING ROLE OF BLOGS

Blogs began as intensely personal things, and most blogs remain essentially online diaries of thought. But blogs have mutated, and though most remain close to the original template, the top tiers, as measured by

12. A short description of this affair can be found in Pejman Yousefzadeh, *The Next Litigation Battleground*, TCS DAILY, Nov. 26, 2003, <http://www.tcsdaily.com/article.aspx?id=112603D>.

13. Google ranks pages in no small part by the number and freshness of inbound links, meaning that blogs—which both give and receive many links, and which constantly post fresh content—tend to be disproportionately well represented in high-ranking Google pages. A roundup of one such incident can be found here: *Damnum Absque Injuria: Infotel*, <http://web.archive.org/web/20040405115803/http://xrlq.com/MT-Archives/001403.php>.

traffic and links, are getting more commercial. Clay Shirky recently observed:

Of the top 10 Technorati-measured blogs, (Disclosure: I am an advisor to Technorati), all but one of them are either run by more than one poster, or generate revenue from ads or subscriptions. (The exception is PostSecret, whose revenue comes from book sales, not directly from running the site.) Four of the top five and five of the [top] ten are both group and commercial efforts—BoingBoing, Engadget, Kos, Huffington Post, and Gizmodo.

Groups have wider inputs and outputs than individuals—the staff of BoingBoing or Engadget can review more potential material, from a wider range of possibilities, and post more frequently, than can any individual. Indeed, the only two of those ten blogs operating in the classic “Individual Outlet” mode are at #9 and 10—Michelle Malkin and Glenn Reynolds, respectively.

And blogs with business models create financial incentives to maximize audience size, both because that increases potential subscriber and advertisee pools, but also because a high ranking is attractive to advertisers even outside per capita calculations of dollars per thousand viewers.¹⁴

I’ve only been blogging for five years, and I’m already a dinosaur. Well, that’s thirty-five years in Internet time. But Shirky’s observation that an increasing number of blogs have “business models” captures a reality. While most bloggers, like me, continue to follow the old “blog what occurs to you” model, there are many new entrants that have a distinctly commercial tone.

In addition (and these two groups overlap, but by no means completely), many new blogs are thoroughly journalistic in nature. Rather than offering mostly opinion, which is not actionable as libel, they focus on delivering firsthand reporting, which is. Jack Shafer notes that such efforts are likely to be as good as most regular journalism:

Professional journalists enjoy better reputations than bloggers, but that’s mostly a function of the propaganda put out by some pros that bloggers fill every sentence with mistakes. (Bloggers return the insult, of course.) When David Shaw of the *Los Angeles Times*

14. Clay Shirky, *Powerlaws: 2006 Dance Remix: Many to Many*, CORANTE, Feb. 14, 2006, http://many.corante.com/archives/2006/02/14/powerlaws_2006_dance_remix.php.

threw a brick from his glass house late last month, I threw it back. While not five nines reliable, the better blogs that I read are as accurate as your average daily newspaper (which might not be saying that much).¹⁵

That's probably right. When blogs are criticized by professional journalists as sloppy, the comparison is usually to some ideal of journalism as practiced at daily newspapers, rather than the far less impressive reality. In reality, everybody makes mistakes, and layers of editors are as apt, sometimes, to introduce errors as to eliminate them. Thus, while blogs may be held to the same standard as traditional journalists, we should recognize that the standard is not a tremendously demanding one. As Shafer concludes: "As I've argued before, journalists have the right to get it wrong occasionally, and this right should be extended to bloggers. If we refrain from publishing until we're 1,000 percent certain, the only thing we'll end up reading is Ph.D. dissertations."¹⁶

Blogs doing reporting, thus, are journalistic outlets every bit as much as newspapers. They're simply using a different technological platform, and to the extent that they're to be treated differently it must be because of that technology. So does that different technology make a difference?

IV. TECHNOLOGY, LIBEL, AND THE BLOGOSPHERE

Existing defamation law already takes account of technological differences, in a small way. Slander, which is spoken but not written defamation, gets treated somewhat less harshly than libel, which is defamation that is published in tangible form.¹⁷ There are two reasons for this difference. First, people aren't expected to be quite as careful in ordinary conversation as they are when aiming for publication. Second, the harm from published defamation is greater. It reaches a larger audience, one that may not be familiar with the speaker or the object of the defamation, and it is potentially immortal: a researcher may look at a decades-old newspaper and be misled by a defamatory statement—even if

15. Jack Shafer, *What Bloggers Can Teach Reporters*, SLATE, Apr. 8, 2005, <http://www.slate.com/id/2116498/>.

16. *Id.*

17. See RESTATEMENT (SECOND) OF TORTS § 568 (1977) (distinguishing libel and slander). It is perhaps relevant that, as the comments note, jurisdiction over libel originated with the Court of the Star Chamber. The Restatement (§ 568A) makes all broadcast defamation libel, though not all state law is in accord.

it's corrected in a later edition. Modern libel law is to this degree based on an industrial-age paradigm: information, at least valuable information, is comparatively expensive and hard to find, and tends to be a mass-produced commodity.

Things are different now. Newsprint publication pretty much guaranteed that at least a day would pass between the publishing of a defamatory statement and a later edition, meaning that many who read the first statement wouldn't even see the issue with the correction. (Slower communications, in the pre-Internet era, meant that the actual lag was days or weeks.) Concerns of expense meant that most corrections would be published in a separate and little-read section dedicated to them, further reducing the likelihood that readers would recognize the change.

Many newspapers still do business this way out of habit, but the technology is different now, and bloggers tend to take a different approach. Errors can be corrected within minutes. The correction is usually appended to the original post, but if enough time has passed it may be posted at the top of the page as well. My approach, outlined below, is pretty typical, I think:

For more substantive errors, my basic rule is that I always put in an update correcting the post where the original error was, so that anyone who follows a link to it (or finds it on Google) will see the correction. If the item has scrolled down, and the correction seems significant, I'll note it again in a separate post so that the correction's at the top of the page. And I'll link the new post to the old one so that people can see clearly what was being corrected. I'll even do that when I'm not certain that the original item was in error, but think the issue has been made significant enough to make sure people hear both versions. . . . On the other hand, your belief that a particular set of facts supports a different conclusion than the conclusion that I draw from those facts doesn't constitute a factual error on my part, but rather a difference in interpretation. I might indicate it, if I think it's interesting or possibly persuasive, but I don't generally treat that as a correction.¹⁸

Not all bloggers feel this way, and some will correct an error in a post in the comment section below the post. I think that's a poor approach, as many readers don't scroll through the comments, and will thus miss the

18. Instapundit.com, <http://instapundit.com/archives/018207.php> (Oct. 3, 2004, 11:16 p.m.).

correction. But I think that—to the extent that any general statement about the blogosphere is applicable—my approach is representative.

This norm of rapid correction, to the extent that it holds, undercuts worries that false and defamatory information might, even if corrected, circulate widely among those who don't know better. Where blogs are concerned, that's just much less likely than where traditional newspapers are involved.¹⁹

Another difference between blogs and traditional newspapers has to do with authority. Newspapers, traditionally, spoke with a different kind of authority than blogs do today. The difference is captured in this passage by James Lileks:

A wire story consists of one voice pitched low and calm and full of institutional gravitas, blissfully unaware of its own biases or the gaping lacunae in its knowledge. Whereas blogs have a different format: Clever teaser headline that has little to do with the actual story, but sets the tone for this blog post. Breezy ad hominem slur containing the link to the entire story. Excerpt of said story, demonstrating its idiocy (or brilliance) Blogauthor's remarks, varying from dismissive sniffs to a Tolstoi-length rebuttal. Seven comments from people piling on, disagreeing, adding a link, acting stupid, preaching to the choir, accusing choir of being Nazis, etc. I'd say it's a throwback to the old newspapers, the days when partisan slants covered everything from the play story to the radio listings, but this is different. The link changes everything. When someone derides or exalts a piece, the link lets you examine the thing itself without interference. TV can't do that. Radio can't do that. Newspapers and magazines don't have the space. My time on the internet resembles eight hours at a coffeeshop stocked with every periodical in the world—if someone says "I read something stupid" or "there was this wonderful piece in the Atlantic" then conversation stops while you read the piece and make up your own mind.²⁰

19. Mickey Kaus noted an example of this phenomenon in a dispute between columnist Jeff Jacoby and a blogger who uses the name "Roger Ailes." Kaus wrote: "'Roger Ailes' has now forthrightly and graciously apologized to Jeff Jacoby. . . . More evidence that on the Web the truth can 'get its boots on' pretty darn quickly—which is why libel on the Web is a bit less dangerous than libel in a newspaper." Kausfiles, <http://www.slate.com/id/2078738> (Feb. 18, 2003, 4:30 p.m.).

20. LILEKS (James) The Bleat, <http://web.archive.org/web/20021113004102/http://www.lileks.com/bleats/archive/02/1002/100202.html> (last visited Apr. 17, 2006).

Making up your own mind is key, and the lack of the voice of authority is a characteristic of the blogosphere. If we police defamation more severely than slander because we think that people will believe what they read in the newspaper more than what they hear over the water cooler, then blogs might better be analyzed under slander than defamation. How often does anyone *really* change an opinion of another person, famous or obscure, solely because of something read on a blog? (As I noted earlier, blogs exist in a low-trust culture.) What goes on instead is what Mickey Kaus calls an “asymptotic approach to the truth:”

The Web really does put a premium on speed and spontaneity over painstaking accuracy. Bloggers instantly print what [sic] they learn, and what they believe to be true. They sometimes—often, actually—get it wrong. But even those errors prompt swift corrections that take the story asymptotically closer to the truth. In the meantime, other bloggers and other sources are activated, which advances the story further, quicker. . . . [*Are you arguing for a relaxation of libel laws as applied to blogs, to let them make more errors?*—ed. Good question. “Reckless disregard” is a pretty loose standard already. I do think the Web changes the social calculus behind libel standards, but mainly because Web errors are corrected so quickly and relatively effectively—the truth now gets its boots on and catches up with a lie halfway around the world, making errors much less dangerous, meaning we don’t need as much of a social deterrent against them. . . .]²¹

As Kaus suggests, technology makes a difference, too. When people used to get their information from just a few sources, errors by those sources mattered a lot. When it was hard to research things, people’s impressions, half-remembered from those sources, meant a lot. People used to fight duels over such things. It’s not that way now. Nor are links only outgoing: bloggers link to other people, and other people (including—I’m tempted to say “especially”—those who disagree) link to them.

Search engines like Google, Technorati, etc., have the effect of undercutting authority by making the full story readily available. Want to know something about me? Search “Glenn Reynolds” on Google. Some of what you find will be wrong, but no individual item will stand alone as authoritative. (I trust in this phenomenon myself. Reports that I put

21. Kausfiles, <http://www.slate.com/id/2067140> (June 19, 2002, 1:50 a.m.).

puppies in blenders to make a refreshing energy drink²² are numerous but incorrect; I am nonetheless confident that few people will be misled.)

Technorati, meanwhile, allows users to enter a URL and find the blog posts that link it. This means that anyone who cares can easily get multiple points of view. Some blogs (and some newspapers like the *Washington Post*) make it easy for readers to find stories linking them via Technorati, but even when they don't, it's not at all difficult.

In addition, with self-publishing and Google, it's pretty easy for the objects of defamation to reply. Traditional libel law assumes a one-way megaphone, with media defendants doing the speaking, and libel plaintiffs effectively voiceless except to the extent that they can enlist the power of the state through litigation. This is much less true today. As Jeff Jarvis has noted, this change is leading some people to pronounce libel itself obsolete:

I say we need libel laws less today. Law professor and blogger Susan Crawford once suggested over coffee (and I hope she doesn't mind my continued quoting of this) that libel laws are out-of-date in a time when the victims of defamation have the means of response via the internet that they never had in print or broadcast. . . . Do we need the courts to confirm for us that the bozo ranting in the corner is, indeed, a bozo? Rarely.²³

Indeed, the Bozo-in-the-corner illustration is perhaps key. People can generally tell—I'm pretty sure that nobody actually thinks I drink blended puppies—and thus the harm done to reputations by any particular blog posting is likely to be quite low. In this, blog posts are not much like newspaper articles of yore—or even the newspaper articles of today, which themselves command less authority than they used to.

This leads me to suggest a few ways in which treatment of defamation in the blogosphere should be different. First, I think that the threshold of harm should be fairly high. Since defamation law is intended to remedy actual harm to people's reputations, courts should take cognizance of the reality that blogs are not generally relied on as sole sources of information: a statement on a blog that a defendant has failed multiple polygraph tests is likely to be seen by most readers as a jumping-off point for further

22. The original source is Frank J. Fleming's post, *It's Fun to be Spiteful*, available at <http://www.imao.us/archives/000567.html>. Imitators abound: an archive of *Filthy Lies About Glenn Reynolds* can be found at http://badexample.mu.nu/archives/cat_filthy_lies.php. (last visited Apr. 18, 2006).

23. Jarvis, *supra* note 3.

research, while a similar statement in the *New York Times* is more likely to be regarded as conclusive. (This matters both as a threshold question, and, should liability be found, again as to damages.)

Second, because of the nature of blogs and blog readership, a swift correction should be seen as entirely remedying the problem. Unlike newspapers' corrections, it will not appear in a separate "edition," but at the same URL, and thanks to search engines like Google and Technorati, it will be readily available to future readers as well.

Third, courts should take into account the ease with which plaintiffs can get their own story out, via blogs and other electronic media, too. Indeed, a plaintiff who feels injured can start a blog, publish his/her response, and—via a link to the offending post—be confident that his or her version will be readily discoverable via Technorati. This sort of self-help might even be regarded as necessary mitigation.

Finally, though I won't go as far as John Perry Barlow's "Declaration of Independence" for cyberspace,²⁴ I think that courts should recognize that the blogosphere is a place with its own culture, norms, and readership, and that charges of defamation should be interpreted in context:²⁵ it's a rough-and-tumble world, not a place where Marquis of Queensbury rules apply.

Of course, many of these technological and cultural factors will in time come to apply to more traditional media as well. Newspapers are capable, technologically, of moving as fast as bloggers, and sometimes do. When they do not, it is usually because of cultural and organizational factors, factors that are likely to change. Likewise, few trust the authority of traditional media to the extent that most people once did.²⁶ And the availability of alternate means of communication is changing the way we think of the Big-Media world as well as the way we think of the blogosphere.

And that is my final point. Many traditional media organizations have been reluctant, at times, to support full First Amendment protection for bloggers and other new-media organizations. As I've suggested

24. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, available at <http://homes.eff.org/~barlow/Declaration-Final.html> (last visited Apr. 17, 2006).

25. See generally Jack Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043 (2004) (discussing a related topic).

26. As an aside, one place where the strictest rules of traditional libel should probably be maintained is the world of commercial databases, credit reports, etc., where users are likely to place a great deal of reliance in the accuracy of reports, and where those who are defamed have less of an opportunity to reply.

elsewhere,²⁷ this is probably unwise, for two reasons. First, big-media organizations are becoming, in many ways, more like blogs all the time. And second, the various protections that the press enjoys, both formally, through the First Amendment, and informally, through culture, are likely to be more robust if people see them as something belonging to Americans generally, as opposed to being something that is the province of a few elite professionals. When it comes to free speech, we must all hang together or we are all too likely to be hanged separately. As we move from traditional media to what Jim Treacher has called “we-dia,”²⁸ that’s something that courts, bloggers, and professional journalists should all keep in mind.

27. GLENN REYNOLDS, *AN ARMY OF DAVIDS: HOW MARKETS AND TECHNOLOGY EMPOWER ORDINARY PEOPLE TO BEAT BIG MEDIA, BIG GOVERNMENT, AND OTHER GOLIATHS* 89–114 (2006).

28. Mother, May I Sleep With Treacher?, <http://jimtreaacher.com/archives/001281.html> (Mar. 17, 2005, 12:12 p.m.).