

**Before you blog:
legal and ethical concerns
about joining the blogosphere**

**Timothy Boudreau
Assistant professor of journalism
Central Michigan University**

Contact information:
Timothy Boudreau
Department of Journalism, Moore 418
Central Michigan University
Mount Pleasant, MI 48859
(989) 774-2354
Email: boudr1t@cmich.edu

Paper presented at Newspapers and Community-Building Symposium XII,
co-sponsored by the Huck Boyd National Center for Community Media
at Kansas State University and the National Newspaper Association Foundation,
at the National Newspaper Association annual convention,
Oklahoma City, October 12-13, 2006

Merriam-Webster declared “blog” its “word of the year” in 2004 based on the number of online lookups. It also provided a concise 19-word definition for blog as “a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” Any attempt to define a blog or blogging so neatly, however, risks oversimplifying a rapidly changing, amorphous phenomenon that has seen remarkable growth in recent years and challenged some of the basic tenets of journalism.

This new form of journalism — what some have called participatory journalism or citizen journalism — presents opportunities and occasional risks for newspapers. Just as blogs themselves are rapidly evolving, so too are the laws and ethical standards of the blogosphere, or the universe of bloggers. This paper examines some of the emerging legal and ethical issues in this fast-moving form of communication, with special emphasis on libel, civility and accuracy.

Definition and growth of blogs

While even bloggers disagree about what qualifies as a blog, several traits typically distinguish blogs from other Web sites. Blogs, short for Web logs, are online writings that often invite reader comment and criticism. Postings usually appear in reverse chronological order, contain links to other Web sites and are marked by an informal, personal style. They are often unedited, which can give them a spontaneous, irreverent tone and occasionally create legal and ethical concerns.

“Many bloggers defy classification,” writes Palser (2005, p. 45). “One post might contain lucid analysis of a news report, the next a wild accusation, the next a photo of the blogger’s poodle.” Actors and actresses blog, as do owners of professional sports teams

and soldiers in Iraq. They are joined in the growing blogosphere by millions of teenagers on Xanga or MySpace who detail their trip to the mall or the Friday night dance.

Those posters have plenty of company.

While some observers argue that blogging has peaked — just as many newspapers have begun joining in — the numbers suggest otherwise. Technorati was tracking 37.3 million web logs as of May 2006, and that number was expected to double within six months. Technorati says each day brings 75,000 new blogs with about 50,000 blog posts every hour. And many blogs survive the novelty stage; more than 19 million bloggers were still posting three months after their blogs were created (sifry.com/alerts).

“Raw, unedited, but still journalism,” is how Jonathan Dube, publisher of Cyberjournalist.net, describes blogging (Beeson, 2006, p. 17). Dube’s Web site is one of a growing list that focuses on how technology and convergence are affecting modern journalism. Already, hundreds of mainstream journalists write their own blogs, either for themselves or as part of their work. Some newspapers allow non-staffers from the community to write blogs under the paper’s brand.

Larger newspapers, such as the *Chicago Tribune*, *Christian Science Monitor* and *San Jose Mercury-News*, are experimenting with blogs (Rosen. 2004), and smaller papers, such as the *Bluffton Today* in Bluffton S.C., and the *Dispatch-Argus* in Iowa’s Quad Cities, have recently joined them.

Newspapers use this emerging form of communication to gather feedback, test out new ideas, develop story ideas and encourage reader-writer interaction (Perlmutter and McDaniel, 2005). They also hope, of course, to reach younger readers and generate

greater loyalty among established audiences. Blogs are part of the digital revolution that is changing the way newspapers and other news media operate.

“Our traditional communication with readers and viewers was one-way,” writes Patrick Dougherty, senior vice president of the *Anchorage Daily News*. “We transmitted and readers received. We were a priesthood, delivering truth to the masses.” That has changed, he observes, as “(e)very reader becomes a potential writer, media critic, and publisher” (2005, p. 48).

Several recent events have placed blogs in the mainstream media spotlight and given them greater heft as legitimate sources of news. In 2002, blogger outrage over what some saw as Sen. Trent Lott’s racist remarks highlighted the growing power of blogs, while conservative bloggers’ questioning of Dan Rather’s documentation for his 2004 National Guard memo story underlined their influence (Pein, 2005). Blogs also saw spikes in activity after major news events such as 9/11, the tsunami that devastated parts of Southeast Asia and the London subway bombings.

Openness, spontaneity and interactivity distinguish blogs from more traditional forms of media. But it is precisely that unfiltered, unedited, style that prompts legal and ethical concerns among editors and publishers.

Legal concerns

While communication technology has evolved rapidly in recent years, court rulings related to that technology have developed much more slowly. Still, those rulings that have been issued suggest the courts will be highly protective of free speech guarantees relating to the Internet.

While laws concerning defamation as it relates to blogging are still taking shape, editors and publishers who exercise reasonable care generally have little to fear on the legal front. By and large, the same rules that apply in print apply online whether to staff-generated blogs or to blogs written by community members not employed by the newspaper. For this reason, some papers have moved cautiously into the blogosphere, which seems to thrive on free-wheeling, spontaneous and extreme types of speech that invite libel claims.

At the same time, Congress has provided broad protections under Section 230 of the Communications Decency Act to Internet service providers that merely act as conduits for third-party postings, as many blogs do. Section 230 states, “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.” The law also preempts state laws that try to hold online publishers liable for defamation or other sorts of offensive material. In short, if a blog posts a defamatory comment by a reader, the reader – or information content provider – is considered the publisher and is liable for its content.

The courts have recognized the unique nature of the Internet as an important electronic forum, and they have provided broad protections for online speech. They have also recognized the difficulty online service providers face in trying to identify and weed out libelous or potentially libelous material posted on blogs and in other online venues.

Common carriers such as telephone companies and distributors such as bookstores are not liable for defamation because they have no control over content. They exercise no editorial control and cannot be expected to monitor every message carried

over their systems or distributed through their stores. Requiring such monitoring would unconstitutionally hinder the free flow of information (Middleton and Lee, 2006).

The courts have applied a similar logic to bloggers and online publishing. Section 230 protects papers from liability if editors delete a post or even edit it. Material changes to a post – editing in a way that changes the meaning – can open papers to liability. So ironically, the more editors edit bloggers' material, the more likely they are to adopt it as their own and be held liable for its content

Courts have already applied those protections to traditional Internet service providers. In *Zeran v America Online*, an anonymous poster placed phony advertisements for T-shirts that made light of the Oklahoma City bombing. The ads urged readers to call Zeran – who had nothing to do with the ads – at his Seattle home. Zeran asked AOL to remove the ads and later sued.

A federal appeals court ruled Section 230 protected AOL. The appeals panel said requiring AOL to edit the millions of messages distributed daily over its system would place an undue burden on the company and chill free expression (*Zeran v America Online*, 1997). AOL was similarly protected from a libel suit stemming from its distribution of the online Drudge Report that contained allegations of domestic violence involving a White House aide (Middleton and Lee, 2006). While Drudge was liable as publisher of the story, the ISP that distributed it was not (*Blumenthal v Drudge*, 1998).

The Electronic Frontier Foundation notes, however, that if bloggers actively gather information on their own and republish it on their blogs, they might be liable for its content. If a newspaper staff member materially changes a bloggers' comment, the newspaper could then become liable (Bloggers' FAQ).

It is difficult to predict the direction the courts will go on the regulation of blogging. Some observers suggest the courts should consider the open nature of blogs and the Internet in general, making it more difficult even for private figures to win libel suits against bloggers. Many targets of false defamatory statements now enjoy rapid, relatively easy access to the Internet to correct those statements, which should weigh against their likelihood of prevailing in a libel case (Ribstein, 2006).

Already, even traditional forms of communication enjoy considerable constitutional protections against claims of libel. Public figures have long been required to show actual malice – that the defamatory statement was published with knowing falsity or with reckless disregard for the truth – to prevail in a libel case (*Times v Sullivan*, 1964). Further, much of what blogs contain clearly falls into that realm of opinion, which is fully protected by the First Amendment.

To date, the courts have been reluctant to restrict the open, irreverent debate found on the Internet, even as some interests have pushed for greater restrictions (Fadeley, 2006). Publishers and editors who exercise reasonable caution and common sense on their blogs would seem to have little to fear.

As the influence of bloggers has grown, their legal status as journalists has begun to take shape. A May 2006 ruling clearly places bloggers on par with traditional mainstream media. In a ruling hailed as a victory for bloggers and citizen journalists, a California appeals court rejected Apple Computer's attempts to force two blogs to reveal their sources of information about a product under development. The bloggers had argued – and the justices agreed – that they were entitled to protect the identity of their sources

under the same California shield law that protects traditional journalists . The court wrote:

We decline the implicit invitation to embroil ourselves in questions of what constitutes ‘legitimate journalis[m].’ The shield law is intended to protect the gathering and dissemination of news, and that is what petitioners did here. We can think of no workable test or principle that would distinguish ‘legitimate’ from ‘illegitimate’ news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace (*Apple v Doe*, 2006).

Editors and publishers who have questioned whether bloggers would enjoy the same protections as full-fledged journalists can take heart from the ruling. Some federal appellate courts had already adopted a standard enunciated in *von Bulow v. von Bulow* (1987), a case out of the Second Circuit. There, the court held that a person’s intent at the start of the information-gathering process – whether the person intended to disseminate the information to the public — would determine whether he or she enjoyed journalistic privilege, “even though he may not ordinarily be a member of the institutionalized press.”

In either case, editors can presume that bloggers would be treated much like traditional journalists and enjoy the same privileges granted by their states’ shield laws..

Yet another question that vexes some editors and publishers is whether they can be forced to reveal the identities of anonymous bloggers who post offensive or even defamatory material. A 2005 ruling places high hurdles before those seeking the identities of anonymous posters in at least one state (*John Doe 1 v Cahill*).

The identity of anonymous speakers, who abound on blogs, can remain masked unless the plaintiffs prove they have strong enough case to proceed to trial, the Delaware

Supreme Court ruled. In that case, the plaintiff failed to meet the standards required to force the disclosure of an anonymous poster who accused a city councilman of “character flaws” and “mental deterioration.” In a unanimous ruling, the court said unmasking the poster could chill free speech and lead to self-censorship.

As with the above cases, the court ruling applies only in a single state or single federal circuit, but it indicates how other courts might rule in similar cases.

Some bloggers or posters might threaten to sue if a newspaper deletes or edits their posts. Again, publishers have little to fear. Even after papers launch a blog, they retain the right to delete posts as they see fit. As private organizations, they are under no obligation to allow posts by bloggers or others. The First Amendment protects against government interference with free speech; it does not apply to private companies, and the right to post to a privately owned and operated blog is a privilege that can be revoked at will.

Ethical concerns

Some reluctance to join the blogosphere stems not from legal concerns, but rather from a discomfort with blogging’s more relaxed ethical standards. Practices widely frowned on in traditional media, such as the use of pseudonyms, being openly partisan and rejecting notions of objectivity (Johnson and Kaye, 2004) are standard practices among bloggers.

While the courts appear to have given bloggers broad free speech protections, journalists must still wrestle with ethical dilemmas this new type of communication poses. Bold assertions of First Amendment rights mean little to the publisher or editor

challenged by members of the chamber of commerce or the local school board to defend a mean-spirited anonymous posting in a blog in that day's paper.

Blogging's shoot-from-hip mentality conflicts with the standards of many newspapers, especially smaller, community-oriented publications. Newspaper blogs commonly feature staff writers who try to engage readers in a conversation about the content of the newspaper. Others invite community members to write about topics of interest — everything from politics to poodles. But even seemingly innocuous topics can generate passionate debate that threatens to erode civility.

Dougherty of the *Anchorage Daily News* wrote of his experience with an online forum:

A small group of people began to write constantly. They were neither the best-informed nor most thoughtful participants. Instead they were profane, bitter, shallow, racist and relentless. Little by little, their ignorant and mean-spirited comments began to predominate. They were prolific. They didn't appear to hold jobs or even sleep. Ultimately their words set a tone for the forum that discouraged reasonable, intelligent, considerate voices from participating ... In the end, I was happy to shut it down" (p. 49).

Editors and publishers who expect high-lofty on their blogs might be disappointed, says Joe Beach, metro editor of the *Dispatch-Argus*, a 45,000-circulation paper that serves the Quad Cities of Iowa. "But there's probably a happy medium between the high-minded approach (that generates little reader response) and sensationalism."

Blogs and similar efforts at expanding the reach of newspapers might invite further trouble, some observers say. Fred Brown, co-chair of the Society of Professional Journalists Ethics Committee, lamented an effort by the *Los Angeles Times* to let readers

rewrite the paper's editorials online. The paper stopped the experiment after posters began posting pornographic images on the site.

Editors at newspapers in Palatka, Fla., and Anniston, Ala., closed their online forums in the face of uncivil or libelous remarks by online posters (Sands, 2004).

Says Brown, "(It)'s risky to reconfigure newspapers to try to seduce people who don't read newspapers. Apparently it doesn't encourage reasoned discourse. It invites anarchy; or, at best, truth by majority vote" (p. 42).

Yet another critic charges that blogs promote "disinhibition ... what the world would look like if everyone behaved like Jerry Lewis or Paris Hilton or we all lived in South Par" (Henninger, 2006).

Further, the majority of readers who are thoughtful and more moderate might begin to associate the paper with the rude and relentless mobs to whom its blogs have given voice. Editors should consider whether an attempt to draw in and engage more readers might actually alienate older, more established readers who see the paper aligning itself with a new breed of journalists and a new type of journalism.

Traditional journalists, too, sometimes see blogging as an alien form of journalism, as the two "sides" approach news and commentary from quite different perspectives.

"A professional journalist's No. 1 obligation is to be accurate," Brown writes. "A citizen journalist's No. 1 obligation is to be interesting" (p. 42) and attempts to fit blogs into the traditional journalism mold can destroy their creativity and spontaneity.

Sometimes that drive to interest readers means the blogger sacrifices accuracy or any attempt at fairness and balance. But even the best-intentioned bloggers often lack

rudimentary reporting skills and fall short of standards expected of the mainstream media.

“More often than being misleading, bloggers just get things wrong; it’s the nature of the blogosphere to toss out hypotheses and wait for evidence to surface,” says one observer (Palser, 2005, p. 47). It’s what one journalist refers to as “ready, fire, aim” journalism” (Dougherty, 2005).

Blogging places the onus on the reader to sort fact from fiction and hype from reality. Blogger/journalist Dan Gillmor says:

It's hard to know what's true online. We've evolved a fairly good BS test in the analog world: I know the supermarket tabloid story about George Bush's latest Martian love child is almost certainly false. But one website looks as good as another, and some people perversely believe -- and can then spread easily -- anything they see online.

Bloggers, however, say the blogosphere is self-correcting and more likely than the mainstream media to correct its errors. When bloggers make mistakes, as they did earlier this year when several bloggers attacked the character and motivations of *Christian Science Monitor* reporter Jill Carroll shortly after her captors in Iraq freed her, the blogosphere functioned as a massive electronic town meeting where incivility was sanctioned and falsehoods were exposed, allowing the truth finally to emerge (Maroney, 2006). Bloggers rigorously edit each other. They can also post their corrections – or be corrected by others – almost immediately, unlike the traditional media.

Still, critics contend that rumors and inaccuracies spread so quickly on the Internet that the damage is already done before the claim is corrected. When a 21-year-old engineering student killed himself with a homemade bomb near a crowded football stadium at the University of Oklahoma, bloggers’ speculation ran rampant. After many

claims of mainstream media cover-ups and charges that the dead man was linked to Muslim terrorists, authorities concluded he was simply a depressed young man (Young, 2005).

But before the blogosphere died down, critics said, the damage had already been done. The inaccuracies generated conspiracy theories that will linger long after the corrections. They also made valid fears of terrorism appear less credible and caused greater grief to the dead man's family (Young, 2005). These sorts of ethical lapses have led to criticisms that some bloggers "say what they please, without regard for the truth, accuracy or even common decency" (Pollack, 2005, p. 25).

Most bloggers make little pretense to objectivity, a standard tenet of the mainstream news media. They say they are simply more open about their biases than are members of the traditional media and that their openness contributes to blogs' free-wheeling and creative nature.

"My God, if I was a journalist, I'd be breaking half the canons of journalistic ethics," says Markos Moulitsas Zuniga, author of the widely read Daily Kos. "I am one walking conflict of interest" (Smolkin, 2004, p. 43).

Some conflicts-of-interest have sullied the reputations of individual bloggers and, to a lesser extent, the blogging community. Two North Dakota bloggers who pilloried then-Sen. Tom Daschle and charged the Sioux Falls (S.D.) *Argus Leader* with bias in its coverage later revealed that Daschle's opponent had paid them \$35,000 for their work. Their actions drew widespread condemnation, even from bloggers sympathetic to their politics, but more for their lack of transparency than for their obvious bias.

Jonathan Dube of CyberJournalist.net is among a growing numbers of blog enthusiasts urging more stringent ethical codes to promote a sense of civility, trust and accountability. He adapted the Society of Professional Journalist's Code of Ethics to this new venue and calls, among other things, for bloggers to be fair and honest in reporting the news, to link to sources whenever feasible, to avoid misrepresentation and conflicts of interest, and to admit and correct mistakes quickly.

Bob Steele, director of the Poynter Institute's ethics program, said lax ethical standards breed disrespect. "Disrespect erodes relationships," he said. "It's antithetical to the spirit of blogging" (Beeson, p. 18).

Others urge bloggers to avoid posting anonymously and to be more transparent about conflicts of interest (Cohen, 2005; Shear, 2005). Bloggers, especially the more influential ones, should hold themselves to the same or similar standards they demand of the mainstream media, despite protestations that they are not journalists but rather activists or even entertainers.

From a practical and business standpoint, too, newspapers that launch blogs should consider whether staffers will have time and resources to produce a quality product, says Beach. Anything less disrespects the publication's readers and compromises the paper's own standards.

John Robinson, editor of the *Greensboro (N.C.) News & Record*, says, "It really needs to be a corporate priority, or at least a newsroom priority" (Transparent life, 2005, p. 59).

Editors must recognize that writing and maintaining a blog – especially responding thoughtfully to readers' comments — takes time. "I feel like I'm becoming a

high-paid pen pal for retired people,” observes Marilyn Greenwax, an economic reporter with Cox Newspapers, after a lengthy debate over wages with a group of retired professors (Transparent life, 2005, p. 59).

Those considering news-related blogs should also consider whether their average reader shares their passion for the minutiae of newsgathering and reporting. What editors might see as compelling, the average reader might dismiss as navel-gazing and self-absorption (Smolkin, 2006).

Blogs have the potential to inspire journalists to higher standards, to seek out new sources and ideas, and to generate a sense of investment and involvement among newspaper readers. The best blogs represent the best in journalism: independence, passion and a crusading spirit. The worst lower the paper’s standards, become a dumping ground for material that would never see the light of day in print, and can lead to legal and ethical problems.

References

- Beach, J. (2006, July 12). Personal interview.
- Beeson, P. (2005, April). The ethical dilemma of blogging in the media. Quill, pp. 17-18.
- Beeson, P. (2006, March). Blogging: What is it and how has it affected the media? Quill, pp. 16-18.
- Bloggers' FAQ – Section 230 protections. Electronic Frontier Foundation.
<http://www.eff.org/faq-230.php> (Accessed May 25, 2006).
- Brown, F. (2005, August). 'Citizen journalism' is not professional journalism. Quill, p. 42.
- Blumenthal v Drudge, 992 F. Supp. 44 (1998).
- Cohen, A. (2005, May 8). The latest rumbling in the blogosphere: Questions about ethics. The New York Times, p. 11.
- Dougherty, P. (2005, Fall). A newspaper talks with readers in a cyber town square. Nieman Reports, 48-50.
- Fadeley, E. (2006, June 18). The wild, wild web – We need laws against blog defamation. The Sunday Oregonian, p. C01.
- Henninger, D. (2006, April 21). Disinhibition nation: When blogs rule, we'll all talk like ---. OpinionJournal.com. <http://www.opinionjournal.com/columnists/dhenninger/>. Accessed June 30, 2006.
- John Doe no. 1 v. Cahill, 884 A.2d 451 (Del. 2005).

Johnson, T. & Kaye, B. (2004). Wag the blog: How reliance on traditional media and the internet influence credibility perceptions of weblogs among blog users.

Journalism & Mass Communication Quarterly, 51, 622-642.

Kesmodel, D. (2005, July 12). Should newspapers sponsor blogs written by reporters?

The Wall Street Journal, p. B1.

Maroney, W. (2006, April 10). Lesson from the blogosphere in the case of Jill Carroll.

The Boston Globe, p. A10.

Middleton, K., & Lee, W. (2006). The law of public communication. Boston: Allyn & Bacon.

Miller, P. (May/June 2006). Monitoring the blogosphere: Should you take the leap?

Communication World, p. 36.

Palser, B. (2005, August/September). Journalism's backseat drivers. American

Journalism Review, pp. 42-51.

Pein, C. (2005, January/February). Blog-gate. Columbia Journalism Review, pp. 30-35.

Perlmutter, D. & McDaniel, M. (2005, Fall). The ascent of blogging. Nieman Reports, pp. 60-64.

Pollack, J. (2005, March). Blogs are not journalism. St. Louis Journalism Review, pp. 25, 28.

Ribstein, L. (2006). From bricks to pajamas: The law and economics of amateur

journalism Illinois Law and Working Paper Series (No. LE06-008). University of Illinois College of Law.

Rosen, J. (2004, January). Bloggin' in the newsroom. American Journalism Review, pp. 10-11.

Sands, K. (2004, March 22). If news is a conversation, who monitors the conversation? Poynter Online. <http://poynter.org/column.asp?id=56&aid=62714> (Accessed July 12, 2006).

Shear, M. (2005, September 1). Bloggers consider a code of conduct. The Washington Post, p. T06.

sifry.com/alerts. State of the Blogosphere, April 2006 Part 2: On Language and Tagging. (Accessed July 12, 2006). <http://www.sifry.com/alerts/>

Smolkin, R. (2006, April/May). Too transparent? American Journalism Review, pp. 17-23.

Smolkin, R. (2004, June/July). The Expanding Blogosphere. American Journalism Review, pp. 38-43.

The transparent life of newspaper blogs. (2005, Fall). Nieman Reports, pp. 56-60.

The New York Times Company v Sullivan, 376 US 254 (1964).

Von Bulow v von Bulow, 811 F. 2d 136 (1987).

Young, C. (2005, October 24). When blog hysteria does real harm. Boston Globe, p. A15.

Zeran v America Online, 129 F.3d, 327 (1997).

