

Blogs and the Law: Key Legal Issues for the Blogosphere

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A. INTRODUCTION

Over the past few years the blogosphere (the community or social network of blogs) has experienced an unprecedented level of growth, in terms of both the popularity of blogs and the number of blogs in existence. The very nature of a blog—a short, instantaneous, highly personalized form of on-line communication that is accessible throughout the world—fundamentally challenges the application and operation of traditional legal doctrines. However, this relationship between the blogosphere and the law is yet to be fully conceptualized from a legal perspective. Therefore, the purpose of this chapter is to consider from an Internet-law perspective some of the most critical legal issues that are currently facing blogs, their authors, bloggers, and the intermediaries that host blogs. The chapter will first provide a broad overview of blogs by examining the nature of a blog, how the courts have interpreted blogs, the rise of the blogosphere, and the emergence of so-called “new generation blogs.” The chapter will then consider some of the key legal issues affecting blogs, including copyright law, defamation law, Internet jurisdiction, employment law, and intermediary liability of blog providers. Finally, the chapter will conclude with some thoughts on how blogs and the blogosphere will survive the many challenging legal issues that they are likely to encounter.

* The author owes special thanks to Professor Brian Fitzgerald for his guidance and assistance with this article, and to Professor Mark Perry. The law as it appears in this chapter is based on Australian Law.

B. AN OVERVIEW OF BLOGS

1) The Definition of a Blog

A blog is a public online journal that features individually authored entries or posts in reverse chronological order, along with hypertext links, and, in some cases, the opportunity for readers to post comments and responses to an author's entry.¹ In their simplest form, a blog is nothing more than a webpage that consists of a number of different entries on a particular topic, which are arranged in reverse chronological order, from the most recent entry to the oldest entry.² Beyond this generic definition, there are also a number of other variations that blogs may use, for example: some blogs feature each entry on a new page, while others organize entries by topic or the date the entry was created.³ However, the key distinguishing feature of a blog is the time-stamping, reverse chronological format that arranges entries from most recent to oldest, according to their date of creation.⁴ New entries are then simply added through a simplified interface that operates in a similar way to a word-processing application.

Commonly, blogs also contain links to other blogs and websites within the individual blog.⁵ Indeed, many of the first blogs relied heavily upon material from other websites to create their entries. However, many of today's blogs now feature a greater amount of original and creative material, which is very much akin to a personal journal or diary of the author.⁶ Most blogs take the form of a personal journal or diary and as such are non-commercial in nature. However, blogs are also increasingly being used by corporations and organizations as a communications and public relations tool.

1 Axel Bruns & Joanne Jacobs, "Introduction" in Axel Bruns & Joanne Jacobs, eds., *Uses of Blogs (Digital Formations)* (New York: Peter Lang, 2006) 1 at 2 [Bruns & Jacobs].

2 Bausch *et al.*, *We Blog: Publishing Online with Weblogs* (Indianapolis, IN: Wiley, 2002) at 7.

3 *Ibid.*

4 Axel Bruns, *Gatewatching: Collaborative Online News Production (Digital Formations)* (New York: Peter Lang, 2005) at 173 [Bruns].

5 For an overview of the legal issues relating to collaborative blogging activities, see Eric Goldman, "Co-Blogging Law" (Paper presented to the Berkman Center for Internet & Society, Bloggership: How Blogs are Transforming Legal Scholarship Conference, 28 April 2006), online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898048.

6 Bruns, above note 4 at 173.

There has so far been very limited judicial consideration of the legal nature of a blog. In the few cases that have examined blogs, it would appear that the definitions provided by the courts have been somewhat misguided, often mistakenly likening a blog to a traditional website or bulletin board. In the US, one of the major decisions to have considered the legal nature of a blog was *Cahill v. Doe*,⁷ where the Superior Court of Delaware described a blog as

[a]n Internet website where users interested in a particular topic can post messages for other users interested in the same topic to read and answer if they wish. When users post information on a blog, they often do so using a pseudonym referred to as a "user name."

In the Australian decision of *Y & H*,⁸ Federal Magistrate Baumann described a blog as "a sort of Internet accessible private diary," which in this case had been used as a forum for debate and comment about the respondent's life and experiences. Similarly, in a decision of the Supreme Court of New South Wales in *Kaplan v. Go Daddy Group Inc.*,⁹ White J. described a blog as a "website . . . which enables anyone with Internet access to post comments." Again, in a recent decision of the Supreme Court of Victoria in *Melbourne University Student Union Inc. (in liq) v. Ray*,¹⁰ Hollingworth J. defined a blog as "essentially an online diary."

2) The Rise of the Blogosphere

The blogosphere has evolved over the past few years to create an entirely new form of media and content production. Blogs have played a significant role in major events throughout the world, and are now regarded by many as a personalized alternative to the mainstream media.¹¹ As Bruns and Jacobs argue, the main reasons for the rise of the blogosphere have been the social networking aspect of blogs, and the potential large-scale collaboration that provides the human and personal dimension to the publishing and publicizing of information online.¹² It is this personalization of content production that enables blogs to go beyond a purely passive and informative role to generate a new platform for social, political, and cultural expres-

7 879 A.2d 943 at 945 (Del. Super. Ct. 2005).

8 [2005] FMCAfam 229 at para. 25.

9 [2005] NSWSC 636 at para. 3 [*Kaplan*].

10 [2006] VSC 205 at para. 3 [*Ray*].

11 Bruns, above note 4 at 175.

12 Bruns & Jacobs, above note 1 at 5.

sion.¹³ Indeed, blogs are in many ways replacing traditional websites as a forum for ideas and information because they give authors the opportunity to interact with their audience, unlike any other form of media.¹⁴ The rise of the blogosphere can also be attributed to the highly democratic nature of blogs and the decentralized nature of the blogosphere.¹⁵

Over the past year, the blogosphere has experienced an unprecedented level of growth. In the October 2006 “State of the Blogosphere” report released by the blog-tracking website Technorati, it was found that the blogosphere doubled in size every six months and is now a hundred times bigger than it was three years ago.¹⁶ Similarly, according to Technorati’s report “State of the Live Web,” April 2007, there are now over 75.2 million blogs, with over 120,000 new blogs created every day and 1.5 million new entries made daily.¹⁷ Interestingly, Technorati’s figures show that blogs and the blogosphere act as a barometer for the digitally connected world, with current news and events triggering a rapid increase in blog entries. For example, the July 2006 Israel-Lebanon conflict caused an increase in daily blog entries of over 2.5 million.¹⁸ The “State of the Live Web” report also demonstrates the global nature of the blogosphere, with English accounting for only 36 percent of blogs, Japanese at 37 percent, Mandarin at 8 percent, and a number of other languages making up the remaining 19 percent.¹⁹

3) The New Generation Blogs: MP3 Blogs, Vlogs, and Photoblogs

Recently there have also been a number of variations to the traditional blog, including MP3 blogs, vlogs or videoblogs, and photoblogs. An MP3 blog is

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*; see also Urs Gasser & Silke Ernst, “From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age” (2006), online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909223 at 4–8 [Gasser & Ernst].

16 David Sifry, “State of the Blogosphere, October, 2006” (6 November 2006), online: <http://technorati.com/weblog/2006/11/161.html> [Sifry]; see also Candace Lombardi, “There’s a Blog Born Every Half Second” (7 August 2006), online: http://news.com.com/Theres+a+blog+born+every+half+second/2100-1025_3-6102935.html.

17 David Sifry, “The State of the Live Web, April 2007” (5 April 2007), online: www.sifry.com/alerts/archives/000493.html [Sifry, “State of the Live Web”]; See also Technorati, “About Us,” online: <http://technorati.com/about/>.

18 *Ibid.*; see also Sifry, above note 16.

19 Sifry, “State of the Live Web,” above note 17.

a type of blog in which the author makes music files—generally in MP3 format—available for download.²⁰ Most MP3 blogs only make available a very small number of songs, sometimes only one or two tracks from an album, which are freely available to download for a short period of time. These MP3 files are then usually annotated with biographical and contextual notes about the artist and music available for download. In an attempt to distance themselves from peer-to-peer file-sharing services, readers are encouraged to download the music for sampling purposes only, and then to purchase the artist's music if they like it. Generally, the music available on MP3 blogs is restricted to a particular musical genre or theme, usually that which is not termed as contemporary or mainstream, and is often difficult to locate.

A vlog or videoblog is simply a blog which uses video as its primary source of content, as opposed to the traditional text format that is featured on most blogs. Typically, a vlog will combine videos, which are directly uploaded to the vlog, along with embedded and linked videos, which are supported by text, images, and metadata.²¹ The growth and popularity of vlogs on the Internet can largely be attributed to two factors: the introduction of video iPods capable of playing videos, along with the introduction of videos to the Apple iTunes Store, and the emergence of the online "clip culture," in particular video-sharing websites such as YouTube, which enable uploaded videos to be embedded directly to vlogs.²²

A photoblog is a form of blog that primarily uses photographs or images as its main source of content. Generally, a photoblog can be distinguished from a blog, as its main emphasis is on photography, with the associated photos and images not simply being used to illustrate the text entries. Similar to traditional blogs, photoblogs contain photos that are posted to the blog, time stamped, and then listed in chronological order, along with the provision for readers to post comments related to the particular entry.

20 For an overview of MP3 blogs see Brian Fitzgerald & Damien O'Brien, "Digital Sampling and Culture Jamming in a Remix World: What Does the Law Allow?" (2005) 10 *Media and Arts Law Review* 279 at 288 [Fitzgerald & O'Brien].

21 Katie Dean, "Blogging + Video = Vlogging" (13 July 2005), online: www.wired.com/news/digiwood/0,1412,68171,00.html?tw=rss.TOP.

22 For an overview of YouTube, see Damien O'Brien & Brian Fitzgerald, "Digital Copyright Law in a YouTube World" (2006) 9(6 & 7) *Internet Law Bulletin* 71 [O'Brien & Fitzgerald, "Digital Copyright Law"].

C. COPYRIGHT LAW

1) Key Copyright Issues

One of the major legal issues facing blogs and the blogosphere in general is copyright law — in particular to what extent bloggers will be legally permitted to reproduce and communicate existing material as a source of content for their blogs.²³ In this regard, it is necessary to consider whether the unauthorized reproduction and communication of text, images, videos, and MP3s on blogs will constitute an infringement of copyright. As a general principle, the *Copyright Act*²⁴ provides protection for either subject matter that falls within the category of Part III “works” or Part IV “subject matter other than works.” The following discussion will consider the copyright implications of some of the most common content featured on blogs, including copyright infringement, the application of the defence of fair dealing, and the infringement of moral rights.

2) Text

The term “literary work” is not defined exhaustively within section 10 of the *Copyright Act*,²⁵ although it is taken to incorporate a broad category protecting any work that is expressed in either print or written form.²⁶ As such, the term “literary work” has been held by the courts to include works as diverse as computer programs,²⁷ telephone directories,²⁸ examination papers,²⁹ and even betting forms³⁰. Furthermore, the term “literary” does not prescribe that the work must reach any particular standard of literary style or merit; thus there is no quality requisite, it must simply be original.³¹ Therefore, in the context of blogs, all original text posted to a blog by either the blogger themselves, or blog contributors, will be protected under the *Copyright Act* as a literary work.

23 See, generally, Gasser & Ernst, above note 15.

24 *Copyright Act 1968* (Cth.) [*Copyright Act*].

25 *Ibid.*, s. 10.

26 Anne Fitzgerald & Brian Fitzgerald, *Intellectual Property: In Principle* (Sydney: Law Book Co., 2004) at 97 [Fitzgerald & Fitzgerald].

27 *Computer Edge Pty. Ltd. v. Apple Computer Inc.*, [1986] HCA 19, 161 C.L.R. 171.

28 *Desktop Marketing System Pty. Ltd. v. Telstra Corp.* (2002), 55 I.P.R. 1.

29 *University of London Press Ltd. v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601.

30 *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 W.L.R. 273 (H.L.) [*Ladbroke*].

31 Fitzgerald & Fitzgerald, above note 26 at 97.

3) Images

The term “artistic work” is defined extensively (although not exhaustively) under section 10 of the *Copyright Act* to include, from the perspective of a blog, photographs, irrespective of the artistic quality.³² Therefore, a wide range of artistic works will be afforded copyright protection, including drawings, diagrams, maps, charts, plans, prints, photographs, paintings, photocopies, and designs.³³ Thus, in relation to blogs, generally most of the images featured on a blog, in particular on photoblogs, will be protected as an artistic work under the *Copyright Act*.

4) MP3s

The *Copyright Act* provides protection for sound recordings, which are defined in section 10(1) of the *Copyright Act* as meaning the aggregate of sounds embodied in a record,³⁴ therefore extending to the recording of sounds on some of the most common mediums, including a CD and an MP3 file.³⁵ Therefore, blogs, in particular MP3 blogs, which contain MP3 files, will be protected under the *Copyright Act* as a sound recording.³⁶

5) Videos

The *Copyright Act* protects videos in the form of cinematograph films and sound and television broadcasts.³⁷ A cinematograph film is defined in section 10(1) of the *Copyright Act* as being the aggregate of the visual images embodied in an article or thing capable of being shown as a moving picture.³⁸ Notably, this also includes the aggregate of the sounds embodied in

32 Above note 24, s. 10(1); Fitzgerald & Fitzgerald, *ibid.* at 99.

33 For example, see *Australian Chinese Newspapers Pty. Ltd. v. Melbourne Chinese Press Pty. Ltd.* (2003), 58 I.P.R. 1; *Melbourne Chinese Press Pty. Ltd. v. Australian Chinese Newspapers Pty. Ltd.*, [2004] FCAFC 201, 63 I.P.R. 38..

34 Above note 24, s. 10(1).

35 Also note that copyright may subsist in other underlying works, including lyrics—literary work and the musical score or composition—and musical work; see Fitzgerald & O'Brien, above note 20 at 282.

36 *Universal Music Australia Pty. Ltd. v. Cooper*, [2005] FCA 972 at paras. 49–53 [*Universal v. Cooper*]; *Universal Music Australia Pty. Ltd. v. Sharman License Holdings Ltd.*, [2005] FCA 1242 at para.412 [*Universal v. Sharman*].

37 Above note 24, s. 87.

38 *Ibid.*

a soundtrack that is associated with the visual images.³⁹ Thus, films, videos, television programs, and multimedia works will all be protected as a cinematograph film.⁴⁰ Similarly, section 87 of the *Copyright Act* provides protection for sound and television broadcasts that are based on underlying copyrighted works or subject matter, as well as on live broadcasts of news, sports events, and unscripted interviews that have no underlying copyright content.⁴¹ The term “television broadcast” is defined to mean the visual images that are broadcast by way of television, along with any associated sounds broadcast with those images.⁴² Therefore, videos featured on blogs, in particular vlogs, will be protected as either a cinematograph film or sound and television broadcast under the *Copyright Act*.

6) Copyright Infringement

Copyright infringement will occur where a person who is not the copyright owner does or authorizes someone else to do, without the licence of the copyright owner, any of the acts within the copyright owner’s exclusive rights.⁴³ Assuming that it has been established that the person has infringed the exclusive rights of the copyright owner—as will be likely where there has been an unauthorized reproduction or communication of one of the above works or subject matter other than works on a blog—it is then necessary to determine whether this act has been done in relation to a substantial part of the work or subject matter other than work.⁴⁴

39 *Ibid.*, ss. 10(1) and 23(1); *Phonographic Performance Company of Australia Ltd. v. Federation of Australian Commercial Television Stations* (1998), 40 I.P.R. 225.

40 *Galaxy Electronics Pty. Ltd. v. Sega Enterprises Ltd.* (1997), 37 I.P.R. 462; *Kabushiki Kaisha Sony Computer Entertainment v. Stevens*, [2003] FCAFC 157, 57 I.P.R. 161; *Stevens v. Kabushiki Kaisha Sony Computer Entertainment* (2005), 65 I.P.R. 513.

41 Fitzgerald & Fitzgerald, above note 26 at 103; *TCN Channel Nine Pty. Ltd. v. Network Ten Pty. Ltd. (No. 2)*, [2005] FCAFC 53; *Network Ten Pty. Ltd. v. TCN Channel Nine Pty. Ltd.* (2004), 59 I.P.R. 1; *TCN Channel Nine Pty. Ltd. v. Network Ten Pty. Ltd.* (2002), 55 I.P.R. 112.

42 Above note 24, s. 10(1). Also see Melissa de Zwart, “Copyright in Television Broadcasts: *Network Ten v. TCN Channel Nine*—‘A Case Which Can Excite Emotions’” (2004) 9(4) *Media Arts and Law Review* 277.

43 *Copyright Act, ibid.*, ss. 36(1) and 101(1). For literary works, see ss. 31(1)(a), (c), & (d); for artistic works, see s. 31(1)(b); for sound recordings, see s. 85; for cinematograph films, see s. 86; and for television and sound broadcasts, see s. 87.

44 *Ibid.*, s. 14(1).

The general test for a substantial part was stated by Lord Pearce in *Ladbroke*⁴⁵ as “whether a part is substantial must be decided by its quality rather than its quantity.” This test was affirmed by Mason C.J. in *Autodesk Inc. v. Dyason (No 2)*⁴⁶ who held that “in determining whether the quality of what is taken makes it a ‘substantial part’ of the copyrighted work, it is important to inquire into the importance which the taken portion bears in relation to the work as whole: is it an ‘essential’ or ‘material’ part of the work?” The High Court approved Mason’s C.J. statement in *Data Access Corporation v. Powerflex Services Pty. Ltd.*⁴⁷ where it was held that “in determining whether something is a reproduction of a substantial part of a [copyright work], the essential features of the [work] should be ascertained by considering the originality of the part allegedly taken.”

The High Court referred to the definition of a substantial part again in *Network Ten Pty. Ltd. v. TCN Channel Nine Pty. Ltd.*⁴⁸ In this case, Kirby J. explained that a small portion in quantitative terms may constitute a substantial part, having regard to its materiality in relation to the work as a whole.⁴⁹ More recently, in *TCN Channel Nine Pty. Ltd. v. Network Ten Pty. Ltd. (No 2)* it was held that whether a part taken is a substantial part or not, involves an assessment of the importance of the part taken to the work as a whole.⁵⁰

An analysis of whether a substantial part of the work or other subject matter is involved will be particularly important given the nature of blogs as short pieces of commentary that very often contain material which is protected by copyright. Where the material posted by a blogger or a contributor is a complete reproduction or communication of the original material, generally a substantial part of the work or subject matter other than work will almost always be involved. However, it becomes more difficult to determine substantiality in relation to very small reproductions or communications, which contain only very small parts of the original material. Such assessments of substantiality will need to be made on a case-by-case basis, and, even then, it may be that the court interprets the substantial part doctrine narrowly, so that even highly transformative derivatives are held

45 Above note 30 at 293.

46 [1993] HCA 6, 176 C.L.R. 300 at 305.

47 (1999), 45 I.P.R. 353 at para. 84.

48 (2004), 78 A.L.J.R. 585.

49 *Ibid.* at 605; see also McHugh A.C.J., Gummow, and Hayne JJ. at 589.

50 Above note 41 at paras. 12 and 50–52; see also *Network Ten Pty. Ltd. v. TCN Channel Nine Pty. Ltd.*, [2005] HCA Trans 842.

to be a substantial part of the work or subject matter other than work.⁵¹ In this regard, it should be noted that thus far, there is yet to be a major reported decision involving issues of copyright infringement on a blog, although there have been a number of cases filed against bloggers that have failed to proceed to trial.⁵²

7) Fair Dealing

After determining that an infringement of copyright has occurred in relation to material posted to a blog, it is then necessary to consider whether any of the fair dealing defences will apply. Under the *Copyright Act*, copyright in a work or subject matter other than a work will not be taken to have been infringed where it falls within one of the five fair dealing exceptions,

51 For example, see *Bridgeport Music Inc. v. Dimension Films Inc.*, 401 F.3d 647 (6th Cir. 2004) where it was held in relation to a sound recording, that a very small amount of music sampling is substantial for the purposes of copyright infringement. For a discussion of the uncertainty in relation to the substantial part doctrine, see Michael Spence & Timothy Endicott, “Vagueness in the Scope of Copyright” (2005) 121 *Law Q. Rev.* 657. Also note a person may be criminally liable for copyright infringement under the *Copyright Act*, above note 24, ss. 132AA–132AO; Brian Fitzgerald, “Copyright Vision: Copyright Jails” (26 October 2006), online: www.onlineopinion.com.au/view.asp?article=5068; Kimberlee Weatherall, “Copyright Amendment Bill: The Criminal Provisions” (25 October 2006), online: http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html.

52 For example, a Maine advertising agency in May 2006 filed a copyright infringement suit against a local blogger who had posted a number of draft advertisements from the Maine Department of Economic and Community Development website to his blog. The case was eventually withdrawn by the advertising agency. See *Warren Kremer Paino Advertising v. Duston*, Civil No. 06-047 (5 May 2006); Harry Wessel, “Orlando Lawyer Is Web Hero after Defending Blogger” *Orlando Sentinel* (12 May 2006) C.1; Robert Weisman, “Blogger who Criticized Maine Tourism Office Faces Lawsuit” (28 April 2006), online: www.boston.com/business/articles/2006/04/28/blogger_who_criticized_maine_tourism_office_faces_lawsuit. Also see *NXIVM Corporation and First Principles Inc. v. Ross Institute*, WL 22298756 (N.D.N.Y. 2003) [*NXIVM N.D.N.Y.*]; *NXIVM Corporation and First Principles Inc. v. Ross Institute*, 364 F.3d 471 (2nd Cir. 2004) [*NXIVM 2nd Cir.*]; *NXIVM Corporation and First Principles Inc. v. Ross Institute*, 543 U.S. 1000 (2004) [*NXIVM U.S.S.C.*]. Also note that the recent decisions involving Google may have copyright implications for bloggers; see *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (Nev. Dist. Ct. 2006); *Parker v. Google Inc.*, 422 F. Supp. 2d 492 (E.D. Pa. 2006); *Perfect 10 v. Google Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006); *Copiepresse v. Google Inc.* 2006/9099/4 (Court of First Instance of Brussels, 29 August 2006).

and its use is deemed to be fair. These fair dealing exceptions are for the purposes of

- research or study;⁵³
- criticism or review;⁵⁴
- parody or satire;⁵⁵
- reporting news;⁵⁶ or
- judicial proceedings or professional advice.⁵⁷

In the context of blogs with a focus of criticism or review, such as academic or scholarly blogs, or even MP3 blogs, it may be argued that they fall within the fair dealing defence of criticism or review. Under this provision, a work or audiovisual item will not infringe copyright provided it is used for the purposes of criticism or review, its use is fair, and sufficient acknowledgement has been made.⁵⁸ There is no definition of criticism or review within the *Copyright Act*, however, it has been held that the words “criticism” and “review” are of “wide and indefinite scope which should be interpreted literally.”⁵⁹ In *Warner Entertainment Co. Ltd. v. Channel 4 Television Corp. PLC*,⁶⁰ Henry L.J. stated that the question to be answered in assessing whether a dealing is fair or not is, “is the [work] incorporating the infringing material a genuine piece of criticism or review, or is it something else, such as an attempt to dress up the infringement of another’s copyright in the guise of criticism.” The question that will arise for blogs will be whether the comments posted to a blog will be sufficient to constitute criticism or review. Given the varying nature of blogs, it is likely that such an assessment will need to be made on a blog-by-blog basis.⁶¹

53 Above note 24, ss. 40 and 103C.

54 *Ibid.*, ss. 41 and 103A.

55 *Ibid.*, ss. 41A and 103A.

56 *Ibid.*, ss. 42 and 103B.

57 *Ibid.*, ss. 43 and 104.

58 *Ibid.*, ss. 41 and 103A; Fitzgerald & Fitzgerald, above note 27 at 170.

59 *TCN Channel Nine Pty. Ltd. v. Network Ten Pty. Ltd.* (2001), 50 I.P.R. 335 at paras. 16–17 and 66; *TCN Channel Nine Pty. Ltd. v. Network Ten Pty. Ltd.*, [2002] FCAFC 146 at paras. 2–6, 15–25, and 94–131. Also see Melissa de Zwart, “Seriously Entertaining: The Panel and the Future of Fair Dealing” (2003) 8 *Media and Arts Law Review* 1.

60 (1993), 28 I.P.R. 459 at 468.

61 For a discussion of the application of the criticism or review defence to MP3 blogs, see Fitzgerald & O'Brien, above note 20 at 288; Brian Fitzgerald & Damien O'Brien, “Bloggers and the Law” in Bruns & Jacobs, above note 1, 223 at 227–28. Also see Evan Brown, “Big Time Blogger Faces Big Time Copyright Suit” (17 December

Similarly, blogs that provide news or current affairs perspective may be entitled to the fair dealing defence for the reporting of news. Under this provision, copyright in a work or audiovisual item will not be infringed where it is dealt with for the purposes of, or is associated with, the reporting of news, by means of a communication, and its use is fair.⁶² Again, in determining whether a blog will be entitled to the fair dealing exception for the reporting of news, it will be necessary to assess the nature of the blog in question and its content on an individual basis.

In regard to the operation of the fair use doctrine in the US, it is arguable that this doctrine provides a broader (although not unlimited) scope for bloggers and blog contributors to rely upon the defence of fair use.⁶³ In determining whether a use by a blogger or blog contributor of copyrighted material will be classified as fair or not, and thus exempted from copyright infringement, the courts will have to regard the following four factors:

- the purpose and character of the use, including whether such use is of a commercial nature;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the market or potential market for or value of the copyrighted work.⁶⁴

8) Moral Rights

The potential for the infringement of moral rights will also need to be considered in relation to blogs. Moral rights are personal rights belonging to the author or creator of the copyrighted work, which exist independently from the economic rights mentioned above.⁶⁵ Under the *Copyright Act* there are three types of moral rights that are protected:

2006), online: <http://blog.internetcases.com/2006/12/17/big-time-blogger-faces-big-time-copyright-suit/>.

62 Above note 24, ss. 42 and 103B; Fitzgerald & Fitzgerald, above note 26 at 171.

63 *Copyright Act*, 17 U.S.C. § 107 [US *Copyright Act*]; Attiya Malik, “Are You Content with the Content? Intellectual Property Implications of Weblog Publishing” (2003) 21 J. Marshall J. Computer & Info. L. 439 at 498–503 [Malik].

64 US *Copyright Act*, *ibid.*; Electronic Frontier Foundation, “Bloggers’ FAQ - Intellectual Property,” online: www.eff.org/bloggers/lg/faq-ip.php.

65 Fitzgerald & Fitzgerald, above note 26 at 118; note that for the purposes of Part IX a “work” is defined to include “a literary work, a dramatic work, a musical work,

- the right of attribution of authorship;⁶⁶
- the right not to have authorship falsely attributed;⁶⁷ and
- the right of integrity of authorship.⁶⁸

The right of attribution of authorship involves the right to be identified as the author/creator of the work if any “attributable acts” are done in respect of the work. The second moral right provides the author/creator of the work the right not to have authorship of the work falsely attributed. The third moral right of integrity involves the right not to have the work subjected to derogatory treatment that would demean the author/creator’s reputation.⁶⁹ It should also be noted that moral rights in respect of a work will only apply in relation to a substantial part of the work and, therefore, in instances where a substantial part has not been reproduced or communicated, infringement will not be an issue.⁷⁰

In the case of blogs, the possibility for the infringement of moral rights will arise where bloggers reproduce or communicate an author/creator’s copyrighted work on their blog. In particular, issues of infringement will arise where a blogger fails to attribute the author/creator of the work in question, where a blogger claims attribution in the work as if it were their own, and where a blogger subjects the work to derogatory treatment that could be interpreted to demean the author/creator’s reputation, particularly where acts of remix are involved.⁷¹

D. DEFAMATION LAW

1) Uniform Defamation Acts

Given the nature of a blog—a highly personalized online journal—it is inevitable that they will encounter many challenging issues in regard to defamation law. It should be noted that significant changes have been made to all defamation laws across Australian states, largely in an attempt by the

an artistic work or a cinematograph film,” but not sound recordings (*Copyright Act*, above note 24, s. 189).

66 *Copyright Act, ibid.*, s. 193.

67 *Ibid.*, s. 195AC.

68 *Ibid.*, s. 195AQ.

69 *Ibid.*, s. 195AQ.

70 *Ibid.*, s. 195AZH.

71 Damien O'Brien & Brian Fitzgerald, “Mashups, Remixes and Copyright Law” (2006) 9 *Internet Law Bulletin* 17.

Commonwealth attorney-general to establish a uniform defamation law.⁷² This has resulted in largely standardized defamation laws being established throughout all Australian jurisdictions, instead of the single, proposed Commonwealth law.⁷³ However, the new defamation laws are accompanied by an intergovernmental agreement, which provides that all laws are to remain uniform and retain the common-law elements.⁷⁴

The uniform state *Defamation Acts 2005* came into effect on 1 January 2006 in Queensland, New South Wales, Victoria, Tasmania, South Australia, and Western Australia.⁷⁵ These uniform Acts continue to make no distinction between libel and slander, and, interestingly, in some states and territories the Acts abolish the previous definition of the term “defamation.”⁷⁶ Instead, a plaintiff will have an action for defamation where they can establish under the common law that the defendant published a defamatory matter about them.⁷⁷ Generally, under the common law a plaintiff will be able to establish a defamatory matter where it can be proved that the imputation satisfies one of the following three tests:

- i) the imputation is likely to injure the reputation of the plaintiff by exposing them to ridicule, contempt, or hatred;⁷⁸

72 Kevin Lynch, “Uniform Defamation Law: An Overview” (2006) 2 *Privacy Law Bulletin* 137 [Lynch].

73 See Australia, Commonwealth, Attorney-General’s Department, *Revised Outline of a Possible National Defamation Law* (July 2004), online: [www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)-revised+defamation%5Br%5D.pdf/\\$file/revised+defamation%5Br%5D.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)-revised+defamation%5Br%5D.pdf/$file/revised+defamation%5Br%5D.pdf).

74 Lynch, above note 72 at 137.

75 Note the *Defamation Act 2006*, No. 8 of 2006 (N.T.) commenced on 26 April 2006, and the amendments to the *Civil Law (Wrongs) Act 2002*, No. 40 of 2002 (A.C.T.) commenced on 23 February 2006.

76 *Defamation Act 2005*, No. 55 of 2005 (Qld.), s. 7; *Defamation Act 2005*, No. 77 of 2005 (N.S.W.), s. 7; *Defamation Act 2005*, No. 75 of 2005 (Vic.), s. 7; *Defamation Act 2005*, No. 73 of 2005 (Tas.), s. 7; *Defamation Act 2005*, No. 50 of 2005 (S.A.), s. 7; *Defamation Act 2005*, No. 44 of 2005 (W.A.), s. 7; *Defamation Act 2006*, No. 8 of 2006 (N.T.), s. 6; *Civil Law (Wrongs) Act 2002*, No. 40 of 2002 (A.C.T.), s. 119; Amanda Stickley, “*Defamation Act 2005* (Qld): A Step Towards National Uniformity?” (2006) 26 *Queensland Lawyer* 192 [Stickley].

77 *Defamation Act 2005* (Qld.), s. 6; *Defamation Act 2005* (N.S.W.), s. 6; *Defamation Act 2005* (Vic.), s. 6; *Defamation Act 2005* (Tas.), s. 6; *Defamation Act 2005* (S.A.), s. 6; *Defamation Act 2005* (W.A.), s. 6; *Defamation Act 2006* (N.T.), s. 5; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 118; Frances McGlone & Amanda Stickley, *Australian Torts Law* (Chatswood, NSW: LexisNexis Butterworths, 2005) at 379 [McGlone & Stickley].

78 *Ettingshausen v. Australian Consolidated Press Ltd.* (1991), 23 N.S.W.L.R. 443 (S.C.).

- 2) the imputation is likely to make people shun or avoid them;⁷⁹ or
- 3) the imputation has the tendency to lower the plaintiff's reputation in the estimation of others.⁸⁰

Finally, for an action of defamation to be established under the *Defamation Act 2005*, the plaintiff is required to show that the defamatory matter that refers to them was published in some way.⁸¹ The previous definition of "publication" in some states and territories has been removed; however, it is suggested that it will retain the same meaning—the imputation must be published to someone other than the person who is defamed.⁸² The uniform Acts do, however, define the term "matter" for the purposes of reference to a "defamatory matter," as including, from the perspective of blogs, a report or other thing communicated by means of the Internet.⁸³ Therefore, a defamatory matter will extend to comments or entries posted to a blog by virtue of the operation of this definition.

It is clear from the preceding discussion that defamatory comments or entries posted to a blog, which satisfy one of the three tests of imputation and are published to a third party, will give rise to an action for defamation in all states and territories throughout Australia. It should also be noted that there are a number of defences under both the uniform Acts and the common law that may provide a defence to defamatory comments posted to a blog. Some of the applicable defences that may be available to blog-

79 *Henry v. TVW Enterprises*, [1990] W.A.R. 475.

80 McGlone & Stickle, above note 77 at 380.

81 *Defamation Act 2005* (Qld.), s. 8; *Defamation Act 2005* (N.S.W.), s. 8; *Defamation Act 2005* (Vic.), s. 8; *Defamation Act 2005* (Tas.), s. 8; *Defamation Act 2005* (S.A.), s. 8; *Defamation Act 2005* (W.A.), s. 8; *Defamation Act 2006* (N.T.), s. 7; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 120; note that under these sections a person has only a single cause of action for the publication of a defamatory matter about the person, even though more than one defamatory imputation may exist.

82 McGlone & Stickle, above note 77 at 26; *Pullman v. Walter Hill & Co. Ltd.* [1891] 1 Q.B. 524.

83 *Defamation Act 2005* (Qld.), s. 4; *Defamation Act 2005* (N.S.W.), s. 4; *Defamation Act 2005* (Vic.), s. 4; *Defamation Act 2005* (Tas.), s. 4; *Defamation Act 2005* (S.A.), s. 4; *Defamation Act 2005* (W.A.), s. 4; *Defamation Act 2006* (N.T.), s. 3; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 116.

gers include justification,⁸⁴ contextual truth,⁸⁵ absolute privilege,⁸⁶ qualified privilege,⁸⁷ honest opinion,⁸⁸ innocent dissemination,⁸⁹ and triviality.⁹⁰

2) Defamation Cases Involving Blogs

Despite the significant risks that defamation laws pose to blogs, so far there have been relatively few cases for defamation brought against blogs and bloggers.⁹¹ In Australia there is very little judicial authority outlining how the courts will apply defamation law to blogs. However, there have been two related decisions (although not actions for defamation) in Australia

84 *Defamation Act 2005* (Qld.), s. 25; *Defamation Act 2005* (N.S.W.), s. 25; *Defamation Act 2005* (Vic.), s. 25; *Defamation Act 2005* (Tas.), s. 25; *Defamation Act 2005* (S.A.), s. 23; *Defamation Act 2005* (W.A.), s. 25; *Defamation Act 2006* (N.T.), s. 22; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 135.

85 *Defamation Act 2005* (Qld.), s. 26; *Defamation Act 2005* (N.S.W.), s. 26; *Defamation Act 2005* (Vic.), s. 26; *Defamation Act 2005* (Tas.), s. 26; *Defamation Act 2005* (S.A.), s. 24; *Defamation Act 2005* (W.A.), s. 26; *Defamation Act 2006* (N.T.), s. 23; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 136.

86 *Defamation Act 2005* (Qld.), s. 27; *Defamation Act 2005* (N.S.W.), s. 27; *Defamation Act 2005* (Vic.), s. 27; *Defamation Act 2005* (Tas.), s. 27; *Defamation Act 2005* (S.A.), s. 25; *Defamation Act 2005* (W.A.), s. 27; *Defamation Act 2006* (N.T.), s. 24; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 137.

87 *Defamation Act 2005* (Qld.), s. 30; *Defamation Act 2005* (N.S.W.), s. 30; *Defamation Act 2005* (Vic.), s. 30; *Defamation Act 2005* (Tas.), s. 30; *Defamation Act 2005* (S.A.), s. 28; *Defamation Act 2005* (W.A.), s. 30; *Defamation Act 2006* (N.T.), s. 27; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 139A.

88 *Defamation Act 2005* (Qld.), s. 31; *Defamation Act 2005* (N.S.W.), s. 31; *Defamation Act 2005* (Vic.), s. 31; *Defamation Act 2005* (Tas.), s. 31; *Defamation Act 2005* (S.A.), s. 29; *Defamation Act 2005* (W.A.), s. 31; *Defamation Act 2006* (N.T.), s. 28; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 139B.

89 *Defamation Act 2005* (Qld.), s. 32; *Defamation Act 2005* (N.S.W.), s. 32; *Defamation Act 2005* (Vic.), s. 32; *Defamation Act 2005* (Tas.), s. 32; *Defamation Act 2005* (S.A.), s. 30; *Defamation Act 2005* (W.A.), s. 32; *Defamation Act 2006* (N.T.), s. 29; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 139C.

90 *Defamation Act 2005* (Qld.), s. 33; *Defamation Act 2005* (N.S.W.), s. 33; *Defamation Act 2005* (Vic.), s. 33; *Defamation Act 2005* (Tas.), s. 33; *Defamation Act 2005* (S.A.), s. 31; *Defamation Act 2005* (W.A.), s. 33; *Defamation Act 2006* (N.T.), s. 30; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 139D.

91 Glenn Harlan Reynolds, "Libel in the Blogosphere: Some Preliminary Thoughts" (Paper presented to the Berkman Center for Internet and Society, Bloggership: How Blogs are Transforming Legal Scholarship Conference, 28 April 2006) [unpublished] [Reynolds].

that have examined the nature of defamatory comments posted to a blog. These two decisions confirm the principle that the courts will treat blogs in exactly the same manner as if the defamatory comments had been communicated in the non-digital, paper-based world.

The first case, *Kaplan v. Go Daddy Group & 2 Ors*,⁹² involved an action for the tort of injurious falsehood. The second defendant in the case created a disparaging blog about the plaintiff, which encouraged other users to post derogatory comments about the plaintiff's business. The result was that six comments were posted to the blog, all of which contained defamatory comments about the plaintiff's business. The plaintiff subsequently brought an application to the court for an injunction to prevent the second defendant from maintaining the defamatory blog. In granting the injunction, White J. held that there was a serious question to be tried in that the second defendant had committed and threatened to commit the tort of injurious falsehood through the posting of defamatory comments about the plaintiff to his blog.⁹³

In *Y & H*,⁹⁴ the Federal Magistrates Court considered the question of whether the respondent, a prominent blogger, should be restrained from publishing information about pending court proceedings in a family law matter. In granting the injunction to restrain the respondent from posting comments to her blog, Baumann F.M. held that it was in the child's best interests that the respondent-blogger be restrained from posting defamatory comments to her blog.⁹⁵

In the US there have also been a number of cases that have considered the nature of defamatory comments posted to a blog. In one of the most notable, *John Doe No. 1 v. Cahill*,⁹⁶ a case considering whether an Internet service provider was required to disclose the identity of an anonymous blogger, the Supreme Court of Delaware considered the question of whether anonymous comments posted to a blog could amount to defamation.⁹⁷ In

92 Above note 9.

93 *Ibid.* at paras. 36–42.

94 Above note 8.

95 *Ibid.* at paras. 29–30; also see *Ray*, above notero, concerning an action for contempt of court against the defendants for posting defamatory comments about the conduct of a liquidator to a blog.

96 884 A.2d 451 (Del. 2005), rev'g *Cahill v. Doe*, above note 7.

97 See "Court Outlines Standard for Unmasking Blogger of Criticism of Public Figure" (2005) 22(12) *The Computer and Internet Lawyer* 25; Sylvia Mercado-Kierkegaard, "Blogs, Lies and the Doocing: The Next Hotbed of Litigation?" (2006) 22 *Computer L. and Sec. R.* 127 at 130 [Mercado-Kierkegaard].

this case, the appellant had anonymously posted defamatory comments on a Delaware community blog, claiming that the appellant, a councilman, was unfit for office. At first instance, the Superior Court of Delaware, applying a “good-faith standard,” held that Cahill had made out on a claim for defamation a good-faith basis.⁹⁸ However, on appeal the Supreme Court rejected the application of the good-faith standard, instead finding that the stricter “summary-judgment standard” applied, which requires a plaintiff to demonstrate sufficient evidence to establish a *prima facie* case for defamation.⁹⁹ Applying this summary-judgment standard, the Supreme Court held that in the context of a blog, no reasonable person could have interpreted the allegedly defamatory comments as being anything other than mere opinion.¹⁰⁰

While the Supreme Court of Delaware expressly stated that it did not hold as a matter of law that comments posted to a blog could never be defamatory, interestingly, the Court did make some observations about the nature of defamation law and blogs.¹⁰¹ First, the Supreme Court noted that a potential plaintiff in an action for defamation involving a blog has a powerful form of extra-judicial relief, in that they can respond instantly to the allegedly defamatory comments on the blog, thereby mitigating any harm the plaintiff might suffer.¹⁰² However, this may not always be possible given that some blogs do not enable readers to leave comments and thereby respond to the allegedly defamatory comments. Furthermore, the fact that there are over 57 million blogs in multiple languages means that it is unlikely that a potential plaintiff would be aware of the allegedly defamatory comments at the time that they were made; thereby somewhat eroding the argument that a plaintiff, by responding to comments made on a blog, can mitigate the damage they might otherwise suffer.

Second, the Supreme Court stated that it is important to consider certain factual and contextual issues relevant to blogs when considering a defamation claim regarding comments posted to a blog.¹⁰³ Expanding on this, the court

98 *Cahill v. Doe*, above note 7 at 954–56.

99 *John Doe No. 1 v. Cahill*, above note 96 at 457–61; *McMann v. Doe* (18 January 2007), Maricopa County, Case No. CV 2006-092226 (Ariz. Super. Ct.).

100 *John Doe No. 1 v. Cahill*, *ibid.* at 466–68.

101 *Ibid.* at 467.

102 *Ibid.* at 464; Larry Ribstein, “From Bricks to Pajamas: The Law and Economics of Amateur Journalism” (2006) University of Illinois Law and Economics Research Paper No. LE06-008 at 40, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=700961 [Ribstein].

103 *John Doe No. 1 v. Cahill*, *ibid.* at 465.

noted that, in terms of reliability, there is a spectrum of sources on the Internet, and blogs tend to be vehicles for the expression of opinion and not a source of facts or data upon which a reasonable person would rely.¹⁰⁴ The court stated:

A reasonable person reading a newspaper in print or online can assume that the statements are factually based and researched. However, this is not the case when statements are posted on a blog. When viewing the allegedly defamatory statements on a blog in context—both the immediate context and the broader social context—it becomes apparent that many of the allegedly defamatory statements cannot be interpreted as stating actual facts, but instead are either subjective speculation or merely rhetorical hyperbole.¹⁰⁵

While in many cases blogs act as nothing more than vehicles for the expression of personal opinions, there are, however, many blogs that could be classed as scholarly, authored by prominent academics and commentators, which might be just as reliable as *The New York Times*, for example. Furthermore, many organizations and media outlets now use blogs as a source to disseminate reliable information, facts, and news. It is therefore difficult to label blogs as simply vehicles for the expression of personal opinions that cannot constitute defamation.¹⁰⁶ It should also be noted, that it would seem

104 *Ibid.*; for the application of this argument in relation to Internet chat rooms and bulletin boards, see *Rocker Management LLC v. John Does 1 through 20, 2003 US Dist LEXIS 16277*; *Global Telemedia International Inc. v. Doe 1*, 132 F. Supp.2d 1261 (C.D. Cal. 2001); *SPX Corporation v. Doe*, 253 F. Supp.2d 974 (N.D. Ohio 2003).

105 *John Doe No. 1 v. Cahill*, above note 96 at 466.

106 Other related United States cases which have been filed involving defamatory comments posted to a blog include: California—*Holmes v. Ford*, No. BC221609 (2000), *Lake v. Ford*, No. SC059805 (2001), *Wald v. Ford*, No. SC086263 (2005); District of Columbia—*Steinbach v. Cutler*, Civil No. 05-00970 (2005); Florida—*Bell v. Shah*, Civil No. 06-21063 (2006), *Hunt v. Patten*, CA002857 (2006), *Johnson v. Tucker Max*, CA004867 (2003), *Lexington Homes Inc v. Siskind*, No. CA01018 (2006); Georgia—*Banks v. Milum* (2006), *Goodens v. Milum* (2005), *Fisher and Phillips LLP v. Doe*, Civil No. 05-01719 (2005); Illinois—*Emmanuel Welch v. Nyberg*, No. 2005L009751 (2005), *Bill Welch v. Nyberg*, No. 2005L009752 (2005); Maine—*The Gentle Wind Project v. Garvey*, Civil No. 04-103 (2006), *Warren Kremer Paino Advertising v. Duston*, Civil No. 06-047 (2006); Minnesota—*Olson v. Brodtkorb* (2005); Mississippi—*Moore v. O'Bannon* (2006); Nevada—*Software Development and Investment of Nevada d/b/a Traffic-Power.com v. Wall*, Civil No. 05-1109 (Nevada 2006) [*Software Development*]; New Jersey—*Landmark Education LLC v. The Rick A. Ross Institute of New Jersey*, Civil No. 04-3022 (2005); New York—*Choy v. Boyne*, No. 115577/2005 (2006), *Citywide Sewer and Drain Service Corporation v. Carusone*, No.

somewhat unlikely that the reasoning in this decision would be applied and followed under Australian defamation law. However, it is worthwhile noting that, in this regard, the uniform *Defamation Acts* do provide for the non-litigious resolution of a defamation claim through the provision of an offer to make amends, although this does not entirely absolve liability.¹⁰⁷

Although not strictly involving a blog, it is worth noting the recent UK decision in *Keith-Smith v. Williams*,¹⁰⁸ which dealt with defamatory comments posted to a Yahoo! bulletin board.¹⁰⁹ In this case, the English High Court awarded the plaintiff Keith-Smith £10,000 in damages against Williams, who had anonymously posted a number of defamatory comments to a Yahoo! bulletin board about Keith-Smith.¹¹⁰ It would seem likely that courts in the UK would take a similar approach when considering defamatory comments posted to a blog.

E. INTERNET JURISDICTION

The decentralized, global nature of blogs and the blogosphere means that comments that are posted or uploaded to a blog in one jurisdiction will be

05-018160 (2005), *Penn Warranty Corporation v. DiGiovanni*, Index No. 600659/04 (2005), *Sollami v. Sheppard*, 21 A.D.3d 408 (N.Y. Sup. Ct. 2005); Ohio—*Ohio v. Baumgartner*, No. CR-05-470184-A (2005), *Ohio v. DuBois*, No. CR-05-470184-B (2005); Pennsylvania—*Deon v. McMonagle*, No. 2005-08774 (2005), *D'Alonzo v. Truscello*, WL1768091 (2006); Texas—*Cisneros v. Sanchez*, No. 2005-CCL-01024-A (2005), *R.L. Lackner Inc. v. Sanchez*, No. 2005-CCI-1032-C (2005); Utah—*Thalin v. Misbach* (2004); Virginia—*Council on American-Islamic Relations Inc. v. Whitehead*, No. CL04000926-00 (Va. Cir. Ct. 2006), *Hargrave Military Academy v. Guyles*, Civil No. 06-00283 (2006); Wisconsin—*Miranda v. Sykes* (2005). Also see Laura Parker, “Jury awards \$11.3M over Defamatory Internet Posts” (10 October 2006), online: www.usatoday.com/news/nation/2006-10-10-internet-defamation-case_x.htm; Laura Parker, “Courts Are Asked to Crack Down on Bloggers, Websites” (2 October 2006), online: www.usatoday.com/tech/news/2006-10-02-bloggers-courts_x.htm.

¹⁰⁷ *Defamation Act 2005* (Qld.), ss. 12–19; *Defamation Act 2005* (N.S.W.), ss. 12–19; *Defamation Act 2005* (Vic.), ss. 12–19; *Defamation Act 2005* (Tas.), ss. 12–19; *Defamation Act 2005* (S.A.), ss. 12–19; *Defamation Act 2005* (W.A.), ss. 12–19; *Defamation Act 2005* (N.T.), ss. 11–18; *Civil Law (Wrongs) Act 2002* (A.C.T.), ss. 124–31.

¹⁰⁸ [2006] EWHC 860 (Q.B.).

¹⁰⁹ See also *Lewis v. King*, [2004] EWCA Civ 1329 [*Lewis*]; *Bunt v. Tilley*, [2006] EWHC 407 (Q.B.).

¹¹⁰ See Catherine Bond, “Can I Sue Google If It Says I’m Gay? The Tales of Internet Defamation in the UK” (2006) 64 *Computer and Law* 1 at 5 [Bond]; Jennifer McDermott, “UK Defamation Law Update” (2006) 11 *Media and Arts Law Review* 212 at 218.

accessible instantaneously in not only that jurisdiction, but in every other jurisdiction where the blog is capable of being comprehended. In particular, bloggers need to be mindful of the law pertaining to Internet jurisdiction in relation to defamation because a potentially defamatory comment that is posted or uploaded to a blog will be capable of being viewed across jurisdictions. This transnational nature of the blogosphere fundamentally challenges the traditional concept that a nation state is able to exercise sovereignty over citizens within a defined territory.¹¹¹ One view is that jurisdiction in the blogosphere will be established in every state where the blog is accessible. Another view is that jurisdiction will only be established where there is some proximate connection or relationship between a state and the blog.

However, the decision of the High Court in *Dow Jones & Co. Inc. v. Gutnick*¹¹² suggests that under Australian law, Internet jurisdiction—at least in relation to defamation—will be established on the basis of where the content is downloaded or comprehended. In this case, content that was produced in New York, uploaded to a server in New Jersey, and then made available on the Internet for access in Victoria, was held to be actionable in the courts of Victoria.¹¹³ In considering the three key issues of whether jurisdiction could be established, whether Victorian law applied, and whether Victoria was a clearly inappropriate forum, the High Court essentially dispensed with all three issues by holding that “publication” for the purposes of defamation occurred where the defamatory material was comprehended.¹¹⁴

Although *Gutnick*¹¹⁵ suggests that Internet jurisdiction may be established on a broad basis of where the content is downloaded or comprehended, this approach is not universal. Indeed, only days later a US court came to the opposite conclusion on similar facts, holding that unless the website containing the defamatory statement was targeted towards the forum state, jurisdiction could not be established.¹¹⁶ However, generally,

111 Brian Fitzgerald *et al.*, *Jurisdiction and the Internet* (Pymont, NSW: Law Book Co., 2004) at 101 [Fitzgerald *et al.*]; Brian Fitzgerald, “*Dow Jones & Co. Inc. v. Gutnick*: Negotiating ‘American Legal Hegemony’ in the Transnational World of Cyberspace” (2003) 27 Melbourne U.L. Rev. 590 at 596.

112 [2002] HCA 56, 210 C.L.R. 575 [*Gutnick*].

113 Fitzgerald *et al.*, above note 111 at 120–21.

114 *Ibid.* at 121; *Gutnick*, above note 112 at 582.

115 *Gutnick*, *ibid.*

116 *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) [*Young*]. See also *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002); *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 379 F.3d 1120 (9th Cir. 2004).

from the decided cases in the US, there have been two approaches to Internet jurisdiction that have emerged:

- the *Zippo Manufacturing v. Zippo.com*¹¹⁷ sliding scale approach; and
- the *Calder v. Jones*¹¹⁸ “effects” and “targeting” approach.

In *Zippo*,¹¹⁹ the court held that a finding of jurisdiction was contingent upon the nature of the website and sought to employ a sliding scale test.¹²⁰ A fully interactive website would establish jurisdiction, while a passive website used for mere advertising would not. In principle, in order to establish jurisdiction, the website would have to reach out and touch the forum in question. The *Calder*¹²¹ “effects” and “targeting” test has also been applied in relation to Internet jurisdiction.¹²² Under this approach, in essence where an act is done intentionally that has an effect within the forum state and is directed or targeted at the forum state, jurisdiction will be established.¹²³

The issue of Internet jurisdiction was also recently considered in the Canadian decision of *Bangoura v. Washington Post*,¹²⁴ where allegedly defamatory articles were published about the plaintiff and subsequently made available on *The Washington Post*’s website. In considering whether the courts of Ontario should assume jurisdiction, the Court of Appeal for Ontario held that there was no real or substantial connection between the action and Ontario, as the plaintiff was not a resident of Ontario when the articles were originally published, thus jurisdiction could not be established.¹²⁵

In the UK there have also been a number of recent cases involving the issue of Internet jurisdiction. In *Harrods Ltd. v. Dow Jones & Company Inc.*,¹²⁶ the English High Court held that England was the appropriate

117 952 F. Supp. 1119 (W.D. Pa. 1997) [*Zippo*].

118 465 U.S. 783 (1984) [*Calder*].

119 Above note 117.

120 Fitzgerald *et al.*, above note 111 at 107–10.

121 *Calder*, above note 118.

122 Fitzgerald *et al.*, above note 111 at 107–16.

123 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Limited*, 243 F. Supp.2d 1073 (C.D. Cal. 2003); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Limited*, 545 U.S. 913 (2005) [*Grokster*, 2005]; *Young*, above note 116; compare *Pavlovich v. DVD Copy Control Association*, 29 Cal.4th 262 (Sup. Ct. Cal. 2002).

124 2005 CanLII 32906 (Ont. C.A.).

125 *Ibid.* at paras. 21–23 and 46; for an analysis of the approaches relating to publication on the Internet in Canada, see paras. 47–49. See also *Bangoura v. Washington Post*, 2006 CanLII 4742 (S.C.C.).

126 [2003] EWHC 1162 (Q.B.) [*Harrods*].

forum for a defamation action against Dow Jones concerning an allegedly defamatory article published on the online edition of *The Wall Street Journal*.¹²⁷ In deciding this, the court held that English law does not recognize a single-publication doctrine, thus under English law there may be separate publications in other jurisdictions that are sufficient to found a separate cause of action.¹²⁸

However, more recently, in *Dow Jones & Company Inc. v. Yousef Jameel*,¹²⁹ the English Court of Appeal refused to allow a Saudi businessman's defamation action in the UK against Dow Jones. In this case, an article published on the online edition of *The Wall Street Journal* incorrectly alleged that the respondent had been involved with Al Qaeda and Osama bin Laden.¹³⁰ The respondent subsequently commenced proceedings for libel in the English High Court. However, on appeal, the Court of Appeal dismissed the respondent's action on the basis that the article had only been viewed by five individuals within the English jurisdiction and thus the respondent had suffered only minimal damage to his reputation.¹³¹

The landmark Australian High Court decision in *Gutnick*¹³² is of particular significance for blogs and the blogosphere, as it is the authority for the principle that defamatory comments published on the Internet will be actionable in not only the jurisdiction where they are uploaded, but in every other jurisdiction where they are able to be downloaded and comprehended. It is likely that in Australia a similar approach would be taken by a court in regard to issues of Internet jurisdiction concerning defamatory comments posted to a blog.¹³³

127 Bond, above note 110 at 1; *Fitzgerald et al.*, above note 111 at 133.

128 Above note 126 at paras. 36–38; also see *Lewis*, above note 109.

129 [2005] EWCA Civ 75 [*Yousef Jameel*].

130 Jennifer McDermott, "UK Defamation Law Update" (2005) 10 *Media and Arts Law Review* 161 at 167; *Bond*, above note 110 at 1; Kylie Howard & Yee Fen Lim, "Defamation and the Internet One More Time: *Dow Jones & Co. v. Yousef Abdul Latif Jameel*" (2005) 8 *Internet Law Bulletin* 21.

131 *Yousef Jameel*, above note 129 at paras.69–71 and 74–77.

132 *Gutnick*, above note 112.

133 For example, in regard to Internet jurisdiction in relation to authorization of copyright infringement, see Jane Ginsburg & Sam Ricketson, "Inducers and Authorisers: A Comparison of the US Supreme Court's *Grokster* Decision and the Australian Federal Court's *KaZaa* Ruling" (2006) 11 *Media and Arts Law Review* 1 at 23–24 [Ginsburg & Ricketson]; *Cooper v. Universal Music Australia Pty. Ltd.*, [2006] FCAFC 187 at paras. 10–12 [*Cooper v. Universal*].

F. EMPLOYEE BLOGS

1) Employment Contracts

One of the most contentious legal issues in the blogosphere at the moment is employee blogs. Employee blogs are those blogs in which the author either predominantly or implicitly makes reference to their employment or employer in some way.¹³⁴ In this regard, it becomes particularly important to ascertain whether an employee's contract of employment will permit them to post comments about their employment and other work-related matters to their personal blog. As such, bloggers need to be aware of any blogging-specific polices in the terms and conditions of their contract of employment, which may enable an employer to terminate their employment.¹³⁵ Most commonly, a company's information technology policy will prohibit employees from using computer equipment for personal use.¹³⁶ However, it becomes less clear where an employee posts comments to a blog away from the workplace.¹³⁷ In this regard, there have been a number of high profile cases where employees have been dismissed for blogging.¹³⁸ A well-known example of this was Ellen Simonetti, a Delta Airlines stewardess whose employment was terminated for posting images of herself in uniform onto her blog, despite never mentioning her employer, Delta Airlines.¹³⁹

As a result of this case and many other similar cases, many employers now incorporate a blogging-specific policy into the existing terms and conditions of employment. In this regard, it is common for such policies to prohibit employees from blogging about work-related matters or refer-

134 Ken Ebanks "Into the Blogosphere: Managing the Risks and Rewards of Employee Blogging" (2005) 22 *The Computer and Internet Lawyer* 1 [Ebanks].

135 Judy Skatsoon, "Blogging May Get You the Sack" (3 May 2006), online: www.abc.net.au/science/news/stories/s1627903.htm.

136 Ebanks, above note 134 at 2.

137 *Ibid.* at 2-3.

138 Laura Smith-Spark, "How To Blog—And Keep Your Job" (20 July 2006), online: <http://news.bbc.co.uk/2/hi/europe/5195714.stm>; Mercado-Kierkegaard, above note 97 at 132-33; A US soldier was demoted and fined for posting comments to his blog criticizing the war in Iraq in *United States v. Clark* (U.S. Army Ct. Martial 2005).

139 See the stewardess' blog, online: <http://blogs.myspace.com/index.cfm?fuseaction=blog.ListAll&friendID=77318790>. A British-based French blogger has also filed a workers tribunal claim after she was dismissed from international accounting firm Dixon Wilson for comments posted to her blog. See Angela Donald, "Blogger in France Sues after Being Fired" (20 July 2006), online: www.usatoday.com/tech/news/2006-07-20-france-blogger_x.htm.

ring to a company's name. However, it becomes more contentious where a blogging policy contains an outright prohibition on all blogging, including personal blogging in an employee's own time. These responses, which may be perceived as harsh, are a result of growing fears among employers about what an employee may disclose on their blog, either intentionally or inadvertently, as even the most inconspicuous of comments may be potentially damaging for an employer.

Employers also need to be mindful of the fact that they could be found vicariously liable for employee blogs where the employer provides the means to blog or where an employee's blog is perceived as being endorsed by their employer.¹⁴⁰ In the context of employee blogs, employers need to clearly establish whether or not the employee is authorized to blog on behalf of the employer. The effect of such authorization will be that the employer will be held vicariously liable for any damage caused by the employee's blog. Generally, in cases where an employee is permitted to blog, the employer will ensure that the employee's blog contains a disclaimer that makes clear that the blog is a personal blog and does not represent the views of the employer.

It should also be noted that some states in the US have legislation that prevents employers from terminating employees for engaging in lawful activities outside of the workplace. For example sections 96(k) and 98.6 of the *California Labor Code*¹⁴¹ prohibit employers from terminating employees for "lawful conduct during non-working hours away from the employer's premises."¹⁴² In this regard, it has been suggested that these sections may be invoked by an employee who is dismissed for blogging during their own time outside of the workplace.¹⁴³

2) Confidential Information and Trade Secrets

In relation to employee blogs, bloggers will also need to ensure that they do not breach any duty of confidentiality by disclosing confidential infor-

140 Ebanks, above note 134 at 2; see, generally, *Broom v. Morgan* (1953), 1 Q.B. 597 (C.A.); *Darling Island Stevedoring & Lighterage Co. Ltd. v. Long* (1957), 97 C.L.R. 36.

141 Cal. Lab. §§ 96(k) and 98.6 (West Supp. 2006), online: www.leginfo.ca.gov/cgi-bin/calawquery?codesection=lab&codebody=.

142 Stacey Leyton, "Bloggers' FAQ: Labor Law" (2006), online: www.eff.org/bloggers/lg/faq-labor.php [Leyton]; *Grinzi v. San Diego Hospice Corporation*, 120 Cal. App.4th 72 at 86–88 (2004); *Barbee v. Household Automotive Finance Corporation*, 113 Cal. App.4th 525 at 534–36 (2003). Also see *Konop v. Hawaiian Airlines Inc.*, 302 F.3d 868 (9th Cir. 2002).

143 Leyton, *ibid.*

mation or trade secrets. Generally, a duty of confidentiality will be formed whenever one party imparts to another party either private or secret matters with the express or implied intention that the communication is for a restricted purpose.¹⁴⁴ In such circumstances, the person to whom the information has been communicated to (the confidant) will be restrained in equity from making any unauthorized use of the information.¹⁴⁵

Therefore, bloggers need to ensure that where confidential information has been imparted to them in circumstances where an obligation of confidence exists, or they are under a contractual obligation, the information remains confidential and is therefore not posted to a blog. Bloggers also need to be cautious about either deliberately or inadvertently posting comments to their blog that have the effect of exposing trade secrets.¹⁴⁶ In this regard, there have been a number of cases brought against bloggers in the US for disclosing confidential information and trade secrets on their blogs.¹⁴⁷

G. INTERMEDIARY LIABILITY OF BLOGS

Issues involving Intermediary liability of blogs, particularly in regard to copyright infringement and defamation, will also need to be considered from the perspective of blog-providers or online service providers who host blogs.

1) Copyright Infringement

The most common issue which will arise in relation to intermediary liability of blogs will be in regard to copyright infringement—in particular, whether blog providers can be held liable for authorizing copyright infringement. The premise behind intermediary liability for copyright infringement was

¹⁴⁴ Gino Dal Pont & Tina Cockburn, *Equity and Trusts in Principle* (Pyrmont, NSW: Law BookCo., 2005) at 74.

¹⁴⁵ *Ibid.*

¹⁴⁶ Mercado-Kierkegaard, above note 97 at 133.

¹⁴⁷ *Apple Computer Inc. v. DePlume*, No. 05-CV-33341 (Cal. Super. Santa Clara County filed Jan. 4, 2005); *Apple Computer Inc. v. Doe*, No. 1-04-CV-032178 (Cal. Super. Santa Clara County Mar. 11, 2005); *The Permanente Medical Group Inc. v. Cooper*, No. RG05-203029 (Cal. Super. Alameda County 2005); *Software Development*, above note 106; *NXIVM N.D.N.Y.*, above note 52; *NXIVM 2nd Cir.*, above note 52; *NXIVM U.S.S.C.*, above note 52. For a recent example, see the action brought by Target against a blogger for posting Target's anti-theft procedures to a blog, *Target Corp. v. Doe* (6 February 2007), Atlanta, Complaint No. 1:06-CV-2116 (Dist. Ct.).

identified by the US Supreme Court in *Grokster* 2005¹⁴⁸ where it held that where a widely distributed service is used to commit copyright infringement, it may be impossible to enforce rights against all direct infringers, so the only practical alternative is to pursue the distributors or hosts for intermediary liability.

Under the *Copyright Act*, a person or organization that authorizes another person to do an infringing act, without the licence of the owner, will themselves infringe copyright.¹⁴⁹ In determining whether a person or organization has authorized the doing of an act that infringes copyright, it is necessary to consider:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned; and
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.¹⁵⁰

It should be noted that, in this regard, the reference to "(if any)" in subparagraph (a) tends to suggest that liability for the authorization of copyright infringement may be established, even if the blog provider has no power to prevent the infringement, or where they deliberately put themselves in a position where they are powerless to prevent the infringement.¹⁵¹ Furthermore, the reference in subparagraph (b) to the "nature of the relationship" between the authorizer (blog provider) and the user (blogger) has important implications in the online environment. In the traditional relationship of vendor-purchaser, the relationship has a distinct end. However, from the perspective of blog providers and bloggers, the relationship is most likely to be one of an continuing nature.¹⁵²

148 *Grokster*, 2005, above note 123 at 930; also see *In re Aimster Copyright Litigation*, 334 F.3d 643 at 645-646 (7th Cir. 2003) [*Aimster*]; Mark Radcliffe, "Grokster: The New Law of Third Party Liability for Copyright Infringement under United States Law" (2006) 22 Computer L. & Sec. R. 137 at 144.

149 Above note 24, s. 101(1).

150 *Ibid.*, ss. 36(1A) and 101(1A); *University of New South Wales v. Moorhouse*, [1975] HCA 26, 133 C.L.R. 1.

151 Ginsburg & Ricketson, above note 133 at 13-14.

152 *Ibid.* For example, blog providers provide their customers, bloggers, with ongoing technical, administrative, and other support and services which do not cease until the blogger ends his relationship with the blog provider.

However, in order to protect the position of intermediaries, such as carriage service providers (CSPs), a defence to authorization liability was introduced under sections 39B and 112E of the *Copyright Act*. This defence provides that a person, including CSPs, will not be held to have authorized copyright infringement merely because the facilities provided by them for making a communication are used by someone else to infringe copyright.¹⁵³ The effect of this defence was first considered in *Universal Music Australia Pty. Ltd. v. Cooper*¹⁵⁴. The Federal Court held that section 112E did not apply, as Cooper had done more than simply provide the facilities for the making of communications by encouraging users to download infringing music files.¹⁵⁵ Similarly, in *Universal Music Pty. Ltd. v. Sharman Licence Holdings*,¹⁵⁶ the Federal Court held that the defence under section 112E did not apply to the defendants, as they had committed positive acts designed to encourage copyright infringement.¹⁵⁷

There remains little judicial guidance on the interpretation of sections 39B and 112E of the *Copyright Act*. However, from the decided cases it would appear that where the person or organization is intimately involved with the infringing content, then the defence to authorization liability will not apply. For example, in *Universal Music Pty. Ltd. v. Sharman Licence Holdings*, Wilcox J. held that something more is required to be held liable for authorization than simply providing the facilities for someone else to infringe copyright.¹⁵⁸ Notably, Wilcox J. held that the legislative intention of section 112E was to “protect the messenger,” that is, CSPs and Internet service providers (ISPs).¹⁵⁹

The critical question for blog providers will be, first, whether they will be held liable for authorizing copyright infringement for the infringing acts of bloggers, and second, whether they will be entitled to the defence to authorization of copyright infringement. In this regard, it should be noted that this is a very uncertain area of copyright law, with there being no clear precedent. However, it is suggested that blog providers would be more likely than other online service providers, such as YouTube and peer-to-peer file-sharing services, in, first, avoiding liability for authorization of copyright

153 Above note 24, ss. 39B and 112E; note this also applies to moral rights under s. 195AVB.

154 *Universal v. Cooper*, above note 36.

155 *Ibid.* at paras. 97–99; aff'd *Cooper v. Universal*, above note 133.

156 *Universal v. Sharman*, above note 36.

157 *Ibid.* at para. 405.

158 *Ibid.* at para. 401.

159 *Ibid.* at para. 418.

infringement, and, second, successfully invoking the defence to authorization liability.

However, if blog providers were to be held liable for authorizing copyright infringement and the defence to authorization liability were to be denied, it is then necessary to consider the safe harbour provisions under the *Copyright Act*. As a result of the *US Free Trade Agreement Implementation Act 2004*,¹⁶⁰ a number of changes have been made to the *Copyright Act* concerning the liability of CSPs for the infringement of copyright.¹⁶¹ These new provisions are an attempt to bring Australian copyright law in line with the "safe harbour provisions" in the US under the *Digital Millennium Copyright Act 1998*.¹⁶² Notably, these provisions do not provide a complete defence for CSPs for copyright infringement; instead, they act to mitigate liability by limiting the remedies available against CSPs for copyright infringement in certain circumstances.

There are four categories of online activities outlined in sections 116AC to 116AF that will qualify for a limitation of remedies for the authorization of copyright infringement under the *Copyright Act*. In the case of blog providers, they will most likely fall within the category C activity under section 116AE, which refers to the storing of copyrighted material at the discretion of the user on a system or network operated by or for the CSP. Under this category, in order for a CSP to qualify for the limitation of remedies they must comply with each of the conditions outlined in section 116AH of the *Copyright Act*, including: adopting and implementing a policy to terminate the accounts of repeat infringers; complying with relevant industry codes; avoiding receipt of a financial benefit that is directly attributable to the infringing activity where they have the right and ability to control the activity; and expeditiously removing or disabling access to infringing material they are hosting when they become aware of it, or facts that make it apparent that the material is infringing.

Again, the key question to be determined in considering whether blog providers will be entitled to the limitation of remedies under the safe harbour provisions will be whether blog providers fall within the definition of a CSP. Under section 87 of the *Telecommunications Act 1997*,¹⁶³ a CSP is defined narrowly as a person supplying a carriage service to the public using a network. It would seem unlikely that blog providers would fall within this

160 *US Free Trade Agreement Implementation Act 2004* (Cth).

161 Above note 24, s. 116AA.

162 *Digital Millennium Copyright Act of 1998*, Pub. L. No. 105-34 [DMCA].

163 *Telecommunications Act 1997* (Cth.).

definition, as they do not *per se* supply a carriage service to the public, unlike ISPs or CSPs. Blog providers do not provide Internet access or any other carriage services, but simply provide the facilities and services to host blogs. Therefore, blog providers are unlikely to be classified as a CSP and, thus, will not be entitled to the benefit of the safe harbour provisions under the *Copyright Act*. However, it is hoped that as a result of the attorney-general's review of the application of the safe harbour provisions, that the definition of a CSP will be extended to cover new user-generated intermediaries that extend beyond the traditional definition of a CSP.¹⁶⁴

It should be noted that under the equivalent safe harbour provision in section 512(c) of the *DMCA*¹⁶⁵ in the US, blog providers will most probably be entitled to the protection of the safe harbour provisions, provided that they comply with the necessary pre-conditions.¹⁶⁶ This provision in the US has a somewhat broader operation, due to the fact that it applies to not only service providers, but also to online service providers. An online service provider is defined broadly under section 512(k)(1)(b) of the *DMCA* as a provider of online services or network access, or the operator of facilities therefore. This broad definition will therefore include virtually every online service, including blog providers.¹⁶⁷ The courts have also endorsed the expansive nature of the definition of an online service provider, holding that peer-to-peer file-sharing services, Amazon, and eBay all fall within the definition of an online service provider.¹⁶⁸ Indeed, in *Re Aimster Copyright Litigation*,¹⁶⁹ the US District Court for the Northern District of Illinois held that the term "online service provider" "is defined so broadly that we have trouble imagining the existence of an online service that would not fall under the definitions"

164 See, for example, O'Brien & Fitzgerald, "Digital Copyright Law," above note 22 at 72–73.

165 Above note 162.

166 Malik, above note 63 at 439, 486–92, and 503–8.

167 Fred von Lohmann, "DMCA 'Safe Harbors' for Online Service Providers" (2006) 237 *InfoSys* 1 at 3.

168 *Corbis v. Amazon.com*, 351 F. Supp.2d 1090 (W.D. Wash. 2004) [*Corbis*]; *Hendrickson v. Amazon.com*, 298 F. Supp.2d 914 at 915 (C.D. Cal. 2003) [*Hendrickson*]; *Re Aimster Copyright Litigation*, 252 F. Supp.2d 634 (N.D. Ill. 2002); *Aimster*, above note 148; *Hendrickson v. eBay Inc.*, 165 F. Supp.2d 1082 at 1087 (C.D. Cal. 2001) [*eBay*].

169 *Re Aimster Copyright Litigation*, *ibid.* at 658.

2) Defamation

In regard to defamation, blog providers and individual bloggers who enable comments to be posted to their blogs need to be aware that they may be held liable for authorizing defamatory comments which are posted to the blogs that they host.¹⁷⁰ However, under both the common law, and state and territory uniform Defamation Acts, blog providers may be able to rely upon the defence of innocent dissemination.

The defence of innocent dissemination applies where an intermediary publishes a defamatory statement made by a person who uses that intermediary's facilities or services to publish the statement.¹⁷¹ In particular, the defence of innocent dissemination provides that a person will not be the primary distributor merely because they were involved in the publication of the matter in the capacity of a service provider. The question again will be whether blog providers fall within the ambit of a "provider of services." It is suggested, however, that this provision is intended to have a broader operation, and thus will include not only ISPs and CSPs, but also providers of other Internet and online services, such as blog providers.¹⁷² Therefore, blog providers will most likely be entitled to the statutory defence of innocent dissemination under the relevant state and territory uniform *Defamation Acts*, provided that they can establish the necessary statutory elements.

In Australia there is yet to be a major decided case involving the liability of Internet intermediaries for authorizing the publication of defamatory comments.¹⁷³ It should also be noted that the common law defence of innocent dissemination may have some application for blog providers and

170 See, generally, Michael Geist, "Free Speech, Libel and the Internet Age" (31 July 2006), online: <http://news.bbc.co.uk/go/pr/ft/-/2/hi/technology/5230776.stm>.

171 For the statutory elements of innocent dissemination, see *Defamation Act 2005* (Qld.), s. 32; *Defamation Act 2005* (N.S.W.), s. 32; *Defamation Act 2005* (Vic.), s. 32; *Defamation Act 2005* (Tas.), s. 32; *Defamation Act 2005* (S.A.), s. 30; *Defamation Act 2005* (W.A.), s. 32; *Defamation Act 2006* (N.T.), s. 29; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 139C.

172 *Defamation Act 2005* (Qld.), s. 32; *Defamation Act 2005* (N.S.W.), s. 32; *Defamation Act 2005* (Vic.), s. 32; *Defamation Act 2005* (Tas.), s. 32; *Defamation Act 2005* (S.A.), s. 30; *Defamation Act 2005* (W.A.), s. 32; *Defamation Act 2006* (N.T.), s. 29; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 139C.; Stickley, above note 76 at 194; also see the Explanatory Notes to the *Defamation Bill 2005* (Qld.), cl. 32 at 20, which gives the example that a provider of an internet email service will generally not be a primary distributor.

173 For a discussion of this issue, see *Bristile Ltd. v. The Buddhist Society of Western Australia Inc. & Anor*, [1999] WASC 259; *Kaplan*, above note 9.

bloggers. However, the operation of this defence remains uncertain and is arguably somewhat narrower than the statutory provisions.¹⁷⁴

In the US, section 230(c)(1) of the *Communications Decency Act 1996*¹⁷⁵ states 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.”¹⁷⁶ The term “interactive computer service” is defined broadly under section 230(f)(2) as including “any information service, system, or access software provider that provides or enables computer access . . . to a computer server, including specifically a service or system that provides access to the Internet”¹⁷⁷ The crucial question in this regard will be whether blog providers and bloggers will fall within the definition of an “interactive computer service” and will thus be entitled to the protection under the so-called “good Samaritan provisions.” It has been suggested that these provisions will apply to blogs. Thus, blog providers and bloggers will be immunized from liability for defamation in the US under the *Communications Decency Act 1996*, where defamatory comments are uploaded by either bloggers, in the case of blog providers, or contributors, in the case of bloggers.¹⁷⁸

174 Richard Potter, “Flamers, Trolls and Bloggers—Are ISPs and Webhosts at Risk from Online Anarchy?” (2004) 57 *Computers and the Law* 6 at 7–8; *Thompson v. Australian Capital Television Pty. Ltd.*, [1996] HCA 38, 186 C.L.R. 574; also see *Broadcasting Services Act 1992* (Cth.), s. 91(1). For the position in the UK, see *Defamation Act 1996* (U.K.), s. 1; *Electronic Commerce (EC Directive) Regulations 2002*, S.I. 2002/2013, rr. 17–19; *Godfrey v. Demon Internet Limited*, [1999] 4 All E.R. 342 (Q.B.); *Bunt v. Tilley & Ors*, [2006] EWHC 407 (Q.B.); Law Commission, “Defamation and the Internet: A Preliminary Investigation” Scoping Study No. 2 (2002), online: www.lawcom.gov.uk/docs/defamation2.pdf; Bond, above note 110 at 3–5.

175 *The Telecommunications Act of 1996*, Pub. L. No. 104-104 §§ 501–561, 110 Stat. 56 [CDA].

176 *Ibid.*, § 230(c)(1); *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997).

177 CDA, above note 175; see also the definition of an “information content provider” under § 230(f)(3).

178 Reynolds, above note 91 at 3–4; Electronic Frontier Foundation, “Bloggers’ FAQ: Section 230 Protections” (2006), online: www.eff.org/bloggers/lg/faq-230.php; Ribstein, above note 102 at 43–44; Mercado-Kierkegaard, above note 97 at 134–35; *Barrett v. Rosenthal*, 40 Cal.4th 33 (Sup. Ct. 2006); *CLC v. Craigslist* (1 November 2006), Illinois 1:06-CV-00657 (N.D. Ill. Dist. Ct.); *Carafano v. Metroplash.com*, 339 F.3d 1119 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. American Online*, 206 F.3d 980 (10th Cir. 2000); *Optinrealbig.com LLC v. Ironport Systems Inc.*, 323 F. Supp. 2d 1037 (N.D. Cal. 2004); *Gentry v. eBay Inc.*, 99 Cal. App.4th 816 (App. Ct. 2002); *Schneider v. Amazon.com Inc.*, 31 P.3d 37 (Wash. App. Ct.); *Perfect 10 Inc. v. CCBill LLC*, 340 F. Supp.2d 1077 (C.D.

H. CONCLUSION

Blogs, bloggers, blog providers, and the blogosphere in general, will be fundamentally challenged by the application of traditional legal doctrines, which remain firmly embedded in the non-digital world. In particular, copyright law, defamation law, Internet jurisdiction, employment law, and the law of authorization for intermediaries will all prove to be a significant impediment to the functioning of the blogosphere. The many challenges that these areas of the law will have on the blogosphere have, to a small degree, already been experienced, with an increase in actions filed against bloggers, specifically for defamation. It is expected that the amount of litigation in the courts involving blogs will increase dramatically, as blogs become a mainstream form of online communication. While it will be interesting to witness the application of these legal doctrines to the blogosphere over the next few years, the law, and in particular the judiciary, should embrace the potential of blogs in a proactive manner and not apply these laws counterproductively so as to stifle the very great potential of the blogosphere. The evolution of this new chapter in online communication has placed content production firmly in the hands of billions of people throughout the world. Blogs and the blogosphere have in many ways democratized the mainstream media, by providing the impetus for an extremely powerful form of social and political expression, which the law should not unduly restrict.

Cal. 2004); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005); *Grace v. eBay Inc.*, 16 Cal. Rptr.3d 192 (App. Ct. 2004); *Barrett v. Fonorow*, 343 Ill. App.3d 1184 (App. Ct. 2003). For the application of the *Communications Decency Act 1996* to Wikipedia see Ken Myers, "Wikimmunity: Fitting the *Communications Decency Act* to Wikipedia" (2006) 20 Harv. J.L. & Tech. 163. Also note there are a number of other legal issues which may arise in relation to blogs and the law. These include privacy issues. For example, see Electronic Frontier Foundation, mentioned previously in this note; Bruce Johnson, "*Steinbuch v. Cutler*: When is a Personal Blog Considered Publicity?" (29 March 2006), online: www.privsecblog.com/archives/blogging-steinbuch-v-cutler-when-is-a-personal-blog-considered-publicity.html. There are also sedition issues. For example, see Samtani Anil, "Singapore Media Law Update" (2006) 11(1) Media and Arts Law Review 75 at 81–82; Edmund Tadros, "Australian Bloggers Muzzled" (7 December 2005), online: <http://blogs.smh.com.au/entertainment/archives//002970.html>.