

# LIBEL IN THE BLOGOSPHERE AND SOCIAL MEDIA: THOUGHTS ON REACHING ADOLESCENCE

*Hannah Rogers Metcalfe\**

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## I. INTRODUCTION

In 2006, Professor Glenn Harlan Reynolds wrote a thought-provoking article entitled “Libel in the Blogosphere: Some Preliminary Thoughts.”<sup>1</sup> In his “preliminary thoughts,” Professor

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\* Hannah Rogers Metcalfe is an attorney in private practice in Greenville, South Carolina. Her practice is primarily litigation with an emphasis on First Amendment, media and communications, and social media. Ms. Metcalfe’s practice also includes appellate advocacy, class action and complex litigation, domestic relations, health care, white collar crime, personal injury, and products liability. She is a graduate of Georgetown University, Edmund A. Walsh School of Foreign Service, B.S.F.S. 1999, and Columbia Law School, J.D. 2002. She was a law clerk for the Hon. Anita B. Brody, United States District Court, Eastern District of Pennsylvania, 2002–2003 and the Hon. William B. Traxler, Jr., United States Court of Appeals for the Fourth Circuit, 2003–2004. She is a frequent speaker and lecturer on legal issues relating to social media and advises the media, bloggers, businesses, and individuals about social media

Reynolds noted the absence of any major blog-related libel case in the United States as of 2006 as a “pretty interesting phenomenon” and went on to provide his “suggestions as to why blog-related litigation ha[d] been relatively scarce.”<sup>2</sup> Professor Reynolds then offered his thoughts for the future of blog-related libel, including how it “should be treated differently than libel in [traditional] newspapers, books, or television broadcasts.”<sup>3</sup>

Times have certainly changed. Forums for defamatory speech—blogs, social networks, consumer gripe websites, news website comment sections—have proliferated across the Internet. Anonymous speech is common, and the anonymity of virtual speech—or relative anonymity when compared to speech in the “real” world—emboldens bloggers and posters. Online archives give even casual comments a long shelf-life, and search engines make Internet speech easy to find.

As a result of this explosive growth in Internet speech, there are an ever-increasing number of libel cases pending across the United States regarding blogs or social media.<sup>4</sup> Similarly, there

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and the law.

1. Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U.L. REV. 1157 (2006). Professor Reynolds is the Beauchamp Brogan Distinguished Professor of Law at the University of Tennessee. *Glenn Harlan Reynolds*, U. TENN. KNOXVILLE C.L., <http://www.law.utk.edu/faculty/reynolds/index.shtml> (last visited Mar. 26, 2011). He is also a prolific blogger whose thoughts on a wide variety of topics can be found at Instapundit.com. See INSTAPUNDIT, <http://www.pajamasmedia.com/instapundit> (last visited Mar. 26, 2011).

2. Reynolds, *supra* note 1, at 1157.

3. *Id.*

4. See, e.g., *In re Anonymous Online Speakers*, 611 F.3d 653 (9th Cir. 2010), *withdrawn and superseded by In re Anonymous Online Speakers*, No. 09-71265, 2011 WL 61635, at \*1 (9th Cir. Jan. 7, 2011) (Quixtar requested the identity of five anonymous online speakers who allegedly wrote defamatory statements about Quixtar); *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010) (dog-breeding software business alleges that the defendants wrote defamatory statements on the Internet which claimed that Man’s Best Friend Software and Versity Corporation stole their online date); *ORIX Capital Mkts., L.L.C. v. Super Future Equities, Inc.*, No. 3:06-CV-0271-B, 2008 WL 4820767, at \*1 (N.D. Tex. Nov. 6, 2008) (ORIX claims that Super Future Equities, Inc., created a website specifically to publish defamatory statements about ORIX); *Kauffman Racing Equip., L.L.C. v. Roberts*, 930 N.E.2d 784 (Ohio 2010) (an unsatisfied customer posted on several websites allegedly defamatory claims about Kauffman Racing Equipment, L.L.C.).

has been an increasing number of suits seeking to determine the identity of anonymous bloggers.<sup>5</sup> In fact, defamation concerns and other issues relating to the postings of bloggers or “citizen journalists”<sup>6</sup> on social media sites has led to the rise of a new niche practice in the law: social media law.

There is now so much litigation relating to internet-based defamation that law practices and legal blogs penned by “social media lawyers” have sprung up across the country.<sup>7</sup> Experts in this new media have created websites and blogs devoted solely to the legal issues posed by new media activities such as blogging,

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5. As many others have already noted, Jane and John Doe are the most wanted folks in cyberspace. See, e.g., Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL’Y 405, 408–09 (2003); Michael S. Vogel, *Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 799–801 (2004); Craig Buske, Note, *Who is John Doe and Why Do We Care?: Why a Uniform Approach to Dealing with John Doe Cases is Needed*, 11 MINN. J. L. SCI. & TECH. 429, 432 (2010). In the five years since 2006, the number of lawsuits filed to determine the identity of anonymous bloggers who have posted allegedly defamatory information online has exploded. See Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 866 (2010) (attached appendix of several recent anonymous cases). These suits, often filed by corporations, have popped up across the country and have left a tangled mess of legal standards. See *id.* A recent example is a case decided on July 12, 2010, *In re Anonymous Online Speakers*, 611 F.3d 653 (9th Cir. 2010), *withdrawn and superseded by In re Anonymous Online Speakers*, No. 09-71265, 2011 WL 61635, at \*1 (9th Cir. Jan. 7, 2011). That matter involved Quixtar, a “multilevel marketing business” that brought suit alleging that a competitor, TEAM, “orchestrated an Internet smear campaign via anonymous postings and videos disparaging Quixtar and its business practices.” *Id.* at 655–56. “As part of the discovery process,” the district court ordered the competitor’s “Online Content Manager” to “disclose the identity of three of the five [online] speakers” who allegedly made the defamatory comments. *Id.*

6. See Mark Glasner, *Your Guide to Citizen Journalism*, PBS (Sept. 27, 2006), <http://www.pbs.org/mediashift/2006/09/your-guide-to-citizen-journalism270.html> (defining citizen journalism and related terminology, and chronicling the history of the movement).

7. See, e.g., BLOG L. BLOG, <http://bloglawblog.com> (last visited Mar. 26, 2011); INTERNET DEFAMATION L. BLOG, <http://www.internetdefamationlawblog.com> (last visited Mar. 26, 2011); SHEAR ON SOC. MEDIA L., <http://www.shearsocialmedia.com> (last visited Mar. 26, 2011); SOC. MEDIA, ESQ., <http://www.socialmediaesq.com> (last visited Mar. 26, 2011); SOC. NETWORKING L. BLOG, <http://www.socialnetworkinglawblog.com> (last visited Mar. 26, 2011).

micro-blogging, and social networking.<sup>8</sup> For example, the mission of the Citizen Media Law Project (CMLP), which is hosted by Harvard University's Berkman Center for Internet and Society, is "to provide assistance, training, research, and other resources for individuals and organizations involved in online and citizen media."<sup>9</sup> CMLP maintains a blog detailing the latest lawsuits filed against bloggers and users of social media as well as an index of "threats" against such "citizen media."<sup>10</sup> Reacting to the rise in the number of lawsuits brought against bloggers, CMLP has recently launched the Online Media Legal Network, a pro bono initiative that connects lawyers and law school clinics from across the country with online journalists and digital media creators who need legal help.<sup>11</sup>

Perhaps equally as important, the "blogosphere" itself has changed radically in the last five years. Although this may not seem like enough time to undergo a seismic shift, as Professor Reynolds noted, five years is equivalent to "thirty-five years in Internet time."<sup>12</sup> In fact, the cyber landscape of the so-called blogosphere has changed so dramatically one might argue the name "blogosphere" is no longer an apt description for the online world that pervades our homes, offices, cars, televisions, gaming consoles, phones, and mobile devices. This shift has been shown in the rise of social media sites like Facebook, the advent of micro-blogging services such as Twitter and Tumblr, and the opening of the "corporate blogging" floodgates. While traditional blogs may have reigned supreme in 2006, Facebook now dominates as a one-stop site for social interaction. Twitter, which allows messages of no more than 140 characters, has only furthered the upheaval.

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8. See, e.g., CHILLING EFFECTS CLEARINGHOUSE, <http://www.chillingeffects.org> (last visited Mar. 26, 2011); MEDIA BLOGGERS ASS'N, <http://www.mediabloggers.org> (last visited Mar. 23, 2011); MEDIA L. RESOURCE CTR., <http://www.medialaw.org> (last visited Mar. 23, 2011).

9. *About the Citizen Media Law Project*, CITIZEN MEDIA L. PROJECT, <http://www.citmedialaw.org/about/citizen-media-law-project> (last visited Mar. 26, 2011).

10. CITIZEN MEDIA L. PROJECT, <http://www.citmedialaw.org> (last visited Mar. 26, 2011).

11. See *About the Citizen Media Law Project*, *supra* note 9.

12. Reynolds, *supra* note 1, at 1161.

The online world of the citizen journalist has shifted to social media. As a result, some of Professor Reynolds's thoughts no longer hold true as the blogosphere—if it continues to be called that—has reached its early adolescence. In this article, I will examine how the passage of time has changed the legal landscape, including an increase in the number of blog or social media-related libel suits involving businesses. Part III will then focus on the way in which the cultural and technological landscape has changed: escalating numbers of “corporate” bloggers, declines in traditional blogging, and simultaneous increases in the use of social media and micro-blogging. A discussion of the corresponding rise in the number of libel cases regarding social media will be included. Finally, like Professor Reynolds did five years ago, Part IV will offer limited predictions for the future of libel cases arising from blogs and social media.

## II. THE CHANGING LEGAL LANDSCAPE

In 2006, Professor Reynolds noted the absence of a major blog-related libel case as a pretty interesting phenomenon and suggested one reason for this was that most bloggers were not wealthy and likely lacked “sufficient resources even to fight such a suit, much less to pay damages if they lose.”<sup>13</sup> Wise to the relative infancy of the blogosphere, however, Professor Reynolds noted that this fact might “change over time . . . as the blogosphere matures.”<sup>14</sup> Five years later, the blogosphere has matured and the body of case law discussing business blog-related libel has increased concomitantly. Likewise, Professor Reynolds's explanation as to the dearth of blog-related libel cases—that bloggers do not have deep pockets—has been dramatically eroded. These developments are considered in turn.

### A. The Swelling Ranks of Business Blog and Social Media-Related Libel Cases

Since Professor Reynolds penned his thoughts on defamation cases stemming from blogs, the number of libel suits brought

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13. *Id.* at 1158.

14. *Id.* at 1159.

against bloggers and users of social media has grown exponentially.<sup>15</sup> In 2007, “106 civil lawsuits against bloggers and others in social networks and online forums were tallied by the Citizen Media Law Project at the Berkman Center for Internet & Society at Harvard University, up from just 12 in 2003.”<sup>16</sup> The number of libel cases has increased as bloggers and users of social media have become more mainstream and as businesses have adopted the medium as a marketing tool. Unlike the bloggers Professor Reynolds focused on, business bloggers as defendants are more likely to have the financial ability to pay substantial verdicts.

Already, there have been some significant jury verdicts awarded in business-related Internet defamation cases. For example, in February 2009, a Texas jury awarded Orix Capital Markets, LLC, \$12.5 million in damages in a defamation case involving statements published on the “gripe site” Predatorix.com.<sup>17</sup> Interestingly the suit was not originally filed

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15. There has also been a corresponding increase in the number of other blogging-based speech-tort lawsuits, the most noteworthy of which is *Snyder v. Phelps*, 562 U.S. \_\_\_, 131 S. Ct. 1207 (2011). In *Snyder*, the father of a deceased service member brought an action against a fundamentalist church and its members, stemming from the defendants’ anti-homosexual demonstration near the service member’s funeral, alleging claims for intentional infliction of emotional distress (IIED), invasion of privacy by intrusion upon seclusion, and conspiracy. *Id.* Snyder also asserted claims against the defendants based on the self-styled written “epic” published on the church’s website several weeks after the service member’s funeral, in which members stated, among other things, that the service member’s father and his ex-wife taught him to “defy his creator, raised him for the devil, and taught him that God was a liar.” *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009) (internal quotation marks omitted). While the Supreme Court did not consider the claims arising out of the defendants’ posting on their website, the Fourth Circuit found that, “[n]otwithstanding the distasteful and repugnant nature of the words being challenged,” the epic posted on the website was constitutionally protected. *Id.* at 226.

16. M.P. McQueen, *Bloggers, Beware: What You Write Can Get You Sued*, WALL ST. J. (May 21, 2009), <http://online.wsj.com/article/SB124287328648142113.html>.

17. Sam Bayard, *\$12.5 Million Jury Verdict in Texas Internet Defamation Case*, CITIZEN MEDIA L. PROJECT (Apr. 22, 2009), <http://www.citmedialaw.org/blog/2009/125-million-jury-verdict-texas-internet-defamation-case>; see also Jury Instructions at 26, 30, *ORIX Capital Mkts., L.L.C. v. Super Future Equities, Inc.*, No. 3:06-CV-0271-B, 2009 WL 531264 (N.D. Tex. Nov. 6, 2008).

by Orix, but by the defendant, Super Future Equities, Inc.—an investor in two commercial mortgage-backed securities trusts in which Orix, a financing division of Wells Fargo, served as both Master and Special Servicer.<sup>18</sup> Super Future Equities sued Orix and others, claiming breach of fiduciary duty, breach of contract, RICO violations, negligence, and gross negligence.<sup>19</sup> The federal court in Texas dismissed these claims, but not before Orix filed a counterclaim against Super Future Equities and a number of individual defendants.<sup>20</sup>

The counterclaim alleged the defendants set up the Predatorix.com website and used it to publish false and defamatory statements about Orix.<sup>21</sup> “For example, Orix claimed that the website accused the company of [financing mortgages irresponsibly,] committing tax fraud[,] and being under federal investigation for violating racketeering laws.”<sup>22</sup> After a two-week trial in February 2009, “the jury awarded Orix \$2.5 million in compensatory damages and \$10 million in punitive damages, split between [all] the defendants, except [one], who was not found liable.”<sup>23</sup> The parties settled the case on undisclosed terms after the verdict [, and] [a]fter the settlement, the [defendants] published an apology on Predatorix.com, acknowledging that the postings were incorrect.”<sup>24</sup>

The *Orix* case is certainly not the only successful online defamation lawsuit brought by a business in the last five years. Such actions are popping up across the country. For example, in Indiana, a business plaintiff sued an out-of-state business based on statements the defendants published on a website “imputing misconduct” in the plaintiff’s franchising business practices.<sup>25</sup> In

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18. ORIX Capital Mkts., L.L.C. v. Super Future Equities, Inc., No. 3:06-CV-0271-B, 2008 WL 4820767, at \*1 (N.D. Tex. Nov. 6, 2008).

19. *Id.*

20. *Id.* at \*1–2.

21. *Id.* at \*2.

22. Bayard, *supra* note 17 (footnote omitted).

23. *Id.*; *see also* Jury Instructions, *supra* note 17, at 26, 30.

24. Bayard, *supra* note 17 (footnote omitted).

25. Noble Roman’s, Inc. v. French Baguette, L.L.C., 684 F. Supp. 2d 1065, 1071 (S.D. Ind. 2010) (finding defendants subject to personal jurisdiction in Indiana because alleged defamatory statements were intended to persuade potential future franchisees not to enter into business arrangements with the

Ohio, the seller of automobile engine blocks brought a defamation action against an out-of-state buyer who posted messages that were highly critical of the seller on various Internet sites.<sup>26</sup> In Illinois, the owner of a dog-breeding software company sued the proprietors of public websites that provide free access to dog pedigree information for defamation after the proprietors made statements on various websites and in e-mails to the dog-pedigree community that the plaintiff had stolen their data.<sup>27</sup> While these three lawsuits arose in the Midwest, libel suits regarding business blogs are not confined to a certain part of the country; scores of similar suits continue to be filed against businesses across the country.<sup>28</sup>

The *Orix* verdict can be viewed as an indicator of the type of Internet-based defamation suits likely to become more prevalent in the next five years—lawsuits filed by businesses taking action against other businesses for allegedly defamatory comments posted online. Business plaintiffs have significant financial interests in their online reputation among consumers. Business defendants also usually have the financial resources to defend Internet-based defamation claims and pay significant damages. This combination will continue to contribute to the growing number of business-related Internet defamation cases.

#### B. Corporate Blogging: Bloggers, Tweeters, and Facebook Users Get Richer, and the Libel Claims Get Bigger

When Professor Reynolds was writing in 2006, the bulk of the blogs he focused on contained comments by individual bloggers. As such, Professor Reynolds appropriately noted that most bloggers were unlikely to have the financial resources to pay any

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plaintiff, ensuring that the effects of the defamation would be felt in Indiana).

26. *Kauffman Racing Equip., L.L.C. v. Roberts*, 930 N.E.2d 784 (Ohio 2010).

27. *Tamburo v. Dworkin*, 601 F.3d 693, 706 (7th Cir. 2010) (finding that although defendants had never been to Illinois, the court determined they were subject to personal jurisdiction because they intended the statements to injure plaintiff's Illinois business through a boycott).

28. *See, e.g., Orix Capital Mkts., L.L.C. v. Super Future Equities, Inc.*, No. 3:06-CV-0271-B, 2008 WL 4820767 (N.D. Tex. Nov. 6, 2008).

damages if confronted with a libel suit.<sup>29</sup> In the five years since, corporate America has embraced blogging and social media as a way to engage their customers and market their products and services. Walmart, Coca-Cola, and Kraft Foods all have Facebook pages.<sup>30</sup> Chevrolet, Bank of America, and Pfizer are all on Twitter.<sup>31</sup> Even BP has a Twitter account targeted at American followers in the wake of the 2010 oil spill in the Gulf of Mexico.<sup>32</sup> Sun Microsystems boasts more than 4,000 employee bloggers, including its chief executive officer and general counsel.<sup>33</sup> But in their rush to join on the social media bandwagon, businesses may leave themselves—and their significant corporate checkbooks—exposed to potential social media-related libel claims.

Litigation targeting Cisco regarding the “Patent Troll Tracker” blog epitomizes the risks that corporations face as they or their employees join the rush to capitalize on the popularity of blogs and social media.<sup>34</sup> The controversial Patent Troll Tracker blog, once considered a “must-read” for intellectual property litigators, focused on the subject of “patent trolls.”<sup>35</sup> The blog was authored by an anonymous blogger, now known to be Richard Frenkel, then an in-house intellectual property lawyer and director at Cisco Systems, who specialized in tracing the identity of individuals and entities behind so-called patent troll

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29. Reynolds, *supra* note 1, at 1158.

30. See *Coca-Cola*, FACEBOOK, <http://www.facebook.com/cocacola> (last visited Mar. 26, 2011); *Kraft Foods—Recipes and Tips*, FACEBOOK, <http://www.facebook.com/KraftFoods> (last visited Mar. 26, 2011); *Walmart*, FACEBOOK, <http://www.facebook.com/walmart> (last visited Mar. 26, 2011).

31. See *BofA\_Help*, TWITTER, [http://twitter.com/bofa\\_help](http://twitter.com/bofa_help) (last visited Mar. 26, 2011); *Chevrolet*, TWITTER, <http://twitter.com/chevrolet> (last visited Mar. 26, 2011); *pfizer\_news*, TWITTER, [http://twitter.com/pfizer\\_news](http://twitter.com/pfizer_news) (last visited Mar. 26, 2011).

32. *BP\_America*, TWITTER, [http://twitter.com/bp\\_america](http://twitter.com/bp_america) (last visited Mar. 26, 2011).

33. Michael Orey, *Busting a Rogue Blogger*, BLOOMBERG BUSINESSWEEK (Mar. 27, 2008, 5:00 PM), [http://www.businessweek.com/magazine/content/08\\_14/b4078075822107.htm](http://www.businessweek.com/magazine/content/08_14/b4078075822107.htm).

34. See Asher Hawkins, *Shut Up, Already!*, FORBES.COM (Mar. 11, 2008, 7:00 PM), [http://www.forbes.com/2008/03/11/cisco-sun-microsystems-ent-tech-ah\\_0311ciscoblog.html](http://www.forbes.com/2008/03/11/cisco-sun-microsystems-ent-tech-ah_0311ciscoblog.html).

35. *Id.*

lawsuits.<sup>36</sup> In an October 2007 posting, Frenkel commented on a patent infringement case in which Cisco was the defendant.<sup>37</sup> Frenkel alleged that the plaintiff in the suit, a company by the name of ESN, filed the lawsuit one day before a patent was issued, and that subsequently ESN's local counsel, two Texas lawyers, conspired with the Eastern District of Texas's clerk's office to alter the filing date of the suit to avoid having the case dismissed for lack of standing.<sup>38</sup>

Several months later, on February 23, 2008, Rick Frenkel revealed his identity as the patent troll blogger.<sup>39</sup> Almost immediately, the Patent Troll Tracker blog was shut down, and Frenkel and Cisco were sued by the two Texas lawyers in two separate defamation lawsuits regarding the blog posting.<sup>40</sup> While both cases eventually settled—the first only after four days of trial and the second on the eve of trial—they highlight the fact that companies can be held liable for work-related activities of their employee bloggers.<sup>41</sup> As a result, corporate defendants that have embraced blogging and social media—especially those with substantial financial resources—may suddenly find themselves pursued by plaintiffs seeking significant damages for alleged libel in the blogosphere.

In another newsworthy business defamation case, the restaurant chain, Subway, sued one of its main competitors, Quiznos, asserting various claims arising out of a Quiznos advertising campaign that compared Quiznos products to similar Subway products.<sup>42</sup> Part of this campaign was an Internet-based contest hosted on the Quiznos website that allowed customers to

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36. Stuart Weinberg, *Controversial Blog on Patent Suits Is Authored by Cisco Executive*, WALL ST. J. (Feb. 25, 2008, 9:25 PM), <http://online.wsj.com/article/SB120398012448391943.html>.

37. Hawkins, *supra* note 34.

38. *Id.*

39. Orey, *supra* note 33.

40. Brenda Sapino Jeffreys, *Trial to Begin in Suit Against Cisco, Patent Troll Tracker Blogger*, TEX. LAWYER, Sept. 14, 2009, at 2.

41. *See, e.g.*, Brenda Sapino Jeffreys, *Cisco Systems Settles Defamation Suit over Blog Posting*, LAW.COM (Jan. 19, 2010), <http://www.law.com/jsp/article.jsp?id=1202438981803>.

42. *Doctor's Assocs. v. QIP Holder, L.L.C.*, No. 3:06-cv-1710(VLB), 2010 WL 669870, at \*1 (D. Conn. Feb. 19, 2010).

upload their own video submissions much like a user of the social media site, YouTube, uploads his or her own video submission.<sup>43</sup> Among its many claims, Subway asserted a cause of action for commercial disparagement, which the district court stated was akin to slander.<sup>44</sup> Subway maintained that the videos posted, including four submissions posted by Quiznos itself, contained disparaging statements about Subway.

The battle between Subway and Quiznos is important because it illuminates the key ways in which the blogosphere has changed since Professor Reynolds penned his thoughts in 2006. As an initial matter, it demonstrates that plaintiffs are now bringing Internet-based libel claims. As discussed, these claims can be quite significant. Additionally, now that defendants are not quite as impecunious as the bloggers mentioned by Professor Reynolds—Quiznos is a successful business with the financial resources to pay damages—blog-related libel claims may start to produce considerable financial returns if successful. Corporations, celebrities, and ordinary bloggers with significant insurance coverage make tempting financial targets. But, the case is equally important because it highlights the shift away from traditional blogs and toward social media. This changing cultural landscape will now be discussed.

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43. *Id.* at \*2–3; see YOUTUBE, <http://www.youtube.com> (last visited Mar. 23, 2011); “Founded in February 2005, YouTube allows billions of people to discover, watch and share originally-created videos. YouTube provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators and advertisers large and small.” *About YouTube*, YOUTUBE, [http://www.youtube.com/t/about\\_youtube](http://www.youtube.com/t/about_youtube) (last visited Mar. 23, 2011). Like Facebook and Twitter, YouTube has been a social media juggernaut.

44. *Doctor’s Assocs.*, 2010 WL 669870, at \*1, \*49 (“In Connecticut, commercial disparagement is ‘akin to the torts of injurious falsehood and slander of title.’” (quoting *Valtec Int’l, Inc. v. Allied Signal Aerospace Co.*, 3:93CV01171 (WVE), 1997 WL 288627, at \*6 (D.Conn. Mar. 7, 1997))).

### C. The Changing Cultural Landscape

#### 1. Out with the Old (Blogs) and In with the New (Social Media and Micro-blogging)

In 2006, blogs were the “outlet of choice for people who wanted to express themselves online.”<sup>45</sup> Five years later, blogs seem to have lost their appeal as people have migrated to social media and micro-blogging. Across social networking, blogging, and micro-blogging, there are a number of constants: users are able to update their own content without vetting or editing to ensure accuracy of content and are able to express their opinions about experiences, products, and companies. However, there are distinct differences between traditional blogs and social media that are having a profound impact on the way in which citizen journalists communicate online. These differences are driving the shift from blogging to social media.

While blogs are regularly updated online journals or commentaries that typically provide links to other blogs and websites, social media sites are online communities that provide ways for users to interact. Facebook is the most popular social networking site in the world, but there are countless other popular social networking sites in the United States, including LinkedIn, MySpace, and Classmates.com, to name a few.<sup>46</sup> There are hundreds of other social networking sites devoted solely to certain communities of people with similar interests such as Yelp, a local business review site, or Flixster, a site related to movies.<sup>47</sup> Micro-blogging services, such as Twitter, Tumblr, and Posterous, enable users to send and read brief messages. For users of Twitter, currently the most popular micro-blogging service, these messages are known as “tweets.” Twitter users are able to comment rapidly and publicly about events, companies, products, experiences, and other people.

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45. Verne G. Kopytoff, *Blogs Wane As the Young Drift to Sites Like Twitter*, N.Y. TIMES, Feb. 21, 2011, <http://www.nytimes.com/2011/02/21/technology/internet/21blog.html>.

46. *List of Social Networking Websites*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_social\\_networking\\_websites](http://en.wikipedia.org/wiki/List_of_social_networking_websites) (last visited Mar. 23, 2011).

47. *Id.*

Facebook, Twitter, and other social media sites have broken the blogs' monopoly. Newer sites such as Tumblr offer even more competition for the traditional blog. Eighty-three percent of adults under the age of thirty-three use social networking sites.<sup>48</sup> In December of 2006, Facebook had just 12 million active users.<sup>49</sup> Since that time, Facebook has grown exponentially. At the time this Article was written, there were over 500 million active users of Facebook, and people spent over 700 billion minutes per month on Facebook.<sup>50</sup> The average Facebook user creates ninety pieces of content each month, and there are more than 30 billion pieces of content, including blog posts, photos, and news stories, shared each month.<sup>51</sup> Twitter, a relative newcomer compared to Facebook, has 175 million registered users as of September 14, 2010.<sup>52</sup> Ninety-five million tweets are written per day.<sup>53</sup>

While social media's star is rising, the blogosphere has been in decline.<sup>54</sup> According to the Pew "Generations 2010" report:

Only half as many online teens work on their own blog as did in 2006, and Millennial generation adults ages 18-33 have also seen a modest decline—a development that may be related to the quickly-growing popularity of social network sites. . . . Yet while the act formally known as blogging seems to have peaked, Internet users are doing blog-like things in other online spaces as they post updates about their lives, musings about the world, jokes, and links on social networking

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48. Kathryn Zickuhr, *Social Network Sites*, PEW INTERNET (Dec. 16, 2010), <http://www.pewinternet.org/Reports/2010/Generations-2010/Trends/Social-network-sites.aspx>.

49. *Company Timeline*, FACEBOOK, <http://www.facebook.com/timeline> (last visited Mar. 26, 2011).

50. *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Mar. 26, 2011).

51. *Id.*

52. *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Mar. 26, 2011).

53. *Id.*

54. Alexandra Silver, *Did Facebook Kill the Blogging Star?*, TIME, <http://newsfeed.time.com/2010/12/17/did-facebook-kill-the-blogging-star> (last visited Mar. 26, 2011).

sites and micro-blogging sites such as Twitter.<sup>55</sup>

In contrast to the explosive growth of social media, traffic to traditional blog hosting sites has stagnated.<sup>56</sup> The effect of the decline is demonstrated by Blogger, a company providing blogging platforms, which experienced a two percent decline in unique visitors in the United States in December 2010 compared to the same time period one year ago.<sup>57</sup>

This steady shift from traditional blogs to social media and micro-blogging does not mean that Internet users are no longer expressing themselves online. So-called citizen journalists are still very much alive. Instead of writing lengthy posts in a blog, however, people now post quick comments on social media sites. While blogging may be a more thoughtful medium in which to relay an online message, social media is faster, easier to use, and more interactive. Nonetheless, this ease and speed of access afforded by social media is not without its drawbacks, including the risk of a potential defamation suit. The exponential growth in the use of social media and micro-blogs has already resulted in a corresponding increase in libel litigation.<sup>58</sup>

## 2. As Facebook and Twitter Surge, So Do Defamation Claims

As a result of the increase in popularity of sites like Facebook and Twitter, there has been a corresponding uptick in libel litigation related to micro-blogging and social media.<sup>59</sup> For example, in one of the first widely reported Twitter-related libel suits, a Chicago property management company filed a lawsuit against a former tenant for allegedly defamatory remarks she shared on Twitter.<sup>60</sup> In May 2009, Amanda Bonnen, a former

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55. Kathryn Zickuhr, *Generations Online in 2010*, PEW INTERNET (Dec. 16, 2010), <http://www.pewinternet.org/Reports/2010/Generations-2010/Overview/Findings.aspx>.

56. *The Evolving Blogosphere: An Empire Gives Way*, ECONOMIST (June 24, 2010), <http://www.economist.com/node/16432794>.

57. Kopytoff, *supra* note 45.

58. *See infra* Part B.

59. *See, e.g.*, Verified Complaint at \*2, Horizon Grp. Mgmt., L.L.C. v. Bonnen, No. 09-008675, 2009 WL 2231162 (Ill. Cir. Ct. July 20, 2009).

60. *Id.*

resident of an apartment building managed by Horizon Realty Group posted a single 140-character tweet about the management company: “Who said sleeping in a moldy apartment was bad for you? Horizon [R]ealty thinks it’s okay.”<sup>61</sup> At the time she posted the tweet, she had only twenty followers and very few probably saw the actual tweet.<sup>62</sup> Nonetheless, just two months later, on July 28, 2009, Horizon Realty responded to the tweet with a lawsuit, suing Bonnen for defamation and seeking \$50,000 in damages.<sup>63</sup> The case was eventually dismissed one year later, but not until Ms. Bonnen was forced to defend herself in court.<sup>64</sup>

Tweeters with only twenty followers are not the only ones getting sued for defamation. Celebrity tweeters are also getting in on the libel litigation action. On March 3, 2011, singer Courtney Love allegedly settled out of court a defamation lawsuit brought against her by Dawn Simorangkir, a fashion designer who claims that Love defamed her in a series of messages on Twitter last year.<sup>65</sup> The dispute began when the designer demanded payment for a few thousand dollars worth of her clothing.<sup>66</sup> In response, Love took to the Internet, using social media sites like MySpace and Twitter to attack Simorangkir for capitalizing on Love’s fame, declaring Simorangkir to be a “drug-pushing prostitute” and claiming that she had a history of assault.<sup>67</sup> In the subsequent defamation suit, Simorangkir claimed that the Twitter tirade significantly damaged her career as a designer. The damage was magnified by Love’s considerable

61. *Id.*; *Twitter Defamation Case Dismissed*, LESLIEREIS.COM (Jan. 23, 2010), [http://www.lesliereis.com/pb/wp\\_b375b750/wp\\_b375b750.html](http://www.lesliereis.com/pb/wp_b375b750/wp_b375b750.html).

62. Verified Complaint, *supra* note 59, at \*2.

63. *Id.*; *Twitter Defamation Case Dismissed*, *supra* note 61.

64. Luckily for Ms. Bonnen, her defense was taken on pro bono by Leslie Ann Reis, the director of the Center for Information Technology and Privacy Law at John Marshall Law School and a group of her students. *Twitter Defamation Case Dismissed*, *supra* note 61. Future Twitter users might not be so lucky.

65. Matthew Perpetua, *Courtney Love Settles Twitter Defamation Suit for \$430,000*, ROLLING STONE (Mar. 3, 2011, 6:35 PM), <http://www.rollingstone.com/music/news/courtney-love-settles-twitter-defamation-suit-for-430-000-20110303>.

66. *Id.*

67. Matt Belloni & Eriq Gardner, *Courtney Love’s Tweets Lead to Court Trial*, REUTERS (Jan. 5, 2011 3:37 AM), <http://www.reuters.com/article/2011/01/05/us-courtneylove-idUSTRE70409020110105>.

media presence and her large number of Twitter followers.<sup>68</sup>

Twitter is not the only new media site that has been implicated in an Internet-related defamation action. Wikipedia has also been the vehicle for alleged defamation. Wikipedia is a “free, web-based encyclopedia” that can be edited by “[a]nyone with access to the site,” and because the website’s policy is to not require posters to provide their real name, Wikipedia provides protection to a writer’s privacy unless the writer chooses to identify himself or herself.<sup>69</sup> On December 2009, actor Rob Livingston of *Office Space* fame filed a lawsuit against an anonymous Wikipedia writer for repeatedly altering Livingston’s entry to falsely state that he is homosexual and in a relationship with another man.<sup>70</sup> While any suit against an anonymous Wikipedia vandal is unlikely to get very far, the Livingston case serves as a high profile example of the increasing number of social media-based libel suits that have begun to be filed by defendants across the country. As greater numbers of Internet users migrate away from blogs to social media and micro-blogging, the incidence of such suits is sure to rise.

### III. PREDICTING THE FUTURE: GOODBYE BLOGS; HELLO SOCIAL MEDIA, CORPORATE DOLLARS, AND A MESS OF TROUBLE

As the abbreviated lifespan of Professor Reynolds’s preliminary thoughts has shown, it is a treacherous undertaking to attempt to predict very far into the future when it comes to the law of the blogosphere, social media, or even the Internet as a whole. Noting that, it makes sense to limit predictions to the next five years—the same amount of time that has lapsed since

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68. At the time of the Twitter tirade, Ms. Love had 40,000 followers. *Id.*

69. *Wikipedia*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia> (last visited Mar. 23, 2011).

70. Bianca Bosker, *Ron Livingston: ‘Office Space’ Star Battles ‘Malicious’ Gay Rumors Online*, HUFFINGTON POST (Dec. 5, 2009, 1:09 PM), [http://www.huffingtonpost.com/2009/12/05/ron-livingston-wikipedia\\_n\\_381345.html](http://www.huffingtonpost.com/2009/12/05/ron-livingston-wikipedia_n_381345.html). Livingston also asserted an additional cause of action against the same anonymous poster for creating a false and defamatory Facebook page. *Id.*

Professor Reynolds's initial musings and a lifetime in the world of blogging and social media. With such limitations firmly in place, this Article makes the following predictions. First, as more corporations adopt social media as a means to promote their products and services by either directly participating in social networking (via a company Facebook page or company tweets) or indirectly participating (by retaining the services of celebrity spokespersons to promote products using social media), there will be a greater number of potential plaintiffs eager to bring libel actions against deep corporate pockets clumsily navigating this bold new world. Second, there will be even more of a shift away from the traditional blog toward social media, especially micro-blog sites like Twitter and Tumblr, and a resulting increase in social media-related libel litigation in the next five years.

There will continue to be a steady increase in social media-related libel litigation because, unlike the impecunious blogger in Professor Reynolds's blogosphere of 2006, many of today's users of social media have the deep pockets that can make a potential libel claim look a lot more worthwhile. As seen in the cases outlined above, corporations have entered the social media realm, and the result will undoubtedly be an increase in the number of libel suits brought against business defendants.

While some corporations may have been dragged into the blogosphere unwittingly, much like Cisco in the "Patent Troll Tracker" cases, most have embraced social media and blogging as a new way to reach a wider audience of potential suppliers, partners, investors, and customers. Businesses that do not jump on the social media bandwagon directly may still do so indirectly. For example, it is now known that celebrities like Kim Kardashian are paid up to \$10,000 to tweet for Nestle.<sup>71</sup> Other celebrities like the actor Charlie Sheen and the rapper Soulja Boy have also signed up with social media marketing firms and are now paid to pitch products via Twitter and other social media sites.<sup>72</sup> And, the legal fallout relating to these paid endorsements

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71. Steven Avalos, *The Secret Business of Celebrity Tweets*, POPEATER (Jan. 5, 2010, 3:03 PM), <http://www.popeater.com/2010/01/05/celebrity-tweets-twitter>.

72. *Id.*

is clear. In fact, Ms. Kardashian has already been sued for defamation in Florida based on allegedly negative tweets she posted about a program called “The Cookie Diet.”<sup>73</sup> In the next five years, there will be an increasing number of corporations hiring celebrity spokespersons to endorse their products via Twitter, Facebook, and other social media sites. As a result, even more social media-related libel litigation will be brought as corporations with deep pockets retain often uncontrollable celebrities to send out promotional tweets.

Secondly, there will be a surge in Internet libel suits as the online community shifts from traditional blogging to the more free-wheeling world of social media and micro-blogging. In 2006, when Professor Reynolds authored his article on the blogosphere, traditional blogs ruled the Internet. As previously discussed, this is no longer the case. Social media sites like Facebook and Twitter have rapidly become more popular and more accessible given changes in device technology. Facebook reports that there are already more than 200 million active users currently accessing Facebook through their mobile devices.<sup>74</sup> Twitter reports that some of the most popular ways to access Twitter are via Twitter for iPhone, Twitter for Blackberry, and Twitter for Android.<sup>75</sup> As more and more people micro-blog or tweet instantaneously from mobile devices as opposed to spending time preparing thoughtful blog entries, society will continue to lose that attention to factual accuracy and commitment to instantly correcting mistakes that Professor Reynolds emphasized was the key to reducing the number of blog-related libel suits.<sup>76</sup>

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73. Verified Complaint for Defamation at \*8, *Siegal v. Kardashian*, No. 09-93439-CA-15 (Fla. Cir. Ct., Dec. 29, 2009).

74. *Statistics*, *supra* note 50.

75. See *Twitter for Android—New and Improved*, TWITTER BLOG (Feb. 10, 2011), <http://blog.twitter.com/2011/02/twitter-for-android-new-and-improved.html> (noting the top five “most-used Twitter applications” include “Twitter for Android,” “twitter.com,” Twitter’s “mobile website,” “Twitter for iPhone[,] and Twitter for Blackberry”); *Twitter for iPhone & iPad: Even Better*, TWITTER BLOG (Mar. 3, 2011), <http://blog.twitter.com/2011/03/twitter-for-iphone-ipad-even-better.html> (“Twitter for iPhone is already the third-most popular way to access Twitter . . .”).

76. Reynolds, *supra* note 1, at 1159–60.

In 2009, a study conducted by Pear Analytics revealed that forty percent of all tweets were “pointless babble.”<sup>77</sup> The medium has been called “socially addictive” with its users feeling compelled to constantly provide updates. As users compulsively update, traditional filters and editing are thrown by the wayside. As Daniel Schorr, senior news analyst for National Public Radio, noted in an interview discussing Twitter:

What we are losing is editing. . . . I grew up and nothing could be communicated to the outside world that didn't go through an editor to make sure you had your facts right, spelling right and so on. Now, every person is his or her own publisher and/or her own editor or her own reporter. And the world is full of people who are sending out what they consider to be news. It may be, it may not be, it may be made up and it doesn't matter anymore. That, to me, is the worst part of this. The discipline that should go with being able to communicate is gone.<sup>78</sup>

Considering the likelihood of future micro-blogging-related libel cases, the fact that Twitter users cannot or do not protect their tweets from the public eye only compounds the problem of pointless babble. Unlike Facebook or other social networking sites that allow some level of security to restrict viewers of a user's page, a Twitter user's page is typically open to the public.<sup>79</sup> Thus, every single piece of pointless babble can be seen by anyone in the world and not just those individuals who have signed on as that user's followers. This was exactly the problem faced by Ms. Bonnen in Chicago when she posted her pointless babble about her apartment.<sup>80</sup> Suddenly, a throw-away comment

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77. *Twitter Study—August 2009*, PEAR ANALYTICS, <http://www.pearanalytics.com/blog/wp-content/uploads/2010/05/Twitter-Study-August-2009.pdf> (last visited Mar. 23, 2011).

78. Andy Carvin, *Welcome to the Twittersverse*, NPR (Feb. 28, 2009), <http://www.npr.org/templates/story/story.php?storyId=101265831> (internal quotation marks omitted).

79. *Controlling How You Share*, FACEBOOK, <http://www.facebook.com/help/?page=839#!/privacy/explanation.php> (last visited Mar. 26, 2011); *Frequently Asked Questions*, TWITTER HELP CENTER, <http://support.twitter.com/forums/10711/entries/13920> (last visited Mar. 26, 2011) (“Twitter profile[s] [are] public by default.”).

80. *Twitter Defamation Case Dismissed*, *supra* note 61.

to a few friends is picked up by a litigious listener ready to file a lawsuit for defamation.

This problem gets worse when moved beyond the average citizen user of Twitter or Facebook and into the realm of corporations and public figures. While the average person may have only a handful of followers, Twitter and other social media sites are used, and may be more likely to be abused, by the same people who have traditionally had the most access to the media: celebrities, politicians, or even large corporations.<sup>81</sup> Influential public figures communicate with thousands—sometimes millions—of followers on social platforms like Facebook and Twitter. For example, at the time this Article was written, NFL wide receiver Chad Ochocinco had over 1.8 million followers on Twitter.<sup>82</sup> And, in early March 2011, at the height of his public meltdown and the ensuing media frenzy following his termination from the CBS sitcom, *Two and a Half Men*, Charlie Sheen set a new Guinness World Record for Twitter as the “Fastest Time to Reach 1 Million Followers” (adding an average of 129,000 new followers per day).<sup>83</sup> Then, on March 3, 2011, Charlie Sheen signed with the Ad.ly marketing agency, which specializes in Twitter and Facebook promotions.<sup>84</sup> As a result, the same concerns about speech-related torts that arise with traditional media may also arise with the use of social media like Twitter.

It is for this reason that the Courtney Love case was followed so closely not only by celebrity-watchers, but also by those interested in the future of the First Amendment in the social

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81. See Douglas MacMillan, *Social Media: The Ashton Kutcher Effect*, BLOOMBERG BUSINESSWEEK (May 3, 2009, 7:36 PM), [http://www.businessweek.com/technology/content/may2009/tc20090503\\_934757.htm](http://www.businessweek.com/technology/content/may2009/tc20090503_934757.htm).

82. *ochocinco*, TWITTER, <http://twitter.com/ochocinco> (last visited Mar. 26, 2011).

83. *Charlie Sheen Twitter Statistics*, TWITTERCOUNTER, <http://twittercounter.com/charliesheen> (last visited Mar. 3, 2011); see Todd Wasserman, *Charlie Sheen Sets New Guinness World Record for Twitter*, CNN (Mar. 3, 2011, 3:09 PM), <http://www.cnn.com/2011/TECH/social.media/03/03/charlie.sheen.twitter>.

84. See Wasserman, *Charlie Sheen Sets World Record*, *supra* note 83.

media age.<sup>85</sup> The Love case raises the important question of whether celebrities and other public figures utilizing social media should be liable if they intentionally put untrue and potentially damaging statements in front of their loyal followers.<sup>86</sup> What is yet to be seen is whether the courts will give individuals posting on Twitter more latitude than other media. Will the courts treat pointless babble as a protected expression of opinion or will they find such comments give rise to a claim of libel?

Unfortunately, because the Love case settled out of court,<sup>87</sup> that question is not answered—this time. But the Love case is only the tip of the iceberg as society careens into the intersection of social media and the First Amendment. In the coming five years, more libel cases will undoubtedly be brought against the users of social media and micro-blogging sites like Facebook and Twitter as the number of users continues to grow exponentially and the financial interests and wherewithal of the companies and individuals involved increases. In the world of instant gratification and spontaneous communication with online followers, social media users do not share the discipline of the traditional journalist or even Professor Reynolds's traditional blogger. And, perhaps most importantly, adding the word "allegedly" to your tweet wastes nine of those precious 140 characters. Hang on to your seat, Professor Reynolds: adolescence in the blogosphere is going to be exciting.

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85. See Belloni & Gardner, *supra* note 67.

86. *Id.*

87. Perpetua, *supra* note 65.