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Blogging: A Journal Need Not a Journalist Make

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Blogging: A Journal Need Not a Journalist Make

Cover Page Footnote

Brooklyn Law School, Margaret Berger, Eric Easton

ARTICLES

Blogging: A Journal Need Not a Journalist Make

Anne Flanagan*

INTRODUCTION

This article explores the status of “blogs” and “bloggers” as journalists in the context of journalistic privilege and other exceptions to legal obligations under U.S. and U.K. laws designed to accommodate freedom of expression. Before that, however, it looks briefly at this fairly recent phenomenon that has emerged in the still somewhat freewheeling culture of the Internet. This discussion is intended to show that the great number, variety and often participatory, unedited and sometimes ill-considered content of blogs challenges traditional notions of journalism. Despite its foibles, this new medium of expression has growing import and possible significance for the future of how news and ideas are disseminated. As this may blur the lines between traditional journalists and bloggers, this article considers what meaningful criteria can be used to ensure that the legal protections accorded to journalists so that the public can receive news and ideas are properly inclusive of blogs and bloggers. It concludes that the customary adherence to a meaningful professional standard or code of conduct can demonstrate the use of a journalistic process to

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gather, verify and publish information, one criteria that has been suggested as the dividing line.

I. BLOGS AND BLOGGERS

Blogging is the act of writing or maintaining a “blog.”¹ A web log or simply a blog, a portmanteau of ‘web’ and ‘log,’ is a website containing, at a minimum, posted entries often around a particular area of interest and that are typically time-stamped by blogging software.² These posts are often, but not necessarily, in reverse chronological order, so that one would have to trace the thread of that topic back to the first posting. Such a website would usually be accessible to any Internet user.³ As noted, there are blogs of many kinds and addressing many topics. One blog directory lists ‘politics,’ ‘music,’ ‘life,’ ‘art,’ ‘culture,’ ‘news,’ ‘technology,’ ‘personal,’ ‘humor,’ ‘photography,’ ‘love,’ ‘sex,’ ‘movies’ and ‘writing’ among the keywords that categorize its posted blog links.⁴ There are even blogs on blogs,⁵ which might be called ‘metablogs’ in techie parlance.

The growth of blog numbers is unquestionable. One American research project has categorized blogs as a “key part of online culture,” noting that in 2004, some eight million Americans had created blogs.⁶ While the same report notes, however, that 62% of Americans were completely unfamiliar with blogs, a 58% increase in blog readership in the U.S. since 2004, indicates that more and more Americans are becoming familiar with this technology.⁷ Nor

¹ However, a blog without original content that merely maintains links to others is referred to as a ‘splog,’ a combination of ‘spam’ and ‘blog’. Wikipedia, ‘List of blogging terms’, http://en.wikipedia.org/wiki/List_of_blogging_terms (last visited February 1, 2006).

² Wikipedia, ‘Weblog’, <http://en.wikipedia.org/wiki/Weblog> (emphasis in original) (last visited Apr. 29, 2005).

³ *Id.*

⁴ See Blogwise, ‘Blogs by Keyword’, <http://www.blogwise.com> (last visited February 1, 2006).

⁵ *Id.*

⁶ Data Memo from PIP Director Lee Rainie, Pew Internet & American Life Project, The State of Blogging (Jan. 2, 2005), available at http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf.

⁷ *Id.*

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are blogs merely a domestic trend. There are estimated to be over 13 million blogs in China.⁸ Indeed, their entrenchment in the Internet culture is further marked by the fact a blogger's lexicon has developed.⁹

Blogs are a potentially unlimited publication format. They are often characterized by casualness and unedited dialog akin to chatting with those familiar to you.¹⁰ It is not surprising, therefore, that some bloggers have run afoul of legal rules and corporate cultures. For example, one online report ascribes the firings of several employees of United States companies to the content of their blogs.¹¹ Purportedly, one was fired after publishing a "suggestive" photo of herself in her Delta Airline attendant's uniform;¹² another after gossiping about the behavior at her company's Christmas party.¹³ Even cutting-edge companies seem no more progressive in their attitudes to the unedited nature of these new fora. Reportedly, Google terminated an employee for ruminating online about its finances¹⁴ and a Microsoft employee lost his job after publishing on his website a photo of Apple computers on a Microsoft loading dock, seemingly a security violation.¹⁵ These and other reports¹⁶ make clear only that some companies have little sense of humor when it comes to blog postings and their corporate image. The risk to some bloggers does not seem to have seriously deterred their use by others, however.

⁸ See Howard W. French, *Letter from China: Despite Web Crackdown, Prevailing Winds Are Free*, NY Times, Feb. 9, 2006 at A4.

⁹ Wikipedia, 'List of blogging terms', http://en.wikipedia.org/wiki/List_of_blogging_terms (last visited February 1, 2006).

¹⁰ See Steve Outing, *The 11 Layers of Citizen Journalism*, POYNTERONLINE, June 15, 2005, http://www.poynter.org/content/content_view.asp?id=83126 (noting that "[w]hat people write goes on [the unedited news blogs]: blemishes, misspellings and all").

¹¹ See Anick Jesdanun, *Blog-Related Firings Focus on Policy*, WASH. POST, Mar. 6, 2005, at B12.

¹² *Id.*

¹³ *See id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See, e.g., Jeremy Blachman, *Job Posting*, N.Y. TIMES, Aug. 8, 2005, at A19, available at <http://www.nytimes.com/2005/08/31/opinion/31blachman.html?th&emc=th>.

Many blogs are still perceived as, and are in fact, mere personal diaries or observations, or, indeed, even ideological rants. Others, however, have edged notably toward the boundaries of traditional media or served its function as sources of information. For example, blogs have provided valuable checks on mainstream press,¹⁷ comprised alternatives to government-restricted media outlets¹⁸ or have gained mainstream institutional recognition.¹⁹ Illustrative here are the issuance of White House press credentials to a blogger,²⁰ the recent citation by the United States Supreme Court to a law blog (or ‘blawg’)²¹ and the numerous notations of the growing role of ‘citizen journalists’ as news sources (such as the posting of photos and news reports by soldiers fighting in Iraq).²² In fact, traditional media outlets now have their own blogs. This institutional lowering of barriers to this medium may be a natural consequence of its growth and use by many. This is despite the cultural rejection by those who consider their very distinction from the mainstream to be the hallmark of a blogger. The drift by numerous blogs toward traditional media has led to efforts to define blogging’s standards, including ethical and other

¹⁷ Wikipedia, ‘Weblog’, <http://en.wikipedia.org/wiki/Weblog> (last visited Apr. 29, 2005) (noting that within 72 hours of the *60 Minutes II* report that caused Dan Rather to resign from CBS News, conservative bloggers had built a case that documents shown during the report were likely forgeries).

¹⁸ See Howard W. French, *Letter from China: Despite Web Crackdown, Prevailing Winds Are Free*, NY Times, Feb. 9, 2006 at A4.

¹⁹ *Id.*

²⁰ See Katherine Seelye, *White House Approves Press Pass for Blogger*, NY TIMES, Mar. 7, 2005, at C5 (noting the credentialing of FishbowIDC published by Mediabistro.com).

²¹ See *United States v. Booker*, 125 S. Ct. 738, 775 n.4 (2005) (Stevens, J. dissent) (citing unpublished memorandum by Christopher A Wray, Assistant Attorney General, U.S. Department of Justice, Guidance Regarding The Application Of Blakely v. Washington, 2004 WL 1402697 (June 24, 2004) To All Pending Cases, available at Sentencing Law and Policy: A Member of the Law Professor Blogs Network, http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf).

²² See, e.g., S. Outing, *The 11 Layers of the Citizen Journalist*, Poynter Online, June 15, 2005, available at http://www.poynter.org/content/content_view.asp?id=83126; S. Rubel, *Citizen Journalist Chronicles SF Explosion*, Micro Persuasion, Aug. 19, 2005, available at http://www.micropersuasion.com/2005/08/citizen_journal.html. See also Wikipedia, ‘Weblog’, <http://en.wikipedia.org/wiki/Weblog> (last visited Apr. 29, 2005).

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boundaries as this Internet medium of expression evolves and matures.²³

II. THE BLOGGER AS JOURNALIST?

One evolutionary boundary poses a potentially difficult question: is a blogger a journalist under the law? This is not a theoretical issue. It is one that has recently been considered in several contexts in the United States and that could present a quandary for Congress in the near future. The first of these was the consideration by the Federal Election Commission in its rule-making process of whether blogs are entitled to the “media exemption” from corporate spending limits under the federal campaign finance laws.²⁴ The issue similarly arose with assertion of the journalistic privilege by several blog authors in opposition to a subpoena by Apple Corporation in California to compel an Internet service provider (ISP) to disclose the sources of leaked information regarding unreleased Apple products.²⁵ This is a scenario that may test traditional “freedom of the press” rights²⁶ and the scope of journalist privileges under the First Amendment. It would also test state-based “shield” laws, which were enacted in response to a perceived lack of protection for journalist information sources under the Constitution.²⁷ The underlying question of the qualification of a journalist under the law in this era

²³ See, e.g., Blogger’s Code of Ethics, Cyberjournalist.net, available at http://www.pcij.org/blog/?page_id=3 (noting that it is based on the Society of Professional Journalists Code of Ethics) (last visited Aug. 30, 2005). The code, however, does not reference the use of confidential sources or the ethical obligation to keep any promise made to confidential sources. See *id.*

²⁴ See *infra* Part II A.

²⁵ See *infra* Part II. B.

²⁶ See Clay Calvert & Robert D. Richards, *Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press*, 23 LOY. L.A. ENT. L. REV. 257, 273 (2004). In considering issues surrounding the scope of press freedoms raised by one technology, the Internet, it is interesting to note the historical fact that the expression ‘freedom of the press’ arises from another technology, the printing press which involved the ‘pressing’ ink on paper via a manual process and which is suggested to have taken its name from yet another technology, a wine ‘press’ which it resembled. This technology has long been obsolete despite the residual use of the word.

²⁷ See BLACK’S LAW DICTIONARY 1410 (8th ed. 2004).

of ubiquitous online publication also has context under the United Kingdom laws that accord special privileges to protect freedom of expression.²⁸ The following first explores the issues under the Federal Election laws and the journalistic privileges under the First Amendment and state “shield” laws. It then addresses how the question of whether bloggers are journalists might be answered. It does this in the context of the journalistic exception from numerous obligations placed on controllers of personal data under the United Kingdom’s Data Protection Act 1998²⁹ and the qualified privilege against defamation.³⁰

A. The Election Law Media Exemption and Bloggers

The consideration by the Federal Election Commission (FEC) in its rule-making process of whether blogs are entitled to the “media exemption” from corporate spending limits under the federal campaign finance laws arises from *Shays v. FEC*.³¹ In this case, the United States District Court for the District of Columbia ordered the FEC to revise its rules issued in implementing the McCain-Feingold campaign finance reforms.³² The *Shays* court held, among other things, that the term “public communication” should include some communications over the Internet which the FEC rules had impermissibly fully exempted.³³ Federal campaign finance laws define “public communication” to be “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.”³⁴ Even though “Internet communications” is not specifically listed, the court

²⁸ See generally Data Protection Act, 1998, ch. 29, § 1 (Eng.) (regulating the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information).

²⁹ Data Protection Act, 1998, ch. 29 (Eng.).

³⁰ See *infra* Part IV B.

³¹ 337 F. Supp. 2d 28 (D.D.C. 2004), *aff’d*, No. 04–5352, 2005 WL 1653053 (D.C. Cir. July 15, 2005).

³² *Id.* at 65, 67–71

³³ *Id.*

³⁴ *Id.* at 65.

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found that some Internet communications clearly fall within the category of “general public political advertising.”³⁵

This definition of “public communication” is important. It triggers certain funding limits and funding-source disclosure obligations called ‘disclaimers.’ Political parties and committees are restricted to the expenditure of delimited federal campaign funds on public communications that promote, attack, support or oppose (PASOs) any candidate for federal office.³⁶ The laws also limit contributions that corporations and labor unions can spend on certain activities in connection with federal elections, including PASOs, unless done through separately financed political action committees (“PACs”).³⁷ PACs are also regulated by reporting and other requirements.³⁸ Following *Shays*, various Internet communications will as well be subject to the funding limitations under revised rules that must be issued by the FEC.

The corporate funding limitations for public communications do not, however, apply to media corporations³⁹ such as Fox, the New York Times or the Washington Post. This is pursuant to a “media exemption” provided for under the laws regarding “contributions” which states that

[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate⁴⁰

This means that media corporations can endorse or support a candidate as and to the extent they choose.⁴¹

³⁵ *Id.* at 67–69.

³⁶ *See* 2 U.S.C. § 431(20)(A)(iii) (Supp. 2002); 11 C.F.R. §§ 100.24(b)(3), 300.13(a), 300.32(a)(1)–(2); 300.36(a)(1) (2005).

³⁷ *McConnell v. FEC*, 540 U.S. 93, 118 (2003).

³⁸ 2 U.S.C. § 434 (2000 & Supp. 2002).

³⁹ 11 C.F.R. § 100.73 (2005).

⁴⁰ *Id.*

⁴¹ *See id.*

In attempting to comply with *Shays*, the FEC has proposed that only paid political Internet advertisements placed on another's website be categorized as a communication that can trigger "the contribution regulation."⁴² If this proposal is followed, most Internet communications would continue to be excluded from the definition of "public communications" for purposes of the contribution limits.⁴³ In addition, the proposed rules would not implement a payment disclaimer requirement for bloggers, which would otherwise require bloggers to disclose the source that paid for their comments including political party or committee sources.⁴⁴ However, the FEC does question (1) whether a blogger should be required to disclose payments if they expressly advocated "the election or defeat of a clearly identified candidate;" and (2) whether "payment by a political committee to a blogger for promotional content on [a] blog constitute(s) 'general political advertising.'"⁴⁵

The FEC's proposal would extend the "media exemption" to encompass Internet media by clarifying that the list of media includes "other periodical publications" whether they appear in print or on the Internet.⁴⁶ This extension hardly seems necessary given the extent of the continuing carve-outs for Internet communications. The extended media list would encompass institutional media websites, even those with no offline presence.

The FEC sought comments as to whether bloggers could fall within periodical publications and whether a blogger's activity should be considered commentary or editorializing or news story activity.⁴⁷ There is a concern that bloggers' participation in the political process will be unduly restrained by unnecessary regulation.⁴⁸ However, there is also a concern that unlimited

⁴² Internet Communic'ns, 70 Fed. Reg. 16,967, 16,970-71 (Apr. 4, 2005) (to be codified at 11 C.F.R. pts. 100, 110 and 114).

⁴³ See generally *id.*

⁴⁴ *Id.* at 16972-73.

⁴⁵ *Id.*

⁴⁶ *Id.* at 16974-75.

⁴⁷ *Id.* at 16975.

⁴⁸ See Letter of Deirdre K. Mulligan, Director, Samuelson Law, Technology & Public Policy Clinic, School of Law, University of California at Berkeley, Geoffrey Cowan, Dean, Annenberg School for Communication, University of Southern California, and

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carve-outs for blogs could erode the constraints intended by the recently-reformed campaign finance laws by permitting corporations and unions to give candidates unlimited contributions via the use of blogs.⁴⁹ Final rules have yet to be promulgated. With its petition for a hearing by the full D.C. Circuit⁵⁰ now denied, the FEC indicates that it now intends to proceed aggressively with the rule making. It expects the final rules to be promulgated by the end of February 2006.⁵¹ Thus, the limitations, if any, imposed on blogs qualifying as “media” under the federal election laws remain to be seen. Such limitations, however, are unlikely to be stringent, given the FEC’s expressed concern that “commentary,” within the defined functions of exempt “media,” is intended to include third-party access to media outlets.⁵²

B. Bloggers and Journalistic Privilege

The second development raising the issue of the legal status of bloggers as journalists emerges in the very complex, fractured and confusing world of United States law governing journalistic privilege. Yet, its importance has been noted as threatening to the very existence of the privilege. This is because if anyone can create a blog and claim that his postings, no matter what their import, purpose, or content, amount to journalism, can any assert a privilege over others?⁵³ A little background might prove helpful to

Matthew Grossmann, Ph.D. Candidate, Department of Political Science, University of California at Berkeley, to Brad C. Deutsch, Assistant General Counsel, Federal Election Commission (June 1, 2005) (enclosing Report of the Bipartisan California Commission on Internet Political Practices), available at http://www.fec.gov/pdf/nprm/internet_comm/comm_14.pdf. See also Allison R. Hayward, “System Failure,” *National Review Online*, <http://www.nationalreview.com/comment/Hayward200511040830.asp>.

⁴⁹ See Amy Pike, *Internet Hearing*, 31(8) RECORD: FEDERAL ELECTION COMMISSION 2 (Aug. 2005), available at <http://www.fec.gov/pdf/record/2005/Aug05.pdf#page=2>.

⁵⁰ See Petition for Rehearing En Banc by the Federal Election Commission, *Shays v. FEC*, No. 04-5253 (D.C. Cir. Aug. 29, 2005), available at http://www.fec.gov/law/litigation/shays_v_fec_petition_rehearing_en_banc_04_5352.pdf

⁵¹ See FEC Court Case Abstracts, *Shays v. FEC*, Petition for Rehearing En Banc Denied, available at http://www.fec.gov/law/litigation_CCA_S.shtml#shays_02.

⁵² See Internet Communic’ns, 70 Fed. Reg. 16967, 16974-75 (Apr. 4, 2005) (to be codified at 11 C.F.R. pts. 100, 110 and 114).

⁵³ See Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUSTON L.

understand the California shield laws and to show why the status of bloggers as journalists will not easily be definitively resolved.

Many legal scholars contend that the Supreme Court, in *Branzburg v. Hayes*,⁵⁴ recognized the existence of a limited privilege under the First Amendment allowing the press to refuse to disclose confidential source information, though such a privilege was not expressed in the terms of the First Amendment.⁵⁵ This contested view⁵⁶ points to a majority mustered from the four dissenting and one concurring justices that a qualified privilege exists.⁵⁷

However, the decision itself concluded that journalist witnesses to a crime were not privileged from testifying before a grand jury despite any confidentiality agreement into which they might have entered.⁵⁸ Thus, the scope and application of journalistic privilege can vary according to its source. Where sought pursuant to the qualified privilege of the First Amendment, courts usually determine its application on a case-by-case basis balancing “vital societal and constitutional interests.”⁵⁹ The scope of the privilege can vary due to the application of different balancing tests by different courts. The tests, however, usually at least require a showing that (1) the information is material and relevant to the claim; (2) the information is necessary to the maintenance of the claim; and (3) other potential sources for the information have

REV. 1371, 1406–16 (2002–2003) (urging that the methods in which professional journalists gather, verify and disseminate information should be the test of the qualification of a ‘journalist’ rather than any institutional or content analysis).

⁵⁴ 408 U.S. 665 (1972).

⁵⁵ See, e.g., Brief for the Reporters Committee for the Freedom of Press, et. al as Amici Curiae Supporting Petitioners, *O’Grady v. Superior Ct. of the State of Cal., County of Santa Clara*, at 8 (Apr. 7, 2005) (No. H028579), available at http://www.eff.org/Censorship/Apple_v_Does/20050407_apple_brief.pdf [hereinafter Amici Curiae Brief].

⁵⁶ See Timothy B. Dyk, *Newsgathering, Press Access and the First Amendment*, 44 STAN. L. REV. 927, 929 (1992) (contending that this privilege has instead been afforded to parties by the lower courts despite the Supreme Court’s reluctance to do so in its decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

⁵⁷ See, e.g., Amici Curiae Brief, *supra* note 55, at 8.

⁵⁸ *Branzburg*, 408 U.S. at 691 (noting expressly that the issue of confidential sources was not before it).

⁵⁹ *Id.* at 710 (Powell J. concurring).

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been exhausted.⁶⁰ Some tests also consider whether the person is a journalist and a party to the action⁶¹ and/or the nature of public interest protected in publishing the information.⁶² The jurisdictional variation in the scope of the privilege is significant. Not only do the courts of the eleven federal circuits and a majority of state courts decide the nature and scope of the privilege in accordance with the First Amendment⁶³ but also under individual state constitutions⁶⁴ or the common law⁶⁵ where applicable. Complexity is further compounded by the fact that thirty-one states have enacted “shield” laws protecting journalists, *inter alia*, from liability for civil and criminal contempt.⁶⁶ These laws give varying levels of protection.⁶⁷ California, for example, has recognized a First Amendment qualified privilege⁶⁸ and a statutory protection for journalists, that is now also enshrined in its state constitution.⁶⁹ The variation in protection under case law and state statutes across jurisdictions ranges from mere protection against the disclosure of confidential sources to the protection of *all* unpublished materials—whether or not confidential.⁷⁰ There is no federal statutory privilege of non-disclosure⁷¹ to enhance the limitations of the constitutional protection.⁷² A federal statutory privilege has been urged in light of the jailing of a journalist from the New York Times in October 2004 in a politically charged case for her refusal

⁶⁰ James C. Goodale, et al., *Reporter’s Privilege*, 580 PRAC. L. INST., PAT., COPYRIGHT, TRADEMARK, & LITERARY PROP. COURSE HANDBOOK SERIES 27, 58 (1999).

⁶¹ *Id.* at 70, 72.

⁶² *See, e.g., Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981).

⁶³ *State v. Siel*, 444 A.2d 499, 502 (N.H. 1982).

⁶⁴ *Id.* at 503.

⁶⁵ *Senear v. Daily Journal-American*, 641 P.2d 1180, 1182 (Wash. 1981).

⁶⁶ *Berger*, *supra* note 53, at 1392.

⁶⁷ But not necessarily more full protection. *See O’Neill v. Oakgrove Constr. Inc.*, 71 N.Y.2d 521 (1988) (decision under New York State and U.S. Federal Constitutions for recognition of qualified privilege in journalist’s photographs that did not fall within absolute privilege of confidential sources and information under New York’s shield law, N.Y. CIVIL RIGHTS LAW § 79-h (Supp. 2006).)

⁶⁸ *Mitchell v. Superior Court*, 690 P.2d 625, 629–30 (Cal. 1984).

⁶⁹ CAL. CONST. art. I, § 2(b).

⁷⁰ Goodale, et al., *supra* note 60, at 46–47.

⁷¹ *See* 42 U.S.C. § 2000aa (2000). There is a federal statutory protection from the search and seizure of certain ‘work product’ and ‘documentary materials’ unless a listed exemption applies. This statute applies to persons.

⁷² *See Berger*, *supra* note 53, at 1384–86 nn. 57–70, and accompanying text.

to reveal a source of information about which she never wrote an article.⁷³ The effort behind a federal statutory provision for protection of journalists is not likely to succeed under the current administration and Congress. However, identical bills have been introduced in the House and Senate⁷⁴ and have been endorsed by parties with clout, including the American Bar Association. These bills, however, apply to a “covered person” defined as:

A) an entity that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means and that—

(i) publishes a newspaper, book, magazine, or other periodical;

(ii) operates a radio or television broadcast station (or network of such stations), cable system, or satellite carrier, or a channel or programming service for any such station, network, system, or carrier; or

(iii) operates a news agency or wire service;

B) a parent, subsidiary, or affiliate of such an entity; or

C) an employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity.⁷⁵

The definition’s limitation to an “entity” and its parents, affiliates and employees and those working on its behalf precludes the extension of protection to blogs operated by individuals in accordance with general legal meaning of “entity.”⁷⁶ The Senate bill’s co-sponsor, Senator Richard Lugar (R-Ind.) has indicated that while the debate is not yet closed, bloggers would “probably not” be considered “real journalists.”⁷⁷ He queried “how do you

⁷³ Terry Frieden, *New York Times Reporter Held in Contempt*, CNN.COM, Oct. 7, 2004, <http://www.cnn.com/2004/LAW/10/07/miller.contempt>.

⁷⁴ See H.R. 581, 109th Cong. (2005); S. 340, 109th Cong. (2005).

⁷⁵ H.R. 581, 109th Cong. (2005); S. 340, 109th Cong. (2005).

⁷⁶ See BLACK’S LAW DICTIONARY 573 (8th ed. 2004).

⁷⁷ M. Fitzgerald, *Shield Law Sponsor Lugar: Bloggers ‘Probably Not’ Considered Journos*, Editor & Publisher, October 10, 2005, available at

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determine who will be included in this bill?”⁷⁸ The Senator’s question might be answered if the Congress were to apply a journalistic process analysis or journalist function analysis. This is a test that has been urged by some to determine appropriate limitations to be imposed, including in the *Apple* case⁷⁹ discussed below. It is, however, suggested that the practical application of such test should be based on the adherence to a professional code or standard that governs the gathering, verifying and dissemination of information. These are, as noted, the necessary elements of the journalistic process performed by those considering themselves to be journalists. Those customarily adhering to professional standards that address all of the processes would earn the right to claim journalistic privilege. Such code or standard need not be that of a particular professional organization. Rather, it might be that developed by the individual blogger or news organization⁸⁰ as long as it had meaningful criteria for each aspect of the journalistic process. How this might work is later explored in the context of UK law.

1. The Apple Lawsuit

Three online websites devoted to Apple Computer Corporation and its products, published several articles in late 2004 about products that Apple had not yet released.⁸¹ The articles included drawings and technical specifications apparently taken from a confidential Apple presentation.⁸² Apple filed suit in December, 2004, against twenty-five unnamed parties (Does 1–25) alleging that the defendants had leaked trade secret information to three

<http://www.freerepublic.com/focus/f-news/1500073/posts> (reporting the Senator’s remarks to the Inter American Press Association).

⁷⁸ *Id.*

⁷⁹ *Apple Computer, Inc. v. Doe 1*, No. 1–04–CV–032178, 2005 WL 578641, *4 (Cal. Sup. Ct., Santa Clara County Mar. 11, 2005).

⁸⁰ *See, e.g.*, the “Ethical Journalism Guidelines” of the New York Times, available at <http://www.nytc.com/company-properties-times-coe.html>.

⁸¹ *Id.* at *1.

⁸² *Id.* at *4.

websites.⁸³ Reportedly, Apple believed the Does were Apple employees.⁸⁴ Apple issued a subpoena to an ISP which provided email services to PowerPage, one of the websites, seeking disclosure of the contents and communications data for emails and postings to the website.⁸⁵ The contents and communications data contains information about the identity of the source(s) that revealed the trade secret information.⁸⁶ The website owners, yet non-parties to the Apple suit, moved for a protective order, asserting, *inter alia*, that this was confidential source information protected pursuant to the journalist privilege under the First Amendment and California's shield laws.⁸⁷ California's shield laws are limited to non-parties to a suit, and could therefore theoretically apply.⁸⁸ Apple, however, countered that as blogs, these websites were not entitled to assert the privilege in any event.⁸⁹

The California shield laws are incorporated into the California Constitution and section 1070 of its Evidence Code. The wording of each provision is essentially identical. The California constitutional provision, in relevant part, states:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so

⁸³ Dawn Kawamoto, *Tentative Ruling Favors Apple in Blog Case*, CNET NEWS.COM, Mar. 4, 2005, http://news.com.com/2163ative+ruling+favors+Apple+in+blog+case/2100-1047_3-5599671.html.

⁸⁴ Brad Gibson, *TMO Exclusive—Apple Subpoenas Mac Rumor Sites Over Audio Product*, THE MAC OBSERVER, Dec. 20, 2004, <http://www.macobserver.com/article/2004/12/20.7.shtml>.

⁸⁵ *Apple*, 2005 WL 578641, at *1.

⁸⁶ *Id.* at *2–4.

⁸⁷ *Id.* at *4–5.

⁸⁸ *Id.* at *6.

⁸⁹ Brief for Apple Computer, Inc. in Opposition to Petition for a Writ of Mandate and/or Prohibition, at 32–33, *O'Grady v. Sup. Ct. of the State of Cal., County of Santa Clara* (Apr. 7, 2005) (Civil No. H028579), available at http://www.eff.org/Censorship/Apple_v_Does/20050407_apple_opposition.pdf.

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connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public. . . .⁹⁰

Although the *Apple* court noted the possible “blog” status in *dicta*,⁹¹ this was not the basis for its decision in *Apple*’s favor. Rather, the superior court assumed *arguendo* that the movants were journalists and ruled that the privilege did not apply to anyone who violated the California trade secret laws.⁹² The court stated that “[t]he California Legislature has not carved out any exception to these statutes for journalists, bloggers or anyone else.”⁹³ However, the court then balanced the “undisputed right to protect intellectual property” embodied in California’s implementation of the Uniform Trade Secrets Act⁹⁴ (the “UTSA”)

⁹⁰ CAL. CONST., art. I, § 2(b).

⁹¹ See *Apple*, 2005 WL 578641 at *2 n.4.

⁹² *Id.* at *4–5.

⁹³ *Id.* at *4.

⁹⁴ Cal. Civ. Code §§ 3426 et. seq (West 1997). It is possible that were the journalists sued themselves they could be found liable under this statute for misappropriation of trade secrets which encompasses disclosure under circumstances whether the reporter knew or should have known it was from one under a duty to keep it confidential. See *id.* at § 3426.1 (b)(1) (defining “Misappropriation”). “Trade secret” is defined under Cal. Civ. Code § 3426.1 (d)(1) to mean:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

and in its Penal Code,⁹⁵ with the “free speech” claim “rife with complexities and restrictions” in light of the broad reach of possible discovery under the California procedural law.⁹⁶ It concluded that Apple had met the necessary showing under the five-part balancing test outlined by the California Supreme Court in *Mitchell v. Superior Court*⁹⁷ for weighing disclosure against the First Amendment privilege.⁹⁸ The *Apple* court set out the test and its findings as follows:

(1) “Nature of the litigation and whether the reporter is a party.”

Although not yet named as defendants, it is certainly possible “journalists” may be; certainly Mr. O’Grady’s declaration suggests this possibility.

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. at § 3426.1 (d)(1).

⁹⁵ Cal. Penal Code § 499c (West 1999). The relevant provisions of this section of the Code are as well fairly broad and may be found, should the authors themselves be sued, to encompass their disclosure. But, it is not as encompassing as the civil liability basis and will depend if the acceptance of the documents constituted unlawfully obtaining access or whether there was some inducement to the source to deliver the information. The relevant sections provide that theft of “trade secret” comprises:

(a)(3) Having unlawfully obtained access to the article, without authority makes or causes to be made a copy of any article representing a trade secret. . . .

(c) Every person who promises, offers or gives, or conspires to promise or offer to give, to any present or former agent, employee or servant of another, a benefit as an inducement, bribe or reward for conveying, delivering or otherwise making available an article representing a trade secret owned by his or her present or former principal, employer or master, to any person not authorized by the owner to receive or acquire the trade secret and every present or former agent, employee, or servant, who solicits, accepts, receives or takes a benefit as an inducement, bribe or reward for conveying, delivering or otherwise making available an article representing a trade secret owned by his or her present or former principal, employer or master, to any person not authorized by the owner to receive or acquire the trade secret, shall be punished by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars (\$ 5,000), or by both that fine and imprisonment.

Id. at § 499c(a)(3), (c).

⁹⁶ *Apple*, 2005 WL 578641 at *2.

⁹⁷ 690 P.2d 625 (Cal. 1984).

⁹⁸ *Id.* at 629–30.

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(2) “Does discovery sought go to the heart of plaintiff’s claim?”

Without this discovery Apple’s case will be crippled, since it will not know the defendants upon whom it should serve process.

(3) “Have other sources of information been exhausted?”

The moving parties maintain Apple should have done more investigating up to this point, including the unusual step of noticing the depositions of its own employees. But the Court is convinced, upon reviewing Apple’s public and *in camera* materials that a thorough investigation has been done and all alternative means have been exhausted.

(4) “What is the public good served by protecting the misappropriation of trade secrets?”

Movants did not present a persuasive reason of “public good” and never answered the Court’s inquiry as to why there was a true public benefit from disclosure.⁹⁹

Apple also met the fifth prong of the test which required a *prima facie* showing on the merits of misappropriation of trade secrets.

The court then held that the California shield laws did not prevent the subpoena from issuing because the law did not grant a privilege to a reporter, if indeed Mr. Jason O’Grady, the owner of PowerPage, was a reporter. Rather, the shield laws granted immunity from being held in contempt.¹⁰⁰ However, the court held that shield laws were not a “license conferred on anyone to violate valid criminal laws.”¹⁰¹ Finally, the *Apple* court seemed to suggest

⁹⁹ 2005 WL 5786421 at *5–6 (citations omitted). In a later discussion, the Court states that although much had been made of the public interest in Apple as a justification for the assertion of privilege, there is a clear distinction between the interests of the public in an ‘iconic’ company such as Apple and disclosures in the public interest such as “the whistleblower who discloses a health, safety, or welfare hazard affecting all, or the government employee who reveals mismanagement or worse by our public officials.” *Id.* at *8. Here, the Court reasoned, “the movants are doing nothing more than feeding the public’s insatiable desire for information.” *Id.*

¹⁰⁰ *Id.* at *6.

¹⁰¹ *Id.* at *6–7.

that Mr. O'Grady himself was likely criminally liable for the unlawful acquisition and dissemination of the proprietary information.¹⁰²

The websites appealed the lower court's decision, which essentially negates the application of journalist privilege where trade secret is alleged, to the California Appellate Court. Traditional media have filed briefs as *amici curiae* and refer to these authors only as journalists.¹⁰³ Apple has raised on appeal the ability of bloggers to assert the privilege.¹⁰⁴ This issue is one that may ultimately need to be decided if the Appellate Court conducts a *de novo* review based on all the facts and reverses on any basis. There seems to be some grounds for reversal. The lower court spent considerable time asserting the primacy of First Amendment protection against prior restraint,¹⁰⁵ which was not at issue in the case. However, the lower court did not address the issue of the First Amendment interest regarding the qualified privilege of journalists to refuse to disclose confidential sources and unpublished information, which is essential to gathering news to inform the public. The *Mitchell* court did address this issue, which is inherent in its balancing test.¹⁰⁶ However, it is not clear that the *Apple* court properly applied the *Mitchell* test. The owner of the PowerPage website is a non-party. The court's assertion that Mr. O'Grady's status as a non-party could change¹⁰⁷ does not alter his current status. The balance of First Amendment and disclosure interests is different for non-parties.¹⁰⁸ However, even as a party to the litigation, the privilege is not necessarily negated.¹⁰⁹ The

¹⁰² *Id.* at *7.

¹⁰³ See Amici Curiae Brief, *supra* note 55.

¹⁰⁴ Dennis Sellers, *Mac Sites Appeal Judge's Pro-Apple Ruling in Lawsuit*, MACSIMUM NEWS: YOUR LEADING APPLE NEWS ALTERNATIVE (Mar. 23, 2005), http://www.macsimumnews.com/index.php/archive/mac_sites_appeal_judges_pro_apple_ruling_in_lawsuit.

¹⁰⁵ *Apple*, 2005 WL 578641, at *4-5.

¹⁰⁶ *Id.* at *5-6.

¹⁰⁷ *Id.*

¹⁰⁸ See *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981).

¹⁰⁹ See *id.* This case involving a leak of sealed government information alleged to comprise an invasion of privacy and on which the *Mitchell* court relied for the tests to be applied in determining balance between disclosure and privilege. The *Zerilli* court held that 'in all but the most exceptional cases' disclosure should yield to privilege in civil

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conclusion that disclosure was necessary because the information was unavailable through other sources is fairly peremptory and does not reflect the nature of the efforts that Apple did make.¹¹⁰ In determining whether other sources of the information are available, the courts, including the courts that authored the earlier federal decisions on which the *Mitchell* test is based, apply a fairly stringent test.¹¹¹ The *Mitchell* decision makes clear that “all alternative sources” should be exhausted, including the deposing of numerous persons.¹¹² In the *Apple* case, this would include, at least, the Apple employees who had access to the confidential information. Whether such an investigation was conducted is unknown because the lower court based its decision in part on an *in camera* inspection of Apple materials.¹¹³ However, it appears unlikely that such an investigation was conducted. Where constitutional protections are at stake, however, the factors for consideration in the balancing of the interests should be made clear.

The *Apple* decision does not address the intersection of the journalist privilege and journalist use of contemporary communications instrumentalities, such as an ISP, as a media-related source. If the privilege attaches to one’s unpublished emails, should the courts permit the privilege to be bypassed through issuance of a subpoena for the contents and communications data from the non-privileged entity that holds the

actions involving non-party journalists. *Id.* at 712. Even in libel cases where the journalist was the party, “disclosure should by no means be automatic.” *Id.* at 714. In *Zerilli*, the refusal to order the disclosure by the reporter of its source of illegally obtained and possibly illegally leaked information from an electronic surveillance, resulted in a summary judgment against the plaintiff. *Id.* at 715.

¹¹⁰ Although the *Apple* court was not specific about Apple’s efforts, it was “convinced, upon reviewing Apple’s public and *in camera* materials that a thorough investigation has been done and all alternative means have been exhausted.” *Apple*, 2005 WL 578641, at *6.

¹¹¹ See *Zerilli*, 656 F.2d at 713–14; *Baker v. F & F Investments*, 470 F.2d 778, 783 (2d. Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

¹¹² See *Mitchell v. Superior Court*, 690 P.2d 625, 634 (Cal. 1984). The *Mitchell* court did not directly state that numerous depositions were required to be taken, but did so by reference to *Zerilli* which stated that “an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure.” *Zerilli*, 656 F.2d at 714.

¹¹³ See *Apple*, 2005 WL 578641 at *6.

data? This would undermine the policy underlying the First Amendment privilege and the shield law immunities. Their protections would be eroded and limited to face-to-face or written communications. Therefore, all electronic communications leaving a digital trace that the communications provider holds would be excluded from protection. In addition, the *Apple* court seemingly concluded at the outset that there were no exceptions to the trade secret laws, even under the First Amendment.¹¹⁴ As California has concluded that the First Amendment requires recognition of such privilege, unless and until the U.S. Supreme Court says otherwise, a California state law cannot abrogate United States constitutional protections.¹¹⁵ Therefore, unless the balancing exercise the court performed is found to be properly applied, the decision cannot stand.

If a court were ultimately required to decide whether these websites with blog attributes¹¹⁶ (hence, for these purposes, “blogs”) are entitled to protection under the California shield provisions, the court would have to look to various sources for guidance. The wording and headings of the California shield laws are instructive. Section 1070 (a) identifies a group of protected persons in “written” media based on their employment positions: “a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed.”¹¹⁷ In contrast, subsection (b) of section 1070 protects identified persons involved in broadcasting based on the nature of the industry in which they are employed.¹¹⁸ Subsection (b) applies to “a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to

¹¹⁴ *Id.* at *4.

¹¹⁵ U.S. CONST. art. VI, cl. 2. In that event, California can still accord the greater protection under its own constitution’s version of the First Amendment.

¹¹⁶ See Wikipedia, ‘Weblog,’ <http://en.wikipedia.org/wiki/Weblog> (last visited Apr. 29, 2005); *Apple Suits: Myth-Busting*, EWEEK.COM, <http://blog.ziffdavis.com/rothenberg/archive/2005/03/17/6456.aspx> (last visited Nov. 4, 2005).

¹¹⁷ CAL. EVID. CODE § 1070(a) (West 1995).

¹¹⁸ See *id.* § 1070(b).

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disclose the source of any information procured *while so connected or employed for news or news commentary purposes on radio or television.*”¹¹⁹ This clearly excludes those in broadcasting whose function is providing mere entertainment rather than news or news commentary.

The “news” limitation is reinforced by the headings of the statutory sections. The protection is contained in the California Evidence Code section 1070, entitled “Refusal to disclose news source,” which is in Chapter 5, entitled “Immunity of Newsman from Citation for Contempt,” of Division 8, entitled “Privileges” of the Evidence Code. This structure suggests a functional requirement that the protected person be engaged in news or news commentary under some evaluative standard that is possibly presumed to already govern newspapers, magazines, and periodical publications under subsection (a).

III. JOURNALISTIC CODE OF ETHICS AS FUNCTIONAL TEST FOR JOURNALIST

Although alternative tests have been proposed for distinguishing journalist bloggers from all other bloggers, Linda L. Berger, a legal scholar and former newsperson, has suggested an evaluative tool that seems worthy of consideration in her article “Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication.”¹²⁰ Noting that defining “news” or “newsperson” is as unhelpful as defining “journalist,” she suggests that there is an objective process to legitimate journalism that seeks to gather, evaluate and disseminate truthful information to the public on a regular basis.¹²¹ Under a cost-benefit analysis, the use of such criteria as the threshold for protection is appropriate because it enhances “the free flow of information to the public while only slightly diminishing the accuracy and efficiency of judicial or governmental processes by allowing witnesses to withhold

¹¹⁹ *Id.* (emphasis added).

¹²⁰ 39 HOUSTON L. REV. 1371 (2002-2003).

¹²¹ *Id.* at 1411-16.

information.”¹²² In this way, neither job titles nor industry affiliations¹²³ that are based on and limited to the status quo in a converging world of media platforms would control; nor would labels such as “blog”. Such functional criteria would not impose any prior restraints on the nature of the content that might impinge upon First Amendment concerns or require vague and theoretical distinctions to categorize the content as news, entertainment or a matter of public interest.¹²⁴

The test of public interest is one that is only determined in hindsight and, therefore, is not really helpful to the individuals or entities seeking to disseminate information within the protections that hinge on such a determination. However, such a test, in many instances, seems unavoidable. This is especially true where the nature of the information can give rise to a claim against the publication, such as defamation, invasion of privacy, or, as in *Apple*, a trade secrets action. Under each of these types of claims, the court has to evaluate the content. If, however, the process by which it was gathered, evaluated, validated and disseminated conforms to a professional standard of journalism, it is likely to ultimately work against a finding on the merits. For example, a valid defense in a defamation action is a showing that the allegedly defamatory statement is true. Adherence to a journalist’s code of professionalism that required validation of information would tend to ensure truth. Further, knowledge on the part of the journalist that adherence to such code could trigger whatever journalistic protections were available would not only serve to provide advance guidance but also to encourage such adherence.

Moreover, examining the public interest protected in that publication or newsgathering and balancing it against the competing interest of disclosure of the source of that news seems necessary to determine which is more worthy of protection in that case. This is especially when other important societal interests are at stake, such as another civil or human right. So, rather than hold that a qualified privilege attains merely because a person can show

¹²² *Id.* at 1374.

¹²³ She notes that a proposal for a model shield law would require specific connections to “established media.” *Id.* at 1408–09.

¹²⁴ *Id.* at 1409–12.

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status as a journalist because (1) either (a) adhere to a code of ethics or (b) they gather news routinely and (2) because any information they publish is subject to an editorial process and philosophy, and thus the content is not unsubstantiated “gossip, nonsense or disinformation” unprotected by shield laws,¹²⁵ the better course would include the process evaluation to determine *ab initio* whether a person is a journalist entitled to claim privilege. A further weighting, and possibly even a presumption, of the importance of the free speech interest could be attained by the defendant once the defendant had proven the professionalism of the process. Only an interest of countervailing weight could overcome this presumption, which would be determined by an examination of the circumstances of the case. The data protection laws of the United Kingdom provide one example of such balancing.¹²⁶ These exempt journalists from many of the duties otherwise imposed on the controllers of personal data in the interest of freedom of expression. Of course, in circumstances where the privilege is absolute and based on status as journalist, evidence of customary adherence to a professional code of journalistic ethics would be compelling proof of having performed the function of a ‘real’ journalist. It would be largely irrelevant whether this was a member of a professional journalist society, an employee subject to an employment code by a media organization that has identified its own ethical criteria or as an individual blogger who has chosen to identify and follow such standards.

IV. THE JOURNALIST IN THE UNITED KINGDOM

How a code of practice can serve as the threshold for test of entitlement to claim privileges intended to protect freedom of expression and, thus, whether a blogger is so entitled, is a question that can be answered under certain United Kingdom and English law related to journalistic activities. These include the Data

¹²⁵ See *id.* at 1410.

¹²⁶ See *infra* Part IV A.

Protection Act 1998¹²⁷ ('DPA') and the qualified privilege in defense of defamation.¹²⁸

A. Data Protection Act 1998

The DPA and the secondary legislation promulgated thereunder provide advance guidance which uses objective, professional ethics criteria as to who benefits under its journalist exceptions. Implementing the European Union Data Protection Directive,¹²⁹ the DPA comprises a scheme of obligations for the lawful processing of personal data by those who collect personal data and outlines the rights of the personal data subjects. The protections under the Directive and, therefore, the DPA are premised on Article 8 of the Council of Europe Convention for Protection of Human Rights and Fundamental Freedoms (CoE Human Rights Convention).¹³⁰ This protects privacy,¹³¹ except as lawfully necessary to protect other societal interests such as the rights and freedom of others. The Directive is also premised on the European Union's (EU) internal market powers, which here ensure the cross-border flow of such data that is integral to the growth of a single market.¹³² Other interests are also balanced

¹²⁷ Data Protection Act, 1998, ch.29 (Eng.).

¹²⁸ See *infra* Part IV. B.

¹²⁹ European Parliament and Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281)31, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31995L0046 [hereinafter Directive].

¹³⁰ Council of Europe Convention for Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, European Treaty Series No. 005, available at <http://www.pfc.org.uk/legal/echrtxt.htm> [hereinafter European Convention on Human Rights].

¹³¹ *Id.* at art. 8. Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

¹³² Directive, *supra* note 129, at art. 1(2).

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within the EU Directive and the DPA, such as the protection of the freedom of expression under Article 10 of the CoE Human Rights Convention.¹³³ Exceptions are granted for journalists, artists and others from some of the obligations applied to other data controllers so that they can gather information involving personal data.¹³⁴ The DPA defines “journalism” as one of three “special purposes” for which personal data may be processed. The other two special purposes are literary purpose and artistic purpose.¹³⁵ Section 32 of the DPA, exempts any person processing data for a special purpose from nearly all of the data protection principles that govern the processing of personal data, including sensitive personal data,¹³⁶ if:

- (a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,
- (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and
- (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.¹³⁷

The DPA, however, further provides that in determining the reasonableness of the belief that publication¹³⁸ is in the public interest under subsection (b), one can consider compliance with

¹³³ European Convention on Human Rights, *supra* note 130, art. 10.

¹³⁴ Directive, *supra* note 129, at art. 9 (stating that “[m]ember States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.”).

¹³⁵ See Data Protection Act, 1998, ch.29, § 3 (Eng.).

¹³⁶ See Data Protection (Processing of Sensitive Data) Order, 2000, No. 417, sch., ¶ 3(1)(c) (Eng.).

¹³⁷ Data Protection Act, 1998, § 32(1)(a)-(c) (Eng.).

¹³⁸ “Publish” in connection with “special purposes” processing under the Data Protection Act is defined merely as to “make available to the public or any section of the public.” *Id.* at § 32(6).

any relevant code of practice applicable for that publication and which the Secretary of State has designated for such purposes.¹³⁹ The Data Protection (Designated Codes of Practice) Order¹⁴⁰ has identified five separate codes of practice which may be used: (1) the Broadcast Standards Commission's code, (2) the Independent Television Commission code, (3) the Press Complaint Commission's Code of Practice, (4) the BBC Producers' Guidelines, and (5) the Radio Authority's code.¹⁴¹

Examining these, the one most likely relevant to bloggers is the Press Complaint Commission's Code of Practice.¹⁴² This code is a voluntary code developed by the newspaper and periodical industry, approved by the Press Complaint Commission (PCC) and applies to both "printed and online versions of publications."¹⁴³ Although clearly developed by and with press institutions in mind, it does not by its terms or application limit itself to any specific press organization or type of publication.¹⁴⁴ The PCC's standards govern the newsgathering, verification and dissemination of information. They appear to have been amended over time to reflect the current human rights legislation and decisions.¹⁴⁵ For example, a recent change to the PCC prevents all photography of people in private places without their consent. A private place is defined as a place that includes both private property and public property where there is a reasonable expectation of privacy.¹⁴⁶ A place may be private irrespective of whether a long lens was

¹³⁹ *Id.* at § 32(3).

¹⁴⁰ Data Protection (Designated Codes of Practice) Order, 2000, No. 1864 (Eng.).

¹⁴¹ *Id.* The Broadcasting Standards Commission, Independent Television Commission and the Radio Authority have been subsumed within the Office of Communications (Ofcom), the UK regulator for communications industries that includes television and radio communications services. *See* The Radio Authority, <http://www.radioauthority.org.uk> (last visited Jan. 2, 2006).

¹⁴² CODE OF PRACTICE (Press Complaints Commission 2005), *available at* <http://www.pcc.org.uk/cop/cop.asp>.

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ Press Complaints Commission, Code of Practice: Introduction, <http://www.pcc.org.uk/cop/intro.html> (last visited Jan. 2, 2006); Press Complaints Commission, Code of Practice: History of the Code, <http://www.pcc.org.uk/cop/history.html> (last visited Jan. 6, 2006).

¹⁴⁶ CODE OF PRACTICE § 3 (Press Complaints Commission 2005), *available at* <http://www.pcc.org.uk/cop/cop.asp>.

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used.¹⁴⁷ This provision appears to take into account the decision of the European Court of Human Rights in *Von Hannover v. Germany*.¹⁴⁸ This provision may require a more precise interpretation by the PCC to effect the scope of the private life standard in that decision.

Thus, under the DPA's use of the PCC codes as an objective standard for reasonableness,¹⁴⁹ the professional journalistic process analysis is built into the public interest balance of privacy and freedom of expression. This does not seem to be precluded by the Human Rights Act 1998¹⁵⁰ which incorporates much of the Council of Europe Convention for Protection of Human Rights and Fundamental Freedoms¹⁵¹ into United Kingdom law and requires government officials, including judges, to act in a manner not inconsistent with the Convention when they interpret and apply laws.¹⁵² This, therefore, requires that the freedom of expression, protected under Article 10 of the Convention, be considered as a separate public interest in interpreting the DPA, which implements

¹⁴⁷ See Press Complaints Commission, Code of Practice: History of the Code, <http://www.pcc.org.uk/cop/history.html> (last visited Jan. 2, 2006) (stating that amendments made in June 2004 to the privacy provision were intended to cover all photography of people in private places regardless of whether a long-lens had been used).

¹⁴⁸ 40 Eur. Ct. H.R. 1 (2005).

¹⁴⁹ The PCC Code is not as comprehensive or as strongly worded in some areas, such as independence and fair play, as the provisions of other codes. Compare CODE OF PRACTICE (Press Complaints Commission 2005), available at <http://www.pcc.org.uk/cop/cop.asp> (lacking any specific provisions requiring independence or fair play) with STATEMENT OF PRINCIPLES, arts. III, VI (American Society of Newspaper Editors 2002), available at <http://www.asne.org/kiosk/archive/principl.htm> (specifically requiring independence and fair play). However, the PCC Code is more comprehensive and strongly worded in certain areas, such as privacy, than other codes. Compare CODE OF PRACTICE § 3 (Press Complaints Commission 2005), available at <http://www.pcc.org.uk/cop/cop.asp> (specifically protecting privacy) with CODE OF ETHICS (Society of Professional Journalists 1996), available at http://www.spj.org/ethics_code.asp (lacking a provision specifically protecting privacy). For a further discussion of the weaknesses in the PCC Code of Practice as an objective standard for balancing conflicting public interests such as privacy and freedom of expression, see Part II.A.2.c of this article entitled "Defamation and Qualified Privilege." For links to various news associations and ethical codes, see http://www.asne.org/print.cfm?printer_page=%2Findex%2Ecfm%2Findex%2Ecfm%3Fd%3D387.

¹⁵⁰ Human Rights Act, 1998, ch. 42 (Eng.).

¹⁵¹ See European Convention on Human Rights, *supra* note 130.

¹⁵² *Id.* at art. 1.

protections stemming from Article 8 of the Convention.¹⁵³ The permitted restrictions on Article 10's freedom of expression can be imposed only pursuant to law and where necessary in a democratic society.¹⁵⁴ Such restrictions include those arising from the responsibilities and duties that arise when the freedom of speech is exercised and for the protection of the reputation and the rights of others.¹⁵⁵ Compliance with a voluntary code of practice that restricts the manner in which the press may gather news, including those restrictions imposed to protect privacy interests, for eligibility for an exemption from the right to privacy under the DPA seems to be a proportionate restriction on the freedom of expression. This results seems justified when balanced against the potential for harm that might occur from the interference with privacy under the exemption which is necessary to ensure access to information and its dissemination, as would seem to be required by the holding in *Campbell v. MGN, Ltd.*,¹⁵⁶ where the House of Lords elaborated the necessary balancing approach required under the Human Rights Act 1998.

B. Defamation and Qualified Privilege

How a journalistic process test can be applied in the context of qualified privilege and using a code of practice can further be seen in examining the English law governing defamation. A privilege is recognized as a defense to an allegation of defamation under English common law and statute. This privilege applies to comments made without malice which were reasonably believed to be true concerning matters which the person publishing the statements was under a duty to make or had a legitimate interest in so doing and the person(s) to whom the statements were made had either a duty or a legitimate interest in receiving the statements.¹⁵⁷ Although the privilege applies to everyone, it has been interpreted

¹⁵³ *Id.* at arts. 8, 10.

¹⁵⁴ *Id.* at art. 10(2).

¹⁵⁵ *Id.*

¹⁵⁶ [2004] 2 A.C. 457 (H.L.) (appeal taken from C.A.) (balancing articles 8 and 10 of the European Convention on Human Rights, *supra* note 140).

¹⁵⁷ See *Reynolds v. Times Newspapers*, [2001] 2 A.C. 127, 164-65 (H.L.) (appeal taken from C.A.) (quoting *Silkin v. Beaverbrook Newspapers, Ltd.* [1958] 1 W.L.R. 743, 746-47).

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most often in the journalistic context. There is no privilege that attaches purely because the communication relates to information regarding political matters, including elections, because personal reputations would fail to be protected. Receiving information about political matters is clearly in the public interest and is important under the freedom of expression. Despite this, the limitations on the qualified privilege that are necessary to protect reputation are considered to meet the requirements of necessity for encroachments on the exercise of this freedom.¹⁵⁸

In 2001, the House of Lords in *Reynolds v. Times Newspapers*,¹⁵⁹ reached this conclusion. It noted that, under the jurisprudence of the European Court of Justice, journalists have the right “to divulge information on issues of general interest provided they are acting in good faith and on ‘an accurate factual basis’ and supply reliable and precise information in accordance with the ethics of journalism” but that “a journalist is not required to guarantee the accuracy of his facts.”¹⁶⁰ The test for whether the qualified privilege attached to the publishing of such information without malice fell under the traditional test balancing the interests and duties at stake.¹⁶¹ The elasticity of this test enables accommodation of freedom of expression interests. The House of Lords set a list of ten non-exclusive factors to be considered in deciding whether a communication satisfied the test and qualified for the privilege.¹⁶² These factors also serve as guidance for reporters and publishers. The factors include:

¹⁵⁸ See European Convention on Human Rights, *supra* note 130, at art. 10(2).

¹⁵⁹ [2001] 2 A.C. 127 (H.L.) (appeal taken from C.A.).

¹⁶⁰ *Id.* at 204.

¹⁶¹ *Id.*

¹⁶² *Id.* at 205.

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1. The seriousness of the allegation.
2. The nature of the information, and the extent to which the subject matter is a matter of public concern.
3. The source of the information.
4. The steps taken to verify the information.
5. The status of the information, for example, the matter may already be under an investigation which commands respect.
6. The urgency of the matter, as news is often a perishable commodity.
7. Whether comment was sought from the claimant, although this is not always necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article, e.g. whether the allegations are stated as fact.
10. The circumstances of the publication, including the timing.¹⁶³

In applying the factors, each of which are given different weights in accordance with the circumstances of each case, the House of Lords noted that a court's decision is made in hindsight which is a benefit the reporter does not have. Thus, the handicap of the reporter should be taken into account. Further, the decision not to disclose a confidential source should not weigh against the

¹⁶³ *See id.*

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finding of privilege. Any “lingering doubts” are to be resolved in favor of publication.¹⁶⁴

Thus, the *Reynolds* court has essentially incorporated the journalist process test to balance the duties and the public interest at stake. Clearly, some of these factors would be addressed by adherence to the PCC, such as the standards for accurate information, the requirement to distinguish between fact and comment or conjecture and, possibly the need for a fair opportunity to reply to inaccuracies. Others would be met by a code with more rigor. For example, the Society of Professional Journalists’ Code of Ethics requires that journalists (1) diligently seek comment from the subject regarding allegations of misdoing, (2) question the motive of sources seeking anonymity, (3) test the accuracy of information from all sources and (4) avoid advocacy.¹⁶⁵ Were the PCC, or an individual publication including a blogger, to enhance its operating standards to include some of these other standards imposed by the Society of Professional Journalists’ Code of Ethics, compliance with such enhanced code would be likely to ensure that journalistic privilege would attach because the publication would likely satisfy the balancing test of the duties and the public interest. Under the *Reynolds* test, the court must evaluate the content of the communication for its subject matter with more weight accorded to political or other purely public matters under the freedom of expression balance.

CONCLUSION

The journalistic process test is a valuable and workable test to determine when one is functioning as a journalist no matter what label is applied to the person’s employment or publication medium. It can be implemented practically by requiring a showing of customary adherence to a code of journalist professionalism. This would establish that a person followed acceptable and recognized journalistic processes for gathering, evaluating,

¹⁶⁴ *Id.*

¹⁶⁵ CODE OF ETHICS (Society of Professional Journalists 1996), available at http://www.spj.org/ethics_code.asp (last visited Aug. 26, 2005).

validating and publishing information. Professional codes could, therefore, be used as the journalist process test for granting special protections and privileges accorded in the interest of freedom of expression such as those recognized under the U.S. First Amendment and statutory shield laws and common law protections. This is a workable scheme that appears to accommodate varying scopes of protection or privilege,¹⁶⁶ although statutory language might need to be amended to accommodate it. With an absolute privilege, for example, it could serve of itself to verify valid journalist status. Here, as well, a person might be considered to have ‘earned’ the privilege addressing some views of links to press responsibility. For qualified privileges, the test could be used as a first step together with those other criteria, in statutes or developed by courts, to balance the competing interests. Compliance with objective professional standards evinces considerable intent and procedural steps to ensure that the facts communicated were of greater validity than disinformation and mere rumor and could further assist in the balance. The United Kingdom experience demonstrates this. It has, without enunciating such a test, effectively put a journalist process test into practice in certain statutes and decisions. The DPA scheme uses a publishers’ code of professional practice to balance whether according the privilege to limit privacy rights is reasonable. Because neither the DPA nor the qualified defamation privilege are limited to a particular entity, industry or status but rather apply to any ‘person’, the *de jure* process analysis of the United Kingdom’s DPA and the *de facto* process analysis of the English common law privilege in *Reynolds* permit such freedom of expression protections to encompass many types of media outlets, as appropriate. These can include the evolving and more participatory media, such as “blogs,” that the Internet and other convergences have and are likely to produce. Such approach in the United Kingdom appears to provide the flexibility to balance the

¹⁶⁶ For example, customary adherence to a code of academic integrity could likely serve to identify the non-journalist scholar whose writing these days might be published in blog, an online journal or a traditional publication. *See, e.g.*, George Washington University, Code of Academic Integrity, available at: <http://www.gwu.edu/~ntegrity/code.html#repeal>.

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competing interests under Council of Europe Convention for Protection of Human Rights and Fundamental Freedoms that the United Kingdom is required to address. This approach would also accord the flexibility and the ability to incorporate different national or other professional standards that reflect the differing rights and sensibilities of each country as well as the possibility that individual bloggers or organizations could follow higher ethical standards. This suggests that it is a test that the United States could readily adapt to its own public interest balance whether under the First Amendment, common law and specific statutes affecting public communications. Congress should seriously consider this approach in any future debate for a federal shield law.