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Are Blogs Commercial Speech?

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Ciolli: Are Blogs Commercial Speech?
ARE BLOGS COMMERCIAL SPEECH?

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I. INTRODUCTION

This Essay will examine under what circumstances a blog or similar web site may fall into the commercial speech category and become subject to a lower level of First Amendment protection. Although Supreme Court precedent may suggest that most blogs would not fall into the commercial speech category, technological change has significantly diminished the Court's underlying policy rationale for these initial rulings, potentially opening the door to classification as commercial speech.

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II. AN OVERVIEW OF BLOGS

A. *What Are Blogs?*

While scholarly articles,¹ the popular media,² and even judicial opinions³ have discussed blogs, “there remains surprisingly little consensus as to what the term ‘blog’ really means.”⁴ One author stated that “[e]very website that is updated at least once . . . can be considered a weblog because it contains two entries,”⁵ while others have argued that a web page is only a blog if it resembles a personal diary and the unedited voice of the author comes through.⁶ A third definition narrowly characterizes blogs as a “new form of journalism,” thus limiting the term blog to “citizen journalists” who attempt to disseminate news and other information outside the traditional media.⁷

For purposes of this Essay, the precise definition of a “blog” will be largely irrelevant to the question of whether courts may classify blogs as commercial speech, since “chronological” blogs, “diary” blogs, and “amateur journalist” blogs⁸ may all be subject to differing levels of First Amendment protection in different factual situations. However, as the following discussion illustrates, citizen journalist blogs—particularly those run by lawyers and law professors—are more likely to possess certain characteristics that may cause courts to classify their speech as commercial.

B. *The Costs and Benefits of Blogging*

The capital costs of starting a blog are very low or nonexistent.⁹ Professor Larry Ribstein has identified blogs as “a classic example of ‘cheap speech,’” for “blogging requires no more than a computer, Internet access, and, perhaps, a blogging program such as Typepad.”¹⁰ As a result, opportunity costs—most notably

1. See, e.g., Paul S. Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145 (2003) (discussing the rapid proliferation of blogs as well as the conflicts between blogs and employment law).

2. See, e.g., Noah Shachtman, *Blogging Goes Legit, Sort Of*, WIRED NEWS, June 6, 2002, available at <http://www.wired.com/culture/education/news/2002/06/52992> (discussing the incorporation of blogging into education from the elementary to the graduate level).

3. See, e.g., *Doe v. Cahill*, 884 A.2d 451, 454–55 (Del. 2005) (involving a city councilman suing four anonymous bloggers for defamation).

4. Anthony Ciolli, *Bloggers as Public Figures*, 18 B.U. PUB. INT. L.J. (forthcoming 2007).

5. Russ Lipton, *What is a Weblog?*, (June 11, 2002) <http://radio.weblogs.com/0107019/stories/2002/02/12/whatIsAWeblog.html>.

6. David Winer, *What Makes a Weblog a Weblog?* (May 23, 2003), <http://blogs.law.harvard.edu/whatMakesAWeblogAWeblog>.

7. See Larry Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 187 (2006).

8. *Id.* at 189–90.

9. *Id.* at 193.

10. *Id.* (citing Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806–33 (1995)).

the cost of the blog author's time—are typically the only significant costs of creating and maintaining a blog.¹¹

Notwithstanding these costs, blogging may confer several potential benefits to blog owners. Persons who maintain blogs typically “derive consumption value from expressing their views and communicating them to others.”¹² Some bloggers—particularly “diary” bloggers who write about their personal lives rather than about matters of public concern—may not even seek attention, but simply “view their blogs as a release, or a way to vent about their problems” and “would continue blogging whether they receive 20 or 200,000 hits a week.”¹³ Obtaining such benefits may “explain[] why blogs would start up with no audience or tangible hope of conventional economic benefit.”¹⁴

However, some bloggers may receive benefits that go beyond mere pleasure or entertainment. Some bloggers, due to the popularity of their blogs, may increase their name recognition¹⁵ and thus receive benefits that can range from publication offers¹⁶ to job offers.¹⁷ In fact, some bloggers have been able to use their blogs to jumpstart professional writing careers.¹⁸ Furthermore, though most blogs do not make much, if any, money, there are some bloggers who earn substantial income by selling advertising on their blogs.¹⁹

III. BLOGS AND THE COMMERCIAL SPEECH DOCTRINE

A. *Commercial Speech and the Supreme Court*

The Supreme Court first distinguished between commercial and non-commercial speech in *Valentine v. Chrestensen*.²⁰ In *Valentine*, the Court held that New York did not violate the Fourteenth Amendment by restraining an individual

11. *Id.*

12. *Id.* at 195.

13. Anthony Ciolli, *Defamatory Internet Speech: A Defense of the Status Quo*, 24 QUINNIPIAC L. REV. (forthcoming 2007).

14. Ribstein, *supra* note 7, at 195.

15. See Christine Hurt & Tung Yin, *Blogging While Untenured and Other Extreme Sports*, 84 WASH. UNIV. L. REV. (forthcoming 2007) (“Depending on the kind of exposure and support available to a junior professor at her home school, blogging may be the best way to gain exposure for one’s work, find mentors and engage in iterative discussions on relevant topics.”).

16. See, e.g., Stephen Bainbridge, *Interesting Law Review Behavior*, http://www.professorbainbridge.com/2004/06/interesting_law_1.html (June 7, 2004) (discussing offers received from using a blog to obtain a publication offer from a top law review).

17. See, e.g., Ian Best Writing Samples, http://3lepiphany.typepad.com/3lepiphany/2006/03/writing_samples.html (Mar. 24, 2006) (providing an example of using a blog in an attempt to secure employment).

18. For instance, Jeremy Blachman was able to parlay his “Anonymous Lawyer” blog’s popularity into a book deal. See Margie Kelley, *Student’s Blog Strikes Chord, Generates Book Deal*, HARV. L. TODAY, Apr. 2005, available at http://www.law.harvard.edu/news/2005/03/24_blachman.php.

19. A premium ad on the Daily Kos blog, for example, costs \$30,000 a month. <http://www.dailykos.com/special/advertising> (last visited May 18, 2007) (follow “Premium Slot” hyperlink; then select the “1 month” radio button under “Duration”).

20. 316 U.S. 52 (1942).

from distributing a commercial handbill on a city street.²¹ The Court noted that although the Constitution prohibits states from placing an undue burden on “the exercise of the freedom of communicating information and disseminating opinion, . . . the Constitution imposes no such restraint on government as respects purely commercial advertising.”²² Even though the handbill had an advertisement on one side and a protest on the other, the Court found that “the stipulated facts justifi[ed] the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition” against distributing handbills in the street.²³

The Court began to shift away from this strong position in *New York Times Co. v. Sullivan*,²⁴ a defamation case where the plaintiff argued “that the constitutional guarantees of freedom of speech and of the press [we]re inapplicable . . . because the allegedly libelous statements were published as part of a paid, ‘commercial’ advertisement.”²⁵ The Court rejected this argument, clarifying that its decision in *Valentine* had been limited to the specific facts of that case, since the “protest against official action had been added [to the handbill] only to evade the ordinance,” thus making the *Valentine* handbill “purely commercial advertising.”²⁶ In contrast, the paid advertisement that appeared in the *New York Times* was not a commercial advertisement, for “[i]t communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.”²⁷ The Court concluded its discussion of the commercial speech issue with a policy argument, stating that

[a]ny other conclusion would discourage newspapers from carrying “editorial advertisements” of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.²⁸

Though the Supreme Court has revisited commercial speech regulations several times since these early cases,²⁹ commentators have criticized the Court for

21. *Id.* at 54–55.

22. *Id.* at 54.

23. *Id.* at 55.

24. 376 U.S. 254 (1964).

25. *Id.* at 265.

26. *Id.* at 265–66.

27. *Id.* at 266.

28. *Id.*

29. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412 (1993) (considering whether a prohibition on the distribution of commercial publications through freestanding news racks on public property violates the First Amendment); *Board of Trustees v. Fox*, 492 U.S. 469, 471 (1989) (considering “[w]hether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end”); *Bolger v. Youngs Drug Prods.*

providing very little guidance as to what constitutes commercial speech.³⁰ Though the Court has discussed commercial speech “does ‘no more than propose a commercial transaction,’”³¹ it has often categorized speech as commercial or non-commercial after considering additional factors, such as the economic motivations of the speaker.³² The question of whether a court will consider an entire blog or parts of a blog as commercial speech, then, will likely hinge on a variety of factors, including the blog’s role in proposing such commercial transactions.

B. When Does a Blog Become Commercial Speech?

Whether a blog falls into the commercial speech category may depend on various characteristics of the blog, such as whether it cross-promotes another business.

1. Blogs that Cross-Promote Other Businesses

Blogs that cross-promote other businesses or services—particularly blogs maintained by practicing attorneys—have already been targeted for regulation on grounds that such blogs are commercial speech. The Kentucky Supreme Court, for instance, recently adopted a rule that would charge lawyers fees for “lawyer advertising” on lawyer blogs³³ and quickly experienced harsh criticism from prominent law professors and lawyer bloggers.³⁴ Commentators have also

Corp., 463 U.S. 60, 61 (1983) (considering whether a statute prohibiting the mailing of unsolicited advertisements for contraceptives violates the First Amendment); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 558 (1980) (considering “whether a regulation of the Public Service Commission . . . violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility”).

30. Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KAN. L. REV. 163, 167 (1994).

31. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340 (1986) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

32. *See, e.g., Bolger*, 463 U.S. at 66–67 (finding a pamphlet constituted commercial speech after considering multiple factors, including economic motivation).

33. *See* KY. SUP. CT. R. 3.130–7.02(1) (defining advertisement to include all disseminated communications containing an attorney’s name, with enumerated exceptions); KY. SUP. CT. R. 3.130–7.05(2) (requiring attorneys to file non-exempt advertisements, together with a \$50 filing fee).

34. *See, e.g.*, Posting of J. Craig Williams to May It Please the Court, <http://www.mayitpleasethecourt.com/journal.asp?blogid=834> (June 9, 2005, 23:11 EST) (suggesting the Kentucky regulations are hypocritical); Posting of Larry Ribstein to Ideoblog, http://busmovie.typepad.com/ideoblog/2005/06/bloggng_and_co.html (June 8, 2005, 05:38 EST) (“[M]ost bloggers should be uncomfortable about what the Kentucky bar is doing, not just practicing lawyers.”); Posting of Eugene Volokh to the Volokh Conspiracy, <http://volokh.com/posts/111820009.shtml> (June 8, 2005 12:06 EST) (arguing that the Kentucky Attorney’s Advertising Commission “has no business restricting lawyer speech in this way”).

criticized³⁵ New York for recently amending its attorney advertising regulations³⁶ to require attorneys to label their web sites and blogs as advertising to “include the names, offices addresses, telephone numbers, and lists of licensing jurisdictions of participating attorneys.”³⁷ The New York amended rules also require attorneys to “print a hard copy of the blog every time it is modified” and to “store the printout for a period of at least a year, and send an additional copy for the New York attorney disciplinary committee for its records.”³⁸ Despite the protests of bloggers and advocacy groups, several other states, such as Indiana and Rhode Island, are considering similar amendments to their lawyer advertising rules.³⁹

Why have these proposed regulations been met with such resistance? Putting aside the typical arguments one may expect against regulation of lawyer advertising in general,⁴⁰ those who support and those who oppose these proposed regulations seem to genuinely disagree as to the primary purpose of most legal blogs. The Kentucky Bar Association and other regulators, while acknowledging that lawyer blogs often contain useful information and commentary about legal events, believe that the primary—and perhaps only—purpose of these blogs is to promote their authors’ law practices.⁴¹ The bar associations’ belief is not without foundation, for there is little question that running a well-written and timely blog, particularly one focused on a specific or narrow area of the law, can improve a lawyer’s client development by getting the lawyer’s name out and demonstrating her expertise in a particular area of the law to the general public and—more importantly—potential clients. In fact, at least one company has built its business around the concept of helping lawyers develop legal blogs as marketing tools to attract new clients.⁴²

Critics of regulation generally focus on the social benefits conferred by blogging and often analogize blogs written by lawyers to law review articles and books written by lawyers. However, one must consider that books and law review articles may also fall into the commercial speech category under certain circumstances. Several regulators, in fact, appear to have adopted lawyer advertising regulations that may apply to some books and law review articles. Kentucky, for instance, while excluding from its definition of advertising “[a]ny communication by a lawyer to third parties that is further distributed by a third party who is not in any way controlled by the lawyer, and for which distribution the

35. Press Release, Public Citizen, *New Lawyer Advertising Rules in New York Violate Free Speech, Impede Internet Communications and Nonprofit Legal Services* (Feb. 1, 2007), <http://www.citizen.org/pressroom/release.cfm?ID=2373>.

36. N.Y. APP. DIV. R. 1200.6, DR 2–101.

37. Posting of Greg Beck to CL&P Blog, http://pubcit.typepad.com/clpblog/2006/09/this_blog_is_fa.html (Sept. 14, 2006, 14:20 EST).

38. *Id.*

39. Leigh Jones, *Law Blogs Raising Prickly Ethical Issues*, NAT’L L.J., Oct. 6, 2006, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1160039129480>.

40. A commentator has criticized regulation of lawyer advertising for being “stupid, anti-competitive,” and for “clear[ly] violat[ing] the First Amendment.” See Stephen Bainbridge, *Blogging as Advertising?*, http://www.professorbainbridge.com/2005/06/blogging_as_adv.html (June 08, 2005).

41. See Jones, *supra* note 39.

42. Law Blogs by LexBlog, <http://www.lexblog.com/> (last visited May 24, 2007).

lawyer pays no consideration,” does not exclude articles or books that are self-published by a lawyer.⁴³ New York, while exempting lawyer communications in newspapers, magazines, and other periodicals from carrying the otherwise required “Attorney Advertising” label, does not exempt books written by lawyers from its other advertising regulations.⁴⁴ In fact, New York’s attorney advertising regulations anticipate that lawyer advertising will serve a dual purpose of promoting the lawyer and providing information that will educate the public.⁴⁵

It is also important to distinguish between placing certain blogs in the commercial speech category and a court upholding how those blogs are regulated. While some of the specific regulations proposed by these bar associations may indeed violate the First Amendment due to being overly broad, blogs run by lawyers may still be constitutionally subject to lesser regulations.⁴⁶

2. *Blogs with Advertising*

Based on the Supreme Court’s *New York Times Co. v. Sullivan* decision,⁴⁷ blogs that contain paid advertising or solicit donations through “tip jars” but do not cross-promote other businesses or services may not fall into the category of commercial speech. Professor Ribstein, for instance, has concluded that “[t]he fact that a blog carries advertising should not be enough to put it in the commercial speech category,” for while “the advertisements themselves are likely to be commercial speech, one who merely publishes the advertisements is not thereby proposing commercial transactions.”⁴⁸

Professor Ribstein is correct that precedent suggests that blogs that merely carry advertising are not subject to regulation as commercial speech. However, when considering legal issues involving new technologies, courts are often willing to re-examine—and occasionally deviate from—earlier precedent when the new technology changes the policy rationale underlying the original precedent.

The law of defamation, for instance, has undergone several significant changes due to technological advances. The invention of the printing press caused courts to begin to distinguish between defamatory statements conveyed orally (slander) and those committed to writing (libel) out of a belief that a defamatory statement made in writing would cause significantly greater harm to an individual’s reputation due to the potential for more widespread distribution.⁴⁹ But the new technologies of radio and television, which allowed defamatory oral statements to potentially reach

43. KY. SUP. CT. R. 3.130–7.02(1)(g).

44. N.Y. APP. DIV. R. 1200.6(h), DR 2–101(h).

45. *Id.* 1200.6(a), DR 2–101(a).

46. *See, e.g., Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142–43 (1994) (finding that a lawyer’s use of the designations CPA and CFP was commercial speech, but finding that the specific regulation of those designations was unconstitutional).

47. 376 U.S. 254, 266 (1964).

48. Ribstein, *supra* note 7, at 239.

49. *See Susan W. Brenner, Complicit Publication: When Should the Dissemination of Ideas and Date Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 282–83 (2003).

millions of people, forced courts to significantly alter this framework because the original policy rationale behind the slander/libel distinction was no longer applicable.⁵⁰ Most recently, the invention and widespread use of the Internet caused both courts and Congress to eliminate the long-standing concepts of publisher and distributor liability for defamatory statements made by third parties in the Internet context.⁵¹

Blogs, as well as the Internet as a whole, are a technological innovation that, in certain circumstances, may cause the policy rationale behind the *Sullivan* decision to be questioned. One must consider that the *Sullivan* Court placed a strong emphasis on the impact on third parties of treating publications that publish paid ads as commercial speech, rather than on the publications themselves. The Court stated that reaching such a conclusion “might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.”⁵²

Given the very high costs of publishing one’s own newspaper or magazine, such regulation would indeed cause at least some individuals or organizations to no longer have the opportunity to express their ideas through mass print media. However, it is difficult to apply this same policy rationale to the Internet. As Professor Ribstein and others have observed, unlike print media, there are no barriers to entry to starting a blog that can get the attention of a large number of readers—the only significant cost involved is an investment of one’s time to the endeavor.⁵³

One must also consider the differences between how paid advertising appears on blogs and how it appears in more traditional media such as newspapers. It is fair to say that a newspaper is not proposing commercial transactions when it runs paid advertising. While the advertisers may be proposing such transactions, the newspaper itself merely acts as a passive conduit, getting paid the same fee regardless of whether running an ad results in any sales, store visits, or other measures of success.

Many blogs, however, do not act as mere passive conduits when they run paid commercial advertising. The relationship between an advertiser and a blog differs from the relationship between an advertiser and a newspaper or magazine. Unlike print and broadcast media, blogs and other internet publishers are typically only paid for performance—the advertiser only pays the blogger if someone actually

50. Because of radio and television’s “wide dissemination,” as well as its greater “prestige and potential effect upon the public mind as a standardized means of publication that many people tend automatically to accept as conveying truth,” courts and the *Second Restatement of Torts* began to treat defamatory statements made as part of radio or television broadcasts as libel even though they would traditionally fall into the category of slander. RESTATEMENT (SECOND) OF TORTS § 568A cmt. a (1976).

51. See 47 U.S.C. § 230 (a)–(c)(1) (2000); *Cubby, Inc. v. Compuserv, Inc.*, 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991) (analogizing internet forum provider to the equivalent of library or news vendor and applying common law limitation of liability only where there is knowledge or reason to know of defamatory statements).

52. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

53. Ribstein, *supra* note 7, at 192.

clicks on the advertisement (a “pay per click,” or PPC, arrangement), or if someone clicks on the advertisement and then purchases a product from the advertiser’s web site or completes some other action, such as joining the advertiser’s mailing list (a “cost per action,” or CPA, arrangement).⁵⁴

Because Internet advertisers generally pay for performance rather than paying a flat fee, many blog owners heavily integrate ads with their editorial content in order to promote or encourage their readers to click on the links or to purchase certain products. Popular Internet advertising intermediaries often encourage such practices, with Google recommending that bloggers blend ads into their blog⁵⁵ and Commission Junction recommending that bloggers tailor CPA ads to editorial content, such as “placing a text link for a hosting offer in the space where you describe your costs as a publisher or a placing a \$50 off at Yahoo! Search Marketing ad when blogging about SEM.”⁵⁶ As a result, it is often difficult for a blog reader to tell the difference between advertisements and editorial content. For instance, unless a reader is familiar with the URL structure of the Amazon Associate program, the reader is unlikely to know whether a blogger giving a positive recommendation to a book, and including a link to purchase the book at Amazon.com in the blog post, has a financial incentive for making the recommendation.⁵⁷

The line between editorial content and advertising is further blurred when bloggers sell—often secretly and without providing appropriate disclosures—endorsements and other editorial content. In one recent high profile incident, Markos Moulitas Zuniga and Jermone Armstrong, the owners of two of the most popular left-wing blogs on the internet—Daily Kos and myDD respectively—were implicated in a “blogola scandal.”⁵⁸ Both bloggers allegedly made blog posts promoting specific Democratic candidates and encouraging their readers to donate to the candidates’ primary campaigns without disclosing that they were paid by those campaigns.⁵⁹ Such incidents are not uncommon, though they may often take place on a smaller scale with less money involved. In fact, the practice is so common that there are even web sites and message boards where bloggers may sell “editorial” blog posts to advertisers,⁶⁰ a practice that newspapers

54. For a discussion of the differences between PPC and CPA advertising, see AllBusiness.com, What is CPA-Based Web Advertising?, <http://www.allbusiness.com/marketing/advertising-internet-advertising/2648-1.html> (last visited May 24, 2007).

55. Google AdSense, Blogtimize—Optimize the Ads on Your Blog, <https://www.google.com/adsense/support/bin/answer.py?answer=43869> (last visited May 24, 2007).

56. Commission Junction, Monetize Your Blog, http://cju.cj.com/publishers/blogsrss/monetize_your_b.html (last visited May 24, 2007).

57. For an example of such a blog post, see Jeremy Blachman, http://jeremyblachman.typepad.com/jeremy_blachman/2007/01/supreme_court.html (Jan. 24, 2007, 13:18 EST).

58. Posting of James Joyner to Outside the Beltway, http://www.outsidethebeltway.com/archives/2006/06/kos_-_armstrong_blogola_scandal/ (June 20, 2006).

59. *Id.*

60. See, e.g., Posting of Odddog to SitePoint.com, <http://www.sitepoint.com/forums/showthread.php?threadid=439652> (Nov. 22, 2006, 01:10) (demonstrating a posting offering blog posts for sale).

are not known for doing. Given that the line between advertising and editorial content on blogs can be blurred or even non-existent, and given the unusual relationship between bloggers and internet advertisers, courts may find blogs containing advertising fall into the commercial speech category even if newspapers do not.

3. *Would Classification as Commercial Speech Result in a Chilling Effect?*

Some may fear that classification of blogs as commercial speech with the resulting exposure to some regulation may result in a chilling effect of reducing the number of individuals who create blogs. Whether such a chilling effect would take place depends largely on what sort of regulations were adopted and how courts respond to those regulations. After all, classifying blogs as commercial speech would not eliminate all First Amendment protection and would not allow excessive regulation, such as an outright ban on blogs.⁶¹ However, classifying blogs as commercial speech may allow courts to uphold more narrowly tailored regulations, such as rules requiring bloggers to disclose if a blog post discussing a product or service is a paid advertisement or if the blogger may benefit financially from following a link.

It is unlikely that narrowly tailored rules, such as those requiring mere disclosure of financial interests, would result in a chilling effect. Since most blogs generate very little, if any, money through advertising, such regulations are unlikely to affect the overwhelming majority of blogs. As for those blogs that such rules would impact, one must consider that commercial speech, because it is motivated by profit, is less likely to be chilled by regulation,⁶² particularly if the regulation is relatively unobtrusive, such as disclosing that a link or a blog post is paid advertising. One must also consider the benefits to blog readers in this analysis. If some blogs shut down due to a relatively minor regulation such as one requiring disclosure that a link or post is an advertisement, it is likely that such blogs were only able to generate revenue in the first place by tricking their readers into believing that its blog posts were not paid advertisements. Thus, the loss of these blogs would likely benefit rather than hurt consumers and society as a whole.

III. CONCLUSION

While the test for determining whether certain speech falls into the commercial speech category remains nebulous, it is likely that blogs that cross-promote other business, such as a law practice, would fall into this category and thus be subject

61. Some of the proposed lawyer advertising rules, as applied to blogs, also might not withstand a First Amendment challenge.

62. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (“Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.”).

to some regulation. Although Supreme Court precedent would suggest that merely containing paid advertising would not subject a blog to regulation, the unique relationship between blogs and advertisers and the way blogs often make paid advertisements difficult to distinguish from editorial content may cause the Supreme Court to reconsider its earlier precedent to allow regulation of blogs under certain circumstances.

*