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## A Shadow Government: Private Regulation, Free Speech, and Lessons from the Sinclair Blogstorm

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# A SHADOW GOVERNMENT: PRIVATE REGULATION, FREE SPEECH, AND LESSONS FROM THE SINCLAIR BLOGSTORM

Marvin Ammori\*

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## I. INTRODUCTION

Less than a month before the 2004 presidential election, newspapers reported that Sinclair Broadcasting Group would require its 62 broadcast stations to air *Stolen Honor*, a documentary attacking Democratic presidential candidate John Kerry. Critics accused Sinclair of attempting to curry favor with George W. Bush's administration and of supporting Bush's candidacy because he was more likely to loosen media ownership rules constraining Sinclair's business plans to acquire more broadcast stations. A few other media outlets criticized Sinclair's decision, though mildly. The Federal Communications Commission and Federal Elections Commission refused to take action.

But thousands of unaffiliated individuals loosely coordinated a response. They did not use or form a legal entity, but worked collectively and independently through focal points at several internet websites. They

agreed Sinclair's actions were wrong, maybe illegal, and that the FCC and FEC were failing their legal duties. So they proposed and implemented rules relying on economic incentives and disincentives to change Sinclair's behavior. They organized challenges to Sinclair's broadcast licenses, pressured Sinclair's largest institutional investors, flooded investor bulletin boards to undermine Sinclair's stock price, tipped online surveys against Sinclair's actions, contacted the FCC, circulated and signed petitions, wrote and called Sinclair, helped initiate a derivative suit for shareholders, and—in less than two business days—implemented a nationwide boycott of Sinclair's advertisers in 39 local broadcast markets. The campaign worked. Sinclair did not air *Stolen Honor*. It aired a much more balanced show on Kerry's Vietnam record.

Then the campaign dissolved.

This campaign, which users of weblogs call a blogstorm, is an example of an emerging form of collective ad hoc private regulation made possible by cheap communication technology. Blogs include a diverse range of easily updated websites; many are political, operated by individuals who link to, analyze, and write political stories. Although blogs were involved against Sinclair, bloggers and blog-users acted as more than mere "citizen journalists."<sup>1</sup> Although the blogstorm reflects an important political phenomenon, namely the relationship between blogs, the mainstream media, and political action, it also represents a different political phenomenon.

Because of the economics of online information, thousands who do not know each other can band together in hours, without previous organizational coordination or any persistent central coordination, to affect others and conform society to their idea of the social good. This changes the dynamic of political action and the ability of unaffiliated, lone individuals to respond to social acts where government and the market have not. Through ad hoc volunteerism, the Sinclair participants produced regulatory action against a private party with whom they were not transacting—because they believed government failed to do so. Although ad hoc volunteerism has received sustained attention as a mode of economic production of information, it has received little attention as a mode of private regulation or a cure for government failure.<sup>2</sup> By "private regulation," I

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1. See, e.g., Andrew Kantor, *Sinclair Is the Latest to Feel the Power of Blogs*, USA TODAY, Oct. 29, 2004, [http://www.usatoday.com/tech/columnist/andrewkantor/2004-10-29-kantor\\_x.htm](http://www.usatoday.com/tech/columnist/andrewkantor/2004-10-29-kantor_x.htm) (interpreting the Sinclair blogstorm as merely another instance of bloggers acting as journalists).

2. Its most famous example is the creation of Linux operating system and other open source software, like the Firefox browser. See Yochai Benkler, *Coase's Penguin, or, Linux and*

mean actions by private actors which deliberately constrain and influence other private actors. Although private regulation is common, often including boycotts, scholars predicted that cheap speech through the internet would *weaken*, not strengthen, the power of “private speech regulations.”<sup>3</sup>

Before the internet, such speech regulators consisted primarily of traditional advocacy groups,<sup>4</sup> which were established non-profit corporations that responded to media indecency, homosexuality (or anti-homosexuality), violence, racism, or other issues.<sup>5</sup> With the economics of online collaboration, these regulatory groups can form and dissolve overnight even when they include thousands of people who have never met, spoken, or emailed.

The Sinclair episode shows that, in addition to its other effects, the internet can permit unaffiliated citizens to work together instantly to respond to perceived legal or ethical norms-violations when government does not. With Sinclair, although the participants used some existing private regulatory tools, like an advertiser boycott, to perform an existing activity, private regulation, the internet transformed the use and nature of these tools and the activity. It did so by lowering the costs of organization to permit unaffiliated volunteers to perform actions that usually had required some level of government—or at least a centralized authority or preexisting institution of some sort. That is, the internet creates means for non-institutionalized actors to engage in collective action without an existing organization and to do so faster and potentially more effectively. The internet, therefore, can increase the power of private regulation by providing such regulation with new, efficient organizational forms, and by including those not already acting within an organization.

Private regulation through blogstorms, whatever their shape or target, will become more common. In the weeks following the Sinclair campaign, groups on both the left and right proposed or started dozens of ad hoc campaigns to regulate “liberal” or “conservative” media

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*The Nature of the Firm*, 112 YALE L.J. 369 (2002), available at [www.benkler.org/CoasesPenguin.html](http://www.benkler.org/CoasesPenguin.html) [hereinafter Benkler, *Linux*]; Randall Stross, *The Fox Is in Microsoft's Henhouse (and Salivating)*, N.Y. TIMES, Dec. 19, 2004, § 3, at 5.

3. See Eugene Volokh, *Cheap Speech and What it Will Do*, 104 YALE L.J. 1805, 1836–37 (1995) (predicting “private speech regulations will remain only where there must be intermediaries who select what gets distributed”).

4. As I argue below, broadly conceived, such private regulators include media companies themselves.

5. See, e.g., Frank Rich, *The Great Indecency Hoax*, N.Y. TIMES, Nov. 28, 2004, § 2, at 1.

companies,<sup>6</sup> car companies seen as too gay-friendly,<sup>7</sup> professors considered ultraliberal by conservatives,<sup>8</sup> and companies based on party affiliation.<sup>9</sup> Other campaigns aimed not to deter but to subsidize; they allocated specific products to chosen groups (like soldiers) based on social policy.<sup>10</sup> This ad hoc, flash regulation can be as powerful and effective as established nongovernmental and governmental bodies in enacting reforms and can potentially support far more active participation. It will transform political action by enabling powerful new collective actions, even those based on diffuse harms. It enables innovative individual and group speech forms and sudden action to check governments and markets as a latent shadow government ready to respond instantly. This new regulation, however, has a dark side. While it provides some with speech and associational power, it can threaten the power and rights of others. While it enables groups instantly to form and to take action, it can support groups that can resemble mobs more than town halls and that can silence others despite the others' speech rights.

This paper analyzes the emerging phenomenon of private regulation through ad hoc online coalitions where the coalitions believe that markets and government have failed. It evaluates the underlying collective action problems and the online cost structures, motivation, and capacity that permit individuals to overcome these problems. It provides a taxonomy of issues and problems in collective action, and how technology affects these issues and problems. Because the paper's primary case study is the Sinclair blogstorm, which targeted speech, many of the paper's conclusions are particularly relevant for private speech regulation, and the paper explicitly considers normative implications of such private regulation targeting speech.

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6. See, e.g., posting of VirginiaDem to Daily Kos, <http://www.dailykos.com/story/2004/11/16/101735/41> (Nov. 16, 2004, 07:17 PDT).

7. See, e.g., Posting of Pamindurham to Daily Kos, <http://www.dailykos.com/story/2004/12/25/85023/455> (Dec. 25, 2004, 06:50 PDT).

8. See, e.g., Posting of Cinnamon68 to Daily Kos, <http://www.dailykos.com/story/2004/12/12/21505/084> (Dec. 12, 2004, 07:50 PDT).

9. See, e.g., Our Mission and Purpose, BuyBlue.org, <http://www.buyblue.org/mission> (last modified July 13, 2005).

10. *U.S. Families of Dead Raise 600,000 Dollars for Fallujah Refugees*, AGENCE FRANCE PRESSE, Dec. 24, 2004, available at [http://www.truthout.org/docs\\_04/122504Y.shtml](http://www.truthout.org/docs_04/122504Y.shtml); posting of Richard Gassan to Daily Kos, <http://www.dailykos.com/story/2004/12/23/64551/725> (Dec. 23, 2004, 04:45 PDT).

## II. CASE STUDY: THE SINCLAIR “STUNT”

In this section, I present what the blogstorm participants called the Sinclair “stunt”<sup>11</sup>—Sinclair’s desire to air *Stolen Honor*—and the blogstorm participants’ response to it. As a result, I discuss the blogstorm’s players, developments, and regulatory tools.

### A. *Dramatis Personae*

From the blogstorm participants’ perspective, there were several key players.

#### 1. Sinclair

In October 2004, Sinclair owned 62 stations in 39 markets that reached approximately 24% of all U.S. television households. Its stations were affiliated with all six networks,<sup>12</sup> and it was the largest owner of local broadcast stations.<sup>13</sup>

To the participants, Sinclair was a conservative media giant. In April, 2004, it preempted a special episode of ABC’s *Nightline* on its ABC affiliate stations. The special aired the “names and photographs of the more than 500 U.S. troops killed in the Iraq war.” Sinclair executives considered it an anti-Bush political statement: “[it] appears to be motivated by a political agenda.”<sup>14</sup> The participants, by contrast, considered Sinclair’s preemption to be motivated by a political agenda. Moreover, a Sinclair vice-president, who also happened to be Sinclair’s head-lobbyist, had a daily “commentary” on all Sinclair stations (apparently no other company has a similar practice), during which he often criticized John Kerry.<sup>15</sup> The same vice-president went to Iraq “to find good news stories that [Sinclair executives] said were being overlooked” by

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11. Although this term sounds pejorative, I use it both for ease of discussion and because much of the blog community used this term for Sinclair’s intended broadcast of *Stolen Honor*. See Sinclair Broadcast Group, DKOSOPEDIA, [http://www.dkosopedia.com/index.php/Sinclair\\_Broadcast\\_Group](http://www.dkosopedia.com/index.php/Sinclair_Broadcast_Group) (last visited Nov. 15, 2005).

12. Sinclair Broadcasting Group, Company Profile, <http://www.sbgi.net/about/profile.shtml> (last visited Nov. 15, 2005) (including “20 FOX, 19 WB, 6 UPN, 8 ABC, 3 CBS, 4 NBC affiliates and 2 independent stations”).

13. Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 120–21 (2004).

14. *McCain Rebukes Sinclair “Nightline” Decision*, CNN.COM, Apr. 30, 2004, <http://www.cnn.com/2004/SHOWBIZ/TV/04/29/abc.nightline/>.

15. Posting of Jay Rosen to PressThink, [http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/11/16/snclr\\_vision.html](http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/11/16/snclr_vision.html) (Nov. 16, 2004, 00:24 EDT).

the “liberal media.”<sup>16</sup> Sinclair’s executives had also made 97% of their 2004 political donations to Republicans, including President Bush.<sup>17</sup> Its stations had aired “fake” news segments prepared by the Bush administration which praised a Medicare bill Bush had championed.<sup>18</sup> Finally, the participants accused Sinclair of lobbying Republicans with potentially illegal tactics.<sup>19</sup>

The participants believed that Sinclair was airing *Stolen Honor* in an attempt to lobby the president. Sinclair sought changes in the media ownership limits to permit it to own two or more television stations in mid-sized markets.<sup>20</sup>

## 2. Makers of *Stolen Honor*

To the participants, the makers of *Stolen Honor* were guilty by association. They were affiliated with, among others, the Swiftboat Veterans for Truth, an anti-Kerry group that had run ads in August, 2004 attacking John Kerry’s Vietnam service. This group had received exposure on the cable news channels, but many in mainstream newspapers and liberal blogs considered their stories to be contradictory and inaccurate.<sup>21</sup> To the liberal blogosphere, the Swiftboat Veterans were the embodiment of lying propaganda, and participants often invoked them metaphorically as

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16. Howard Kurtz & Frank Ahrens, *Family’s TV Clout in Bush’s Corner: Sinclair Orders 62 Stations to Air Anti-Kerry Film*, WASH. POST, Oct. 12, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A25406-2004Oct11.html>.

17. *Id.*

18. David Sirota et al., *The Progress Report*, CENTER FOR AMERICAN PROGRESS, Apr. 30, 2004, <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=63020>; posting of Zknower to Daily Kos, <http://www.dailykos.com/story/2004/10/12/113949/43> (Oct. 12, 2004, 08:39 PDT).

19. See Kurtz & Ahrens, *supra* note 16 (“Sinclair provided Maryland Gov. Robert L. Ehrlich Jr. the cut-rate use of a luxury helicopter during the Republican’s 2002 race. The helicopter came from an aviation firm whose sole director was J. Duncan Smith [also a Sinclair executive]. A year earlier, as a Maryland congressman, Ehrlich sent the FCC a letter urging action on a Sinclair request to buy a dozen TV stations. An Ehrlich spokesman at the time called the letter ‘garden-variety constituent service’ and said the governor’s failure to disclose the helicopter rides was an oversight.”); see also Elizabeth Jensen & Walter F. Roche Jr., *Sinclair’s Growth Matched by Criticism*, L.A. TIMES, Oct. 24, 2004, at A1.

20. Sinclair Broadcast Group, DKOSOPEDIA, *supra* note 12 (discussing the “favors” Sinclair wanted from the Bush administration). See also Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (including Sinclair among the petitioners challenging FCC ownership limits); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) (challenging the FCC ownership limits).

21. See, e.g., *Republican-funded Group Attacks Kerry’s War Record*, FACTCHECK.ORG, Aug. 22, 2004, <http://www.factcheck.org/article.aspx?docID=231>; Joe Conason, *Republicans’ Dishonorable Charge*, SALON.COM, Aug. 6, 2004, [http://www.salon.com/opinion/conason/2004/08/06/mccain\\_on\\_swift\\_boat\\_veterans/](http://www.salon.com/opinion/conason/2004/08/06/mccain_on_swift_boat_veterans/) (referring to John McCain’s response).



such.<sup>22</sup> *Stolen Honor's* director was also affiliated with Reverend Sun Myung Moon, owner of the conservative *Washington Times*.<sup>23</sup>

### 3. Blog Communities

As the name suggests, blogs were central to the blogstorm. Blog communities consist of networks of people,<sup>24</sup> tied to each other through specific interests<sup>25</sup> and also to many others through nodes. Nodes are the highly trafficked points where many readers and bloggers converge: through them, readers link to and discover other blogs.<sup>26</sup> The distribution of blog popularity conforms to a power log graph, meaning a few A-list blogs get the lion's share of blog traffic, and they can serve as nodes.<sup>27</sup> When the Sinclair blogstorm began, the nodes were naturally a few A-list blogs that became involved in the Sinclair blogstorm and directed their considerable traffic.

First, Talking Points Memo, the blog of journalist Joshua Micah Marshall, had over 400,000 unique monthly viewers,<sup>28</sup> was liberal-leaning, and claimed to have an audience of "politicians, journalists, and other influential decision- and opinion-makers"<sup>29</sup> (and likely also students, office employees, and others). Unlike many other blogs, it did not permit anyone other than Marshall to post or to comment on his posts.

22. Joshua Micah Marshall wrote: "I had been thinking about a post that would put in stark terms what is going on with this Sinclair Broadcasting stunt, . . . [it was like] an hour long Swift Boat ad. . . . It isn't like a Swift Boat ad. It actually is a Swift Boat ad." Posting of Josh Marshall to Talking Points Memo, <http://www.talkingpointsmemo.com/archives/003641> (Oct. 11, 2004, 17:19 EDT).

23. Posting of Josh Marshall to Talking Points Memo, <http://www.talkingpointsmemo.com/archives/003639> (Oct. 11, 2004, 13:49 EDT) [hereinafter Marshall, *The Times Today*].

24. HOWARD RHEINGOLD, *SMART MOBS: THE NEXT SOCIAL REVOLUTION* 163 (2002) (noting a few observers believe that networks with flat governance hierarchies and distributed power may emerge as the "newest major social form, after tribes, hierarchies, and markets").

25. See, e.g., Barry Well & Milena Gulia, *Virtual Communities as Communities, in COMMUNITIES IN CYBERSPACE* 167, 171 (Marc A. Smith & Peter Kollack eds., 1999) [hereinafter COMMUNITIES] ("Most community ties are specialized and do not form densely knit clusters of relationships. . . . [E]xcept for kin and small clusters of friends, most members of a person's community network do not really know each other. . . . People do get all kinds of support from community members but they have to turn to different ones for different kinds of help."); RHEINGOLD, *supra* note 24, at 56–57.

26. Cf. Peter Kollock & Marc Smith, *Communities in Cyberspace, in COMMUNITIES, supra* note 25, at 3, 17–18 (noting that community is now often mapped in network-structures).

27. Clay Shirky: *Power Laws, Weblogs, and Inequality*, [http://www.shirky.com/writings/powerlaw\\_weblog.html](http://www.shirky.com/writings/powerlaw_weblog.html) (last visited Nov. 15, 2005).

28. Talking Points Memo, *Advertise*, <http://www.talkingpointsmemo.com/advertise.html> (last visited Nov. 15, 2005).

29. *Id.*

As a result, it did not spark an open debate among participants, and Marshall had to solicit responses through users' email.

Second, Daily Kos, owned by Markos Moulitsas Zúniga, a thirty-something technology lawyer who served in the United States Army before attending college, was one of the blogosphere's most highly trafficked and linked sites.<sup>30</sup> Unlike Talking Points Memo, Daily Kos was a "multilayered community engineered to reward ideas that bubble up from below," and Moulitsas permitted users to post comments to his posts (and to others' posts) and to set up their own "diaries," which were "blogs within his blog." The site also permitted peer accreditation, "where members rank[ed] each other's entries and comments," and user diaries ended up on the recommended list or, perhaps, on the main page.<sup>31</sup>

Third, former economist Duncan Black, known in the blog community as Atrios, had a popular blog called Eschaton, which pushed the blogstorm from the beginning.<sup>32</sup> Like Daily Kos, it provided a space for comments, but it provided neither space for diaries nor peer accreditation of comments.

Other top liberal blogs posted and discussed the stunt during the campaign.<sup>33</sup> These included the blog associated with Howard Dean's organization to elect Democrats to local office,<sup>34</sup> as well as MyDD.com, a mostly political blog,<sup>35</sup> where Moulitsas began blogging.<sup>36</sup>

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30. Daily Kos, About, <http://www.dailykos.com/special/about> (last visited Nov. 15, 2005). Moulitsas claims that his blog is not necessarily liberal, but is decidedly partisan for Democrats on the right and left; some commenters disagreed. Posting of Kos to Daily Kos, <http://www.dailykos.com/story/2004/11/15/212411/47> (Nov. 15, 2004, 19:24 PDT).

31. Micah L. Sifry, *The Rise of Open-Source Politics*, THE NATION, November 22, 2004, at 14, 17–18, available at <http://www.thenation.com/doc.mhtml?i=20041122&s=sifry> (The "Kos community has become a very efficient collaboration engine . . . for rapid fact-checking of political statements and news stories, quick dissemination of news of voting irregularities and brainstorming of campaign themes.").

32. Posting of Atrios to Eschaton, <http://atrios.blogspot.com/2004/10/sinclair.html> (Oct. 9, 2004, 17:56 EDT) [hereinafter Atrios, Sinclair].

33. See, e.g., posting of Kevin Drum to Political Animal, [http://www.washingtonmonthly.com/archives/individual/2004\\_10/004901.php](http://www.washingtonmonthly.com/archives/individual/2004_10/004901.php) (Oct. 12, 2004, 12:49 EDT); Free Press, Stop Sinclair, <http://www.freepress.net/sinclair/links.php> (last visited Nov. 15, 2005).

34. Posting of Mike Yedinak to Blog For America, <http://www.blogforamerica.com/archives/005375.html> (Oct. 20, 2004, 14:08 EDT).

35. Posting by Chris Bowers to MyDD, <http://www.mydd.com/story/2004/10/9/153537/663> (Oct. 9, 2004, 15:35 EDT).

36. CHRISTIAN CRUMLISH, POWER OF MANY 27 (2004).

Steve Soto's non-A-list blog was also important. Soto had previously been a Kos contributor,<sup>37</sup> and posted an entry on his blog, The Left Coaster, that provided many initial ideas on "*How to Deal with Sinclair Broadcast Group's Attempt to Play Kingmaker*."<sup>38</sup> His blog also provided a space for comments, where users debated tactics.

In addition to these blogs, many websites took shape the day Sinclair's intentions were reported. The most important, BoycottSBG.com, coordinated the Sinclair advertiser boycott. It "was founded on October 11, 2004 by Nick Davis, a concerned citizen . . . [a]fter reading an article in the Los Angeles Times [explaining Sinclair's intentions]." The site was an immediate focal point, having "over 300,000 unique visitors in its first week of operation."<sup>39</sup> It reciprocally linked to other sites developing blogstorm strategies.<sup>40</sup> Other sites created that day were less influential, but included Sinclair Watch, a project of a nonprofit media-activism organization called Free Press,<sup>41</sup> which helped provide information on challenging licenses, such as filing appropriate complaints.<sup>42</sup> Local blogs focused on specific broadcast stations.<sup>43</sup>

#### 4. Other Liberal Organizations

Beyond blogs, existing organizations also played roles. Media Matters For America, a web-based liberal media watchdog group founded earlier in the election cycle by ex-conservative David Brock, analyzed mainstream media coverage of the stunt and blogstorm, and underwrote the eventual derivative lawsuit against Sinclair.<sup>44</sup> Air America Radio, a

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37. Posting of Kos to Daily Kos, <http://www.dailykos.net/archives/001709.html> (Feb. 24, 2003, 16:04 PDT).

38. Posting of Steve Soto to The Left Coaster, <http://www.theleftcoaster.com/archives/002856.php> (Oct. 11, 2004, 10:14 EDT).

39. Sinclair Advertiser Boycott, Media Contacts, <http://www.boycottsbg.com/advertisers/press.htm> (last visited Nov. 15, 2005) [hereinafter Media Contacts].

40. Posting of Nick to Boycott Sinclair Broadcast Group, <http://www.boycottsbg.com/2004/10/stop-sinclair-broadcasting-group.htm> (Oct. 11, 2004, 11:43 EDT).

41. Free Press is a current client of the author at the Institute for Public Representation. This Article contains solely the author's opinion.

42. Sinclair Watch, Homepage, <http://www.sinclairwatch.org> (last visited Nov. 15, 2005).

43. See, e.g., posting of Skip Graham to Stop Sinclair RDU, [http://boycottsbg-ral.blogspot.com/2004\\_10\\_01\\_boycottsbg-ral\\_archive.html](http://boycottsbg-ral.blogspot.com/2004_10_01_boycottsbg-ral_archive.html) (Oct. 12, 2004, 13:34 EDT). They did not add much value, considering the national nature of the stunt, the blog community, and Sinclair.

44. *Media Matters for America Underwrites Sinclair Broadcast Group Shareholder Demand*, MEDIA MATTERS, Oct. 19, 2004, <http://mediamatters.org/items/200410190004>. See Media Matters, <http://mediamatters.org> (last visited Nov. 15, 2005) [hereinafter Media Matters].

liberal talk radio channel, posted about the Sinclair stunt on its blog, and provided concrete suggestions and restatements of other blogs' suggestions. Air America also had Reed Hundt, a former Bill Clinton-appointed Chairman of the FCC, on its most popular show to discuss the stunt.<sup>45</sup> The liberal think-tank, Center For American Progress, provided research, and published an article on a liberal e-news site.<sup>46</sup>

There was much less discussion of the blogstorm among right-wing bloggers. Apparently none attacked the blogstorm itself—just any intimations of *government* regulation.<sup>47</sup>

### B. *The Perceived Background: FCC and Mainstream Media*

Liberal blog users shared common perceptions about the FCC and most media companies before the stunt. First, they believed that loosening the media-ownership rules harmed democracy. They believed that select media companies would have too much political influence if they owned the majority of media outlets informing the public. A few days into the blogstorm, Democratic FCC Commissioner Michael J. Copps reflected their belief, calling the Sinclair stunt “proof positive of media consolidation run amok.”<sup>48</sup>

Second, the participants believed the media was conservative and biased against Democrats.<sup>49</sup> For example, the blogstorm participants

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45. Posting of Rob Mackey to Al Franken Blog, <http://www.airamericaradio.com/alfrankenshow/node/1916> (Oct. 12, 2004, 17:43 EDT).

46. Christy Harvey et al., *Sinclair Strikes Again*, ALTERNET, Oct. 12, 2004, <http://www.alternet.org/story/20151/>.

47. For example, Glenn Reynolds, owner of the popular conservative blog Instapundit, focused on the response by officials in the Kerry campaign, not unaffiliated individuals. He suggested that Kerry's campaigners' implicit threats either consisted of or were calling for government action. He characterized the attempt to stop Sinclair as part of a larger assault on freedom of speech; he called Kerry's campaign “thuggish” in its response; then he suggested Sinclair's bias was no different from CBS's. He implicitly approved of the blogstorm's legitimacy, likening it to a recent conservative campaign that prevented the broadcast of a movie allegedly critical of Ronald Reagan: that movie “was stopped by public outcry, not government action.” Posting of Glenn Reynolds to Instapundit, <http://instapundit.com/archives/018388.php> (Oct. 12, 2004, 16:26 EDT).

Andrew Sullivan, owner of The Daily Dish, disagreed with Reynolds, and called *Stolen Honor* a smear. Although his instincts were against “any attempt to [governmentally] regulate” the showing, he considered it troubling and understood why liberals would protest. Posting of Andrew to The Daily Dish, [http://andrewsullivan.com/index.php?dish\\_inc=archives/2004\\_10\\_10\\_dish\\_archive.html#10976138913630787](http://andrewsullivan.com/index.php?dish_inc=archives/2004_10_10_dish_archive.html#10976138913630787) (Oct. 12, 2004, 16:43 EDT).

48. David Lieberman, *Plan to Air Divisive Film Raises Questions*, USA TODAY, Oct. 11, 2003, at B1, available at [http://www.usatoday.com/printedition/money/20041012/1b\\_corptax12.art.htm](http://www.usatoday.com/printedition/money/20041012/1b_corptax12.art.htm).

49. Conservative blog-users believed the opposite.

considered Fox News to air propaganda,<sup>50</sup> and considered CNN and MSNBC also to be anti-Kerry. The Kos community had been following the comments of even Sumner Redstone, a Democrat, who controls Viacom (owner of CBS, MTV, Blockbuster, etc.). Redstone said he supported President Bush's candidacy because of Bush's media consolidation policies. One blogger said, "Substitute . . . any other big media corporation [who has the same incentive to support Bush's deregulatory policies] and things get clearer" why the media would prefer Bush.<sup>51</sup> The users believed that Sinclair's stunt was at least partly motivated by Sinclair supporting, or further encouraging, Bush's proposed deregulatory policies.<sup>52</sup>

### C. The Story Breaks

On Saturday, October 9, 2004, the *Los Angeles Times* broke the story.<sup>53</sup> The headline referred to Sinclair as a "Conservative TV Group," and the sub-headline noted that "[e]xperts call the move highly unusual." The article explained that "a number of people privately expressed outrage at the seemingly overt nature of the political attack."<sup>54</sup> That day, a member of the Daily Kos community said he would purchase a site to counter Sinclair's actions and would create a petition.<sup>55</sup> Atrios's popular Eschaton blog also mentioned the *L.A. Times* story.<sup>56</sup> A blogger at MyDD.com pasted part of the story, pointed to the Kos post, encouraged those in Sinclair markets to call Sinclair, and linked to an advertiser boycott blog he had personally started (which did not become a blogstorm focus).<sup>57</sup>

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50. See, e.g., posting of Rimjob to Daily Kos, <http://www.dailykos.com/story/2005/1/25/155253/426> (Jan. 25, 2005, 12:52 PDT) (quoting Ted Turner).

51. Posting of Zgveritas to Daily Kos, <http://www.dailykos.com/story/2004/9/25/03040/0125> (Sept. 24, 2004, 21:40 PDT).

52. See, e.g., posting of Fyreflye to Daily Kos, <http://dailykos.com/story/2004/10/11/163831/07> (Oct. 12, 2004, 18:00 PDT).

53. Elizabeth Jensen, *Conservative TV Group to Air Anti-Kerry Film*, L.A. TIMES, Oct. 9, 2004, at A1. Although Sinclair claimed it had never decided to show *Stolen Honor* as the "special" program, the participants believed they had evidence proving this false. Sinclair Broadcast Group, DKOSOPEDIA, *supra* note 12.

54. Jensen, *supra* note 53.

55. Posting of Chicagoprogressive to Daily Kos, <http://www.dailykos.com/story/2004/10/9/122919/659> (Oct. 9, 2004, 21:29 PDT).

56. See, e.g., Atrios, Sinclair, *supra* note 32.

57. Bowers, *supra* note 35; see MyDD, About MyDD, <http://www.mydd.com/special/about> (last visited Nov. 15, 2005).

### D. The Blogstorm Begins

Despite the *L.A. Times* story and blog posts on October 9, activity did not pick up until Monday morning, October 11, when Steve Soto posted an entry on his blog about how to take on Sinclair.<sup>58</sup> A-list blogs pointed to this post.<sup>59</sup> The silence over the weekend may have been because most participants were not at their computers, or because Soto was the first to provide a wide range of possible options.

Blogs can do at least five things with news stories. They can break a story (reporting it first),<sup>60</sup> disseminate a story to a specific group,<sup>61</sup> flog it (keeping it alive despite the 24 hours news-cycle),<sup>62</sup> spin it (providing a

58. See Steve Soto, *supra* note 38.

59. See, e.g., posting of Josh Marshall to Talking Points Memo, [http://www.talkingpointsmemo.com/archives/week\\_2004\\_10\\_10.php](http://www.talkingpointsmemo.com/archives/week_2004_10_10.php) (Oct. 11, 2004, 14:03 EDT) [hereinafter Marshall, Yesterday Former]; posting of Kos to Daily Kos, <http://www.dailykos.com/story/2004/10/11/163831/07> (Oct. 11, 2004, 14:28 PDT) [hereinafter Kos, Sinclair Advertiser DB Up].

60. Bloggers may have broken the Lewinsky story. See, e.g., Lawrence K. Grossman, *The Press and the Dress*, COLUM. JOURNALISM REV., Nov./Dec. 1998, at 34, available at <http://archives.cjr.org/year/98/6/dress.asp>. They also may have broken the story of CBS's allegedly fake National Guard memos about President Bush's service. Posting of Jay Rosen to PressThink, [http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/11/23/rather\\_exit.html](http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/11/23/rather_exit.html) (Nov. 23, 2004, 02:17 EDT).

61. Disseminating a story is inherent to many blogs that have specific audiences. See, e.g., Marshall, *The Times Today*, *supra* note 23; Kurtz & Ahrens, *supra* note 16; Lieberman, *supra* note 48; cf. CASS SUNSTEIN, *REPUBLIC.COM* (2001).

Blog users, can also inform others through email or their own blogs. In fact, on October 11 and 12, the *Post* listed an article about the Sinclair stunt as the most emailed article of the day. This may be partly because of the story's inherent shocking news value and partly because the participants were recruiting others. See posting of The Other Rasmussen to Daily Kos, <http://www.dailykos.com/story/2004/10/12/121355/52> (Oct. 12, 2004, 16:06 PDT).

The blogs, emails, and mainstream media so informed citizens that one day into the controversy the websites of Sinclair broadcasters included online polls asking this question: "Do you think Sinclair Broadcast Group should run the documentary?" Word had spread so far and wide by Monday, October 11 that visitors to the site knew exactly what "the documentary" was. Posting of Sparky to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 06:37 EDT).

62. Flogging may affect mainstream journalistic coverage, in part because of news-cycle timing, especially for television reporters. Television reporters often drop a story after 24 hours unless there is some sort of peg to keep it going, including a reaction from the other side, a newspaper writing about it, or (now) blogosphere furor for several days. An example of flogging is when Trent Lott said the country would have been better off had Strom Thurmond been elected president in 1948. Before the blogs flogged it, reporters had thought Lott's comments were not even newsworthy; it was drowned out by "newsworthy" events, like John Kerry's allegedly expensive haircut. ESTHER SCOTT, HARV. KENNEDY SCH. OF GOV'T CASE STUDY, "BIG MEDIA" MEETS THE "BLOGGERS": COVERAGE OF TRENT LOTT'S REMARKS AT STROM THURMOND'S BIRTHDAY PARTY 1, 10, 12, 23 (2004), [http://www.ksg.harvard.edu/presspol/Research\\_Publications/Case\\_Studies/1731\\_0.pdf](http://www.ksg.harvard.edu/presspol/Research_Publications/Case_Studies/1731_0.pdf).

frame for the story),<sup>63</sup> and call readers to action. In the Sinclair blogstorm, blogs and users did not break the story. The blogs disseminated the story to their readers, kept it alive for weeks, framed it as an instance of Conservative Big Media flouting the law, and called their readers to action.

The participants' first reactions were that the stunt was unbelievable and that it could not be legal. They believed Sinclair violated at least basic norms of fairness, if not the law.<sup>64</sup>

Former FCC Chairman Reed Hundt helped convince the participants that the stunt was an unaddressed legal violation. On the Monday the blogstorm started, Joshua Marshall posted a letter from Reed Hundt addressed to Sinclair's executives. The bloggers were not experts in broadcast and election law, but they relied on experts like Hundt. Hundt suggested that while Sinclair's actions were not specifically forbidden, carrying "anti-Kerry propaganda" (or "anti-Bush propaganda") was not in the public interest. He asked, "[w]hy should a broadcaster keep its licenses if it behaves in this manner?"<sup>65</sup> Sinclair did not positively respond to this letter.

A day later, Hundt wrote a letter, not to Sinclair, but to Joshua Marshall, which Marshall promptly posted on his blog. Hundt used harsher terms in this letter. He wrote that it was "important that Sinclair Broadcasting be urged in all lawful ways that can be imagined to reconsider its decision." Hundt explained general communications policy, that the electronic media's role is not to praise the incumbent president, but to aim for "the goal of balance and fairness."<sup>66</sup> He singled out Sinclair's current acts as almost unique, knowing, violations of these principles: "Sinclair has a different idea [of the law], and a wrong one in my view. . . . This is the law, and it should be honored."<sup>67</sup> Hundt did not mention that although the Sinclair stunt probably did not *legally* require equal time for Kerry,

63. As an example, some blog-users, following the 2004 election, tried to spin the discrepancy between the exit poll data and poll results to convince others that the exit polls were correct. *See, e.g.*, posting of LondonYank to Daily Kos, <http://www.dailykos.com/story/2004/11/3/53438/6175> (Nov. 3, 2004, 02:34 PDT).

64. Although scholars define "norms" in many ways, Amitai Aviram, *Regulation By Networks*, 2003 B.Y.U. L. REV. 1179, 1181 n.4 (2003) (and sources cited therein), I use the term broadly "to include all rules and regularities concerning human conduct," *id.*

65. Marshall, Yesterday Former, *supra* note 59 (quoting Reed Hundt).

66. His evidence included "specific provisions relating to rights to buy advertising time, bans against the gift of advertising time, rights to reply to opponents, and various other specific means." Posting of Josh Marshall to Talking Points Memo, <http://www.talkingpointsmemo.com/archives/003649.php> (Oct. 12, 2004, 10:41 EDT) (posting a letter from Reed Hundt) [hereinafter Reed Hundt, Letter].

67. *Id.* ("If Sinclair wants to disseminate propaganda, it should buy a printing press, or create a web site. These other media have no conditions on their publication of points of view.")

this was largely because of loopholes—Kerry was the candidate “featured” in *Stolen Honor* so Bush, not Kerry, could demand response time.<sup>68</sup> Sinclair contended the documentary fit the legal exemption for news.<sup>69</sup> Participants agreed with Hundt, however, that Sinclair violated the spirit of the law, if not the letter, and the law must be “honored,” even if the participants themselves had to enforce it.

Steve Soto observed that online costs permitted new activism to counter the stunt, even if the government would not. He suggested challenging Sinclair’s license renewals to burden Sinclair with lawyer fees though he said he had “no illusions that the FCC and Michael Powell [the Republican-appointed and then-FCC Chairman] may actually reject some Sinclair licenses over this.” He believed the costs of opposing Sinclair were manageable because the internet had reduced transaction and organizational costs:

Sinclair assumes that [license-challenges] would not happen because a national campaign opposing a major media conglomerate would cost [Sinclair] opponents way too much. *Yet they are not counting on how cheaply the weblog community*, working with outfits like the Alliance for Better Campaigns, the Center for Digital Democracy, Take Back the Media, and others that would join in, *could organize the opposition* by working with local media law attorneys who could work pro bono on organizing the license renewal opposition campaign, while of course getting some local and national media coverage themselves.

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68. A broadcaster who sells or gives time for a candidate’s use must “afford equal opportunities to all other such candidates for [the same] office in the use of such broadcasting station.” 47 U.S.C. § 315 (2000). This is only triggered, however, when the candidate appeared personally, not his friends or campaign committees.

69. One commentator suggests:

There are at least three doctrines that might apply to this situation. The first is the “fairness doctrine” of the Federal Communications Commission, which required broadcasters to grant reply time to those who said their views were criticized. That rule was killed in 1987. The second are two corollaries of the doctrine—the “personal attack” rule and the “political editorial” rule—vestiges of the fairness doctrine that survived a while longer and then died in 2000. The third is the “equal time” law for political candidates, which still exists but probably doesn’t apply to Sinclair because the candidate featured in the film was Kerry, not Bush [and because Sinclair claims the special was bona fide news].

Drew Clark, *How Fair Is Sinclair’s Doctrine?*, SLATE.COM, Oct. 20, 2004, <http://www.slate.com/id/2108443/>.



I think if the major weblogs start talking about this, it could happen.<sup>70</sup>

BoycottSBG.com was launched on October 11, and its owner helped organize a database essential for the advertiser boycott.<sup>71</sup> On the day of its creation, A-list blogs directed participants to the new database.<sup>72</sup> Blogs were also providing technical feedback to participants, such as the database's compatibility for AOL users.<sup>73</sup>

### E. Affecting Sinclair's Behavior—Regulatory Tools

The participants deliberated on their ultimate goal. They did not want to stifle *Stolen Honor* entirely. A consensus developed, instead, to encourage Sinclair to provide "equal time" or "balance" to the opposing viewpoint. They proposed balance with the Michael Moore documentary, *Fahrenheit 9/11*, or the pro-Kerry documentary, *Going Upriver*, but no consensus emerged.<sup>74</sup>

With the regulatory goal of equal time, the participants turned to using "all lawful ways that can be imagined." Commenters posted thousands of comments on the central blogs, peripheral blogs, and on lesser read blogs. Moreover, the uncoordinated process led to mass redundancy,<sup>75</sup> where participants repeated or pasted others' comments from the same or other blogs. For ease of discussion,<sup>76</sup> I categorize the discussion based on the different regulatory tools participants discussed or implemented.

70. Steve Soto, *supra* note 38.

71. Nick Davis's first post was on October 9 and called for an advertiser boycott. It received little or no attention. Email from Nick Davis, founder of BoycottSBG.com, to Marvin Ammori (February 22, 2005, 18:37 EDT) (on file with author) [hereinafter Davis, Email].

72. Moulitsas told his Kos community to "Get to work!" on the database. Kos, Sinclair Advertiser DB Up, *supra* note 59; *see also* posting of Josh Marshall to Talking Points Memo, <http://www.talkingpointsmemo.com/archives/003643> (Oct. 12, 2004, 05:00 EDT) (directing readers to the advertiser database).

73. Posting of Kos to Daily Kos, <http://www.dailykos.com/story/2004/10/12/111923/01> (Oct. 12, 2004, 09:19 PDT).

74. *See, e.g.*, posting of Norm to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 08:16 EDT).

75. *Cf.* Benkler, *Linux*, *supra* note 2.

76. Because the blogstorm was so anarchic and redundant, and created so much text, it would be cumbersome to present a chronological discussion. *Cf.* Marc A. Smith, *Invisible Crowds in Cyberspace*, in *COMMUNITIES*, *supra* note 25, at 195 (diagramming the community "structure" of Usenet).

## 1. Challenging Licenses

Soto provided a detailed discussion of how to challenge Sinclair's licenses.<sup>77</sup> Another blog provided similar information,<sup>78</sup> and Joshua Marshall posted Hundt's letter suggesting Sinclair should not keep its licenses after such a stunt.

Participant feedback, however, caused the blogstorm largely to abandon this idea. First, according to commenters who worked in broadcast television, licensees are not concerned about losing their licenses because the standard required to keep a license is so low. Second, most Sinclair licenses were not up for renewal until after the stunt. Although challenging the licenses threatened Sinclair with retribution, it would not stop the stunt.<sup>79</sup>

## 2. Boycotting Advertisers

An advertiser boycott quickly emerged as a top option.<sup>80</sup> A-list blogs funneled users to BoycottSBG.com, which invited the users to contribute advertisers to its database. While being constructed, the database provided the advertisers' names, email addresses, phone numbers, and (with a pulldown bar) their broadcast market. The site claimed it would verify the advertiser within 24 hours, but the database was displayed during creation for participants to contribute, check, use, and provide feedback. The site used technical advice from users to make the database more user-friendly. As a result, the database came to permit, with one click, emailing many advertisers, by broadcast market.<sup>81</sup> Contributors posted sample emails to send advertisers, while others critiqued and improved those samples,<sup>82</sup> and bloggers posted examples of letters.<sup>83</sup> A Sinclair

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77. Steve Soto, *supra* note 38.

78. Sinclair Watch, *supra* note 42.

79. See, e.g., posting of Josh Marshall to Talking Points Memo, [http://www.talkingpointsmemo.com/archives/week\\_2004\\_10\\_10.php](http://www.talkingpointsmemo.com/archives/week_2004_10_10.php) (Oct. 11, 2004, 10:00 EDT) [hereinafter Marshall, A Suggestion from a Reader].

80. Advertiser boycotts have often been used with such traditional regulation: "boycotts usually try to induce their targets to adopt behavior that the government could have [and sometimes "should have"] itself mandated." C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 59 (2002).

81. See, e.g., Sinclair Broadcast Group Advertisers, Boycott, <http://www.boycottsbg.com/advertisers/default.aspx> (last visited Oct. 9, 2005).

82. Posting of TommyG to Daily Kos, <http://www.dailykos.com/story/2004/10/11/63831/07> (Oct. 11, 2004, 19:15 PDT).

83. See, e.g., Sinclair Advertiser Boycott, Sample Letters, <http://www.boycottsbg.com/advertisers/SampleLetters.htm> (last visited Nov. 15, 2005).

employee wrote a letter agreeing with BoycottSBG.com, which the site posted for moral authority.<sup>84</sup>

In addition, lawyers volunteered to evaluate the advertisers' contracts. They would confirm the advertisers had the rights to pull advertising because many local advertisers were small business, apparently without in-house counsel.<sup>85</sup> The site gave minimal top-down directions. For example, it gave suggestions on etiquette: "Please, please, please be civil to the advertisers and their representatives."<sup>86</sup>

As it had weakened the license-challenge strategy, participant feedback helped strengthen and tailor the boycott. Broadcast industry workers argued that advertiser boycotts worked.<sup>87</sup> Further, feedback tailored the boycott. The workers suggested that Sinclair's local stations made most of their money from the 6pm newscasts, so the blogstorm targeted those newscasts' sponsors.<sup>88</sup> The workers also suggested that local, not national, advertisers were key, and word spread.<sup>89</sup> Participants called on those in Sinclair markets to watch the news, and list all advertisers on the database, including local ones.<sup>90</sup> In addition to targeting newscast sponsors, feedback moved towards more apparent bang for the buck.<sup>91</sup> BoycottSBG.com listed the top ten advertisers by spending.<sup>92</sup> A thirty-year broadcast veteran encouraged participants to "write to the sales manager—not the general manager"—and to mention the actual

84. See Sinclair Advertiser Boycott, FAQ, Letter Received on 10/21 from an SBG Employee, <http://www.boycottsbg.com/advertisers/sbgemployee.htm> (last visited Nov. 15, 2005) [hereinafter Nick, Letter Received from SBG Employee].

85. See Sinclair Broadcast Group Advertisers, Boycott, *supra* note 81.

86. *Id.*

87. Posting of Josh Marshall to Talking Points Memo, [http://www.talkingpointsmemo.com/archives/week\\_2004\\_10\\_10.php](http://www.talkingpointsmemo.com/archives/week_2004_10_10.php) (Oct. 12, 2004, 10:16 EDT) [hereinafter Marshall, From a Reader].

88. Posting of Josh Marshall to Talking Points Memo, [http://www.talkingpointsmemo.com/archives/week\\_2004\\_10\\_10.php](http://www.talkingpointsmemo.com/archives/week_2004_10_10.php) (Oct. 12, 2004, 17:09 EDT) [hereinafter Marshall, In the Last]. Marshall posted a reader's email, but this reader had apparently posted the same advice, with minor word discrepancies, on Steve Soto's blog. See posting of Heynewt to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 18:15 EDT).

89. Posting of Josh Marshall to Talking Points Memo, <http://www.talkingpointsmemo.com/archives/003655.php> (October 12, 2004, 14:20 EDT).

90. Marshall, In the Last, *supra* note 88.

91. That is, it moved towards the lowest cost-benefit ratio or efficiency. See, e.g., posting of James on The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 12, 2004, 16:45 EDT); posting of Kynn123 to Daily Kos <http://www.dailykos.com/story/2004/10/11/163831/07> (Oct. 14, 2004, 06:37 PDT) ("Boycott Against Sinclair Is Too Weak").

92. Sinclair Advertisers, Top 10, <http://www.boycottsbg.com/advertisers/TopTenAdvertisers.aspx> (last visited Nov. 15, 2005).

names of the local advertisers they contacted or would contact.<sup>93</sup> A commenter confirmed the veteran's targeted advice:

[The sales manager] was really concerned when I read him a list of local [advertisers]. . . . He practically begged me not to, saying 'this involves people's livelihoods.' . . . So you are correct. Local stations—SALES MANAGERS [sic] and local advertisers AD MANAGERS [sic] are the pressure point.<sup>94</sup>

Other feedback targeted or corrected activity. Feedback pointed out companies that were wrongly listed as Sinclair advertisers, or were listed with wrong phone numbers. Participants also recommended speaking to specific employees, and provided those employees' names.<sup>95</sup>

The boycott was highly successful. The participants did not even have to institute a boycott against many of the advertisers, who pulled out almost immediately based on the credible threats of boycott. Eighty advertisers pulled out after one week.<sup>96</sup> At one point, over 100 advertisers removed their ads indefinitely.<sup>97</sup>

### 3. Attacking Sinclair's Stock Price

Participants had several ideas, some more realistic than others, to attack Sinclair's stock price. First, many listed the names and holdings of Sinclair's institutional investors. They encouraged participants invested with those investors to call and request withdrawing from Sinclair stock.<sup>98</sup>

93. Marshall, From a Reader, *supra* note 87.

94. Posting of Josh Marshall to Talking Points Memo, [http://www.talkingpointsmemo.com/archives/week\\_2004\\_10\\_10.php](http://www.talkingpointsmemo.com/archives/week_2004_10_10.php) (Oct. 12, 2004, 11:50 EDT).

95. All of these examples come from one comment, which included ideas typical of much of the feedback. Posting of Maryscott OConnor to Daily Kos, <http://www.dailykos.com/story/2004/10/12/121355/52> (Oct. 12, 2004, 04:23 PDT) (noting a certain company "does not advertise on Sinclair—according to the very weary woman who asked me if there were a way to get the phone calls to stop"; noting "CHILI'S—call the 800 number, not the 515 number"; and noting at "PFIZER: Call Ms. Fishman at 212-733-6029"); *see also* posting of Zic to Daily Kos, <http://www.dailykos.com/story/2004/10/12/121355/52> (Oct. 12, 2004, 15:40 PDT) (discussing Iams Corporation, General Mills, and Great Earth Vitamins); Kos, Sinclair Advertiser DB Up, *supra* note 59 (comments).

96. Posting of Nick to Boycott Sinclair Broadcast Group, <http://www.boycottsbg.com/2004/10/advertiser-pullout-update.htm> (Oct. 18, 2004, 22:36 EDT).

97. Media Contacts, *supra* note 39.

98. Posting of Kos to Daily Kos, <http://www.dailykos.com/story/2004/10/11/18560/484> (Oct. 11, 2004, 16:56 PDT). Commenters, not blog-owners, seem to have devised the list. *See, e.g.*, posting of Debra to Daily Kos, <http://www.dailykos.com/story/2004/10/11/163831/07> (Oct. 11, 2004, 18:54 PDT) (pasting a comment from the Eschaton blog).

Second, many proposed calling (especially Democratic) state treasurers managing pension investments that invested in Sinclair.<sup>99</sup> This had some success. On October 18, the New York State Comptroller sent a letter to Sinclair's CEO to "ask about some recent actions that have brought a great deal of publicity to our company," calling Sinclair "our company" because New York's retirement and pension fund held 256,600 Sinclair shares. The comptroller asked fifteen pointed questions based on advertiser boycotts, license challenges, viewers' negative reaction, poor publicity, Sinclair's unequal voting structure, its small number of independent board members, and the company's poor 2004 performance.<sup>100</sup>

Third, many criticized Sinclair's stock on investor electronic bulletin boards.<sup>101</sup> The blogstorm spawned thousands of criticisms on Yahoo! Finance alone. Its Sinclair bulletin board received over 1,800 messages in the blogstorm's first two business days, almost 600 more than it had received for all previous dates.<sup>102</sup> Those criticizing included proposals, at times, of a concerted sell-off.<sup>103</sup>

Fourth, some had less practical ideas. Almost all involved billionaire George Soros, who would publicly short Sinclair stock to drive down the price,<sup>104</sup> buy all the stock and take over the company,<sup>105</sup> or buy Sinclair's (very high level of) debt and call it.<sup>106</sup> Although at least one user argued a stock buy-out was impossible—because one family largely controlled

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99. Posting of Annalivia to Daily Kos, <http://www.dailykos.com/story/2004/10/12/121355/52> (Oct. 12, 2004, 16:23 PDT).

100. Letter from Alan G. Hevesi, New York State Comptroller, to David D. Smith, Chief Executive Officer for Sinclair Broadcast Group (Oct. 18, 2004), available at [http://www.truthout.org/mm\\_01/4.sinclairletter101804.pdf](http://www.truthout.org/mm_01/4.sinclairletter101804.pdf).

101. See, e.g., posting of Exhausted to Daily Kos, <http://www.dailykos.com/story/2004/10/11/163831/07> (Oct. 12, 2004, 19:17 PDT); posting of Christian Dem in NC to Daily Kos, <http://www.dailykos.com/story/2004/10/12/121355/52> (Oct. 12, 2004, 15:45 PDT). The Yahoo! Finance page for Sinclair is at <http://finance.yahoo.com/q?s=SBGI&d=t>.

102. There had previously been 1260. Posting of Skunky Wazoo to Yahoo! Finance Message Boards: SBGI, <http://finance.messages.yahoo.com/bbs?.mm=FN&action=m&board=7083976&tid=sbgi&sid=7083976&mid=3066> (Oct. 13, 2004, 08:05 EDT). Apparently, most of these messages, recommending "strong sell" and criticizing the company, have been removed. See Yahoo! Finance Message Boards: SBGI, <http://finance.messages.yahoo.com/bbs?.mm=FN&action=l&board=7083976&tid=sbgi&sid=7083976&mid=1> (last visited Nov. 15, 2005).

103. See, e.g., Christian Dem in NC, *supra* note 101.

104. Posting of Trifecta to Daily Kos, <http://www.dailykos.com/story/2004/10/11/18560/484> (Oct. 11, 2004, 21:15 PDT).

105. Posting of Debra to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 12:04 EDT).

106. Posting of Victor Harbison to Daily Kos, <http://www.dailykos.com/story/2004/10/11/18560/484> (Oct. 11, 2004, 20:50 PDT).

Sinclair through unequal rights of different stock classes—some still held out hope.<sup>107</sup>

Feedback also reinforced and targeted these attacks. The participants followed the stock price and rejoiced at its fall.<sup>108</sup> On blogs, they posted mainstream stories noting that Sinclair’s stock dropped 12 cents on the first day of the blogstorm, that Sinclair’s stunt “annoyed investors”—including an investor company with 4% of Sinclair—and that Sinclair was “barely profitable and laden with debt.”<sup>109</sup>

Sinclair’s shares, which during 2004 had already lost half their value,<sup>110</sup> declined from Monday, October 11, 2004, when the blogstorm began, to the day Sinclair was to show *Stolen Honor* on Friday, October 22. The following chart demonstrates how the stock slid sharply during the blogstorm, while volume of sales shot up.

TABLE I

Date	Open	High	Low	Close	Volume
4-Oct-04	7.4	7.64	6.87	7.61	597500
5-Oct-04	7.61	7.7	7.5	7.62	381800
6-Oct-04	7.7	7.88	7.62	7.82	272200
7-Oct-04	7.84	7.84	7.63	7.71	286200
8-Oct-04	7.59	7.76	7.5	7.5	219000
Weekend Before Blogstorm					
11-Oct-04†	7.58	7.65	7.37	7.38	587100
12-Oct-04	7.37	7.45	7.24	7.29	425600
13-Oct-04	7.3	7.45	7.14	7.14	451000
14-Oct-04	7.15	7.26	7.1	7.11	350100
15-Oct-04	7.2	7.31	6.98	7.04	428600
Weekend During Blogstorm					
18-Oct-04	7.01	7.07	6.37	6.49	1187400
19-Oct-04	6.66	6.67	6.12	6.26	1244500
20-Oct-04	6.5	7.36	6.46	7.05	2545900

107. Posting of Kathy to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 12:13 EDT).

108. See, e.g., posting of Atrios to Eschaton, <http://atrios.blogspot.com/2004/10/sinclair-ceo.html> (Oct. 19, 2004, 16:14 EDT).

109. See, e.g., posting of Dontbruisethegin to Daily Kos, <http://www.dailykos.com/story/2004/10/12/121355/52> (Oct. 12, 2004, 16:13 PDT).

110. See Lieberman, *supra* note 48.

Date	Open	High	Low	Close	Volume
21-Oct-04	7.16	7.25	6.94	7.13	1233400
22-Oct-04*	7.24	7.25	7.08	7.17	706600
Weekend After Stunt					
25-Oct-04	7.22	7.23	7.03	7.08	282200
26-Oct-04	7.09	7.15	7	7.05	481600
27-Oct-04	7.05	7.14	6.96	7	593900
28-Oct-04	6.9	7.12	6.87	6.99	467000
29-Oct-04	6.99	7.05	6.98	7	385100

Table 1. (†) Date blogstorm began. (\*) Date of Sinclair's stunt.

As this shows, after the blogstorm's first weekend, there was a sharp jump in volume, perhaps because of the major media coverage or the blogstorm's persistence. Volume almost tripled on the Monday after the first weekend, and it doubled again that Wednesday, when a lawsuit was filed and Sinclair announced it would change its program.<sup>111</sup> The Monday after the stunt, the volume fell back almost to pre-blogstorm volume, and the price went slightly back up to pre-blogstorm levels. But weeks after the blogstorm, it was down again 20% from its pre-blogstorm price.<sup>112</sup> Significantly, between October 9 and October 18, even before the derivative law suit, Sinclair's stock fell nearly 13%, eliminating "nearly \$90 million in shareholder value,"<sup>113</sup> and continued to fall until October 20. Eventually this drop in stock price helped inspire the derivative law suit.

#### 4. Circulating Petitions

Many organizations circulated petitions, while the participants appeared largely uninterested in them. The Democratic National Committee promoted a petition;<sup>114</sup> StopSinclair.org, started by an established nonprofit, had a petition that was also a pledge to oppose Sinclair's decision.<sup>115</sup> Petitions were even presented. On October 15,

111. See PRNewswire, *Sinclair Broadcast Group to Air Different Program*, FOX CAROLINA.COM, Oct. 20, 2004, <http://www.foxcarolina.com/Global/story.asp?S=2452736>.

112. Posting of Grushka to Daily Kos, <http://www.dailykos.com/story/2004/11/19/151928/62> (Nov. 19, 2004, 13:19 PDT).

113. *Media Matters For America Underwrites Sinclair Broadcast Group Shareholder Demand*, *supra* note 44.

114. DNC: Take Action, Stop the Right-Wing Smears Against John Kerry, <http://www.democrats.org/action/200410120001.html> (last visited Oct. 24, 2004).

115. Stop Sinclair Broadcast Group, <http://www.stopsinclair.org/> (last visited Nov. 15, 2005).

StopSinclair.org and a protest crowd presented an interim petition with 80,000 names on it to Sinclair's Baltimore headquarters. Thousands more subsequently signed the petition.<sup>116</sup> Participant feedback suggested, however, petitions would not be enough.

### 5. Spreading Other Embarrassing Information

In addition to these actions, the participants happily spread any embarrassing information they learned about Sinclair executives. They dredged up the story about a Sinclair executive being arrested with a prostitute in 1996, noting he was "charged with committing a perverted sex act in a [moving] company-owned Mercedes."<sup>117</sup> A Baltimore user, sensing her usefulness to the greater community, offered to find the mug shots.<sup>118</sup>

The participants also spread comments by Sinclair executives that they considered outrageous. Early in the blogstorm, in an appearance on CNN, an executive compared other television networks that were not running the same anti-Kerry documentary to Holocaust-deniers. He also said that reporting unemployment statistics and deaths in Iraq was pro-Kerry propaganda.<sup>119</sup> Bloggers spread his words mockingly.<sup>120</sup> They then gleefully posted a letter from the Anti-Defamation League, which opposes anti-Semitism, that condemned the executive's Holocaust-comment.<sup>121</sup>

Participants spread other "information," or conjecture, hoping to substantiate it. A user suggested a Sinclair executive was engaged in insider trading, linking to the information for others' scrutiny.<sup>122</sup> Another user linked to a story stating that Sinclair owned a military contractor

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116. Stop Sinclair Broadcast Group, Latest News, <http://www.stopsinclair.org/news.php> (last visited Nov. 15, 2005).

117. See, e.g., Atrios, Sinclair, *supra* note 32; posting of Atrios to Eschaton, <http://atrios.blogspot.com/2004/10/calling-all-baltimoreans.html> (Oct. 11, 2004, 22:35 EDT). BoycottSBG.com never ran this story. Davis, Email, *supra* note 71.

118. Posting of Marty to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 16:52 EDT).

119. American Morning (Transcript), CNN.COM, Oct. 12, 2004, <http://transcripts.cnn.com/TRANSCRIPTS/041012/tm.04.html>.

120. Posting of Bink to Daily Kos, <http://www.dailykos.com/story/2004/10/12/84719/978> (Oct. 12, 2004, 06:47 PDT) (providing updates based on comments and directing users to Talking Points Memo, as well).

121. Posting of Josh Marshall to Talking Points Memo, [http://www.talkingpointsmemo.com/archives/week\\_2004\\_10\\_10.php](http://www.talkingpointsmemo.com/archives/week_2004_10_10.php) (Oct. 12, 2004, 12:16 EDT).

122. Posting of Dingo to Al Franken Blog, <http://shows.airamericaradio.com/alfrankenshow/node/1914> (Oct. 12, 2004, 10:33 EDT).



that had recently received a military contract, suggesting it was related to Sinclair broadcasting viewpoints favoring Republicans.<sup>123</sup>

Spreading this information did several things, but its effect was primarily internal. First, it reinforced the participants' notion that Sinclair executives violated social norms in general. They were "bad" people, and their motives for the stunt could be assumed. Second, correspondingly, it placed the participants on the side of justice. Not only were they opposing bad guys, but "good" guys like the Anti-Defamation League were, to some extent, on the same side. There was little feedback, however, on spreading information as a tool to regulate Sinclair's behavior.

## 6. Filing Lawsuits

From the first day, users spearheaded the idea of a derivative lawsuit.<sup>124</sup> A derivative lawsuit is one brought by a shareholder against management for somehow wasting corporate assets.<sup>125</sup> For example, Joshua Marshall posted a Texas lawyer's letter explaining the fundamentals of a derivative suit, stating where it could be brought (Maryland, Sinclair's state of incorporation), and calling for a Maryland lawyer. One of a derivative suit's advantages, according to a user, was the possibility of a temporary injunction,<sup>126</sup> which is an order to do or not do something, as opposed to merely obtaining a monetary award.

This indicates that the participants believed Sinclair's executives were violating not only communications and election law, but also corporate and contract law. The executives were breaking obligations to shareholders, television networks (with whom they had contracts), and advertisers (who did not bargain for such heat nor to advertise only to Republicans).

In addition to the derivative suit, there were other legal actions. The Kerry campaign sent a letter to Sinclair arguing that Sinclair's actions were illegal under FCC regulations. A photographer sued *Stolen Honor's*

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123. See, e.g., posting of Defoliant to Al Franken Blog, <http://airamericaradio.com/weblogs/sowhateiseisnews/index.php?franken/comments/1916/> (Oct. 12, 2004, 13:08 EDT). This story was picked up on the blog for the liberal magazine *American Prospect*. Posting of Matthew Yglesias to Tapped, <http://www.prospect.org/weblog/archives/2004/10/index.html#004373> (Oct. 12, 2004, 12:10 EDT).

124. See, e.g., posting of Stevie Diaries to Daily Kos, <http://abe.dailykos.com/story/2004/10/11/214450/32> (Oct. 11, 2004, 07:44 PDT).

125. Wasting corporate resources would be an agency cost between the agent (executive) and principal (shareholder). This argument actually conflicted with the participants' other argument that a Bush presidency would provide Sinclair with profits because Bush could relax ownership limits constraining Sinclair.

126. See, e.g., Marshall, A Suggestion from a Reader, *supra* note 79.

makers for copyright infringement.<sup>127</sup> Despite blog discussion, the participants themselves largely did not implement these legal actions.

### 7. Other Actions—Taken or Proposed

Commenters suggested filing an FCC or FEC action,<sup>128</sup> finding volunteer lawyers “with connections” to get local injunctions based somehow on election law,<sup>129</sup> filing suits for false advertising (for calling the documentary “news”),<sup>130</sup> canvassing during the documentary to hand out leaflets and to discuss the stunt,<sup>131</sup> complaining to the television networks (ABC, NBC, WB, or CBS) about being unable to watch the preempted shows,<sup>132</sup> using public access channels to show counterpoints (perhaps successful in some areas),<sup>133</sup> organizing a student protest at a Sinclair station,<sup>134</sup> working with “well-established” Democratic-leaning advocacy groups like MoveOn.org (itself young) and unions,<sup>135</sup> and boycotting every Sinclair station during sweeps week to hurt their ratings. One group formed the blog “Taco Eaters For Truth,” with the goal of boycotting one large advertiser for one hour, including physical picketing outside their stores for that hour, to send a signal.<sup>136</sup> Other participants took to attacking media outlets: a liberal group argued that CNN was unfairly presenting only Sinclair’s side of the controversy.<sup>137</sup>

127. Sinclair Broadcast Group, DKOSOPEDIA, *supra* note 12 (listing the FCC regulations at issue).

128. See, e.g., Posting of Duckman GR to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 10:38 EDT); posting of Carleen to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 12, 2004, 14:18 EDT).

129. Posting of Dusty to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 12:00 EDT).

130. Posting of Bz to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 12:09 EDT).

131. Posting of Gogaddy to Daily Kos, <http://www.dailykos.com/story/2004/10/12/121355/52> (Oct. 12, 2004, 16:03 PDT).

132. Posting of J Mid to Daily Kos, <http://www.dailykos.com/story/2004/10/11/163831/07> (Oct. 12, 2004, 17:55 PDT).

133. Press Release, Media Alliance, Area Cable Access Stations to Show “Hijacking Catastrophe” as Counterpoint to KOVR’s Anti-Kerry “News Special” (Oct. 20, 2004), <http://www.media-alliance.org/article.php?story=20041022102556478>.

134. Posting of NaomiHart to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 15:21 EDT). Soto responded with suggestions based on attracting media coverage.

135. See, e.g., James, *supra* note 91.

136. Boycott KFC/Taco Bell for One Hour, <http://yumboycott.blogspot.com> (last visited Nov. 15, 2005). This inspired little enthusiasm, perhaps because the advertiser was fairly arbitrarily chosen, not based on its particular badness.

137. *Media Critic*, *Heal Thyself*, MEDIA MATTERS, Oct. 12, 2004, <http://mediamatters.org/items/200410120009>.

Often, a user had an idea, but asked for feedback on how to implement the idea, drawing on the community's experience and thought.<sup>138</sup>

Inadvertently, the blogstorm also harmed Sinclair by slowing down access to its website. This stifled Sinclair's ability to respond through messages on its website, though Sinclair appeared slow to respond even without this slowdown.<sup>139</sup>

Some users hoped that insiders would work with them, perhaps overestimating the power of insiders. One user suggested that if one "courageous station manager would tell Sinclair to take a hike," it would embolden others and receive enough publicity to stop the stunt.<sup>140</sup> This did not happen, however. Sinclair's news manager in Washington, D.C. called Sinclair's stunt "indefensible"; Sinclair promptly fired him and the press promptly covered it.<sup>141</sup> This seemed not to have much effect, especially compared to other parts of the blogstorm.

Finally, a few users were reluctant to take action. They feared their actions could backfire, or that Karl Rove, Bush's campaign architect whom many Democrats assumed had almost superhuman powers,<sup>142</sup> was setting a trap for them all: "Are we just doing what Rove wants?"<sup>143</sup>

#### F. Victory

From the time the story broke to the proposed stunt, the blogstorm could last only two business weeks, from October 11 to October 22. It effectively lasted only one and a half weeks, and it even appeared to lose vigor after only its third day.<sup>144</sup>

In this brief time, fueled by participant feedback, the blogstorm saw concrete incremental results. Advertiser pull-outs, especially those of

138. See NaomiHart, *supra* note 134.

139. Posting of InternetJunkie to AI Franken Blog, <http://airamericaradio.com/weblogs/sowhatelseisnews/index.php/franken/comments/1916/> (Oct. 12, 2004, 13:04 EDT).

140. Posting of Peter Jung to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 12:27 EDT).

141. See, e.g., Howard Kurtz, *Sinclair Fires Critic of Plan to Broadcast Anti-Kerry Film*, WASH. POST, Oct. 19, 2004, at C1, available at <http://www.washingtonpost.com/wp-dyn/articles/A43681-2004Oct18.html> ("The Washington bureau chief of Sinclair Broadcast Group was fired yesterday after accusing the media company of 'indefensible' conduct for planning to air a movie attacking Sen. John Kerry's Vietnam record in the coming days."); *Sinclair Fires Reporter For Criticizing Anti-Kerry Program*, CNN.COM, Oct. 19, 2004, <http://www.cnn.com/2004/ALLPOLITICS/10/19/sinclair.kerry/>.

142. Maureen Dowd, *Desperate Democrats Fixate On Conspiracies*, INT'L HERALD TRIB., Sept. 17, 2004, at 7.

143. Posting of Alan S to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 18:55 EDT).

144. Kynn123, *supra* note 91.

well-recognized advertisers, and stock drops were easily quantifiable measures of success. On October 20, Burger King announced it would pull its advertising for the day of the broadcast, the 22nd, and bloggers celebrated.<sup>145</sup>

On Wednesday, October 19, two days before the stunt and a day after New York's Comptroller sent his pointed letter, a shareholder action commenced. A shareholder made a demand at 10 am. Media Matters For America underwrote the costs of the action, and it paired up with the institutional investor Glickenhau & Co., a 43 year-old registered investment advisor with over \$700 million under management and the owner of 6,100 shares of Sinclair stock. The CEO of Glickenhau explained that he was not partisan; he just cared about shareholder value, and Sinclair's stunt hurt value.<sup>146</sup>

Glickenhau sent a demand letter to the CEO of Sinclair recounting some "alarm[ing]" facts: Congresspersons had requested an inquiry, market analysts downgraded the stock out of fears the licenses may not be renewed (especially if Bush lost), the stock price had fallen, advertisers had pulled advertising, and Sinclair's reputation was harmed among both the public and advertisers. The letter also quoted Lehman Brothers, which had reported that Sinclair "has previously put the interests of management ahead of the shareholders." The letter asked Sinclair to rectify the situation: should its management persist in airing *Stolen Honor*, it had to provide equal access for opposing views, in terms of an equal time amount and equivalent time of day.<sup>147</sup> That day, the volume of Sinclair's stock purchases and sales doubled from its already high level. The price continued to fall.<sup>148</sup>

Later that same day, Sinclair issued a press release saying it would not air *Stolen Honor* but instead would air a special on political media bias on television and the use of documentaries. The press release suggested Sinclair would accuse other news organizations of partisan bias (liberal) for not promoting certain anti-Kerry stories.<sup>149</sup> Sinclair's lawyer

145. In addition, Al Franken, on liberal Air America Radio, ate a Burger King Whopper during the show in appreciation. He noted, however, if Burger King had pulled its advertising from Sinclair *indefinitely*, he would have said how good the burger tasted on the air. *The Al Franken Show* (Air America Radio broadcast Oct. 22, 2004).

146. *Media Matters For America Underwrites Sinclair Broadcast Group Shareholder Demand*, *supra* note 44.

147. Letter from James M. Glickenhau, partner of Glickenhau & Co., to David Smith, Chief Executive Officer for Sinclair Broadcast Group (Oct. 19, 2004), *available at* [http://mediamatters.org/static/pdf/sinclair\\_demand\\_letter.pdf](http://mediamatters.org/static/pdf/sinclair_demand_letter.pdf).

148. *See* Table 1, *supra* at 21.

149. *See* PRNewswire, *supra* note 111.

stated that the blogstorm controversy did not affect Sinclair's decision,<sup>150</sup> although the participants did not believe this.

Sinclair's statement caused utter confusion in the blogstorm. Although some in the press considered it "a surprising cave-in,"<sup>151</sup> most participants did not. They read Sinclair's statement not as victory but as deception: "Put simply, this isn't over. . . . Sinclair made a largely cosmetic retreat."<sup>152</sup> A Sinclair employee wrote to BoycottSBG.com with the same message,<sup>153</sup> as did others.<sup>154</sup>

But the blogstorm died almost immediately without any deliberate coordination.

After the broadcast, the surprised blogosphere claimed near total victory. BoycottSBG.com announced, "It's Official, We've Won!"<sup>155</sup> It praised the blogstorm's collective power: "We changed this program. We made a difference. We, quite possibly, changed the outcome of this election. Let us also not forget the power that we, collectively, have in this country."<sup>156</sup>

### G. Dissolution

Some who also declared victory called the blogstorm only one battle in a larger war against media consolidation.<sup>157</sup> This larger war was not immediately taken up. The blogstorm created no permanent institution.<sup>158</sup>

150. Frank Ahrens & Howard Kurtz, *Anti-Kerry Film Won't Be Aired*, WASH. POST, Oct. 20, 2004, at A7, [http://www.washingtonpost.com/wp-dyn/articles/A46338-2004Oct19.html?nav=most\\_emaild](http://www.washingtonpost.com/wp-dyn/articles/A46338-2004Oct19.html?nav=most_emaild) ("We did not and do not make programming decisions because of political pressure.") (quoting Sinclair's lawyer).

151. *Id.* (quoting Andrew Schwartzman, of the public interest communications law firm Media Access Project).

152. Posting of Josh Marshall to Talking Points Memo, [http://www.talkingpointsmemo.com/archives/week\\_2004\\_10\\_17.php](http://www.talkingpointsmemo.com/archives/week_2004_10_17.php) (Oct. 17, 2004, 22:10 EDT); see also Mike Yedinak, *supra* note 34; posting of BriVT to Daily Kos, <http://www.dailykos.com/story/2004/10/19/185722/64> (Oct. 19, 2004, 16:47 PDT).

153. See Nick, Letter Received from SBG Employee, *supra* note 84.

154. A Kos diarist wrote, "Sorry for another Sinclair diary . . . ok, I'm not. See, almost everyone is missing the point here. Sinclair has not changed its position one bit." BriVT, *supra* note 152.

155. Posting of Nick to Boycott Sinclair Broadcast Group, <http://www.boycottsbg.com/2004/10/its-official-weve-won.htm> (Oct. 22, 2004, 20:11 EDT).

156. *Id.*

157. See, e.g., posting of Kos to Daily Kos, <http://www.dailykos.com/story/2004/10/23/143857/06> (Oct. 23, 2004, 12:38 PDT) [hereinafter Kos, Sinclair].

158. After a few weeks, a minor organization did continue, through existing liberal groups, leading to at least one advertiser withdrawal. See, e.g., posting of Evan to Alternet, <http://www.alternet.org/mediaculture/2005/01/002799.html> (Jan. 5, 2005, 08:29 EDT). Even this sparked controversy, as that advertiser appeared to deny having withdrawn. See letter from David Brock, President of Media Matters for America, to Ron Sargent, Chief Executive Offi-

The owner of BoycottSBG.com, mistaking the short-term burst for long-term interest, announced a “permanent” “SinclairPatrol.” It received almost no support. A few days after the relatively balanced show aired, on November 1, BoycottSBG.com announced that SinclairPatrol’s launch would be delayed, in part because “[T]raffic to this site has hit all new lows . . . [And] [d]onations . . . have been equally bad. This reiterates to me that people are now complacent that Sinclair did not air *Stolen Honor*.”<sup>159</sup>

Indeed, the participants did nothing to stop broadcast stations which, after the stunt, aired *Stolen Honor* anyway.<sup>160</sup> A conservative group paid national and local networks, including Pax, to air *Stolen Honor* several times a day the weekend right before the election.<sup>161</sup> Participants assumed that payment made it acceptable; the owner of BoycottSBG.com equated “legit[imacy]” with legality: “I’m not a lawyer, but since NewsMax is paying for the time, as long as equal time is made available for the other side at the same price, then it seems legit.”<sup>162</sup>

At the same time, the participants, wherever they were, ignored a similar move by another company. A California broadcaster, Pappas, announced it would donate \$325,000 of free air time to the Republican party. This generated almost no blog interest; nobody added a single advertiser to the Pappas advertising database set up by the owner of BoycottSBG.com.<sup>163</sup> Meanwhile, however, the FCC surprised Pappas by requiring it to provide equal time to Democrats. Pappas’s spokesperson said the FCC’s decision “directly contradicts advice we were given by

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cer for Staples, Inc. (Jan. 7, 2005), available at [http://sinclairaction.com/press\\_releases/4.html](http://sinclairaction.com/press_releases/4.html).

159. Posting of Nick to Boycott Sinclair Broadcast Group, <http://www.boycottsbg.com/2004/11/sinclairpatrol-launch-delayed.htm> (Nov. 1, 2004, 10:26 EDT).

160. Posting of Nick to Boycott Sinclair Broadcast Group, <http://www.boycottsbg.com/2004/10/sinclair-airing-stolen-honor.htm> (Oct. 31, 10:06 EDT) [hereinafter Nick, Sinclair Airing *Stolen Honor*] (assuming it was Sinclair not Pax); see also Elizabeth Dwoskin, *Don't Stop Speaking Out Against Sinclair!*, UTNE.COM, Oct. 21, 2004, [http://www.utne.com/webwatch/2004\\_171/news/11415-1.html](http://www.utne.com/webwatch/2004_171/news/11415-1.html) (encouraging users to continue fighting Sinclair); Free Press, *Stop Sinclair*, *supra* note 33 (including links to continue fighting Sinclair).

161. See *DISH Network Air "Stolen Honor"*, NEWSMAX.COM, Oct. 31, 2004, <http://www.newsmax.com/archives/articles/2004/10/30/193750.shtml>.

162. Nick, Sinclair Airing *Stolen Honor*, *supra* note 160.

163. Pappas Advertiser Boycott, <http://www.boycottsbg.com/pappas/> (last visited Nov. 13, 2005).

[the] FCC.”<sup>164</sup> This ruling led participants to believe that perhaps their previous effort on Sinclair had cast a shadow.<sup>165</sup>

After the stunt, Sinclair tried to spin its actions in a positive light. It claimed its “news special” was hugely profitable, because new advertisers supported it.<sup>166</sup> It cast its special as a commentary on liberal media bias. Even weeks after the show, its website’s initial page prominently discussed the special and emphasized that all viewpoints were presented and the Kerry campaign cooperated.<sup>167</sup> Perhaps understanding the power that comments to the government regulator could have, it ended: “To voice your support to the FCC for Sinclair’s broadcast of ‘A P.O.W. Story.’ Click Here.”<sup>168</sup>

### III. WHAT KIND OF PRIVATE REGULATION?

The Sinclair episode shows that, in addition to its other effects, the internet can permit unaffiliated citizens to work together instantly to respond to perceived norms-violations when government does not.<sup>169</sup>

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164. Jennifer M. Fitzenberger, *FCC Rules in Favor of Equal Airtime*, FRESNO BEE, Oct. 30, 2004, at A1, available at <http://www.fresnobee.com/local/story/9356548p-10263362c.html>.

165. Posting of Nick to Boycott Sinclair Broadcast Group, <http://www.boycottsbg.com/2004/10/fcc-rules-against-pappas.htm> (Oct. 30, 2004, 09:08 EDT).

166. Michael Learmonth, *Sinclair Plots Docs: Broadcaster Planning More Political Programs*, DAILY VARIETY, Nov. 5, 2004, at 6, available at [http://www.variety.com/index.asp?layout=upsell\\_article&articleID=VR1117913027&categoryID=14&claims=1](http://www.variety.com/index.asp?layout=upsell_article&articleID=VR1117913027&categoryID=14&claims=1).

167. Sinclair Broadcasting, <http://www.sbg.net/> (last visited Nov. 15, 2005). On November 10, 2004, the statement read:

We welcome your comments regarding the special news event “A POW Story: Politics, Pressure and the Media,” Sinclair’s third news special of 2004. The program aired on 40 television stations around the country on Friday, October 22, 2004. The program dealt with a variety of topics including the allegations made by 13 American POWs – including two Medal of Honor winners – about their captivity in North Vietnam. All viewpoints were included in this documentary.

We would like to thank the Kerry Campaign for its participation during the private discussions that took place over a period of weeks. Through the recommendations of senior Kerry Campaign officials, several people closely allied with Senator John Kerry, including his close friend of 40-years and his co-editor of “The New Soldier,” George Butler, participated in the news special.

168. *Id.*

169. There was still an aspect, of course, of thwarting government. The users blamed government deregulatory moves (many of which were signed by Bill Clinton) for Sinclair’s power, and believed that Sinclair was attempting to curry favor with the ruling government. Nonetheless, the blogstorm focused on a private entity and the government’s failure to address the private entity, in the name of fairness, justice, regulation, or public interest.

Although the participants used some existing private regulatory tools to perform an existing activity, the internet transformed the use and nature of these tools and the activity by lowering the costs of organization. It permitted unaffiliated volunteers to perform actions that usually had required some level of government.

### A. Acting Self-Consciously as Regulators

Regulation encompasses actions such as the blogstorm. “Regulation” has many meanings,<sup>170</sup> and can cover “almost any external control of business.”<sup>171</sup> Though some use the term to cover instruments of public law enforced by government,<sup>172</sup> more “[b]roadly speaking,” regulation “includes the creation of norms, detection of violations of those norms, and enforcement of the norms on the detected violators.”<sup>173</sup> Non-governmental regulation is common; Lawrence Lessig argues that “[b]ehavior is regulated by four types of constraint. Law is just one of those constraints,” while the other three are norms, markets, and architecture.<sup>174</sup> Many different parties can regulate, including governments, trade associations (which, like the National Association of Broadcasters, can adopt codes of conduct<sup>175</sup>), informal regulators (like social networks), and the parties themselves (self-regulation).<sup>176</sup> Much regulation involves both public and private actors, including industry representatives, “agency regulators, . . . congressional experts[,] . . . public interest groups, citizen advocacy organizations, and even academics.”<sup>177</sup>

The blogstorm was an informal regulator, using markets and norms. It had different tools than social networks of the past, which often relied merely on word of mouth, gossip, or other information campaigns.<sup>178</sup> The

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170. STEPHEN G. BREYER, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 4 (4th ed. 1999).

171. Anthony I. Ogus, *Introduction*, in *REGULATION, ECONOMICS, AND THE LAW* ix (Anthony I. Ogus ed., 2001) [hereinafter *REGULATION, ECONOMICS, AND THE LAW*].

172. *Id.*

173. Aviram, *supra* note 64, at 1180 n.1.

174. Lawrence Lessig, *The New Chicago School*, 27 *J. LEGAL STUD.* 661, 662 (1998), available at <http://www.lessig.org/content/articles/works/LessigNewchicschool.pdf>.

175. See, e.g., T. BARTON CARTER ET. AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 343–44 (5th ed. 1999) (discussing NAB code limitations on advertising).

176. For a discussion of self-regulation and the mass media, see Angela J. Campbell, *Self-Regulation and the Media*, 51 *FED. COMM. L.J.* 711 (1999).

177. See LORI A. BRAINARD, *TELEVISION: THE LIMITS OF DEREGULATION* 6 (2003).

178. Scholars have delineated five types of regulation to enforce transactions, which may be helpful to consider here. First, first-party regulation is self-regulation, where a party conforms its own behavior to norms. Second, second-party regulation is where the parties to a transaction force each other to conform to norms. Third, government regulation relies on government. Fourth, informal regulators (like social gossip networks) use information and



participants clearly tried to impose external controls on a business, and were detecting and punishing norms-violations—including media, election, and corporate norms. To succeed, the regulation involved many parties, including some public officials—like senators and state pension managers—and private individuals—like citizen journalists, lawyers, liberal groups, institutional investors, small investors on electronic bulletin boards, and local and national advertisers.

Not only does regulation encompass blogstorm activities, the participants consciously considered themselves to be acting as regulators. They believed they were enforcing actual FCC or FEC regulations. Indeed, the participants *began* by petitioning these agencies and turned to the blogstorm merely as a second-best alternative.

As a result, many of the participants' motivations reflected traditional regulatory motivations. First, the most usually cited motivation for traditional regulation is market failure.<sup>179</sup> Market failure is where the free market "fails" to produce maximum social benefit or to provide certain socially valuable goods or services.<sup>180</sup> The blogstorm participants were motivated by perceptions of several common market failures. Foremost was Sinclair's market power. Competitors' market power can undermine competition by extracting monopolistic profits, including non-monetary profits such as political influence.<sup>181</sup> The participants framed Sinclair's stunt as deriving from media deregulation that permitted too few companies to control too many outlets and, hence, to have market power. This was less a researched theory of economic markets than an abstract perception of speech markets. The participants believed Sinclair was monopolistically extracting political power to augment its ability to

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switching mechanisms, spreading information and transacting with others, to help enforce transactions. Fifth, organizational regulators (like trade associations) rely on information and switching, as well as exclusion and control mechanisms. See Aviram, *supra* note 64, at 1190 n.31.

179. See, e.g., Joseph E. Stiglitz, Nobel Prize Lecture: Information and the Change in the Paradigm in Economics (Dec. 8, 2001), <http://nobelprize.org/economics/laureates/2001/stiglitz-lecture.pdf> (discussing how information effects undermine many free market predictions).

180. This can happen when the conditions of a "free market" are absent. See Avery Wiener Katz, *Notes*, in FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 36, 39–40 (Avery Wiener Katz, ed., 1998) (and sources cited therein) [hereinafter FOUNDATIONS]; Harold Demsetz, *When Does the Rule of Liability Matter?*, in FOUNDATIONS, 80, 80–81.

181. The conditions that the government imposes on broadcast licensees can be an example of a monopolistic government extraction of non-monetary profits through content regulation.

lobby for more media deregulation (which would lead eventually to increased profits).<sup>182</sup>

A second market failure that often inspires regulation, and inspired the blogstorm, is inadequate or imperfect information. An individual may not have enough information to make a decision that would benefit that individual in a free market. In such situations, regulators may require private parties to supply information, may supply information themselves, or may take other actions such as banning a product.<sup>183</sup> Here, in part because Sinclair was a media company, the participants believed that *Stolen Honor's* consumers would have inadequate information of the opposing viewpoints. In addition, consumers might lack other information the participants considered relevant, such as Sinclair's Republican connections and the documentary-makers' associations.

A third market failure that influenced the participants centered on their perception that the Sinclair stunt would create negative externalities. One party's action is said (somewhat inaccurately)<sup>184</sup> to create an externality when it affects the well-being of another person with whom that party is not transacting. The participants believed the Sinclair stunt would create harmful externalities—misinformed fellow-citizens and a possible Bush reelection. They saw this as a major harm to them and to others.

Besides market-failure rationales, other motivations for regulation were present among the participants. One motivation includes "collective aspirations." Cass Sunstein explains that people often want quality newscasts on television even if their own consumption patterns favor sitcoms; they often favor laws to help the poor even if they do not themselves give to the poor.<sup>185</sup> With Sinclair's stunt, the participants' (and maybe the country's) collective aspiration reflected having truthful, unbiased reporting—even if many people's consumption patterns favor allegedly biased discussion, like Fox News or Air America Radio.

The participants determined to regulate Sinclair's behavior not only because of market failure but also because of government failure. Government failure exists where government action or inaction fails to provide the most desirable group outcome. Governments fail because of

182. For example, in announcing victory, Moulitsas wrote: "The best part of the Sinclair boycott . . . was clearly illustrating the [market power] dangers of media consolidation." Kos, Sinclair, *supra* note 157.

183. See BREYER, *supra* note 170, at 6–7.

184. See *id.*, at 7 (the "problem [of an externality] results from a large number of acts and omissions on both sides").

185. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 57–59 (1990).

officials' incompetence (necessary lack of complete information or ability) or agency costs (maximizing officials' own self-interest over public's interest). A commonly cited government failure is "regulatory capture," where a public regulator becomes "captured" or controlled by the parties it nominally regulates. The parties capture government through controlling information to the agency (exploiting incompetence) and providing officials with individual benefits for protecting the parties' interests (exploiting agency costs—costs resulting from a misalignment of the incentives of an agent and its principal).<sup>186</sup> The participants turned to the FCC first, as well as to senators and congressmen.<sup>187</sup> The participants failed at convincing the FCC or Congress, and were predisposed to believe the large media companies had already captured the FCC. Since the public regulator failed to correct the problem, the participants perceived a government failure. They turned instead to private regulation.

### B. *Organizational Differences Between Internet-Enabled Private Regulation and Traditional Advocacy Regulation*

Before the internet, many private groups attempted to police norms-violations but had different organizational structures than a blogstorm. The organizations that most closely share the Sinclair blogstorm's goals are traditional advocacy groups working on media issues, so they provide the most apt comparison.<sup>188</sup> Like a blogstorm, many traditional advocacy groups consider themselves regulatory organizations.<sup>189</sup> One group, the American Family Association (AFA), provides tools on its website to help individuals get existing community laws enforced.<sup>190</sup> A few weeks after the Sinclair stunt, the AFA pressured 66 ABC affiliates

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186. See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). The benefit is often a well-paying private lobbying position.

187. The rise of ad hoc lobbying deserves its own discussion in another work. It can stiffen backbones and change minds. Changes in media have historically resulted in more participatory lobbying. See DENNIS W. JOHNSON, CONGRESS ONLINE 35, 45, 55, 59 (2004). For example, talk radio encouraged millions of letters to Congress in 1939, over the repeal of the 1937 Neutrality Act. *Id.* at 3.

188. For an excellent study on media-activist groups and their significance, see MILTON MUELLER ET AL., REINVENTING MEDIA ACTIVISM: PUBLIC INTEREST ADVOCACY IN THE MAKING OF U.S. COMMUNICATION INFORMATION POLICY, 1960–2002 (2004), <http://dcc.syr.edu/dord/rma/reinventing.pdf>.

189. A vast literature addresses the relationship between interest groups and governance. See, e.g., JEFFERY M. BERRY, THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUP (1999); INTEREST GROUP POLITICS (Allan J. Cigler & Burdett A. Loomis eds., 5th ed. 1998); NORMAN J. ORNSTEIN & SHIRLEY ELDER, INTERNET GROUPS, LOBBYING AND POLICYMAKING (1978).

190. See, e.g., *Steps to Take to Get Your Community's Laws Enforced*, AMERICA FAMILY FOUNDATION, <http://www.afa.net/pornography/stepstoole.pdf> (last visited Nov. 15, 2005).

not to air *Saving Private Ryan* on primetime,<sup>191</sup> claiming the AFA was enforcing indecency regulations. Even after the film's broadcast, the AFA filed FCC complaints against ABC.<sup>192</sup> Two weeks later, groups targeted ABC's show *Desperate Housewives* for its alleged indecency.<sup>193</sup> Also like a blogstorm, these groups are often effective. The AFA's campaign against *Saving Private Ryan* was "successful": both Sinclair and Pappas refused to run the movie, and Pappas described its preemption as a civic duty.<sup>194</sup>

Internet-enabled regulation has obvious organizational differences with advocacy groups. Advocacy groups rely on hierarchical decision-making. The AFA has opposed profanity and indecency on television since 1977. It is incorporated as a non-profit 501(c)(3) organization, and it has built up expertise and, to some, credibility since the 1970s. Its leader has been a frequent guest on television, and it has been involved in a wide-range of campaigns, such as supporting Alabama judge Roy Moore's refusal to remove the Ten Commandments from his courtroom, exposing the National Endowment for the Arts's "abuse" of tax dollars, and pressuring federal prisons into removing porn magazines from their commissaries.<sup>195</sup> Although the AFA's website has "Action Tools" for activism, the group has existed as a nonprofit corporation, and its organization is top-down. Another group, the Parents Television Council (PTC), has a million members, and may file a majority of the FCC's complaints.<sup>196</sup> The PTC understands that "online activism is the future" and points to activism software like Capwiz,<sup>197</sup> but its campaigns are still more top-down than the Sinclair blogstorm.

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191. See Frank Rich, *Bono's New Casualty: "Private Ryan,"* N.Y. TIMES, Nov. 21, 2004, § 2, at 1, available at <http://www.nytimes.com/2004/11/21/arts/21rich.html>.

192. *Action Alert: File an indecency complaint against ABC for 'f' word and 's' word,* AMERICA FAMILY FOUNDATION, <http://www.afa.net/activism/IssueDetail.asp?id=135> (last visited Nov. 15, 2005).

193. See, e.g., *id.*

194. Other companies claimed to preempt the movie out of fear, saying "they were afraid to run the movie because the expletive uttered by Vice President Cheney on the floor of the Senate back in June is heard many times in the movie." Lisa de Moraes, *Where Aired, "Private Ryan" Draws a Crowd,* WASH. POST, Nov. 13, 2004, at C1, available at <http://www.washingtonpost.com/wp-dyn/articles/A46922-2004Nov12.html>.

195. America Family Association, About Us, <http://www.afa.net/about.asp> (last visited Nov. 15, 2005).

196. See Parents Television Council in the News, <http://www.parentstv.org/PTC/news/main.asp> (last visited Nov. 15, 2005).

197. See Capitol Advantage—Online, Capwiz, <http://capitoladvantage.com/online.html> (last visited Nov. 23, 2004).

### 1. Nature of the Firm—Neither Market nor Hierarchy

Unlike traditional advocacy groups, the Sinclair blogstorm was not organized through markets or hierarchy.<sup>198</sup> In a classic article published in 1937, Ronald Coase argued that individuals can organize interactions through the market, with contracts, or through hierarchy.<sup>199</sup> He argued that individuals choose the more profitable organization—that is, all else equal, the one that minimizes organization costs. Since there are costs to contracts and to hierarchy, choosing between the two in different situations is an empirical question. Recently, Yochai Benkler has argued that the internet permits a third model of production, ad hoc volunteerism, apparent in producing open source software.<sup>200</sup> The blogstorm took this form.

The blogstorm participants did not choose organization through the market. Despite thousands of user suggestions, not one proposed devising property and contract rights to provide incentives or certainty to users. Establishing markets would have had far higher costs than potential benefits—for example, to delineate rights for a secondary market in the users' excess labor capacity. Instead of writing contracts and negotiating miniscule pay from a nonexistent fund, the users devoted resources to the immediate tasks of writing sample letters for others to use and calling advertisers. In addition, proposing property rights likely would have violated group norms for bloggers, who are generally unpaid except through tip jars and advertising.<sup>201</sup>

The participants also did not choose hierarchy. Nobody gave orders, and nobody took orders. Participants relied on persuasion, not perceived authority.<sup>202</sup> Indeed, participants acknowledged that anyone could persuade them, regardless of community status; bloggers like Josh Marshall invited users to provide expertise. It was through persuasion, not authority, that users joined the blogstorm and chose certain activities within it, having determined these activities were more worthwhile than, for example, reading, posting, or watching football.

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198. Although markets, hierarchy, and volunteer collaboration are all present in many firms, industries, and traditional private-regulatory groups, the blogstorm relied on volunteer collaboration more than other forms of organization generally do. Whether or not the difference is in degree or in kind, there is at least a large difference in degree between the blogstorm and the AFA.

199. Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390–97 (1937).

200. Benkler, *Linux*, *supra* note 2.

201. See DAN GILLMOR, *WE THE MEDIA* 152 (2004).

202. As Howard Rheingold said of the World Wide Web itself, the blog spread “by infection, not fiat.” RHEINGOLD, *supra* note 24, at 52.

In addition, outside the blogstorm, the participants did not turn to any established, largely hierarchical, organizations for guidance or commands. Participants largely ignored official responses, either because they could not or did not want to help with them. They could not help with some official responses, like the DNC's complaint to the FEC or the letter from 19 Democratic Senators to the FCC.<sup>203</sup> They did not want to help with the other official responses, feeling their responses would not be effective. Most of the official groups merely suggested that users contact a powerful person and express disapproval. Air America Radio, for example, posted some suggestions,<sup>204</sup> including asking Senator John McCain to criticize *Stolen Honor*, as he had previously criticized the Swiftboat Veterans' advertisements and the decision to preempt *Nightline's* special.<sup>205</sup> But the participants were not persuaded that the Senator's previous criticisms had been effective, that new criticism would be effective, or that the participants would even be able to encourage this possibly ineffective action.<sup>206</sup> Air America also suggested contacting FCC commissioners, based on Hundt's suggestion, though the participants believed the FCC would not help.<sup>207</sup>

Not only were the participants unpersuaded about the effectiveness of official responses, they were unpersuaded these responses best used all of the participants' capacity.<sup>208</sup> The participants could do more than email a senator. The DNC merely provided a small platform for citizen action, announcing it would "Stop the Right-Wing Smears Against John Kerry" by asking users to add their names to an online petition directed to Sinclair (and likely also the FCC), and announced users could "Do More" by telling others about the *petition* only, taking "action" on *other* issues, or giving money to the DNC.<sup>209</sup> The bloggers had far more capacity than signatures and donations, and they did not feel the signatures effective. Apparently the DNC's best move was pointing to BoycottSBG.com

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203. See Kurtz & Ahrens, *supra* note 16; Elizabeth Jensen & Stephen Braun, *Democrats Attack Plan for Anti-Kerry Broadcast*, L.A. TIMES, Oct. 12, 2004, at A20; Press Release, Diane Feinstein, 19 Senators Seek FCC Investigation of Reported Plans by TV Group to Air Anti-Kerry Film (Oct. 11, 2004), <http://feinstein.senate.gov/04Releases/r-19sinclair.pdf>.

204. Rob Mackey, *supra* note 45.

205. Conason, *supra* note 21; McCain Rebukes Sinclair "Nightline" Decision, *supra* note 14.

206. Posting of Actor212 to Al Franken Blog, <http://shows.airamericaradio.com/alfrankenshow/node/1916#comment> (Oct. 12, 2004, 12:52 EDT) (suggesting in rude terms that McCain lacked the courage to stand up to Bush).

207. See, e.g., Marshall, From a Reader, *supra* note 87.

208. Kurtz & Ahrens, *supra* note 16.

209. Take Action, *supra* note 114.

without doing more. Because the DNC pointed to the site, mainstream media outlets considered it to have legitimacy.<sup>210</sup>

The only authority that may have affected the participants' acts was Reed Hundt's.<sup>211</sup> Hundt's analysis solidified the idea that Sinclair was violating communications policy, but his analysis was more persuasion than authority, in long detailed letters by a retired official. In addition, he did not give specific orders to participants. He suggested pressure on Sinclair including "all lawful ways that can be imagined," but did not imagine the ways for the participants.<sup>212</sup>

Moreover, no official hierarchical organization would have had the resources to direct the blogstorm through authority. The DNC, for example, did not and could not expend the resources to coordinate, through fiat or market, all the actions the participants eventually took. The costs would have been far too high for decision-making, identification of talent, allocation, and coordination.<sup>213</sup>

## 2. Problem of Social Cost—Neither Government nor Bargaining

The participants turned neither to government regulation, nor to private bargaining, but to collective private pressure. They perceived Sinclair to harm them. Parties often benefit or harm those with whom they are not transacting. This often can make the group, including the transacting and affected individuals, worse off. For example, individuals may pollute a common field without compensating or transacting with others who use the field, thus harming the others.<sup>214</sup> In the early twentieth-century, the economist A.C. Pigou referred to activities affecting others as an externality, a kind of market failure, and argued that government regulation is appropriate to correct the externality through taxes and subsidies.<sup>215</sup>

There are two relevant problems with Pigou's reasoning. First, it ignores government failures. Government can fail to act or can improperly target taxes and subsidies. Second, Pigou's formulation ignores why the parties harming one another are *not* transacting. In another classic arti-

210. Davis, Email, *supra* note 71.

211. Reed Hundt, Letter, *supra* note 66.

212. *Id.*

213. Cf. Benkler, *Linux*, *supra* note 2, at 410–26.

214. An individual could also provide positive externalities to others with whom she is not transacting; if the others do not compensate the individual, this harms the group because the individual has less incentive to create the positive externalities, so they will be underproduced.

215. See Katz, *Two Competing Economic Models of Law*, in FOUNDATIONS, *supra* note 180, at 41, 42.

cle, Ronald Coase argued that government regulation is not a cure-all in such situations.<sup>216</sup> Instead, private bargaining provides another method for dealing with the problems of arranging social affairs. If the costs of transacting among all affected are low or nonexistent, then the parties can come together and bargain for the group's best outcome. The costs of transacting, however, are often high.<sup>217</sup> For example, those uncompensated by a common field's pollution would benefit from collective action; they could come together to reach a bargain with the polluters or to become a firm with the polluter that manages the field. The costs of coming together, however, may outweigh the benefit, especially if the problem involves a large group of people with large costs of transacting, all with small harms. In such cases, the large group may turn to government as an alternative, but government failures mean that government is not always effective in resolving such problems.<sup>218</sup>

The Sinclair blogstorm illustrates an alternative to private bargaining or government intervention likely not envisioned when Coase wrote his article. The effects of the Sinclair stunt are similar to the harms of an individual polluting a common field. A blogstorm enables those harmed to come together instantly to regulate the pollution, without government, even if they had not been previously organized. Going forward, perhaps, without any notice, unorganized communities could respond to industries moving into their areas; unorganized workers could organize across industry lines or national borders could organize around one issue; or minorities that are spread across continents could harness their collective power, and then disband.

### 3. Collective Action Problems and Blogstorm Organizational Structure

To regulate Sinclair's behavior, the participants were able to overcome several perceived or real collective action problems because of the internet's low transaction costs. The participants did not follow their independent self-interests but acted in the "larger" group's self-interest. The larger group could have included the participants, or liberals, or Democrats, or Americans. Collective action refers to situations where the

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216. Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

217. These would include monetary costs and information asymmetries, as well as cultural or language differences, a grudge, or a family feud.

218. Even "non-regulatory" proposals often require government action. See, e.g., Roger G. Noll, *Economic Perspectives on the Politics of Regulation*, in REGULATION, ECONOMICS, AND THE LAW, *supra* note 171, at 41.



efforts of two or more are necessary to achieve a certain outcome.<sup>219</sup> Predictions about the feasibility of collective action hinge on many factors.<sup>220</sup> Collective action problems happen when collective action is not possible, often due to the costs of coordination, and uncoordinated, self-interested actions lead to an undesirable group outcome. With the blogstorm, the users acted collectively to improve a group outcome, although all of them acting independently would not have had the incentive or the ability to change Sinclair's behavior.

Sinclair reflected several different perceived or real collective action problems. First, the blogstorm overcame collective action problems associated with providing a public good. Providing a public good is a variant of a problem called prisoner's dilemma. In the usual stylized example of this problem, each participant (a prisoner) is individually better off (a reduced sentence or some other benefit), no matter what the other participants (co-conspirators) do, performing or not performing the same action (confessing). But the sum of the individual outcomes would be highest if none in the group confesses. By performing the uncoordinated, self-interested acts, the sum of individual benefits would be lower than it would otherwise be if they could coordinate their actions.<sup>221</sup>

Producing a public good is a version of the prisoner's dilemma. A public good is a good that is nonexcludable and nonrival. Nonexcludable means one cannot exclude others from its benefit; nonrival means a person's consumption of the benefit does not diminish others' benefit. Common examples include lighthouses, clean air and other environmental goods, and information goods like music and art. As a result of being nonexcludable and nonrival, providing a public good without proper coordination suffers from lack of motivation. Someone bears costs to provide the good but cannot exclude others and reap profits from those who benefit. Unless the person's benefit to herself outweighs the costs, she has no incentive to produce the good. Her self-interest is most served by incurring no costs (not cleaning the air) and free-riding off the benefit when others create the public good (breathing anyway). Every member of the group is in this position, so, without coordination, the group will not create the good and collectively be worse off. With the blogstorm, participants wanted to "produce" the "public good" of Sinclair's balanced television programming or a Kerry election victory. To

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219. See TODD SANDLER, GLOBAL COLLECTIVE ACTION 17 (2004).

220. These include (1) group size, (2) group composition, (3) rules governing player interaction, (4) strategic nature of interaction (recurring or not), (5) players' information, and (6) sequence of interactions. *Id.* at 11.

221. SANDLER, *supra* note 219, at 23–25.

them, these were benefits others would have shared, without rivalry or exclusion.<sup>222</sup> As a result, each participant had an incentive *not* to act, and to free-ride off others, but collective action would have benefited the group.<sup>223</sup>

Second, the Sinclair blogstorm may have appeared to some participants to have overcome a related collective action problem, called “chicken.” Chicken envisions an impending harm to the whole group that a subset could deflect—like a coming flood. Unlike providing a public good, collective inaction leads to loss, not foregoing a benefit. Collective inaction harms each individual, but private inaction helps the particular individual. Free-riders would wait until other individuals “chicken out” to bear the costs, conferring a gain on all members.<sup>224</sup> If a blogstorm participant viewed the situation as chicken and not public

222. Peter Kollock, *The Economies of Online Cooperation: Gifts and Public Goods in Cyberspace*, in COMMUNITIES, *supra* note 25, at 220, 223 [hereinafter Kollock, *Economies of Online Cooperation*].

223. Another prisoner’s dilemma variation is managing common-pool resources. Although this variation is often both created and solved by the internet, the Sinclair blogstorm did not reflect it. Managing common-pool resources reflects the prisoner’s dilemma in a different way. While a public good is a good that is nonexcludable and nonrival, common-pool resources concerns situations where a good is nonexcludable but at least partially rival. One example is a common field for a group of cattle ranchers. The field is nonexcludable, but it is rival to the extent that consumption by some individuals decreases the benefit to others. Each is better off consuming as much as possible, but if each does so, the group is worse off by overconsuming the field, rendering it useless. With public goods, each individual is better off by doing nothing, but with common resources, each is better off by doing something. (For this distinction, I ignore any philosophical complexities of the omission/commission distinction. Cf. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).) Both acts hurt the group. SANDLER, *supra* note 219, at 24–27.

The blogstorm did not reflect managing a common resource, and so did not reflect many of the factors commonly associated with such management, especially how communities use reputation. Observers have emphasized that online collective action often involves managing public goods, *see* RHEINGOLD, *supra* note 24, at 35–37, and often involves contributors engaging in a “gift-economy,” *id.* at 172, sanctioning those who do not contribute, *id.* at 131, recognizing contributors at least through reputation, *id.* at 46; *see also* Kollock, *supra* note 222, at 235, establishing group boundaries that are “well-defined and defended,” Kollock, *supra* note 222, at 235, maintaining privacy for members, and providing in person meetings for members, CRUMLISH, *supra* note 36, at 66–69.

Reputation was conspicuously irrelevant. Individuals are more likely to contribute if their actions are public, not private, based on reputation. Kollock, *supra* note 222, at 233. This may be tied to reciprocity, as observers have noted those with online reputations to help others more quickly receive help. *Id.* at 227 (and citations therein). But with the blogstorm, activity was largely anonymous and private (calls to advertisers, posts on Yahoo! Finance, emails to Josh Marshall). Nor could the participants develop a reputation for ingenuity, as one could with developing free software. Most of the blogstorm tasks did not involve ingenuity or skill. Indeed, the most skillful individual advice was often anonymous, offered by those explaining merely that they worked in broadcasting and had friends, who could not be named, at Sinclair.

224. SANDLER, *supra* note 219, at 28–29.

good, she may have been more likely to contribute for non-rational reasons. Although there is a general social stigma against those who free-ride,<sup>225</sup> free-riding on chicken may appear more immoral than free-riding on public goods. In addition, individuals are psychologically more motivated to avoid suffering a harm (chicken) than to gain a new benefit (public good).<sup>226</sup> This would suggest individuals are more motivated to act in the chicken game than the public good scenario.

Third, another collective action problem that the Sinclair participants overcame is called assurance. In this problem, the contributions of an individual are wasted unless others also contribute, and then all contributors (and perhaps non-contributors) benefit.<sup>227</sup> If only two contributions are needed, one member can lead by contributing, thus putting another in a position where the other benefits by contributing. In other situations, many must contribute and incur a cost before they could enjoy a possible benefit to all. The Sinclair blogstorm could reflect this situation, as individual contributions would be wasted without the contributions of many others. Sinclair blogstorm participants needed to assure others through their own contributions.

Fourth, another collective action problem arises when redundancy makes the group worse off. If one individual (or subset) could supply the entire benefit to the group, there is a problem that many individuals or subsets may redundantly incur costs with no additional group benefit.<sup>228</sup> So Sinclair participants could have determined that others had already made effective letters to advertisers or that someone else would watch the local news and input advertisers. They would not want to waste their efforts. The Sinclair participants had to overcome this problem too; they did so in part by publicly reporting their actions.

On top of the different forms of problems, a group has to overcome these problems based in part on the available aggregation mechanisms.<sup>229</sup> The mechanisms determine how an individual's contribution affects the total contribution. First, the participants' acts can be summed, where each individual contribution adds to the whole. Second, the mechanism can be weighted-sum, where certain contributions are worth more than others. Both of these aggregation mechanisms were present for blogstorm activities. Contacting advertisers likely summed, while contributing legal

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225. RHEINGOLD, *supra* note 24, at 32–33 (and sources cited therein).

226. See Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, in FOUNDATIONS, *supra* note 180, at 304.

227. SANDLER, *supra* note 219, at 26–28.

228. *Id.* at 28 (calling this a coordination problem).

229. *Id.* at 60–68.

advice to advertisers was weighted for lawyers. Third, a collective can rely on “weakest link” aggregation, where the smallest contribution fixes the quantity of the public good for all. A usual example is collective security. An aspect of the blogstorm that had this quality was persuading advertisers. Participants stressed that callers be polite in calls to advertisers: even one rude participant could have undermined the others’ calls. Fourth, a collective can have best-shot aggregation, where the largest single provision level equals the level of the public good. With the blogstorm, broadcast veterans provided the “best-shot” advice on some strategy decisions.<sup>230</sup>

### C. Ad Hoc Collaboration

Because of low transaction costs on the internet, the Sinclair participants overcame the collective action problems they faced. Cheap communication and established communities enabled the participants to organize and plan quickly and effectively. Cheap communication also moved participants towards more effective and less costly action through feedback and sharing.<sup>231</sup>

#### 1. Cost-Structure

The internet lowers many individual costs. Although the blogstorm aimed not to produce information but to change a private party’s actions, its cost-structure mirrored those of peer-produced information for two reasons. Peer-produced information is information produced collectively, without property rights, such as at Wikipedia or with the code for Linux or Firefox.<sup>232</sup> First, the blogstorm similarly relied on a networked computer environment, human capital, and low communication costs.<sup>233</sup> Second, the blogstorm peer-produced information as part of its campaign, including

230. An additional component of aggregation is possible. Aggregation can be “threshold,” meaning whether acts are summed, weakest-link, or aggregated otherwise, the acts must meet a threshold level to have an effect. In part, the blogstorm had to meet a threshold or else the effort would have been wasted, though certain acts did have an independent effect (advertiser pullouts, decreased share price, etc.). *See id.* at 64–66.

231. *See* RHEINGOLD, *supra* note 24, at xviii; *id.* at 114 (asserting that agriculture, the alphabet, science, the nation-state, and the telegraph, like the internet, “enlarged the scale of cooperation”).

232. *See* Benkler, *Linux*, *supra* note 2.

233. *See id.* at 405–06. The Dean campaign’s followers similarly developed software in the process of campaigning for him. *See* CRUMLISH, *supra* note 36, at 24, 37–39.

regulatory strategy, an advertiser database, Yahoo! Finance and institutional investor information, and news analysis.<sup>234</sup>

The collaborating users could work together because the organization as a whole had low information, allocation, collaboration, and integration costs, and participants had low individual costs.

#### a. Information Costs

The internet provided low information costs. Participants could receive and produce high-quality information cheaply. Marginal production costs were low, as most participants produced information based on their experience, initial thoughts, responses, or Googling (all cheap and easy). Marginal distribution costs were also negligible—clicking on the word “post” or “send” is much less costly than, say, publishing, selling through bookstores, broadcasting, or arranging physical meetings.

The information was also of a high quality. Group information is often better than individual information, especially where the group can debate and draw on experts.<sup>235</sup> The internet made the production of group information much less costly, as many could analyze and contribute information through software.<sup>236</sup>

Participants had low search costs. Other than attention costs and a mouse click, they received information about the stunt and potential collaborators with no marginal costs. They also had low costs of advertising their own availability: no resumes, interviews, or commercials, just a click to post a comment. They had low processing costs, as the information came in usable form, requiring no special hardware or effort to understand.

Preexisting, though loose, associations also reduced the information costs of searching for collaborators.<sup>237</sup> Creating ties between two groups provides greater value more quickly than creating ties between individu-

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234. In addition, the blogs collaboratively created, accredited, and distributed the information. See, e.g., Caio M. S. Pereira Neto, *Online Collaborative Media and Political Economy of Information: A Case Study*, 21 J. MARSHALL J. OF COMPUTER & INFO. L. 515 (2003).

235. GILLMOR, *supra* note 201; cf. Thomas Jackson, *The Fresh-Start Policy in Bankruptcy Law*, in FOUNDATIONS, *supra* note 180, at 322 (discussing how individual risk-assessments are corrected through market aggregation).

236. RHEINGOLD, *supra* note 24, at 180.

237. The preexisting groups consisted of like-minded people, associated loosely through blogs. Future blogstorms could draw from churches, which provide organization on the right. They could also draw from unions, as such households are likely to be online. JOHNSON, *supra* note 187, at 56.

als.<sup>238</sup> As a result of these associations, mainly through blogs, a site like BoycottSBG.com could launch a massive campaign overnight.<sup>239</sup>

Conversely, the internet raised the costs of spreading some information that could have harmed collective action, like information about social distinction, race, gender, geography, or other stigmas. These were less easily communicated online than in person-to-person contact.<sup>240</sup>

#### b. Allocation Costs

In conjunction with the low information costs, the cost of allocating tasks was low. Because of the low search and self-advertising costs, no central entity had to bear the costs of identifying those best suited for particular tasks, or those with relevant information. The participants allocated themselves, not only to the blogstorm, but to different tasks within it.

The participants understood the effectiveness of grassroots allocation. Unlike the DNC which asked for no feedback, the owners of A-list blogs “allocated” work by admitting their lack of expertise, and inviting users to self-select and contribute their own expertise.<sup>241</sup> Bloggers often actively solicited user-email: “[I]n this case [derivative suits] I’m particularly interested in hearing [from] folks with professional insight into how this might work.”<sup>242</sup> Indeed, bloggers even criticize users who “whine” to the bloggers instead of allocating themselves and taking “action on their own” without blogger guidance.<sup>243</sup>

238. See RHEINGOLD, *supra* note 24, at 58–61 (discussing how Reed’s Law, which holds that the value of connecting networks is exponential, is more powerful than Metcalfe’s Law, which holds the value of a network connecting individuals to all other individuals in the network increases with the square of the number of individuals).

239. For Sinclair, its previous reputation also lowered information costs. The participants found little need to continue searching for information on Sinclair’s motives; that could be assumed.

240. It is unclear what role this plays in online collaboration, but it is likely a positive effect. Kollock, *supra* note 222.

241. Lawyers, television industry veterans, and investors provided detailed advice to help plan and to refine the participants’ strategies. Sinclair Advertiser Boycott, Database, <http://www.boycottsbg.com/advertisers/default.aspx> (last visited Oct. 20, 2004).

242. See, e.g., Marshall, A Suggestion from a Reader, *supra* note 79.

243. Posting of Kos to Daily Kos, <http://www.dailykos.com/story/2005/1/3/135759/4341> (Jan. 3, 2005, 11:57 PDT) (“To name three examples—the Sinclair Boycott people, the Buy Blue people, and Operation Fool Me Once were all built by Kosmopolitans [Daily Kos users] who didn’t whine about an issue getting covered or not covered[;] they took action on their own.”).

### c. Collaborative Costs

The participants also had low collaborative costs. Communication was cheap through software for blogging, email, internet chat, and phone calls.<sup>244</sup>

Participants even lowered the collaborative and individual costs through constant feedback that pushed individuals to more cost-effective actions. For example, participants advised other participants not to waste time challenging licenses or petitioning the FCC or Sinclair, but to target key employees for advertisers for the 6pm newscast.<sup>245</sup>

Participants bore low collaborative costs in part because contributions did not deprive the participants of their contributions' value. Contributing information is not like contributing apples, as participants benefited from the information even after contributing it.<sup>246</sup>

The blogstorm also benefited from the low costs of mistakes. The risk of making mistakes was high, but the cost of such mistakes' was low. Phone calls to the wrong advertisers annoyed the recipients, but they informed new people, and a few wrong calls for a day were, relatively, not very costly. Moreover, the participants worked quickly together to correct these mistakes. In addition, unlike creating software, the "bugs" of calling the wrong people did not have to be detected and undone before going forward in the right direction.

### d. Integration Costs

The blogstorm had low integration costs partly because of what the blogstorm was producing (another's action), and partly because of technology. The project was not producing an integrated finished product, like an operating system. Other parties, such as advertisers and Sinclair, had to integrate these actions to determine the blogstorm's facts and their own responses.

The internet also lowered the costs of the little internal integration the users performed. For example, one person was able to manage BoycottSBG.com, assembling the user-volunteered information for an advertiser database, eliminating redundancy among the listed advertisers, categorizing advertisers by market, and keeping the database updated.

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244. Cf. JOHNSON, *supra* note 187, at 3 (discussing how email costs, compared to letter costs, increased communication from constituents to Congress).

245. See, e.g., Marshall, A Suggestion from a Reader, *supra* note 79.

246. See Kollock, *supra* note 222, at 225–26 (providing illustrations showing that, outside the internet, a non-wealthy individual usually cannot produce a public good alone).

### e. Low Individual Costs

The individuals bore low costs for three reasons. First, the blogstorm could be broken into pieces. Where individuals can break a project into small pieces, each small piece imposes a small cost. Second, the pieces were small enough for individuals to handle alone: including watching news and listing the advertisers, trashing Sinclair's stock on Yahoo! Finance, contacting Sinclair stations and advertisers, contacting media, and contacting institutional investors. Third, the tasks were of various sizes and specialties, which permitted those of varying motivations and skills to contribute based on the variable costs.<sup>247</sup>

In addition, no extra costs were imposed on the volunteers. Many of the blogs had no login requirements or passwords,<sup>248</sup> despite the fear of potential "trolls."<sup>249</sup> Many participants did not even pay for their long-distance because some phone plans charge the same rate up to a certain number of minutes.

Moreover, network effects lowered individuals' costs. "Network effects" refer to situations where the "value of membership . . . is enhanced by an increase in the numbers of other members."<sup>250</sup> With fewer fellow-participants, each participant had higher costs, as there would be more work to do. With more participants, costs of participation decreased.<sup>251</sup> In addition, those joining with fewer members bore heavier risk-costs, as it was less likely that others would join and make their effort worthwhile early on.<sup>252</sup>

## 2. Sufficient Motivation and Capacity

Although the internet has lowered the costs of collaboration, which should affect any potential blogstorm,<sup>253</sup> some costs do remain. As a result,

247. See Benkler, *Linux*, *supra* note 2, at 439.

248. Cf. CRUMLISH, *supra* note 36, at 35, 77 (Dean's campaign requiring login decreased traffic). Crumlish argues that advocacy groups should "[m]ake it easy to contribute thoughts and ideas. Create the most minimal possible barriers to entry." *Id.* at 77.

249. Trolls are those who disagree with users on a particular blog, and they merely attempt to annoy and waste users' time. Users can handle trolls by ignoring them, which is usually effective, or through other mechanisms. For example, the Dean campaign had a dedicated troll-fund: users would donate more money to Dean whenever a troll made a comment, which convinced trolls their actions were counterproductive. See *id.* at 41.

250. See Aviram, *supra* note 64, at 1195.

251. See Pereira Neto, *supra* note 234, at 517; Benkler, *Linux*, *supra* note 2, at 434–35.

252. This helps explain why the number of other people joining a group often determines if a later individual will join—for lynch mobs, stock sales, riots, strikes, rumors, and leaving a social gathering. See RHEINGOLD, *supra* note 24, at 175.

253. This reflects in part what Sifry calls "open source" politics:



a group must have the motivation and capacity to overcome these (admittedly low) costs.<sup>254</sup> Therefore, limitations on the frequency and power of future blogstorms will likely not be costs (unless internet laws or standards raise the costs of speech and collaboration),<sup>255</sup> but motivation and capacity. Although Sinclair's stunt inspired a blogstorm, many similar events did not. To understand the future of ad hoc regulation, we must analyze what kind of motivation and message inspired the Sinclair blogstorm. This will help determine the kind of motivation and capacity that may spark future regulatory blogstorms.

#### a. Sufficient Motivation

Individuals have wildly different (rational and irrational) motivations<sup>256</sup> and different motivation thresholds to act in different circumstances. A blogstorm is possible where enough people reach their motivation thresholds.<sup>257</sup>

(1) *A Few Highly Motivated Participants.* At least some highly motivated participants appear necessary to start a blogstorm. First, before others join, the individual collaboration costs are high. Second, highly motivated participants can lower others' costs by joining and by deliberately making it easier for others. With Sinclair, these participants researched lines of attack and developed websites, email lists, sample letters, and databases.<sup>258</sup>

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Applied to political organizing, open source would mean opening up participation in planning and implementation to the community, letting competing actors evaluate the value of your plans and actions, being able to shift resources away from bad plans and bad planners and toward better ones, and expecting more of participants in return. It would mean moving away from egocentric organizations and toward network-centric organizing.

Sifry, *supra* note 31, at 19.

254. For a discussion of collaborative costs online versus collaborative costs through hierarchies and markets, see Benkler, *Linux*, *supra* note 2. This entire discussion benefits greatly from Benkler's seminal work.

255. Cf. LAWRENCE LESSIG, *THE FUTURE OF IDEAS* (2001); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 NYU L. REV. 23 (2001); Yochai Benkler, *Property, Commons, and the First Amendment: Towards a Core Common Infrastructure* 27 (White Paper for the Brennan Center for Justice), <http://www.benkler.org/WhitePaper.pdf> (2001) [hereinafter Benkler, *Core Common Infrastructure*].

256. See Herbert Simon, *Rationality in Psychology and Economics*, in FOUNDATIONS, *supra* note 180, at 299, 299–302.

257. See RHEINGOLD, *supra* note 24, at 174 (arguing "a diversity of cooperation thresholds among the individuals can tip a crowd into a sudden epidemic of cooperation").

258. See, e.g., Marshall, In the Last, *supra* note 88.

Beyond starting a blogstorm, highly motivated participants are necessary for specific activities. Some activities cannot be divided easily among more than one person and require considerable effort from that one person. For the Sinclair blogstorm, integration required one highly motivated participant for the advertiser boycott.

(2) *“Medium” Likelihood of Success.* Users should be most motivated by a project with some, but not an overwhelming, likelihood of success.<sup>259</sup> When it appears likely the group will provide the public good, individuals have an incentive to free-ride, so not enough individuals will work to produce the good.<sup>260</sup> When it appears unlikely the group will provide the good, individuals have little incentive to contribute because their contribution will be wasted.<sup>261</sup> With the Sinclair blogstorm, the users felt they could succeed, but did not feel success was a foregone conclusion.<sup>262</sup>

(3) *Network Effects and Motivation.* In addition to lowering costs, network effects also can increase motivation. Larger blogstorms can likely better support diverse motivations. A smaller blogstorm may appeal to fewer potential participants because there are fewer available activities that could best use their skills.<sup>263</sup>

(4) *Short Time-Horizon.* The blogstorm’s short time-horizon likely helped support the participants’ motivation, making procrastination less attractive. If one assumes that the users had a wide range of procrastination-tendencies, the short time-horizon would have encouraged those with both high and low tendencies to act almost immediately, and together.

The blogstorm appeared to rely on short bursts of enthusiasm. While Steve Soto suggested a long-term effect of a campaign,<sup>264</sup> one of his users

259. In addition, this medium-level likelihood of success can sustain two concurrent motivations—efficacy and challenge, discussed below with non-economic motivations.

260. See Kollock, *supra* note 222, at 224 (noting this is so even when the group’s goal is to protest).

261. *Id.* at 223. This lack of incentive conforms to the advice, “You can’t fight City Hall,” which suggests you should not even try.

262. The creation of Linux operating system provides an example of how the increase in likelihood of success sparked collaboration. There, one individual, Linus Torvalds, created the kernel of an operating system and asked others to help. Once the kernel was available, the likelihood of success increased to the point where others were willing to contribute without feeling impotent. *Id.* at 230–31.

263. A larger blogstorm increases the likelihood a task would interest a potential participant because it permits participants to “scour large groups of resources in search of materials, projects, collaborations, and combinations” See Benkler, *Linux*, *supra* note 2, at 366–67.

264. Steve Soto, *supra* note 38 (“on the longer term, I think the license challenge campaign can really send a message and point media coverage to this issue and to Sinclair’s detriment”).

suggested that it was more short-term for him: "I'll be on this nonstop for the next week at least."<sup>265</sup> Indeed, the time-horizon for most blogstorms may be even shorter than Sinclair's. This blogstorm benefited from incremental short-term goals, like stock price changes and advertiser withdrawals.<sup>266</sup> Long battles could also dissuade many potential participants upfront, as individuals would realize that they would become part of the blogstorm community for months or years, and may not want to take on even a loose commitment.<sup>267</sup>

In addition, a short time-horizon may take advantage of participants' initial, "hot" reaction.<sup>268</sup> A longer time-horizon could cause participants to "cool off," and act less on emotional impulse.<sup>269</sup> In addition, participants can get bored over time<sup>270</sup> and devote their excess labor to other endeavors.<sup>271</sup> Since blogstorm activities would get boring for participants at different rates, the number of participants would decrease as participants lose motivation at different moments, which could increase costs on those remaining, including to a level above the motivational levels of many users. Having many different activities to complete could keep participants in the blogstorm for longer than having few activities.<sup>272</sup>

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265. Posting of Lud to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 11:48 EDT).

266. Beyond the effect of waning enthusiasm, the early stages of the Sinclair blogstorm may have had a wider pool of users than the later stages for other reasons. The first stages involved activities that the users enjoy so much they did them everyday—blog-like activities such as expressing rage, proposing ideas, and debating in short, unpunctuated posts.

The later stages involved non-blog activities for implementation—calling advertisers to complain, calling institutional investors, sending form emails, and discussing stocks on bulletin boards. So it is likely that the pool of users from the blogs who enjoyed the early stages was larger than those who enjoyed the later stages.

267. This is supported by Amartya Sen's theory that many actions are not motivated by pure rationality but in part by taking on a commitment, such as to pay taxes even if one will not be audited. See Katz, *supra* note 180, at 37.

268. Cf. SETH GODIN, *PURPLE COW* 2–3 (2003) (explaining to marketers that cows are beautiful when unique, but soon become boring and unremarkable).

269. See Jackson, *supra* note 235, at 324–25 (discussing paternalism, regret, and impulse control); Daniel Gilbert, *Four More Years of Happiness*, N.Y. TIMES, Jan. 20, 2005, at A23 ("people typically overestimate the intensity and duration of their emotional reactions to adversity"); cf. JOHNSON, *supra* note 187, at 40–41 (discussing a proposed cool-off period for direct democracy to correct impulsive tendencies).

270. That is, diminishing marginal utility from participating in the blogstorm.

271. This may contradict economists' assumptions of stable preferences, but it may be more accurate based on psychology. See Katz, *supra* note 180, at 37.

272. The evidence from MoveOn.org supports this idea. MoveOn.org activists constantly shifted activities, with movie-watching house parties, conference calls, national bake sales, amateur advertising contests, get-out-the-vote canvassing, letter-writing campaigns, a virtual march on Washington, D.C., among other activities. See, e.g., Moveon.org: Democracy in Action, <http://www.moveon.org> (last visited Nov. 15, 2005) [hereinafter Moveon.org].

(5) *Non-Monetary Motivations*. Participants likely must have non-monetary motivations to take part in a regulatory blogstorm.<sup>273</sup> For the blogstorm to derive solely from economic motivations, the participants would have to ensure they would be paid. Considering the high costs of establishing payment mechanisms for thousands of people and the likely low payments to each participant for their minor contributions, the transaction costs would likely far outweigh the economic benefits to the participants. Accordingly, unless transaction costs of setting and enforcing contracts can come down or an entity funds the actions, it is likely that non-monetary motivations must support a blogstorm.

As “diverse motivations [beyond monetary self-interest] animate human beings,”<sup>274</sup> several non-monetary motivations could support a blogstorm.<sup>275</sup> For the participants in the Sinclair blogstorm to reach their motivation-thresholds, the contributing motivations were likely diverse—both across the range of participants and for each participant with more than one motivation.<sup>276</sup>

(i) *Efficacy*. Participants may be inspired by the desire to affect their environment.<sup>277</sup> With the blogstorm, many could have felt effective through special expertise, like living in a Sinclair local market or being a broadcaster or lawyer.<sup>278</sup> This sense of efficacy would have partly counteracted the interest to free-ride.<sup>279</sup>

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273. For a discussion of what she calls the “ethos” of online activism groups, see Laura J. Gurak, *The Promise and Peril of Social Action In Cyberspace*, in *COMMUNITIES*, *supra* note 25, at 243.

274. Benkler, *Linux*, *supra* note 2, at 378; see Katz, *supra* note 180, at 37. Standard economics recognizes this point. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (6th ed. 2003) (“[S]elf-interest should not be confused with selfishness; the happiness (or for that matter the misery) of other people may be a part of one’s satisfaction.”).

275. Americans’ non-monetary motivations, in fact, were apparent in the election, as large numbers on both sides voted against their monetary interests. See, e.g., THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004).

276. Indeed, diverse motivations lead individuals to form relationships with people. See, e.g., Well & Gulia, *supra* note 25, at 171.

277. After all, the participants had been providing semi-daily commentary in an attempt to change their environment, largely through elections and party-building. See, e.g., posting of Kos to Daily Kos, <http://dailykos.com/story/2004/11/30/102859/54> (Nov. 30, 2004, 08:28 PDT).

278. For example, a commenter in law school gave advice and wrote with apparent joy: “I just learned about shareholder derivative lawsuits this week. (Yay!)” Posting of Matt Davis to The Left Coaster, [http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry\\_id=2856](http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2856) (Oct. 11, 2004, 13:11 EDT).

279. This turned it into an assurance game for “experts” with best-shot aggregation. They could not assume others could perform their task, and would understand that if others in other broadcast markets also worked, they would all benefit.

In addition, participants would have felt effective even without complete success,<sup>280</sup> because of the tangible effects of following the pull-out of each advertiser,<sup>281</sup> of reading notes from advertisers posted on the blogs,<sup>282</sup> and of tracking every dip in the stock price.<sup>283</sup> For example, one commenter posted a small success: a letter from Pepsi Cola Company, which explained that it favored accurate and balanced journalism and stated that it had no national advertising buys with Sinclair.<sup>284</sup>

Significantly, redundancy did not undermine feelings of efficacy. Without a central allocator, participants ran the risk of redundantly performing the same tasks others were performing, for no benefit. The costs of redundancy, however, were low for many activities—watching a news program. Other activities even benefited from the redundancy, such as phone calls to advertisers and institutional investors. Posting redundant comments on different blogs helped spread information.<sup>285</sup> Redundancy also permitted people with different backgrounds and skills to address the same problems, providing a wider, perhaps more innovative, range of

280. See Don Hazen, *Moving On: A New Kind of Peace Activism*, ALTERNET, Feb. 11, 2003, <http://www.alternet.org/story/15163> (“They offer . . . something specific to do and immediate feedback.”).

281. Names of other withdrawing advertisers surfaced. Posting of JBLIII to Daily Kos, <http://www.dailykos.com/story/2004/10/12/121355/52> (Oct. 12, 2004, 14:50 PDT). BoycottSBG.com, however, eventually did not publish their names, because advertisers did not want any recognition. Sinclair Advertiser Boycott, FAQ—Pulled Ads, <http://www.boycottsbg.com/FAQ.htm#pulledads> (last visited Nov. 15, 2005) (“The consensus is that the advertisers do not want to be praised, they want to be left alone. This just opens them to more pressure from the opposition. From what we’ve heard, they don’t even want to be thanked[;] they want to get back to business.”).

282. For example, a local furniture store sent a scathing letter to Sinclair:

As an advertiser on your Minneapolis affiliate, KMWB23, we are appalled at Sinclair Broadcasting Group’s lack of corporate citizenship in the mandatory broadcasting of ‘Stolen Hour.’

The deliberate support of any candidate over another candidate has no place in media programming governed by FCC regulations. . . . It is our intention to cease advertising with your affiliate unless actions are taken by the Sinclair Broadcast Group to establish and maintain fair and balanced viewpoints in programming.

Posting of Dqw5644 to Daily Kos, <http://www.dailykos.com/story/2004/10/12/121355/52> (Oct. 12, 2004, 16:37 PDT).

283. Cf. RHEINGOLD, *supra* note 24, at 117.

284. Posting of AllenB101 to Daily Kos, <http://www.dailykos.com/story/2004/10/11/163831/07> (Oct. 13, 2004, 20:09 PDT).

285. See, e.g., Debra, *supra* note 98 (pasting a comment from the Eschaton blog); posting of CapeFearforKerry to Al Franken Blog, <http://airamericaradio.com/weblogs/sowhatelseisnews/index.php?/franken/comments/1916/> (Oct. 11, 2004, 12:56 EDT) (noting Sylvan Learning’s pull out and directing Al Franken blog users to Daily Kos).

options. Finally, redundancy ensured that verifiable information was correct, despite possible incompetent or malicious participants.

(ii) Challenge/Fun. Many individuals enjoy challenge in part for its own sake, and so play chess, video games, or athletics.<sup>286</sup> Indeed, leaders can often motivate people with the enormity of the challenge ahead and the correlative feeling of efficacy resulting from surmounting the enormous challenge.<sup>287</sup> Similarly, many could have considered the blogstorm fun.<sup>288</sup>

(iii) Policy/Political. Many were motivated based on policy or politics. Some of these motivations included opposition to (1) general media bias, (2) conservative media bias, (3) dirty campaigning, (4) the Swift-boat Veterans opposing Kerry, and (5) President Bush's reelection. The election provided considerable motivation, and encapsulated a wide diversity of motivations, both economic and non-economic (environmental protection, healthcare, protecting the middle-class, among others). The proximity between Sinclair's stunt and the election motivated the participants, as did the presence of Sinclair stations in swing states.<sup>289</sup>

(iv) Public Interest. Many people prefer believing their actions are not based solely on self-interest. Research shows that individuals are often more generous to others than self-interest would require.<sup>290</sup> Indeed, one pervasive social rationale for the pursuit of self-interest in a competitive market is that an "invisible hand" will benefit all, providing an altruistic reason for self-interest,<sup>291</sup> even if many economists disagree that this theory represents reality.<sup>292</sup> Many of the blogstorm participants were

286. See Kollock, *supra* note 222, at 232 (using the collaboration on Linux as an illustration).

287.

Sure, it would require some sacrifice. But remember J.F.K.'s words when he summoned us to go to the moon on Sept. 12, 1962: "We choose to go to the moon in this decade and do the other things, not because they are easy, but because they are hard, because that goal will serve to organize and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one which we intend to win."

Thomas L. Friedman, *Fly Me to the Moon*, N.Y. TIMES, Dec. 5, 2004, § 2, at 13.

288. Cf. RHEINGOLD, *supra* note 24, at 64 ("A great deal of peer-to-peer technology was created for fun—the same reason the PC and Web first emerged from communities of amateur enthusiasts.").

289. Marshall, *The Times Today*, *supra* note 23 ("Those 62 stations include affiliates of all six major broadcast networks in Florida, Ohio, Wisconsin, Nevada and Pennsylvania.").

290. RHEINGOLD, *supra* note 24, at 129.

291. MICHAEL NOVAK, *THE UNIVERSAL HUNGER FOR LIBERTY* 51–52 (2004) (using Adam Smith to defend free markets based on Catholic and other religious principles).

292. See, e.g., SANDLER, *supra* note 219, at 3; Stiglitz, *supra* note 179.

responding to their own sense of public interest. For example, many believed that it was in the public's interest to receive balanced journalism, and they served the public interest through taking part in the blogstorm.

(v) Moral Outrage/Animosity. Another motivation was moral outrage. Research demonstrates that individuals often take actions against their self-interest to penalize norms-violators to the benefit of the group.<sup>293</sup> Moral outrage and other subtle punishments enforce many social norms.<sup>294</sup> As I have argued, with Sinclair, the participants were morally outraged, regarding the stunt as an off-the-charts norms-violation.<sup>295</sup>

Similarly, animosity is motivational.<sup>296</sup> It motivated both sides in the 2004 election.<sup>297</sup> The blogstorm participants had a deep animosity for Sinclair and other alleged-members of conservative media. Two of the activities even permitted the participants to communicate this animosity—posting on Yahoo! Finance boards and calling advertisers.

(vi) Reciprocity. Partly through immediate self-interest and partly through psychology,<sup>298</sup> participants could be motivated to contribute to blogstorms in part because others were contributing. Indeed, the costs of many contributions were low—contributing information they already knew or to which they had easy access—while the benefits from others' contribution were high—receiving vast amounts of new information.<sup>299</sup>

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293. SANDLER, *supra* note 219, at 126.

294. Since punishing norms-violators benefits the group, those who do not punish are themselves free-riding on those who enforce social norms. So punishing may be another form of generosity. *Id.* at 128–29.

295. Rosen, *supra* note 15; *cf.* Too Generous, *supra* note 22 (“It’s not a ‘fairness’ or a free speech issue. It’s a massive and quite public case of election and campaign finance fraud.”).

296. *See, e.g.*, RHEINGOLD, *supra* note 24, at 48 (“One time-tested way of inducing a group to work together is to introduce an external threat.”).

297. Observers suggested that animosity to Bush motivated Democrats even more than devotion to any candidate; the Democratic candidate was “Anybody But Bush.” *See, e.g.*, Robert Novak, *The Anti-Bush*, August 7, 2003, CNN.COM, <http://www.cnn.com/2003/ALLPOLITICS/08/07/column.novak.opinion.antibush/> (ascribing Howard Dean’s early success to his anti-Bush stance).

The Republicans also motivated their supporters through animosity to Democrats (or gay marriage, French people, liberal elites, Massachusetts liberals, Hollywood, the National Association for the Advancement of Colored People, or People for the American Way) and, perhaps, won the election as a result. John Zogby, *What’s the Matter with the Incumbent Rule?*, ZOGBY’S REAL AMERICA, Nov. 2004, at 1, available at <http://www.zogby.com/news/ReadNews.dbm?ID=931>.

298. RHEINGOLD, *supra* note 24.

299. *Cf. id.*, at 30, 71 (noting “Napster is nothing more than a folder full of MP3s if you’re the only user”) (quoting Cory Doctorow); CRUMLISH, *supra* note 36, at 225 (noting that a stranger helped him debug software because, according to the stranger, “it wasn’t difficult for him to help me, so why not?”).

(vii) Community. Users may have felt tied to the community on their favorite blog(s), and users felt an obligation to help for the same reason alumni may donate to their colleges. “Virtual” social bonds possibly can be as meaningful as many “personal” bonds.<sup>300</sup> The community can be part of a user’s identity such that the user may want the community to succeed for apparently self-interested reasons.

Alternatively, perhaps the users considered the blogstorm itself to be a community ritual, akin to attending church or putting on a school play. Despite the costs, it built a community through bonds of memories and obligations for immediate and future benefit or enjoyment.<sup>301</sup>

### b. Sufficient Capacity

In addition to motivation, the blogstorm needed sufficient capacity to succeed. This included both labor and message. Sufficient labor is necessary to perform the actions. And, as marketing and memetic theory suggest, participants need a compelling message to galvanize this labor.

#### (1) Labor.—

(i) Increments of Excess Capacity. The blogstorm relied on the participants’ excess labor capacity. The participants had excess labor capacity—extra minutes in the day to contribute to leisure or labor. They devoted excess capacity to the blogstorm where it outweighed the opportunity costs of performing other activities in those spare moments. Aggregating this excess capacity across the wide range of users resulted in a large amount of labor.<sup>302</sup>

Because the participants had enough labor, they could communicate with advertisers using more than email. Email has the advantage of being cheap for a participant,<sup>303</sup> but the disadvantage of being cheap for everyone. Those opposed to a blogstorm can just as easily mobilize counter-emails, perhaps neutralizing the blogstorm’s emails with an apparent showing of equal support. Also, email recipients understood that the sender expended perhaps minimal (cut and paste) resources to send

300. See CRUMLISH, *supra* note 36, at 190, 230–231.

301. Indeed, weeks after the blogstorm, members of Daily Kos referred to the blogstorm nostalgically for how the community came together. See, e.g., VirginiaDem, *supra* note 6.

302. Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L. J. 273 (2004), available at [http://www.yalelawjournal.org/pdf/114-2/Benkler\\_FINAL\\_YLJ114-2.pdf](http://www.yalelawjournal.org/pdf/114-2/Benkler_FINAL_YLJ114-2.pdf); see also RHEINGOLD, *supra* note 24, at 65. As a result, the blogstorm reflects the internet’s ability to mobilize “five minute activists” because of low transaction costs. For example, in 2003, Moveon.org had 300,000 “five minute activists.” JOHNSON, *supra* note 187, at 36.

303. Emails are cheap not only in money, but also in time, being immediate.



an email, so they could be less responsive to emails than letters or phone calls.<sup>304</sup>

(ii) Magnifying Labor's Power Through Advertisers. Because of how advertising funds television programs, boycotting advertisers magnifies the boycotters' power beyond their numerical strength in a direct boycott. Indeed, a boycott of Sinclair would likely have done very little: many of the liberal participants would not have watched Sinclair, or *Stolen Honor*, to begin with.<sup>305</sup> Edwin Baker has analyzed how advertiser boycotts magnify the effort of those attempting to influence a media company. He argues that advertisers "often wish to avoid . . . content that offends or takes a position on a controversial issue" for four possible reasons, two of which are relevant here. First, advertisers want to attract the largest possible audience.<sup>306</sup> Material taking a position on controversial issues could segment the audience; with the 2004 election, the public was evenly divided on Bush and Kerry.

Second, advertisers usually desire not to offend any potential customers. Baker argues that this is a major concern for advertisers because "the last thing advertisers want is for their advertising to drive customers away."<sup>307</sup> Baker argues that, "[g]iven the small chance that an advertisement will . . . influence[e] any individual viewer, each alienated viewer costs the advertiser more than is gained from each viewer pleased by the programming."<sup>308</sup> Advertising that attracts consumers is difficult and expensive to craft: advertising on a controversial show that drives consumers away would waste these resources and repel consumers instead of attract them.

This fear of driving away customers plays a large role in the effectiveness of advertiser boycotts, because even those who do not view the program will associate a product with a controversial position they oppose. As a result, these costs and benefits to an advertiser often empower even a small group to change programming.<sup>309</sup> Because even a relatively small group can affect programming, Baker argues that the "advertisers' fear of offending potential customers leaves the media disproportionately subject to actual and threatened consumer boycotts . . . directed at sup-

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304. Evidence from Congress suggests as much. See JOHNSON, *supra* note 187, at 3, 9, 60.

305. Volokh, *supra* note 3, at 1836–37.

306. BAKER, *supra* note 80, at 56.

307. *Id.*

308. *Id.* at 60.

309. *Id.* at 61 (arguing that "even if the vast majority of television viewers would like to see a program that took a controversial position, a realistically threatened boycott by a relatively small number of viewers is often leads a 'rational' sponsor to withdraw").

pressing material offensive to some organized group.”<sup>310</sup> There is a long history of successful advertiser boycotts and successful threatened boycotts, from the McCarthy period through the present, that targeted politically suspect performers, allegedly indecent or violent material, and political commentators on the left or right.<sup>311</sup>

Indeed, during the Sinclair blogstorm, advertisers acted largely as Baker would suggest. BoycottSBG.com explained: “The consensus is that the advertisers . . . want to be left alone. [Praise] just opens them to more pressure from the opposition. . . . [T]hey don’t even want to be thanked, [sic] they want to get back to business.”<sup>312</sup>

(2) *Message*. The blogstorm could not have taken shape, or succeeded, without a message that participants would find compelling. The usual metaphor for a message is the spread of a virus. Some marketing theorists believe certain ideas can act like idea-viruses and self-market themselves.<sup>313</sup> Some cultural scholars believe certain messages can act like “memes”—viral ideas that use people to replicate themselves.<sup>314</sup>

More importantly, the message has to be compelling to those *outside the blogstorm*. The Sinclair message benefited from two simple facts. It was communicable in one sentence to each relevant group and appeared immediately to violate already-held social norms.

The public largely agreed with the participants’ unstated theory of market power; seventy percent of Americans think media companies are too large.<sup>315</sup> Sinclair’s perceived actions were exactly the kind many feared of large media companies—favoring incumbent government and currying regulatory favors.

The public also agreed with the perceived status quo of apolitical broadcasters.<sup>316</sup> People are more receptive to retaining the status quo than altering it. Studies show that individuals are often risk-averse when confronted with potential gains but risk-seeking when confronted with potential losses.<sup>317</sup> Responding to Sinclair reinforced the status quo.

310. *Id.* at 57.

311. *Id.* at 58.

312. Sinclair Advertiser Boycott, FAQ, <http://www.boycottsbg.com/FAQ.htm> (last visited Nov. 15, 2005).

313. SETH GODIN, UNLEASHING THE IDEAVIRUS (2000).

314. *See, e.g.*, J. M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY (1998).

315. CONSUMER FEDERATION OF AMERICA, PUBLIC SUPPORT FOR MEDIA DIVERSITY AND DEMOCRACY IN THE DIGITAL AGE 2 (2001), <http://www.consumerfed.org/MediaSurvey10.31.02.pdf>.

316. Rosen, *supra* note 15.

317. *See, e.g.*, Tversky & Kahneman, *supra* note 226, at 304–07. For example, consumers are more willing to forego a gain, like an individual discount, than to pay a loss, like an individual surcharge. *Id.* at 281.

For example, even the blogstorm's chosen remedy conformed with most Americans' views of the status quo. In general, over 90% of Americans believed that broadcasters should provide equal time to both major party candidates.<sup>318</sup> This conformed to Americans' general viewing preference: most claimed to prefer getting news from balanced sources.<sup>319</sup> A survey before the stunt showed that the vast majority of Americans, 78%, would prefer that Sinclair air the other side of the issue if it broadcasted *Stolen Honor*; only 10% thought a response was not necessary.<sup>320</sup> Among the public, there appeared more support for showing both *Stolen Honor* and an opposing view than for not showing *Stolen Honor* at all.<sup>321</sup>

To the extent the participants' views were not already widely held by Americans, their message may have benefited from credible analysts. A former FCC chairman, along with Democratic senators, likely had some credibility to the public at large, advertisers, and institutional investors, even if some blogs may have lacked that credibility.

#### D. Towards a Better Blogstorm

Although the Sinclair blogstorm was extremely powerful, it failed in many ways. It dissolved quickly (perhaps a byproduct of its low start-up costs) and gave birth to a much weaker organization, at most, whose ambitions were low compared to other proposed blogstorms (like destroying Fox News). It merely altered one hour of highly controversial programming by a debt-laden company. Meanwhile, the liberal users wanted to take down media consolidation itself, because they believed the FCC had failed on consolidation. On the blogstorm's third day, participants aimed for the "right-wing" media<sup>322</sup> and proposed to patrol Sinclair, to "finish off Sinclair," or to destroy Fox News,<sup>323</sup> Rush Limbaugh, Sean Hannity, or Matt Drudge.<sup>324</sup> More people watch and listen to Fox News and Rush Limbaugh every month than voted for George Bush or John Kerry in 2004, so destroying either of the former would be a tall

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318. *Id.* at 6.

319. Sixty-seven percent prefer to get news from sources with no particular point of view, while only a quarter prefer news reflecting their leanings. PEW RESEARCH CENTER, LARGE IN FRAGMENTED POLITICAL NEWS UNIVERSE 4-5 (2003), [http://www.pewinternet.org/pdfs/PIP\\_Political\\_Info\\_Jan04.pdf](http://www.pewinternet.org/pdfs/PIP_Political_Info_Jan04.pdf).

320. CONSUMER UNION, MEDIA SURVEY 12 (2004), <http://www.consumersunion.org/pub/CU%20MEDIA%20SURVEY.pdf>.

321. *Id.* at 8-12.

322. *See, e.g.*, Kos, Sinclair Advertiser DB Up, *supra* note 59.

323. Posting of Birdie to Daily Kos, <http://www.dailykos.com/story/2004/10/12/121355/52> (Oct. 12, 2004, 18:31 PDT).

324. *See, e.g.*, VirginiaDem, *supra* note 6.

order.<sup>325</sup> Media consolidation and the allegedly conservative media were real concerns among liberal blog-users.<sup>326</sup> Users started sites to take on Sean Hannity<sup>327</sup> and Fox News (listing all of its advertisers).<sup>328</sup> But the Sinclair blogstorm ended,<sup>329</sup> and none related to it were effective.

Although it is unlikely that a blogstorm could enact an anti-conservative (or liberal)-media or an anti-media-monopoly agenda, it is not impossible in theory. The main ingredient to create a blogstorm powerful enough to win the liberal-users' war against mainstream media would be more blogstorm participants.

### 1. Labor—Benefits of Increased Capacity

With more participants, larger projects would be possible. A network's power increases by the square of the number of its members, so new members increase a large networks' power more than they would

325. First, Fox News and Limbaugh can more easily withstand pressure than Sinclair could. Fox News is arguably the number one cable news channel. Project for Excellence in Journalism, *Cable TV: Audience*, STATE OF THE NEWS MEDIA (2004), [http://www.stateofthenewsmedia.org/narrative\\_cabletv\\_audience.asp?cat=3&media=5](http://www.stateofthenewsmedia.org/narrative_cabletv_audience.asp?cat=3&media=5). Limbaugh is, less arguably, the number one talk radio host. WBAL Radio, The Rush Limbaugh Show, <http://www.wbal.com/shows/limbaugh/> (last visited Nov. 15, 2005). Second, a blogstorm against Fox News or Limbaugh targets them based on them being *consistently* dishonest, so the goal is more ambitious: destruction, not just altering one hour of broadcast programming. Third, the Fox News and Limbaugh advertisers are less likely to fold to pressure. Sinclair stations are local, so Sinclair advertisers included local furniture stores, lawyers, and car dealerships. See, e.g., posting of Kos to Daily Kos, <http://www.dailykos.com/story/2004/10/13/141150/25> (Oct. 13, 2004, 12:11 PDT). As Fox News is a cable network, its sponsors are predominantly national companies. Spending Liberally, <http://www.spendingliberally.org/index.cgi> (last visited Nov. 15, 2005). So are many of Limbaugh's. Take Back the Media!, Media Watch: Rush Libaugh Calls War Protestors "Anti-American, Anti-Capitalist Marxists and Communists," <http://www.takebackthemedias.com/rushbusted.html> (last visited Nov. 15, 2005).

326. See posting of Kos to Daily Kos, <http://www.dailykos.com/story/2004/12/21/14057/872> (Dec. 21, 2004, 12:57 PDT); see, e.g., posting of Stephdray to Daily Kos, <http://www.dailykos.com/story/2004/12/22/23654/446> (Dec. 22, 2004, 12:36 PDT); posting of Molls to Daily Kos, <http://www.dailykos.com/story/2004/12/14/23254/136> (Dec. 14, 2004, 21:02 PDT); posting of Ihlin to Daily Kos, <http://www.dailykos.com/story/2004/12/13/20563/326> (Dec. 13, 2004, 18:56 PDT).

327. Ad Nausea, List of Sean Hannity Sponsors, <http://www.adnausea.org/sponsors.html> (last visited Oct. 30, 2004).

328. Spending Liberally, Companies to Avoid, <http://www.spendingliberally.org/index.cgi?companies=1> (last visited Nov. 15, 2005).

329. There may have been economic reasons why the blogstorm dissolved so quickly. Because the blogstorm gathered so cheaply and quickly, individuals may have considered it a waste of time to devote constant excess labor to media-warfare. When a media-battle popped up, they would merely join. In the meantime, they could turn instead to blogging, commenting, campaigning, or watching football.

for a small network.<sup>330</sup> An increase in participants also lowers costs for others to join and decreases new members' risk that they are wasting their energy.

A large blogstorm permits more diverse actions. People and groups would have different interests and skills, and more individuals could bring their interests and skills to bear. If sub-activities need a critical mass to be effective, more participants make these sub-activities more likely. As a result, it also permits more people with interests and skills to help the blogstorm.<sup>331</sup>

With more participants, a long blogstorm is more possible. Despite waning enthusiasm, a large group can provide enough members for low-level media patrolling over a longer period. Participants could devote no more than a few minutes a week, as they chose, and it would have a large effect. Also, some of the participants could meet up physically in groups and perform extensive outreach while others with less motivation merely email and boycott.<sup>332</sup>

With many participants, a participant could devote some excess labor sporadically throughout the year. With enough participants, any battle would continue without interruption.

Again, the pool can leverage its power through third parties. This includes advertisers, as Edwin Baker shows,<sup>333</sup> and also sibling companies of their targeted media conglomerates or conservative media.<sup>334</sup> Participants targeting, for example, Fox News or the *New York Post*, could boycott Fox Sports, Fox network affiliates, Harper Collins, or 20th Century/Fox.

## 2. Message—How to Get More Participants

To recruit more participants, the users need to communicate with more people. They could probably not buy television advertising directing viewers to blogstorm sites: stations can legally refuse to sell them advertising,<sup>335</sup> and those owned by large media companies would likely not sell advertisements for blogstorms aimed at them. They could use

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330. RHEINGOLD, *supra* note 24, at 58–61 (called Reed's Law).

331. Unless there is best-shot aggregation or redundancy is inefficient for other reasons.

332. This is somewhat inexpensive through Meetup.com, but meeting would still cost more than emailing from home. See Meetup, Organizing Local Interest Groups, <http://www.meetup.com> (last visited Nov. 15, 2005).

333. BAKER, *supra* note 80, at 46.

334. Volokh, *supra* note 3, at 1836.

335. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

billboards. The owners of the billboards, often large media companies, can refuse to transact.<sup>336</sup>

Instead, participants could make use of public and leased access cable channels in the areas that provide such channels.<sup>337</sup> Apparently, a group made use of such channels in response to the Sinclair stunt.<sup>338</sup> In such channels, the participants would have considerable legal latitude.<sup>339</sup> They could use email. Their emails would likely not be illegal, even to strangers, because they would not be commercial.<sup>340</sup> Unsolicited email, however, is generally unwelcome, and may not convert many. Participants could use a mass or targeted direct-mailing campaign. The letters could explain the participants' take on Fox News, media consolidation, or general media conservatism. A blogstorm-produced mass-mailing could mirror the letter-writing campaigns of the Howard Dean primary campaign, where supporters personally wrote letters,<sup>341</sup> or could resemble George McGovern's successful mass-mailings in 1972<sup>342</sup> or the Republicans' mailings ever since.<sup>343</sup> They could write whatever they want in mail,<sup>344</sup> but it is more costly than email. Also, they could organize telephone calls, use public spaces for signs and speeches, have house parties, distribute documentaries (one about Fox News),<sup>345</sup> and more.<sup>346</sup> Through word of mouth they could link together several existing networks, including churches, unions, registered party members, neighborhood groups, magazine or newspaper subscribers, and college groups.<sup>347</sup>

In addition to a medium, the participants would need a message. They may have to choose a message, either opposing conservative media

336. See, e.g., Project Billboard.org, Billboards, <http://www.projectbillboard.org/billboards.html> (last visited Nov. 15, 2005) (stating Clear Channel refused to display their "Bomb" billboard in Times Square).

337. See, e.g., LAURA R. LINDER, PUBLIC ACCESS TELEVISION (1999).

338. See, e.g., Press Release, Area Cable Access Stations to Show "Hijacking Catastrophe" as Counterpoint to KOVR's Anti-Kerry "News Special," *supra* note 133.

339. See, e.g., Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

340. See CAN-SPAM Act of 2003, 15 U.S.C.A. § 7705 (West Suppl. 2005).

341. Gary Wolf, *How the Internet Invented Howard Dean*, WIRED, Jan. 2004, [http://www.wired.com/wired/archive/12.01/dean\\_pr.html](http://www.wired.com/wired/archive/12.01/dean_pr.html).

342. CRUMLISH, *supra* note 36, at 22 (about George McGovern's use in 1972).

343. RICHARD A. VIGUERIE & DAVID FRANKE, AMERICA'S RIGHT TURN: HOW CONSERVATIVES USED NEW AND ALTERNATIVE MEDIA TO TAKE POWER (2004).

344. See, e.g., *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

345. See OUTFOXED: RUPERT MURDOCH'S WAR ON JOURNALISM (The Disinformation Company, 2004).

346. See, e.g., Moveon.org, *supra* note 272.

347. Ben Waxman, *It's Time to Look to the Campus*, ALTERNET, Dec. 3, 2004, <http://www.alternet.org/wiretap/20644/>.

or opposing media deregulation. Some conservatives oppose media consolidation, but not necessarily a conservative media.<sup>348</sup> If a blogstorm targets the “conservative” media, the blogstorm would have to convince Americans that a conservative media exists, since many believe the media is liberal.<sup>349</sup>

The proposed blogstorms must have a simple complaint they can communicate to an advertiser, institutional investor, or consumer in one sentence. It appears one egregious violation is an easier sell than a series of diffuse violations. For example, conservative groups galvanize animosity to Moveon.org not with Moveon.org’s many pro-Democrat activities, but with two advertisements that compared Bush to Hitler, not even endorsed by Moveon.org.<sup>350</sup> By contrast, those proposing blogstorms because Fox News is allegedly biased refer to material that fills books and movies.<sup>351</sup> Other groups also provide much information. One claims to watch Fox News “so you don’t have to”;<sup>352</sup> it partnered with an “established” liberal media group, Altnet.org,<sup>353</sup> to create a resource targeting Fox News.<sup>354</sup> Another site tracks all Fox News advertisers.<sup>355</sup>

Liberal groups could cling to one story and use it as conservatives used the Moveon.org-Hitler videos. The example must be so egregious that intent can be presumed.<sup>356</sup> Favorite liberal stories for conservative media are abundant: Rush Limbaugh’s defense of torture at Abu Ghraib,<sup>357</sup> his repeated alleged distortions and lies,<sup>358</sup> Tom Daschle’s accusation that Limbaugh increased the death threats against Democratic

348. William Safire, Editorial, *Win Some, Lose Some*, N.Y. TIMES, Jan. 24, 2005, at A17.

349. Cf. ERIC ALTERMAN, *WHAT LIBERAL MEDIA? THE TRUTH ABOUT BIAS AND THE NEWS* xi (2003).

350. *Ad Showing Children Laboring to Pay Off Deficit Wins MoveOn Contest*, CNN.COM, Jan. 13, 2004, <http://www.cnn.com/2004/ALLPOLITICS/01/13/elec04.prez.moveon.winningad.ap/> (reporting ads were submitted by those unaffiliated with Moveon.org).

351. See, e.g., AL FRANKEN, *LIES AND THE LYING LIARS WHO TELL THEM: A FAIR AND BALANCED LOOK AT THE RIGHT* (2003); *OUTFOXED*, *supra* note 345.

352. News Hounds, <http://www.newshounds.us/> (last visited Nov. 15, 2005).

353. Posting of Melanie to News Hounds, [http://www.newshounds.us/2004/12/06/the\\_fight\\_fox\\_campaign.php](http://www.newshounds.us/2004/12/06/the_fight_fox_campaign.php) (Dec. 6, 2004, 20:41 EDT).

354. Altnet, Fight Fox, <http://www.altnet.org/fightfox/> (last visited Nov. 15, 2004).

355. Spending Liberally, *supra* note 325.

356. For example, Viacom’s “conservative” denial of certain pro-Kerry advertisements did not attract much participant activity; some even defended Viacom as the least anti-liberal conglomerate and the owner of Jon Stewart’s popular fake news show. See Kos, *Sinclair Advertiser DB Up*, *supra* note 59 (and comments therein).

357. *Limbaugh on Torture of Iraqis: U.S. Guards Were “Having a Good Time,” “Blow[ing] Some Steam Off”*, MEDIA MATTERS, May 5, 2004, <http://mediamatters.org/items/200405050003>.

358. See, e.g., STEVE RENDALL ET AL., *THE WAY THINGS AREN’T: RUSH LIMBAUGH’S REIGN OF ERROR* (1995); AL FRANKEN, *RUSH LIMBAUGH IS A BIG FAT IDIOT AND OTHER OBSERVATIONS* (1996).

congressmen (Limbaugh repeatedly had called Daschle “Satan” and “el Diablo”),<sup>359</sup> FoxNews.com running a fake anti-Kerry article following the first debate,<sup>360</sup> Fox News allegedly having a conservative message-of-the-day,<sup>361</sup> a Fox News host claiming that Osama Bin Ladin wore a “Kerry for President” button,<sup>362</sup> and Fox News lending credibility to the Swift-boat Veterans against Kerry and playing their allegations for weeks.<sup>363</sup>

Leadership from Democratic insiders may help, but it could be hard to find. Conventional wisdom holds that a politician cannot criticize media, especially media consolidation, without losing an election.<sup>364</sup> Bureaucrats may have less to lose and may speak more freely: for example, Democratic FCC Commissioners have publicly opposed media consolidation.<sup>365</sup> Moreover, while running for chairmanship of the Democratic National Committee, Howard Dean told a Fox News interviewer, “Fox [News] is the propaganda outlet of the Republican party.”<sup>366</sup> Such high-level leadership could support a blogstorm’s message. Democrats may prefer the liberal participants to take on Fox News without putting their names behind the effort for fear of reprisal.

#### IV. NORMATIVE IMPLICATIONS

In this section, I briefly discuss some policy considerations. I discuss, first, the pervasiveness and legal backing of private speech regulation; second, the increasing likelihood of blogstorms; third, whether blogstorms can be more socially valuable or harmful than traditional advocacy groups; fourth, whether blogstorms can be regulated

359. Press Release, FAIR, Rush Limbaugh Demonizes Tom Daschle—Literally, Nov. 22, 2002, <http://www.fair.org/press-releases/rush-daschle.html>.

360. *Cameron’s Fake Kerry Story Capped FOX Commentators’ Manicure Fixation*, MEDIA MATTERS, Oct. 4, 2004, <http://mediamatters.org/items/200410040006>.

361. See OUTFOXED, *supra* note 345.

362. *Cavuto Defended Suggestion that Bin Laden Was Wearing Kerry Campaign Button in Videotaped Message*, MEDIA MATTERS, Nov. 4, 2004, <http://mediamatters.org/comments/latest/200411040008>.

363. See, e.g., *Conservatives Complained that Swift Boat Vets Were Ignored; Now They Tout Impact*, MEDIA MATTERS, Nov. 5, 2004, <http://mediamatters.org/items/200411050002>.

364. Norman Solomon, *Dean and the Corporate Media Machine*, ALTERNET, Dec. 4, 2003, <http://www.alternet.org/columnists/story/17317/> (“Howard Dean is asking for media trouble.”).

365. Stephen Labaton, *White House Drops Effort to Relax Media Ownership Rules*, N.Y. TIMES, Jan. 27, 2005, <http://www.nytimes.com/2005/01/27/business/27cnd-media.html?>

366. Fred Barnes, Editorial, *The Ruthless Party*, THE WEEKLY STANDARD, Feb. 7, 2005, at 7, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/005/192gglig.asp> (not noting the common ownership between Fox News and the Weekly Standard).



without violating the First Amendment; and fifth, how the internet has enabled regulation across a range of activity, not just media speech.

A. *Pervasiveness of Private Speech Regulation and Interested Parties' Preferences for Certain Forms*

Before addressing normative considerations of this particular form of private speech regulation, we can place it within the larger framework of private speech regulation. Media companies who complain about the private speech regulation of advocacy groups often ignore the more pervasive private speech regulation throughout media industries. That is, media companies (or those within media companies) have the power to regulate private speech. Broadly speaking, private speech regulation includes the many private forces and actors who distort, or shape, the communications environment. For over a half-century, private speech regulation has been recognized as pervasive and a function of both economics and law.<sup>367</sup> Indeed, the speech industries cannot function without some private regulation. As a result, opponents of the Sinclair blogstorm cannot argue against private speech regulation *in general*. They must argue against particular forms of it.

Here I briefly discuss two pervasive forms of private regulation: the allocation of speech rights within and among media organizations, and advertisers' effects on private speech.

1. Through Government Allocation of Speech Rights

Within media industries, the allocation of legal rights permits private individuals to determine who can use assets through which to speak. First, corporate and contract law determine which private individuals and entities can determine who speaks through which assets. Within a media company, corporate law helps determine the relative control rights of executives, business managers, producers, editors, writers, and janitors. Executives and editors usually can modify the speech of journalists (the First Amendment generally treats media speech not as the journalists' speech but as the company's speech);<sup>368</sup> an executive of a conglomerate like General Electric can determine by law who speaks through the assets of NBC, which GE owns. Although this seems natural, it is a

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367. See, e.g., ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* vii, ix-xii (1965).

368. C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 63 (1994).

pervasive form of private speech regulation of journalists and other media workers.<sup>369</sup>

Second, because of law, some corporate communications-infrastructure owners can determine the speech of consumers and competitors using the infrastructure. Phone companies cannot determine, and are not responsible for, the speech of callers. So phone companies do not “privately regulate” callers’ speech.<sup>370</sup> By contrast, television broadcasters select programs and commercials. They act as “middlemen” for information, providing accreditation, advising, filtering, and performing other functions,<sup>371</sup> and they can exercise discretion, or private regulation, by refusing to run ads with which executives disagree.<sup>372</sup> Similarly, newspaper executives can determine what goes in newspaper pages, even if dissenters offer to pay for advertising space. Companies that own cable lines can determine which channels to carry and, therefore, exercise a private regulatory power over channels seeking access.<sup>373</sup> By statute, however, they lack this private speech power over broadcasters, who are guaranteed access.<sup>374</sup> There is a current debate on how much those who own cable or telephone lines and provide high-speed internet access through them can control the speech of internet users, content providers, and independent service providers.<sup>375</sup>

Third, media industries are self-regulatory across industries and segments. Industries may adopt formal guidelines, such as the American Society of Newspaper Editors’ Code of Ethics.<sup>376</sup> They may also have informal guidelines. For example, for years cable news organizations informally would not run advertisements for hard liquor.<sup>377</sup> Hard-liquor “speakers” had no ability, then, to speak to CNN viewers.

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369. Hale, *supra* note 223.

370. Sable Communications of Cal. v. FCC, 492 U.S. 115 (1989).

371. Cf. CRULISH, *supra* note 36, at 9, 217.

372. See, e.g., Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94 (1973); Peter Henderson, *CBS Blocks PETA, MoveOn Super Bowl Ads*, REUTERS, Jan. 16, 2004, available at <http://www.commondreams.org/headlines04/0116-01.htm>.

373. With non-broadcasters, cable companies have determined that certain advertisements will not run on channels they do not even own. Press Release, Peace Action Network, *Anti-War Ads Pulled by Comcast*, Jan. 29, 2003, <http://www.peace-action.org/pub/releases/re1012903.html>.

374. Turner Broad. Sys., Inc. v. FCC 520 U.S. 180 (1997); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

375. See, Benkler, *Core Common Infrastructure*, *supra* note 255; National Cable & Telecommunications Ass’n v. Brand X Internet Services, 125 S. Ct. 2688 (2005).

376. American Society of Newspaper Editors, *Statement of Principles*, available at <http://www.asne.org/kiosk/archive/principl.htm> (last updated Aug. 28, 2002).

377. Stuart Elliott, *In a First, CNN Runs a Liquor Commercial*, N.Y. TIMES, March 2, 2005, at C5.

This means that government in part delegates private speech regulation to certain individuals, from executives to companies owning communications wires.<sup>378</sup> Following the Sinclair stunt, Sinclair's CEO condemned the actions of a "vocal minority" who attempted to abridge Sinclair's speech rights:

We cannot in a free America yield to the misguided attempts by a small but vocal minority to influence behavior and trample on the First Amendment rights of those with whom they might not agree.<sup>379</sup>

Law, however, helps make Sinclair's executives a vocal minority—one that is both more vocal and more a minority than the blogstorm's participants.<sup>380</sup>

## 2. Through Advertising

Advertisers may serve as private regulators, "regulating" with both general and specific effects on media. The general effect, according to Edwin Baker and others, is that media outlets become less likely to be controversial, more likely to create a "buying mood," and more apt to appeal not to the entire public but to demographics favored by advertisers—say, affluent individuals between the ages of 25 and 49.<sup>381</sup> It also changes newspapers from being partisan to embracing "objective" journalism.<sup>382</sup> Baker also lists some specific examples of advertisers affecting content. In 1970, for example, NBC ran a documentary critical of Coca-Cola; Coca-Cola then withdrew all advertising from NBC; for the next several years, NBC ran no documentaries critical of major advertisers.<sup>383</sup> One advertiser threatened to pull advertising from any station that ran a specific advertisement against a subsidiary's actions in El Salvador; when one station ran the ad, the advertiser pulled advertising.<sup>384</sup> For decades, cigarette advertising may have affected coverage of cigarettes' health effects.<sup>385</sup> Newspapers remain cautious about automobile stories because of automobile advertising revenue, and they may change their

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378. Cf. Hale, *supra* note 223.

379. Press Release, Sinclair Broadcasting, Sinclair to Air "A POW Story," Oct. 19, 2004, [http://www.sbgi.net/press/release\\_20041019\\_87.shtml](http://www.sbgi.net/press/release_20041019_87.shtml).

380. For an excellent discussion of the public/private distinction and censorship by private property owners and private media companies, see Magarian, *supra* note 13.

381. See, e.g., BAKER, *supra* note 80, at 7–42, 62–70.

382. *Id.*

383. *Id.* at 48.

384. *Id.* at 54.

385. *Id.* at 52–53.

speech accordingly.<sup>386</sup> Indeed, according to Baker, advertisers often threaten to withdraw advertising based on coverage, and news media often change their speech as a result.<sup>387</sup> Historically, newspapers have altered coverage, apparently for advertisers, to support management in strikes, utility companies, and local department stores.<sup>388</sup>

With Sinclair and other advertiser boycotts, non-advertisers attempt to use the power of advertisers to privately regulate speech. This may be more objectionable than situations where the advertisers themselves exert influence, but the reasons why it would be more objectionable are not readily apparent.

### *B. The Increasing Likelihood of Private Regulation Because of Cheap Technology*

Private regulation may increase for several reasons. First, internet and broadband access continues to increase, as does familiarity with the internet and blogs for news, opinion, and community.<sup>389</sup> So there will be a larger pool of activists for blogstorms, with the attendant possibility of larger blogstorms.<sup>390</sup>

Second, both conservative and liberal citizens have incentives to engage in such private regulation. On both sides, a set of citizens could disagree with the party leadership, legislatures, or president and can turn to private regulation to enact their agendas. As groups on one side increase their activities, the other side will counter with their own.<sup>391</sup>

386. *Id.* at 53.

387. *See id.* at 54 (discussing real estate advertisers, agricultural advertisers, and others), 108 (discussing rewriting an article about Earth Day to ensure that advertisers would not be offended).

388. GEORGE SELDES, *FREEDOM OF PRESS: CIVIL LIBERTIES IN AMERICAN HISTORY* (1935).

389. *See* Sifry, *supra* note 31 (“More than 2 million children aged 6–17 have their own website, according to a December 2003 survey by Grunwald Associates. Twenty-nine percent of kids in grades K-3 have their own e-mail address.”).

390. In December 2004, the FCC Chairman noted that “[i]n recent years, complaints about television and radio broadcasts have skyrocketed, and the F.C.C. has stepped up its enforcement in response. Advocacy groups do generate many complaints . . . but that’s not unusual in today’s Internet world.” Michael K. Powell, Op-Ed., *Don’t Expect the Government to Be a V-Chip*, N.Y. TIMES, Dec. 3, 2004, at A29.

With more activists, more blogs may gain power; certain blogs may simply increase their power. Either way, the power of unorganized individuals should increase.

391. Gary Minda, *The Law and Metaphor of Boycott*, 41 BUFF. L. REV. 807, 811 n.10 (1993) (“[P]olitical action groups with conservative ideologies, such as the National Federation for Decency, the Church of Christ, and the American Life Lobby have become more vocal and active, spurring more liberal groups to counter with their own political action measures.”).

Third, on the right, specifically, many conservatives feel emboldened by the Republican party's dominance and want to reshape private institutions to reflect what they consider America's conservative values.<sup>392</sup> The right also has more sophisticated organization, in part through churches, so linking together these many existing organizations would provide immediate power.

Fourth, the left may have more motivation to use private regulation. Unlike the right, the left has no foothold in government and few organizations that are not ad hoc (such as churches). In blog-communities, liberals also believe there are no checks on the Republican agenda.<sup>393</sup> Many liberals feel that Republicans, who currently control every branch of government, will be unresponsive to their concerns;<sup>394</sup> private action is necessary.<sup>395</sup> They also think the mainstream media, which ostensibly "checks" government, has failed or is pro-Republican,<sup>396</sup> especially the broadcast and cable news channels,<sup>397</sup> and must be replaced.<sup>398</sup> They feel the Democratic party, which should check Republicans, is weak and often incompetent;<sup>399</sup> they feel its leadership often crafts poor messages, falsely claims to be "centrist" while being unimaginative or pro-

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392. For example, conservatives would want to reshape media. Regarding *Desperate Housewives*, on November 24, 2004, on MSNBC's *Scarborough Country*, conservative activist Jennifer Giroux, and Republican strategist Jack Burkman called for private regulation: a Christmas-shopping boycott of the show's advertisers, Kmart and Target.

393. Many on Daily Kos refer daily to the allegedly imminent American fascism. See, e.g., posting of Tomtech to Daily Kos, <http://www.dailykos.com/story/2004/12/15/223645/28> (Dec. 15, 2004, 20:36 PDT).

394. *National Press Club Speech: Securities Regulation* (C-Span television broadcast Jan. 31, 2005) (New York State Attorney General Eliot Spitzer detailing how the Republican federal government attempted to thwart his attempts to regulate different industries).

395. Unlike liberals, conservative groups can feel that the government is more responsive to them. On the show discussed in *supra* note 392, Mr. Burkman thought private regulation was not enough, chastised the unreliable FCC, and invited President Bush to "join" the "culture war," and "stick it to" ABC by suspending ABC's broadcast licenses for a week.

396. See, e.g., George Monbiot, *A Televisual Fairyland: The U.S. Media Is Disciplined by Corporate America into Promoting the Republican Cause*, GUARDIAN (U.K.), Jan. 18, 2005, at 19, available at <http://www.guardian.co.uk/comment/story/0,3604,1392770,00.html>; Eric Boehlert, *Giving Bush a Pass—Again*, SALON.COM, Jan. 20, 2005, [http://www.salon.com/news/feature/2005/01/20/media\\_on\\_inauguration/index\\_np.html?x](http://www.salon.com/news/feature/2005/01/20/media_on_inauguration/index_np.html?x); James Zogby, *Cultural and Commercial Influences on the Free Press*, ARAB AM. INST., Jan. 17, 2005, <http://www.aaiusa.org/wwatch/011705.htm>; posting of Bink to Daily Kos, <http://www.dailykos.com/story/2005/1/21/11592/0727> (Jan. 21, 2005, 21:03 PDT).

397. See, e.g., Frank Rich, *On Television, Torture Takes a Holiday*, N.Y. TIMES, Jan. 23, 2005, § 2, at 1.

398. See, e.g., Scott Galindez, *Building a New Majority*, TRUTHOUT.ORG, Jan. 19, 2005, [http://www.truthout.org/docs\\_05/012005W.shtml](http://www.truthout.org/docs_05/012005W.shtml).

399. See posting of Philinmaine to Daily Kos, <http://www.dailykos.com/story/2004/12/21/215446/21> (Dec. 21, 2004, 19:54 PDT).

corporate, and fails to stand up for Democratic values.<sup>400</sup> They also feel that election-campaign leadership consists of consultants financially threatened<sup>401</sup> by the power of blogs for organizing and message-making.<sup>402</sup> In conjunction with this feeling, bloggers often consider themselves as helping to provide backbone to individual Democratic officials or lobbying to change their minds.<sup>403</sup> Indeed, Barbara Boxer thanked Daily Kos users for their support after she protested the 2004 Ohio election results and grilled Condoleeza Rice during confirmation hearings.<sup>404</sup> There are historic analogs for those out of power turning to private regulation,<sup>405</sup> so the users' activist response could be expected.

As a result, participants call for a "Shadow Government"—a group outside the government composed of progressives and liberals.<sup>406</sup> One site angrily lambasted Kerry voters:

Your protests will not be listened to by the government, nor covered by the press. If you don't like it, well, too bad because you have no recourse. Are you angry yet? Then join our boycotts.<sup>407</sup>

Boycotts are popular among these angry liberals.<sup>408</sup> Another, more popular, liberal site presented a nearly identical sentiment: "The president and congress will not address the issues we care about. We can either stand by . . . or we can take action."<sup>409</sup>

Private *speech* regulation, specifically, may increase because of perceived biases on both sides. Liberal groups believe that most of "the

400. See, e.g., posting of Captainahab to Daily Kos, <http://www.dailykos.com/story/2005/1/19/225933/083> (Jan. 19, 2005, 20:59 PDT); posting of Blogswarm to Daily Kos, <http://www.dailykos.com/story/2004/12/5/143129/016> (Dec. 5, 2004, 12:31 PDT).

401. See Sifry, *supra* note 31.

402. Posting of Josh Marshall to Talking Points Memo, [http://www.talkingpointsmemo.com/archives/week\\_2004\\_11\\_14.php](http://www.talkingpointsmemo.com/archives/week_2004_11_14.php) (Nov. 14, 2004, 20:00 EDT).

403. Posting of Josh Marshall to Talking Points Memo, [http://www.talkingpointsmemo.com/archives/week\\_2004\\_12\\_19.php](http://www.talkingpointsmemo.com/archives/week_2004_12_19.php) (Dec. 20, 2004, 17:01 PDT).

404. Posting of Barbara Boxer to Daily Kos, <http://www.dailykos.com/story/2005/1/27/124226/410> (Jan. 27, 2005, 15:11 PDT).

405. For example, a decrease in government consumer protection during the Reagan administration led to increased consumer boycotts. See, e.g., Minda, *supra* note 391, at 811 n.10 ("Consumer affairs specialists claim that consumer boycotts are a citizen reaction to the policies of the Reagan Administration that brought a 'dramatic diminution of support for consumer protection programs at all levels of government,' thus forcing consumer groups to take self-help measures for mutual aid and self-protection.") (citations omitted).

406. Posting of Meteor Blades to Daily Kos, <http://www.dailykos.com/story/2004/11/22/31512/197> (Nov. 22, 2004, 01:15 PDT).

407. Spending Liberally, *supra* note 234.

408. See, e.g., posting of Rabidnation to Daily Kos, <http://www.dailykos.com/story/2005/1/11/5162/98777> (Jan. 11, 2005, 03:16 PDT).

409. See, e.g., Our Mission and Purpose, BuyBlue.org, *supra* note 9.

news media” are biased heavily against liberals<sup>410</sup> and Democrats.<sup>411</sup> On the other side, conservatives are just as convinced “the media” is liberal,<sup>412</sup> especially Dan Rather and the New York Times editorial page. Media is a usual target of these attempts at private regulation. For weeks after the Sinclair stunt, a comment on a liberal blog about CBS and CNN such as “Maybe we can SInclair [sic] them?” would spark a dozen comments.<sup>413</sup> Members of Moveon.org believe that media reform is one of the two most important issues facing the country.<sup>414</sup> So media companies may see more private speech regulation.

### C. Under the Constitution, Can Blogstorms Be Regulated?

In many circumstances, private individuals cannot engage in forms of private regulation. They cannot privately regulate murder by trying and executing culprits. They can, however, regulate murder by forming neighborhood watch groups, locking their doors, and watching for suspicious activity. Public law shapes the private regulation. There is a concern that blogstorms may harm society. Blogstorms that target speech can undermine First Amendment values. Political will may be lacking to regulate blogstorms targeted at indecency; it may be lacking even for blogstorms aimed at speech widely considered political propaganda. But if blogstorms start to effectively target and silence media news and shows considered acceptable by many Americans, governments may move to regulate blogstorms. One option would be to regulate them under the antitrust laws as conspiracies against trade.

Government, however, probably cannot regulate blogstorms without violating the First Amendment. With a speech-inspired blogstorm, there are free speech and free association considerations on both sides. A

410. For example, many books and organizations make this argument. Shortly before the 2004 campaign the following books and report were published: FRANKEN, *supra* note 351; JOE CONASON, *BIG LIES: THE RIGHT-WING PROPAGANDA MACHINE AND HOW IT DISTORTS THE TRUTH* (2003); PEW RESEARCH CENTER, *supra* note 319.

Liberal groups include Media Matters, *supra* note 44; Fairness and Accuracy in Reporting (FAIR), <http://www.fair.org/> (last visited Nov. 15, 2005); and Moveon.org, *supra* note 272.

411. For example, they believe any Democrat—no matter how virtuous, intelligent, or competent—will be unfairly demonized in the media, while an incompetent Republican will get a free pass. Matthew Yglesias, No, No, No, No!, [http://yglesias.typepad.com/matthew/2004/11/no\\_no\\_no\\_no.html](http://yglesias.typepad.com/matthew/2004/11/no_no_no_no.html) (Nov. 14, 2004).

412. BERNARD GOLDBERG, *ARROGANCE* (2003); ANN COULTER, *SLANDER* (2002).

413. Posting of Jfern to Daily Kos, <http://www.dailykos.com/story/2004/12/4/24844/0937> (Dec. 4, 2004, 23:45 PDT).

414. Marc Cooper, *Weaker Than Ever: MoveOn's State of Denial Is Bad for Democrats*, L.A. WEEKLY, Dec. 3–9, 2004, at 14, available at <http://www.laweekly.com/ink/05/02/dissonance-cooper.php>.

detailed analysis of the free speech implications of blogstorms is beyond the scope of this Article. There have been detailed analyses for traditional advocacy campaigns, and their discussions are relevant to blogstorms.<sup>415</sup> Many, especially in the media,<sup>416</sup> feel that these forms of private speech regulation harm the communications environment because they can lead to less diversity of viewpoints, harm speakers and listeners, chill media speech, and lead to less coverage of controversial positions.<sup>417</sup> Many groups may attempt to regulate in ways that would be unconstitutional if imposed by the government.<sup>418</sup> Many advocacy groups seek content censorship, not the equal-time-type regulation the Sinclair participants sought.<sup>419</sup> A blogstorm's spontaneity and apparent grassroots support do not make them any better: lynch mobs were spontaneous and had apparent grassroots support.<sup>420</sup> Since mainstream media are so important for society—"news, public affairs, and entertainment programs reflect and shape the dominant values and norms in society"<sup>421</sup>—citizen groups may have a stake in determining the content, but they should not censor such vital communication.

Those opposing private-regulatory campaigns can attempt to regulate them through government. Many of the campaigns' activities, however, are clearly both constitutionally protected and generally moral. First, informing members and others is clearly protected speech, subject only to the usual First Amendment exceptions for defamation and content-neutral restrictions, among others. Second, using electronic bulletin boards to say a stock is overvalued seems unobjectionable, and protected, unless there is some conflict of interest.<sup>422</sup> Third, contacting the

415. See, e.g., Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts*, 34 ARIZ. L. REV. 709 (1992); Patrick M. Fahey, Comment, *Advocacy Group Boycotting of Network Television Advertisers and Its Effects on Programming Content*, 140 U. PA. L. REV. 647 (1991).

416. Powell, *supra* note 390 ("The high pitch at which many are discussing the enforcement of rules against indecency on television and radio is enough to pop an eardrum. It is no surprise that those who make a handsome living by selling saucy fare rant the loudest—it drives up the ratings.").

417. See Fahey, *supra* note 415, at 667–86. This discussion is indebted to Fahey's work. See also BAKER, *supra* note 80, at 59; Volokh, *supra* note 3, at n.95.

418. Private individuals can regulate speech with far fewer restrictions than can the government, as a comparison of public and private schools would show.

419. For a discussion of content and structural regulation, see Marvin Ammori, *Another Worthy Tradition*, 70 MO. L. REV. 59 (2005).

420. Cf. RHEINGOLD, *supra* note 24, at xix.

421. See Fahey, *supra* note 415, at 648.

422. See Linda C. Quinn & Otilie L. Jarmel, *Securities Regulation and the Use of Electronic Media—Year 2001*, in SECURITIES LAW AND THE INTERNET DISCLOSURE PRACTICES IN THE REGULATION FD ERA 293, 349 (PLI Corp. Law & Practice Course, Handbook Series No.



FCC and other governmental departments is protected under the First Amendment's right to petition.<sup>423</sup>

Fourth, advertiser boycotts, often the "weapon of choice" by advocacy groups,<sup>424</sup> are slightly more complicated. Some argue that government can regulate advocacy boycotts subject to *O'Brien/Turner* intermediate scrutiny.<sup>425</sup> Others consider them mere instances of democratic or free market triumph. Others object that advertisers are unfairly targeted, since they have little effect on direct programming decisions.<sup>426</sup>

But even opponents of advocacy boycotts concede that such boycotts have constitutional protection.<sup>427</sup> The most important protection here may be the right to association, as only associations and institutions could produce noticeable regulatory results. The Supreme Court has drawn a distinction between a peaceful political boycott, which presumptively government cannot regulate because it is protected "expression on public issues,"<sup>428</sup> and pure economic boycott activity, regulable under antitrust laws.<sup>429</sup> As a result, a political blogstorm against a media company appears constitutionally protected.<sup>430</sup> This could be the line between constitutional and unconstitutional regulation. Where a blogstorm is merely economic, then perhaps the government could regulate it.<sup>431</sup> Most blogstorms, however, even those targeting all companies that give disproportionately to Democrats or Republicans, will be political, not solely

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BO-00WU, 2001), WL 1258 PLI/Corp 293; Reynolds Holding, *Double Whammy in Stock Fraud Case*, S. F. CHRON., Nov. 9, 2003, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2003/11/09/MNGO92TRV71.DTL>.

423. Cf. *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

424. See Fahey, *supra* note 415, at 649.

425. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *United States v. O'Brien*, 391 U.S. 367 (1968); Fahey, *supra* note 415, at 655;

426. Of course, government can regulate third-parties to affect the targeted parties. For example, government can impose liability on peer-to-peer computer networks for the copyright-infringing activity the networks facilitated. See, e.g., Aviram, *supra* note 64, at 1181.

427. See Fahey, *supra* note 415, at 653–56.

428. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982).

429. See *id.*; Fahey, *supra* note 415, at 651.

430. California Supreme Court deemed constitutionally protected a political boycott that aimed to change a newspaper's editorial policies. *Id.* at 653 (citing *Env'tl. Planning & Info. Council v. Superior Court*, 680 P.2d 1086 (Cal. 1984)); see also *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214 (9th Cir. 1990) (concluding that a private groups' actions that pressured a group not to provide a forum to Holocaust-deniers could be tortious where such actions included threats of violence).

431. Other proposals to distinguish constitutional and unconstitutional forms of private censorship draw different lines, such as an institutional/person distinction. Even if the First Amendment could apply to private institutions under this proposal, a blogstorm would still be constitutionally protected. See Magarian, *supra* note 13.

economic. Indeed, blogstorms apparently must have non-monetary motivations.

Despite their many harms, speech-inspired blogstorms may have some benefits. They involve both speech and association rights. They permit individuals to affect their information environment largely through market and democratic actions.<sup>432</sup> They help individuals counter what they perceive to be the negative externalities of some speech, whether violent, indecent, or unbalanced. Finally, private speech regulation is pervasive. A policy that singles out advocacy groups and blogstorms would require a defense that distinguishes such action from other private regulation.<sup>433</sup>

#### D. Non-Media-Related Internet-Enabled Regulation

Although the focus of this paper has been internet-enabled private speech regulation, the internet enables other collective actions analogous to government regulation. This is natural, as governments are collective bodies through which citizens attempt to shape their societies. One example of non-speech action includes Net Day 96. On March 9, 1996, without direction from an organizational staff, thousands of Californians self-selected themselves, by location and expertise, to wire California schools for internet access.<sup>434</sup> Another example is privacy-regulation: activists successfully stopped the introduction of certain software on privacy grounds.<sup>435</sup> The war in Iraq has spawned several private regulatory initiatives, such as providing soldiers with benefits: equipment for snipers,<sup>436</sup> winter clothes for soldiers abroad,<sup>437</sup> and (with the coordination of airlines) free airfare.<sup>438</sup> Boycotts are clearly popular: one site, KarmaBanque,<sup>439</sup> ranks which companies are most susceptible to consumer boycotts based on whether a company's income relies on a high volume of sales or on high margins.<sup>440</sup> One partisan group encourages

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432. See BAKER, *supra* note 80, at 57–60.

433. The government could likely, however, burden blogstorms through more neutral regulation. Blogstorms depend on an unbiased, uncensored internet. Such an internet has many qualities that may be being dismantled. For a discussion of an unbiased and uncensored internet, see sources cited in *supra* note 255.

434. See, e.g., Kollock, *supra* note 222, at 232–34.

435. See Gurak, *supra* note 273, at 243–44.

436. AmericanSnipers.org, <http://www.americansnipers.org/> (last visited Nov. 15, 2005).

437. Gassan, *supra* note 10.

438. Operation Hero Miles, <http://www.heromiles.org/> (last visited Nov. 15, 2005).

439. Karmabanque, <http://www.karmabanque.com> (last visited Nov. 15, 2005).

440. Danny Bradbury, *Become an Armchair Activist*, INDEPENDENT (U.K.), Feb. 16, 2005, at 10, available at [http://news.independent.co.uk/world/science\\_technology/article11290.ece](http://news.independent.co.uk/world/science_technology/article11290.ece).

Democrats to purchase only from companies that gave campaign donations to Democrats, to reward such behavior.<sup>441</sup> Other regulatory examples include physical swarming tactics through mobile phones for democracy, anti-globalization, bicycle activism,<sup>442</sup> and private tsunami relief.<sup>443</sup>

## V. CONCLUSION

The internet provides low costs that permit ad hoc coalitions to organize online to implement private regulation through volunteer collaboration. Groups overcome collective action problems through instant loose coordination based on these costs and take action where motivation and capacity are sufficient. Such regulation has already taken place, especially targeted at media companies, and Americans can expect more ad hoc private regulation in the near future. This Article takes a first step towards understanding this emerging phenomenon.

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441. See, e.g., Our Mission and Purpose, BuyBlue.org, *supra* note 9. This could have unintended effects and act like campaign finance regulation. Republicans can turn to buying Red (Republican). Although Buy Blue intends to reward companies that favor liberal and progressive policies, along with Buy Red, the ultimate effect could be to reward apolitical companies. Taken to the extreme, companies could opt-out en masse, effectively as though reacting to a (potentially unconstitutional) campaign finance regulation limiting donated money, along somewhat arbitrary lines. Or companies could opt-in and strengthen their sales in rural areas (currently Red) or cities (currently Blue) as a result.

442. See, e.g., RHEINGOLD, *supra* note 24, at 158; CRUMLISH, *supra* note 36, at 51–52.

443. Many bloggers considered the initial federal government commitment to be stingy, posting of Armando to Daily Kos, <http://www.dailykos.com/story/2004/12/28/11618/729> (Dec. 28, 2004, 17:18 PDT), and linked to ways to help, *see id.*; Posting of D. Weinberger to Joho the Blog, <http://www.hyperorg.com/blogger/mtarchive/003507.html> (December 27, 2004, 14:27 EDT). Others also argued the government had been stingy. Editorial, *Are We Stingy? Yes*, N.Y. TIMES, Dec. 30, 2004, at A22. [http://www.nytimes.com/2004/12/30/opinion/30thu2.html?incamp=article\\_popular\\_1](http://www.nytimes.com/2004/12/30/opinion/30thu2.html?incamp=article_popular_1). The government even took part in organizing private donations. *Bush, Clinton to Lead Tsunami Fund Raising*, ABC NEWS, <http://www.nytimes.com/aponline/national/AP-Bush-Tsunami.html>? (last visited Nov. 15, 2005).