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Is Your Blog Exposing You to Legal Liability?

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The growth of streamlined Web sites presented primarily in journal form, known as “Web logs” or, more succinctly, “blogs,” operated and populated by individuals as well as businesses, continues to be nothing short of explosive. But as usually is the case with such rapid adoption of technology and communication ability, there is the potential for legal liability.

This article will provide a brief overview of some of the major legal issues presented to and which must be considered by those who are or who contemplate operating a blog. Although this article focuses on U.S. law, the global reach of the Internet means that the laws of many jurisdictions may potentially apply, which may not be as protective of certain relevant rights as our law is.

GENERAL CONSIDERATIONS

A threshold issue is whether blogs are any different from more traditional means of communication. Among the questions that the courts have yet to answer fully are:

- What is the significance of the increased immediacy of blogs?
- Are blogs more likely in the defamation context to be construed as protected “opinion”?
- Are they more likely in the copyright or trademark context to be construed as a permissible “fair use” of the intellectual property of others?
- Do traditional communications law principles apply and, if so, in what manner?
- Are bloggers journalists, such that both the privileges and

the responsibilities of journalists are applicable to them?

Business blog operators have to consider what latitude to give employees to make posts. As companies are generally held responsible for actions by their employees performed within the scope of the employees’ employment, the ramifications can be quite significant.

Another key decision for blog operators is whether they will allow posts/comments by third parties. There is no requirement that such posts be allowed, and in fact many blogs do not allow them. If you want to reduce legal liability, not allowing posts or comments by others is a major step toward that objective. But, again, that can have practical downsides. It is another of many examples of the conflict/trade-off between maximizing legal protections versus business, image and other considerations.

A less severe alternative would be to provide an e-mail address as opposed to direct posting capability, with the idea that you can then select which messages to post. The selection element, however, may increase the risk of exposure in certain respects, because of the more active involvement of the blogger in publicizing the content of the post/comment.

DEFAMATION

A major issue in the blog context is defamation. Although definitions vary from state to state, generally speaking a defamatory statement is a false and disparaging statement about another that causes injury to reputation (or in some cases causes emotional distress). It is a communication that exposes people to hatred, ridicule (more than a simple joke or satire/exaggeration) or contempt; lowers them in the esteem of others; causes them to be shunned or injures them in their business or calling.



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Qualifying your language (with less than absolute words like “may”) may reduce liability risks somewhat. Should you determine that a mistake was made and a false derogatory statement was posted on your blog, a prompt correction/clarification of prominence comparable to the original should help reduce potential damages. Plus, it furthers the goal of providing accurate information to your readers.

May a blog operator be held liable for defamatory statements posted to the blog by a third party? One influential court has recently said no. On Nov. 20, in *Barrett v. Rosenthal*, the Supreme Court of California ruled that, pursuant to the Communications Decency Act of 1996, “plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement,” — i.e., the third party who posted the statement on the operator’s blog. The court “acknowledge[d] that [its] recognizing broad immunity for defamatory republications on the Internet has some troubling consequences.” It remains to be seen to what extent other courts will follow the California Supreme Court’s lead, and/or whether Congress will step in and revise the law.

Defenses to a defamation claim include truth, the “fair reports privilege” and the fact that the statement was one of opinion/rhetorical hyperbole. Truth is a complete defense, and it is usually sufficient if there is “substantial truth” or the “gist” is accurate, even if minor details are off. A key protection for law blogs, the fair reports privilege protects fair and accurate reports of judicial, legislative or executive proceedings and records. The official source must be identified, the report should reflect the entire record/proceeding and denials of a civil complaint should be summarized.

It used to be the case that “opinion” was virtually completely protected from being the basis for libel liability. However, the scope of the exception has been narrowed by more recent court decisions. Calling something an opinion does not make it so, and words like “I think” or “I believe” do not necessarily assure protection for what follows. A statement may be actionable to the extent it implies a false assertion of fact. Nevertheless, statements may be protected if they are truly opinion and are not capable of being proven either true or false.

COPYRIGHT

Another major legal issue presented in the blog context is copyright.

The first question is, who owns the rights to the content? Material that is created by you is owned by you. Situations of joint creators, where there is joint ownership, can present issues when the creators/owners develop differences. Where content is created by another for you, it is necessary to scrutinize the terms of the arrangement.

For example, if content is created by an employee within the scope of his or her employment, under the Copyright Act the employer automatically owns all rights in the work. In such circumstances, no specific grant of rights is necessary.

In the situation of a freelance content creator, the key is for the blog operator to structure the arrangement with the author as a “work made for hire” under the Copyright Act, with an express agreement between the parties such that the copyright belongs to the party commissioning the work.

The alternative approach in the freelance context is to

have an agreement with the freelance provider that specifically grants “all rights” to you.

With regard to posts/comments submitted by third parties onto your blog, you probably would be viewed as having an implied license from the posting party to have the material appear on your site (in the absence of “terms of use” language conveying greater rights).

Copyright infringement is a serious concern for blog operators, both in terms of the potential use of others’ intellectual property on your blog and others’ use of your intellectual property elsewhere. With regard to the former, you have to make sure that you only use on your blog material that you own, which you have permission to use or which falls under the scope of fair use, allowing you to use it without the permission of its owner. If your blog offers podcasts (pre-recorded and downloadable audio segments), make sure they are “podsafe” — that the audio content offered does not infringe the rights of others (e.g., any unlicensed and copyrighted background music).

Bear in mind that you could be on the hook for infringing material that is posted onto your blog by others. There are ways to deal with this — or at least to try to reduce the scope of damages potentially recoverable.

One is to have an express agreement with posters that states that they are representing that they have the right to post the content they post. But that can only take you so far and does not prevent you from being found responsible in a suit by the true owner. There may be a “safe harbor” exception from offending user posts under the Digital Millennium Copyright Act if the blog can be considered an Internet service provider (which is questionable), which would require the blog operator to remove infringing content once notified of the problem.

Fair use is a privilege allowing others than the copyright owner to use copyrighted material in a reasonable manner without the owner’s consent. There is a balancing of interests, including the purpose and character of the use, the nature of the copyrighted work, the proportion that was “taken” and the economic impact of the taking (the extent to which the use may diminish the value of the original work). Common examples of fair use include criticism (obviously a staple of blog communications), educational use and parody.

TRADEMARK

Similar considerations arise when trademarks are considered, with issues including the name of the blog, the use of others’ trademarks in the blog and affirmatively asserting the blog’s trademark against use by others.

In a trademark infringement case, a plaintiff has to prove two things:

- its mark is entitled to protection; and
- the defendant’s use of its mark will likely cause consumers to confuse it with the plaintiff’s mark.

In addition to registering your trademarks as trademarks, you should consider registering your blog’s name and possibly also a variety of similar names as domain names to protect yourself from others who may try to divert traffic from your blog.

You should also search the Internet on a regular basis for illegal uses of your domain name, blog name, trademark or similar names. If you find others using your name or

trademark, determine whether the other uses are legitimate, and if they are not, contact such users, tell them it is yours and ask them to stop using it. Make sure that you have permission to use any other individual's or company's brand names or trademarks that you display on your site.

If you have an issue with something someone has posted on your blog, you are probably best off simply removing it. Attempting to edit it may expose you to potential liability. This issue can be addressed in the blog's terms of use, affirmatively specifying broad power to delete items.

OTHER SIGNIFICANT POTENTIAL CLAIMS

Other significant potential liability issues involve claims of invasion of privacy, such as unauthorized appropriation or use of one's name or likeness. Defenses to such appropriation include a "newsworthy exception," where the image was used to illustrate a matter of public interest with which it is reasonably related. There could also be obscenity issues, for example in the context of discussion of the facts of a case, either in text or if graphics/illustrations are used. Bear in mind that the Internet has a global audience, and obscenity standards vary.

If the blog provides links to questionable materials (such as instructions for compromising the security of computer systems, cracked software, instructions for cracking, virus making or directions how to generate questionable materials) or if the blog is viewed as encouraging or promoting that others provide such links, there may be potential inducement liability.

Given the possibility that a blog may be viewed in whole or part as an advertisement, companies must make sure they comply with all applicable advertising, "deceptive practice" and "unfair competition" laws and regulations.

A related and presently hot issue is whether lawyer blogs constitute lawyer advertising; the language of some prohibitions is quite broad and could sweep up law blogs within their scope.

DISCLAIMERS

One precaution that can be taken is the appropriate use of disclaimers, which can provide some greater level of comfort and protection. But they are not perfect or ironclad, and the degree to which courts uphold them is not absolute. And beyond the legal considerations there are practical considerations: Disclaimers may turn off users, inhibit contributions you may in fact want or be otherwise inconsistent with your business model. If overused, they may arguably dilute the effectiveness of those disclaimers relating to your most significant concerns. Here are just a few examples of possible language.

Parameters of use/requirement of compliance: "We grant you a nonexclusive, nontransferable, limited right to access, use and display the blog and the materials provided hereon, provided that you comply fully with these Terms and Conditions of Use."

Postings may not be current: "The information on the blog may be changed without notice and is not guaranteed to be complete, correct or up to date."

Distinguish firm from individual authors/posters: "The opinions expressed on the blog are the opinions of the individual author and may not reflect the opinions of the firm or any individual employee or client."

Disclaiming creation/existence of attorney-client relationship (law firm blog): "We provide this blog for general informational purposes only. We do not create an attorney-client relationship with you when you use the blog. By using the blog, you agree that the information on this blog does not constitute legal or other professional advice, and no privileged or confidential attorney-client or other relationship is thereby created between you and us. This blog is not a substitute for obtaining legal advice from a qualified attorney licensed in your state."

External links: "Links to external sources are provided solely as a courtesy to our blog visitors. We are not responsible for and do not endorse or warrant in any way any materials, information, goods or services available through such linked sites or any privacy or other practices of such sites."

Other matters addressed in such statements could include that the use of blog's e-mail/messaging system does not constitute giving legal notice to the firm; the reservation of the right to revise terms and conditions; and an express prohibition against certain activities by users.

Bear in mind that if you offer RSS feeds ("really simple syndication"), although that may be convenient and helpful for readers (who then need not visit multiple blogs to receive their content), it may have legal implications for you. The appearance of your blog in an RSS feed may change from the way you set it up, and, depending on how they were created, not all of what you have carefully set up in terms of notices and disclaimers may necessarily transfer.

CONCLUSION

Blog operators need to be alert for situations possibly raising liability issues. Use common sense, use appropriate disclaimers and, if you are not a lawyer, consider legal review. Check your insurance policies to determine if your risks may be covered.

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