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Protecting Bloggers From Liability

Blogs benefit from the same freedoms and protections as traditional publications, but they are also subject to the same legal difficulties

By Jonathan Bick

Web logs (blogs) are prepared and used for personal, political and economic reasons. The liability issues associated with blogs are the same as those associated with traditional publications that are made available to the public. Blogs receive the same freedom-of-speech and press protections as traditional publications. And, like traditional publications, blog posts can result in allegations of plagiarism, unauthorized use and defamation. Legal, technical and insurance options are available to reduce or eliminate such blog-related difficulties.

The laws concerning blogs vary from state to state. However, a blogger in any state may ameliorate legal difficulties by taking certain actions. To reduce exposure to foreign laws and the inconvenience of foreign jurisdictions, a blogger can employ contract law. In particular, a blogger can require visitors to consent to a terms-of-use agreement prior to using the blog, which can limit out-of-state legal difficulties for the blogger.

For example, the blog's terms-of-

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use agreement may require the blog user to employ a particular set of laws, such as New Jersey statutes, and a particular set of courts, such as New Jersey courts. If the user agrees, then New Jersey courts and laws will mostly likely be employed to resolve all blog-related disputes initiated by the user.

Additionally, by implementing such a terms-of-use agreement, the blogger will benefit from an ability to rely upon the fact that all federal laws, such as copyright law or Section 230, will be resolved in a New Jersey court and allow the blogger the use of New Jersey's shield law.

A notice published in a blog's terms of use, or elsewhere on the blog, can reduce or eliminate other legal difficulties. For example, if the terms-of-use agreement contains a notice that specifically excludes all users under the age of 13, the blogger may be able to reduce legal difficulties related to the Child Online Privacy Protection Act. It should be noted that the blogger may have to take certain specific actions, in addition to posting notices, to avoid some legal difficulties.

A terms-of-use agreement may also be used to supplement the enforcement of certain legal rights, such as copyrights. For example, a blogger may want to begin or end each entry with: "This blog is for personal, noncommercial use

only. If this material is used in another way please contact [insert e-mail address], to allow the blogger to take action against infringers."

In addition to using a terms-of-use agreement to protect the blogger, the blogger can take advantage of public laws. For example, the blogger can register the blog as an Internet service provider (ISP) for purposes of the Digital Millennium Copyright Act, in order to reduce or eliminate legal difficulties related to copyright infringement.

Using an Internet application found at www.uscopyright.gov, a blogger may complete an online form, print it out and file it with a payment of \$105, in order to register as an ISP. After registering, posting a Digital Millennium Copyright Act notice and taking down allegedly infringing content, the blogger is most likely immune from copyright infringement judgments.

A typical notice begins with an overview such as: "If you believe that the content of this blog infringes your copyright, please forward a written notice describing the content, a certification of your ownership and a removal request. Your notice will initiate a content removal action by the blog."

The overview is usually followed by a liability notice, for example: "Please be advised that you will be liable for damages (including costs and attorneys'

fees) if you materially misrepresent that a product or activity is infringing your copyright.”

Finally, a set of guidelines is normally offered to assist the alleged copyright owner with how to proceed. These include where to send the complaint, and a reminder to the alleged copyright owner to include certain information, including: a physical or electronic signature of the copyright owner or a person authorized to act on their behalf; an identification of the copyright claimed to have been infringed; a description of the nature and location of the alleged infringing; the full name, address, telephone number and e-mail address of the alleged copyright owner; and a statement by the alleged copyright owner.

The content-owner statement should have three parts. First, an assertion that the alleged copyright owner believes in good faith that the use of the content is not authorized by law, or by the copyright owner or such owner’s agent. Second, a statement that the all of the information contained in the Infringement Notice is accurate. Third, under penalty of perjury, an assertion that the alleged copyright owner is either the copyright owner or a

person authorized to act on their behalf.

In New Jersey, bloggers face four other significant legal liabilities: defamation, intellectual property infringement (usually copyright or trademark), violation of a third party’s right to publicity and intrusion into a third party’s seclusion. The defamation claims can usually be minimized by relying upon and documenting sources. The proper use of trademarks will minimize trademark infringement claims. Proper application of New Jersey’s Shield Law will minimize or eliminate claims related to violation of a third party’s rights to publicity and intrusion into a third party’s seclusion.

A blogger may also employ some technical solutions to avoid difficulties. For example, by leaving a link in your post to your “home page,” and possibly in any charts or photographs, an unauthorized copy of the blogger’s content will allow a subsequent user to be returned to the blogger’s domain. Such links also make infringement claims easier to resolve.

Similarly, watermarking content will discourage unauthorized use because of the difficulty of removing watermarks. Watermarks also make infringement claims easier to resolve. Watermarks can

be as simple as a copyright symbol with the blogger’s site or may be associated with a hyperlink to the blogger’s home page.

The blogger should also consider purchasing errors and omissions (E&O) insurance. This is a special type of business-liability insurance, which most businesses have for certain types of employees, such as insurance agents, real estate agents and brokers, architects and third-party administrators.

E&O insurance is intended to cover mistakes that cause financial harm to another, which can occur in almost any transaction in any profession. This type of insurance helps to protect a professional, an individual or a company, from bearing the full cost of defense for lawsuits relating to an error or omission in providing covered services, such as blogging. More often than not, this is a separate coverage from a standard general liability or property insurance policy. However, it is possible that a blog may be covered by existing E&O insurance. Also, it should be noted that some bloggers have been turned down by underwriters because their blog content was error prone and not subject to verification. ■