

The Latest Thing: Blogs and Legal Liability

by Bob Tarantino

Once your Mom has heard of it, it's no longer just an underground fad – blogs are here to stay. They have now played a role in elections on both sides of the border and have resulted in unflattering news pieces for many individuals and businesses. An increasing number of organizations, including law firms, are currently publishing or exploring the publishing of online web logs. This brief article aims to highlight some of the legal and management concerns which lawyers may want to bear in mind when asked to provide advice to clients (commercial or otherwise) who enquire about potential liabilities arising from blogs and blogging. It should be borne in mind that the various concerns which are engaged by the global nature of the internet (*e.g.*, liability in multiple jurisdictions) continue to apply with respect to blogs. Though there are no unique or original legal claims that arise from blogging *per se*, because it is a relatively new medium with its own conventions and dynamics, liability concerns may come about in unexpected ways.

Introduction

First, a definition. Blogger Dan Gillmor has described a blog as “an online journal comprised of links and postings in reverse chronological order, meaning the most recent posting appears at the top of the page”. In the coining of Meg Hourihan, blogs are “post-centric” – each “entry” in the “journal” is referred to as a “post” – with the post comprising the “key element of the blogging experience”; in a similar fashion, music CDs can be described as “track-centric” or “song-centric”. A blog can have a single author or multiple contributors, and many blogs allow readers to submit comments on each post – popular posts at highly-trafficked blogs can prompt “conversations” that are hundreds of comments long.

There are as many topics covered by blogs as there are bloggers – they range from politics [www.instapundit.com] to the arts [www.artsjournal.com] to automobiles [www.autoblog.com] to technology [www.gizmodo.com] and everything between, around, above and beyond those elementary selections. Even Canadian law firms are getting in on the action – Davis & Company alone publishes two (one on legal issues revolving around the video game industry [<http://www.videogamelawblog.com/>] and one on Japanese law [http://www.davis.ca/community/blogs/japan_group/]).

Managing Liability

The interactive nature of contributing to blogs results in a field potential liability landmines. As noted above, many blogs have multiple authors – individuals who are authorized to contribute posts to the blog; as well, many blogs allow readers to submit comments – a sort of free-form “letter to the editor” function. This means that materials giving rise to all of the heads of liability which are identified below can be introduced by both authors and readers.

This multiplicity of liability sources can be managed in a number of different ways: with respect to authors, all posts can be submitted for review to a single editor prior to publication – this will, of course, require that one individual be trained to identify problematic material, and depending on the expected volume of traffic for the blog, could impose quite a burden on the individual in question.

With respect to the risks posed by third-party comments being posted on the blog, there are three ways to manage the risk:

- (1) do not allow comments at all – this tactic has been adopted by some of the most popular blogs, and was also recently introduced by the *Washington Post* when the comments section of their blog was overrun by, in the words of the editors, “personal attacks, the use of profanity and hate speech”;
- (2) require comments to be approved by an administrator prior to them being published on the blog – virtually all blogging software allows this feature to be implemented, allowing blog administrators to “gatekeep” potentially problematic comments; and
- (3) deletion of comments after publication – this is the least pro-active course of action and most dangerous: in order to be effective, it requires constant vigilance of comments which have been posted; this also raises one of the characteristics of the internet which has such relevance for any issues revolving around the internet: once something is published on the internet, it can never be truly, completely, irretrievably “deleted” – there is inevitably a cached copy of the publication or a mischievous reader will have “screen captured” an image of the web page containing the offending material (just ask Ontario Liberal Mike Klander, whose musings about Olivia Chow on his blog became political fodder during the recent federal election).

Potential Liability Concerns

1. *Damaging Speech: Defamation and Hate Speech*

Libel is often the first concern which comes to mind when dealing with publications on the internet. And with good reason: in *Barrick Gold Corp. v Lopehandia*, the Ontario Court of Appeal saw fit to more than quadruple the trial courts damage award on the basis that defamatory words published on the internet have a unique capacity “to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature”. Blog publishers need to ensure that neither the author(s) nor commentors publish defamatory material. Courts have made clear that liability for defamation can occur on regular websites and message boards: although only a single Canadian case appears to have dealt with defamatory material on a blog, there is no compelling reason why the existing framework for defamation analysis would not extend to material posted on a blog.

Attention should also be paid to the hate propaganda sections of the *Criminal Code*, which can give rise to liability for publication of materials which advocate genocide or hatred against an identifiable group. It is to ensure that no possibility exists for third parties to publish defamatory statements or hate propaganda (via the comments section) that a number of popular blogs simply do not allow comments.

2. *Copyright and Trade-mark*

One of the prominent “styles” of blogging involves critiquing material which has been created by others – the subject of the criticism can be a piece of news reporting, an opinion column, song, artistic materials such as posters or cartoons, clips from television shows or feature films, or any other creative product. The item to be critiqued is often quoted at length (if it is written material) or copied and pasted directly into the post in question (if it is primarily visual in nature). In each such case, the copyright and trade-mark interests of the creator owner of the original material may be violated. The free-wheeling and sometimes anarchic nature of the blogging community sometimes leads to a failure to adequately consider what authorizations may be required in order to properly display copyrighted or trade-marked materials. As well, there is a tendency on the part of individuals to over-estimate the latitude afforded to users under the “fair dealing” exemptions to copyright owners rights – a tendency which is often exacerbated in the online context.

3. *Breach of Confidence/Disclosure of Trade Secrets/Privacy*

Although this is of particular concern for professionals who have additional ethical duties to their clients, all bloggers should take care not to inadvertently use their blog as platform to publish confidential information. As well, steps should be taken to ensure that neither the authored material or the technical aspects of the blog enable the disclosure of personal information in contravention of provincial and/or federal privacy legislation.

4. *Securities Disclosure*

Employers who permit employees to blog should bear in mind potential liability arising from the disclosure of sensitive information, misrepresentations contained in public statements, and disclosure during any applicable blackout periods.

Public Profile Concerns

1. *The Single Voice*

While a majority of blogs are the product of a single author, an increasing number are written by groups of individuals. In the business context, allowing numerous authors to contribute to the blog has the attraction of distributing the work-load; but there is a potential downside: maintaining a consistent message on matters of importance can be difficult when multiple unique voices are allowed a platform

from which to speak. Although having a single editor can address the potential for variance from a single corporate line, such a tactic may prove unsatisfactory: one of the most appealing aspects of blogs is their idiosyncratic nature, and the discovery of fresh voices – smothering that potential in favour of toeing the corporate line can lead to an unenjoyable experience for both authors and readers.

2. *The Compatible Voice*

Bloggers who seek to promote business interests through their blogs should be careful not to damage any relationships (or potential relationships): caution must be exercised to ensure that information or opinions published does not upset partners, suppliers or customers. There are numerous variations on how this can arise: it can range from expressing an unfavourable opinion about a product sold by a supplier to criticizing a government policy which a client finds beneficial.

Conclusion

Though blogs provide a unique marketing opportunity and potentially innovative vehicle for communicating with clients and customers, a variety of legal concerns are engaged. Advisors to organizations which decide to publish a blog should counsel the implementation of mechanisms which seek to ensure that the matters discussed in this article do not result in liability exposure.