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Avoiding Blog Liability

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media•insights is published periodically by OneBeacon Professional Partners to address the broad scope of exposures faced by our agents' and brokers' clients, as media-related companies are scrambling to meet the public's appetite for information, news and entertainment in an increasingly litigious society. This issue of media•insights looks at sound risk management practices for mitigating legal issues, including defamation, copyright and trademark infringement and the disclosure of confidential information, associated with blogs.

The word “blog” is short for web log or weblog. A blog may be a publication of personal observations, web-links, musings or hard-hitting news – but is often considered a “four-letter” word by the traditional media, corporate America, and politicians because of its provocative nature and global reach.

Blogs are as unique as the individuals who publish them and can be personal journals or more commonly, commentary or news on a particular topic such as current events, sports, or hobbies. Blogs typically are composed of words, but may also include images and links to other blogs, internet sites, videos, audio recordings or photographs. The “Drudge Report” is a well known example of an early news-based blog founded by self-proclaimed reporter Matt Drudge. It became well known to many Americans during the events leading to the impeachment of President Clinton in 1996.

A recent estimate is that 75,000 new blogs are created daily, joining the existing number of more than 40 million blogs. It has been reported that growth is so explosive that the number of currently existing blogs is twice as high as the number that existed a mere six months ago.

Because of the number of persons reading and commenting upon particular blogs, which can be done at any time by anyone anywhere in the world, bloggers reporting upon public affairs have gained increasing credibility in breaking news stories or helping to frame debates on public issues. In 2002, comments made by then U.S. Senate Majority Leader Trent Lott at a party honoring U.S. Senator Strom Thurmond were seen as implicitly approving racial segregation. The comments were made publicly in front of the media, but no major news organizations reported on Lott's remarks. “Bloggers” broke the story and helped fuel the public outcry that forced Lott to step down as majority leader. Similarly, blogs were a leading force in breaking the 2004 “Rathergate” CBS News crisis concerning the military service record of President Bush. On “60 Minutes”, Rather produced documents which seemed to contradict President Bush's description of his official military service. Bloggers quickly determined the documents were not authentic and CBS later apologized for what it admitted were insufficient professional reporting procedures. Rather later left CBS. This

particular series of events was seen to give credibility to the fast-paced reporting format of blogs as a source of news and commentary and as an important factor in shaping opinion and the application of political pressure.

Most blogs are private, but some are used for business purposes such as marketing or public relations. Many newspaper and magazines now sponsor personal blogs by their employees in the ilk of traditional newspaper columns. Despite the fact that the world may be watching and reading, many individuals publish highly personal content in their blogs once saved for close friends and locked diaries.

Typical legal issues concern defamation, copyright and trademark infringement and the possible disclosure of confidential information. Internet service providers are generally believed to be free from legal liability for information from third parties they merely republish under the 1996 U.S. Communications Decency ACT and the EU Directive 2003/31/EC. Section 230 of the Communications Decency Act holds that no provider or user of an interactive computer service is to be treated as the publisher or speaker of information provided by the third party. The legal effect is that persons making their own comments remain legally responsible for their comments, but not for content from others they merely re-publish.

Whether Section 230 is broad enough to protect traditional publishers for

blogs written by others such as their employees is an emerging legal question. This question may turn partially on whether or not the particular blogger is an employee of the publisher or merely an independent contractor. However, some fear the publisher would not readily escape liability if the columnist writes regularly for and, in the eyes of the public, is associated with the publisher. This leads to the invariable question of whether or not the publisher should edit the blog or if by doing so it might somehow assume legal liability it might not otherwise have. Experts are divided on this question.

Establishing standards regarding the oversight and editing of content delivered in real time is receiving a lot of attention. Some experts envision a future ruling limiting the immunity of the publisher for blog content provided by bloggers. Other experts advise publishers to edit blogs just as they would their newspaper or magazine. Still, others maintain that any editing which changes the writer's content diminishes the so-called Section 230 defense; the publisher should, instead, monitor the content and ask for help from blog readers through blog user statements. Such a statement may contain disclaimers concerning errors, omissions, limitations of liability and policies concerning the posting of unlawful or offensive content. A link or option to notify the publisher or perhaps to request deletion of questionable content might be utilized in addition to a screen or filter. Washingtonpost.com provides on its site as follows:

"We encourage users to analyze, comment on and even challenge

Washingtonpost.com's articles, blogs, reviews and multimedia features. User reviews and comments that include profanity or personal attacks or other inappropriate comments or material will be removed from the site. Additionally, entries that are unsigned or 'signatures' by someone other than the actual author will be removed. Finally, we will take steps to block users who violate any of our posting standards, terms of use or privacy policies or any other policies governing the site."

Such statements and procedures are probably sound risk management practices while the law concerning blogs remains unsettled. While no newspaper or magazine publisher should copy the Washingtonpost.com statement, similar statements can be prepared with the help of your lawyer and are probably advisable.

Media companies and traditional companies that sponsor logs should make sure that their coverage extends to company-sponsored blogs. First Media's policies provide coverage for the online activities of policyholders, including blogs. That said, coverage is not available, however, for blog sites of employees that are not sponsored by the company. Because blogs are fertile area for suit, insurance producers should make sure that their clients' internet and blogging exposures are fully addressed.

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