
BLOGGING AND PODCASTING: CHALLENGES, LEGAL ISSUES, AND LAWYER ADVERTISING

MATTHEW J. SMITH
AUTHOR

While blogs and podcasts have created an innovative way for lawyers and others to disseminate information, lawyers and their clients need to be aware of the potential downside to using this technology. Claims of copyright and trademark infringement, dilution and unfair competition, defamation, and invasion of privacy can ensnare unwary users. Ethical canons and state bar association rules may also constrain the use of blogs and podcasts as vehicles for advertising and providing legal information to the public and other lawyers.

BLOGGING AND PODCASTING

Challenges, Legal Issues, and Lawyer Advertising

By Matthew J. Smith

New advances on the Internet and in personal technology enable users to access and disseminate information in new and innovative ways. Search engines, digital audio players, and shared user-created and controlled content (such as images, text, or audio or video files) that is aggregated on sites like iTunes, Napster, Myspace.com, and YouTube.com have all enhanced and facilitated access to information. Each new development presents a challenge to the legal community: to understand each new technological development, adapt traditional notions of applicable law to adequately protect the legal rights implicated, and foster the development of new law where needed.

Blogs and podcasts are creating ripples within the legal community as well. Lawyers must understand how these tools influence their clients, and how blogs and podcasts can be valuable advertising or marketing tools for their own purposes. Recently, two state bar associations have addressed the issue of lawyer advertising in electronic media (including blogs and podcasts). The proposed changes have caused concern in the legal community and have threatened the legitimate use of

blogs and podcasts as vehicles to provide information on a variety of legal topics.

Web Logs or Blogs/Podcasts

At their inception, blogs were primarily used for personal expression or communication on a localized level that arose out of Usenet posts, email threads, and online diaries.¹ This is no longer the case. Now, in addition to personal use, businesses, news organizations, political groups, and others have adopted this low-cost means of disseminating information. According to Technorati.com, more than 54.5 million blogs are currently in existence, and as of July 2006 an average of 1.6 million postings are created per day.² Some blogs are manually edited, simple text articles posted on a website in reverse chronological order. Others are more sophisticated, utilizing third-party software (including RSS, or real simple syndication, feeds) to notify users of new content, and contain periodic articles or text, images, or other information automatically aggregated and presented from a wide variety of sources.

Podcasting, generally considered a blend of the words “iPod” and “broadcasting,” was developed in part by Adam Curry, a former MTV video jockey. Podcasts originated as a method of audioblogging or stringing a series of audio and video media files together for playback on mobile devices or per-

sonal computers.³ According to a recent Arbitron poll, 22 percent of Americans have heard of podcasts and 11 percent have tried a podcast (representing approximately 27 million Americans).⁴ The Apple iPod, combined with its companion software package, iTunes, has fostered the creation, dissemination, and adoption of podcasts as new digital broadcast media. The iPod is currently the most widely known and world’s best selling digital audio player. According to Apple’s quarterly financial results, in 2006 Q3 alone, Apple sold more than 8 million iPods.⁵

Blogs and podcasts can and do touch on every conceivable topic, including politics, social commentary and, most importantly for us, legal issues. The issue of podcasting has received attention from lawyers on a national⁶ and international basis.⁷ Sites such as iTunes, Blawgcast.com, Feedburner, and Rethink(ip) offer podcasts on a variety of topics in the legal field. An iTunes search for “law” or “legal” returns a number of podcasts, including (to name a few) the Transactions Podcast Channel from Ernst & Young, Duke Law Events from Duke University Law School, and The Law and Economics Podcast from *The Journal of Law, Economics and Policy*.⁸

At its most basic form, the creation of a blog or podcast is a form of expression and a publication (or republication) of information.

Matthew J. Smith is an associate in the Science & Technology Department in the St. Louis, Missouri, office of Polsinelli Shalton Welte Suelthaus PC. He is a member of the ABA Section of Science & Technology Law.

Depending on the nature of the use of the blog or podcast, content creators can be considered both providers and users of interactive computer services by creating or editing a blog or podcast, and may be held liable for third-party content under certain circumstances. Although there is currently no separate federal or state law related specifically directed to blogs or podcasts, courts have dealt with many specific legal issues and concerns related to content, including copyright or trademark infringement, defamation, invasion of privacy, or infringement on a person's right of privacy. Given the rate of adoption of blogs and podcasts, it is incumbent upon the legal community to understand and address these issues.

Legal Challenges Presented by Blogs/Podcasts

Copyright/Trademark Issues

Bloggers and podcasters who create original content in their postings can obtain copyright protection in such original work. Copyright law affords protection to "original works of authorship fixed in any tangible medium of expression."⁹ Bloggers and podcasters also make use of previously existing information, which implicates copyright rights of third parties. Copyright clearance and appropriate attribution of sources is an important, but often overlooked, element of avoiding legal difficulties. Information, though readily available on the Internet, or accessible in digital format, is still protected under federal and state copyright law. The unauthorized posting or dissemination may violate a third party's right to reproduce, prepare derivative works, distribute copies, perform, display, or, in the case of sound recordings, perform the work through audio transmission.¹⁰ Unauthorized copying, incorporation, or adaptation of third-party information can be a crucial concern for bloggers, particularly where a blog permits third party posting or comments. In addition to any text or related material, podcasting often requires special attention to clearing or obtaining a license to use

music as part of the podcast.¹¹

Even where the blogger or podcaster has exercised due diligence in clearing any copyright issues, such actions may raise claims of copyright infringement, even in cases where the party creating or hosting the blog did not post such information, on the basis of direct, vicarious, or contributory infringement.¹² "One infringes contributorily by intentionally inducing or encouraging direct infringement . . . and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."¹³ Although there is the potential to limit liability for contributory or vicarious infringement under the safe harbor provisions of the Digital Millennium Copyright Act (DMCA),¹⁴ one recent court case held that no liability attaches for "online service providers" where the content is created by a third party (other than the blogger or podcaster) and intended for publication.¹⁵ However, a key provision of the DMCA requires that defendants register their websites with the Copyright Office.¹⁶ Failure to register may preclude the availability of "safe harbor" provisions for bloggers or podcasters.

In addition to copyright infringement concerns, the unauthorized use of trademarks in blogs and podcasts may subject bloggers and podcasters to claims of trademark infringement, dilution and unfair competition claims. Trademark law is designed to act as a source identifier (e.g., provide a link between the mark and goods or services offered by an individual or business), and a false designations of sponsorship or affiliation or misuse of a trademark in a blog or podcast may be actionable under federal¹⁷ as well as state law. Use of a trademark or service mark by a blogger or podcaster without authorization or for a purpose that is not otherwise permitted (e.g., fair or nominative use or parody) may give rise to trademark infringement, dilution or unfair competition claims by the trademark owner. Although disclaimers may help avoid trademark infringement claims (e.g., "All other trademarks mentioned are the property of their

respective owners."), it is important to be aware that trademarks should be used in an informative, rather than commercial sense. For more information on the issues associated with the use of trademarks in blogs or podcasts, see the EFF Blogger's FAQ.¹⁸

Defamation/Invasion of Privacy Issues

Blogs and website postings may also give rise to defamation, invasion of privacy, or claims arising from the public disclosure of private facts.¹⁹ Although differing from state to state, a defamation claim may generally be made where a blogger makes (1) a false or defamatory statement concerning another, (2) in an unprivileged publication to a third party, (3) if the defamatory matter is of public concern, fault amounting at least to negligence on the part of the publisher, and (4) damage to the plaintiff. Although a blogger may assert that the statements made are protected under the First Amendment, or were merely an expression or statement of opinion, this will not always insulate the blogger from liability.²⁰ Even anonymous postings may not insulate bloggers from liability for defamation claims.²¹ In addition to direct liability for posts, bloggers may be held liable for third-party content posted on a blog under certain circumstances, based primarily on the level of activity in editing or moderating a blog; however, under federal law, third party liability may be preempted.²² Even so, under certain circumstances, discussion group or website moderators can be immune from liability for messages posted to their group or website, under the safe harbor provisions of the Communications Decency Act of 1996 as noted above.

Lawyer Advertising Through Blogs or Podcasts

Blogs and podcasts can be valuable marketing tools for attorneys, offering another means to provide information to existing and potential clients. Interactive informational newsletters, industry updates and discussions, continuing legal education topics and

broadcasts are just a few of the ways that lawyers are using blogs and podcasts. At least one pioneering law firm has created a podcast for law students designed to recruit new associates.²³ Legal blogs discuss developments on the Supreme Court of the United States,²⁴ Internet, technology and marketing law,²⁵ trademark law,²⁶ law practice tips²⁷ and general commentary by lawyers on issues related to technology, culture and the law.²⁸ As mentioned above, podcasts discussing these legal issues and others are readily available through iTunes.com, or on other sites.

In addition to the concerns regarding copyright, defamation, and invasion of privacy, lawyer advertising and marketing is regulated by rules of professional conduct.²⁹ These rules are based on the American Bar Association Model Rules of Professional Conduct (Model Rules), which have been adopted in some form by almost every state. In particular, lawyer advertising is addressed by Model Rule 7.2, which states, in part, “a lawyer may advertise services through written, recorded or electronic communication, including public media.”³⁰ Lawyer advertising must not contain any false or misleading communications, and must conform to certain content requirements and disclosures. Model Rule 7.3(c) provides that “[e]very written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words ‘Advertising Material’ on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).”³¹

In addition, the Federal Trade Commission (FTC) has an interest in lawyer advertising based upon its mandate to enforce laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The overall goal is to protect the public by ensuring that lawyers do not disseminate false or misleading information. Efforts to revise

the ethics rules in Kentucky and New York to cover the expansion of the use of new technology in the legal profession have met with some controversy and have threatened the continued use of blogs and podcasts as a legitimate means of disseminating information on legal topics.

Kentucky

In Kentucky, new ethics rules proposed in early 2005 (and subsequently adopted) were intended to amend Rule 7.02(1), which define advertisements. The proposed definition raised concerns because the term “advertisement” would then mean “to furnish any information or communication containing a lawyer’s name or other identifying information,” with certain exceptions.³² Although an exemption existed for communications to third parties that are further distributed by the third party only covered more traditional communications.³³ The proposed rules required a lawyer to deliver copies of each advertisement to the Kentucky advertising commission with a filing fee of \$50.³⁴

In light of the resulting commentary from bloggers within Kentucky and elsewhere, it appears that the Kentucky Attorney’s Advertising Commission has altered its approach. Kentucky lawyers must now obtain Commission approval for any web page that contains biographical information on an attorney, but each blog post will not be subject to a separate \$50 fee.³⁵ This result is a more reasoned approach that accommodates new technology and expands the current state of the law rather than constraining it by applying old standards.

New York

In New York, ethics rules proposed by the New York State Unified Court System (NYSUCS) would redefine “advertisement” in a manner that would require attorneys to label email and blogs with the word “ADVERTISEMENT.” Commentators and bloggers responded similarly to the proposed Kentucky rules, pointing out the fact that, while well meaning, the proposed revisions would hinder the dissemination of legal information

through the use of blogs and podcasts.³⁶ The comment period on the proposed rules has been extended to November 15, 2006. It is likely that through the comment process, the NYSUCS will clarify the proposed changes. This is another example of the importance of understanding new technology and its use prior to legislating restrictions in the name of protecting the public good.

Conclusion

Although blogs and podcasts offer new and innovative ways to disseminate information, bloggers and podcasters must be aware that the use of third-party information carries some risk. Copyright and trademark clearance, or a reasoned review of information placed on a blog or in a podcast by legal counsel, will lessen the likelihood of becoming a defendant in a lawsuit. Compliance with the Digital Millennium Copyright Act can also minimize these risks.

As in many situations, lawyers have multiple roles in this process. Lawyers must understand the current boundaries of the law, as well as new developments and legal trends in order to advise clients. In some instances, lawyers must take the opportunity to comment on proposed rule changes or legislation to ensure a reasoned approach to new technology. Finally, lawyers must navigate the additional requirements and restrictions on advertising imposed by ethical canons and rules of professional responsibility in the jurisdiction where the lawyer practices in the adoption of new technology or the implementation of a blog or podcast. ♦

Endnotes

1. Wikipedia, Blog, at <http://en.wikipedia.org/wiki/Blog> (last visited September 19, 2006).
2. David Sifry, Sifry’s Alerts, <http://www.sifry.com/alerts/archives/000436.html> (August 6, 2006).
3. iPodder—A Brief History at <http://www.ipodder.org/history> (last visited September 19, 2006).
4. PodcastingNews.com, Arbitron: 27

- Million American Podcast Users; Podcast Users Young and Rich, at http://www.podcastingnews.com/archives/2006/04/arbitron_27_mil.html (April 14, 2006).
5. Apple Reports Third Quarter Results, <http://www.apple.com/pr/library/2006/jul/19results.html> (last visited September 19, 2006).
 6. Jason Krause, *The Future is Hear—Online Audio Podcasts Are the Legal Blogosphere's Latest Trend*, 16 A.B.A. J. EREPORT 6 (April 22, 2005).
 7. Joint Statement of Podcasting Organizations and Podcasters on the Proposed Wipo Treaty for the Protection of Broadcasts and Broadcasting Organizations Presented to 15th Session of Wipo Standing Committee on Copyright and Related Rights, at http://www.eff.org/IP/WIPO/broadcasting_treaty/podcasting.php (September 11-12, 2006) (last visited September 19, 2006).
 8. See generally iTunes.com.
 9. Copyright Act of 1976, 17 U.S.C. § 102.
 10. Copyright Act of 1976, 17 U.S.C. § 106.
 11. Jared Barrett, *Podcasting Pop Songs? Licensing Concerns with Podcasts That contain Mainstream Music*, 3 SHIDLER J. L. COM. & TECH. 3 (Aug. 24, 2006) at <http://www.lctjournal.washington.edu/vol3/a003Barrett.html>; see generally Michael N. Lang, *The Regulation of Shrink-Wrapped Radio: Implications of Copyright on Podcasting*, 14 COMLCON 463 (2006).
 12. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
 13. Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 851 (C.D. Cal., 2006) (quoting Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (citations omitted)); see also Gershwin Publishing Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1163 (2d Cir. 1971).
 14. Digital Millennium Copyright Act of 1998, 17 U.S.C. §§ 512 et seq.
 15. Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).
 16. Online Service Providers: Service Provider Designation of Agent to Receive Notification of Claims of Infringement, at <http://www.copyright.gov/onlinesp/> (last visited September 23, 2006).
 17. The Lanham Act, 15 U.S.C. §§ 1114, 1125(a).
 18. EFF: Legal Guide for Bloggers, <http://www.eff.org/bloggers/lg/> (last visited September 23, 2006).
 19. Carolyn Kelly MacWilliam, *Individual and Corporate Liability for Libel and Slander in Electronic Communications, Including E-mail, Internet and Websites*, 3 A.L.R. 6th 153 (2005).
 20. Penn Warrantly Corp. v. DiGiovanni, 810 N.Y.S.2d 807 (N.Y. Sup. 2005) (reviewing the context to determine whether statements were defamatory or opinion).
 21. John Doe 1 v. Cahill, 884 A.2d 451 (Del. 2005) (involving allegedly false and defamatory postings on a blog by an anonymous person).
 22. Communications Decency Act of 1996, 47 U.S.C. § 230.
 23. Quote.com, First Podcasts for Recruiting Law Students Are Introduced by Legal Insight Media; Goulston & Storrs Podcasts Showcase Distinct Firm Culture (September 7, 2006), available at http://www.quote.com/qc/news/story.aspx?symbols=BWIRE:100&story=200609071203_BWR_82881409 (last visited September 19, 2006).
 24. SCOTUSblog, <http://www.scotusblog.com/movabletype/> (last visited September 19, 2006).
 25. Evan Brown, Internetcases.com—Legal developments involving the Internet and new technologies, <http://www.internetcases.com> (last visited September 19, 2006); Eric Goldman, Technology & Marketing Law Blog, <http://www.blog.ericgoldman.org> (last visited September 19, 2006).
 26. Marty Schwimmer, The Trademark Blog, at <http://www.schwimmerlegal.com> (last visited September 19, 2006).
 27. Jim Calloway, Jim Calloway's Law Practice Tips Blog, <http://jimcalloway.typepad.com/> (last visited September 19, 2006).
 28. Between Lawyers, at <http://www.betweenlawyers.corante.com> (last visited September 19, 2006).
 29. American Bar Association, Center for Professional Responsibility, at <http://www.abanet.org/cpr/links.html> (last visited September 21, 2006).
 30. American Bar Association Model Rules of Professional Conduct, Rule 7.2 at http://www.abanet.org/cpr/mrpc/rule_7_2.html.
 31. American Bar Association Model Rules of Professional Conduct, Rule 7.3 at http://www.abanet.org/cpr/mrpc/rule_7_3.html.
 32. Kentucky Bar Association, Rules of the Supreme Court of Kentucky, SCR.3.130 (7.02) Definitions, at [http://www.kybar.org/documents/scr/scr3/scr_3.130_\(7.02\).pdf](http://www.kybar.org/documents/scr/scr3/scr_3.130_(7.02).pdf) (last visited September 25, 2006).
 33. Rule 7.02(g), at http://www.law.cornell.edu/ethics/ky/code/KY_CODE.HTM.
 34. Rule 7.05(2), at http://www.law.cornell.edu/ethics/ky/code/KY_CODE.HTM.
 35. Ben Cowgill, "Ben Cowgill on Legal Ethics, Update: How Kentucky's Attorney Advertising Commission Is Now Treating Blogs By Kentucky Lawyers," at http://cowgill.blogs.com/legaethics/2006/08/update_how_the_.html#top (last visited September 21, 2006).
 36. Eugene Volokh, "Will New York Law Bloggers Find It Much Harder to Blog?" at <http://volokh.com/posts/1158347573.shtml> (September 15, 2006); Eric Bangeman, New York "Courts May Keep Bloggers from Blogging," at <http://arstechnica.com/news.ars/post/20060915-7753.html> (September 15, 2006).

Blogging and Podcasting: Challenges, Legal Issues, and Lawyer Advertising

**First published in Vol. 3, No. 3, Winter 2007 of *SciTech Lawyer*,
a publication of the Section of Science & Technology Law.**

About the Section of Science & Technology Law

The mission of the ABA Section of Science & Technology Law is to provide leadership on emerging issues at the intersection of law, science, and technology; to promote sound policy and public understanding on such issues; and to enhance the professional development of its members.

<http://www.abanet.org/scitech>

About ABA Publishing

ABA Publishing is a division of the American Bar Association (ABA), responsible for providing professional publishing guidance to both the association and its members. Our legal publications support professional excellence and greater understanding of the law. We publish approximately 100 law books per year as well as approximately 75+ magazines, newsletters, and journals in numerous specialized areas of the law.

Our law books provide the best practice tips and pointers, sample forms and language, and professional legal guidance from experienced practitioners and are available in a variety of formats, including print, PDF, audio, and CD-ROM. Our authors and editors are outstanding professionals who are active in their fields. Experts rigorously review our products to ensure the highest quality information and presentation.

Articles

Individual articles are available as PDF downloads at www.abanet.org/abastore/index.cfm

For customer service, call 1-312-285-2221

Monday–Friday, 7:30–5:00 CST