

Legal issues of blogging

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IP & IT analysis: Following reports that a blogger is facing legal action in Australia over ‘deceptive conduct’ concerning material on her blog, Christina Michalos, a media and intellectual property law barrister at 5RB, considers some of the potential legal pitfalls surrounding the blogosphere and ways to avoid them.

What kinds of legal issues and risks arise in relation to blogs and why?

The same legal risks that attach to any kind of publishing. There is nothing magical or special about a blog—it’s just a form of publication on the internet. So the typical problems are going to be the same as those that would apply to mainstream media:

- defamation
- invasion of privacy
- copyright infringement
- trade mark infringement, and
- contempt of court

There may be additional issues—for example harassment (if a blog is targeting a particular person without justification) or data protection claims. However, the items listed above are the most likely core problems.

Do specific types of blogs raise different types of legal issues or risks?

It all depends on the predominant content. So if the predominant content is, for example, recipes, the main risk will be copyright infringement—in respect of non-original recipes taken from other sources and photographs, if they are not the author’s own work. Anything that does not involve discussion of other people is low risk for defamation. Conversely, a blog that routinely touches on current criminal matters and the law is going to be a higher risk for contempt of court. Blogs reporting on any kind of court cases need to be ‘fair and accurate’ in order to claim privilege under the Defamation Act 1996.

Theoretically, a blogger could be found liable for negligent publication if the blog contains inaccurate instructions or advice and a person following those instructions or advice is injured or suffers damage. However, this requires satisfying the *Caparo v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568 test for requirements for a duty of care to exist. A key question is whether a defendant has substantial legal or factual control over the way in which an activity is conducted. In most publication cases, a publisher will not be in a position to direct the way in which activity is conducted. In addition, it has been said that to hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to the world for any purpose for which they may choose to rely on, is to subject him to ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class’.

There have been some cases in other jurisdictions that have succeeded. In the US, a student who was badly burned in a chemistry class after following an experiment described in a text book succeeded in a claim against the publishers. A jury in Massachusetts awarded \$155,000 against the publisher (*Carter v Rand McNally & Co* (D. Mass 4 September 1980)). Conversely, in another American case, *Cardozo v True* 342 So 2d 1053, the retailer of a book was held not liable for a failure to warn that an ingredient in a recipe book was poisonous if not cooked. For the information of unwary cooks, the ingredient was the Dasheen plant. According to the court it is ‘commonly known as “elephant’s ears”’—which seems an ambitious attribution of familiarity to the public.

But generally speaking, the law has not looked favourably on claims against publishers for inaccurate advice and those types of ‘negligent publishing’ cases typically fail.

Given their global audiences, are there any interesting jurisdictional issues?

Difficulties can arise in internet publication cases because the place where the publication is uploaded, where the claimant lives, where the defendant is normally domiciled and where the damage occurs can all be different. This means that forum shopping—looking for the jurisdiction that is most legally favourable to your claim—is prevalent. The basic rule is that a defendant domiciled in an EU Member State (under the Brussels & Lugano Conventions) should be sued in the court of that state. However, they can be sued in the courts of another contracting state if that is permitted by regulation or convention. In tort claims, a person can be sued in the place ‘where the harmful event occurred’—this can be either the harmful event causing the damage (publication) or the damage itself and argument typically centres on these issues.

The recent case of *PJS v Newsgroup Newspapers* [2016] UKSC 26, [2016] All ER (D) 135 (May) illustrates the practical challenges claimant’s face in terms of jurisdiction especially in privacy cases. A claimant may succeed in getting an injunction in England & Wales, but in reality that is of limited effect if the rest of the world is free to blog, tweet and publish the matter and the other half can access it anyway via the internet.

Are there any best practice tips for blogs looking avoid legal issues from the outset?

In simple terms, don’t publish risky content or material you are not sure is legally safe. Simple tips are:

Plagiarism and permission

Make sure your content is your own work and not plagiarised. If you are using third party content, either get permission from the owner/rights clear it or be very sure that you have brought yourself within one of the exceptions in the Copyright Designs & Patents Act 1988. Typically, this will mean complying to the letter with the requirements to sufficiently acknowledge the work and its author in order to claim defences of criticism or review, quotation or reporting current events.

Damaging reputations

Be very careful about publishing material which damages the reputation of living individuals or has the potential to without being 100% certain it is true. If a blog is expressing an opinion, it is always better to clearly distinguish between the facts relied on and the opinion itself.

Warnings and disclaimers

If necessary, depending on blog content, warnings and disclaimers are always a good idea and disclaim any warranty by the author/publisher in respect of the blog. Terms and conditions of using/accessing the site that limit the publisher’s liability are another option.

Advice

If in doubt, take legal advice. There are plenty of direct access ‘baby barristers’ who specialise in media law who can be instructed for a one-off piece of advice about content without it having to cost a fortune. Equally, there are entities that specialise in pre-publication advice.

Interviewed by Alex Heshmaty.

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