

PRODUCT LIABILITY

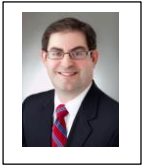
FEBRUARY 2015 – SECOND EDITION

IN THIS ISSUE

Product liability bloggers whose expertise is in product liability law may not be aware of the intellectual property that they are creating in the form of works of authorship, brands, and social media connections. Some may not be aware of the potential legal issues that may be faced for infringing on and violating the rights of another in the operation of their blogs. Many of these potential legal issues can be minimized, if not eliminated, with proper planning, awareness, and understanding.

Legal Issues for the Product Liability Blogger

ABOUT THE AUTHORS



Jeffrey Lilly is a partner in Gordon & Rees's Austin office and is a member of the firm's Drug & Medical Device and Tort & Product Liability practice groups. He also serves as Co-Chair of the E-Discovery Practice. As a litigator, with a general focus on broad based product liability law and an emphasis on pharmaceutical and medical device mass torts, Jeff represents clients in state and federal court, including national MDLs. Jeff primarily handles and manages nationwide litigation issues. He can be reached at jlilly@gordonrees.com.



Bradley B. Bush is an associate in Gordon & Rees's Austin office and is a member of the firm's Drug & Medical Device practice group. He has experience in many aspects of civil litigation case management and handling in complex litigation in state and federal courts, including fact development, document review and management, analysis of complex issues, initial pleadings, fact and expert discovery, and motion practice. Bradley served as a Law Clerk to the Honorable Nancy M. Koenig, United States District Court for the Northern District of Texas, Lubbock Division. He can be reached at bbush@gordonrees.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Jessalyn Zeigler
Vice Chair of Newsletter
Bass Berry & Sims PLC
jzeigler@bassberry.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Introduction. Blogs continue to grow in number, popularity, and influence. As a result, more and more product liability blogs are competing for a spot on the ABA Journal Blawg 100. However, many bloggers whose expertise is in product liability law may not be aware of the intellectual property that they are creating in the form of works of authorship, brands, and social media connections. Others may not be aware of the process for protecting that intellectual property. Furthermore, some may not be aware of the potential legal issues that may be faced for infringing on and violating the rights of another. This paper surveys some of the intellectual property rights that are important to product liability bloggers, as well as some of the potential legal issues that product liability bloggers should be aware of in the operation of a blog.

Copyright. A copyright is one type of intellectual property important to product liability bloggers. In general, subject to the exceptions provided by law, the owner of a copyright has the exclusive right to reproduce, distribute, sale, transfer, perform, and display the copyrighted work.¹ Copyright protection is available for “original works of authorship fixed in any tangible medium of expression.”² “Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other

audiovisual works; (7) sound recordings; and (8) architectural works.”³ Originality is a requirement for obtaining copyright protection.

Securing a Copyright. One point of frequent confusion for individuals is the process for securing a copyright. “No publication or registration or other action in the Copyright Office is required to secure [a] copyright.”⁴ In addition, since the United States became a member of the Berne Convention for the Protection of Literary and Artistic Works, the use of a copyright notice is optional in the United States.⁵ Although registration and notice are not required, there are benefits to registering the copyright and providing notice, and it is prudent to avail yourself of those benefits. Some benefits of registration include establishing a public record that can be useful if a judicial determination over ownership is ever necessary, registration is required before an infringement action can be filed, and the owner is entitled to statutory damages and attorney’s fees in court actions if the work is registered within three months after publication.⁶ Notice also “informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year of first publication.”⁷ When notice is provided and appears on the copies available to an infringer, the notice operates as a defense to an infringer’s claim of innocent infringement.⁸ It is also prudent to keep a record of your works, drafts, and other

¹ 17 U.S.C. § 106.

² 17 U.S.C. § 102.

³ *Id.*

⁴ U.S. Copyright Office, *Copyright Basics* (2012), at 3.

⁵ *Id.* at 4.

⁶ *Id.* at 7.

⁷ *Id.* at 4.

⁸ *Id.*

documents in the event that court action is necessary. Good documentation can support an individual's claim of copyright ownership.

Copyright Ownership. Ownership of a valid copyright is one point that must be proved in order to establish a claim of copyright infringement.⁹ Issues of ownership can occur in the context of User Generated Content ("UGC") on a social media platform.¹⁰ Some product liability bloggers utilize a social media platform in the operation of their blogs. All social media platforms have Terms of Service ("TOS") that a user must agree to before utilizing the platform.¹¹ Few users read the TOS and even fewer understand them.¹² The same is true for some product liability bloggers with little to no experience with TOS, licenses, and intellectual property matters. Defendants in copyright infringement actions may claim that the platform's TOS provide them with a license to use the copyrighted materials.

This is exactly the situation that occurred in the case of *Agence France Presse v. Morel*.¹³ Following the earthquake that struck Haiti on January 12, 2010, photojournalist Daniel Morel "was on the scene and captured a number of images of the aftermath."¹⁴ "Morel then posted his photographs to Twitter through a TwitPic account."¹⁵ "A Twitter user named Lisandro Suero copied the photographs into his own Twitter feed

without Morel's consent, and though the parties dispute precisely what happened next, eight of the photographs—initially credited to Suero—ended up being distributed by AFP and its 'image partner' Getty to thousands of news outlets and other customers around the world."¹⁶ When Morel claimed that AFP and others committed copyright infringement with respect to the photographs, AFP contended that by posting the photos on Twitter through TwitPic Morel subjected the photos to Twitter and TwitPic's TOS and that the TOS "provided AFP with a license."¹⁷ Based on the TOS and facts at issue in the *Morel* case, the United States District Court for the Southern District of New York did not find that Twitter's TOS granted the license that AFP urged.¹⁸ However, under a different TOS and/or facts, another court might not reach the same decision. Consequently, it is important to read and understand the TOS of your social media platform.¹⁹ In fact, many product liability bloggers have blogged about a similar issue in the context of consumers and the warnings that accompany products.

Social Media and Copyright. The *Morel* case highlights one of the risks that social media presents to the ownership of copyrights. However, product liability bloggers should also be cautious to avoid committing copyright infringement. The Internet and social media platforms present unique risks in this regard. For example, bloggers sometimes work with others as co-bloggers, guest

⁹ 17 U.S.C. § 106.

¹⁰ See, e.g., *Agence Fr. Presse v. Morel*, 934 F. Supp. 2d 547, 559 (S.D.N.Y. 2013).

¹¹ G. Ross Allen and Francine D. Ward, *Things Aren't Always as They Appear: Who Really Owns Your User-Generated Content?*, *Landslide*, American Bar Association, November/December, 2010.

¹² See *id.*

¹³ *Morel*, 934 F. Supp. 2d at 559.

¹⁴ *Id.* at 551.

¹⁵ *Id.*

¹⁶ *Agence Fr. Presse v. Morel*, 2014 U.S. Dist. LEXIS 112436, at *4 (S.D.N.Y. 2014).

¹⁷ *Morel*, 934 F. Supp. at 559.

¹⁸ *Id.* at 564.

¹⁹ G. Ross Allen and Francine D. Ward, *supra* at n.11.

bloggers, joint bloggers, or group bloggers.²⁰ In addition, bloggers may work as partners or in an employment relationship.²¹ This means that bloggers may be liable for copyright infringement when it comes to their own actions, as well as those of their partners, employees, or co-bloggers.²² In the context of product liability blogs, lawyers often share responsibility for the blogs with other lawyers in their practice area at different firms. As a result, these product liability bloggers might also share the responsibility for any potential copyright infringement.

Attribution Does Not Avoid Infringement.

Product liability bloggers may believe that there is no copyright infringement if attribution or credit is given to the copyright owner. After all, product liability bloggers are accustomed to giving attribution or credit every day in the form of citations in their legal writing. But such a belief is mistaken as the copyright owner has the exclusive right to reproduce or display the copyrighted work.²³ In fact, one company has filed lawsuits alleging infringement on the basis of providing a hyperlink to copyrighted articles.²⁴ Product liability bloggers can minimize the potential for copyright infringement by understanding the exclusive rights granted to copyright owners. The Copyright Act also provides several limitations on the exclusive rights that are granted to copyright owners. The most important limitation provided by the Copyright Act is that of fair use.

Fair Use. “[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”²⁵ Four factors are considered when determining whether use is fair use. “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”²⁶ One should not assume that the availability of defenses to copyright infringement, such as fair use, means that a blogger has carte blanche authority to use a copyrighted work. Similar to other areas of the law, the application of the fair use defense to copyright infringement is an area in which reasonable lawyers sometimes disagree. Nevertheless, the factors can provide a guide for fair use. For example, a blogger might note whether he or she is using all (favoring infringement) or only a small portion (favoring fair use) of a copyrighted work.

Trademark. A trademark is another type of intellectual property important to product liability bloggers. “A trademark is a brand

²⁰ Eric Goldman, *Bloggership: How Blogs are Transforming Legal Scholarship: Co-Blogging Law*, 84 Wash. U. L. Rev. 1169, 1171 (2006).

²¹ *Id.* at 1172.

²² *Id.* at 1174.

²³ 17 U.S.C. § 106.

²⁴ Nicole Downing, *Using Fair Use to Stop a Copyright Troll from Threatening Hyperlinkers*, 12 N.J. J.L. & Tech. On. 155, 161 (2011).

²⁵ 17 U.S.C. § 107.

²⁶ *Id.*

name.”²⁷ A trademark can consist of “any word, name, symbol, or device, or any combination . . . [used or intended to be used] to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”²⁸ “A blog’s name, domain name, and logo may be protected by trademark law if they (1) are used in commerce in connection with the sale of goods and services and (2) are distinctive – or, if descriptive, acquire enough recognition that the name or logo is uniquely associated with the blog (i.e., derive ‘secondary meaning’).”²⁹ Blog names that are descriptive may not be able to obtain trademark protection.³⁰ Also, the name of a blog that is not used in commerce may not be trademarked.³¹ However, a blog that is generating revenue may satisfy the “use in commerce” requirement of trademark law.³²

Trademark Registration. Federal registration of a mark is not required.³³ But similar to the process for copyrights, registration confers benefits on the owner of the mark, and it is prudent to avail yourself of those benefits.³⁴ Benefits of registration include providing “notice to the public of the registrant’s claim of ownership of the mark, legal presumption

of ownership nationwide, and exclusive right to use the mark on or in connection with the goods/services listed in the registration.”³⁵

If a blog’s name meets the requirements for trademark protection and is registered with the United States Patent and Trademark Office, one should not assume that other parties are prevented from using an infringing mark. The United States Patent and Trademark office points out that the owner is responsible for policing the mark.³⁶ Given that a trademark is a brand name, owners have to actively police their marks in order to protect the potential dilution of their brands by infringing marks.

The process for policing and protecting a trademark often starts with cease-and-desist letters and can sometimes result in litigation. Social media can complicate the process of protecting trademarks. In the age of the Internet, one should always consider the possibility that something might “go viral.” Brand owners should be conscious of this possibility and draft cease-and-desist letters under the assumption that the letters will go viral.³⁷ One does not have to look very far to find a current social media campaign boycotting a company. An example from Jack Daniel’s protection of its brand demonstrates how to avoid a social media boycott.³⁸ “When [Jack Daniel’s] learned a book was being

²⁷ United States Patent and Trademark Office, *Trademark Basics*, (Oct. 17, 2014), <http://www.uspto.gov/trademarks/basics/>.

²⁸ 15 U.S.C. § 1127.

²⁹ Goldman, *supra* at 1180.

³⁰ *Id.* at 1181.

³¹ *Id.*

³² *Id.* at 1180.

³³ United States Patent and Trademark Office, *supra* at n.27.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Peter Brody and Mariel Goetz, *Ten Things You Need to Know about Social Media and Intellectual Property in 2013* from Patent, Trademark & Copyright Law Daily, (Jan. 30, 2013), <http://www.bna.com/ten-things-need-n17179872092/>.

³⁸ *Id.*

published with a cover that strikingly resembled the famous label for Jack Daniel's Whiskey, the company's lawyers sent the author a friendly letter noting it was flattered by the author's 'affection for the brand,' but had to minimize such uses of its trademark to ensure it would not be weakened in the future."³⁹

Misappropriation of Trade Secrets.

Misappropriation of trade secrets is another area of potential liability for product liability bloggers. Generally speaking, a trade secret is confidential information that provides a business with an economic advantage. In Texas, a "trade secret" is defined as "information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that: (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."⁴⁰

Product liability bloggers need to be aware that disclosing another's trade secret may subject one to liability for misappropriation of trade secrets. Given that a list of customers or suppliers may constitute a trade secret, one can argue that social media connections are also trade secrets. If a product liability blogger believes that his or her social media connections or other confidential information

might rise to the level of a trade secret (i.e., another individual might obtain economic value from its disclosure), then the blogger should ensure that he or she is taking reasonable steps to maintain the secrecy of the information in order to obtain trade secret protection.⁴¹

Ownership issues may also arise in the context of social media connections. As discussed above, bloggers sometimes work with others as co-bloggers, guest bloggers, joint bloggers, or group bloggers,⁴² which raises the question of who owns the social media connections. In the context of an employer-employee relationship, if the employee develops the social media connections in furtherance of his or her employment, then the employer might be able to make a claim for ownership under certain circumstances.

Libel. Product liability bloggers should also be cognizant of potential legal issues relating to libel. Libel is a false statement that injures a person's reputation.⁴³ False statements made on a blog, in social media, or on the Internet constitute libel just as if the statement was published in the newspaper. However, since libel concerns only false statements, the fact that a statement is true is a defense to a claim of libel.⁴⁴

Conclusion. Blogging offers a number of opportunities, such as developing business, marketing, and networking. In addition, bloggers have the opportunity to create intellectual property in the form of copyrights, trademarks, and trade secrets. However,

³⁹ *Id.*

⁴⁰ TEX. CIV. PRAC. & REM. CODE § 134A.002(6).

⁴¹ *See id.*

⁴² Goldman, *supra* at 1171.

⁴³ *See* TEX. CIV. PRAC. & REM. CODE § 73.001.

⁴⁴ TEX. CIV. PRAC. & REM. CODE § 73.005.



bloggers need to be mindful of the potential legal issues that can exist in the operation of their blogs. Many potential legal issues can be minimized, if not eliminated, with proper planning, awareness, and understanding.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

FEBRUARY 2015

A Primer on Product Recalls
Scott Kozak and Casey Housley

DECEMBER 2014

Alternative Approaches to Alternative Design: Understanding the Reasonable Alternative Design Requirement and Its Different Applications
Alex Purvis and Simon Bailey

NOVEMBER 2014

Expert Testimony that Contradicts Plaintiff's Testimony is Admissible in the Sixth Circuit
Jim Doran and Jackie Garfield

OCTOBER 2014

The Application of CAFA's Mass Action Provision to Multi-Plaintiff Products Liability Cases
Tamar B. Kelber and Daniel A. Spira

SEPTEMBER 2014

A Twist on Component Supplier Liability in Medical Device Cases
Sarah Grider Cronan and Jessie Zeigler

An Overview of the Legal Standard Regarding Product Liability Design Defect Claims and a Fifty State Survey on the Applicable Law in Each Jurisdiction
Mike McWilliams and Margaret Smith

AUGUST 2014

The Erosion of California's Sophisticated User and Purchaser Defenses in Product Liability Litigation
Merton Howard and Kyle Mabe

The Ethical Use of Social Media in Litigation
Daniel B. Carroll and Julie L. Tersigni

JUNE 2014

Noneconomic Damages: A State-By-State Survey of Limiting Caps and Their Constitutionality
Robert Miller and Kathleen Carrington

APRIL 2014

Garlock Bankruptcy Judge: Asbestos Settlements "Infected With the Impropriety of Some Law Firms"
Mary Margaret Gay, Mark Behrens and Virginia Knapp Dorell

A Deal is a Deal, Even in the Arena of Product Liability Indemnity
Daryl G. Dursum

MARCH 2014

New FDA Rule on Drug Labeling May Mean Increased Exposure and an Uncertain Path for Generic Pharmaceutical Manufacturers
James W. Matthews, Katy E. Koski, Michael H. Hinckle and Jason L. Drori