

Washington University Law Review

Volume 84

Issue 5 *Bloggership: How Blogs Are Transforming Legal Scholarship*

2006

Co-Blogging Law

Eric Goldman

Santa Clara University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Business Organizations Law Commons](#), [Intellectual Property Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Eric Goldman, *Co-Blogging Law*, 84 WASH. U. L. REV. 1169 (2006).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol84/iss5/15

This Symposium is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

CO-BLOGGING LAW

ERIC GOLDMAN*

Abstract: Bloggers often work collaboratively with other bloggers, a phenomenon I call “co-blogging.” The decision to co-blog may seem casual, but it can have significant and unexpected legal consequences for the co-bloggers. This essay looks at some of these consequences under partnership law, employment law, and copyright law and explains how each of these legal doctrines can lead to counterintuitive results. The essay then discusses some recommendations to mitigate the harshness of these results.

I. INTRODUCTION

Beginning a blog seems tantalizingly easy. Google’s Blogger service invites users to:

Create a blog in 3 easy steps:

- (1) Create an account
- (2) Name your blog
- (3) Choose a template¹

This solicitation suggests that the decision to blog can be made casually, but it is hardly a trivial decision. The adverse consequences of blogging can be severe, ranging from being fired² to being sued, and bloggers—and the service providers catering to them—rarely discuss these risks.³ Therefore, a new blogger can start a blog without contemplating these consequences.

* Assistant Professor, Santa Clara University School of Law and Director, High Tech Law Institute. Email: egoldman@gmail.com. Web page: <http://www.ericgoldman.org>. Blogs: Technology & Marketing Law Blog (<http://blog.ericgoldman.org>) and Goldman’s Observations (<http://blog.ericgoldman.org/personal>). Thanks to Christine Hurt, Scott Moss, John Ottaviani, Bill Sjostrom, and the participants at the *Bloggership: How Blogs Are Transforming Legal Scholarship* conference at Harvard Law School for their comments.

1. Blogger, <http://www.blogger.com/start> (last visited July 22, 2006).

2. See, e.g., Krysten Crawford, *Have a Blog, Lose Your Job?*, CNNMoney.com (Feb. 15, 2005), <http://money.cnn.com/2005/02/14/news/economy/blogging> (discussing famous fired bloggers like Mark Jen and Ellen Simonetti).

3. See Elise Ackerman, *Negative Postings May Spur Lawsuit*, SAN JOSE MERCURY NEWS (July 16, 2006), available at <http://www.mercurynews.com/mld/mercurynews/business/15051517.htm?template=contentModules/printstory.jsp> (noting how websites generating user content rarely mention the associated legal risks).

A blogger can work solo, with other bloggers in a joint or group blog, or as a “guest” at someone else’s blog. This essay defines these various types of collaborative blogging activities as “co-blogging.” As with the initial decision to blog, many bloggers form co-blogging relationships casually without considering the legal implications.⁴

The law inevitably will blindside some of these co-bloggers. Bloggers may find unexpected liability for their co-bloggers’ posts or actions, or co-bloggers may decide to separate and find that default legal principles allocate the bloggers’ rights and responsibilities in counterintuitive ways.

This essay will analyze the law of co-blogging and some of the unexpected consequences of that law. The essay will then make some recommendations to mitigate the harshest consequences. Unfortunately, this essay does not identify or propose any great solutions. Blogger blindsiding can be avoided only by readjusting bloggers’ expectations so that they better appreciate the significance of their decisions. Well-publicized legal incidents have this effect, but at significant personal cost for the subject bloggers. Perhaps this essay can help some bloggers avoid being the unlucky test cases.

II. WHAT IS BLOGGING?

The term “blog” lacks a single well-accepted definition. Blogs are one of many ways to publish content over the Internet, along with other publication methods like message boards, chat, e-mail lists, USENET groups, and websites. There are no bright-line distinctions between these publication methods. However, to the extent blogs are a discrete Internet publication medium, blogs typically adhere to the following three conventions:

- *Reverse Chronological Presentation.* Blog posts are almost always presented in reverse chronological order (with the latest posts on top).⁵
- *Self-Edited.* Typically, a blogger publishes content without third-party review or editing.

4. See Posting of Bill Sjoström to Truth on the Market, <http://www.truthonthemarket.com/2006/01/21/group-blog-agreement/> (Jan. 21, 2006, 10:27 EST) (discussing how law professors launched a group blog without talking about the legal issues).

5. See Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH. U. L. REV. 1127 (2006).

- *RSS Feeds*. Typically, blogs offer an RSS⁶ feed that notifies readers of new content upon publication.

In addition to the foregoing three conventions, blogs often have the following attributes:

- *Multiple Navigational Structures*. In addition to chronological navigation, blogs may structure their posts into additional taxonomical structures (i.e., by subject matter, by author).
- *Personal Observations*. Bloggers often post their personal perspectives and commentary.
- *Interlinking*. Blogs routinely link extensively to other blogs in substantive blog posts and via a “blogroll.”⁷

While bloggers have many norms and conventions,⁸ none of them are immutable—except, perhaps, the reverse chronological presentation of new posts. This fluidity means that any discussion about blogs—including this essay—typically applies to other types of Internet publications.

III. THE LAW OF CO-BLOGGING

A. *Definition of Co-Blogging*

Bloggers can work together in a variety of ways. A “guest blogger” typically is given the right to publish content via the blog for a fixed period of time. Guest bloggers typically do not get administrative power over the blog’s operation. In “joint blogs” or “group blogs,” two or more bloggers publish content via the blog on an ongoing basis. Sometimes, a subset of bloggers have principal responsibility for the blog’s administration; in other cases, all bloggers share administrative rights. Collectively, I refer to guest blogging and joint/group blogging as “co-blogging.”

6. RSS is a technical protocol for websites to communicate information to subscribers who voluntarily opt to monitor the protocol.

7. A blogroll is a “list of links to other blogs or websites that the author of the blog regularly likes to read.” Blogossary, <http://www.blogossary.com/define/blogroll/> (last visited Apr. 14, 2006).

8. See generally Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185 (2006).

B. Legal Characterizations of Co-Blogging

Co-blogging arrangements may fit within one of four principal legal doctrines: partnerships, employment, joint authors, and independent contractors.

1. Partnership

A general partnership is “an association of two or more persons to carry on as co-owners of a business for profit”⁹ and can be formed expressly or impliedly. General partners may be personally liable for partnership obligations, including the acts of other partners in furtherance of the partnership.¹⁰ Upon the partnership’s dissolution, partnership assets and liabilities are divided among all partners.

Many blogs do not generate revenues of any kind and therefore may not qualify as a “business for profit.” In these situations, it is unlikely that co-bloggers would be characterized as partners in an implied general partnership.

In contrast, if a blog generates revenues—such as through advertising—it is very possible that joint or group bloggers, in the absence of some other agreement or arrangement, will be deemed to be in an implied general partnership.¹¹ However, guest bloggers may not be deemed partners of that partnership because they may lack the requisite intent or permanence to be “carrying on” together.

2. Employment

Bloggers could be in an employment relationship. In general, an employment relationship exists when the hiring party has the “right to control the manner and means by which the product is accomplished,”¹² determined via multifactor tests that differ based on the applicable legal regulation. The Internal Revenue Service, for example, uses a twenty-factor test to determine employment for tax purposes.¹³

An employment relationship might exist when a co-blogger or a group of co-bloggers has principal responsibility for the blog’s operations—thus

9. Uniform Partnership Act § 202(a) (1997).

10. See Ribstein, *supra* note 8, at 233–36.

11. See *id.*; Posting from Stephen Bainbridge to ProfessorBainbridge.com, http://www.professorbainbridge.com/2005/02/are_group_blogs.html (Feb. 14, 2005) (“Are Group Blogs Partnerships?”).

12. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989).

13. See Rev. Rul. 87–41, 1987-1 C.B. 296.

constituting the employer—and other co-bloggers are asked to perform specific tasks—thus becoming the employees. Depending on the facts, guest bloggers also could be employees.

In an employment relationship, the employer is vicariously liable for the employee's acts within the scope of employment. Employers also can be liable for employees' acts under other doctrines as well, such as the negligent supervision doctrine. The employer would automatically own all copyrights created by the employee within the scope of employment.¹⁴ Among other duties, a blogger-employer could be required to pay minimum wages to the blogger-employees, withhold taxes and issue W-2s, and pay unemployment insurance.

3. *Joint Works*

Copyright law defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."¹⁵ In rare cases, each individual blog post is an interdependent component of the whole blog. In that case, the blog and all individual posts may be a joint work, and the bloggers would be coauthors of the joint work.

In most cases, blog posts are neither inseparable nor interdependent. As a result, blogs are more likely to be characterized as collective works¹⁶ rather than joint works.¹⁷

If bloggers are deemed authors of a joint work, the bloggers will co-own the work¹⁸ and have a duty to account to their co-owners for any proceeds from the work.¹⁹ Joint work status should not affect a blogger's liability for other bloggers' postings or actions.

4. *Independent Contractors*

If co-bloggers do not fit into the prior three categories, they are probably independent contractors. In that case, they will retain ownership of any assets they create, and ordinarily, subject to numerous exclusions, they will not be liable for each other's acts.

14. 17 U.S.C.A. § 201(b) (2001).

15. 17 U.S.C.A. § 101 (2001).

16. "A 'collective work' is a work . . . in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101.

17. See *infra* Part III.C discussing the consequences of a collective-work characterization.

18. 17 U.S.C. § 201(a).

19. See 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.12[A] (2006).

5. Summary

The following chart summarizes this subpart's discussion:

Relationship	Liability	Asset Ownership
Partnership	Partners personally liable for acts of other partners	Assets and liabilities divided among all partners on dissolution
Employment	Employer vicariously liable for employee's acts within employment scope	Employer automatically owns all copyrights created by employee within employment scope
Joint Work	N/A	Parties co-own copyrights, subject to accounting duty
Independent Contractors	Generally no liability for other bloggers' activities	Each party owns assets he or she creates

C. Liability Consequences of the Legal Characterization

This Subpart applies the high-level discussion about legal characterizations of co-blogging to the possible legal liability that co-bloggers face. The next Subpart discusses the implications of each characterization on ownership.

Co-bloggers are exposed to liability for copyright infringement, trade secret misappropriation, and a variety of other claims putatively covered by 47 U.S.C. § 230.²⁰

1. Copyright Infringement

A blogger who publishes copyright-infringing content via a blog may be directly liable for infringement. The fact that the medium is a blog does not affect the infringement analysis. In addition to the blogger's direct liability, any co-bloggers who are partners or employers of the infringing blogger are also automatically liable for that infringement.

However, even co-bloggers who are independent contractors or employees may face contributory or vicarious liability for a blogger's infringement. Contributory liability occurs when the defendant, "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another,"²¹ and vicarious liability

20. 47 U.S.C. § 230 (2000).

21. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

occurs when the defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”²²

The precise contours of contributory and vicarious copyright infringement for online activities are subtle and dynamically changing, so they are beyond this brief essay’s scope.²³ Generally, bloggers face a nontrivial threat of copyright infringement for their co-bloggers’ activities. Bloggers often work closely together and share administrative responsibilities, which may translate—when legally scrutinized—into the requisite level of knowledge of, or control over, their co-bloggers’ posts.

In theory, 17 U.S.C. § 512²⁴ might mitigate some of this risk. Congress enacted § 512 to give online service providers some relief from copyright liability committed by third parties. Section 512 could apply when a blogger acts as a service provider for the publication of third-party content, such as comments posted by blog readers or even guest blogger contributions. If § 512 applies, the safe harbor would limit the blogger’s liability. Thus, § 512 could be the cornerstone of a blogger’s defense against copyright infringement claims for third-party posts.

However, in practice, § 512 will not help in most co-blogger infringement lawsuits. First, it is unclear when a blogger qualifies as a “service provider” to co-bloggers. Section 512 defines “service provider” broadly,²⁵ so the statute could cover bloggers. However, based on their cooperative interaction, co-bloggers may not be legally independent enough for one blogger to be deemed the service provider of another co-blogger.²⁶ Thus, co-bloggers may act as “service providers” to third parties, but not to each other.

Second, the case law interpreting the § 512 safe harbor is mixed. Some cases interpret the safe harbor fairly narrowly.²⁷ As a result, the safe harbor has proven less useful than defendants initially hoped.²⁸

22. *Id.*

23. Interested readers may wish to review my list of derivative online copyright infringement cases at <http://www.ericgoldman.org/Resources/osliability.htm>.

24. 17 U.S.C. § 512 (2000).

25. “[T]he term ‘service provider’ means a provider of online services.” 17 U.S.C. § 512(k)(1)(B). Service providers include web hosts that permit third parties to submit content. *See, e.g., Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001).

26. See the analogous discussion *infra* Part III.C.3 with respect to 47 U.S.C. § 230.

27. *See, e.g., ALS Scan v. RemarQ Communities.*, 239 F.3d 619 (4th Cir. 2001) (effectively eviscerating the statutory notification scheme with a flexible interpretation of the notification requirements); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002) (§ 512 does not apply to vicarious copyright infringement claims).

28. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005). The

Finally, few blogs satisfy the numerous technical prerequisites for § 512 eligibility, such as registering their websites with the U.S. Copyright Office.²⁹ To assess this, on April 18, 2006, I searched the Copyright Office's database of § 512 registrations³⁰ and found only ten registrations containing the word "blog."³¹ Admittedly, this search is neither rigorous nor exhaustive,³² but it does reinforce the possibility that a trivial percentage of blogs qualify for the § 512 safe harbor.³³

Without the § 512 safe harbor, and given sometimes expansive applications of contributory and vicarious copyright infringement, bloggers appear to face significant copyright infringement exposure from co-blogging.

2. *Misappropriated Trade Secrets*

A blogger who publishes a third-party trade secret via the blog may be liable for trade secret misappropriation. Partners or employers of the misappropriating blogger could be vicariously liable if the misappropriation occurred in the scope of the partnership or employment. In other circumstances, the co-blogger liability analysis is indeterminate. To my knowledge, no published cases have addressed a website operator's liability when a third party posts misappropriated trade secrets to the

Grokster Supreme Court opinion, for example, does not reference 17 U.S.C. § 512 at all. *Id.*

29. See 17 U.S.C. § 512(c)(2).

30. Directory of Service Provider Agents for Notification of Claims of Infringement, <http://www.copyright.gov/onlinesp/list/> (last visited July 22, 2006).

31. The ten registrations are: anablog.com, blogabout.com, blogabout.net, blogbox.com, BROADWAYBLOGS, LLC, freeblogging.com, hasablog.com, Pill Blog, Socially Blog, Inc., and spongeblogger.com. Of those registrations, seven appear to cover inactive websites (anablog.com, blogabout.com, blogabout.net, BROADWAYBLOGS, LLC, freeblogging.com, and hasablog.com). Only Pill Blog (<http://www.pillblog.com/>), one of Socially Blog's properties (Dave's Daily at <http://www.davesdaily.com/>), and spongeblogger.com look like "traditional" blogs. And, of those, two appear dormant; Pill Blog's last posting was October 2005, and Spongeblogger's last posting was November 2004.

On July 22, 2006, I also searched the database for the term "blawg." I found one additional site, Blawg Republic, a blog aggregator operated by the same company that operated Pill Blog.

32. For example, the search did not pick up any blog that did not register with the word "blog" in its title. Note, however, that the registration form prompts registrants to enumerate all names and URLs they wish to cover under the § 512 safe harbor. As such, most prudent registrants will register URLs, blog names, and (if applicable) corporate names.

33. Readers may find it relevant that I have not registered my own blogs for the § 512 safe harbor. My Goldman's Observations blog is a solo blog, and my Technology & Marketing Law Blog has only infrequent guest postings. Therefore, I have decided that my likely personal benefit from § 512 is low.

website.³⁴ At minimum, I think co-bloggers will not face such liability without some scienter about the misappropriation.³⁵

3. Other Claims

Except with respect to copyright infringement and trade secret misappropriation claims, a co-blogger's liability for almost all other tortious content published by another co-blogger putatively is covered by 47 U.S.C. § 230.³⁶ Under § 230, a party generally is not liable for tortious content posted by someone else³⁷ other than claims based on intellectual property, federal criminal law, or the Electronic Communications Privacy Act (ECPA).³⁸

Section 230 is an exceptionally powerful defense. For example, if a guest blogger publishes a defamatory blog post, § 230 should absolutely insulate all co-bloggers from defamation liability—regardless of the co-bloggers' scienter,³⁹ editorial role,⁴⁰ or financial benefit from the

34. A blogger has been sued for trade secret misappropriation based on user-submitted comments to the blog. *See* *Software Dev. & Inv. of Nev. v. Wall*, No. 2:05-cv-01109-RLH-LRL (D. Nev. 2006). On February 13, 2006, this lawsuit was dismissed for lack of jurisdiction, and it appears (based on a review of PACER on November 3, 2006) that the plaintiff has not refiled the case.

35. Scienter is required to misappropriate a trade secret. The Uniform Trade Secret Act defines "misappropriation" as

(i) acquisition of a trade secret of another by a person who *knows or has reason to know* that the trade secret was acquired by improper means; or (ii) disclosure or use of a trade secret of another without express or implied consent by a person who (A) used improper means to acquire knowledge of the trade secret; or (B) at the time of disclosure or use *knew or had reason to know* that his knowledge of the trade secret was (I) derived from or through a person who has utilized improper means to acquire it; (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (C) before a material change of his position, *knew or had reason to know* that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Uniform Trade Secret Act § 1(2) (1989) (emphasis added).

36. 47 U.S.C. § 230.

37. Specifically, the statute says: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

38. *See* 47 U.S.C. § 230(e). Because of their relatively low applicability, this article does not analyze some possible derivative claims excluded from § 230, including trademark or patent infringement, obscenity/child pornography, and ECPA claims.

39. So long as a third party published the content, § 230 applies even if the co-blogger was negligent. *See* *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). Indeed, § 230 should apply even if the co-blogger *intended* for the tortious content to be published.

40. Section 230 applies even if the defendant edited or modified the published content. *See, e.g., Ramey v. Darkside Products, Inc.*, 2004 U.S. Dist. LEXIS 10107 (D.D.C. 2004); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001).

publication.⁴¹ Further, § 230 typically ends the lawsuit on a motion to dismiss, making these lawsuits comparatively cheap and quick to defend.

Clearly, bloggers will want § 230 immunization for their co-bloggers' activities. However, there may be situations where a co-blogger might not be able to claim § 230.

Section 230 applies only when "another information content provider" provides the tortious content. Even if a blogger edits or obtains ownership of a third party's content, the content still will be provided by another information content provider so long as the third party had any responsibility for developing the content.⁴² However, if a blogger employs the co-blogger who publishes the tortious content, then the blogger-employer may be deemed to be the information content provider.⁴³ The same result probably occurs with publications by partners in a blogging partnership; in that case, the partnership may be deemed the information content provider.

Thus, § 230 may not insulate tortious publications by employees and partners. One can expect plaintiffs will allege that co-bloggers are partners or employers to avoid the otherwise terminal effect of § 230 on their lawsuits; at a minimum, these allegations may allow the lawsuit to survive a motion to dismiss. As a result, depending on the nature of the co-blogging relationship, the potential loss of the § 230 defense exposes bloggers to significant, unexpected liability.

D. Ownership Effects of the Legal Characterization

1. Copyright

Bloggers typically produce a variety of copyrightable works. A blog's core assets are its individual postings, which are copyrightable so long as they are "original works of authorship."⁴⁴ The standard for originality is

41. Section 230 applies even if the defendant syndicated the content for profit. *See Prickett v. infoUSA, Inc.*, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006).

42. *See* 47 U.S.C. § 230(f)(3) (defining "information content provider" as "any person or entity that is responsible, *in whole or in part*, for the creation or development of information provided through the Internet or any other interactive computer service") (emphasis added); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005); *Fair Hous. Council of San Fernando Valley v. Roommate.com*, 2004 U.S. Dist. LEXIS 27987 (C.D. Cal. Sept. 30, 2004); *Prickett v. infoUSA, Inc.*, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006).

43. *But see Delfino v. Agilent Techs., Inc.*, 2006 WL 3635399 (Cal. App. Ct. Dec. 14, 2006) (employer can claim § 230 defense for employee's online acts outside employment scope).

44. 17 U.S.C.A. § 102(a) (2001). The statute also requires fixation in a tangible medium of expression, but all web-published content, by definition, meets this standard. *Id. See MAI Sys. Corp. v.*

low,⁴⁵ so most individual blog posts should qualify for copyright protection. The rare exceptions may include blog posts that contain only trivial original expression, such as a one-sentence blog post with a third-party link or republications of someone else's content.

A blog may generate other copyrightable material in addition to individual posts, including the entire collection of blog posts and reader comments, which may be a collective work; the blog's organizational structure (its "taxonomy");⁴⁶ and the blog's "look and feel," which also may be protectable as trade dress or a trademark.

Initially, copyright ownership of all blog-associated copyrightable material vests with the author.⁴⁷ So presumptively, a blogger owns each item of content he or she authored—such as individual blog posts—and can decide to withdraw his or her content from subsequent publication. For example, if co-bloggers separate, default rules should permit the departing blogger to extract his or her posts from the blog's database of posts—effectively blocking continued publication of the blog *in toto*.

A blogger's default "blocking" rights do not apply in a number of circumstances. First, the parties may expressly agree to a copyright license or an assignment of copyright ownership.⁴⁸ Alternatively, a court may find an implied license permitting the blog to continue republishing the content.

Second, a co-blogger could claim that the blog was a collective work and that each blog post was a contribution to the collective work. In that case, the co-blogger could continue to publish a departing co-blogger's content as part of the blog or a revision to that blog.⁴⁹

Third, if a blogger was an employee and was blogging in the course of the employment, then the employer-blogger would automatically own the employee-blogger's copyrights when created. In this case, the employer-blogger can continue publishing the content without restriction upon the employee-blogger's departure. Indeed, because ownership transfer occurs automatically, the employee-blogger would not retain the rights to republish the content elsewhere.

Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).

45. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

46. See *Am. Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977 (7th Cir. 1997) (finding that a taxonomy was copyrightable).

47. See 17 U.S.C. § 201(a).

48. Even so, the author will retain a non-waivable right to terminate that license or assignment thirty-five to forty years after the transfer. 17 U.S.C. § 203.

49. See 17 U.S.C. § 201(c); *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001) (discussing the applicability of the § 201(c) privilege to electronic republication of content).

Fourth, the bloggers could be deemed joint copyright owners if (a) their work is deemed a joint work, or (b) the bloggers are in a general partnership and their work is deemed partnership property.⁵⁰ In either case, the parties would jointly and equally own the content, even if they did not equally contribute to the work's creation.⁵¹ Each blogger would have a nonexclusive right to publish jointly owned works—and to allow others to do so—even after termination of the co-blogging arrangement, subject to an obligation to account for any revenues the blogger generates from the work's continuing use.

This discussion illustrates that bloggers face several unexpected copyright ownership traps. For example, bloggers might assume that they have complete control over their postings, but this control may be circumscribed when bloggers are employees or contribute to a collective work; and if a blogger is deemed an employee, the blogger retains no copyright interests at all. At the same time, a co-blogger might be tempted to claim that a blogger was an employee to obtain ownership of that blogger's copyrights, but this might simultaneously implicate an employer's obligations described in Part III.B.2, *supra*.

2. Domain Names and Trademarks

A blog's name, domain name, and logo may be protected by trademark law⁵² 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”).

Whether a word or symbol may be protected as a trademark is a fact-specific inquiry, but two general observations are appropriate. First, blogs that generate revenue presumptively should satisfy the “use in commerce” standard.⁵³ The converse proposition—no revenue, no use in commerce—may hold true as well.⁵⁴ Second, blog names are often descriptive⁵⁵ and

50. *See* *Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984) (“[W]e see no reason why partners should be excluded from the general rules governing copyright ownership . . .”).

51. *See* 1 NIMMER & NIMMER, *supra* note 19, § 6.08.

52. These assets may qualify for other protections as well. For example, even if the domain name cannot be protected as a trademark, it may still qualify for protection under the Anti-Cybersquatting Consumer Protection Act (codified at 15 U.S.C. § 1125(d) (1995) and 15 U.S.C. § 1129 (1995)) or some state laws (such as California's anti-phishing law, codified at CAL. BUS. & PROF. CODE § 22948.2 (1997 & Supp. 2006)).

53. “Use in commerce” means “the bona fide use of a mark in the *ordinary course of trade* . . .” 15 U.S.C. § 1127 (emphasis added).

54. Although this makes intuitive sense—trademark law, after all, protects *consumers*, and a non-

thus cannot be protected as trademarks until they achieve secondary meaning. Based on the foregoing principles, some popular blog names and domain names may not be protected as a trademark yet—or ever.

It is inevitable that bloggers will fight over the blog's domain name and trademarks when they split up. First, people become emotionally attached to brands. Second, in some cases, a blog's brand becomes an extension of the blogger's identity. Indeed, in some cases, the blog's brand may be more widely known than the names of the blog's individual contributors. Third, the blog's domain name may have significant and immediately recognizable value⁵⁶ due to its ongoing monetizable traffic both from existing readers and search engine referrals.⁵⁷

If bloggers have been using the blog name or domain name in commerce (such that the names may qualify for trademark protection), then the associated commercial activity may support the imposition of an implied general partnership. In that case, the trademarks and domain name will be allocated according to standard partnership dissolution procedures. If some blogger-partners want to keep using the trademarks, they may be required to buy out the interests of departing bloggers.

Alternatively, if the bloggers are in an employment relationship, the employer would own all rights to the domain name and trademarks, and a departing blogger-employee would not have any rights in either.

If bloggers have not used the domain name, blog name, or logos in commerce, these assets will not be deemed trademarks, and the parties probably will not have an implied general partnership such that the partnership allocation procedures apply. As a result, it is not clear what

commercial endeavor has no consumers to protect—it bears noting that the meaning of “use in commerce” is particularly confused in Internet jurisprudence, and there are some cases (wrongly decided, in my view) where non-revenue-generating activities nonetheless have been deemed a “use in commerce.” See, e.g., *SMJ Group, Inc. v. 417 Lafayette Rest. LLC*, 2006 WL 1881768 (S.D.N.Y. July 6, 2006) (gripping leaflet using the target's logo was deemed a “use in commerce”). See generally Eric Goldman, *Online Word of Mouth and Its Implications for Trademark Law*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* (Graeme B. Dinwoodie and Mark D. Janis eds., Edward Elgar Press 2007) (discussing the statutory and common law confusion about the “use in commerce” requirement).

55. The names of my blogs, the “Technology & Marketing Law Blog” and “Goldman's Observations,” are two such examples.

56. See Ribstein, *supra* note 8, at 15–16; Jon Swartz, *Sellers of Internet Addresses Surf for—and Get—Some Big Payoffs* (Apr. 13, 2006), http://www.usatoday.com/tech/news/2006-04-13-hot-domain-names_x.htm?POE=TECISVA (discussing the resurgence in domain-name valuations). Indeed, many of the highest-priced domain-name transactions have involved domain names that may never qualify for trademark protection.

57. An existing domain name usually has an existing PageRank, a reputational score assigned by Google, that, in turn, can increase the quantity of referrals.

legal doctrines will be used to resolve any disputes over these assets.⁵⁸ Fortunately, litigation over such domain names, blog names, or logos should be relatively rare: this would occur only when bloggers have not commercialized these assets yet still think they are valuable enough to litigate.

3. *Advertising Revenue*

Revenue-generating blogs may have accumulated cash or accounts receivable. If co-bloggers are partners, they are entitled to equal shares of these proceeds after liabilities are settled. Alternatively, co-bloggers who are employees or independent contractors of an employer-blogger will not be entitled to any share of the proceeds.

IV. SOLUTIONS AND RECOMMENDATIONS

Part III discussed the law applicable to co-blogging and identified a number of areas where default rules are unclear or may lead to unexpected results. This Part discusses some possible ways to avoid those situations.

A. *Private Arrangements*

Co-bloggers may be able to avoid the undesirable or unclear consequences discussed in Part III by structuring a private arrangement. Co-bloggers have two principal choices for their private arrangements: form a limited liability entity or enter into a co-blogger agreement.

1. *Form a Limited Liability Entity*

Co-bloggers can operate the blog via a limited liability entity, such as a corporation, limited liability company, or limited partnership.⁵⁹ In this case, the entity would own all of the blog's copyrights and trademarks unless the parties agreed otherwise.⁶⁰ Also, the limited liability provided

58. Independent of the legal resolution, the person listed as the domain-name registrant has technical/administrative control over the domain name, including the ability to turn off the domain name or point it at a different blog/website. As a result, domain-name registrants have (at least in the short run) significant practical leverage over the domain name's disposition.

59. See Ribstein, *supra* note 8, at 53.

60. Note that if a co-blogger is deemed an independent contractor to the entity, then the co-blogger will retain ownership of his or her copyrights. See *supra* Part III.D.1.

by the entity may protect the bloggers from personal liability for co-bloggers' blog-related activities.⁶¹

However, these benefits come at some cost, including upfront costs to form the entity and ongoing costs to comply with tax and reporting obligations. The entity also must comply with certain types of formalities to maintain its limited liability status, and these formalities can be a hassle and potentially costly as well. It may be hard to justify these costs when they exceed the revenue generated by the blog.

Also, to the extent that the entity's equity is tied to blog participation, additional complications can arise with the addition of new bloggers or the departure of existing bloggers. These situations may trigger a reallocation of equity, which may lead to thorny, emotional discussions about the fairness of existing equity or governance allocations, and there may also be out-of-pocket costs to document any ownership changes. In addition, these transactions may require real cash to move between the bloggers (i.e., payments from incoming bloggers to buy equity; payments to departing bloggers to buy their equity), even though there may not be any clear exit strategy or other way to recoup these cash payments.

2. *Co-Blogger Agreement*

Instead of forming a limited liability entity, bloggers can enter into a co-blogger agreement. From a legal standpoint, this agreement will act as a partnership agreement if the bloggers intend, or are deemed, to be in a partnership. Otherwise, the agreement governs the rights and responsibilities of independent contractors.

A co-blogger agreement offers several benefits over the formation of a limited liability entity. First, the agreement easily can be customized, within broad public policy limits, to fit the blogger's particular situation and preferences. Second, a private agreement has low transaction costs: the parties will incur few, if any, upfront out-of-pocket costs to create the agreement; the agreement may not require the parties to maintain any formalities; and the parties can easily and cheaply modify the agreement to reflect changed circumstances.

However, private agreements may not completely address bloggers' needs. Most obviously, the agreement can allocate or eliminate liability among its signatories, but it cannot limit the signatories' liability to third-party non-signatories. Also, although the agreement may expressly

61. The "corporate veil" will protect bloggers as investors, but it will not provide protection for bloggers' actions as the principal tortfeasor or as employees, directors, or officers of the corporation.

disclaim a partnership or employment arrangement, such contractual disclaimers are not dispositive, and the arrangement could be characterized as a partnership or employment arrangement despite the parties' preferences.

3. Conclusion About Private Arrangements

Whether a limited liability entity or a private agreement is the better choice depends on the bloggers' specific circumstances and goals.⁶² However, either choice is preferable to co-bloggers doing nothing proactive to override the default rules. With a non-choice, bloggers potentially bet their houses with every blog post they and their co-bloggers make and remain at risk of being blindsided by unexpected legal rules.

B. Education

Education about the legal consequences of co-blogging can help bloggers make smarter decisions about whether and how to co-blog. Education may also establish some new blogging norms, like entering into co-blogger agreements when appropriate. Bloggers are also a uniquely educable group; blogger word-of-mouth is very strong and disseminates key messages quickly. Therefore, blogger education offers some promise as a way to ameliorate blogger blindsiding.

Unfortunately, education is not a complete solution. Co-blogging law is complex and nuanced, and many bloggers will fail to grasp it. Worse, many bloggers will naively assume that they can always work out any difficulties with their co-blogger friends—failing to consider that friendships change, friends die, and third parties may seek to impose an unwanted characterization on all co-bloggers.

Among other topics, any blogger education effort should address the following specific points:

- Bloggers should consider registering their blogs with the Copyright Office under § 512, which may give bloggers some protection from copyright liability for the content of co-bloggers and readers who post comments.

62. See Posting of Bill Sjoström to Truth on the Market, <http://www.truthonthemarket.com/2006/04/23/legal-structure-for-co-blogging/> (Apr. 23, 2006, 10:50 a.m. EST) (discussing the choices based on circumstances and goals).

- Bloggers should think carefully before generating revenues from the blog. The decision to make money from blogging has some significant consequences. On the plus side, it will generate cash and may help the blog engage in a “use in commerce” sufficient to commence protectable trademark rights. On the minus side, it may lead to the formation of an implied general partnership—with numerous unexpected consequences—and may negate any coverage from the blogger’s homeowner’s insurance policy.⁶³
- Bloggers must trust their co-bloggers. No amount of legal prophylactics will cure an affiliation with an untrustworthy co-blogger.

C. *Judicial Restraint*

Bloggging is not so new or radical that it requires new laws or a distortion of existing laws. For example, the laws of partnerships or employment do not need revision solely due to bloggging. Further, it should be generally unnecessary for legislatures to provide blog-specific rules or safe harbors; it is too hard to define blogs or bloggging with sufficient precision, and legislation is too static to cope with the rapid evolution of bloggging technology and practices.

Instead, the common law typically can handle the idiosyncrasies of bloggging in a sensible and contextually sensitive manner. In that respect, judges evaluating blogs should recognize that unexpected or counterintuitive rulings could significantly destabilize the bloggging community. Fortunately, many of the legal doctrines discussed in this essay, including partnership and employment law, are naturally flexible. Judges should use that flexibility to balance the many considerations around bloggging.⁶⁴

V. CONCLUSION

The emergence of bloggging has sparked an exciting new era of Internet communications. Bloggers contribute to important First Amendment ideals by expanding the marketplace of ideas and performing the watchdog

63. See Posting of Eugene Volokh to the Volokh Conspiracy, <http://volokh.com/posts/1107896002.shtml> (Feb. 8, 2005, 14:53 EST) (“Bloggers—You May Already Have Blogging Libel Insurance”).

64. See Ribstein, *supra* note 8 (advocating that judges consider the law and economics of bloggging as part of the adjudication process).

function normally associated with the Fourth Estate. There is a lot of good activity taking place in the blogosphere.

However, the news is not all good. Existing legal doctrines do not cleanly apply to blogging, raising the specter that socially beneficial and well-intentioned decisions by bloggers will produce unexpected and adverse legal consequences. Bloggers will need to get smarter about these consequences, but judges can mitigate the harshest consequences by using their discretion to produce sensible and nonpunitive results.