



Consumer Reviews of Doctors and Copyright Law

Prof. Eric Goldman

Director, High Tech Law Institute

<http://www.ericgoldman.org> • <http://hightechlaw.scu.edu>
egoldman@gmail.com



Doctors and Consumer Reviews

- Many doctors hate negative consumer reviews
 - Doctors may take reviews personally
 - Most patients aren't expert evaluators of medical services
 - Doctors' historical marketing efforts haven't tied directly to consumer satisfaction
 - Negative reviews can cost doctors money, especially for elective procedures
- Medical Justice helps doctors manage their legal liability
 - Additional business line: system to control negative consumer reviews

Medical Justice Form Contract (2007?)

In consideration for treatment and the above noted patient protection, Patient agrees to refrain from directly or indirectly publishing or airing commentary upon Dentist and his practice, expertise and/or treatment unless explicitly mandated by law. Publishing is intended to include attribution by name, by pseudonym, or anonymously. Dentist has invested significant financial and marketing resources in developing the practice. In addition, Patient will not denigrate, defame, disparage, or cast aspersions upon the Dentist; and (ii) will use all reasonable efforts to prevent any member of their immediate family or acquaintance from engaging in any such activity. Published comments on web pages, blogs, and/or mass correspondence, however well intended, could severely damage Dentist's practice.

Source: <http://www.drgarysteen.com/Privacy%20Policy.pdf>

Medical Justice Form Contract (2009?)

“In consideration for treatment and the above noted patient protection, Patient agrees to refrain from directly or indirectly publishing or airing commentary upon Physician and his practice, expertise and/or treatment - the sole exceptions being communication to a confidential medical-peer review body; to another healthcare provider; to a licensed attorney; to a governmental agency; in the context of a legal proceeding; or unless mandated by law. Publishing is intended to include attribution by name, by pseudonym, or anonymously. If Patient does prepare commentary for publication about Physician, the Patient exclusively assigns all Intellectual Property rights, including copyrights, to Physician for any written, pictorial, and/or electronic commentary. This assignment is in further consideration for additional privacy protections provided by Physician. This assignment shall be operative and effective at the time of creation (prior to publication) of the commentary. Physician has invested significant financial and marketing resources in developing the practice. In addition, Patient will not denigrate, defame, disparage, or cast aspersions upon the Physician; and (ii) will use all reasonable efforts to prevent any member of their immediate family or acquaintance from engaging in any such activity. Published comments on web pages, blogs, and/or mass correspondence, however well intended, could severely damage Physician’s practice.”

Source: http://www.piedmontdermatology.com/PDFs/MutAgrmntMntnPriv_English.pdf

Medical Justice Form Contract (2010?)

“Physician has invested significant financial and marketing resources in developing the practice. Nothing in this Agreement prevents a patient from posting commentary about the Physician - his practice, expertise, and/or treatment - on web pages, blogs, and/or mass correspondence. In consideration for treatment and the above noted patient protection, if Patient prepares such commentary for publication on web pages, blogs, and/or mass correspondence about Physician, the Patient exclusively assigns all Intellectual Property rights, including copyrights, to Physician for any written, pictorial, and/or electronic commentary. This assignment shall be operative and effective at the time of creation (prior to publication) of the commentary.”

Source: http://www.silverleafdermatology.com/PDF/mutual_agreement.pdf

Why Get Copyright Assignment in Reviews?

- Web host liability for user content
 - 17 USC 512 = notice-and-takedown
 - 47 USC 230 = immunity even if host gets takedown notices
- Web hosts handle demand notices differently
 - Often ignore complaints about negative consumer reviews
 - Usually immediately honor 512(c)(3) takedown notices
- Copyright assignment means doctors often can remove any patient reviews they dislike via a simple takedown notice

Problems with Medical Justice's Approach (1)

- Legal

- New York v. Network Associates, 758 N.Y.S.2d 466 (N.Y. Sup. Ct. 2003): form contract prohibiting consumer reviews violated consumer protection laws
- Department of Health & Human Services, Office of Civil Rights: doctor ordered to stop using a contract promising enhanced privacy protection for an anti-review provision
- Contract unconscionability
 - Patients may need health care urgently
 - Professional service provider in superior position
 - Patients' choices may be limited by insurance
 - Contract presented in paperwork blizzard
 - Copyright assignments have nothing to do with doctor-patient relationship
- 17 USC 512(f) liability for sending bogus takedown notice

Problems with Medical Justice's Approach (2)

- **Medical**

- AMA Ethics Code violations? Ex: putting doctor's financial interests ahead of patients' interests
- Wedge in doctor-patient trust relationship
- Inhibits a valuable source of customer feedback

- **Social**

- Doctors will only target negative reviews
- Patients need a critical mass of reviews to make informed decisions

Implications

- Cross-elasticity between 230 and 512: too-strong copyrights can vitiate other policy objectives
- Prospective copyright assignments could proliferate
 - Ex: Burning Man
 - Why wouldn't every vendor take a prospective assignment in their customers' reviews?
- Copyright law (and other IPs) threatens the vitality of consumer review databases, a key to efficient markets
- Possible solutions
 - Vendor forbearance
 - Shaming/publicity
 - Litigation/government enforcement actions
 - Legislative intervention