

Blogs, blawgs and legal issues

When Bill Gates starts making speeches extolling the productivity benefits of technologies such as blogging, RSS (Really Simple Syndication) and other online communities that are integrated into websites, you know its time to take notice. Unsurprisingly, Gates has noticed the growth in those using blogging and RSS as a means to communicate, and disseminate. In 1999, there were approximately 50 recognised blogs in existence, today there are over 4 million. Blogs are now all over the web, with organisations such as AOL providing each subscriber with the chance to start one.

What are blogs?

Blogs, or web logs to give them their full title, are essentially chronologically organised websites that either collect, present or comment on other website content, or alternatively act as a sort of online diary/journal. Like most web developments, they were originally the domain of just web geeks, but now through sites such as the Google-owned *Blogger.com*, anyone can be up and blogging - in a matter of minutes.

The two most prevalent types of blogs are:

- the personal journal - gaining many column inches in the world's newspapers (and a six-figure book deal) recently for the author of *Belle de Jour* (the alleged diary of a London call girl); or
- the 'filter' style blog - where the blog owner scours the web and filters the content to identify only those items of interest to themselves and those who might read their blog - such as *Bespacific* (which offers accurate, focused law and technology news).

The filter sites attract readers because they often draw attention to material overlooked by the more mainstream press. Many bloggers are now gaining enough respect to be given the rights of journalists - this year's US Democratic Convention gave out a number of its press passes to bloggers.

Risks

Starting a blog is a quick and easy method of creating your own web presence. Within minutes you can be online sharing your thoughts about what you have done or using the blog as a soapbox to pour forth wisdom on anything that tickles your fancy. And this is where problems can arise.

Due to embedded social attitudes towards traditional media, the writer of an offline diary is more likely to weigh his words carefully - and of course, there are less legal risks because he has a limited audience. Online content, however, can be read by just about anybody with an internet connection, across multiple jurisdictions. In addition, writers often exercise less editorial consideration over their words in an online arena. Legal problems, such as copyright, confidentiality, defamation and libel are never far away.

Linking and copyright

Most 'filter' bloggers operate by copying a news item, or part of a news item, and including it (with or without their own comments) on their blog. Needless to say, this is invariably done without the permission of the writer of the original story, and will therefore leave the blogger open to claims of copyright infringement. Many websites, especially those of newspapers, often have a clause in their terms and conditions of use prohibiting the redistribution of any of their content. This includes copying headlines and deep linking to, framing or harvesting content for any similar purposes unless

the newspaper has given its prior permission for any such use.

This stance, especially on deep linking, is common, and also the one that most perplexes internet users. As stated above, 'filter' type websites are there partly to take the onus off the reader in having to conduct a search from the homepage of each individual site every time he wants to find an article. A few years ago, commercial websites defended their position on deep linking with the argument that it deprived them of the advertising revenues associated with the advertising placed on their homepages. This argument no longer holds as much sway as it did, since most webpages on a commercial site carry some form of advertising. Also, with Google still the preferred web search tool, and Google's search algorithm heavily weighted towards links, every time a blogger links to a website, that website's Google rank will rise slightly.

That said, the questionable legality of deep linking is an ongoing issue. The courts have generally found that hyperlinks do not infringe copyright law, as they merely represent a technical means of accessing something that is already available on the internet.

The only UK case addressing the issue, the *Shetland Times* case¹ (often referred to as the first linking case), looked at whether Shetland News' (News) deep link to embedded pages of the Shetland Times' (Times) website was an act of copyright infringement. The court agreed that there might be a case to answer and issued a preliminary injunction stopping the News from linking to the Times' material. The case was settled with the News agreeing just to link to the Times' homepage, and to clearly label the linked headlines as being from the Times.

Elsewhere in Europe, in Denmark (in the *Newsbooster* case²) and Germany (the *Paperboy* case³), the courts have also ruled on the issue. The judges in the *Paperboy* case stated that 'without search engines and hyperlinks (and deep-links in particular), a meaningful use and evaluation of the vast amount of information on the World wide web would be almost impossible'.

In both the *Newsbooster* and the *Paperboy* case, the plaintiffs argued that the defendants were infringing their copyright by providing deep-links that enabled the user to bypass their respective homepages. In both cases, the defendants provided search engines to search for news articles where both sites' search engines 'crawled' the websites of other newspapers and media sites to identify headlines and establish deep-links to those articles, systematically reproducing and publishing the headlines and links to the articles. (Google's news search service does the same thing.)

However, the courts did not come to the same conclusion in the two cases. The judge in the *Paperboy* case, found that the defendant's deep linking to articles on the plaintiff's website did not infringe copyright or database rights under the German Copyright Act, nor did it amount to unfair trade practices - hence it was 'fair-use'. However, in the *Newsbooster* case, the judges decided that the same action was illegal under both the Danish Copyright Act and the EU Database Directive. In the *Paperboy* case, the judge ruled that the deep-links did not violate copyright law, as they did not constitute an act of reproduction, but merely facilitated quick access to material already available on the internet by technical means. (It is therefore doubtful that the changes in German law brought about by the implementation of the EU Copyright Directive would have affected the outcome of this case.) The court also dismissed the claim that the action amounted to unfair trade practices, as Paperboy did not make use of the plaintiff's internet content, but only pointed users to that content, which was clearly identified as being from the plaintiff. Even the systematic 'crawling' of the plaintiff's website was fair use according to the court, as links to articles were neither a significant portion of the work, nor did they affect the market value of the articles as in fact they drove more readers to the material than may otherwise have seen it.

Interestingly, the judge in *Paperboy*, whilst stressing the importance of linking for the functioning of the internet, did say that if the plaintiffs did not want others deep linking to their content, all they had to do was to introduce technical measures to prevent them (eg subscription or registration). Under

the EU Copyright Directive, circumventing such technical measures would almost certainly have fallen foul of the law.

On the other side of the coin, in classifying the plaintiff's website as a database, the court in the *Newsbooster* case gave the plaintiff the right to prevent or control unauthorised access to, or re-distribution of, its website content. It saw the content of the plaintiff's website as a 'collection of independent works, data or other materials arranged in a systematic or methodical way or individually accessible by electronic or other means'. What this meant was that linking to *any* content on the site, without the express permission of the website owner, would be illegal, whether technical measures were in place to prevent it or not.

The court was guided by Article 7(5) of the EU Database Directive, which prohibits the 'repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with normal use of the database or which unreasonably prejudice the legitimate interests of the maker of the database'.

Defamation and libel

As suggested above, writers are often more open in expressing their opinions online than off. Blogging makes it even easier to vent feelings quickly, and through technology such as Google's cache facility, thoughts recorded in this way will still be present long after it seems all trace of them has been removed.

This is something that can be attested to by Amy Norah Burch,⁴ an undergraduate co-ordinator at Harvard who recently lost her job as a result of things she wrote on her blog. The problems started when Burch included a link to her personal website in her work e-mail signature. This in turn linked to her blog, which was very much in the style of an online diary. Burch said she used the blog as 'a way to let off steam'. Her blog contained entries about colleagues, some uncomplimentary in nature: 'anal retentive control freakishness', 'stupid professors'; and 'I am 2 snotty emails from professors away from bombing the entire Harvard campus'.

Steven Den Beste was perhaps the first blogger to be threatened with a defamation lawsuit, when someone with whom he had exchanged emails threatened to sue him for libel unless he posted a retraction of something he had said about him in a post. Neither the retraction nor the case materialised, however.⁵

The problems encountered by major news publishers, such as the Washington Post⁶ and Dow Jones,⁷ underline how alleged defamation online can cause problems in other jurisdictions, due to the power and reach of the internet. In both cases, the defendants successfully argued that the cases should be heard in a court situated in the jurisdiction in which they read the articles (Canada and Australia respectively) rather than in the US, where the publishers are situated and where the articles were posted.

Business and blogs

The issue of business and blogs can be divided into two separate segments:

- official company-sanctioned blogs; and
- personal blogs by individuals, usually people who identify themselves as being an employee of a certain company.

Taking the latter circumstance first, it seems obvious that Jane Doe starting her own blog and stating that, for example, she is Librarian of Company X, is doing nothing wrong, merely identifying herself for credibility purposes. The problem arises when Jane Doe is, for example, a lawyer who starts a

personal blog (or 'blawg' as law blogs are called) and begins commenting on legal issues. If again she has identified herself as being employed by company X, she risks being identified as the 'spokesperson' for the company and being seen as expressing the company's position on a given topic.

The answer, of course, is not to prevent Jane Doe from having what is a personal blog, but is certainly to make sure that any potential Jane Doe in Company X knows to place a proviso somewhere on that blog, where it cannot be missed, stating clearly that the views expressed on the blog are her own and not those of her employers. This sounds like common sense, but very few bloggers, and indeed blawgers, seem to have this type of disclaimer.

The other fear resulting from Jane Doe blogging is that she might reveal information about her own company, or about business in which her company is involved, that is confidential. It is easy, after all, to believe that information is already in the public domain when it is not.

Software developer John Stanforth discovered this the hard way in 2002 when, after posting comments about software he had developed for internal use by a former employer, he received a cease-and-desist letter from his old company stating that, by mentioning the software, he had violated the non-disclosure agreement that he signed when he joined the company.⁸

Yet despite the risks, official company blogs are also starting to develop, and it seems likely that businesses will start to embrace the technologies behind blogging more and more over the next few years, with officially sanctioned blogs being used as both external and internal tools. Bill Gates summed up the mood by saying that it is now time for the corporate world to look at blogs as a marketing tool and a means to connect more with their customers.

The problem facing those looking to have an official blog, however, is how to maintain the chatty openness that prevails in the blog community while managing to remain 'on message'. The trick will be to create a blog that is open, but yet does not contradict the corporate message. It also needs to be one that is not blinkered in any way, so that if a negative story appears, the blog comments on it as quickly as they would highlight a positive story.

Unsurprisingly, it is companies such as Google, Macromedia, IBM, Microsoft and Sun⁹ that are leading the way in officially sanctioned company blogs. Others such as Nike, have chosen to experiment by outsourcing their first blog (which will essentially function as a straightforward marketing tool).

Internally too, the use of blogs in business looks set to grow, both as a tool to manage and improve the flow of information in the workplace and as a project management or knowledge management tool.

Conclusion

Blogs are here to stay. How much use will be made of them for personal and business use is unknown. It seems probable, especially after the Burch case above, that it will not be long before blogs will have a special mention in companies' acceptable use policies governing the use of email and the internet. Linking to a personal webspace from an official work email signature, for example, is unlikely to be identified as best practice.

It does seem probable that, despite the inherent risks of blogging, the courts will be unlikely to take the view that isolated instances of linking to web content, as on most filter blogs, would constitute copyright infringement; and indeed if a large publisher threatened legal action against a blogger, it is probable that the blogger would be unable to afford to defend himself, and would therefore remove the offending item. However, until the first blogging case arrives to test the issue, we cannot know for certain.

Blawgs of note!

For those with an interest in the law there are now literally hundreds of related blogs, many created by lawyers themselves. In the realm of e-law there are a number of high quality blawgs - still predominantly American - that are well worth paying attention to for news and opinions on the latest case law.

Susan Crawford Blog [<http://scrawford.blogware.com/blog>] - Susan Crawford is Assistant Professor of Law at Cardozo Law School and previously a partner at Wilmer, Cutler & Pickering (Washington DC). The blog covers: internet law and policy issues, including governance, privacy and digital copyright.

Dennis Kennedy Blog [www.denniskennedy.com/blog/] - Dennis Kennedy is the sole practitioner of Denniskennedy.com, LLC, a legal technology and internet consulting firm and a former partner of The Stolar Partnership, a St Louis law firm. The blog covers: legal technology and technology law, as well as other 'musings'.

Michael Girard's e-lawg [www.cacounsel.com/e-lawg/] - The blog covers: civil litigation, particularly in the commercial, professional liability, securities, technology and insurance areas.

IPKAT [<http://ipkitten.blogspot.com/>] - Jeremy Phillips, a partner at Slaughter and May, and Ilanah Simon have created an entertaining intellectual property blog. The blog covers: copyright, patent, trademark, branding and privacy/confidential information issues from a mainly UK and European perspective.

BeSpacific [<http://bespacific.com/>] - Sabrina I Pacifici has worked as a law librarian in Washington DC for 25 years. The blog covers: copyright, privacy, censorship, the Patriot Act, ID theft and freedom of information, focusing on the expanding resources in the public and private sector related to law and technology news.

Greplaw [<http://grep.law.harvard.edu/>] - This blog is produced by the Berkman Center for Internet and Society. The blog covers: copyright, open source, domain names and privacy law.

Lessig Blog [www.lessig.org/] - Lawrence Lessig is Professor of Law at Stanford Law School and founder of the School's Center for Internet and Society, and represented website operator Eric Eldred in the ground-breaking case *Eldred v Ashcroft*, a challenge to the 1998 Sonny Bono Copyright Term Extension Act. The blog covers: copyright issues.

InformationOverlord [www.informationoverlord.co.uk] - This author's own blog. The blog covers: Media, Communications and IT law news, as well as information management and librarian issues.

References

1. *Shetland Times Ltd v Jonathan Wills and Another* (1997) FSR (24 October 1996).
2. *Danish Newspaper Publishers Association and others v Newsbooster ApS* (Copenhagen Bailiff's Court).
3. *Handelsblatt v Paperboy* (Federal Superior Court of Germany).
4. See Leon Neyfakh 'Online Weblog Leads To Firing' *Harvard Crimson*, 26 May 2004:

www.thecrimson.com/article.aspx?ref=502702

5. See http://denbeste.nu/cd_log_entries/2002/08/Openletter.shtml
6. *Bangoura v Washington Post*: www.canlii.org/on/cas/onsc/2004/2004onsc10181.html
7. *Dow Jones & Company, Inc v Gutnick* (M3/2002, 28 May 2002).
8. See www.washingtonpost.com/ac2/wp-dyn/A9204-2002Dec18?language=printer
9. Blog by Jonathan Schwartz, President of Sun:
<http://blogs.sun.com/roller/page/jonathan>