

# Louisville BAR BRIEFS

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## Blogs and the Law

Web logs, or blogs, have become a popular communication vehicle. They have grown from simple Web-based diaries to a journalistic medium. In the course of this growth, a number of issues have come to light regarding their development and use. Among them are intellectual property issues, use as a research tool, and their implications for Kentucky's advertising rules. This month, Peter J. Stavros and Kurt X. Metzmeier share the uses and the dangers of blogs.

### Bloggers, Blawgs & Finding Current Law

by Kurt X. Metzmeier

The explosion of the technology of the Internet Web log or "blog" has redefined publishing. No longer does freedom of the press apply only to those who can afford a press: individuals can now broadcast their opinions as easily as typing into a rectangular box and clicking "publish." Clearly the phenomenon has the mainstream media worried. Last summer bloggers proved a CBS News story on President Bush's military record was based on forgeries; since then news agencies like CNN have incorporated blogs into their coverage.

The legal publishing industry is now facing its own challenge from legally oriented blogs, whimsically known as "blawgs." Created by lawyers, law professors and even law students, blawgs offer opinions on new legal developments in case law and statutes, discuss the practice of law, and engage in theoretical debate. Even more useful to legal researchers are those blawgs that attempt to report on these developments, by linking to new cases, rules, statutes, and legal commentary—all in a timely and comprehensive way. The best of these kinds of blawgs can compete with pricey current awareness services like BNA's *United States Law Week* or CCH's *Daily Labor Report*.

#### Assessing Blawgs

Just as lawyers must be careful when they create a blog, they also must be cautious when relying on a blawg for legal news and information. However, there are a few things a researcher can look at to "find the better blawg."

First, while a rose may just be a name, a name is better than no name. Anonymity

has its place in the blogosphere, but the most reliable blawgs are run by legal professionals who provide their names, their identifying organization (law firm, university, agency), and some biographical information.

Second, running a blog is a lot of work, and the best blawgs spread out the work among multiple authors. These collective blawgs can provide regular posts and broad coverage without burning out the bloggers. The Internet is littered with the husks of single-author blogs that died when the author "got a life."

The third sign of a good blawg relates to what could be called Descartes' rule of blogs: I blog, therefore I exist. The essence of blogging is currency; without regular, frequent posts, a blawg loses its utility as a current awareness tool. If you are following DOGLAWBLAWG and it misses the latest court decision defining the "first bite" rule because the author is taking a break to "spend more time with the family," it is worse than worthless as a source. At minimum a blawg should have regular—at least weekly—posts, and clearly explain any breaks in coverage.

#### Types of Blawgs

There are a variety of types of blawgs, but they break down into two broad functional groupings: those that primarily analyze and comment on the law or the legal profession, and those that primarily collect recent links to documents and opinions on the law. In other words, there are the "thinkers" and the "linkers."

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### Bloggers Could Face Legal Consequences for Internet Postings

by Peter J. Stavros

The Internet has provided us with new outlets to impart our most significant, and inconsequential, thoughts and opinions upon the entire world—or at least upon everyone with access to the World Wide Web—one of the most prevalent of which is the "blog site." However, what might be freedom of expression to a blogger could be infringement of a copyright or trademark, misappropriation of a trade secret, or even defamation to another. While it is relatively easy to post comments online, one must consider the legal implications of blogging before typing up a remark and hitting the send button.

#### Blogging 101

The term "blog" is short for "Web log," a type of diary or journal written and posted on a Web site and generally available to anyone with a computer and an Internet connection. Blogs are regularly updated and express the blogger's commentary, views, and criticisms on a near plethora of issues. There are blog sites that focus on a particular subject matter—the Boston Red Sox, Star Wars trivia, or unicorns—or on whatever the blogger happens to be concerned with at a particular moment—the weather, a family pet, or the physics mid-term. Bloggers often invite responses and a virtual colloquy ensues.

Blogging has undoubtedly been around as long as the Internet, even if it might not have always been specifically referred to as blogging. Since those early days of the Web,

the practice of blogging has expanded almost exponentially, and today blogging has taken its place in popular culture. Googling the word "blog" reveals a myriad of blog sites and postings. There are even Web sites and software devoted to helping the newbie blogger begin. In addition to the technical aspects and fundamentals of blogging, bloggers should also have an understanding of the legal consequences that could arise from speaking one's mind on the Internet.

#### Copyright Protection & Items Posted on Blog Sites

Copyright law protects an original work of authorship that has been created in a fixed, tangible form of expression—such as a book, photograph, or computer file—from being reproduced, distributed, performed, displayed, or prepared in a derivative work without the author's consent. Only the person who created the work—unless someone else commissioned it or it was prepared within the scope of employment—maintains these exclusive rights. Steep penalties may be imposed upon someone who infringes a copyright, including damages suffered by the copyright holder, profits obtained by the infringer, and attorney fees and costs. The copyright holder may also choose to recover statutory damages of up to \$30,000 for each infringed work, increased up to \$150,000 for willful infringement.

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### Are Blogs Legal Advertisement?

Lexington Kentucky attorney Ben Cowgill has asked the Kentucky Bar to make a ruling on that issue. Because a true blog requires regular updates, the question of whether or not a blog will be treated as advertisement has become an issue of great interest in the blogging community. If ruled legal advertisement, a legal blog publisher in Kentucky would need to resubmit the blog's content to the bar after each entry is posted, and possibly pay fees for each update. For more information on the issues at hand, see "Is a Lawyer's Blog an Ad? Query to Kentucky Panel Sets the Internet Buzzing" by Victoria Slind-Flor, [www.abanet.org/journal/ereport/jn17blog.html](http://www.abanet.org/journal/ereport/jn17blog.html). ■

## Bloggers Could Face Legal Consequences

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Included within the broad scope of works entitled to protection under the copyright laws are items that a blogger might choose to post on a Web site, such as text, articles, images, and sound. Copying verbatim something written by someone else, without first obtaining permission from the author, could result in a claim of copyright infringement. While the fair use doctrine is a defense to copyright infringement, there is no guarantee that it would apply in every situation. Certain factors are taken into consideration—the nature of the copyrighted work, whether its use was for commercial or non-profit educational purposes, how much of the work was used, and the resulting effect upon the market or value of the copyrighted work—to determine if the use of the particular work was fair or if it ran afoul of copyright law.

The fair use doctrine generally applies to criticism, commentary, news reporting, teaching, scholarship, research, and parody. For example, it would be fair use to quote select passages of a copyrighted work in a scholarly article or news report. A blogger who posted only an excerpt of a copyrighted work, along with his or her criticism or commentary on the piece, should be able to make the case for fair use. On the other hand, posting an entire copyrighted work on a blog site, devoid of any of the blogger's own thoughts or impressions, could land the blogger in hot water with the copyright holder. Between these two extremes lies a slippery slope, as there are no clear-cut rules regarding the extent or amount of use of a copyrighted work that may be considered fair.

The blogger should err on the side of less extraction and more blogging—even if the blogger acknowledges the source of the material—unless the copyright holder explicitly consents to use of the work on the site. Just because the work might not contain the copyright symbol, or any other indication of copyright registration, it does not mean that the work is not protected by copyright. Copyright protection begins immediately upon creation, and if the blogger does not possess the copyright in a work, the chances are that someone else probably does.

The same holds true for photographs or other visual images. Copying a picture that belongs to someone else, and altering a visual image, such as by cropping a photograph, and then posting these on a blog site without permission, could trigger copyright liability. Additionally, removing a watermark from a photograph would violate the Digital Millennium Copyright Act of 1998, which was enacted for such purposes as preventing the circumvention of technological measures used by copyright holders to protect their rights. The safest course is to always first obtain permission before using someone else's copyrighted material.

### Think Before You Hyperlink

A hyperlink allows the Internet user to move directly from one Web site to another without typing in the URL address. One click on the hyperlink—which is usually indicated on a Web page by an underline, different color text, etc.—and the user is immediately transferred to another Web site, either in the same browser or opening into another window.

Although merely linking to another Web site without copying any text or graphics from that site should not raise any concerns of direct copyright infringement, if the hyperlink on a blogger's site leads to a Web site that is itself directly infringing a copyright, a claim for contributory copyright infringement could be made against the blogger. Contributory infringement occurs when someone acts with knowledge of the infringing activity to induce, cause,

or materially contribute to the infringing conduct of another. A claim for vicarious copyright infringement—defined when someone has the right and ability to control the infringing activity and receives a direct benefit from the infringement—could also be found against a blogger.

Additionally, if the text accompanying a hyperlink, or the context in which the hyperlink appears on the blog, misrepresents anything about the linked site to the confusion of the user—for example, by falsely indicating that the blog were in some manner sponsored or endorsed by, or affiliated with, the linked site—claims for commercial disparagement, false advertising, or trademark infringement might be made against the blogger. Using someone else's trademark or copyrighted image as the hyperlink could also be considered an infringement. If this were not enough to worry about, a blogger might also be in breach of contract if linking to a Web site were found to violate that site's terms and conditions of use.

Even if the blogger does obtain an expressed agreement to hyperlink to another Web site, the blogger should also clearly notify the user that clicking on the hyperlink will take the user to another Web site that is in no way associated with the blog site.

### Trade Secret Theft and Defamation

Bloggers must also realize that with improved search engines their postings are generally accessible for the entire world to read. After all, that is one of the aspects that draws a lot of people to blogging. As blog sites increase in popularity, with some blogs even followed by the media, bloggers should consider carefully the type of information they reveal in blogs, particularly if it relates to trade secrets or other confidential information to which, by reason of their employment or other special relationship, they might be privy.

A trade secret is generally defined as any type of information that derives independent economic value from not being known to the public, and which is the subject of reasonable efforts to maintain its secrecy. A trade secret may include a formula, pattern, compilation, program, device, method, technique, or process. In a case closely watched by bloggers, *Apple Computer, Inc. v. Doe 1*, Case No. 1-04-CV-032178 (California Superior Court), Apple Com-

puter filed suit against several defendants whom it claims have leaked trade secret information about new Apple products in Web postings. An attempt to block a subpoena issued by Apple to uncover the sources of this information was denied by the court in March. While making clear at the beginning of its opinion that the decision concerned only the issue of discovery, and not the ultimate merits of the claims or defenses in the case, the court held unavailing the bloggers' claim of journalist privilege from disclosing their sources. The court, however, did not decide whether or not the bloggers were journalists, noting that "[d]efining what is a 'journalist' has become more complicated as the variety of media has expanded. But even if the movants are journalists, this is not the equivalent of a free pass." The bloggers have appealed the decision, and while it remains to be seen how this case will play out, or what ultimate effect it might have on blogging, there is a very real threat of exposure to litigation from comments made on a blog site.

In addition to an action for trade secret theft, as in the Apple Computer case, a claim for defamation or libel could also arise where a blogger is alleged to have made false or malicious comments harmful to the reputation of another—sometimes referred to as "cyberlibel." In perhaps one of the more widely known such cases, a \$30 million defamation lawsuit was filed several years ago against Matt Drudge, the author of the Drudge Report Web site, over a story posted by Drudge in 1997 that then-incoming White House assistant Sidney Blumenthal had a history of spousal abuse. Drudge retracted the story shortly after it appeared, and the case eventually settled. However, although the law on cyberlibel might still be in flux, bloggers should recognize that they might face the same consequences for defamation or libel as any other journalist, and, at the very least, check the facts before posting their remarks on the Internet.

### Now That You Know Some of the Legal Basics, Blog Away

Blogging provides an innovative and almost instantaneous means to exchange thoughts and ideas. One can easily get caught up in the various blog sites that continue to sprout up on the Internet. As the case law concerning the legal issues arising from blogging continues to develop, bloggers should be aware that while the context of their blogs might just seem like chatty conversation, the effects might have far reaching legal implications.

Peter J. Stavros, Attorney at Law, is chair of the LBA's Intellectual Property Section. ■



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## Bloggers & Blawgs

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### Selected Blawgs

The following sites are referenced in the article:

**VOLOKH CONSPIRACY**  
<http://volokh.com>

**OHIO LAW BLAWG**  
<http://ohiolawinfo.blogspot.com>

**LAWWIRE**  
<http://www.louisvillelaw.com>  
(currently in listserv format)

**SUPREME COURT NOMINATION BLOG**  
<http://www.sctnomination.com>

**SCOTUSBLOG**  
<http://www.scotusblog.com>

**HOW APPEALING**  
<http://legalaffairs.org/howappealin>

### The Linkers: Freelance Organizers of Legal Information

The most useful types of blawg to the legal information seeker are those that follow online court dockets, legislative Web sites, Web editions of newspapers, and other blawgs to collect links to all current information on a hot legal issue or case, and post it in a timely manner.

A good example is the coverage of the Terry Schiavo case by HOW APPEALING (see sidebar for Web addresses of referenced blawgs). After the intervention of the U.S. Congress sparked the last round of litigation, the blawg made a Herculean effort to link to or post to dozens of documents, including federal legislation, state and federal court decisions, briefs by all parties, and commentaries. In most cases this was done all within minutes of their official release.

In some cases blawgs cover a single court or jurisdiction. Even though they may only link to documents on a single court Web site, they do a service because, frankly, most court sites are poorly designed. Even when they are relatively well organized, users need to know exactly what they are looking for and need party names or docket numbers to find cases. If all you know is that you are looking for the recent ADA case on cruise ships, you'd be better off looking at disability law blawgs than raking through the Supreme Court Web site.

One of the best of these blawgs is SCOTUSBLOG, overseen by Tom Goldstein of Goldstein & Howe, a Washington, D.C., legal boutique that specializes in federal appellate work, especially Supreme Court advocacy. Goldstein (who clerked for Justice Stephen G. Breyer) has 14 co-bloggers, including G&H partners and associates, and law student contributors from Columbia, Harvard, and Georgetown. SCOTUSBLOG has regular posts covering the U.S. Supreme Court docket. Links to recent opinions, oral argument transcripts, and briefs are posted as soon as Goldstein or his contributors find them. Analysis of recent decisions found in both online newspapers and blawgs is also collected, and Goldstein is careful to link to views on all sides.

Recently, the G&H folks have spun off a new blawg, the SUPREME COURT NOMINATION BLOG, to collect speculation and information about the vacancies everyone expects.

Another important blawg is Legal Affairs' HOW APPEALING (discussed above), which follows newsworthy activity in all the nation's courts, state and federal. Managed by Pennsylvania appellate lawyer Howard J. Bashman, who posts several times a day,

HOW APPEALING follows articles on appellate activity in the press. It also frequently links to primary documents. Its around-the-clock coverage of the Schiavo case proved that when the law and the national zeitgeist intersect, HOW APPEALING will be there.

Some of the most useful blawgs cover a particular state. While Kentucky does not yet have such a blog (at least until Michael Stevens converts his Louisville LAWWIRE listserv to blog format), one good example is Ken Kozlowski's OHIO LAW blawg. In a typical week Kozlowski, the Ohio Supreme Court librarian, will post links and descriptions of Supreme Court of Ohio decisions, Ohio Board of Tax Appeals decisions, newly introduced bills of the Ohio legislature, press releases from the governor, and news reports relating to the law.

Other linking blawgs cover subject areas of law, issues related to sectors of the profession, and even legal gossip.

### The Thinkers: Instant Legal Analysis

Legal research is not just about finding cases; sometimes researchers need to see how legal scholars analyze those cases. The blogosphere is an opinionated place, so it is not surprising that there are blawgs where one can find opinions on what the cases mean—or should mean. Law professors (usually young but already tenured) are the predominant animal in this habitat. An excellent example is the VOLOKH CONSPIRACY, where UCLA professor Eugene Volokh and his dozen contributors opine all matter of legal developments, usually from a libertarian-conservative legal perspective.

### A Free Lunch?

The careful legal researcher should always be cautious of free sources but when properly evaluated, blawgs can be a valuable tool for keeping up on new developments in the law and to sample the perspectives that underpin debate on topics like judicial appointments and interpretation of the constitution. Besides, these sources aren't actually freely given. Blawgers are promoting their legal practices, legal treatises, and professional reputations; users "pay" by acknowledging their value.

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