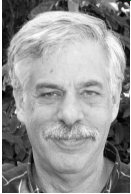


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spam and blogs



PART 2: BLOGS, FOR

GOOD OR ILL

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This is the second part of a two-part article based on a tutorial I gave on spam and blogs at the LISA '06 conference in Washington, D.C., in December 2006. The first part, on spam, appeared in the April 2007 issue of ;login:.

THE EVER-INCREASING USE OF THE Internet creates new challenges for the system administrator. Many of these challenges have legal dimensions. This is particularly true of spam and blogs. By some estimates, over 75% of all email traffic is spam. In the United States and abroad, laws have been enacted to regulate spam with various remedies and varying success in encouraging compliance. Blogs are increasingly used not just for personal expression but also for commercial purposes. It often falls to the system administrator to design and enforce company policies to protect against spam, to limit personal use of blogs using company facilities, and to ensure that the company is in full compliance with all applicable laws and regulations.

Blogs have become increasingly popular and easy to use just in the past few years. Unlike spam, however, no body of laws has arisen that specifically addresses or attempts to regulate blogging. This may be because blogs, unlike spam, do not inherently impose themselves on unwilling recipients. Blogs are more passive: One can read them or ignore them. Readers must search them out, whereas spam arrives in one's email inbox unsolicited.

To a great extent, blogs are simply publications like any other. The innovation in blogging is that the Internet reduces the cost of publication to virtually nothing while it enables distribution to the widest possible audience. Blogging enables everyone to be a publisher and provides everyone with a means of reaching an audience with their ideas and opinions.

Blogs raise the same legal issues that are common to all other publications. This article focuses on several of the most important of these: defamation, intellectual property infringement, and employer-employee relations.

Defamation

Defamation is a civil law cause of action where one person sues another because some statement made by the other has caused damage to his or her reputation. To be actionable, the statement

must be false, the person making it must know it is false, and the statement must actually result in injury to the reputation of the person suing.

Often, defamation arises in the context of the publication of false statements by the media, such as newspapers or radio or television broadcasting stations. United States Supreme Court decisions shield the media against suits by public figures unless they can show that the defamatory statements about them were made with malicious intent. However, plaintiffs who are not public figures only have to show that the injurious statements were made with a knowledge of their falsity.

There is every reason to believe that the same standards applied to the media would apply to bloggers. The constitutional right of free speech will usually protect bloggers, even if they make false statements about others. But the balance tips toward protecting the reputations of others against those false statements where the blogger knows those statements are false and, in the case of public figures, where the blogger has malicious intent.

Intellectual Property Infringement—Copyrights

Federal copyright law protects authors against unlawful copying of their articles or other works. Obviously, copying an entire article written by someone else and republishing it as one's own would be a blatant case of copyright infringement. Even republishing it and giving the true author appropriate attribution would still constitute infringement unless the author gave his or her consent.

The more difficult cases involve the "fair use" doctrine. That doctrine balances the author's right to control the publication of his or her work with the importance of a free press. For instance, journalists are permitted to republish portions of copyrighted works without obtaining their authors' consent, in the interests of serving this social objective.

However, the fair use doctrine has its limits. Even journalists cannot republish whole works without their authors' consent; and the availability of the privilege will be balanced against other considerations, such as the purpose and character of the copying, the nature of the copyrighted work, the amount and substantiality of the copying, and whether it will deprive the author of the value of the original publication.

Blogs are publications, and the fair use doctrine should be as available to them as to the publications of the mainstream media. Still, the rights of bloggers to copy and reproduce works of others is not absolute. Publishing without attribution, copying whole or major portions of articles, republishing for commercial gain, and republishing that deprives the author of income are all highly suspect.

A common practice among bloggers is to link to third-party content instead of copying it. A few lawsuits have been filed alleging that linking to such content without the consent of the author of that content is a copyright infringement. In one of those lawsuits, Ticketmaster sued Tickets.com and lost. Ticketmaster also sued Microsoft on the same issue, and the suit was settled before a decision could be reached. Thus far, no court in the United States has ruled that linking to another's Web site content without the other's consent is illegal.

Incidentally, some readers may wish to know how to "copyright" their blogs. Since copyrights arise from the creation of the work, blogs are protected by copyright without doing anything at all. No registration is required; neither is the inclusion of a copyright notice. Nevertheless, I advise my clients to put a copyright notice prominently on their blog home pages.

Intellectual Property Infringement—Trade Secrets

Another kind of intellectual property right that blogs call into question is the right of trade secrecy. In the United States, state laws make it illegal to misappropriate confidential information that gives its owner a commercial advantage from not being known to competitors. Publishing such information without the consent of its owner can certainly constitute a violation of these state laws and may even result in the loss of that information to the public domain.

Bloggers must be very careful not to reveal any trade-secret information to which they have access. The fair use doctrine will not shield them from liability for publishing this category of information, particularly if they were or should reasonably have been aware of the confidential nature of this information prior to its publication. Violation of the state laws protecting trade-secret information can result in substantial fines and in some cases the infringer can be required to reimburse the plaintiff's legal fees as well.

Employer-Employee Relations

No area has generated as much interest among bloggers as the issues that arise in the context of employer-employee relations. Bloggers write about their jobs and their employers. They also blog about unrelated topics during working hours, thus detracting from the attention they are supposed to be giving to their workplace responsibilities. And increasingly, employers are using blogs to promote their products and services and to communicate with their customers.

What rights do employees have to blog about their employers? Are there any limits to the free speech rights of employees? To what extent do employers have the right to prohibit personal blogging by their employees while on the job? And when can an employee refuse an employer's request to contribute to company blogs?

It is clear that employees can be terminated and even sued for revealing confidential information about their employers if that confidential information rises to the status of trade secrets. Information rises to the status of trade secrets when it gives the employer a commercial advantage in not being known by its competitors. Employees have a duty to safeguard the confidential information of their employers. Often, that duty is made explicit in a nondisclosure agreement that the employee must sign. But even without a nondisclosure agreement, that duty is imposed by law.

Individuals who come upon trade secrets without breaching any obligation to keep that information confidential may not be in violation of the law if they publish that information in blogs. However, it is difficult for employees to take advantage of this exception to liability. Employees who blog are particularly vulnerable to allegations of trade-secret misappropriation because of the access they have to the confidential information of their employers and the presumption that their duty to keep it secret is absolute.

Employees charged with trade-secret infringement by their employers often point to the "whistle-blowing" effect of publication of the illegal or unethical activities of their employers. There are laws that reward rather than penalize employees for disclosing their employers' secret, but illegal activities. But these do not constitute legitimate trade secrets. Often, activities that the employee thinks are illegal are not, so the employee makes that determination at his or her own risk. The better advice for employees is to consult a lawyer

before disclosing any confidential information about their employers.

The balance between employer and employee rights in the workplace differs greatly from state to state. Some states, such as California and New York, are very protective of employees and many others, such as Texas, are much more protective of employers. Generally, however, employers have a right to expect their employees to devote complete attention to their duties and responsibilities during working hours. Employees who engage in personal blogging during the working day can be terminated after they receive reasonable notice that those activities are inappropriate. The right to pursue free speech in the workplace is trumped by the employers' interest in maintaining a profitable and efficient business.

Some laws impose affirmative obligations on employers to regulate certain kinds of speech. Examples include content that may constitute harassment of other employees or that contributes to an unsafe work environment. Employers can also curtail actions by their employees to the extent necessary to protect themselves from suit by third parties for unlawfully revealing the third party's trade secrets and confidential information. But the employer's powers in these circumstances stem from laws of a more general purpose rather than laws aimed specifically at blogging.

Implications for System Administrators

Many system administrators are aware of increasing blogging activity by employees using their employers' systems. It is clear that the constitutional rights of free speech and free press are not unlimited. Those rights are always balanced against countervailing rights and interests, such as the right not to have one's reputation injured by false statements, the right to protect one's intellectual property, and an employer's right to the undiluted loyalty and focus of its employees.

Employers should develop policies that address employee blogging. At a minimum, these policies should prohibit publishing content that harasses other employees or damages their reputations and content that jeopardizes the employer's intellectual property rights. Further, these policies should address whether blogging using the employer's facilities is even a permitted activity.

It is often useful for employer blogging policies to be developed with the input of the employer's system administrators, since they are the ones who

are frequently tasked with monitoring compliance with those policies. At a minimum, system administrators need to be familiar with those policies and given the tools and authority to enforce them. The system administrator should question any policies that seem to be overreaching or that do not adequately address any of the issues described in this article.

As blogging becomes more prevalent in the workplace and outside of it, system administrators will often be expected to inform their employers of

any activities that appear to be illegal or that may violate established employer policies. Often it will not be easy to make the initial determination. Clear policies will help, but the system administrator will always be working in an environment of substantial ambiguity and legal uncertainty. Asking for help from the employer or the company's legal counsel at appropriate times will relieve the system administrator from the full burden of determining which blogging activities are appropriate and which are not.



LinuxConf Europe 2007

UK JUG



At the start of September 2007, a series of Linux events will take place in Cambridge, UK. From Sunday, Sept. 2, to Tuesday, Sept. 4, there'll be a significant new technical conference, incorporating the best elements from the UK Unix User Group's Linux Developers' Conferences (2006) and the German Unix User Group's Linux-Kongress (2006).

This event will be followed by the invitation-only 2007 Linux Kernel Developers Summit, sponsored by USENIX, on Sept. 4–6. Python enthusiasts may also wish to attend PyCon UK in Birmingham on Sept. 8–9.