

Ohm's Law: Blogs – Basic Copyright Considerations
By Hun Ohm*

You are a struggling writer, but also a candy and pastry lover at heart, hell-bent on finding salted caramel perfection and other goodies in New England. For fun (and as an outlet for your words), you have maintained a blog to document your quest. Your quirky and sometimes irreverent posts ring true, and the blog has gone viral. Seemingly overnight, you are the go-to person for all things sweet. What you say goes, and your readers hang on your every word. Some individuals have even begun to repost your posts in their entirety on their own copycat sites without any mention of you. While imitation may be the sincerest form of flattery, you are feeling uneasiness about this activity and wonder if there is anything you might, or should, do.

These days, blogs have become ubiquitous on the Internet, with many millions of blogs currently in existence. The term “blog” results from the combination and truncation of “web log” and typically refers to an online collection of content posted by an individual or entity, often on an ongoing, regularly updated basis. Blogs can take many forms, ranging from personal journals to photo essays to running commentary on any number of topics. Indeed, blogs have proven to be a valuable source of information, entertainment and social networking that enrich our experiences on the Internet and beyond. While the majority of blogs do not generate an appreciable amount of revenue, if at all, some blogs can become brands and empires in themselves, generating in the hundreds of thousands of dollars, or even more.

Regardless of whether your blog is a business model or simply for your own, personal enjoyment (or amusement), the rapid growth and easy accessibility of blogs have made intellectual property concerns and pitfalls immediately relevant to many. For today, let's think about copyrights.

Copyrights

Copyright protects an original expression of an idea that has been fixed in tangible form. Literary works, pictures, videos, music: these are all examples of works protected under copyright law, as well as examples of content that you might expect to be posted on blogs. So your original expression of words expounding on the virtues of black forest cake, your carefully composed photographs of chopped walnuts tumbling from a confectioner's palm -- each of these elements posted on your blog likely qualify for copyright protection.

With technology advancing on a daily basis, it has become increasingly easy to post images, sounds, videos, and other content on a blog, including information found on the Internet. However, just because information is available online does not mean that it is free for the taking. Unauthorized uses, *e.g.* copying a photograph from a website and reposting it on another site, or placing someone else's video footage on a website, could be deemed to be copyright infringement. Remember, copyright laws provide the creator of a work with a set of exclusive rights (*i.e.*, the right to reproduce the work, to prepare derivative works based on the work, among other rights) for a limited period of time and help the creator protect against the unauthorized use of such work.

Why should this matter? Copyright infringement can have serious consequences, including injunctive relief and possible statutory damages if a lawsuit is filed. While the specter of a federal lawsuit may seem like an unlikely or remote risk to some, there could be ramifications on a more practical level. For example, if you are using a third party entity to host your blog and you post infringing (or even arguably infringing) content, you might find your blog being removed from the entity's servers as a result of a takedown notice filed by an upset copyright owner. Unfortunately, it can be uphill battle to get the content back online.

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Given these risks, as a rule of thumb, it may be prudent to start from the viewpoint that most content you observe online is protected under copyright law, and then proceed with an analysis of whether a proposed use of such content may nevertheless be made without the permission from a copyright owner. While copyright law does grant creators a broad set of rights and powerful remedies if those rights are infringed, there can be instances where permission is not mandatory.

For example, “fair use” is a legal concept that allows the use of another person’s work without permission under certain circumstances. A multi-factor test is utilized to determine whether a use is “fair,” which factors include: (a) the purpose and character of the use, (b) the nature of the copyrighted work being used, (c) the amount and substantiality of the work that is being used, and (d) the effect on the market place for the work being used. For better or for worse, the standard is vague with much room for interpretation and argument, and the analysis is likewise fact-specific and complex, with no “one-size-fits-all” rule; however, there can be instances when some portion of material, from a blog or other source, may be reposted on another site without the use being deemed an infringement.

There are also limits to copyright protection. For instance, copyright does not protect ideas or facts. So going back to your confectionery blog, while third parties may not be able to copy your exact original sonnet praising the texture of nougat in the candlelight, they could create their own original descriptions of their experiences with the various joys of nougat consistency without running afoul of any rights you may have. Additionally, some works may be in the public domain and no longer protected under copyright law. These works may be freely utilized by the public (*e.g.*, incorporated into a blog) without restriction.

At the end of the day, you need to carefully consider whether you can incorporate any content that is not your own into your blog; conversely, you need to be aware of when a third party’s use of your own material may be objectionable or may infringe your rights, and when a use may perhaps be permissible without your authorization. There may be times when taking no action could be the logical choice (*e.g.*, the additional attention or dissemination of your content brings you more readers, or otherwise benefits you notwithstanding any potential infringement issues). Either way, with careful thought and analysis, you can strike that balance of protecting your rights as a creator (and respecting the rights of others), while also continuing to produce content that your readers value and enjoy. In other words, there are ways where you can eat your cake, and have it too.

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