

# Blogging 101: Almost Everything You Need To Know

*The Editor interviews Maureen Haney, Associate in the Cincinnati office of Vorys, Sater, Seymour and Pease LLP. Her experience includes all aspects of commercial and business litigation, and she has had extensive experience in media, communications and advertising law.*



**Maureen Haney**

**Editor: Has the law caught up to the Web yet?**

**Haney:** No, technology continues to outpace us. Legislation still gets written after the fact, in response to issues that arise. When the Web arrived 15 or 20 years ago, there was no immediate expectation that blogs would come along. We were in many ways unprepared for this. The law has evolved to deal with these developments, but it remains largely reactive in nature.

**Editor: Assume I'm a small professional services firm and I'm considering encouraging selected staff members to write blogs. We believe our talent sets us apart, and that blogs could help us market ourselves and show off our intellectual capital. These blogs will appear on our Web site, under our logo. Question No. 1: Is this a good idea?**

**Haney:** It depends. You have to weigh the costs and benefits carefully. There are certainly risks inherent in hosting a blog. You expose your company to a whole new universe of liability. Disclosure of trade secrets or confidential company information is a concern. Hosting a blog is a great way to show off your intellectual capital, as you say, but you do have to be careful you're not also showing off your intellectual property.

**Editor: Are there any general guidelines you could offer to the employer venturing into these waters? Five rules for the employer? Five rules for the employee?**

**Haney:** As far as an employer is concerned, (1) Be very conscious of the content being published on your blog. Assume that everyone – your biggest competitors, potential employees, customers – will read each and every word. (2) Dedicate someone internally to be responsible for reviewing content before it's published. (3) Make use of disclaimers. (4) Have clear policies about what is and is not appropriate material for blogs. Make sure employees understand those policies. (5) At the first sign of trouble – a complaint from someone, a cease and desist letter, a subpoena – work with your attorneys to resolve the issue. How you handle an initial complaint oftentimes determines whether a lawsuit gets filed against your company.

For employees, (1) Always remember that you are writing at the pleasure of your employer. Anything you say reflects on the company, and can be imputed to the company. (2) Familiarize yourself with some basic law on copyright and trademark, defamation, etc. (3) Avoid being too "off the cuff." Put careful thought into all of your content. Even an innocent comment, inartfully phrased, can be a problem down the road. (4)

Don't use the blog as your personal forum for airing grievances, opinions, etc. (5) Assume that every word you post will end up being read by your boss.

**Editor: Do the same defamation and libel rules apply that exist in traditional media?**

**Haney:** For the most part, yes.

**Editor: But the blog publisher doesn't necessarily control all the content. The blog format is interactive – the blogger is encouraging responses, which as often as not are anonymous and inflammatory. That's scary for a publisher.**

**Haney:** It is. Thankfully, there is a saving grace. It's a federal law referred to as Section 230. "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This means you can't be held liable for what others post on your blog. It provides significant protection in the situations you mentioned – where someone has posted libelous statements on your blog.

But, and there's always a but with laws like this, if you add to the content that's being posted or edit it in a way that might lead a reader to believe you've adopted the statement as your own, you can be held liable.

**Editor: So there are better protections for the blogger than for traditional media? If I'm a newspaper editor and I publish a letter from a reader that contains libelous statements, I'm just as responsible as the letter writer.**

**Haney:** That's right. Section 230 provides broad protection, and implicit in the law is a recognition that blogging is a different animal altogether.

**Editor: Some bloggers – especially reporters affiliated with traditional media – are more scrupulous about cleaning up their blogs and will remove problematic material. By that scrupulousness, are they removing their protection under 230? Is a newspaper better off legally if it just allows anything to be posted on its reporters' blogs?**

**Haney:** There's certainly an argument that can be made to that effect. You could argue that the more you control the content or the speech on your Web site or blog, the more you've manifested an endorsement of the views that you do leave up there. But the far better course is to carefully control your content. I wouldn't want to be the one standing in court arguing that a client shouldn't be held liable for a defamatory statement because it was only one out of a thousand defamatory statements published on the blog.

**Editor: Who are these bloggers? Who has the time to devote to a hobby like this? Don't they have jobs to attend to?**

**Haney:** It's easy to dismiss the bloggers as tech geeks, but according to Pew research, they're everyday people. They're mostly in the suburbs, they're racially diverse, they're evenly divided between men and women, and 46 percent are over age 30. Eight percent of Internet users, approximately 12 million U.S. adults, keep blogs, and 39 percent of Internet users, or about 57 million U.S. adults, read blogs.

**Editor: Assume I'm an employee who maintains a personal blog unrelated to my work. In general, what are my rights? What are my employer's? What if I say something that embarrasses my employer?**

**Haney:** If you're an at-will employee of a company – that is, you're not represented by a union or covered by any kind of contract – you're on more dangerous ground in this situation. An at-will employee has remarkably few rights under these circumstances.

**Editor: I'm not using vulgar language, I'm not discussing my work life or colleagues, I'm just sharing my thoughts on, say, the music of Gustav Mahler. If I express a love of Mahler on my blog, and my boss hates Mahler, can he fire me for that?**

**Haney:** If you're an at-will employee working for a private employer – and by that I mean a private company, not a government agency or office – you can be fired for any reason or for almost no reason at all. There's very little protection – unless you are blogging about certain topics that the law protects. For example, if you were communicating with colleagues in an effort to unionize. As a matter of public policy, we want to protect employees in those situations, so you couldn't be lawfully terminated for such comments.

**Editor: How much do I need to worry about borrowing stuff from other blogs? If I see five paragraphs in the New York Times that I want to reference, can I cut and paste that into my blog? Isn't that fair use?**

**Haney:** At some point, too much borrowed content takes you outside the ambit of the fair use doctrine. Fair use allows you to use content or pictures for the purpose of comment or criticism, but at some point you risk running afoul of

that privilege. If you use a small portion of writing, or link to a thumbnail of a picture, you're probably going to be safe. But it really just depends.

**Editor: Can I link to anything I want to?**

**Haney:** Generally, yes. As a matter of law you can. Some companies, though, don't want the free advertising, or they don't want to be associated with a certain blog. Ticketmaster, for example, once sued to prevent others from linking to its site.

**Editor: Is every blogger a journalist? Are some bloggers journalists?**

**Haney:** The way the law would answer that question is that *some* bloggers are journalists. But there's no bright line test. There are no hard-and-fast rules about who is and who isn't. Courts look at the totality of the circumstances – what kind of content is on your blog? Do you conduct your own investigation or information gathering? Do you write your own content? Are you relied upon or quoted by others?

**Editor: How do you defend yourself against the blogosphere? Is there anything that a public figure, or even a private citizen, can do to prevent rumors and falsehoods from spreading on the Web?**

**Haney:** From a legal standpoint, one of the first things you should do is talk to an attorney. He or she can help determine whether you have a viable cause of action against the blogger. There are some pretty substantial legal defenses available in defamation cases, for example, so you may come to find out that you don't have the case you thought you had. But you very well may be able to, at a minimum, get the offending content taken down.

One tool that can be very effective – and this is for that company defending itself against that anonymous blogger who is making a career out of trashing the company on the Web – is a subpoena. If you're out there anonymously posting about your employer, and the company catches wind of your comments, they can issue a subpoena to the Internet Service Provider to say: Disclose to us who this character is. Normally ISPs fight these subpoenas, but they don't always win, so you need to be aware that even if you think you are writing anonymously, ultimately your identity may be revealed.

Also, there is a federal law that was passed in January of this year that makes it a federal crime to "annoy" somebody on the Internet. Posting anonymously on the Internet in a way that, in essence, harasses another person, can result in liability. The constitutionality of the law is questionable because it's unclear what is meant by the term "annoy." Because of this vagueness, we're really reliant on the concept of prosecutorial discretion. That may be an uncomfortable concept, but, frankly, the same law has been in effect for telephone harassment for years. What the new law did was expressly extend that law to Internet communications.

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