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Intellectual Property Law Alerts from Ober|Kaler's IP Group

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Come On and Take a Free Ride — Blogging Without Infringing

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The wonder of the internet is the speed and ease with which it allows us to share information. Before it can be shared, however, this information must be produced or procured and producing this original content takes time and money. As media companies move to monetize their online publishing, "free-riding" by blogs that reuse content to attract traffic to their own sites is increasingly challenged. As print advertising declines, media companies are less willing to simply give content and traffic away.

At the same time, it's never been easier for non-media companies to add news or content to their website using "free" RSS feeds. Companies who publish blogs, or whose employees blog, should establish and follow guidelines to avoid claims for copyright and trademark infringement, unfair competition, and hot news misappropriation.

Recent legal disputes show waning tolerance for lengthy quotes in blogs — even with attribution and a link. Sites such as Boston.com, Drudge Report and All Headline News were recently challenged for recycling other publishers' content. Some of these uses might qualify as fair use. But judging fair use of another's content requires consideration of four subtle factors in light of the particular facts. Fair use is a complicated legal defense and should not be the foundation for a business plan without access to a fat bank account and media liability insurance.

Authors and editors have long sought a simple word count rule to avoid copyright infringement. *No word count rule exists.* Every situation is unique. But based on recent disputes, here are four guidelines to keep in mind when blogging:

1. **Don't copy the Original Expression.** Use just facts or very short quotes if necessary to your own commentary. Facts and ideas, alone, are not protected by copyright law and may be freely copied. News is thinly protected by copyright law, because it's mostly facts. Copyright is intended to protect original expression of fact and ideas. So commentary, fictional materials and longer quotes of news and other material is more likely to infringe copyright than restating mere facts. The Associated Press (A.P.) recently threatened the Drudge Report for using quotes from its news stories. The quotes ranged in size from approximately 40 to 80 words. While these sound brief, bear in mind that many A.P. stories are only one or two paragraphs in length. So an 80 word quote could be the larger part of an A.P. article. In another case, The Nation was found to infringe President Gerald Ford's memoirs by quoting just 300 words out of a 300+ page book because it copied the *heart* of the work — his pardon of former President Richard Nixon. Copying the title and lede of another's article may provide a reader with the heart of the article, just enough of the story so there's no need to click through and read the original. Re-writing an idea in

2. **Don't Free-Ride on Hot News.** Under New York misappropriation law, competitors that "free-ride" by republishing breaking "hot news" stories from other sources may be liable for unfair competition. Sites like Google and All Headline News have been challenged recently for aggregating news from other sources. Ninety years ago, the A.P. was vindicated in a U.S. Supreme Court opinion, *International News Service v. Associated Press*. The Court found that a property right exists in hot news —outside of copyright law — despite the lack of copyright protection for facts. Usurping the first publication of breaking news is unfair competition because it deprives the original source of benefiting from its substantial investment in obtaining and transmitting news.

Twelve years ago under the 1976 Copyright Act, the NBA was unable to stop Motorola's pager (and website) transmission of sports scores with a claim for Hot News Misappropriation because the state law action was preempted by federal copyright law. The subject matter related to the misappropriation of NBA's sports scores are its broadcast rights that fall within the scope of copyright law. But the NBA opinion left the door open to protection of a publisher whose investment in news gathering is harmed when its competitor "free-rides" on the publisher's valuable and time-sensitive "hot news." Last month, a federal judge in New York allowed Hot News Misappropriation law to apply to online publishing when it denied defendant All Headline News' motion to dismiss the A.P.'s Hot News Misappropriation claim. If you are an online media company, or a popular blog that enjoys a reputation for breaking news, be very careful in recycling news from A.P. and other "professional" content providers.

3. **Read the Fine Print — the Terms of Use.** Before quoting articles or adding another site's RSS feed to your website, check its copyright policy and terms of use to understand what uses of its content are authorized. If terms permit only non-commercial use only, don't use it on a company website — even for a non-profit company. "Commercial use" refers broadly to more than just direct pay models and typically include websites that display advertising or have gift shops. If the content benefits your business, check to see if the source provides commercial feeds in exchange for advertising on your site or request a license. Boston.com was recently challenged by Gatehouse for scraping and quoting materials from Gatehouse's RSS feed without authorization. Other publishers may also provide guidelines for use of their materials. The A.P. has recently announced that it will provide guidelines for quoting its materials in blogs.
4. **Provide Attribution and a Link — Properly.** Accurate attribution to source materials used in blogs should always be provided. Links are customary in websites but should be employed with care to avoid having the credit create an implied endorsement of, or affiliation with, your website. The large law firm Jones Day filed a lawsuit against real estate website Blockshopper for deep linking to its attorney bios when referring sale of real estate in Chicago to confirm the identity of the attorneys. This information comprises publicly available facts but Jones Day nevertheless claimed the links violated its intellectual property. The case settled but Blockshopper reportedly agreed that it would not use hidden links (highlighted words that lead to another site when clicked), but would in the future would display the entire underlying link. Many object that this practice, if required, will make the internet less elegant. But cautious bloggers might recognize that displaying the source's actual web address more clearly discloses the source of the material.