

# Broadcasters ONLINE

A Legal Guide to the Cyber-Jungle

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# The Cyber Jungle

## A Traveler's Guide

- Digital and Social Media Change Everything – Unlimited Platforms to Exploit
- Unlimited Possibilities
- Unlimited Audience
- Unlimited Competition
- Wireless brings digital media everywhere
- But lots of legal uncertainties
- So plan your digital safari carefully....

# The Cyber Jungle

- Uncharted Territory
- It's Not Clear Who Is In Charge
- The Natives Are Restless -- New Law Is Arising Every Day
- Expectations of audience and users, management, staff and others are often contradictory and can present problems – need to keep them all in mind in making your digital plans

# No Easy Answers to Digital Media Legal Questions – A Little Perspective

- Facebook started 2004 (open to everyone in 2006), Twitter in 2006
- Pandora and YouTube started 2005
- Netflix started streaming about 2007 and Amazon did in late 2006
- Craigslist (1995 in San Francisco and 2000 nationwide) and Monster.com (1994) – the wounding of the newspaper
- Compare this with broadcast regulation – around since 1934, and copyright since the 17<sup>th</sup> century

# Protect the Farm

## Your Digital Broadcasts

- FCC Digital Obligations Growing for Radio and TV – new captioning requirements for TV programs used on-line
- On-line public files are here for TV, and may come for radio
- FCC regulation of website material directed to children – when promoted by over-the-air material, no links to commercial material
- FCC looking more and more at on-line aspects of traditional media, and this could result in obligations on media companies
- Different obligations for same program on different platforms can create issues

# A New FCC Regulation of Note

- TCPA – Telephone Consumer Protection Act – Limits on Text Messages for Commercial Purposes
- Can't text people without specific consent
- Consent must be clear and unambiguous – separate check-off box, not buried in other disclaimers
- As of October, if you don't have this consent, you should not be texting

# Protecting Your Sheep

Call Letters, Slogans and Program Titles

- Don't Risk Your Existing Identity
- The Internet Makes Information About Your Media Outlet Available Worldwide -- And the Predators Are Watching
- Make Sure You Have the Rights To Your Content Before You Put It On-Line
- Protect slogans, positioning statements and other station identifiers through trademark protection – trademark searches are important!
- New domain names coming all the time – protect your brand!

# Remember Who You Are

## Domain Names

- Domain Names are registered, but registration doesn't give you protection for names and slogans
- Trademarks give some protection
- Even If you've registered a Domain Name, a similar Trademark can force you to stop using your name
- Search first -- Before you start branding
- Protect your trademark and domain names as domain naming possibilities expand – especially important for in a world of .xxx and .radio – don't want your brand confused – Trademark Clearinghouse and aggressive enforcement are warranted

# Hire the Right Guides, Buy The Right Maps

## Internet Service Providers and Consultants

- Know What You Need – don't pay for services you will never use
- Check References
- Beware Of Long Term, Non-Negotiable, Preprinted Contracts
- Make Sure They Have Rights to Materials They Provide
- Make sure that they are up
- Think about what you are getting and how long it will be good for – as technology changes fast, don't get tied into a long-term contract for a short-term fix

# Purchase The Right Supplies

## Existing Relationships

- Program Agreements May Not Give You On-Line Rights
- Rights to All Sorts of Information May Not Carry Over On-Line, e.g. Syndicated programs for Radio, Most of the Rights to TV Programs
- Make sure rights you get carry over all digital platforms – not just your website
  - Pictures – who owns rights to professional photos?
  - Programming
  - Background music and themes
- **Check Your Insurance Coverage**

# Be Careful With What You Find in the Jungle

- Just because something is on the Internet, you don't have a right to use it on your website
- Assume that pictures and articles are copyrighted
- If you are doing summaries of articles with links, keep the summaries very short, and describe the article in your own words – not those from the site

# Be Careful With What You Find in the Jungle

- Lots of demand letters based on improper use of pictures
- Demands for tens of thousands of dollars in damages
- Don't ignore these letters
- Recent suits against big broadcasters for improperly using pictures
- Recent case where big photo company found liable for millions

# Purchase The Right Supplies

## Music Rights

- For many uses, it's not entirely clear who you pay for music licenses
- You've heard about issues for noninteractive uses, e.g. Internet radio – like standard uses of music by radio – the “public performance right” – but there are far more issues in the digital world
- On-demand rights, “synch” rights, and other uses are not covered by the usual rights that you have for broadcasting your signal – you need to reach out and specifically negotiate with Copyright holder for these uses

# Purchase The Right Supplies

## On Demand Music Basics

- Two copyrights in most music, and you usually need clearance from holders of both
  - Sound recording
  - Musical composition
- Copyright holder has many different rights in each piece of music
  - Public Performance
  - Reproduction
  - Distribution
  - Derivative Works
- Need to look at what you are doing to decide what rights you need

# Purchase The Right Supplies

## Music Rights – Public performance right

- ASCAP, BMI and SESAC – pay for the public performance right to musical composition – and that is all that you get
- But need new license if you are streaming – as in a digital world, you also need rights to the public performance of the sound recording

# Purchase The Right Supplies

## Music Rights – Sound Recording Public performance right

- Same right as is in issue for over-the-air performance royalty (“performance tax”)
- Now applies to digital, noninteractive audio performances – does not apply to audio-visual productions
- Set by Copyright Royalty Board, collected by SoundExchange
- You need to register with Copyright Office and sign up with SoundExchange before you stream music – they won’t come find you
- Lots of different rates for broadcasters, other commercial webcasters, and noncommercial entities

# Purchase The Right Supplies - Music Rights

## Sound Recording Public performance right

- Current broadcaster rates - .23 cents per song per listener, .25 in 2015
- Proceeding to set new royalties for webcasting for 2016-2020 starting now
- Some exceptions for recordkeeping for small broadcasters – but they could go away – so think about full compliance

# Buy the Right Supplies

## Beware of Local Customs – Music Rights for other uses

- Need permission directly from copyright holders for most other uses of music:
  - Downloads
  - Use in podcasts
  - Use of music in commercials, or where it is otherwise “fixed” with words or video – music videos, even promotional announcements, TV video productions recorded and used on the web
  - To take musical composition and put new words to the music
- Sometimes the copyright holder asks for money, sometimes *lots* of money – but you need to find the right person to give you permission

# No Impenetrable Shields – Fair Use

- Don't rely on “fair use” too much
- Difficult to apply conclusively – several factors to review
  - Amount of work used
  - Whether the use is for profit or not
  - Effect of use on ability of copyright holder to make money
  - The nature of the work being used
- No 5, 10, 20 or 30 second automatic exceptions
- “Parody” can be fair use, but parody is not just something funny, it must actually be a commentary on the original work – not easy to apply

# Hire The Right Porters and Guides

## Employee Issues

- Watch Overtime Issues
- Employees v. Independent Contractors--Who Owns the Website They Create?
- Beware of Using Existing Material Created By Independent Contractors On Your Site
- Non-Compete Agreements
- Social networks
  - Issues of when employees are speaking for themselves and when they are speaking for the station

# Be Social With Care – You Never Know Who You'll Meet

- Facebook, twitter and the social media – necessary in today's world, but can cause issues
- Look at content policies of social media sites
- Some can claim use of all the content that you post – and they can repurpose it as they like
- Others have restrictive policies as to what you can and cannot do without buying a commercial license
- Think about the degree of interaction that you are ready to take on too – as some sites can generate lots of comments – some that you'd rather not see

# Limits on Being Social

- If you do use social media, think about a policy for employees and enforce it – especially if posts can be attributed to employer by authority or by implication
- Issues to address in the policy:
  - No defamation
  - No harassment
  - Employees are personally responsible for posts
  - Not disparaging comments
  - No references to clients and customers without consent
  - Disclaimers on private sites that employee is not speaking for employer – make sure this is observed
  - Make sure reference is made to trade secrets policies and securities issues
  - Identify Station in-house source for employees to ask for clarification of the policy
  - No oral modifications of policy to avoid issues of interpretation

# Volunteers Welcome?

## User Generated Content

- Stations can allow postings on their websites by third parties – if you follow the rules
- Most user-generated content is generally without liability to you, if:
  - Your site has a policy against intellectual property infringement and other legal issues
  - You do not encourage illegal conduct like copyright infringement
  - You notify the Copyright Office of who can be notified when there is copyright infringement
  - You take down offending material when properly notified
  - You're not profiting from the infringement or legal violations

# Watch the Journal Entries

## - Blogging and Sponsorship ID

- Sponsorship ID applies on-line just like it does on-air, perhaps even more strict
- FTC issues for bloggers and other social media use – disclose financial relationships for products that are mentioned
  - Warn employees about posting comments about station or clients without attribution
  - Recent \$250,000 fine for website paying affiliate websites to promote its services and their quality without disclosing the payments
- Specific disclaimers on any sort of testimonial advertising – not just “your results may vary”

# No random smoke signals

## - Email and fax issues

- Laws on unsolicited faxes and emails
- Can't fax person without permission or existing business relationship
  - Must get permission – no negative options
  - Must be voluntarily given fax number
  - Can be terminated by either party
  - Statutory penalties for even single violation, plus attorneys fees – plus really big FCC fines
  - Conspicuous language for free opt out on cover page and first page of any unsolicited fax – even to company with relationship
- Emails a bit more forgiving
  - Must have accurate subject lines
  - Must state it is an ad
  - Must identify the sender
  - Must provide opt-out email or online opportunity

# Watch For Lurking Tigers

## COPPA

- Protects Children Under 13
- Applies to Any Site Directed to Kids or Where Site Owner Know Kids Are Present
- Can't Collect Personal Information Without Prior Parental Consent
- Information Includes Name, Address, Phone, Email, Cookies, Persistent identifiers, pictures

# Watch For Lurking Tigers

## Privacy Issues Coming

- A developing area of concern
- Incorporate privacy protections into business practices
- Protections include
  - Reasonable data security
  - Reasonable data collection limits (collect only what you need)
  - Sound retention policies
  - Data disposal policies
  - Data accuracy
- Be very careful about your privacy policies – more and more concerns about these policies in Washington, and there is can be legal trouble:
  - Don't promise more security than you can deliver
  - Don't put restrictions on what you will do with private information and then do something else

# Watch for lurking Tigers

- Privacy also a big issue in states
- Recent California law that requires disclosures of all data collection by sites – including third party data collection – like ad networks
- Another coming that allows minors to delete information from social media sites
- Since so many users in California, the laws may have national application

# Watch For Lurking Tigers

## Linking and Aggregation Issues

- Link With Permission
- Link With Care
- Be careful with framing
- Be careful with news aggregation – limit excerpts – many recent cases of concern with giving too much of someone else’s story on your site
- Don’t exploit other’s content in a way that impairs their ability to profit from it

# The Cyber Jungle

- Uncharted Territory
- It's Not Clear Who Is In Charge
- The Natives Are Restless -- New Law Is Arising Every Day
- And it's not only US laws that apply....
- **Safari Carefully**

# For More Information

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