BROADCASTERS ONLINE

A Legal Guide to the Cyber-Jungle

David Oxenford
Davis Wright Tremaine LLP
Washington, DC
davidoxenford@dwt.com
www.broadcastlawblog.com

Anchorage
Bellevue
Los Angeles

New York
Portland
San Francisco

Seattle
Shanghai
Washington, D.C.

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

The Cyber Jungle

A Traveler's Guide

- Digital Changes Everything – Unlimited Platforms to Exploit
- Unlimited Possibilities
- Unlimited Competition
- Wireless Is here, bringing 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 users, employers, employees and others are often contradictory and can present problems.

Protect the Farm
Your Digital Broadcasts

- FCC Digital Obligations Growing for Radio and TV
- On-line public files may be coming
- Potential FCC regulation of website material directed to children – even when not tied to over-the-air material
- FCC examining the Future of Media – including on-line media, and this could result in obligations on new media companies
- Different obligations for same program on different platforms can create issues

Protecting Your Sheep

Call Letters, Slogans and Program Titles

- Don’t Risk Your Existing Identity
- The Internet Makes Information About Your Station 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
- 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 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

Buy The Right Maps

Internet Service Providers and Consultants

- Know What You Need
- Check References
- Beware Of Long Term, Non-Negotiable, Preprinted Contracts
- Make Sure They Have Rights to Materials They Provide

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
  - Programming
  - Background music and themes
- **Check Your Insurance Coverage**

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 more issues in the digital world
- But on-demand rights, "synch" rights, and other uses are not covered by the usual rights that you have for broadcasting your signal

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 right to musical composition
- ASCAP and BMI over-the-air licenses cover streaming of broadcast signal – for now
- But need new license if you are doing new streams
- SESAC charges more for streaming
- In a digital world, also need rights to 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 performances
- 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, NPR affiliates, and other noncommercial entities

Purchase The Right Supplies

Music Rights – Sound Recording Public performance right

- At 2010 rates, assuming 12 songs an hour – about 2 cents per listener hour
- By 2015 – 3 cents per listener hour
- About $13.80 monthly if you average 1 listener, 24-7
- $21.60 monthly for 1 average listener in 2015

Buy the Right Supplies

Beware of Local Customs – Music Rights for other uses

- Need permission directly from copyright holders to do many things:
  - Downloads
  - Use in podcasts
  - Use music in commercials, or where it is otherwise "fixed" with words or video – music videos, even promotional announcements
  - To take musical composition and put new words to the music
- Sometimes the copyright holder asks for money, sometimes lots of money – if you can locate the right person to give you permission

No Magic 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 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

Remember Who Is In Charge of the Safari

- Facebook, twitter and the social media – necessary in today's world, but can cause issues
- Adopt a policy for employees and enforce it – especially if posts can be attributed to employees by authority or by implication
- How does your policy mesh with Unions contracts and other employee agreements?
- 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 reference is made to trade secrets policies and securities issues
  - Identify Station Source for information about policy
  - No oral modifications of policy to avoid issues of interpretation

Volunteers Welcome?
User Generated Content

- Stations can allow postings 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

- 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
- 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, or Cookies

Watch For Lurking Tigers

Privacy - FTC Guidelines

- *Notice/Awareness* - notice of a company's online information practices.
- *Choice/Consent* - a choice about the use and dissemination of information revealed to a company.
- *Access/Participation* - access to information collected to ensure accuracy and completeness.
- *Integrity/Security* - personal information collected adequately secured from outside parties and from corruption of the data.
- *Enforcement/Redress* - a way to ensure that the company complies with these core privacy principles.

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
- 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

David D. Oxenford
Davis Wright Tremaine LLP
davidoxenford@dwt.com
www.broadcastlawblog.com

202.973.4256 direct
202.973.4499 fax

Suite 200
1919 Pennsylvania Avenue NW
Washington, D.C. 20006