

# Broadcasters in the Digital World

## A Legal Guide to the Cyber-Jungle

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State Broadcast Association Webcast

November 30, 2016

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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
- Unlimited legal issues – some new to broadcasters
- With lots of legal uncertainties
- Today, we'll look for the snares and quicksand where broadcasters can get caught
  - But this is just to alert you to things to look for, consult your own experts to analyze the particulars of any situation

# The Cyber Jungle

- Still uncharted legal territory – relatively new medium, legally speaking
- Legal issues for digital media are all relatively new compared to traditional media – and the law hasn't had time to develop to address all the issues that come up
- It's not always clear who is in charge
- The Natives Are Restless – new law is arising almost every day, and it is not always consistent
- 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)
- Compare this with broadcast regulation – around since 1934, and copyright since the 17<sup>th</sup> century

# Protect the Farm Before Your Journey

## FCC Issues for Digital Media

- FCC Digital Obligations Growing for Radio and TV – new captioning requirements for TV programs used on-line
- Online public files are here for TV and for big market radio, and are coming for the rest of the radio industry
- Most recent EEO Public File Report is required to be kept online
- FCC looking more and more at on-line aspects of traditional media, and this could result in obligations on media companies
- Lots of other government agencies involved when you look for online legal answers
- Different obligations for same program on different platforms can create issues

# Digital Access

- For TV, if you move captioned program online – needs caption
- For clips moved directly online, need caption on station sites
- For “mash-ups” – captions due January 1
- For live and near-live TV streamed online, captions July 1, 2017
- Not an FCC issue, but for every business posting anything online – other accessibility issues with content posted online
  - Accessibility lawsuits for online text that can’t be read by text readers – lots of lawsuits – watch posting old PDFs on your sites

# 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 as, once online, rightsholders can find violations from across the country – or across the world
- Protect slogans, positioning statements and other station identifiers through trademark protection – trademark searches are important!
- Search first -- Before you start branding

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# Remember Who You Are

## Domain Names

- New domain names coming all the time – no longer just .com, .net, .edu and even .fm - protect your brand!
- Domain Names are registered, but just registering your domain doesn't give you protection
- Trademarks give some protection
- Even if you've registered a Domain Name, a similar Trademark can force you to stop using your name
- 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
- Watch as new domains come online – and think about grabbing ones that relate to your current brand

# 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. Some syndicated programs for Radio, Most of the rights to TV programs
- Make sure the rights you get carry over to all digital platforms – not just your website
  - Pictures – who owns rights to professional photos? – the photographer unless specifically assigned to you
  - 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, videos and articles found online are copyrighted – so you usually need permission to reproduce them on your own website
- Lots of lawsuits over online pictures repurposed for someone else's websites – just posting picture online does not make it available for everyone to use
- Demand letters to TV, too, for running online video on their stations without permission from creators
- 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 - Photos

- Lots of demand letters based on improper use of pictures on websites and ***even on social media***
- Demands for tens of thousands of dollars in damages
- Don't ignore these letters
- Lots of recent suits against big broadcasters for improperly using pictures found on the Internet on their own websites, without permission from the photographer
- Recent case where big photo company found liable for millions
- Be careful even with “creative commons” works – make sure you follow all limitations on use of the works

# Purchase The Right Supplies

## Music Rights – Public performance right

- ASCAP, BMI and SESAC (and GMR) – you pay them for the *public performance right* to use musical composition (words and music to a song) – and that is all that you get
- SoundExchange is paid only for digital *public performance right* to the sound recording (the composition as recorded by a particular band or singer)
- These royalties only cover performances – and, for SoundExchange, only digital “noninteractive” performances – recent Sony and Warner waivers give broadcasters some extra rights
- Lots of other rights in music, e.g. right to *reproduce, distribute or make “derivative works”*
- When you have content available on-demand, or for download where a copy is made, ASCAP, BMI, SESAC and SoundExchange are not enough – and for reproductions, they don’t apply at all

# 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 productions, or where it is otherwise “fixed” with words or video – music videos, even promotional announcements, TV video productions recorded and used on the web
  - Taking musical composition and putting 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 – A Word About 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 such thing as 5, 10, 20 or 30 second automatic exception to copyright
- "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 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 non-negotiable, preprinted contracts
- Make sure suppliers have rights to materials they provide- and that they indemnify you if it turns out that they don't – lots of recent patent cases against users of software from established vendors
- Make sure that they are up to date on the services that they provide
- 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

# Know the Local Customs

## Be Careful with How You Use Social Media

- Social Media have their own rules and regulations, and you need to be sure that you are following them
- Don't want to build up a legion of followers, only to have an account cancelled or limited
- You are warranting that you have all rights in what you post
- Limits on what you do on various sites – limits on advertising and promotions on some sites:
  - Facebook – e.g. any contest must specifically state that Facebook is not involved; pages on firearms, alcohol, tobacco, or adult products must be limited to 18 or older; no gambling promotion w/o Facebook approval; no promotion of prescription drugs
  - YouTube – no sale of advertising, sponsorships, or promotions placed on or within the Service or Content without YouTube consent
- Be careful what the services can do with your content!

# Facebook

- For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your [privacy](#) and [application settings](#): you grant us a ***non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License)***. This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.

# Instagram

- Instagram does not claim ownership of any Content that you post on or through the Service. Instead, you hereby grant to Instagram a ***non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service***, subject to the Service's Privacy Policy, available here <http://instagram.com/legal/privacy/>, including but not limited to sections 3 ("Sharing of Your Information"), 4 ("How We Store Your Information"), and 5 ("Your Choices About Your Information"). You can choose who can view your Content and activities, including your photos, as described in the Privacy Policy.

# Twitter

- You retain your rights to any Content you submit, post or display on or through the Services. What's yours is yours — you own your Content (and your photos and videos are part of the Content).
- By **submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed). This license authorizes us to make your Content available to the rest of the world and to let others do the same.** You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals for the syndication, broadcast, distribution, promotion or publication of such Content on other media and services, subject to our terms and conditions for such Content use. Such additional uses by Twitter, or other companies, organizations or individuals, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services.
- Twitter has an evolving set of rules for how ecosystem partners can interact with your Content on the Services. These rules exist to enable an open ecosystem with your rights in mind. **You understand that we may modify or adapt your Content as it is distributed, syndicated, published, or broadcast by us and our partners and/or make changes to your Content in order to adapt the Content to different media.** You represent and warrant that you have all the rights, power and authority necessary to grant the rights granted herein to any Content that you submit.

# YouTube

- Content is provided to you AS IS. You may access Content for your information and personal use solely as intended through the provided functionality of the Service and as permitted under these Terms of Service. You ***shall not download any Content unless you see a “download” or similar link displayed by YouTube on the Service for that Content. You shall not copy, reproduce, distribute, transmit, broadcast, display, sell, license, or otherwise exploit any Content for any other purposes without the prior written consent of YouTube or the respective licensors of the Content.*** YouTube and its licensors reserve all rights not expressly granted in and to the Service and the Content.

# More YouTube

- For clarity, you retain all of your ownership rights in your Content. ***However, by submitting Content to YouTube, you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the Content in connection with the Service and YouTube's (and its successors' and affiliates') business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels.*** You also hereby grant each user of the Service a non-exclusive license to access your Content through the Service, and to use, reproduce, distribute, display and perform such Content as permitted through the functionality of the Service and under these Terms of Service. The above licenses granted by you in video Content you submit to the Service terminate within a commercially reasonable time after you remove or delete your videos from the Service. You understand and agree, however, that YouTube may retain, but not display, distribute, or perform, server copies of your videos that have been removed or deleted. The above licenses granted by you in user comments you submit are perpetual and irrevocable.

# Interpreting the Native Language

- Terms of service allow these services to do what they want with your content
- Often applies not only to their own site, but for other purposes
- Some specifically allow derivative works – they can edit, adapt, mash up, use characters you create, etc. for their own uses
- Can transfer such rights too
- Think about what you post on social media sites, as you may find that it is used in ways that you don't anticipate

# Other Limits on Being Social

- Think about social media implications, and urge you staff to do so too
- Don't mix personal and business sites – make sure that personal sites are labeled personal and not promoted on the air – set social media policies for employees, but watch labor law issues
- Think about statements about sponsors and underwriters
- Think about how statements reflect on the station or licensee company
- Be careful what's posted, as what's said online can last much longer and be seen by many more people than what you broadcast or print

# Watch the Journal Entries

## Social Media 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
  - A few years ago, a \$250,000 fine for website paying affiliate websites to promote its services and their quality without disclosing the payments
  - Last week, a 30-year consent decree for not disclosing paid promotion of video game
- Specific disclaimers on any sort of testimonial advertising – not just “your results may vary”

# Volunteers Welcome?

## User Generated Content

- You can allow postings on your websites by third parties with limited liability – 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 (and post it on your site) – Copyright Office just announced new electronic filing system for registering agent for take-down notices - must re-register by December 31, 2017
  - You take down offending material when properly notified
  - You're not profiting from the infringement or legal violations

# 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

- A developing area of concern
- Be very careful collecting personal data – listeners clubs, credit cards, other identifiable information about people
- Think about PayPal, Eventbrite or other online systems for selling merchandise or tickets so you don't collect financial information
- If database of personal information is hacked, serious repercussions can follow
- Lots of lawsuits for not following privacy terms of use
- Disclose what you will do with information and who will have access – and stick to them – disclose that others may gather information on your site (e.g. ad serving companies)
- Disclose that private information can be transferred to buyer of station
- Other laws about revealing customer information, and state laws too – like California kids right to be forgotten
- More rules likely on their way

# The Cyber Jungle

- Uncharted Territory – think about having outsiders (e.g. counsel) do an audit of your digital operations, plans and policies
- It's Not Always 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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