Counseling Content Providers in the **Digital Age**

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ISBN: 1-57969-294-X
Product Number: 4063

INTRODUCTION

Welcome to the art and science of pre-publication review—a subset of media law encompassing print and audiovisual media in which the lawyer's goal is to review content for media companies before it reaches the public to avoid exposure to lawsuits. For as long as there have been printing presses, there have also been accusations of libel, invasion of privacy, intellectual property infringement and other torts stemming from what is published on those presses. Now that much of the content reaching the public is distributed over the Internet, broadcast/cable/satellite television or radio and film, in addition to print, the field has become more complicated and more important. In recognition of the ever-growing significance of the audiovisual media, this book uses the term "pre-broadcast review" as shorthand for the review before distribution of any kind of content.

Although the specialty is little known outside the worlds of entertainment and media, pre-publication review is an essential part of getting content of any kind—books, movies, blogs, television and radio shows—out to the public. In practical terms, insurance companies that write policies for such productions often insist that the material be reviewed by an attorney before publication or broadcast. Regardless of the need for insurance, most companies and individuals in the creative fields understand that the cost of a single lawsuit for defamation or copyright infringement will quickly dwarf the time and cost of hiring a lawyer to review content in an effort to avoid such suits.

Pre-broadcast review is both an art and a science. The science consists of methodically spotting every legal issue contained in a piece of content that might trigger a lawsuit against its creator or distributor. The art consists of working closely with the content creators to give them guidance on how to "say their piece" without violating the rights of others. This art requires practitioners to balance a keen appreciation of the First Amendment with sensitivity to the damage that the media can unwittingly inflict on those caught in its spotlight. Finally, the art of the work is evident in the many judgment calls the reviewing lawyer must make—Who are the potential plaintiffs? How likely are they to sue? Which party might be more sympathetic? The reviewing lawyer must stand ready to offer the client a detailed risk assessment and must stay abreast of the client's appetite for such risk.

Lawyers who review or "vet" content for a living are very lucky lawyers indeed. They get the pleasure of reading articles and books, watching

television programs and movies, and viewing Web sites and video, as well as the challenge of spotting legal issues and finally the satisfaction of solving problems for creative individuals and companies. Sometimes, they even get their names in the credits. At the same time, the field can be nerve-racking, as clients demand fast answers and creative solutions, all without too much interference with their creative and editorial goals. The vetting lawyer needs nerves of steel, a sense of humor, the ability to break bad news and a love of creative work—whether it be a high-culture documentary or a lowbrow reality television show. Most important, the vetting lawyer must understand that his or her job is not to tell a media client that it cannot publish something but to work with the client to figure out how it *can* publish with the least amount of risk.

Like any legal practice area, much of pre-broadcast review must be learned from experience, but this book will give media and entertainment lawyers a good grounding in the essential issues that reviewers face repeatedly. At the very least, it will help the casual practitioner know when he or she needs to call in an expert.

The first six chapters of the book set out the major torts that every vetting lawyer must know by heart—defamation; invasion of privacy; right of publicity; copyright infringement; trademark infringement; and the newsgathering torts, including misrepresentation, fraud, trespass and breach of contract by journalists.

The next four chapters of the book focus on some of the important practices the media industry, particularly the television and film industry, have created to tackle the legal challenges of creating and distributing content—rights and clearances, errors and omissions insurance, systems for contracting with minors in the entertainment business, and television standards and practices.

The last two chapters offer advice on a panoply of issues that face television producers and journalists, with a focus on television's most legally problematic format—the reality show, including those that use hidden cameras and pranks or focus on sensitive subjects such as personal health or family dynamics.

Virtually every legal issue the media faces is covered—from well-known concepts like defamation and trademark infringement to lesser-known ones like paparazzi statutes, veggie libel laws, federal indecency regulations, sweepstakes rules, torts in fictional works and idea theft. In addition to a thorough rundown of the problems, the book explores solu-

tions—retractions, disclaimers, releases, licenses, fair use defenses, seven-second delays and privacy protections, among many others.

The point of this book is to act as a handbook for practitioners—the lawyers representing media clients who need concise and fast answers to everyday problems. Thus, while each chapter defines the legal concepts in play and sets out the leading cases, it also provides real-life examples of the concepts and gives insider tips about what to embrace and what to avoid. Throughout the book, the authors have appended a variety of forms to help lawyers with the everyday practicalities of content review. A glossary at the end of the book helps the uninitiated understand some of the arcane language of media contracts.

Finally, the authors themselves are all daily practitioners (not theorists) of the art and science of pre-broadcast review. They represent in nearly even numbers the twin centers of the media and entertainment world—California and New York. With each chapter, they present the reader with the true practitioner's perspective, offering a good mix of down-to-earth suggestions and creative approaches befitting the subject matter.

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CONTENTS

Chapter 1 Defamation 1
Kai Falkenberg, Esq.
Toby Butterfield, Esq.

Chapter 2 Invasion of Privacy 29
David E. Fink, Esq.
Lan P. Vu, Esq.

Chapter 3 Right of Publicity 67
Elizabeth McNamara, Esq.
Monica Pa, Esq.

Chapter 4 News-Gathering Torts 95
Joshua Koltun, Esq.

Chapter 5 Copyright Infringement 109
Kathleen Conkey, Esq.

Chapter 6 Trademark Infringement 165
Saul B. Shapiro, Esq.
Abja Midha, Esq.

Chapter 7 Rights and Clearances 187
Pamela C. Jones, Esq.
Melinda L. Lee, Esq.

Chapter 8 Errors and Omissions Insurance 279
Ted Gerdes, Esq.

Chapter 9 Contracting With Minors in the Entertainment Industry 301
Diane Krausz, Esq.
Glenn Litwak, Esq.

Chapter 10 Television Standards and Practices 361
Deborah Principe-Lake, Esq.

Chapter 11 Reality Television: Pranks and Sensitive Subject Matter 389
Kathleen Conkey, Esq.

Chapter 12 Miscellaneous Steps in Pre-Broadcast Review 407
Andrew J. Siegel, Esq.

DETAILED TABLE OF CONTENTS

Introduction iii
About the Editors vii
About the Authors ix

CHAPTER 1 DEFAMATION
Kai Falkenberg, Esq.
Toby Butterfield, Esq.

[1.0] I. Definition and Elements 3
[1.1] II. Statement of Fact 4
[1.2] A. True or False 4
[1.3] B. Loose, Figurative or Hyperbolic Language 5
[1.4] III. Defamatory Meaning 5
[1.5] A. Defamatory Implication 8
[1.6] B. Headlines—The Fair Index Rule 8
[1.7] C. Juxtaposition of Photos and Text 9
[1.8] IV. Of and Concerning a Living, Identifiable Person or Entity 10
[1.9] A. What Does "Identifiable" Mean? 12
[1.10] B. Libel in Fiction 12
[1.11] C. Photo Mistakes 13
[1.12] V. Falsity 14
[1.13] A. Substantial Truth 14
[1.14] B. The "Gist" or "Sting" Test 14
[1.15] VI. Fault 15
[1.16] VII. Privileges 16
[1.17] VIII. Assessing and Documenting Sources 17
[1.18] A. Inflammatory Nature of an Allegation 17
[1.19] B. Reliability of Source 17
[1.20] C. Maintain Records 18
[1.21] D. Police Activity 18
[1.22] E. Libel Review 18
[1.23] IX. Retraction Demands and Mitigation of Damages 19
[1.24] A. Retraction Statutes 19
[1.25] B. Common Law 20
[1.26] X. People and Businesses Most Likely to Sue 21
[1.27] A. Politicians and Judges 21
[1.28] B. Celebrities 21
[1.29] C. Private Professionals 21
[1.30] XI. False Light 22

[1.31] XII. Trade Libel and Product Disparagement 24
[1.32] XIII. Conclusion 26
Appendix 27

CHAPTER 2 INVASION OF PRIVACY

David E. Fink, Esq.
Lan P. Vu, Esq.

[2.0] I. Introduction 31
[2.1] II. Hidden Camera and Wiretap Statutes 32
[2.2] A. Definition and Elements 32
[2.3] 1. State Law and Federal Law 32
[2.4] 2. Which States Are "Safe"? The Consent Provisions (One- and Two-Party States) 34
[2.5] 3. What Places Are "Safe"? What's a Reasonable Expectation of Privacy? 35
[2.6] 4. What Constitutes a Violation, and What Are the Penalties? 37
[2.7] B. Leading Cases 38
[2.8] C. Real Examples From Television Programs and Books 40
[2.9] D. Spotting a Hidden Camera/Wiretap Violation When It Is Not Obvious 42
[2.10] 1. Is Your Reporter a Part of the Conversation or Just Eavesdropping? 42
[2.11] 2. What If the Reporter Is in New York and Records a Phone Call to California? 43
[2.12] III. Intrusion on Seclusion and Paparazzi Statutes 44
[2.13] A. Definition and Elements 44
[2.14] 1. Anti-Paparazzi Statutes 45
[2.15] 2. Trespass and News Gathering 47
[2.16] 3. Leading Cases 47
[2.17] B. Spotting a Privacy Violation When It Is Not Obvious 51
[2.18] 1. Can I Photograph Anything I Can See From the Public Street? 51
[2.19] 2. How Close Can I Fly a Helicopter to Catch a Celebrity Wedding? 51
[2.20] 3. Can I Film a Car Wreck on a Public Street? .. 52
[2.21] 4. Can I Lie to Gain Access to a Closed Set? 53
[2.22] C. Definition and Elements 54
[2.23] 1. Publication of Private Facts 54
[2.24] 2. Leading Cases 54

[2.25] 3. Real Examples From Television Programs and Books 57
[2.26] D. Publication of a "Questionably" Private Fact 58
[2.27] 1. If She Told Me She Is on Prozac, Can I Publish That? 58
[2.28] 2. Is It Okay to Be Gay Yet? 59
[2.29] 3. What About Being an Alcoholic, a Convict or a Victim of Child Abuse? 60
[2.30] 4. HIPAA Rules 64
[2.31] IV. Conclusion 66

CHAPTER 3 RIGHT OF PUBLICITY
Elizabeth McNamara, Esq.
Monica Pa, Esq.

[3.0] I. Definition 69
[3.1] A. New York—N.Y. Civil Rights Law §§ 50 and 51 69
[3.2] B. California—Cal. Civil Code § 3344 69
[3.3] II. Elements of a Right of Publicity Claim 70
[3.4] A. Identity 70
[3.5] B. Consent 71
[3.6] C. Commercial Purpose 71
[3.7] III. Core Questions in Analyzing A Right of Publicity Claim 71
[3.8] A. Common Misconceptions 72
[3.9] B. Issues Concerning Identity 73
[3.10] 1. Soundalikes 74
[3.11] 2. Look-alikes 75
[3.12] 3. Persona 76
[3.13] 4. The Exact Same Name or Photograph Is Not Necessary for Infringement 78
[3.14] 5. Animals 79
[3.15] C. Issues Concerning Commercial Use 79
[3.16] 1. Life Story 79
[3.17] 2. Creating a False Impression by Using Photographs to Illustrate an Article 81
[3.18] 3. Broad Definition of Newsworthiness 83
[3.19] 4. Republication of Newsworthy Events in Promotional Materials 83
[3.20] 5. Expressive Uses of Celebrity Images on Promotional Merchandise 84
[3.21] 6. Knowingly False Materials 85

[3.22] 7. Social Commentary Use 86
[3.23] 8. Artistic Uses 86
[3.24] 9. Comedic Uses 88
[3.25] D. Who Can Sue? The Dead! 89
[3.26] E. Newest Trends 90
[3.27] IV. Related Law 91
[3.28] A. Practical Note 91
[3.29] B. Other State Laws 92
[3.30] C. Procedural Law 92
[3.31] D. Remedies 92

CHAPTER 4 NEWS-GATHERING TORTS
Joshua Koltun, Esq.

[4.0] I. Constitutional Issues 97
[4.1] II. Common-Law and Statutory Issues 100
[4.2] A. Media "Promises" 100
[4.3] B. Interference With Contract/Trade Secret 103
[4.4] C. Ride-Alongs and Other Involvement With Law Enforcement 105
[4.5] III. Conclusion 107

CHAPTER 5 COPYRIGHT INFRINGEMENT
Kathleen Conkey, Esq.

[5.0] I. Copyright Defined 111
[5.1] A. Works Excluded From Copyright 112
[5.2] 1. Ideas 112
[5.3] 2. Facts 112
[5.4] 3. Unfixed Works 113
[5.5] 4. Titles and Other Short Phrases 113
[5.6] 5. Information From Public Documents 113
[5.7] 6. Unoriginal Works 113
[5.8] 7. Works Authored by the U.S. Government 113
[5.9] B. Works Under Copyright 113
[5.10] II. Elements of Copyright Infringement 115
[5.11] A. What Constitutes a Copy? 116
[5.12] B. Visual Material 117
[5.13] 1. Drawings 117
[5.14] 2. Choreography 117
[5.15] 3. Film Clips or Television Show Clips 117
[5.16] 4. Photographs 118
[5.17] 5. Posters and Other Two Dimensional Artwork 119

[5.18] 6. Sculptures 119
[5.19] C. Written Material 119
[5.20] 1. Letters 119
[5.21] 2. Quotes From Books or Poems 120
[5.22] 3. Newspaper Articles 120
[5.23] 4. Magazine or Newspaper Covers 120
[5.24] D. Useful Objects 120
[5.25] 1. Buildings 120
[5.26] 2. Dresses and Other Fashion Items 121
[5.27] 3. Makeup 121
[5.28] 4. Music 122
[5.29] E. Other Works to Watch Out For 122
[5.30] F. Remedies for Infringement 122
[5.31] 1. Injunctive Relief 122
[5.32] 2. Monetary Damages 123
[5.33] 3. Criminal Infringements 123
[5.34] III. Works Made for Hire 123
[5.35] IV. Public Domain 124
[5.36] A. Works Created for the Public Domain 124
[5.37] B. Time Limitations 125
[5.38] C. Notice or Renewal Errors 126
[5.39] V. *De Minimis* Uses 127
[5.40] VI. Fair Use 128
[5.41] A. Definition and Elements 128
[5.42] B. The Four Factors 129
[5.43] 1. The Purpose and Character of the Use 129
[5.44] 2. The Nature of a Copyrighted Work 131
[5.45] 3. The Amount and Substantiality of the Portion Used 132
[5.46] 4. The Economic Effect on the Value of the Copyrighted Work 133
[5.47] VII. Fair Use in the Digital Space 136
[5.48] VIII. Digital Millennium Copyright Act 137
[5.49] IX. Common Copyright Myths 138
[5.50] X. Other Copyright Types of Theories of Liability 143
[5.51] A. Trade Secrets 143
[5.52] B. Idea Theft 143
[5.53] C. Life Rights 144
[5.54] XI. Conclusion 144
Appendix Contents 145
Appendix A 147
Appendix B 149

Appendix C 151
Appendix D 153
Appendix E 155

CHAPTER 6 TRADEMARK INFRINGEMENT
Saul B. Shapiro, Esq.
Abja Midha, Esq.

[6.0] I. Trademark Misconceptions 167
[6.1] II. Trademark Defined 169
[6.2] III. Trademark Protection 169
[6.3] IV. Trademark Registration 170
[6.4] V. Trademark Infringement 171
[6.5] A. Validity of a Mark 172
[6.6] B. Use in Commerce 173
[6.7] C. Likelihood of Confusion 173
[6.8] VI. Trade Dress Infringement 174
[6.9] VII. Remedies 176
[6.10] VIII. Defenses 176
[6.11] A. Fair Use 176
[6.12] B. First Amendment 177
[6.13] C. Non-Use 178
[6.14] IX. Trademark Dilution 179
[6.15] A. Elements of Dilution Claim 179
[6.16] B. Types of Dilution 179
[6.17] C. Famous Mark 181
[6.18] X. Digital Space 181
[6.19] A. Internet Domain Names 181
[6.20] B. Keyword Advertising 183
[6.21] C. Use in Commerce 184
[6.22] D. Initial Interest Confusion 185
[6.23] E. Practical Considerations 186

CHAPTER 7 RIGHTS AND CLEARANCES
Pamela C. Jones, Esq.
Melinda L. Lee, Esq.

[7.0] I. Introduction 189
[7.1] II. Strategy for Success and Early Planning 190
[7.2] A. Script Clearance 190
[7.3] B. Establishing Clearance Requirements 190
[7.4] III. Copyright Basics and Content 191
[7.5] A. Statutory Framework 191
[7.6] B. Chain of Title 192

[7.7] IV. Contracts 193
[7.8] A. Literary Rights (Option Purchase) Agreements 193
[7.9] B. Work-for-Hire Service Agreements 194
[7.10] C. Release and Consent Agreements 195
[7.11] 1. Life Story Rights 195
[7.12] 2. Personal (Appearance) Releases 196
[7.13] 3. Video (On-Camera) Releases 197
[7.14] 4. Shooting (Filming or Videotaping) Signage, Audience Releases 197
[7.15] 5. Location Releases 198
[7.16] D. Permits 199
[7.17] V. Music and Content 199
[7.18] A. Original Scores 200
[7.19] B. Pre-Existing Recorded Music 202
[7.20] VI. Use of Existing Materials 204
[7.21] A. Footage (Clips) 204
[7.22] B. Clearing Elements Within a Clip 205
[7.23] 1. On-Camera Appearances in Clips 205
[7.24] 2. Music in Clips 205
[7.25] C. Still Photographs 206
[7.26] VII. New Media Terms, Clearances and Considerations 206
[7.27] A. Download 207
[7.28] B. Limited Download 207
[7.29] C. Streaming 207
[7.30] D. Interactive Streaming 207
[7.31] E. VOD/Free on Demand 207
[7.32] VIII. Hypotheticals: The Challenge of Identifying Rights Holders 209
[7.33] A. Hypothetical 1 209
[7.34] B. Hypothetical 2 210
[7.35] C. Hypothetical 3 210
[7.36] D. Hypothetical 4 211
[7.37] E. Hypothetical 5 212
[7.38] IX. Elements of a License 213
[7.39] A. What Is a License? 213
[7.40] B. Standard Licensing Terms 213
Appendix Contents 215
Appendix A 217
Appendix B 219
Appendix C 221
Appendix D 225
Appendix E 229

Appendix F 237
Appendix G 245
Appendix H 249
Appendix I 267
Appendix J 269

CHAPTER 8 ERRORS AND OMISSIONS INSURANCE
Ted Gerdes, Esq.

[8.0] I. What Is It? Types of E&O Policies 281
[8.1] II. Scope of Coverage 282
[8.2] A. Generally 282
[8.3] B. Named Perils 282
[8.4] C. All-Risk Policy 282
[8.5] D. Policy Limits 282
[8.6] E. Defense Costs 283
[8.7] F. Policy Period 284
[8.8] 1. Claims Made Policy 284
[8.9] 2. Occurrence Policy 284
[8.10] III. Who Needs E&O Insurance, and Who Is Covered? ... 285
[8.11] IV. Why is E&O Insurance Necessary? 286
[8.12] V. When Should a Policy Be Obtained? 286
[8.13] VI. What Does an E&O Policy Cost? 287
[8.14] VII. What Is the Process of Obtaining a Policy? 288
[8.15] VIII. Finding an Insurance Broker 290
[8.16] IX. Other Insurance 290
[8.17] X. Conclusion 291
Appendix 293

CHAPTER 9 CONTRACTING WITH MINORS IN THE ENTERTAINMENT INDUSTRY
Diane Krausz, Esq.
Glenn Litwak, Esq.

[9.0] I. Introduction 303
[9.1] II. Common Law and Minors 303
[9.2] III. Minors and Entertainment Contracts 303
[9.3] IV. California Laws Concerning Minors in the Entertainment Industry 304
[9.4] A. California Law Fundamentals 305
[9.5] B. Capacity of a Minor to Contract in California 305
[9.6] C. Disaffirmation of Contract by a Minor 306
[9.7] D. Exceptions to a Minor's Right to Disaffirm: Contracts for Necessaries 306

[9.8] E. Types of Contracts Between Minors and Third Parties Covered by Cal. Fam. Code §§ 6750–58 (Coogan Act) 307
[9.9] F. Enforceability of Talent Agency Contracts 308
[9.10] G. Approving a Minor's Employment Contract in California 308
[9.11] H. Coogan Trust Account 310
[9.12] V. New York Law Regarding Minors 311
[9.13] VI. New York Requirements to Obtain Court Approval of a Minor's Contract for Services 313
[9.14] VII. Conclusion 316
Appendix Contents 319
Appendix A 321
Appendix B 323
Appendix C 327
Appendix D 335
Appendix E 339
Appendix F 345
Appendix G 349
Appendix H 353
Appendix I 357

CHAPTER 10 TELEVISION STANDARDS AND PRACTICES
Deborah Principe-Lake, Esq.

[10.0] I. Introduction 363
[10.1] II. The Law 364
[10.2] A. Obscenity Versus Indecency 364
[10.3] III. The Standards for Each Medium 366
[10.4] A. Internet Standards 366
[10.5] B. Cable, Radio and Television Standards 367
[10.6] IV. Standards and Practices 367
[10.7] A. Language and Dialogue 367
[10.8] B. Nudity 368
[10.9] C. Sex 369
[10.10] D. Drug Use 369
[10.11] E. Racial and Ethnic Stereotypes, Hate Speech, Religious Sensitivities 369
[10.12] F. Dangerous Demonstrations 369
[10.13] G. Ratings 370
[10.14] H. Disclaimers 370
[10.15] I. Dayparting 370

[10.16] J. Live Programming: Audio and Video Delays 371
[10.17] K. Wireless 372
[10.18] L. Internet 372
[10.19] M. Stay Tuned 372
Appendix Contents 373
Appendix A 375
Appendix B 381
Appendix C 387

CHAPTER 11 REALITY TELEVISION: PRANKS AND SENSITIVE SUBJECT MATTER
Kathleen Conkey, Esq.

[11.0] I. Types of Reality Programs 391
[11.1] A. Ensemble Shows 391
[11.2] B. Physically Challenging Shows 392
[11.3] C. Hidden-Camera Prank Shows 393
[11.4] D. Medical Reality Programs 394
[11.5] E. Emotionally Challenging Shows 394
[11.6] II. Typical Reality Show Claims and How to Avoid Them 396
[11.7] A. Negligence From Lack of Proper Vetting of Participants 396
[11.8] B. Negligence From Lack of Proper Safety Planning 397
[11.9] C. Copycat Suits 397
[11.10] D. Intentional Infliction of Emotional Distress 397
[11.11] 1. What Is a Prank, and Who Is the Mark? 398
[11.12] 2. Analysis of the Prank 398
[11.13] 3. Considerations 399
[11.14] a. Comfort With the Insiders 399
[11.15] b. Comfort With the Setting 399
[11.16] c. Comfort With the Mark 400
[11.17] 4. The Four Golden Rules of Pranks 400
[11.18] E. Publication of Private Facts 400
[11.19] F. Wrongful Death 401
[11.20] III. A Note on Releases and Contracts 402
[11.21] A. Releases 402
[11.22] B. Contracts 402
[11.23] C. Medical Releases 403
[11.24] IV. Notes on Minors 404
[11.25] V. Conclusion 404

CHAPTER 12 MISCELLANEOUS STEPS IN PRE-BROADCAST REVIEW

Andrew J. Siegel, Esq.

[12.0] I. Introduction 409
[12.1] II. FCC Issues 409
[12.2] A. The Telephone Taping Rule 409
[12.3] B. Payola/Plugola 410
[12.4] C. Indecency 410
[12.5] D. Lotteries and Contests 411
[12.6] III. Access Issues 412
[12.7] A. Public Areas 412
[12.8] B. Offices 413
[12.9] C. Courthouses 414
[12.10] D. Prisons 414
[12.11] IV. Payments to Sources 414
[12.12] V. Subpoenas 415
[12.13] VI. Ambushes 416
[12.14] VII. Product Tests 417
[12.15] VIII. Illegal Activities 417
[12.16] IX. Conclusion 417

Table of Authorities 419

Index 433