Editors Only.

The Newsletter of Editorial Achievement

Issue for June 2011

Getting Sued for Doing Your Job

Posted on Wednesday, June 29, 2011 at 10:27 AM

Potential legal liability for exercising your editorial discretion!

By Meredith L. Dias

No matter how savvy an editor you are, risks of potential legal liability are always present. With them comes the threat of hefty litigation-defense expenses and possible monetary damage awards -- sometimes massive. Some of the risks are not obvious. This month, attorney Lawrence Savell sat down with us to discuss the potential liability of editors and their publications. We focused on circumstances when editorial discretion allegedly becomes editorial indiscretion.

EO: Editors are usually quite vigilant about copyright issues. They know that, before they publish an article, they've got to have the right to do so. If they don't, they could be sued. You've pointed out that editors are open to other risks. There is the possibility of being sued for other decisions they make in their work as editors.

LS: That's right. Although editors and publishers have traditionally enjoyed the right to make reasonable edits, from a legal perspective the bounds of editorial discretion are not limitless.

EO: What are the limits? On what basis have claims been brought?

LS: Creative plaintiffs' lawyers have attempted to invoke in such contexts a broad range of traditional theories in response to perceived excesses or other wrongs. These include alleged copyright violation, trademark violation, unfair competition, breach of contract, misrepresentation -- and even defamation.

EO: Can you give us examples of some cases?

LS: One of the earliest and most widely-cited cases involved the Monty Python troupe, who asked a court to block re-broadcast of heavily-edited

Contents

» Home
» About
» Classifieds
» Books
» Resources
» Subscribe
» Contact

Categories

» Books
» Copyright
» Design
» Editing
» Freelancers
» Grammar
» Management
» News
» Surveys
» Technical
» Writing

Archives

» Master Archives
» June 2011
» May 2011
» April 2011
» March 2011
» February 2011
» January 2011
» December 2010
» November 2010
» October 2010
» September 2010
» August 2010
» July 2010
» June 2010
» May 2010
» April 2010
» March 2010
» February 2010
» January 2010
» December 2009
» November 2009
» October 2009
» September 2009

versions of their programs. The alterations allegedly were quite extensive, including deleting more than a quarter of the original show, with the removed content including the climax of routines or essential elements in the development of story lines -- which made the segments very hard (if not impossible) to follow. The court granted the requested preliminary injunction. It concluded that unauthorized changes in a work that are so extensive in volume and effect as to impair the integrity of the original work go beyond the normal degree of latitude allowed in making changes, and may possibly constitute a basis for liability.

EO: Have there been cases involving extensive deletion of content where publications have fared better?

LS: Yes. For example, in a case brought against *Harper's Magazine* by the author of a letter, the court found, among other things, that the published excerpted version of the letter (which deleted about half its content) was in fact representative of and did not substantially distort the original.

EO: In what other contexts have claims been brought?

LS: Another case involved the alleged addition of typos and other inaccuracies in the course of the editing process. In this case, a law student alleged that a law journal's editorial staff had so "mangled" his submitted piece through numerous substantive and typographical errors that its publication in that form, among other claims, constituted a violation of federal unfair competition/trademark law, prohibiting "false designation of origin" for the journal to refer to him as the article's author. The trial court ruled for the journal and dismissed the complaint and the appeals court affirmed that dismissal. Among other things, the court found that, as contrasted with the situation in the Monty Python case, the deviation was not as significant as the writer alleged.

EO: Editors know that they have to give appropriate credit to authors. But have there been cases where editors or publishers have gotten into hot water when attributing a work to an author?

LS: Yes. There is a case currently on appeal in federal court in Pennsylvania brought by two law professors against a major legal publishing company. The professors had previously authored a treatise for the publisher, but alleged that, although due to a compensation dispute they did not participate in the preparation of a subsequent update, the update was nevertheless attributed to them as authors. They claimed the update, prepared by others, was so poor that it defamed them because of the implication to readers that they were responsible for it. A jury in December issued a verdict for the professors on their defamation and false light invasion of privacy claims, and awarded each $90,000 compensatory and $2.5 million punitive damages. This April, the trial court entered judgment in favor of the professors but in the reduced total amount of $200,000 for each. Both sides have appealed -- basically, the professors would like to get more money, and the publisher would like to get the decision reversed.

EO: Have claims been brought that attempt to invoke other types of legal theories?

LS: Yes. Many of the cases in this area have (expressly or implicitly) included claims that the editor or publisher's (or similar entity's) actions

» August 2009
» July 2009
» June 2009
» May 2009

RSS Updates

» Entries (RSS)
» About RSS

violated the author's "moral rights" (from the French term droit moral). This is a concept which historically has been more extensively recognized in countries other than the United States. In legal systems where recognized, moral rights can protect the reputation of authors through, among other things, the right of attribution (whether the author's name is associated with or withdrawn from a work) and the right of integrity (distortion, modification or mutilation of a work).

EO: Has there been legislation in the US recognizing moral rights?

LS: In the United States, the Visual Artists Rights Act of 1990 provides protection but to only a limited scope of works, and expressly excludes any "motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication . . . ." Some states have enacted forms of moral rights legislation, but these are also typically narrow. Some courts and commentators have pointed to, among other things, such narrow enactments and various First Amendment considerations, as making it difficult for plaintiffs to pursue certain moral rights claims in traditional publishing contexts.

EO: In light of all this, what's your advice to editors?

LS: Although this area of media law continues to evolve, there are nevertheless steps that editors and publishers can take to reduce potential exposure.

The first is obvious -- make sure that changes you make are accurate and do not add typographical or substantive errors to the work.

Second, if an article does require massive editing, consider not accepting/running it or asking the author for a re-write. If you do plan to make significant deletions or major substantive changes, notify the author and seek written consent in advance of publication.

As is the case with numerous aspects of the editor-author relationship, the safest course may be to address all of this specifically in your written contract with the author. Affirmatively specify that the editor or publisher has broad power to edit and otherwise change the work. But be mindful of (and, if agreed to, make sure you comply with) terms that certain authors -- such as celebrities or others with particular negotiating leverage -- might impose, which might instead prohibit or severely limit edits. In many of the cases in this area, there were written agreements bearing to varying degrees on the issues, but such agreements were not always as clear or comprehensive as they might have been.

Meredith Dias is senior editor of Editors Only.

Lawrence Savell is a litigation attorney concentrating on products liability and media law in the New York office of Chadbourne & Parke. He can be reached at lsavell@chadbourne.com, 212-408-5343.

Add your comment.

Posted in (RSS)