Assessing the Legal Limits of Editorial Discretion

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Special to Law.com | May 23, 2011

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By definition, editors edit. Among other things, they correct grammatical and typographical errors. They revise for clarity and precision; to follow the style of the magazine, newspaper or other publication; and to reduce the length to the allotted space. But can an editor or publisher go too far? Can the exercise of editorial discretion expose an editor or publisher to legal liability to a displeased author?

Although editors and publishers certainly have and have traditionally enjoyed the right to make reasonable edits, the bounds of editorial discretion are not limitless. Actions have been brought in response to perceived excesses or other wrongs, invoking a broad range of theories including alleged copyright violation, trademark violation, unfair competition, breach of contract, misrepresentation and even libel. Some plaintiffs have also sought to assert in this context "moral rights" of creators, a concept which historically has been more extensively recognized in countries other than the United States.

Currently on appeal (by both sides) to the 3rd U.S. Circuit Court of Appeals is ***Rudovsky v. West Publishing Corp.***, a case brought by two law professors who had authored a treatise for West. Plaintiffs alleged that, although they did not participate (due to a compensation dispute) in the preparation of a subsequent "pocket part" update of the treatise, the pocket part was attributed to them as authors, and was so inadequate as to defame them because of the implication to readers that they were responsible for its inadequacies. A jury in December **returned a verdict in favor of plaintiffs** on their defamation and false light invasion of privacy claims, and awarded each $90,000 compensatory and $2.5 million punitive damages. In an April 13, 2011 Order, the U.S. District Court for the Eastern District of Pennsylvania denied defendants' motions for judgment as a matter of law and for a new trial, and entered judgment in favor of plaintiffs but in the **reduced total amount of $200,000 per plaintiff**.

Other cases have asserted inordinate deletion of content. For example, in the 1976 opinion in ***Gilliam v. American Broadcasting Companies, Inc.***, the 2nd Circuit directed that a preliminary injunction issue in favor of the "Monty Python" troupe in their action seeking to prevent re-broadcast of heavily edited (for reasons including to make space for commercials) versions of their programs. The alteration allegedly consisted of omitting approximately 27 percent of the original show, with the removed content including the climax of segments or essential elements in the development of story lines. These had the effect of rendering some of the routines unfathomable (or at least more so than usual). The court concluded that unauthorized changes in a work that are so extensive in volume and effect as to impair the integrity of the original work (in Python parlance perhaps, making it "something completely different") go beyond the normal degree of latitude afforded in making changes, and may possibly constitute a basis for liability.

What about typos and other inaccuracies? In 1996, in ***Choe v. Fordham University School of Law***, the 2nd Circuit affirmed the U.S. District Court for the Southern District of New York's 1995 dismissal of a law student's complaint. The student alleged that a law journal's editorial staff had so "mangled" his submitted student comment through numerous substantive and typographical errors that the publication, 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 its author. Among other things, the Southern District had found that, as

contrasted with the situation in *Gilliam*, the departure was not as significant as the writer alleged.

A number of cases in this area have (expressly or implicitly) included claims that the editor or publisher's (or similar entity's) actions violated the author's "moral rights" (from the French droit moral). In legal systems where recognized, moral rights can protect the reputation of authors through such aspects as the right of attribution (regarding whether the author's name is associated with or withdrawn from a work) and the right of integrity (relating to such things as distortion, modification or mutilation of a work). In the United States, the **Visual Artists Rights Act of 1990** ("VARA") provides protection 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 the enactment of VARA, recent decisions such as the U.S. Supreme Court's 2003 Lanham Act ruling in ***Dastar Corp. v. Twentieth Century Fox Film Corp.***, and various First Amendment considerations as making it difficult for plaintiffs to pursue certain moral rights claims (or Lanham Act claims asserting similar theories) in traditional publishing contexts.

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

1. Obviously, make sure that changes are accurate and do not add typographical or substantive errors to the work.

2. If a work requires massive editing, consider not accepting/running it or asking the author for a re-write. If you plan to make significant deletions or substantive changes, notify the author and seek written consent in advance of publication.

3. Perhaps the safest course is 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.

4. Finally, keep in mind the relevant "custom and usage" in your industry. In the absence of any (or a comprehensive or clear) contractual provision on point, courts may look to "custom and usage" in the business for guidance to determine the relative rights.

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