

# Minimize Your Legal Risks

**To avoid spending a great deal of time and money defending against a lawsuit, you need to ask yourself more than “Am I defaming anyone with the material I am about to print or post?” Eight key questions that can help keep you out of hot water.**

**I**n an era of increasing litigation and staggering court judgments against the media, magazine editors and staff need to be alert to and minimize potential claims and liabilities. An ounce of prevention truly is worth a pound of cure. To the extent that you can spot and deal with potential problems before they appear in print, you can help your magazine avoid such headaches. The following are some of the questions you should ask when preparing articles for publication in your magazine, with suggestions on how to minimize such risks.

## Are you defaming anyone?

False statements that defame a person, entity or product of another may invite a libel or disparagement claim. Classic examples include statements asserting criminal conduct or immorality; statements imputing current disease or mental illness; statements alleging incompetence in a person's occupation; or statements challenging a corporation's honesty, ethics, credit or ability to carry on business.

When you make statements about a person or company that could be viewed as seriously impugning their reputation, make sure you have the evidence to support them. (Also, make sure that photographs of persons, entities or products are not incorrectly associated with unrelated negative stories.)

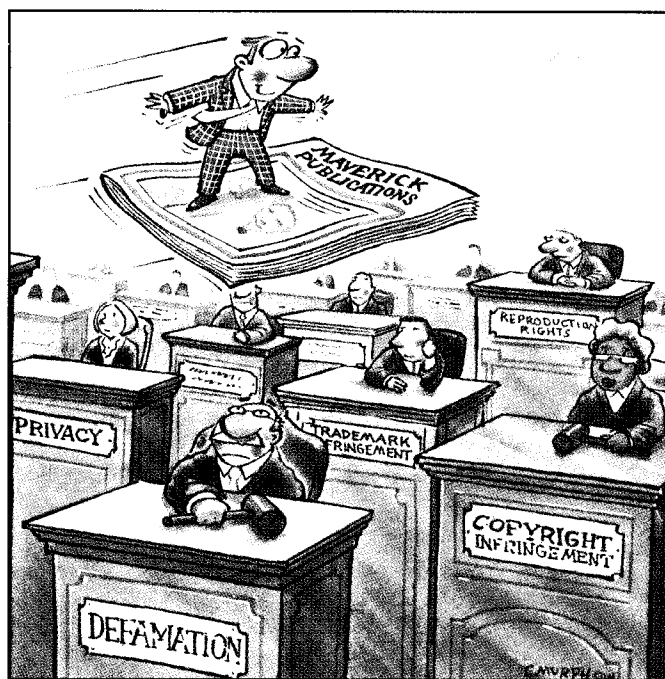
Besides truth, a critical defense to a libel action is that the statement is a fair and accurate report of an official governmental proceeding or record. Although statements of opinion rather than asserted or implied facts still enjoy protection, the scope of such protection has been narrowed. Should a valid libel claim be raised, a quick, full and comparably prominent retraction or clarification may significantly reduce potential damages.

## Are you invading anyone's privacy?

Statements that invade the privacy of another can provide the basis for a claim. Depending on the jurisdiction, a magazine may face potential liability for “appropriation” of a person's name, portrait or picture for advertising or trade purposes

without prior written consent; extreme situations of public disclosure of private and embarrassing facts; statements portraying one in a “false light”; and physically intrusive news-gathering efforts.

An important defense to an appropriation claim regarding a photograph is that the picture was used to depict a newsworthy event or illustrate a matter of public interest with which the picture was reasonably related.



There is increasing public interest and legislation regarding Internet privacy. Many Web sites post “privacy statements” that promise to protect the confidentiality of user information that may be provided or collected. If you make such promises, you must keep them.

## Are you infringing anyone's copyrights?

The unauthorized use of material whose copyright is owned by someone else may provide the basis for an infringement claim against you. Make sure that text and pictures used were either internally created or commissioned as a “work made for hire,” or that permission has been obtained from the copyright owner. A privilege such as “fair use” may apply in cer-

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tain circumstances, such as criticism, allowing limited use without such permission.

A currently “hot” issue is the right of companies to publish electronically on a Web site, without specific consent, freelance material it had previously published in print with consent. In its 1999 decision in *Tasini v. New York Times*, the Second Circuit Court of Appeals ruled that, under federal copyright law, publishers could not place the freelance contents of their periodicals into electronic databases and onto CD-ROMs without the permission of the writers. In November, the U.S. Supreme Court agreed to hear this case, and its eventual ruling is likely to provide significant insight into these issues.

Recent Internet-specific copyright claims include unauthorized “framing” (the creation by one site of an on-screen border that remains visible even as a visitor jumps to other sites) and unauthorized linking to specific sub-pages in another’s site (bypassing the latter’s home page and other material, including advertising).

Limited court guidance currently exists regarding these matters; you should exercise caution and obtain appropriate advance consents.

#### **Have you protected yourself with a written contract?**

The safest way to protect your magazine on the electronic rights front is with a written contract with the freelance writer or other outside content provider that transfers the broadest range of rights to you—such as one that grants “all rights.”

You should also think about expanding the scope of the contract to memorialize other matters that may be of importance to you.

Among the various provisions that publishers have considered for inclusion in the contract are subject and length of the article; the due date, or deadline; the format of submission; payment amount and its being premised on the publisher’s final acceptance; various representations and warranties by the author (such as being the sole author, and that the work is not libelous and does not violate any other copyright, trademark or privacy); indemnification

*Think carefully before allowing third-party postings on your Web site through uploads or chat rooms. A plaintiff might argue that you are responsible for or have “republished” such matter.*

(the writer agrees to pay any adverse judgment and defense costs related to the work); the editor/publisher’s broad power to edit or otherwise change the work; that the magazine is under no obligation to publish the work; and an explanation of reimbursement for expenses that may be incurred in the creation of the work (including documentation requirements).

#### **Are you infringing anyone’s trademarks?**

Like copyrights, the unauthorized use of another’s trademark may provide the basis for liability. Currently “hot” online legal issues are the registration of domain names that allegedly infringe on existing trademarks, and the use of the trademarks of others in hidden “metatags” (internal Web site programming code accessed and utilized by many Internet search engines).

#### **Are you letting others post material on your site?**

If you allow statements or materials by others to be posted on your Web site through uploads or chat rooms, a plaintiff might argue that you are responsible for or have “republished” such matter. Courts have sometimes been more likely to find liability where the site operator has exercised some degree of “editorial control,” rather than no control at all, over such matter. Think carefully before allowing third-party postings.

#### **Are you linking to other sites?**

A plaintiff may allege that a company’s link to another’s Web site makes the company responsible for the content of that other site. To minimize such risks, accompany any link to third-party sites with a notice disclaiming responsibility for and affirmatively denying any endorsement of products, services or information contained on that outside site. Should operators of other’s sites wish to link to your site, consider requir-

ing that they first enter into a Web site linking agreement that sets forth requirements with which they must comply.

#### **Are you making health claims or other promises?**

Be careful when dispensing advice or advocating products or activities that could potentially cause physical injuries or financial losses. There have actually been products liability claims brought against publishers by readers who relied on an article or advertisement or who did an exercise, used a recipe or followed medical advice that had an unfortunate result. Don’t make any guarantees regarding the accuracy of the information presented, the results reported, or the safety of the products or activities described. Consider printing a disclaimer putting readers on notice that the magazine is not making any guarantees regarding such matters. Finally, advise readers to consult their personal medical or financial professionals.

These are just some of the legal issues to which print and online magazines must be sensitive. Consult your in-house or outside counsel if you have any questions or uncertainty as to the legal implications of contemplated efforts. Check whether your insurance covers the broad spectrum of potential claims, and consider obtaining additional coverage, if necessary.

Also, affirmatively protect your own copyrights and trademarks (such as your publication’s name and logo) from being infringed by others. Print appropriate copyright and trademark notices in your magazine and post them on your Web site. Run Internet searches regularly, including searches for “cybersquatting” domain names registered and “metatags” used by others that improperly incorporate your company’s trademarks. □

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