



"Practical Problem-Solving Advice for Publishers"

Six Suggestions on Intellectual Property and Social Media: A McHugh Select

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Attorney David Koehser, my legal advisor, shares with us these six suggestions. Dave's suggestions are an updating of a *McHugh Expert Interview* I did with Dave in 2010. For more on Dave, see "About David Koehser" at the end of this paper.

Contents: Using Protected Works: Fair Use; Trademark; Non-Intellectual Property Pitfalls; Linking; and Compliance Advice

Using Protected Works

The same rules for copyright and trademark infringement apply, regardless of the medium. Any reproduction, distribution, display or performance of a copyrighted work without the copyright owner's consent constitutes copyright infringement, and any use of an existing trademark or a mark that is similar to an existing trademark in a manner which is likely to confuse others into believing that the user's goods or services are affiliated with or endorsed by the trademark owner constitutes trademark infringement.

Fair Use

Fair use will apply (or not apply) just as it does in print media. The use of a limited amount of copyrighted material may or may not qualify as a fair use, depending on the context. Uses for commentary, criticism and news reporting are likely to be given more leeway in this regard than uses for other purposes. For example, quoting a sentence or two from a book for purposes of reviewing that book on a blog will generally qualify as a fair use, just as it does in print. However, simply copying someone else's work for purposes of conveying the same message and avoiding having to create anything new and original will generally not qualify as a fair use. As is the case with print or any other media, fair use determinations will continue to be made based on the facts and circumstances of each individual situation.

Trademark

There are no problems with using another party's trademark to the extent necessary to identify that party's goods or services. For example, if you want to compare cars on your blog, you have to be able to refer to Buick, BMW, Audi, etc., in order to make the comparisons. Likewise, if you want to discuss the results of last night's big game, you have to use the names of the teams involved in that game in order to have a meaningful discussion.

Trademark use becomes an issue only if you infringe on another person's mark – that is, if you use the mark in a way that is likely to confuse your readers into believing that your site or the

goods or services promoted or sold through your site are produced, endorsed or sponsored by or in some way affiliated with the owner of the trademark.

The use of another person's trademark as a metatag – that is, a tag that is not visible to the user but that is visible to search engines and that causes a search engine to lead a user to your site – may constitute trademark infringement, as such use can be viewed as causing the user to believe that your site or the goods or services promoted on that site are affiliated with the owner of the trademark. For example, if you are selling knock-off watches on your site, the use of the mark "ROLEX" as a metatag to lead people to your site may constitute trademark infringement.

Non-Intellectual Property Pitfalls

As is the case with copyright and trademark law, the same rules apply, whether the statement is made in print or on a blog. Thus a defamatory statement will still be defamatory if made in an online environment; disclosure of information which the disclosing party was obligated to keep confidential will still give rise to liability; and posting photos or information that violates a person's right of privacy will still be grounds for legal action.

However, there are at least two unique considerations with respect to blogs:

(1) Material posted on a blog will generally be accessible worldwide. Thus even if the posting would not violate defamation, privacy or other laws in one state or nation, the same may not be true in other states or nations. For example, some states extend privacy and publicity rights beyond death, while others do not.

(2) The ability to act and react immediately in an online environment tends to make posters lose their inhibitions. Thus people may get carried away and post things online that they would never publish under the more deliberate review processes typically required for publication in print.

Linking

Linking is generally acceptable as long as the linked site is not framed or otherwise made to appear to be part of your site. Upon clicking the link from your site, a new frame should open over your site, or the user should be transferred away from your site and to the other site.

Deep linking refers to a direct link from your site to an interior page on another party's site. In some cases, the owners of the sites that were the subject of deep linking have argued that the deep link violates their rights by by-passing their home page or other opening page. These arguments have generally not been successful, but anyone seeking to deep link to another site is still advised to get permission first.

Compliance Advice

Remember that the law does not change with the medium. Acts that would constitute copyright or trademark infringement or that would violate personal rights if done in print will yield the same result if done online. Think twice before you post, and if you are hosting a site, be sure to monitor all comments from others before allowing those comments to be posted on your site.

About David Koehser

Thanks to Attorney David Koehser for his comments. David Koehser is a Minneapolis-based lawyer who practices in the areas of copyright and trademark law. Dave's website contains articles on the topics of: Publishing Law, Merchandise Licensing,

Copyrights and Trademarks, and Theater and Performing Arts. Request a copy of Dave's informative quarterly e-newsletter, *Publishing and Merchandise Licensing Law Update*. Link to Dave's Web site www.dklex.com.

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McHugh Rights and Permissions Services

John B. McHugh is an experienced publishing executive and consultant with special expertise in managing rights and permissions. His advice and insights cover all areas of intellectual property management for both print and electronic products.

Tap into McHugh's extensive information industry expertise to help you:

- Grow revenues by fully exploiting the income potential of your electronic rights. McHugh will help you effectively organize your rights management to take advantage of the exploding innovation in digital distribution.
- Educate yourself and your staff about the often confusing and ambiguous subject of copyright practice with McHugh's executive coaching and on-site workshops.
- Get a detailed analysis of the strengths and weaknesses of every area of your rights management with McHugh's ***Rights and Permissions Audit***. He will make recommendations to optimize staffing, streamline management processes, and increase rights, revenues and profitability. *Most importantly, McHugh will alert you to serious legal exposure and when you should contact a copyright attorney.*

Call Jack McHugh now at 414-351-3056 or e-mail at jack@johnbmchugh.com .

About John B. McHugh, Publishing Consultant

John B. “Jack” McHugh, a 40-year veteran of the publishing business, is a successful long-time publishing consultant. He is the author of the ***McHugh Selects***—25 practical papers on all aspects of publications management that are available free at his website.

He also publishes the ***McHugh Expert Interview Series***, 16 interviews with publishing leaders on various publishing specialties, also available free at www.johnbmchugh.com.

In the book publishing business, McHugh has worked as an executive for Houghton Mifflin, Wadsworth, and Saint Mary’s Press. McHugh is also an experienced association publishing executive. For seven years, he was Publisher and Director of Programs at the American Society for Quality. For a two-year period, McHugh served as the Interim Publisher at the Project Management Institute.

McHugh has advised a variety of association publishers including: AASHTO, Alliance for Children and Families, ASCD, ASM International, ASTM, AWHONN, Boy Scouts of America, International Employee Benefit Foundation, Custom Computer Services, Inc. NSTA, Police Executive Research Foundation, SAE, SMACNA and SNAME. McHugh has also worked for commercial publishers such as Butterworth Heinemann, Cardiotext, Kendall Hunt, and Llewellyn Worldwide.

Jack McHugh’s specialties include association/nonprofit publishing, book publishing, executive recruiting, journal publishing, rights and permissions, organizational design, and startups. McHugh is the manager of a LinkedIn™ group, Association and Nonprofit Publishing. To join: [Association and Nonprofit Publishing](#)

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