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McHUGH EXPERT INTERVIEW

Copyright Aspects of Social Media:
An Interview with Attorney David Koehser

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Social media has swept the publishing and association world. Social media is used for many purposes as it is efficient, inexpensive, and captures all the advantages of viral marketing. However, it's important to be aware of the copyright considerations; namely, what are the legal ramifications of using others' protected material in social media.

Author's Note: Because rights have many legal and technical terms, you may want to have handy McHugh Rights and Permissions Glossary, which is at my Web site, link R-23 McHugh's Rights Permissions Glossary, 2010, 7 pages . For example, you will need to understand the term "fair use" and "license."

Q Is there anything different when it comes to using protected works in social media when contrasted to an all- print world? In other words, how does copyright and trademark play out in social media?

A 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.

Q How does fair use apply to the use of copyrighted material in blogs and other social media?

A 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 copy-

ing 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.

Q If someone posts comments to my blog/social media site are those comments then licensed to me?

A The Copyright Act provides for two types of licenses—exclusive and nonexclusive. Under the Act, a license which is not evidenced by a written agreement signed by the licensor (i.e., the copyright owner) can only be a nonexclusive license. Comments posted to a blog would arguably be covered by an implied nonexclusive license, since the party posting the comments presumably consented to the reproduction, storage, publication and display of the comments on the site.

However, rather than relying on an implied license argument, most blogs and other sites that invite comments resolve this issue by having terms and conditions of use which state that: (1) by posting to the site, the posting party grants a nonexclusive license to the site to reproduce and display the material posted; and (2) by posting to the site, the posting party agrees to be bound by the terms of use for the site.

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Q Are there other pitfalls in using another organization's trademark or service mark in social media?

A 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.

Q What is the worst that can happen if I infringe on someone else's protected material?

A The short answer is "it depends." If you infringe on another person's copyright by copying and displaying that person's work on your site, and that person has registered the copyright in the work, you may be liable for statutory damages of \$750 - \$30,000, plus any attorney's fees and costs that the copyright owner incurs in taking action against you. If the owner can establish that you acted "willfully," the damage amount could go as high as \$150,000. You may also be subject to damages for trademark infringement if you infringe on another person's trademark.

One of the advantages of the online environment is that infringing material can be removed immediately and without cost. Unlike the print world, ceasing to infringe does not mean having to destroy a large and costly inventory of printed products. In many cases, simply removing the offending material will be enough to satisfy the copyright or trademark owner, although one should never knowingly post infringing material with the hope that any wrongs can be righted simply by removing that material if requested to do so.

Q Are there other non-intellectual property legal issues to be aware of when blogging—for example, things like libel or trade secrets or invasion of privacy?

A 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

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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.

The anonymity of the Internet can also give rise to problems. If you maintain a blog and allow persons to post to that blog, you may find anonymous or pseudonymous posters posting defamatory statements, or statements that violate another person's right of privacy or confidentiality. As a general rule, you will not be liable for these postings, provided you respond immediately to a request to remove them. However, even if you remove these types of postings as soon as you are made aware of them, your reputation may still be damaged if you or your blog become associated with the sentiments expressed in the postings or with the posting party. For this reason, most blogs that allow for comments carefully monitor all comments submitted before posting them on the site.

Q Can one quote material on a social media site that has been posted on another social media site? For example, can one quote material on one's own blog from another blog?

A Copyright protects original works from the point that those works are created and fixed in a tangible medium. Thus original materials posted to a blog will be protected by copyright from the moment of posting, and any reproduction or redistribution of those materials without the consent of the copyright owner will be copyright infringement, unless fair use applies. As noted above, fair use determinations are made on a case-by-case basis, so one should not be quick to conclude that re-use of material from another site can qualify as fair use.

However, a distinction can be made between copyright-protected expression and the facts contained in that expression. Facts are not protected by copyright, and simply reciting the facts discussed in another person's blog, without copying any of that person's copyright-protected expression, will not constitute copyright infringement.

Q Is it okay to "deep link" to someone else's website, blog, or social media site?

A 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

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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.

Q What other suggestions do you have for social media users that will help them comply with current law?

A 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.

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 publishing 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 confusing, subject of copyright practice with McHugh's coaching and willingness to serve as a resource in answering copyright and permissions questions your staff may have.

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**
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