

Counseling Content Providers in the **Digital Age**

Editors: Kathleen Conkey, Esq.

Elissa D. Hecker, Esq.

Pamela C. Jones, Esq.

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INTRODUCTION

Welcome to the art and science of pre-publication review—a subset of media law encompassing print and audiovisual media in which the lawyer’s goal is to review content for media companies before it reaches the public to avoid exposure to lawsuits. For as long as there have been printing presses, there have also been accusations of libel, invasion of privacy, intellectual property infringement and other torts stemming from what is published on those presses. Now that much of the content reaching the public is distributed over the Internet, broadcast/cable/satellite television or radio and film, in addition to print, the field has become more complicated and more important. In recognition of the ever-growing significance of the audiovisual media, this book uses the term “pre-broadcast review” as shorthand for the review before distribution of any kind of content.

Although the specialty is little known outside the worlds of entertainment and media, pre-publication review is an essential part of getting content of any kind—books, movies, blogs, television and radio shows—out to the public. In practical terms, insurance companies that write policies for such productions often insist that the material be reviewed by an attorney before publication or broadcast. Regardless of the need for insurance, most companies and individuals in the creative fields understand that the cost of a single lawsuit for defamation or copyright infringement will quickly dwarf the time and cost of hiring a lawyer to review content in an effort to avoid such suits.

Pre-broadcast review is both an art and a science. The science consists of methodically spotting every legal issue contained in a piece of content that might trigger a lawsuit against its creator or distributor. The art consists of working closely with the content creators to give them guidance on how to “say their piece” without violating the rights of others. This art requires practitioners to balance a keen appreciation of the First Amendment with sensitivity to the damage that the media can unwittingly inflict on those caught in its spotlight. Finally, the art of the work is evident in the many judgment calls the reviewing lawyer must make—Who are the potential plaintiffs? How likely are they to sue? Which party might be more sympathetic? The reviewing lawyer must stand ready to offer the client a detailed risk assessment and must stay abreast of the client’s appetite for such risk.

Lawyers who review or “vet” content for a living are very lucky lawyers indeed. They get the pleasure of reading articles and books, watching

television programs and movies, and viewing Web sites and video, as well as the challenge of spotting legal issues and finally the satisfaction of solving problems for creative individuals and companies. Sometimes, they even get their names in the credits. At the same time, the field can be nerve-racking, as clients demand fast answers and creative solutions, all without too much interference with their creative and editorial goals. The vetting lawyer needs nerves of steel, a sense of humor, the ability to break bad news and a love of creative work—whether it be a high-culture documentary or a lowbrow reality television show. Most important, the vetting lawyer must understand that his or her job is not to tell a media client that it cannot publish something but to work with the client to figure out how it *can* publish with the least amount of risk.

Like any legal practice area, much of pre-broadcast review must be learned from experience, but this book will give media and entertainment lawyers a good grounding in the essential issues that reviewers face repeatedly. At the very least, it will help the casual practitioner know when he or she needs to call in an expert.

The first six chapters of the book set out the major torts that every vetting lawyer must know by heart—defamation; invasion of privacy; right of publicity; copyright infringement; trademark infringement; and the newsgathering torts, including misrepresentation, fraud, trespass and breach of contract by journalists.

The next four chapters of the book focus on some of the important practices the media industry, particularly the television and film industry, have created to tackle the legal challenges of creating and distributing content—rights and clearances, errors and omissions insurance, systems for contracting with minors in the entertainment business, and television standards and practices.

The last two chapters offer advice on a panoply of issues that face television producers and journalists, with a focus on television's most legally problematic format—the reality show, including those that use hidden cameras and pranks or focus on sensitive subjects such as personal health or family dynamics.

Virtually every legal issue the media faces is covered—from well-known concepts like defamation and trademark infringement to lesser-known ones like paparazzi statutes, veggie libel laws, federal indecency regulations, sweepstakes rules, torts in fictional works and idea theft. In addition to a thorough rundown of the problems, the book explores solu-

tions—retractions, disclaimers, releases, licenses, fair use defenses, seven-second delays and privacy protections, among many others.

The point of this book is to act as a handbook for practitioners—the lawyers representing media clients who need concise and fast answers to everyday problems. Thus, while each chapter defines the legal concepts in play and sets out the leading cases, it also provides real-life examples of the concepts and gives insider tips about what to embrace and what to avoid. Throughout the book, the authors have appended a variety of forms to help lawyers with the everyday practicalities of content review. A glossary at the end of the book helps the uninitiated understand some of the arcane language of media contracts.

Finally, the authors themselves are all daily practitioners (not theorists) of the art and science of pre-broadcast review. They represent in nearly even numbers the twin centers of the media and entertainment world—California and New York. With each chapter, they present the reader with the true practitioner’s perspective, offering a good mix of down-to-earth suggestions and creative approaches befitting the subject matter.

ABOUT THE EDITORS

KATHLEEN CONKEY, ESQ.

Kathleen Conkey is a New York City media and entertainment lawyer with 17 years of experience. Prior to starting her own firm in 2007, she was Vice President and Senior Counsel in the Intellectual Property and Litigation Department of MTV Networks, where she was primarily responsible for pre-broadcast review of productions at MTV, VH1, Spike, Comedy Central, LOGO and other channels. Before joining MTVN, she was Assistant General Counsel at CBS Broadcasting, where she was production counsel for “Inside Edition” and other King World Productions programs. She began her career at Debevoise and Plimpton, where she spent three years as a litigation associate before moving to Lankenau Kovner & Kurtz (now part of Davis Wright Tremaine) to concentrate in media law.

She is admitted to the Bars of New York State and the Southern and Eastern Federal Districts of New York. She received her J.D. with Highest Honors from Rutgers Law School-Newark in 1991, where she was an editor of the Law Review. She has a B.S. in Journalism and a B.G.S. in Theatre from the University of Kansas. Prior to law school, Ms. Conkey was Press Secretary to Manhattan Borough President David Dinkins and a staff writer for Ralph Nader.

ELISSA D. HECKER, ESQ.

Elissa D. Hecker, of the Law Office of Elissa D. Hecker, located at 90 Quail Close, Irvington, NY 10533, practices in the fields of copyright, trademark and business law. Her clients encompass a broad spectrum of the entertainment world. In addition to her private practice, Elissa is Past Chair of the Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association (NYSBA), Editor of the *EASL Journal*, member of the Board of Editors for the *NYSBA Journal* and Co-Chair and creator of the EASL Pro Bono Committee. She is also a frequent author, lecturer and panelist, a member of the Copyright Society of the U.S.A. (CSUSA) and a member of the Board of Editors for the *Journal of the Copyright Society of the U.S.A.* Elissa is the recipient of the New York State Bar Association’s 2005 Outstanding Young Lawyer Award. She can be reached at (914) 478-0457 or by email at EHeckerEsq@yahoo.com.

PAMELA C. JONES, ESQ.

Pamela C. Jones is a transactional attorney specializing in the television, media and entertainment industries.

Ms. Jones has managed the business and legal affairs departments for broadcast and cable television networks including CBS Entertainment (a division of CBS Inc.) and BBC Worldwide Americas, where her work contributed to bringing some of the BBC's most beloved dramatic and comedic properties to the United States.

Jones was a member of the launch team for LOGO, MTV Networks' digital channel, and managed television business operations for the publicly traded company Martha Stewart Living Omnimedia, where she had P&L responsibility for the \$30 million television division overseeing studio operations, ad sales, finance, distribution and promotion. Most recently, Ms. Jones has provided transactional guidance and thought leadership to the AETN Television Networks in the transformation of under-utilized music properties into highly profitable digital assets.

Pamela C. Jones is a graduate of Middlebury College and received her J.D. from the Quinnipiac School of Law. She is a member of the Bars of New York and Connecticut; a founding member of the Entertainment Arts & Sports Law Section of the New York State Bar Association, and a former Adjunct Professor at New York Law School. She is currently Co-Chair of the Television & Radio Committee and a juror for the International Emmy Awards. Pamela Jones can be reached at her law office at pamelajonesesq@aol.com.

ABOUT THE AUTHORS

TOBY M. J. BUTTERFIELD, ESQ.

Toby Butterfield is a litigation partner at Cowan DeBaets Abrahams & Sheppard LLP. Toby handles intellectual property, copyright, trademark, digital media and general commercial cases in federal and state courts, as well as counseling clients on various non-litigated matters. Toby is a graduate of Oxford University, 1988 (B.A. Hons.), the Inns of Court School of Law in London, 1989, and New York University School of Law, 1990 (LL.M. International). He was admitted as a barrister in England in 1989 (although he does not practice English law) and was admitted in New York in 1992.

Since 2007, Toby Butterfield has been selected as a “New York Super Lawyer” for Intellectual Property Litigation. He chaired the Committee on State Courts of Superior Jurisdiction at the Association of the Bar of the City of New York, and now chairs its Entertainment Law Committee. He contributes regularly to MLRC newsletters and lectured for the Practising Law Institute and at the Banff World Television Festival, the Rose D’Or Festival in Lucerne, Switzerland and to the Copyright Working Group of the Asia-Pacific Broadcasters Union. Toby was also the Administrator of the Judicial Screening Panel for 2005 New York State Supreme Court candidates for the Democratic Party, and on the advisory board for WNYC Radio.

DAVID E. FINK, ESQ.

David Fink is a founding member of White O’Connor Fink & Brenner, LLP in Los Angeles. Mr. Fink’s practice includes business and entertainment matters, with an emphasis on First Amendment, entertainment and intellectual property litigation. Mr. Fink’s creative strategies and dynamic litigation style have enabled him to achieve highly favorable results in a wide variety of complex disputes in trial and appellate courts throughout the United States. In addition to representing major news media, television and entertainment clients, Mr. Fink has served both as litigation counsel and as a consultant for numerous companies and individuals.

Mr. Fink received his undergraduate degree with a major in English from the University of California, Berkeley in 1988, and his law degree from the University of California, Hastings College of the Law in 1993. Mr. Fink is a member of the State Bar of California, and is admitted to practice before the United States District Court for the Southern, Central

and Northern Districts of California and the United States Court of Appeals for the Ninth and Seventh Circuits. Mr. Fink is a member of several bar associations and practice groups including the Los Angeles Copyright Society, the Intellectual Property Law Section of the State Bar of California, the Intellectual Property & Entertainment Law Section of the Los Angeles County Bar Association, the American Bar Association and the Beverly Hills Bar Association. Mr. Fink has been named as a Southern California “Super Lawyer” by *Los Angeles* magazine every year since 2004. Mr. Fink lectures regularly to entertainment clients on the subjects of copyright, trademark and idea submission law. Mr. Fink also writes on media and entertainment related topics.

TED GERDES, ESQ.

Throughout his 28-year legal career, Ted F. Gerdes has practiced media and entertainment law, specializing in clearance or vetting of fact-based productions. He has litigated numerous rights-related claims involving copyright, defamation, trademarks, and implied contract on behalf of producers, entertainment companies, and errors and omission insurance carriers, and reviewed the work of numerous writers, producers, directors, and Internet providers to advise them of the changes needed to minimize legal risk.

Ted Gerdes began his legal career defending claims. As outside counsel to producers, studios, advertising agencies, and authors, he was involved in the defense of *Buchwald v. Paramount* and *Waits v. Frito Lay*, to name two. This litigation experience taught him the futility and expense of litigation and the need for preventive lawyers, so he flipped the focus of his practice. By clearing projects, he now works to minimize and eliminate these types of claims.

He recently served on the Board of Trustees of the Los Angeles Copyright Society and is a past Chair of the Intellectual Property and Entertainment Law Section of the Los Angeles County Bar Association. Gerdes serves as a member of the National Academy of Recording Arts and Sciences, and was formerly Chair, Board Member, and Special Editor of Entertainment Law special editions of *Los Angeles Lawyer* magazine, several of which garnered the Western Publishers’ prestigious “Maggie” Award. He has published numerous articles in *Los Angeles Lawyer*, *Billboard*, *New Technologies 101* and *Music Connection* magazines.

KAI FALKENBERG, ESQ.

Kai Falkenberg is the Editorial Counsel for Forbes, Inc., where she is responsible for all legal issues relating to the content of Forbes's magazines and Web sites. She provides regular advice on issues of libel, privacy, copyright, access and reporters' privilege. In addition, she writes on legal matters for *Forbes* magazine and Forbes.com and appears as a commentator on the "Forbes on Fox" program on Fox News. She is a Co-Chair of the Media Law Resource Center's Pre-Publication Review Committee.

Prior to joining Forbes, Kai practiced media law at Davis Wright Tremaine. She graduated from Dartmouth College and obtained her law degree from Columbia School of Law, where she was an editor of the Law Review. Following law school, Kai clerked on the D.C. Circuit Court of Appeals for the Honorable A. Raymond Randolph and worked in the litigation department of Wachtell, Lipton, Rosen & Katz.

JOSHUA KOLTUN, ESQ.

Joshua Koltun is a San Francisco general commercial litigator whose practice has focused on media, intellectual property, advertising/trade practices, unfair competition, privacy/ecommerce, and consumer law. He has experience with trial, appellate and complex litigation in the federal and state courts. He also counsels on licensing matters and reviews content before publication for intellectual property, defamation, privacy and related issues. His pro bono work has included civil rights litigation, a death penalty appeal, and human rights litigation in Zambia, Zimbabwe, Botswana and Swaziland.

He has represented and counseled (among others) software companies, ecommerce sites, publishers and authors (of books, newspapers, magazines, online publications, electronic games, software and databases), network broadcasters, manufacturers (of networking equipment, LEDs, medical technology, jewelry, motorcycles, beverages and cosmetics), local governments, insurance brokers, and religious, educational and charitable institutions.

DIANE KRAUSZ, ESQ.

Diane Krausz is New York-based entertainment attorney specializing in theatre, film and television. Ms. Krausz has represented various businesses, productions and entities, in addition to both well-known and emerging talent, in various business transactional agreements, legal issues and intellectual property disputes. She has been appointed by the Surrogate's Court of New York as a guardian ad litem for the approval of numerous minors' contracts for more than 20 years.

Ms. Krausz is a member of the New York State Bar Association's Entertainment, Arts, and Sports Law Section, serving as the Theatre and Performing Arts Committee Co-Chair. She is also a board member for the League of Professional Theatre Women, the Finance Committee of The Friars' Club and the Advisory Committee of The Women's Theatre Project. She frequently guest lectures on entertainment and the entrepreneur, and will be featured as part of the Practising Law Institute's 2010 program, "Counseling Clients in the Entertainment Industry."

Ms. Krausz can be contacted by email at DKrausz@lwyrsmail.com or on her Web site, www.DianeKrausz.com.

MELINDA L. LEE, ESQ.

Melinda L. Lee is a content specialist, entrepreneur and New York City attorney. She is the Founder and Chief Content Officer for Uncensored Interview, a Web site dedicated to interviewing media influencers and cultural trendsetters. Ms. Lee also serves as Of Counsel for the law firm Johnson & Conway, concentrating on new media law, licensing and rights issues pertaining to content exhibition on emerging platforms and technologies. Prior to this, Ms. Lee was the Head of Content Management & Strategy group for Joost, the innovative online video company. Before assuming her role at Joost, Ms. Lee led the International and Digital Media Team for the Business and Legal Affairs Group at MTV Networks.

Ms. Lee graduated from Rutgers Law School in 1997. After law school, she clerked with Judge Anne McDonnell in the NJ Superior Court for Gloucester, Cumberland and Salem counties. Upon completion of her clerkship, Ms. Lee continued her legal education overseas as a visiting student at Cambridge Faculty of Law concentrating on International Law. Ms. Lee is admitted to the bar in New Jersey and New York State.

GLENN T. LITWAK, ESQ.

Glenn Litwak is a veteran Beverly Hills-based entertainment attorney who represents clients in the music, film and television industries. Mr. Litwak has represented recording artists in all aspects of their careers, including the platinum-selling teen R&B/pop group B2K as well as other minors involved in the entertainment business.

Mr. Litwak is a frequent speaker at music and entertainment conferences around the country and has recently published articles on the music business. He is also an instructor at the UCLA Extension, Entertainment Studies Program, where he conducts a seminar entitled “Self-Defense in the Music Industry.”

He can be contacted by email at glenn@litwakandhavkin.com or through his Web site www.litwakandhavkin.com.

ELIZABETH MCNAMARA, ESQ.

Elizabeth McNamara, a partner at Davis Wright Tremaine in New York City, has more than 25 years of litigation and counseling experience in media and intellectual property law, representing publishers (books, magazines, newspapers and Web sites), television and radio broadcasters, cable companies and motion picture producers and distributors. Her litigation practice includes all areas of sophisticated IP, media and entertainment litigation at the trial and appellate level of federal and state courts, in such areas as libel, privacy, copyright, trademark, prior restraint and reporter’s shield laws.

Elizabeth’s clients include Bauer Publishing, Cablevision, CBS, CNN, Conde Nast, Hachette Book Group, Macmillan, MTV Networks, NBC, New York Times, Random House, Sesame Workshop, Showtime, Simon & Schuster, Time Inc. and Wenner Media.

ABJA MIDHA, ESQ.

Abja Midha is a litigation associate at Patterson Belknap Webb & Tyler LLP. She is active in a variety of intellectual property matters, including trademark protection and false advertising disputes. Prior to joining the firm, Ms. Midha served as a Law Clerk to the Hon. Charles P. Sifton of the U.S. District Court for the Eastern District of New York. Her responsibilities in that role included analysis of complex intellectual property issues.

MONICA PA, ESQ.

Monica Pa is an associate in the New York office of Davis Wright Tremaine LLP. She represents U.S. and foreign broadcasters, magazines, newspapers, and artists in the areas of libel, privacy, copyright, trademark, and other aspects of First Amendment, publishing, media and entertainment law. Pa is a member of the Committee on Entertainment Law of the Association of the Bar of the City of New York, and a member of the steering committee for the New York State Bar Association's Entertainment, Arts and Sports Law Section. She was previously a law clerk for the Honorable Rosemary S. Pooler, United States Court of Appeals for the Second Circuit. She graduated magna cum laude from New York University Law School, where she received the Walter Derenberg Prize for Copyright Law.

DEBORAH PRINCIPE-LAKE, ESQ.

Deborah Principe-Lake has more than ten years of experience in both cable and broadcast Standards, Practices and Compliance and has worked on several Emmy Award-winning shows. Currently Vice President, Standards & Practices for Comedy Central, Spike TV and LOGO, she oversees all linear, consumer products, wireless and broadband content for all related entities. She worked as VP, Advertising Standards and Program Compliance, at NBC and as Senior Director, Standards & Practices—Original Programming, at NBC. She has her J.D. from New York Law School and is currently working on her LLM in International Intellectual Property & Digital Rights at Fordham University Law School.

SAUL SHAPIRO, ESQ.

Saul B. Shapiro is Co-Chair of the Media & Entertainment practice at Patterson Belknap Webb & Tyler. He is a litigator, with a particular focus on complex commercial litigation, as well as intellectual property and First Amendment disputes. Mr. Shapiro has considerable experience with disputes in the media, communications and entertainment businesses. He has won the dismissal of numerous cases on pre-trial motions. He has also been lead counsel in seven trials, and he has been victorious in all four of the jury trials he has taken to verdict. Mr. Shapiro is an experienced appellate lawyer, and has conducted numerous internal investigations. He is a 1986 graduate of Yale Law School, where he was an editor of the *Yale Law Journal*. After law school, he clerked for the Hon. Robert L. Carter in the Southern District of New York, before joining Patterson Belknap.

Mr. Shapiro is recognized as a leading practitioner in *Chambers USA*. Euromoney/Institutional Investor's 2009 *Benchmark: America's Leading Litigation Firms and Attorneys* lists Mr. Shapiro as a "Litigation Star" for New York. He has also received Martindale-Hubbell's highest "AV" rating and has been named by *Super Lawyers* in the area of general litigation.

ANDREW J. SIEGEL, ESQ.

Andrew J. Siegel is Vice President and Assistant General Counsel for CBS Broadcasting Inc., representing CBS's owned and operated television stations. He is also primary counsel for CBS Television Stations' Digital Media Group. Prior to joining CBS, he was Law Secretary to the Honorable Theodore R. Kupferman, Appellate Division, First Department and an associate at the law firms of Shea & Gould and Fly, Shuebruk, Gaguine, Boros and Braun. Licensed to practice law in New York State and New Jersey, he is a graduate of St. John's University and the Benjamin N. Cardozo School of Law. He is the author of a number of articles on broadcasting, cable television and the Internet.

LAN P. VU, ESQ.

Lan P. Vu is an attorney practicing in Beverly Hills, California. She specializes in entertainment, intellectual property, class actions, and complex business litigation. Ms. Vu earned her B.A. from the University of California, Irvine, in 2001 and her J.D. from Loyola Law School Los Angeles in 2004.

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