

FISHERBROYLES

A LIMITED LIABILITY PARTNERSHIP

BUSINESS BUYERS (AND WEBSITE OPERATORS): GO THROUGH THE HOOPS SO YOU DON'T GET STUNG... BY COPYRIGHT CLAIMS!

Anyone operating a website or considering the acquisition of or an investment in a business which does so, needs to understand the exposure to claims of liability for copyright infringement, and how to mitigate that risk. Under the legal theory of secondary infringement, one who does not themselves infringe anything but contributes to such effort by another may face substantial liability, especially if – as is usually the case – the actual infringer cannot be found or is judgment proof (broke!). A provision of federal law known as the service provider safe harbor of the Digital Millennium Copyright Act (the “DCMA”) provides a process intended to reduce such exposure.

For example, if a company operates a website which accepts public posts, and some of those posts include copyrighted movies, texts or music, the company may be liable to any aggrieved copyright owners unless it has “jumped through the proper hoops.” Those considering an acquisition or sale of their own company must address in their due diligence process and in the warranty and indemnity negotiation whether the requisite hoop jumping has occurred.

You should determine whether your target company has taken the steps described below ... and do these things with your own site(s). Key items to be addressed during both due diligence and ongoing website operation include:

- **Agent Designation.** The website must include contact information for a specific person who is to receive infringement notices. Such person must also be designated in an online filing with the US Copyright Office – and re-designated even if a paper filing was previously done.
- **Proper Terms of Use.** Web policies must clearly state that no one may post infringing material, or material which is obscene, defamatory or an incitement to violence.
- **Filtering Technology.** While not necessarily required, it is legally and commercially preferable if the site host maintains a screening device to identify and reject submissions which contain “signatures” provided by copyright holders. Major court cases indicate that judges favor those who use this technology and make note of those who don’t.
- **Prompt Removal.** The site operator must be able to establish that it has acted promptly and consistently to remove material which is the subject of a credible notice of infringement.
- **Moderation.** While moderation in some senses of the word may be a desirable trait, moderation (meaning “management”) of a site’s content carries certain risks. If an operator designates one or more persons to oversee a site to keep out “bad stuff,” those persons must limit their efforts to genuinely infringing or otherwise unlawful material, and NOT exercise editorial discretion to keep the site “interesting” or “fresh” – i.e. ensuring discussion of only trending topics. Recent case law indicates that moderation that goes beyond avoiding infringing or unlawful material is a no-no for those seeking to limit their legal exposure. Management of content may be helpful for other legal and commercial reasons, but may have unfavorable legal consequences in this area.

FISHERBROYLES

A LIMITED LIABILITY PARTNERSHIP

- **Be Discrete ... but Don't Use Discretion.** The DCMA indicates that when the site operator acts as something other than a conduit for the public submissions, and uses any sort of editorial discretion, whether based upon personal preference, desire to keep the site interesting, or otherwise, it loses the benefit of legal protections otherwise available. While some technical measures to prepare a digital file for placement on a site are often necessary, these should be kept to the bare minimum.
- **Watch the Record.** Reference to records may suggest vinyl LPs and sound archaic in this digital age, but we are referring to records of internal communications. The US Supreme Court has made clear that it will not look kindly upon site operators or other technology vendors who leave an email trail which treats copyright matters with disdain, or worse, knowingly allows the preservation of an infringing post, because it is "grabbing eyeballs." As we made clear last month, email is often a smoking gun in litigation.
- **Kick Out the Bad Actors.** Both statutory law and common sense make clear that when you are dealing with someone who continues to post infringing material, which occurs with distressing frequency, you have to permanently bar them from the site. Considerations of good customer relations or resource allocation will NOT help you if there is a legal challenge.

Finally, the posting of materials to a web site can raise intellectual property issues beyond copyright. For instance, unauthorized recordings of concerts or other live musical performances may also raise issues and compliance concerns under federal anti-bootlegging provisions. Also, website guidelines are needed to handle and protect against third-party posts that may violate trademark, publicity and privacy rights.

No one wants to walk into a hornets' nest of legal claims when they buy a business or simply continue to operate one. In today's environment, there are many hornets' nest out there for buyers, and our corporate partners are happy to work with you to discuss the appropriate "bug spray" to use to deal with all of them.

If you would like additional information, please contact any of the following FisherBroyles partners:

Atlanta

Carl Johnston
(404) 330-8179
carl.johnston@fisherbroyles.com

Los Angeles

Steven Papkin
(310) 415-6254
steven.papkin@fisherbroyles.com

Chicago

Marty Robins
(847) 277-2580
martin.robins@fisherbroyles.com

FisherBroyles, LLP — Cloud-based. Not Virtual™

Founded in 2002, FisherBroyles, LLP was the first in the US, and now the largest full-service, cloud-based law firm in the world. The Next Generation Law Firm[®] has grown to approximately 200 attorneys in 21 offices nationwide. The FisherBroyles' efficient and cost-effective Law Firm 2.0[®] model leverages talent and technology instead of unnecessary overhead that does not add value to our clients, all without sacrificing BigLaw quality. Visit our website at www.fisherbroyles.com to learn more about our firm's unique approach and how we can best meet your legal needs.

These materials have been prepared for informational purposes only, are not legal advice, and under rules applicable to the professional conduct of attorneys in various jurisdictions may be considered advertising materials. This information is not intended to create an attorney-client or similar relationship. Whether you need legal services and which lawyer you select are important decisions that should not be based on these materials alone.

© 2018 FisherBroyles LLP