

Sizzling Content, Legal Fires



By *KENNETH GOLDSTEIN* and
ANTHONY DOLCE

Sure, content's king. But it can also get dethroned by costly litigation. Here are some solutions that can help prevent lawsuit devastation.

A radio talk show host makes some sexually charged comments about another well-known public figure and former dating partner and calls her a "con artist." She sues the host and his former employer for defamation, invasion of privacy, intentional infliction of emotional distress, and negligent hiring/supervision.

Police arrest a man after he burns a gay pride flag at a Pride Parade. A television station broadcasts the occurrence, reporting that violence erupted, a fight occurred, and the man would be charged with a felony. The man sues the station for defamation.

Two police officers are accused of committing sexual assault. A local television news program broadcasts details of the allegations, including the officers' names. The program also shows the officers refusing to comment outside of their homes. The officers sue, alleging invasion of privacy and intentional infliction of emotional distress.

These real-life stories exemplify the kind of double-edge sword that content can present, when media outlets ride the fine line between attracting significant ratings, and major attention in the courts.

Media liability issues – which sometimes are also First Amendment issues – have long been an adventurous area. But in these litigious times, which seem to be punctuated by an anti media mentality, the trend toward edgy content only exacerbates things.

Although the First Amendment protects the right to freedom of expression, it does not, from a business perspective, mandate financial assistance to the media to fend off litigation, whether or not it has merit.

The three “dark clouds” described above all had a silver lining for the broadcast outlets involved: they were dismissed in court. Looked at another way, none of the broadcasters in these cases did anything wrong in the legal sense, but they were sued anyway.

Many companies – not just media organizations – overlook the simple idea that you don’t need to do anything wrong to be sued, and that regardless of the merit of the suit, legal defense costs and possibly settlement costs must still be paid.

It’s not uncommon for defense costs in media liability cases to top \$100,000. The most common media liability lawsuits involve allegations of defamation, invasion of privacy, copyright infringement or trademark infringement.

When you consider the potential impact of a media liability lawsuit – including out-of-pocket dollars, time and how the incidents affects a company’s reputation – the importance of managing this risk becomes very apparent.

Given the litigious climate, it’s no longer a matter of if a media organization will face a liability lawsuit, but when. Fortunately, it’s possible to take numerous steps to help reduce the threat.

Guarding Against Lawsuits

Often, all it takes are “common sense” measures in order to help head off potential media liability suits. Here are some risk management best practices:

- Avoid programming that includes aggressive or outrageous content (as might be the case with morning “drive time” radio programming).
- Obtain the necessary licenses, consents, and releases from content providers. Make sure the nature of the permission received is well understood by management and filtered down to the appropriate parties.
- Maintain tight controls on newsgathering practices. Involve management at a high level to give oversight when controversial content is contemplated. Appropriate in-house and/or outside counsel should also be involved.
- Have a policy for vetting the accuracy and appropriateness of unsolicited information, including ideas, articles, and story lines.
- Categorize content on a scale from “fairly innocuous” (low risk) to “potentially controversial” (high risk). For example, a cable network might categorize home and garden programming as a low risk, community access programming as a medium risk, and gossip or exposé-type programming as a high risk.
- Match your staff’s level of oversight expertise to the level of risk of the content. High-risk content should have “more eyes” reviewing the subject matter before airing. Inexperienced staff should begin with low-risk material and be properly supervised.
- Develop your staff. The more experience and knowledge your employees have, the less likely their actions will result in a lawsuit. Therefore, engage in-house counsel or outside counsel to conduct training on legal issues pertaining to libel, privacy, intellectual property and other relevant areas of media law, and encourage continuing education. (Associations such as the BCFM that represent broadcasters often provide courses, for example.)
- For live broadcasts, use a delay device. Live broadcasts should also be overseen by experienced employees. Don’t be afraid to pull the plug on a live segment that appears to be going in the wrong direction.
- Use appropriate disclaimers when disseminating content containing advice or technical information that viewers may rely upon.
- Include a privacy statement on your organization’s Web site containing information about the potential use of information that’s collected from consumers during contests, or when giving them access to streamed content, or when they purchase merchandise online. Ideally, don’t use or disclose

**Many companies
– not just media
organizations
– overlook the
simple idea that
you don’t need to
do anything wrong
to be sued.**

Often, all it takes are “common sense” measures in order to head off potential media liability suits.

customer information. However, if you do, give up-front notification regarding the nature and extent of use. In addition, have customers acknowledge the terms and conditions of the privacy statement.

- If you receive content from third parties, ensure a proper contract that tenders defense and indemnity to the third party and includes representations and warranties with regard to originality of content, non-libelous material, non-infringing content, etc. Also require independent insurance, if possible and/or realistic.
- Obtain appropriate waivers from other parties in order to limit your organization’s liability in certain circumstances. However, also note that while waivers may be helpful, they are not “bulletproof.” A “waiver defense” may give rise to questions regarding lack of appropriate consent, fraudulent inducement, and/or whether the waiver was appropriately broad enough for the given situation.
- If your content includes an error, correct the error or retract the content in a timely and prominent manner. Retractions and corrections, handled correctly, can be an effective means to avoid litigation or mitigate damages. If appropriate, involve outside counsel to provide independent judgment.
- Have a document retention policy, and ensure proper adherence to it. In addition, properly safeguard documents related to a lawsuit—such documents

can mean the difference between an early dismissal and prolonged, potentially expensive litigation that results in a trial.

- Ensure a proper understanding of and adherence to pre-broadcast review and general clearance procedures. Strong internal/external vetting, including following the advice of counsel, can help catch content problems before they occur and potentially act as a viable defense in litigation.

These best practices may help avoid a lawsuit. However, mistakes may still happen, and people sue over mistakes and perceived mistakes. Liability insurance can help defray the costs associated with such a lawsuit.

With the help of a trusted insurance agent or broker, conduct a risk analysis and review your current media liability coverage to ensure that your most important liability exposures are covered. Because important gaps in your coverage can spell financial disaster down the road, one important feature to look for in a media liability insurance policy is “all risk” coverage—some media liability policies cover only the specific risks that are spelled out in the policy and exclude all others.

Legal Responses

Should your organization be sued, it should be prepared to take several actions. And one of the first is to give timely notice to your insurance carrier in order to properly trigger coverage.

With your insurance carrier’s guid-

ance, you’ll be able to select proper legal counsel, being careful to match the legal experts to the type of case at issue. Working hand in hand with a qualified attorney and your insurance carrier, it will be possible to evaluate the allegations asserted and potential defenses available.

Appropriate response strategies can then be conceived, including decisions on whether the case should be tried, or whether your organization should try to negotiate an early exit from litigation. An insurance carrier’s claims specialists can assist in developing the most effective strategy. Good media liability insurance carriers have extensive experience and knowledge of claim trends as well as alternative dispute resolution techniques.

Evaluating the reasons why a lawsuit occurred can provide some important lessons. Certain procedures that previously may have seemed appropriate may be deemed problematic. Look for systemic issues that could recur (and, in turn, make your organization an uninsurable risk) and change them.

Although content will always be king in the broadcasting business, media organizations need to be aware that even well-intentioned content can bring on a reign of terror in the form of a media liability lawsuit.

Regardless of whether such a lawsuit is legitimate or groundless, it could potentially cost hundreds of thousands of dollars in defense costs alone—as well as settlement costs and uninsurable penalties. The guidelines above provide some general guidance to help prevent such a lawsuit, but are not a substitute for legal advice. By establishing a strong risk management program based on recommendations from general counsel and on industry best practices, media organizations can help reduce the chances of legal action and mitigate losses when lawsuits happen.

Kenneth Goldstein is a worldwide media liability manager and Anthony Dolce is a senior errors & omissions claim supervisor at The Chubb Group of Insurance Companies. They can be reached at: goldstek@chubb.com and adolce@chubb.com.