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Intellectual property issues in film & interactive media

“CONTENT IS KING” MAY BE AN OVERUSED PHRASE IN TODAY’S MEDIA WORLD, BUT THE KIND IS MORE POWERFUL THAN EVER BEFORE, AND THE PALACE RULES ARE CHANGING. THESE DAYS, CONTENT USERS AND CREATORS MUST NAVIGATE AN EVER-GROWING WEB OF INTELLECTUAL PROPERTY (IP) ISSUES.

Specifically, the interactive nature of the media content creation process has had a dramatic effect on IP rights of the participants. Recently, significant changes in the nature of media content creation, content delivery methods, and celebrity status have contributed to shifts in the way content is created and monetized.

Three IP leaders in the legal industry sat down with Inside Counsel to explore practical ways for companies to protect themselves in today’s rapidly changing media landscape.

According to IP Partners at Akin Gump Strauss Hauer & Feld Chad Everingham and Michael Simons, many brands including Lexus, Red Bull, and BMW have become advertisers as well as content creators. Celebrity status isn’t just confined to Hollywood, as communication innovations allow online creators to gain exposure to billions of potential fans. Although traditionally, content has been channeled through studios to television and theaters, YouTube and Vine provide an alternative for content creation and distribution.

“These changes have resulted in an environment where almost everyone is connected,” explained Simons and Everingham. “Through the new technology, traditional advertising is easily skipped, creating a challenge for traditional advertising models. However, these same technologies allow for the development of niche audiences who can provide real-time feedback to content creators, allowing for a constant feedback loop and opening up opportunities to target very specific audiences.”

So, how does a company protect its IP rights when creating branded entertainment? According to Chris Spicer, entertainment partner at Akin Gump, a growing method of advertising is brand integration. This can be viewed as a three-sided deal, with the brand, producer, and talent each having distinct interests to protect.

He said, “The brand wants exposure and protection against unfavorable depictions, the producer wants to protect the quality and integrity of the content, and the talent wants to protect his or her image.”



Former U.S. Magistrate Judge **Chad Everingham** is a partner in Akin Gump’s intellectual property practice.

Often, a brand must obtain a license from the producer to use clips from content in which the brand appears and frequently the brand requires the consent of the talent as well. A brand must also give the producer broad, perpetual rights to use the brand’s name, logo, marks, and product in the content.

“To protect its own interests, the brand should be as involved in the production as possible,” he explained. “This includes carefully reviewing scripts and scene pages where the brand is intended to appear,



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Michael Simons
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negotiating clear parameters for depiction, mention or integration, seeking limitation of use of the brand within content, and negotiating for exclusivity and minimum guaranteed integration.”

The level of control that a brand will have in protecting its interests also depends on the bargaining position of each party. And, protecting the talent's interests includes seeking pre-approval in talent agreements, pursuing monetary skin in the game, including equity and revenue sharing where available, and considering FTC guidelines on endorsements to fully understand the scope of activities before talent engages in them.

“Internet personalities with online followings should be doing a few key things to make sure they protect their rights while trying to monetize their online status by connecting with brands. Internet

personalities are often both the talent and the producer of the content. This means that they should consider a broader scope of interests than either the producer or the talent in a traditional brand integration model,” said Spicer.

According to Spicer and Simons, they need to consider the impact of the brand integration on their personal image and on the content being produced. “Working with the brand from the outset of the agreement to define the scope of the anticipated activities and possible tie-in advertisements limits the potential for problematic litigation down the road,” they explained. This may include defining the parameters for depiction, mention, or integration and carefully negotiating exclusivity and minimum guaranteed integration terms.

Today, it's also a very difficult problem for film producers to protect themselves from piracy and illegal movie downloads. Everingham explained that while there was some success in fighting the early file sharing entities such as Napster and Grokster, modern BitTorrent technologies have made it harder for film and television producers to protect themselves from illegal downloads.

He said, “Recent court decision make it difficult for producers to rely solely on IP addresses to combat piracy, and this reality, among other factors, makes the cases expensive to investigate. Even non-legal approaches, like the use of digital rights management technology, have been overcome by software designed to defeat them.”

Ultimately, there are few strong avenues for preventing online piracy of content. Some content producers have attempted to embrace the buzz generated by massive piracy of their content. Others suggest that the parties who steal content were unlikely to buy it in the first place. These responses, however, are attempts to put a positive spin on a significant ongoing legal challenge.

According to Spicer, content creators should only work with trusted vendors and minimize sending out screeners or links prior to the release of a film or show. Content creators should follow a strict protocol with international distributors and force them to do their subtitling and dubbing at approved central lab. Distributors should only be allowed to have a DCP (digital cinema package) that is encrypted. If they want to screen the film they have to get a key from the content creator, and the content creator should only keep it open for only a certain window of time.

Additionally, content creators can hire a service of which there are several to monitor the internet for a title. Once a title appears as available, a protection campaign is started. Some services track and send take-down requests to the uploader, but those tend to be ignored. Some companies bury the link so that anyone searching for the film online will have to scroll through dozens of pages before finding a link that works.

Further, if the film is in release in one territory and foreign countries don't release for several months after, then the film will be online and available to the pirates who will create subtitles in their local territories. By the time the film is properly released in the local territory, a big part of the audience has already seen the film. As a result and to the extent possible, producers of films can try to release on the same date across as many worldwide territories as possible. Once a film is released on DVD or VOD anywhere, it is pretty much game over. It is impossible at that point to stem the flow. Content creators can continue to try to bury the links, but it's a finger in a dyke. The real goal is to keep the film offline until the DVD/VOD release.

Spicer explained, “If film producer can do that, then it is a success (or at least a partial success).” ●