

Challenge: Publisher wanted author of book to conduct lecture tour on various topics from book. The book was recently published by Avekta's Creative Director.

AUTHOR: I want to open this seminar with one little, frightening and very true fact:

"Anyone willing to pay the costs, can sue anyone for anything at any time."

The statement above is true. Its implications are significant. You can smile at someone in a bar and the next morning that person could sue you for everything you own. Anyone. Anytime. For anything. Take asbestos litigation, for instance. Last year, approximately 91,000 lawsuits were filed against corporations. Of those 91,000 cases, only 6% of the claimants actually suffered from an asbestos-related illness. Nearly all the remaining claimants demanded compensation for *anxiety* over the risk that they *might* have asbestosis.

We live in what is called a **litigious** society - that is, a place where people are highly inclined to sue, or litigate at the slightest provocation – and the United States of America, with over 1,050,000 lawyers licensed to practice, is the most litigious of all countries on earth.

So how do you avoid getting sued, or worse, losing a suit and everything you own? First, there are blessed facts of life that actually limit the tendency to sue. Without these limitations, we'd all be in court every day of our lives. These factors are:

1. It costs time and money to sue somebody.
2. If a case is frivolous or without merit, it is difficult to win and you can face sanctions
3. The possibility of reward must outweigh the cost of proceeding

Think about this. You design a website. Someone reads it and gets worried about what he reads. He sues you for a million dollars because he can't sleep at night. You have to hire a lawyer to defend yourself. The case takes a normal amount of time to come to court, say three years. By the time you face the judge, you've paid thousands in legal bills and you're broke. Later, you learn that the plaintiff was a close relative of your chief competitor.

Here's another scenario. You've designed a website for a large click-and-mortar book chain. Six months after you've finished the job, the client calls you to tell you that a hacker has invaded the site you designed and shipped \$50,000 worth of medical textbooks to a nonexistent Chinese university. The client says a bug in your software made the theft possible.

Sound like science fiction?

Relax. The stories I've told you here are true. But they haven't happened to you. Not yet.

Generally someone will sue you if they believe that you have caused them serious damage and/or financial loss. As noted above, the cost of bringing suit is large and not usually reimbursable, so it can be assumed that your damage to the suing party must be in excess of the cost of bringing the suit. The various causes for a suit within the media business, therefore, may be listed as follows:

Damages Due to Content

As a media producer, you should be aware that the content of your work carries with it certain liabilities or risks. These risks can be said to have derived from the content of the work itself. Today's media includes many forms of content; text, music, photographs, video, programming, designs, concepts, etc, all of which are considered **intellectual property**. Few producers are capable of creating all forms of content themselves. And even in so doing, the creation may not be entirely original. Where producers acquire content, the ownership of that content must be identified, verified and properly compensated.

Identity of ownership is not always simple. Rights of ownership can be sold, bestowed or lost by the original owner or divided among owners. Ownership can be incomplete, such as when a presumed owner incorporates the intellectual property of others into his work without proper compensation and then attempts to sell that work.

Often the search for the owner of a particular intellectual property can be complex and time consuming. Searches are best commenced with the organizations that serve each media. For instance, the owners of most published music may be found at ASCAP or BMI after only a few minutes. The US Library of Congress database is also an excellent place to research owners of copyrights, trademarks and service marks. When all else fails, the producer may wish to consult an **acquisition counselor** who is experienced in such searches and will usually quote a reasonable fee for research and negotiation of the rights you require.

You risk significant damages if you produce work that contains the intellectual property of others whose rights have not been properly acquired. These rights include copyright and privacy right.

I'll assume you know what copyright is, but what about this "Right of Privacy?"

When you create a production that incorporates a photograph, videotape, film or portrait of an individual, the law recognizes that you owe **good and valuable consideration** to that individual for the rights to use his or her likeness. In other words, you have to pay money to and get permission from anyone whose likeness appears in your work.

The amount of money is inconsequential. One dollar will suffice if the individual accepts it. In addition, the person must sign a document, often called a **release**, wherein the

individual grants permission for the use of his or her likeness. It's also a good idea for someone to witness the signature by adding a second signature to the release.

Right about now, perhaps you're starting to worry about your employees going off and doing something rash that would bring unplanned risk into your enterprise. You might ask yourself, "Is there some kind of insurance for content risks?"

Yes, there is. You can purchase insurance to protect you from financial resulting from damages due to content. Such risks are generally covered under an **Errors & Omissions** (E&O) policy. Such policies are relatively expensive, however. Because E&O policies insure against damages that can result in a great deal of money, they are usually beyond the budget of a corporate media producer. Expect to pay over \$10,000 in premiums for a home video production for sale to the general public, for instance.

In addition to the cost, the applications for E&O policies require you to supply significant proofs or **due diligence**, that your content is not risky in the first place. Having executed such due diligence, you may come to believe that you don't really need E&O insurance. Finally, the **deductible** for an E&O policy - that is, the amount of money that you pay out of your pocket in case of a lawsuit, before the insurance coverage takes effect - may be larger than you can afford. In the case of the \$10,000 E&O premium noted above, the deductible was \$10,000.

Cases where E&O insurance is practical and necessary are those where a client releases your media into the general public and where the content of that media is risky. For instance, if a client were paying you to design a customer training CD to operate a dangerous power tool, you should ask the client to cover the cost of a complete E&O package with adequate liability coverage in case a customer injured himself after viewing the CD. The client should also agree to include your company within the umbrella of the insurance policy's protection.

In addition to the insurance for risks of content, there is also insurance available to cover the risks commonly associated with producing media. This is called, Production Insurance.

Various risks exist which may affect the product you have contracted to deliver to your client. On location, a piece of equipment may fail to work. A roll of film or a videocassette may be faulty, causing the loss of valuable footage that may not be discovered until you return home from a distant location. A computer hard drive may crash, causing the loss of hundreds of hours of work.

All of these risks are covered under the insurance category known as Media Production Insurance. Underwriters with media production experience have developed comprehensive plans that cover a wide range of risks, many of which you may never imagined. At the very least, it would benefit you to examine such policies and learn what kinds of risks exist in your business. Media Production Insurance is not cheap, but it is necessary, especially if you are going to work on location.

Many a city will require that a production company apply for and possess a **production permit** before it can work in the public places of that city. In order to obtain a production permit, the city may require that the production company have an insurance policy in force for workmen's compensation and personal liability. The New York City Mayor's Office of Film, Theatre & Broadcasting for instance, which is the authority that issues production permits in the Big Apple, requires proof of workmen's compensation and a minimum of one million dollars per incident of personal liability insurance.

Representations

When you produce a work of media, it is assumed that the work will – well, work. Let's say you are commissioned to design a website that will serve as the Internet commerce engine of a book publisher. Your proposal acknowledges a deadline to have the site functional and launched. That is your **representation**. Then, you blow the deadline.

You have breached your agreement with the publisher. Your contract represented that you would have the website functional by the deadline. Now, the publisher may claim damages against you. These damages would begin, at the least, with the fees you have been paid or are due to be paid for the website. Then the publisher may consider suing you for **consequential damages** caused directly or indirectly by your failure to meet the deadline. Consequential damages are damages that a reasonable person would realize would occur, in addition to the cost of producing a nonworking website, should the website itself not be ready by the deadline.

Direct consequential damages could include loss of anticipated business, since the publisher will not be making any book sales through your site until your site is launched. Indirect consequential damages could result if the publisher had obligations with others, such as book authors, shippers, printers etc. who might claim to be damaged by your failure. For instance, a book author who had been promised a banner advertisement on your site, or a shipper who had been contracted to deliver the anticipated sold books, might consider suing your client for damages that were originally caused by your failure. Your client would then turn to you to recoup his damages from the author and shipper who are defined as **third parties**.

Crew Crimes

Employee crime is a growing issue in our country. Such criminal behavior can be internally directed at you and your company, or externally directed at your clients. Employee crime may also be accidental. The most common form of internal employee crime is theft. Theft can range from stealing your software, equipment or petty cash, up to **embezzlement**, where an employee, entrusted with your checking or bank account, steals from your company treasury. As serious as embezzlement, but not in the eyes of the law, is the theft of proprietary data, such as your client database or bid proposals, which a thief could sell to your competition while continuing to appear a loyal employee.

Accidental employee crime is also a growing concern as new, young employees enter our industry without having to "pay the dues."