

Darwin Bruce in The Licensing Law Journal: Evolving Trends in the Production and Distribution of Streaming Media

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Haynes Boone Counsel Darwin Bruce published an article titled "Entertainment Licensing" in the March 2021 edition of The Licensing Journal. Below is an excerpt of the article.

Evolving Trends in the Production and Distribution of Streaming Media

I can still remember the days when I listened to amazing music as records would spin on a phonograph. It also seems like a short time ago when we inserted a VHS tape to view our favorite movie. Times have definitely changed as the media and entertainment industry has evolved to meet the demands and desires of consumers in an expeditious manner with expanded content options. The media and entertainment industry has also been significantly affected by the "new normal" presented as a result of Covid-19. These trends and developments have several legal implications for both the production and distribution of media. It is best to prepare for what lies ahead to maintain business continuity and growth.

Technology advancements have enhanced the ability of all content providers to produce high quality content. Most content providers can be innovative in their approach by using several different production formats as well as developing new ways to monetize their content and expand their number of viewers or subscribers. We have all heard the phrase "cash is king," but it can be argued that in the media and entertainment industry "content is king". Content can often be considered the most valuable asset of such companies. For this reason, it is important that rights to that content are established, maintained, and protected from the point of inception through distribution and monetization.

Tools for Protecting Copyright in Digital Media

An important recent industry development was the signing of new legislation to deter piracy in streaming media. The Protecting Lawful Streaming Act of 2020 was signed into law on December 27, 2020. The new law makes it a felony to engage in mass-streaming of copyright material. The Digital Millennium Copyright Act, which was signed into law on October 28, 1998, was also an important congressional action to address many of the copyright and piracy issues in digital media. This legislation, while controversial in some quarters, may be seen as an extremely valuable tool for those building viable business enterprises in the streaming media industry and operating in compliance with requirements to properly secure intellectual property and avoid infringement. It could also be seen as a deterrent to business expansion for those who find it difficult to manage their intellectual property resources on a broad scale while focusing on risk management and the increased cost of ensuring compliance. The volume of content readily available makes it challenging to ensure a company has cleared all copyright and trademark hurdles in all productions and communications.

Developing a Digital Strategy

Each original content provider should first complete appropriate database searches with the U.S. Copyright Office and the U.S. Patent and Trademark office for any existing registrations to avoid creating content and brands that could conflict with existing rights held by others. If the content provider plans to incorporate any intellectual property owned by others into their materials, it should contact the appropriate parties to obtain written permission or a license to utilize such property. Content providers should not only file registrations with the governing regulatory authorities to protect original content, but they would be well advised to incorporate specific provisions in all contractual agreements that protect and maintain their rights in all intellectual property to which they desire to retain ownership.

There has been an increase in the quantity and variety of video streaming service platforms as well as continued growth in the use of social media for content distribution. Each distribution channel category has its own unique methods and business model. Securing intellectual property rights and avoiding infringement are the key factors in building a successful media distribution platform. Video streaming service platforms have additional considerations. All acquirers of media content are generally aware that they must either secure complete ownership or a license to utilize intellectual property content provided by other parties. The complexity often involves the management of all of the intellectual property content and data secured where there is a large volume of third party content. Obtaining well drafted releases from the original content providers with provisions for indemnification and elimination of liability from all parties with regard to the original content secured can also be challenging.

Many companies have business models designed to produce original content and acquire content from other parties for distribution. One of the most important considerations going forward for such companies is minimizing risk of liability as while continuing to find innovative ways to develop and distribute content. Streaming media distribution companies should take all measures to reduce risks and monetize opportunities by strategically drafting and negotiating all contractual agreements with original content providers as well as all third-party vendors. Companies seeking to expand digital media productions, including social media, should also ensure the contractual agreements with talent and other contracted parties secure the rights to the intellectual property being captured remotely by or on all other party's digital media platforms if any exist.

Pure live stream productions, as opposed to archived live streams or pre-recorded material, could present issues that arise during the production process in real time. Though such productions are produced in real time, it is important to develop a production plan in advance that includes a list of possible third party intellectual property that may be used during the production in an effort to avoid inadvertent infringement on the intellectual property rights of other parties during the creative production process.

Beyond Entertainment: Reviewing Contracts

One must also understand that streaming media is not used solely for entertainment purposes, but also for business development, training, instruction, marketing and advertising, podcasts, and other uses designed to share information with consumers. Therefore, the types of consumers of streaming media could be extremely broad. If a consumer has a contractual agreement in place with a streaming media provider to provide the streaming services for a specific purpose, the streaming media provider should consider drafting and reviewing all contractual agreements to ensure adequate protections are in place to protect it from liability under any "force majeure"

provisions or other performance clauses. These provisions should specifically include a listing of the events that create the inability of performance.

Media and entertainment companies must prepare for the continued growth of streaming media. There is no doubt that the market for this distribution method will be more expansive and varied in the years ahead. New technology will continue to be developed to meet the needs of the market and the desires of consumers. Future developments in the industry may also result in new legal developments to address the issues faced with the new trends. I say let the music play on regardless of the methods used to do so.

To read the full article, click [here](#).