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Can an Editor Go Too Far?

The right to edit is not limitless. Perceived excesses in editorial discretion have spurred a broad range of legal actions. And courts are starting to grow more receptive to these claims.

Consider the following scenarios:

■ A freelance writer (who by day practices law) has an article accepted by a leading national fitness magazine. The editor provides the writer with galleys, which the writer approves. Subsequently, the editor makes extensive, substantive changes to the article—including adding a sentence demeaning a particular consumer product, which happens to be a product of one of the author's clients. Without notification to the writer, the revised article runs, bearing the author's name.

■ The same writer has two articles accepted by a prominent daily newspaper. Without any notice to the writer, the editors (1) insert a statement critical of a past mayoral administration, and (2) refer in an arguably pejorative way to an ethnic group.

■ Our hapless freelancer spends over 100 hours preparing a lengthy scholarly article for a prestigious law review. The law school's practice at the time is to have the manuscript rekeyed into its word processing system. Galleys reflecting the hundreds of typos resulting from that process are forwarded to the author, who painstakingly marks them up and returns them to the journal, which acknowledges their receipt. The article appears in an issue distributed to subscribing lawyers (including colleagues and clients), judges, law schools and law libraries around the world. Virtually none of the corrections are made.

Fortunately for the publications involved, none of these real-life scenarios resulted in litigation. (They did, however, prompt some rather pointed dialogues. Indeed, the third necessitated the costly revision, re-publication and re-distribution of the entire issue, with an explanatory letter from the publisher to subscribers.) But if they had resulted in litigation, could any of the claims been successful? Possibly. Despite what some may think, while editors certainly have the right to make reasonable edits, the bounds of editorial discretion are not limitless. There may be points beyond which an editor and his or her publication may be found liable for damages to an author.

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The range of claims

Plaintiff attorneys are a creative lot, and they can be counted on to come up with novel claims or novel applications of traditional claims when they sense a deep pocket nearby. Thus, a broad range of actions have been brought in response to perceived excesses in editorial discretion, including alleged copyright violation, trademark violation, unfair competition, breach of contract, misrepresentation and even libel. In addition, efforts have been made to have American courts recognize so-called "moral rights" of creators, a concept that has been extensively recognized in other countries.

The danger in deletions

Under extreme circumstances, deletions of content can support a claim. In the landmark media law case of Gilliam v. American Broadcasting Companies Inc., the United States Court of Appeals for the Second Circuit ruled in favor of the "Monty Python" troupe in their action seeking to prevent rebroadcast of heavily edited versions of their programs.

The alteration consisted of deleting approximately 27 percent of the show, including the climax of segments or essential elements in the schematic development of their story lines. These had the effect of rendering some of the routines unfathomable. The Court noted that copyright owners generally have the right to control how their works are presented to the public. It concluded that unauthorized changes in a work that are

so extensive as to impair the integrity of the original work may constitute copyright infringement, as well as cause injury to the creator's professional reputation.

Certainly the facts of that case, particularly the magnitude of the deletions and the receptiveness of the Court to find a valid cause of action, were unusual. And that Court even agreed that normally a degree of latitude in making changes is afforded. Still, it provides a cautionary lesson: One can go too far in paring down a work, and should be sensitive to the effect such alterations may have.

Typo tyranny

Can a publication face liability for typos? Perhaps, but in a recent case involving a law journal, the Court rejected the claim under the facts presented. In Choe v. Fordham University School of Law, the plaintiff/author claimed that the *Fordham International Law Journal*'s alleged "mangling" of his article through numerous substantive and typographical errors made it depart so much from his original work that it was a violation of federal unfair competition/trademark law, prohibiting "false designation of origin," for the journal to refer to him as its author.

The United States District Court for the Southern District of New York rejected the author's claims, finding that the "departure" was not as significant as the writer alleged. (It presumably did not help his case that, as the Court observed, the complaint and affidavit submitted by the author in the lawsuit were themselves riddled with typos.) The decision was affirmed on appeal.

What about moral rights?

In Gilliam, the Court found justification for claims that the plaintiffs' work had been "mutilated" as a result of the editing. It noted that such an assertion "finds its roots in the continental concept of *droit moral*, or moral right, which may generally be summarized as including the right of the artist to have his work attributed to him in the form in which he created it."

The Court ruled for the plaintiffs despite conceding that "American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors." Instead, it invoked the "false designation of origin" concept, noting that to "deform [the author's] work is to present him to the public as the creator of a work not his own, and thus make him subject to criticism for work he has not done."

The receptiveness of courts to moral rights claims are likely to increase over time. In addition, legislative recognition of such claims is evidenced by the federal Visual Artists Rights Act of 1990 and the fact that several states have enacted some form of moral rights legislation. However, these statutes generally would not currently extend to the magazine context, particularly as to articles.

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Steering clear of liability

There are a number of steps you can take to protect your magazine. First, make sure that the changes you make are accurate, and have not added typographical or substantive errors to the article. Recognize that editorial discretion does have limits. Legal concerns aside, you probably don't want to alienate your valued writers. If you believe an article requires massive editing, consider not accepting/running it, or ask the author for a re-write.

Second, if you are contemplating significant deletions or substantive changes, let the author know what they are, possibly through providing galleys, and try to obtain his or her consent, preferably in writing. A written record memorializing that what you proposed was approved can be quite helpful down the road. And if your author raises a stink, at least you know at a time when you can make the decision whether or not to go ahead, or to undertake further negotiations.

But if you get approval for what you have proposed, don't then do something way beyond that. Similarly, if for some reason (perhaps for a particular celebrity author) you have agreed not to make any edits or to make very limited edits, don't breach that agreement.

Probably the simplest way to dispose of this issue is to incorporate a specific provision addressing it in your written contract with the freelancer. Some contracts affirmatively specify that the editor or publisher has broad power to edit and otherwise change the article. One example utilized by a leading in-flight magazine was the following: "Seller agrees that Buyer has the right to edit, abridge, revise, augment, title, or otherwise change the Work. Although Buyer may provide Seller pre-publication galleys for review, and although Buyer may consider Seller's views, Buyer has final and ultimate say over whether any, and, if so, what, additional edits, abridgements, revisions, augmentations, titling, or other changes may be made."

Some contracts further provide that the author agrees to rewrite or make such changes in the work as the editor or publisher may reasonably request. Some also note that publication or use of the article is solely at the discretion of the editor or publisher, and that the magazine is under no obligation to publish or use the article.

The precise language appropriate for your situation will depend on your circumstances, including your relationship (and leverage) with your authors, and the scope of your anticipated modifications.

In the absence of a contractual provision on point, some courts have looked to "custom and usage" in the business to determine the relative rights. Even where the contract addresses the issue, if it does so in a less than comprehensive way, the courts will still look to such industry customs for guidance.

In one case where a contract provided that the publisher reserved the right to edit or otherwise change the work as the publisher found reasonably necessary, the court concluded that if custom and usage limited the expression "edit and change" to "reasonable modification," the author would prevail where very substantial changes were made. □

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