

ARE YOU A NEW MEDIA LAWYER?

A LOOK AT WHO THEY ARE, WHAT THEY DO

By Christopher J. Gulotta, Michael M. Membrado & Alan M. Tarter



Alan M. Tarter

It seems that every attorney and law firm these days wants to be practicing “Internet” law. The country’s most prestigious law firms have established so-called “new media” or “technology” departments to attract and represent, among others, under-capitalized start-up companies run by a new breed of entrepreneur, typically high-octane, 20-some-thing generation X graduates who are confident that their ideas will soon be the next “big thing.” The

new economy is humming along at 56K and no one wants to be left behind as even greater opportunities are springing out of the ever increasing bandwidth. Internet law is the new darling of our industry.

For all of the buzz, however, outside of the high-profile worlds of Sand Hill Road in Palo Alto or New York’s Silicon Alley, relatively few attorneys really understand precisely what practicing Internet law involves. Even fewer are actually practicing it. This article is a behind-the-scenes glimpse of what life in the hyper-speed lane is all about these days. It offers a brief analysis of the characteristics that separate those law firms that are playing instrumental roles in making their clients successful from those that are hoping that their clients will somehow make them successful.

‘SPACE’ GRAB, IPO RUSH

A peek inside the Internet world reveals an environment characterized by extreme entrepreneurial enthusiasm and energy. The belief, whether justified or not, that jackpots await for owners of even the most modestly successful companies has created a new excitement. Not since the Great Land Grab and Gold Rush of the 1800s have so many people been so highly focused on staking a claim for themselves in such a concentrated way, although now the “land” is digital “space” and the “Gold” is pre-IPO equity.

And while the nature of this new medium may seem to the uninitiated to be limitless, space — at least in a commercial sense — is already a scarce commodity. Whether one is talking about domain names or particular commercial markets, the ability to take control and ownership of any given space is becoming more difficult every day. We are all very familiar,

moreover, with the rewards that await those that prove able to buck the ever-decreasing odds for success.

ATTORNEYS AS FACILITATORS

With clients that are relatively less experienced in creating, building and operating companies, but passionately consumed by their objectives and determined to adhere to a cadence that compresses a three-year business plan into a six-month development cycle, the challenges for new media counsel can be daunting. The new media entrepreneurs who find themselves in this new economy seem to understand the new rules better than many of their more experienced counterparts, and certainly more than traditional attorneys. What they are not looking for, in representation, is the traditional stodgy firm with a staffing paradigm and legal “processing” methodology that was designed for a different time.

At the start-up stage, new media clients need a firm that will provide a “toolbox” of value-added services. These clients do not have years to assemble, on their own, all of their professional advisors and strategic partners. Given this time crunch, the most effective firms are those that, in addition to their role as legal counsel, whether acknowledged or unacknowledged, also serve major functions as de facto business consultants, investment bankers, professional team assemblers, managers, strategic power brokers and, like it or not, corporate psychologists. In short, the best firms in this space are those that are facilitators for the success of their clients.

Becoming such a facilitator, however, requires an unusual combination of abilities, skills and talents and a firm’s willingness to rethink traditional billing, staffing and representation methodologies. More than anything, though, a firm’s success in carving out its space in this emerging practice area requires a level of enthusiasm for the whole process, and a fascination with the new technology equal to or greater than that of the clients.

So, what precisely distinguishes a successful new media firm from one that is wandering around in anti-space?

BUSINESS KNOWLEDGE

New media counsel must possess an extraordinarily diverse and highly perceptive grasp of general business know-how and

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insight into the new and fast-changing paradigm for success in the new economy. This is true for essentially the following two reasons: (i) the fact that the “Internet” is not technically an “industry,” and (ii) the profile of the Internet entrepreneur.

Because the Internet is not technically an “industry,” being able to understand the complexities of new and existing business applications on the Web requires a remarkably broad understanding of the offline business world. Remember, what the new media clients are doing, so quickly and creatively, is looking at traditional business, revenue, distribution and production models, and using this digital revolution and the [attendant] technological tools only now available, to deconstruct those models that are “fat,” inefficient or incapable of fully capitalizing on the current business opportunities.

Then, in their place, they are constructing a new methodology designed to more quickly, more efficiently and more fully capture the industry-specific, and more and more, the cross-industry global, opportunities and methodologies that now exist. Consequently, being an effective new media attorney requires the ability to understand and appreciate the subtleties of a wide variety of industries and businesses, and the ability to mentally combine the adaptable processes, methods and trends of such industries and businesses in ways never before contemplated.

As to the profile of the typical Internet entrepreneur, that centers around a technological sophistication. This sophistication, coupled with the absence, in many cases, of significant financial and psychological barriers to entry, has allowed for a majority of Internet companies to be developed by relatively young, less experienced, extremely bright and hardworking entrepreneurs. Attorneys with wisdom in a variety of legal and business areas will be the greatest help to these young entrepreneurs.

‘RIGHT BRAIN’ MENTALITY

New media counsel must possess and demonstrate a certain degree of so-called “right brain” mentality. This business creativity is a prerequisite because the Internet is a rapidly evolving phenomenon for which there is no historic precedent from which to draw conclusions. No one knows exactly what the Internet — or the business environment contained within it — will be or look like once it matures. This is equally true with most of the start-up companies that are vying for a place in the Internet’s evolution.

Due to this fundamental reality, those working with the Internet on any level, including lawyers that are responsible for drafting agreements that will have application and potentially significant financial consequences years from now, must look ahead onto the horizon and creatively imagine what is likely to develop in order to plan for it. Lawyers, as a lot, have never been particularly well known for their creative abilities or their visionary tendencies.

LEGAL DRAFTING SKILLS

New media counsel must possess and demonstrate outstanding and creative legal drafting skills. Because the Internet is such a new, evolving area, there is not an established, or in most cases even an existing, body of tried-and-tested agreements that apply and which can be used as a basis for documenting the many deals that are being made daily.

The ability to construct and draft entirely new state-of-the-art agreements from scratch is critical. Unfortunately, this is not something that they teach in law school, and few lawyers have the benefit of relevant on-the-job training at some point in their careers.

CROSSING DISCIPLINES

New media counsel must possess a strong cross-disciplinary orientation within the law, coupled with a particular strength in the areas of corporate finance and securities. This is true because, although they intend to grow fast, most Internet start-up client companies are relatively small.

Further, dealing with a traditional law firm that services clients on a traditional multi-departmental and tiered staffing model generally proves inefficient for them. What they really need is a close-knit team of experienced attorneys that can serve as their general counsel on all matters, but which can also provide more specialized expertise in particular areas as required. Because most Internet companies are particularly interested in raising capital, and because this is a critical but commonly misunderstood area, corporate finance and securities expertise is essential. Intellectual property and executive compensation expertise is almost invariably required as well.

ENTREPRENEURIAL URGENCY

New media counsel, like their clients, must consistently act with an entrepreneurial sense of urgency. Given the compressed

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start-up period, attorneys too must adopt and maintain an attitude of aggressive prosecuting, and not simply processing, of these transactions. If the attorneys on the team are not equally committed to getting a client where it needs to be and in the same time frame, they can cause fatal disruptions in the momentum otherwise being generated by the client's entrepreneurial energy and, possibly, crucial business relationships.

Another essential function of counsel is that of "deal closer." All too often in representing Internet clients, multiple alternatives (e.g., mutually-exclusive and valuable financing, strategic and/or acquisition opportunities) are so pervasive that many are lost for failure to seize upon them, or many that are pursued, retard the client's closure rate on the ultimate objective.

NETWORK OF CONTACTS

New media counsel must possess and demonstrate a solid network of financial and industry contacts. Now more than ever, Internet clients are looking to and becoming reliant upon attorneys to leverage contacts.

Whether it is in seeking to obtain otherwise inaccessible introductions to potential angel investors, venture capitalists, investment bankers or strategic industry players, the degree to which new media attorneys can provide such high-level access will often be the defining difference in the success or failure of a developing company. And, in pitching their services to such clients, these lawyers will demonstrate precisely how they will distinguish their legal services from those of other firms. Interestingly, financial contacts are increasingly becoming the factor seemingly most heavily weighted in clients' choice of counsel.

BILLING ARRANGEMENTS

It is not uncommon for new media clients — especially start-up companies to offer, or even require, that attorney compensation be tied to the success of the venture, typically in the form of deferred billing tied to a success fee or an equity interest in the start-up. This is particularly prevalent in relation to companies which have yet to secure any substantial initial financing.

On the flip side, the opportunity for a firm to participate in the success of a client venture is fast becoming the ultimate incentive for new media firms. This mutually beneficial dynamic, although riddled with a corresponding risk, is enhanced and fortified by the fact that new media start-ups, much more than traditional

clients, require a close working relationship with their attorneys for many of the reasons discussed above.

CONCLUSION

All of these factors are forcing existing and would-be new media attorneys and firms to become smarter, faster and better. The digital revolution and the emerging entrepreneur, both driven by a new paradigm for success, offer law firms a great opportunity to rapidly develop expertise in this fast-growing area, and to work more closely with clients. From a firm's perspective, the additional reward (beyond creative compensation tied to a client's success) is that the new media companies that do succeed will become the blue chip clients of the future, requiring all the traditional services (albeit provided in a faster, more creative and responsive manner) of pre-digital era companies.

For the practitioner, this phenomenon offers the unique opportunity to make a difference, to participate in heretofore uncharted space, and to stretch his or her substantive, creative and business skills to really put a client "on the map." For most attorneys, who suffer from chronic professional frustration because of their traditional and extremely compartmentalized legal service-provider role, the opportunity now exists, as never before, to become interwoven, on almost every level, into the entrepreneurial process of this digital revolution.

Alan M. Tarter is now a partner of Tarter Krinsky & Drogin LLP.