

MAY 2019

Best Practices for Social Media Advertising

By Amanda H. Wilcox

Social media is growing up, and this means that brands of all sizes and across all industries are using social media as part of their marketing strategy. Customer engagement and brand awareness mixed with some educational content and entertainment in one platform is a great reason to be on social media. Every post and share is an opportunity to drive users to company websites and boost sales, as well as to connect with customers on an emotional level. However, courts have confirmed that the basic tenets of intellectual property law and advertising law still apply. The following guidelines stem from common questions that clients often have in the area of social media marketing.

Get Permission to Share

Content and Images on Social Media Are Not Fair Game

One common misconception regarding social media is that it is acceptable to share or repost content created by third parties without permission because that is the purpose of social media. No one will bat an eye at you sharing photos of the newest baby or pet in the family with your own family and friends. However, when content is shared in a commercial context, the conduct of the company will be subject to a higher level of scrutiny. Social media platforms have terms of service that generally allow content sharing within those platforms, and when users post content, they retain ownership rights in the original content and give the platform the right to use, display, reproduce and sublicense to other users. Users within a platform can share content, but only if doing so does not violate any third-party intellectual property rights or any individual's right of publicity/personality.

Content may have a short shelf-life on a commercial social media page, but once posted, others can share in numerous ways, leaving a trail of evidence. While there are fair use exceptions to copyright infringement, mainly in the news and educational realms, keep in mind that fair use is a defense to infringement. Sharing content without permission in a commercial setting is unlikely to fall under the fair use exception to infringement. Even for news media outlets, fair use is hard to prove when sharing social media content without permission.

In *Otto v. Hearst Communications, Inc.*, a news outlet's publication of a photo taken by a wedding guest was found to be copyright infringement, and fair use was not a defense. See, *Otto v. Hearst Communications, Inc.*, 345 F. Supp.3d 412 (S.D.N.Y. 2018). A famous wedding crasher that goes by the nickname POTUS delighted the newlyweds and guests with his unexpected appearance at a wedding in June 2017 at a venue that he owns: the Trump National Golf Club in New Jersey. *Id.* One of the guests, Jonathan Otto, took a photo of the wedding crasher with his iPhone and texted it to another guest. By the next morning, the photo had gone viral on Instagram and in several media outlets. *Id.* Otto filed for a copyright registration and then brought suit against the media outlets. In rejecting Hearst's fair use defense, the court stated that "the promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use 'news report'" *Id.* at 427, citing *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 557 (1985). "It would be antithetical to the purposes of copyright protection to allow media companies to steal personal images and benefit from the fair use defense by simply inserting the photo in an article which only recites factual information — much of which can be gleaned from the photograph itself." *Id.* at 428. The court went on to ponder why anyone should pay to create or license photos if all personal images posted on social media were free to use by media companies, and granted summary judgment for Otto's infringement claims, while simultaneously denying Hearst's fair use defense. See, *id.* at 428, 437.

Using a third-party text, photo or video without permission, especially for promoting a brand through a commercial social media account, can be copyright infringement. Further, using a photo or video of a person without permission can give rise to complaints for violations of the right of publicity and personality. The use of brand names and logos should also follow established trademark use guidelines in terms of acceptable comparative advertising, and an ownership disclaimer should be included in content for any such use. A good rule to follow is that if permission would be required for use of the content for print, television or online ads, likewise obtain permission to use the content on social media. Keep in mind that attribution alone does not excuse unauthorized copying, and posting content without permission can be copyright infringement, even if you give credit and link back. In fact, giving credit and linking back without permission can also be an admission of and proof of unauthorized copying.

Obtain Proper Releases

A single piece of content can include several different types of third-party intellectual property rights. For example, a photographer may own the copyright in a photo, but people appearing in the photo also need to give permission if there is any way they can be recognized from the photo. Rights of publicity and personality can be nuanced, as some state laws require that you have written consent from any person before using their likeness for any commercial purpose, and the age of consent can vary. Permission should be obtained from artists for any artwork or sculptures appearing in a photo as well.

If photos include any trademarks or iconic products or trade dress of other brands, permission is needed so that people do not mistakenly believe that the third-party brand is endorsing the brand or that there is a relationship between the brands. Even famous landmarks and well-known places, such as the Empire State Building, the Seattle Space Needle (these two buildings are registered as trademarks), and amusement parks and stadiums can be protected IP, so check to see if permission from the owner or registrant is needed before using any images of these for commercial purposes on social media.

Video content can require permission from videographers, editors, and people appearing in the video, as well as from any well-known venues. Even permissions from musicians or music rights agencies are required for songs played in the video. Keep in mind that the video creator may have a license to use a song, but that might not include the right to license to others. “Sync” and “master” licenses are also likely needed.

Whether requesting permission through the platform itself, or by a separate communication, make sure to verify that the person or entity is the original creator and owner of the work. Keeping copies of all permissions is very important, even those obtained through posts or direct messaging, since posts can be modified or deleted. Honor any requests to remove the content if the user later revokes permission.

Get Permission to Embed Other Social Media Posts

Embedding social media posts on websites or blogs can be copyright infringement if done without permission. In *Goldman v. Breitbart News Network, LLC*, photographer Justin Goldman photographed Tom Brady and others on a street in East Hampton, then uploaded the photo to his Snapchat Story. The photo went viral and was shared by Twitter users, after which several

online news outlets published the photo as an embedded Tweet, and a copyright infringement action followed. *See, Goldman v. Breitbart News Network, LLC*, 302 F. Supp.3d 585 (S.D.N.Y. 2018). Goldman claimed that posting to Snapchat was not a public release or license of the photo, and the court agreed that when the news outlets displayed the embedded Tweets on their websites, Goldman's exclusive right to display was violated. *Id.* at 586. Permission should be obtained for sharing photos even as embedded content, since in addition to copyright violations, it may also violate the social media platform's terms, especially when sharing content across platforms.

Follow Permissions Diligently and Comply With Terms of Use

Once the proper permissions are in place, make sure to give attribution when sharing content, and limit use to what was specifically approved. For example, if the requested permission was to share the content on Facebook, it should not be shared on Instagram without further permission. Make sure to include the person's name as the original source of the content and a URL to their original post. If you are using text written by others, make sure to properly quote them. All posts should comply with the terms of use of the originating social media platform and any other platform on which you are posting the content.

Video clips, memes and GIFs are also likely copyrighted material, so proceed with caution. In 2015, Getty Images made headlines for enforcing rights against bloggers posting the "Socially Awkward Penguin" meme, a photo originally taken by National Geographic Photographer George F. Mobley. Also, avoid content that might paint a person in a negative light, show illegal behavior or otherwise be considered offensive to that person. The use of "Success Kid" without permission from his parents for an age-inappropriate product, as he is still a minor, generated litigation in Florida in 2015. *See, Laney Marie Griner v. Jake's Fireworks, Inc. et al.*, No. 6:15-cv-162-Orl-22-DAB (M.D. Fla. 2015). The image was included on the "Back Off" fireworks product, claiming to shoot flaming balls, and injunctive relief against the defendant was part of the settlement later that year.

Think About Truth-In-Advertising Laws

The relationship between social media influencers and the brands that they endorse should be disclosed "clearly and conspicuously," according to a Federal Trade Commission (FTC) press release from April 19, 2017. The FTC sent [90 letters](#) reminding influencers of the disclosure requirements and provided further guidance that disclosing the relationship in hashtags, such as

“#sp” or “#partner” or at the end of a post, is not as likely to be seen or understood by readers. Both brands and influencers could face action for failing to comply. In February 2019, the FTC [announced its first case](#) challenging fake paid reviews, reinforcing the importance of proper disclosure. The FTC’s website, www.ftc.gov, is a great resource that can provide further guidance on properly disclosing endorsements.

Conclusion

Social media posts can raise issues across multiple areas of IP and advertising law. The takeaway from all of these examples is that the traditional rules of IP and advertising law still apply. While some copyright owners do not mind content-sharing for personal use, it is risky to use third-party content without permission in any commercial context.

Amanda Wilcox is a Partner in the Cleveland office of Taft Stettinius & Hollister LLP. She focuses her practice on all aspects of intellectual property, including enforcement of IP rights, management of IP in mergers and acquisitions, and managing international trademark portfolios. She can be reached at awilcox@taftlaw.com.