



Like It or Love It: How Not to Get Pinned (Legally) When Using Social Media to Promote Your Brand

By Philip Nulud

Twitter®, Instagram®, Facebook®, Pinterest® and other social media websites and apps are great ways to interact with friends, family and potential customers. They are great avenues for advertising and promotion of one's business and brand. A brand owner can share their latest offerings, get people excited about new products, develop brand awareness, etc.—the possibilities are endless.

However, in using social media to promote one's business, there are a number of pitfalls that one must avoid. Using social media in relation to a business is not the same as using it for personal, non-commercial use. While it may seem like everything online is fair game, it is not. Just because something is found online does not mean that it is ok to use. Trouble can and does arise rather quickly...

There are three primary legal considerations when using social media and they fall within the realm of intellectual property—copyrights, right of publicity and trademarks. Often times, it is difficult to distinguish whether you are using someone else's intellectual property—one must be cautious not to do so when posting on social media. The issues with using someone else's copyrights, right of publicity and trademark in social media to promote one's business is that one is profiting off of someone else's property that does not belong to them and that can and does create a significant amount of conflict. Profiting from another's property is what separates the use of social media in business from just personal use.

Copyrights protect works of authorship that are original and fixed in a tangible form or medium. This includes photographs, pictures, drawings, designs, songs, poems and other works. Many times, brand owners see pictures of celebrities out in public wearing their clothes on various blogs and websites. Although this can be extremely exciting for the brand owner, it is unwise to share these photos on social media without clearing it first.

Often times, those pictures found online are copyrighted. The photographers obtain copyright registrations for those photos and retain attorneys to protect their intellectual property. Attorneys have been known to use

reverse image search software to find where those photos were posted online. If the photos appear on a business's social media account, they will often times send a cease and desist letter and request compensation of \$7,000 - \$14,000. If you refuse to submit to their demands you will most likely be threatened with a lawsuit against you, or worse, they will just go ahead and file a lawsuit against you. Sadly, while it does seem disingenuous, many times they have a colorable case since their client has a copyright registration and their client's photo was used without authorization for commercial purposes.

How does one avoid these situations? Determine where the photo came from. Get a license for the photo. Look to see if the photo is in the public domain. Do not just repost the photo. This happens not only with celebrity photos, but also with photos that appear to be stock photos online. Unless there is a license that comes with a photo, you should not use what you find online. Feel free to post all the photos you take, but be cautious when it comes to posting photos from unknown sources.

In addition to a potential copyright claim over the use of a celebrity's photo, there could be a right of publicity claim. Right of publicity is the right to use one's name, likeness or identity for a commercial purpose. It applies when someone uses a celebrity name, likeness or voice and can range anywhere from a picture or silhouette to a famous quote. It may create a false and misleading impression that someone is endorsing a product. A famous person does not need to be alive for a claim to be made, their estate can still make the claim for them. The laws vary from state to state and applicable law is determined by where the celebrity resides or died, but as a rule of thumb, do not use the image, name, likeness or even quotes from a celebrity to promote your products. If you would like to do that, contact them, speak with their agent and try to obtain a license or endorsement.

The last social media concern is trademarks. Trademarks protect brands and their identity. Trademarks can be a simple word, slogan, logo, design or even sound. Trademarks are used as source identifiers to help



consumers identify where a particular product originates from.

As a rule of thumb, one does not wish to cause any confusion with another brand owner. Thus, in using social media, be aware of the potential trademarks of others. Do not use anyone's brand name¹. There may be a funny slogan or brand name that you want to make a play on, but if there is a possibility consumers will immediately think of the other brand owner and be confused, then do not do it. It could cause the other brand owner to bring forth trademark infringement claims. It does not take much for someone to send a cease and desist letter.

In sum, while social media is a great marketing tool, exercise caution when using it. One must look to where they are obtaining their posts, pictures and inspiration from and one must review whether their post would cause any confusion with or false association with another. If there are any questions or potential confusion in one's commercial use of social media, then it is best simply not to do it, but if you must, consult with an experienced attorney.



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¹ The only exception in using someone's trademark is in comparing your product to another's. It's part of the trademark doctrine of "fair use". One can use a competitor's trademark (but only as much as necessary to accurately identify the product) to compare their product with another's product.