

Legal Update

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Intellectual Property and Social Media: Protecting Your IP and Avoiding Infringement

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A recent survey reported in *Business Week* showed that 60% of executives surveyed believed that they have a right to know how their employees portray themselves and their company online. Meanwhile, 53% of employees surveyed believed that their employers have no business prying into their social media activities.

What accounts for this gap? The high value that employees place on their privacy rights is surely one factor. Another may be that employees overlook intellectual property and confidentiality issues that arise from social media activities. By implementing an effective social media policy, employers can protect valuable intellectual property and minimize potential liability. In this *Legal Update*, we discuss some of the major intellectual property-related issues that should be addressed in a comprehensive social media policy, including copyrights, trademarks, trade secrets and privacy laws, and ownership of social media content.

Copyrights

Copyright owners are often proactive in pursuing those who infringe their copyrights online, and companies engaging in social media should be equally proactive in preventing liability.

For instance, Getty Images, the provider of stock images and footage, uses advanced “image tracking” technology to detect unauthorized uses of Getty’s images. Although Getty’s website states that its policy is “to turn [unintentional] infringements into licenses, and infringers into customers,” copyright owners like Getty can seek injunctive relief and money damages for each infringing use. Clearly, mistakes can be costly to employers.

Employees who post content created by others should include proper attribution and limit the content they reproduce to that which a court would consider a “fair use” of the copyrighted content. Attribution, however, is not always enough. Some content, such as copyrighted video or sound recordings or social media applications (often called “apps”), generally should not be posted absent permission from the copyright owner. For instance, game developers, including Hasbro, have sued Facebook for offering apps that resemble their games (the lawsuits were dropped after changes were made to avoid infringement).

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Companies should have policies and contact people in place to ensure that their employees do not post infringing content for which their organizations might ultimately be liable. Of course, companies should also police social media sites to ensure that their copyrights are not infringed and be prepared to act in case of infringement. Several monitoring programs are available to assist companies in policing use of their intellectual property.

Trademarks

Some may think that “no publicity is bad publicity” and believe they are doing a company a favor by splashing its trademark logos or brand and product names all over the Internet. These activities, however, can bring unintended consequences by “diluting” a company’s trademarks or creating the impression that the company endorses content that it does not. Further, use of others’ trademarks on social media sites can lead to liability for infringement.

Some social media sites offer assistance to companies seeking to remove infringing uses. For example, Twitter has a “report and takedown” procedure in place to disable accounts that violate trademark rights. It also allows high profile individuals and organizations to display a “verified account” logo on their pages due to problems with imposters posing as celebrities.

Other sites may not have such mechanisms in place, in which case the best prevention mechanism is vigilant monitoring. Trademark owners who do not enforce their marks risk abandoning them. It is generally not a social media site’s responsibility to enforce members’ marks. Indeed, in a case currently on appeal, a court ruled that eBay was not liable for infringement based on sales by members of fake Tiffany jewelry because it is a “trademark owner’s burden to police its mark, and companies like eBay cannot be held liable . . . based solely on generalized knowledge that trademark infringement might be occurring.”

Companies should have a strategy in place, responsive to their individual needs, for dealing with online trademark infringement. In some cases, a cease and desist letter or a lawsuit may be necessary to deal with infringers, while, in others, consensual licensing may be more desirable. Companies should also advise their employees not to use company trademarks on social media sites without authorization.

Trade Secrets and Privacy

Similar concerns also arise regarding disclosure of trade secrets and confidential information through social media. For example, Coca-Cola would not want one of its employees to disclose its soft drink formulas on Facebook, even if the employee intended only to demonstrate Coke’s superiority to its competitors. Similarly, companies risk losing the patentability of a new product or design by premature online disclosures.

Businesses should take care to avoid losing the protection of trade secret and patent laws through inadvertent online disclosures and should ensure that employees understand what information they

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may freely discuss online and what information is “off limits.” Companies must also protect themselves against disclosures by former employees by communicating, upon their departure, their continuing legal obligations regarding confidential information.

Equally important is preventing disclosure of confidential customer or patient information. Employees who are not informed of such risks could inadvertently subject their employers to liability under privacy laws including the Health Insurance Portability and Accountability Act (HIPAA), the Sarbanes-Oxley Act, the Bank Secrecy Act, and other state and federal laws.

Employers should provide employee training to prevent loss of trade secrets and confidential information. They also should be sure to have confidentiality and nondisclosure agreements and policies tailored to encompass social media.

Ownership

Employees’ use of social media, particularly when authorized by an employer, may give rise to issues regarding ownership of intellectual property. For instance, disputes may arise regarding ownership of an employee’s social media accounts and accompanying content. Courts have yet to determine, for example, whether an employee’s “friends” or “followers” may constitute customer lists protectable as trade secrets, or whether an employee’s posts written on an employer’s behalf are “works for hire” to which an employee owns the copyrights.

Employers may therefore wish to implement policies regarding ownership of social media content created using company time and resources. Further, companies may wish to urge employees to maintain separate accounts for work-related social media activities to minimize disputes.

Conclusion

Intellectual property issues related to social media are often complex and may seem counterintuitive to employees. Companies should inform employees of the risks and rewards of social media and implement policies suited to their unique culture and goals and targeted at optimizing social media use and avoiding pitfalls.

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