What PR Professionals need to know about copyright and trademark

Copyright law

Copyright applies to all of the work you are producing, although work produced in the scope of your employment (if you are working for a company or agency) likely belongs to the company as a *work for hire*. Work that you produce on a freelance basis belongs to you unless you sign over the rights in writing. Anything produced on a Web 2.0 product is copyrighted as well, except Twitter, which at only 140 characters and likely too short – although compilations of tweets could be copyrighted.

Clipping services

What are the copyright issues related to clipping services and routing clips to people?

When clipping services were literally clipping papers, there wasn't a copyright problem because they were giving you a physical copy they had purchased. Under copyright's *first sale doctrine*, you can sell or give away something you have purchased, assuming that after you give it away, you no longer have it.

Now clipping services scan articles. That means they are retaining their copy while reproducing another and distributing it to you. Without the original publisher's permission, that is a copyright violation.

The Associated Press is suing Meltwater News Service, a paid service that monitors and delivers news stories on keyword-specific topics to paying customers —for selling AP content to its clients. The company had been ordered in the UK and Norway to pay licensing fees for its service, but was not doing that here.

Technically, you cannot reproduce and distribute copies of news stories to your clients without a license and they cannot circulate them and post them on their websites without a license.

AP has developed a service called NewsRight that tracks the use of stories on websites, blogs and other Internet forums. It also includes 28 other news organizations including the New York Times and Washington Post.

Clipping services, like Clip & Copy, are now providing notices of news hits linked to licensing options. This is now going to be the norm.

Music and copyright

Can you use a song in a short promotional video?

You should license songs because when music is incorporated into a commercial product, there is very little leeway for commercial use.

An Austin, TX wedding photographer was sued for copyright infringement for including Coldplay's song "Fix You" as theme music in a wedding video for Dallas Cowboys quarterback Tony Romo and his bride, Candice Crawford, after it went viral on YouTube. He settled the suit for five figures (undisclosed).

What if I bought the song?

There is a difference between buying a song and buying a license to use the song. Buying a copy of the song on a site like iTunes means that you have paid for a copy for your private use not a public performance broadcast on the Web. You need to license use of the music.

What kind of license do I need?

You need a synchronization license from the music publisher (to combine your video with the musical work). If you want to use a particular version of the song (by a favorite artist, for example) you need a master recording license by the record label as well.

What is the best way to get a license to use music?

There are established music clearance and licensing companies that can help with this, or you can do it yourself. The music publisher and recording

company will want to know the term of use (how long you plan to use it), how much of it you need, the territory in which it will be used and the venue (TV, movies, just online?).

Music publishers are BMG, Warner, and EMI, ASCAP and SESAC.

Sound Exchange and record companies themselves license exclusive rights on behalf of copyright owners in a sound recording.

Isn't using a small amount of something in my video a fair use?

This is always a tricky question. Courts decide what is fair or not, after a lawsuit has been filed.

Consider using a Creative Commons song if money is tight.

Creative Commons licenses provide a standard way for content creators to grant someone else permission to use their work.

You can find all kinds of content there that has different types of licenses at http://creativecommons.org/. Look for one that allows commercial use and alteration (since syncing involves that).

You can also find other things on Creative Commons, including images.

However, *be careful* when using images with people for commercial use. Just because the photographer has given people permission to use the copyrighted photo, does not mean that the subject has given permission to use her image. Virgin Mobile was sued for that when its employees downloaded a photo of a Texas girl and made fun of her in one of the company's advertisements.

Social Media

If someone posts a photo on a company's social media page, can the company reuse that image without attribution? Would the image be

considered a donation?

No. You need to ask the poster for permission to use the image in other venues and whether attribution would be required. When the person signed on to the social media site, he or she gave the site a license to use the work, but not other users.

Can Social Media (Facebook, Twitter, Google+) claim copyrights to your content?

Social media sites like Facebook and Twitter are quick to tell you that you retain ownership of your work on their sites.

However, what they don't like to volunteer is that their terms of service include a worldwide nonexclusive license to use your work anyway they want – and to sublicense it to others – so effectively, they have the same rights to use it that you do.

> Facebook users have agreed to give it a *"non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use to use any IP content that you post on or in connection with Facebook."*
>
> Twitter users have agreed to give it *"a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed)."*

What they cannot do with it after you have clicked on this agreement will depend on the limits they have place on themselves in their terms of use (for privacy, for example). The FTC has punished Google, Twitter and Facebook for not honoring self-imposed restrictions in its terms of service.

Is it OK to embed material (photographs, videos) from other site into mine?

Embedding, otherwise known as inline linking, allows content from site A to appear in site B. This is done by incorporating a link to site A in site B's code, not by actually reproducing the material. The link points back to the original site, but only to that one little part of the original site, so the linked image or video appears to be on site B as well.

Aside from changing the context of the image, people sometimes do this without crediting the original copyright holder. This is considered rude, and artists sometimes get back at people who do this by switching out the original image with something embarrassing.

But, inline linking, has not been found to be illegal. The Ninth Circuit held that the practice was legal in *Perfect 10 v. Amazon* (2007). The court also found that thumbnail copies of images qualified as a fair use when the thumbnail images were used *transformatively*. (In that case, the thumbnails were used in a search engine that pictured content on pages.)

Pinterest has raised a lot of copyright questions.

The site, which acts as an online pinboard, has not been open about exactly how it works. Pinterest creates an inline link from a users' board to the original image (which should be fine), but it also appears to store a low-resolution copy of the image for repinning. *Whether those copies would qualify as "thumbnails" or be considered transformative* is the question.

It has just changed its terms of service to make it clear that artists who don't want their work pinned have two choices:
1) to place a line of code in their page that will prevent Pinterest from inline linking to the site (although that won't stop users copying images there and uploading them to Pinterest), or
2) Sending Pinterest a DMCA takedown notice, which Pinterest will have to honor in order to avoid liability for infringement.

People also find videos and embed them in their blogs.

YouTube and Vimeo require that posters agree to let other users use their content in this way, so embedding content from these sites is legal as long as the original poster owned the content.

YouTube also pays licensing fees to the American Society of Composers, Authors, and Publishers that cover public performances of ASCAP music in YouTube videos from YouTube's servers all the way through to end-user embeds.

Trademark Law

What are the guidelines for using a specific product names/brands, companies/organizations in advertising or Web content, particularly if they are used for humor to get a point across?

For trademark infringement, you would have to use a mark in interstate commerce in a way likely to cause confusion between their product and your use.

> Some companies like, Louis Vuitton, for example, are very litigious regarding the use of their trademarks. The company's lawyer recently sent a letter of complaint to University of Pennsylvania Law School over a student group's use of Vuitton-like marks on an invitation and poster for a fashion law symposium covering trademark issues. Instead of the LV, the student group that arranged the symposium used a TM.
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> In the Vuitton example, it would be difficult to argue that people would be confused between Vuitton's luxury goods and a student group's educational conference. This was clearly a fair use. They were using the mark to evoke issues of fashion intellectual property to be discussed at the conference. Since LV is known for being very litigious, it was a parody.

For trademark dilution, it is considered fair to use trademarks in comparative advertising (as long as it's honest), parodies, criticism, and commentary, along with references to trademarks in news reporting and commentary

Trademark dilution does not apply to noncommercial uses.

Can I use trademark law to prevent someone from mentioning or criticizing my company (in a website, blog or video)?

Not unless the site is 1) commercial (selling something) and 2) likely to make viewers wonder whether you are the source, or likely to dilute your famous brand by blurring it with an association to a dissimilar product or tarnishing it with an association to an inferior or disreputable product.

Congress precluded liability for fair uses of trademarks in comparative advertising, parodies, criticism, and commentary, along with references to trademarks in news reporting and commentary

Even gripesites that use trademarks in their domain names (e.g. yourcompanysucks.com) are protected as long as they remain noncommercial.

A group calling itself "Youth for Climate Change" set up a fake website for Koch Industries at "koch-inc.com." The website contained a press release designed to appear as though it was from the company. The fake release announced Koch had changed its position on environmental issues. (Koch is known for disputing climate change.)

The court asked to examine the case dismissed the plaintiff's Lanham Act claims for failing to meet the commercial use requirement, explaining that the defendants' "press release and fake website did not relate to any goods or services and were only political in nature."

However, if someone registers a domain using your trademark or one confusingly similar to it, in an attempt to sell it back to you or to profit from your good will, that would constitute cybersquatting, which is illegal.

It is not against that law to register a domain that incorporates someone's trademark; it is against the law to do that in a "bad faith" attempt to profit from the mark.

What happens if someone starts a social media site in my company's name?

This has happened to BP (@BPpublicrelations) and Gap (@GapLogo). The real issue is whether the fake site is an actual impersonation or makes it clear that the site is a fake or homage to the brand.

Twitter allows fake sites that are clearly fake. Its users are allowed to create parody, commentary, or fan accounts, but accounts with the clear intent to confuse or mislead may be suspended.

Facebook does not allow impersonation profiles, so you can simply ask that to be removed.

A NJ court ordered a woman to stand trial for identity theft for faking a Facebook page that included allegations of drug abuse and prostitution. The law did not mention social media but did mention impersonating another to cause harm.

New York's criminal impersonation statute makes it illegal to impersonate somebody "by communication by Internet website or electronic means." California added an e-personation statute to its penal code, which includes opening a "profile on a social networking Internet Web site in another person's name" in the definition of "e-personation." The Texas penal code includes a narrower "online harassment" statute that is limited to barring impersonation on "commercial social networking sites." Washington state has enacted an e-personation statute to to harass, threaten, defraud or humiliate another person or cause financial or professional harm.