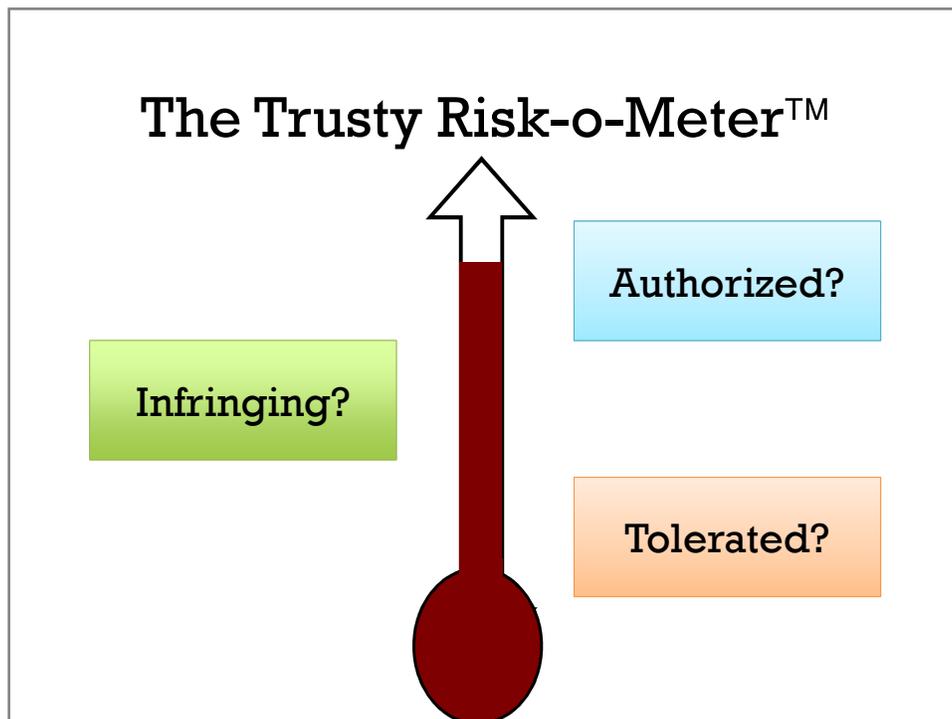


A Nation of Law Breakers?: Social Media and Intellectual Property Infringement

**Tiffany Hall
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Agenda

- **Overview: Evaluating risk in an uncertain legal environment.**
- **Is it Advertising?: When brands use social media, are they engaging in commercial speech?**
- **Authorization: What permissions have you been granted from the platform's TOS, policies, and guidelines?**
- **Right of Publicity**
- **Copyright**
- **Social Media and Regulatory Compliance**



I

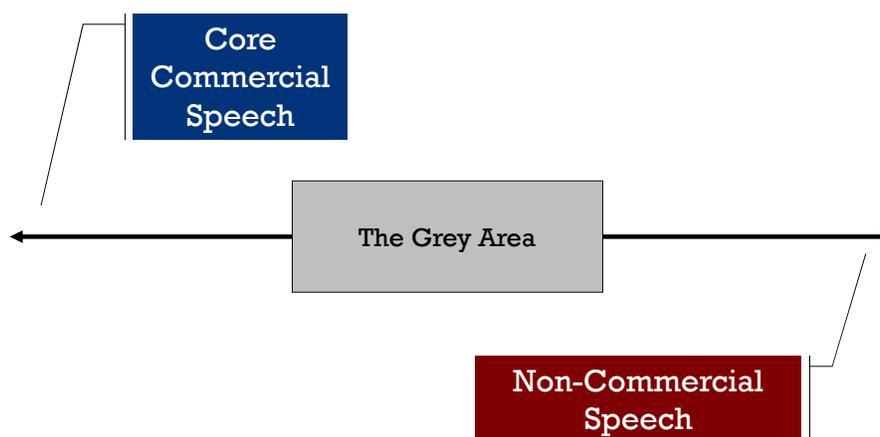
How do you characterize
speech by corporate actors
in the social universe?

And what are the implications?

Shades of Grey

- The lines between advertising and editorial content have always been blurry.
- This matters because the rules that apply to advertising are different from those that apply to editorial content.
- The law is a tortoise; technology, a hare.

A spectrum



Blurry Lines

- Commercial speech classic: *Nike v. Kasky* (Cal. 2002)
- “Old media” blurring: *Downing v. Abercrombie & Fitch* (9th Cir. 2001)
- “New media” blurring: *Cardo Systems* (NAD 2008)

Practical Questions

- *Who is the speaker?* The brand!
- *Who the audience?* The customer?
- *What is the purpose?* To build the brand’s image and sell products?
- *Who controls it?* The CMO?
- *Who pays for it?* Does it come out of the marketing budget?
- *Is it objective?* Yeah. Right.

II The Architecture of Social Media

Authorized Use.

Authorized Sharing of Content on a SM Platform

- Many websites invite you to post their content on social media



- This is typically done through an API rather than by permitting you to make a copy of files

Integrating SM Content in Apps, on Brand Websites, etc.

- Users of social media sites grant broad rights to the social media platform, and the platform grants broad rights to developers



- Your use of social media content must conform to developer guidelines
- Despite terms/policies, some users may not understand that their content can be used in a commercial context
- TOS/Developer Guidelines NOT always so clear:
 - Twitter API TOS allow use of tweets “in advertisements, not as advertisements”

Twitter’s TOS – How Broad? AFP v. Morel (SDNY 1/14/13)

- Photographer who posted Haiti photos on Twitpic alleged that use of photos by various news agencies was unauthorized
- Media companies argued that the TOS for Twitter and TOS for Twitpic, read together, constituted a broad license to exploit photos
- Held:
 - Despite some broad language, the TOS did not grant a license to media companies to enable use of the photos off Twitter. (They are not “partners.”)
 - The media companies were not third party beneficiaries

Ripped from the Twitter TOS (Circa 2010)

“You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us 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).

Tip: This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same. But what’s yours is yours – you own your content.

You agree that this license includes the right for Twitter to make such Content available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use.

* * *

You are responsible for your use of the Services, for any Content you provide, and for any consequences thereof, including your use of your Content by other users and our third party partners.”

III Right of Publicity

Right of Publicity: Overview

- Name
- Likeness / Photograph
- Voice
- “Persona”
- For “Commercial” Purposes

Three Not-So-Simple Questions

- What permission did user give to platform?
- What permission did platform give to advertiser?
- Does this amount to permission from user to advertiser?

Three Not-So-Simple Real World Examples

- Posting third party content on or via a brand's social media platform or page
- Aggregating social media content on a brand's website or in a brand's app via an API
- Retweeting a celebrity's tweet

The Mysterious Case of *Sponsored Stories*

- "Sponsored stories are messages coming from friends about them engaging with your Page, app or event that a business, organization or individual has paid to highlight so there's a better chance people see them." (FB FAQs)
- Virtually impossible (currently) to opt out
- Do Sponsored Stories violate the right of publicity of *all* FB users? FB users who are *minors*?

Sponsored Stories

Fraley v. Facebook, Inc. (N.D. Cal.)

- **12/2011:** FB's motion to dismiss denied:
 - CDA defense rejected on grounds that FB is partially the information content provider
 - Court rejects FB's argument that Sponsored Stories are newsworthy (and exempt from CA right of publicity statute)
 - Court rejects FB's argument that the user consented to appear in Sponsored Stories because facts in dispute
- **8/2012:** Court rejects first attempted \$20M settlement
- **Today:** Court preliminary approved the revised settlement and is considering final approval. Hearing currently scheduled for June 28, 2013

IV

Copyright

Copyright Overview

- Any original creative work that is fixed in a tangible form
- Assume anything written, drawn, photographed, or recorded by someone else in the U.S. after 1923 is copyrighted
- Generally speaking, a copyrighted work may not be used or copied - in whole or in part - without permission



How the Internet Works ...

- The internet functions by *linking* and making *multiple copies*
- The law presumptively makes most unauthorized copying *infringing*
- The upcoming *generation* never experienced the world without the internet
- When does *fair use* come into play?

Questions

- Is there *copying*?
- If there is copying, is it *authorized*?
- If not authorized, does any *safe harbor* protect the website?
- If not authorized and no safe harbor, is it a *fair use*?
- If it is not a fair use, will it be *tolerated*?

Inline Linking/Embedding = Copying/Infringement?

- No copy is being made of the image/video on the server
- Instead, the link is just HTML code pointing to the image or video on another server
- Can you infringe the display or performance right if there is no copying?
 - *Perfect 10 v. Amazon* (9th Cir. 2007) (the “server test”)
 - *Flava Works v. Gunter* (7th Cir. 2012)

Does it turn on statutory language?

- To “display” a work means to show a **copy of it**, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.
- To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, **to show its images** in any sequence or to make the sounds accompanying it audible.

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Pinterest: Sideloading (not uploading)



“Your responsibility for your content”

“Anything that you post *or otherwise make available on our Products* is referred to as "**User Content**." You retain all rights in, and are solely responsible for, the User Content you post to Pinterest.” (TOS)

“You agree not to post User Content that: ... infringes any third party's Intellectual Property Rights, privacy rights, publicity rights, or other personal or proprietary rights.” (Acceptable Use Policy)



“How Pinterest and other users can use your content”

“You grant Pinterest and its users a non-exclusive, royalty-free, transferable, sublicensable, worldwide license to use, store, display, reproduce, re-pin, modify, create derivative works, perform, and distribute your User Content on Pinterest solely for the purposes of operating, developing, providing, and using the Pinterest Products.

Is Pinterest an Infringer?

- Does the TOS protect it?
- Is Pinterest a service that plays a sufficiently passive so only users are deemed culpable of the infringing activity? *See Cartoon Network v. CSC Holdings, Inc. (2nd 2008)*
- Contributory liability?
 - Capable of a substantial non-infringing use?
- Safe Harbor?

17 U.S.C. 512(c)

“A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright **by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider**, if the service provider ... “



WARNING: “How long we keep your content”

“Following termination or deactivation of your account, or if you remove any User Content from Pinterest, we may retain your User Content for a commercially reasonable period of time for backup, archival, or audit purposes. *Furthermore, Pinterest and its users may retain and continue to use, store, display, reproduce, re-pin, modify, create derivative works, perform, and distribute any of your User Content that other users have stored or shared through Pinterest.*”

Safe harbors may protect
Pinterest, but they won't protect
the person who "pins" content
without authorization.

*That poor sucker has to rely
on fair use.*

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In Search of “Transformative”

- Is the selection, sequencing, framing and commentary on third party photos *transformative*?
 - How much commentary is there?
 - Is a scrap book a fair use?
- Do, in the founder of BuzzFeed’s words, “lots of little things add up to a transformation as opposed to a copyright violation”?

“Core” Fair Use

Brownmark Films v. Comedy Partners (7th Cir. 2012)

- Plaintiff owns video to “What, What in the Butt,” a YouTube sensation with nearly 50MM hits
- *South Park* episode includes it’s own version, starring ... Butters!
- *Held*: Fair Use. Episode both lampoons the original video and “comments on and critiques the social phenomenon that is the ‘viral video.’”

Newsworthiness/Commentary?

Monge v. Maya Magazine (9th Cir. 2012)

- Gossip rag publishes stolen photos of celebrity couple's secret Vegas wedding to prove that wedding occurred
- Couple/owner of photos sues
- Majority: rejects fair use.
 - Newsworthiness alone does not require a finding of fair use
 - No transformation: magazine added nothing new to the character, meaning, purpose, or message of the photographs.

Questions

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v
Social Media in a Regulatory
Environment

BRAND PAGES

Reach

Inform

Entertain

Engage



HELP!

Day in the Life: Brand Page Compliance Review Sources

- **DISCUS Code of Responsible Practices**
- **DISCUS Social Media Marketing Guidelines**
- **Pernod Ricard's Code for Commercial Communications**
- **Regulations & Statutes**

Day in the Life: Brand Page Compliance Review Process

- **Digital Agencies**
 - **Contract process**
 - **Training**
 - **Meetings/reports**

Day in the Life: Brand Page Compliance Review Process

- Pre-post review
 - Wireframes for new pages and new tabs
 - Written posts and photos
 - Contests or sweepstakes
 - Responses to consumers

Day in the Life: Brand Page Compliance Review Process

- Live Review
 - User Generated Content (“UGC”)
 - Written posts
 - YouTube videos
 - Photographs
 - Contest entries
 - Spontaneous responses to consumers

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