

Social Media Law Boot Camp

By Jerry Cohen on the #SMMANNERS Chat

I was thrilled when Dabney Porte (@dabneyporte), the dynamic and engaging hostess of the lively #SMManners chat, invited me as her guest on Tuesday, May 16 at 10PM EDT. #SMManners is a well-attended chat where people discuss how to effectively use social media in all areas of their lives. It's not surprising that the wide-spread use of social media is raising a host of new and challenging legal issues that can trip us up if we're unprepared. I'll be speaking about some of these issues and providing helpful tips and solutions. Below is a cheat sheet for our discussion. It may seem a bit complicated at first because the law is in flux but don't let that scare you – we'll unravel the issues together.

1. Trademark Basics

- (a) What is it?
A trademark is a word, phrase, symbol, and/or design that identifies the source of goods or services.
- (b) Must I register a trademark?
You can protect a mark by using it in commerce without registration; however registration provides several advantages including a presumption of ownership. The nature and value of the mark, the market, your resources, cost/benefit analysis, and culture are some of the factors that affect the registration decision. You'll also want to do your diligence to make sure that the mark is not already in use, and if it is, how it is being used.
- (c) Can I use another parties' mark in my blog?
Not for commercial purposes unless for example it's carefully and truthfully used in comparative advertising, it's used in an informative manner, for example to identify the product or company you're talking about; or you're indicating a product is compatible with the trademarked product.
- (d) Should I attack every unauthorized use of my trademark?
A trademark owner has a legal obligation to police its use or risk losing certain rights. However, the owner is not obligated to object and threaten every unauthorized use – choose your battles. Consider
- (i) the harm caused (counterfeit products, pornography, fraud, phishing, impersonation and other flagrant misuse should be slammed),
 - (ii) will overzealous enforcement affect the owner's reputation (having your cease and desist missive posted publicly can be embarrassing);
 - (iii) will enforcement be cost effective and successful;
 - (iv) does the bad guy have a reputation for infringing and needs to be stopped,
 - (v) is there a public health and safety issue at stake;
 - (vi) does a message have to be sent to discourage other infringers; and
 - (vii) can the owner obtain quick and inexpensive relief by using the websites' takedown policies.
- Trademark owners may sometimes benefit from the infringing use of the mark that enhance its reputation (e.g., a fan page) – that's the marketing goal of using social media.
- (e) What should I do if I receive a cease and desist letter?
Often taking down the infringing use (without admitting liability) will satisfy the trademark owner.
- (f) Takeaway:
Social media is about creating dialogue not controlling dialogue.

(continued on next page)

2. Copyright Basics

- (a) What is it?
Copyright allows the "author" of "original works" to prohibit others from copying the work for the life of the author plus 70 years (and a longer term for "works made for hire" by an employee or independent contractor). Copyright protects the expression of the idea, rather than the idea itself. Expression can be in the form of words, numbers, notes, sounds, pictures, etc., and may be published or unpublished.
- (b) Must I register it?
No, copyright of a work is automatic upon its creation, but you must register a copyright to sue for infringement and obtain other benefits.
- (c) Can I post someone else's article, photos, audio/video clips?
Only if it falls under an exception such as the "fair use" doctrine which includes an analysis of the following factors:
- (i) the purpose and character of the use, including commercial vs. non-commercial;
 - (ii) the nature of the work;
 - (iii) the amount and portion used in relation to the copyrighted work as a whole; and
 - (iv) the effect of the use on the market for or value of the work.
- Short quotations, review or criticism, parody, and other "transformative" uses are often fair use.
- (d) Defenses that can be filed under "the dog ate my homework":
"Other people copied the work too;" "I gave the author credit for the work;" "It's public information;" "I didn't know it was copyrighted;" "I won't do it again, promise."
- (e) Can I invite others to copy from my blog post?
Sure, a copyright can be licensed, sold, and transferred. A "Creative Commons" license is a popular method to share your post while reserving varying rights.
- (f) What happens if my OSP received a DMCA notice about my blog:
The Digital Millennium Copyright Act Section 512(c) protects online service providers against copyright infringement claims for content posted by third parties when the OSP follows certain guidelines including adopting notice and take-down procedures and a policy for repeat offenders. Upon receipt of a proper take-down notice from a copyright owner, the OSP must remove or disable access to the infringing material. If you believe that your content does not infringe the copyright, you can deliver a proper counter notice. The OSP must restore the content (and still qualify for the safe harbor) unless the copyright owner files a lawsuit within 10 to 14 business days.
- (g) Can I claim the Section 512 safe harbor for content posted on my blog by third parties?
This is unsettled at the moment but in any event to qualify you would need to follow the guidelines including registering an agent with the USPTO and establishing certain procedures described above and in the statute.

3. Rights of Privacy and Publicity

- (a) What is it?
A claim that a person's name, likeness, image, voice or persona was used for commercial purposes without permission. This right and protection varies from jurisdiction to jurisdiction.
- (b) Can I use a favorable tweet outside of Twitter for commercial purposes.
That may open the door to a claim against you.
- (c) What are the defenses?
Although there is a First Amendment defense such as parody and other defenses such as a limited fine art exception, running afoul of the right of publicity can be expensive in terms of damages. In a cost/benefit analysis, most advertisers/bloggers will seek the consent of the individual.

(continued on next page)

Social Media Law Boot Camp (cont'd)

4. FTC Guidelines for Endorsements and Testimonials.

- (a) The FTC Guidelines require disclosure of relationships between sponsoring advertisers and endorsers. This includes (i) bloggers who receive free products or are paid a commission or other incentive or compensation for reviewing and promoting the product, and (ii) employees that post reviews of the employer's product. The review must be truthful and claims can't be made if they require proof you don't have (for example that the product cures a disease without scientific evidence). When in doubt, disclose.

5. Defamation

- (a) What is it?
A false statement communicated to persons other than the party being defamed, and that gives a negative impression of a person or entity. Slander is defamation by spoken words, and libel is defamation by print or pictures.
- (b) What if the person's name was not used?
A person can claim defamation if they can show they were reasonably identifiable.
- (c) Will I be responsible if a defamatory statement is posted on my blog by a third party?
Not generally. Section 230 of the Communications Decency Act states that a provider or user of computer service is Not the publisher or speaker of the information provided by another content provider.

6. User Generated Content ("UGC")

- (a) How can I protect myself from claims relating to UGC posted on my website and can I use UGC?
If you allow UGC on your website or blog, the Terms of Use are critical and should include among other things (i) a broad license and release to exploit the content; (ii) a broad right to use the name, likeness, and image of the submitter in all media and for all marketing purposes; (iii) an indemnification against third party claims such as infringement or defamation; and (iv) representations and warranties regarding the content submitted. See also the discussion above regarding compliance with the DMCA Section 512 safe harbor.

7. Other Topics Coming Up For Discussion, So Check Back

- (a) Employer/Employee Issues; SM Policy in the Workplace
- (b) Sweepstakes do and don'ts
- (c) Domain Names Strategy and Enforcement
- (d) Search Engine Advertising (misuse of TMs)

If you have any questions or comments, please feel free to contact Jerry at the telephone and email address below or @jerry_cohen.

jcohen@ctswlaw.com
(212) 586-5800

This blog is intended to provide basic and useful information but not legal advice. As legal advice must be tailored to the specific circumstances of each case, and laws are constantly changing, nothing provided in this blog should be used as a substitute for the advice of competent counsel. We recommend you consult a lawyer to ensure that the information provided, and your interpretation of it, is applicable to your particular situation.