

Copyrights: The Intersection Between Social Media & Copyright Infringement



Social media gives all of us the ability to share content with the click of a mouse. We “like,” “retweet,” and “re-pin” messages and images without batting an eye. Social media platforms give us the ability to easily re-post, save and/or share other people’s content. The ease with which we may do so allows us to forget about the possible legal implications of what you do on social media.

Copyright is a federal law that protects original works of authorship. A work of authorship includes literary, written, dramatic, artistic, musical, and certain other types of work. Once material is copyright, it comes with a host of exclusive rights that allow the owner to do or authorize a number of things including the ability to: (1) reproduce the copyrighted work; (2) display the copyrighted work publicly; (3) prepare derivative works based on the copyrighted work; and (4) distribute copies of the copyrighted work for the public by sale, rental or lending, and/or displaying the image.

So when can you use someone else’s copyright work? The general rule is that you must receive authorization from the creator in order to use his/her image. Does this mean every single one of the billions of photos on the Internet is either authorized by the creator or in violation of copyright? The answer is no, and that is where fair use comes into play.

What is fair use? Fair use is an exception to copyright law. How the fair use defense applies to social media is an evolving issue, as fair use protects uses of copyrighted material for, among other things, criticism, comment, news reporting, teaching, scholarship or research. Courts reviewing a fair use defense look at four primary factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken; and (4) the effect of the use upon the potential market.

As you can see, fair use is not a black or white concept. There is very little guidance from case law regarding the fair use defense and the Internet, including whether through filtering or editing social media users can transform content into something new or merely copy an original work.

When you post something in a social media platform, you should consider whether the content you are posting is the original work of someone else. This can be extremely difficult because a lot of information, content, photos, etc. on social media can be posted by hundreds of users to the point where authorship is unclear. If you cannot determine the author of the content, do not use it. If you can determine the identity of the author, it is necessary to contact them and ask for permission to share the content. Attributing the copyrighted material to the source does not absolve the unauthorized copyright violation. There is no blanket right to copy and distribute others content, even if it is properly attributed. At the same time, though, “news reporting” is one of the identified fair uses purposes.

Here is the best guidance we can give based on the limited fair use court rulings: A social media post is likely to be considered fair use if the character of the use is non-profit, educational or personal; the nature of the material used is factual published material; only a small amount of the material will be posted; and the impact on the market for the material is very small.

Conversely, a posting of material would likely not be considered fair use if the character of the use is commercial (promoting a product or service, charging to access the copyrighted material, advertisements), the nature of the material used is imaginative and/or unpublished, the majority of the material will be posted (for example, an entire book or chapter instead of a quoted sentence), and the use detrimentally impacts the market for the original.

Given the ambiguity in the law, when in doubt you should err on the side of not posting someone else's content. The reason for this is simple: copyright claims are expensive to defend and expensive if the court finds infringement. A copyright owner's first response to an active infringement is usually to send a cease and desist letter demanding that the infringement stop. Additionally, a copyright holder can file a claim for actual damages suffered by the infringement. If the copyright has been registered with the United States Copyright Office, the copyright holder can file a claim for "statutory damages" without proving the copyright user was actually harmed by the infringement. An award of statutory damages can be as little as \$750.00 or as much as \$300,000.00. If the copyright holder can prove you knew the work was protected under the law, an award of damages can be as much as \$150,000.00. And, importantly, if a plaintiff prevails in a copyright infringement claim, she is entitled to be paid his/her reasonable attorney's fees, which are usually far more than the available damages and/or penalties.

The bottom line is this: there are very few final rulings in social media-related fair use cases, and thus there are more questions than there are answers. One thing is clear: copyright is alive on-line. Just because it is Facebook, Twitter or Instagram, that is not a legal defense to infringement. If you have any reason to believe that the content that you want to post, share, tweet or re-tweet is copyright, put the phone down.

Tips to Avoid Copyright Infringement on Social Media

- » If you want to post something on social media that is not yours, finding the source and get permission before posting;
- » If you cannot find the source of the content, rather than copying and pasting language or clicking the save the image, link to the original source or where you found it instead;
- » Do not copy and paste portions of news stories – either simply link to the article or summarize it in your own words. Providing a link to a news story or article with a one sentence comment about the article should suffice; and
- » When in doubt, assume material is copyright and do not post.