

Sailing through the social media storm: a guide to copyright issues for brands, influencers and rights holders

By Donald S. Zakarin, Esq., and Nicholas Saady, Esq., Pryor Cashman LLP

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The popularity of social media has created new opportunities for the consumption of content and created significant copyright issues. Brands, influencers, and creators commonly incorporate music and other intellectual property into their content: popular songs played as background in TikTok videos and still images popping up during a Twitch or YouTube live stream.

Brands and creators should be aware of that incorporating music and other IP into content implicates copyright laws when that content is used for commercial purposes. Copyright owners also need to be cognizant of the need to monitor the use of, and enforce their rights in, copyrighted material on social media.

How copyright laws operate

At their most basic level, copyright laws require a copyright owner's permission to use original creative works. The U.S. Copyright Act identifies broad categories of copyrightable material, including virtually anything that can be expressed in a tangible medium of expression, such as books, compositions, recordings, dramatic and choreographic works, photographs, drawings, architectural works and motion pictures.

Red flags arise for brands and influencers when such material is incorporated in social media content. The use of such material without license is likely to expose the relevant influencer(s) and brand(s) to claims of copyright infringement. This is especially because copyrights crystallize at the time of the original work's creation — there is no need for registration — so if you use someone else's work you can fairly assume it's protected (although registration is required to sue for infringement).

Walking the fine line of infringement

For influencers, the manner and circumstances under which copyrighted content is used on social media must be closely examined to weigh whether a contemplated use is infringing. Within this circumstance-specific analysis, there are some clear guideposts.

For example, an influencer's TikTok video promoting a product using a copyrighted recording in the background is more problematic than an influencer's TikTok video with no music or only the briefest snippet played. Commercial use is almost presumptively infringing and it is always safer to err on the side of caution — especially when

there are often alternatives to the unlicensed use of copyrighted material (including licensing or using public domain music).

Licensing is better than liability

Influencers, creators, and brands can avoid liability by obtaining the requisite licenses to use copyrighted material. Licenses are legal agreements between the copyright owner(s) and license holder (i.e., brand or influencer), which allow the holder to use the copyrighted content, usually for a specific purpose and/or period of time.

Carefully crafted written agreements are essential for brands and influencers to mitigate risks associated with IP laws.

For example, an influencer might license a clip from the motion picture "Rocky" to incorporate in a YouTube video, or a brand might license "99 Problems" by Jay-Z for use in a video promoting an innovative product.

The types of licenses can vary according to the material being used. For example, for music, sometimes as many as three licenses will need to be obtained — a synchronization license for the composition, a public performance license for the public performance of the composition, and a master use license for the recording (if the recording is being used).

Further, brands and influencers cannot rely on social media platform's licenses for such content, as the platforms' terms of service state otherwise. For example, TikTok's terms expressly provide that "no rights are licensed with respect to sound recordings and the musical works embodied therein that are made available from or through the service."

The necessity of obtaining appropriate licenses to use copyrighted material is illustrated by the potential liability for brands and influencers. There can be direct infringement — resulting from a brand or influencer directly posting content without authorization.

There can also be secondary infringement under the U.S. Supreme Court's *Grokster* standard — where a brand or influencer either

(i) materially contributes to, or induces, infringement, or (ii) has the right to supervise or control the direct infringer and derives a financial benefit from the infringement.

Infringement has financial consequences: under the Copyright Act, an infringer can be liable for statutory damages, or actual damages and defendants' profits (and potentially attorney fees).

These risks are not hypothetical. The importance of obtaining appropriate licenses for social media content and the consequences of not doing so have been starkly illustrated in recent U.S. Federal court decisions relating to Bang Energy and litigation initiated by Warner against GymShark and Iconic London. Individual influencers have also been subject to lawsuits, such as YouTube star Michelle Phan, who was sued by Ultra Records for using Ultra's copyrighted music in her YouTube videos.

Even if liability is clear, proving damages or profits obtained from infringing posts is complicated.

Influencers and brands should also be cognizant of intellectual property laws in other jurisdictions, given the universality of social media. This was recently emphasized in Kenya, where influencer Brian Mutinda was threatened with copyright infringement lawsuits by hip hop artist Nonini and rap group Wakadinali arising from Mutinda's use of their music in his content.

Practicalities of obtaining licenses

For brands, seeking licenses should be automatic. However, for influencers, the time, cost and practicalities associated with obtaining such licenses can be prohibitive — depending on the copyrighted material, the type of promotion in which they are engaging, and the influencer's resources. That is where innovative organizations may come into play. Micro-licensing companies like Lickd, allow creators and influencers to license prominent songs as well as stock tracks.

Another option is to use material obtained through Creative Commons, which is generally free subject to adherence to the Creative Commons license terms; or to use royalty-free music, which is less expensive because it only requires an upfront fee.

A more novel approach is to utilize AI-generators which generate tailored music that comes with the requisite licenses (although there are limits to those licenses and potential risks associated with AI created content).

Crafting contracts to reduce influencers' risk

Carefully crafted written agreements are essential for brands and influencers to mitigate risks associated with IP laws.

Influencers may include clauses requiring brands to obtain and pay for necessary license(s) to use specific content. This is especially so if the contract is a work-for-hire agreement in which rights in the relevant content are owned by the brand, or an assignment or

perpetual license agreement which provides all content rights to the brand.

In such cases, influencers are well-advised to negotiate *both* an upfront payment and commission calculated according to profits derived from promotional codes or the like on their post(s). Influencers should also seek contractual guarantees and indemnities from brands for legal liabilities and costs associated with use of the relevant product or service — especially if it is one that may cause personal injury or loss.

Influencers might also consider utilizing content creators to defray the potential liability associated with the production content — obtaining appropriate contractual guarantees and indemnities from such creators. Nonetheless, influencers must recognize that contractually imposing responsibility on the brand to secure licenses will not immunize them from liability should the brand fail to do so and the value of any indemnity depends on the ability of the indemnitor to pay (including covering legal defense costs).

Critical considerations for brands

For brands engaging influencers, written agreements should include clearly worded guarantees that any content posted by an influencer will be compliant with all laws (such as copyright laws and FTC regulations), indemnification provisions for any liability and costs resulting from the influencer's content (such as for copyright infringement), and the right to audit or pre-approve an influencer's posts to ensure compliance.

Agreements may also include morals clauses, which provide for termination and/or damages if an influencer or their associates engage in conduct that detrimentally affects the brand. On that note, brands are well-advised to do their diligence on influencers' professional and personal backgrounds, as well as to ensure the legitimacy of influencers' followings (i.e., no fakes or bots) and previous endorsements (i.e., no fake promos), *before* engaging them. Here too, the value of indemnities have the same limitations as noted above.

Agreements can also be structured to ensure that payments are received simultaneously with an influencer posting or producing required content — to ensure an influencer's compliance while avoiding lawsuits such as those involving Luka Sabbat, who was sued by PR Consulting Inc. for allegedly failing to promote Snap's Spectacles on Instagram; and YouTube influencer Bethany Mota, who was sued by promoter Studio 71 for allegedly failing to adhere to the terms of an endorsement agreement.

Relatedly, clauses can be included which mandate non-public arbitration, instead of court proceedings, in the case of a dispute.

Like influencers may do with creators, brands may seek to outsource responsibility for all of the above by engaging advertising agencies to mitigate the risks associated with hiring influencers and advertising generally. Again, the efforts to export responsibility and liability to others does not provide any guarantee of protection against claims.

While such action and controls will help reduce the risk that a brand may ultimately be financially responsible for contributory,

vicarious and/or willful copyright infringement, as well as prevent infringement altogether, it remains essential for brands to be proactive in ensuring that content connected to their goods and services complies with all relevant laws — both before it is posted and regardless of who is posting it.

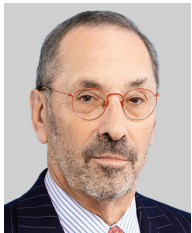
It should also be noted that these same controls may render a brand liable for contributory or vicarious infringement (as contribution, inducement, and the right to supervise or control are relevant factors in the *Grokster* analysis). So if brands do have such controls, it is critical for them to *actually exercise* those controls to prevent any infringement in the first place.

Issues for copyright owners

As social media advertising increases, it is critical for copyright owners to monitor the use of their material on social media to protect its value. Owners can utilize increasingly advanced AI programs which detect infringing content and even automatically send take down notices to make this task easier — although they are not without their limitations.

When infringement is detected, takedown notices or cease and desist letters should follow. But compliance is not assured as some brands and influencers may lack the resources to comply (or prefer devoting scarce resources elsewhere). In such circumstances, lawsuits may be necessary.

About the authors



Donald S. Zakarin (L) is the co-chair of **Pryor Cashman LLP's** litigation group in New York City. Over the course of his 47-year career he has focused on the music and entertainment industries, representing both the owners and creators of intellectual property. He can be reached dzakarin@pryorcashman.com. **Nicholas Saady** (R) is a New York-based associate who is also in the firm's litigation group. He represents notable influencers, content creators and media personalities on legal issues arising from their work — particularly regarding the protection of their IP. He can be reached at nsaady@pryorcashman.com.

When legal action is initiated for infringement, even if liability is clear, proving damages or profits obtained from infringing posts is complicated. The copyright owners' burden is eased by the need only to prove the gross revenues of the infringer, leaving it to the infringer to prove what part of the revenues are attributable to other factors.

There may also be jurisdictional issues associated with commencing a lawsuit, especially where the infringer is from overseas, as there are complicated requirements that must be met to engage U.S. courts' jurisdiction.

A final word

Social media raises many significant copyright issues. Comprehending how copyright laws operate, and what types of content they protect, are just as important as obtaining appropriate licenses. Written agreements are vital in clarifying responsibility and liability in social media transactions and therefore, avoiding the negative externalities of non-compliance with applicable laws.

When influencers and brands understand and proactively address issues such as those discussed in this article, they position themselves for smooth sailing amidst the contemporary social media storm — safeguarding their reputations and fostering the financial prosperity and longevity of their careers and businesses.

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