

Social media marketing: are you following copyright law?



The explosive growth of digital marketing on social media has encouraged inventive ways for advertisers to reach out to their audiences. This newer form of advertising is defined as “The marketing of goods and services via digital technologies.”^[8] Digital marketing is different from traditional advertising because it is unique to our social media preferences and browsing history. Digital marketing is a growing business, in fact, eMarketer estimates that roughly 70% of the population will make a purchase digitally this year.^[3]

One method digital marketers employ to reach potential buyers is to use “influencers.” A social media influencer is an individual who utilizes a variety of social media platforms to express their opinions on specific brands or products, consequently influencing their captive audience.^[2]

Companies can work with influencers in a variety of ways, including paying them to use their videos or to create posts which promote a company’s products. These videos or posts often include tutorials using a product. Influencer marketing is becoming a large portion of marketing budgets; in fact, the influencer marketing industry was set to grow to approximately \$9.7B in 2020.^[7]

However, there are risks that businesses should consider before making the transition to digital marketing via influencers

Intellectual property or IP is one of those risks that should be reviewed to ensure there are no infringements that could lead to costly claims for violating intellectual property or Federal Trade Commission (FTC) laws. IP is defined as a work or invention that is the result of creativity, such as a manuscript or a design, to which one has rights and for which one may apply for a patent, copyright, trademark, etc.^[6] Many social media posts include music and songs or pictures that are the intellectual property of others; misuse without permission can lead to copyright infringement claims, which can be costly. One high-profile example: Katy Perry has been sued for \$150,000 for posting a photo of herself on her Instagram page; that picture was taken by and is owned by someone else who is now suing Perry.^[4]

IP is owned by the creator, who must grant permission to use their property (often there is a cost associated with this use). IP compliance is a major risk among digital marketers and influencers; according to a study published in 2020 only 14% of influencer posts sampled were fully compliant with FTC copyright guidelines.^[7]

Each time a company works with an influencer on social media by sharing posts or videos, the company becomes liable for the contents of that post including any IP infringements. Influencers may share pictures taken by someone else who is the owner of that IP or they may play music while making a video; if they do not have permission to use that owner’s picture or that song from the owner of the music, they and the company who has hired them can be held liable and have to pay damages. Companies must also disclose that the influencer posts are paid advertisements. In addition, whether companies use influencers or other methods of digital advertising, if they use copyrighted or licensed material of others then they need to make sure they obtain written permission from the owner.

While these instances of copyright infringement may have been accidental, they can be costly. Awards to the owner of IP are based on the number of instances of infringement. These generally average between \$750 to \$30,000 but can also go as high as \$150,000 or even more.^[1] So, avoiding copyright infringement is important when advertising with social media and hiring influencers.



When advertising on social media it is generally best to assume items such as songs, pictures or art work, and video are protected by copyright and take steps to protect your company from claims of copyright infringement. The owner of that item may grant permission to use their work, but you must locate the owner (or Performance Rights Organization such as ASCAP or BMI) and reach out to them before using their work. An owner may also request that they be compensated for the use of their property. If you are entering into a contract to use copyrighted material it may be best to work with legal counsel to fully understand the risks and for contract review.

If you are unable to get permission to use IP that belongs to another, there are some sources of material that can be purchased for use and some that are in the public domain and free to use. These two options will require some research but doing it upfront is better than having an unexpected claim later.

It is also suggested that your company develop a social media policy to ensure all employees understand the importance of maintaining compliance in this area and to document controls that are in place to protect your company. The policy should, at a minimum, include roles and responsibilities, applicable regulations and legal risks, security risks, accountability, and how to report concerns. Working with legal counsel to develop such a policy is suggested for those companies that engage in digital marketing.

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