The Tortoise and the Hare: Social Media and the Law

Brian G. Murphy

ACC Hot Topics in Digital Advertising
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Tell me what you want ...  
(What you really, really want)

• To join a global conversation
• About current events, pop culture, politics ...
• 24/7 and in real time
• Simultaneously across multiple platforms
• (Oh, yeah – we want to promote the brand and its products simultaneously)
Agenda

• **3 Rules and 1 Metaphor:** Calibrating risk in an uncertain legal environment.
• **A Preliminary Question:** When companies use social media, are they engaging in commercial speech?
• **A Framework:** A method, consisting of three simple questions, to help evaluate infringement risk across all social media platforms.
• **A Practical Exam:** You will be graded.
• **A Search for Social Tolerance:** You’ll see.
Act 1

3 Rules and 1 Metaphor
Rule 1
Tell the truth. (Please.)
Rule 2
Don’t rip anyone off.
(Please.)
Rule 3
The same legal rules *(probably)* apply in traditional and digital media. (Sorry.)

No way!

Yes way!
The Metaphor

A Disclaimer and Philosophy

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The Trusty Risk-o-Meter™

No?

Maybe!

Yes?

Reward?
Act 2

A Preliminary Question: How do you characterize speech by corporate actors in the social universe?
Blurred Lines

• 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.
  – False Advertising
  – Rights Clearance (esp. Right of Publicity)
• And there is no question that social media can be advertising...
The real (hard) question: do a brand’s activities on social media channels *always* constitute advertising or marketing?

*The law is a tortoise; technology, a hare.*
“Old Media”: Blurry Lines

*Downing v. Abercrombie & Fitch* (9th Cir. 2001)
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.
Act 3
A Framework
Three Simple Questions
Rights Clearance & Social Media

1. Do I *need* permission?  
   Maybe

2. Do I *have* permission – based on the “permission infrastructure” of the social media platform?  
   Maybe

3. Is the permission I have *robust* enough to cover what I’m doing?  
   Maybe
Oh yeah ... There is a fourth question ...

Good things come to those who wait.
Question 1

Do I need permission?
<table>
<thead>
<tr>
<th>Law</th>
<th>Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right of Publicity</td>
<td>The name, likeness, photograph, voice, identity, and “persona” of any person living (and in many places dead)</td>
</tr>
<tr>
<td>Copyright</td>
<td>Any creative material fixed in a tangible medium of expression</td>
</tr>
<tr>
<td>Trademark</td>
<td>Words, logos, symbols, taglines (and possibly other things) that are used to identify the source of goods or services</td>
</tr>
</tbody>
</table>
Do I need permission?

Copyright

• Every reproduction, distribution, exhibition, performance, or creation of a derivative work presumptively needs permission (especially in advertising)
  – Fair use? (Do you really want to go there?)
Do I need permission?

Copyright and Inline Linking

- Can I link to the material to avoid copyright issues?
- No copy is made of the image/video on the linking site’s server; instead, code points to the image/video on a different server.
Do I need permission?

Copyright and Inline Linking

• Does the linking site *directly* infringe the distribution, display or performance rights if there is no copying of the file?

• Cases:
  – *Perfect 10 v. Amazon* (9th Cir. 2007)
  – *Flava Works v. Gunter* (7th Cir. 2012)
  – *Levyfilm, Inc. v. Fox Sports* (N.D. Ill 2014)
The Statutory Language
Copyright and Inline Linking

• 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 publicly means “to transmit or otherwise communicate a performance ... of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times.”
Do I *need* permission?

**Copyright and Inline Linking**

- Plaintiffs were trying to hold the defendants liable for linking to infringing content on a third party server.
- What happens when a brand links to content that is *not* infringing on the plaintiff’s server.
- In that instance, the site selects (curates) the content, engaging in *volitional acts* that ultimately results in the end user “experiencing” the content.

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Do (or should) a copyright owner’s exclusive rights include a right to “present” content via links?

Once again, the law is a tortoise; technology, a hare.
A Functional Equivalent?

ABC, Inc. v. Aereo, Inc. (2014)

“Why should any of these technological differences matter? They concern the behind-the-scenes way in which Aereo delivers television programming to its viewers’ screens. … [They do not] significantly alter the viewing experience of Aereo’s subscribers.” (Justice Breyer)

“It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes.” (Justice Scalia)
Secondary Liability

- Are you acting as an intermediary that facilitates direct infringement by an end user (or someone else)?
  - *Inducing* infringement
  - Making a *material contribution* to the infringement with *knowledge* of the infringement
  - *Profiting* from infringement with a *right and ability* to stop the infringement
Practical Advice:
Don’t bet the farm on the “server test.”
Do I need permission?

Trademark

- Is there a likelihood of confusion as to sponsorship, approval, endorsement ...?
- Is there dilution?
- Nominative fair use?
- Classic fair use?
- Free speech/Parody?
- **Bottom line:** Is the rights holder likely to do anything about it (beyond a c&d)?

Probably not
The Ambush
McDonald's @McDonalds · Feb 1
That @VictoriasSecret ad was magical. RT and you could win a lovin' $1,000 Victoria Secret gift card

Lovin’ the Super Bowl

18+, US Only, Click Learn More for Official Rules
lovinwins.com

Learn more

McDonald's @McDonalds · Feb 1
Lovin’ the celebrity charcuterie tomfoolery @Wix. RT to try to win an iconic laptop and a premium website for a year

Lovin’ the Super Bowl

18+, US Only, Click Learn More for Official Rules
lovinwins.com

Learn more
Do I need permission?

Right of Publicity

Arby's @Arbys
Hey @Pharrell, can we have our hat back? #GRAMMYs

Pharrell Williams @Pharrell
Y'all tryna start a roast beef? 😁😊 "@Arbys: Hey @Pharrell, can we have our hat back? #GRAMMYs"

Related headlines
Arby's Slayed the Grammys With This Tweet About Pharrell...
Adweek @Adweek
Grammys 2014: Pharrell's hat gets life -- and Twitter -- of its...
CNN @CNN
Recap of the Day: The Best Memes from the 2014 Grammys
Cheezburger @Cheezburger
At last!

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A different perspective ...

Hi @DuaneReade - unlike @KatieHeigl, I am very happy to be photographed coming out of your excellent stores. And feel free to tweet it.
7:57 PM - 9 Apr 2014

58 retweets 92 likes
Is this even commercial?

Citi Bike
@CitibikeNYC

Congrats to frequent Citi Bike rider Leonardo DiCaprio on his #GoldenGlobes win!

86 RETWEETS  54 FAVORITES

7:29 PM - 12 Jan 14
But I don’t even mention a product!

*Jordan v. Jewel Food Stores* (7th Cir. 2014; N.D. IL 2015)

“Good things are just around the corner”

“Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was ‘just around the corner’ for so many years.”
But I don’t even mention a product!

Jordan v. Jewel Food Stores (7th Cir. 2014; N.D. IL 2015)

- Image advertising = advertising
- “Jewel’s ad has an **unmistakable commercial function**: enhancing the Jewel-Osco brand in the minds of consumers. This commercial message is implicit but easily inferred, and is the dominant one.”
- Is “commercial” under the First Amendment purposes the same as under ROP statutes?
Right of Publicity vs. First Amendment

• At least 8 different balancing tests, including:
  – Transformative
  – Predominant Purpose
  – Rogers v. Grimaldi
  – Real Relationship
The Special Case of Native Advertising

Blurrier and blurrier and blurrier
The Native Advertising “Game”

• You likely have to label native advertising as “advertising” – in the words of FTC, when in doubt, “disclose”
• If I do this, how do I argue that I didn’t need a release to use someone’s name, likeness, etc.
  – Oh, I’ve got arguments!

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Question 2
Do I have permission?
Do I *have* permission – *Directly* from the rights holder?

- A click-through
- An email
- A reply to comment
- An invitation to share
- A hashtag

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Hashtags to Obtain Permission

- First vs. next generations
- On or off platform?
- How specific is your hashtag?
- What is in the photos?
- Moderation?
#IgrantpermissiontoBrandtousephotoinallmediaforadpurposes

(That’s 57 characters, if you’re counting)
Do I have permission?

Indirectly from the rights holder

- Users of social media sites grant broad rights to the social media platform, and the platform grants broad rights to developers.
- Despite terms/policies, some users may not understand that their content can be used in a commercial context.
- Your use of the content must conform to the TOS/Developer Guidelines which are NOT always so clear:
  - Facebook: Get consent before including user’s data in any ad
  - Twitter: Ok to use tweets “in advertisements, not as advertisements”
Question 3

Do I have all the permissions I need?

You gotta read the fine print.
#1: Facebook’s TOS
Fraley v. Facebook, Inc. (N.D. Cal. 2011)

- Class action alleged that sponsored Stories violated the right of publicity of FB users (especially minors)
  - **12/2011:** Court holds, among other things, that whether users agreed to appear in Sponsored Stories is a disputed question of fact that jury must decide
  - **8/2012:** Court rejects first attempted $20M settlement (in August)
  - **8/2013:** Court approved settlement
10. About Advertisements and Other Commercial Content Served or Enhanced by Facebook

Our goal is to deliver advertisements and other commercial or sponsored content that are valuable to our users and advertisers. In order to help us do that, you agree to the following:

1. You can use your privacy settings to limit how your name and profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. You give us permission to use your name, and profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us, subject to the limits you place. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you. If you have selected a specific audience for your content or information, we will respect your choice when we use it.

If you are under the age of eighteen (18), or under any other applicable age of majority, you represent that at least one of your parents or legal guardians has also agreed to the terms of this section (and the use of your name, profile picture, content, and information) on your behalf.
“Creative Commons licenses do not waive or otherwise affect rights of privacy or publicity to the extent they apply. *If you have created a work or wish to use a work that might in some way implicate these rights, you may need to obtain permission from the individuals whose rights may be affected.*”

(Creative Commons FAQs)
Instagram and Regramming

• Main interaction through comments
  – All comments are public
• No “sharing” functionality of posted content
  – Sharing occurs through screenshots, cropping, and “re-gramming”
  – No permission infrastructure to support this
  – Might this be fair use?
Sideloading
(not just 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.

More simply put.

If you post your content on Pinterest, it still belongs to you but we can show it to people and others can re-pin it.
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.”
Act 4

The Practical Exam
Act 5
A Search for Social Tolerance
But everybody’s doing it.
What you do on your personal Facebook page may not fly on a brand’s Facebook page.
(The Promised 4th Question)

Will your use be tolerated?
This outline is a discussion in summary form and may not address all applicable issues or be relevant to all situations. It is not intended to be legal advice. Please consult your attorney for legal advice.