

## Social Media, Your Brand and the Law – Part 1

Social Media is a wonderful asset to all businesses – but Social Media is a lot of work. Protecting your intellectual property online is difficult, but the payoff can be significant. In Part 1 of our Social Media and the Law Newsletter, we'll be considering the copyright and brand implications of social media.

### Copyright Basics

Copyright exists in any original expression. That includes any artistic, literary, musical, film or broadcast work, but not a mere idea.

The work is owned by the author or creator of work, unless the person is doing it as a part of their role as an employee, journalist or as a commissioned work (in certain circumstances). However, Contractors are not employees, and they retain the copyright to anything they create unless you've contracted otherwise.

A copyright owner's rights are infringed if a substantial part is copied or made public without that owner's permission.

### Your Content

When your business uploads content to a social media platform, you're required to agree to that platform's terms of service. Those terms will grant the service a licence to use any material you provide to it. The extent of this licence varies from site to site, and they may also (but not always) grant you a licence to use content provided by other users.

However, even if those terms are acceptable to you now, you should be aware of how these terms might be varied - terms may change without your express knowledge. Before you post anything online, stop and consider:

If it's your content

- Who created the content?
- Who owns copyright in the content?
- Do you have rights to post / publish / copy?
- What rights have you given up when posted on social media?

If it's others' Content

- Does copyright subsist in what you have used?
- Are you entitled to use?
- Have you copied a "substantial part"?
- Do you fall under a fair dealing?

### Brands

When you work with social media, your brand is a valuable asset (perhaps *the* most valuable asset) that you'll want to protect. Damage can be done to your brand in the form of:

1. Trade Mark Infringement and Passing Off
2. Misleading and Deceptive Conduct
3. Name Squatting and Parody Accounts

**Trade Mark Infringement** is the use of a mark which is substantially identical with, or deceptively similar to, a registered trade mark on similar goods or services. Where a brand exists but no Trade Mark has been registered, the tort of **Passing Off** may be enforced similarly.

**Misleading and Deceptive Conduct** will occur where a person involved in trade or commerce, engages in any conduct that is misleading or deceptive or is likely to mislead or deceive.

Meanwhile, **Name Squatting** and **Parody Accounts**, cover any registration of another's name or brand name for malevolent purposes. This includes the registration of Twitter handles, Facebook Pages and domain names. Although not a cause of action itself, Name Squatters are very likely to be infringers under other intellectual property grounds.

### What Are Your Remedies?

#### Proactive Steps

Perhaps the simplest protection of your brand is defensive registration. This refers to the creation of official brand accounts for each new social media platform. Although this is not an enforcement mechanism, it is simple and cheap and offers an official outlet for your customers to gravitate towards.

On most social media platforms, under the terms of service, you'll also have the right to lodge a complaint or letter of demand if you have evidence that your intellectual property is being infringed upon.

If serious damage has been done to your brand, legal enforcement mechanisms may be appropriate.

#### Reactive Steps

First consider if it's in your best interest to stop the use. The public relations fallout from coming down heavy handed against an individual might substantially outweigh any benefit.

If your organisation decides that stopping any unauthorised use is necessary, it is important to act quickly, action any terms of use violation and then if all else fails, consider formal legal action.

### Conclusions

Social media is an important tool, but a number of legal risks are present for organisations. However, social media shouldn't be written off as too risky too soon.

Most risks associated with intellectual property infringement and brand management can be effectively controlled through education of your staff and the development a strong but flexible social media policy.

*If you would like assistance training your staff in the use of social media, help with the development of a social media policy, or would like any further information on this topic, please contact Richard Prangell on 8239 6500 or [richard.prangell@kreissonlegal.com.au](mailto:richard.prangell@kreissonlegal.com.au).*

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