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Fair Is Fair? Navigating Product Integration and Clearance for Content Creators

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When you are in the business of creating content, it's crucial to know when licenses or permissions are required to use the intellectual property of others (such as copyright and trademarks). In this article, we explore what fair use entails, how clearance and permissions are key areas of risk management for content creators, and provide advice on avoiding infringement claims and practical steps to manage these issues in your content creation business.

Copyright

Copyright is a bundle of rights granted to the creators of original works, giving them exclusive control over how their work is used, reproduced, and distributed. This includes things like photographs, music, movies, art, and software. Copyright protects the expression of an idea, not the idea itself. In order to distribute, adapt, or otherwise use the copyright works of others (such as including music in a post or showing a painting in the background of a video), you must: (1) ensure the work is in the public domain; (2) use the work in a way that constitutes fair use; or (3) have the permission of the owner of the work.

Public Domain

Copyrights are typically granted for a specific period, and once that period ends, the work enters the public domain. Once a work enters the public domain, anyone can use it without permission. Determining whether a work is in the public domain can be challenging because copyright terms may be calculated differently based on when the work was created and where. In the section on clearance below, we include some tips for determining whether a work is in the public domain.

Fair Use

You may be tempted to use a popular song, meme, artwork, or image in your content and rely on fair use to do so without permission. Copyright law considers the following fair use factors: (1) the purpose and character of the use, *i.e.*, whether commercial or nonprofit; (2) the nature of the copyrighted work; (3) the amount/substantiality used in relation to the work as a whole; and (4) the effect of the use on the potential value of the work.^[1] Two recent cases illustrate how the principle of fair use has been applied in the social media and advertising context: In *Griner v. King*, the district court found Congressman Steve King liable for copyright infringement after using a popular meme on social media to solicit campaign contributions. The defendant appealed the damages, arguing it made fair use of the image. The circuit court disagreed, stating use of the image was purely commercial and

intended to solicit donations, and therefore was not fair use. In *Eight Mile Style LLC et al. v. LaFontaine Ford St. Clair Inc*, Eminem's music publisher filed suit against a Detroit Ford dealership alleging the dealership referenced Eminem's song "Lose Yourself" in ads that ran on social media. Although the case has since been dropped, it is indicative of the risks of using songs without permission in social media posts.

Be aware there is no magic percentage of a work you can use that constitutes fair use, and that every case will be fact-specific. In our practice, we have seen investors, distributors, and advertising agencies require representations that all social media content of a creator be noninfringing. To be able to give such a representation, it is important to clear all of the copyrighted work and trademarks of others you plan to use in your content.

Trademarks

When creating content for an advertiser, or your own brand, there may be times when other brands appear in the content, such as in the background of a video or image. Use of another party's trademark without permission, whether intentionally or inadvertently, may not automatically be considered infringement. Classic fair use under trademark law is an affirmative defense that requires the defendant to show the term is (1) not used as a trademark; (2) used only to describe the goods and/or services; and (3) used fairly and in good faith. For example, in the case of *Solid 21, Inc. v. Breitling U.S.A., Inc.*, a watch manufacturer's use of "red gold" in product advertisement was descriptive and did not infringe the plaintiff's RED GOLD trademark for identical goods. It may also be acceptable to use another party's trademarks in your content to describe their product or compare it to your product or one you are advertising; this is known as nominative fair use. Nominative fair use is use of another's mark to identify the trademark owner's goods and/or services. The use does not suggest sponsorship or endorsement by the trademark holder. However, if you do more than compare products and actually encourage the consumer to use both products together, this may suggest endorsement and lead to consumer confusion, which is not fair use. Simply having a product with a trademark visible in the background of a video may not be infringement, unless the product is that of a competitor of the company you are advertising for or you use the product in a way that disparages the goodwill of the trademark.

Avoiding Infringement: Clearance

The best way to avoid infringement claims when using third-party work is to clear the use of the work beforehand. This could include an assessment of whether the work is in the public domain or whether the use will be considered "fair." Clearance may also take the form of searches of copyright and trademark registers and other public sources. For longer works, you may consider hiring a clearance firm that specializes in media clearances.

Copyright

The most useful resource to help determine whether a book, film, photograph, or song is in the public domain is the [U.S. Copyright Public Catalog](#). The catalog contains a record of registered U.S. copyrights from 1978 to present and is a great starting point to locate information on the owner of works and copyright terms, among other information. Keep in mind, the U.S. Copyright Public Catalog only contains a record of registered copyrights, and a work not listed in the catalog may still be subject to copyright protection depending on the date of creation.

Trademarks

The two main sources to search for determining trademark ownership and rights are the U.S. Patent and Trademark Office, for registered marks, and the Internet, for uses of unregistered trademarks. When conducting Internet searches look for registered domains, websites where the trademark is used with goods and services in the U.S., and references to the trademarks in online publications to determine ownership.

Avoiding Infringement: Inadvertent Use

When creating content for commercial use, even an inadvertent inclusion of a trademark, artwork, or building^[2] in the background of a photograph, reel, video, or post could give rise to legal issues. Taking a few minutes to clear your setting and to investigate any restrictions in public places will go a long way to reducing this risk. Using a checklist or having a policy for employees and contractors to follow for each post is an effective way to ensure these mistakes don't occur.

Negotiating Permissions and Licenses

If you determine that you will need a license to use someone's work or trademark, you can reach out to the owner directly (particularly in the case of trademarks), publisher, or producer. Alternatively, there are organizations that can assist with these types of requests. For example, Shutterstock and Getty Images provide royalty-free licenses for editorial and stock images. In the case of music, there are many organizations that manage licensing, such as: ASCAP (American Society of Composers, Authors and Publishers), a performing rights organization (PRO) that collects royalties on behalf of songwriters and publishers; Harry Fox Agency: A U.S.-based music rights agency for reproduction rights; and Global Music Rights: A PRO that collects royalties for music performed online and through digital media. This is not an exhaustive list but a good starting point.

When negotiating licenses, be sure to have clarity on how the work may be used, how many times, what portions (if not all), any restrictions, credit requirements, and fees. Keep copies of all licenses.

Best Practices

Based on our experience working with content creators in a wide spectrum of media, here are **five** tips to help avoid intellectual property infringement claims:

1. Build clearance into your content creation process.
2. Review content for common issues before posting (products with trademarks in the background, music, clips from shows, artwork, or protected buildings).
3. Have a policy and procedure for you and your employees/contractors to follow.
4. Know what you have licensed and how you can use it.
5. When in doubt, seek legal advice.

[1] 17 U.S.C. § 107

[2] Many famous landmarks restrict photographer for commercial use.

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