

Social media – intellectual property owner's friend or foe?

Treat your friend as if he might become an enemy (Publilius Syrus, 85-43 BC)

Social media is a very powerful marketing tool. If used and managed properly, platforms like Facebook, Instagram and Twitter can be a brand's best friend.

If not managed properly, however, social media platforms can be a brand's enemy. They can, at least temporarily, impede growth and – in the most extreme circumstances – cause significant damage to brand reputation.

In the context of intellectual property (IP) rights, whether social media platforms are your friend or foe depends on two factors:

- + How you manage the IP rights of your own business, and
- + How you treat the rights of others.

In this article, we focus on the two IP rights that feature most prominently in social media marketing – copyright and trade marks – and how these should be managed on social media.

Copyright – be vigilant

The IP right that is probably the most often complained about in social media is copyright.

Copyright rights arise automatically on the creation of an original copyright work. 'Original' means the product of more than minimal time, labour, skill and judgement and not copied from someone else's work; it doesn't mean 'brand new' or 'novel'. The threshold to achieve 'original' status is low.

Copyright works include logos, photos, images, paintings, illustrations, sound recordings and films – all of which are used extensively on social media.

Quite often, copyright works are used on social media without a copyright owner's permission. Businesses – from sole traders to large corporates – should be vigilant to ensure their copyright rights are not being infringed.



If you see unauthorised use of your copyright material on a social media platform, you should contact the infringer immediately asking them to stop and remove the posts.

If this is unsuccessful, or you are not comfortable with contacting the infringer directly, you should ask your IP specialist to send a strongly worded letter. If there is no response or action to that letter, you can make a formal complaint to the platform on which your copyright is being infringed.

The online complaint forms used by Facebook and Instagram, for example, require you to provide them with details of your copyright work (what type it is – photo, video, artwork, software, logo, etc.) and links to where the copyright work can be publicly seen. If the copyright work isn't viewable online then you have to describe the work in detail or attach an authorised example. Without this information, the platforms cannot assess your complaint.

In cases involving photos, videos, artwork and logos businesses should be able to readily provide evidence of their rights to the platforms. In other cases, it could be

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more difficult to describe the copyright work or provide the requisite evidence.

It may be that you don't want to provide a copy of your copyright work to Facebook; for example, if your complaint relates to infringement of copyright in confidential product drawings by a New Zealand competitor. In this case, the last thing you want to do is disclose your copyright works. However, enforcing your rights directly against an infringer to avoid the requirements of a formal complaint process may be difficult as the infringer could be based overseas or may not be locatable at all.

The bottom line is that if you can't meet the platform's requirements to prove copyright infringement you risk your complaint not being upheld and the unauthorised use of copyright material continuing.

Trade marks – be registered

Rights in a trade mark can be acquired through registration and/or use.

In the social media arena, registration of your trade mark is particularly important. Enforcing rights in unregistered trade marks on social media platforms is extremely difficult as these platforms do not recognise unregistered trade mark rights.

As a general rule, a business's principal trade mark/s – usually a name and/or logo – should be registered for a number of reasons; the two main ones being:

1. It is the best form of protection against unauthorised use of your trade mark. As registration is a matter of public record, anyone thinking of registering or using an identical or similar trade mark to yours can easily check to see if they can (or cannot), and
2. It provides a readily identifiable, nationally-recognised business asset – unlike the situation with unregistered trade marks where owners must provide evidence of use to establish their rights and where rights are often locally or regionally limited in scope.

A registered trade mark not only gives your trade mark better IP protection, but it is also more attractive to

investors and potential buyers of your business than an unregistered trade mark.

If you see unauthorised use of your trade mark on a social media platform, then as with copyright infringement you should contact the infringer immediately asking them to remove the references or posts.

If this is unsuccessful, or you are not comfortable with contacting the infringer directly, then again you should ask your IP specialist to send a strongly worded letter. If that doesn't work, make a formal complaint to the platform on which the infringement took place.

The online complaint form used by Facebook and Instagram, for example, asks you to provide registration details such as the country or countries in which your trade mark is registered, its registration number and the categories of goods and/or services covered by your registration. You are also asked to upload a scanned copy of your trade mark registration certificate/s or a screenshot of the registration on the website or database of the applicable national or community IP office/s; in New Zealand, this is the Intellectual Property Office of New Zealand. If your trade mark is not registered, you cannot complete the form.

The need for your trade mark to be registered is reinforced, for example, by Facebook's Commerce & Ads IP Tool which gives users the ability to search ads, marketplace posts and group sale posts and report content that the user identifies as infringing their IP rights. Access to the Tool is not automatic though. IP rights owners must apply to gain access using Facebook's online form – which requests much of the same information as the trade mark complaint form.

In short, if you don't have a registered trade mark you will face an uphill battle convincing a social media platform to uphold your complaint.

Parting thoughts

If you actively use social media to market and promote your business, do treat social media cautiously. If you haven't already done so, register your principal trade marks and maintain a vigilant eye for any infringement of your copyright rights. +

Copyright infringement by former President Trump's team

An example of copyright infringement that hit the news in mid-2020 was the use on Twitter of a cover of Linkin Park's 2002 song 'In the End' in a campaign advertisement released by former President Trump's team. The video advertisement, originally posted by White House social media director Dan Scavino, was later retweeted by the former president.

On 18 July 2020, Twitter removed the advertisement following a formal takedown request by Machine Shop Entertainment, Linkin Park's business arm and management company.



Cyber security 101 for business

Some practical tips

You arrive at work to find that files with sensitive commercial and client information held on your computers have been hacked. This is the situation the Reserve Bank of New Zealand (RBNZ) found itself in earlier this year. In January, the RBNZ encountered a data breach of its global file-sharing application Accellion FTA. This application was once used by the RBNZ and its stakeholders to share personal and commercially-sensitive information.

It is alarming to contemplate having to negotiate with hackers who have stolen your business information for ransom. All businesses can learn from the RBNZ's incident to increase awareness of cyber security and minimise the risk of a hacker attack. Prevention is the best solution.

Install antivirus software

Antivirus software helps detect, quarantine and remove malicious software from computers. Although Windows 10 comes with Windows Defender built-in, this only provides a baseline level of protection. Hackers are constantly inventing new viruses and threats, and it's important to have up-to-date antivirus software. It's worth paying for reputable antivirus software; free antivirus software programs can be fake and/or harbour viruses.

Use a virtual private network (VPN)

If you connect a device to free public Wi-Fi networks at, say, local cafes, you're running a business risk. If hackers access that network, they can see everything you do on the internet, including logins and passwords. A VPN helps to protect you from these risks. A VPN provides online privacy, anonymity and security by creating a private network connection. Like antivirus software, it is worth paying for VPN software to ensure you receive a higher quality product.

Implement patch management

Patch management ensures that all operating systems and software on your business computers are up-to-date so the likelihood of a known security risk being exploited on your computers is reduced.

Although it is tempting to delay notifications that say 'Windows needs to restart your computer to install the latest update', installing those updates is critical to maintain security.

Older operating systems such as Windows 7 are easier to hack than the later version (Windows 10) because Microsoft no longer provides updates and support has ended. As a result, there are known security vulnerabilities which have not been fixed.

Regularly back up data

Your IT systems, including all data, should be backed up to a secure location, so that business can be restored quickly if it is cyber-attacked or there is another data loss event. Typically backup and business continuity plans are developed to ensure downtime is minimised. Often this will include backups taken at multiple times on any given day and at day end, and stored in multiple locations. Backups should be held for a reasonable period to avoid replicating viruses or other harmful codes.

Implement email filtering system

Emails are a big threat to cyber security. An email can purport to be from a genuine company but have fake credentials, could have been compromised by a hacker or have malicious attachments.

Downloading such emails could give a virus access to your computer. It is advisable to prevent programs from being run inside email attachments without permission. Email filtering system features are available with some Microsoft products but you may need to ensure these are turned on.

Web filtering

This technology stops web pages from being accessed that are known to contain harmful or restricted content. Web filters rely on constantly updated databases that record websites known to be associated with harmful or restricted content.

Train your staff

Staff members should be trained on cyber-attack risk and its protection. Even with the best measures in place, staff can unwittingly present security risks, such as clicking on email attachments from spam emails.

Don't forget the basics

It's easy to forget IT fundamentals. Have a screen lock. Create a complex password; ensure it is different for each account and change it frequently. Install two-Factor Authentication (2FA) that adds an extra layer of security by requiring users to provide two layers of information to gain access to a computer or network (such as inserting a password as well as code texted to your mobile phone).

Have an IT adviser

Unless your core business is IT, employ (or have on call) an IT adviser who can assess the risks to your business and implement the above steps. We also recommend you engage them periodically to undertake audits and to expose any weaknesses before a cyber-criminal exploits them.

Protect your business

Cyber security and cyber threats are now global problems. Failing to put in place measures to protect your business from these threats can easily lead to business failure. It should be a priority in your business planning. +

A child's right to a relationship with both their parents



Input is needed from Mum and Dad

When a couple separates, there is sometimes a major dispute when parents or caregivers can't agree on the care arrangements for their children. Communication has broken down and mediation hasn't worked, so one parent (or both) applies to the Family Court to decide the details of the children's care.

What does the Family Court take into account when dealing with battling parents or caregivers? Many parents say, "I want to care for my kids, but I still want the other parent involved in their lives." Others say, "Why should I participate? The other side is going to win anyway." The reality is that not only legally but also morally, children have a right to a relationship with both Mum *and* Dad.

The assumption

Historically, it was common practice in the western world for the mother to stay home with the children, while the father went to work. Mum is a full-time parent – or the more 'hands-on' parent. So when Mum and Dad separate, the assumption is that the children stay with Mum.

Inevitably, the relationship between the children and Dad starts to fade. They've gone from seeing Dad every day, to visiting him in the weekends or the holidays, or sometimes not at all.



It is important that both parents participate so they both get a say in their children's care.

The situation becomes worse when communication between the parents breaks down. The children start to feel that they have to pick sides. These assumptions and scenarios often come up in court.

A number of people believe that the Family Court is biased towards mothers. Some have also mentioned that they don't think they will get a say about their children's care – because they have been violent, or they have a history of criminal activity or drug abuse.

There are cases where one parent hasn't participated in the proceedings, apparently due to these incorrect assumptions.

The court, however, has a duty to put children at the forefront of its decisions, and this is assisted by input from both their parents or caregivers.

The law

At a hearing, the court follows the objectives and principles of the Care of Children Act 2004.

The paramount principle is that the court must act in the welfare and best interests of a child. In order to determine that, the court looks at other principles,

one of which is that children have a right to a relationship with both parents (and wider whānau). The Family Court is aware of studies and statistics confirming that children thrive more when both parents are involved (safely) in their day-to-day lives.

It is very unusual for the Family Court to make an order that doesn't make provision for both parents to care for their children.

It is important that both parents participate so they both get a say in their children's care. If a parent doesn't take part in the proceedings, a

decision will be made without their input. Once a final decision is made, it could be a long time before it is looked at by a court again.

Participate

If there are live Family Court proceedings about the care of your children or children in your wider family, make sure you contact our family lawyers and *actively participate* in the court process. It doesn't matter if you saw your children yesterday or if you haven't seen them in years, you are their parent and your voice matters. Otherwise, it will be your children who will be the ones missing out.

Kia kaha, kia māia, kia manawanui
(Be strong, be brave, be steadfast). +



LIM reports and property files

What is the difference?

If you are considering buying a property, you should carry out due diligence to assess its overall suitability for you and, amongst other things, to ensure all consents have been issued. Two sources of information are the Land Information Memorandum (LIM) and the property file held by local councils. We explain the differences between each.

LIM

A LIM contains a summary of the information held by the local council about the property and its neighbourhood. It holds a summary of resource consents and building consents for the property, and perhaps neighbouring properties, and information on rates, including whether rates are outstanding. It may include building plans. It records whether a property, or a building situated on it, has a particular status such as an historic place designation. A LIM contains information on zoning issues and utilities. It identifies, for example, flood plains, areas of erosion or subsidence and other hazards.

If there is an error in the LIM, or an item omitted, this can give rise to a claim against the council.

Agreements for Sale & Purchase commonly include a 'LIM condition' that allows a buyer 15 working days to obtain and assess a LIM; this generally takes around 10–12 working days to obtain and costs a few hundred dollars. An urgent request can generally be ordered which takes around two working days to obtain at additional cost.

Property file

Property files are held by the relevant council and contain all information

known by that council about a property. The file includes full copies of resource consents and building consents (and original plans), rather than the summary found in a LIM. Included is all correspondence with the council about the property – not all of which will be in a LIM.

Conversely, property files do not necessarily include general information about the neighbourhood which is included in a LIM (although this information is available on some council websites).

Some councils have excellent free online searchable property files. Other councils continue to hold hardcopy files only and charge a fee for their inspection.

Agreements for Sale & Purchase do not generally contain a specific clause relating to property files. The file can be inspected before making an offer, or offers can be made subject to a due diligence clause.

Do you need both?

It may be necessary to obtain both a LIM and to inspect the property file before buying a property. If there is a suspicion that some building work was unconsented, for example, assessing the property's original plans against the summary of consents in the LIM may provide an answer.

Get a LIM as a minimum

Many buyers will be content with obtaining a LIM only, although buyers who can inspect property files for free online will presumably do so. A LIM, however, remains an important resource for buyers. +

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Postscript

Leave and pay entitlements during Covid response and recovery

Over the past 14 months or so, employers and employees have had to work together during national and regional lockdowns, working from home as a requirement and/or choice and many other employment-related situations. Employment law obligations do not cease during these periods and employers must ensure they are acting in good faith towards their employees, while also trying to navigate these complex and rapidly changing situations.

Covid has thrown up some uncertainties for employers when calculating their employees' entitlements when they are unable to work from home, self-isolating, unable to travel (where necessary) and so on. The wage subsidy regime was introduced in 2020 to cover a portion of employees' wages during the first nationwide lockdown and has been reintroduced periodically as needed. In addition, the COVID-19 Leave Support Scheme provides support for employees who cannot work from home or need to self-isolate. To find out more about the Scheme go to www.workandincome.govt.nz and search for the Covid support scheme.

This is a complex area of employment law and it's important to get it right. For more information, go here: www.employment.govt.nz/leave-and-holidays/

We are happy to help if you would like more guidance on ensuring you are paying everyone correctly. +

Check your passport is current

With a travel bubble opening with Australia, do check that your passport is still valid before making a reservation.

The Department of Internal Affairs says around 300,000 people currently hold expired passports.

As well as being the best regarded form of identity for AML and other requirements, it would be a pity to have your travel delayed if, at the last minute, you discover your passport has expired. To apply for a new passport go to: www.passports.govt.nz +

A reminder about major changes to tenancy laws

This year heralds some significant changes to tenancy laws:

Changes from 11 February 2021: Several changes to the Residential Tenancies Act 1986 took effect on this date. These include an increase to either the 63 or 90 days' notice period for termination of a periodic tenancy and an increase in the level of awards the Tenancy Tribunal can make from \$50,000 to \$100,000.

There are further changes that take effect from **1 July** and **21 August 2021**; and from **1 July 2023** and **1 July 2024**.

To read more about this go to www.tenancy.govt.nz/law-changes/ +

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