

OPINION

Today's Business: Avoiding pitfalls of social media

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For business owners, the sheer volume of social media platforms and options can be overwhelming and difficult to manage, especially for businesses trying to respect trademark and other intellectual property rights. What can you say and how can you say it on social media to avoid violating some other party's property rights?

The good news: Courts are sorting out some of these issues for businesses. As a general matter, to violate another's trademark rights under the Lanham Act, one required element is to establish that the use was in "commerce" versus personal use with no relationship to sales or business pursuits.

The federal 1946 Lanham Act provides for a national system of trademark registration, helping to protect against the use of similar marks if likely to result in consumer confusion or even dilution of a famous mark.

One popular social media platform is LinkedIn, the professional networking site principally focused on furthering business interests. Posting information about a trade-protected mark on that platform raises a general presumption that it is in commerce. Of course, the law also requires that the content must be “in connection with the sale, offering for sale, distribution or advertising of any goods or services,” leaving room to argue that a posting on LinkedIn may not necessarily constitute a trademark violation.

One common occurrence on LinkedIn, Facebook, Instagram and other platforms is clicking the “like” icon. In most instances, clicking registers a “like” to the associated content and nothing more. Courts have been wary to deem a simple “like” as an adoption or use in commerce of the disputed trademark, primarily because it is ambiguous, imprecise and unverifiable. This is inherently the case given that a “like” may mean nothing more than attraction to or pleasure in the content, rather than endorsement.

Similarly, it is often not clear what a person is liking when a third-party’s post contains varied content. Suppose a post on Instagram contains a photograph with personal content and a hashtag that incorporates another’s trade name? It would be unclear what content was actually “liked” or whether that “like” could be deemed an adoption of the content.

Notably, hashtags also can be problematic depending on how they are used. A hashtag is a combination of words and/or numerals preceded by the hash sign (#) that amplifies a message and enhances the ability of others to connect with the content by subject matter.

Persons will use commonly known, public information, including names of existing retailers or other businesses as hashtags to drive users to their posts. The most litigated misuse of hashtags is when they are used to trade on an established brand to sell one’s private goods. So, if a business sells generic handbags on line, but uses a hashtag with commonly desired brands such as Coach or Prada to attract customers, this may violate the trademarks of those established brands.

By contrast, if a hashtag containing the names of established brands are used to critique the business practices of those companies, such use is likely not violative of trademark laws and is otherwise protected by the First Amendment to the United States Constitution, so long as the speech is not defamatory.

These are but a few of numerous issues the courts have addressed in connection with the ever-evolving social media universe. While the risks for businesses in navigating social media are many, they are manageable.

So, don't give up on using social media for business, especially with a solid understanding of how social media platforms function and the purpose and manner in which content is posted and delivered.

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