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COMMENTARY

IP Law Trends On the Rise and What Lawyers Need to Know

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July 08, 2022 at 12:30 PM

8 minute read

Intellectual Property

By Oscar A. Gomez

NFTs, Meta Tags and OnlyFans—oh my!

Oh my is right. In fact, it's been the first reaction for many of us in the legal profession when having to advise clients with regards to copyright and trademark infringement. The fast-paced and ever-evolving tech landscape we are currently living in—or rather, living through—continuously takes many twists and turns, and it's in our best interest to stay on top of it.

Among the newest intellectual property law trends are questions surrounding maintaining and transferring intellectual property rights through NFTs, trademark infringement for embedded meta tags, and copyright ownership questions arising from digital collaborations.

Here, we cover the top three trends and what us lawyers need to know.

Recently, ownership has come into question when content creators began litigating over ownership and rights to digital assets which were created as part of a collaboration or in exchange for payment. Social media platforms and the rise of pandemic-favorite OnlyFans have led to questions about joint works under copyright law.

OnlyFans is a content subscription service where content creators earn money from fans who subscribe to their website. Subscribers often opt to pay for personalized videos, oftentimes explicit, from their favorite performers. The OnlyFans business model allows the content creators to retain most of the income generated; however, this model also brings an increased likelihood of problems arising.

The leaking of photos without the consent of the creator, copyright infringement of photos, videos or other content, the unauthorized uploading of material through fake accounts, and cyber bullying or online harassment are a handful of problems OnlyFans has created. Content creators should know that upon filming and creating original content, copyright protection automatically attaches to the work. Copyright protection confers to content creators the exclusive rights of reproduction, derivative works, distribution, performance, and display rights. Absent an assignment or licensing agreement, no other person—besides the content creator—can use or distribute the content without infringing on these exclusive rights. Although registration with the Copyright Office is not needed to attain legal rights, registration is highly recommended, as it creates a presumption of validity, is a prerequisite to pursue a copyright infringement claim in federal court, allows a person to pursue statutory damages and attorneys' fees, and places third parties on notice of their rights in the original work.

Nevertheless, the question still stands: who is the "creator" of an OnlyFans video? If the video calls for a high-level production team, is it the videographer, the performer, or the director who has copyright ownership? When multiple players have a stake in the content, it is important for the parties involved to lay out contracts, copyright assignment agreements, or licensing agreements that define or limit copyright ownership and the rights. Without these agreements in place, claims of copyright infringement may arise, bringing the costs of litigation potential damages. For example, under 17 U.S.C. Section 504, statutory damages for copyright infringement of a registered work could range from $750 to $150,000 per work.

Another IP concept implicated on the OnlyFans platform is a person's right of publicity, which prohibits unauthorized commercial use of a person's name, image or likeness. Everyone, not just celebrities and well-known figures, have a right of publicity. A person's right of publicity is protected under state statutory and common law; there is generally no federal claim for the misappropriation of a person's name, image, or likeness. OnlyFans performers can protect their right of publicity by reporting unauthorized users who use their name or likeness for commercial or profitable purposes.

Now turning to trademark law, another question that has arisen in the IP world is whether the use of trademarks in meta tags and paid Adwords (on Google, Amazon, or other platforms) constitutes infringement. Meta tags are snippets of text that describe a page's content; the meta tags do not appear on the page itself, but only in the page's source code. Meta tags are essentially short content descriptors that assist search engines in understanding a web page's content.

Meta tag descriptions have proven to be a powerful tool in increasing a website's search ranking. Armed with this knowledge, some companies have begun manipulating the system and using their competitors' trademarks within their meta tags; this malicious move often causes a decrease in online traffic and sales for companies associated with the trademark, prompting many to take legal action.

Adwords are a similar form of advertising technique, where advertisers bid on certain search terms and keywords for search engines to display sponsored results when consumers type in those specific words. Adwords provide a competitive edge to businesses and companies who seek to increase clickthrough or conversion rates with their businesses when consumers are searching the Web for specific goods or services. Like meta tags, Adwords are not typically visible in the search results' text.

Although meta tags have been around since the 90s, Adwords are a fairly new territory in cyberspace, and there remains uncertainty over when their use constitutes trademark infringement. Many courts tend to view the use of these search optimization tools, particularly meta tags, as trademark infringement. To prevail on a claim for trademark infringement, a person must show that a person used their trademark without authorization, causing ordinary consumers to be confused or misled as to the origin of the mark. When determining whether consumers will likely be misled as to the source of the advertised goods or services, courts will consider numerous factors, including the similarity of the marks, the similarity of the advertised goods or services, the sophistication of consumers, and actual confusion.

These search engine optimization efforts to attract consumers effectively divert the consumers from the website of the trademark owner whose mark was searched, potentially confusing consumers into thinking that the sponsored website is affiliated with the trademark brand. Because Adwords are not literally reproduced on the party's website and are not necessarily written in the links or text of the sponsored search result, it may be more difficult to establish a claim of infringement. However, if the term is reproduced in the advertisement or text of the sponsored result, this would provide a stronger, independent ground for an infringement claim. Because courts are divided, whether usage of a competitor's trademark as an adword or in a meta tag constitutes infringement is determined on a jurisdiction-by-jurisdiction basis. Business owners and companies should therefore err on the side of caution when deciding to employ a competitor's trademark in their SEO marketing efforts.

Finally, NFTs continue to see issues with rightful ownership and copyrighted material. An NFT, or a non-fungible token, is a unique, one-of-a-kind, not mutually interchangeable digital asset. With NFTs, each unit is distinctly identifiable and is defined by metadata and secured on a blockchain ledger that incorporates a unique role, function, and value. A token can represent music, videos, graphics, tweets, etc., but most of the headline-grabbing, big ticket NFTs are digital representations of art. A unit of currency, such as the U.S. dollar or a Bitcoin is fungible—you can trade a dollar for another dollar, or a Bitcoin for another Bitcoin, and get something virtually indistinguishable from your original. In contrast, NFTs are unique—an individual piece of art can be a singular NFT, or it can be one of many distinctly numbered copies.

NFT creators often overlook a significant step in the process: filing for IP protections over their work. Consumers and NFT creators should know that the sale or acquisition of NFTs does not itself result in the assignment of intellectual property rights to the purchaser. Absent an assignment or license agreement, copyright ownership typically remains with the person or entity who created the work underlying the NFT, meaning purchasers may not distribute, reproduce, or display the NFT's underlying work without infringing.

Before an NFT is sold, NFT creators should consider whether they will convey a license or assign the work to the purchaser—for example, these agreements can provide for the commercial use of the work. If a license is being granted to the purchaser, NFT licensing agreements should spell out the period of time the licensee has authority to enjoy the exclusive rights associated with the copyrighted work and any specific provisions explaining the fees and royalties to be given to the creator. On the other hand, purchasers should review all contracts related to the purchase of an NFT to determine what rights, if any, they gain upon purchase. The use of these agreements, particularly in the form of smart contracts stored on the blockchain, provides a clear outline of the rights and limitations that accompany an NFT.

Where the road of innovation will take us, no one knows, but we cannot be caught off guard. We as legal professionals need to stay up to date on the latest developments and ensure we are properly versed and prepared to work on our client's behalf. If that means hiring someone specialized in tech to "advise" you and keep you up to date, or having monthly tech updates with your team, then it must be done.

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