

SOCIAL NETWORKING SITES AND IP: FRIENDLY AND UNFRIENDLY ISSUES

By Daniela Bassan



This article explores the interaction of social networking sites (SNS) with intellectual property (IP) rights. In particular, the treatment of copyright and trade-mark material on SNS is explored to identifying some of the key issues facing owners and users of IP in today's online social media.

What are Social Networking Sites (SNS)?

SNS can be defined as digital platforms through which individuals or corporations publicly communicate information to other individuals or corporations. Examples of the most popular and well-trafficked SNS include Facebook, Twitter, MySpace, LinkedIn and YouTube.

Navigating the waters of SNS can be tricky, whether from a personal or commercial perspective. The goal for business owners is to effectively utilize social networking tools in order to optimize marketing returns and performance while also ensuring that IP strategies underlying innovation, reputation, goodwill, etc. are adequately protected.

What IP Issues Arise on SNS?

There are a multitude of IP issues that may be engaged by activities on SNS including:

- The unauthorized uploading of musical or literary works to SNS (e.g., original songs or lyrics);
- The unauthorized use of registered or unregistered trade-marks in connection with commercial activities on SNS (e.g., promotion or sale of consumer goods);
- The unauthorized transformation of musical or literary works on SNS (e.g., digital enhancements or modifications) which are substantially similar to the original work;
- The unauthorized linking or transmission of musical or literary works between different SNS in order to reach different audiences;
- The unauthorized posting of musical or literary works in a format which permits users to access substantial portions of the works on SNS;
- The unauthorized association of one brand with another brand in connection with goods or services being offered on SNS; and
- The unauthorized use of copyright material or

trade-mark designs by non-profit or volunteer organizations seeking to promote the availability of their services via SNS.

What Legal Approaches are Used?

There are a variety of approaches that may be used to address the situation where one's IP is being used without authorization on SNS. Generally speaking, the approaches range from "soft" ones (i.e., focus on flexible IP licences without many restrictions) to "hard" ones (i.e., emphasis on strict enforcement and control of IP rights).

Hard Approaches

At the "hard" end of the scale, there are traditional litigation strategies directed at enforcement of IP rights through the courts or specialized tribunals. The targets of litigation may be individual users of SNS (if they can be identified and located) or entities representing the SNS themselves. There may be legislative, regulatory or contractual provisions which affect the ability to bring such litigation or determine the jurisdiction in which such litigation could be conducted. While it is beyond the scope of this article to consider such provisions, it is worth noting some of the pros and cons associated with the litigation route.

One advantage of *not* pursuing litigation may be the opportunity to benefit from "free" advertising of an IP brand or investment by third parties engaging in SNS activities. Another advantage of staying out of court would be a savings of costs and resources which could be diverted to development of other SNS strategies (see below) to minimize one's IP risks. *Contra*, a lawsuit could send a strong message of deterrence to third parties, particularly in instances where the SNS activities are largely for-profit and commercial in nature. A court action, if successful, could also serve as a strong precedent for any similar disputes in the future.

However, it is also possible that a message of heavy-handedness by an IP owner against an infringer could go "viral" on SNS and result in large-scale negative publicity, particularly in borderline infringement cases. This means that "hard" approaches against IP infringement on SNS require careful assessment of all the circumstances and possible consequences to one's brand or profile.

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Soft Approaches

At the “soft” end of the scale, there are a variety of licensing options which may be effective to protect (or at least manage risk to) one’s IP on SNS. A traditional licence would seek full protection of IP rights, digitally and otherwise. A typical IP licence would include, for example, payment terms, quality controls, ownership provisions, and limitations on modifications to IP. However, overly restrictive licence provisions may still prompt negative reaction from SNS users and could generate adverse publicity for the IP owner. A less traditional (and less restrictive) licence would be a creative commons licence. This type of licence is not based on protecting all legal rights and interests of the owner but, rather, enforces select or qualified rights, such as allowing reproduction or transformation of the IP as long as there is acknowledgment given to the original owner of the IP.

Related to the “soft” approach, however, is the need for monitoring and compliance systems to be put in place by the IP owner. That is, if an IP licence is issued for SNS activities or SNS users, the IP owner should ensure that the terms of the licence are respected on an ongoing basis. Given the inherently public nature of many SNS activities, some aspects of monitoring and compliance may be easily tracked by the IP owner. For example, it should be apparent to the IP owner whether proper ownership credit is being given and whether quality standards are being met on the licensed SNS. Other aspects may be more challenging to track such as the extent of re-distribution or re-transmission of the IP to unlicensed third parties who have access to the SNS. At the same time, there may be technical solutions available to assist with tracking IP movement (from one user or site to another) on SNS.

What Risk Management is Needed?

There are a number of steps that can be taken to mitigate or eliminate the risks posed by SNS to one’s IP rights and interests:

- Creating a portfolio of template agreements to authorize/license the use of IP on SNS;
- Developing specific in-house policies to govern employees’ treatment of copyright, trade-marks, etc. in the context of email communications, Internet usage, and SNS activities;
- Seeking advance clearance of copyright and trademark issues for all corporate materials to be published or distributed online, particularly those accessible on or linked to SNS;
- Establishing a system of monitoring and compliance for IP licences which have been issued to SNS users or entities;
- Developing a self-contained system for selling and promoting goods or services through SNS (e.g., to ensure all IP is properly licensed and that jurisdictional issues are addressed in the event of IP disputes); and
- Obtaining advance opinions on any significant IP infringement issues identified on SNS.

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