Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Where Did Marketing Get That Content?

Law360, New York (March 7, 2016, 9:19 AM ET) --

Jed Enlow

As an attorney in media production, I am often asked for a set of clear and simple rules for use of third-party materials in creative marketing content. What's OK? What isn't? Will we really get sued? The answers to these questions vary widely, so the rules aren't so simple.

Companies of all sizes, across all industries, are eschewing and/or supplementing traditional advertising in favor of digital and social media content, in the hopes that it goes viral. Mobile technology has made content creation and distribution incredibly easy and inexpensive. Anyone with a mobile phone can publish photos and video across the globe in an instant, and as a result, the volume of quality visual content at the fingertips of marketers has exploded to a nearly incomprehensible level. If a marketer wants to use a high-quality image of a particular scene, why would they spend time and money on equipment, travel and talent to create one, when there are likely thousands of good options already online and available with the click of a mouse?

Adding fuel to the fire, content-hungry consumers are driving a lightning-fast release schedule, where the expectation is that content is created and released within hours or days, not weeks or months. Creative staff of today are tech-savvy, deadline driven and accustomed to getting content for free. Most are not particularly informed about rights and clearances.

If you accept all of this as the current reality, then here is another way to summarize: Your marketing department likely has a team of people with easy access to a massive quantity of third-party visual content. They expect to get those materials for free, and they might not even understand that they need to obtain rights in them. They release content worldwide, instantaneously, as frequently as possible, with little to no time for anyone to review and ask questions.

I would call this a perfect storm of legal risk in content creation. I often find myself asking creators, "Where did that photo (or footage) come from?" The exchange that often proceeds goes something like this:

Sally (marketing executive): "I'm not sure. Joe put this together, and I told him not to spend any money. Joe?"

Joe (digital media producer): "I asked Kris to find some good royalty-free options of a beautiful mountain scene with a cowboy. Kris, where did this one come from?"

Kris ((barely) paid intern for digital marketing department) : “I Photoshopped from a couple of different stock photos we used in a prior campaign. I found them on the company shared drive. That’s OK, right?”

After a few levels of inquiry, we still don’t know the original source of the photo, but we do know that we need to track down licensing information for at least two separate photographs. Hopefully the records for the prior campaign will clearly indicate the original sources. Once that is determined, the terms of the prior license agreements need to be examined to determine if the photos are also clear for this new proposed use, and if the terms allow for altering the photographs in the way Kris did. The terms might have been limited to a specific purpose, timeframe, media, etc. We can’t necessarily assume without understanding the original terms whether these new proposed uses are clear.

Another likely response from the intern, Kris, might be something like, “I got that from my boyfriend Dave’s Instagram. He just went hiking out West and then posted that photo. He won’t care if we use it.”

This might be true, but just in case, Dave should sign a short, gratis photo license agreement. What happens when Kris and Dave break up, and he decides he does care now? He could try to recover statutory damages for willful copyright infringement.

In another scenario, Kris says, “One of my favorite reality stars tweeted that photo last week on a detox retreat. Doesn’t that mean it’s public domain?”

Courts and social media companies have both been clear that copyrights are not impacted when owners post photos to their services, so the copyright in the photo must still be licensed. Additionally, the reality star will likely want to get paid for his/her association with your brand if he/she is depicted or referenced. Paid social media posts have become huge business with some top personalities demanding six figures per post. Actress Katherine Heigl sued Duane Reade Inc. when they tweeted a presumably accurate depiction of her walking on a city street with a Duane Reade-branded shopping bag. She eventually dropped her Lanham Act suit, but it’s a safe bet that she was compensated handsomely through the confidential settlement.

If Kris is more sophisticated in content sources, maybe she says, “ I pulled that from a Flickr Creative Commons stream. It was clearly marked as ‘Public Domain Dedication,’ and I printed out the attribution information.”

Kris was prepared for this one, and it might provide the risk aversion you are looking for, as it probably makes it less likely that you will get in trouble for using the photo, but it is by no means a legal protection. How can you know that someone didn’t go rogue and post a copyrighted image to the Flickr public domain feed? If that’s the case, or if someone simply designated the image incorrectly, you won’t find any legal protection. The Creative Commons terms of use specifically disclaim any warranty with regard to copyright, and in fact users indemnify Creative Commons for any use of the services. In other words, if the photo Kris pulled is actually a famous image by Alberto the Argentinian landscape photographer, you might end up paying to defend yourself and the Creative Commons organization in a copyright infringement suit.

Or, in a best case scenario, Kris says, “I have a signed license agreement from a local photographer, and the guy on the horse is his friend, Larry.”

Finally we have a scenario where the copyright in the photo seems to be properly licensed. But what

about Cowboy Larry? He might not want his image used in that ad for new steakhouse because he just went vegan! Unless the photographer represented and warranted that no likeness consents are necessary, you should also get an appearance release or consent from Larry. And even if the photographer is indemnifying you, a separate release is a good idea as an additional layer of protection, because an indemnity will only protect you to the extent of the photographer's ability to pay for a defense. A group of models recently filed a class action against a photographer and Getty Images for licensing their likenesses without consent. And, even if you are comfortable that you have adequate consent for Larry's likeness, the context of your use could negate that. Most photo agencies specifically disclaim warranties if models are used in an unflattering or controversial manner. If your company is producing a pro-life campaign and Larry is pro-choice, even a seemingly airtight license agreement might not protect you.

Typically after going through one of these scenarios, one of the next questions from producers is: "What about fair use?" Fair use is an affirmative defense to copyright infringement. In the business-decision stage, I always recommend finding an answer that avoids any infringement in the first place, instead of relying on an argument that would only be supported by the finding of a court. Also, since we are most likely discussing commercial uses of third-party materials, most factors will likely weigh against a fair use determination.

Another frequent question is: "Will we really get sued?" Again, this is a question without a simple answer. There are many factors that impact the risks associated with using visual content under the above scenarios. The context and scope of use in any particular instance can range from internal corporate training videos for 50 people with a universally loved not-for-profit organization, to branded and paid advertising for a polarizing political figure in a nationwide race. While the risk of a lawsuit might be remote in many cases, the entire framework for this discussion is based on examples from what many consider unlikely lawsuits. While I have struggled to provide a simple set of rules to cover all situations, I can offer the following list of tips to diminish risk:

1. Understand the rights you need to obtain.

Most lawyers understand that photos and video footage have a copyright that needs to be purchased or licensed, but in many cases that license will not include the rights to the individuals, logos or artwork that might be depicted in the content.

2. Educate your staff.

Your staff should understand the risks involved with taking content from the internet, or at least know that they need to check with someone who does.

3. Keep careful source records.

In a world where content is combined and edited and evolved multiple times to create something new, it is hard enough to track down rights holders when you know where the content came from, and nearly impossible if you don't.

4. Read the fine print (especially in the indemnity clause).

The endless sea of user-created photo and video content has given rise to a new crop of content licensing agencies, and they will be happy to take your money. Be sure you are getting adequate

protection before you pay them. The agreements and terms for these agencies are often poorly drafted, and/or heavily slanted in the agency's favor. Some agencies give all appearances of a valid license, but the terms they offer are essentially a quitclaim, giving you no real protection. Negotiating every word of a website's terms and conditions may seem tedious, but it is much better than defending a lawsuit from Kris' boyfriend Dave, Alberto the Argentinian photographer or Cowboy Larry.

—By Jed Enlow, Leavens Strand & Glover LLC

Jed Enlow is of counsel with Leavens Strand & Glover in Chicago and the production attorney for the "Steve Harvey" daytime show. He was previously senior attorney for Harpo Productions Inc., where he handled all aspects of production legal matters for "The Oprah Winfrey Show," "The Rosie Show" and various other television programs.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2016, Portfolio Media, Inc.