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Commercializing User-Generated Content: Five Risk Reduction Strategies

John Delaney and Anthony M. Ramirez

John Delaney is a partner at Morrison & Foerster in New York, NY, and former chair of the firm's Technology Transactions group. He founded, edits, and contributes to the firm's popular blog on the law and business of social media, Socially Aware. He can be reached at jdelaney@mofo.com.

Anthony Ramirez is an associate in the Technology Transactions Group at Morrison & Foerster in New York, NY. Mr. Ramirez advises clients on commercial and transactional matters, with an emphasis on intellectual property licensing and emerging technologies. He can be reached at aramirez@mofo.com.

We are currently in the midst of a seismic shift in how companies interact with user-generated content (UGC). For years, companies were happy simply to host UGC on their Web sites, blogs, and social media pages and reap the resulting boost to their traffic numbers. US law under Section 512(c) of the Digital Millennium Copyright Act (DMCA) accommodated this passive use of UGC by creating a safe harbor from copyright damages for Web sites, blogs, and social media platform operators that hosted UGC posted without the authorization of the owners of the copyrights in such UGC, so long as such operators complied with the requirements of the safe harbor.

Increasingly, companies are no longer satisfied with passively hosting UGC. Rather, they now want to find creative ways to commercialize such content by incorporating it into ads (including print, TV and other offline ads), creating new works based on such content, and even selling such content. In moving beyond mere hosting to proactive exploitation of UGC, companies risk losing the benefit of the DMCA Section 512(c) safe harbor, which could result in potentially significant copyright liability exposure.

For example, if a company finds that users are posting potentially valuable UGC to the company's Facebook page, or on Twitter in connection with one of the company's hashtags, that company may want to make such UGC available on its own Web site. The DMCA Section 512(c) safe harbor, however,

is unlikely to protect the company in copying such UGC from the Facebook or Twitter platform to its own Web site.

Potential Pitfalls of Exploiting User-Generated Content

The reality is that any company seeking to monetize or otherwise exploit UGC needs to proceed with extreme caution. This is true for several reasons:

- UGC can implicate a wide range of rights. As with any content, UGC is almost certainly subject to copyright protection, although certain Tweets and other short, text-only posts could be exempt from copyright protection if they qualify as “short phrases” under the Copyright Act. If any individuals are identifiable in UGC, then rights of publicity and rights of privacy also may be relevant. In addition, UGC may contain visible third-party trademarks or comments that defame or invade the privacy of third parties.
- UGC can implicate a wide range of rightsholders. Notably, many of the rights necessary to exploit UGC are likely to be held by individuals and corporations *other than* the posting user. For example, unless a photo is a “selfie,” the photographer and the subject of the photo will be different individuals, with each holding different rights—copyright, for the photographer, and the rights of publicity and privacy, for the subject—that could be relevant to the exploitation of the photo. Moreover, any trademarks, logos, and other images contained in a photo potentially could implicate third-party rightsholders, including third-party corporations. Videos also raise the possibility of unauthorized clips or embedded music.
- If the UGC is hosted by a third-party social network, the provider of such network may have Terms of Service that help—or *hurt*—efforts to exploit the UGC. Most social media networks collect broad rights to UGC from their users, although they differ substantially when

it comes to passing those rights along to third parties interested in exploiting the content. For example, if a company uses Twitter's Application Programming Interface (API) to identify and access Tweets that it would like to republish, then Twitter currently grants to that company a license to "copy a reasonable amount of and display" the Tweets on the company's own services, subject to certain limitations. (e.g., Twitter currently prohibits any display of Tweets that could imply an endorsement of a product or service, absent separate permission from the user.) Instagram also has an API that provides access to UGC, but, in contrast to Twitter, Instagram's API terms *do not currently appear to grant any license to the UGC* and affirmatively require companies to "comply with any requirements or restrictions" imposed by Instagram users on their UGC.

Best Practices for Exploiting User-Generated Content

With the above risks in mind, we note several emerging best practices for a company to consider if it has decided to exploit UGC in ways that may fall outside the scope of DMCA Section 512(c) and other online safe harbors. Although legal risk can never be eliminated in dealing with UGC, these strategies may help to reduce such risk.

- **Carefully review the Social Media Platform Terms.** If the item of UGC at issue has been posted to a social media platform, determine whether the Terms of Service for such platform grants any rights to use such posted UGC off of the platform or imposes any restrictions on such content. Note, however, that any license to UGC granted by a social media platform almost certainly will not include any representations, warranties, or indemnities, and so it may not offer any protection against third-party claims arising from the UGC at issue.
- **Seek Permission.** If the social media platform's governing terms don't provide you with all of the rights needed to exploit the UGC item at issue (or even if they do), seek permission directly from the user who posted the item. Sophisticated brands will often approach a user *via* the commenting or private messaging features of the applicable social media platform, and will present him or her with a link to a short, user-friendly license agreement. Often, the user will be delighted by the brand's interest in using his or her content.
- **Make Available Terms and Conditions for "Promotional" Hashtags.** If a company promotes a particular hashtag to its customers, and would like to use content that is posted in conjunction with the hashtag, the company could consider making available a short set of terms alongside its promotion of that hashtag. For example, in any communication promoting the existence of the hashtag and associated marketing campaign, the company could inform customers that their use of the hashtag will constitute permission for the company to use any content posted together with the hashtag. Such an approach could face significant enforceability issues—after all, it is essentially a form of "browsewrap" agreement—but it could provide the company with a potential defense in the event of a subsequent dispute.
- **Adopt a Curation Process.** Adopt an internal curation process to identify items of UGC that are especially high risk. These could include videos, photos of celebrities, photos of children, professional-quality content, any content containing copyright notices, watermarks and so forth, and any content containing potentially defamatory, fraudulent or otherwise illegal content. Ensure that the curators are trained and equipped with checklists and other materials approved by the company's legal department or outside counsel. Ideally, any high-risk content should be subject to the company's most stringent approach to obtaining permission and clearing rights or perhaps avoided altogether.
- **Adjust the Approach for High Risk Uses.** Consider the way in which the UGC at issue is expected to be used, and whether the company's risk tolerance should be adjusted accordingly. For example, if an item of UGC will be used in a high-profile advertisement, the company may want to undertake independent diligence on any questionable aspects of the UGC, even after obtaining the posting user's permission—or perhaps avoid any questionable UGC altogether.

In a social media age that values authenticity, more and more companies, even big, risk-adverse

Fortune 100 companies, are interested in finding ways to leverage UGC relevant to their business, products or services. Yet the shift from merely hosting UGC to actively exploiting it raises very real legal hurdles for companies. The tips above

are not a substitute for working closely with experienced social media counsel, but they collectively provide a framework for addressing legal risks in connection with a company's efforts to commercialize UGC.

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