

YOUR BRAND & SOCIAL MEDIA: HOW TO PROTECT YOUR CUSTOMERS



BY MAURINE L. KNUTSSON

Social media has proven itself equally helpful and harmful. Establishing a strong presence on social media can do great things for your brand, but social media is also a haven for frauds and fakes that can harm you and your customers. There are five steps you should take to protect your brand and your customers on social media: (1) learn, (2) plan, (3) preempt, (4) take action, and (5) repeat.

(1) LEARN

In order to protect and nurture your brand on social media, it is necessary to identify potential issues and risks. Like any other problem, it is difficult to find a solution if the problem is not understood. The risks faced on social media come in two forms: those created by your use of social media and those created by third parties' use of social media.

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The main legal risks presented by your use of social media are liability for using content or trademarks without the owner's permission, accidental disclosure of confidential information, and defaming others.

The legal risks presented from third parties' use of social media are multitudinous and constantly changing. These risks also vary for different industries. Some of the most common legal issues include scams;

fake accounts, aliases, pages, and ads; infringing products; and the unauthorized use of your content or trademarks.

Scams on social media platforms include phishing scams — where users are tricked into giving personal information, such as passwords, credit card numbers, or social security numbers — and fraud — where, for example, users are tricked into paying money in return for a falsely promised product or service. Scams are not only dangerous if you or your employees fall victim to one, but they can also be harmful to your brand if they are carried out by a fake social media account pretending to be you, your company, or your affiliate. Aside from scams, some fake accounts, aliases, pages, and ads on social media pretend to be you or your affiliate to attract users to webpages offering infringing products, competing products, or unrelated products. Having your brand used in a scam or

fake account can hurt you and your customers. Customers may unknowingly fall for the scam or end up with an inferior product. Your goodwill may also be at risk if people wrongly believe, but believe nonetheless, that you were responsible for the scam or fake account.

Social media is also a breeding ground for infringing products, including counterfeits, knock-offs, replicas, stolen goods, and third-shift goods. Real and fake accounts, aliases,

pages, and ads often lead users to websites and other platforms, such as Amazon and eBay, selling infringing products. Infringing goods are also commonly found in buy-in groups on social media. Buy-in groups allow individuals to pool their resources to buy bulk wholesale products that they can then resell. Many of the bulk wholesale products purchased are inexpensive, not because they are bought in bulk and cut out the middleman, but because the products are not authentic. Further, social media also offers buy-sell interfaces like Facebook Marketplace, which are flooded with infringing products.

The last common issue is the illegitimate use of trademarks and copyrights. Users may wrongly infer that you are an affiliate or sponsor by including your trademark in their posts. Copyright infringement on social media can be blatant, such as using someone else's photo or freebooting, including stripping and ripping the content identifying the original creator and reposting. It can also be more subtle, such as taking someone else's content and creating an infringing derivative work, doctoring an image, or remixing a song.

(2) PLAN

Following identification of the issues that arise on social media, you must plan to protect your brand and your customers. You will need to find your own balance for dealing with the seemingly never-ending concerns. Since the risks that arise are two-fold, a plan should cover both guidelines and best practices for employees' use of social media and tactics for minimizing and limiting third parties' actions that may harm your company or your customers.

You may develop a plan internally or hire a consultant that specializes in brand protection on social media. It is also important that your plan changes and adapts as your company grows.

(3) PREEMPT

Many companies are merely reactive when it comes to protecting their brand and their customers on social media, but there are steps that you can take to preempt issues before they arise. The steps you can take include:

- registering trademarks,
- registering copyrights,
- working with U.S. Customs and Border Protection to prevent infringing goods from entering the market,
- policing manufacturers and suppliers,
- taking steps to minimize goods being stolen,
- including unique identifiers on products,
- limiting warranties to products sold by authorized sellers,
- internal and external education,
- and creating a strong presence on social media.

Registering your trademarks and copyrights makes it easier to enforce your rights through each individual social media platform. Some platforms even require trademark registration before rights can be enforced. Another important preemptive step is to notify customs of your registered trademark and copyright rights. This can include providing Customs with a guide on how to identify counterfeit

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versions of your products. Customs offers a template guide here: <https://www.cbp.gov/document/guidance/ipr-product-id-training-guide>.

Another preemptive act is taking steps to prevent third-shift goods, non-spec goods, and stolen goods from entering the marketplace. Third-shift goods are extra production runs or extra product tooling made and sold by your manufacturers and suppliers and then sold without your knowledge or authorization. Non-spec goods are goods made by your manufacturers and suppliers that did not meet your quality standards and are then sold behind your back after you have instructed that the goods be scrapped. Stolen goods are genuine products that a company planned to sell but were taken from a warehouse or while in transit.

Your employees and affiliates can be great assets when it comes to social media. Educating and providing them with tools on how to use social media, and the risks that arise on social media, can help protect you and your customers. It can also be beneficial to create well-meaning materials and information that customers can access to learn how to protect themselves from scams and infringing products found on social media. Your materials can include a list of authorized dealers or ways to tell if a product is genuine (but be careful not to create a road map for counterfeiters).

Finally, creating a strong presence on social media will make it more likely that a customer finds your genuine content and products. If a search on social media ends in your account, a customer may never be exposed to the fakes and scams.

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To assist and incentivize customers to make sure products they receive are genuine, you can include unique identifiers on products that are hard to replicate, like QR codes. You may also consider only offering warranties for products sold by authorized dealers. So, if a customer calls for a replacement or repair, you can verify that the product is under warranty. Additionally, you will have the option of taking action against unauthorized dealers falsely advertising that products sold by them are under warranty.

(4) TAKE ACTION

There are both cost-sensitive actions, including filing takedown complaints with individual websites, Digital Millennium Copyright Act (DMCA) complaints, and demand letters; and expensive actions, including district court lawsuits and International Trade Commission (ITC) proceedings, available to protect your brand and customers on social media.

Filing takedown complaints with individual websites should be a routine practice. It is

a quick and easy way to remove the clearly infringing and harmful content. But if the rights being violated are unregistered or unclear, or the infringement or harm is more nuanced, a takedown complaint may not be successful. Further, takedown complaints can feel like a “whack-a-mole” game. As soon as one scam or infringer is taken down, another one pops up. In these cases, more aggressive action may be necessary.

(5) REPEAT

Social media, like everything on the Internet, is constantly evolving. It is important to reevaluate your risks often and continue to plan, preempt, and take action to protect your goodwill and customers. ■

BANNER & WITCOFF RESOLVES DISPUTE, SUPPORTS MISSION OF PRO BONO ARTS ORGANIZATION CLIENT

Banner & Witcoff has recently come to the legal aid of Elastic Arts, a 26 U.S.C. § 501(c)(3) non-profit organization based in Chicago. Elastic Arts fosters a community of multidisciplinary art forms, including music, visual, and literary arts, by providing a venue for artists to perform and present original works of unconventional art. Regular programs include improvisational music and electro/acoustic and video performance series, among other events. Incorporated 15 years ago, Elastic Arts has developed into a leading grassroots, arts-centered organization.

Justin M. Philpott, an attorney with Banner & Witcoff, was originally referred to Elastic Arts through Lawyers for the Creative Arts (<https://law-arts.org>), a pro bono legal services organization dedicated to all areas of the arts. Elastic Arts returned to Justin for legal advice after they became involved in a music copyright dispute with a large entity. Justin assisted Elastic Arts in resolving the dispute by engaging in productive communications with the large entity, supporting Elastic Arts’ position with legal reasoning. Elastic Arts now continues its mission of creating an innovative and inspiring environment for artists and audiences alike.

For more information about Elastic Arts, please visit elasticarts.org.