

Trademark and Copyright Pitfalls: Avoiding Common Missteps

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The following memo is part of a series on risk-management topics for organization leaders. This is an informational memo only, meant as organizational advice, not legal advice, and not the final word on your legal protections and risk-management options. There is no substitute for maintaining 100-percent in-house legal compliance and discussing these matters with your own private legal counsel, board of directors, accountant, and other trusted advisors. We encourage you to review the full series of memos to ensure all aspects of risk management are being addressed at your organization.

Overview

It can certainly ruin a CEO's day to get a demand letter from a lawyer insisting on thousands of dollars in payment because somewhere on the organization's website, someone has put up a picture without permission. This happens more frequently than one may expect. With the right processes in place, however, it's a scenario that can be avoided.

This memo discusses common missteps SPN affiliates may make when it comes to trademark and copyright laws, along with practical advice for ensuring compliance. There are also three appendices:

1. A review of intellectual property basics
2. What to do about licensing
3. Helpful resources

Common Issues Related to Copyrights or Trademarks

Every ambitious organization will encounter issues relating to copyright and trademark. It can be especially challenging to navigate the fine line between sharing relevant, publicly accessible information, and respecting or protecting intellectual property in our increasingly digital world. While most issues related to copyright or trademark can be resolved out of court with minimal disruption to normal business operations, these matters can be expensive and labor intensive to resolve.

Issues can arise from physical materials (printed publications, event collateral, handouts, etc.), on your website or other online property (blog, online journal, online tools and resources, digital reports and presentations, podcasts, recorded events, etc.), and on social media (Instagram, Twitter, Facebook, YouTube, etc.).

When issues related to copyright or trademark arise, pause and investigate before responding.

Understand:

- what the alleged issue is
- who is allegedly at fault
- what the potential repercussions are
- whether your insurance policies provide any coverage on this kind of matter
- your general counsel's advice

This is especially important because some allegations may be false, similar to a phishing scam.

Allegations of Copyright Infringement

As a general matter, copyright infringement occurs when a copyrighted work is reproduced, distributed, publicly displayed or performed, or made into a derivative work (editing or abridged) without the copyright owner's permission.

It is important to understand that while a "fair use" defense may be available in some cases, these activities presumptively constitute infringement regardless of whether there was a profit motive by the alleged offender.

In our digital world, allegations of copyright infringement typically happen on websites or via digital publications. Four common instances of allegations of digital copyright infringement are detailed below, along with recommendations for preventing them.

1. **Images:** Many readily available images, graphics, or diagrams found on the internet (e.g., via Google Images or Flickr) are copyrighted and the mere fact that they are readily available does not mean they can be freely used without permission. Copyright infringement occurs when a third party, such as an SPN affiliate, uses these images on their own website, social media, or digital platforms without securing the necessary permissions from the original owner. There are companies and individuals who track these seemingly minor infringements, issue cease and desist letters, and demand compensation for the infringement. Some firms use artificial intelligence or software crawlers to identify the unauthorized use of images.

Recommendation: Obtain digital images through a service like Shutterstock, which provides images and the licenses to use them as one flat monthly fee. Consider including an attribution or subscription in the caption of the photo on your website, as this will help future employees know the source of the photo. On social media, when sharing images, videos, or news articles, it is best to cite the original source of the media and link to where it was originally published.

2. **Quotes and Citations:** It is safe to assume that all writing published within the past 90 years is copyrighted. Copyright infringement occurs when third parties republish or quote substantial materials from such works without a license. While many authors who publish digitally (blogs, articles, reports) do so under a Creative Commons license, this is not always the case. Even where a work is within Creative Commons, the license will often contain requirements that users of the work cite the author in the appropriate way, link back to the original work, or refrain from editing or abridging the work in specified ways. Sometimes authors bring formal legal claims for this; more often, a potential relationship is ruined when an author feels slighted.

Recommendation: Do not republish or quote substantial materials from written works without a license, and ensure compliance with any applicable license restrictions.

3. **Events:** Everything your organization uses at events must be owned by your organization, or properly licensed. This includes photos in printed materials and on posters and signage; background music in communal spaces and walk-on music for speakers; graphics and videos in presentations, pamphlets, and handouts; sponsor logos and slogans; and the actual material presented.

Recommendation: The agreements with presenters and sponsors (requiring them to be responsible for the copyright or trademark compliance of their materials) can mitigate some of this risk, and your event venue may be able to help as well (e.g., using their sound system and canned music). Additionally, it is best practice to provide an audiovisual notice to attendees if the event will be photographed, video recorded, or audio recorded. This notice should describe how these recordings will be owned and used. Agreements with speakers should make clear their responsibility to ensure any copyright material is properly licensed or attributed so your organization is not liable for their content.

4. **Accidental Sublicensing:** As noted, only the original author or owner of a work can grant a license. Copyright infringement occurs when a licensee tries to give a third-party permission to use a material. This sometimes happens during research collaborations, shared writing exercises, or multi-entity events. If someone has secured permission for their organization to use an image, dataset, essay, or other work of this kind, that does not necessarily mean peer organizations have permission to use the work as well.

Recommendation: Ensure your organization has clearly documented all the licenses it has to use copyrighted works.

Allegations of Trademark Infringement

Trademark infringement allegations can occur between competitor organizations in a space, especially if one organization is trying to register a trademark. When the US Patent and Trademark Office (USPTO) registers a new trademark, it surveys whether anyone else is using a similar trademark in a similar sector. For example, if there are two public interest law firms in Texas and they are both trying to use the trademark "Lone Star Liberty," the firm who begins using that phrase later will be viewed as having infringed on the other firm's trademark.

Coca-Cola is often used as an example when discussing trademark infringement. The name, the red and white logo, and the distinctive font of the Coca-Cola brand are well recognized. Any other brand in the food and beverage industry would be infringing on Coca-Cola's trademarks if it tried to use a similar name, logo, or stylization. However, a travel agency specializing in whale tourism using a similar name, logo, or stylization would not cause consumer confusion. The two companies are so different that trademark infringement could not be alleged.

Recommendation: Perform a quick internet search of the phrase or logo you are trying to use and see what results you get. Similar words or logos from organizations in different sectors or different geographies are typically not cause for concern.

Loss of Copyright or Trademark Through Non-use or Non-enforcement

Trademarks must be used and enforced by their owners to remain valid. If an owner stops enforcing their rights, granting licenses, and/or using their trademark, the USPTO will no longer recognize ownership. The work will then become part of the public domain. A general guideline for when trademark rights are considered abandoned is after three years of non-use.

Recommendation: Consistently use trademark symbols.

Preventing Issues Related to Copyright or Trademark

1. Register your organization's name, logo, and tagline.

If you have not already, consider applying for a trademark for your organization's name, tagline, and logo. The [USPTO](#) has online instructions and clear procedures for doing this. While it may be time intensive up front, registering your trademark may deter those who might want to harm your organization and its reputation.

2. Consider copyright registrations for signature products.

While registration with the US Copyright Office is not necessary to obtain a valid copyright, it is a prerequisite to bringing an action for infringement. In addition, certain key remedies, such as statutory damages or an award of attorney fees, are only available if the work was registered prior to the infringement. Thus, while it is not necessary to register every work that your organization owns and publishes, it may be beneficial to do so for signature products or high-profile work. For example, if your organization published a journal or an annual research report, copyright registration may help you deter unauthorized reproductions or derivatives, which might harm the brand or reputation of the work and your organization.

At the very least, have an internal policy about what kind of copyright your organization wants to assert over works published. For example, you could decide that everything on your website is Creative Commons Attribution-Noncommercial-No Derivatives (i.e., material may be copied in any medium and format for noncommercial purposes, without modification, so long as proper attribution is made). Insert a standardized footer on your website pages that describes this.

Some may find it useful to use [Creative Commons](#) tools to quickly and easily provide copyright licenses to use their work.

Your general counsel can best advise your organization on what makes the most sense for your unique operating environment and risk factors.

3. Indicate when something you are using is trademarked or copyrighted.

When using content that is owned by another party, whether through a specific license or through Creative Commons use guidelines, make sure to note that you're using the content with permission ("reproduced with permission from XYZ owner"; "image copyright XYZ photographer, printed here with permission"; "published here from XYZ owner through

CC4.0 license”). Oftentimes the licensing agreement or Creative Commons license will provide specific instructions on attribution.

When you are publishing or sharing content that your organization owns, indicate the appropriate language to assert your ownership of the intellectual property. Provide instructions on your website for requesting the right to share, republish, or otherwise use your work. On reports and publications, note that the work is “Copyright XYZ organization, YEAR.” For marks and images that have not been registered with the USPTO, you may use the “tm” symbol to indicate ownership.

Consistently noting the ownership of your work and the work of others will indicate to the general public that you are conscious of and care about your own intellectual property and the intellectual property of others.

4. Use an image licensing service.

As noted above, there are people who seek out instances of copyright infringement for digital images, issue cease and desist demands, and request compensatory payments. Dealing with these motivated enforcers can be expensive and time consuming for an organization. It is much less expensive and easier to use an image licensing service to avoid this issue altogether. There are numerous companies that offer this kind of service, such as [Shutterstock](#).

At the very least, conduct an internal audit of ALL the images and graphics your organization uses on social media and on your website. Do you own them all? If not, remove or replace the ones you do not. While this process can be time consuming and unpleasant, the alternative—a costly legal case to settle—is even worse.

5. Update and implement your website's terms of use policy.

Your website's terms of use policy is the first source people review when they have questions relating to copyright or trademark issues. Ensure this policy is easily accessible, up to date, and covers trademark and copyright matters. Include information about your organization's copyright, including any Creative Commons licenses your organization uses with proprietary content published. This will protect your organization's intellectual property.

Make sure the contact information listed on your terms of use policy is accurate, up to date, and goes to an informed individual at your organization. That way, in the event of alleged infringement, notices are received promptly and handled appropriately. As with any legal action, the penalties for failing to respond in a timely manner can often be worse than the penalties for the alleged infraction.

A sample terms of use policy (Amazon.com's) can be found [here](#).

6. Ensure your agreements with employees and contractors properly describe the ownership of work products.

Proactive agreements, understandings, and dispute resolution processes will go a long way to managing issues relating to intellectual property.

- a. **Employees.** Depending on the kind of employment relationship your organization has with employees, the employer may assume ownership of work created. In many cases it is assumed that any work a regular full-time employee creates is owned by the employer. This is not always true of managers, or employees of LLCs. Check with your general counsel or an employment litigator to better understand what is detailed in your standard employment agreements, and ways to improve it for your organization.

Consider the term of the ownership of work:

- Does it survive in perpetuity?
- Is there shared ownership of some works that are closely tied to an employee's public persona?
- Does the employee retain ownership over intellectual products they bring to the organization at the time of hire?
- Is there a dispute resolution process in place for matters of intellectual property?

- b. **Contractors.** In general, unless otherwise specified in a signed contract, it is assumed that contractors or vendors retain ownership of any work created for your organization, even work that your organization has paid for. Therefore, it's important to check the following:

- Do your contractor agreements assert ownership over work products created by the contractor?
- Does your organization automatically get a non-exclusive license to the work if the contractor retains ownership?
- Is there a dispute resolution process in place for resolving intellectual property matters?

Common issues occur here with photography vendors, consultants, and contracted writers. For example, if your organization hires a photographer to document an event, does the services agreement detail who retains ownership of the photographs? Does it detail how the non-owning party can use the images (in the form of a licensing agreement)? And, what's the term of the agreement? If an outside firm is hired to develop a strategic plan for your organization, who retains ownership of that work and how might the non-owning party be permitted to use that work?

- c. **Include information about this in your employee handbook.** Here are some key pieces of information to include in your employee handbook:

- Define what copyrights and trademarks are and how to avoid common pitfalls with them.
- Explain why it is important to be conscious of your organization's intellectual property and the intellectual property of others.
- Set policies on how to evaluate the usage of intellectual property: for events, for your website, for social media, and for physical publication.
- Designate which staff members may request a license from an outside entity to use copyrighted or trademarked material.
- Ensure your employees know what copyrights or trademarks your organization owns, and how to properly use and protect them. This should include information about who on staff is authorized to license a copyright or

trademark and who is responsible for internal enforcement. Make clear to your employees your organization's expectations abiding by these policies.

Typically, it is challenging for an organization to hold an individual employee personally responsible for the organization's copyright or trademark infringements. Therefore, it may be beneficial for your organization's communications and external relations team to receive special training on this matter. Your general counsel may be able to provide this training.

Finally, ensure there is one person on staff who is knowledgeable about these matters, and knows where to find your organization's documentation related to owned and licensed intellectual property.

- d. **Keep your board informed.** If you have not already, provide your board of directors with information on your organization's copyrights and trademarks (logo, name, products, reports, etc.). Consider also sharing the following with your board:
- How your organization uses and protects these assets and how your organization handles the intellectual property of others.
 - Why this is important: potential copyright or trademark infringement affects their fiduciary duty to the organization.
 - A short guide on how to properly use your organization's copyrights and trademarks. This can be as simple as providing them with a logo file that cannot be edited, or guidelines on when they can use your organization's letterhead or name.

In general, your organization's directors and officers insurance indemnifies your board members for anything they do in their professional capacity on your board. Therefore, proactive education is a stronger tool than reactive punishment.

Conclusion

It is important to be proactive to eliminate unintended copyright infringements by your organization. At the same time, taking a few steps now and applying consistent policies will help protect your own intellectual property—one of the most important assets an SPN affiliate creates.

Appendix A: Intellectual Property Basics—A Refresher

Intellectual property (IP) broadly defined is a work, creation, idea, or invention that is the result of creativity or human intellect; something created with the mind that is usually intangible. In general, there are four types of intellectual property rights: patents, trademarks, copyrights, and trade secrets.

Patents generally cover technical inventions or products; trademarks cover words, phrases, or designs that uniquely identify your business; copyright covers artistic, literary, or intellectual creations; and trade secrets include proprietary business information and plans.

Intellectual property is recognized as being “owned” by the original creator or developer. While certain employment relationships or contractual arrangements may change this, generally IP rights are assumed to be with the creator.

What is trademark law?

In the United States, trademarks are registered and administered federally by the US Patent and Trademark Office. Trademarks cover names, logos, phrases, and other uniquely identifying things related to your business. Registered trademarks last in perpetuity, as long as the owner continues to use the trademark and re-registers it every 10 years.

The benefit of registering a trademark is that it prevents others from using it without your permission or using or registering a very similar one without your permission. Often, trademarks are considered to be part of a business’s brand identity.

What is copyright law?

In the United States, copyright law is federally administered by the US Copyright Office. Copyright covers things like websites, essays, blogs, reports, datasets, publications, designed images like logos or graphics, software, and other similar things. Copyright is a form of intellectual property protection grounded in the Constitution and granted by federal law for original works of authorship in a tangible medium of expression. Copyright covers both published and unpublished works. In general, copyright does not cover a specific idea, fact, or concept, but can cover the way these things are expressed. Generally, copyright once registered covers the entirety of the author’s life plus an additional 70 years after their death.

The benefit of a copyright is that it protects the author’s exclusive right to reproduce, distribute, or profit from the work in question. Others who want to copy or otherwise exploit the work must get explicit permission from the author.

Interestingly, copyright need not be registered to be assumed: The moment something is created, federal law recognizes it as “owned” by the author or creator. However, to enforce copyright protections legally (e.g., through a lawsuit for infringement), the copyright must be registered with the US Copyright Office.

It is worth noting that audio works, like podcasts or other recordings, may have more complicated copyright provisions, as the law may see the recording and production as separate from the conversation and ideas being recorded.

Appendix B: What Information Do I Need to Know About Licensing?

Both trademarks and copyrights can be licensed to third parties in several different ways, so long as the license is granted by the true owner of the trademark or copyright. Licensees may not in turn grant sublicenses for use; only the owner may grant use licenses. Additionally, only the owner may assert claims related to infringement; licensees have no legal standing to claim infringement.

Generally, licenses authorize someone other than the owner to use, distribute, copy, or otherwise benefit from the work in question. They may be written broadly or can be limited in scope: An author may time-limit a license, or limit where and how a licensee may use the work. These licenses are typically granted via a contract or other legal document; this is done to protect the owner and the licensee.

Licensing is a temporary granting of rights to others; an “assignment of rights” is when the original owner transfers (“assigns”) their copyright or trademark to a new owner. This is permanent and must be registered with either the US Patent and Trade Office or the US Copyright Office.

Exclusive versus non-exclusive

An “exclusive” license is typically only seen with copyright, not trademarks. In an exclusive license, the owner of the work is given exclusive permission to use it; the owner may no longer use it or grant any additional licenses. An exclusive license functions practically like a transfer of the copyright to the licensee.

A “non-exclusive” license, which is much more common, allows the owner to retain usage rights, and allows the owner to grant more than one license.

Creative Commons licenses

Creative Commons (CC) licenses are the most well-known of a kind of public copyright license, where the author wants to enable the free use and distribution of their work. Typically when work is listed as “creative commons license” it is followed by an adjective that describes the kind of free license: “CC-Attribution” means that as long as the original author is credited, anyone may use or adapt the work; “CC-Non-Commercial” indicates that as long as a user is not profiting, they may use the work; “CC-No-Derivative” indicates that as long as the original work is not edited or changed, anyone may use it.

Many times, this kind of license is used when an individual or organization wants their work to be widely shared by the public. Many think tanks and academic institutions use some form of a Creative Commons license for all the material they share online to ensure the public has access to use and share it.

Specific use licenses

An owner may choose to grant a very limited license to a third party for a specific use. These specific use licenses are very similar to non-exclusive licenses but contain many restrictions on how a work may be used.

For example, an event organizer might seek a specific use license to use an organization’s tagline on their promotional materials; a book author might seek a specific use license to use

another author's quote in their book; an organization might seek a specific use license to use a photographer's work on their website. It is important to note that with specific use licenses, a specific permission granted for use does not imply any other permissions granted.

Fair use

Sometimes copyrighted material can be used without a license or permission from the owner under what is called the "fair use doctrine." Typically, though not always, the scope of this use is narrow:

- for educational purposes
- offers the user no financial benefit
- transforms the original work enough to change its purpose and character
- uses only of a portion of the original work
- does not harm the value of the copyright to the owner

Typically, "fair use" instances of copyright materials happen when the copyright material is referenced or reported in the context of a larger work. However, fair use law can be incredibly complex and situation dependent. When planning to use copyright or trademarked material under fair use law, it is best to consult with an experienced lawyer.

Public domain

The public domain is not a specific place; it simply refers to when a work of authorship is no longer under copyright protection (it has expired) or failed to meet the requirements for copyright protection. Things in the public domain can be used freely without the permission of the author or former owner.

Jurisdiction

Federal courts have jurisdiction over both copyright and trademark disputes; however, if a claim also involves state law issues such as breach of contract, state courts may have jurisdiction over the case.

A country's copyright laws only apply to works created and used in that country. This means that the copyright an author holds in the United States may not be valid in other countries.

Copyright and trademark enforcement typically happens in civil court when a suit is brought by an owner or author. A suit will often seek an immediate injunction to prevent further violation of the copyright or trademark, followed by monetary compensation to the owner for the infringement.

Appendix C: Helpful Resources

Subscription services that offer licensed images:

- [Shutterstock](#)
- [Adobe Stock](#)
- [iStock](#)

How to register a copyright:

- [General information](#)
- [Guidelines and step-by-step how-to](#)

How to register a trademark:

- [General information](#)
- [Guidelines and step-by-step how-to](#)