



## Insta-worthy or Insta-infringement

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By:

Today's means of communication is ever more dependent on social media. Whether you're an individual, a onewoman shop, a fortune-500 company, or even the President of the United States, social media is the fastest and easiest way to be heard. But where does the line lie between legally sharing someone else's material and intellectual property infringement? Specifically, is re-posting an article or photo, using a brand hashtag, or re-sharing a meme infringement? The answer to all three questions is maybe, depending on certain factors. A discussion of some general guidelines to keep in mind from a U.S. perspective is below.

While litigation involving social media use has been relatively sparse (perhaps due to an inability to locate infringers or calculate damages), sharing and re-sharing copyrighted work on social media has led to some law suits, as has use of brand hashtags. Litigation is also routinely threatened for posting memes with copyrighted images. U.S. courts presiding over cases involving social media posts must decide the very fact-intensive legal questions of trademark and copyright infringement and whether any fair use defenses apply. In the trademark context, the fair use inquiry seeks to identify whether the trademark is used only to describe a product or service and/or to refer to the trademark owner without suggestion of sponsorship or endorsement by the mark holder. The copyright fair use question involves weighing the following four factors, which are highly fact-specific and subject to interpretation:

1. The purpose and character of the new use, including whether the work is non-commercial and serves as a "transformative" purpose, such as commentary or criticism, and adds something new
2. The nature of the copyrighted work
3. The amount and substantiality of the portion taken, and
4. The effect of the use upon the potential market for the original and derivative works

Because of the fact-intensive analysis and specific context of each case, very few U.S. courts have issued clear guidance with regard to infringements and any potential fair use defenses on social media. As a result, social media users cannot assume that the trademark and copyright fair use analyses are any different for social media shares and postings than for more "traditional" forms of infringement. Below are some general guidelines to keep in mind:

1. **Public Domain:** Use of anything in the public domain is fair game. Note, however, that just because an image is on the Internet, that does not mean it is in the public domain nor does that mean it is available to use.

Examples of works in the public domain are (a) a work in which a copyright has lapsed; or (b) certain works of the U.S. federal government.

2. **Know What You're Sharing:** Are you using an artist's image, music, or video clip, or a company's trademark? Tread with caution if you have not asked for permission or paid a license to use the material. Generally, creative or artistic works are given very broad copyright protection. And while words and short phrases such as names, titles,

and slogans, familiar symbols or designs, and lettering typically cannot be copyrighted, they can be claimed and registered as trademarks under certain circumstances.

- 3. Ask for Permission or Get a License:** Obtain express permission from a trademark or copyright owner to use their material and follow their guidelines for use. With regard to websites that allow you to download content, be sure to know the terms of use. Some websites even make clear that they provide consent to share their material. Also, some companies will allow use of brand hashtags in connection with promotions, contests, or in reference to their products.

A license is a formal means of consent to use material and often involves payment. License terms can be found on websites that offer images, music, and other copyrighted work for sale. The terms may also clarify that a specific type of use (commercial versus personal) is covered if the terms are strictly followed.

- 4. The Fair Use Defense Is Fact-Specific:** Fair use is only a defense to infringement and is a complex and fact-intensive inquiry determined on a case-by-case basis. Thus, weigh the fair use factors carefully when thinking about use, and do not assume fair use will protect you from liability.
- 5. Know Terms of Social Media Platforms:** Whether it's Facebook, Twitter, Instagram, Snapchat, Pinterest, or others, check the terms of use or service. Often these platforms will work with you to assist in taking down infringing material posted by others, but can also hold you solely responsible for any infringing posts of your own.