

THE DAILY RECORD

Tuesday, August 15, 2017 / Volume 109 / Number 151 / \$2.00 • Western New York's trusted source for legal and real estate news

IP FRONTIERS

Risks associated with user-generated content and design on e-commerce sites: A trap for the unwary—Part I

The surge of user-generated e-commerce and social media platforms has provided individuals—regardless of location, experience or financial status—the power to become a commercial artist, author, designer, musician or photographer. For emerging entrepreneurs, traditional barriers to entry have been removed by e-commerce websites such as Zazzle, CafePress, Threadless and Etsy.

For many of these sites, all the individual needs is a computer and an internet connection; everything else (e.g., manufacturing, printing, packaging, inventory, shipping, invoicing, etc.) is handled by a third-party e-commerce website. Similarly, Facebook, Instagram, YouTube and Twitter provide a platform for inspiring authors, photographers and musicians to post and spread their creative content worldwide, as well as the opportunity to generate income.

Given the access and ease with which one can generate and distribute products and/or creative content, many are drawn to these websites with aspirations of earning money and/or being discovered. These platforms provide a sense of empowerment, opportunity and endless possibilities for success.

However, for individuals who generate creative content—as well as those who use content they “find” on the internet—risks lie with opportunity. Too often, individuals who engage in online business ventures find themselves down a road they never intended to travel.

This article, Part I of a two-part series, explores some of the risks creative content generators face when they take advantage of the e-commerce marketplace. Part II will



By **ALANA M. FUIERER**
Daily Record
Columnist



By **SHANNA K. SANDERS**
Daily Record
Columnist

explore the risks and exposure faced by those who copy and use materials they find on the internet, albeit perhaps “innocently,” and the potential liabilities and safeguards internet service providers should consider before launching a website that incorporates user-generated content.

From the content generator's standpoint

A creative content generator is someone who creates an original work and then posts or offers it for sale online. Such as:

- A photographer who takes a photo of a beautiful sunset and then posts it on Instagram.
- An artist who creates a metal sculpture and offers it for sale on Etsy.
- A graphic designer who creates a new T-shirt graphic and offers it for sale on Zazzle.
- A musician who writes a song and performs it in a video posted on YouTube.

For these individuals, copyright can be a powerful tool. Unfortunately copyright

is widely misunderstood, especially in the context of online content and internet commerce. There is a vast amount of information and “tips” that can be found on the internet regarding copyright. Indeed, there is more commentary about copyright than most other forms of intellectual property, by both amateurs and professionals alike, perhaps because it applies to the largest audience.

While some of the commentary is accurate, a great deal is not. For those who do generate their own creative content, designs or artwork, there are a few copyright rules that should be kept in mind before one posts content or otherwise makes it available online.

1. Copyright exists at the moment the content is created and placed in a tangible medium. But that is not the end of the story. Although copyright automatically exists in a creative work upon “fixation” (i.e., when the work is embodied in a physical or digital medium that can be seen and copied by others), in general, an author cannot take legal action or collect damages without a United States copyright registration in hand. The immediate attachment of copyright protection allows the author to put a copyright notice on the creative work, but little more.

2. A copyright registration increases success of online enforcement. In order to walk into federal court, you need a registered copyright or, in some jurisdictions, a pending (or refused) copyright application. Similarly, although the Digital Millennium Copyright Act (DMCA) provides copyright owners with a powerful tool to submit take

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down notices to remove infringing content without the need to go to federal court, some Internet Service Providers (ISPs) will only take infringing material down if you can show you own a copyright registration directed to the material.

3. Time is of the essence: availability of statutory damages and attorney fees.

The holder of a copyright registration is entitled to statutory damages and attorneys' fees, if the application is filed within three months of first publication or before infringement begins. Without a prompt registration, a copyright holder is limited to actual damages or the infringer's profits, both of which can be insignificant and/or difficult to prove. Statutory damages, on the other hand, are determined by the judge and can be significant (up to \$150,000 per infringement, plus attorneys' fees), without the need to prove any actual damages.

4. Before you post on the internet, read the Terms & Conditions. These are typically found via a seemingly insignificant link located at the bottom of a website. By relying on and using a third-party website to reach an audience or potential consumer market, the content generator agrees and is subject to the legal terms and conditions (T&Cs) of the website platform. These terms often are long, complex and one-sided in favor of the website or ISP.

For a content generator, these T&Cs are significant because many include clauses that could affect the legal rights associated

with your creative work (User Content). For example, while Yahoo states that you retain your intellectual property rights in User Content, it also states the user is granting Yahoo a worldwide, non-exclusive, royalty free license to use the User Content. (See, <https://policies.yahoo.com/us/en/yahoo/terms/utos/index.htm>.) This means that in certain situations, Yahoo can do whatever it wants with the User Content, without permission. Similar provisions are found on Twitter, Facebook, Pinterest, Zazzle and Instagram, just to name a few.

Despite this potential impact on User Content, according to a study from the University of Connecticut, most people do not read the T&Cs associated with website platforms. In fact, 98% of the participants in this study signed up for a fictitious social networking site that required them to give up their first-born child and allowed the ISP to share all information with the NSA. (See https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2757465.)

5. Consider filing a copyright application before you post your content. This is important for several reasons:

- Once you post, your copyrighted work is publicly accessible and available for others to copy. Thus, the likelihood of someone infringing your work increases.
- The ability to recover statutory damages depends on when an application is filed (as discussed in No. 3 above).
- Perhaps the most overlooked reason to file a copyright application stems from the T&Cs found on most websites. As mentioned

above, many websites include a provision that the user grants the website an unconditional license to the User Content. Under the Copyright Laws, the grant of such a license constitutes a publication of your creative work. Why is this important? Because once a work is published, it can no longer be filed with the U.S. Copyright Office as a collection of works. Each individual work (e.g., each photograph, graphic design, etc.), once published, requires a separate copyright application and a separate government filing fee. In contrast, in most circumstances, a collection of creative works can be filed under one application (with one filing fee), provided they are not yet published.

Conclusion

The internet provides a wealth of possibilities but likewise many unknown pitfalls for the unwary content generator. It is important for those who intend to post creative content on the Internet to be mindful of these pitfalls and to investigate ways to protect themselves.

Alana M. Fuierer, Esq. is a partner in the Rochester office of Heslin Rothenberg Farley & Mesiti, PC. She can be reached at (585) 288-4832 or alana.fuierer@hrfmlaw.com. Shanna K. Sanders, Esq. is a partner in the Albany office of Heslin Rothenberg Farley & Mesiti, PC. She can be reached at (518) 452-5600 or shanna.sanders@hrfmlaw.com.

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