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SOCIAL MEDIA AND REAL ESTATE

Social media has become a popular marketing tool for the real estate industry. Attorneys at Olshan Frome Wolosky LLP discuss the intellectual property issues that real estate firms should be wary of as they post photographs and other online content to advertise their businesses.

Social Media

Social Media Considerations for Real Estate Companies



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Social media websites and apps, such as Facebook, Pinterest, Twitter, YouTube and LinkedIn, have become essential marketing tools for many businesses, including real estate companies. This is especially true as the small screen has replaced traditional forms of consumer entertainment and sources for information.

It isn't enough for a real estate business to simply have a website, and the number of businesses that are using social media to target and connect with customers and potential customers has skyrocketed over the last several years. What some firms forgot, however, is that social media is simply another form of advertising even if it is less formal.

Importantly, business can't use social media in the same way that individuals use social media, and content that may be okay to post on an individual's social media page could subject a business to legal consequences if used on the social media page of a business.

Before posting a photo, video or other content to social media, all businesses, including real estate companies, should keep in mind the laws of copyright, trademark, rights of privacy and publicity.

Copyrights

Most photographic, artistic, audio/visual and musical works created from 1923 until the present are protected by copyright. A copyright exists at the time of creation, regardless of whether or not the creator obtains a copyright registration and protects against unauthorized use or copying of the work. You must presume that virtually all content of any type found on the Internet is protected by copyright. While this article discusses mainly the use of photographs, please keep in mind that the same principles apply regardless of the type of work you wish to use.

Even though it is technologically simple to copy a photograph or other material that is easily found online,

that doesn't mean that the same can be used on your social media account. If you copy a photograph found on another website or social media page and use that photograph on your own website or social media page, you have infringed the copyright in the photo and can be found liable for copyright infringement.

Using stock photographs from websites such as Getty Images may be an option, but be careful. Many of the photographs from such websites are for "non-commercial" use only. Thus, even if you purchase a license to use a photograph from a company such as Getty Images, the license you obtain may not give you the right to use the photograph in connection with your business.

Also, if there are any persons or brands depicted in the photograph, the license may not give you any rights to use the person's image or the brand's trademark, the implications of which are discussed below.

Many companies will take their own photographs or hire a photographer to do so. If you take your own photograph, you will own the copyright in the photograph and can use the photograph as you see fit without liability for copyright infringement, keeping in mind, of course, the issues of privacy/publicity and trademark discussed below.

If you hire a photographer to take photos for you, keep in mind that with very limited exceptions, the ownership of a copyright will vest in the person who creates the work regardless of who pays for it. Therefore, a photographer will own the copyright in his or her photographs, and it is important for you to obtain an assignment of the photographer's rights in the photograph so that you may freely use the same.

If the photographer won't give you an assignment, you at least need a very broad license to use the photograph. Failure to obtain an assignment or license can subject you to infringement of the photographer's copyright.

Another copyright concern arises when you post a photograph that contains a protected work of art. This situation could come into play, for example, if you photograph the interior of a home or apartment, and a painting, sculpture or photograph is depicted in your photograph.

Just as the owner of the copyright in a photograph has the right to prevent the unauthorized use or copying of the photograph, the owner of the copyright in any work shown in a photograph also has the right to prevent the unauthorized use of the same. Therefore, unless you are certain that the work shown in a photograph was created before 1923 (and is thus no longer subject to copyright infringement), it is best to remove or "blur" any such works so that they can't be identified in the photograph.

Finally, any buildings created after Dec. 1, 1990, may also be protected by copyright as "architectural" works. There is a "photographer's exception" to such copyrighted works however, and Title 17 U.S.C. § 120(a) provides that: "The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place."

Thus, you may photograph and use photographs of such buildings. This doesn't give you the right, how-

ever, to use the images of such buildings in a trademark sense as discussed below.

Trademarks

In addition to the copyright considerations discussed above, real estate firms should also be aware of trademark issues that may arise with the use of social media. In general, a business may not use the name or image of a brand in order to promote the business' services.

Even if unintentional, the question to ask is whether a reasonable consumer would assume there might be some association between you and the brand featured in a photograph or other material you may post online. In this regard, it is always best to err on the side of caution.

Famous buildings can acquire trademark protection, and in fact, some buildings have even registered the building's silhouette as a trademark. The Empire State Building, the Flatiron Building, and the Chrysler Building are just some examples of building silhouettes that are registered as trademarks by the U.S. Patent and Trademark Office.

Even without a registration, however, it is possible for the owner of a building to claim that the building's appearance is so recognizable that it ought to be given protection as a trademark. Therefore, using a photograph of the Empire State Building prominently in social media or otherwise could lead consumers to believe that you are officially connected to the building and subject you to liability for trademark infringement.

Of course, using an image of a building if you are offering space within the building is allowed, as long as you don't state or imply that you are somehow endorsed or sponsored by the building, unless, in fact, you are. Similarly, using an image of a skyline in which a famous building appears may be acceptable as well as this wouldn't highlight any particular building over any other building.

Another way that trademark considerations may come into play would be any trademarks shown in photographs that you want to use. A recognizable product or brand name shown only tangentially in a photo—e.g., a photo of a living room that depicts a Steinway piano—is likely not a trademark violation as long as the Steinway logo isn't prominently featured or the photograph isn't staged in such a way that anyone would believe Steinway had endorsed you or that you were somehow connected to Steinway.

Rights of Privacy/Publicity

Before you post anything online, you must remember that individuals, whether famous or not, have rights of privacy/publicity. You should therefore obtain releases from any individual shown in a photo that you wish to post online. If you can't obtain such release, the individual should be taken out of the photo, or at least that person's image blurred so that the person can't be identified.

Celebrity photos and names are often used in connection with the social media postings of businesses. While many businesses show photos of celebrities using their products in everyday life, you must remember that a celebrity often earns substantial sums of money by licensing the rights to use his or her name and likeness.

If you use a celebrity's name or image in connection with your social media efforts, you could be subjecting yourself to liability for violating that celebrity's rights of publicity. Note as well that the use of a deceased celebrity's name or likeness can give right to claims by that celebrity's heirs.

Celebrities do take action against the unauthorized use of their names or photos online.

Duane Reade, a drugstore in New York, was recently sued for using a photo of Katherine Heigl in its Twitter and Facebook pages. Best known for her role on *Grey's Anatomy*, Heigl was photographed with a Duane Reade bag while leaving the store. Duane Reade posted the photo on Twitter and Facebook and tweeted the following message on Twitter: "Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore." The lawsuit has since been settled for an undisclosed amount.

Other recent examples of celebrities suing businesses for violation of their rights of publicity include Michael

Jordan, the estate of Humphrey Bogart, Halle Berry and Sandra Bullock.

Such activities have also prompted the White House to curtail the practice of President Obama taking "selfies" when a "selfie" was taken and tweeted by Boston Red Sox player David Ortiz and then re-tweeted by Samsung, who had paid Ortiz to take the photo for its use. While the President didn't end up taking legal action against Samsung, according to White House officials, there were "discussions" with Samsung's attorneys about Samsung's unauthorized use of the photograph.

Conclusion

Given the numerous intellectual property issues involved in promoting real estate properties, firms should carefully consider the use of images prior to posting on social media. Businesses should assume that traditional advertising clearance rules apply despite the informal nature of social media platforms.

