

Brandjacking on Social Networks: Confusion About the Source of Information or Advertising

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Abstract

Many companies and organizations today are using social networking sites such as Facebook, MySpace, and Twitter to provide information to other users and the public about their goods, services, and activities. Examples include Coca-Cola, Southwest Airlines, and my own law school. Trademark holders often use their brand name or other trademarked terms as a username to identify themselves on these sites. Yet markholders are not the only ones who have registered usernames that contain trademarked words or phrases. An example is “Janet” who, without authorization, registered ExxonMobilCorp on Twitter and used the Twitter account to answer questions about the direction of the company and where it was spending philanthropy resources. Individuals have also set up unauthorized Facebook accounts for Coca-Cola, Nine West Shoes, and other brands.

Some people may have a legitimate reason for registering and using another’s trademarked term as a username. Others may be engaging in username squatting, just like cybersquatters who register domain names containing trademarks with a bad faith intent to profit from the mark. Some users may even attempt to impersonate the markholder on the social networking site, which could harm both consumers and markholders if the information provided is false or misleading. (Exxon’s actual spokesperson said Janet’s posts contained several errors.) Such “brandjacking” may prevent firms from using their trademarks as usernames. More importantly, it may cause confusion regarding the source of information provided by the individual who signed up with that username. The markholder’s reputation may be harmed if untruthful information, rude or lame comments, and even spelling or grammatical mistakes are made on website pages purportedly authored by the markholder’s representatives.

While many social networking sites prohibit the unauthorized use of trademarks in usernames and the impersonation of individuals and brands, it is not clear whether and how trademark infringement law applies to brandjacking on social networks. The username registrant may not be using the mark to cause confusion about the source or quality of goods or services. Even so, it may still be causing confusion that is harmful. After discussing these issues, the Article explores the broader theoretical issue of whether trademark law should apply to unauthorized use of a mark that causes confusion regarding the source of information or advertising where the markholder is—unlike news or ad agencies—not primarily in the business of providing information or advertising services. There is no free speech right to use a trademark in a username or domain name and falsely state or imply on the associated website that the markholder’s representative is the author of the expression on the site. Even if there is no confusion about the source or quality of goods or services, this information-source confusion can be detrimental to consumers who may rely on the information. The right to freedom of expression should permit some unauthorized uses of trademarks online to communicate information and ideas. It should not allow third parties to use trademarks to impersonate markholders on social networks and elsewhere on the Internet.