

September 19, 2019

FAQ: Social Media Issues for Nonprofits

1. *I found a picture online that I want to post on my organization's Instagram account. Can I use it?*

Not necessarily. Just because material is accessible online does not mean that it is permissible to post. Most content is protected by copyright and/or trademark law, and you cannot post (or repost) it on social media (or anywhere else) without permission from the owner of the intellectual property rights. Some authors use Creative Commons licenses, which allow people to use a copyrighted work so long as they make clear who the author is, or meet some other requirement. Sometimes, the "fair use" doctrine may allow you to use copyrighted material for a particular purpose (this is discussed more fully in the answer to question 3). Often, though, it is necessary to obtain permission to use a copyrighted work. This can be a complicated process. If you think you might be using content owned by somebody else, you should consult with an attorney.

2. *I know that I cannot post any copyrighted content without permission unless it is in the public domain. But what is the public domain?*

Works in the public domain are those that are not, or are no longer, protected by copyright law. For example, some works are not subject to copyright protection because they fail to meet the originality standard (e.g., short phrases, titles), or are not fixed in a tangible medium (e.g., ideas). In addition, copyright protection over a given work does not last forever. The Copyright Act limits the length of copyright protection in order to balance the interests of individual content creators and the development of public discourse. A work arrives in the public domain when its copyright protection expires (for works published after 1977, a copyright expires 70 years after the last surviving author's death). A copyright owner can also choose to dedicate her work to the public domain, for some or all purposes. Once works are in the public domain, they belong to the public and can be used without obtaining permission.

3. *My organization is using copyrighted material for noncommercial purposes. Does this constitute fair use, or do I still need permission?*

It depends. The fact that a copyrighted work is not being used for commercial purposes is one factor in the fair use analysis, but it is by no means dispositive. Whether a use of copyrighted work is fair under copyright law (and therefore requires no permission from the copyright owner) is based on an analysis of four factors: (1) the purpose of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, and (4) the effect of the use upon the potential market for the copyrighted work. Use of a copyrighted work for nonprofit educational purposes, rather than for commercial purposes, will weigh in favor of fair use under the first factor. However, the fair use analysis is holistic and highly fact specific. You may need to consult an attorney to determine the likely outcome.

4. *If I solicit donations via my social media account, do I have to register my charity in all 50 states?*

Not necessarily. A nonprofit organization conducting charitable solicitation online should be registered as a charity where it has its principal place of business. In addition, the nonprofit organization may also be required register in any other state where it (a) targets donors, or (b) receives contributions on a repeated and ongoing or substantial basis. The precise definition of what constitutes repeated, ongoing, or substantial depends on the state.

5. *My organization took great pictures of an event we held recently in Central Park, and we would like to post the photos on our social media pages. Do we need to obtain any legal permissions for pictures that we took ourselves?*

If your photos feature images of people who attend the event, you should obtain legal permission from the photos' subjects in order to post them. You should generally obtain consent before posting a picture online if the event is in a venue where privacy is expected. But even if your event is in a public space, like Central Park, you will need permission to post the photos for promotional or advertising purposes. You should consider having participants sign a release consenting to their likeness being used for broad purposes, including promotion on social media, when they sign up for the event or at the event itself. At a minimum, you should make attendees aware that photos of the event will be taken and that by attending the event they agree to have their photos used by your organization. This can be done, for example, by notice in event materials or on a ticket stub.

6. *My organization is based in the U.S., and its programming occurs solely in the U.S. Our website and social media presence are obviously accessible globally, and usually include a donation button and an interface for users to sign up for newsletters and follow us on social media. Are we subject to GDPR?*

Your organization might indeed be subject to the European Union General Data Protection Regulation (GDPR), which applies to all corporations (including nonprofits) that offer goods or services to or monitor the behavior of people within the EU. Even if your organization does not target EU citizens, you are likely subject to GDPR if your organization has ever received a donation from someone within the EU, or if your organization has ever included someone within the EU on its newsletter listserv. Organizations that are subject to GDPR and do not comply may be liable for steep fines.

For more information on GDPR and its requirements, see [Legal Alert: Should My Nonprofit Organization Be Concerned about the European Union's New Data Law?](#)

7. *When is it permissible or appropriate to look at an applicant or employee's personal social media account and use information that I find to make decisions regarding employment?*

While it is permissible to investigate applicants and employees by Googling them and looking at their personal social media accounts, such research involves risks. Employment decisions should be based on job-related information only. Accessing private social media accounts can increase the risk of learning that the applicant is a member of a protected class (such as a person with a disability), and being accused of acting on the basis of that information. If you decide to conduct such research, your organization should have a clear written policy about when and why you do so to avoid discrimination claims. For more information about information that potential employers cannot seek from job applicants in NY, see [Legal Alert: Are You Ready to Hire Your First Employees?](#)

However, an employer can safely confront employees about postings that relate to that person's employment on their personal social media if the employee has voluntarily friended the employer or the posting is reported by another employee. For example, it may be employment-related information if an employee posts photos enjoying an active vacation while he is on intermittent leave for back injuries, or if an employee is making bullying and harassing comments about other employees on her personal social media.

8. What rules can my organization have about social media use?

The same rules that apply to your employees regarding misconduct and harassment also apply on social media. Your organization can create a social media policy that prohibits your employees from engaging in certain behavior online, such as threats, bullying and harassment. Likewise, the same rules that apply to privacy and confidentiality would also apply online. Your social media policy may therefore also prohibit posts that would jeopardize the privacy and protected information of other employees, clients, or donors. Your policy can also forbid making official statements without authorization, and posting confidential information, obscenity, or illegal activity.

Your policy should not ban the use of social media to discuss or attempt to resolve concerns that employees have regarding their working conditions. The National Labor Relations Act protects the rights of employees to act together to address conditions at work, even if the employees are not members of a union. A policy prohibiting the use of social media to discuss working conditions could be construed as a violation of that Act.

9. My organization does not lobby government directly, but we encourage our social media followers to communicate support for or opposition to certain proposed legislation in order to further our mission. Is this activity considered lobbying?

This activity might be considered lobbying, because social media posts can constitute lobbying, just like any other form of communication. Tax exempt public charities are permitted to lobby so long as lobbying is no more than an insubstantial part of their activities. Other government regulators may require registration and reporting as a lobbyist if an organization spends more than a certain amount on lobbying each year. Each regulator has its own definition of lobbying. For instance, in New York State it would be lobbying to ask your Twitter followers to call a state senator to ask her to vote for a piece of legislation. On the other hand, in New York State it would *not* constitute lobbying to merely mention a legislator and a piece of legislation in a social media post, if the legislator is not tagged and the post does not ask the public to lobby. For more information, see [FAQs on Nonprofits & Lobbying](#) and [Legal Alert: How Do NY State Lobbying Disclosure Rules Apply to Social Media?](#)

10. My organization's mission is aligned with a particular political candidate's platform. Can we like her posts, or refer our users to her website?

If your organization has 501(c)(3) tax exempt status, it cannot engage in partisan political activity, including supporting or opposing a candidate for public office or a political party. That means you should not retweet or "like" posts issued by a candidate's campaign staff, and you should not provide a link to the website of a campaign or political party. To avoid penalties for improper political activity, your organization should focus on the issues instead of the candidate.

For a more thorough discussion about legal issues that arise when nonprofits use social media, Lawyers Alliance's pre-recorded webinar, Understanding Social Media and the Law, is available upon request. To register, visit <https://lawyersalliance.org/recorded-webinars>. There is a \$25 fee.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Senior Policy Counsel Laura Abel at (212) 219-1800 ext. 283 or visit our website at www.lawyersalliance.org for further information.

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