

## **Brands & Influencers Beware! Popular Songs on Social Media at the Heart of Copyright Infringement Lawsuit**

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Anyone who has ever browsed Instagram® or TikTok® (or any parent with phone-addicted kids) realizes that music is an integral part of short-form video social media. Content creators record a few minutes or even a few seconds of video, then set it to a snippet of a song. The result is an easily digestible piece of entertainment that engages several senses and may be the next viral hit.

Social media users also know that advertisers increasingly are turning to content creators on these apps to promote products and services. There are many examples of this in industry trends reports, and one's own perusal of social media. According to one industry report, the **2023 Influencer Marketing Benchmark Report**, companies are expected to spend more than \$21 billion globally on influencer and creator marketing in 2023—compared to just \$1.7 billion in 2016.

This convergence of content creation, popular music, and product marketing is fertile ground for IP disputes. Whether you are a

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copyright owner, advertiser or influencer, a recently filed copyright infringement suit provides some reminders of potential watchouts in digital advertising today.

At the end of October, recording industry giant Sony Music Entertainment together with several record labels filed a **copyright infringement lawsuit** in the Southern District of Florida against OFRA Cosmetics for its use of unlicensed songs in allegedly more than 300 social media video posts. Sony alleges it warned OFRA to desist, which it did not, prior to suing OFRA.

The alleged infringement involves such famous songs from Sony's catalog as Michael Jackson's "Thriller" and George Michael's "Careless Whisper," as well as more recent hits such as Doja Cat's "Say So" and Lil Nas X's "Old Town Road." The list of allegedly infringed Sony songs also includes songs by such household name artists as Beyoncé, Britney Spears, Usher, and Will Smith. Sony attorneys say that if OFRA wants to use this music to promote its products, it should license the songs it wants to use.

The complaint emphasizes "the importance of music to social media posts and consumer engagement" and says "the OFRA videos often specifically highlight or explicitly refer to the featured sound recording in the video's caption." As you may expect, copyright owners tend to scrutinize these types of commercial uses, where the fame of the song, and stature of the recording artist, are used in direct connection with the marketing of a brand's product.

The commercial nature of the work (here, one of the posts to OFRA's social media channels) is also a key factor in the affirmative defense of copyright "fair use," of which the first factor is "the purpose and character of the use, including whether the use

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is of a commercial nature...” Backing tracks for social media posts are analogous to television commercials, which is a key source of licensing revenue for prominent recording artists and record labels. That too is a statutory factor under the U.S. Copyright Act in analyzing a potential fair use, as a court must consider the effect of the use on the potential market for or value of the copyrighted work. Even very short song snippets may not be fair uses, as the “amount and substantiality of the portion used” is but one factor in the analysis. OFRA will likely try to defend its posts as “fair use,” but that kind of defense will likely be challenging under the circumstances.

Sony’s suit asserts claims against videos that were allegedly directly created by OFRA, and by others where OFRA contracted with content creators to do so, in exchange for either monetary payments or free products. In its complaint, Sony claims OFRA is responsible for those content-creator infringements because OFRA “actively reviewed, selected, copied, re-posted, and shared infringing content created by its influencers.” These third-party influencers were not named as defendants in the case, but Sony could try to amend its complaint and add them later as co-defendants. Both the advertiser (OFRA) and its content creators may be liable depending on the circumstances.

Sony also asserts that using unlicensed music for commercial purposes violates the various social media platforms’ terms of use—where the OFRA-promoting content was posted.

At a minimum, *Sony v. OFRA* may provide further insight on the legal landscape for social media advertising for all involved—for copyright owners, advertisers, and influencers. Judgments and settlements that support copyright-owners’ rights in this area will give them increased leverage, both in terms of proper licensing of

songs in the social media space, and in takedown efforts for unlicensed uses. This case also highlights the need for brands to protect themselves from potential copyright infringement claims in their advertisements, including when third-party influencers may select the content and “soundtrack” for social media posts on the company’s behalf. Content creators must also be savvy in their field as well—while the brand (in this case, OFRA) might be the bigger target, individual influencers may be separately liable for infringement.

We do not need to wait for a ruling in this case to fall back on the tried-and-true rule: ask permission to use all third-party content in advertising. Brands and content creators should both appreciate the risks of using unlicensed material, and address it their agreements, and in review procedures specific to social media posts. There is no substitute for good advertising hygiene.

*Obligatory lawyer disclaimer: This firm does not represent either Sony or OFRA in this lawsuit. The named individuals, brands, and third party platforms mentioned in this alert are not a party to the lawsuit between Sony and OFRA, and are cited merely for illustrative purposes. Numerous other examples could also be cited.*

Click here to read [Sony Music, et al. v. OFRA Cosmetics, LLC, et al.](#), 0:23-cv-62073 (S.D. Fl.)

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