

Copyright Guide for the Use of Publicly Posted Videos Online

The Internet has made it easy to find and view videos on a wide variety of topics. Some of these may help an Amway Independent Business Owner grow his or her business. For example, an Amway IBO may find that showing such a video at an IBO event, or linking to it on his or her Facebook® page (or posting it to his or her personal blog) is a terrific way to highlight the benefits of a new product, or to inspire prospects to join the business. However, before playing those videos for others – at meetings, IBO functions or online – remember that playing videos obtained on the Internet without adequate licenses may infringe others' copyrights in those videos. Not only could it infringe on the rights of the video owners, but it may also infringe on copyrighted works shown within the videos themselves, as well as the privacy rights of those people appearing in the videos.

Copyrights consist of a bundle of exclusive rights that empower the copyright owner to exclude others from certain uses of his or her work. The exclusive rights of reproduction, adaptation, public distribution, public performance, public display, and the digital sound recording transmission right enumerated in 17 U.S.C. Section 106 define the general boundaries of copyright ownership. 17 U.S.C. Section 501(a) reads that "Anyone who violates any of the exclusive rights ... is an infringer of the copyright."

Publicly performing a video without the copyright owner's permission is copyright infringement. Public performances occur when videos are played at a place open to the public or at any place where a substantial number of people outside of a normal circle of family and its social acquaintances are gathered. A **public performance** doesn't require that the video be shown to an audience during a live presentation. Posting a video onto your Facebook page, linking to it on Twitter®, or attaching it to your personal blog all likely fall within the realm of a "public performance." Rather than worrying about what does, doesn't or might fall within the scope of a "public performance," the simple rule of thumb is to assume that anytime you show a video to others (even when posted online), that will be considered a public performance under copyright law. In addition to issues this creates under the copyright laws, it also raises issues under state privacy laws. Specifically, the people who appear in videos may be able to claim infringement of their privacy rights (sometimes referred to as the right to their "name and likeness").

To avoid infringement of others' copyrights and privacy rights, a written license (permission) should be obtained from all relevant copyright owners and from those appearing in the video, before publicly performing the video. The relevant copyright owners not only include the owner of the video itself, but also include the copyright owners of other copyrighted works within the video. Other copyrighted works that frequently appear in videos include background music (including both the musical composition and the sound recording embodying it); background artwork, including paintings, drawings, photographs, sculptures, and other works of art; a literary work to the extent it is read aloud or clearly displayed; a dramatic or choreographic work performed in the background; and an audiovisual work (e.g., a movie or television clip).

Alternatively, and often the easier solution to pursue if it is available, is to get a license from someone who has obtained broad enough rights from all relevant copyright owners to be able to grant third parties a license to publicly perform the video. Major corporations frequently obtain such broad rights relating to videos they create. However, if you obtain the video elsewhere, from YouTube®, Facebook, or another website for example, such sites do not usually obtain from their users the broad licenses you will need to show the videos posted. These sites generally claim to host videos for the purpose of individual viewing rather than for public performance, and do not represent or warrant to users that the videos have been posted by the rightful copyright owners or by those who have obtained a license. Therefore, unless a video is owned by a major corporation or someone else that has obtained all rights from the relevant copyright owners, and is willing to license the video to third parties and indemnify third parties for copyright/privacy rights infringement, the IBO would have no legal assurance that the license obtained from the video poster would shield him or her from lawsuits.

The consequences of copyright infringement can include an injunction, court costs, attorneys' fees, the copyright owner's actual damages, and profits attributable to the infringement or statutory damages of up to \$150,000 per each instance of willful infringement. The consequences of privacy rights infringement vary, depending on the facts and/or the value of the person's image.

So, what should IBOs do?

For the above reasons, IBOs should only publicly perform videos found on social media and other websites that are posted by verifiable and reliable sources, such as major corporations, and even then, only where the owner of the copyright in the video has given the IBO the right to publicly perform it. To this end, the IBO should contact the apparent owner of the copyright in the video to verify that they own the rights to it (including all copyrighted material in the video), and obtain a written license to use that video. This can involve multiple steps.

Identify the copyright owner

Unfortunately, there is no centralized database that tracks ownership of online videos. So, it is up to the IBO to do some sleuthing to find out who owns the rights to the video that the IBO wants to publicly perform. The IBO should start by contacting the person or organization that posted the video. If the video was found on a company website, the IBO can start by contacting that company (through contact information that typically appears on the website) and asking to speak with somebody about licensing the video clip that is shown on the company website.

If the video is posted to a website such as YouTube®, the IBO can start by contacting the YouTube user that posted the video. However, just because a person posted a video on YouTube does not mean that the poster owns the rights necessary to license the video to you. Be suspicious. Ask them if they own the copyright to the video and all of its component parts (e.g., including the music, any graphics, etc.). Ask them how, when, and where they got the video. Did they create it themselves?

Also, does the video contain any other copyrightable material in it? If so, does the poster have a license to use that material, and the ability to allow others to use it, i.e., the ability to sublicense? (Helpful hint: if the video contains music that you recognize, especially if it is performed by a well known music group, there is a good chance it is not properly licensed to the poster, and even if it is, the owner of the video likely does not have the ability to sublicense that music. Beware.) Also ask whether they have the right to allow others to use the images of the people in the video.

If the purported owner of the copyright in the video doesn't know the answers or their answers don't make sense, he or she may not be the owner of all the rights to the video. IBOs should endeavor to find the rightful owner(s). Look for other websites where the video is posted. There may be clues in the video itself that can help identify the copyright owner, such as the presence of copyright notices, or the use of registered trademarks or business names.

Get a written license

Once all relevant copyright owners have been identified, the IBO needs formal written permission (a license) to use the video and any copyrighted works in it in the manner desired. In addition to describing the circumstances under which the IBO intends to use the video, the license should also contain representations and warranties that:

1. The copyright owner of the video owns the copyright and has broad enough rights to be able to grant the IBO a license to publicly perform the video – and any copyrighted works contained in the video – at his/her commercial function without infringing others' copyrights and privacy rights; and
2. The copyright owner will indemnify the IBO if the IBO is sued for copyright and/or privacy rights infringement.

Note that if the copyright owner of the video does not own the rights to copyrighted works within the video or the privacy rights for those appearing in the video, the IBO will need to secure licenses from those people as well.

IBOs can attempt to secure licenses on their own, however, this can be difficult, and the licenses can be complex. This document serves only as a high level overview of the legal issues involved with using online videos, and should not be relied upon as legal advice. IBOs should consult with their legal counsel to ensure that they are securing adequate licenses to use the video.

This is really complex, isn't there another way?

Yes. In addition to seeking assistance from a lawyer, IBOs can choose to turn this whole process over to a video-rights clearinghouse. Usually for a flat, daily fee (\$500/day appears to be an average), a rights clearinghouse will secure all the rights (including copyright, right of publicity, etc.) needed to show a video clip, news clip, excerpt from motion pictures, television, etc. and provide the licensee with all necessary representations, warranties and promises of indemnifications in the event a lawsuit is launched. Note: the cost of the license itself is in addition to the fee paid to the video-rights clearinghouse for the service it provides in securing the necessary rights.

The following are names and contact information for several clearance companies that work with video rights. This is by no means an exhaustive list. Also, note that we have not vetted and cannot vouch for any of these firms.

1. Entertainment Clearances Inc.

Laura Sevier
(562) 494-7240
laura@ent-clear.com

2. Thought Equity

4130 Cahuenga Blvd., Suite 315
Universal City, CA 91602
phone: 818.432.4000
fax: 818.760.0820
or
240 West 35th Street, Suite 1201
New York, NY 10001
phone: 917.267.5460
fax: 917.267.5450
www.thoughtequity.com

3. Re: Search

Shari Chertok, President
432 Park Avenue South
Suite 1009
New York, NY 10016
Phone: 646.365.1300
Fax: 646.365.1304
www.researchandrights.com

4. Swank Motion Pictures, Inc.

10795 Watson Road
St. Louis, Missouri 63127-1012
1-800-876-5577
www.swank.com

A hypothetical

This hypothetical is for instructional purposes only. The actual facts of any instance may vary.

Amway has a fabulous new product that is featured on a morning show of a major television network. Someone – we don't know who – captures a video clip of that particular segment, and posts it on Facebook®. Excitement for the product is huge, and the clip is reposted time and again; it goes viral. Eventually, it comes to the attention of an IBO who decides that the clip would be perfect for an upcoming prospecting event.

What steps must the IBO take?

The IBO found the subject clip posted by one of her Facebook “friends.” Not knowing where else to start, the IBO sends an email to this “friend” asking if the friend knows who owns the clip and/or where it was originally obtained. The “friend” suggests contacting the morning show. This, as it turns out, is a very good suggestion. Because the clip comes from the morning show, going directly to the show is an excellent place to start.

The first step toward contacting the morning show is locating the appropriate contact information. If the IBO knows that the show appears on 123 network, he/she may start by looking for a main telephone number to 123 network, or may simply search (e.g., on the Internet) for a telephone number that would lead directly to the morning show.

Searching the Internet, the IBO finds no direct contact information for the show, but does find: (a) that the show is produced at 123 Studios in New York, and (b) a main number for 123 in New York. At this point, the IBO should contact 123, and tell the switchboard operator “I would like to talk to someone about licensing a video clip from the morning show that I saw posted on Facebook.” The switchboard operator will likely transfer the IBO directly to the production office for the morning show. Once connected, the IBO should again explain the purpose for the call.

In this hypothetical (given that the IBO does not know precisely with whom she/he should speak), the person at the morning show tells our IBO to speak with 123's Clearance Department. Hot on the trail, the IBO calls there, only to be told to contact someone in the 123 News Archive Department. The IBO needs to keep following these leads, even if they appear circuitous, because eventually they will lead to the right place. In fact, the IBO finds that the 123 News Archive Department is the right place.

Speaking with the 123 News Archive Department, the IBO needs to be precise as to how he or she wants to use the video clip at issue. Our IBO needs to say, for example, that it will be used at an IBO prospecting event (and any other anticipated use) in order to ensure that the appropriate licenses are obtained.

Once the scope of the use is determined, the IBO needs to verify – and confirm with the 123 News Archive Department – that 123 owns the copyright to that clip and all of its components (or has a transferable license to the clip and all of its components, with the right to sublicense it), and that 123 either has or can obtain on the IBO's behalf a right of publicity license applicable to individuals whose images appear in the video clip.

Let's assume that the 123 News Archive Department tells the IBO that, while it owns the copyright to the clip and its component parts, it has no right or ability to address the necessary right of publicity license related to the talent who appear in the clips. This is now a two-step process. First, the IBO must enter into a written copyright license with 123 for use of the clip. Under our hypothetical, this license covers only limited, non-transferable right to publicly display the work at the IBO prospecting event. With that license in hand, our IBO must now track down the talent agent/manager or representative of the individuals who appear in the clip (or, in the case of non-celebrities, the actual individuals) and secure from each of them a license to use their image in the public display of the clip. This license should be in writing, signed by the individual.

With each of these licenses in hand, is our IBO ready to screen the video clip, or does he or she need a license from (in our example) Facebook? The answer is he or she is ready for the show. No license from Facebook is required. Indeed, unless the person who first posted the clip did so with all appropriate licenses, the work appearing on Facebook is itself an infringement of 123's copyright and a misappropriation of the name and likeness of those who appear in it.

Now, dim the lights and let the prospecting event begin.

Questions and Answers

Q: You want to show a clip from the latest Geico® insurance commercial at an IBO event. The clip appears on YouTube® and was posted by a user named “GeckoLover.” Is there a problem if you play that clip from YouTube at the event?

A: The answer is yes.

The Geico commercial will be viewed as an audiovisual work, which is protected under copyright law. Playing the Geico commercial via YouTube at an IBO event would most likely be viewed as a public performance, for which permission from the relevant copyright owners is required. Merely because the video clip is accessible via YouTube is no guarantee that it was posted there in accordance with copyright and other applicable laws.

Moreover, even if the video clip was posted with a valid license, that license almost certainly does not extend to individuals or entities beyond the one(s) who acquired the license to upload it. That is, the individual who acquired the license may not have authorization to sublicense it to you—even if that individual claims to have such right and attempts – in turn – to sublicense the work to you.

Finally, YouTube itself does not have authorization to license the use of content uploaded by third parties on its website. As such, your best bet is to try to contact the individual who posted the video you wish to use in order to determine the relevant copyright owners. Note, however, that when dealing with an individual – as opposed to a corporate entity such as CNN®, for example – it is often difficult to verify copyright ownership. For a more detailed discussion, please see the sections entitled, “Identify the copyright owner” and “This is really complex, isn’t there another way?”

Q: You want to show a clip from the latest Geico® insurance commercial at an IBO event. You found the clip on the Geico web page. Is there a problem if you play that clip from the Geico website at the event?

A: The answer is largely the same as the above, in that “playing” the video clip at an IBO event would likely be viewed as public performance and would require a license from the relevant copyright owner(s).

Merely because Geico has made that commercial publicly available on its website does not permit anyone who may have access to a computer to copy and/or use it in a way that infringes the copyright holder’s exclusive rights in it.

In short, if you want to show a video clip from that commercial at an IBO event, you’ll need to get permission for it. For a discussion on how one might seek such permission, again, please see the sections entitled, “Identify the copyright owner,” “Get a written license,” and “This is really complex, isn’t there another way?”

Q: At a prospecting event, you want to show a short video clip that your friend filmed and uploaded to YouTube®, showing other IBOs enjoying their time at the Achievers Invitational Business Conference. Is there a problem if you play that clip from YouTube at the event?

A: The video clip created and uploaded by your friend is an audiovisual work that may be entitled to copyright protection, and based on the nature of the prospecting event, the public performance right likely applies. Since the copyright owner is your friend, it may be easy to obtain a license (permission) to use it. However, the video clip may contain other elements that are protected by copyright that your friend was not authorized to reproduce and license, e.g., music or a movie playing in the background.

Moreover, the use of your friend’s video – even if no copyright issues are presented – may still be problematic: the individuals appearing in the video have privacy rights that protect them against the unauthorized use of their names and likenesses.

Q: Same scenario as above, but instead of playing the video at an event, you are playing it in your living room for a small group of prospective IBOs. Any problems?

A: Under the Copyright Act, public performance means “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances.” Assuming the video your friend shot raised copyright concerns, this use would likely be excused because the performance likely does not qualify as “public.” The public performance right is applicable only based on performances in front of a substantial number of people. And due to the non-public nature of this viewing, privacy issues mentioned above are likely not an issue as well.

Q: Similar scenario to those discussed above, but instead of playing the video at your home, you post it to Facebook®, Twitter® or your personal blog, where the intended audience includes prospective IBOs. Any problems?

A: Yes. Unless it is safe to assume that no one outside your immediate family will ever receive your Facebook post or Twitter feed or read your blog (not a reasonable assumption), you should assume that posts you make to the Internet will be deemed a public performance under the Copyright Act. The reason for this is simple: these venues are generally open to the public, even if you do have some control over your circle of Facebook “friends.” Accordingly, it is safe to assume that the public performance right applies to posting the video online.

Q: You know you need permission to use a video at an upcoming event, but who do you ask?

A: While determining precisely who to call when seeking permission to use a video is not quite as easy as calling Amway Customer Service, it doesn't have to be impossible. First, as indicated previously, there are a number of video-rights clearance companies that can (for a fee) obtain all the licenses you'll need. Even more importantly, they may agree to hold you harmless and defend you if they fail to obtain all necessary rights and the rights holder decides to sue you.

In the event you don't want to go through a video-rights clearance company, you'll want to identify, locate and contact the owner(s) of the copyright in the video, including its component parts. This should not be confused with the owner of the video itself. (A good example: many of us may own a copy of Disney's “Little Mermaid,” but none of us own the copyright in that work. That is owned by the Walt Disney Company, and it alone has the right to grant a license for its use.) Once you've secured the right to publicly perform the video, you'll also need to get a “name and likeness” license from every identifiable individual who appears in the video. This may be friends who live in your neighborhood, or the entire cast of “Friends,” depending on the clip you're hoping to use. Either way, you'll need a license from these people – famous or not.

Q: Now that you have identified the copyright owner. What should you ask for?

A. Generally speaking, you want all relevant copyright owners to provide you with a written license (it may be referred to as a “consent”), signed by each copyright owner.

The license – which may be as informal as a written response, in letter form – must indicate that the copyright owner is providing you with permission to publicly perform the specific materials in question. If the copyright owner owns or has a transferable license to use all copyrighted elements in the video, the license should also contain a guarantee to that effect. Remember, these additional elements may include: background music (including both the musical composition and the sound recording embodying it); background artwork, including paintings, drawings, photographs, sculptures, and other works of art; a literary work to the extent it is read aloud or clearly displayed; a dramatic or choreographic work performed in the background; and an audiovisual work (e.g., a movie or television clip). If the copyright owner of the video doesn't have a transferable license to all these copyrighted elements within the video, you could be held legally responsible for infringing the copyright in them if you don't obtain separate licenses for those elements.

You can expect this license/consent to state that it is effective only upon your counter signature (agreeing to any terms outlined by the copyright owner), and only provides for a non-exclusive, non-transferable license for a limited time. In other words, the copyright owner may license the materials to others as well as to you, and you will not be able to transfer the license granted to you from the copyright owner to a third party.

Don't be surprised when the license also includes paragraphs chockfull of legalese that roughly translates to your acknowledgment that you have acquired no ownership interest in the material, or in the copyright holder's copyrights, trademarks or other proprietary rights. The license will also likely require you to indemnify or hold harmless the copyright owner from and against any claims related to your use of the licensed materials.

Q: What should the license say? Does it have to be in writing? Signed?

A: The prior Q&A sets forth what the copyright owner will likely require. From your perspective, you'd like some assurances, too. Notably, these are assurances you should obtain irrespective of whether you obtain your clip through a video-rights clearance company or on your own.

First, you want your agreement to be in writing.

Second, you want to make sure that the rights you obtain are as broad as possible. Are you looking to show the clip only at an IBO event, or do you also want to post it to a website that advertises products (or future IBO events)? From your perspective, the broader the better. Even if you start the process thinking you'll only use the video at an IBO event, why not give yourself the flexibility to post it online if you later decide this makes sense? To this end, you'd like a worldwide, non-exclusive license to publicly perform the clip. This allows you the right to publicly show the clip anywhere in the world without being limited to a specific location.

Third, you want to make sure the license you obtain includes all applicable rights related to the talent who appears in the clip. This means that you'd like the license to represent and warrant that it includes the right to use the talent's name and likeness, and that no other license or payment will be necessary to accomplish your objective. In other words, you do not want to have to obtain separate licenses for talent or pay additional fees.

Fourth, you want the agreement to affirmatively represent and warrant that the copyright owner for the video has all right, title and interest in the clip, including any copyrighted works that may be contained in the clip (e.g. the music, background artwork, or television clip performed in the background). If the copyright owner for the video can't make that representation and warranty, you will need to contact the copyright owners for each of the additional copyrighted works appearing in the clip to get permission. In either case, you want the copyright owner(s) to agree to indemnify or hold you harmless and defend you in the event that you are sued for copyright infringement.

Is this asking a lot? Yes. Is it necessary? Yes. Are we kidding? No.

Q: What can happen if you don't get a license?

Using copyright-protected material without a license, or in an otherwise unexcused manner, is considered copyright infringement. The consequences of copyright infringement can be severe. You can be sued and, if successful, the copyright owner may be entitled to:

1. Actual damages suffered, which may include lost licensing fees or lost value of the copyrighted material; plus
 2. Profits you earned that are attributable to the infringement and were not accounted for in calculating actual damages;
- or
3. Statutory damages as determined by U.S. copyright law, ranging from \$750 to \$150,000. In cases of innocent infringement, a court may decrease a minimum award of statutory damages to \$200.

In addition to the above, a court may also award a successful copyright plaintiff:

4. The costs incurred in prosecuting the copyright infringement;
5. The attorneys' fees incurred in prosecuting the copyright infringement;
6. An order to stop the use of the infringement material in any way; and
7. The destruction or disposal of the infringing material.

Q: What if you get the clip you want to use at a video store, and the store owner says it is OK to display rented or purchased movies, does that make it OK?

A: The short answer is no. Don't take this person's word for it. Video stores are closing by the dozens every day. Even assuming they're still around if trouble arises, they're not going to help you out if you get sued. Video stores exist to rent and sell movies for "home use only." You can only obtain permission to use the video outside the home from the copyright owner.

Q: Who bears the responsibility if a clip is shown without a license?

A: You do. If the IBO event is held in a hotel or other such venue, the management of that venue may also be held responsible. Of course, according to your rental agreement with that venue, they'll come after you for any loss they acquire as a result of your infringement. Bottom line: get a license.

