

# **Web Analytics and Social Media Data in Intellectual Property**

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# Social Media and Web Analytics in the Trademark World

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## Presenters



**DAVID HAAS**  
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STOUT

David A. Haas is a Managing Director in Stout's Dispute Consulting Group and the Leader of the Chicago Intellectual Property Practice. Mr. Haas has served as an expert witness in a variety of litigation matters, including intellectual property disputes and commercial contract disputes. He has offered opinions in Federal District Court and in arbitrations on issues including lost profits, reasonable royalties, unjust enrichment, price erosion, prejudgment interest, and other compensation topics, including determination of incremental costs, market share, and manufacturing and marketing capacity. Mr. Haas was selected as one of the IAM Patent 1000 top patent damages experts in the U.S. in 2014, 2015, 2016, and 2017.

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**FRANCESCA SILVERMAN, ESQ.**  
SENIOR COUNSEL, INTELLECTUAL PROPERTY  
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Francesca Silverman is Senior Counsel, Intellectual Property at Mastercard. Francesca is responsible for all aspects of Mastercard's global trademark and copyright portfolio, including strategic planning, clearance, prosecution, enforcement, and licensing. She advises business teams on IP-related issues concerning brand development and protection, marketing, technology, advertising, sponsorships, and commercial transactions. Francesca also has extensive experience in structuring, drafting and negotiating licensing and other commercial agreements related to intellectual property rights. Prior to her position at Mastercard, Francesca was an attorney in the Intellectual Property Department of Kramer Levin Naftalls & Frankel LLP. Francesca received her B.A., *cum laude*, from Columbia University, and her J.D. from Harvard Law School.

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## Background



- Traditional use of trademarks
- Evolution of the Internet
  - Changes in commercial norms
  - Challenges to legal principles
- Rise of social media and alternative communications tools

## Role of Social Media / Web Analytics re: Trademarks



- Litigation
- Secondary meaning
- Proving common law rights
- Enforcement (cease and desist)

### 15 U.S.C. § 1125

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which...

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person...

### Types of Evidence

- Consumer reviews (Amazon, Yelp, Google, other)
- Web search strings
- AdWord purchases

## Secondary Meaning

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1. Advertising expenditures
2. Consumer studies linking the mark to a source
3. Unsolicited media coverage of the product
4. Sales success
5. Attempts to plagiarize the mark
6. Length and exclusivity of the mark's use

*Centaur Commc'ns, Ltd. V. A/S/M Commc'ns, Inc.*, 830 F.2d 1217, 1222 (2d Cir. 1985)

## Secondary Meaning – Potential Evidence

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- Consumer reviews (Amazon, Yelp, Google, other)
- Web advertising expenditures/click-thru data
- Number of unique web visitors relative to size of relevant market
- Social media contacts
  - Followers
  - Tweets/retweets
  - Likes

## Extent of Use – Measurement of Impressions



- Website visits
- Web advertising displays/click-thru data
- Social media contacts
  - Followers
  - Tweets/retweets
  - Likes

## Extent of Use – Measurement of Impressions



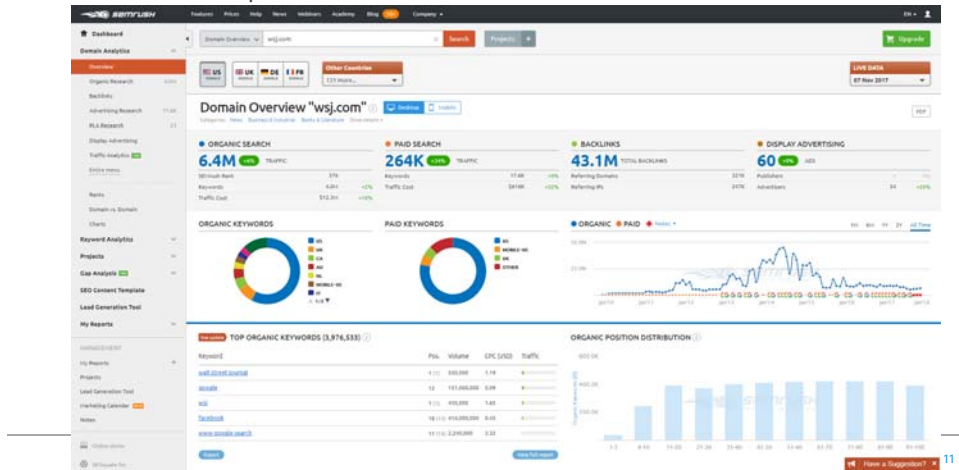
- Website visits
- Web advertising displays/click-thru data
- Social media contacts
  - Followers
  - Tweets/retweets
  - Likes

## Extent of Use – Measurement of Impressions



### SEMrush

- View Google search analytics
- View total organic and paid website views through search, estimated Google Ad spend, search term counts
- Website: <https://www.semrush.com/>

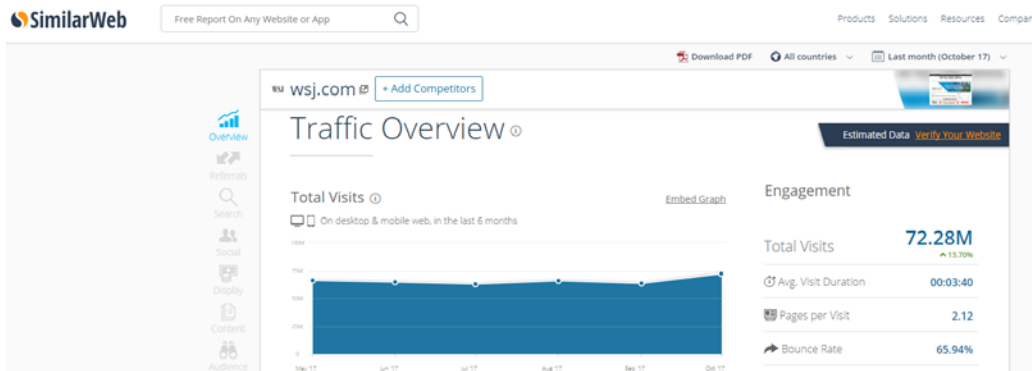


## Extent of Use – Measurement of Impressions



### SimilarWeb – Website Rankings

- View website rankings and analytics
- View total website visits, duration, pages per visit, bounce rate, among other features by geography
- Website: <https://www.similarweb.com/>



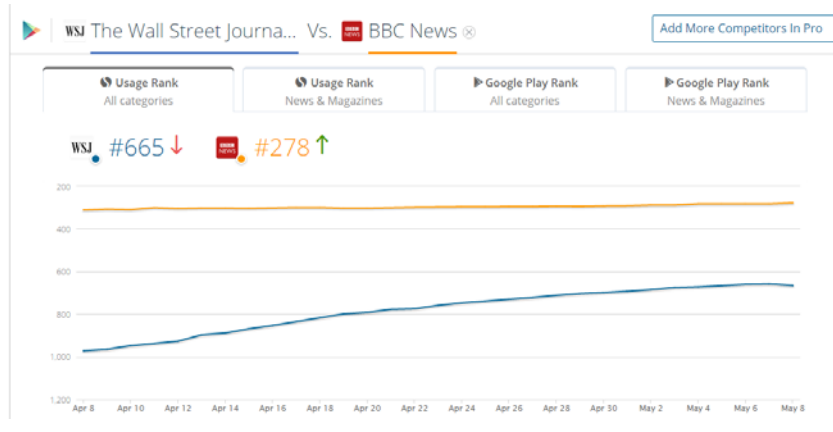


## Extent of Use – Measurement of Impressions



### SimilarWeb – Application Rankings

- View app rankings and analytics against competitor apps
- View timeline of app ranking by usage or downloads, compare metrics against competing apps, among other features



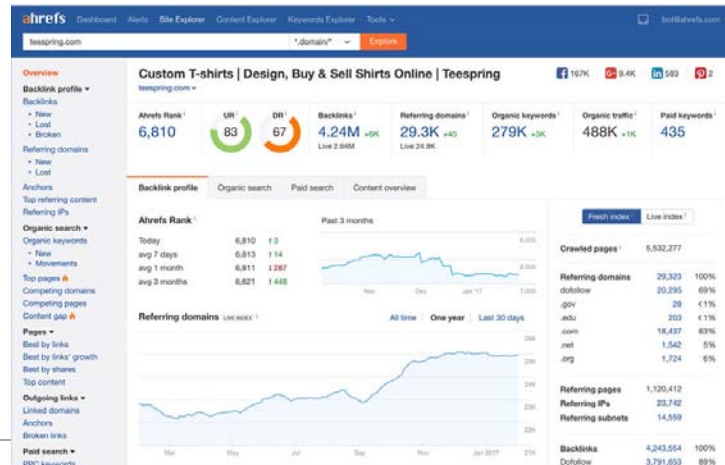
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## Extent of Use – Measurement of Impressions



### Ahrefs

- View website search analytics
- View website search term information, with a tool that allows for a side-by-side comparison of different websites' search term rankings, page visits, and social media metrics
- Website: <https://ahrefs.com/>



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## Extent of Use – Measurement of Impressions



### Google Analytics

- Tracks and reports website traffic (available to domain owners)
- Measure advertising ROI and track Flash, video, and social networking sites and applications
- Website: <https://analytics.google.com/>

Google Analytics Solutions

Analytics Tag Manager Optimize Data Studio Surveys Attribution Audience Center Analytics 360 Suite



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## Extent of Use – Measurement of Impressions



- Website visits
- Web advertising displays/click-thru data
- Social media contacts
  - Followers
  - Tweets/retweets
  - Likes

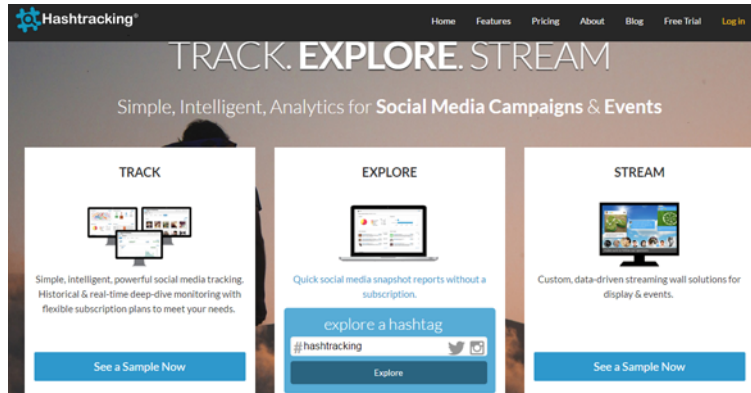
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## Extent of Use – Measurement of Impressions



### Hashtracking

- View hashtag analytics (Example: #SuperBowl2018)
- View total number of tweets, timeline deliveries, number of contributors, and reach for a hashtag
- Website: <https://www.hashtracking.com/>



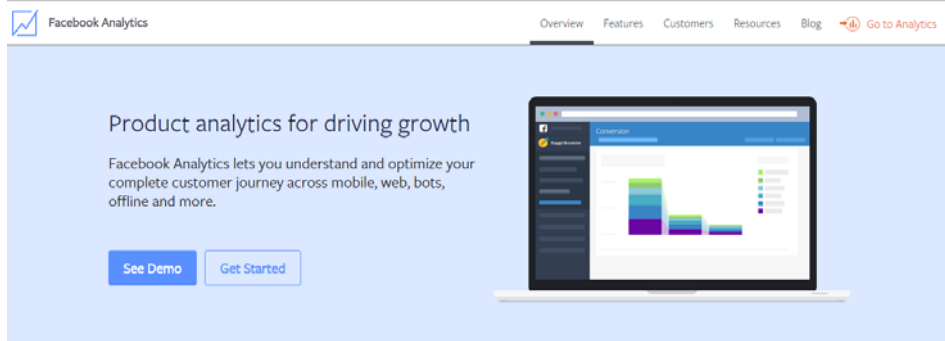
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## Extent of Use – Measurement of Impressions



### Facebook Analytics

- View Facebook customer demographics and data (available to page owner)
- Build funnel, revenue, and retention reports to analyze performance and deep dive into specific audiences with precise segmentation tools
- Website: <https://analytics.facebook.com/>



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## Extent of Use – Measurement of Impressions



### Twitter Analytics for Business

- View metrics for number of times Twitter users have seen, Retweeted, liked, and replied to a tweet (available to Twitter page owner)
- Track follower growth over time and learn about followers' interests and demographics
- Website: <https://business.twitter.com/en/analytics.html>

How to use Twitter analytics

Analyze your Tweets and understand your followers

Every word, photo, video, and follower can have an impact.

Twitter's analytics help you understand how the content you share on Twitter grows your business. Here's what you can learn -- and where.

- 1 | **Account home** is your Twitter report card, with high-level statistics tracked from month to month. It's also a gallery of your greatest hits: we'll spotlight your top-performing Tweets and introduce you to the influencers in your network.  
[Visit your Account home today or learn more.](#)
- 2 | Your **Tweet activity dashboard** is where you'll find metrics for every single one of your Tweets. You'll know exactly how many times Twitter users have seen, Retweeted, liked and replied to each Tweet.  
[Visit your Tweet activity dashboard today or learn more.](#)
- 3 | Your **audience insights dashboard** contains valuable information about the people who follow you on Twitter. You can track your follower growth over time and learn more about your followers' interests and demographics.  
[Visit your audience insights today \(click the "Followers" tab\) or learn more.](#)

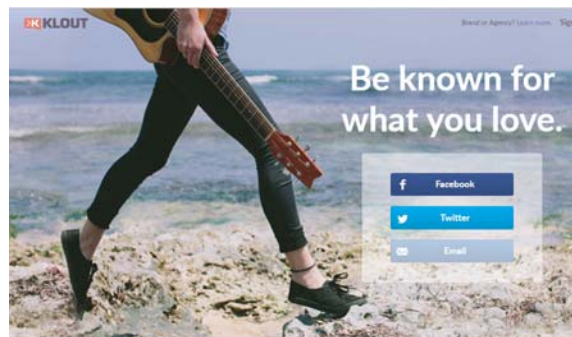
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## Extent of Use – Measurement of Impressions



### Klout

- Measure social media influence across multiple social networks using proprietary algorithm – “Klout Score”
- Klout score can only be used by linking personal or company Facebook, Twitter, Instagram, LinkedIn, and other accounts website
- Website: <https://klout.com/home>



The best way to have an impact online is to create and share great content. Klout helps you do exactly that.

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## Other Types of Impressions



- TV/radio/magazine ads
- Billboard views
- Physical location visits
- Correspondence (direct mail, customer communications)
- Event sponsorship

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## Other Types of Impressions

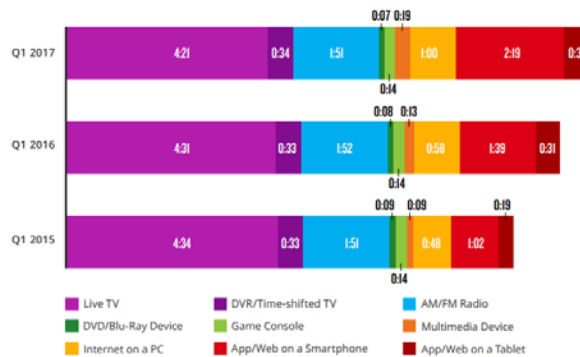


### Television and Audio

- Nielsen Total Audience quarterly reports accessible online
- Contain information on reach of television and radio advertisements by demographic, number of hours spent exposed to different mediums of media, and many of other exposure metrics
- <http://www.nielsen.com/us/>

#### AVERAGE TIME SPENT PER ADULT 18+ PER DAY

EXHIBIT 1 - BASED ON THE TOTAL U.S. POPULATION



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## Other Types of Impressions



### Billboard Views

- Measure views through Daily Effective Circulation (DEC), which represents the number of vehicles that pass by the billboard (also includes the number of pedestrians)
- Example analysis from Pelican Outdoor Advertising:

Location	
Cars Per Day	131,860
Effective Lighting	0.95
Effective Circulation	125,267
Number of Passengers	1.38
Total DEC per Billboard	172,868
Number of Billboard Faces	2
DEC per Billboard Face	86,434

- Various companies can perform a similar calculation, such as Capitol Outdoor (<http://www.capitoloutdoor.com/about-us/contact-us/>)

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## Other Types of Impressions



### Direct Mail Marketing Measurement

- Companies such as PFL have a paid services to implement and measure success of direct mail marketing campaigns
  - <https://www.pfl.com/Measuring-Success-of-Direct-Mail-Marketing.html>
  - Measurements from direct mail marketing include:

#### Example of high-level lifecycle analysis

Program	Channel	Total Members	Received Direct Mail	Registered	Lifecycle Influence	Success %
DM MQL Drivers	Direct Mail	5,728	5,054	179	495	11.8%
DM TradeShow Gifts	Direct Mail	1,081	1,054	15	12	2.5%
DM Cooking Kit Giveaway	Direct Mail	3,803	3,500	128	175	8.0%
DM Holiday Gifts	Direct Mail	11,573	10,786	539	248	6.8%
DM Top Accounts	Direct Mail	586	500	54	32	14.7%
Total		22,771	20,894	915	962	8.2%

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## Overall Follower Metrics



### Summary of Follower Reach – Wall Street Journal

Social Media Platform	Number of Followers
Twitter	15.4 million
Facebook	5.9 million
Instagram	1.0 million
LinkedIn	3.4 million

\*Data as of January 9, 2018

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## Asserting Common Law Rights



- Market penetration analysis historically based on geography
  - Volume of sales
  - Growth trends in the area
  - Number of persons purchasing relative to potential number of customers
  - Amount of product advertising in the area
- In *Natural Footwear Ltd. v. Hart, Schaffner & Marx*, 760 F.2d 1383 (3<sup>rd</sup> Cir. 1985), de minimis market penetration found
  - Gross annual sales below \$5,000
  - Total of less than 50 annual customers

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## Asserting Common Law Rights (cont.)



- In the age of the internet, is geography still a good yardstick for measuring market penetration? If so:
  - Sales by state
  - Web traffic by state
- If not, many measures of market penetration are not geography-constrained:
  - Customer reviews
  - Web searches
  - AdWords

## Practical Social Media Trademark Management Tips



- Monitoring social media for use of your marks
- Enforcement actions and potential repercussions
- Protection of hashtags
- Treating brand protection as a marketing activity



## Monitoring Social Media for Infringement



- Social media: new avenues for brand engagement and infringement
- Infringement investigations should always include social media platforms
- Potential engagement of companies that provide sophisticated monitoring of unlawful uses of your trademark, logo, and even copyrighted works.

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## To Enforce or Not to Enforce: Potential Backlash



- Use analytic tools to assess the impressions and scope of impact of infringement
- Weigh considerations of free speech v. actual infringement
- Potential of online publication of enforcement letters
- Special considerations for fan accounts
- Importance of being mindful of potential social media backlash (example: Red Bull v. Old Ox Brewery)



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## Red Bull v. Old Ox Brewery



Hey Red Bull –

You seem pretty cool. You sponsor snowboarders, adventure racers, rock climbers and motocross bikers. You launch people into space so that they can skydive back down to earth. That's all really darn cool. For all I know, you're reading this while strapping yourself into a Formula One racecar that is about to be lit on fire and jumped over a large chasm of some sort. How cool would that be? Feel free to give it a try.

Here's the thing, though. You are being extremely uncool to us at Old Ox Brewery. We are a small startup brewery in Ashburn, Virginia. We're family-run, we love beer, and we love our community. For reasons that we cannot understand, you have attempted to strong arm us into changing our identity for the last 10 months because you believe folks might mistake Old Ox beer for Red Bull energy drinks. We respectfully disagree. The only similarity between our two products is that they are both liquids. You make non-alcoholic (but very extreme) energy drinks. We make delicious (but laid-back) beer. Our consumers are looking for two distinctly different experiences from our respective products.

Basically you are holding us hostage with a list of demands that, if agreed to, would severely limit our ability to use our brand. Demands like, never use the color red, silver or blue; never use red with any bovine term or image; and never produce soft drinks. Do you own the color red? What about fuchsia, scarlet, crimson, or mauve? Are you planting your flag in the color wheel and claiming those shades for Red Bull? Do you claim exclusive rights to all things bovine? Do you plan to herd all heifers, cows, yaks, buffalo, bison, and steer into your intellectual property corral, too?

**When we refused to succumb to your demands, you responded by filing a formal opposition to not just our trademark but to the very name Old Ox Brewery. Way to step on our American dream. You say you are protecting your intellectual property rights, but your claim, in our opinion, is Red B-----t.**

**We can only interpret your actions as one thing—bullying. You are a big Red Bully. Just like that mean kid from grade school pushing everyone down on the playground and giving us post-gym class wedgies. You are giving us one hell of a corporate wedgie. We don't appreciate it and we sure as hell don't deserve it.**

Is this really what you're about? Are you a bully? Your extensive marketing campaigns (your glitzy advertising, your sponsored sports events, your death defying stunt shows, etc.) certainly don't project that image. Take a hard look at your "case." Can you honestly look at our brand and say, "this is a threat to my image?" We don't think you can. Given that, we repeat our offer: We agree NEVER to produce energy drinks. In exchange, we are asking for one simple thing: Leave us alone. Drop this trademark dispute. The only people benefiting are the lawyers.

Sincerely and Uninfringingly Yours,

Chris Burns  
President – Old Ox Brewery

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## Hashtags: Using Social Media to Strengthen Your Brand

- USPTO: a term containing the hash symbol or the term "hashtag" may be registered as a trademark, but "only if it functions as an identifier of the source of the applicant's goods or services." See TMEP §1202.18.
- Examples of registered hashtags:
  - #HowDoYouKFC for restaurant services (owned by KFC)
  - #BLAMEMUCUS for pharmaceutical preparations (owned by Mucinex)
  - #EVERYDAYMADEWELL for retail stores and conducting contests (owned by Madewell)

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## Hashtags: Using Social Media to Strengthen Your Brand



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## Hashtags: Using Social Media to Strengthen Your Brand

- Examples of refused hashtag marks:
  - HASHTAG SKATE for skateboards and skateboard products (descriptiveness refusal)
  - #PINUPGIRLCLOTHING for shopping site and retail stores featuring women's vintage inspired clothing, etc. (specimen showed mark being used as social media data tag).



SOCIAL MEDIA:  
#PINUPGIRLCLOTHING  
#PINUPGIRLSTYLE

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## Brand Protection as an Extension of Marketing



- Social media landscape necessitates a more creative and innovative approach to brand protection
- Examples:
  - Mars "Spokescandies"
  - Netflix/Stranger Things
  - TGI Fridays
  - Bud Light/Dilly Dilly

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# NETFLIX

August 23, 2017

Emporium Arcade Bar  
% Danny and Doug Marks  
2363 N. Milwaukee Ave  
Chicago, IL 60647

Via email 

Danny and Doug,

My walkie talkie is busted so I had to write this note instead. I heard you launched a *Stranger Things* pop-up bar at your Logan Square location. Look, I don't want you to think I'm a total wastoid, and I love how much you guys love the show. (Just wait until you see Season 2!) But unless I'm living in the Upside Down, I don't think we did a deal with you for this pop-up. You're obviously creative types, so I'm sure you can appreciate that it's important to us to have a say in how our fans encounter the worlds we build.

We're not going to go full Dr. Brenner on you, but we ask that you please (1) not extend the pop-up beyond its 6 week run ending in September, and (2) reach out to us for permission if you plan to do something like this again. Let me know as soon as possible that you agree to these requests.

We love our fans more than anything, but you should know that the demogorgon is not always as forgiving. So please don't make us call your mom.

Thanks,

  
Director/Senior Counsel - Content & Brand IP

# TGI Fridays Enforcement Letter



October 24, 2017

Direct Dial: [REDACTED]  
E-mail: [REDACTED]

VIA COURIER  
COPY VIA EMAIL TO [REDACTED]

16<sup>th</sup> on Center Chicago  
1035 N. Western Ave.  
Chicago, IL 60622  
ATTN: Bruce Finkelman, Managing Partner

Re: Moneygun's TGI Fridays Halloween Event

Dear Bruce:

As the trademark counsel at TGI Fridays, I wanted to reach out regarding Moneygun's plan to dress up as TGI Fridays for Halloween.

It's certainly a rite of passage to dress up as your personal hero for Halloween. After all – TGI Fridays is renowned for being the country's first singles bar and has been credited for creating loaded potato skins and popularizing the Long Island Iced Tea. (You're welcome, by the way.)

Fortunately, we have a number of things you can take off our hands to party like it's always Friday. Please see enclosed gift.

All is yours to keep...we don't need it anymore.

Unfortunately (for you – not us), trademark law requires us to protect our brands and to take action against any use that might cause confusion or diminish the value of our trademarks. I'm concerned that your event – featuring "TGI" branding, our logo, a variation of our IN HERE, IT'S ALWAYS FRIDAY slogan, and so on – would cross that line.

As such, we must ask that you avoid using TGI Fridays' trademarks, logos, and other property in your event.

Seriously. Don't. Thanks. Happy Halloween.

  
[REDACTED]  
Senior Attorney

19111 Dallas Parkway, Suite 165, Dallas, TX 75287