

Will Delta Airlines 'Keep Climbing' With Customers?

By Lori Beam After its latest move to claim use of customers' social media images, some are wondering if Delta Airlines should change its slogan from "Keep climbing" to "Keep overreaching". In December Delta Airlines made a major update to its SkyMiles terms and conditions. A new section now claims that if you use the hashtag #SkyMilesLife or #DeltaMedallionLife in social media, you are automatically granting Delta a very broad license to use the image you post. **How broad?** By tagging photos using either hashtag, you grant Delta a license to use the posted image:

- Perpetually – forever;
- Worldwide – everywhere;
- For any media now existing or later developed – not just the social media channel on which you post;
- In derivative works – allowing edits and modifications to the image
- For any purpose – advertising, merchandising, sublicensing; and
- Without compensation or attribution to you or the copyright holder.

It's not known whether, for example, Delta would actually use your posted vacation photo in a print ad published in its inflight magazine or on Delta-branded playing cards sold or distributed online or onboard. But Delta's rewards program terms and conditions say it could. We have seen brands include language in their Instagram profiles stating that your use of the brand's hashtag gives it permission to use your photo. We've also seen companies reach out to people to attempt to get consent for broad license to use posted content for company benefit. But Delta's attempt to automatically claim broad license rights on mere use of a hash tag using language buried in rewards program terms? That seems new. **Is it legal? Is it enforceable?** Nothing in the law restricts a company from including a clause like this in its terms of use. It can require you to accept these terms as a condition of participating in the loyalty program.

- But, it likely would not be enforceable against someone who is not a member of the rewards program.
- And, it may not be enforceable against program members who did not read this section of the program terms prior to posting an image. While Delta reserves the right to change program terms without notice, it's questionable whether Delta can take away the legal right to control your intellectual property by including the license in program terms without giving meaningful notice of the broad license term.

Reaching Further. In addition, by using the hashtag, you agree to pay Delta's legal fees and damages if Delta gets sued by someone claiming the image infringes the claimant's intellectual property rights. I admit lawyers often want broad language to give them something to point to in the event of a claim. But terms and changes like these can generate backlash from loyal customers. Think through your boilerplate and whether all the language is actually needed. "Keep climbing" higher than Delta by incorporating some transparency and respect for your customers. Lori Beam is a former board member of KCDMA and an attorney at Seigfreid Bingham where she chairs the firm's Advertising, Marketing and Promotions practice group. Contact her at lbeam@sb-kc.com or 816-421-4460. *This article is general in nature and does not constitute legal advice. Readers with legal questions should consult with an attorney prior to making any legal decisions.