Navigating Social Media Copyrights

by Peter L. Skolnik

The waters of social media copyrights are shark infested, but with luck you get to the point where you think it's safe to go back into the water. Then you wake up to find some Internet guru's article bearing a title like "Twitter's latest innovation will make social media's copyright issues even weirder."

Reality check: There are web servers holding copyrighted social media content in virtually every corner of the globe—probably billions of them. There are folks placing new content on social media platforms in each of those corners—unquestionably billions of folks, who every day become instant copyright owners and roil the Internet ocean with hundreds of billions of Twitter tweets, Facebook and Tumblr posts, LinkedIn updates, Flickr and Pinterest images, and myriad other copyrighted works on scores of social media platforms.

If you wade into the waters of social media copyright without some basic understanding of Internet technology, you are in more trouble than you think, and help is beyond the scope of this article. But if the Internet is not a total mystery to you, there is some good news. *First*, social media copyright issues—although admittedly thorny and sometimes a bit weird—are relatively straightforward. *Second*, most of the sharks in those waters are toothless, so if your client stumbles into infringing conduct, the likely penalty will be a simple requirement to stop (to take down, either voluntarily or not, the infringing content). The flip side, of course, is that you are not likely to get rich as a copyright plaintiff's lawyer trawling the web for unsuspecting infringers.

Caveat: Much of this article addresses the landscape of social media content actually created by a platform's users, or by the users of other social media platforms with which that platform connects, whose users have, in turn, posted content they created. If a client posts an Annie Leibovitz photograph on his Facebook page without permission, it is an infringement, and the basic principles of copyright liability and damages will apply.

Instant Copyright

How is it that millions of new copyrighted works are created every hour? Surprisingly—notwithstanding the 1976 sweeping overhaul of U.S. copyright law[1]—there persists, even among much of the legal community, a misassumption that one must jump through a series of hoops to copyright something. That assumption is wrong. Since what copyright lawyers call "The '76 Act" came into force in Jan. 1978, writings, photos, music, drawings, videos and all other sorts of "original works of authorship" are protected by copyright (are copyrighted) from the instant they are "fixed in any tangible medium of expression...from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[2] What is a machine or device? Think computer; think smartphone; think Internet; think social media. Post a status update on Facebook, write a mini-blog entry on Tumblr, send a Twitter tweet, take an iPhone photo (even before you upload it to Flickr or Pinterest), and it is yours. You own it. It is 'copyrighted.' No hoop jumping required. As long as your work satisfies the *very* low-threshold "modicum of creativity" requirement first established by the Supreme Court in the telephone book case, *Feist v. Rural Telephone,*[3] you're instantly the proud owner of a copyright, which you have elected to communicate—either to a self-selected limited audience, or to the universe—on whichever social media platforms you fancy.

You Can Build It, But (Like It or Not) They Will Come

As a general rule, social media applications classify all the bits and pieces their clients create and post as 'user content.' Invariably, each platform posts its terms of service (TOS), to which you must consent when registering an account. Those TOS will make clear that the copyright of user content is owned by the user. *But*—and it is a noteworthy but—the TOS

will make it equally clear that, except to the extent (if any) that the platform permits you to circumscribe the group who can access your work, by using the service you are granting the service *and all of its other users* the broadest imaginable nonexclusive license to reproduce, modify, display and further distribute your copyrighted work *both within and outside of that social media platform*.

Twitter's TOS are typical:

> You retain your rights to any Content you submit, post or display on or through [Twitter]. By submitting, posting or displaying Content on or through [Twitter], you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content *in any and all media or distribution methods* (now known or later developed). (Emphasis added).

Twitter then immediately provides an explanatory tip: "This license is you authorizing us to make your Tweets available to the rest of the world *and to let others do the same*" (emphasis added). Indeed Twitter's TOS declare: "We encourage and permit broad re-use of content." Twitter warns that "you *have to use [the* Twitter *interface]* if you want to reproduce, modify, create derivative works, distribute, sell, transfer, publicly display, publicly perform, transmit, or otherwise use the content" (emphasis added). *But*—another important but—Twitter's interface, like most social media interfaces, is designed to connect and cross-pollinate with several of the other popular platforms, and indeed with websites and services of every conceivable variety. Similarly, Facebook's platform has evolved from enabling development of bells and whistles for use just on Facebook to one that supports integration of posted user content across the Internet and for all the devices that connect users to the Internet.

Tumblr is a platform that allows its users—over 100 million of them—to post multimedia and other content on short-form blogs. Most of Tumblr's content-providing copyright owners are teenagers (as its TOS insist: "You have to be at least 13 years old to use Tumblr. We're serious....If you're younger than 13, don't use Tumblr. Ask your parents for an Xbox or try books"). Tumblr's TOS, which, in fact, mirror those of other social media, explain themselves in language even a child can understand: "Don't do bad things to Tumblr or other users"; "When you upload your creations to Tumblr, you grant us a license to make that content available in the ways you'd expect from using our services.... We never want to do anything with your content that surprises you"; "One thing you should consider before posting: When you make something publicly available on the Internet, it becomes practically impossible to take down all copies of it."

At the other end of the user-friendly TOS spectrum is the seven-page, single-spaced seven-point type employed by LinkedIn, the social media platform that promotes itself as the "World's Largest Professional Network" and opens its TOS with a boldface all-caps warning: "You are concluding a legally binding agreement."

Another *caveat*: While few, if any, posted TOS explicitly address 'commercial uses' of user content, courts have begun to grapple with the issue of whether the typically broad social media license permits others to exploit your copyrights *commercially*. Best guess: It does not.[4]

It is a fact that your posts on one social media platform may—and probably will—quickly find their way to others that introduce some layers of complexity and make it awfully hard to determine where and if your copyright is being exploited in ways you did not intend, do not like, but probably cannot entirely stop—if for no other reason than you cannot find them all.

Take as an example a simple Twitter tweet. Your tweets appear on your individual Twitter page, as well as the pages of all of your followers; conversely, all the tweets from your followers show up on your page. And there is no limit to the amount of tweets a person or organization can send in one day. Assuming your settings on the platform make your tweets public, they can be re-tweeted endlessly—the reward, or penalty, for either being a celebrity tweeter, just having a way with words, or tweeting something truly interesting. Yes, a single tweet is limited to a meager 140 characters, but tweets can be 'embedded' to carry far more content as they wend their way around the globe: photos, videos, Tumblr images, audio, story summaries and the like. You create a short video and post it on your Facebook page; a Facebook friend embeds your video in her tweet; her Twitter follower re-tweets to *his* followers—one of whom is his cousin in Prague, who adds badly translated Czech subtitles and uploads it to YouTube.

You can probably jump through the necessary hoops to have the Czech mess removed from YouTube, but if a thousand Czechs have already shared the video—by email, Facebook, or right back onto Twitter—it is beyond your reach.

Speaking of Uphill Battles

Virtually all social media platforms provide 'take down' procedures in their TOS. Indeed, like other Internet sites that permit users to post content, social media *must* do so to avail themselves of the protection from liability provided by Title II[5] of the Digital Millennium Copyright Act (DMCA), codified in 17 U.S.C. §512. The DMCA creates several safe harbors for online service providers, such as social media platforms. Title II takes aim at the enormous potential for secondary or contributory liability arising from

infringing content posted by users.

An owner whose copyright has been infringed on a social media service must follow the take-down procedures of Section 512 carefully, and they are quite detailed. But generally: 1) the service must promptly take down any allegedly infringing content identified in a properly framed notice, and notify the user accused of infringement that the content has been removed or disabled; 2) the accused user may submit a counter-notice to declare that the challenged content does not infringe; 3) the service must then notify the accuser of the counter-notice; and 4) if the accuser does not file suit in federal district court within 14 days, the service must restore the material.

It is certainly worth noting here that garden-variety defenses to copyright infringement apply with equal force on social media. The fair use doctrine in 17 U.S.C. §107 is by now well-developed in the law. You might well wonder how Justice Sandra Day O'Connor's focus on whether a use can be fair when it appropriates "the *heart* of the work"[6] applies to a 140-character tweet. Do 140 characters have a heart? Indeed, many a written social media post cannot be infringed because its degree of creative expression is so *de minimis* that it cannot rise to anyone's understanding of the original works of authorship protected by copyright law. Many a tweet says little more than "buying bread and going to the movies."

Of course, fair use becomes trickier—and the *de minimis* exemption will not likely apply—when a social media post contains a photo, a video, or an original haiku, for example. As a theoretical matter, such content is far more susceptible to infringement. But, as with any tort, a copyright plaintiff must establish damages. Enter the hoops. *First*, by its TOS as a service user you have almost certainly granted the platform and all its users a broad nonexclusive license to your content, probably excluding commercial uses as noted above. *Second*, if you surmount that hurdle somehow, there remains a very high likelihood that you cannot prove *actual* damages or loss of profits "attributable to the infringement."[7]

Yes, the Copyright Act provides for statutory damages and attorney's fees. But these are only available—with very limited exceptions—for infringements that occurred *after* registration of the work in the Copyright Office. What's more, again with limited exceptions, you cannot commence an infringement suit in district court until the work has been registered.[8] Has your client registered his or her tweets? Has he or she registered the smartphone photos uploaded to Facebook? It's doubtful.

Excuse Me: Who Does This Belong to?

Social media users do retain some measure of control over exploitation of certain types of content—more on some platforms; less on others. It is possible to send a 'private' tweet that can be read only by its intended recipient and cannot be re-tweeted. Tumblr permits its users to make their blogs private. Flickr, unlike most social media, tells you when a photo you are viewing has been marked "All Rights Reserved" by its owner, signifying you are not permitted to *reproduce* it without permission. But without actually uploading the protected Flickr photo to your Twitter page, you can *link* to it there. Although Flickr allows you to prohibit reproduction of the photo, Twitter's TOS say it can reproduce photos you post there. You have not uploaded it; you have not reproduced it; but when you *link* to the Flickr photo, Twitter automatically includes the full photo in a Twitter card attached to your tweet. Now your tweet, along with the protected photo, can be embedded in the tweets of others and sent on an around-the-world tour.

All of this is to say that it is often difficult to know whether the particular content you are inclined to incorporate into your post is meant to be protected, rather than posted with the intention and hope that the world will sit up and take notice. What's more, when you *do* want attention, admiration and applause, social media technology, which changes faster than Usain Bolt runs the hundred, has some black holes into which your credit may disappear. Tweet a link to a Tumblr blog that has itself linked to another user's content—with full and proper attribution of the source. Your tweet will now carry a Twitter card that identifies *your* source, but not your *source's* source, whose name has been buried alive.

The *right* of attribution—to be identified as the author of a creative work and to prevent being credited as the author of a work you did not create—is one of the four major so-called 'moral rights' that are protected to varying degrees in most countries but have never gained much legal traction in U.S. copyright law, due in large measure to strenuous opposition from the film industry and broadcast media.[9]

The use of a 'creative commons' license is another way to seek some measure of protection over content you post to social media. Creative commons (CC) is, in its own words, "a global nonprofit organization that enables sharing and reuse of creativity and knowledge through the provision of free legal tools." Key among those tools are the various forms of license agreements CC make available *gratis* to existing copyright owners. In other words, you must own the copyright in the work you are licensing through a CC agreement. CC licenses generally carry the requirement that your content can be used freely, as long as the right of attribution is honored—that is, as long as you receive the credit you believe you so richly deserve. CC licenses are also designed to allow the nonexclusive grant to a licensee of

some, but not all, of the bundle of rights inventoried in 17 U.S.C. §106. A subsequent social media posting should then carry a "Some Rights Reserved" legend rather than the standard "All Rights Reserved." Of course, violation of a CC license is not, itself, a copyright infringement; it is a breach of contract.

Using Stipple.com is another way to assure attribution of your copyrighted images. Stipple is not really a social media platform, but rather an online service that, among other things, permits users permanently to attach attribution to their images, then to move those now-secure images with a few mouse clicks into tweets and Facebook pages.

Pistols or Light Sabres?

As is true for the Internet generally, there are no easy answers to jurisdictional issues that can rear their heads in social media copyright disputes. As a generally applicable international rule, the law of the country where the infringement occurs governs infringement claims. But most of the major social media you and your clients use are U.S. companies; their TOS all but invariably contain forum and choice of law clauses that specify exclusive jurisdiction in the courts of the platform's home state, application of that state's laws without regard to conflicts of law, and a waiver of objections to personal jurisdiction. It is lucky that few lawsuits are brought against social media by their users, or the courts of Santa Clara, California, would drown in the high tide. LinkedIn, Facebook, Flickr and Pinterest are all located there; Twitter is an hour away, in San Francisco. If you find yourself in a dispute with Tumblr and convince them you should sit down and reason together, consider yourself lucky as you take the Holland Tunnel to 21st Street in Manhattan.

But also remember the words of wisdom Tumblr's TOS offer to its youthful faithful: "When you make something publicly available on the Internet, it becomes practically impossible to take down all copies of it."

Endnotes

1. 17 U.S.C. §101 *et seq.*
2. 17 U.S.C. §102.
3. 499 U.S. 340, 362(1991).
4. *See Agence France Presse v. Morel*, Civ. Action No. 10-cv-02730 (AJN-MHD) (S.D.N.Y. Jan. 14, 2013) (reproduced at http://blogs.nppa.org/advocacy/files/2013/01/AFP-Morel-Decision-01-14-13.pdf) (granting summary judgment to photojournalist whose copyright in photos of Haitian earthquake posted initially on Twitter was infringed when subsequently published by *The Washington Post*, holding, *inter alia*, that Twitter's TOS did not intend "to confer a benefit on the world-at-large to remove content from Twitter and *commercially* distribute it." (emphasis added)).
5. Online Copyright Infringement Liability Limitation Act (OCILLA), 17 U.S.C. §512.
6. *Harper & Row v. Nation,* 471 U.S. 539, 564-65 (1985).
7. 17 U.S.C. §504.
8. 17 U.S.C. §412. Various of the noted 'exceptions' apply solely to infringements of works of visual art, set forth in 17 U.S.C. §106A.
9. The sole exception, once again, is the §106A protection granted to the right of attribution for works of visual art.

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