

## 'I Found It On Twitter' — Not A Defense In Copyright Case

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Social media has fundamentally changed dynamics on the Internet. Now that no one needs to rely on a webmaster, we are all more active in cyberspace. Liking. Linking. Posting. Pinning. The problem? Only some of these activities are legally permissible. Others may give rise to a cause of action against social media enthusiasts, including companies seeking to establish a more robust cyber presence.

Visual content is useful on social media platforms because it “drives engagement 90 percent faster than text” alone.[1] And engagement is the name of the game these days. Social media campaigns have been used to reach out to new groups of consumers,[2] and to breathe life into outdated brands.[3] There is a good reason that 92 percent of company owners view social media as necessary to their businesses.[4] But there is a disconnect. While over 70 percent of executives understand that the benefits of social media come with potential risks, only 41 percent of companies perform risk assessments.[5] An even smaller number provide social media training to their employees (36 percent), or have a social media policy in place at all (33 percent).[6] Accordingly, the potential for legal missteps is not insignificant. Among them? Copyright infringement.



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Under the U.S. copyright statutes, owners have the exclusive right to reproduce, distribute or display a copyrighted work, or to prepare a derivative work.[7] A “work” is “any creative expression that is fixed in a tangible medium,”[8] which encompasses pictures, or images, or videos. And this is exactly the type of social media content that prods consumers into taking certain actions, in part because it drives an emotional connection.[9] Before visual content is posted on a company’s social media page, though, the page owner should obtain all appropriate licenses and fully understand their scope.

For example, companies should make sure that any existing licenses encompass social media platforms, and not just use on a website. In a case brought by a photographer against a sports arena, a copyright infringement claim was made even though the arena had worked with the photographer for 15 years, and the parties had a written agreement.[10] The dispute was over whether the arena was licensed to use photographs on its Facebook page, when the agreement explicitly covered “newsletter[s], advertising, display prints, broadcast, and the web site.”[11]

The arena faced an initial objection from the photographer, who eventually agreed that his photographs could be posted on Facebook, subject to certain requirements. The arena was to post low-resolution photos, provide attribution, preserve identifying metadata, and take steps to ensure that the photos could not be copied. With this understanding in place, the photographer assisted the arena over a six-month period, providing photos specifically for its Facebook page. During that time, though, he learned that his photos could be downloaded from Facebook and that, on occasion, the arena had inadvertently posted high resolution photos. In his view, their agreement was breached, and he filed suit against the arena for copyright infringement.[12]

The arena won on summary judgment. The copyright claim was dismissed because of the photographer's course of conduct, which had created an implied license. He had been complicit in the arena's Facebook activities — including uploading photos to a secure website specifically for the page, and emailing the arena's staff when photos were available for download. To the extent that some of his requirements had not been followed, the appropriate cause of action was for breach of contract, not copyright infringement. The requirements were not conditions precedent to the license, but covenants. And implicit in the license was a promise not to sue for copyright infringement.[13] Because the case was not open and shut, the court denied attorneys' fees. The infringement claim had not been frivolous. It had turned on a nuanced distinction — the difference between a covenant and a condition precedent — that even defendant had not appreciated.[14]

License scope was also at issue in a case between a photographer and a news agency over photographs on Twitter.[15] This case vividly illustrates the key lesson that "it's on the Internet" is not a synonym for "it's in the public domain." It is also an excellent example of how sizable copyright damages can be.

After an earthquake in Haiti, a news agency looked for photographs taken in the country. It found eight images that a photographer had tweeted. It removed the photographs from Twitter and included them in its databank of images, to which there are paid subscribers. The photographs were also sent to Getty Images and included in Getty's 41 million image database, which is also accessible by subscription. One of Getty's subscribers, the Washington Post, subsequently published four of the eight photos in its own online gallery.[16] The photographer objected, and the parties ended up in litigation.

Defendants argued that once the photographs were posted on Twitter, they were free to use. In their view, Twitter's terms of service provided the necessary license. The court disagreed. The terms provided a license for others to use the photographs on Twitter. Retweeting the images was fair game. And while Twitter's terms also purport to give Twitter the ability to make content available to its own partners, Defendants did not fall into that category. The terms explicitly state that any other rights in tweeted content are retained by the individual who posts them.[17]

Given the facts of the case and the language of the terms, there was no "clear intent" to give Defendants the right to remove images from Twitter, and certainly no intent that they be able to license them to others. "Even if some re-uses of content posted on Twitter may be permissible, this does not necessarily [result] in a general license to use this content." [18]

A jury determined that the defendants were liable for willful infringement and awarded over \$1.2 million in statutory damages, or \$150,000 for each infringing photograph.[19] This award was recently confirmed by the district court, which largely denied the defendants' post-trial motions.[20] Even after the defendants were fully aware that the photographs belonged to the photographer, they had continued to make them available by subscription, and had simply added attribution. Identifying the author was insufficient to avoid copyright liability, and actually supported the willfulness

determination.[21]

Another potential misconception is that works that can be found online — licensed under a creative commons license — are free to be used in whatever manner a licensee sees fit. Not so. Different versions of these licenses allow for different uses. Not all creative commons licenses allow for commercial use. Nor does every license allow for adaptations of a work to be shared.[22] Either restriction might be an impediment to using a work on a for-profit company's social media page.

It is also important to obtain a license from everyone with a copyrightable interest in social media content. Visual content on social media is often paired with audio content, which may be owned by completely different authors. A beauty blogger was recently sued based on music she had incorporated into 55 different YouTube videos.[23] The blogger is 27 years old and has leveraged her storytelling ability into a YouTube channel with over 7 million subscribers.[24] Although the suit is against the blogger in her personal capacity, she also creates videos for a well-known cosmetic company, and has launched her own cosmetic line through its parent company.[25] This not only highlights the necessity of obtaining a license for all content, but is a reminder of the importance of doing due diligence when developing social media content has been outsourced.

Finally, companies should be aware that litigating a copyright claim in the context of a social media platform has — at least once — begun to reshape the contours of what qualifies for copyright protection to begin with. Consider a case between an actress, an independent film producer and Google Inc.

Over a vigorous dissent, and at odds with the Copyright Office, the Ninth Circuit determined that — in the context of a preliminary injunction — the plaintiff-actress was likely to succeed on the merits. In particular, she was likely to establish that she has an independent copyright interest in the portion of a film that represents her performance.[26] Although the filmmaker “wrote the dialogue she spoke, managed all aspects of the production and later dubbed over a portion of her scene ... [a]n actor does far more than speak.”[27] An actor “must ‘live his part inwardly, and then ... give to his experience an external embodiment.’”[28]

According to the divided panel, when a performance is fixed, it is independently copyrightable so long as there is “some minimal degree of creativity,” which includes body language, facial expressions and reactions.[29] In this case, while there was a broad, implied license between the plaintiff and the filmmaker, it was not unlimited. The filmmaker used the actress's footage to make a completely different film than the one she had agreed to make, so the film exceeded the scope of the license.[30]

The dissent in the case has pointed out that a screenplay is distinct from its performance.[31] Under the copyright statutes “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.”[32]

The Copyright Office, too, has rejected the plaintiff's application for a copyright.[33] After a reported uproar by “Hollywood, Internet companies and First Amendment fans,”[34] the Ninth Circuit amended its original order, explaining that it has not — and did not — decide whether “every actor has a copyright in his performance within a movie.”[35] It further explained that the district court is not precluded from eventually deciding that plaintiff does not have a copyrightable interest, or that Google should prevail on one of its defenses.[36] The case is moving forward at the district court level against the filmmaker.[37]

Although the Ninth Circuit’s rationale in the case against Google may not ultimately stand, it raises an interesting question. What qualifies as a “minimal degree of creativity,” sufficient to create a copyright interest, in social media content? Tweets? These range from the banal to the creative, and are authored by seemingly everyone ranging from Justin Bieber to Pope Francis, but how do you draw the line when — at best — there are 140 characters with which to work?

A similar issue was litigated in connection with a Listserv post.[38] In that case, the post was not copyrightable because it was dictated purely by functional considerations. The court noted, though, that even an “opening sentence of a poem may contain sufficient creativity to warrant copyright protection whereas a more prosaic sentence of similar length may not.”[39] In the Twittersphere, at least for now, whether text is copyrighted might come down to “I know it when I see it.”

Best bet? Ask for permission first, as seeking forgiveness after you have posted something on social media might be expensive.

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[6] Id. at 1, 11, 12.

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[8] 17 U.S.C. § 102.

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[10] Davis v. Tampa Bay Arena Ltd., 2013 U.S. Dist. LEXIS 90602 (M.D. Fla. June 27, 2013).

[11] Id. at \*3-4.

[12] Id. at \*4-14.

[13] Id. at \*14-24.

[14] Davis v. Tampa Bay Arena, Ltd., 2013 U.S. Dist. LEXIS 116370 (M.D. Fla. Aug. 16, 2013).

[15] Agence France Presse v. Morel, 934 F. Supp. 2d 547 (2013).

[16] Id. at 552-558.

[17] Id. at 560-564. Twitter's Terms of Service can be found at (<https://twitter.com/tos>) (last accessed Sept. 27, 2014).

[18] Agence France Presse, 934 F. Supp. 2d at 562.

[19] Agence France Presse v. Morel, 2014 U.S. Dist. LEXIS 112436 (S.D.N.Y. Aug. 13, 2014).

[20] Id. at \*47-48.

[21] Id. at \*19-18.

[22] Creative Commons, Explore the Creative Commons Licenses (<https://creativecommons.org/choose/>) (last accessed Sept. 25, 2014).

[23] Ultra Int'l. Music Publishing et al. v. Michelle Phan, No. 14-5533 (C.D. Cal.) (July 16, 2014) (D.I. 1).

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[26] Garcia v. Google et al., No. 12-57302 (9th Cir. Feb. 26, 2014) (D.I. 39).

[27] Id. at 8.

[28] Id.

[29] Id.

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[31] Id. at 22, citing 17 U.S.C. § 101.

[32] Id., citing 17 U.S.C. § 102(b).

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[35] Garcia v. Google et al., No. 12-57302 (9th Cir. July 11, 2014) (D.I. 127 at 11).

[36] Id.

[37] Garcia v. Google et al., Case No. 2:12-cv-08315 (C.D. Cal.).

[38] Stern v. Does, No. 09-01986 (C.D. Cal.) (D.I. 181) (Feb. 10, 2011).

[39] Id. at 10.