

# Copyright, Ownership, and Control of User-Generated Content on Social Media Websites

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## I. Introduction

In just over two decades, the use of online social networking and social media has become nearly ubiquitous.<sup>1</sup> Social networking sites have enabled their users to connect with friends, family, colleagues, and customers in ways previously unavailable. As social networking and social media sites have evolved and become more sophisticated, the sites have provided new opportunities for users to share information. In addition to communication via text, today's social media sites allow users to share photographs, music, videos, and other forms of content. Inevitably, this sharing of content poses new questions of copyright law and forces scholars to reexamine old views and frameworks. The purpose of this paper is to give a broad overview of the effect of copyright law in one particular context: that of content generated by the users of social media sites ("user-generated content"). The paper touches on many areas of copyright law at a high level to highlight the unique issues raised by user-generated content on social media sites. It is especially concerned with the exploitation of user-generated content by social media sites.

This paper uses the term "social media" interchangeably with the more familiar term "social networking," although social media is a broader concept than social networking. Social networking sites provide people a forum to communicate through text, real-time chat, images, videos, and other methods. Social networking sites also allow users to make new social connections with strangers or "friends of friends," etc., hence the moniker "networking." Social media sites, on the other hand, may, but do not necessarily, include the networking functions of social networking sites; their focus is more on distributing content in general. In addition, social

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<sup>1</sup> For a history of social networking, see Wikipedia, Danah M. Boyd & Nicole B. Ellison, *Social Networking Sites: Definition, History, and Scholarship*, 13(1) *Journal of Computer-Mediated Communication* (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (last visited Nov. 27, 2009).

media include phenomena such as virtual worlds like Second Life. Under this definition, social networking sites are a subset of the larger set of social media. Regardless, the ideas and analyses in this paper apply to both social media and social networking sites. Additionally, in this paper “social media sites” may refer both to the websites themselves or to the enterprises that provide the websites.

“User-generated content” is defined as digital content created by a user of a social media site and published by that user on a social media site. This paper focuses on completely original user-generated content, i.e. content that does not specifically adapt or incorporate previously existing content. If derivative or “transformative” content were included, the issues of third-party copyright infringement and secondary liability of social media sites and Internet service providers would naturally have to be included. These issues deserve more extensive treatment than a broad overview can provide; hence, the limit of original user-generated content.

The creators of user-generated content on social media sites are rarely looking to make a profit. Most are just sharing photographs, audio or video recording, blogs, or chatting with friends.

## **II. Copyright Creation and Ownership**

### **A. Copyright Creation—Eligible Subject Matter**

#### **1. Subject Matter Requirements**

In most contexts, user-generated content presents no problems in terms of copyrightable subject matter. The vast majority of user-generated content published on social media sites falls under one of the following categories of works: (1) texts, (2) photographs, (3) music recordings, or (4) videos. Indeed, these four categories of works are explicitly enumerated in the Copyright

Act. Texts are protected as literary works;<sup>2</sup> photographs are protected as pictorial or graphic works;<sup>3</sup> music recordings are protected as sound recordings;<sup>4</sup> and videos are protected as motion pictures or other audiovisual works.<sup>5</sup> The social networking service Twitter, however, may present special problems, as discussed below. The following analysis of the subject matter requirements of the Copyright Act is necessary to the Twitter discussion.

The Copyright Act states that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>6</sup> The bedrock of copyright law is the concept that ideas are not protectable but the expression of ideas is.<sup>7</sup> This means that the facts in a copyrighted work are not protectable, but the text or other medium containing them is.<sup>8</sup>

The Copyright Act contains two general requirements for copyrightable subject matter: (1) originality and (2) fixation in a tangible medium of expression. The first requirement, originality, is the “*sine qua non* of copyright” and is a constitutional requirement.<sup>9</sup> Originality requires both independent creation, meaning the work was not copied, and minimal creativity.<sup>10</sup> The amount of originality required in a work is *de minimis*; virtually anything meets the

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<sup>2</sup> See 17 U.S.C. § 102(a)(1) (2006).

<sup>3</sup> See 17 U.S.C. § 102(a)(5) (2006).

<sup>4</sup> See 17 U.S.C. § 102(a)(7) (2006).

<sup>5</sup> See 17 U.S.C. § 102(a)(6) (2006).

<sup>6</sup> 17 U.S.C. § 102(a) (2006).

<sup>7</sup> See 17 U.S.C. § 102(b) (2006) (“In 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.”).

<sup>8</sup> See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (“Others may copy the underlying facts from the publication, but not the precise words used to present them.”).

<sup>9</sup> *Id.* at 345

<sup>10</sup> See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) (“‘Original’ in reference to a copyrighted work means that the particular work ‘owes its origin’ to the ‘author.’ No large measure of novelty is necessary.”).

requirement. Fragmentary words or phrases, however, have been denied copyright.<sup>11</sup> This requirement is easily met by content-creating users.

The second requirement, fixation in a tangible medium of expression, is somewhat more complex. Fixation requires that a work must “be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>12</sup> Thus, the medium must be a relatively stable and permanent embodiment. Software programs and computer files “permanently” stored on hard disk are considered fixed because they may be “perceived . . . with the aid of a machine or device”—the computer itself and its display. Some courts have even held that simply holding a computer file in RAM memory storage constitutes fixation, a view known as the RAM Copy Doctrine.<sup>13</sup> Consequently, the fixation requirement is also easily met. A user’s content is potentially fixed in three places: (1) the user’s own computer; (2) the hosting social networking enterprise’s server; and (3) the viewing user’s computer, whether on hard disk or in RAM. The content-creating user’s works are perceivable with the aid of a machine or device: the viewing user’s computer, which includes her monitor, speaker, or any other device that “displays” the content.

## **2. Copyrighting Twitter “Tweets”**

The issue of the copyrightability of short messages, such as those found on the social networking site Twitter, has recently been raised. Twitter allows users to post messages, commonly called “tweets,” of up to 140 characters.<sup>14</sup> Tweets are displayed on the author’s

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<sup>11</sup> See *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705 (7th Cir. 1972) (the phrase “most personal sort of deodorant” is not copyrightable).

<sup>12</sup> 17 U.S.C. § 102(a) (2006).

<sup>13</sup> See *e.g.* *MAI Sys. Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993); *Triad Sys. Corp. v. Southeastern Express Sys.*, 64 F. 3d 1330 (9th Cir. 1995); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir.); *Stenograph L.L.C. v. Bossard Assocs. Inc.*, 144 F.3d 96, 101-102 (D.C. Cir. 1998).

<sup>14</sup> See Wikipedia, Twitter, <http://en.wikipedia.org/wiki/Twitter> (last visited Nov. 24, 2009).

profile page and are delivered to the author’s subscribers, known as “followers.”<sup>15</sup> Although an author can post anything she wishes (such as a URL—a link to a website) within the character limitation, tweets are commonly used to report news or comment on news items, personal or otherwise.<sup>16</sup> Authors utilizing Twitter include people just keeping in touch with their friends, celebrities using tweets to increase their public exposure, and companies looking to find new marketing channels. Increasingly, lawyers and law firms are using Twitter as a tool to find new business and increase their recognition in the legal community.

Some commentators have recently wondered whether the short length requirement of a tweet, 140 characters, might prevent tweets from being copyrightable.<sup>17</sup> This fear is unfounded, as tweets are protectable as literary works. Indeed, there are no copyrightability prohibitions on short literary works per se. Thus, a particular tweet must meet the same originality and fixation requirements as any other literary work. As discussed above, there is little problem meeting the originality requirement for a tweet, as long as the author of the tweet has not resent or copied another author’s tweet. Additionally, because tweets are stored on a server, they meet the fixation requirement. Hence, a tweet is copyrightable.

Consequently, the main stumbling block to copyright protection for tweets is the fact-intensive nature of many tweets, such as in news reports.<sup>18</sup> As discussed above in Section II(A)(1), the expression of facts is protectable but facts themselves are not. This is not so much an issue of subject matter eligibility as it is an issue of copyright infringement. The idea of

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See, e.g.*, Brock Shinen, Twitterlogical: The Misunderstandings of Ownership, <http://canyoucopyrightatweet.com> (last visited Nov. 23, 2009); Michael F. Martin, Are Tweets Copyrightable?, [http://brokensymmetry.typepad.com/broken\\_symmetry/2009/03/are-tweets-copyrightable.html#comment-6a00e008d9fbb3883401156ebd11c3970c](http://brokensymmetry.typepad.com/broken_symmetry/2009/03/are-tweets-copyrightable.html#comment-6a00e008d9fbb3883401156ebd11c3970c) (last visited Nov. 23, 2009).

<sup>18</sup> For an interesting example of a potential use of Twitter in news reporting, see *United States v. Shelnett*, 2009 U.S. Dist. LEXIS 101427 (M.D. Ga. 2009) (request to tweet about the proceedings directly from the courtroom denied as a “broadcast” under Fed. R. Civ. P. 53 as amended in 2002).

“thin” copyright protection comes into play in this context.<sup>19</sup> A fruitful metaphor for thin copyright protection is that of a wrapper around a sandwich. The “wrapper” is the text in which the “sandwich,” or ideas, are contained. Thus, the “wrapper” is the protectable expression around which the non-protectable “sandwich” of facts is wrapped. Essentially, thin copyright protection means that in the infringement analysis, laid out in Section III(B) below, improper appropriation does not occur unless the “wrapper,” (the text itself) has been copied verbatim or mostly verbatim. Thin copyright protection strikes a balance between protecting the author’s labor and allowing new authors to draw upon public domain material in a different way to create works that enrich society. Thus, a thinly-protected factual tweet may have less protection from infringement than a more “thickly”-protected opinion tweet.

## **B. Initial Ownership**

The issue of who owns the initial copyright in user-generated work upon creation is trivial in the Twitter context. The Copyright Act states that “[c]opyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.”<sup>20</sup> Thus, the users who create a work own the copyright in that work. In most cases, the user or group of users has created a work from scratch and it is obvious who owns the copyright. Some examples of this are a mother posting on Facebook pictures she took of her child, or an indie band posting a video on YouTube. Sticky issues of copyright ownership may arise, however, in the context of collaborative works, such as blogs combined with reader-generated blog comments. Misunderstandings as to copyright ownership

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<sup>19</sup> For a general discussion of thin copyright in the context of factual compilations, see *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348-349 (1991).

<sup>20</sup> 17 U.S.C. § 201(a) (2006).



also may occur, such as when an employee blogs or tweets for her company, as a part of her job. These issues and misunderstandings are discussed in the next section.

### **III. The Exclusive Rights and Copyright Infringement**

#### **A. The Exclusive Rights**

What rights does a copyright actually protect? A copyright protects the copyright holder against the infringement of six exclusive rights: (1) reproduction (copying), (2) adaptation, (3) distribution, (4) performance, (5) display, and (6) sound recording digital audio transmission.<sup>21</sup>

Every digital transmission of a copyrighted work over the Internet via a social media site potentially implicates at least three of the exclusive rights: reproduction, distribution, and display. When a content-creating user uploads content onto a social media site, the digital file is stored on a computer server. Every time another user downloads this content, there is both a distribution and a reproduction. First, the electronic file is sent from the server to the user's computer; this is a distribution. Second, that file is stored in the user's RAM memory and possibly also stored on the user's hard disk; this is a reproduction. Although display of the downloaded content is not necessary in this scenario, the entire point of the user downloading the content is to view or listen to the content at some point via the computer's monitor or speakers; when that occurs, whether immediately upon downloading or at a later time, it is a display.

#### **B. Copyright Infringement in General**

The violation of any of the six statutorily enumerated exclusive rights is copyright infringement.<sup>22</sup> To establish infringement, the plaintiff must prove two elements: (1) ownership

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<sup>21</sup> 17 U.S.C. § 106 (2006).

of a valid copyright and (2) copying of constituent elements of that work that are original.<sup>23</sup>

“Copying” in the second element is a term of art; for “copying” the defendant must have *actually* copied the plaintiff’s work and that copying must have been an improper appropriation.<sup>24</sup>

“Copying” is also a proxy word for the violation of the display, distribution, and performance rights. A plaintiff may prove that a copying was improper appropriation by direct evidence or circumstantial evidence.<sup>25</sup> Since direct evidence of copying—the defendant’s testimony—is rarely available, the plaintiff can prove improper appropriation circumstantially by showing that the defendant had access to the copyrighted work and that there is substantial similarity between the copyrighted work and the copied work.<sup>26</sup>

In general, proving infringement in cases of user-generated content and social media sites is not particularly difficult. A plaintiff can prove access using things like server logs (if provided by the social media site) which show whether a particular user downloaded a particular file. The more difficult issue is linking the infringer to the social media site user account. Presumably, access to the infringer’s computer during discovery would accomplish this task.

## **C. The Big Issue: Express Licenses and Economic Exploitation**

### **1. Terms of Service Agreements**

Perhaps the biggest issue in the context of user-generated content on social media sites is the potential for commercial exploitation of users’ content by the enterprises that run the sites.

This paper focuses extensively on this issue. Social media sites recognize that the user who

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<sup>22</sup> See 17 U.S.C. § 501(a) (2006) (“Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the owner . . .”).

<sup>23</sup> See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

<sup>24</sup> See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

<sup>25</sup> *Johnson v. Gordon*, 409 F.3d 12, 12-13 (1st Cir. 2005) (affirming grant of summary judgment against the copyright owner).

<sup>26</sup> *Id.* at 13.

posts her own content on the site retains ownership of the copyright of that work. For example, Facebook's Terms of Service agreement ("TOS") state, "[y]ou own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings."<sup>27</sup> Similarly, YouTube's TOS state, "you retain all of your ownership rights in your User Submissions."<sup>28</sup> Also, MySpace's more verbose versions states that

MySpace does not claim any ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, applications, or any other materials (collectively, "Content") that you transmit, submit, display or publish ("post") on, through or in connection with the MySpace Services. After posting your Content on, through or in connection with the MySpace Services, you continue to retain any such rights that you may have in your Content . . .<sup>29</sup>

Unfortunately, further down in the TOS, the social media sites inevitably grant themselves extensive rights to exploit users' content. Facebook, for example, states that

[f]or content that is covered by intellectual property rights, like photos and videos ("IP content"), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ("IP License"). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.<sup>30</sup>

Similarly, MySpace provides that

[b]y posting any Content on, through or in connection with the MySpace Services, you hereby grant to MySpace a limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce, and distribute such Content solely on, through or in connection with the MySpace Services, including, without limitation, through the MySpace Services to applications, widgets, websites or mobile, desktop or other services which are linked with your MySpace account (collectively, "Linked Services"), including, without limitation, distributing part

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<sup>27</sup> Facebook, Statement of Rights and Responsibilities § 2, <http://www.facebook.com/terms.php?ref=pf> (last visited Nov. 25, 2009).

<sup>28</sup> YouTube, Terms of Service § 6(C), <http://www.youtube.com/t/terms> (last visited Nov. 25, 2009).

<sup>29</sup> MySpace, Terms and Conditions § 6.1, <http://www.myspace.com/index.cfm?fuseaction=misc.terms> (last visited Nov. 25, 2009).

<sup>30</sup> Facebook, Statement of Rights and Responsibilities § 2(1), <http://www.facebook.com/terms.php?ref=pf> (last visited Nov. 25, 2009).

or all of the MySpace Services and any Content included therein, in any media formats and through any media channels, except that Content marked “private” will not be distributed by MySpace outside the MySpace Services and Linked Services. This limited license does not grant MySpace the right to sell or otherwise distribute your Content outside of the MySpace Services or Linked Services. After you remove your Content from the MySpace Services we will cease distribution as soon as practicable, and at such time when distribution ceases, the license will terminate . . . . The license you grant to MySpace is non-exclusive . . . , fully-paid and royalty-free . . . , sublicensable . . . , and worldwide . . . .<sup>31</sup>

Also, YouTube states that

by submitting User Submissions to YouTube, you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions in connection with the YouTube Website and YouTube's (and its successors' and affiliates') business, including without limitation for promoting and redistributing part or all of the YouTube Website (and derivative works thereof) in any media formats and through any media channels.<sup>32</sup>

Finally, Twitter gives itself even more extensive rights.

You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, 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).

You agree that this license includes the right for Twitter to make such Content available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use.

Such additional uses by Twitter, or other companies, organizations or individuals who partner with Twitter, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services.<sup>33</sup>

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<sup>31</sup> MySpace, Terms and Conditions § 6, <http://www.myspace.com/index.cfm?fuseaction=misc.terms> (last visited Nov. 25, 2009).

<sup>32</sup> YouTube, Terms of Service § 6(C), <http://www.youtube.com/t/terms> (last visited Nov. 25, 2009).

<sup>33</sup> Twitter, Terms of Service, <http://twitter.com/tos> (last visited Dec. 20, 2009).

These provisions grant the social media sites express, nonexclusive licenses to exploit users' content in a very broad arena by a broad array of methods. For instance, each of the above provisions contemplates the social media site taking users' images or videos and incorporating them in the site's television advertising. This advertising activity would obviously add to the site's revenue stream. Tellingly, these provisions specify that the license is royalty-free; the content-creating user will not be compensated.

As a result, social media sites will be able to profit from users' content without notifying the users or rewarding them with a cut of the revenue. The issue of these express licenses is potentially huge. Imagine an indie band that puts its songs on MySpace for the public to listen to. The band hopes to reach a broader audience, build its fan base, and gain some name recognition, all in the pursuit of a major record deal. At this time, however, the band is not selling its music. Suppose MySpace uses the indie band's song in a TV commercial that gets nation-wide exposure. The song becomes extremely popular and generates new revenue for MySpace. It seems fair that the band should get a cut of MySpace's revenue for the use of its song. The TOS explicitly states, however, that the license is royalty-free. Should copyright law provide more protection for content-creating users? Before answering that question, this section must examine these provisions in further depth and examine if they are valid. This paper then answers the question in Section V below after exploring other areas of copyright law that help determine the answer.

The scope of these express licenses is very broad but they do have limits. Many of the social media sites provide that their license ends when a user deletes her content or deletes her account. Note, however, that the MySpace Terms claim that MySpace will

cease distribution of the content upon deletion “as soon as is practicable.”<sup>34</sup> Additionally, like Facebook, many of the sites do not use content that is marked “private.” Finally, the social media sites limit their exploitation to the sites or “in connection with” the sites. This term is so vague that it is not clear what the actual limit is. Even so, this term by itself should prevent a social media site from retailing copies of a work, such as selling MP3s of the indie band’s song from the site.

## 2. Enforceability of the Terms of Service Licenses

Meanwhile, the question remains—are these broad licenses enforceable? The issue has been litigated very infrequently in the context of social media.<sup>35</sup> A closely analogous phenomenon exists, however, in software end-user licensing agreements (“EULAs”).<sup>36</sup> An EULA is a contract that is presented to the purchaser or user of software either before opening the software package (“shrink-wrap EULA”) or on a splash-screen while installing the software or before using the software for the first time (“click-wrap EULA”).<sup>37</sup> A click-wrap EULA requires a user to check a box, click a button, or some other affirmative act meant to signify agreement to the terms of the EULA.<sup>38</sup>

Website’s TOSs are essentially an extension of software EULAs.<sup>39</sup> The user is agrees to the terms in order to use the software; in the case of websites, the software resides on a web server instead of locally on the user’s computer but the result is the

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<sup>34</sup> MySpace, Terms and Conditions § 6, <http://www.myspace.com/index.cfm?fuseaction=misc.terms> (last visited Nov. 25, 2009).

<sup>35</sup> See, e.g., *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (2007) (holding the arbitration provision in Second Life’s Terms of Service to be procedurally and substantively unconscionable).

<sup>36</sup> See Sharon K. Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements*, 26 Hamline L. Rev. 499, 503 (2003) (discussing the enforceability of website terms of use agreements).

<sup>37</sup> See 3-4A COMPUTER LAW § 4A.02[4][a] (Matthew Bender, 2009) (discussing software “wrap” agreements).

<sup>38</sup> *Id.*

<sup>39</sup> Sandeen, *supra* note 36, at 503.

same. Most social media sites use a click-wrap approach—when a user signs up for an account on the site, it provides the user with a link to the text of the TOS and requires the user to check a box or press a button to accept the terms in order to complete the sign-up process.

Importantly, courts have held EULAs enforceable. The seminal case of *ProCD, Inc. v. Zeidenberg* states the general rule (in the context of shrink-wrap licenses): “[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).”<sup>40</sup> Thus, a court is likely to find the terms of a social media site’s TOS enforceable. The fact that most users do not actually read the TOS is not an objection to enforceability. Courts have required only that the software publisher give the user a reasonable opportunity to review the terms.<sup>41</sup> The licensing provisions in the TOSs discussed above are very likely enforceable because they do not restrict the rights of the content-creating users; they merely grant the social media sites non-exclusive licenses.

## **D. Defenses to Copyright Infringement**

### **1. Implied Licenses**

The basic uses of others’ content on social media site are protected by implied licensing. When a content-creating user uploads his work onto the social media site and publishes it to a group of people, she has created by her conduct an implied, non-exclusive license for those

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<sup>40</sup> 86 F.3d 1447, 1449 (7th Cir. 1996) (finding for the plaintiff where the defendant copied database information from the plaintiff’s software product in violation of the EULA).

<sup>41</sup> See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997) (holding an arbitration clause contained in printed materials inside a computer box enforceable despite plaintiffs not having read the materials).

people in the group to make certain uses of the work which would otherwise violate her exclusive rights<sup>42</sup>, such as distribution from the server, reproduction on the user's computer, and display on the user's computer. After all, the primary purpose of posting content on a social media site is to share it with your friends or disseminate it to the wider public so they people can view or listen to it; in short, the purpose is the free exchange of information. The existence of the implied license does not impact the analysis of the TOS express license. It provides a non-commercial user, however, protection from infringement for the legitimate consumption of user-generated content.

## 2. Fair Use

The defense of fair use is considered the most important defense to copyright infringement in general. In the context of user-generated content, though, the fair use defense does not pose any special problems beyond those in other contexts. The Second Circuit has stated, “[t]he doctrine of fair use . . . permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>43</sup> Fair use is codified in the Copyright Act in § 107:

the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>44</sup>

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<sup>42</sup> See 3-10 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 10.03[7] (2009).

<sup>43</sup> *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

<sup>44</sup> 17 U.S.C. § 107 (2006).



The fair use defense is unnecessary for the social media sites, which have express licenses, and the target consumers of user-generated content, who have implied licenses. The fair use defense, then, primarily applies to those who seek to further distribute and display others' user-generated content for educational or informational purposes.

The first factor, the purpose of the use, examines whether the use is commercial or for nonprofit educational purposes. Generally, if the purpose of the use is commercial there is a presumption against fair use.<sup>45</sup> This factor weighs against fair use in the context of commercial exploitation of user-generated content.

The second factor, the nature of the copyrighted work, examines whether the work is informational. This factor allows wider use of a work that is informational in nature, such as a news report.<sup>46</sup> Thus, tweets or blog entries that are news reports are less protected than works of entertainment, such as a comedy video on YouTube.

The third factor, the amount and substantiality of the portion used in relation to the work as a whole, simply prevents a person from using more of the work than is necessary under a fair use defense.

Finally, the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, tends to protect some types of content-creating users but not others. The content created by a typical user with no aspirations of commercializing his or her work, such as the mother posting pictures of her children on Facebook, are slightly more open to exploitation under this factor. However, the indie band that posts its videos on YouTube with the hope that it will gain fame and eventually make money off of its work is more protected from fair uses by this factor.

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<sup>45</sup> See *Sony Corp. of Am. V. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)

<sup>46</sup> *Id.* at 496-98.

## **E. Obstacles to Bringing Successful Copyright Infringement Actions**

In addition to the issue of social media sites giving themselves broad licenses to exploit user-generated content, content-creating users face difficulties in bringing infringement suits. The main obstacles that owners of user-generated content face in bringing successful infringement actions are practical in nature rather than technical. As discussed in the Introduction, the typical user of social media sites is either an average person just staying in touch with friends or connecting with new people, or an artist using social media to reach a wider audience.

As far back as 2003, litigating even a “low-stakes” copyright infringement suit through discovery typically exceeded \$100,000.<sup>47</sup> These costs render an infringement suit out of the reach of all but the wealthiest content-creating users. For the typical user to contemplate bringing an infringement suit there must be relatively high stakes involved. Even then, the high cost is a massive barrier to bringing suit.

In addition to the high cost of litigation, copyright formalities present another obstacle to bringing a successful infringement suit. To pursue a copyright infringement action in the first place requires registration with the Copyright Office.<sup>48</sup> In addition, the Copyright Act requires timely registration within three months of publication for both statutory damages and attorney’s fees to be available.<sup>49</sup> Unfortunately, the typical content-creating user is unaware of copyright law registration requirements. Thus, statutory damages and attorney’s fees are often unavailable. Additionally, as discussed below in Section IV(C), actual damages are frequently unavailable to

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<sup>47</sup> Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. Va. L. Rev. 999, 1003 (2008) (citing an American Intellectual Property Law Association survey from 2003).

<sup>48</sup> 17 U.S.C. § 411(a) (2006).

<sup>49</sup> 17 U.S.C. § 412 (2006).

typical content-creating users of social media sites. Without actual damages, statutory damages, and attorney's fees, litigation is practically rendered pointless.

## **IV. Remedies**

### **A. Monetary Damages**

The Copyright Act provides for the recovery of two categories of monetary damages: (1) actual damages and profits<sup>50</sup> and (2) statutory damages.<sup>51</sup> The Act states that

[t]he copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.

The Act also states that

the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just.<sup>52</sup>

Statutory damages are only available for works that have been timely registered under 17 U.S.C. § 408 within three months of publication.<sup>53</sup> Furthermore, the Act increases the awards for statutory damages if the infringement was willful.<sup>54</sup>

As a practical matter, actual damages and profits are frequently be unavailable for the creators of user-generated content on social media site. The primary purposes of social media sites and the nature of the Internet in general as a place for free expression make it unlikely that a content-creating user will suffer any actual injury from an infringing act. The vast majority of

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<sup>50</sup> 17 U.S.C. § 504(a) (2006).

<sup>51</sup> 17 U.S.C. § 504(b) (2006).

<sup>52</sup> 17 U.S.C. § 504(c)(1) (2006).

<sup>53</sup> 17 U.S.C. § 412 (2006).

<sup>54</sup> 17 U.S.C. § 504(c)(2) (2006).

social media site users are doing just what the name suggests: socializing. The text, images, and even the songs and videos a person posts are generally used as tools to express ideas or connect with friends, family, acquaintances, or a potential audience. These content-creating users have no intent to earn any money from their content. Thus, these users will have no damages to the market value of their work because they have never and will never put the work on the market. Similarly, infringing parties will generally have no intent to commercially exploit their infringing copies of a work. Thus, these parties will have no profits for the content-creating users to recover.

This practical unavailability of actual damages and profits changes when an infringing party commercially exploits a content-creating user's work downstream, such as by using a copyright image in advertising without authorization or selling a copyrighted video. Because of the nature of the typical social media site user, the obstacles discussed above in Section III(D) frequently arise and may prevent the user from even bringing an infringement suit. Additionally, if the potential infringer is the social media site itself, the use of the copyrighted work likely falls under the site's TOS as discussed above in Section III(C). Consequently, the content-creating user will not be able to prove infringement.

Thus, frequently the only available damages for a content-creating user are statutory. The timely registration requirement, however, is a major obstacle for the vast majority of users. Very few users will be aware of copyright registration requirements until they consider litigation.

By then it will often be too late.

## **B. Costs and Attorney's Fees**

Costs and attorney's fees are available at the court's discretion in a suit for copyright infringement.<sup>55</sup> Nonetheless, a work must be timely registered to recover attorney's fees.<sup>56</sup> Because a content-creating user rarely has timely registered a work, attorney's fees will often be unavailable. Even where a user seeks solely to make a point or set a precedent, the unavailability of attorney's fees will make litigation difficult.

### **C. Injunctive Relief**

The copyright act allows courts to grant both preliminary and permanent injunctions at their discretion.<sup>57</sup> The standard for granting a preliminary injunction is “a showing of possible irreparable injury And [sic] either (1) probable success on the merits Or [sic] (2) sufficiently serious questions going to the merits to make them a fair ground for litigation And [sic] a balance of hardships tipping decidedly toward the party requesting the preliminary relief.”<sup>58</sup> In the traditional four-factor test for a permanent injunction, the plaintiff must show: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” Additionally, some courts have held that there is a presumption of irreparable harm where the plaintiff makes out a *prima facie* case of infringement.<sup>59</sup>

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<sup>55</sup> 17 U.S.C. § 505 (2006).

<sup>56</sup> 17 U.S.C. § 412 (2006).

<sup>57</sup> 17 U.S.C. § 502(a) (2006).

<sup>58</sup> *Caulfield v. Bd. of Educ.* 583 F.2d 605, 610 (2d Cir. 1978) (affirming lower court's denial of preliminary injunction).

<sup>59</sup> *See, e.g., Educ. Testing Serv. v. Katzman*, 793 F.2d 533, 543-44 (3d Cir. 1986); *Hasbro Bradley, Inv. V. Sparkle Toys, Inc.*, 708 F.2d 189, 192 (2d Cir. 1985).

The threshold issue for both preliminary and permanent injunctions is the showing of irreparable harm to the copyright owner. Because there is often a presumption of irreparable harm once a prima facie case of infringement has been raised, injunctive relief is available as long as the plaintiff can show probable success on the merits. Thus, injunctive relief will often be available to a content-creating user.

In addition, in the scenario where the social media site exploits a user's work, case law supports the user getting an injunction but only where the social media site has exceeded the scope of its injunction. In *LGS Architects, Inc. v. Concordia Homes of Nevada*,<sup>60</sup> an architectural firm licensed a builder to use the firm's architectural plans in building a housing community.<sup>61</sup> When the builder used the plans in building a second community, the architectural firm sued the builder.<sup>62</sup> The Ninth Circuit held that a preliminary injunction was appropriate because the builder exceeded the scope of the licensing agreement and thus the architectural firm was likely to succeed on the merits.<sup>63</sup> Analogously, if a social media site exceeds the scope of its license, for example by selling a work commercially without connection to the site's advertising or any other function of the site, the copyright owner will also succeed on the merits. The owner will still have to prove irreparable harm from the commercial exploitation but this may be easier than is typical because the infringer has already shown the commercial viability of the work. Thus, the copyright owner has been shown to be harmed because the owner could have exploited the work commercially him- or herself.

#### **D. Unlikelihood of Available Remedies**

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<sup>60</sup> *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150 (9th Cir. 2006).

<sup>61</sup> *Id.* at 1151.

<sup>62</sup> *Id.* at 1152.

<sup>63</sup> *Id.* at 1157.

As a result of these remedies considerations, it is very likely that a content-creating user will have little recourse to injuries caused by copyright infringement. Even if the user may successfully bring an action for infringement, the user will seldom will have any monetary damages or costs and attorney's fees available. And, even though the user could successfully seek injunctive relief, the costs involved in litigation are too high and the potential payoff too low or nonexistent. Accordingly, an infringement action will rarely be a viable option for creators of content on social media sites.

## **V. Should Copyright Law Better Protect User-Generated Content?**

As discussed above, content-creating users of social media sites have little protection under copyright law. The TOS of social media sites allow the sites to commercially exploit users' works extensively. Additionally, the practical obstacles to bringing an infringement suit are steep. And, even when a user can successfully bring an infringement suit, the unavailability of remedies often makes bringing a suit pointless. So, should copyright better protect user-generated content on social media sites? First, this section examines the justificatory framework of copyright law in the United States. Then, this section briefly formulates the economic and philosophical problems associated with providing greater protection to user-generated content and argues that further protection through copyright law is unnecessary.

### **A. Copyright Justification**

The primary justification for copyright law in the United States is the economic rationale. According to the economic rationale, the purpose of copyright law (and intellectual property law in general) is to provide an economic incentive for authors to create new works by giving them exclusive rights in their works. As the U.S. Supreme Court has stated,

[t]he economic philosophy behind the clause empowering Congress to grant patents copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors in science and the useful arts.<sup>64</sup>

### **A. The Problems of Greater Protection**

From the beginning of the Internet, its central value has been the free flow of ideas and information. The commercialization of the Internet came at a later date. This value of the free flow of ideas, however, is still the core value of the Internet. A paradigmatic incarnation of this value is the website Wikipedia,<sup>65</sup> which allows any number of people to collaborate together to write and edit encyclopedia articles which can be accessed for free by anyone else. Social media users enjoy the fruits of the free flow of information and ideas by the very ease in which social media connects people.<sup>66</sup>

Therefore, copyright law should protect the free flow of ideas and information in the context of the Internet and social media. Adding new protections, however, would have the opposite effect of stifling the flow of ideas and information and lead to economic inefficiency. The cost of social media and networking would rise to account for compliance with new regulations. As Professor Lawrence Lessig states, “the central question becomes not whether government or the market should control a resource, but whether a resource should be controlled at all.”<sup>67</sup> Thus, further copyright protection in the context of social media is unnecessary.

In addition, the market will correct any imbalances caused by an overreaching social media site giving itself overly broad rights to users’ content. There are many competing social media sites for content-creating users, especially artists, to use to distribute their works.

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<sup>64</sup> Mazer v. Stein, 347 U.S. 201 (1954).

<sup>65</sup> Wikipedia, <http://www.wikipedia.org> (last visited Dec. 21, 2009).

<sup>66</sup> Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows* 762

<sup>67</sup> LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 14 (Random House 2001).



Sophisticated users are able to read the TOSs of a site and decide whether the trade-off in control over their content is worth the benefits of using that particular site.

Moreover, the Open Source/Free Software movement has made it increasingly efficient and simple to create a new social media site. For example, Twitter was created using Ruby on Rails,<sup>68</sup> an open-source web application framework used by web developers for rapid development.<sup>69</sup> Furthermore, there is no shortage of willing open-source developers in the open-source community that would build a free, open-source social media site in response to a tyrannical commercial social media site.

## **VI. Conclusion**

Copyright law presents special problems in the context of user-generated content on social media sites. Practical concerns and registration formalities often make litigation unrealistic for a content-creating user. Also, social media sites give themselves broad rights to exploit user-generated content commercially. These concerns, however, are mitigated by the nature of the typical user. Non-sophisticated users will seldom have a reason to raise an issue. Even where sophisticated user, however, expects to derive a profit from his work in the future, the value of the free flow of ideas and information outweighs the potential losses. Sophisticated users have options when it comes to posting their content on a social media site, including the option to create new sites and new avenues to share their work. The market corrects the imbalances. Thus, further copyright protection is unnecessary.

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<sup>68</sup> Twitter, About Twitter, <http://twitter.com/about> (follow the “How is Twitter built?” hyperlink) (last visited Dec. 21, 2009).

<sup>69</sup> See Wikipedia, Ruby on Rails, [http://en.wikipedia.org/wiki/Ruby\\_on\\_rails](http://en.wikipedia.org/wiki/Ruby_on_rails) (last visited Dec. 21, 2009).