

SOCIAL MEDIA AND COPYRIGHT: THE CHANGING DIMENSIONS BY TANIA SINGLA*

ABSTRACT

In recent times, the swift and large scale penetration of the Internet has been a matter of consternation for policymakers almost as much as it has been a cause for celebration for the users. Social Media has revolutionized the way people meet, interact and communicate in the virtual world but this revolution has not been without consequence. Questions about protection of intellectual property rights in the virtual world are steadily surfacing in academic circles. Drawing from this background, this note focuses on nexus between rights of the copyright owner under the Indian Copyright Act and the seemingly innocuous Terms of Use of social media websites which host user-generated content. It situates the interface between copyright and social media websites in the contours of the Indian Copyright Act and analyses the Terms of Use of popular social media websites. It also discusses the defenses to copyright infringement in the context of social media as interpreted by the courts. The note also observes that governments are beginning to look upon this area with interest and progresses to identify some of the more recent tools developed to address copyright issues on social media websites. Finally, the author concludes the note by succinctly summarizing the observations and makes recommendations for the way forward.

I. INTRODUCTION: WHERE THE PATHS CROSS FOR SOCIAL MEDIA AND COPYRIGHT

Social media has begun to make its presence felt in our lives in a myriad of ways which we could not have envisaged less than a decade ago. We certainly had our means of access to information revolutionized by digital technologies some years ago but it continued to be a one-way street; we acted only as “consumers of culture”¹. Suddenly, the Internet is becoming a lot more interactive². Users have graduated from an erstwhile ‘ordinary’ lifestyle of merely reading books and going to the movies to a daily routine of actively participating and engaging on social media platforms — Facebook, Twitter, Pinterest, Flickr, Instagram,

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¹ Elizabeth Townsend Grad and Bri Whetstone, *Copyright and Social Media: A Preliminary Study of Pinterest*, 31 Mississippi C.L. 249, 249 (2012).

² Paul Anderson, *What is Web 2.0, Ideas, Technologies and implications for Education*, JISC TECHNOLOGY AND STANDARDS WATCH, 4 (February 2007) <http://www.jisc.ac.uk/media/documents/techwatch/tsw0701b.pdf>.

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YouTube to name just a few. Those consumers have now transformed into users that *generate* culture; for whom words like ‘commenting’, ‘liking’, ‘uploading’ and ‘posting’ are now an inseparable part of their common language³. Clearly, it is changing how we perceive the Web and for copyright law in particular, presents unprecedented questions and challenges.

In a recent copyright infringement lawsuit, a Manhattan jury found that Agence France-Presse (AFP) and the Washington Post infringed upon the copyright of photojournalist Daniel Morel by using pictures that he had taken in the aftermath of the Haiti earthquake in 2010⁴. Curiously, these pictures had been uploaded by Mr. Morel on his *Twitter account*. AFP had argued that that once the pictures appeared on Twitter, they were freely available as a part of the public domain. But this was squarely rejected by the judge. Even though the ruling was largely based on the Terms of Service for Twitter users, this case showcases a broader but hazy picture. Thousands of users across the world are posting pictures on Facebook and Flickr, sharing content on Twitter and creating a pinboard of their ideas on Pinterest without understanding the legal implications. But what are the legal implications?

II. COPYRIGHT AND ITS LEGAL CONTOURS

As these new technologies challenge the traditional copyright and attribution framework, it is essential that we understand the fundamental policies underlying the copyright system. The theoretical underpinnings of copyright law take us beyond the conventional wisdom that suggests that it creates incentives for authors and publishers. Professor Neil Netanel argues that the copyright system fulfills both a “production function” and a “structural function” which fosters the creation of a marketplace characterized by diversity of expression⁵, something that social media is today making possible in real time. In addition and most importantly, the enforcement dimension of copyright is designed to help safeguard individual creators from free-riders who pilfer their works⁶. This finds statutory expression in the Indian Copyright Act of 1957.

³ Grad and Whetstone *supra* at 249.

⁴ Agence France Presse v. Morel, 2011 WL 147718 (S.D.N.Y. Jan. 14, 2011).

⁵ Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L. J. 283, 353 (1996).

⁶ Eastern Book Company v. D.B. Modak (2008) 1 SCC 1.

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The 1957 Copyright Act does not define copyrightable matter but Section 13 provides that copyright shall subsist in *original* literary, dramatic, musical and artistic works, cinematograph films and sound recordings⁷. Since the term “original” has not been defined in the Copyright Act, 1957, the Indian Supreme Court has held the position that the standard of originality under the Act falls somewhere in between the “sweat of the brow” doctrine (which is too low) and the “creativity” doctrine (which is too high)⁸. The Court decided that the test of originality therefore should consist of skill, labour, judgment coupled with certain amount of intellectual effort⁹ — the “modicum of creativity”, a phrase the Court borrows from *Feist Publications*¹⁰. *Prima facie*, user-generated content on social media platforms, as long as it is created by the individual user, could easily fall within the ambit of copyrightable matter under the Act. A user's status updates, comments, videos and photos uploaded on websites are certainly all independent creations when they have been generated by the individual user¹¹. But is *all* the user-generated content really ‘original’?

Although the threshold of originality has been lowered to the ‘modicum of creativity’, much of the content that users post still may not actually contain the requisite originality to be protected. A majority of the status updates on Facebook, tweets on Twitter and comments on YouTube are often short sentences in ordinarily conversational words, from which it would be difficult to identify the modicum of creativity. Slogans, short phrases, and commonly used words are generally not copyrightable because they do not demonstrate the requisite modicum of creativity¹². Even for photographs, the Supreme Court of the United States has held that not all photographs carry sufficient creativity to be held copyrightable¹³. It must be taken into account that the Court would require evidence of only a small degree of photographer’s ‘inventive efforts’ in posing the subjects and the setting of the photograph¹⁴. This equally applies to user-created videos too but in the general scheme of things, status updates and comments are less likely to receive protection¹⁵.

⁷ Section 13, Copyright Act 1957.

⁸ Modak *supra*.

⁹ Modak *supra*.

¹⁰ *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

¹¹ Jessica Gutierrez, “Sharing” Copyrights: *The Copyright Implications of User Content in Social Media*, 35 Hamline J. Pub. L. & Pol’y 103, 108 (2014).

¹² *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir.1959); *Jean v. Bug Music, Inc.*, No. 00-4022, 2002 WL 287786, (S.D.N.Y. Feb. 27, 2002).

¹³ *Burrow Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884).

¹⁴ *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

¹⁵ Gutierrez *supra* 109.

This is not to suggest that user-generated content is not copyrightable. A user posting his poem or short story on Facebook or tweeting new content on Twitter solely attributable to him, is an 'author' and protected under the Copyright Act. Section 14 of the Act extends to an author a bundle of six exclusive rights of ownership: the right to reproduce the work, right of distribution of copies of the work, right of public performance, derivative works, and rights of translation and adaptation of the work¹⁶. But when the user posts the content on a social media platform, the Terms of Use (TOU) of the website may automatically result in the alteration of the author's rights.

III. SOCIAL MEDIA AND TERMS OF USE

When users register with a social media website, they are likely to spend more time choosing their profile photograph compared to reading the lengthy Terms of Use (TOU) document that governs their legal relationship with others users and the website¹⁷. The operative framework of social media platforms, as the name suggests, thrives on distribution of user content among their registered members¹⁸. In order to address the issues of copyright at least within the users of the website, every user at the time of registration is generally required to license his rights. This is done through the website's TOU, to which the user signifies acceptance by clicking on "Agree", usually at the bottom of legal text outlining the terms and conditions. This class of online contract formation is called the 'click-wrap' agreement¹⁹ and is a valid agreement because there is notification of the terms to the user and the act of clicking on "Agree" signifies acceptance²⁰.

The TOUs of a number of social media platforms such as Twitter, Facebook, YouTube, Instagram and Pinterest allow the users to retain the copyright over the content they generate and post on the website. At the same time, they carry extremely broad terms which non-exclusively license the content to the website²¹. For instance, under YouTube's TOU, the

¹⁶ Section 14, Copyright Act 1957.

¹⁷ Oliver Smith, *Facebook terms and conditions: why you don't own your online life*, The Telegraph, January 04, 2013 at <http://www.telegraph.co.uk/technology/social-media/9780565/Facebook-terms-and-conditions-why-you-dont-own-your-online-life.html>.

¹⁸ Gutierrez *supra* 111.

¹⁹ Kevin W. Grierson, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 309, 317 n.1 (2003).

²⁰ Gutierrez *supra* 112.

²¹ Smith *supra*.

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license that it acquires allows it to “reproduce, distribute, prepare derivative works of, display, and perform”²² user content posted on the website. Therefore, it acquires the entire bundle of the six rights granted to the author under Section 14 of the Copyright Act without the user probably even realizing it. Facebook presents another classic example. Its TOU allows the company to acquire a license through this vague statement: “you grant us a license to use any IP content that you post.”²³ There is no definition of the term ‘use’, it grants the company almost total control over the user’s content that can be “used” in any way the company deems fit. But this story does not end here: more often than not, these licenses incorporate a grant of continued use even though their terms suggest that the license terminates when the content is deleted by the user. Facebook’s TOU provides that “this IP License ends when you delete your IP content on your account unless your content has been shared with others, and they have not deleted it.” However, it also states that its license to the content terminates with the removal of the content by the user. Contradictions such as these place the user in a delicate position. Since the very purpose of joining a social media website is to share content, there may be several copies of the user’s photos doing the rounds on the website and consequently, the license of social media platforms will persist. It is true that not all user-generated content on social media websites is copyrightable but the platform makes no distinction — even for the content that may be copyrightable, it acquires a non-exclusive license to the content as soon as it is posted. This is clearly the mechanism that social media companies have adopted to comply with the Copyright Act. It is true that the system of Copyright law could not have remotely anticipated social media becoming such a crucial part of our lives. But the casualty of this chasm between existing copyright system and the burgeoning growth of social media is the user: she is left with barely any bargaining power and no remedies under the Copyright Act²⁴.

IV. EXCEPTIONS TO COPYRIGHT INFRINGEMENT

A. Fair Dealing Defense

²² YouTube, Terms of Service, <http://www.YouTube.com/t/terms> (last accessed on Nov. 17, 2014).

²³ Facebook, Statement of Rights and Responsibilities, <https://www.facebook.com/legal/terms> (last accessed on Nov. 17, 2014).

²⁴ Gutierrez *supra* 115.

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Section 52 (a) of the Copyright Act allows copyrighted works to be used for private and personal use (including research), criticism or review and for reporting current events²⁵. This is called the Fair Dealing exception in Indian copyright law and is a common feature in almost all the national copyright legislations. It is an absolute defense to copyright infringement. This exception has tremendous importance for users on social media websites who are sharing and reposting other users' content which may be copyrightable. Sharing others' content implicates several of the exclusive rights granted under the Copyright Act and will constitute infringement unless the user has obtained a license from the original creator of the content or the use is covered by the Fair Dealing exception²⁶.

There are four factors considered by the Indian courts before granting the defense, which one will also find codified in U.S.C Section 107:

1. Amount and substantiality of portion used,
2. Purpose and Nature of the use,
3. Nature of the work, and
4. Effect of Use upon Market or Value.

The second and the fourth factors can help to safeguard *bona fide* users when the use is not commercial and it somehow is transformative from the author's original work²⁷. Transformative use usually makes for a strong fair dealing exception. But the first and the third factors may not ordinarily go in the users' favour because when users share pictures, videos, text, a copy of the *entire* work is created. Further, if the shared work is artistic in nature, it weakens the possibility of receiving the defense²⁸. The four factors are often not given equal weight, making it difficult to predict the circumstances where fair dealing protection may be granted²⁹.

B. Other Defenses

The Indian copyright jurisprudence is yet to develop in the field of social media but it may be relevant to analyze the jurisprudence developing in the United States. Users also commit

²⁵ Section 52, Copyright Act 1957.

²⁶ Holland & Hart LLP, *Sharing copyrighted content on social media – fair use or infringement?* (April 4, 2014) at <http://www.lexology.com/library/detail.aspx?g=7357b483-8524-433a-968a-792e5414144c>.

²⁷ Gutierrez *supra* 127-128.

²⁸ Holland & Hart LLP *supra*.

²⁹ Gutierrez *supra* 129.

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copyright infringement in a contributory manner by linking to copyrighted material. The *Flava Works* judgment extended protection to such users stating that mere linking is not a sufficient contribution to the infringing activity³⁰. Further, the *Perfect 10* case suggests that where the act of linking only involves sharing the HTML without any thumbnail image or copyrighted material, direct liability may not be imposed on such users³¹. Contributory liability may even be Internet service providers if infringing content is found on their website. They can avoid liability by allowing copyright holders to complain about infringement of their work and in response, the website can disable any further access to the infringing material³². Even though the law is unsettled, these cases are indicative of the efforts the law is making to adapt to Web 2.0.

C. DE-MYSTIFYING SOCIAL MEDIA AND COPYRIGHT

Governments and organizations are slowly beginning to respond and evolve tools to bridge the gap between social media and copyright law. Two such tools have been highlighted in this section.

A. *The eCO System*

The U.S. Copyright Office started the Electronic Copyright Office (eCO) System in 2007 which offers professional photographers and amateur enthusiasts the opportunity to apply for copyright registration for their photos online³³. It is much quicker and convenient than regular method of applying through documentation. Currently the services are offered only for registration of pictures but we may see possible expansion to other kinds of works in the near future. Since the certificate of registration is received in a matter of weeks, the photographer can comfortably release the pictures in social media and even exercise his remedies effectively in the case of infringement.

B. *Creative Commons Licenses*

³⁰ *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012).

³¹ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

³² *ALS Scan*, 239 F.3d at 625; 17 U.S.C. § 512(c) (2012).

³³ Carolyn E. Wright, *Registering your Copyrights using the eCo System* (November 11, 2008) at <http://www.naturescapes.net/articles/business/registering-your-copyrights-using-the-eco-system/>.

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Creative Commons (CC) is a non-profit organization that seeks to circumvent the cumbersome permissions and royalties process under Copyright law by offering “Some Rights Reserved” licenses. These licenses have been designed primarily for authors and artists. Founded in 2001, the CC framework is designed in a manner such that it can co-exist with copyright. Creative Commons looks at the spectrum of possibilities between full copyright — *all rights reserved* — and the public domain — *no rights reserved*³⁴. This is for those authors who are willing to share their work in the public domain and allows them to waive certain rights granted by traditional copyright. The authors can choose which rights to abdicate and are even allowed to waive all of their rights. CC Licenses eliminate the need to identify and contact the copyright owner to seek permission³⁵. Some social media websites such as Flickr explain CC licenses, allow users to search for CC-licensed content and share it accordingly on the website³⁶.

D. CONCLUSION

Social media, through its distribution-based framework poses fundamental challenges to the traditional dimensions of Copyright law. The manner in which it is currently operating within the contours of copyright law is precarious to say the least and represents another one of those occasions when technology has proved itself to be two steps ahead of the law. Social media platforms are trying to play it safe by using broad terms in their TOUs to acquire license over the content of the unwitting user. However, it is quite heartening to see that some websites have begun to include the implications of the license terms in simple English along with the accompanying legalese to help users understand what they are agreeing to.

Strangely, despite overbroad license terms and large scale infringement over social media, cases that have gone to court still remain almost negligible in number. But considering the uncertainties associated with the Fair Dealing doctrine, it is nevertheless advisable for users to be careful in determining whether the material they are sharing or linking to is copyrighted. Memberships of social media websites continue to grow every day and organizations across the world are making efforts to devise models that can help reduce the copyright implications on social media. But law cannot lag behind for too long. This transformation of the culture of

³⁴ Creative Commons, <http://creativecommons.org/about/>.

³⁵ K.K. Olson, Chapter 4: Intellectual Property, p. 88 in DAXTON STEWART, SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATION STUDENTS AND PROFESSIONALS (Routledge Publishers) (2013).

³⁶ <https://www.flickr.com/creativecommons/>.

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the web is something the Legislature can no longer ignore. It is time for the legislative process to adapt, evolve and do something about it.

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