WHO OWNS YOUR PICTURES? SOCIAL NETWORKING AND UNAUTHORIZED COPY

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When dealing with issues regarding copyright and the Internet, we are often confronted with two diametrically opposed goals: rendering the work accessible and acknowledging the contribution of the author.

These two goals reflect the very nature of the legal framework we tread in these days with the advent of social networking (in fact, at this point it can be regarded as old news). It is however important to keep in mind that your rights in one sphere of activity may very well vary in another, especially when these rights stem from your activities online.

Most social networking sites, whether we are discussing Facebook, Twitter, or whatever comes next (Twitface?), have established terms of use agreements that require users to click and accept broadly drafted contractual terms which try to legally "box in" the user experience with regard to the content they are sharing. In other words, each service comes with their set of conditions that users must agree to in order to have access to the network.

These user agreements can sometimes be at odds with "real world" practical applications of existing user rights. For example, most social networking user agreements boast that their users retain all ownership rights to the content they generate. However, if one were to read some of these agreements more carefully, it would be possible to realize that for the most part, a user is in reality agreeing to provide these sites (as well as any affiliates and partners) with a full, non-exclusive, royalty free license to their content, which includes the right to sub-license to others. Therefore, from a practical perspective, even though the user retains ownership to the content they post, the entity providing the social network itself is nonetheless given a non-exclusive license to freely use and distribute the content, thereby devaluing the concept of actual ownership. This was the very nature of a recent

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American dispute: Agence France Presse v. Morel - F.Supp.2d ----, 2011 WL 147718 (S.D.N.Y. Jan 14, 2011) (NO. 10 CIV 2730 WHP).

In this case, Agence France Presse (AFP) was seeking a declaration from the Courts that it had not infringed any existing copyrights residing in pictures taken by Mr. Morel of the 2010 earthquake in Haïti that he himself uploaded to the Twitter social networking service. AFP had obtained these photos without requesting permission from Mr. Morel and sold them, through an intermediary, to CNN and CBS for broadcast. AFP argued that since Mr. Morel uploaded and shared the pictures via his Twitter/Twitpic account, he made them publicly available to all Twitter users, thereby giving others an implicit license to share or re-publish them. In other words, there was no potential for infringement since Mr. Morel had given general permission to use the pictures that were already being shared publicly as since the very nature of Twitter requires that material be posted, shared and re-posted by others.

This case is interesting from a licensing perspective as access to Twitter's service depends on the user accepting the terms of agreement as discussed above. These terms explicitly give Twitter and its affiliates a non-exclusive license to use and distribute any copyright protected materials. The Courts decided that given this explicit language, this license could not extend itself to the distribution of said work outside the "Twitter sphere". In view of this specific Twitter license agreement, any "real world" publication or use is still subject to "real world" copyright laws and not covered by this license under the terms of use agreement. One cannot assume that because a certain material was publicly shared online (under a specific set of circumstances), that this would extend to an "implicit" license allowing the distribution and use of this same material outside of the social network it was distributed in.

While there are not many other pending court decisions in Canada or the United States currently studying this question of explicit vs. implicit license agreements with respect to social networking and the public sharing of copyright protected works, the real world effects of this duality are surely tangible.

One must be wary when dealing with the distribution of copyright protected materials obtained through license. For example, if an exclusive license to a specific picture has been given to a newspaper for publication, and said newspaper then posts and shares the picture on their Twitter page, this act would give a non-exclusive license to Twitter as well as their affiliates and partners, to distribute and sub-license the photograph, thereby going against the terms of the exclusive license already in force between the initial parties.

Conversely, if a photographer posts a picture on Twitter and the BBC, for example, then decides to link this picture to their Twitter feed without the author's consent, there would be no potential for infringement due to Twitters' non-exclusive license agreement. However, if the BBC took the picture as posted on Twitter and, instead

of linking directly to the photographers Twitter feed, copied and posted the picture directly onto their webpage, there would be a potential for infringement since the content would have been taken out of the "Twitter universe". From a rights holder perspective, this is treacherous ground and rights holders need to be aware that specific license terms should be in place in newly drafted agreements to take into account these new and converging licensing spheres.

While Canadian courts have not yet been asked to hear a similar case, we believe that they would likely come to a similar conclusion with respect to the economic rights recognized by Canadian copyright legislation. However, one can only speculate as to what their assessment would be regarding the existence of moral rights residing in a copyright protected photograph distributed via social media, these rights being separate from economic rights in Canada and which can be the subject of an entirely new article altogether.

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