

MEETING OF THE MINDS

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Things Aren't Always as They Appear: Who Really Owns Your User-Generated Content?

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Seventh Circuit Court Judge Richard A. Posner has stated, “The way law historically develops is from custom. I can imagine customs emerging from interactions among avatars”¹ (Think James Cameron’s blockbuster film *Avatar*.) Social media applications such as MySpace, Facebook, LinkedIn, Twitter, and Second Life have proven to be more than a passing fad. In fact, technology has quickly outpaced the law surrounding the creation, use, and ownership of user-generated content. Once reserved for a small community of college students, “adding friends” has now ballooned into a viable and lucrative business model, quickly becoming the communication tool of choice for many. As social media customs develop, the need for greater regulation becomes apparent.

Social media is the hottest discovery since e-mail. It’s fun, fast-paced, and interesting, and allows people to connect with friends, colleagues, and potential clients never before possible. And for lawyers, it’s a particularly useful tool allowing attorneys to stay connected, market, and network all in one easy-to-navigate venue. But for all the good it can accomplish and ease with which it can be used, it can also create landmines. Recent statistics provide strong evidence that companies are using (and will continue to use) social media venues to promote products and services.² Even if companies do not use social media, their employees and clients will use it. Therefore, companies need to monitor online user feedback, how their brands are portrayed, and any unauthorized uses of their intellectual property.

It’s not just kids and business owners who need to beware of the potential dangers. Increasing use of social media by lawyers creates risks for those just starting to play in the social media

sandbox. As business and social media online interactions continue to intensify, so does the necessity that users understand the rules regarding intellectual property in this new setting. For example, social media sites commonly provide that, while each social media site owner and each developer retain sole rights in the underlying platform, the user retains intellectual property ownership in any user-generated content it creates. However, things are not always as they appear. While the Terms of Use or Terms of Service (hereinafter and collectively TOU) are located on every site, few, if any, users read them or even understand what they have read. And even if users read the TOU, an argument could be made that the TOU doesn’t always mean what it says.

User-Generated Content and Intellectual Property Ownership

Social media applications provide a venue for users to create community, develop content, and share that content with millions of others—in an instant. To understand the IP ownership issues surrounding social media, one can place the rights at issue into two categories: (1) those arising out of the underlying platform (the platform) and (2) those arising out of user-generated content (UGC). The platform consists of the social media application’s underlying html source code and the

machine-executable object code. Social media sites such as Facebook and Second Life own the copyright and other intellectual property in the platform. The UGC is any content that the user generates, produces, and uploads to the platform, such as articles, photographs, blogs, and/or videos. Most social media sites represent that the users own their UGC. But once again, things are not always as they appear. A closer look at the TOU of most social media venues reveals a possible contradiction.

Most businesses have protectable trademarks or service marks. These marks enjoy the same trademark protection on social media sites as they do elsewhere—online and offline. Therefore, any unauthorized posting, use, or replication of a business’s trademark or service mark risks liability for infringement.

In some cases, the author of UGC holds the rights to his or her work. The exceptions are content comprised of the copyright-protected work of another person or a work-made-for-hire. In these cases, in the absence of an agreement stating otherwise, someone other than the author of the UGC is the copyright holder. The term of a copyright for works created after January 1, 1978, is the life of the author plus 70 years.³ For works made for hire, the copyright endures for a term of 95 years from the year of its first publication, or 120

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years from the year of its creation, whichever expires first.⁴ As discussed below, whether the UGC is created for personal use or for a business purpose has implications for the duration of a user's copyright.

The Digital Millennium Copyright Act (DMCA)⁵ grants providers of online services some degree of immunity from liability arising out of copyright infringement perpetrated by users. However, social media applications must take some steps towards protecting users' intellectual property rights by developing a complaint process. In order to fall under the DMCA's safe harbor provision, the social media site must provide contact information so that an owner can notify the site of allegedly infringing material to enable the site to review the alleged infringement and take down the content if required. Further, it is advisable that businesses create their own TOU for their social media pages, (see, e.g., Coca-Cola's Facebook page), to minimize liability arising from other users posting content on the business's social media page.⁶ These TOUs must clearly define the media covered, expectations of the social media site owner, and which actions would be deemed a breach of the TOU.

With regard to other users' activities, companies should be vigilant in monitoring for potential misuses of their intellectual property. UGC posted on a social media site is easily copied—or "scraped." Social media applications provide communications outlets to millions of online users. Any unauthorized user could use infringing material in a way that harms the reputation or goodwill associated with the owner's business in a matter of seconds.

The Cost of Using Social Media: Nonexclusive License to UGC

Copyright ownership, which vests in the author, is freely transferable by the copyright owner.⁷ A "transfer of copyright ownership" occurs when there is an "assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but *not including a nonexclusive license.*"⁸

Membership in these sites is not free, albeit no fee or tax penalty is required. In return for membership, most social media sites require that the user grant the site and its third-party affiliates, now known or later established, a nonexclusive license to any UGC posted by the user. The nonexclusive license granted to the social media site is necessary for the site to operate. It must manipulate the UGC in order to provide its services and republish the content. The question then becomes this: What rights does the owner really have in his or her UGC? The answer to this query depends on the specific TOU provided by each site, as well as the various state contract laws. The following provides a brief sampling of social media sites' TOUs regarding ownership of intellectual property.

Facebook: An Online Social Network

In its trademark application, Facebook defines its services, in part, as "hosting online web facilities for others for organizing and conducting online meetings, gatherings, and interactive discussions; . . . creating an on-line community for registered users to participate in discussion, get feedback from their peers, form virtual communities, and engage in social networking."⁹ Facebook is a social utility site that connects people to friends, family, businesses, social causes, and other interests. It has become one of the world's top websites, with more than 250 million users. According to Experian Hitwise, Facebook recently surpassed Google as the most visited U.S. website.¹⁰ In fact, Facebook traffic has increased almost 200 percent over the past year.¹¹

Facebook's users are permitted to display photographs, upload videos, and share content with others known as "friends." There are no fees to join Facebook. However, Facebook's TOU requires that an end-user grant Facebook a broad license in return for the privilege of membership.

Facebook proudly states that the end-user owns any content he or she creates and uploads to the site. However, the TOU states in part, "[f]or content that is covered by intellectual property rights, like photos and videos ('IP content')," the user grants Facebook a "non-exclusive, transferable, sub-licensable,

royalty-free, worldwide license to use any IP content" that the user posts "on or in connection with Facebook."¹² So while the user owns the content—in theory—an argument can be made that by granting Facebook a license to use content, the user also gives Facebook permission to allow others to do the same. This little provision could also pose a problem for anyone claiming infringement because infringement does not occur if you grant permission for use.

Another somewhat deceiving provision of the TOU states that the "[l]icense ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it."¹³ Here a user is led to believe that delete equals delete, yet the very nature of social networking is the "sharing" concept. So if a user shares her content with 500 of her "friends," and then decides to delete the content, those 500 friends still have access to the content; therefore, it is not deleted.

In order for Facebook to take action against infringement of a user's IP rights, the user must report the infringement using specific procedures outlined by Facebook as required by the DMCA. Additionally, Facebook has an IP infringement report for infringements other than copyright violations under the DMCA, such as trademark infringement.¹⁴ Upon investigation, Facebook states, it will terminate repeat infringers "when appropriate."¹⁵ Overall, Facebook's TOU provides it with wide latitude in deciding how it will use, handle, and manage UGC, and how vigilantly it will punish those who allegedly infringe upon another user's protected rights.

LinkedIn: An Interconnected Professional Network

While boasting several similarities to Facebook, LinkedIn provides business professionals around the world the ability to connect with others, market themselves and/or their companies, and easily access resources. LinkedIn users can establish and maintain business relationships while expanding their networks through groups related to a user's business interests. Frequently, users post self-authored articles, presentation slides, program materials, and other content qualifying for

IP protection.

LinkedIn's TOU addresses the ownership of IP rights, providing that the user may submit anything to LinkedIn, including UGC. If the user chooses to submit UGC, the user must grant "a nonexclusive, irrevocable, worldwide, perpetual, unlimited, assignable, sublicenseable, fully paid up and royalty-free right to [LinkedIn] to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialize, in any way now known or in the future discovered, any information [the user] provide[s]."¹⁶ Thus, LinkedIn reserves the right to use any content uploaded or posted onto a user's LinkedIn account page or message board for any purpose it chooses, including a commercial purpose.

Regarding copyright infringement, LinkedIn provides a procedure under the DMCA wherein a user can contact LinkedIn's copyright agent to report any user-generated content copied in a way that constitutes infringement.¹⁷ As with Facebook, the onus is on the user to monitor its intellectual property and ensure its rights are not being violated.

Twitter: A Real-Time Short Messaging Service

Twitter, an online messaging service, allows users to submit micro-blogs of no more than 140 characters. These are short responses to the question, "What's happening?"¹⁸ Twitter has been used by political figures such as President Obama to express campaign messages,¹⁹ by relief organizations such as American Red Cross to exchange information and coordinate efforts regarding local disasters,²⁰ and by news services to provide up-to-the-minute news reports.²¹ Twitter's popularity has grown exponentially, increasing 1,170 percent in the last year.²² More and more businesses, including lawyer firms, are finding Twitter to be a useful marketing tool.²³

In September, Twitter announced its new TOU. The previous TOU had not expressed any licensing parameters.²⁴ However, the new TOU explicitly provides that the user grants Twitter 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."²⁵ Twitter emphasizes, "what's yours is yours—you own your content."²⁶ In spite of this, like most social media applications, users also are told that once they use the service, they grant Twitter and all its unnamed partners and affiliates a license as well.²⁷

Additionally, Twitter's previous TOU provided that, once a user deletes his or her account, Twitter removes the user's profile and any text and images the user has stored in the system. The new TOU makes no mention of removal, nor does it limit the duration of time for the nonexclusive license the user must grant Twitter and its partners.

Twitter recently announced that it is testing a feature called "Verified Accounts," which allows "well known accounts" to prevent impersonation or identity confusion.²⁸ These accounts included those of "well known personalities, organizations, government agencies, and others."²⁹ Twitter does not yet verify business accounts. Once an account is verified, it receives a "Verified Account" badge, which notes the account's authenticity.

Twitter's new TOU follows the same basic format as other social media sites. Therefore, businesses should be aware that whatever they post on Twitter could likely be rebroadcast by Twitter or its partners and/or users. Further, such uses by Twitter and/or its partners do not require it to pay compensation to the user with respect to any posting, regardless of whether the user's posted content is protected under the copyright or trademark laws. Therefore, while the user owns the rights in the content it posts, Twitter and its partners maintain a worldwide, nonexclusive, royalty-free, and arguably perpetual license to use any user's protected content.

Second Life: An Online Virtual World Copyright and trademark issues abound in virtual worlds such as Linden Lab's Second Life.³⁰ Second Life is not just a virtual venue for games; it is increasingly being utilized as a key platform for virtual corporate meetings, event management, corporate training, and educational simulations.³¹ Major brands

now have a presence in Second Life; these include BMW, Starwood, Nike, Coca Cola, Nissan, IBM, and ING, just to name a few.³² With such online presence in virtual worlds, businesses may have to struggle to control their brand identity. Some companies that embrace social media, such as Wells Fargo & Company, find the best way to handle this new forum is to be transparent and readily manage their brands by adopting their own interactive virtual identities.³³

Regardless of a business's eagerness or reluctance to join the virtual world, there is no doubt that the virtual economy of Second Life is booming. Second Life reported the value of transactions between users in the second quarter of 2009 was \$144 million—an increase of 94 percent over 2008.³⁴ In Second Life, users generate revenue by selling everything from goods, such as clothing, houses, and art, to services.³⁵ With goods and services estimated to generate over \$600 million in 2009, Second Life has grown to have an economy exceeding 19 countries' GDPs.³⁶

Second Life's TOU specifically states that a user may not select an account name that would cause deception or confusion or violate any trademark right, copyright, or other proprietary right.³⁷ By using Second Life, Linden Lab grants a user a "non-exclusive, non-transferable, non-sublicenseable, limited, revocable license to access and use the Service"—the way a user accesses the virtual world.³⁸ While the user retains copyright and other intellectual property rights with respect to its user-generated content in Second Life,³⁹ as with other social media applications, Second Life requires the user to automatically grant to Linden Lab a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, nonexclusive right and license to use, reproduce, and distribute the user's content as it wants, whether for marketing or promotional purposes or for testing and servicing the application.⁴⁰ Additionally, Second Life disclaims any responsibility for the legal actions or failure to act on the user's part with regard to the user's intellectual property rights.⁴¹ Use of Second Life specifically grants Linden Lab the right to retain ownership of the account and related data, regardless

of any intellectual property rights the user may have in his or her generated content.⁴² As with other social media applications, Linden Lab/Second Life responds to allegations of copyright infringement in accordance with the DMCA.⁴³

In an effort to secure stronger protections of users' intellectual property, Second Life has issued a "Content Management Roadmap," which includes improving its intellectual property complaint process, promoting standard industry practices for tools copying content from Second Life, implementing a program to build trust among users, clarifying and updating its TOU to promote awareness of intellectual property ownership issues, and developing content licensing "to help facilitate a content marketplace outside [its] hosted Second Life virtual world."⁴⁴

Who Owns the Online User Content: Employee or Employer?

The rise of social media demands that companies adopt policies regarding social media use. While some companies have restricted employees' social media use, others have embraced, and even encouraged, online representation of the employer. This leads to several questions. When the employee's social media participation is at the behest of the company, who owns the employee's online profile containing all the employee's contacts? What happens when the employee posting company information no longer works for the employer?

For example, suppose an employee sets up a Facebook page, a LinkedIn profile, or a Twitter account and uses the site to develop new business contacts, foster existing ones, and post company information. The employee's work on the social media site is considered part of his or her work on behalf of the employer. If the employee decides to leave the company, can the employee refuse to provide the username and password for the account?

If the employee refuses to give the employer ownership of the site, then the employer loses all the new contacts established and all the time invested.

The law concerning ownership of UGC between employers and employees is still undeveloped. While the author is usually the owner of the copyrighted material, the situation may be analyzed under the "work made for hire"⁴⁵ doctrine. Analysis of copyright ownership for works made for hire is determined by the relationship of the parties. In such cases, the author's employer would own the work if the employee—not hired as an independent contractor—created the UGC *within the scope* of his or her employment.⁴⁶ Generally, it is the best practice for businesses to have policies or specific TOUs providing that the employee agrees that any UGC created by the employee for company-specific purposes belongs to the employer. Another problem arises in instances of mixed use, i.e., where the employee mixes business property with personal property such as personal photographs. A business's social media policy should be sure to address how employees may reference and use business property such as communications, press releases, and trademarks, when mixing such content with the employees' personal property.

Cases Addressing Social Media and User-Generated Content

***Eros, LLC v. Linden Research, Inc.* (N.D. Cal. 2009)**

On September 15, 2009, online merchants Eros, LLC and Shannon Grei sued the creator of Second Life for direct, contributory, and vicarious infringement of its trademarks and copyrights.⁴⁷ Eros describes itself as a proprietor of, among other items, adult-themed merchandise under the name SexGen within Second Life.⁴⁸ Eros owns the SexGen trademark.⁴⁹ Shannon Grei is the proprietor of "skins"—popular clothing and coverings worn by "residents" of Second Life.⁵⁰ Grei owns the copyright to "Nominee Araignee Set," under the category of "Visual Material."⁵¹

Eros alleged that Linden Lab and its merchants in Second Life are infringing Eros's registered trademark SexGen by actually cloning Eros's products and reselling them without compensating

Eros.⁵² The complaint reads as a typical trademark infringement claim where the infringer is falsely designating the origin of its goods, creating customer confusion, and capitalizing on the business goodwill of the trademark owner. However, the only difference is that this setting takes place in a virtual world. By directly controlling and monitoring the technology comprising Second Life, Eros alleged that Linden Lab creates an environment for infringement.⁵³ Further, it alleged that Linden Lab profits from such infringement based on the 3.5-percent exchange rate Second Life charges for converting its currency—LindeX—into real-world currency.⁵⁴

The complaint also alleged that Second Life Residents made unauthorized use of Grei's copyrighted virtual clothes that she sells within Second Life.⁵⁵ Grei alleged that Linden Lab had knowledge of these residents' unauthorized use and "materially" contributed to the infringement by, among other things, charging upload fees to the infringers uploading pirated content, profiting from the LindeX currency exchanges, and operating a fee-based marketplace where Second Life Residents can search for and purchase virtual items.⁵⁶

While Linden Lab's TOU provides methods for reporting infringing content, this case focuses on Linden Lab allegedly providing a pathway for and generating revenue from infringement by Second Life users. This case will be of interest to those participating in virtual world economies and may provide guidance on the nature of obligations social media platforms have to monitor infringement.

***Oneok, Inc. v. Twitter, Inc.* (N.D. Okla. 2009)**

Also on September 15, 2009, natural gas distributor Oneok, Inc. sued social media site Twitter for trademark infringement and contributory trademark infringement, alleging that Twitter allowed an anonymous user to create an account with username ONEOK, the company's trademark, and upload the company's graphic onto the ONEOK Twitter site.⁵⁷ The complaint further

alleged that Twitter allowed the user to post communications—“Tweets”—containing information about the company that “have the appearance of being an official statement issued by Oneok.”⁵⁸ Oneok, Inc. operates a Twitter account under the username “ONEOKNews” in which it posts company information.⁵⁹ Oneok, Inc.’s complaint alleged that it attempted to have Twitter assign the ONEOK Twitter account to Oneok, Inc., but Twitter allegedly failed to conduct such assignment.⁶⁰

Twitter’s TOU and “The Twitter Rules” prohibit “Username Squatting” in which a user signs up for the sole purpose of claiming the username of a trademark owner.⁶¹ Twitter provides a mechanism wherein a trademark owner may reclaim its username by reporting the trademark violation to Twitter.⁶² Twitter does not detail how it treats reports of infringement or how it determines whether a violation has occurred.

One day after the Oneok, Inc. complaint was filed, the lawsuit was dropped, and it has been reported that the ONEOK Twitter account was transferred to Oneok, Inc.⁶³ This case serves as a prime example of how important it is that businesses police their IP rights in social media applications. The risk that an unknown user could create a username relating to an unrelated company and post false public relations reports can result in far-reaching irreparable damage, as the false information can quickly reach millions of users in a single click. At the current time, it is difficult to expect a social media application with millions of users to police every username and prevent every copyright or trademark violation. Therefore, the burden falls on businesses to monitor the unauthorized use of their intellectual property and self-report to the social media site.

***Melkonian v. Facebook, Inc.* (Cal. Super. Ct. 2009)**

In August 2009, an array of former Facebook users—from minors and a college student to an actress and a photographer—filed a complaint against Facebook alleging that the social media

giant’s license agreement effectively gave it ownership and perpetual title to all data uploaded by the users to Facebook even after the users terminated service.⁶⁴ Further, the complaint alleged that Facebook failed to comply with the users’ requests to stop posting private information, including photographs owned by the users.⁶⁵

The primary allegations in the complaint centered on privacy issues and do not allege copyright or trademark infringement by Facebook.⁶⁶ However, the 41-page complaint highlights Facebook’s TOU requiring a potential user to consent to an irrevocable, perpetual license granting Facebook free use of a user’s intellectual property rights.⁶⁷ Many claims, especially by the photographer, appear to be claims for copyright infringement, so the claims may be preempted by the Copyright Act.⁶⁸ Regardless, the complaint illustrates one of the most popular social media application’s alleged uses of user-generated content for purposes of data mining⁶⁹ or advertising.⁷⁰

***Bragg v. Linden Research, Inc.* (E.D. Pa. 2007)**

In October 2007, the law and the virtual world collided. *Bragg* is one of the first cases addressing the rights and obligations between a social media application and UGC.⁷¹ This case involved a claim against the virtual world application of Second Life. Marc Bragg, a Second Life user, sued Linden Research, Inc., the creator of Second Life, in 2005 over ownership of virtual real estate.⁷² Although at first this may not seem readily apparent, virtual real estate is similar to actual real estate in the sense that users of Second Life can purchase it and sell it for actual currency.⁷³ Second Life is a massive multiplayer online role-playing game (MMORPG) built around a real-world business model. It employs a currency system using Linden dollars, which are purchased and can be exchanged for actual currency, including U.S. dollars.⁷⁴ While virtual real estate can be purchased and sold like actual real estate, the primary distinguishing feature is that the virtual real estate exists as software code

representing land, houses, or buildings.

In *Bragg*, the user had purchased virtual land valued at \$300.⁷⁵ However, because the user acted in ways Linden thought were in violation of its TOU, it canceled the user’s account, leaving the user with no way to access his purchased property.⁷⁶ While the user and Linden settled the case with undisclosed terms,⁷⁷ this case leaves many questions unanswered as to the rights a user has in his or her content.

Conclusion

Users of social media applications, whether for personal or business use, should be aware that any protected UGC can be used by social media websites under their nonexclusive licenses without express permission. Moreover, businesses seeking to utilize the many benefits of social media must address employees’ use of social media applications and develop effective social media policies, considering the extent employees can represent the company, who owns the content posted or uploaded, and who owns the account in the event the employee ceases employment. As the popularity of social media continues to expand, it is increasingly important to monitor these sites for unauthorized activities that may harm business goodwill. Finally, a word of caution to all who play in the social media sandbox: *read and understand the TOUs.* You’re likely to be bound by them! ■

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64. Complaint at 3, Melkonian v. Facebook, Inc., No. 30:09-00293755 (Cal. Super. Ct. Aug. 17, 2009), *available at* <http://www.scribd.com/doc/18758717/melkonianvfacebookcomplaint>.

65. *Id.*

66. *Id.* at 12.

67. *Id.* at 19.

68. 17 U.S.C. § 501.

69. Complaint, *supra* note 64, at 15.

70. *Id.* at 33.

71. Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D. Pa. 2007).

72. *Id.* at 595.

73. *Id.* at 595 n.5.

74. *Id.*

75. *Id.* at 597.

76. *Id.*

77. Adam Reuters, *Linden Lab Settles Bragg Lawsuit*, REUTERS/SECOND LIFE, Oct. 4, 2007, <http://secondlife.reuters.com/stories/2007/10/04/linden-lab-settles-bragg-lawsuit/>.