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### Copyrights

The author evaluates the risk of copyright infringement and the scope of the fair use defense in the expanding world of social media.

## Social Media and Fair Use



BY MARY ANN L. WYMORE

**S**ocial media websites have skyrocketed in popularity. Every day millions of users across all demographic lines log on to Pinterest and various other social media sites such as Facebook and Twitter to get and share news and information about a limitless range of topics.

In fact, some analysts posit that young adults may get more than half of their daily news from such sites. But these sites are not just for keeping up with the news—and they are certainly not just for the young. Users share information on all manner of subjects from reci-

pes to cleaning to music to photographs to music to fashion and much, much more.

Facebook claims more than 950 million users<sup>1</sup> currently, 46 percent of whom are aged 45 or older,<sup>2</sup> and Twitter has grown to more than 140 million monthly users,<sup>3</sup> 58 percent of whom are aged 35 or older.<sup>4</sup> A relative newcomer to the group, Pinterest is now the third most popular social networking site behind Facebook and Twitter.<sup>5</sup>

Growing exceptionally fast since its launch in 2009, Pinterest now boasts more than 20 million users,<sup>6</sup> of whom 64 percent are aged 35 or older and roughly 80

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<sup>1</sup> At the end of March 2012, Facebook had 901 million monthly active users. Facebook, *Facebook Newsroom: Key Facts*, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Aug. 3, 2012).

<sup>2</sup> *A Case Study in Social Media Demographics* ONLINE MBA (Mar. 8, 2012), <http://www.onlinemba.com/blog/social-media-demographics/> (hereinafter "Social Media Demographics").

<sup>3</sup> Shira Ovide, *Twitter's Mobile Ads Begin to Click* WALL ST. J., June 28, 2012, available at <http://online.wsj.com/article/SB10001424052702304458604577491170573156612.html>.

<sup>4</sup> Social Media Demographics, *supra* note 2.

<sup>5</sup> Aaron Pragnell, *Pinterest: The Next Social Media Giant*, S.F. CHRON., June 28, 2012, available at <http://www.sfgate.com/business/investopedia/article/Pinterest-The-Next-Social-Media-Giant-3672174.php>.

<sup>6</sup> Social Media Demographics, *supra* note 2.

percent of whom are women. Not to be outdone, men are flocking to websites such as Manteresting.com, a pinboard style site similar to Pinterest but designed with more traditionally “manly” interests in mind.<sup>7</sup>

“Sharing” is the idea behind websites such as Pinterest, Facebook, Twitter, and scores of others. Users share information, pictures and videos which are uploaded, downloaded, transferred, pinned and, well, shared with others who have similar interests.

Users can create and manage theme-based image collections such as events, interests, and hobbies, and can browse other pinboards for inspiration, “re-pin” images to their own collections or “like” photos and other information. Indeed, Pinterest’s mission is to “connect everyone in the world through the ‘things’ they find interesting”<sup>8</sup> via a global platform of inspiration and idea sharing.

One of the fastest growing social services in the world, Pinterest calls itself a “virtual pinboard” where you can “organize and share all the beautiful things you find on the web.”<sup>9</sup> Facebook is designed to help you “connect and share with the people in your life.”<sup>10</sup> And Twitter, an information network using small “bursts of information called tweets,” allows users to “see photos, videos and conversations” while discovering information in real-time.<sup>11</sup>

Although the concept of online sharing seems magnanimous, it is not without legal implications, particularly related to ownership and infringement of intellectual property. Pinterest poses an excellent case study. A Pinterest user can post or pin<sup>12</sup> his or her own or anyone else’s material, including copyrighted or copyrightable material.

If Pinterest users post or pin another’s work without permission, have they violated copyright law? Does it matter if the work posted or pinned by a user was originally posted to Pinterest by the author or creator of the work? If users impermissibly post or pin a copyrighted work, are they then contributing to infringement when another user in turn re-posts it or pins it on their own page? And while there is a surplus of questions, there is a shortage of answers.

The potential ramifications of Pinterest’s rippling methodology are only just beginning to be evaluated and the legal community is just beginning to scratch the surface in defining and understanding the legal implications of increasingly clever social media techniques.<sup>13</sup>

<sup>7</sup> Manteresting, <http://manteresting.com/> (last visited Aug. 3, 2012).

<sup>8</sup> Pinterest, *Pinterest: Our Mission*, <http://pinterest.com/about/> (last visited Aug. 3, 2012).

<sup>9</sup> Pinterest, *Pinterest: Getting Started*, <http://pinterest.com/about/help/> (last visited Aug. 3, 2012).

<sup>10</sup> Facebook, *Facebook Policies*, <http://www.facebook.com/policies/> (last visited Aug. 3, 2012).

<sup>11</sup> Twitter, *About*, <http://twitter.com/about> (last visited Aug. 3, 2012).

<sup>12</sup> According to Pinterest, a pin is “is an image added to Pinterest. A pin can be added from a website using the Pin It button, or you can upload images from your computer. Each pin added using the Pin It button links back to the site it came from.” Pinterest, *Getting Started*, <http://pinterest.com/about/help/> (last visited Aug. 3, 2012).

<sup>13</sup> One lawyer deleted her Pinterest account in February 2012 after briefly researching the copyright ramifications presented by the website. Kirsten Kowalski, *Why I Tearfully Deleted My Pinterest Inspiration Boards*, DDK PORTRAITS (Feb. 24,

Until Congress or the courts sort this all out, the existing copyright law framework provides some guidance, even if the answers are difficult to “pin” down.

## Can Posting on Facebook, Twitter, or Pinterest Really Violate Copyright Law?

In a word: yes. Copyright holders have various exclusive rights in their creative works, such as the right to reproduce, distribute, and publicly display the copyrighted material.<sup>14</sup>

If the social media user is not the copyright holder, therefore, he or she infringes the copyright in the work by reproducing, distributing, or publicly displaying the copyrighted material on a social media website. But the social media user posting on these websites is not automatically doomed to “infringer” status.

First, the copyright holder can permit or license use of the copyrighted material upon request.<sup>15</sup> But the average social media user stands little chance of obtaining such authorization, especially with celebrity or corporate sources, and likely does not have the time or desire to seek permission for every piece of copyrighted material he or she pins.

With respect to permission, another avenue to explore for authorization are the terms and conditions of the various sites on which the copyrighted material is found. Users also can work through Creative Commons, Flickr, Google, and other such sites which authorize certain uses of copyrighted material.

Another alternative, though a bit risky for users without a background in copyright law, is to assess whether the intended use of another’s work falls within the realm of a “fair use,” which is a statutory defense to copyright infringement.<sup>16</sup> The application of this defense is case-specific and depends in large part on the character of the new work.<sup>17</sup>

## The Fair Use Factors and Social Media: An Evolving Analysis

The Fair Use Doctrine permits the use or reproduction of copyrighted materials “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”<sup>18</sup> Four statutory factors are considered when determining whether the use or reproduction of copyrighted material is a fair use: (1) the purpose and nature of the use; (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>19</sup>

The first factor—the purpose and nature of the use—actually combines a variety of factors, the most important of which considers whether the new work is “transformative” and whether it is intended for a commercial

2012), <http://ddkportraits.com/2012/02/why-i-tearfully-deleted-my-pinterest-inspiration-boards/>.

<sup>14</sup> 17 U.S.C. § 106.

<sup>15</sup> *Id.* (stating that the copyright holder has the “exclusive rights to do and to authorize any of the following . . .”) (emphasis added).

<sup>16</sup> 17 U.S.C. § 107.

<sup>17</sup> *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 581, 29 USPQ2d 1961 (1994).

<sup>18</sup> 17 U.S.C. § 107.

<sup>19</sup> *Id.*

purpose.<sup>20</sup> To be transformative, a new work must do more than merely “supersede the objects of the original creation” and add “something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>21</sup>

Importantly, at least one court has determined that a search engine’s use of thumbnail images in online searches was “highly transformative” because rather than serving an aesthetic or entertainment function, the use “transform[ed] the image into a pointer directing the user to a source of information.”<sup>22</sup> Posting (or pinning) copyrighted material on a social media website is not as directive-oriented as an online search engine. That is, there is certainly an aesthetic or entertainment purpose behind these posts, even if they also link to the original source.

Pinterest, Facebook, and Twitter are much more than “electronic reference tools.” As such, whether a specific social media use is transformative will depend on what else the user does with the material, if anything, and a court’s interpretation of that use.

The “commercial use” factor is a broad concept.<sup>23</sup> As the U.S. Supreme Court has stated, “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”<sup>24</sup>

In the context of a social media use, the case-specific analysis will scrutinize what the social media user is doing with the copyrighted work. If, for example, a bride-to-be is merely making a personal “pinboard” of ideas for her wedding, barring other factors the use would likely be deemed non-commercial. If, on the other hand, the user designs or sells wedding dresses or is a wedding planner using social media to promote her business, pinning some of her favorite dress designs by others likely would be deemed to be a commercial use.

The second statutory factor in the fair use analysis is the nature of the copyrighted work. Considerations include whether the copyrighted work is published, confidential, or out-of-print.<sup>25</sup>

But the major consideration is the creativity of the copyrighted work. Generally, “the more creative a work, the more protection it should be accorded from copying” while “the more informational or functional

the [original] work, the broader should be the scope of the fair use defense.”<sup>26</sup> In the context of social media uses, a wide range of material is posted online. What exactly the social media user posts or pins will be a factor in determining whether it is entitled to the fair use defense.

The third factor considers the amount and substantiality of the portion of the work used. Basically, a court looks at how much of the original work was used and whether that amount is reasonable for the purpose of the use.<sup>27</sup>

A key inquiry here is whether the “heart” or “essence” of the copyrighted work has been used. Social media users often post or pin a copy of an entire work, such as a photograph pinned on Pinterest.

While this does not automatically rule out a fair use defense, the use must be reasonable in light of the purpose. For example, use of an entire photograph has been found to be reasonable for the purpose of a search engine because it allowed users to recognize the image and decide whether to pursue the website further.<sup>28</sup>

The final statutory factor is the effect of the use on the market for the original work. The relevant questions are whether the use: “(1) tends to diminish or prejudice the potential sale of [the] work; or (2) tends to interfere with the marketability of the work; or (3) fulfills the demand for the original work.”<sup>29</sup>

It is certainly possible that posting or pinning copyrighted material on social media websites could do any of these three things, especially fulfill the demand for the original work. But social media also could serve as tremendous marketing for original works. For instance, a photographer’s photo that is repinned on Pinterest or shared on Facebook hundreds of times is garnering that much more visibility.

And social media users may then follow the links (assuming the original source is linked) back to the photographer’s website and purchase the photo, or view and purchase additional photos. Ultimately, a court will decide whether the use adversely affects the market of the original, and if so, it will weigh against the application of a fair use defense.

## Conclusion

Social media has become part of the fabric of our culture and is very likely here to stay. With a bit of careful thought and an ounce of caution, there is no need to shy away from it whether you are pinning, posting, tweeting, or liking for fun or to promote your business.

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

<sup>27</sup> *Peter Letterese and Associates Inc. v. World Institute of Scientology Enterprises International*, 533 F.3d 1287, 1322 n.30, 87 USPQ2d 1563 (11th Cir. 2008) (79 PTCJ 374, 7/18/08) (stating the inquiry as “whether the amount taken is reasonable in light of the purpose of the use and the likelihood of market substitution”).

<sup>28</sup> *Perfect 10*, 508 F.3d at 1167-68.

<sup>29</sup> *Hustler Magazine Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1155-1156, 230 USPQ 646 (9th Cir. 1986) (internal citations omitted).

<sup>20</sup> *Perfect 10 Inc. v. Amazon.com Inc.*, 508 F.3d 1146, 1164, 99 USPQ2d 1746 (9th Cir. 2007) (74 PTCJ 119, 5/25/07). Courts also look at whether the use is for one of the stated purposes in the statute (criticism, comment, etc.) and the conduct of the user. See *Sony Corporation of America v. Universal City Studios Inc.*, 464 U.S. 417, 478, 220 USPQ 665 (1984) (“The situations in which fair use is most commonly recognized are listed in § 107 itself.”).

<sup>21</sup> *Campbell*, 510 U.S. at 579.

<sup>22</sup> *Perfect 10*, 508 F.3d at 1165.

<sup>23</sup> 4-13 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[A][1][c] (Matthew Bender, Rev. Ed.) (hereinafter *Nimmer*).

<sup>24</sup> *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539, 562, 225 USPQ 1073 (1985).

<sup>25</sup> *Nimmer* § 13.05[A][2][a].