Copyright and Social Media

Rebecca Dunn, Peter Pereira and David Krasovitsky[1] provide some high level observations about copyright subsistence and infringement in the social media environment.

The rise of social media has meant that individuals now produce and publish material to the public, a privilege that was previously held only by mass media publishers. The freedom to create and the opportunity to share those creations online is unprecedented and powerful. This article considers the role that copyright law plays in this new publishing environment. In particular, we address two questions: first, when does copyright subsist in a social media post and second, how is any such copyright infringed?

COPYRIGHT SUBSISTENCE ON SOCIAL MEDIA

The subsistence of copyright in social media posts will depend on the nature and content of the publication, and this will be informed to some extent by the social media platform being used. For example, Instagram enables users to publish photographs, and to incorporate their own editorial control over the appearance of the photographs via application of filters and other tools. It is very likely that copyright will subsist in most original photographs published on Instagram.

The situation is more complex in relation to the micro-publishing application Twitter, which allows users to tweet to their followers and the world at large. A tweet is capped at 140 characters, and in relation to copyright subsistence there is a live question as to whether a publication of such insubstantial length has sufficient originality to enable copyright to subsist.

In considering whether a tweet can be a literary work, guidance can be drawn from the headlines case of *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109 (**Reed**). In that case, copyright was found not to subsist in certain headlines of newspaper articles. Those headlines included the following:

- "Investors warned on super changes"
- "Blackout probe sheds little light"
- "Laser a ray of hope for eye problems"

As can be seen, these headlines were mostly descriptive in nature with little originality in their exposition. In finding that copyright did not subsist in the headlines in issue, Bennett J acknowledged that this did not exclude the possibility that copyright could subsist in a particular headline (at [50]). As with the subsistence of copyright generally, the question is whether the party asserting copyright can adduce sufficient evidence to show that the headline is an "original literary work" within the meaning of s 32 of the *Copyright Act 1968* (Cth). A finding of originality typically involves consideration of:

- a number of factors including: original skill, labour, judgment or ingenuity in the expression of the idea;
- whether there was sufficient effort of a literary nature being expended by one or more authors; and
- whether the form of expression is the result of particular mental effort which is not essentially dictated by the nature of the information conveyed.

As to original skill, it is not enough to demonstrate originality by the deployment of a literary device like a pun or double entendre. If the expression (in this case the headline) conveys no more than the fact or idea conveyed, it will not be protected by copyright. The challenge for all publishers is to do more than this. Ultimately, the issue of copyright subsistence is an evidentiary one.

Like headlines, a tweet with sufficient originality could also attract copyright protection. Consider the following tweets from the comedian Jimmy Fallon:

It is likely that these tweets from Jimmy Fallon would not attract copyright protection under Australian law because, as the court said in *Reed,* copyright does not protect facts or information or even ideas; it protects the original expression of ideas.

On the other hand, consider the following tweets from the same comedian:

Assuming these tweets have not been published elsewhere prior to Jimmy Fallon publishing them, they would appear to contain the requisite originality to attract protection.

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There is clearly some ingenuity and effort of a literary nature that went into their publication.

Given the millions of Twitter users the amount of potentially copyrightable material being generated on a daily basis is enormous. Tweets can also be 'commercialised'. For example, the Twitter handle 'The Grade Cricketer' expresses humorous tweets based on the experiences of a participant in and observer of the Sydney grade cricket competition. By way of example:

"Umpire warned me for running on the pitch. I warned him he was wasting his twilight years officiating meaningless grade cricket fixtures."

"Donald Trump bats 8 and doesn't bowl".

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The success of the Twitter account has now found expression in a book called "The Grade Cricketer", which essentially takes the many tweets published by the author and converts them into narrative form. This demonstrates the importance and value of copyright protection, which as Bennett J said in *Reed* "is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public".

INFRINGEMENT

Copyright is infringed when material in which copyright subsists is used without the permission of the owner of the material. A person who infringes copyright exposes themself to legal action by the owner of the copyright. There are examples both in Australia and internationally of actions brought in relation to the infringement of copyright works published on social media.

In 2013, a jury in New York ordered two media companies to pay $1.2 million to a freelance photojournalist, Daniel Morel, for their unauthorised use of photographs he posted to Twitter (*Agence France-Presse v. Morel, U.S. District Court for the Southern District of New York,* No. 10-02730). An editor at one of the media companies had discovered Morel's photos through another Twitter user's account and provided the photos to Getty who went on to distribute the photos widely, including to *The Washington Post*. The jury found that the media companies had wilfully infringed Morel's copyright, and ordered the maximum statutory penalty available. It did not matter, for example, that Morel's Twitter feed was publicly available. Since then, Morel has posted photos to Twitter with a large text box saying "(C) Daniel Morel".

In Australia, in *Tylor v Sevin* [2014] FCCA 445 a landscape photographer from Hawaii sued an Australian travel agent who used a print from his website to advertise a trip to Hawaii without the photographer's permission. The Federal Circuit Court ordered the travel agent to pay almost $24,000 in damages. Almost 18 months after the order, the ABC reported that the travel agent had yet to pay a cent in damages.

READ THE TERMS OF USE!

Most if not all social media platforms have quite extensive terms and conditions regarding copyright. For Facebook, Twitter and Instagram the terms state that the author of the post retains full copyright. Contrary to the popular view that anything posted to a social media platform is owned by the platform, users actually retain rights in material they publish online and as such can, to an extent, control what happens with their material.

Allowing publishers of material to retain rights mitigates the risk of legal liability to the platform itself. If Facebook, Instagram or Twitter retained rights in everything posted on their platforms they could find themselves exposed to claims of infringement by third party rights holders. For example, if a user posts a video on Facebook that features audio belonging to a recording label, Facebook purports to avoid all liability by stating, under its terms of use, that it does not condone copyright infringement and that it has no rights in what is posted. Instead, the record label would need to approach the platform or the user directly to have the material removed. Facebook itself (and the other major platforms) have processes by which owners may request the removal of copyright infringing material.

From a user perspective, it is important to appreciate the consequences of posting material on social media platforms. While the benefits of owning the intellectual property rights in material are obvious, it is equally important to ensure the material posted does not infringe the copyright of other people, and in the event it does, to take measures to remedy this.

For publishers and media outlets, it is important to recognise the intellectual property rights that users may have in material which warrants publication. As the cases described above show, it can be an expensive exercise to fail to treat material posted on social media in the same way as traditional methods of producing content.

For lawyers, appreciating the terms on which material is posted to social media is the first step in working out where intellectual property rights lie. Whether copyright subsists in material depends on the same principles that apply to other content.

CONCLUSION

While the interaction between copyright and social media is evolving, the underlying legal principles remain the same. The challenge for publishers is to generate original content, no matter what medium the content is expressed through. The challenge for media platforms is to balance the need to allow users to express themselves freely while providing robust protection for those whose own material might be infringed in the process. And the challenge for lawyers is to deal with the fine lines in relation to the application of copyright law to subsistence and infringement in this new media landscape.