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WHEN IT COMES TO SOCIAL MEDIA, SOME OLD-SCHOOL LEGAL RULES MAY NOT APPLY

The distinction between “social media” and just “media” has been narrowing for years, to the point where today it barely exists at all. It’s common for major news organizations to use platforms like Twitter to provide real-time updates of everything from police chases to the National Football League draft. More than half of all professional U.S. journalists now report “regularly” using Twitter and other “micro-blogging” platforms in their work.¹

Although social media seems like a routine presence in Americans’ lives, it is still a very new technology. The “granddaddy” of social-networking sites, MySpace, has been around only since August 2003. As a result, the law of online rights and responsibilities is still evolving. (A search of U.S. Supreme Court cases as of June 2014 finds zero opinions — none — using the word “Facebook.”)

Even though forums like Facebook feel very different from books, magazines or newspapers, writing on a Facebook page is still “publishing.” That means, for the most part, the same legal principles created for paper-and-ink publishing should still hold true on a smartphone screen.

This article will focus on a few novelties and twists about publishing on social networking sites — ways that old-school legal rules might not completely translate to Web 2.0 interactive digital media.

A KISS IS NOT A CONTRACT. BUT A CLICK MIGHT BE.

Remember that line of really small print at the bottom of the social-media home page that said, “By clicking Sign Up, you agree to our Terms and Conditions” — the one you never bothered reading? That’s a contract. Even if you don’t read it, clicking “agree” when you create your social-media account — or just going ahead and using the service after being warned of the terms you’re accepting — can create a legally binding agreement.²

The “terms and conditions” that accompany a social-media site are the ground rules for your relationship with that site. They address who can use the site,³ what shouldn’t be posted,⁴ and what uses of the site are permitted. (For example, many sites ban accounts under false names, or tell users they can’t operate multiple accounts.) Violating the site’s terms can result in having material yanked down from the site or even closure of the account.

In the early days of the Web, reading a website was just like reading a newspaper, and there was no question who owned the material on the site — the publisher. But in the Web 2.0 era, sites became interactive platforms for users to share their own material. Suddenly, it was no longer quite so clear who “owned” a comment written on a Facebook wall or a video shared on YouTube. That’s where terms of service become especially important.

There’s a widespread myth that Facebook, Pinterest or Instagram “own” your photos when you submit them. That’s an oversimplification.

“Ownership” means exclusive ownership. If Facebook truly “owned” the photos of its users, then Facebook could stop the original owners from sharing those pictures without Facebook’s permission (for instance, creating your own photo portfolio site). What Facebook and other social-media sites have is not “ownership.” They have a “license” that allows the site to reuse whatever you post.

For example, Facebook’s Statements of Rights and Responsibilities states in part: “[Y]ou grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any ... content that you post on or in connection with Facebook.” In plain English, that means Facebook does not have to pay to use its account-holders’ posts or photos (“royalty-free”), and can sell access to its users’ content to anyone else (“transferable”).

In the opinion of some privacy advocates, these licenses can go too far — especially when material is shared for purposes of targeted advertising.

Normally, a person’s name and photo may not be used without permission to imply endorsement of a product or service.⁵ But agreeing to the terms of a social-media site might be “permission” enough. The licenses claimed by social-media sites can be broad enough to cover commercial re-use of photos shared on the sites.

Facebook, the largest and most successful social-media site with more than 1.2 billion worldwide account-holders as of the start of 2014,⁶ has become a target for privacy lawsuits.

In 2011, attorneys for Facebook users filed a class-action lawsuit in California accusing the social-media giant of misusing users' faces in "sponsored stories" on the site without permission. The lawsuit ended with a negotiated settlement, with Facebook agreeing to pay \$20 million in damages and adopt clearer privacy policies.⁷

But in February 2014, a coalition of privacy groups filed an objection to the settlement and asked a federal appeals court to overturn it.⁸ The groups, including Public Citizen, claim that the settlement fails to address parents' privacy concerns about photos of their children turning up in ads. They argue that Facebook should be required to get advance parental consent before a photo of a minor can be used in connection with an endorsement. That case is awaiting a decision before the Ninth Circuit U.S. Court of Appeals in San Francisco.

The bottom line is that, while social media sites don't actually "own" your work and can't stop you from using it outside of their sites, they can use your work in promoting their own services and — potentially — in promoting the companies they do business with.

IS THERE SUCH A THING AS 'PRIVATE-ISH?'

When the director of technology for a school district in Georgia was asked to make a presentation about Internet safety, he did what he thought seemed logical: Browsed the Facebook pages belonging to students in the district. He found what seemed like the perfect photo to illustrate his point about the potential for embarrassment and reputational harm in posting photos on social media: A picture of 17-year-old high school senior Chelsea Chaney in a bikini, posing next to a cardboard cutout of rapper Curtis "Snoop Lion" Broadus during a beach vacation. Audience members at a school-district assembly found the photo amusing. Chaney didn't.

She filed suit in U.S. district court in Georgia, claiming that the technology director violated her privacy by using her photo at his seminar in a way that implied Chaney was involved in drugs, drinking or other illicit activities. A federal judge disagreed and, in September 2013, threw out Chaney's case.⁹

U.S. District Judge Timothy C. Batten ruled that, because Chaney had knowingly set her Facebook privacy settings to the most "open" setting possible — allowing "friends of friends" to see everything she posted — the photo was not "private." Chaney gave up any claim for invasion of privacy when she willingly shared the photo in a way that made it accessible to potentially thousands of people, Batten decided.

Chaney's experience is an embarrassing lesson for the rest of us: Once material is posted on a social-networking page, the law no longer will consider it "private."

It's unclear how the judge might have ruled if Chaney had used tighter privacy settings. It's risky to assume that even a "friends-only" photo will be considered "private" if the user has a list of friends in the hundreds. Once something is shared with 100 people — some of whom will probably be only distant acquaintances — any privacy claim has probably been waived. (However, it's possible that other legal claims might apply — for example, if the school district had used fraud or computer hacking to gain unauthorized access to Chaney's account.)

FREE TO LOOK, COSTLY TO COPY

Copyright law gives the makers of original works of creativity the exclusive right to reproduce, adapt and profit from their work — including work that is shared online. Journalists who want to republish material they find on social media need to consider whether they can get the owner's consent, or if not, whether re-using the material would be a legally defensible "fair use."

The SPLC.org website has an extensive Guide to Fair Use that explains the law in detail, but to summarize it briefly: Fair use is a defense to copyright infringement if copyright-protected material is republished in a way that (a) comments on the material, using no more than is necessary for purposes of the commentary, and/or (b) transforms the material into a brand-new piece of creative work (e.g., by parodying it).

To illustrate: For a sports story about an NCAA investigation of a college football program, it would be a fair use to republish a photo from a football player's Facebook page that shows the athlete partying with sports agents. That the player is engaging in suspicious behavior potentially violating NCAA rules is newsworthy, and the photo is evidence of the behavior. However, if the story has nothing to do with the photo — let's say it's just a preview of an upcoming game — then it would not be a defensible fair use to simply pull a photo of the player from Facebook instead of shooting an original photo.

A website's terms of service also come into play. Some social-media sites require users to accept limits on the off-site use of material from the site.

Sites such as Twitter actually encourage — within their own guidelines — reproducing material on external websites such as blogs. Twitter provides an “embed” feature that makes it possible to cause a tweet to display on a blog or website in a format similar to its appearance on Twitter itself. However, Twitter requires that those republishing tweets adhere to a set of standards such as faithfully reproducing Twitter logos without alteration.¹⁰

For news purposes, there should be no problem in republishing snippets from social-media postings that are newsworthy, or even the entirety of short posts such as 140-character tweets. For instance, when singer Whitney Houston was found dead in a Las Vegas hotel room in February 2012, reporters instantly turned to Twitter to capture how the music industry was reacting to the tragic news.¹¹

Republishing a one-sentence Twitter tribute as part of a news story about fan reaction to the death would not be copyright infringement, for several reasons. First, a phrase of six or seven words probably lacks the required degree of creativity and originality to be protected by copyright in the first place. And second, quoting a tweet to demonstrate how people are reacting to a news event “re-purposes” the statement in a new context, which qualifies for the defense of fair use.

Likewise, there should be no copyright issues when linking to material on another site. Copyright law restricts treating the creator’s content as if it is your own — e.g., republishing a story on your site as if it came from one of your own writers. But when you link to a site, you are simply directing readers to the original article, not “republishing” it. Simply linking to other creators’ work should not be confused with copyright infringement.¹²

Don’t fall into the trap, however, of assuming that the creator of a photo or article “waives” copyright protection by sharing the material on social media. Just as articles on CNN.com are the cable network’s copyright-protected property, so are photos, artwork, blog posts and other works of creativity shared on social media. The practical risks of “borrowing” material from a Facebook wall may be less than “borrowing” it from CNN.com, since Facebook wall postings rarely have monetary value to be worth suing over. But that doesn’t mean social-media postings are always free to reuse.

It is a still-unsettled legal question whether one website can be held responsible for linking to libelous material on an unrelated website. Because there is no certain legal answer to this question, editors should always read the stories they link to, and try to direct readers only to reputable websites.

DISCIPLINE GOES DIGITAL

A high school sophomore in Hannibal, Mo., was chatting online with friends about his anger over a recent breakup. The chat turned to violence. The student talked about having a “hit list” of people at school that he would “have to get rid of” if he could borrow a .357 Magnum, naming five specific people he’d target.

One of the friends on the chat was worried that the messages might be serious and told an adult, who emailed a transcript of the chat messages to the principal at Hannibal High School. The student — referred to in court papers only by his initials, “D.J.M.” — was taken into custody by juvenile authorities and hospitalized for a month in a psychiatric institution.

D.J.M.’s parents sued the school district, claiming that punishment for off-campus messages on social media — ones that D.J.M. testified were meant as a joke — violated the First Amendment. But a federal district judge dismissed the case, and the Eighth Circuit U.S. Court of Appeals agreed.¹³

The takeaway from D.J.M.’s case and similar cases across the country¹⁴ is that jokes about violence don’t “translate” on social media. If students talk online about harming people at the school, especially if they threaten specific people and appear to have access to weapons, the courts will not step in to protect that speech even if it turns out to be a misunderstood joke.

Federal courts are struggling to figure out how much jurisdiction schools should have over what students publish when they’re using personal devices on their own time. Until recently, social media sites were inaccessible on school grounds during the school day. But once smartphones became widely available, students could “bring the Internet to school” in a pocket — and the clear line between off-campus and on-campus speech no longer seemed so clear.

While the Supreme Court has yet to address the issue, some principles are emerging from lower-court rulings. First, courts will be more protective of students’ ability to criticize school officials than to attack fellow students.¹⁵ Second, off-campus speech does not lose its First Amendment protection just because someone is offended and complains about it.¹⁶ And third, courts almost never will second-guess school discipline if a student’s speech could be interpreted as hinting at school violence.

It’s not just students who are at risk of punishment for what they say about their schools on social media. Schools and colleges are increasingly trying to regulate what their own employees post.

After a University of Kansas journalism professor touched off a fierce backlash with a remark on Twitter harshly criticizing the National Rifle Association, the Kansas Board of Regents responded with a crackdown on all employees' social media use.¹⁷ Academic-freedom advocates denounced the resulting policy, and the Regents slightly narrowed it in May 2014, clarifying that the policy would apply only to "social" media sites and not to academic or journalistic articles.¹⁸ The controversy has not deterred other colleges, including New York University, from pursuing their own policies restricting what employees can say on social networking sites.¹⁹

As more colleges claim disciplinary authority over what faculty say on social media, legal challenges are certain. Some (but not all) federal courts believe that college instructors are entitled to greater First Amendment protection than other government employees because of their unique role as "thought leaders" who must be free to develop innovative curriculum and explore unconventional ideas.²⁰ Whether the doctrine of "academic freedom" translates from the classroom to the chat room is a question the courts unavoidably will be asked to decide.

FOLLOWING THE FOLLOWING

When a salaried employee creates something — a book, a drawing, an invention — as part of his job duties, that creation belongs to the employer (unless a signed agreement says otherwise). When that same employee writes a book, draws a picture or invents a device on personal time on a Saturday, that creation remains the employee's personal property. But what happens when the "creation" is a social media account where the writer mixes professional and personal posts?

Mixing personal and professional activity on social media is common. It can be as simple as a reporter who promotes her own stories on her personal Facebook page, or as complicated as a Twitter account that intertwines the personal and the professional — for instance, a sportswriter whose Twitter account handle is @HeraldBaseball_Bob.

Because of the marketing value of a social-media following, a handful of companies have sued their former employees over ownership of Twitter, Facebook or LinkedIn accounts.

The best-known of these cases took place in San Francisco in 2011.²¹ It started when blogger Noah Kravitz went to work for PhoneDog, which provides consumers with research and comparative pricing on cellphone plans, and built up a 17,000-follower Twitter presence under the Twitter name @PhoneDog_Noah. When Kravitz left the company in October 2010, he changed the account name to @noahkravitz but kept the login — and his 17,000 followers — for his own use.

PhoneDog sued Kravitz, claiming that the loss of 17,000 Twitter followers cost the company \$340,000 in lost opportunities. PhoneDog's attorneys compared "stealing" a professional Twitter account to stealing a customer list. Kravitz responded that that Twitter audience was his personal following, not the company's, and that he was entitled to take that following to his next job.

In 2011, a federal district judge decided that PhoneDog could pursue a claim that the Twitter login for Kravitz's account was a "trade secret" belonging to the company. The case ended in 2012 with a confidential settlement,²² so there is no telling how it might ultimately have been resolved.

There are huge unanswered legal questions about what happens when an employee's job assignments include posting material on social media even beyond work hours and outside the workplace. For example, could the newspaper be responsible for a libelous tweet on the @HeraldBaseball_Bob account that Bob creates when he's at home watching TV? Would it make a difference whether the post is about baseball — for instance, falsely accusing a ballplayer of using steroids — or about the restaurant where Bob ate lunch Saturday?

The courts haven't yet answered most of these questions. But as a matter of common sense, the greater the employer's involvement with the account — and the more the employee's Twitter or Facebook activity looks like a work assignment — the greater the risk that the employer will be legally liable.

Because of the uncertainties, it's a good idea for any employer (including a media organization) to map out the relationship in advance. A simple written agreement can avoid disputes if the employee leaves and wants to take his social-media account with him.

Many media outlets, both student and professional, are turning to "social media policies" to govern the online behavior of their staff members. The primary focus of these policies is on social-media activity on accounts that belong to, or might be interpreted by readers as belonging to, the publication itself.

While some degree of policing probably makes sense on "official" accounts of the publication — e.g., journalists shouldn't be using those sites to float unconfirmed rumors that they wouldn't feel confident publishing in print — it is much more problematic when employers start trying to regulate their employees' off-hours social lives. Extreme cases of professional misconduct on social media, such as

leaking the confidential details of an upcoming investigative story, might legitimately be punishable in the workplace. But it can be a managerial headache — and in some cases, even illegal — to get into the business of regulating minor online missteps.²³

CONCLUSION

The legal principles created by courts and legislatures in the days when “publishing” meant “paper” still apply, for the most part, when information is posted on social media. All of the same legal risks — defamation, invasion of privacy, copyright infringement — can arise when sharing material on Instagram or Twitter.

Student media organizations may want to consider policies clarifying the ground rules for social-media accounts that are an official part of the publication or station, such as who owns the account if the original creator leaves. As with student newspapers and broadcast outlets themselves, it’s always the better (and legally safer) practice for students to police their own online behavior. Letting schools and colleges regulate what students post online invites abuse, either because of purposeful image-motivated censorship or because of misunderstandings when attempts at humor don’t “translate” for the ears of campus regulators.

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ENDNOTES

1. Lars Willnat & David H. Weaver, “The American Journalist in the Digital Age” (Indiana Univ. Sch. of Journalism 2014) at 21, available at <http://news.indiana.edu/releases/iu/2014/05/2013-american-journalist-key-findings.pdf> (last viewed June 8, 2014).
2. A user can form a legally binding contractual relationship with a website either by actually clicking a button indicating agreement (“clickwrap”) or simply by continuing to use the service after being warned that proceeding deeper into the website means accepting the site’s terms (“browsewrap”). See Ian Rambarran & Robert Hunt, Are Browse-Wrap Agreements All They Are Wrapped Up to Be?, 9 TUL. J. TECH. & INTELL. PROP. 173, 174 (2007) (“A click-through agreement is usually conspicuously presented to an offeree and requires that person to click on an acceptance icon, which evidences a manifestation of assent to be bound to the terms of a contract. On the other hand, a browse-wrap agreement is typically presented at the bottom of the Web site where acceptance is based on ‘use’ of the site.”).
3. For example, the terms of use of Ask.fm provide: “You are not allowed to register on Ask.fm or use the site unless you are 13 years old or over.” Facebook’s Statement of Rights and Responsibilities also requires users to affirm that they are 13 or older, and also prohibits use by convicted sex offenders.
4. For instance, the Acceptable Use Policy of Pinterest.com spells out 10 categories of material that the site prohibits, including content that “is gratuitously violent or gory” or that promotes “self-harm, eating disorders or hard drug abuse.” Note that, because these websites are privately owned, they are not bound by the First Amendment and are free — just like any retail establishment is free — to restrict what messages are displayed in their “place of business.”
5. See, e.g., *Downing v. Abercrombie & Fitch*, 265 F. 3d 994 (9th Cir. 2001) (ruling that surfers whose photos appeared in fashion catalog without their consent could sue under California law for misappropriation of their likenesses).
6. Jemima Kiss, “Facebook’s 10th birthday: from college dorm to 1.23 billion users,” *The Guardian*, Feb. 3, 2014.
7. David Kravets, “Judge Approves \$20M Facebook ‘Sponsored Stories’ Settlement,” *Wired.com*, Aug. 26, 2013.
8. Karen Gullo, “Facebook Ads Settlement Challenged by Consumer Group,” *Bloomberg News*, Feb. 13, 2014.
9. *Chaney v. Fayette County Pub. Sch. Dist.*, 2013 WL 5486829 (N.D. Ga. Sept. 30, 2013).
10. See Twitter, Developer Display Requirements, available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1647&context=historical> (last viewed June 8, 2014).
11. Christina Ng, “Whitney Houston’s Death: Celebrity Reactions,” *ABC News*, Feb. 12, 2012 (quoting tweets from Mariah Carey, Oprah Winfrey and others), available at <http://abcnews.go.com/Entertainment/whitney-houstons-death-celebrity-reactions/story?id=15567676> (last viewed June 8, 2014).
12. For example, in a widely cited 2000 ruling, a federal district judge refused to grant an order preventing Tickets.com from linking to pages on rival Ticketmaster’s website, which Ticketmaster claimed was copyright infringement. See *Ticketmaster Corp. v. Tickets.com, Inc.*, No. 99CV7654, 2000 WL 1887522 (C.D.Cal. Aug. 10, 2000). In another oft-quoted case involving Google search results, a federal court decided that just displaying “thumbnail” sized images from another website while linking to the full-sized images was not copyright infringement. *Perfect 10 v. Google, Inc.*, 416

- F. Supp. 2d 828 (C.D. Cal. 2006).
13. D.J.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754 (8th Cir. 2011).
 14. See, e.g., Wynar v. Douglas County Sch. Dist., 728 F.3d 1062 (9th Cir. 2013) (finding no First Amendment violation when school disciplined student over MySpace chat messages that discussed a “hit list” of students he planned to shoot in a massacre planned to simulate one at Colorado’s Columbine High School).
 15. Compare J.S. v. Blue Mtn. Sch. Dist., 650 F.3d 915 (3d Cir 2011) (en banc) (Pennsylvania middle school violated First Amendment by suspending student who ridiculed her principal with crude humor on a fake MySpace profile page) with Kowalski v. Berkeley County Sch., 652 F.3d 565 (4th Cir 2011) (West Virginia high school did not violate student’s First Amendment rights by suspending her for creating MySpace page that mocked a classmate, identified by name and photo, for purportedly having herpes).
 16. See, e.g., T.V. v. Smith-Green C’mty Sch., 807 F.Supp.2d 767 (N.D. Ind. 2011) (ruling that Indiana school district violated two students’ First Amendment rights by suspending them for sexual humor in photos they shot at a slumber party and shared on Facebook and Photobucket).
 17. Scott Jaschik, “Fireable Tweets,” Inside Higher Ed, Dec. 19, 2013, available at <http://www.insidehighered.com/news/2013/12/19/kansas-regents-adopt-policy-when-social-media-use-can-get-faculty-fired#sthash.pzwZGSp1.dpbs> (last viewed June 8, 2014).
 18. Brian Lowry, “Kansas regents adopt revised social media policy,” The Wichita Eagle, May 14, 2014.
 19. See Carl Straumsheim, “Balancing Act,” Inside Higher Ed, May 15, 2014, available at <http://www.insidehighered.com/news/2014/05/15/nyu-tries-balance-faculty-concerns-student-needs-new-electronic-communications#sthash.5CYaNqae.dpbs> (last viewed June 8, 2014).
 20. For example, a federal appeals court ruled in 2013 that Washington State University overreached in issuing a professor a disciplinary write-up and denying him a promotion in retaliation for distributing a pamphlet that criticized the structure of the college’s journalism and communications programs. The court decided that academic employees’ speech is entitled to heightened protection even when they are speaking about matters relating to their employment. Demers v. Austin, 729 F.3d 1011 (9th Cir. 2013).
 21. Phonedog v. Kravitz, No. C 11-03474, 2011 WL 5415612 (N.D.Cal. Nov. 8, 2011).
 22. Mary C. Long, “Twitter Follower Suit Settled; Highlights Need For Clear Account Ownership Guidelines,” Mediabistro.com, Dec. 4, 2012 (last viewed June 8, 2014).
 23. The National Labor Relations Board, which regulates private non-governmental employers, has penalized businesses for disciplining workers for complaining on social media about working conditions, if the complaints are meant to engage co-workers in addressing the problem. See, e.g., Hispanics United of Buffalo, Inc., NLRB Case 03-CA-027872 (Dec. 14, 2012) (finding that an employer violated the National Labor Relations Act by firing five employees who complained in a Facebook wall discussion about unfair criticism by one of their coworkers).