

THE PRICE OF ADMISSION TO THE WORLD WIDE WEB?



Each time you upload a picture to facebook, post a video to youtube or make a witty tweet, you are creating something unique. The Copyright, Designs and Patents Act 1988 protects that creation by granting you copyright over your creations: there is no need for you to register, state or even indicate through the use of a © symbol that your work is protected, it simply is.¹ However, many contemporary web sites force users to agree to terms which permit them to make use of your work without your consent, even for profit; each and every day web users create content and license their rights to it without a thought. This poster discusses the biggest UK web sites,¹ in particular the ways in which you may create rights by using their services.

"...you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook..."² **#2: facebook**

What's in a Profile Picture? Facebook is most often in the news and of concern to its users with regard to its attitude toward user privacy, but such issues are not the only points that should be of note to users. Interesting questions arise with regard to facebook photos; is your profile picture truly worthy of copyright? This alone is not controversial, artistic quality is quite different from copyrightability, but Arnold notes³ that each other category of 'artistic works', most commonly sound recordings and film, only protect the media itself and not the content therein. Thus, a film copyright does not prevent amateur theatrical societies from re-enacting a scene⁴ and a sound recording copyright does not in itself prevent cover bands recreating the original production.⁵ This does not mean that such derivative works are wholly unrestricted, they simply do not fall within the original artistic copyright of the author, instead falling to one of a number of secondary copyrights, such as a musical composition. If you, as a user, upload a photograph of yourself to your facebook profile, is that particular image protected or is it the abstract portrait which attracts protection? There is support in case law for both positions; if the image itself is the only copyright-protected element,⁶ there is nothing to prevent a user's friends or even facebook itself from deriving from the composition and even subject matter of the image, marketing the essential character of your work even without a license to do so. If, instead, it is the subject matter, which is subject to protection, such appropriation is not possible, though the license shown above permits facebook itself to do so.

#3: YouTube

"...a worldwide, non-exclusive, royalty-free, transferable licence (with right to sub-licence) to use, reproduce, distribute, prepare derivative works of, display, and perform that Content...including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels..."¹⁸

What's in a Mashup? While many videos uploaded to youtube are entirely original in nature, other are not; though certain of these less original works are direct copies of existing copyrighted works and clearly fail to attract any sort of protection, others are more difficult to classify, often combining samples of various pre-existing works into a single, entirely new, work, often referred to as a 'mashup', the classic example being clips from film and television cut together with short samples of popular music. In this instance, the existing statute and policy of the United Kingdom does not protect such works; though the United Kingdom recognises a doctrine of 'incidental inclusion',⁷ cases have dictated that this exception to copyright infringement is only valid where the inclusion is not the intention of the work.¹⁷ In this instance, this work will instead look to the practice followed by the United States, a practice the United Kingdom may adopt following a forthcoming review.⁸

Though a full description is beyond the scope of this work, the United States, rather than applying a fixed set of now-statutory and therefore somewhat stagnant 'fair dealing' defences as in the UK, the US evolved from its common law predecessor a doctrine of 'fair use' at common law, a policy which continues to develop today. Two doctrines under that system make such Youtube submissions permissible as works under copyright law; non-commercial use and a transformative nature. On the first point, the US Courts have consistently proven more willing to grant the benefit of a fair use defence to those whose intentions were distinctly non-commercial in nature,⁹ with the most recent statutory copyright recognition of the defence giving notice to this tendency by listing it among points delineated as relevant in considering the application of the defence.¹⁰ Far more likely to be persuasive, however, is the 'transformative' nature of such mashups; current jurisprudence holds that where the 'meaning, expression or message'¹¹ of copyright material is altered in the resulting work. In the case of mashups, this will normally, though not always, be the case.

"By submitting, posting or displaying Content on or through the Services, you grant us 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..."¹² **#9: twitter**

What's in a Tweet? At first glance, you might not consider 140 characters to be very much, and certainly not enough to be worthy of copyright protection. Reinberg¹³ points to a number of issues which might prevent your latest tweeted witticism to fall short of copyright protection, each calling back to essential elements of copyright in any sense: creativity and uniqueness. Both of these issues manifest in Reinberg's first point, that a tweet, no matter how original, is still only 140 characters and cannot possibly have the unique character inherent in creative, copyrightable works. However, shortness need not always be fatal, cases such as *Infopaq v Danske Dagblades Forening*¹⁴ have considered whether or not creative output as short as eleven words, in that case a headline, can be protected by copyright; the Court held that so long as the words remain an expression of original thought and creativity by the author, the length was of secondary importance. The remaining question Reinberg raises is whether the tweet in question is sufficiently creative, one cannot copyright facts,¹⁵ nor generic descriptions of events.¹⁶ This need not exclude intelligent, concise tweets and users should bear in mind the rights they gain by making use of such micro-blogging platforms.

¹ Alexa.com <<http://www.alex.com/topsites/countries/GB>>, acc. 29/03/11

² Terms of Use <<http://www.facebook.com/terms.php>>, acc. 02/04/11

³ R Arnold, 'Copyright in photographs: a case for reform' (2005) EIPR 303

⁴ *Norowzian v Arks Ltd* 1999 EMLR 57

⁵ *CBS Records Australia Ltd v Telmak Teleproducts* 1987 9 IPR 440

⁶ *Bauman v Fussell* 1978 RPC 485

⁷ *FA Premier League v Panini* 2004 1 WLR 1147

⁸ The 'Hargreaves Review'

⁹ *LA Times v Free Republic* 2000 US Dist LEXIS 5669

¹⁰ Copyright Act 1976 90 Stat. 2541, s. 107

¹¹ *Campbell v Acuff-Rose Music* 1994 127 L Ed 2d 500

¹² Terms of Service <<http://twitter.com/tos>>, acc. 02/04/11

¹³ C Reinberg, 'Are Tweets Copyright-Protected?' (2009) 4 WIPO Mag.

¹⁴ *Infopaq International v Danske Dagblades Forening* 2010 FSR 20

¹⁵ *Baigent v Random House Group* 2008 EMLR 7

¹⁶ *Irving v Penguin Books* 2000 EWHC QB 115

¹⁷ Copyright, Designs and Patents Act 1988 c. 48, s. 31(3)

¹⁸ Terms of Service <<http://www.youtube.com/t/terms>>, acc. 02/04/11