

Blogging and Other Social Media

*Exploiting the Technology and
Protecting the Enterprise*

ALEX NEWSON

WITH DERYCK HOUGHTON

AND JUSTIN PATTEN

GOWER

The Law of Social Media¹

CHAPTER 18

This chapter provides an overview of some of the key legal issues associated with blogging and using social media under the laws of England and Wales. It aims to equip users of the social web with a basic level of knowledge of the relevant laws in the UK, including both the risks and users' rights. It also addresses some of the ways that the law has adapted to face the new challenges of the social web and how service providers have been affected. The speed with which the web has developed in recent years has resulted in many issues remaining untested by the courts, so by necessity some of our analysis is speculative, based on disputes that have been settled before reaching the courts, or on cases from other jurisdictions where different laws may apply.

This chapter is structured as follows, with sections addressing a number of the key areas of the law that apply to the social web:

- Introduction: social media and the law
- Copyright
- Brand protection – trade marks, passing off and domain names
- Defamation
- Privacy and data protection
- Employment and blogging
- E-commerce and the 'hosting' exemption
- User contracts and terms of use
- Jurisdiction
- Summing up – other issues and the future.

¹ This chapter is not intended to constitute advice in relation to any particular legal issue. If readers require advice on any of the issues raised, they should seek legal advice from a qualified solicitor.

Introduction: Social Media and the Law

Hailed for their democratizing influence and enthusiastically embraced by millions of people across the world, social media typify the new shape of the internet. Dubbed 'Web 2.0', they are characterized by collaboration, users generating their own content and websites that succeed by 'harnessing collective intelligence'.² It is a 'social web' that is built and ordered by its users.

THE ROLE OF LAW IN ORDERING THE SOCIAL WEB

The tools of the social web have allowed people to communicate through innovative channels, but they have also given rise to their own social structures, including the playful communities of Facebook 'groups', the huge amorphous 'blogosphere', and the virtual worlds of Second Life and World of Warcraft.

As facilitators of social interaction, it is no surprise that social media have played host to a wide range of social and legal issues, many of which are familiar from the 'real' world. There are disputes, transactions, collaborations and assertions of rights. But of course the inhabitants of the social web are still governed by the laws of the real world, so we have seen social media act as forums for exploring and testing the limits of our existing laws, many of which were created long before even the internet was conceived.

In addition, some of the new risks raised by the developing technologies of the social web are also 'public' issues that result in government intervention through statute, such as the new offence of 'grooming' under the Sexual Offences Act 2003,³ addressing concerns about the use of chat rooms by paedophiles.

The participants in the social web have also demanded the creation of their own bespoke rules to meet the new requirements of the communities of the social web. Some of these are discrete 'private' rules established by the new communities themselves. So users of Second Life are required to abide by comprehensive Terms of Service and Community Standards (see <http://secondlife.com/app/help/rules/cs.php>), addressing prohibited behaviour in the Second Life world, and breach may result in 'Suspension' or 'Banishment'. Wikipedia has rules for handling disputes between contributing 'Wikipedians' (http://en.wikipedia.org/wiki/Wikipedia:Resolving_disputes), and even an arbitration panel for unresolved disputes (http://en.wikipedia.org/wiki/Wikipedia:Arbitration_committee).

2 O'Reilly Media, Inc. (2008) 'What is Web 2.0?', <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html?page=2>.

3 Sexual Offences Act 2003, Section 15.

It is no surprise that these communities, characterized by user participation, should also see users involved in their own legislative processes and the enforcement of the rules. For instance, Wikipedians are involved in debating and developing the rules for contributors (http://en.wikipedia.org/wiki/Wikipedia:Policies_and_guidelines) and enforcing them on other users by deleting or editing inappropriate content. Even the guilds of World of Warcraft write their own rules of conduct. The Phoenix Legion's Guild Charter states: 'We do not tolerate dude speak' (<http://phoenixlegion.co.uk/guild-charter/>). Members who do not comply may find that they are dismissed from the Legion – the Charter makes it clear that the officers' decision is final.

THE RISKS OF THE SOCIAL WEB

For the average person, the laws applicable to social media have presented their own challenge. Professional journalists may be well used to working within (or on the edge of) the laws that apply to writing and publishing, but now amateur bloggers are required to understand the principles of defamation, intellectual property infringement and privacy. The opportunities of the social web go hand in hand with the risks. Everything a blogger writes forms part of a permanent, searchable repository that is available everywhere all the time. The ease with which people can contribute to the social web belies the complexity of some of the accompanying legal issues.

Generally, though, just as the new societies of the web have tended to shape themselves into familiar hierarchies (in Second Life, the economy of the Linden Dollar behaves rather similarly to 'real world' economies – http://randolfe.typepad.com/randolfe/2007/01/secondlife_revo.html), there have been few surprises in the application of existing laws to social media. There is no new law of blogging; more frequently, existing legal principles are reaffirmed by their application to interactions taking place through social media.

Copyright

Copyright owners have the right to prevent others from copying their works. The law on copyright protects the form of those works (for example, the actual words or music – see below) rather than the ideas expressed in those works. So when the authors and publishers of *The Da Vinci Code* were sued by the authors of an earlier book, *The Holy Blood and The Holy Grail*, the Court of Appeal held⁴ that *The Da Vinci Code* did not infringe copyright because, among other

⁴ *Baigent and Leigh v The Random House Group Limited* (2007) EWCA Civ 247.

things, the material allegedly copied consisted of ideas rather than the actual expression (text) of the earlier book.

Unlike some other intellectual property rights such as patents, copyright does not give owners a monopoly right over their works, so in theory two authors could create identical works and each separately own copyright in the works they create provided they work wholly independently and do not 'copy' each others' work.

COPYRIGHT – THE LAW

What is copyright and who owns it?

Copyright arises automatically in the UK and so there is no need to register a work to benefit from copyright protection. This can be contrasted with the USA, where additional rights may be obtained through registration. However, a work must fall within a specific list of categories in order to be protected, of which the ones most relevant to users of the social web are the following:

- original 'literary' works – which could include the text of blogs and wikis, the lyrics of songs shared through YouTube and the html code underlying a website;
- dramatic, musical and artistic works – for example in the music of a song shared through YouTube, or in a drawing displayed on a social networking site homepage; and
- sound recordings, films and broadcasts – including the recording of a film or song.

If the work is a literary, dramatic or musical work, it will not be protected by copyright until it is recorded (in writing or otherwise). In addition, works will only be protected under UK copyright if at the time of publishing the material the author was a British citizen, or was domiciled or resident in the UK, or the work was first published in the UK. The duration of copyright varies depending on the category of work. For example, copyright in literary works such as blog posts lasts for the life of the author plus 70 years from the end of the calendar year in which the author dies. Copyright in sound recordings lasts for 50 years after the year in which the recording was made or first released (though the record industry has been lobbying for an extension).

Generally, the author of a work will own the copyright in that work. However, where a work is made by an employee in the course of their

employment, the employer will be the owner of the copyright, subject to any contrary agreement.

Regardless of who owns the copyright, authors of some categories of works (including literary works such as blogs and musical works such as songs) also have certain moral rights. Moral rights include the right to be identified as the author or director of the copyright work, the right to object to derogatory treatment of a copyright work and the right not to have a copyright work falsely attributed. An employee will only have limited moral rights where the copyright in a work is owned by their employer.

How can copyright be infringed?

The copyright owner has the exclusive right to copy a work (for example, by reproducing the text of a blog post), issue copies to the public (for example, by placing a song or movie on a file-sharing site), perform, show or play it in public, communicate the work to the public (which might include streaming over the internet) or make an adaptation of a copyright work. A third party who, without consent, does any of these acts will commit primary copyright infringement. In addition, a person who deals with an article that they know or have reason to believe is an infringing copy will commit secondary infringement.

To establish copyright infringement, claimants must show that a substantial amount of the work in question has been copied, and this is judged by reference to what has been copied rather than how much. If a whole article is copied then clearly this will constitute copyright infringement; however, a small but critical part of a work may also be 'substantial' (such as a refrain from a song).

There is no requirement for an intention to infringe and therefore a writer can infringe copyright in a work without knowing that their actions are an infringement. It is even possible to infringe the copyright in a work without having seen the work, for example if the writer has been given information from the original or seen a recreation of the original.

Copyright owners may be entitled to recover any profits made by infringing parties from copying their works, or an injunction to prevent further infringement.

What are the defences?

There are only a limited number of defences to copyright infringement, based on the concept of 'fair dealing'. These include fair dealing for the purposes

of criticism or review, which might apply to bloggers reviewing new movies and music, and fair dealing for the purpose of news reporting, which might apply in the context of blogging journalists. It is not yet clear how far the fair dealing for news reporting defence will be stretched now that every blogger might claim to be an amateur journalist. To qualify for one of the fair dealing defences an author's work must also contain a sufficient acknowledgement (that is, generally the author copying the relevant section must acknowledge the author by name).

There is no statutory guidance about when dealing is 'fair', but the courts have considered factors such as whether the alleged infringing use competes commercially with the copyright owner's exploitation of their work, whether the copyright work has already been published or made available to the public (if not, it will be harder to establish that the dealing is fair) and the amount and importance of the part of the work copied (was it necessary to copy the amount copied?).

COPYRIGHT AND SOCIAL MEDIA

It is easy to see how the growth of the internet and the increasing popularity of blogging has resulted in an increase in copyright infringement. The multimedia world of the social web is littered with copyright materials, which may or may not be reproduced with the consent of the rights owners. Photographs posted to Facebook and Flickr, films and music posted to YouTube and materials posted on a blog may all be the subject of copyright protection but come from a variety of sources. For example, a blogger might copy text from an article or a photograph belonging to another without permission for their own blog post. Users infringing the rights of copyright owners risk being sued for infringement. For instance, the British Phonographic Industry, which represents the record companies and other major stakeholders in the UK music industry, started (successfully) taking legal action against members of file-sharing communities for copyright infringement in 2005.⁵

Service providers also run the risk of being exposed to claims of copyright infringement. Most famously, Napster was found liable in the USA for contributing to the infringement of copyright by its users, who were sharing music files over a peer-to-peer network.⁶ More recently, though again in the USA, the musician Prince has reportedly required YouTube to remove infringing

5 'Peter' (2005) 'BPI sues file sharers', *Naked Law*, http://nakedlaw.typepad.com/naked_law/2005/08/the_bpi_has_iss.html.

6 *A&M Records, Inc v Napster, Inc* 239 F.3d 1004 (9th circuit 2001).

copies of his music, and has threatened to sue YouTube (currently owned by Google) for contributory infringement.⁷

The bloggers' guide: Managing the risks of copyright infringement

An obvious way to avoid infringing the copyright in an existing work is not to copy it at all, though in the spirit of 'harnessing collective intelligence' cross-referral and mutual recognition is common. Bloggers should therefore be careful about how much they copy from an existing work. If they do copy a 'substantial' part (see above), they should either obtain consent from the copyright owner first or, where a fair dealing defence does apply (for example, journalistic blogging), they should ensure that they include appropriate acknowledgements. A reference to the existing work will not be a defence to copyright infringement in itself, though it may go some way to pacifying the original author, it may avoid a breach of any moral rights (see above for an explanation of moral rights) and it may help to establish a 'fair dealing' defence. They should also check the terms of use of any website they wish to take material from – these may give readers a specific right to reproduce the website contents, subject to certain restrictions.

Users of the social web should also be aware of the terms of use of their service providers, including both internet service providers (ISPs) and social website operators (see 'User contracts and terms of use' below). Service providers are likely to require a warranty that any material contributed will not infringe third-party rights; breach may result in suspension or termination of access to the service, and in some cases indemnities for any costs suffered by the service provider (for instance, if they were sued by the copyright owner).

The bloggers' guide: Protecting your rights

There are a number of steps that writers can take to protect their works. First, they should identify all of the materials likely to have copyright protection. Copyright owners should also put the public on notice that they are the owners of the rights in the works that they publish. Commonly, terms of use include a statement identifying the owner of rights in the content (see 'User contracts and terms of use' below), warning users that the copyright owner is prepared to assert these rights and creating a presumption that the stated owner is the actual owner in case of dispute.

⁷ G. Sandoval (2007) 'Prince lashes out at YouTube, eBay and The Pirate Bay', CNET News.com, http://www.news.com/8301-10784_3-9778087-7.html.