



TIP SHEET

an informational newsletter on intellectual property matters **FEBRUARY 2010**

INTELLECTUAL PROPERTY PRACTICE GROUP

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PICTURE THIS



BY RACHEL BLUE
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Ever click on an “I Agree” button on a website? Of course. Ever

actually read what you’re agreeing

to? Well.... You’re not alone, many of us don’t. But if you’re using a

site that allows you to upload photos, you may want to start reading a little more carefully. Website terms of service define what the website is allowed to do with content or information you bring to the table, and,

conversely, what you’re allowed to do.

The truth of the matter is that almost anything that you can see or hear online can be copied – whether or not it should is a different matter. You probably won’t be too surprised to learn that most copyright infringement today takes place online. Add to that the relatively new phenomenon of using social media sites as business marketing tools, and you have some trouble brewing.

The “Terms of Service” on a website generally address the activity that takes place on that site, but sometimes the language is vague about what happens to material once it’s posted. Some terms of service actually encourage copyright infringement, and some social media sites actually disable the protections that authors and creators have tried to put in place for their works. Here are some examples:

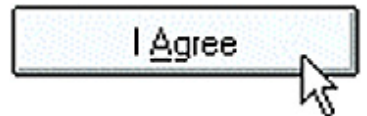
YouTube is pretty restrictive about content:

Content on the Website is provided to you AS IS for your information and personal use only and may not be downloaded, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, or otherwise exploited for any other purposes whatsoever without the prior written consent of the respective owners.

Twitter is less so:

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 (now known or later developed). This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same.

Pixable lets users print custom photo books using any image they can see on FACEBOOK. Neat tool if you use it for good instead of evil. Using the tool to pull together an album for a family reunion or a company photo directory is great, but using it to grab a picture of a



competitor's product line for a catalogue? Maybe not.

Photobucket allows the site and/or other users to “copy, print or display *publicly available Content* outside of the Photobucket Services, including without limitation, via the Site or third party websites or applications (for example, services allowing Users to order prints of Content or t-shirts and similar items containing Content).” It's that “publicly available content statement that confuses most users. It's probably not unreasonable to interpret something you find on the Internet as “*publicly available content*.” You're the public, and it's available, right? But that's very different from *public domain* under copyright law. Public domain means information that is not protected by copyright (either because of its intrinsic nature or because the copyright has expired).

Photobucket's default setting allows others to freely copy media that is posted on the site. You can uncheck a box, which appears to prevent that: *Uncheck this box to disable right-click save functionality on images and prevent anyone who views your albums from saving copies of your images or videos.*

But the fine print says:

Note: If your images can be seen in a web browser, they can still be downloaded by advanced users. This option discourages viewers from saving copies, but it does not completely prevent it. Also, this option only applies to images when they are viewed in your Photobucket album. It is still possible to copy files that you share or embed on other sites.

The functions these sites make available aren't inherently infringing, but they can enable infringement: Unfortunately, too many people assume that if they have the tools to do something, then it must be OK to do it. To make matters worse, some social media sites strip metadata automatically, so if you've tried to embed copyright metadata (like the copyright notice) in photos, your copyright notice goes away when you upload the content to the site. This could be a problem if you were a copyright holder trying to prove that the infringement of your image was intentional — a fact that influences the kind of damages you could collect from the infringer.

Before uploading images, it might be wise to consider a few things:

1. Don't just click “I agree.” Read the terms of service so that you understand exactly what the site or its other users can do with content you post. If you don't like the way the site handles content or deals with complaints about mishandled content, you should look at other possibilities before you upload any data. Once you've chosen the site, go back and review the terms of service occasionally to be sure they haven't changed the way data is handled.
2. Think about the purpose of posting the content. If it's exposure to a large audience, you may want to consider alternatives, like using a digital watermark or identification that stays as part of the image. You can also try uploading a lower resolution image that would be difficult to reproduce, or simply posting a link back to your own site instead of the image itself.
3. Be a control freak. Check the site functionality and choose settings that give you some say in who can see your images, and whether you can set up any obstacles to copying your original images, and explore any tools the site makes available for tracking who is seeing/copying/reposting your images.

And finally, the ultimate in common sense:

4. If you really don't want it copied, don't post it.

If you have further questions, please do not hesitate to contact any member of our intellectual property group listed on this newsletter.

A former trademark examining attorney with the U.S. Patent & Trademark Office, Rachel Blue brings extensive experience and insider knowledge to her role as a valued counselor on intellectual property matters. Based in McAfee & Taft's Tulsa office, her practice is global in scope.

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