

A Picture's Worth: The Future of Copyright Protection of User-Generated Images on Social Media

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ABSTRACT

In the current digital age, the internet is teeming with personal websites and social media posts. As more people around the world are becoming and staying connected to the internet, more stories and photos are sharing over social networking sites each second. Social media presents a ubiquitous platform to share one's life with others, but this accessibility comes at a price. This Note examines the history and present state of copyright law, within the framework of photography, to highlight the gaps within these laws as applied to personal works of art, like personal photographs, posted to social media sites. Social media providers have gained power through their popularity among large userbases, and this Note suggests that these companies are misusing their bargaining power by requiring users to forgo their copyrights in photographs uploaded to these sites as part of user agreements. This Note provides recommendations for both national and global improvements to copyright laws and agreements for greater protect of individuals and their photographs—personal and copyrighted works of art—while still sharing their works of art through social media.

INTRODUCTION

The purpose of this Note is to identify the gaps in copyright protection for user-generated images on social media websites and to propose amendments to current legislation to provide increased copyright protection. User-generated content is any type of media,

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including text and photographs, uploaded to a social media platform like Facebook or Instagram.¹ Intellectual property (IP) rights in user-generated social media content are emerging and becoming the focus of IP litigation. This Note will discuss user-generated images to reference photographs and other images created by a user, with a camera or application, and uploaded by the owner to a social media platform. Traditional copyright protection covers works of art fixed in a tangible medium and explicitly extends to photographs.² Photographs have long existed as fixed works of art, so the focus of this Note centers on photography as the primary example. However, the discussion could extend to other copyrightable works, especially music, performances, movies, audiovisual works, and literary works.

Social media users are posting photographs online in extraordinary quantities.³ As the amount of user content on social media websites increases, a large number of copyrightable photographs are readily accessible and ripe for unauthorized copying both by other users and commercial entities. User-generated photographs and images published on social media may require the creation of a new form of copyright protection, superseding website terms of service, to prevent infringement and unauthorized use of personal and/or professional authored works.

Courts have begun to uphold copyrights in user-generated images, but the Digital Millennium Copyright Act (DMCA) should be expanded to encompass specific protection for photographs online. The DMCA provides a safe harbor from copyright infringement for social media service providers,⁴ but service providers still require users to sign away their copyright in images posted to social media sites;⁵ here, that safe harbor is a provision within a statute that outlines permissible conduct that is shielded from the other limiting provisions of the act. The landmark case *Agence France Presse v. Morel* highlights the lack of copyright protection for creators, despite safe harbor provisions for website hosts in the DMCA. Morel, a freelance photographer, was awarded \$1.2 million in damages for unauthorized use of his photograph, posted on Twitter, by a news agency to sell to multiple

1. See Jessica Gutierrez Alm, "Sharing" Copyrights: The Copyright Implications of User Content in Social Media, *HAMLIN J. PUB. L. & POLY.*, no. 1, 2013 at 104, 108.

2. See 17 U.S.C. § 102(a)(5) (2015) ("Copyright protection subsists . . . in original works of authorship . . . includ[ing] . . . pictorial, graphic, and sculptural works . . .").

3. See *Our Story*, INSTAGRAM, <http://instagram.com/press> (last visited Nov. 1, 2015).

4. See Julie Nichols Matthews et al., *Social Media in the Digital Millennium*, 5 *LANDSLIDE*, May-June 2013, at 26, 27.

5. See *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/legal/terms> (last visited Nov. 1, 2015); *Terms of Use*, INSTAGRAM, <http://help.instagram.com/478745558852511> (last visited Nov. 1, 2015).

news outlets.⁶ The court ruled in Morel's favor based on the Twitter terms of service and the news agency's violations of the DMCA,⁷ but the DMCA did not offer any protection for Morel's individual copyright interests in the photograph.

While social media terms of service can offer some protection of images, terms of service often do not protect creators; therefore, copyright protection should arise from a reliable legal standard to protect user-generated content. Terms of service fluctuate frequently and are written to serve website hosts, rather than users.⁸ Images published on social media by users deserve statutory copyright protection under federal property law, despite the terms of service outlined in the click-through agreements that social media users accept. Account user contracts for social media websites may rise to a level of unenforceability, like other click-through agreements, due to users' lack of negotiation power.⁹ This proposal directly combats the current open-source culture of online content, social media websites, and current copyright laws because regular users are being disadvantaged by this way of operating. This proposed legislation will provide continued copyright protection to authors of photographic works shared and distributed online, upholding the traditional copyright protection offered to photographs.

This Note will first set a groundwork by discussing the traditional copyright protection of photographs and will highlight the changes brought to copyright law by the DMCA. While the DMCA offers some supplemental protection for copyrightable work, there is a gap in protection for creators of copyrighted work that needs to be filled. The Note will then analyze terms of service governing social media networks and discuss the gaps in user protection in those agreements. The third section of this Note will outline relevant cases involving user-generated images and the harms felt by the authors of the images. The fourth section of the Note will propose amendments to the DMCA, Creative Commons, and international agreements to fill the legal void discussed in the previous sections. The Note will conclude with a summary of the argument and the strongest reasoning for the proposed amendment.

6. *Agence France Presse v. Morel*, No. 10-cv-2730, 2014 WL 3963124, at *1 (S.D.N.Y. Aug. 13, 2014).

7. *See id.*

8. Gutierrez Alm, *supra* note 1, at 113.

9. *See, e.g., Specht v. Netscape Comm'n Corp.*, 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001), *aff'd*, 306 F. 3d 17 (2d. Cir. 2002).

I. THE EVOLUTION OF COPYRIGHT LAW FOR PHOTOGRAPHY

Copyright law has been a fundamental part of U.S. law since the Constitution gave Congress power over the useful arts.¹⁰ The Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹¹ The purpose of copyright law is to encourage people to invest in the creation of intellectual and artistic works by rewarding authors with control over the sale and use of their works.¹² The Copyright Act of 1790 laid the foundation for copyright law as the first copyright act written into law;¹³ and the Copyright Act of 1976, codified in Title 17 of the U.S. Code, is the modern basis for copyright protections.¹⁴ Copyright protection traditionally extends over “original works of authorship fixed in any tangible medium of expression.”¹⁵ The fixation requirement of the statute is satisfied when a work is put into a “relatively stable and permanent embodiment.”¹⁶

Copyright gives a bundle of property rights to the author of a work, but the contents of that bundle continue to change over time. This bundle of rights grants the owner the exclusive right to reproduce copies of, prepare derivative works based on, sell or lease copies of, and publicly display the copyrighted work.¹⁷ Copyright is established in the moment the author fixes the work in a tangible medium, regardless of copyright registration.¹⁸ Copyright infringement occurs when a copyrighted work is reproduced, distributed, or displayed without permission from the copyright holder.¹⁹ Innovation and technology have continually created challenges for copyright law to properly control,²⁰ and the digital age of computer-based content highlights this difficulty.²¹ In 1998, Congress passed the DMCA to bring copyright up-

10. See U.S. CONST. art. I, § 8, cl. 8; Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 331 (2008).

11. U.S. CONST. art. I, § 8, cl. 8.

12. *Goldstein v. Cal.*, 412 U.S. 546, 555 (1973).

13. See Lee, *supra* note 10, at 351.

14. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 9 (5th ed. 2010).

15. 17 U.S.C. § 102(a) (2015).

16. LEAFFER, *supra* note 14, at 49.

17. 17 U.S.C. § 106 (2015).

18. LEAFFER, *supra* note 14, at 271.

19. Craig C. Carpenter, *Copyright Infringement and the Second Generation of Social Media: Why Pinterest Users Should Be Protected from Copyright Infringement by the Fair Use Defense*, 7 J. INTERNET L. 1, 6 (2013).

20. Gutierrez Alm, *supra* note 1, at 106.

21. LEAFFER, *supra* note 14, at 25-27.

to-date with the new technologies of the internet.²² The DMCA provides civil and criminal remedies for the circumvention of permissible digital rights management of copyrighted works.²³ As a basis for later arguments, this Note will first explain the traditional copyrights of photographs and the changes brought about by the DMCA. Current copyright law covers a large variety of works, but this discussion is limited to photography as a longstanding category of work that exemplifies the current laws as the world continues to evolve in the digital age.

A. *Traditional Copyright Protection of Photographs in the United States*

Photographs easily fulfill the statutory requirements for a copyrightable work as original works of authorship that are fixed, either physically or digitally, at the moment of capture. Copyright protection has extended to photographs since the late nineteenth century.²⁴ Photographs garner copyright protection in the moment that the image is captured by a camera because when a photograph is taken, the image becomes immediately fixed in the tangible medium of either film or digital storage. This copyright protection endows the owner with exclusive rights over copies and derivative works of the image.²⁵ Copyright endures for a long time relative to other intellectual property rights—the basic term is the author's lifetime plus seventy years.²⁶ However, the copyrights granted are not without limitations.

A notable exception to copyright is the fair use exception in Section 107 of the 1976 Copyright Act.²⁷ Uses “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” are deemed fair use of a work

22. See Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 233 (2009).

23. LEAFFER, *supra* note 14, at 29; see also *id.* (explaining that the DMCA “gives copyright holders *supra-copyright* protection against the circumvention of digital rights management (DRM) on copyrighted works”).

24. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884). The plaintiff, a photographer, brought suit against the defendant, a lithographer, for copyright infringement of the plaintiff's photograph of Oscar Wilde. *Id.* at 54. The court ruled that “this photograph [is] an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish and sell.” *Id.* at 60. This ruling became a landmark case for copyright law, and photography was later codified in copyright law.

25. LEAFFER, *supra* note 14, at 10.

26. See *id.* at 225.

27. See 17 U.S.C. § 107 (2015).

and, therefore, not infringement of a copyright.²⁸ The digital age has raised questions regarding what works garner copyright protection and what actions constitute infringement because digital systems allow for reproduction and distribution in entirely new ways from traditional photography.²⁹ The DMCA was passed in an effort to supplement traditional copyright laws for these new methods of distribution.

B. Copyright on a Global Scale Through International Treaties

Global copyright protection does not exist, but some international treaties have reached agreements regarding international copyright.³⁰ The Universal Copyright Convention, the Berne Convention, and the Trade-Related Aspects of International Property Rights (TRIPS) Agreement have played a major role in shaping international treatment of copyright over the last century.³¹ The Universal Copyright Convention, in force by 1955, requires all member nations to provide authors adequate and effective protection of their works by giving foreign authors the same protection as domestic authors under each nation's laws.³² The Universal Copyright Convention has one hundred member nations.³³ The Berne Convention, concluded in 1886 but not joined by the United States until 1989, has a similar focus on national treatment of copyrighted works from all member nations.³⁴ After decades of revisions, the Berne Treaty currently has 169 contracting parties.³⁵ The TRIPS Agreement of 1995 is, to date, the most comprehensive multinational agreement on intellectual property.³⁶ The TRIPS Agreement provides minimum standards for IP protection, and

28. *Id.*

29. LEAFFER, *supra* note 14, at 27.

30. *See id.* at 570.

31. *See id.*; Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 279-80 (1998).

32. LEAFFER, *supra* note 14, at 571-72.

33. *Other IP Treaties: Universal Copyright Convention 1952*, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=208&group_id=22 (last visited Jan. 23, 2016).

34. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Jan. 23, 2016); *see also* LEAFFER, *supra* note 14, at 574 (providing an overview of the Berne Convention's origin and basic provisions).

35. *WIPO-Administered Treaties: Assembly (Berne Union)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search_what=B&bo_id=7 (last visited Feb. 9, 2017).

36. *Overview: The TRIPS Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tra_top_e/trips_e/intel2_e.htm (last visited Jan. 23, 2016).

the 164 World Trade Organization (WTO) member nations are party to the Agreement.³⁷

Efforts to harmonize copyright agreements on a global scale have brought tension in determining the appropriate scope of the copyright protection given in different countries individually and as an international standard.³⁸ International organizations, like the WTO (which established the TRIPS Agreement) and the World Intellectual Property Organization (WIPO) (which administered the Berne Convention) have established agreements on international IP matters, but this cooperation does not sufficiently manage international copyright law.³⁹ The gaps left in international copyright protections call for a new approach to this global problem.⁴⁰

C. The DMCA Advances U.S. Copyright Law into the Digital Age

The Digital Millennium Copyright Act of 1998 was passed to keep up with the challenges of media sharing in the digital age and in response to two WIPO treaties from 1996.⁴¹ The WIPO treaties require member nations to protect digitally available works from circumvention of technological measures implemented to restrict access to copyrighted works and to maintain the integrity of copyright management information.⁴² The DMCA contains five titles, the first of which complies with the terms of the WIPO treaties.⁴³ The second title of the DMCA, the Online Copyright Infringement Liability Limitation Act, addresses liability for Internet copyright infringement, and this title is most applicable to social media.⁴⁴

37. *Understanding the WTO: The Organization: Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 9, 2017).

38. Netanel, *supra* note 31, at 237.

39. *See generally* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000) (exploring problems with international copyright law and exploring ways to use private law mechanisms to further develop the law).

40. *See* LEAFFER, *supra* note 14, at 579-80.

41. *See id.* at 404 (explaining that Title I of the DMCA implements the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty); David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909, 915 (2002).

42. LEAFFER, *supra* note 14, at 404; Nimmer, *supra* note 41 at 915.

43. LEAFFER, *supra* note 14, at 404.

44. Matthews et al., *supra* note 4, at 27; Lateef Mtima, *Whom the Gods Would Destroy: Why Congress Prioritized Copyright Protection over Internet Privacy in Passing the Digital Millennium Copyright Act*, 61 RUTGERS L. REV. 627, 645-46 (2009); *see also* 17 U.S.C. § 512(c) (2015).

The Liability Limitation Act provides a safe harbor for internet service providers from liability for end users storing infringing works on providers' sites.⁴⁵ This safe harbor provision does carry requirements for the service provider,⁴⁶ but recent cases have demonstrated that social media providers like YouTube and Photobucket (a photo sharing website) have met the requirements to stay within the DMCA's safe harbor on copyright infringement claims.⁴⁷ Social media was just beginning to emerge when the DMCA was signed, so it follows that the drafters did not take this form of online interaction into consideration when writing the act.⁴⁸ As user interaction with social networks continues to increase, a problem concerning the intellectual property rights in user-generated images remains. Social media service providers require users to consent to terms that are unfavorable to authors who distribute their works online.

II. SOCIAL MEDIA USER TERMS OF SERVICE

Social media has become a ubiquitous part of the everyday lives of many people, and these online interactions are governed by user terms of service. Facebook draws nearly one billion daily active users,⁴⁹ Twitter attracts 320 million monthly active users,⁵⁰ and users "like" 3.5 billion Instagram photos and videos daily.⁵¹ Instagram is home to more than forty billion photos.⁵² These social media giants allow millions of users to connect to each other in a way that was previously impossible, and content sharing is a fundamental part of social media interactions. To interact in this unique way on social media, users must accept click-

45. Matthews et al., *supra* note 4, at 27.

46. *Id.* ("[A] service provider must meet certain requirements . . . [including] the service provider must not have actual knowledge of infringing activity or awareness of 'facts or circumstances from which infringing activity is apparent,' or upon obtaining knowledge or awareness fail to act 'expeditiously' to remove or to disable the material. Similarly, the service provider must not receive a financial benefit from the infringing activity and must take down material when a DMCA notice is issued.")

47. *E.g., id.* at 27-29.

48. *Id.* at 26. See generally Diane Leenheer Zimmerman, *Copyright and Social Media: A Tale of Legislative Abdication*, 35 PACE L. REV. 260 (2014) (discussing a proposed revision of the DMCA).

49. *Stats*, FACEBOOK, <http://newsroom.fb.com/company-info> (last visited Nov. 1, 2015).

50. *Twitter Usage/Company Facts*, TWITTER, <http://about.twitter.com/company> (last visited Nov. 1, 2015).

51. *Our Story*, *supra* note 3.

52. *Id.*

through agreements containing terms of service.⁵³ These terms of service are written by and tend to favor the network host.⁵⁴

Social network terms of service often require users to agree to abandon many or all property rights in images uploaded to the network. Facebook terms of service state that photos uploaded to their site “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.”⁵⁵ Twitter and Instagram employ similar policies with umbrella grants by users for royalty-free licenses and the right to sub-license, presumably to any third party.⁵⁶ These terms serve as a private agreement between the network and user, and networks are in a position of power to update terms at will.⁵⁷ This vast bargaining power is carried by social media giants, and some literature suggests these contracts may be partly or fully unenforceable as contracts of adhesion.⁵⁸ In *Bragg v. Linden Research*, a district court found the user terms of service for Second Life, an online virtual world, to be unconscionable and unenforceable against a user’s claim to virtual property rights in the site.⁵⁹ There is little litigation regarding the enforceability or unenforceability of social media terms of service, but courts may continue to find in favor of users due to the relative bargaining power between users and website hosts.

53. *Statement of Rights and Responsibilities*, *supra* note 5.

54. See Agnieszka A. McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887, 899 (2013).

55. *Statement of Rights and Responsibilities*, *supra* note 53.

56. See *Terms of Use*, *supra* note 5 (“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).”); *Twitter Terms of Service*, TWITTER, <http://twitter.com/tos?lang=en> (“You hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service, subject to the Service’s Privacy Policy.”).

57. See Gutierrez Alm, *supra* note 1, at 113.

58. See Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two - Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829, 842 (2008) (“I argue that there is good reason to believe that Facebook is engaged in offering unconscionable contracts to millions of people, especially to the millions of minors who spend time on the site. Not only are the contracts unconscionable but they are nullities.”).

59. *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Penn. 2007); see also Hetcher, *supra* note 58 at 833-37.

III. MORE HARM THAN GOOD? CASE STUDIES OF USER-GENERATED IMAGES USED FROM SOCIAL MEDIA ACCOUNTS

The case studies below are limited to examples of photography as a type of work explicitly covered by copyright laws. The discussion of photographs published online demonstrates the convergence of two types of media in the present digital age. The principles of these examples can be applied to other forms of copyrightable works.

A. *Twitter and War—Photograph Protection in AFP v. Morel*

Agence France Presse (AFP) v. Morel was a recent landmark case covering the issue of copyright infringement of a photograph posted to Twitter. Morel, a professional photographer, took pictures of the aftermath of the Haitian earthquake in 2010 and uploaded a photograph to Twitter.⁶⁰ Another Twitter user posted the photograph to his own Twitter page, a use permitted under the Twitter terms of service.⁶¹ The photograph was picked up and distributed by news outlet AFP and subsequently distributed to AFP's business partner Getty Images; AFP and Getty Images credited the photograph to the second Twitter user.⁶² AFP and Getty Images continued using the photo after discovering Morel to be the true author of the photograph.⁶³ Morel sued for copyright infringement and was awarded \$1.2 million in damages because the jury found AFP and codefendant Getty Images to have acted in violation of both the Twitter terms of service and the DMCA.⁶⁴ Twitter's terms of service did not allow for commercial re-use of content.⁶⁵ AFP was found liable for violating the DMCA, which "makes it unlawful to knowingly, and with the intent to 'induce, enable, facilitate, or conceal infringement,' either 'provide' or 'distribute' (or 'import for distribution') false [copyright management information]."⁶⁶ This unauthorized infringement of Morel's work of art was correctly ruled in his favor, but the DMCA does not always adequately provide for copyright holders. Morel was awarded damages only because of AFP's willful facilitation and distribution of false copyright management

60. *Agence France Presse v. Morel*, No. 10-cv-2730, 2014 WL 3963124, at *1 (S.D.N.Y. Aug. 13, 2014).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at *2.

65. *Photographer Wins \$1.2 Million From Companies That Took Pics Off Twitter*, 20 WESTLAW J. INTELL. PROP., no. 17, 2013, at *1, *2.

66. *Morel*, 2014 WL 3963124, at *7.

information, and this case demonstrates the lack of explicit protection for copyright holders.

B. A Global Problem—Lack of Jurisdiction in Chang v. Virgin Mobile USA

The widespread reach of social media networks presents an infringement problem on a global scale, as demonstrated in the case of *Chang v. Virgin Mobile USA*.⁶⁷ Minor child Alison Chang had her photograph taken by her church counselor Justin Ho-Wee Wong, and Wong uploaded the photograph to photo-sharing website Flickr.⁶⁸ The Flickr terms of service “provides for the most unrestricted use available to any worldwide user (including commercial use and no monetary payment).”⁶⁹ Under this policy, Australian mobile service provider Virgin Wireless used an edited version of Wong’s photograph of Chang for an unflattering advertising campaign for mobile phone services.⁷⁰ The court ultimately dismissed the claims due to lack of jurisdiction, either general or personal, over the Australian company.⁷¹

The court did not address the issue of copyright infringement, but the facts of the case demonstrate the harmful effects of the unauthorized commercial use of Chang’s photograph, even within a foreign context. Young Ms. Chang felt the harmful emotional impact of the appropriation, as intellectual property can be a deeply personal form of property.⁷² This emotional harm is one example of the problems that can accompany the economic inefficiencies of commercial appropriation of user-generated images. The commercial demand for candid photographs exists, especially in the advertising business, and the lack of statutory protection for photographers provides no deterrence for the continued (mis)appropriation of photographs online.⁷³

The widespread use of social media platforms around the world will continue to increase the opportunities for unauthorized use of user-generated images. Social media has consumed the global population—

67. *Chang v. Virgin Mobile USA, LLC*, No. 3:07–CV–1767–D, 2009 WL 111570 (N.D. Tex. Jan. 16, 2009).

68. *Id.* at *1.

69. *Id.*

70. Noam Cohen, *Use My Photo? Not Without Permission*, N.Y. TIMES (Oct. 1, 2007), <http://www.nytimes.com/2007/10/01/technology/01link.html> (“[A]ccording to the ad, Alison is the kind of loser ‘pen friend’ (pen pal) whom subscribers will finally be able to ‘dump’ when they get a cellphone.”).

71. *Chang*, 2009 WL 111570, at *7.

72. See Shannon E. Trebbe, *Enhancing Copyright Protection for Amateur Photographers: A Proposed Business Model*, 52 ARIZ. L. REV. 97, 107 (2010).

73. See *id.* at 106.

nearly three billion of the world's population of seven billion (or thirty-seven percent of the global population) actively maintain social media accounts.⁷⁴ North and South America have 535 million active mobile social media accounts, a statistic that is dwarfed by the 1,441 million active mobile users throughout Asia.⁷⁵ Facebook, Twitter, Instagram, and Flickr are headquartered in the United States,⁷⁶ and commercial entities are located around the globe. *Chang* demonstrates the global problem arising from conflicts between the interests of users and companies from different locations. As the use of social media continues to spread around the world, social media users need adequate protection of their copyrighted images, and commercial users need a global and legal route to access desirable images.

C. *The Prince and the Pauper—The Fair Use Exception*

Appropriation artist Richard Prince has built a controversial career over decades by creating new versions of the photographs of other artists,⁷⁷ basing his rights to use the works on the fair use exception to the Copyright Act.⁷⁸ The fair use clause allows use of a copyrighted work if the new use transforms the original work and does not have a negative effect on the market for the original work.⁷⁹

In 2009, photographer Patrick Cariou sued Prince for copyright infringement of photographs published in a Cariou's book.⁸⁰ Cariou worked as a professional photographer, spending six years getting to know a group of Rastafarians in Jamaica and photographing them.⁸¹ Cariou published many of his photographs in a book, and Prince used

74. See Simon Kemp, *Digital in 2017: Global Overview*, WE ARE SOCIAL, (Jan. 24, 2017), <http://wearesocial.com/blog/2017/01/digital-in-2017-global-overview>.

75. See *id.* Statistical figures have likely grown since the date of publication.

76. *Facebook HQ*, FACEBOOK, <http://www.facebook.com/Facebook-HQ-166793820034304/> (last visited Jan. 23, 2016) (Menlo Park, California); *Office Information*, TWITTER, <http://about.twitter.com/company> (last visited Jan. 23, 2016) (San Francisco, CA); *Instagram HQ*, FACEBOOK, <http://www.facebook.com/instagramhq> (last visited Jan. 23, 2016) (Menlo Park, California); *Flickr Location*, FLICKR, <http://www.flickr.com/jobs> (last visited Jan. 23, 2016) (San Francisco, CA).

77. See Katie Sola, *Artist Richard Prince Sells Instagram Photos That Aren't His For \$90K*, HUFFINGTON POST (May 27, 2015, 8:05 PM), http://www.huffingtonpost.com/2015/05/27/richard-prince-instagram_n_7452634.html.

78. See Lizzie Plaugic, *The Story of Richard Prince and his \$100,000 Instagram Art*, VERGE (May 30, 2015 11:28 AM), <http://www.theverge.com/2015/5/30/8691257/richard-prince-instagram-photos-copyright-law-fair-use>.

79. See Richard H. Chused, *The Legal Culture of Appropriation Art: The Future of Copyright in the Remix Age*, 17 TUL. J. TECH. & INTELL. PROP. 163, 164-65 (2014).

80. *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011).

81. See *id.* at 343.

forty-one of Cariou's photographs in various pieces for a 2007 art show.⁸² Prince used the photographs, physically torn from one of Cariou's books, in collage-style artwork, "enlarged, cropped, tinted, and/or over-painted."⁸³ Prince sold one of the collection's pieces for nearly \$2.5 million.⁸⁴ The district court ruled in favor of Cariou, finding copyright in Cariou's photographs and Prince's use outside of fair use.⁸⁵ However, the Second Circuit reversed in part and vacated in part, finding that all but five of Prince's uses made fair use of Cariou's work because Prince had sufficiently transformed the photographs.⁸⁶ The Supreme Court denied certiorari on Cariou's appeal,⁸⁷ and Prince's appropriation was largely permitted under the holding from the Second Circuit's decision.⁸⁸ Cariou settled with Prince out of court for the infringement claims on the remaining five photographs.⁸⁹ This case highlights the enormous benefit that commercial users can derive from the copyrighted works of another, in the absence of adequate protection for the author.

In May 2015, Richard Prince drew controversy to his work again with an exhibit appropriating photographs from Instagram, bringing his appropriation into the realm of social media. Prince wrote comments under Instagram photos posted by various Instagram users then printed exact images of the photos on canvas with his comments visible below.⁹⁰ Prince sold his prints for \$90,000 each at a New York gallery exhibit.⁹¹ The prints are purported to be fair use of the Instagram users' images because his comments are transformative.⁹² The appropriated Instagram users have publicly commented on their lack of consent or knowledge of Prince's use of their photographs.⁹³

The fair use exception seems to be fundamentally unfair to the photograph owners whose work Prince appropriated. Prince has profited

82. *See id.* at 343-44.

83. *Id.* at 344.

84. Randy Kennedy, *Apropos Appropriation*, N.Y. TIMES (Dec. 28, 2011), <http://www.nytimes.com/2012/01/01/arts/design/richard-prince-lawsuit-focuses-on-limits-of-appropriation.html>.

85. *Cariou*, 784 F. Supp. 2d at 355.

86. *Cariou v. Prince*, 714 F.3d 694, 712 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

87. *Cariou v. Prince*, 134 S. Ct. 618 (2013) (denying cert.).

88. *See generally Cariou*, 714 F.3d at 694 (exemplifying a lack of copyright protection for transformed art).

89. David McAfee, *Artist Prince, Photographer Cariou Settle Fair Use Feud*, LAW360 (Mar. 18, 2014), <http://www.law360.com/articles/519819/artist-prince-photographer-cariou-settle-fair-use-feud>.

90. *See Sola*, *supra* note 77.

91. *See Plausic*, *supra* note 78; *id.*

92. *See Plausic*, *supra* note 78.

93. *See Sola*, *supra* note 77.

millions of dollars from his arguably transformative uses of photographs, while the authors of the photographs had no knowledge or consent of his use. Although the appropriate applicability of the fair use exception is an argument entirely in itself, the cases surrounding Prince serve to highlight the personal harm and economic disparity that can result from copyright infringement of personal photographs. A revision to current copyright law to solidify and expand author rights could serve to better protect copyright holders from commercial misappropriation and abuse of oversharing. While the proposed changes to legislation may fly against the norms of the technology industry, these revisions will garner support from the individuals and artists who need greater copyright protection.

IV. PROPOSALS TO REMEDY LACK OF USER PROTECTION

Although user-generated content can be collaborative and makes a social network social in its truest sense,⁹⁴ there remains a personal sense of ownership in user-generated images—the same ownership rights that brought copyright protection to photography in 1884.⁹⁵ Social media sites provide a platform for friends and strangers to interact and share moments of their lives through photographs, and these photographs can be taken by other users for their own purposes—either personally or commercially motivated. While user-generated content should be distinguished from user-found content,⁹⁶ a deeply personal connection remains between an author and the photographs she takes in user-generated images.

94. Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1501-02 (2008) (“The incredible growth of [user-generated content] is the direct result of technological innovation, largely driven by the Internet. The Internet is a vast network for communication built on a platform that is open to all. . . . A considerable part of the development of Web 3.0 is the offering of powerful Internet applications for everyone to remix content as a basic feature of experiencing the Internet. . . . In Web 3.0, people will no longer ‘surf’ the Web—they will mash it.”) (demonstrating the collaborative nature of social media).

95. See generally *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (upholding the power of Congress to extend copyright protection to photography).

96. Carpenter, *supra* note 19, at 1 (“Originally, these leading social media companies showcased user-generated content that was typically created by the user; social media was a way to express ones thoughts and learn more about other people. . . . The focus of social media is shifting from user-created content to user-found content. This trend is shared by new versions of the original social media powerhouses and recent social media startups. . . . [B]oth Twitter and Facebook have made it easier for users to integrate photos and videos from the internet into their profiles.”).

A. *Amending the DMCA*

This Note proposes an amendment to the DMCA to include explicit protection of copyright in user-generated photographs uploaded to social media websites, superseding any terms of service agreements users have signed. The DMCA was designed to prevent unauthorized access to copyrighted works, and this proposal falls within that scope. This amendment would provide a statutory basis for user protection, thereby creating a standard for both courts and infringers to follow.

While some authorship on the future of copyright has called for different solutions to the infringement of online content, this Note advocates for protection of user-generated images. Legal scholar Edward Lee calls for informal regulation of user-generated content on the web for noncommercial uses of a work with attribution to the author.⁹⁷ This Note highlights the harms brought by unauthorized commercial use of user-generated images, in a large part because commercial uses are more likely to be litigated, but the same harms may be felt by noncommercial uses. Maria Pallante, Director of the U.S. Copyright Office, suggests broad reform to copyright law; one change to current law she envisions is creating an opt-out regime for copyright licensing, rather than the current opt-in licensing system.⁹⁸ In a comparable line of discussion, law professor Richard Chused suggests a royalty-free patent pooling system as a remedy to the problem of inadequate protections under traditional copyright law for the rapid proliferation of digital distribution and the culture of appropriated art.⁹⁹ While a pooling system or an automatically inclusive licensing system may be possible solutions, this Note argues for the protection and enforcement of individual property rights in user-generated images. Pooling is an expensive and impractical solution that in practice would benefit only distributors, rather than copyright holders. While remedies in contract and tort law may naturally arise from disputes regarding user terms of service, this Note proposes a solution within the DMCA for a copyright law remedy to the copyright infringement problem.

B. *Globalizing the Creative Commons Through Codification*

One solution to issues with digital copyright ownership currently in action is the Creative Commons. Creative Commons is a nonprofit organization that assists authors to attach blanket copyright licenses for

97. See Lee, *supra* note 94, at 1540.

98. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 337-38 (2013).

99. Chused, *supra* note 79, at 194.

their works of art with terms that accompany the work itself.¹⁰⁰ Creative Commons is working to reform copyright law by providing tools to create a communal “copyright pool” within the bounds of current copyright law.¹⁰¹ To do this, Creative Commons uses contracts to give new meaning to the practical application of copyright and grants public freedom to use, reproduce, and modify works under Creative Commons licenses.¹⁰² Subsequent creators can build on the existing content to make their own creations. Creative Commons has gained popularity among individual users and works under the mission to “[k]eep the internet creative, free, and open.”¹⁰³ Israeli Scholar Niva Elkin-Koren calls the Creative Commons “a social movement seeking to bring about social change.”¹⁰⁴

In its mission to reform global copyright, the widespread use of Creative Commons in recent years has presented a few problems with its current execution. A problem with global implications is the use of images with invalid licenses.¹⁰⁵ Users can post images online with a valid Creative Commons license, but those users may not be the true owners of images. True owners of the images can sue any subsequent users of the misappropriated images, regardless of the purported Creative Commons license.¹⁰⁶ Another problem with reliance on

100. See Lee, *supra* note 94, at 1485, 1540; *About Creative Commons*, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited Nov. 4, 2015).

101. *About Creative Commons*, *supra* note 100 (“The combination of our tools and our users is a vast and growing digital commons, a pool of content that can be copied, distributed, edited, remixed, and built upon, all within the boundaries of copyright law.”).

102. Severine Dusollier, *Contract Options for Individual Artists: Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 278 (2006); see also *Creative Commons Legal Code*, CREATIVE COMMONS, <https://creativecommons.org/licenses/by-nc-sa/2.5/legalcode> (last visited Jan. 24, 2015) (exemplifying Creative Commons granting terms from the The Attribution Non-commercial Share Alike License: “Subject to the terms and conditions of this License, Licensor hereby grants You a worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright) license to exercise the rights in the Work as stated below: to reproduce the Work, to incorporate the Work into one or more Collective Works, and to reproduce the Work as incorporated in the Collective Works; to create and reproduce Derivative Works; to distribute copies or phonorecords of, display publicly, perform publicly, and perform publicly by means of a digital audio transmission the Work including as incorporated in Collective Works; to distribute copies or phonorecords of, display publicly, perform publicly, and perform publicly by means of a digital audio transmission Derivative Works.”).

103. See Lee, *supra* note 94, at 1485-86; *About Creative Commons*, *supra* note 100.

104. Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 387 (2005).

105. Kelley Keller, *5 Expensive Problems with Using Creative Commons for Small Business*, SMALL BUS. TRENDS (Mar. 9, 2015), <http://smallbiztrends.com/2015/03/using-creative-commons.html>.

106. Pamela Vaughan, *Copyright Law on the Internet Is a Total Train Wreck Right Now*, HUBSPOT (June 10, 2013), <http://blog.hubspot.com/marketing/internet-copyright-law->

Creative Commons is the host's release from liability.¹⁰⁷ Users of Creative Commons licenses who encounter problems with licensed works cannot turn to Creative Commons for legal assistance or advice.¹⁰⁸ Creative Commons is an inherently global idea that should be fine-tuned and codified into an international agreement. Supplementing the Creative Commons system with a global agreement could provide the formal backbone that the international copyright landscape needs.

User-generated images on social media are often personal images of the author or friends and relatives of the author; these personal photographs should not be freely available to the general public without the author's explicit permission. Creative Commons is an avenue to grant licensing permissions. In its mission of open use for all, Creative Commons stated that "[t]he public would benefit from more extensive rights to use the full body of human culture and knowledge for the public benefit."¹⁰⁹ This ideal copyright scheme cannot be reached through only licensing;¹¹⁰ national and international laws must also progress copyright law forward in the digital age.

C. Centralizing International IP Laws

As technology and IP have evolved over the last two decades, international laws and global agreements have struggled to keep up. In an article from 2000, Chicago-Kent College of Law Professor Graeme B. Dinwoodie called for a "broader understanding of international copyright lawmaking."¹¹¹ International copyright norms are influenced both by public organizations like WIPO and national courts and by private dispute resolution.¹¹² Private dispute resolution mechanisms should take on a greater role in the international lawmaking process, and national courts should work to create and enforce global norms.¹¹³ In 2005, Niva Elkin-Koren called for a "legal regime that would validate Creative Commons' licenses would also enforce contracts that restrict access to creative work" and a "sustainable alternative to the current

failure (where the blog author was threatened with potential litigation for copyright infringement of images she had taken from Flickr under a Creative Commons license; the Flickr user had stolen the images from a stock photography website; and the website pursued infringers of their copyrighted images).

107. Keller, *supra* note 105.

108. *See id.*

109. *Creative Commons and Copyright Reform*, CREATIVE COMMONS, <https://creativecommons.org/about/reform> (last visited Jan. 21, 2016).

110. *See id.*

111. Dinwoodie, *supra* note 39, at 579-80.

112. *Id.* at 580.

113. *Id.*

copyright regime [that] would require enforceable legal measures that would restrain the power of copyright owners to govern their works.”¹¹⁴ In global intellectual property agreements, “it is indispensable to effective decision making that participants investigate, understand and appreciate not only the political and monetary implications, but also the social and cultural implications of the debate,” says Pennsylvania State University Professor of Law Geoffrey Scott.¹¹⁵ These quotes exemplify the call for change in international copyright policies, especially above and beyond the capabilities of the Creative Commons.

Two organizations best positioned to lead and enact this change are WTO and WIPO. Both groups maintain international treaties containing global copyright standards for all member nations.¹¹⁶ In consideration of the successes and limitations of the Creative Commons, either the WTO or the WIPO should encourage reexamination of and amendments to the TRIPS Agreement or the Berne Convention, respectively, to encompass a more globalized approach to copyright protection. In the current digital age, this copyright protection can promote more open access to copyrighted works, while still allowing authors to retain some rights.

CONCLUSION

Social media has become an essential part of our lives and daily communications with others around the world. Interactions on social media involve mass quantities of data, including many user-generated photographs and images. Despite the quantity of photographs posted online, copyright protects these images in the same way traditional photographs are protected. Social media platforms are designed to allow users to share photographs with others, but this open design also leads to appropriation, infringement, and commercial use of personal photographs. Social media providers, especially giants like Facebook and Instagram, exert a great amount of control over the social media landscape, and these providers are using their power to require users to license away all rights in content shared on the sites. Misuses of user-generated images can bring economic and emotional harm to authors, who—despite their profession or level of artistic skill—create works of art through their photography.

On a national scale, copyright protection has been a fundamental part of U.S. law since the writing of the Constitution. Congress should

114. Elkin-Koren, *supra* note 104, at 421-22.

115. Geoffrey Scott, *A Protocol for Evaluating Changing Global Attitudes Toward Innovation and Intellectual Property Regimes*, 32 U. PA. J. INT'L L. 1165, 1268 (2011).

116. See *WIPO-Administered Treaties: Assembly (Berne Union)*, *supra* note 35.

take steps to continue protecting copyright as the age of social media transforms how works like photographs are used and shared. On a global scale, user-generated images are being created and shared in massive quantities. A global solution is required to protect personal interests in images existing in the global world of social media. Achieving a balance between the desire for accessibility and the protection of creativity and authorship can benefit our global society, and an international treaty can best set a global legal standard for this allocation of rights.



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