

MANAGING YOUR ONLINE CONTENT AND WEBSITE

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MANAGING YOUR ONLINE CONTENT AND WEBSITE: A SURVEY OF PRIVACY, COPYRIGHT, AND TRADEMARK ISSUES

Today, even Elvis has a Facebook page,¹ Instagram² and Google+³ accounts, a Twitter handle,⁴ a Pinterest board,⁵ and a mobile app.⁶ The Internet and the mobile electronic world have become the primary tools that entertainers, and artists of every kind, use to share and promote their works.

Indeed, technological means of communications have developed at breakneck speed in the past twenty years. The rate at which society has adopted these advancements is stunning. But, as with many uniquely new things, all of us are learning how to use technology responsibly to further creative pursuits and to express ideas and points of view. The law has the difficult task of keeping up with the times, playing a crucial role in helping society discern what is and is not responsible. Most notably, courts and lawmakers have struggled with—but are largely succeeding in—adapting and applying media and intellectual property laws to the new Wild West.

This article addresses just some of the many legal issues associated with managing the use of the burgeoning electronic frontier to create and publish works. We focus primarily on online privacy, copyright, and trademark issues. We also briefly discuss legal questions involved with “crowdfunding,” or the practice of raising money online to support creative projects. The article concludes by offering practical tips to help members of the entertainment community avoid liability in these areas.

I. ONLINE PRIVACY

Personal information is a valuable asset for companies who advertise online. When an Internet user visits a website, various kinds of personal information, such as an IP address, geographic

¹ <https://www.facebook.com/elvis>

² http://instagram.com/official_elvis_presley

³ <https://plus.google.com/u/0/+elvispresley/posts>

⁴ <https://twitter.com/elvispresley>

⁵ http://www.pinterest.com/elvis_presley/

⁶ “ELVIS 2.0.”

location, or online browsing history, could be collected. Website operators might use this personal information themselves or sell it to third parties to assist in targeting online advertisements to a specific consumer base. For example, Facebook’s privacy policy states that it uses its 1.2 billion members’ postings and personal information for advertising purposes.⁷

A recent survey showed that 92% of Internet users in the United States worry about their privacy online, and 89% of U.S. Internet users avoid doing business with companies that they believe do not protect their privacy.⁸ Consequently, consumers are less likely to click on online advertisements, use mobile apps they do not trust, or enable online location tracking.⁹ Mindful of these concerns, states have taken the lead as creators and enforcers of privacy laws in the absence of comprehensive federal legislation. However, because Internet usage crosses state boundary lines, one state’s internet laws can significantly impact users and service providers across the country.

A. Federal Trade Commission Efforts in the Area of Data Security Breach

Despite the lack of comprehensive federal privacy legislation,¹⁰ the Federal Trade Commission (FTC) has pursued data security claims under the deception and unfairness prongs of 15 U.S.C. § 45(a). When faced with such a complaint by the FTC, many companies have settled. One company, Wyndham Worldwide Corporation (the entity that operates the Wyndham Hotel Group), challenged the FTC’s power to regulate in the area of data security.

⁷ “We use the information we receive about you in connection with the services and features we provide to you and other users like your friends, our partners, the advertisers that purchase ads on the site, and the developers that build the games, applications, and websites you use.” *Facebook Data Use Policy*, FACEBOOK, <https://www.facebook.com/about/privacy/your-info> (last visited Oct. 14, 2014); see also Vindu Goel, *Facebook Reasserts Posts Can Be Used to Advertise*, N.Y. TIMES (Nov. 15, 2013), http://www.nytimes.com/2013/11/16/technology/facebook-amends-privacy-policies.html?_r=0.

⁸ *2014 Consumer Privacy Index: Consumer Confidence Addition*, TRUSTe (Jan. 28, 2014), <http://www.truste.com/window.php?url=http://download.truste.com/TVarsTf=910JQPAZ-445>.

⁹ *Id.*

¹⁰ One notable exception is the Children’s Online Privacy Protection Act (COPPA), which relates to collection of personal information from children under 13 years of age. 15 U.S.C. § 6501 *et seq.*

In June 2012, the FTC filed a complaint against Wyndham alleging that the company failed to maintain “reasonable and appropriate data security for consumers’ sensitive personal information.”¹¹ Specifically, the FTC alleged that Wyndham’s data security practices were unfair and deceptive to consumers.¹² Wyndham moved to dismiss the FTC’s claims, arguing that (1) the FTC’s unfairness authority does not cover security practices; (2) the FTC failed to provide companies like Wyndham with notice of what constitutes “reasonable” security; and (3) even if the FTC has legal authority to regulate unfair security practices, the FTC failed to plead sufficient facts to show that Wyndham’s practices harmed consumers.¹³

The United States District Court for the District of New Jersey denied Wyndham’s motion to dismiss. First, the court held that the FTC has authority under the FTC Act (15 U.S.C. § 41 *et seq.*) to take action against companies who fail to provide reasonable security for consumers’ personal information.¹⁴ Although Congress has enacted data security laws to regulate specific industries, the court found that this “subsequent data-security legislation seems to complement—not preclude—the FTC’s authority.”¹⁵ Responding to Wyndham’s argument regarding notice, the court held that the FTC had articulated a reasonableness standard through guidance, consent orders and complaints sufficient to provide companies like Wyndham with notice of what is “unfair” in the data-security context.¹⁶ Finally, the court determined that the FTC complaint contained allegations of unfairness and deception sufficient to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).¹⁷

Even though the FTC appears to have the upper hand in the early stages of this case, its authority to regulate data security may still be in jeopardy. If Wyndham prevails on appeal, the result could be a major set-back in the FTC’s ability to regulate privacy. Furthermore, a ruling against the FTC could make state privacy laws even more significant than they are today. For now, however, we expect the FTC to continue on its current path and remain active in this area.

¹¹ *F.T.C. v. Wyndham Worldwide Corp.*, No. 13-1887 ES, 2014 WL 1349019, *1 (D.N.J. Apr. 7, 2014), *motion to certify appeal granted* 2014 WL 2812049 (D.N.J. June 23, 2014).

¹² *Id.*

¹³ *Id.* at *4-6, *9-15, *15-24.

¹⁴ *Id.* at *8-9.

¹⁵ *Id.* at *7.

¹⁶ *Id.* at *11-15.

¹⁷ *Id.* at *16-24.

B. California at the Forefront of State Privacy Legislation

California continues to lead in the area of online privacy laws. In 2003, the California legislature passed the California Online Privacy Protection Act (CalOPPA), requiring all commercial websites that collect “personally identifiable information” about California residents to post and implement a conspicuous privacy policy on their websites.¹⁸ Personally identifiable information includes Internet users’ names, physical addresses, email addresses, telephone numbers, social security numbers, and any other information that would allow the user to be contacted personally or online.¹⁹ Among other things, CalOPPA requires a website’s privacy policy to identify the categories of personal information collected and third parties with whom the information is shared.²⁰ To avoid potential fines of up to \$2,500,²¹ website operators who collect personal information should be mindful of these recommendations as nearly all websites are likely to have visitors from California.

The impact of CalOPPA, as well as other state privacy laws, has been significant. Between 1998 and 2011, the number of websites with Internet privacy policies grew 84%.²² Additionally, the California Attorney General has worked with online developers such as Apple and Amazon.com to post privacy policies regarding their mobile applications.²³

In 2013, the California legislature enacted amendments to strengthen CalOPPA and further enhance online privacy. First, California added “Do Not Track” provisions,²⁴ requiring websites to disclose how they respond to Do Not Track (DNT) technology. This technology is integrated into Internet web browsers and allows Internet users to click a setting so that their desires not to be tracked online are

¹⁸ CAL. BUS. & PROF. CODE § 22575 *et seq.*

¹⁹ CAL. BUS. & PROF. CODE § 22577.

²⁰ CAL. BUS. & PROF. CODE § 22575.

²¹ CAL. BUS. & PROF. CODE §17206(a).

²² *2011 Privacy Index, Website Addition*, TRUSTe (Dec. 8, 2011), <http://www.truste.com/window.php?url=http://download.truste.com/TVarsTf=X3F7Y6ZY-247>.

²³ *See* Katie W. Johnson, *California Court Dismisses State AG’s Mobile App Privacy Lawsuit Against Delta*, BLOOMBERG BNA (May 13, 2013), <http://www.bna.com/california-court-dismisses-n17179873953/>.

²⁴ AB 370, 2013-2014 Leg., Reg. Sess. (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB370.

communicated to websites.²⁵ Notably absent from this legislation, however, is a requirement that websites actually abide by users' preferences.

California also recently passed "Privacy Rights for California Minors in the Digital World," or so-called "eraser button law."²⁶ The law states that websites must allow "minors" (residents under 18 years old) to remove information they post online. Additionally, the law prohibits websites from marketing products like cigarettes, alcohol, firearms, and other items that are illegal for minors to purchase. The law will go into effect January 1, 2015 as Cal. Bus. & Prof. Code §§ 22580-22582.

In May 2014 the California Attorney General issued a 28-page set of recommended best practices for website operators to develop meaningful privacy policies.²⁷ Highlights from these recommendations include:

- **Readability:**
 - o Use plain and straightforward language. Avoid technical or legal jargon.
 - o Use a format that makes the policy readable, such as a layered format.
- **Online Tracking/Do No Track:**
 - o Describe how you respond to a browser's Do Not Track signal or to other such mechanisms. This is more transparent than linking to a "choice program."
 - o State whether other parties are or may be collecting consumers' personally identifiable information while they are on your site or service.
- **Data Use and Sharing:**
 - o Explain your uses of personally identifiable information beyond what is necessary for

fulfilling a customer transaction or for the basic functionality of an online service.

- o Whenever possible, provide a link to the privacy policies of third parties with whom you share personally identifiable information.

- **Individual Choice and Access:**

- o Describe the choices a consumer has regarding the collection, use, and sharing of his or her personal information.

- **Accountability:**

- o Tell your customers whom they can contact with questions or concerns about your privacy policies and practices.²⁸

II. OVERVIEW OF COPYRIGHT & TRADEMARK INFRINGEMENT

In addition to legal issues involving privacy laws, entertainers often find themselves in legal battles over copyrights and trademarks.

Copyright law protects works of authorship that have been tangibly expressed.²⁹ Under the U.S. Copyright Act, 17 U.S.C. § 101 *et seq.*, copyright protection subsists in (1) original works of authorship and (2) fixed in any tangible medium of expression.³⁰ Works of authorship include literary works, musical works (and lyrics), pictorial and graphic works, audiovisual works (including motion pictures), and sound recordings.³¹ Among other things, the Copyright Act provides a copyright owner with exclusive rights to (1) reproduce the work, (2) prepare derivative works, and (3) distribute copies or transfer ownership of the work.³²

To establish a claim for copyright infringement, a plaintiff must prove that:

- a) s/he owns a valid copyright and
- b) the defendant copied constituent elements of the plaintiff's work that are original.³³

²⁵ See, e.g., *Longer battery life and easier website permissions*, GOOGLE CHROME BLOG (Nov. 6, 2012), <http://chrome.blogspot.de/2012/11/longer-battery-life-and-easier-website.html> (last visited Oct. 16, 2014).

²⁶ SB 568, 2013-2014 Leg., Reg. Sess. (Cal. 2013), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568.

²⁷ Kamala D. Harris, Attorney General, *Making Your Privacy Practices Public: Recommendations on Developing a Meaningful Privacy Policy*, California Department of Justice (May 2014), available at https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersecurity/making_your_privacy_practices_public.pdf.

²⁸ *Id.* at 2.

²⁹ *Trademark, Patent, or Copyright?*, uspto.gov, <http://www.uspto.gov/trademarks/basics/definitions.jsp> (last visited Oct. 16, 2014).

³⁰ 17 U.S.C. § 102. Copyright law does not protect abstract ideas but rather the concrete expression of those ideas. *Id.*

³¹ *Id.*

³² 17 U.S.C. § 106(1)-(3).

³³ *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 251 (5th Cir. 2010).

Fair use is a defense to an infringement claim. In determining whether the use made of a work is a fair use, courts consider the following statutory factors:

- “1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work.”³⁴

A trademark generally refers to a company’s slogan, symbol, or design that is used to distinguish goods and services. For example, Twitter’s trademarks include the Twitter name, logo, the term “Tweet,” and “any word, phrase, image, or other designation that identifies the source or origin of any of Twitter’s products.”³⁵

To succeed in a trademark infringement claim, a party must first show that it has a protectable right in the mark. It must also show that there is a likelihood of confusion between the marks.³⁶

The issues and cases below are by no means an attempt to provide a comprehensive survey of all copyright and trademark issues. Instead, they offer a glimpse into legal issues and recent cases that have arisen in the entertainment community.

III. COPYRIGHT ISSUES

A. Reality Television

Many television shows are now streamed online. For example, SideReel advertises that it indexes tens of thousands of TV shows and hundreds of thousands of episodes.³⁷ HBO recently announced that the company will offer a stand-alone HBO streaming service in 2015.³⁸ One category of programming that seems on an ever upward trend is the reality television show. Perhaps not surprisingly, some of those shows have spawned litigation, but in an area few expected—copyright infringement.

In 2000, CBS created the reality show *Big Brother* about a group of strangers who live together in a house, are cut off from the outside world, and compete with each other over a number of weeks until one person remains. In 2012, ABC created *The Glass House*, a reality show about a group of strangers who live together in a house, are cut off from the outside world, and compete with each other over a number of weeks until one person remains. The similarities between these two programs prompted CBS to file a lawsuit in federal court alleging copyright infringement, among other claims, against ABC.³⁹ CBS sought a preliminary injunction, emphasizing the “voyeuristic” feel and “unscripted” character of *Big Brother*, and that approximately 26 of *The Glass House* staff members formerly worked on *Big Brother*.⁴⁰ In comparing the two shows, CBS also produced testimony about:

- 1) the number and placement of cameras used to record the activities of the “cast” of the show;
- 2) the fact that the video streams live to the internet;
- 3) the fact that contestants are housebound for some or all of the period during which the show is shot;

³⁴ 17 U.S.C. § 107.

³⁵ *Brand Assets*, TWITTER, <https://about.twitter.com/press/brand-assets> (last visited Oct. 15, 2014).

³⁶ *Paulsson Geophysical Servs., Inc. v. Sigmar*, 529 F.3d 303, 309, 311 (5th Cir. 2008) (there must be “more than a mere possibility of confusion”). In determining whether a likelihood of confusion exists, courts consider the following nonexhaustive list of factors: (1) the type of trademark allegedly infringed, (2) the similarity between the two marks, (3) the similarity of the products or services, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant’s intent, (7) any evidence of actual confusion, and (8) the degree of care employed by consumers. No one factor is dispositive, and a finding of a likelihood of confusion does not even require a positive finding on a majority of these “digits of confusion.” See *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 194 (5th Cir. 1998); *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816, 830 (5th Cir. 1998).

³⁷ See <http://www.sidereel.com/> (last visited Oct. 16, 2014).

³⁸ *HBO Chairman and CEO Richard Plepler Announces HBO to Offer a Stand-Alone HBO Streaming Service in 2015*, TIME WARNER (Oct. 15, 2014) <http://www.timewarner.com/newsroom/press-releases/2014/10/15/hbo-chairman-and-ceo-richard-plepler-announces-hbo-to-offer-a>.

³⁹ Complaint For: (1) Copyright Infringement (17 U.S.C. § 101 et seq.) (2) Trade Secret Misappropriation (Cal. Civ. Code §§3426-3426.11); (3) Unfair Competition (Cal. Bus. & Prof. Code § 17200 et seq.); (4) Breach of Contract; (5) Breach of Fiduciary Duty; (6) Inducing Breach of Contract; (7) Inducing Breach of Fiduciary Duty; (8) Conversion; (9) Conspiracy; (10) Aiding and Abetting, *CBS Broad. Inc. v. American Broad. Cos., Inc.*, No. CV 12-04073 GAF-JEM, 2012 WL 1648840 at ¶ 152 (C.D. Cal. May 10, 2012).

⁴⁰ *CBS Broad. Inc. v. American Broad. Co., Inc.*, No. CV 12-04073 GAF-JEM (C.D. Cal. June 21, 2012).

- 4) the timing and scope of the post-production work;
- 5) the fact that the post-production does or does not involve editing of content;
- 6) the fact that shows commence airing before the final episode has been shot; and
- 7) the size of the production crew and the array of positions that are held by crew members.⁴¹

The court denied CBS's motion, writing that, while it "does not doubt that some copying has occurred," the "evidence...indicates that, under the substantial similarity test, CBS is not likely to prove that Glass House has misappropriated protectable elements of Big Brother."⁴² Among the court's reasons: copyright does not protect hard work, industriousness, persistence, perseverance, tenacity or resourcefulness; while the various procedures and processes CBS identified "may ultimately have an impact on the expressive elements of the show, 17 U.S.C. § 102(b) establishes that they are not within the ambit of copyright protection;" "CBS essentially seeks copyright protection in a voyeuristic reality show involving a group of 12 to 14 participants who compete for a grand prize while being subjected to round-the-clock observation while locked in a sound stage designed to give the appearance of a house."⁴³ Ultimately, the case settled, and *The Glass House* premiered in 2012 as scheduled.⁴⁴

In *Castorina v. Spike Cable Networks, Inc.*, the U.S. District Court for the Eastern District of New York held that the producers of a sports reality show did not own an enforceable copyright in the "basic concept" of the show.⁴⁵ In *Castorina*, plaintiffs Christopher Castorina and Steven Morse sued Spike TV for copyright infringement, claiming Spike TV's reality show *Pros v. Joes* infringed on the copyright of their reality show, *Two Left Feet*. Both shows were premised on the idea of pitting amateur sports fans against professional athletes in a variety of athletic competitions, and awarding cash prizes to the amateur athletes who won.⁴⁶ The district court found that the

copyrighted material in *Two Left Feet*, if any, flowed from the original way the producers arranged "stock elements" of a sports reality show, rather than from the concept of the show itself.⁴⁷ Although the court observed that *Two Left Feet*'s producers selected and arranged some of the show's concepts in an "artistic" way, the similarities between the shows did not rise to the level of copyright infringement.⁴⁸

ABC and Spike TV are not the only networks to air reality programs similar to those on other networks. *American Idol* (Fox), *The Voice* (NBC), and *Rising Star* (ABC) are all shows that allow singers to compete with each for viewers' votes. Arguably, CBS's concept for *Big Brother* itself could be said to be similar to the concept of MTV's *The Real World*. Luckily for television networks and aspiring producers seeking to capitalize on the success of reality show concepts, courts have generally found that reality show "ideas" are not copyrightable.

B. Music

For singers and musicians looking to move up in the music industry, or express themselves through a non-traditional medium, YouTube has become an alternative route to achieving fame. Justin Bieber began his career on YouTube singing cover renditions of popular songs. Like so many artists on YouTube, however, Bieber does not own the rights to many of the songs that first made him famous.⁴⁹

In 2013, the National Music Publishers' Association (NMPA) filed a copyright infringement lawsuit against Fullscreen, one of the largest suppliers of YouTube videos. NMPA argued that Fullscreen infringed on the copyrights of dozens of music publishers by producing videos containing unauthorized cover versions of the publishers' songs and neglecting to pay the publishers for any royalties earned from ad revenues.⁵⁰ The complaint included 74 songs that were alleged to have been used without licenses, including songs by Jay-Z, Katy Perry, Rihanna, and Brittany Spears.⁵¹ NMPA and Fullscreen settled in January 2014, with Fullscreen agreeing to

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ David R. Ginsburg, *Reality Television and the Limitations of Copyright*, HUFFINGTON POST: THE BLOG (June 24, 2012), http://www.huffingtonpost.com/david-r-ginsburg/glass-house-lawsuit_b_1622293.html (last Visited Oct. 15, 2014). *The Glass House* aired for one season. [http://en.wikipedia.org/wiki/The_Glass_House_\(2012_TV_series\)](http://en.wikipedia.org/wiki/The_Glass_House_(2012_TV_series)) (last visited Oct. 15, 2014).

⁴⁵ *Castorina v. Spike Cable Networks, Inc.*, 784 F. Supp. 2d 107, 111 (E.D.N.Y. 2011).

⁴⁶ *Id.* at 108-09.

⁴⁷ *Id.* at 111-12.

⁴⁸ *Id.* at 112-13.

⁴⁹ See Dan Schawbel, *Inside the Brand of Justin Bieber: An Interview with Manager Scooter Braun*, FORBES (Feb. 11, 2011), <http://www.forbes.com/sites/danschawbel/2011/02/11/inside-the-brand-of-justin-bieber-an-interview-with-manager-scooter-braun/> (last visited Oct. 16, 2014).

⁵⁰ Complaint, *Warner/Chappell Music, Inc. v. Fullscreen Inc.*, No. 13 CV 5472, 2013 WL 3992918 at ¶ 4 (S.D.N.Y. Aug. 6, 2013).

⁵¹ *Id.* at Exhibit A.

pay royalties to copyright holders and removing videos containing unlicensed music from its channels.⁵² Prior to its case against Fullscreen, NMPA settled a similar lawsuit with another popular YouTube channel, Maker.⁵³

This represents a shift in the relationship between music publishers and video producers, with both sides working together to foster creative expression on the Internet and compensate copyright holders for the use of their works. Both Fullscreen and Maker have also entered into licensing agreements with the Universal Music Publishing Group in an effort to avoid copyright litigation.⁵⁴ Members of the entertainment community should be cautious of publishing material that is not a wholly original work and continue to seek licenses and partnerships with copyright holders.

C. Photography

Fashion and portrait photographer Rachel Scroggins was surprised when she noticed that a picture she had taken of supermodel Karlie Kloss appeared on Kloss's Instagram account without crediting her as the photographer. Scroggins was even more surprised when the same picture, downloaded from Instagram, appeared on the websites of over a dozen fashion magazines from *Vogue* to *Harper's Bazaar*, again without mentioning Scroggins or compensating her for her work.⁵⁵

Today, with just two taps on a mobile device, an Instagram or Facebook user can download another user's photograph and send a copy of it around the world. Consequently, professional photographers like Scroggins continue to find their works published on the Internet without proper attribution and, more significantly, without compensation. Courts have just begun to address this thorny issue.

⁵² *NMPA and Fullscreen Reach Settlement Agreement*, NATIONAL MUSIC PUBLISHERS ASSOCIATION, (Jan. 8, 2014), <http://nmpa.org/media/showwhatsnew.asp?id=96>.

⁵³ *Press Release: NMPA Sues YouTube Network Fullscreen*, NATIONAL MUSIC PUBLISHERS ASSOCIATION, (Aug. 6, 2013), <https://www.nmpa.org/media/showrelease.asp?id=228>.

⁵⁴ Alex Pham and Ed Christman, *Universal Music Publishing Inks Deals with Fullscreen, Maker Studios*, BILLBOARD (Feb. 14, 2013), <http://www.billboard.com/biz/articles/news/1538590/univers-al-music-publishing-inks-deals-with-fullscreen-maker-studios>.

⁵⁵ Rachel Scroggins, *What Happens When a Supermodel Violates Your Copyright*, PETAPIXEL (Aug. 5, 2014) <http://petapixel.com/2014/08/05/happens-supermodel-violates-copyright/> (last visited Oct. 16, 2014).

1. Test Case: *Agence France Presse v. Morel*

When a 7.0 magnitude earthquake shook the island country of Haiti, Haitian photographer David Morel was one of first people on the ground capturing images of the devastation. Morel posted his photographs on TwitPic, a photo-sharing website that until recently allowed users to post pictures on Twitter. TwitPic user Lisandro Suero copied the photos and posted them on his TwitPic page, without credit to Morel. Shortly thereafter, Agence France-Press (AFP), a French news agency that offers an international photo service to the media, emailed Morel asking if he had the pictures. Minutes later, AFP downloaded thirteen pictures from Suero's TwitPic page. AFP licensed Morel's pictures to American photography agency Getty, and within 24 hours of Morel's initial TwitPic post, his pictures appeared on the CBS Evening News, CNN, the website of the New York Times, and in dozens of newspapers around the world. All images identified "AFP/Getty" as the authorized source of the photographs.⁵⁶

The district court denied AFP's motion to dismiss Morel's claims for direct copyright infringement, contributory infringement, and Digital Millennium Copyright Act (DMCA) violations.⁵⁷ The court rejected AFP's argument that Twitter encourages and permits broad re-use of content, such that any other Twitter user has a right to re-use copyrighted material.⁵⁸ In other words, the court said that media companies do not obtain rights to use photos simply because they appear on social media.

On November 22, 2012 a jury awarded Morel \$1.2 million for copyright infringement against AFP.⁵⁹ Morel's legal battle, which lasted for nearly four years, is seen as an important victory among the photographer community.⁶⁰

2. The "Selfie"

Identifying the copyright holder of a picture is easy when there is one person holding the camera. More complicated questions arise when a self-portrait, otherwise known as a "selfie," is taken by a group of people or someone other than a human being.

⁵⁶ *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 300 (S.D.N.Y. 2011).

⁵⁷ *Id.* at 308.

⁵⁸ *Id.* at 303.

⁵⁹ James Estrin, *Haitian Photographer Wins Major U.S. Copyright Victory*, N.Y. TIMES (Nov. 23, 2011), http://lens.blogs.nytimes.com/2013/11/23/haitian-photographer-wins-major-u-s-copyright-victory/?_php=true&_type=blogs&_r=0.

⁶⁰ *Id.*

A monkey in Indonesia made headlines around the world when she borrowed photographer David J. Slater's phone and began taking pictures of herself.⁶¹ The photographs soon went viral, prompting the U.S. Copyright Office to answer the novel question: Who owns the copyright to a picture taken by a monkey? The Copyright Office answered the question with "nobody." For a work to be copyrightable in the United States, it must have a human author.⁶² Even though the phone used to take the monkey's photograph belonged to Slater, he did not "create" the work and could not claim copyright holder status.

Similar ownership issues arise when a group of people take a selfie. During the 2014 Academy Awards, Ellen DeGeneres persuaded celebrities including Julia Roberts, Bradley Cooper, and Brad Pitt to pose with her in what became the most retweeted photo in Twitter's history.⁶³ The Associated Press attempted to get Ellen's permission to publish the photo, but attorneys for Bradley Cooper asserted that Cooper holds the copyrights to the photo because he actually snapped the photo.⁶⁴

By 2013, more than 250 billion photos had been uploaded to Facebook, with an average of more than 350 million photos uploaded daily.⁶⁵ There is no estimate as to how many of those posts include copyrighted material. To avoid copyright infringement, members of the entertainment community should take extra steps to ensure that the person or source from whom they have received a photograph has the authority to grant permission for its use. Just because a photograph appears on the Internet or social media does not mean that the copyright holder has given permission to third parties to publish the picture. As *Morel* demonstrates, failure to conduct due

diligence may have significant consequences. That is, unless a monkey took the picture.

D. Creative Commons Licenses

One of the most convenient ways to potentially avoid copyright infringement is by operating under a Creative Commons license. Creative Commons is a nonprofit organization founded to promote the free use of creative works. The organization aspires to reduce the transaction costs inherent in a traditional copyright licensing system by creating a user-friendly license system that allows authors to retain some rights in their works, while also allowing "certain uses."⁶⁶ Creative Commons maintains a searchable database, providing access to thousands of artistic works and their accompanying licenses.

Creative Commons licenses allow creators to tag their works with the following:

- 1) Attribution (BY)—the work may be used as long as credit is given;
- 2) Share-Alike (SA)—the work can be used freely, so long as the user likewise freely shares any derivative work;
- 3) Non-commercial (NC)—the work may only be used for non-commercial purposes; and
- 4) No Derivative Works (ND)—the work may be used freely as long as it is used on its own, without modification.

Creators often mix-and-match the tags. For example, a work tagged "BY-SA-NC" can be used for noncommercial purposes, as long as the user provides appropriate credit and makes any subsequent work freely available.⁶⁷

Users operating under a Creative Commons license, however, may not always avoid liability. For example, in *Chang v. Virgin Mobile USA, LLC*, the parents of a young girl sued Virgin Mobile and Creative Commons, Inc. for invasion of privacy, libel, breach of contract, and copyright infringement arising out of Virgin Australia's use of an image of the girl in a marketing campaign encouraging customers to "DUMP YOUR PEN FRIEND" and advertising "FREE VIRGIN TO VIRGIN TEXTING."⁶⁸ The picture had originally been uploaded to flickr.com by the girls' youth pastor with a Creative Commons CC-BY-2.0 license, which allows for commercial use of

⁶¹ Danny Cevallos, *When a monkey takes a selfie...*, CNN (Aug. 18, 2014), <http://www.cnn.com/2014/08/08/opinion/cevallos-monkey-selfie-copyright/>.

⁶² Rule 608, *Compendium of U.S. Copyright Office Practices: Third Edition*, U.S. Copyright Office, available at <http://copyright.gov/comp3/docs/compendium-full.pdf> (stating the U.S. Copyright office will refuse to register a copyright claim where "the work lacks human authorship").

⁶³ Philip Bump, *Paging Bradley Cooper's Lawyers: He Might Own Ellen's Famous Oscar Selfie*, THE WIRE (March 3, 2014), <http://www.thewire.com/politics/2014/03/paging-bradley-coopers-lawyers-you-might-own-ellens-famous-oscar-selfie/358758/>.

⁶⁴ *Id.*

⁶⁵ Cooper Smith, *Facebook Users Are Uploading 350 Million Photos Each Day*, BUSINESS INSIDER (Sept. 18, 2013), <http://www.businessinsider.com/facebook-350-million-photos-each-day-2013-9#ixzz3DIBTsAQ6>.

⁶⁶ *About*, Creative Commons, <https://creativecommons.org/about> (last visited Oct. 16, 2014).

⁶⁷ <https://creativecommons.org/licenses/> (last visited Oct. 16, 2014).

⁶⁸ *Chang v. Virgin Mobile USA, LLC*, 2009 WL 111570, *1 (N.D. Tex. Jan. 16, 2009).

the photo without obtaining permission from the copyright owner.⁶⁹ The youth pastor had taken the photo at a church event. The court dismissed the case on procedural grounds in 2009.

Chang illustrates that even though a picture is available under a Creative Commons license, publishing a photo in a different context could present a host of other liability issues. One should be mindful of these considerations before using any picture from Creative Commons for commercial, entertainment and/or journalistic purposes.

IV. TRADEMARK ISSUES

A. A Brave New Virtual World

Trademarks like the Starbucks logo and McDonald's arches abound in the real-world, but can a product receive trademark protection if it appears in a virtual world? In *Fortres Grand Corp. v. Warner Bros. Entertainment, Inc.*,⁷⁰ the Seventh Circuit explored this very question. Fortres Grand sells security software called "Clean Slate." The software is used to erase all prior use on a network computer so that each new user starts with a "clean slate."⁷¹ Fortres Grand owns a federal trademark registration for "Clean Slate" and has accumulated millions of dollars in software sales. A legal battle began over the Clean Slate trademark when fictional character Selina Kyle, otherwise known as Catwoman, used a computer software program similar to Clean Slate to erase her criminal history from computer databases in the movie *The Dark Night Rises*. The software program in the movie was designed by fictional company, Rykin Data, and it is mentioned throughout the film as providing its users with a "clean slate."⁷² During the marketing campaign for *The Dark Night Rises*, Warner Brothers also created two websites that allowed fans to access a fictional website for Rykin Data that provided descriptions of its computer erasing program.⁷³ Fortres Grand argued that Warner Brothers infringed on its trademark and caused its sales to decline due to a mistaken belief by consumers that its software was illicit or phony.

In upholding the district court's ruling granting Warner Brothers' motion to dismiss, the Seventh Circuit first focused on the traditional elements of a trademark infringement claim, namely whether Warner Brothers' actions could have resulted in confusion and

impacted consumer purchasing decisions.⁷⁴ The court rejected Fortres Grand's theory of "reverse confusion," whereby consumers believe that the "junior user" of a product is the product's originator. The court observed that because Warner Brothers does not sell merchandise similar to Fortres Grand's software, the only two products to compare under a trademark analysis were Fortres Grand's computer program and Warner Brothers' movie. Accordingly, the court found that Fortres Grand had not alleged any facts that "would make it plausible that a super-hero movie and desktop management software program are goods related in the minds of consumers in the sense that a single producer is likely to put out both goods."⁷⁵ While the court acknowledged that some actual confusion may have existed because of "Internet chatter", it observed that Fortres Grand had not alleged a case of actual confusion but rather mistaken belief about the nature of Fortres Grand's software.⁷⁶

The Seventh Circuit's decision in *Fortres Grand* is significant for entertainment companies who have invented virtual worlds using elements from real-life. The court's decision suggests some faith in consumers' ability to draw distinctions between products that exist in the real-world and those in an alternate reality. As the virtual universe expands through increased video game production and Internet use, legal battles about trademarks appearing in virtual reality will likely continue.

B. Hashtags

Social media has changed how people communicate. There is no greater evidence of this than the invention of the hashtag. Hashtags began on Twitter to allow users to quickly identify posts on related topics. They have since expanded to Facebook, Instagram, and are even used in common speech. There is a growing practice among businesses to use hashtags to promote products through marketing campaigns. For example, Nike and Starbucks have been successful in encouraging customers to post pictures of their products on Instagram accompanied by a hashtag including the companies' names.⁷⁷

⁷⁴ *Id.*; see also 15 U.S.C. § 1125(a)(1).

⁷⁵ *Id.* at *4.

⁷⁶ *Id.* at *5. Because the Seventh Circuit found there was no valid trademark claim, it did not address Warner Brothers' argument that the First Amendment protected the fictional software company as an expressive work.

⁷⁷ Clare O'Connor, *Starbucks and Nike Are Winning Instagram (And Your Photos Are Helping)*, FORBES (Feb. 13, 2014), <http://www.forbes.com/sites/clareoconnor/2014/02/13/starbucks-and-nike-are-winning-instagram-and-your-photos-are-helping/>.

⁶⁹ *Id.*

⁷⁰ 2014 WL 3953972 (7th Cir. Aug. 14, 2014).

⁷¹ *Id.* at *1.

⁷² *Id.*

⁷³ *Id.* at *2.

Companies can trademark a hashtag like any other product, as long as they provide a product or service to the public associated with that hashtag. A hashtag may be affiliated with a company's brand name, product, or slogan. For example, Starbucks uses #PSL to refer to pictures and posts about its the Pumpkin Spice Latte and owns a federal trademark registration for "PSL".⁷⁸ Dez Bryant, a wide receiver for the NFL's Dallas Cowboys, filed a trademark application last month for his Twitter hashtag, #ThrowUpTheX, for "news bulletins."⁷⁹

Social media websites like Twitter and Facebook have adopted trademark usage policies that are intended to protect trademark owners from having their trademarks stolen by unauthorized users. Twitter considers it a violation of its trademark policy for a user to use "a company or business name, logo, or other trademark-protected material in a manner that may mislead or confuse others with regard to its brand or business affiliation."⁸⁰ If Twitter concludes that a user has a "clear intent to mislead others through unauthorized use of a trademark," then the user's account can be suspended.⁸¹ To prevent confusion, Twitter suggests that users ensure their usernames do not include the trademarked name of a company, do not include another's trademark in a profile photo or background image, and that users do not communicate with others in an attempt to confuse them about the user's true identity.

Hashtags can be an effective, low-cost method of advertising. Weight Watchers has found success in its

#SimpleStart Plan.⁸² Doritos' #CrashTheSuperBowl Ads performed well.⁸³ In the UK, Domino's Pizza U.K. ran a promotion on March 5, 2012 from 9 a.m. to 11 a.m., in which Domino's promised to cut the price of the chain's Pepperoni Passion Pizza every time someone tweeted the hashtag #letsdolunch. After 85,000 tweets, the price dropped from £15.99 to £7.74.⁸⁴

Hashtags—like many other social media tools—can create PR nightmares, too. For example, in 2011 Qantas Airlines asked its Twitter followers, "What is your dream luxury inflight experience?" and suggested that they include the hashtag #QantasLuxury in their reply.⁸⁵ Unfortunately, the campaign began a day before Qantas became embroiled in a well-publicized battle with several labor unions over Qantas' contracts with its staff. The first tweet in connection with the campaign: the Twitter user stated he wanted "planes that arrive intact and on time because they're staffed and maintained by properly paid, Australia-based personnel." Qantas received "about 16,000 tweets and 17 million impressions, which were anywhere between sarcastic and critical..."⁸⁶

C. Mobile Apps: Apple's Trademark Policy

Mobile app design has become one of the most popular and potentially profitable jobs for aspiring web designers today. This is especially true when those apps are created for an Apple device. As of 2013, smartphones made up 56 percent of the American cell phone market, with Apple's iPhone accounting for 25 percent of the total.⁸⁷ For this reason, Apple offers

⁷⁸ See, e.g., "PSL", United States Patent and Trademark Office, <http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4805:01d333.2.4> (last visited Oct. 16, 2014).

⁷⁹ "Bryant's signature, 'ThrowUpTheX' has been a celebration that he's been delivering to crowds since high school that quickly became a trend adapted by fans and all throughout sports. Heisman Trophy winner Johnny Manziel and NBA stars Marcus Smart, Russell Westbrook, and LeBron James have all been seen 'throwing up the X', amongst others." <http://dez Bryant.com/latest-news/nfl-superstar-dez-bryant-launches-his-official-throwupthex-brand/> (last visited Oct. 16, 2014).

⁸⁰ Trademark Policy, Twitter, <https://support.twitter.com/articles/18367-trademark-policy#> (last visited Sept. 17, 2014). Twitter's Trademark Policy reads: "Using a company or business name, logo, or other trademark-protected materials in a manner that may mislead or confuse others with regard to its brand or business affiliation may be considered a trademark policy violation." So, Twitter users should be careful about using other companies' names as hashtags to promote their own brands or to suggest affiliation, as this may violate Twitter's policy.

⁸¹ *Id.*

⁸² Lisa Parkin, *Top Social Media Campaigns of 2014 So Far*, HUFFINGTON POST: THE BLOG (Mar. 27, 2014), http://www.huffingtonpost.com/lisa-parkin/top-social-media-campaign_b_5042513.html (last visited Oct. 16, 2014).

⁸³ *Id.*

⁸⁴ Todd Wasserman, *6 Successful Twitter Hashtag Campaigns*, MASHABLE (Mar. 23, 2012), <http://mashable.com/2012/03/23/twitter-hashtag-campaigns/> (last visited Oct. 16, 2014).

⁸⁵ Raz Godelnik, *What We Can Learn From the #QantasLuxury Fiasco About Twitter and Engagement*, TRIPLE PUNDIT (Dec. 5, 2011), <http://www.triplepundit.com/2011/12/learn-quantasluxury-fiasco-about-twitter-engagement/> (last visited Oct. 16, 2014).

⁸⁶ *Id.*

⁸⁷ Kevin Bostic, *Smartphones now account for 56% of US market, Apple's iPhone at 25% share*, APPLEINSIDER (Sept. 9, 2013), <http://appleinsider.com/articles/13/09/09/smartphones-now-account-for-56-of-us-market-apples-iphone-at-25-share> (last visited Oct. 16, 2014).

multiple resources to help guide new mobile app developers in their efforts to develop applications and prevent trademark infringement.

Apple's "Developer Page" begins with the following disclaimer:

"We have over a million Apps in the App Store. If your App doesn't do something useful, unique or provide some form of lasting entertainment, or if your app is plain creepy, it may not be accepted."⁸⁸

In other words, not only does Apple expect unique material in a potential mobile app, it also guards app developers against would-be copyright infringers. Just a few lines later, Apple explicitly states that it rejects apps that "attempt to cheat the system."⁸⁹

Developing "unique" applications may be easier said than done. With over 1 million mobile apps for sale on iTunes alone, app developers should be cautious of unintentionally infringing on another's trademark or copyright. For app developers who believe someone has infringed on their work, Apple has streamlined the process for reporting trademark or copyright infringement through an online tool where "copycat apps" can be reported.⁹⁰

V. CROWDFUNDING

Media entrepreneurs who lack the funds to produce their works through a traditional production studio have turned to the Internet to raise support for their projects. The practice known as "crowdfunding" allows artists to pitch ideas for webisodes, movies, music and games in a short video to solicit donations. The most famous crowdfunding website, Kickstarter, has helped generate \$1 billion from nearly 7 million people over the last five years. Crowdfunding provides a potential glimpse into the future of the entertainment industry and raises new questions for attorneys and their clients.

A. Ownership Issues

Kickstarter and some other prominent crowdfunding websites operate under a rewards-based system. Money that is given to support a project is treated as a donation, and it does not convey any ownership rights in the project or the possibility of return on the investment.⁹¹ The project's creator

retains complete control of the created work. This is different from an equity crowdfunding system, where donations are treated as investments and the giver owns some part of the project.⁹² Licensing agreements and royalties for successful Kickstarter projects impact only the project's creator, with its donors often earning only pride in having helped a once struggling entrepreneur.

Although projects on Kickstarter are owned by the project's creator, like other videos and projects on the Internet, Kickstarter projects may include copyrighted or trademarked material. Copyright and trademark law apply to crowdfunding projects just like any other user generated content that is posted on the Internet. Kickstarter disavows itself of any liability for the improper use of protected material that is used in projects on its website.⁹³ Therefore, before a burgeoning Steven Spielberg decides to use a piece of music in the opening scene of his video, he should make sure that he has secured all necessary approvals and licenses.

B. SEC Regulations

One of the legal questions surrounding crowdfunding is whether individuals raising money through crowdfunding websites are subject to the U.S. Securities Act. An investment contract subject to SEC regulation usually includes some expectation of profits for the investor.⁹⁴ Therefore, rewards-based crowdfunding systems like Kickstarter are not likely to involve "securities" subject to federal securities law. However, an entity using an equity crowdfunding model may be deemed to offer "securities" and, as a result, find their fundraising activities governed by federal or state securities regulations.⁹⁵

The SEC has been skeptical of crowdfunding efforts, but until recently, had few rules designed to regulate this type of fundraising system. This changed in 2012 when Congress passed the Jumpstart Our Business Startups Act, otherwise known as the JOBS

⁸⁸ *App Store Review Guidelines*, APPLE, <https://developer.apple.com/app-store/review/guidelines/> (last visited Oct. 16, 2014).

⁸⁹ *Id.*

⁹⁰ *See iTunes Content Dispute*, APPLE, <http://www.apple.com/legal/internet-services/itunes/appstorenotices/> (last visited Oct. 16, 2014).

⁹¹ C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 17 (2012).

⁹² *Id.* at 24.

⁹³ For example, Kickstarter's website reads "Using another party's trademark-protected materials in a way that confuses or misleads others may be considered trademark infringement and a violation of Kickstarter's trademark policy." *Trademark Policy*, KICKSTARTER, <https://www.kickstarter.com/help/trademark> (last visited Oct. 16, 2014).

⁹⁴ *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

⁹⁵ Bradford, *supra* note 64 at 30-31.

Act.⁹⁶ Title II of the Act addresses equity crowdfunding directly, referring to startup businesses that raise “actual investment funds from individuals in exchange for equity or a share of the profits.”⁹⁷ In October 2013, the SEC proposed rules that would permit entrepreneurs to raise up to \$1 million a year through equity crowdfunding efforts via an SEC-registered online “funding portal,” without themselves having to register with the SEC.⁹⁸ These offerings are subject to a number of limitations and disclosure requirements. For example, if a project does not reach its target amount, the proposed rules require that all amounts received in the offering are returned.

It is worth reemphasizing that the JOBS Act and proposed SEC rules apply only to equity crowdfunding efforts and do not regulate rewards-based systems like Kickstarter.⁹⁹ Kickstarter has maintained its position that it will not participate in equity crowdfunding. However, as more startups look to crowdfunding to raise money, there is a far greater incentive for individuals to give money under an equity system in hopes of seeing a return on “the next big thing.” For example, if Mark Zuckerberg had used equity crowdfunding to back his idea for Facebook, a small group of investors would have experienced extraordinary gains. The SEC’s proposed crowdfunding rules are not yet effective, and the laws surrounding this relatively new practice are likely to expand and evolve. Additionally, a number of states have moved to adopt their own crowdfunding rules governing intrastate offerings.¹⁰⁰

VI. PRACTICAL TIPS

This paper presented a quick survey of some of the current legal issues associated with managing media content online. Drawing from the cases and regulations discussed above, below are some practical tips to consider:

- Ensure that your website complies with the most stringent state’s Internet privacy laws.
- Do not assume lack of copyright notice means that the work is not protected by copyright.
- Consider trademark issues before using marks in the virtual world or in social media.
- Before using a Creative Commons work, read the license to make sure your intended use is covered by the license.
- Use of Creative Commons works may compromise copyright rights in your own works, or in work licensed to you.
- Conduct due diligence to make sure the licensor of a creative work is the copyright owner.

⁹⁶ Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified in scattered sections of 15 U.S.C.).

⁹⁷ *Id.* §§ 301-305, 126 Stat. at 315-23.

⁹⁸ *Crowdfunding*, Securities and Exchange Commission, available at <http://www.sec.gov/rules/proposed/2013/33-9470.pdf>.

⁹⁹ Catherine Clifford, *As Commentary Period Closes, Debate Over Equity Crowdfunding Rules Rages On*, ENTREPRENEUR (Jan. 24, 2014), <http://www.entrepreneur.com/article/231043>.

¹⁰⁰ Steven Overly, *As federal regulators move slowly on equity crowdfunding, states adopt their own rules*, WASHINGTON POST (Aug. 24, 2014), http://www.washingtonpost.com/business/capitalbusiness/as-federal-regulators-move-slowly-on-equity-crowdfunding-states-adopt-their-own-rules/2014/08/22/81c6da54-2942-11e4-958c-268a320a60ce_story.html.