

Copyright and Social Media

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Overview

1. The big picture

- Some definitions
- A shifting framework
- The legal framework

2. When copyright meets social media

- Scope of application of the CopA
- The author rights at stake
- Exceptions

3. Parties, rights and duties

- The user's perspective
- The author's perspective
- The social media operator's perspective

The big picture

What is a social media?

- According to the federal Council:

«Social media or social networks are more or less open platforms, interactive and participative, that allow to communicate, build and maintain rapports with people»

Source: Federal Council, cadre juridique pour les medias sociaux, Rapport du Conseil federal en réponse au postulat Amherd du 29.09.2011, p. 2

- Encourage the exchange, research or diffusion of information
 - The user can publish
 - Or share published content
- Wide range of communication means
- Small costs for users to publish a widely available content

The forces at stake

Judicial framework:

- GDPR (General Data Protection Regulation)
- Revision of the Swiss copyright act
- Risks of sanction for the operator

Social framework:

- Changes in terms of usages
- Smartphones
- New types of practices

The forces at stake

Economic framework:

- «free» product
- Advertising revenues
- A strategy focused on growing

Technology:

- More bandwidth / higher speeds
- More storage
- Strong computing power from everywhere

... resulting in various categories...

Depending on the **content**:

- Wikies vs. YouTube

Depending on the **relations**:

- Specific group vs. everybody

Depending on the **function**:

- Hosting, exchange, information, education, publication vs. Putting people in touch

Depending on the **financing model**:

- Commercial vs non-commercial

Depending on how the user participate:

- A tweet or a Wikipedia page?
- A specific circle vs the world?

... Challenging copyright law

The picture changes over time...

- New usages
- Previously unplannable cooperation
- The distinction between author, producer and user is blurred
- The distinction between private and public communication is harder
- Data is processed everywhere

Legal framework

No loophole

- From a Swiss perspective, there is no specific piece of legislation designed especially for social media
- No “lex specialis” does not mean that there is a gap in the Swiss legislation
- The Swiss copyright act, although drafted before the revolution induced by the development of internet, also regulates the use of protected works on social media

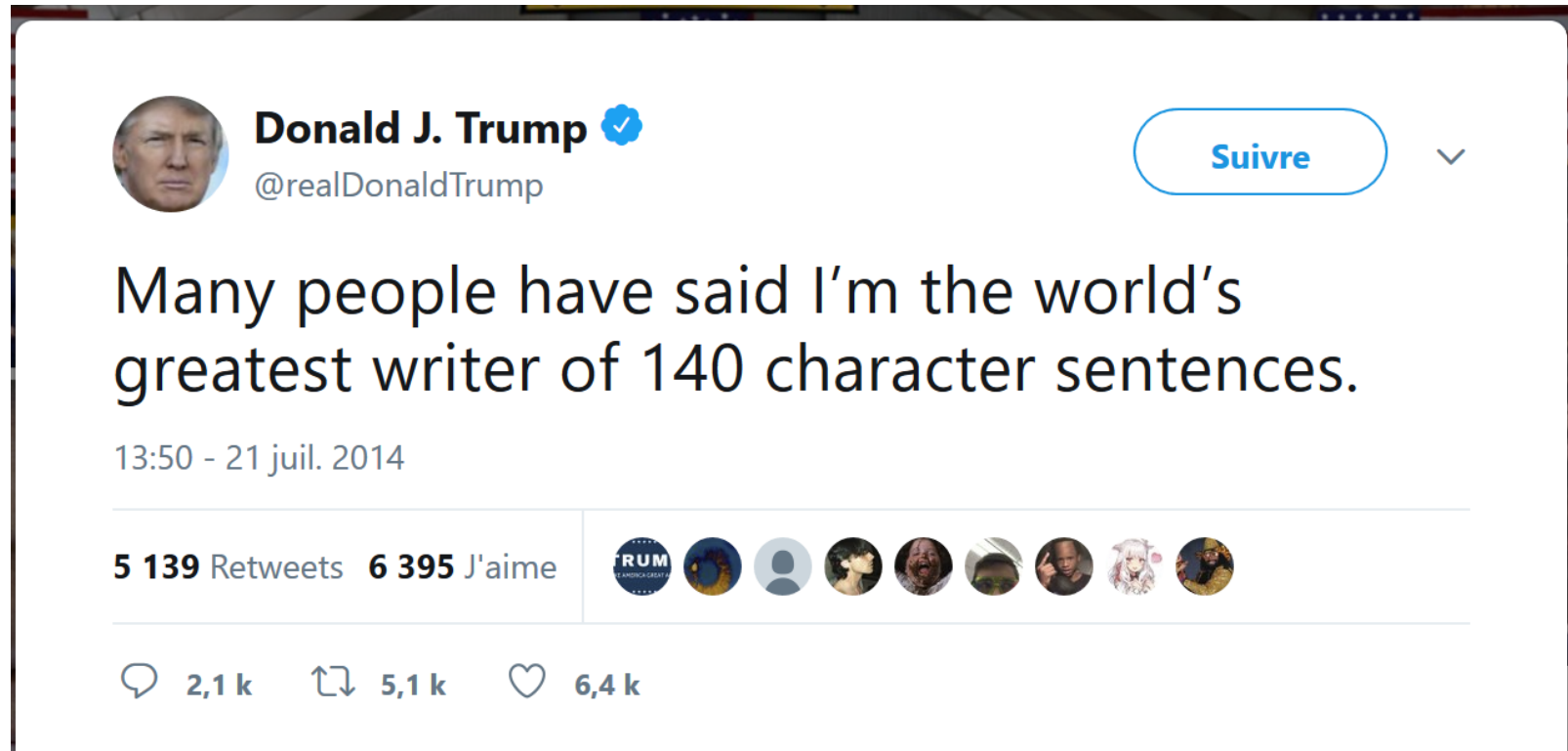
Scope of application of the Copyright Act

Article 2 § 1 CopA:

*“Works are literary and artistic **intellectual creations** with an **individual character**, irrespective of their value or purpose”*

Moreover, the work must be **expressed**.

Are tweets protected?



D. Trump, from @realDonaldTrump, 21.07.2014

Question



1) Shall a tweet be considered as work according to the definition of article 2 § 1 CopA?

- a) Yes, according to the Swiss legislation, the means of expression is irrelevant
- b) No, tweets cannot be considered as intellectual creations
- c) It depends on the tweet and its context

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Particular content

Texts

- According to article 2 § 2 CopA, «*literary, scientific and other linguistic works*» are considered as work.
- Examples: poems, plays, fictions, articles but also tales or speeches.
- As long as they have an **individual character**.

Particular aspects of literary works from social media

- Blogs
- Articles from Wikipedia
- Discourses on YouTube

Particular content

Photos

- According to article 2 § 2 let. g: «*photographic, cinematographic and other visual or audio-visual works*» are protected.
- But as long as they have an **individual character**
- And are **intellectual creations**

So, are photos you post or share covered by the CopA?

- It depends on the composition
- But the federal supreme court has a restrictive approach

Particular content



Source: <https://www.nextinpact.com/news/89381-le-selfie-d-un-singe-n-est-pas-protege-par-droit-d-auteur.htm>

Question



2) I want to put on my page an image given by a friend. Sadly, he is unable to tell me where he found it or if the author was credited. Shall I publish it anyway?

- a) Yes. Everyone can post what they want
- b) No, the author has the right to be mentioned as the creator when his/her work is reused

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Right of paternity

According to article 9 CopA:

«The author has the exclusive right to his own work and the right to recognition of his authorship»

- Right to define by what given name the author wants to be credited.
- Right to be recognized as the author.
- Problems in relation to social media:
 - The work is easily reproduced
 - The practice does not imply the citation of the author

Question



3) I decide to edit a photo that I found while following an artist that I like. To what extents can I publish the result?

- a) It depends on the scope of the editing. Improving small details are permitted, as long as the work is not denatured
- b) The right of integrity covers any type of editing, no matter the opportunity or the range of the modifications. I must thus ask the author.
- c) The question is complicated; however, some social media provide particular rules applicable between the user and the author. Some even agree to submit their work to Creative Commons licenses which simplify the work
- d) It is not possible to modify the work without the author's consent. However, fan fictions are permitted, as long as we can distinguish them enough from the original work

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Right of integrity

According to article 11 al. 1 let. a CopA:

« The author has the exclusive right to decide:

- Whether, when and how the work may be altered;*
- Whether, when and how the work may be used to create a derivative work ».*

- With Internet, the work can be easily reproduced and altered or set in a context that infringes the right to integrity.
- Limitations such as the number of characters, or a certain length or resolution may put the work out of context.
- Research function enables the user to focus on a part of the work.

Question



4) I am writing an article, and I send it via Facebook to some friends for proofreading: Have I published my work?

- a) No, they know that it is not the definitive version
- b) Yes, my article is now anywhere and I have absolutely no mean to control its dissemination
- c) It depends on the circle of friends who have access to it
- d) The transmission operation has no impact as such: It is only depending on my wish to publish it

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Right to authorize first publication

According to article 9 al. 2 LDA:

«The author has the exclusive right to decide whether, when, how and under what author's designation his own work is published for the first time.»

- A work is published when it is made accessible to an amount of recipients that is no longer controllable by the author.
- The circle of recipients is difficult to assess on social media.
 - Assessing the existence of publications is harder.

Question



5) I want to digitize an article so that my friends on the class's WhatsApp group can read it. Is it subject to the copyright law?

- a) Yes, the existence of a reproduction is not related to the identification of the support
- b) I have no idea about how the work is stored on WhatsApp's distant servers. It is thus none of my business
- c) The copy on my phone is my property and not the legislator's business
- d) Today, everything is digital: only the access to the work is important from a copyright perspective
- e) I guess that it is a reproduction, but I benefit from the exception for educational purposes

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Reproduction rights

According to article 10 al. 2 let. a LDA

«the author has the right to produce copies of the work such as (...) data carriers».

- A copy is made when the work is incorporated in a durable material.
 - Digital supports such as hard drives.
 - But also temporary copies in some situations.
- Digitization is thus a reproduction
- What happens with hyperlinks?

Right to distribution

According to article 10 al. 2 let. b, the author has the right:

«to offer, transfer or otherwise distribute copies of the work»

- Any act of disposal is encompassed by the definition.
- Does the transmission of a work on the network, which results in the creation of a local copy, correspond to a distribution?
 - Access on demand always implies the distribution
 - Or is it limited to physical copies?
- Be careful: your usage might infringe other rights

Question



6) My favorite author just published a new work. His profile is accessible to everybody. Shall I take his work and republish it?

- a) Yes, his profile is public: my republication is not extending the access to the work
- b) It depends on the technical means used. A link to his profile, including a miniature of his work is ok, but reposting it is risky
- c) It is ok as long as the author is credited
- d) No previous possibility is permitted according to the CopA

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Performing right

According to article 10 al. 1 it. C, the author has the right:

«to recite, perform or present a work, or make it perceptible somewhere else or make it available directly or through any kind of medium in such a way that persons may access it from a place and at a time individually chosen by them»

- Corresponds to any situation where the work is perceptible on demand
- Posting a work, for example on YouTube violates the performing right
- A link is not enough
- And a retweet?

The participant's perspective

WHAT ARE THE RIGHTS, RISKS AND DUTIES OF THE DIFFERENT PARTICIPANTS?

The user's perspective

A crucial role in the mere functioning of social media:

- Create
- Generate
- Communicate (and define the recipients of his or her communications)
- Create links
- Define what is visible

No longer a mere visitor but also a « content provider » who is also the recipient of the communications of other « content providers ».

Result:

- The user is no longer passive

The user's perspective

The principle:

- The Author has the monopoly over the use of his or her work.
- The user is then responsible for the compliance with the CopA of the content he or she makes available.
- Only works according to article 2 are protected.

The exceptions:

- The CopA provides exceptions to the author's monopoly.
- These exceptions can also be taken in account for social media.

Question



7) Is a “friend” on Facebook considered as “closely connected”?

- a) Yes
- b) No, this notion has to be interpreted restrictively
- c) It depends, I might be close enough to some, but not to all of them

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The user's perspective

The private use:

According to article 19 al. 1 lit. a:

« published works may be used for personal use, or use within a circle of persons closely connected to each other ».

- Restrictive approach: a simple social link is not enough

The user's perspective

What about « friends » on Facebook?

- The uploading of a work on Facebook:
 - The uploader: violation of the right to distribution.
 - The user: private use, unless reuploading (YouTube).
 - What happens when the publication is restricted?
- An other type of social media: WhatsApp
- What about the use of a social media within your organization?

Question



8) May I share a work that is no longer available on the market with my students through a social media?

- a) No
- b) Yes, the exception for educational purpose is not limited to what happens “physically” in the classroom

Question



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a) No

b) Yes, the exception for educational purpose is not limited to what happens “physically” in the classroom

The use of a work for educational purposes

The use of a work by a teacher and his class for educational purposes:

- Private use according to article 19 al.1 let. b
- Restricted by its goal: the use of the work must serve the purpose of teaching.
- Restricted by its scope: the complete or substantial copying of a work obtainable commercially is prohibited.
- The use of social media can be covered by the exception for educational purposes, but:
 - What if an author publish a work that would be useful for teaching?
 - Can a student transfer or upload the teacher's lessons?
 - What happens when your organization uses social media?

The author as a content provider

- A lot of reasons might lead the author to willingly decide to make his work available on the social media.
- However, the author, as a user of the social media has to agree with their terms and conditions.
- It is then necessary to be very cautious in order to limit the risks.

The author as a content provider

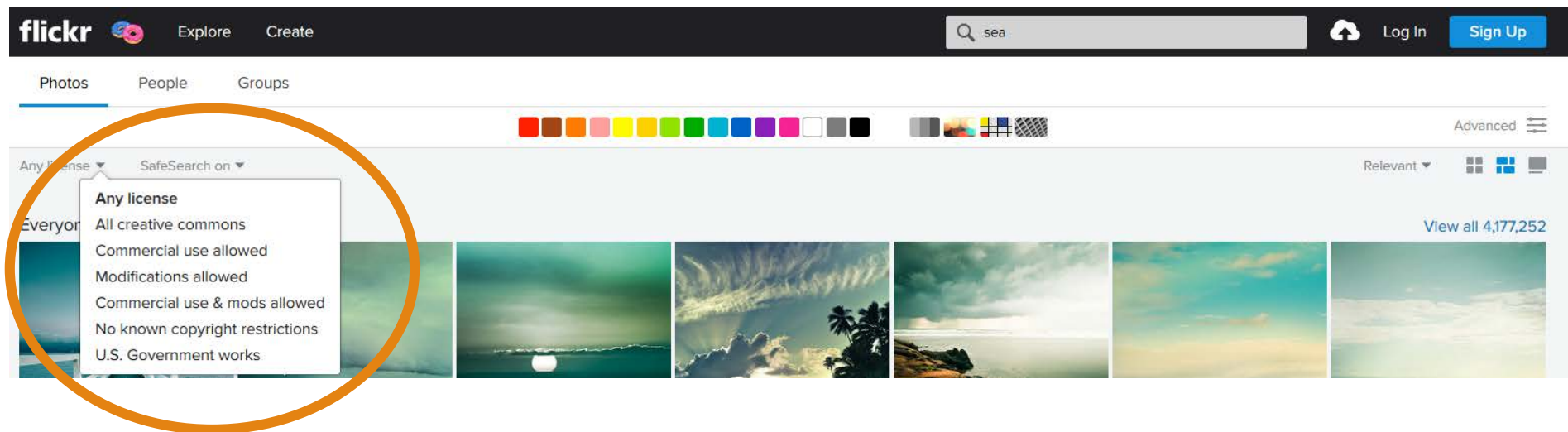
- On Wikipedia, the author agrees with the license CC BY SA 3.0
- Users are free to share
- Users are free to adapt
- Users agree to publish derivative works under the same conditions
- Users mention the source
- Can I require different rules?



The author as a content provider

Flickr:

- The user can choose within a set of licenses



Other: the author keeps his rights

But Be careful with terms and conditions !

Social media terms and conditions

Facebook's terms and conditions:

*«Specifically, when you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Products, **you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content** (consistent with your privacy and application settings). This means, for example, that if you share a photo on Facebook, you give us permission to store, copy, and share it with others (again, consistent with your settings) such as service providers that support our service or other Facebook Products you use.»*

Source: Facebook's terms and conditions, art. 3 § 3 (<https://www.facebook.com/legal/terms/update>)

Social media terms and conditions

YouTube terms and conditions:

*«When you upload or post content to YouTube, you grant to YouTube, **a worldwide, non-exclusive, royalty-free, transferable licence (with right to sub-licence) to use, reproduce, distribute, prepare derivative works of, display, and perform that Content** in connection with the provision of the Service and otherwise in connection with the provision of the Service and YouTube's business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels»*

Source: YouTube's terms and conditions, art. 8.1 (<https://www.youtube.com/static?gl=GB&template=terms>)

The author whose work is used on social media

The exclusive rights of the author can be in theory enforced through numerous actions:

- Under civil law;
- Under criminal law.

In fact, the enforcement is difficult:

- An increasing exchange of data;
- Difficulties to find who is responsible;
- The copy of the work is located abroad;
- The use is also changing.

What to do in case of violation?

The operator

According to article 50 CO:

«Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the injured party»

The operator can be qualified as a participant in two situations:

- The operator knows the unlawful damage
 - And doesn't take measures
- The operator should have known the unlawful damage
 - And, negligently, doesn't take measures

This topic is highly discussed

Problems of “over blocking”

The operator

Measures:

- YouTube content ID
- Contact and signalization

Conclusions

1. There is neither special regulation nor legal no man's land: remember that copyright rules can be applicable.
2. Always ask yourself if you are in presence of a work or not.
3. If so remember that sharing a work on the social media is potentially infringing copyright law.
4. Is your intended use covered by an exception?
5. Different framework are set by social media operators: take care of their rules, both as an author or as a user
6. You have access to an unimaginable range of tools: Use them!
7. Do not fear to contribute, but remember that you can sometimes be both the author and the user.

Thank you for listening!

If you have any questions, please write to:
info@ccdigitalaw.ch