

Intellectual Property Law in Cyberspace

Third Edition

**Excerpt from Chapter 4: Using and Protecting
Works in an Online and Mobile World**

Section II.F: Social Media and Virtual Worlds

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Intellectual Property Law in Cyberspace

Third Edition

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I. THE “VIRTUAL” COPYRIGHT

The Internet and its various related applications—Web sites, social media networks (Facebook, Twitter, Instagram), mobile applications, virtual reality, shareware, etc.—make it easier than ever for individuals to express themselves creatively and to communicate their creative works to millions of others. The Internet, social media, and mobile technology have become the ultimate tools for achieving the fundamental purpose of copyright law: making information and creative works instantly and readily available to all of society.

Of course, that same accessibility by society is the reason that copyrighted works are misused more frequently on the Internet and related applications than in any other medium. In addition, advances in technology have given rise to novel scenarios that test the extent of copyright protection and, in fact, have presented some of the most glamorous legal showdowns between the owners of copyrighted works and groups who feel that Internet-based content should be free to use and share under the First Amendment. The conflicts between, for instance, the recording industry and the creators of file-sharing music pirates (such as the original Napster) and their users resulted in updates and extensions to existing copyright laws as courts and lawmakers attempted to balance the rights of copyright owners with the dissemination of information across the Internet to the benefit of users and society. New technologies such as virtual reality and virtual worlds, and the omnipresence of mobile technology will pose further challenges to copyright owners.

Whether in the virtual or the real world, the legal standards are the same regarding: (1) the definition of a copyright and the purpose underlying copyright protection; (2) the requirements for a work to be protected by copyright; and (3) what constitutes infringement of a copyright. A copyright consists of a bundle of rights that are divisible. Author Stephanie Meyer does not have just a single copyright interest in her novel, *Eclipse*; she has interests in the North American hardcover, European paperback, the overall *Twilight Saga* series, the audio book, film adaptation, and interactive games, just to name a few. Meyer also has a bundle of exclusive rights in the copyright which control the work and as copyright owner may exercise any of these rights—say, the right to distribute copies—with respect to all or just a few of the copyright interests in the work. For example, Ms. Meyer may give one book publisher the rights to reproduce and distribute *Eclipse* in hardcover book form, may give an e-book publisher the rights to reproduce and distribute an abridged version of the book in electronic form, and may give a movie studio the right to make a derivative work—the adaptation of the novel to film.

Other courts have reached a different conclusion. For example, in *Patrick Collins, Inc. v. Does 1–8*,⁶⁸⁹ the United States District Court for the Eastern District of Pennsylvania found that the plaintiff had not sufficiently alleged that the defendants had participated in the same transaction or occurrence. The court noted that the “[m]ere fact that any of the Doe Defendants may have allegedly clicked on a command to participate in the Internet file sharing does not mean that each, together, was part of the downloading done by hundreds or thousands of individuals.”⁶⁹⁰ The court particularly noted that the allegations involved activities that occurred over the course of a seven-week period. The court found that in these circumstances, permitting joinder was not only impracticable, but would undermine Rule 20(a)’s purpose of promoting judicial efficiency, would “go against notions of fundamental fairness,” and would “ultimately cause prejudice to defendants.”⁶⁹¹

Finally, even if a plaintiff is able to obtain discovery and identify the party that subscribes to the IP address that was involved in a BitTorrent swarm, that alone may not be sufficient to prove liability. In *Malibu Media, LLC v. Fitzpatrick*,⁶⁹² the plaintiff had moved for summary judgment based on evidence that the defendant’s ISP had named the defendant as the subscriber of the IP address that had illegally downloaded three of the plaintiff’s movies. The court denied summary judgment on the grounds that this evidence was not sufficient to support a finding of liability on summary judgment because the plaintiff had not produced any evidence that the defendant himself downloaded or redistributed the copyrighted works.⁶⁹³

F. Social Media and Virtual Worlds

The emergence of new forms of communication and interaction, such as virtual reality, virtual worlds, and social media, has created new challenges and issues for copyright owners. Social media has revolutionized the way we communicate and network. Through YouTube, Facebook, Twitter, Tumblr, Spotify, Pinterest, or personal blogs of various types, billions of online users are sharing, linking, embedding, and cutting and pasting copyrighted content as a common practice. The viral nature of these platforms makes it more challenging to control unauthorized reproduction and distribution of copyrightable material.

⁶⁸⁹No. 2:11-cv-07252, 2012 WL 1686071 (E.D. Pa. Mar. 8, 2012).

⁶⁹⁰*Id.*

⁶⁹¹*Id.* See also *Hard Drive Prods., Inc. v. Does 1–188*, 809 F. Supp. 2d 1150, 1164 (N.D. 2011). The disadvantages of joinder of BitTorrent swarms also include delays in the disposition of cases, plaintiffs’ avoidance of paying separate filing fees, and pressure on individual defendants to settle because of the higher costs in multi-party litigation. *Malibu Media*, 950 F. Supp. 2d at 784.

⁶⁹²No. 1:12-CV-22767, 2013 U.S. Dist. LEXIS 149495, 2013 BL 289531 (S.D. Fla. Oct. 17, 2013).

⁶⁹³*Id.*, 2013 U.S. Dist. LEXIS 149495, at *12–13.

Copyright laws apply to social media in the same way as traditional forms of media. For example, there is little question that the posting of a photo on a social media platform is a form of reproduction that could violate a copyright owner's exclusive rights if such posting was not authorized. As a practical reality, most posts are of a personal and noncommercial nature, and therefore probably qualify as fair use. However, if the use involves valuable copyrighted material or is used in a commercial context, it will be more difficult to assert fair use to defend against infringement or misappropriation of another's intellectual property on social media.

An example of this is the case of *North Jersey Media Group, Inc. v. Pirro*.⁶⁹⁴ There, a newspaper publisher sued Jeanine Pirro and Fox News Network (collectively Fox) for copyright infringement.⁶⁹⁵ Fox had posted a version of the “now iconic photograph of three firefighters raising the American flag at the ruins of the World Trade Center” juxtaposed against “the classic World War II photograph of four U.S. Marines raising the American flag on Iwo Jima” on their Facebook page to commemorate the anniversary of the September 11th terrorist attacks.⁶⁹⁶ Fox claimed fair use, and moved for summary judgment.⁶⁹⁷ Denying Fox's motion, the district court considered the established fair use factors as it would in any fair use case. It recognized, however, that the “Me too”⁶⁹⁸ nature of social media posting and reposting can factor against transformativeness, an important part of the fair use balancing.⁶⁹⁹

Terms that social media platforms require users to accept as a condition to use the platform also present important copyright issues. Most social media sites do not claim ownership of the work that users post on their sites; the copyright is still retained by the owner. But they will usually require the user to grant the social media platform a broad license to use and distribute the posted work, without any license fee or payment. For example, Twitter's Terms provide as follows:

By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed). This license authorizes us to make your Content available to the rest of the world and to let others do the same. You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submit-

⁶⁹⁴74 F. Supp. 3d 605, 113 USPQ2d 2010 (S.D.N.Y. Feb. 10, 2015).

⁶⁹⁵*Id.* at 609, 113 USPQ2d at 2011.

⁶⁹⁶*Id.*, 113 USPQ2d at 2011 (footnote omitted).

⁶⁹⁷*Id.*, 113 USPQ2d at 2011.

⁶⁹⁸When the picture was posted on Fox's Facebook page on September 11, 2013, the hashtag “#neverforget” was trending on social media. *Id.* at 611 n.4, 113 USPQ2d at 2012 n.4. The juxtaposition of the 9/11 flag raising and the Iwo Jima flag raising was also not new—the production assistant who posted the image to Fox's Facebook page found it by searching “9/11” in Google. *Id.* at 610–11, 113 USPQ2d at 2012. This led the court to question “whether the commentary Fox News wished to convey created anything new at all, much less anything transformative.” *Id.* at 617, 113 USPQ2d at 2017.

⁶⁹⁹*Id.*, 113 USPQ2d at 2017.

ted to or through the Services available to other companies, organizations or individuals for the syndication, broadcast, distribution, promotion or publication of such Content on other media and services, subject to our terms and conditions for such Content use. Such additional uses by Twitter, or other companies, organizations or individuals, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services.⁷⁰⁰

Copyright owners need to be aware of the broad license they are granting when posting their copyrighted material.

The emergence of mobile applications that allow the transmission of content, such as Periscope, Snapchat and other live streaming technologies, implicate copyright as well. Recording a performance of a song, for example, could infringe the copyright in both the underlying musical composition as well as the performance by the artist. Transmitting a copyrighted broadcast of a professional sports event likely violates copyright interests that professional leagues or broadcasters often claim in such events.⁷⁰¹ However, it is less certain whether independently recording and streaming that same sports event, as opposed to streaming another's broadcast, violates copyright law unless there is a copyrighted subject matter in the event itself, such as music or choreography. Some courts have noted that the underlying sports event does not qualify as a copyrighted work entitled to copyright protection.⁷⁰²

Virtual reality and virtual worlds have emerged as important platforms for education, entertainment, and human interaction. Virtual reality is a computer-generated simulation of a three-dimensional space, which allows users to experience digital space as if they are exploring a real physical environment. Often users will wear a headset over their eyes and ears that displays the virtual environment and blocks out the physical world. The movements of the user's head, body, or a handheld device can influence or change the virtual environment the user experiences.

The underlying computer code that generates these virtual realities and virtual worlds are protectable as computer programs under the Copyright Act. In a recent jury verdict, Oculus VR LLC (a subsidiary of Facebook Inc.) and some of the company's executives were held liable for \$500 million in damages stemming from a dispute with ZeniMax Media Inc. over virtual reality (VR) technology and the software that powers VR.⁷⁰³ Of this, \$50 million was based on copyright infringement of ZeniMax's code. As this text goes to print, Oculus is seeking judgment as a matter of law against the copyright decision, claiming that the court applied improper tests of copyright infringement and that ZeniMax did not carry its burden of proof. But the \$50 million verdict does show that courts and juries remain willing to enforce copyright over computer code.

⁷⁰⁰ See <https://twitter.com/en/tos#usContent> (accessed June 28, 2017).

⁷⁰¹ See note 40 *infra*.

⁷⁰² *NBA v. Motorola, Inc.*, 105 F.3d 841, 843–45 (2d Cir. 1997).

⁷⁰³ Charge to Jury, Document 914 filed on February 1, 2017 in *ZeniMax Media Inc. v. Oculus VR LLC*, No. 3:14-cv-01849 (N.D. Texas).

The more interesting and more rapidly evolving question is the scope of copyright protection for the virtual environments themselves, given their ever changing nature and the risks of depicting third-party content in a virtual environment.⁷⁰⁴ These issues have come up in *Second Life*, an online virtual world where users control “avatars” to interact with their digital surroundings. *Second Life*’s developer, Linden Research, Inc., sells parcels of virtual real estate called “islands” and allows users to “change the topography and landscape” of the islands through a process called “terraforming.”⁷⁰⁵ In *FireSabre Consulting LLC v. Sheehy*, a copyright dispute arose after the defendants refused to pay for “digital design services” that FireSabre performed by terraforming a group of islands.⁷⁰⁶ The defendants contended that “terraforming is not eligible for copyright protection because it is not a ‘fixed’ work” for purposes of copyright.⁷⁰⁷ Denying the defendants’ summary judgment motion, the district court found this argument “meritless,” explaining that FireSabre’s designs were “visible within Second Life” for more than a “transitory duration” and “sufficiently permanent” for user interaction.⁷⁰⁸ The court found no difficulty applying copyright to the digital landscaping as it would apply to physical designs.

In addition to terraforming, *Second Life* users can create virtual objects and buy or sell these objects using virtual currency called Linden Dollars.⁷⁰⁹ Eros LLC and Shannon Grei designed virtual objects for use in *Second Life*, and sold them to other users.⁷¹⁰ Because their creations were valuable, imitators began copying their designs. Eros and Grei sued Linden Research, claiming that Linden made “copyright infringement free and easy, turning the Second Life community into a vast virtual flea market in which users peddle knockoffs and pirated copies of IP-protected products.”⁷¹¹ Eros and Grei ultimately filed dismissals, presumably accepting a settlement offer.⁷¹²

The scope of fair use in virtual reality is still uncertain. For example, attempts to depict actual physical environments incur a risk that copyrightable materials, such as artwork, sounds, logos, and characters, will need to appear for a realistic experience. Courts will have to analyze each of these situations under the fair use principles to provide guidance to developers and users of virtual reality systems.

⁷⁰⁴ See Chapter 14 for a discussion of virtual property.

⁷⁰⁵ *FireSabre Consulting LLC v. Sheehy*, No. 11-CV-4719, 2013 U.S. Dist. LEXIS 139550, at *1–2 (S.D.N.Y. Sept. 26, 2013).

⁷⁰⁶ No. 11-CV-4719, 2013 U.S. Dist. LEXIS 139550, at *1–2 (S.D.N.Y. Sept. 26, 2013).

⁷⁰⁷ *Id.* at *10.

⁷⁰⁸ *Id.* at *15–16.

⁷⁰⁹ These Linden Dollars carry real world value. *Second Life*’s developer operates an official exchange where users can exchange Linden Dollars for U.S. Dollars. Complaint at 5, *Eros LLC v. Linden Research Inc.*, No. 4:09-cv-04269 (N.D. Cal. Sept. 15, 2009).

⁷¹⁰ *Eros LLC*, No. 4:09-cv-04269.

⁷¹¹ Complaint at 7, *id.*

⁷¹² See *Eros v. Linden—Case Closed*, 3D INTERNET LAW (May 9, 2011), <http://www.3dinternetlaw.com/Blog/files/f49a5fa3217c979ea810532150487eb5-62.html> (accessed June 28, 2017).