
The art of posting: social media, copyright and artist attribution

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Introduction

The click of a button is all it takes to tell the internet you like art and to be liked back for it. Posting a photo of a painting on Facebook is easy. Maybe Instagram is preferred to adapt and improve with a filter. Tweeting to 800 followers could score cultural kudos. The forms are endless and the impact invisible — for the most part. But the legal and moral implications of failing to attribute artists or infringing copyright on social media go deeper than might be first imagined. It is a tight rope for social media companies to walk in providing a service that depends on generating content. At the same time, artists stand to gain from new income streams and expanded audiences opened up by social media reach. Going “viral” or reaching millions of followers influences culture in a way that used to be achieved primarily by traditional forms of media. The extent of that influence, and the power of such platforms, must be balanced with a realistic approach to copyright and attribution by both artists and organisations.

This article explores the issue social media presents as an unreconciled tension between freedom of use and protection for rights holders.¹ It examines and supports the moral case for artist attribution as well as the practical realities that make enforcement difficult in the private, as opposed to commercial, sphere of social media use. The purpose of this article is to raise awareness of social media use and the effect on artists, and to provide a legal backdrop to the discussion. It is intended for lawyers, commercial clients, artists and arts organisations grappling with these challenges in a digital world that is here to stay.

Take away tips

- Read the terms of service and policies of any social media site you, or your clients, have signed up to or are intending to use as rights holders can report unauthorised use or take legal action.
- Follow the general rule “if in doubt, don’t” when posting, especially if your post is for commercial purposes. Seek legal advice if unsure.
- If you do decide to post make sure you attribute work to the artist or seek permission for use,

including obtaining a licence. Not only will it mean the artist reaches new audiences and respects the integrity of the work, it will assist in the event of a moral rights or copyright infringement claim.

- Check and adhere to venue guidelines on photography and social media use. It may not be a legal issue, but it is a matter of etiquette and even policy that underpins the moral basis for artist attribution and the economic argument for copyright protection.
- Venues and arts organisations should consider social media and engagement strategies, including whether to embrace the medium to attract wider interest or seek to regulate it.

Background

Social media is, in relative terms, a recent phenomenon. Whether enjoyed or shunned, it is true that millions of people use various platforms for a whole number of reasons:

- news;
- politics;
- connection with friends;
- business;
- writing;
- idea generation; or
- simply for fear of missing out.

Even Supreme Courts have Twitter accounts.² Prior to social media it was print newspapers, magazines and letters that dominated to communicate updates. Sharing was asking your neighbour to borrow a cup of sugar. Now it means posting a YouTube clip of a cat sitting on a Roomba in a shark costume chasing a duckling on the “wall” of a “friend”. That is to say, sharing has become both easier and a vexed concept.

It is this conundrum which faces artists wishing to build a reputation and fan base online to attract audiences while at the same time protecting the work that is the product. Digitisation and the internet has made unlawful copying and use of original works almost endemic. Musicians must contend with cloud based

platforms, while writers have e-books. Visual artists can show and sell work in online galleries. Dancers can choreograph an innovative piece and upload it. Aboriginal and Torres Strait Islander artists in remote communities can share cultural practices and risk breach of Indigenous Cultural Intellectual Property. Theatre makers can broadcast live from the United Kingdom to audiences in Australia. Filmmakers have the capacity for streaming, equal to the risk of pirating. The internet itself can be the subject of art in any of these forms and anything in between.³

Such accessibility leads to works being, or at risk of being, unlawfully reproduced on social media or beyond. It is — to paraphrase — the dark side of the medium. Artist attribution, copyright for artists and the parameters around sharing touches on almost every aspect of contemporary cultural life. Clarity around these matters should therefore be given due consideration.

Moral rights and artist attribution

The moral case for artist attribution is grounded in respect for the inherent value of the author's work.⁴ The debate around this recognition in Australia culminated in 2000 with the introduction of moral rights provisions in the Copyright Act 1968 (Copyright Act).⁵ It is not likely broadly known that failing to attribute an artist's work casually shared on social media may be a breach of these provisions. Even if it were known it is a stretch to argue it would be widely cared about. That is not to say inherent value of art is not theoretically supported by private social media users, but that the risk of breach sits obscure from the close community that an individual user reaches every time they post. Unfortunately for artists, the damage of so-called "domestic" sharing, at least in the legal sense, is negligible.⁶

Making a case for breach of moral rights, however, is not without precedent. The case of *Perez v Fernandez*⁷ concerned a Perth DJ who sampled and altered a work made by hip-hop/pop recording artist Pitbull (Perez). The integrity of authorship, being the underpinning principle of moral rights, was upheld and damages for infringement ordered. Damage rested in harm to the reputation and goodwill of Perez and his work. Similarly, in *Corby v Allen & Unwin Pty Ltd*,⁸ the Federal Court made a declaration that failure to attribute the author of photographs published in a book, originally taken by the Corby family in relation to Schapelle Corby, was not reasonable. In *Meskenas v ACP Publishing Pty Ltd*,⁹ damages were awarded for infringement of moral rights relating to failure to attribute authorship for a portrait of heart surgeon Dr Victor Chang in the background of a photograph published in *Woman's Day*. These cases successfully argued for recognition of moral rights and remedy for infringement under the Copyright

Act. Whether rights holders choose to pursue users for failure to attribute on social media specifically is another matter.

The digital fine print

A second legal consideration is that it is possible for rights holders to seek removal of infringing content from social media platforms. When social media users sign up to a particular platform there may be a vague awareness that an agreement has been entered into with the provider. It may surprise those who do not make it their habit to read through the terms and conditions that within is a series of user obligations. One of these is usually a warranty or agreement that no intellectual property will or has been infringed while using the site. Facebook, for example, has a publicly available Statement of Rights and Responsibilities.¹⁰ Section 5 (as at March 2016) states:

Protecting Other People's Rights

We respect other people's rights, and expect you to do the same.

1. You will not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law.

The Statement of Rights and Responsibilities then contains a number of policies, guidelines and actions that can be taken to address intellectual property infringement. For copyright it includes a process for reporting infringements to a designated contact. Generally, the approach for users is "if you are not sure, don't post it". No doubt this is a wise approach, but social media is a temporal medium. It is probable that even savvy individual social media users will not consider this when deciding whether to post, despite the fact they could be subject to terms of service in the event of an infringement claim. Commercial entities, as well as individuals and organisations who are similarly bound by terms of service, should consider the reputational risk and impact of such claims when posting on social media.

Copyright and social media case law

Third, case law demonstrates that when failure to attribute moves beyond an individual user to the commercial scale, rights holders and commercial entities could be faced with a significant legal battle without any certainty of outcome. Copyright infringement is a serious issue for artists. It can significantly impact on incomes, which are relatively low to begin.¹¹ Unremedied infringement and reduced artist income can have the effect of devaluing original works. At a macro level, it can result in increased pressure on public funding for support of arts practice. The issue of posting without acknowledgment or in breach of copyright is not a light one.

Some case law has developed in the copyright and social media space, though in overseas jurisdictions. Despite this persuasive rather than binding nature of application, overseas cases offer insight into the complexities faced when posting or re-posting original works on social media. In the oft-cited case *Agence France Presse v Morel (Morel case)*,¹² a United States (US) court awarded large damages for copyright infringement by AFP and Getty Images, which shared photographs taken by Daniel Morel that he had posted on Twitter via TwitPic. The photographs were taken in the wake of the Haitian earthquake and offered insight into its devastation, as well as a potential for profit from licensing. The photographs were re-tweeted, shared and subsequently licensed for profit by AFP and Getty Images without permission. This was despite an initial copyright warning accompanying the originals. The companies unsuccessfully attempted to rely upon Twitter's terms of service and an argument that the photographs were in the public domain. Despite Morel's success, the litigation was protracted over a number of years, which is not usually a desirable avenue for artists or organisations, though it is a watershed for the legal approach to social media and copyright infringement in the US.

The legal system in the US is distinctive to that in Australia and results in greater financial outcomes. However, the *Morel* case is a cautionary tale of the issues springing from social media use and copyright infringement.

Creative Commons: an alternative

A fourth legal consideration — and potential solution — is the alternative to copyright licensing and moral rights strictures: for artists to licence work under the Creative Commons scheme. Creative Commons makes work available for reproduction, with certain stipulations, without breaching copyright or moral rights. For example, Creative Commons has been implemented at different levels of government for works such as the Federal budget or for research publications.¹³ This allows reproducing of work for the benefit of public and widespread consumption. The argument in favour is that it encourages innovation built upon existing works for the collective good, rather than focusing on protecting individual copyright.

Many artists and arts organisations which do not have a public mandate may be uncomfortable with the notion of Creative Commons, and this could outweigh the benefit of this type of licensing. It could certainly address the issue of sharing via social media at the small scale level where there is no economic detriment. On the other hand, it could have the effect of reducing artist incomes. Further development in this area, and its implications for art and social media, is needed.

Intellectual property reform and fair dealing

A final legal issue is the prospect of social media use as a category of fair dealing under the Copyright Act. Numerous proposals and reviews of the Australian intellectual property regime by government have canvassed expansion to fair dealing categories.¹⁴ When considering this issue, the Australian Law Reform Commission (ALRC) made a distinction between sharing within a “domestic sphere” and more broadly in a way that would harm the economic benefit of rights holders. The ALRC noted stakeholder submissions that rights holders would be more likely to pursue largescale misuse rather than infringement for sharing with an immediate community on social media.

At present, it has not been suggested that fair dealing categories be definitively expanded to social media but that social media use of infringing material should be decided on a case by case basis. This is a realistic approach in light of the practical issues around social media monitoring and enforcement. The final position on this issue remains to be seen and may be addressed in upcoming reports such as the Productivity Commission's Inquiry into Intellectual Property Arrangements, the draft discussion paper having been released in April. The draft shows early indications of a positive view of fair use. Social media, though the subject of some commentary particularly in relation to originality and non-commercial use, does not feature strongly as a consideration. Any transition though to fair use will have an impact on social media as noted in this article.¹⁵

In real life considerations

Despite the above legal minefield, artists and the arts organisations which support and contract with them benefit from social media. Notwithstanding the ongoing debate about the value of “exposure”,¹⁶ individuals sharing the content of a particular artist with a small pool of friends and family can be a factor in marketing strategies. In turn, artists' work can be shared with more people and the likelihood of profitability or success increased. Some museums, galleries, festivals and venues have embraced the #hashtag culture of social media to engage new audiences and expand reach.¹⁷ Social media engagement with art in all its forms can be a powerful drawcard.

Other arts organisations have attempted to achieve balance or complete prohibition by regulating social media use via the photography and technology that feeds it. It is not a unique occurrence to see arts attendees taking photographs of an artwork or a theatre set. Presumably, many of these photographs are uploaded. However, in theatres it is commonplace to be asked to switch off mobile phones and forbid taking photographs

or recording the performance. Similarly, some art galleries will dictate terms under which viewers can enter rooms and require either no photography using “selfies sticks”¹⁸ or, at least, no flash photography. This type of regulation is an attempt to protect artists’ work, associated rights and, frankly, annoyance to others. But without strict rules (surrendering of phones at the gallery or theatre entrance for example) it is difficult to measure or enforce when it comes to social media. The consequent inconvenience to audiences may outweigh the benefit. Social media can be a boon.

Artists and arts organisations could of course simply accept that sharing is here to stay. This does little to address the very real toll it can take, particularly on emerging and small to medium artists who do not have resources to pursue legal action and who rely in some way on income streams from licensing. Consider the example of fashion label Discount Universe and its allegations against popstar Miley Cyrus for use of a claimed trademark in her costumes at the Video Music Awards in 2015.¹⁹ The creators attempted to address the issue via a post to Instagram fans and subsequent media attention gained momentum, though the outcome is unclear. This demonstrates that there is an alternative avenue for redress by artists. However, it carries the risk of a defamation suit if large organisations or individuals choose to defend it (as happened in the *Morel* case above) and is unwise if legal footing is not solid. Caution should be taken until this is certain and legal advice sought.

Artists and organisations may take a pragmatic approach to managing social media use rather than viewing the issue only through a legal lense. The pathways for remedy (or defence) through both legal and non-legal avenues, however, are not without pitfalls and a preemptive strategy combining the legal with the practical is prudent. Social media use can be a blessing more than a curse if thoughtfully executed.

Conclusion

This article has explored the difficulties and opportunities available for artists, arts organisations, commercial entities and individuals when using social media. It supports the view that there is inherent value in artistic work and also that economic rights should be protected. It has outlined the legal status of sharing art on social media and the effect of failing to attribute authorship correctly. Finally, it has demonstrated that artists and organisations may take different and non-legal approaches to managing the use of material on social media but that this may carry with it some challenges and uncertainties.

The avenues for artists to pursue claims of copyright infringement or failure to attribute online, and for organisations to respond, are many and often fraught

with difficulty. The financial and emotional stakes are high regardless of artist career level. In an ideal world author attribution would be par for the course. This is unlikely. Legal protections via the Copyright Act and social media company policies will assist with attribution and copyright. Artists, social media users and organisations should be aware of the personal and the commercial realms within which art exists, and endeavour to ensure respect for original works online where possible. There is a strong case to be made around the moral obligations surrounding attribution, which is easy to do and is so important to an artist. Artists and arts organisations should also weigh up the potential opportunities that social media presents with the legal issues discussed. A robust approach to social media use, copyright and art will embolden cultural life and strengthen the cultural economy at the heart of contemporary society now and for the future.



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Footnotes

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