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Best Practice Recommendations for Social Networking Sites

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In response to member requests, ASMP commissioned attorney Chris Reese to undertake a review of the Terms of Service (TOS) of six social media sites and to prepare findings and recommendations. The sites included in his assessment are Facebook, Photobucket, Flickr, MySpace, YouTube and Twitter. This report presents recommended best practices, considerations, common terms used, and hypothetical situations photographers may face when images are posted on social networking sites.

Summary of Best Practices

1. Decide why you are considering posting your images on a social networking site. Do you want a sample of your work to reach the largest possible audience for free? Are you trying to advertise your most prized photographs in the hope of selling a few limited prints? Would you mind if people made unauthorized copies?
2. After determining why you want to post your images, read the Terms of Service ("TOS") for the site. Make sure you have a good understanding of what the company and other users are legally permitted to do with your media. Look at other policies, such as the Privacy Policy, to see if they are relevant.
3. Browse through the site to get an idea of its functionality. Are there settings you can choose which will provide you with some control over who sees your images? Are there settings you can choose which provides roadblocks to the easy-copying of your original image? View images posted by other photographers and see if it is possible to copy the photos and at what quality. Find out if there are ways to track who is seeing or copying or reposting your images.

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4. After reading the TOS and understanding the functionality of a site, including any attempts to provide copy protection, decide whether you have chosen the right social networking site. Every site handles these issues differently, sometimes markedly so. If you aren't sure about it, consider other sites before making a decision.
5. Once you decide that you want to post images, we recommend embedding each image with copyright, contact, and other information. This can be done in Photoshop. However, you should know that some sites, such as Facebook and MySpace strip that information as a result of the software they use to manipulate and post files. You might also want to consider adding an identifying watermark to your images. If one of the reasons you are posting images is to use the site as a marketing tool, then providing an identification that stays with an image might be a good idea. Others might have the right to repost images or have the ability to copy the image and use it on other sites or distribute via e-mail. If the image goes viral, it would be nice to have your name attached to it.
6. If you don't want people to have copies of high quality images, you can also consider posting only small, low resolution versions of your work.
7. After posting your images, make it a point to review the TOS regularly to see if the terms have changed. Also, if available, check the data on how many people are viewing your images or spreading the word to others. This will help you decide if your initial reasons for posting the images continue to make sense.
8. If you become aware of misuse of your images, contact the site and begin the procedure described in the site's copyright violation policy. If warranted, take legal action.

Terms of Service (TOS) Considerations

As you decide whether to post images on a social networking site, you'll have to keep in mind the great difference between legal rights and technological capability. Although we strongly recommend that you read the TOS for any site before you post any images, we want to warn you that the terms are only one consideration. Although they provide some shape to the legal landscape of your rights and the rights of the hosting company and other users, they are also limited in their practical effect for at least four reasons:

1. Most of the TOS include language which gives the hosting company the right to make changes to its TOS without notifying you;
2. Many of the TOS contain very broad language and it may be difficult to determine where the hosting company's rights end;

3. The TOS may not be clear enough about what one user is allowed to do with another's content, and
4. Many, if not most, users do not read the TOS. They simply click through. In those instances, the practical question is more about what people are *able* to do with the content than what they are *allowed* to do with the content.

These four limitations on the TOS are for the average user who generally wants to respect the copyrights of others. Unfortunately, if someone doesn't care about infringing someone else's copyright, then matters are even more difficult. As a matter of technological capability is concerned, anything that you can see or hear online can be copied by an advanced user. Certain functionality can make it easier or more difficult to make copies, but it doesn't really constitute copy protection.

For example, the Photobucket service provides a default setting where others can freely copy media that is posted on the site. However, it gives you the option to uncheck a box, implying that others won't be allowed to copy your photographs. However, the fine print on the site includes the following:

Uncheck this box to disable right-click save functionality on images and prevent anyone who views your albums from saving copies of your images or videos.

Note: If your images can be seen in a web browser, they can still be downloaded by advanced users. This option discourages viewers from saving copies, but it does not completely prevent it. Also, this option only applies to images when they are viewed in your Photobucket album. It is still possible to copy files that you share or embed on other sites.

Therefore, if there are images that you want to protect from copying at all costs, then you shouldn't be posting them online. Our best practices recommendations are tied to your reasons for posting images on social networking sites and your comfort level regarding the risks of others making unauthorized copies.

Common Terms

Before offering our recommendations, it's helpful to review the basic contours of the TOS. These are general areas of common ground, but you should review the specifics of each site's TOS before posting.

1. The companies acknowledge that they are not getting a copyright interest in any of your photographs. (When discussing photographs, unless noted, the same would generally be true for any media).

Representative example from MySpace:

MySpace does not claim any ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, applications, or any other materials (collectively, "Content") that you post on or through the MySpace Services. After posting your Content to the MySpace Services, you continue to retain any such rights that you may have in your Content, subject to the limited license herein.

2. However, the companies do get a royalty-free license to use the images posted until you either remove the content from the site or terminate your account.
3. Most, but not all, of the sites allow you to have some control over who will be able to view your posted content. For example, Photobucket makes posted content available to everyone — even nonmembers who are outside the Photobucket services — unless you mark your content as "private" and then it is available only through the Photobucket services. Facebook allows you to be even more restrictive. You can limit your audience to only those fellow Facebook members you've allowed to be labeled as "friends."
4. Subject to any restrictions you may have chosen, the Companies can distribute their services through all media outlets.

There is also some common ground with respect to how the TOS discuss the rights of other users with respect to the content that you post.

1. Users are prohibited from infringing the IP rights, including copyrights, of others.
2. Users have a right to report copyright infringement to the company and the company has the right to take down infringing material and/or terminate the account of the infringer. (Termination is usually reserved for repeat infringers).
3. The procedure for reporting and acting on allegations of copyright infringement is very similar across all companies and seems to comply with the Digital Millennium Copyright Act ("DMCA"). (Several expressly state that they do comply with the DMCA).

However, in our view, many of the TOS could be more explicit in stating what others can and (more importantly) cannot do with the content posted by other users. Photobucket and YouTube are admirably clear in this regard. The Photobucket license provides a very broad licensing of rights using concrete examples:

Photobucket and/or other Users may copy, print or display publicly available Content outside of the Photobucket Services, including

without limitation, via the Site or third party websites or applications (for example, services allowing Users to order prints of Content or t-shirts and similar items containing Content).

YouTube is equally clear in its more restrictive licensing of rights:

Content on the Website is provided to you AS IS for your information and personal use only and may not be downloaded, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, or otherwise exploited for any other purposes whatsoever without the prior written consent of the respective owners.

The dramatic difference in the license rights granted by Photobucket and YouTube underscores the fact that you must read the TOS before posting your images.

Hypotheticals

To give you an idea of how your images may or may not be used according to the TOS, let's pretend we have a photographer, Melissa, who has posted a photograph of a cow on top of a lighthouse.

A. Can the hosting company create a coffee table book called ***Stranger than Fiction***, which includes Melissa's photograph?

Photobucket — yes. Twitter — maybe. All other sites — no.

In our opinion, Photobucket TOS (as quoted above) creates a license that is probably broad enough for this kind of use by the Company. If Melissa changes her mind and places restrictions on the photograph, then further distribution would be limited to the Photobucket services (which would probably make the coffee table book a bad idea).

Twitter does not have the same kind of explicit examples that Photobucket uses, but it does have very broad licensing language:

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 is you authorizing us to make your Tweets available to the rest of the world and to let others do the same.

As for the other sites, they all appear to state that the license given to the company is limited to the companies' services and that Melissa would have the right to terminate that license at any time by removing the content or

terminating her account. In my opinion, it would be hard to stretch the definition of their services to include the sale of a coffee table book.

B. Would a user, who owns a T-shirt company, be able to use Melissa's photograph to create and sell a new T-shirt design?

1. Photobucket — yes. Twitter — maybe. Same as in hypothetical A.
2. Flickr and YouTube — no. Both sites specifically state that you cannot copy or use another's content for commercial purposes.
3. MySpace and Facebook — no, but not as clear. Both sites state that users may not infringe another's copyrighted content. Unless there is express language (as with the Photobucket TOS), copyright law would not allow a user to copy a posted photograph and make a derivative work, like a T-shirt. However, the TOS are not clear enough. The type of infringement they discuss is primarily, if not exclusively, directed toward actions that take place on the site. For example, a user may not post Melissa's photograph and claim it as his own. The lack of explicit language could create confusion as to what rights Melissa has granted to other users when she chooses to post an image for them to see.

C. Would a user, who thinks Melissa's photograph is the funniest thing he's ever seen, be allowed to launch an e-mail chain letter, which includes the photograph.

1. Photobucket and Twitter — yes.
2. Flickr and YouTube — maybe. I think that the negative implication of the language prohibiting the copying or distribution of content for commercial purposes, could give rise to an argument that Melissa has granted other users the license to copy and distribute her content for non-commercial purposes.
3. MySpace and Facebook — still not clear. MySpace is the same analysis as above. Facebook might be even less clear because it seems to imply that once Melissa has chosen to share her photographs with certain people, they retain the right to keep it posted on their pages, thereby sharing it with others. Even though this might not grant them the right to send the photograph to others via e-mail, the TOS could be more clear.

In conclusion, it is important to map out your goals for social networking, understand your rights, and monitor conditions as you navigate the rapidly changing world of social media.