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Recent legal developments involving Twitter: practical implications for lawyers

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If you still think that tweeting is something only birds do, it is time to fly the coop. Launched in 2006, Twitter is an online social networking site that enables its 645 million registered users worldwide[1] to send and receive 140 character "tweets". More than 5700 tweets are sent every second[2] and up to 75% of mainstream journalists now find stories through Twitter.[3]

Despite the prevalence of social media, in June 2013 one in five Australian corporate counsel indicated that their legal team lacks a practical understanding of how social media works.[4] This is concerning, particularly given that more than 64% of large Australian businesses are on Twitter.[5]

Five tips for lawyers advising about Twitter

- Join Twitter yourself in order to understand the platform and its unique jargon (retweets, mentions, trending topics and so on).
- Read the Twitter Terms of Service (TOS) and related policies and guidelines. The terms are extensive, covering a broad range of topics — including how tweets can be displayed in ads, and how the Twitter trade marks can (and cannot) be used to promote your Twitter presence.
- Ensure that your company or clients appreciate that Twitter is not a "free-for-all". If they are sourcing photographs from Twitter, they should check that the source is accurate, they should seek permission (which may involve paying a licence fee) and they should credit sources correctly.
- If you are approving advertising copy including tweets, remember that copyright may subsist in certain tweets. Even if there is no copyright, reproducing a tweet in advertising without the user's permission will amount to a breach of the Twitter guidelines.
- If you are tweeting, even anonymously, watch what you say. You may be liable for publishing defamatory content, whether in a tweet or in a retweet. Even if the content is not defamatory, ensure that it does not constitute a breach of your employment contract or related social media policies.

Recent legal developments

This article provides a brief overview of some recent legal developments involving Twitter across the globe, shedding light on three hot topics:

- What happens to copyright in photos once you post them to Twitter?
- Does copyright subsist in a 140-character tweet?
- Defamation, and other reasons why you cannot always tweet anything you want.

Hot topic 1: What happens to copyright in photos once you post them to Twitter?

Under Australian law, copyright in photographs includes the exclusive rights to reproduce, publish and communicate to the public. If you upload your photo to Twitter, you continue to own copyright, but you grant a broad licence to Twitter to use the photo and an implied licence to Twitter users to reproduce the photo on Twitter (by retweeting). This implied licence does not make photos on Twitter a free-for-all.

This has recently been confirmed in the US in the case of *Agence-France Presse and Getty Images v Morel*.[6]

On 12 January 2010, when a destructive earthquake struck Haiti, killing more than 220,000 people, professional photojournalist Daniel Morel was one of the only individuals able to capture images of the devastation, secure internet coverage and upload the photos. He posted the images first to TwitPic,[7] then linked to them via Twitter. Reports suggest that another photographer, Lisandro Suero, copied the images to his own account and tweeted that he had exclusive photographs of the earthquakes. The facts are convoluted from this point on, but AFP and Getty obtained Morel's photographs and redistributed them worldwide, without his permission and without crediting the photos to him.

AFP unsuccessfully argued that by posting the photos to Twitter, Morel agreed to Twitter's expansive TOS, which AFP claimed included a universal licence for third parties to use any photo posted to Twitter without permission.

Twitter's TOS[8] read:

> By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive,

> royalty-free license … 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).
>
> Tip: This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same. But what's yours is yours — you own your content.

Judge Alison Nathan held that while the Twitter TOS may allow some reuse of content posted on Twitter (such as retweeting on the Twitter platform itself, or displaying tweets in broadcast in accordance with Twitter's Guidelines),[9] the TOS were "not intended to confer a benefit on the world-at-large to remove content from Twitter and commercially distribute it".[10] Judge Nathan held that, having failed to establish its only defence, AFP was liable for direct copyright infringement.

The jury then determined that AFP and Getty had:

- "willfully"[11] infringed Morel's copyright, and that Morel should be awarded the maximum statutory damages of $150,000 per infringement, a total of $1.2 million; and
- violated the Digital Millennium Copyright Act on 16 occasions by miscrediting Morel's photos (in breach of 17 USC §§ 1202(a) and 1202(b)), for which the jury awarded an additional $20,000 in damages.

According to Morel's lawyer, Joseph Baio:

> … this is the first time these defendants, or any other major digital licensors, have been found liable in the willful violation of a photojournalist's copyrights in his own works.[12]

On 7 January 2014, AFP and Getty appealed the jury verdict, arguing that the conduct was not "willful" infringement, that they did not violate the Digital Millennium Copyright Act, and that the statutory damages award of $1.2 million was a "miscarriage of justice" — particularly as it represented 60 times the actual damages Morel could have recovered, and 4700 times the day rate of professional freelance photographers.

In Australia, a copyright infringement matter would generally be decided by a judge and not a jury.[13] Further, while there is no specific allowance for increased damages as a result of wilful infringement, additional damages may be awarded having regard to a number of factors, including the flagrancy of the infringement.[14]

Lesson

This case clarifies the proper interpretation of the Twitter TOS and serves as a potent reminder to media outlets that, although we are in the age of social media "sharing" and the readily available online image, when it comes to copyright material, failure to check sources, obtain consent and correctly credit can carry hefty penalties. Stay tuned for the outcome of the appeal.

Hot topic 2: Does copyright subsist in a 140-character tweet?

While there is no question that copyright subsisted in Morel's photographs, even once they were posted on Twitter, a recent Twitter controversy has raised the question of whether copyright can subsist in a 140-character tweet.

On 30 December 2013, A O Scott, chief film critic for the *New York Times*, tweeted to his 36,000 followers: "You all keep fighting about Wolf of Wall St. and Am Hustle. I'm gonna listen to the Llewyn Davis album again. Fare thee well, my honeys."

On 4 January 2014, CBS Films placed a full-page ad in the *New York Times* to promote its new film, *Inside Llewyn Davis*, at a cost of US$70,000.[15] The ad was almost all white space, except for what looks like a screen grab from Twitter, with A O Scott's profile picture, name and a (modified) tweet: "I'm gonna listen to the Llewyn Davis album again. Fare thee well, my honeys."

According to the *New York Times*,[16] Scott was asked by the movie's publicist if it was okay to use a shortened version of the tweet. Scott responded with a clear "No". However, the ad went ahead. The incident came to be known as "#aoscottgate", garnering significant media coverage and thousands of tweets from across the globe. Can copyright subsist in a 140-character tweet?

While Twitter's TOS state that "you retain your rights to any Content you submit, post or display on or through [Twitter]", this does not mean that copyright necessarily subsists in each tweet you submit. In Australia, the fundamental question is whether a 140-character tweet can be considered an "original literary work" that will receive copyright protection under the Copyright Act 1968 (Cth). Not every piece of printing or writing that conveys information will be protected by copyright.[17] The 140-character limit puts tweets into *de minimis* territory, meaning that they may be too "insubstantial" to qualify for copyright protection.

The Australian position on this issue may be analogised to the treatment of a number of newspaper headlines in *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd*,[18] in which Bennett J of the Federal Court found that copyright did not subsist. While the creation of headlines might involve effort and skill, headlines are, generally, no more than a combination of common English words. The headlines in question were mostly short factual statements of the subject matter of the article. Justice Bennett left open the possibility that a particular individual headline could be protected by copyright. However, Fairfax Media failed to prove that copyright subsisted in the particular headlines in the case.[19]

The Australian approach differs from that of other jurisdictions, but illustrates the potential difficulties in proving the subsistence of copyright in tweets. Like headlines, the majority of tweets are short factual statements, whether about the latest sporting scandal, what you ate for breakfast, or, in the case of A O Scott, what music you are about to listen to. Whether or not copyright will subsist in a tweet under Australian law will depend on whether the tweet is considered "original" (demonstrating a degree of independent intellectual effort) and a "work" (more than just words or a single phrase).

Scott's tweet displays a level of intellectual effort, but whether it would really be considered a "literary work" is uncertain. The situation is further complicated by the fact that Scott is a known film critic, and the film industry has a long-established practice of using (usually glowing!) snippets of critics' reviews in promotions. However, in the case of a tweet, rather than a longer review, it may be easier to argue that what has been copied is a substantial part of the original work. Even if copyright does not subsist in Scott's tweet, other legal issues with the ad include that:

- it reproduces Scott's Twitter profile picture without permission, which would constitute copyright infringement under Australian law;
- it may falsely suggest some association or endorsement by Scott, which, in Australia, may constitute misleading or deceptive conduct or a false representation in breach of the Australian Consumer Law; and
- it breaches Twitter's Guidelines for Displaying Tweets,[20] because it uses Scott's tweet in advertising without his permission, has been modified, and does not feature the Twitter bird or a timestamp.

While Twitter etiquette suggests that CBS could and should have included the Twitter identifier "MT" to show that it was a modified tweet, this show of good manners is unlikely to change the legal analysis. Scott suggests that CBS could have just retweeted his tweet, as allowed on the Twitter platform, and saved itself the US$70,000.

Lesson

This incident highlights the importance of being familiar with Twitter's terms and conditions, particularly if you are approving advertising copy containing tweets. By including a person's tweet without their permission, you will be in breach of the Twitter guidelines, as well as risking a groundbreaking copyright infringement test case over the subsistence of copyright in tweets.

Hot topic 3: Defamation, and other reasons why you can't always tweet anything you want

As Twitter is a public forum, users risk liability for the content they post. Recent proceedings in the United Kingdom have found users liable for defamation as a result of tweeting or retweeting. In Australia, even if tweets are not defamatory, employees may face adverse action as a result of tweets that breach employment contracts or related policies.

In the United Kingdom, former Tory party treasurer Alistair McAlpine brought legal proceedings in 2012 against a number of high-profile Twitter users who had named him on Twitter after an erroneous BBC report claimed that a leading politician had abused boys living in his care, but did not name him. McAlpine sued Sally Bercow, wife of the Speaker of the House of Commons, who tweeted to her 56,000 followers: "Why is Lord McAlpine trending? *Innocent face*". In May 2013, Tugendhat J of the High Court of Justice found that Bercow's tweet was defamatory in that it "pointed the finger of blame".[21] In October 2013, Bercow agreed to pay McAlpine £15,000 in damages, withdrew the allegations and apologised in court and on Twitter.[22]

McAlpine also brought proceedings against users who had retweeted his name, including Alan Davies, stand-up comic and panelist on BBC2's *QI*. Davies tweeted to his 450,000 followers: "Any clues as to who the Tory paedophile is?", then subsequently retweeted a response naming McAlpine. Davies settled with McAlpine, also paying £15,000 in damages, plus a contribution to costs and voluntary charity donations totalling £13,000. On 24 October 2013, Davies tweeted "Have today apologised sincerely to Lord McAlpine in court — hope others have learned tweeting can inflict real harm on people's lives".

In Australia, Liberal party strategists Mark Textor and Lynton Crosby have brought a defamation action in the Federal Court in relation to a tweet that they claim suggested they were push-pollsters. This is set to be the first Twitter defamation action ever to go to a full trial in Australia. Former Labor MP Michael Kelly had until late January 2014 to serve a draft amended defence.[23]

Even if your tweet does not amount to defamation, critical or negative speech may constitute a breach of your employment contract or your employer's social media policies and guidelines. There have been many cases before Australia's Fair Work Commission involving inappropriate use of social media by employees.

The Federal Court of Australia has confirmed, in *Banerji v Bowles (acting Secretary, Dept of Immigration and Citizenship)*,[24] that a public servant may be dismissed for criticising government policies on Twitter,

even though her profile was anonymous. Michaela Banerji, a Public Affairs Officer at the Department of Immigration and Citizenship (DIAC), used a Twitter account under the pseudonym "@LaLegale" to tweet regular commentary about government officials, other employees of DIAC and issues including the Australian government's immigration policies.

DIAC sought to terminate her employment for breaches of the Australian Public Service (APS) Code of Conduct and DIAC's social media guidelines, because her tweets demonstrated a failure to behave with honesty and integrity, and in a way that upheld APS values and the integrity and good reputation of the APS.

Ms Banerji unsuccessfully argued that a termination on the basis of expressions of political opinion, made in her own time, outside of work, would curtail the implied freedom of political communication. Judge Neville of the Federal Circuit Court held that:

- the "unbridled right" to freedom of political communication, championed by Ms Banerji, did not exist (in Australia); and
- even if such an unfettered right did exist, it would not provide a licence to breach a contract of employment.

While the federal government has offered to settle the case with Ms Banerji, she rejected the offer and vowed to keep fighting.[25] The case is expected to return to the Federal Court in February.

This case sets a clear precedent that if your employment contract (or related policies) prohibit criticism, then anonymity is no shield. Even if you think you are anonymous, many companies' social media policies include broad clauses that provide that personal use of social media can still identify you as an employee, including based on previous communications or other material readily available online.[26]

Lesson

Proffering controversial opinion contrary to the terms of your employment (even anonymously) is at your own risk. If your identity is revealed (whether inadvertently or otherwise), the current law is that no defence will be afforded by any attempt to separate your private (anonymous) identity from your public identity as an employee.

Twitter is a rapidly emerging platform about which clients are increasingly seeking legal guidance. For lawyers, Twitter represents an opportunity, as well as a chance to network and stay informed.

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Footnotes

1. Statistic Brain "Twitter statistics" 1 January 2014, available at www.statisticbrain.com.
2. Twitter's IPO Form S-1 Registration Statement, lodged 3 October 2013, available at www.sec.gov.
3. S Lepitak "Three quarters of mainstream journalists find stories through Twitter research finds" *The Drum* 4 March 2013, available at www.thedrum.com.
4. King & Wood Mallesons *KWM Compass Report 2013* 30 August 2013, available at www.reports.kwm.com. The report is based on survey responses from 200 Australian corporate counsel, representing a broad range of industry sectors.
5. "Large" businesses are those with more than 200 employees. Sensis *Yellow™ Social Media Report* 21 May 2013, available at www.about.sensis.com.au.
6. *Agence-France Presse and Getty Images v Morel* 10 Civ 2730 (AJN) (SDNY).
7. TwitPic is a photo-sharing website that allows users to post images to Twitter. Twitter did not offer direct image-sharing functionality until August 2011.
8. See www.twitter.com.
9. Twitter "Guidelines for using tweets in broadcast", available at www.support.twitter.com.
10. Opinion of Nathan J, 14 January 2013, p 23, available at www.nysd.uscourts.gov.
11. "Willful" and "willfully" are used here (along with other American usages quoted in this article), as this is the American spelling of the word found in the Copyright Act 1976 17 USC § 504(c).
12. J T Baio "Litigation department obtains landmark verdict in high-profile copyright infringement case involving social media" Willkie Farr & Gallagher LLP, 25 November 2013, available at www.willkie.com.
13. Federal Court of Australia Act 1976 (Cth), s 39; Copyright Act 1968 (Cth), s 131A.
14. Copyright Act 1968 (Cth), s 115(4).
15. M Sullivan "When a (partial) tweet becomes an ad, what are the rules?" *The New York Times* 6 January 2014, available at www.mobile.nytimes.com.

16. Above, n 15.
17. *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; 254 ALR 386; [2009] HCA 14; BC200902942.
18. *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109; 272 ALR 547; [2010] FCA 984; BC201006524.
19. For more information, see A Spies "'Twagiarism': does copyright protect a tweet?" *King & Wood Mallesons' IP Whiteboard* 21 November 2011, available at www.ipwhiteboard.com.au.
20. Twitter "Guidelines for displaying tweets and other Twitter content", available at www.about.twitter.com; Twitter "Guidelines for using tweets in broadcast", available at www.support-.twitter.com.
21. *Lord McAlpine of West Green v Sally Bercow* [2013] EWHC 1342 (QB) at [72].
22. K Dutta "Lord McAlpine libel row with Sally Bercow settled in High Court" *The Independent* 22 October 2013, available at www.independent.co.uk.
23. *Crosby v Kelly* [2013] FCA 1343; BC201315607.
24. *Banerji v Bowles (acting Secretary, Dept of Immigration and Citizenship)* [2013] FCCA 1052; BC201311780.
25. ABC News "Tweet public servant rejects offer to settle out of court" 15 January 2014, available at www.mobile.abc.net.au.
26. For more information, see N Hickey and S McHugh "Banerji v Bowles" (2013) 13(5) *e-commerce law reports* 24.

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