

PINNING IT DOWN: Pinterest

AND ITS CHANGING TERMS OF SERVICE

Kevin A. Nelson Huddleston Bolen LLP

Hailed as the fastest growing social media site ever, Pinterest was launched in March, 2010 with the mission of “connect[ing] everyone in the world through the things they find interesting.”¹ By January 2012 Pinterest had 11.7 million unique users, making it the fastest site in history to break through the 10 million mark. In July 2012, it broke the 20 million visitors mark.

Pinterest allows users to save images and categorize them on different “boards.” Users can follow the boards of other users with similar tastes. Popular categories include travel, cars, food, film, humor, home design, sports, fashion, and art.

Because Pinterest relies almost entirely on images posted by “pinners” and does not vet images before they are pinned, it faces potential copyright and trademark actions arising from the pinning of images owned by third parties. Its efforts to address these concerns have varied considerably over the past year and raised concerns among both pinners and those whose copyrighted images may be pinned regarding whether Pinterest seeks to protect copyright interests or just insulate itself from potential liability.

THE CONTROVERSY SURROUNDING PINTEREST’S TERMS OF SERVICE

In February 2012, photographer and lawyer Kirsten Kowalski wrote a blog post in which she announced that she was deleting her Pinterest inspiration boards due to potential copyright violation concerns.² Her post “went viral” and contributed to build-

ing criticism of Pinterest’s Terms of Service (TOS). Blog posts warning users of their potential liability and complaints from content creators were rampant.

In response to Kowalski’s post, Pinterest co-founder Ben Silbermann contacted her directly to discuss making Pinterest more user friendly and legally compliant. Silbermann explained he knew there were “issues with Pinterest and the fear of claims of copyright infringement and he want[ed] to figure out a way to make his *little web page* work within the confines of the law.”³ Eventually, Pinterest revised its TOS.

PINTEREST’S APRIL 2012 TOS

Pinterest released new TOS on April 6, 2012. The revised TOS surprisingly did little to allay concerns about Pinterest’s attempts to foist potential copyright liability onto its users. But they did begin to differentiate between individual and commercial pinners.

In its original TOS, Pinterest claimed to have a permanent license to users’ content. Under the April 2012 TOS, users’ content remained on Pinterest’s servers for a “commercially reasonable period of time” after users terminated their accounts. There was, however, an exception: if users posted content publicly, or other users re-pinned it, Pinterest would keep it posted.

Under the TOS, liability to third parties was placed solely upon users. Pinners were advised: “[y]ou therefore agree that any User Content that you post ... does not and will not violate any law or infringe on the rights of any third party, including ... any

Intellectual Property Rights ... publicity rights or rights of privacy.” Similarly, Pinterest’s April 2012 TOS warned users that: “[t]he entire risk arising out of your access to and use of the services ... remains with you.”

The TOS’s indemnity clauses required users to indemnify Pinterest for costs incurred as a result of an action stemming from Pinterest use. Users agreed “to indemnify and hold harmless Pinterest ... from and against any claims ... including ... reasonable legal and accounting fees.” The primary distinction between the original and April 2012 TOS’s indemnification provision was the addition of the section “Your Responsibility for Your Content.” This section instructed users that “you are in the best position to know if the materials you post are legally allowed.”

Pinterest’s April 2012 TOS for the first time included a liability provision for those creating a Pinterest account on behalf of an entity. “If you open an account on behalf of a company ... then (a) ‘you’ includes you and that entity, and (b) you represent and warrant that you are an authorized representative of the entity with the authority to bind the entity to these Terms, and that you agree to these Terms on the entity’s behalf.”⁴

PINTEREST’S CURRENT TOS

Pinterest again revised its TOS; as of March 1, 2013, the TOS more clearly define the rights, responsibilities, and potential liabilities of business and individual users. It also published a separate “Copyright” policy

that governs all users, identifies the protections that it asserts it has under the Digital Millennium Copyright Act (DMCA), and informs copyright owners of the steps they should take to provide notice that an infringement has occurred.⁵ The latest TOS, however, only require indemnification of Pinterest if it is used “for commercial purposes,” a departure from the former terms which attempted to impose indemnification upon all users. These changes likely reflect Pinterest’s expansion into a new model that emphasizes increased posting by businesses, which was previously prohibited by the TOS.⁶ The new TOS also do not differentiate between public or private posts for the purposes of their use after a pinner departs.

DEFENSES TO COPYRIGHT INFRINGEMENT AVAILABLE TO PINTEREST

Federal copyright laws grant the author of a copyrighted work the sole and exclusive right to publish and reproduce the work, with certain limitations. Some use of copyrighted work may constitute “fair use,” which allows limited rights to its use. Under 17 U.S.C. §107, the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research is not an infringement of copyright. The fair use analysis, which weighs the social benefit of use against the private loss, considers four factors:

- The purpose and character of the use, including whether it is for commercial or educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the copyrighted material used in relation to the work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

Pinterest’s TOS include a potential argument to rebut allegations of copyright infringement: captions. Pinterest requires users to post a caption to anything they pin. By adding a caption, Pinterest is essentially requiring its users comment on the image. Commentary is a type of fair use that the law encourages and provides a potential argument against a copyright infringement claim.⁷

PINTEREST’S DEFENSES FOR LIABILITY UNDER THE DMCA

The DMCA is a U.S. copyright law that implements two 1996 treaties of the World Intellectual Property Organization. Under the DMCA, production and dissemination of technology, devices, or services intended to circumvent measures that control access to copyrighted works is criminalized. Merely circumventing an access control (whether or not there is actual infringement of copyright itself) is also a violation of the DMCA. The DMCA contains a safe harbor provision which protects websites from liability for content uploaded by users as long as the site promptly removes content when requested by its owner.

Pinterest has a notification system which allows copyright holders to request that content be removed from the site. This system, however, may not provide Pinterest with protection from copyright infringement claims.⁸ There are exceptions to the safe harbor defense when the service provider actively encourages copyright infringement; when a service provider has knowledge of the infringement but ignores it; and when a service provider receives a financial benefit from the infringement and has the ability to control the activity.

Pinterest released a statement in March 2012 in which it claimed protection under the DMCA’s safe harbor provisions. No major copyright lawsuits against Pinterest

had emerged as of March 1, 2013, although there is increasing internet chatter about the effectiveness of Pinterest’s terms of use in avoiding or removing pinned copyrighted material.⁹ Pinterest has also enabled entities to opt-out of having their content pinned. A “no-pin” HTML meta tag was released by Pinterest in February 2012 to allow websites to opt-out.¹⁰ On February 24, 2012, Flickr implemented the code to allow users to opt-out their photos.

LIABILITY ISSUES OF INDIVIDUALS AND BUSINESSES USING PINTEREST, CLAIMS OF CONTENT CREATORS, AND REMAINING CONCERNS FOR PINTEREST ITSELF

Generally speaking, U.S. governmental entities and courts have been more willing to protect ownership rights of content creators on the internet than they have been to take action that may appear to affect First Amendment rights.¹¹ While Pinterest’s TOS attempt to insulate it from copyright liability, it is unclear whether its efforts, at least in their current form, will be successful. It will, however, likely take a potential plaintiff with financial or political clout to require Pinterest to affirmatively undertake more stringent initial oversight of pinned images or more decisive action once it receives notice under the DMCA.

While individual pinners no longer face the risk of indemnifying Pinterest if they pin protected content that risk remains for its corporate users. Businesses should update their social media policies to: (1) emphasize that employees who use the site must only share company-owned content; and (2) that the content will remain the property of the company even if the employee leaves. Both individuals and business, however, still may be subject to claims by content creators for copyright violations.

¹ <http://pinterest.com/about/>

² An inspiration board is a large group of images on a user’s page. “How to Use Pinterest’s Pinboard on the Web.” <http://www.usatoday.com/tech/news/story/2012-01-17/how-to-pinterest-mark-smith/52615856/1>

³ <http://ddkportraits.com/2012/02/my-date-with-ben-silbermann-following-up-and-drying-my-tears/>

⁴ <http://pinterest.com/about/terms/>

⁵ <http://about.pinterest.com/copyright/>

⁶ <http://techcrunch.com/2012/11/14/pinterest-launches-new-business-terms-for-companies-website-verification-widgets-and-access-to-new-features/>

⁷ http://articles.businessinsider.com/2012-03-08/tech/31135048_1_caption-copyright-image-owners

⁸ Interestingly, Pinterest still asserts that it may “take whatever action, in its sole discretion, it deems appropriate” upon receipt of the notice of copyright infringement.

⁹ <http://pinterest-out.blogspot.com/>

¹⁰ <http://www.bizreport.com/2012/02/virtual-pinboard-social-network-releases-nopin-tag-code.html>. If a user attempts to pin content that is “non-pinnable,” the user will be notified that: “This site doesn’t allow pinning to Pinterest. Please contact the owner with any questions.”

¹¹ For example, the peer-to-peer file sharing service Napster was forced to shut down and went bankrupt based on legal action over copyright infringement. <http://en.wikipedia.org/wiki/Napster>.



Kevin Nelson is Managing Partner of Huddleston Bolen's Charleston, West Virginia office. The primary emphasis in his legal practice is in employment law, where he has litigated matters involving trade secrets, discrimination, and wrongful discharge. He also provides his clients with risk management advice and review on a variety of employment matters including social media use and is also an active litigator in defamation and First Amendment cases. He has been recognized for five consecutive years as one of The Best Lawyers in America and was named a SuperLawyer in employment law in 2013.