

What's 'fair' in 'fair use?'

When it comes to using photos posted to social media, what are the limitations, implications?

Last month, I had the opportunity to talk with reporters at the SEMO Press and Ozark Press meetings, and I thought this was a great opportunity to discuss a topic that several callers to the hotline have asked me to clarify for them – your right to use materials (particularly photos and head shots) that appear on social media sites like Facebook.

I've written about that subject in recent months in this column, but I broadened the topic and covered a variety of social media Terms of Use to discuss what is permitted. When I was done, I was glad to have some time for questions and had a good discussion.

Afterward, however, I was dissatisfied with my answer to one of the questions: Does a newspaper's right to use a photograph found on a Facebook site mean that your competitors have a right to use photographs your newspaper posts on its Facebook page? I found myself caught up in a difficult situation trying to make clear sense in a few sentences of some basic copyright concepts, so I'm going to try again in this column.

Facebook's Terms of Use specifically says "When you publish content or information using the Public setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with you (i.e., your name and profile picture)."

So, yes, if you want to use a photo from Facebook, there's an implied consent by the person posting it that you may "access and use" that information, with attribution to Facebook.

It has to be used, however, in a legal way. Having a right to access and use a photo doesn't give a person the same rights as the copyright holder. Certainly, I think there's a



strong argument that the copyright exception for "fair use," when it is found in a news gathering and reporting context, clearly would allow the use of such a photo.

However, the "fair use" exception doesn't, under any understanding of the law, come with a simple demarcation line as to what is allowed and what isn't.

I can tell you, based on my understanding of how courts have ruled in the past, that your use of someone's image, for example, to advertise a product would NOT be found to be fair use. I can tell you that in analyzing some sets of facts, a court would hold that a copyright holder has rights that would trump the "fair use" exception.

The focus of the question, and the point I'm trying to make, is there are some situations I'll refer to as "hot news" situations where I believe a court would say that what might arguably seem to be a news-gathering use of a photo so impairs its "hot news" value that the "fair use" exception would not apply.

For example, if you took a photo of the hijacker's planes on Sept. 11, 2001, piercing the World Trade Center towers, you would have some rights to control where your photo was reproduced and who was allowed to use it.

If you have such a photo, I think it's critical to protect your interest by getting it copyrighted and asserting that ownership through use of a copyright notice in any use. And, if you are thinking about making such use of a photo, I would suggest you are looking for trouble.

I know for a fact the Digital Millennium Copyright Act (DMCA) provides a mechanism a copyright owner can use to protect these rights. Your published content in your newspaper is protected by copyright (Note that it's better protected if you've filed your copyright notice with the Library of Congress.) and you have the ability, if another person reproduces that content on social media such as Facebook, to send Facebook what is called a "take-down" notice to get it removed. My experience is that Facebook responds within 24 hours by removing the infringing content.

Okay, that's probably far more than you wanted to know; but I hope I've clarified my answer somewhat!

As a final note on a separate issue, don't let your local law enforcement folks browbeat you in regard to mug shots, in light of the new state mugshot law.

The law, which takes effect Aug. 28, says that websites which run mug shots may not charge for their removal. This law does *not* say you cannot run mugshots. You may still run them in your newspaper. You may leave them in your electronic archives available online.

If anyone writes to you to claim that you must now take down their mugshot that you published years ago when they were arrested, your response should be that you do not now, and never have, charged to remove a mugshot from your content and you are therefore not governed by the new law. These folks were arrested in the past – that's a true state of fact. This new law does not change history!

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