Can I Infringe on Your Tweet?

By Lisa Martens and Alexander Garcia

With 75 million users of Twitter worldwide, it is the fastest growing form of communication. Twitter receives approximately 55 million tweets every day. Businesses are embracing Twitter to connect with their target audiences and relay marketing information. Even the U.S. Government is interested in maintaining tweets. The Library of Congress recently announced that it will launch a program to digitally archive every public Twitter posting since Twitter's launch in 2006. The purpose of the program is to document and archive important or notable tweets, such as President Barack Obama's tweet following his victory in the 2008 presidential election.

The growing popularity of Twitter's social networking program is raising new and interesting questions concerning the intellectual property rights of Twitter users, particularly concerning whether a Twitter user can obtain copyright protection in a particular tweet. As with any communication, some of this material may be original work...but does copyright law apply to protect the various tweets posted by Twitter users? As is generally the case, the legal answer is: "It depends."

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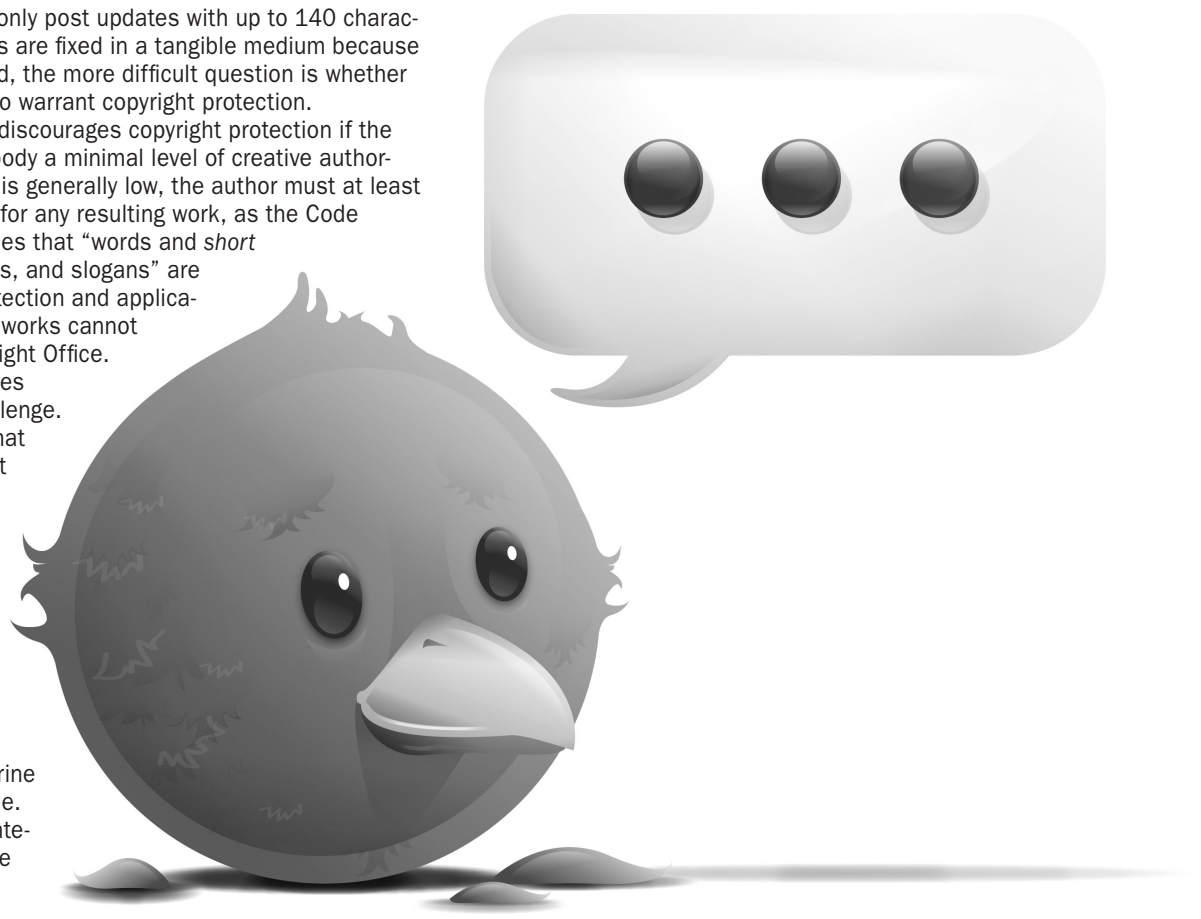
Obtaining copyright protection for a tweet will be rather difficult. In fact, the reality is that obtaining a copyright registration for a *typica*] tweet is *almost* impossible. However, setting aside the difficulty of the matter, it may be possible for some novel tweets to obtain copyright protection. Knowing the difference may prevent unintentional infringement or provide the basis for enforcement measures.

Misconceptions abound when it comes to social networking sites such as Twitter. Users may believe their postings are not eligible for copyright protection simply because their musings are "too short" in length. Others mistakenly assume that because all tweets on Twitter are the property of the person who posted them, per Twitter's terms of service, these postings are automatically protectable under copyright law.

In fact, neither of these presumptions is correct. Whether a posting on a social networking Web site is eligible for copyright protection will depend more upon the creativity of the posting than any minimum length and there certainly is no "automatic" copyright protection for these tweets.

A copyright provides legal protection that guards an author's interest in an "original" work that has been "fixed in a tangible medium." Unique to Twitter, users can only post updates with up to 140 characters. As a result, while tweets are fixed in a tangible medium because they can be visually perceived, the more difficult question is whether they are sufficiently original to warrant copyright protection.

The "de minimis doctrine" discourages copyright protection if the claimed materials fail to embody a minimal level of creative authorship. While the creativity bar is generally low, the author must at least demonstrate *some* creativity for any resulting work, as the Code of Federal Regulations provides that "words and *short phrases* such as names, titles, and slogans" are "not subject to copyright protection and applications for registration of such works cannot be entertained" by the Copyright Office.



For Twitter users, these rules create a very interesting challenge. In 140 characters or less, what is sufficiently original to merit copyright protection?

At first glance, the term "short phrases" would seem to immediately exclude Twitter postings from the realm of copyright law. However, there is no absolute rule requiring a minimum number of words to create protectable matter. Instead, the de minimis doctrine is equivalent to a sliding scale. Generally, the shorter the material submitted, the greater the originality required to obtain copyright protection.

There are many familiar short phrases and/or works found to be potentially protectable as copyrights and not barred by the de minimis doctrine, including: "E.T. Phone Home;" "You Are Special Today;" "SUPERCALIFRAGILISTICEXPIALIDOCIOUS;" and various other short poems and haikus registered with the Copyright Office

However, for each of the examples above, there are many more examples where short works were not found by the courts to be protectable as copyrights, including: "You Got the Right One, Uh-Huh;" "Building Bridges to the Future;" and "Eat Your Art Out."

In examining these results, it is readily apparent that the few "short phrases" found to be *potentially* protectable under copyright law were fairly original, as compared to those not found to be protectable. Further, the number of examples of protectable short phrases are miniscule, as compared to the exponentially larger set of short phrases excluded under the de minimis doctrine.

Purely "factual" information or "news of the day" is generally not eligible for copyright protection, which presents another bar to copyrighting tweets. As a general rule, aside from some unique arrangement or presentation of the facts, or under other limited circumstances, the underlying facts themselves are generally not subject to copyright protection.

When closely analyzed, probably as much as 99 percent of the information posted on Twitter is purely factual in nature or could be considered the "news of the day." Whether it is a celebrity or athlete tweeting about what they are doing, or a company announcing a new product, these postings are factual. While sometimes amusing they are largely unoriginal, meaning that they are probably not eligible for copyright protection.

Three key areas of copyright law — idea, expression and merger — have proven difficult to embrace and as a result, many legal practitioners often misapply them. The idea-expression dichotomy is best summed up in this quote from an early case before the Supreme Court in *Holmes v. Hurst*, 174 U.S. 82 (1899):[

"The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas..".

While the arrangement of words by an author may be subject to copyright protection, the *idea* behind the words is not eligible for copyright protection. There are some instances where the idea and the expression "merge" because there are only so many ways to express a particular idea. The "merger doctrine" is best described as follows in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (1971):

"*When the 'idea' and its 'expression' are...inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea' upon the copyright owner free of the conditions and limitations imposed by patent law.*"

A good example of the application of the merger doctrine, and relevant to Twitter posts, is the expression of facts. For facts, there are only so many different ways that people can describe what they are doing or any other benign observation. Accordingly, most of these statements, including tweets, are also likely barred from copyright protection by the merger doctrine.

When determining whether a tweet is copyrightable, the tweets that have the best chance of obtaining copyright protection are those that are high on originality and yet low on character count. A short poem, a haiku or other very short but highly original and creative play on words, will be the most likely to succeed. However, the majority of Twitter postings are simply too unoriginal to lead to copyright protection.

Legal Ramifications of Arizona's Immigration Law

By Jennifer M. Chacón

On April 19, 2010, Arizona passed an immigration law that was characterized by Randall Archibald of the *New York Times* as "the broadest and strictest immigration measure in generations." The stated purpose of the Act is to "make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of th[e] act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activities by persons unlawfully present in the United States."

To achieve its stated goal of achieving compliance with immigration law through attrition, the new law requires localities to enable enforcement of immigration law "to the full extent permitted by federal law" and allows citizens to sue localities that enact policies that in any way limit the full enforcement of federal immigration law. Some officials have already expressed concern about the effect of this provision on their ability to set law enforcement priorities, and critics contend that these provisions open up municipalities and local agencies entities to a host of frivolous lawsuits.

The bill also specifies that noncitizens present in the United States who are not carrying their alien registration cards or who have failed to register for such a card are guilty of a crime in Arizona, although the provision does not apply to "a person who maintains authorization from the federal government to remain in the United States." State and local law enforcement generally are not authorized under federal law to enforce the civil provisions of federal immigration law, so these criminal provisions are designed to give Arizona's state and local law enforcement a state criminal law justification for arresting individuals whose only underlying violations are violations of civil immigration law.

The bill also mandates state and local agents' direct participation in the enforcement of federal immigration law. Specifically, the bill — as amended on April 30 by H.R. 2162 — states that where a state or local law enforcement agent conducts a "lawful stop, detention or arrest" of an individual for a violation of a law or ordinance, if that officer has "reasonable suspicion" that the individual is "an alien who is unlawfully present in the United States," then "a reasonable attempt shall be made, when practicable, to determine the immigration status of the person" by consulting with federal immigration agents. The law also allows for warrantless arrests when "an officer has probable cause to believe that the person has committed any public offense that makes a person removable from the United States." These provisions, which call upon state and local agents to enforce federal immigration law without prior federal training or authorization, are perhaps the most controversial features of a hugely controversial bill. The bill also includes criminal provisions targeting the hiring of day laborers and solicitation of work in a public place.

The law's opponents undoubtedly will raise a number of legal challenges in the coming months. First, the law is likely to face a federal constitutional challenge on preemption grounds. The basic argument is that the federal government is empowered to regulate immigration law, and because the federal government occupies the field, state laws like Arizona are precluded by the Supremacy Clause of Article VI the U.S. Constitution from legislating in this area. Supporters of the bill argue that this law is immune from preemption challenges because it simply tracks federal immigration law. While state ordinances that complement federal immigration regulation have survived preemption challenges, the Arizona law arguably creates a role for state and local agents in enforcing immigration law that goes beyond that which is authorized under current federal law and develops its own standard for making determinations of a noncitizen's immigration status. Courts may therefore conclude that this law unconstitutionally interferes with federal regulation of immigration law.

Associated Press

The National Coalition of Latino Clergy and Christian Leaders announce the filing of a lawsuit seeking an injunction against Arizona's immigration law on April 29, 2010.

The preemption argument could apply, for example, to provision criminalizaing failure to comply with federal registration requirements. The law exempts authorized immigrants and citizens from criminal punishment, but by apparently circumventing immigration court determinations on the complex determinations of who has legal status, the Arizona law arguably creates a tension with federal law, and may run afoul of constitutional limits. Furthermore, even if a court reaches the conclusion that the law tracks federal immigration provisions precisely, it might still find that Arizona's aggressive efforts are in tension with federal immigration policy goals, and this alone would be a sufficient basis upon which to conclude that the law is preempted. Preemption arguments are the most likely arguments to prevent the bulk of the law from going into effect. However, First Amendment claims might also be brought to block some components of the day laborer solicitation provisions; such arguments have blocked similar anti-solicitation ordinances in the past.

If the law does go into effect, however, litigants surely will challenge the constitutionality of the law as it is applied. In cases involving the criminal prosecution of noncitizens, such as prosecutions under the Arizona trespassing law, defendants might argue for the suppression of evidence obtained in the course of their initial stop on the grounds that the Fourth Amendment was violated during that stop. Stops based on race alone are impermissible, and many litigants may argue that there was no other possible basis for their stop. Such challenges will not always be easy to win, however, as law enforcement is frequently able to advance pretextual, non-race-based reasons for the stops that courts accept in the wake of *Whren v. United States*, 517 U.S. 806 (1996). Moreover, after some of these stops, at least some individuals will be placed in removal proceedings rather than criminal proceedings. In removal proceedings, the noncitizen has no right to counsel at government expense, and evidence seized in violation of the Fourth Amendment is not suppressible unless the violation is "egregious." In the 9th Circuit, purely race-based stops are considered "egregious," but it could be difficult for an unrepresented noncitizen to make and win a suppression argument in immigration court. Consequently, critics of the Arizona law fear that it creates incentives for aggressive policing at the very same time that the policies and procedures that apply in removal proceedings will be insufficient to ensure adequate policing of the police themselves.

Citizens and lawful permanent residents subject to wrongful stops might bring lawsuits under provisions such as 42 U.S.C. Section1983 against state and local actors. Section 1983 allows individuals to sue state officials acting under color of law for violations of their constitutional rights. Stops made on the basis of racial appearance alone, for example, would be illegal under the Fourth Amendment and could form the basis of successful 1983 litigation. Successful suits could serve to deter some future violations. However, many citizens and noncitizens may be unwilling to expend the effort to bring civil lawsuits even when they have been subject to a discriminatory law enforcement practice. The barriers to bringing such suits — including finding a lawyer and spending the time in discovery and at trial — are often too high for potential litigants bear. For these reasons, critics of the law would presumably prefer to stop the law from going into effect, rather than challenging the law once it is in operation.

Undoubtedly, a host of legal arguments will be made in the litigation over Arizona's new law. The courts' responses to these arguments will have a significant impact on how other states and localities address the issue of unauthorized migration. In the meantime, however, the law has underscored the need for comprehensive immigration reform at the national level.

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