

BLOPYRIGHT:

PROTECTING YOUR INTELLECTUAL PROPERTY IN THE BLOGOSPHERE

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INTRODUCTION

I sat there staring at the screen. Westlaw didn't usually have this effect; if anything my daily summer forage into the online database bordered on mind-numbing (under-insured motorist litigation is only so exciting.) But the advertisement glaring back at me from the center of the screen was different. *1L of a Ride: A Well-Traveled Professor's Roadmap to Success in the First Year of Law School*. Cute title, but I didn't remember giving the author, a University of Memphis professor, permission to use it. After all, it was *my* title for *my* 1L blog, *1L of a Ride*, long before it became "well-traveled." I spent the next ten minutes mired in the trauma. How could someone steal something so precious? It took two weeks to find the right name for that blog, and the end result was a double entendre even my older brothers respected. My anger eventually subsided; I simply was not prepared to bring a intellectual property suit against an author selling a 1L guidebook, as tempting as his double-digit profits were. Still, the experience was alarming: what was the scope of my intellectual property rights, and those of the countless others who spend the afternoon blogging about their kids or that errant American Idol audition? What, if anything, of my blog did I own, and how could I protect it?

Unfortunately, much of the discussion surrounding intellectual property and blogs concerns bloggers infringing on other people's intellectual property by illegally copying and

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posting such property to their blogs.² Hardly discussed is a blogger's own intellectual property rights—what of his³ blog he owns, which intellectual property laws apply, and what concerns he should have about blogging. This article only scratches the surface of that discussion, focusing on copyright as a means of blog protection, and looking into potential pitfalls within terms of service agreements and the doctrine of copyright abandonment as means of curbing protection. I leave for another day any discussion of trademark and other potentially relevant intellectual property laws.

Part I of this note provides useful background on blogging, breaking down a typical blog into different parts and creating a thorough definition that this article and other articles can use to frame their intellectual property analysis. Part II discusses copyright principles and applies them to blogs, inquiring about some questionable areas of protection, but concluding that copyright protection should apply to most blogs. Part III surveys three terms of service agreements from three leading blog publishing applications, and highlights unique provisions and common questions relevant to a blogger's intellectual property. Finally, part IV discusses whether a blogger impliedly puts his work into the public domain because of an underlying motivation to have his work shared with as many people as possible.

2. See, e.g., Eric Goldman, *Overview of Blogs and Social Networks*, 929 P.L.I./PAT. 35, 55 (2008) (discussing a blogger's susceptibility to direct liability for posting copyrighted materials on his blog).

3. Women blog, too, but I was motivated to write this note based on my own blog experience, and I'm a man, so I use the male pronoun "he" to describe the blogger throughout this note.

I. DEFINING A BLOG: THE SUM OF ITS PARTS

In an era where YouTube streams to Blackberrys and iPhones, defining a blog seems unnecessary. A blog might be the afternoon ramblings of the neighborhood ninth grader on school, politics, and of course, whether Han Solo could beat Boba Fett in a John Wayne-esque blaster duel.⁴ It could be a grab bag of political editorials, such as the Huffington Post, or a punk band's updates from the tour. In other words, the blogosphere is so diverse and has evolved to such an extent that any single definition runs the risk of over-generalizing. Nevertheless, to examine the intellectual property within blogs, some sort of technical definition is useful. Breaking the typical blog model down into recognizable parts makes allows a blogger to see potential gaps in protection.

A blog (from the compound of "web log") is a website where a user can post chronological, up-to-date e-journal entry of his thoughts,⁵ much like a diary. The primary difference between it and a physical diary is that a blog is usually open and accessible to the millions of people surfing the web at any given moment. The blog site itself usually consists of several key components. First, there is the blog name. From "Perez Hilton" to "Dooce", all blogs start with a name, which usually sits atop of the webpage in a custom header.⁶ The blog's most important features are the journal entries, or posts, which are arranged in reverse

4. See e.g., Matthew Stover, *Unsung Heroes and Villains*, STARWARS.COM BLOGS, <http://blogs.starwars.com/darthsdroidsandmatthewstover/3> (Sept. 26, 2009, 10:13 AM).

5. NETLINGO: THE INTERNET DICTIONARY, BLOG, <http://www.netlingo.com/word/blog.php> (last visited Nov. 22, 2009).

6. The blog name is very often the blog's domain name as well. This note focuses mostly on the content of a blog itself, rather than domain name ownership, but does briefly discuss domain names in the context of terms of service agreements. See *infra* notes 63–64 and accompanying text. For further discussion of domain names and intellectual property, see

chronological order, so that the newest entry is at the top of the page.⁷ Writing for a blog is termed “blogging,” and the author of a post is the “blogger.”⁸ Blogs posts often allow readers to respond to posts by leaving comments. Such comments can be simple one liner’s such as “I love this story—hilarious!” but may also be as long, if not longer, than the post itself.⁹ The blogger can also respond to comments, and essentially create an ongoing conversation as an addendum to the post itself.¹⁰

The final prominent aspect of most blogs is the sidebar. Usually found on the left- or right-hand side of the blog, this section of the site is a hodgepodge of “widgets”¹¹ which links to previous posts, other websites and embedded information. Sidebars typically make it easier to navigate through the different blog posts. The sidebar therefore often consists of an “archive” widget that lists previous blog posts by chronological order, topic, or popularity. Blog sidebars also often have a list of links to other websites that the blogger follows or likes, most often other blogs. Similarly, some widgets allow the blogger to embed videos or status updates into the

7. See WIKIPEDIA, BLOG, <http://en.wikipedia.org/wiki/Blog> (last visited Nov. 22, 2009).

8. *Id.*

9. See e.g., Comment of Cardiogirl, *Owen Wilson’s Suicide Attempt*, <http://everyoneneedstherapy.blogspot.com> (Apr. 7, 2008 1:07 PM).

10. See, for example, *id.* how comments can positively add to the conversation. The author, Cardiogirl, responded to TherapyDoc’s post on Owen Wilson’s bout with depression, adding that “All my life my father has told me ‘[Depression is] all how you look at it and if you try hard enough you’ll be happy.’ . . . I really don’t get why [depression] seems like such a huge stigma in society, but I certainly keep it close to my vest in real life.” *Id.* Of course, not all blog followers can be trusted to provide helpful insight. At the same blog, but on a different post, a reader left a comment insinuating that the blogger was subconsciously racist for using the term “African American” in a post. See Comment of Karen, *Water, Water Everywhere: David Foster Wallace*, <http://everyoneneedstherapy.blogspot.com/2008/09/water-water-everywhere.html> (Sept. 22, 2008 10:48 PM).

11. NETLINGO, WIDGET, <http://www.netlingo.com/word/widget.php> (last visited Nov. 22, 2009) (“A ‘widget’ is an application that sits on top of a Web site and offers users interactive features. . . Popular widgets (Google calls them “gadgets”) include photo slide shows, videos, music playlists, [etc.] Widgets are normally added to social networking profiles, blogs, or Web pages.”).

sidebar that the author hosts on another site, such as Youtube or Twitter. Widgets can be renamed to fit the overall theme of the blog. For example, in 1LofaRide, the blog's archive is titled "THE CASEBOOK," and the embedded Twitter feed is titled "MENS REA."

These aforementioned pieces—the title, posts, comments, and sidebar—are standard features of a Blogger or Wordpress blog. In recent years, however, the blogosphere has expanded to include micro-blogging sites which break from such conventions. Microblogging allows users to send brief text updates, photos or audio clips to a host, such as Twitter, which publishes them to the microblogger's user page, either to be viewed by anyone or a restricted group chosen by the microblogger.¹² To illustrate the difference between "traditional" blogging and microblogging, one need only look at the content. Unlike a traditional blog post, where there are no set limits on how much a person can write or how many photos he can include, microblogging is generally restricted to a small number of characters or small file sizes.¹³ For example, the micro-blogging giant, Twitter, restricts the size of its posts (or "tweets") to only 140 characters. A few tweets might read, "I'm at the Greenday concert—anyone else?" or "Just saw Steve Carrell at the Grove!" Although they are shorter than blog posts, when read together and in order, tweets may not read very differently from a typical blog post. For example, if a microblogger attends a Chicago White Sox game, and while there tweets sixteen times about the game, readers will see a string of tweets all on the same topic, essentially creating a single cohesive blog post.

II. BLOGS AND COPYRIGHT BASICS

12. Jennifer Archie, Jennifer Barry and Christopher Olson, *Protecting Your Rights in 140 Characters or Less: Trademark Protection on Twitter*, 21 I.P.T. L.J. 23, 23 (2009); see also WIKIPEDIA, MICROBLOGGING, <http://en.wikipedia.org/wiki/Microblogging> (last visited Nov. 22, 2009).

13. Archie et. al., *supra* note 12, at 23–24.

United States copyright law is rooted in the Constitution. The Patent and Copyright Clause¹⁴ grants Congress the Power “to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.”¹⁵ In 1790, Congress enacted the first federal copyright statute; the most recent revision was culminated the Copyright Act of 1976.¹⁶ The 1976 Act most notably eliminated common law copyright protection for fixed works by applying federal copyright protection to an original work of authorship from the moment of fixation in a tangible medium of expression.¹⁷ In so doing, it also preempted state copyright law on fixed works, so that the federal statute governs all cases involving copyright protection, except for works created before 1976.¹⁸

Because federal copyright protection applies upon fixation in a tangible medium, compliance with copyright formalities (i.e., affixation of a copyright notice, registration, and deposition) is not a prerequisite to copyright protection.¹⁹ Nevertheless, a work must still be eligible for copyright protection. This standard is set forth in Section 102(a) of the 1976 Act, which provides that eligible works are “original works of authorship fixed in any tangible medium of expression. . . .”²⁰ With limited exceptions,²¹ a work that meets this standard is

14. U.S. CONST. art. I, § 8, cl. 8.

15. *Id.*

16. 17 U.S.C. § 101 (2009).

17. *Id.* at § 102.

18. One of the classic cases involving state law copyright was *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341 (N.Y. 1968). In *Hemingway*, the author’s estate sought common law protection of conversations Hemingway had with the author of a subsequent book. *Id.* at 344–345. The latter had used direct quotes from the conversations without Hemingway’s knowledge. *Id.* The 1976 Act also preserved common law protection for unfixed works. H.R. REP. NO. 94-1476, at 131 (1976).

19. Of course, compliance with such formalities is required in order for a copyright holder to enforce his or exclusive rights in a copyright proceeding. 17 U.S.C. § 411 (2009).

20. *Id.* at § 102(a).

eligible for copyright protection. The “elements” of copyright protection are therefore (1) originality, (2) work of authorship and (3) fixation.

A. Originality

To gain copyright protection, the subject matter must be “original.” While the originality requirement existed in the early days of U.S. Copyright legislation,²² the Supreme Court most clearly defined it in the 1991 case *Feist Publications, Inc., v. Rural Telephone Service*.²³ In *Feist*, the Court considered whether a typical telephone directory, such as white pages, was copyrightable.²⁴ The defendant copied the names, telephone numbers, and addresses from the plaintiff’s telephone directory for use in its own telephone directory, and the plaintiff sued for copyright infringement.²⁵ The Court explained that the dispute was rooted in the clash between two seemingly incongruous tenets of copyright law: on the one hand, that facts are not copyrightable, and on the other, that compilations of facts, such as telephone directories, generally are.²⁶ The practical difference, as the court explained, was the originality requirement. “Original, as the term is used in copyright,” wrote Justice O’Connor for the majority, “means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”²⁷ Thus mere facts—

21. Some otherwise eligible works can be excluded by other provisions of the Act. *See id.* at §§ 104, 105.

22. *See, e.g., In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (“And while the word *writings* may be liberally construed, as it has been to include original designs for engravings, prints, & c., it is only such as are *original*, and are founded in the creative powers of mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like.”).

23. 499 U.S. 340 (1991).

24. *Id.* at 342.

25. *Id.* at 343–344.

26. *Id.* at 345.

27. *Id.*

such as names, addresses, and telephone numbers—are, by definition, unoriginal.²⁸ The organizational method of a compilation, however, is potentially protectable if the selection and arrangement are sufficiently independent and creative.²⁹ It found nothing original in the alphabetical arrangement or universal selection of telephone subscribers.

Applying the *Feist* definition to blogs can be tricky. The self-made posts and comments that make up many blog sites definitely satisfy the originality requirement. But what about a blog designed to compile links to other sites from around the internet? Boingboing.net, ranked number five in Technorati's list of the top 100 blogs,³⁰ does exactly that. Launched in 2001, BoingBoing, a self-described “directory of wonderful things”, compiles links relevant to the cyberpunk subculture.³¹ On any given day it may feature editorials against internet piracy restrictions to the more tongue-in-cheek “Life Lessons from the Vogelkop Bowerbird.”³² The blog often includes a short caption written by the editorial staff introducing the link, but is that—or the fact that the links are connected by a loosely defined cyberpunk genre—enough to afford it copyright protection as a compilation? Under *Feist*, the answer is probably yes. Obviously BoingBoing cannot claim a copyright on any of the material it links to, but assuming its organizational structure can be defined, it is both an original and creative compilation. Even so,

28. *Id.* at 347.

29. *Id.* at 348. It was the lack of creativity that doomed the plaintiff in *Feist*, where the Court found that Rural's directory was simply an alphabetic list of all subscribers to its service, and totally devoid of creativity. *Id.* at 361. The Court reached this conclusion, despite acknowledging that “the requisite level of creativity [for originality] is extremely low.” *Id.* at 345. Nevertheless, the Court's decision reflected the subject matter at hand: facts, and as the Court argued, “[f]acts are never original.” *Id.* at 357.

30. TECHNORATI, TOP 100, <http://technorati.com/blogs/top100/> (last visited Nov. 22, 2009).

31. WIKIPEDIA, BOING BOING, http://en.wikipedia.org/wiki/Boing_Boing (last visited Nov. 22, 2009).

32. <http://www.boingboing.net/2009/11/09/life-lessons-from-th.html> (Nov. 9, 2009 2:17 PM).

as *Feist* points out, “the copyright in a factual compilation is thin. . . [A] subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.”³³ Under this standard someone else could copy some the URLs representing the links on BoingBoing’s site and arrange them in a different order.

B. *Works of Authorship*

The term “works of authorship” is left undefined in the copyright statute. Section 102’s use of the term functions to broaden the scope of copyright protection—to guard against the possibility of confining copyright protection to “Writings” as specified in the Constitution.³⁴ The Copyright Act contains an illustrative list of possible works of authorship.³⁵ While not intended to be exhaustive, the list adequately covers the materials a blogger might post to a blog. Perhaps the most important category listed is “literary works,” defined by the Copyright Act as “works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia . . . regardless of the nature of the material objects . . . in which the works are embodied.”³⁶ This category covers the most important components of a blog—original posts and comments. But because blogging is such a fluid open and diverse art form, other categories such as “pictorial, graphic, and sculptural works”³⁷ and “audiovisual works”³⁸ may also appeal to pictorial and video bloggers.

33. *Feist*, 499 U.S. at 349.

34. *See* U.S. CONST. art. I, § 8, cl. 8.

35. 17 U.S.C. § 102(a) (2009) (listing (1) literary works; (2) musical works and accompanying words; (3) dramatic works and accompanying music; (4) pantomines and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works).

36. *Id.* at § 101.

37. *Id.* at § 102(a)(5).

38. *Id.* at § 102(a)(6).

C. *Fixation*

The fixation requirement—that works are only copyrighted if “fixed in any tangible medium of expression”—is both implicit in the Constitution³⁹ and explicit in the Copyright Act. Under the Section 102(a) of the Act, a work is fixed “when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁴⁰ Fixation thus depends on satisfying two important requirements. First, the work must be fixed by, or under the authority of the author. For bloggers posting their own original material to their own blog, this should not be a problem. If a blogger is publishing the work for the first time in a blog he or she does not control, he impliedly authorizes it.

Second, the work must be fixed upon something “sufficiently stable” as to enable it to be seen for more than a “transitory duration.” This embodiment requirement is something of a red herring. On the one hand, typical “copies” available for fixation include writing something down in a paper format, or recording it to a DVD or computer hard drive. These examples exude a permanent and tangible character, distinguishable from the internet. Regardless, however, of whether a copy is stored on a DVD sitting on the author’s desk, or on Google’s server in Santa Monica, the point is that it is stored somewhere, and for a period of time. Therefore there is little reason to think the fixation requirement is not satisfied.

In sum, blogs are prime candidates for copyright protection. From the perspective of content alone, there appear to be few, if any, impediments to their protection under the Copyright

39. See *U.S. v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999) (“[T]he Copyright Clause does not envision that Congress is positively forbidden from extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term ‘Writings.’”).

40. 17 U.S.C. § 101.

Act. What remains to be seen is if there are any contractual obligations or underlying philosophies which stunt a blog's copyright protection.

III. TERMS OF SERVICE AGREEMENTS AND QUALIFIED PROTECTION

For most bloggers, a discussion of property rights begins with their Blog Publishing Application (BPA).⁴¹ BPAs are software designed to simplify the creation and maintenance of blogs. Often a BPA also offers to host a blog on its private server. This openness does not come without cost; to protect itself, a BPA usually requires a blogger to accept and adhere to its Terms of Service (TOS) agreements. TOS agreements often cover a wide range of rights and controls, including, for example, warranties, marketing rights, privacy policies, and content disclaimers. Pertinent to the discussion of a blogger's property rights, TOS agreements often include a paragraph or more on a blogger's intellectual property rights. If a BPA's TOS deal concretely on issues of blogger intellectual property rights, there may be no need for further discussion of property rights because the TOS may assign them to the blog host. Conversely, a BPA's failure to lay out those rights clearly and adequately can leave a blogger at risk.

Discussed below are the intellectual property TOS provisions from three leading BPAs: Google (Blogger), Wordpress and Twitter. Each agreement is first addressed separately, but this part concludes with some common questions facing each.

A. *Google (Blogger)*

41. The terms "Weblog Software", "blogware", "Blog Publishing Software" and "Blog Publishing System" are synonymous with BPA. I choose BPA, however, because it is the least ambiguous. For more information on BPAs, see WIKIPEDIA, BLOG SOFTWARE, http://en.wikipedia.org/wiki/Weblog_software (last visited Nov. 22, 2009).

Provision 6 breaks down into two categories: Google’s intellectual property rights, and the user’s intellectual property rights.⁴² The paragraph addressing the former simply says that Google owns all intellectual property in the actual service (Blogger),⁴³ as opposed to the blog content. Google does not, however, claim “ownership or control over any Content submitted, posted or displayed by [the blogger] on or through Google services.”⁴⁴ It goes on to state that bloggers “retain all patent, trademark and copyright to any Content [they] submit . . . and [are] responsible for protecting those rights. . . .”⁴⁵ To this point in the agreement, the trade-off seems relatively one-sided: Google allows a blogger to use its program without cost. Google has no standing to bring a copyright infringement suit on behalf of the blogger, but if there’s a suit to be brought, it is the blogger’s to win.

Or is it? Immediately after disclaiming certain rights to a blogger, Google offers the following caveat:

By submitting, posting or displaying Content on or through Google services which are intended to be available to the members of the public, you grant Google a worldwide, non-exclusive, royalty-free license to reproduce, publish and distribute such Content on Google services for the purpose of displaying and distributing Google services.⁴⁶

This provision makes clear that the blogger is not always—if ever—the sole owner of all rights to his blog content. There are times when the blogger grants Google the privilege to reproduce

42. Blogger, Terms of Service, <http://www.blogger.com/terms.g> (last visited Nov. 22, 2009).

43. *Id.*

44. *Id.* Section 230 of the of the Communications Decency Act actually creates an incentive for the hosting site to disclaim ownership of such content by providing immunity from liability for providers and users of an “interactive computer service” who publish information provided by others. *See* 47 U.S.C. § 230.

45. Blogger, *supra* note 42.

46. *Id.*

his work for the open-ended purpose of “displaying and distributing Google services.”⁴⁷ Arguably, under this provision, Google can use a blogger’s content on a highway billboard or television commercial promoting Google.

Less clear from the provision are the limits of the content licensed to Google. Arguably, not all content or blog posts are “intended to be available to the members of the public.”⁴⁸ After all, a blogger can change the default settings of his blog so that only surfers that apply to read his blog and that he approves can do so. Restricting access in such a way most likely signifies that the content is not intended for public use. But should the fact that default settings leave the blog open to everyone mean that if a blogger fails to privatize his blog posts, he then acquiesces to Google’s royalty-free license? Or, are all posts private by default, and Google can only use material that a blogger makes public by some affirmative action, such as licensing it with Creative Commons?⁴⁹ Ultimately, the terms of service are not clear, but the practical difference for a blogger’s intellectual property rights can be significant.

B. *Wordpress (Automattic)*⁵⁰

The intellectual property provision in Wordpress’s terms of service agreement is significantly shorter, spanning all of one paragraph, and focusing mostly on specific intellectual property (Wordpress’s “trademarks, service marks, graphics, and logos”) that a blogger has no rights to.⁵¹ It is very similar to the corresponding Google provision, but leaves out entirely the second part about a blogger’s own intellectual property rights. Missing, therefore, is any broad

47. *Id.*

48. *Id.*

49. For more information about Creative Commons, see *infra* note 99.

50. Automattic is the company that owns Wordpress (the “Google” to “Blogger”). I prefer to use “Wordpress” in this section, but the TOS often refer to Automattic. Consequently, the terms are used interchangeably throughout the section.

51. Wordpress, Terms of Service, <http://en.wordpress.com/tos/> (last visited Nov. 22, 2009).

statement by the Wordpress disclaiming any rights to the blog content.⁵² Other provisions of the TOS seem to signify that the blogger owns his content, but ambiguously. For example, the opening paragraph of the agreement explains that the service “is designed to give [the blogger] as much control and ownership over what goes on [his] blog as possible”⁵³ but never really fleshes out the parameters of the goal anywhere in the agreement.⁵⁴

Elsewhere in the TOS, Wordpress includes a similar royalty-free licensing provision but with a couple of significant differences: “By submitting Content to Automattic for inclusion on your Website, you grant Automattic a world-wide, royalty-free, and non-exclusive license to reproduce, modify, adapt and publish the Content solely for the purpose of *displaying, distributing and promoting your blog.*”⁵⁵ Like Google, Wordpress takes a share of the blogger’s intellectual property pot, but for certainly more agreeable purposes. Rather than to promote its own services, Wordpress can only use a blogger’s content for the benefit *of the blogger*. In leaving out “intended to be available to members of the public”, Wordpress also does not differentiate between private and public content. Thus, the Wordpress agreement is more favorable to the blogger than the Google provision; although Wordpress has a royalty-free license in all content, its uses for such content are limited to those solely benefiting the blogger.⁵⁶

C. Twitter

52. As opposed to Blogger’s, which did. *See supra* note 44 and accompanying text.

53. Wordpress, *supra* note 51, at “The Gist”.

54. The 1976 Copyright Act actually requires that transfers of copyright, other than by operation of law, are not valid unless it is in writing and signed by or under the direction of the owner. 17 U.S.C. 204(a).

55. Wordpress, *supra* note 51, at “Responsibility of Contributors” (emphasis not included in original).

56. One critique of this provision, though, is its placement. Instead of placed in the Intellectual Property provision, *see* Wordpress, *supra* note 51 and accompanying text, it is tucked away in a different provision making it easy for blogger to miss.

In the wake of recent public outcry over intellectual property rights on social networking sites,⁵⁷ Twitter recently released its new Terms of Service agreement on September 10, 2009.⁵⁸ This new agreement has some features not found in either the Google or Wordpress agreements. Unlike Wordpress TOS, it has a provision regarding the blogger's intellectual property rights, and unlike Blogger's TOS, this provision comes before the provision discussing its own rights. Still, many of the same questions arise.

Under Twitter's agreement, the microblogger "retain[s] his] rights to any Content [he] submit[s], post[s] or display[s] on or through the [Twitter] Service."⁵⁹ It then throws out its first caveat—a royalty free license to distribute such content "in any and all media or distribution methods (now known or later developed"⁶⁰—but this is a minor point. A short note follows explaining that the "license is [the blogger] authorizing [Twitter] to make [his] Tweets available to the rest of the world. . . But what's yours is yours—you own your content."⁶¹ Still, nothing is free:

[The blogger] agree[s] that this license includes the right for Twitter to make such Content available to other companies, organizations or individuals who partner with Twitter for syndication, distribution or publication of such Content on other media services. . . Such additional uses . . . may be made with no compensation paid to [the blogger] with respect to the Content that

57. See, e.g., Chris Walters, *Facebook's New Terms of Service: "We Can Do Anything We Want With Your Content. Forever."*, THE CONSUMERIST, Feb. 15, 2009, at <http://consumerist.com/5150175/facebooks-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever> (discussing specific Facebook terms of service provisions that give Facebook unrestricted rights to a Facebook user's content).

58. Email from Biz Stone, Co-founder and Creative Director of Twitter, to David Freedman, Twitter Account Holder, (Sept. 10, 2009) (on file with author) ("We'd like to let you know about our new Terms of Service. As Twitter has evolved, we've gained a better understanding of how folks use the service. As a result, we've updated the Terms and we're notifying account holders. . .").

59. Twitter, Terms of Service, <https://twitter.com/tos> (last visited Nov. 22, 2009).

60. *Id.*

61. *Id.*

[the blogger] submit[s], post[s], transmit[s] or otherwise make[s] available through the Services.⁶²

The final words “or otherwise make[s] available through the Services” carries the same sort of ambiguity as “intended to be available to the members of the public” in Google’s TOS. Are tweets available at all times; unless locked up; or only if the blogger takes some affirmative action that shows they available for public use?

Twitter’s provision about its own intellectual property also makes some important claims unique to its agreement. The so-called “Twitter Rights” provision states that “[nothing in the Terms give[s the blogger] a right to use the Twitter name or any of the Twitter trademarks, logos, domain names, and other distinctive brand features.”⁶³ Perhaps most notably, the restriction on domain names—not present in either the Wordpress or Blogger agreements.⁶⁴ Both Wordpress and Google offer free hosting, and give the blogger a free domain name ending with the service (*i.e.*, www.the3L.wordpress.com; www.2LandBack.blogspot.com). Twitter gives out similar domains (www.twitter.com/dovidfreedman), but Twitter appears to retain ownership of such domain names, apparently denying account holders the privilege of reproducing, or publicly displaying the URL.

D. *Common Questions Facing BPAs*

Other provisions, common to all three of the terms of service agreements surveyed above, raise some interesting questions about the premise that blog posts are copyrightable. For example, each agreement contains a provision effectively granting the BPA the right, in its sole

62. *Id.*

63. *Id.*

64. *Id.*

discretion, to remove any content and terminate any blog at any given time.⁶⁵ Given these provisions, it is worth questioning whether a blog can truly satisfy the fixation requirement that works be “communicated for a period of more than transitory duration.”⁶⁶ Further, what intellectual property rights subsist in original content that violates the Terms of Service Agreement? For example, Wordpress’s TOS explicitly prohibits users from posting any pornographic content.⁶⁷ If someone breaches the terms, and posts such content, do their intellectual property rights in it change? This latter point is something none of the agreements deal with, but is again something that can have significant consequences for the users.⁶⁸

The bigger point, though, is enforceability. The terms of service agreements discussed here are classic “clickwrap” or “point-and-click” agreements, electronic versions of a shrink-wrap license where the blogger agrees to the terms of an electronically displayed agreement.⁶⁹ Their enforceability is the subject of debate, with some courts enforcing them under the Uniform

65. See Blogger, *supra* note 42 (“Google furthermore reserves the right to refuse to accept, post, display, or transmit any Content in its sole discretion.”); Wordpress, *supra* note 51 (“Automattic has the right (though not the obligation) to, in Automattic’s sole discretion (i) refuse or remove any content that, in Automattic’s reasonable opinion, violates any Automattic policy or is in any way harmful or objectionable, or (ii) terminate or deny access to and use of the Website to any individual or entity for any reason, in Automattic’s sole discretion.”); Twitter, *supra* note 59 (“We may modify or adapt your Content in order to transmit, display or distribute it over computer networks and in various media and/or make changes to your Content as are necessary to conform and adapt that Content to any requirements or limitations of any networks, devices, services or media.”).

66. 17 U.S.C. § 101 (2009)

67. Wordpress, *supra* note 51, at “Responsibility of Contributors”.

68. The Copyright Act does not exclude pornographic material from protection; the questions here are, for example, whether the fact that the material may be backed up on a server somewhere might still satisfy fixation, or whether the violation of the terms of service agreement should forfeit intellectual property rights in some way.

69. See BLACK’S LAW DICTIONARY 1195 (8th ed. 2007).

Commercial Code and others rejecting them.⁷⁰ The rationales against enforcing these provisions—lack of affirmative assent to the terms, lack of adequate notice, or contradiction with federal copyright law⁷¹—do not apply to these agreements, where the BPAs require the blogger to accept the terms affirmatively before using the application. Moreover, at least one court has held that the failure of one party to read such terms does not invalidate the contract.⁷²

Still, there are some provisions that raise an eyebrow. For example, Provision 9 in the Wordpress TOS gives Wordpress “the right, at its sole discretion, to modify or replace any part of [the TOS] Agreement”, leaving to the blogger the responsibility to “check [the] Agreement periodically for changes.”⁷³ If enforced in the context of the intellectual property provisions, such an agreement can significantly impact the rights of the average blogger. It is not farfetched to think that the average blogger will never check back to see whether the provisions have changed; indeed Wordpress, arguably, implicitly recognizes that the average blogger probably never actually reads the Terms of Service Agreement,⁷⁴ much less checks up on it periodically. If the trend towards enforceability continues,⁷⁵ bloggers need to stay aware of these provisions.

70. Kevin W. Grierson, *Enforceability of “Clickwrap” or “Shrinkwrap” Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 5th 309 § 2[a] (2003).

71. *Id.*

72. *See* Barnett v. Network Solutions, Inc., 38 S.W.3d 200, 204 (Tex. Civ. App. 2001) (“Parties to a written contract have an obligation to read what they sign; and, absent actual or constructive fraud . . . they are not excused from the consequence upon a failure to read the contract. . . The same rules applies to contract which appear in electronic format.” (internal citations omitted)).

73. Wordpress, *supra* note 51, at “Changes”.

74. Notice the emphasized words in Provision 11 of the Wordpress Terms of Service: Disclaimer of Warranties. The Website is provided “as is”. Automattic and its suppliers and licensors hereby disclaim all warranties of any kind, express or implied, including, without limitation, the warranties of merchantability, fitness for a particular purpose and non-infringement. Neither Automattic nor its suppliers and licensors, makes any warranty that the Website will

IV. STAYING OUTSIDE OF THE PUBLIC DOMAIN

When content is in the public domain, it is not controlled by anyone. Such content is “public property” and is available to anyone, free of use and of possible infringement. In Copyright Law, the public domain is most commonly discussed in the context of property that was at one time protected, but whose copyright has expired after running its full duration.⁷⁶ Other content, such as works prepared by an officer or employee of the US government as part of that person’s official duties, are automatically treated as part of the public domain and are never protected by copyright.⁷⁷ Still another category of the public domain covers otherwise copyrightable works whose copyright have been abandoned by their owners. It is this final category that is most important to the blogger.

Prior to 1978, the default status for a creative work was non-copyright. If an author failed to affix a copyright notice on his work, it automatically passed into the public domain.⁷⁸

be error free or that access thereto will be continuous or uninterrupted. *If you’re actually reading this, here’s a treat.* You understand that you download from, or otherwise obtain content or services through, the Website at your own discretion and risk.

Wordpress, *supra* note 51, at “Disclaimer of Warranties” (emphasis not in original). The link sends the mythical reader to a “plate of tender, moist Texas brisket.” Wordpress, TOS Treat, <http://en.wordpress.com/tos/treat/> (last visited Nov. 22, 2009). I have no doubt that the treat is tasty and well-deserved, but both I, and apparently Wordpress, doubt that most bloggers will ever get far enough in the terms of service to “taste” it.

75. Margaret Littman, *Social Studies*, 95-JN A.B.A. J. 11, 11 (2009) (“‘Thirty years ago, no one would have said these unilateral agreements were enforceable,’ says Stanford Law School professor Mark A. Lemley, director of the school’s Program in Law, Science and Technology. But traditional contract law has changed, he says, and courts are enforcing click-through agreements on software and other kinds of unilateral agreements.”).

76. Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC’Y. U.S.A. 137, 151–152 (1993) (“The category of the public domain that is on the strongest historical footing is the collection of works in which copyright has expired because the term of protection has run its full duration.”).

77. See I.R.C. § 105 (2000).

78. *Cultivating the Public Domain*, CREATIVE COMMONS.COM, at http://wiki.creativecommons.org/Cultivating_the_Public_Domain (last visited Nov. 22, 2009).

The 1976 Act, however, reversed these defaults, giving eligible works copyright protection upon fixation and making the notice of copyright optional. The default for creative works is therefore no longer the public domain, but copyright protection.⁷⁹ This shift from default vulnerability to default protection should technically serve the interests of bloggers interested in protecting their work from infringement. After all, if the content of the blog is, by default, not part of the public domain, then copying the content runs a strong risk of copyright infringement, assuming all other requirements (i.e., originality and fixation) are satisfied.

But the shift, while effectively narrowing the public domain, has not shut the door on it entirely. Instead, to put something in the public domain, an author must now perform some “overt act” that demonstrates his intent to surrender, or abandon, his rights. The shift has also garnered some backlash—scholars and movements, who promote a wider public domain and steps to relinquishing some, if not all, of a person’s intellectual property rights. These two ideas are interrelated and pose some interesting questions for bloggers interested in blog ownership rights.

A. Abandonment

Although the Copyright Act automatically grants an author copyright protection in eligible works, an author is still free to surrender such protection through abandonment. In doing so, the author becomes a former owner, and can no longer establish copyright infringement. Copyright abandonment therefore acts as an affirmative defense against claims of infringement of those rights.⁸⁰

79 *Id.*

80. Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV. 85, 92 (1992). As will be explained, abandonment is an *affirmative* defense because the defendant must show that the copyright holder committed an overt act which manifests his purpose to surrender his rights.

This defense is nothing new. As early as 1951, Judge Learned Hand held that to abandon a copyright, an owner must effect “some overt act which manifests his purpose to surrender his rights in the ‘work,’ and to allow the public to copy it.”⁸¹ His holding—almost sixty years ago—remains the standard today;⁸² abandonment defenses are still judged by an overt act that clearly manifests the author’s intent to relinquish copyright protection.⁸³ The requirement of intent is important as it distinguishes abandonment from forfeiture, the latter generally occurring prior to the enactment of the Berne Amendments through an author’s failure to affix a notice of copyright to a new work, regardless of intention.⁸⁴ Thus unlike forfeiture, which is no longer possible,⁸⁵ abandonment of copyright, is possible and remains a viable defense.⁸⁶

Abandonment can be either explicit⁸⁷ or implicit.⁸⁸ Because copyrights can be divided temporally or spatially different rights can be abandoned for different time periods,⁸⁹ and only the sole owner of a particular copyright right can commit the overt act that effects abandonment

81. Nat’l Comics Publ’n, Inc. v. Fawcett Publ’ns, Inc., 191 F.2d 594, 598 (2d Cir. 1951).

82. See e.g., Hadady Corp. v. Dean Witter Reynolds, Inc., 739 F. Supp. 1392 (C.D. Cal. 1990) (“To find abandonment, ‘the copyright owner must have clearly manifested that intention through some affirmative act.’” (citation omitted)).

83. *Id.*

84. See Kreiss, *supra* note 80, at 93.

85. Congress finally eliminated the notice of copyright requirement in 1988 to meet the standards of and join the Berne Convention. Samuels, *supra* note 76, at 157. By abolishing this requirement, Congress shut the door on copyright forfeiture. *Id.* at 157-58. In the words of one scholar, “After 1989, don’t bother asking if copyright exists in a work: it does. Don’t bother to claim the status of an innocent infringer: there are no innocent infringers.” *Id.* at 158.

86. *Id.*

87. See, e.g., *Hadady*, 739 F. Supp. at 1399 (holding owner explicitly abandoned copyright where owner distributed newsletter with notice stating that copyright protection only lasted for two days).

88. See, e.g., *DeSilva Constr. Corp. v. Herral*, 213 F. Supp. 184, 196–97 (D.C.Fla. 1962) (holding owner implicitly abandoned copyright in architectural blueprints where copies of the blueprints were freely passed around to subcontractors without notice of copyright, completed house was open to the public without restrictions, and newspaper advertisement depicting house and floor plan did not contain copyright notice).

89. Kreiss, *supra* note 80, at 95.

of that right.⁹⁰ The oft-litigated question in abandonment defenses, however, is whether the owner of the copyright has committed an overt act manifesting intent to abandon. In the context of blogs, therefore, the concept of abandonment poses an interesting question: does a blogger, who posts his work to his blog using a standard BPA such as Blogger or Wordpress, explicitly or impliedly abandon the copyright in his content? In other words, is the use of a standard BPA an overt act that manifests a blogger's intent to abandon his copyright in otherwise copyrightable material?

One of the underlying rationales for blogging makes it tempting to suggest such abandonment should occur when using a BPA. Specifically, many bloggers write in order to garner attention and audiences that they would otherwise not have access to. These audiences can help thrust the blogger into the spotlight where he can be read and perhaps discovered. For example, without the cult following of his blog, WaiterRant.net, Steve Dublainica, would probably still be waiting tables in New York City rather than basking in the riches from his 2008 *New York Times* bestseller.⁹¹ Blogging is, and continues to be, an opportunistic endeavor, and for many, the actual content or blog post is less important than its being shared and seen by as many people as possible. Maintaining a copyright in a post may limit how that post is shared, and the number of people who see it, working against the ultimate motive of such an opportunistic blogger. In this light, it is at least plausible that a blogger impliedly abandons his work to the public domain merely by posting it through a BPA. The choice of posting through a BPA, rather than something more private, manifests an intent that copyright in the posts are abandoned, to better serve the blogger's ultimate goal of becoming read by millions.

90. *See id.* at 97.

91. See Steve Dublainica, New York Times Bestseller, <http://waiterrant.ent/?p=494> (Aug. 7, 2008).

Nevertheless, the correct answer (for now, at least) is no. First, abandonment requires specific intent to relinquish copyright rights.⁹² An underlying hope of recognition—no matter how strong—is different from an affirmative intent to abandon; on the contrary, by creating a blog site and publishing posts to it, the author is essentially taking care to organize and preserve his work. This organization and preservation signifies that the blogger maintains control over his material, that he cares where his work is and what happens to it. It does not signify abandonment. And, of course, not everyone blogs for the purpose of being discovered by a Hollywood agent; there are individual user blogs for all sorts of private purposes. For such bloggers, there is little reason to think that use of a BPA manifests their intention to abandon, however suspect their failure to lock-up their blog might be.

More importantly, the express language of several BPA Terms of Service agreements recognize the bloggers intellectual property rights. The aforementioned abandonment argument only holds water if, when the blogger first uses the BPA, nothing suggests to him that his work is protected. In other words, the Terms of Service agreement—the first thing a potential blogger using a BPA would see—must not include any provision that would suggest a blogger’s potential discovery goal could coexist with maintaining intellectual property rights. By giving bloggers all intellectual property rights in the content they post, though, Google’s TOS shuts the door on the argument.⁹³ Instead of maintaining a potential default for new bloggers where posts are automatically within the public domain, Blogger advocates looking into symbols such as Creative Commons to achieve such means.⁹⁴ The result is default copyright protection. By not using such symbols or disclaimers of copyright, a blogger thereby affirmatively denies any

92. Nat’l Comics Publ’n, Inc. v. Fawcett Publ’ns, Inc., 191 F.2d 594, 598 (2d Cir. 1951).

93. Blogger, *supra* notes 42–44 and accompanying text.

94. *Id.*

intention to abandon his copyright. In other words, the agreements themselves negate the blogger's intent to donate his content into the public domain; instead they evidence that the Blogger retains his intellectual property rights in the work. Any blogger reading such provisions would understand that they owned their content, not that they were abandoning it to the public domain.

B. *The Public Domain Moving Forward*

Even if blogs stand protected from abandonment today, recent trends suggest a future with less certainty. One of the rationales supporting abandonment of copyright is that it increases the body of work in the public domain.⁹⁵ By dispensing with the need for copyright notice formalities, the Berne Amendments⁹⁶ not only narrowed the public domain, but also made it more difficult to identify which works are actually in the public domain.⁹⁷ After all, the overt act required for abandonment is not necessarily visible to a potential user, and the potential user might decide against using an abandoned work out of fear that it is indeed copyright protected. To combat this problem, organizations such as Creative Commons offer different licenses which bloggers can use to show which rights they preserve in their content, and which rights they waive for the benefit of other users.⁹⁸ Google's TOS agreement gives users the option of using symbols that disclaim certain intellectual property rights such as Creative Commons,⁹⁹ but makes copyright protection a default. The Wordpress TOS, however, makes no mention of a blogger's

95. Kreiss, *supra* note 80, at 99.

96. *See supra* note 84.

97. *See e.g.*, Samuels, *supra* note 76, at 154.

98. *About Creative Commons*, CREATIVECOMMONS.COM, at <http://creativecommons.org/about/> (last visited Nov. 22, 2009).

99. Creative Commons is a nonprofit organizations dedicated to making it easier for people to share and build upon the work of others, consistent with the rules of copyright. It provides free licenses that enable people to easily change their copyright terms from the default "all rights reserved" to "some rights reserved." For more on Creative Commons, see What is CC?, <http://creativecommons.org/about/what-is-cc> (last visited Dec. 12, 2009).

intellectual property rights in his content. Is it really beyond the realm of possibility that as Creative Commons grows more popular within the blogosphere, BPAs whose TOS agreements fail to explicitly mention intellectual property rights to bloggers, will be interpreted to grant lesser protection?

LEGAL CONCLUSIONS

The goal of this article was to begin a conversation about a blogger's intellectual property rights in the content of his blog. The central legal conclusion made here is that original blog content should be protected under federal copyright law. Granted, it may be difficult for some bloggers, particularly those compiling different sites, to show the requisite amount of originality in their content. But for most originality should not be an issue. Of even smaller concern is the fixation requirement; whether stored on Google's, Twitter's or Wordpress's servers, the point is that blog content is stored, and therefore fixed somewhere.

The Terms of Service agreements surveyed generally support the notion that a blogger owns the content he posts, although they leave the blogger in charge of protecting those rights. The agreements, however, do not always give the blogger sole ownership of all rights to the content. Some agreements give the service provider royalty-free licenses to use blog content for various purposes, some broader than others, and not always for the sole benefit of the blogger. The major question for these provisions is less about their enforceability (as time passes, courts are increasingly enforcing them), and more how they are triggered. Courts can reasonably conclude that these provisions work in opposing ways: either by default—that merely using the service triggers the license—or by some affirmative act of the blogger disclaiming rights to the content.

Finally, the fact that many bloggers hope to share their content and boost readership does not mean that they are impliedly abandoning such content to the public domain. There is a difference between affirmatively disclaiming content and passively enjoying the benefits of having content shared on the internet. By publishing his content through a blog service application, a blogger has not made an overt act manifesting intent to abandon his copyright.