

## Users Pin on Pinterest, But Pinterest Pins Users

### *Media Law Bulletin*

May 2012 by [David Almeida](#), [F. Paul Pittman](#)

There's nothing that causes you to lose time faster than a good 'ole social media website. Well, social media has a new kid on the block, and its name is Pinterest. Seemingly out of nowhere, Pinterest has become the fastest website ever to receive 10 million visitors in a month. Instead of only having to worry about "posting" and "tweeting" consuming our free (or not so free) time, we now have "pinning" to suck us in. Thanks, Pinterest!

The concept is fairly straightforward—basically, Pinterest is an online pin board that allows users to pin images, text and videos to personalize boards that they create. Those boards may be personalized according to themes selected by the user and can be populated with works taken from all over the Internet. For example, a user may create a board titled "Places I'll Never See Because I'm Always on Twitter" and pin images found on various websites of sandy beaches in Tahiti, panoramic hillside towns in Italy and the Taj Mahal. Users pin works to their boards by use of a "Pin It" tab installed on users' tool bars. Whenever users come across works they simply click the "Pin It" tab, and that work is pinned to the user's board. Users may also re-pin works that they like from the boards of other users and may choose to follow other users whose boards they like.

Typically, users collect images or images of other content that they like—text and videos—from various sites across the web without concern for who might own and have licensing rights to these works. All of this pinning and repinning can raise some sticky legal issues when it comes to copyright and privacy rights.

## **Hey! That's Mine! Take Your Pins Out of My Stuff!**

Before turning to Pinterest-specific legal issues, a brief foray into general copyright principles may provide a useful backdrop. Generally speaking, copyright owners have the exclusive right to use, reproduce, license and profit from the images, pictures and other creative works they create. Importantly, copyright owners have the right to decide how—if at all—their work will be used. The impermissible use by another of a copyrighted work is typically infringement, unless such use is permitted "fair use," which is a limited exception recognized to further the free exchange of ideas without impairing the present or future economic value of the work. Copyright holders profit from extending licenses to others to use their works. If works are used or reproduced without a license, the copyright holder may be entitled to damages.

Pinterest's business model certainly appears to be problematic when viewed from an intellectual property perspective. Pinterest encourages its users to "organize and share all the beautiful things you find on the web." Even the simplest transaction on Pinterest may result in copyright infringement. For example, a user who maintains a board about "Places I Can't Afford to Visit" finds a beautiful picture of the Colosseum in Rome taken at sunset from the website of a photographer. The user clicks the "Pin It" button on his or her browser and the image is pinned to his or her board. What seems like a simple action may be direct infringement of the copyright held by the photographer. Pinterest asks users to credit the source of images it pins, but doing so doesn't necessarily cure the infringement because the user has not obtained permission to use the image. Additional problems arise when users credit inaccurate sources and deprive the authors of appropriate credit as well as the ability to promote the work.

Pinterest arguably facilitates the violation of privacy rights as well; in particular, a person's right to publicity, by allowing users to pin images of people. A person has the right to control

the commercial use of his image. For example, if an actor or athlete has licensed his image for use by Warner Brothers Studio or the NFL, that license does not extend to users of Pinterest and those that pin those images may violate that person's privacy rights.

## **Pin and Get Pricked!**

Pinterest is likely protected from liability under the safe harbor provisions of the Digital Millennium Copyright Act (DMCA), which typically provides immunity to service providers for acts of copyright infringement by customers who use their service if the service provider removes the infringing material upon receiving notice of the infringement.

Additionally, Pinterest recently revised its Terms of Service (TOS) to require its users (*i.e.*, pinners) to refrain from posting content that "contains any information or content that you do not have a right to make available under any law or under contractual or fiduciary relationships." The TOS further require users to represent that the content that they pin does not infringe, misappropriate or violate a third party's patent, copyright, trademark, trade secret, moral rights or other proprietary or intellectual property rights or rights of publicity or privacy. Perhaps the most controversial (or, at least talked about) aspect of Pinterest's recent changes to its TOS is that now users agree to furnish Pinterest with a worldwide, non-exclusive, transferable, royalty-free license to use and to distribute the works they pin on the website. It is highly unlikely that the millions of users of Pinterest obtain these licenses and representations that Pinterest requires of its users.

Pinners who are not careful can get stuck with liability. If Pinterest subsequently distributes images pinned by a particular user, the user may be liable for infringement. In addition, users who pin images taken from the web may be subject to infringement claims from the copyright holders whose content is infringed. Notably, small businesses owners who use the web to sell and to market their products stand to miss what are already very limited

opportunities to license and to profit off of any of their works that are pinned by others. They have a big incentive to bring infringement claims against users of Pinterest who pin their content.

Pinterest may pose a different problem for the large companies that have begun flocking to the site solely to market their products to the vast audience of Pinterest users.

Companies that create boards and pin images of their products risk granting Pinterest a license to use and distribute the images of those products. Some companies may welcome the additional exposure, but others may not, particularly where the company does not own the images they pin to advertise their products or services. In those cases, re-pinning by Pinterest might open the door to claims for infringement by the copyright holders.

Pinterest has provided some protection for the copyright holders whose works are pinned, but it may not be enough. Pinterest recently created an online form that makes it easier for copyright holders to report infringement. Before, copyright holders were required to fill out a form to report instances of infringement and mail or email it to Pinterest, a process that likely slowed the reporting of copyright infringement.

In addition, Pinterest offers an "opt-out" code that allows websites with copyrighted works to prevent Pinterest users from pinning images from the copyright holder's website. Users who attempt to pin images from the websites that make use of the "opt-out" code receive a message stating, "This site doesn't allow pinning to Pinterest. Please contact the owner with any questions. Thanks for visiting!" The efficacy of this "opt-out" code is questionable since Pinterest is new and copyright holders may not be aware that the code is available. In addition, the existence of the code might result in the unintentional grant by the copyright holder of an implied license to pin for the pinner. The grant of an implied license to use copyrighted materials has been found in similar situations. In Nevada, the owner of a website containing copyrighted material failed to make use of widely available code that

would enable him to prevent the display of images from his website on Google. The court found that the website owner's failure to make use of the code resulted in a grant of an implied license to cache and display images from the website to Google. *Field v. Google, Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006). Copyright holders who fail to employ the "opt-out" code offered by Pinterest may similarly be at risk.

## **Pinterest Removes Some of Its Pins From Users**

While Pinterest's current TOS are not completely friendly to users or copyright holders, the current incarnation of Pinterest's TOS are an improvement over the TOS that were in place until recently and evidence a willingness by Pinterest to adapt its policies. Previously, Pinterest required users to provide them with an "irrevocable" and "perpetual" license to sell all content pinned to the site; a license that the users themselves typically are not authorized to provide. Pinterest eliminated that provision from its TOS on April 6, 2012, and claims it merely plans to use content pinned to its site to operate the site and provide the service.

The changes Pinterest made to its TOS should not only benefit Pinterest, but also the users who pin, and the copyright holders whose works are pinned, on the site. Users of Pinterest can rest easy knowing that Pinterest will not sell (although Pinterest can still distribute) works they pin on the site, thereby lessening the likelihood of claims of copyright infringement against the users for pinning works. Naturally, the changes to the TOS increased Pinterest's own protections by eliminating some of the situations in which it could be held liable for copyright infringement (unauthorized sale of copyrighted works) and reducing the types of damages (lost profits of copyright holder) for which it might be liable for. Overall, it appears that copyright holders benefit the most from the recent changes to Pinterest's TOS. The revised TOS allow copyright holders to keep some control over their exclusive right to sell, profit, or license for use, their copyrighted works and eliminates the

possibility that Pinterest will move to sell or profit from the copyright holder's work that may have been unknowingly pinned to the site.

## **Pinterest Not Completely Out of the Water**

Despite the DMCA and its TOS, Pinterest may not be able to shield itself completely. Immunity under the DMCA might not be available should Pinterest start to monetize the pins. Pinterest has experimented with several revenue options including advertising and embedding affiliate links to pins featuring goods from retail sites such as Target and Amazon. If someone clicks on the link and purchases a product featured in the pin, Pinterest could make money from the transaction. Pinterest's exposure may also have been increased by a recent decision in the Second Circuit Court of Appeals involving a copyright infringement suit against YouTube. In *Viacom Int'l, Inc. v. YouTube, Inc.*, 2012 WL 1130851 (2d Cir. Apr. 5, 2012), the court held that a web service provider's simple removal of infringing material after being notified of infringement by a copyright holder may be insufficient to obtain immunity under the DMCA where the web service provider has actual knowledge, or is aware of facts or circumstances, indicating that the specific infringing activity is occurring.

Additionally, claims for contributory infringement (for inducing infringing behavior) may start to proliferate, and courts could perceive Pinterest as they did Napster and find that the service Pinterest provides compels infringing behavior. In *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), the court found that Napster's service, which allows users to exchange and download copyrighted music files from their computers, encouraged and assisted the infringement of its users **and** that Napster had actual and specific knowledge of the infringement. The court also found that Napster derived a financial benefit because the infringing material attracted additional customers to the service, thereby increasing its customer base and ultimately its revenue. The service provided by Pinterest

arguably is comparable to Napster, and Pinterest certainly benefits from the increase in traffic and marketing opportunities.

## **If I Use Pinterest Will I Get Stuck?**

Whether folks – particularly the risk averse (looking at all lawyers out there) among us – should use Pinterest in light of these concerns is an individual question. Pinterest provides a unique and socially useful service that inspires creativity, yet places an important responsibility on its users. Whether this responsibility is too much to ask from the typical consumer remains to be seen, but if Pinterest is to survive, users must evolve and adapt to the new digital media platform. That means users of Pinterest must learn to comply with the TOS of the site and to obtain permission before using certain images that may infringe on the intellectual property rights of others. It also means that small business owners should recognize the possibilities presented by Pinterest and take steps to protect their intellectual property (opt-out), while at the same time being open to free publicity or licensing of their works for display to the large (and growing) audience of Pinterest users.

Big businesses such as large retail chains should continue to view Pinterest as a gold mine as Pinterest combines consumers with similar interests and tastes in one place. Companies that would benefit from this should open accounts and create boards with lasting imagery for its customers and products. Doing so might create a buzz about certain products and drive traffic to Pinterest boards and their websites. Most importantly, companies must ensure that they make use of their own images, or images they are licensed to use, to avoid any infringement issues.

Pinterest must also continue to adapt. Pinterest's introduction of the "opt-out" code and recent changes to its TOS in response to public dismay about the control it takes over content pinned to its site, shows that Pinterest is listening. Pinterest must continue to

evolve and develop mechanisms for users to obtain permission, or limited licenses, from copyright holders in order to pin works on Pinterest properly. That way Pinterest can at least provide some protection to those who are most important to the site: the users.

**Related Practices:**

[Commercial Practices](#)

[Media, Entertainment & Sports Law](#)