



Terms of service on social media sites

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This article considers the provisions within the terms of service ('TOS') of the social media behemoths of today — Facebook, YouTube, Twitter and the Wikimedia Foundation. In particular, it examines the main provisions that purport to regulate, from a copyright perspective, generative activities on social media sites. This empirical work is undertaken so that the article can shed light on the relationship between the contractual and copyright regimes. To do so, the article identifies the instances where the contractual regime is to some extent aligned with the copyright regime, and further, where there are potential incompatibilities between the two regimes. It also refers to the legal position in the United States, as a result of the nationality of the companies operating the social media sites examined. Additionally, this article makes references to the legal positions in the United Kingdom and Australia, to draw attention to the potential implications of the TOS on social media site users in other jurisdictions. The discussions in the early part of the article lead readers to its conclusion on the appropriate role for TOS, vis-à-vis the copyright regime, in regulating generative activities on social media sites. Its concern is a real one and can serve as a platform for future scholarly contributions to the field, given the worldwide usage of social media sites.

Introduction

Facebook, YouTube and Twitter are amongst the most utilised social media sites in the world, and as of December 2012, there were approximately 693 million active users on Facebook, 300 million active users on YouTube and 288 million active users on Twitter.¹ The prevalence of social media use is evident from a finding that the total time spent on social media in the United States across personal computers and mobile devices has increased exponentially by 37 per cent — from 88 billion minutes in July 2011 to 121 billion minutes in July 2012.² Figures from Eurostat and the Office for National Statistics show the British to be amongst the most prolific users of

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1 See International Business Times, *Google Plus Becomes World's No 2 Social Network after Facebook, Knocking off Twitter* (28 January 2013) <<http://www.ibtimes.com/google-plus-becomes-worlds-no-2-social-network-after-facebook-knocking-twitter-1042956>>; ZDNet, *Facebook remains top social network, Google+, YouTube battle for second* (14 May 2013) <<http://www.zdnet.com/facebook-remains-top-social-network-google-youtube-battle-for-second-7000015303/>>.

2 Nielsen and NM Incite, *Social Media Report 2012* (2012) <<http://blog.nielsen.com/nielsenwire/social/2012>>.

social networking sites in Europe, with half of British adults using Facebook and Twitter.³ On the other hand, up to half of the Australian population uses Facebook and YouTube.⁴

What is social media exactly? It is generally interpreted to mean the platforms of communications that enable people to create, share and exchange information on virtual networks.⁵ Social media has been defined by Kaplan and Haenlein more specifically to mean ‘a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content’.⁶ In addition to this frequently cited definition of social media,⁷ the authors further proposed a classification system derived by way of grouping the applications into six specific categories based on their characteristics, being: collaborative projects; blogs; content communities; social networking sites; virtual game worlds and virtual social worlds.⁸

This article is concerned with the regulation of generative activities resulting in creative content, such activities occurring on sites in the first four categories of the classification system above. This accords well with the Organisation for Economic Cooperation and Development’s (‘OECD’) oft-cited⁹ definition of user-generated content (‘UGC’), under the label ‘user-created content’, as: (i) content made publicly available over the internet; (ii) which reflects creative effort; and (iii) which is created beyond

3 See Victoria Woollaston, ‘The Meteoric Rise of Social Networking in the UK: Britons are the Second Most Prolific Facebook and Twitter Users in Europe With a Fifth of Over 65s Now Using These Sites’, *Daily Mail* (online), 13 June 2013 <<http://www.dailymail.co.uk/sciencetech/article-2340893/Britons-second-prolific-Facebook-Twitter-users-EUROPE-fifth-aged-65.html>>. It is noted that Eurostat defined social networking use broadly to include use of blogs, in addition to that of traditional social networking sites.

4 See The Shannon Company, *Top 15 Social Media Sites in Australia* (10 June 2013) <<http://theshannoncompany.com.au/blog/?p=1321>>; Social Media News, *Social Media Statistics Australia — September 2013* (1 October 2013) <<http://www.socialmedianews.com.au/social-media-statistics-australia-september-2013/>>.

5 Wikipedia, *Social Media* (8 January 2013) <http://en.wikipedia.org/wiki/Social_media#cite_note-1>.

6 Andreas M Kaplan and Michael Haenlein, ‘Users of the World, Unite! The Challenges and Opportunities of Social Media’ (2010) 53(1) *Business Horizons* 59, 61.

7 See, eg, The Social Media Guys, *The Complete Guide to Social Media* (8 November 2010) <<http://www.thesocialmediaguys.co.uk/wp-content/uploads/downloads/2011/03/CompleteGuidetoSocialMedia.pdf>>; Julia Ying-Chao Lin et al, ‘Social Media Usage and Work Values: The Example of Facebook in Taiwan’ (2012) 40(2) *Social Media and Personality* 195, 196; Wikipedia, *Social media* <http://en.wikipedia.org/wiki/Social_media>; Jan H Kietzmann et al, ‘Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media’ (2011) 54 *Business Horizons* 241, 242; James Benjamin, ‘Tweets, Blogs and the Ethics of 21st-Century Communication Technology’ in Hana S Noor Al-Deen and Hohn Allen Hendricks (eds), *Social Media: Usage and Impact* (Lexington, 2011) 271, 277.

8 Kaplan and Haenlein, above n 6, 59.

9 See, eg, Daniel Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2009) 11(4) *Vanderbilt Journal of Entertainment and Technology Law* 841, 857; Warren Chik, ‘Paying it Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content under Copyright Law’ (2011) 11 *The John Marshall Review of Intellectual Property Law* 240, 248; Andreas M Kaplan and Michael Haenlein, ‘Users of the World, Unite! The Challenges and Opportunities of Social Media’ (2010) 53(1) *Business Horizons* 59, 61; Pamela J McKenzie et al, ‘User-Generated

the professional context.¹⁰ It is opportune to state here that the regulation of activities on virtual game and social worlds is beyond the scope of this article, as the resulting UGC has been observed to be of a different type.¹¹ This can however be undertaken as the subject of another study.

Notably, the TOS of social media sites are becoming increasingly similar. In general, users of social media sites give scant attention to the TOS that they enter into to use such sites. However, the ubiquitous use of such TOS globally amplifies their impact on the generative activities that take place on social media sites, and more attention is required to be directed to these TOS. The ceding of control by users over their content has been observed to happen to a greater extent on social media sites than in other contexts governed by standard-form contracts.¹² Arguably, the perception of participatory culture underlying such arrangements obscures the factual exploitation of the labour of users in these situations.¹³

In the second part of this article, the TOS proffered by specific social media sites — namely, Facebook, YouTube, Twitter and the Wikimedia Foundation — to their users will be examined. The specific sites are chosen because they represent a wide spread of the different types of social media sites pursuant to the classification system mentioned earlier:¹⁴ Facebook is a popular social networking site; YouTube is a ‘content community’; Twitter is a micro-blog; and Wikipedia, operated by the Wikimedia Foundation, is an apt example of a collaborative project. While Kaplan and Haenlein’s proposed taxonomy can serve as a guiding post, I acknowledge that the definitive lines between the categories are unclear and that it is reasonably foreseeable that any social media site can be classified in more than one, or even two, categories. By virtue of the term ‘social media’ being a generic one subject to varied interpretations, there are numerous conceptions of social media and the categories within.¹⁵ It is therefore important to be open to overlaps and ambiguity in classifying social media sites, and to recognise that the classification system is simply a good starting point from which social media can be considered. The aim of analysing the TOS of such sites is to highlight the main ways in which they attempt to prescribe the generative activities undertaken by the users of these sites. The focus of the analysis, therefore, is on clauses relating to:

Online Content 1: Overview, Current State and Context’ (4 June 2012) 17(6) *First Monday* 1, 3; Michael B McNally et al, ‘User-Generated Online Content 2: Policy Implications’ (4 June 2012) 17(6) *First Monday* 1, 3.

10 Sacha Wunsch-Vincent and Graham Vickery, ‘Participative Web: User-Created Content’ (Report, Organisation for Economic Co-operation and Development, 2007).

11 See Samuel E Trosow et al, *Mobilizing User-Generated Content for Canada’s Advantage* (1 December 2010) Faculty of Information and Media Studies at the University of Western Ontario <ir.lib.uwo.ca/fimspub/21/>; Pamela J McKenzie et al, ‘User-Generated Online Content 1’, above n 9, 3.

12 See Aaron T Chiu, ‘Irrationally Bound: Terms of Use Licences and the Breakdown of Consumer Rationality in the Market for Social Network Sites’ (2012) 21 *Southern California Interdisciplinary Law Journal* 165, 194.

13 See Kenneth C Werbin, ‘The Social Media Contract: On the Paradoxes of Digital Property in This Digital Land’ (2012) 46(2) *Journal of Canadian Studies* 245, 253.

14 Kaplan and Haenlein, above n 6, 59.

15 See, eg, W Glynn Mangold and David J Faulds, ‘Social Media: The New Hybrid Element of the Promotion Mix’ (2009) 52 *Business Horizons* 357, 358.

- (a) ownership and licensing;
- (b) the extent to which the TOS can be unilaterally altered;
- (c) copyright policy;
- (d) the site's indemnity vis-à-vis the conduct of users; and
- (e) jurisdiction and choice of laws.

The third part of this article outlines the relationship between the TOS and copyright laws. In many instances, there is alignment between the TOS and the copyright regime; it is argued, however, that there are three areas that give rise to potential incompatibilities. These incompatibilities are largely obscured by the oversimplification in the TOS of complex contractual and copyright issues that the various TOS purport to cover. First, the conferment of 'ownership' of content on a user who creates such content does not appear to accord with the concept of ownership under the copyright regime — not least because the content concerned may not be copyright protectable in the first place. Second, on the assumption that the content is copyright protectable, the ability for TOS to confer permissions on third party users of copyright material might be undermined by the strict application of the doctrine of privity. Third, the choice of jurisdiction and law clauses under the TOS may be unenforceable as against a user resident in other states of the US (not being California) or in another country, due to the applicability of conventions, treaties or mandatory domestic laws users from other jurisdictions are subject to. In addition, the different elements of a copyright claim will warrant the application of different laws. Thus the laws on contract and copyright in other jurisdictions could be relevant when it comes to the resolution of disputes under the TOS.

TOS for social media users

Users have to tread through a labyrinth of terms and policies scattered over multiple documents, frequently accessible via hyperlinks, to ascertain their rights and obligations in relation to creative content on social media sites. For instance, the main TOS for Facebook which outline its users' rights and responsibilities are comprised within Facebook's 'Statement of Rights and Responsibilities' ('Facebook Statement'),¹⁶ albeit many hyperlinks to separate documents¹⁷ are embedded within the Facebook Statement and have a bearing on the overall position of a user when it comes to issues surrounding his or her creative content. The TOS for YouTube¹⁸ ('YouTube Terms'), Twitter¹⁹

16 Facebook, *Statement of Rights and Responsibilities* (11 December 2012) <<https://www.facebook.com/legal/terms>> ('Facebook Statement').

17 See Facebook, *Facebook Principles* <<https://www.facebook.com/principles.php>>; Facebook, *Data Use Policy* (11 December 2012) <<https://www.facebook.com/about/privacy/other>>; Facebook, *Facebook Copyright Policy* <https://www.facebook.com/legal/copyright.php?howto_report>; Facebook, *Community Standards* <<https://www.facebook.com/communitystandards>>.

18 See YouTube, *Terms of Service* (9 June 2010) <www.youtube.com/static?template=terms> ('YouTube Terms'); YouTube, *YouTube Privacy Guidelines* <http://www.youtube.com/static?gl=US&template=privacy_guidelines>; YouTube, *Copyright on YouTube* <<http://www.youtube.com/yt/copyright/>>; YouTube, *Community Guidelines* <http://www.youtube.com/t/community_guidelines?hl=en-GB&gl=AU>.

19 See Twitter, *Terms of Service* (25 June 2012) <<https://twitter.com/tos>> ('Twitter Terms');

(‘Twitter Terms’) and the Wikimedia Foundation²⁰ (‘Wikipedia Terms’) are similarly presented. This section examines the primary provisions under the TOS of these social media sites that relate to the generative activities of their users.

Ownership and licensing

Pursuant to the Facebook Statement, a user grants to Facebook, in respect of content ‘covered by intellectual property rights’, a ‘non-exclusive, transferable, sub-licensable, royalty-free, worldwide license’ to use any content covered by intellectual property rights that he or she posts on Facebook.²¹ This licence is effectively unencumbered, even though a user owns all the content he or she posts on Facebook.²² It is further stated that where a user publishes content and chooses the ‘Public setting’, the user is in effect allowing everyone, including non-Facebook users, ‘to access and use that information’ and to associate it with the user.²³ Notably, the term ‘use’ is broadly defined in the Facebook Statement and includes the acts of copying, public performance or display, distribution, modification, translation and the creation of derivative works.²⁴

The YouTube Terms provide that a user retains all ownership rights, although by submitting his or her content, the user grants to YouTube a similarly unencumbered licence to, inter alia, use, reproduce, distribute, prepare derivative works of, display, adapt, electronically transmit and perform his or her content.²⁵ In relation to the sharing of content by a user, *other users* of YouTube are also expressly granted a licence with similar rights as that under the licence granted to YouTube, except that the rights of adaptation, and to prepare derivative works, are specifically omitted.²⁶ In addition, under the YouTube Terms, the licences in respect of comments a user submits, ie, to other videos, are irrevocable and perpetual.²⁷ It is noted that user comments are subsumed under the YouTube Terms’ broad definition of

Twitter, *Privacy Policy* (3 July 2013) <<https://twitter.com/privacy>>; Twitter, *Help Center: Copyright and DMCA Policy* <support.twitter.com/articles/15795-copyright-and-dmca-policy#>; Twitter, *The Twitter Rules* <<http://support.twitter.com/articles/18311-the-twitter-rules#>>.

20 See Wikimedia Foundation, *Terms of Use* (25 May 2012) <http://wikimediafoundation.org/wiki/Terms_of_Use> (‘Wikipedia Terms’); Wikimedia Foundation, *Privacy Policy* <http://wikimediafoundation.org/wiki/Privacy_policy>; Creative Commons, *Attribution-ShareAlike 3.0 Unported License* <<http://creativecommons.org/licenses/by-sa/3.0/>>; GNU Operating System, *GNU Free Documentation License* (28 February 2013) <<http://www.gnu.org/copyleft/fdl.html>>; Wikimedia Foundation, *Licensing Policy* <http://wikimediafoundation.org/wiki/Resolution:Licensing_policy>; Wikimedia Foundation, *Wikimedia Commons Licensing Policy* <<http://commons.wikimedia.org/wiki/Commons:Licensing>>; Wikipedia, *Copyright Problems* <en.wikipedia.org/wiki/Wikipedia:Copyright_Problems>; Wikipedia, *Wikipedia:Dispute Resolution* <en.wikipedia.org/wiki/Wikipedia:Dispute_resolution>.

21 Facebook Statement, above n 16, cl 2.

22 Ibid.

23 Ibid.

24 Ibid cl 18.

25 YouTube Terms, above n 18, cl 6C.

26 Ibid.

27 Ibid.

'content' which includes, inter alia, text, software, photographs, videos, audiovisual combinations, etc, that a user views or contributes to the site.²⁸

Under the Twitter Terms, while a user retains the rights to his or her content,²⁹ a 'worldwide, non-exclusive, royalty-free license (with the right to sublicense)' is granted to Twitter to, inter alia, use, copy, reproduce, adapt, modify, publish, display and distribute such content.³⁰ A 'tip' below the clause clarifies that the licence authorises Twitter to make a user's 'tweets' available to the public and to let *others* do the same³¹ — this tip arguably expresses what the actual paragraph on a user's rights does not. Furthermore, it is noted that any use of a user's content by Twitter, or entities it partners with, is made with no compensation paid to such user.³² Again, 'content' is broadly defined and includes text, photos or 'other materials uploaded, downloaded or appearing on' Twitter.³³

The Wikimedia Terms are the TOS that apply to users of Wikipedia, a collaborative project undertaken by the Wikimedia Foundation. Its user-friendly summary states that while a user can share and re-use Wikipedia's articles and other media under free and open licences, such user also licenses his or her contributions to the site under free and open licences, except where such contributions fall within the public domain.³⁴ In the Wikimedia Terms, it is reiterated that the Wikimedia Foundation merely *hosts* the content, which is created and managed by users.³⁵ In general, the project Wikipedia requires all submitted content to be licensed so that it is freely reusable by anyone who is interested in accessing it.³⁶ Particularly, in relation to the licensing of content, users contributing content to the site are required to 'grant broad permissions to the general public to re-distribute and re-use' their content freely, so long as there is proper attribution of the use and the same freedom to re-use and re-distribute is granted to derivative works.³⁷ The licensing requirements for text in respect of which a user holds the copyright are set out under the 'Creative Commons Attribution-Share Alike 3.0 Unported License'³⁸ and the 'GNU Free Documentation License'.³⁹ It is noted that these licences do allow for *commercial* uses of the content, so long as users are compliant with the licensing terms.⁴⁰ On the whole, the provisions under the Wikimedia Terms relating to the ownership of content and licensing are couched differently from those under the TOS of the other social media sites examined earlier. For instance, the Wikimedia Terms make it a point to specify that the re-use of content on the Wikipedia site is acceptable.⁴¹

28 Ibid cl 2A.

29 Twitter Terms, above n 19, cl 5.

30 Ibid.

31 Ibid.

32 Ibid.

33 Ibid.

34 Wikipedia Terms, above n 20.

35 Ibid.

36 Ibid cl 7.

37 Ibid.

38 Creative Commons, above n 20.

39 GNU Operating System, above n 20.

40 Wikipedia Terms, above n 20, cl 7(a).

41 Ibid cl 7(g).

It has been observed that a user not only grants the relevant social media site an unencumbered licence to use his or her content under the respective TOS, he or she also grants other users the licence to use his or her content. It is submitted that the rights of other users in relation to a user's content are vague and equivocal under the Facebook Statement and the Twitter Terms, as compared to the Wikimedia Terms. This may be because the main purpose behind a collaborative project such as Wikipedia is to expand the commons of free culture and knowledge,⁴² and ensuring that content is freely accessible and re-usable is consistent with its overall ethos. On the other hand and as mentioned earlier, under the YouTube Terms, other users are clearly granted limited (in comparison to that granted to YouTube) licences to re-use a user's content, which do not include the rights of adaptation and to prepare derivative works.⁴³

Ease of unilateral amendment

Under the Facebook Statement, Facebook has to give its users 7 days' notice and an opportunity to comment on any change made to its TOS, unless the change is made for 'legal or administrative reasons' or 'to correct an inaccurate statement'.⁴⁴ Additional and prominent notice, as appropriate in the circumstances, will be given if the changes are *material*.⁴⁵ The onus is placed on users to subscribe to Facebook's 'Site Governance' page with their Facebook accounts,⁴⁶ should they wish to be pointedly updated of any changes and their effective date. Facebook nonetheless retains the unilateral discretion to decide if it wishes to adopt the proposed changes. Just as is the case with most standard-form TOS, a user's continued use of Facebook after any modification constitutes acceptance of Facebook's amended terms.⁴⁷

The onus is similarly placed on YouTube's users to 'periodically review the most up-to-date version' of its TOS displayed on its site.⁴⁸ The language in the YouTube Terms is more permissive than prescriptive, and YouTube '*may attempt to notify users when major changes are made*'.⁴⁹ Again, much is left to the discretion of YouTube. In any case, users agree to be bound by such modifications made by YouTube from time to time.⁵⁰

Twitter too has an obligation, under the Twitter Terms, to notify its users if the revision is, in its *sole* discretion, *material*.⁵¹ Users who continue to use Twitter after any revision is effective are bound by the modifications.⁵²

Again, the Wikimedia Terms stand out in comparison against the equivalent clauses proffered by the above sites. Under the Wikimedia Terms, the Wikimedia Foundation commits to giving the Wikimedia community a

42 Ibid cl 7.

43 YouTube Terms, above n 25, cl 6C.

44 Facebook Statement, above n 16, cl 14. See also Facebook, *Data Use Policy*, above n 17.

45 Facebook, *Data Use Policy*, above n 17.

46 Facebook Statement, above n 16.

47 Ibid cl 14.

48 YouTube Terms, above n 18, cl 1B.

49 Ibid.

50 Ibid.

51 Twitter Terms, above n 19, cl 12C.

52 Ibid.

minimum period of 30 days to comment on the Wikimedia Terms, as well as on any *substantial* future revisions.⁵³ It is noted that the Wikimedia Foundation expressly acknowledges that community input is essential for the Wikimedia Terms to serve its users properly.⁵⁴ An additional 30 days will be provided for comments after the Wikimedia Foundation posts translations, in the three languages it has chosen, of substantial proposed revisions.⁵⁵ There is a similar qualifier to the equivalent provision in Facebook, such that ‘for changes for legal or administrative reasons, or to correct an inaccurate statement’, or further, in respect of ‘changes in response to community comments’, the Wikimedia Foundation only has to provide 3 days’ of notice to its users.⁵⁶ Notice will be provided online on the Wikipedia website and via notification on WikiMediaAnnounce-L⁵⁷ (a page that users have to subscribe to if they want to be pointedly notified of changes). Once again, the onus is placed on users to regularly review the updated version of the Wikimedia Terms, and continued use by a user of the site, following the notice and review period, constitutes an acceptance of the Wikimedia Terms.⁵⁸ The Wikimedia Foundation overtly states that if a user does not agree with its terms, he or she cannot use the site.⁵⁹

It is observed that with the exception of the Wikimedia Terms, users may not receive notice of amendments made to the TOS, if the relevant social media sites decide, at their discretion, that the changes are not material. Users of Wikipedia will receive at least 3 days’ notice of changes to the Wikimedia Terms. Although the Wikimedia Foundation appears to give more importance to altruistic notions such as community values and fairness more than the other social media sites,⁶⁰ this superficial distinction has little practical effect in reality because the proviso ‘*for legal or administrative reasons, or to correct an inaccurate statement*’ is broad enough to encompass most modifications, entitling users to only 3 days’ notice, and not the generous 30 day comment period that the Wikimedia Foundation appears willing to offer upfront. In this respect, whether an amendment to the TOS falls under the proviso is arguably a matter decided at the Wikimedia Foundation’s discretion. Moreover, users are contractually bound by the TOS they have entered into, including its modifications from time to time, so long as they continue to use the sites. The practical effect of this is that the majority of users are bound by terms they have not seen, as it is plausible that a typical user will not make a deliberate effort to review the TOS for the first time before accepting such terms, let alone at regular intervals thereafter.

53 Wikipedia Terms, above n 20, cl 16.

54 Ibid.

55 Ibid.

56 Ibid.

57 Wikimedia Foundation, *WikimediaAnnounce-L: Announcements and Reports of the Wikimedia Movement* <<https://lists.wikimedia.org/mailman/listinfo/wikimediaannounce-l>>.

58 Wikipedia Terms, above n 20, cl 16.

59 Ibid.

60 Ibid.

Copyright policy

Under the *Digital Millennium Copyright Act* ('DMCA'),⁶¹ there is a safe harbour provision which can, subject to the meeting of other conditions,⁶² exempt social media sites (being service providers)⁶³ from secondary liability for copyright infringement⁶⁴ by their users. The conditions that have to be met are as follows:

- (a) the site does not have either actual or constructive knowledge of the infringing activity;⁶⁵
- (b) the site does not receive any direct financial benefit from the infringing activity, where such a site has the right and ability to control such activity;⁶⁶ and
- (c) where notified of infringement, the site responds expeditiously to remove infringing material.⁶⁷

Another condition to be met is that the social media sites will have to have a termination policy in respect of the accounts of users who are repeat copyright infringers.⁶⁸ Moreover, it is noted that these sites are protected from liability to users whose content has been erroneously removed if the removals have been done in good faith, even if the content is ultimately determined to be non-copyright infringing.⁶⁹ There are safeguards built into the DMCA to prevent abuse by copyright holders of this notice-and-takedown process available to them — these include the user's option to issue a counter notice where his or her content has been erroneously removed,⁷⁰ and the stipulation of liability for damages where a copyright holder knowingly and materially misrepresents that content is infringing.⁷¹ Separately, the DMCA also lists the requisite elements for a notice alleging copyright infringement,⁷² as well as

61 *Digital Millennium Copyright Act*, 17 USC § 512 (1998) ('DMCA').

62 *Ibid* §§ 512(c), (i)(1).

63 The reason for this is that social media sites can fall within the broad definition of a 'service provider' under the DMCA, being, inter alia, 'a provider of online services': see *ibid* § 512(k)(1B).

64 This could refer to contributory or vicarious infringement. For contributory infringement, see *Gershwin Publishing Corp v Columbia Artists Management Inc*, 443 2d 1159, 1162 (2nd Cir, 1971); *Metro-Goldwyn-Mayer-Studios Inc v Grokster Ltd*, 380 F 3d 1154, 1660 (9th Cir, 2004); *Perfect 10 Inc v Amazon.com Inc*, 487 F 3d 701, 728 (9th Cir, 2007). Alternatively, for vicarious infringement, see *Metro-Goldwyn-Mayer-Studios Inc v Grokster Ltd*, 380 F 3d 1154, 1660 (9th Cir, 2004); *Parker v Google Inc*, 2007 WL 1989660, *4 (3rd Cir, 10 July 2007).

65 DMCA § 512(c)(1A).

66 *Ibid* § 512(c)(1B).

67 *Ibid* § 512(c)(1C).

68 *Ibid* § 512(i)(1A), which sets the requirement for service providers to adopt a termination policy for repeat infringers.

69 *Ibid* § 512(g).

70 *Ibid* §§ 512(g)(2), (3).

71 *Ibid* § 512(f).

72 *Ibid* § 512(c)(3). The notice has to include, inter alia, identification of the copyrighted work and infringing material, a statement of good faith belief in its infringing use, and a statement, under penalty of perjury, that the complaining party is authorised to act on behalf of the copyright holder.

that for a counter notice disputing the same.⁷³ This section examines the copyright policies of each social media site individually — in this respect, it is noted that the DMCA mechanism is incorporated into the TOS of the social media sites.

The Facebook Statement prohibits a user from sharing content that infringes another user's rights.⁷⁴ Under the Facebook Statement, Facebook expressly reserves its rights to remove content that violates the intellectual property rights of a copyright holder, and to disable a user's account for repeated infringements against the intellectual property rights of others.⁷⁵ It is noted that Facebook has created a page, accessible via a hyperlink,⁷⁶ which specifically advises users on copyright and trademark infringements. Furthermore, a user is expressly warned against misrepresenting that an activity is infringing, as he or she may be liable for damages,⁷⁷ including costs and fees incurred by Facebook or other users. Other alternatives, such as resolving the issue directly with another user whom the copyright holder (at times also a user) believes is infringing his or her copyright, or seeking legal advice before reporting the infringement, are proposed to a copyright holder.⁷⁸ A copyright holder who nonetheless wishes to notify Facebook of copyright infringement has to fill in a DMCA compliant form made available online.⁷⁹ He or she can alternatively submit a report to Facebook's designated agent, which includes all elements of a copyright notice under the DMCA, such as the requisite declaration that he or she is alleging copyright infringement in good faith.⁸⁰ A user can appeal against any wrongful removal of content by Facebook.⁸¹

Under the YouTube Terms, YouTube can terminate the account of a repeat infringer who has been notified of infringing activity for the third time.⁸² The mechanism under the DMCA is similarly available to copyright holders and users — copyright holders can notify YouTube of copyright infringement using an online DMCA compliant form,⁸³ while a counter notice using another online form can be submitted to YouTube if it has removed content erroneously.⁸⁴

As is the case with the other social media sites discussed, Twitter can

73 Ibid § 512(g)(3). The counter notice has to include, inter alia, identification of the erroneously removed material, and a statement, under penalty of perjury, of good faith belief in its wrongful removal.

74 Facebook Statement, above n 16, cl 5.

75 Ibid.

76 Facebook, *Facebook Copyright Policy*, above n 17.

77 DMCA, § 512(f).

78 Facebook, *Reporting Copyright Infringements* <<https://www.facebook.com/help/400287850027717>>.

79 Ibid.

80 Facebook, *What Should I Include When Submitting a Report to Facebook Alleging Infringement of My Copyright?* <<https://www.facebook.com/help/231463960277847>>.

81 Facebook, *Reporting Copyright Infringements* <<https://www.facebook.com/help/400287850027717>>.

82 YouTube Terms, above n 25, cl 8B.

83 YouTube, *Copyright Infringement Notification Basics* <www.youtube.com/yt/copyright/copyright-complaint.html>.

84 Ibid.

terminate the account of a repeat infringer under the Twitter Terms.⁸⁵ Copyright holders can avail themselves of the DMCA notice-and-takedown procedure and submit an online form for this purpose.⁸⁶ In response to wrongful removals of content, users can submit counter notices.⁸⁷

Users are prohibited under the Wikimedia Terms from infringing intellectual property rights,⁸⁸ and the Wikimedia Foundation can terminate the account of a repeat infringer.⁸⁹ In addition to the notice-and-takedown mechanism, as well as counter notice procedures available under the DMCA, the Wikimedia Foundation offers two alternative mechanisms to copyright holders.⁹⁰ The first alternative is to submit a request to the Wikimedia community, which, in Wikipedia's own words, 'handles copyright issues faster and more effectively than that prescribed under the DMCA'.⁹¹ The copyright holder can post a notice stating his or her copyright concerns on a relevant page created for this purpose.⁹² Such a listing remains on the designated page for 5 days before the matter is reviewed and closed by an administrator.⁹³ During the review period, interested contributors can offer feedback to any copyright issue raised, propose revisions to the material, or request copyright permission.⁹⁴ At the end of the review period, the administrator can take further action if necessary.⁹⁵ The second alternative is for the copyright holder to send an email to the community, at the email address provided.⁹⁶

The DMCA mechanism is available to both copyright holders and users under all of the TOS examined. Beyond the DMCA, Facebook, YouTube and the Wikimedia Foundation have flagged out other self-help alternatives to such parties. Indeed, Facebook appears to encourage copyright holders to seek self-help firsthand when they have copyright concerns. It is noted separately that YouTube offers, under its 'Copyright Center', a vast source of self-help options⁹⁷ for copyright holders of content and users.⁹⁸ Finally, Wikipedia too directs copyright holders to take up community self-help options, instead of the legal route under the DMCA.

85 Twitter Terms, above n 19, cl 9.

86 Twitter, *Report Copyright Infringement* <<https://support.twitter.com/forms/dmca>>.

87 Twitter, *Copyright and DMCA Policy* <<https://support.twitter.com/groups/56-policies-violations/topics/236-twitter-rules-policies/articles/15795-copyright-and-dmca-policy#9>>.

88 Wikipedia Terms, above n 20, cl 4.

89 *Ibid* cl 8.

90 *Ibid*.

91 *Ibid*. See also Wikipedia, *Copyright Problems*, above n 20.

92 Wikipedia Terms, above n 20, cl 8.

93 Wikimedia Foundation, *Copyright Problems*, above n 20.

94 *Ibid*.

95 *Ibid*.

96 Wikipedia Terms, above n 20, cl 8.

97 For instance, there is a self-help tool that can be utilised by content owners to easily identify and manage their content on YouTube. Videos uploaded are scanned against a database of files submitted to YouTube by content owners. When there is a match, content owners can choose to apply from a few policies available on YouTube, including blocking the relevant video with the matched content. See YouTube, *How Content ID Works* <support.google.com/youtube/bin/answer.py?hl=en&answer=2797370&rd=1>.

98 YouTube, *Copyright on YouTube* <www.youtube.com/yt/copyright>.

Transfer of risk

Facebook disclaims all responsibility for the acts of its users on Facebook, including the transmission of content.⁹⁹ Should there be any claim brought against Facebook in relation to a user's content, such user is required to indemnify Facebook against all damages incurred.¹⁰⁰ Facebook further unequivocally excludes or limits,¹⁰¹ to the fullest extent permissible under applicable law, its liability to a user.¹⁰²

The YouTube Terms provide that YouTube is not responsible for, inter alia, the (infringement of) intellectual property rights in content accessible by users on its site; users waive their rights against YouTube; and users agree to indemnify YouTube and its affiliates, etc, to the fullest extent permitted by law, in matters relating to their use of YouTube,¹⁰³ including their violation of the copyright of third parties (oftentimes also users).¹⁰⁴ The YouTube Terms also limit¹⁰⁵ or exclude its liability to a user, whether arising out of conduct by a third party or otherwise, to the fullest extent permissible by law.¹⁰⁶

Twitter expressly disclaims responsibility for any content posted on Twitter.¹⁰⁷ Furthermore, pursuant to the Twitter Terms, liability is excluded or limited, to the maximum extent permissible under law, for matters resulting from the use of Twitter or the content on Twitter, whether arising out of the conduct of the user or a third party.¹⁰⁸

Under the Wikimedia Terms, the Wikimedia Foundation disclaims, inter alia, responsibility for content or acts of third parties (oftentimes also users).¹⁰⁹ The Wikipedia Foundation also limits¹¹⁰ or excludes its liability to a user, or any other third party, to the fullest extent permissible under law.¹¹¹

As can be seen, all the social media sites examined disclaim liability for the use of such sites and the content available. In any case, if such sites are so found liable and the disclaimers are ineffective, the liability clauses under the TOS will apply, to the maximum extent legally permissible, to limit or exclude their liability. In addition, it is noted that a user has the contractual obligation to indemnify Facebook and YouTube under the Facebook Statement and the YouTube Terms respectively, if there are losses incurred by these sites as a result of such user's use of Facebook or YouTube, as the case may be. It is noted that the indemnity and the release of liability clauses have been drafted very broadly, both in respect of the scope of circumstances they can apply to,

⁹⁹ Facebook Statement, above n 16, cl 16.

¹⁰⁰ Ibid.

¹⁰¹ Limited to the greater of USD100 or the amount paid to Facebook in the past 12 months: see *ibid.*

¹⁰² Facebook Statement, above n 16, cl 16.

¹⁰³ YouTube Terms, above n 18, cls 5D and 9.

¹⁰⁴ *Ibid* cl 11.

¹⁰⁵ Limited to either supplying the services again to the user, or the cost of supplying the user the services again: see *ibid* cl 10.

¹⁰⁶ YouTube Terms, above n 18, cl 10.

¹⁰⁷ Twitter Terms, above n 19, cl 11A.

¹⁰⁸ Limited to USD100 or the amount paid to Twitter in the past 6 months for the services giving rise to the claim: see *ibid* cl 11C.

¹⁰⁹ Wikipedia Terms, above n 20, cl 14 .

¹¹⁰ Limited to USD1000: see *ibid* cl 15.

¹¹¹ Wikipedia Terms, above n 20, cl 15.

as well as the number of parties contemplated (ie, users of such sites or other third parties).

Jurisdiction, governing law and dispute resolution clauses

The laws of the State of California govern the Facebook Statement ‘without regard to conflict of law provisions’. The state or federal courts in Santa Clara County, California, have the jurisdiction to litigate any claim between a user and Facebook.¹¹²

In this respect, the YouTube Terms are similar to that of Facebook. Notably, YouTube takes a prudent approach by making its users agree that the service is deemed ‘solely based in California’ and is ‘a passive website that does not give rise to personal jurisdiction over YouTube’, in jurisdictions other than California.¹¹³

Under the Twitter Terms, the governing law is that of the State of California, although the courts with jurisdiction are the federal or state courts located instead in San Francisco County, California.¹¹⁴ The governing law is applicable regardless of conflict of law provisions or the state or country of residence of a user, and a user waives any objection on grounds of inconvenient forum.¹¹⁵

Notably, the language in the equivalent clause under the Wikimedia Terms is permissive rather than prescriptive, and users are encouraged to seek resolution through the alternative dispute resolution procedures provided by the relevant project (ie, Wikipedia).¹¹⁶ The Wikimedia Terms are similar in this respect to the Twitter Terms — the laws of the State of California constitute the governing law, and the courts with jurisdiction are the state or federal courts in San Francisco County, California.¹¹⁷

Evidently, the social media sites have chosen, as the governing law of their TOS, the laws of the state where their headquarters are based. Another interesting point to note is that there is a deliberate exclusion of the applicability of private international law principles to the choice of governing law of the TOS, exercised by these sites.

Relationship with the copyright regime

There is some extent of alignment the TOS have with the copyright regime, evidenced mainly by the integration of notice and takedown mechanisms under the DMCA into their copyright policies. I argue however that there are potential incompatibilities between the TOS and the copyright regime obscured by the oversimplification of complex contractual and copyright issues under the TOS. *First*, the TOS confers ‘ownership’ of content on a user who creates it — this does not per se entitle the user to exclusive rights a copyright holder is entitled to under the copyright regime, as the content may not be copyright protectable for reasons discussed below. *Second*, on the

¹¹² Facebook Statement, above n 16, cl 16.

¹¹³ YouTube Terms, above n 18, cl 14.

¹¹⁴ Twitter Terms, above n 19, cl 12B.

¹¹⁵ Ibid.

¹¹⁶ Wikimedia Foundation, *Wikipedia: Dispute Resolution*, above n 20.

¹¹⁷ Ibid.

assumption that the content of a user is copyright protectable, the TOS purport to legitimise use of such content by third party users. However, the licensing provisions under the TOS may not have the requisite clarity to qualify as exceptions to the doctrine of privity and are hence ineffective in conferring the necessary permissions on such third parties. *Third*, the choice of jurisdiction and law clauses may be unenforceable, as against a user resident in a US state (beyond California) or in another country, as a result of the applicability of conventions, treaties or mandatory domestic laws users from other jurisdictions are subject to. Furthermore, different laws may apply to the different elements of a copyright claim. A more elaborate discussion on the above is set out below.

Alignment with the copyright regime

Pursuant to the discussion above, copyright holders who observe infringing use of their content on the social media sites examined, can initiate the takedown process under the DMCA.¹¹⁸ The requisite conditions for service providers such as social media sites hosting content online to qualify for protection under the safe harbour provision¹¹⁹ give such sites great incentive to incorporate the DMCA notice and takedown regime¹²⁰ into their copyright policies, so as to be shielded from secondary liability for copyright infringement.¹²¹ As mentioned earlier, under their TOS, social media sites have reserved their rights to disable the accounts of users for repeated infringements. This usually occurs when more than one DMCA takedown notice has been received in relation to content from the same user.¹²² Arguably, the possibility of expulsion from a social media site for repeated infringements¹²³ has an added deterrent effect against potentially copyright-infringing activities. It therefore appears that social media sites are solicitous about being perceived to discourage users against undertaking generative activities that are not respectful of the copyrights owned by others.

In the above respect, social media sites purport to sit on the same side of the fence as copyright holders. Notably, there is no separate copyright analysis undertaken by social media sites, prior to their removal or reinstatement of content under the DMCA. This leads us into describing now the uneasy relationship between the TOS and the copyright regime, and the potential incompatibilities between the two.

118 See, eg, Facebook, *Facebook Copyright Policy* <http://www.facebook.com/legal/copyright.php?howto_report>; YouTube Terms, above n 18, cls 8B, 9; Wikipedia Terms, above n 20, cl 8.

119 DMCA § 512(c).

120 Ibid.

121 This could refer to contributory infringement: see *Gershwin Publishing Corp v Columbia Artists Management Inc*, 443 2d 1159, 1162 (2nd Cir, 1971); *Metro-Goldwyn-Mayer-Studios Inc v Grokster Ltd*, 380 F 3d 1154, 1660 (9th Cir, 2004); *Perfect 10 Inc v Amazon.com Inc*, 487 F 3d 701, 728 (9th Cir, 2007). Alternatively, this could refer to vicarious infringement, see *Metro-Goldwyn-Mayer-Studios Inc v Grokster Ltd*, 380 F 3d 1154, 1660 (9th Cir, 2004); *Parker v Google Inc*, 2007 WL 1989660, *4 (3rd Cir, 10 July 2007).

122 See, eg, Facebook Statement, above n 16, cl 5; YouTube Terms, above n 18, cl 8B; Twitter Terms, above n 19, cl 9; Wikipedia Terms, above n 20, cl 8.

123 See also the DMCA which sets the requirement for service providers to adopt a termination policy for repeat infringers.

Potential incompatibilities between the TOS and the copyright regime

This section discusses the potential incompatibilities between the TOS and the copyright regime. The legal positions in the US, the UK and Australia on aspects of the TOS will be succinctly discussed. This is done given that the choice of governing law expressly provided for under the TOS will not necessarily be the applicable law for contractual, as well as non-contractual, issues arising under the TOS, because of the application of private international law principles. The article does not purport to discuss each issue extensively. Rather, its main intention is for its insights to serve as a springboard for future research looking at the generative activities on social media sites.

Vesting of 'ownership' under the TOS

The vesting of 'ownership' on a user of a post on Facebook, a video clip on YouTube, a tweet on Twitter and a contribution on the Wikipedia site under the TOS, does not per se entitle him or her to copyright protection of his or her content. A foreseeable barrier to the grant of copyright protection to creative content on social media sites is the comprisal primarily of banal words, phrases and language of widespread usage.¹²⁴ As such, much content on social media sites may not qualify as independent creations containing the requisite modicum of creativity entitling such content to copyright protection.

It is noted that there is a higher originality threshold to be met in the US¹²⁵ than in the UK.¹²⁶ In Australia, the position has somewhat shifted away from the UK position towards that of the US¹²⁷ — the seminal Australian cases on originality are however predicated on factual scenarios involving compilations of facts. As other factual considerations could have impacted on the decisions, which go beyond the assessed originality of the relevant works,¹²⁸ the direct applicability of principles gleaned from these cases to the wide spectrum of instances where content is generated on social media sites is limited. This is because the decisions made hinge on the specifics of each case.

While there can be no generalisations, *ceteris paribus*, if the relevant content is taken to originate from the user, a post on Facebook, a video clip on 'YouTube' or a contribution on Wikipedia is more likely to meet the

124 *Acuff-Rose Music Inc v Jostens Inc*, 155 F 3d 140, 144 (2nd Cir, 1998); *Jean v Bug Music Inc*, No. 00-4022, 2002 WL 287786, *6 (SDNY, 2002).

125 See, eg, *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340.

126 See, eg, *Walter v Lane* [1900] AC 539. This case is frequently upheld as an early example of the 'sweat of the brow' doctrine and recognised as authority for the notion of originality in copyright law, even though the word 'original' was introduced formally to copyright law in the UK only after the case was decided, in the now-repealed *Copyright Act 1911* (UK).

127 See, eg, *Ice TV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 (22 April 2009), cited in *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* (2002) 119 FCR 491 (25 May 2001) which was overturned by the decision in *Telstra Corporation Ltd v Phone Directories Pty Ltd* (2010) 194 FCR 142 (8 February 2010).

128 For instance, in *Telstra Corporation Ltd v Phone Directories Pty Ltd* (2010) 194 FCR 142 (8 February 2010), there was no identifiable human author. It was furthermore noted in the case that there should exist a correlative relationship between authorship and originality.

originality threshold than a tweet on Twitter, given the latter site's imposition on its users of a limit of 140 characters or less per tweet. Because there is a need for a higher level of creativity to qualify a short textual work for copyright protection, a brief work such as a tweet is less likely to be copyright protectable as it affords lesser opportunities for originality.¹²⁹ It is nonetheless possible for some tweets to cross this originality threshold and gain copyright protection.¹³⁰

Additionally, brief works such as status updates on Facebook and tweets on Twitter are less likely to be copyright protectable for another reason — that of not meeting the fixation requirement or its equivalent.¹³¹ Unlike photographs and video clips on Facebook, such updates and tweets are not likely to exist as stored formats (ie, other than on the frequently refreshed page of the particular social media site) on other sites or locations. Indeed, it has been suggested that the Facebook Statement recognises the distinction between photographs and video clips on the one hand and status updates on the other when it expressly states that photographs and video clips are content covered by intellectual property rights, but silently leaves open to debate the same question in respect of status updates.¹³² Arguably, brief works such as status updates on Facebook and tweets on Twitter can meet the general fixation requirement in the US,¹³³ or the equivalent requirement in the UK¹³⁴ and Australia,¹³⁵ although there are considerations which may point the other way. As a matter of fact, subject to a Facebook user's privacy settings, status updates from years back can still be found on the Facebook site. On the other hand, while it has been observed that some tweets posted over a year back are still retrievable,¹³⁶ if a user tweets too frequently, recent tweets under a year old may be inaccessible for the reason that Twitter only allows retrieval of up to 3200 tweets.¹³⁷ The evidentiary purpose of fixation is defeated in the case of inaccessible tweets, as such transient media cannot enable preservation of the identified author's contribution to the public domain, nor provide reliable proof of the bounds of his or her copyright protectable expression.¹³⁸

Henceforth, the same line of reasoning can conceivably apply to comments made to video clips on YouTube, although in the case of the Wikipedia site,

129 See, eg, *Lexmark International Inc v Static Control Components Inc*, 387 F 3d 522, 542 (6th Cir 2004); Rebecca Haas, 'Twitter: New Challenges to Copyright Law in the Internet Age' (2010) 10 *The John Marshall Review of Intellectual Property Law* 231, 248.

130 See Rebecca Haas, 'Twitter: New Challenges to Copyright Law in the Internet Age' (2010) 10 *The John Marshall Review of Intellectual Property Law* 231, 244.

131 See Elizabeth White, 'The Berne Convention's Flexible Fixation Requirement: A Problematic Provision for User-Generated Content' (2012–2013) 13(2) *Chicago Journal of International Law* 685, 689.

132 See *ibid*; Facebook Statement, above n 16, cl 2.

133 See DMCA; White, above n 131, 697; Haas, above n 130, 245.

134 *Copyright, Designs and Patents Act 1988* (UK) c 48, s 3.

135 *Copyright Act 1968* (Cth) s 22.

136 Haas, above n 130, 246.

137 Twitter, *Help Center: New user FAQs* <<http://support.twitter.com/articles/13920-new-user-faqs#>>.

138 See White, above n 131, 703. See also Gregory S Donat, 'Fixing Fixation: A Copyright With Teeth for Improvisational Performers' (1997) 97 *Columbia Law Review* 1363, cited in Aaron Perzanowski, 'Fixing RAM Copies' (2010) 104 *Northwestern University Law Review* 1067, 1094–5.

the fixation requirement or its equivalent will likely pose less of a challenge to the copyright-ability of content shared on the Wikipedia site. This is because of the purpose of the latter site — the Wikipedia site serves as a repository of cumulative knowledge users build on, as well as go to, for information. Thus most of the content on the Wikipedia site will be stored for a longer period of time than on the other social media sites.

That much of the content ‘owned’ is not copyright protectable in the first place leads to the logical inference that most of the purported acquisitions of licences by social media sites, in relation to the content of their users, are mere precautionary measures.¹³⁹ Therefore, the ‘ownership’ acquired by a user of his or her content under the TOS is a hollow label that does not confer the exclusive rights a copyright owner is ordinarily entitled to.

Imposition of the TOS on third parties

The doctrine of privity provides generally that contracts, such as the TOS entered into by users of social media sites, cannot confer rights or impose obligations on any third party user, other than the direct parties to such contracts. As demonstrated above, to varying degrees, the TOS of the respective social media sites make reference to the rights of others¹⁴⁰ to use the content made available by a user on the relevant social media site. A strict application of the doctrine of privity means that third parties may not be able to invoke these provisions under the TOS to justify their uses of content.

It is noted however that the doctrine of privity has been relaxed (albeit to different extents) in the US¹⁴¹ and other jurisdictions, including the UK¹⁴² and Australia,¹⁴³ in recent years. As such, a third party to a contract may be able to enforce a contractual term if it is clearly intended to benefit him or her. With reference to the TOS examined, it is submitted that the intention to benefit third party users (ie, to confer licences on third party users for permitted uses of a user’s content) is less clearly expressed within the Facebook Statement and the Twitter Terms than in the YouTube Terms and the Wikimedia Terms, as the latter sites are more unequivocal in this respect.¹⁴⁴

The case of *Agence France Presse v Morel*¹⁴⁵ lends support to the argument

139 Orit Fischman Afori, ‘Flexible Remedies as a Means to Counteract Failures in Copyright Law’ (2011) 29 *Cardozo Arts & Entertainment Law Journal* 2, 2.

140 See, eg, Facebook Statement, above n 16, cl 2 (where the Facebook user allows everyone, including non-Facebook users to use the information that he or she publishes to the public); YouTube Terms, above n 18, cl 6C (where other users acquire a licence similar to YouTube in respect of content shared by a user, except that the rights of adaptation and to make derivative works are specifically omitted); Twitter Terms, above n 19, cl 5 (where other users can make a user’s tweets available to the public); Wikipedia Terms, above n 20, cl 7 (where a user has to grant broad permissions to the general public to distribute and use his or her content freely).

141 By way of development of common law, see *Lawrence v Fox*, 20 NY 268 (1859); *Burr v Beers*, 24 NY 178 (1861).

142 *Contracts (Rights of Third Parties) Act 1999* (UK) c 31, s 1.

143 See *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, where it has been held that a third party beneficiary may uphold a promise made for its benefit in a contract of insurance to which it is not a party.

144 See YouTube Terms, above n 18, cl 6C; Wikipedia Terms, above n 20, cl 7.

145 *Agence France Presse v Morel* (USDC SDNY, 10 Civ 02730, 2013 WL 146035, 14 January 2013).

that the intention to benefit third parties is unclear under the Twitter Terms. It also confirms the copyright-ability of Twitter-related content — ie, a photograph.¹⁴⁶ The trial court rejected Agence France Presse's (AFP) argument that there was an implied licence for AFP to use Morel's works under the Twitter Terms, and held that the unencumbered copyright licence granted to Twitter under the Twitter Terms did not extend to benefit third party users. As such, AFP, which has its own user account on Twitter,¹⁴⁷ was held liable for copyright infringement when it (together with its distribution partner in the US) distributed and licensed, for commercial use by third party news agencies, photographs that Morel, a photojournalist, took and posted on his Twitter page, without Morel's permission. The decision was made in spite of the fact that the licence granted by a user to Twitter under the Twitter Terms includes the right of Twitter to make the content available to other companies or individuals that partner with Twitter,¹⁴⁸ and further, that Twitter is authorised to make a user's tweets available to the public and to let *others* do the same.¹⁴⁹

Notwithstanding the above, Twitter has guidelines that address the requirements for the use of one user's content by other users, such as displaying the full text of the tweet with the displayed image and attributing the correct user for the tweet or image,¹⁵⁰ which AFP did not comply with. By suggesting that content should not be disassociated from the tweet with which they are shared, the guidelines further highlight the fact that the Twitter Terms did not clearly manifest the intention of a user to confer a benefit on the world-at-large to commercially use his or her content,¹⁵¹ other than for the limited purpose of 're-tweeting', or the rebroadcasting of a tweet. As such, it appears that in the US courts are prepared to recognise a user's rights to his or her copyright protectable content on social media sites, but are inclined to interpret narrowly any incursions on a user's rights, such as the scope of licence to a user's content granted under the TOS he or she entered into, particularly if the TOS are not manifestly clear in this respect. The position is likely to be similar in the UK.¹⁵² It is noted that Australian courts will be more likely to hold, than in the US or the UK, that a third party user has no licence to use content under the TOS, as there is no general exception to the doctrine of privity.¹⁵³

146 White, above n 131, 697.

147 Twitter, *Agence France-Presse*, <<https://twitter.com/AFP>>.

148 Twitter Terms, above n 19, cl 5.

149 Ibid.

150 *Agence France Presse v Morel* (USDC SDNY, 10 Civ 02730, 2013 WL 146035, 14 January 2013). See also Twitter, *Help Center: Guidelines for Using Tweets in Broadcast* <<https://support.twitter.com/articles/114233-guidelines-for-using-tweets-in-broadcast#>>.

151 Ibid.

152 See *Contracts (Rights of Third Parties) Act 1999* (UK) c 31, where a third party to a contract can enforce a contractual term if it purported to confer a benefit, and the parties intended for the term to be enforceable by him or her.

153 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 creates a limited exception to benefit third parties in insurance contracts, and the extent of its scope of flexibility is uncertain. Some statutory modifications made to the privity rule are encapsulated in *Property Law Act 1969* (WA) s 11, *Property Law Act 1974* (Qld) s 55 and *Property Law Act 2000* (NT) s 56. There is no equivalent to the *Contracts (Rights of Third*

The use of voluntary licensing by social media sites to obviate the risk of copyright infringement springs from the assumption that the content is copyright protectable. In addition, an inquiry is necessary as to the level of clarity required under the TOS to legitimise the use of content by third party users, so that such use is not considered to be an unlicensed use falling foul of copyright laws. In that sense, the attempts made by such social media sites to legitimise uses of copyright protected content are rendered ineffective by the principles relating to contractual interpretation.

Private international law issues — choice of jurisdiction and governing law (of contract and copyright)

There are many complexities with respect to private international law issues. The first relates to the choice of jurisdiction under the TOS, while the second relates to the choice of governing law of the TOS. Separate consideration is further warranted in respect of the choice of governing (copyright) law applicable to copyright-related matters linked to generative activities on social media sites. It is worth highlighting that the entirety of private international law issues are too extensive to confine within the scope of this article and do not constitute its focus. I have attempted to discuss what is necessary for readers to understand why the enforceability of choice of jurisdiction and law provisions under the TOS are limited, and why the legal positions in the UK and Australia (and other jurisdictions for other users) on various issues are therefore relevant to users of social media sites.¹⁵⁴

Choice of jurisdiction

The governing law chosen under the TOS, in relation to a dispute between a user in the US and the US-incorporated company operating the relevant social media site, will likely be honoured, although state laws may limit the enforceability of this clause on the choice of jurisdiction with respect to users in other states (not being California) in the US.¹⁵⁵

The scenario involving a user in the UK can be considered first. It is noted that member states of the European Union ('EU') are subject to the Brussels regime.¹⁵⁶ Under the Brussels I Regulation, the autonomy of parties to determine the court having jurisdiction is respected, albeit to a limited extent.¹⁵⁷ This gives rise to a complication when the generative activities

Parties) Act 1999 (UK) c 31 in Australia at the moment, but the doctrines of trust, agency and estoppel may provide some respite from the privity rule.

154 Readers may wish to note that I have made a conscious decision to leave intricate details beyond this broad-brush discussion for a separate study.

155 Generally jurisdiction clauses are enforced, see, eg, *The Bremen v Zapata Offshore Co*, 407 US 1 (1972); *Carnival Cruise Lines Inc v Shute*, 499 US 585 (1991). But this may not be the case if such a clause points to a specific forum with express exclusion to others: see, eg, *Future Industries of America v Advanced UV Light GmbH* (2nd Cir, 10-3928-cv, 19 October 2011). The laws of individual states must also be considered.

156 *Regulation (EC) No 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2012] OJ L 351/1 ('*Brussels I Regulation*'). This is also known as the Brussels Regime.

157 *Ibid* Preamble [11] (that jurisdiction is generally based on the domicile of a defendant save where the autonomy of the parties warrants a different linking factor), [14] (limited autonomy to determine the courts having jurisdiction when it comes to a consumer contract).

occur online and cannot be confined geographically, a reality since users from all over the world share content with one another.

There are rules for consumer contracts under the Brussels regime which will apply to the TOS, in view that they are consumer contracts and that the US-incorporated companies have directed their activities to the UK where the user resides.¹⁵⁸ Under the home court rule, proceedings against the user can only be brought in a court of the UK, even though such a user has the option of bringing proceedings either in the US or in the UK.¹⁵⁹ Even where the user does not exercise his or her right to sue the US company in a court of the UK, it has been averred that a European court will refuse to enforce a judgment if a user from a member state within the EU was summoned to a court in a distant forum such as the US for litigation.¹⁶⁰ On a separate note, it should be added that a court of the UK adopts the doctrine of *forum non conveniens*, or the *Spiliada* test,¹⁶¹ and will only stay proceedings if there is a more appropriate court for trial. The result of this is consistent with the home court rule.

The other scenario involving a user in Australia can now be considered. There is no equivalent to the Brussels regime applicable to users resident in Australia.¹⁶² In general, the jurisdiction agreement incorporated under the TOS will likely be respected by an Australian court,¹⁶³ even though it has been suggested that an Australian court may refuse to enforce a jurisdiction clause where doing so would be tantamount to allowing parties to contract out of applicable legislation.¹⁶⁴ Nonetheless, in light of *Voth v Manildra Flour Mills Pty Ltd*,¹⁶⁵ an Australian court is unlikely to order a stay of its proceedings against an Australian user who commences litigation proceedings in a court of Australia, unless it considers itself a clearly inappropriate forum. As such, it appears to be even rarer, as compared to a British plaintiff by an English court under the *Spiliada* test,¹⁶⁶ for an Australian plaintiff to be turned away by a court of Australia on grounds of jurisdiction.¹⁶⁷

Thus, as illustrated, notwithstanding the choice of jurisdiction clause under

158 *Brussels I Regulation* [2012] OJ L 351/1, art 15(1c).

159 See *ibid* arts 16(1), (2). See also Michael L Rustad and Maria Vittoria Onufrio, 'Reconceptualising Consumer Terms of Use for a Globalized Knowledge Economy' (2011–2012) 14(4) *University of Pennsylvania Journal of Business Law* 1085, 1124.

160 See Rustad and Onufrio, *ibid* n 159, 1127.

161 *Spiliada Maritime Corporation v Consulex Ltd* [1987] 1 AC 460 ('*Spiliada*').

162 It is noted though that the Australian government has considered the impact of acceding to the Hague Choice of Court Convention (signed on 30 June 2005), and further that copyright and related rights (unlike other intellectual property rights) are not excluded from the application of the Convention.

163 See, eg, Andrew Bell, 'The Future of Private International Law in Australia' (2012) *Australian International Law Journal* 11, 15; Richard Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?' (2009) 5(1) *Journal of Private International Law* 161, 163.

164 See Andrew Bell, 'The Future of Private International Law in Australia' (2012) *Australian International Law Journal* 11, 15.

165 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

166 *Spiliada* [1987] 1 AC 460.

167 See, eg, *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370 (13 October 2006); *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 (29 September 2005).

the TOS, where the dispute concerns a user in another jurisdiction, the applicability of the provision is limited.

Choice of law

It is noted that even though the Restatement (Second) of Conflict of Laws supports the application of the contractual choice of governing law under the TOS,¹⁶⁸ an allowance is made for an alternative governing law to apply where the contractually chosen governing law would be contrary to a fundamental policy of the other state which has a materially greater interest.¹⁶⁹ If a user is resident in another state in the US, the content of such state's laws will be relevant to the inquiry on applicable governing law.

Again, scenarios involving users in the UK and Australia can be contemplated. With respect to a user in the UK, the Rome I Regulation applicable to EU member states¹⁷⁰ is to be taken into account. While the freedom of the parties to choose a governing law for the contract entered into is respected to some extent, the rules under the Rome I Regulation recognise that the contractual choice of law clause will not override provisions which cannot be derogated from by way of private agreement.¹⁷¹ Similar to the discussion above on the Brussels regime, the US-incorporated companies operating the social media sites examined are perceived as having directed their activities to users in Europe.¹⁷² However, there are mandatory provisions under the law of the country where the consumer has his or habitual residence which cannot be derogated from.¹⁷³ This means that the relevant court has to consider that there is no protection offered to the British user under the mandatory laws of the UK, which he or she is deprived of, under the governing law contractually chosen.¹⁷⁴

There is no equivalent regime applicable to a user in Australia. It is noted though that because English and Australian choice of law rules are non-mandatory and there is no obligation on the part of the relevant plaintiffs to plead foreign law, the implied permissible choice of governing law is effectively that of the forum or jurisdiction where the dispute is heard.¹⁷⁵ As a result of this closely connected relationship between the test for *forum non conveniens* and the pleading of foreign law, when the adjudicating court is an English or Australian court and where there is a failure to plead foreign law effects, the governing law will likely be that of the UK or Australia, as the case may be.

Again, this affirms my argument that an alternative law may govern a dispute between a user resident in a country such as the UK and Australia, and

168 See American Law Institute, Restatement (Second) of Conflict of Laws (1998) §§ 186–7.

169 Ibid §§ 187(2b), 188.

170 Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177/6 ('Rome I Regulation').

171 Ibid art 3.

172 Ibid art 6(1).

173 Ibid art 6. Article 6 of the Rome I Regulation adopts the consumer's home court rule, which means that the governing law for consumers is where he or she has her 'habitual residence'.

174 See Rustad and Onufrio, above n 159, 1128. These laws can include those prohibiting unfair contract terms, limiting the validity of standard-form contracts, etc.

175 See James McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31(2) Melbourne University Law Review 401, 408. See also Richard Fentiman, *Foreign Law in English Courts* (Oxford University Press, 1998).

the relevant US-incorporated company operating the social media site, despite the express stipulation to the contrary.

Applicable copyright legislation

Beyond the contractual elements of the TOS, private international law issues in respect of the non-contractual elements relating to copyright will have to be considered. If, in spite of other considerations, the governing law of the TOS remains to be that of the laws of the State of California as contractually provided, the principle of presumption against extraterritoriality, as developed under US case law,¹⁷⁶ may paradoxically apply to limit the application of US copyright legislation to activities confined within the territorial limits of the US. This may defeat the attempt made by social media sites to include activities outside of the US (an evident reality given the de-territorialised cross-border usage patterns) under the purview of US copyright legislation.

It is noted that there is a dearth of detailed guidance on this issue, legislative or otherwise, in the UK or in Australia.¹⁷⁷ The *Berne Convention for the Protection of Literary and Artistic Works* ('*Berne Convention*'),¹⁷⁸ to which the US, the UK and Australia are contracting parties, may shed further light on this issue. The principle of national treatment articulated by art 5 of the *Berne Convention* restricts a member state from treating its domestic copyright holder more favourably than a foreign copyright holder from another member state.¹⁷⁹ This means that, independent of the existence of protection in the country of origin of the work,¹⁸⁰ protection is conferred on a copyright work by the law of the country for which protection is sought. Such law will apply to issues pertaining to the extent of protection and redress available to the copyright holder¹⁸¹ — this applicable law could be different from that which governs the rights and obligations of the parties under the TOS.

The choice of jurisdiction and governing law clauses may nevertheless still have a role to play when it comes to the grant of non-exclusive licences under the TOS.¹⁸² It has been suggested that such licences do not affect the proprietary rights of the copyright holder and therefore the conventional

176 *Equal Employment Opportunity Commission v Arabian American Oil Co*, 499 US 244 (26 March 1991); *Morrison v National Australian Bank*, 130 S Ct 2869 (2010); *Kiobel v Royal Dutch Petroleum*, 133 S Ct 1695 (2013). Absent a clear congressional intent to that effect, federal statutes are presumed not to have effect to conduct outside of the territorial jurisdiction of the US.

177 See Copyright, Designs and Patents Act 1988 (UK) c 48; Copyright Act 1968 (Cth). See also James James Fawcett and Paul Torremans, *Intellectual Property and Private Law* (Oxford University Press, 2nd ed, 2011) [13.41].

178 *Berne Convention for the Protection of Literary and Artistic Works*, signed 9 September 1886 (entered into force 5 December 1886) ('*Berne Convention*'). See especially *ibid* art 5.

179 *Ibid* art 5(1).

180 It should be noted that this can depend on the place of first publication or (for unpublished works) the nationality of the copyright holder. See *ibid* art 5(4).

181 *Berne Convention*, signed 9 September 1886 (entered into force 5 December 1886) art 5(2). See also Copyright, Designs and Patents Act 1988 (UK) c 48, ss 1(3), 153–62; Fawcett and Torremans, *above* n 177, [13.41].

182 Facebook Statement, *above* n 16, cl 2; YouTube Terms, *above* n 18, cl 2A; Twitter Terms, *above* n 19, cl 5; Wikipedia Terms, *above* n 20, cl 7.

choice of law principles continue to apply in this respect.¹⁸³ The difficult questions of characterisation of issues arising under and relating to the TOS, into that which is contractual and non-contractual, add an unnecessary layer of complexity to the analysis. Henceforth, the jurisdiction and choice of law clauses under the TOS have limited applicability.

Implications

Regardless of the broad enforcement of choice of jurisdiction and governing law clauses by US courts, the EU regimes discussed above, construed as comprising of non-waivable and mandatory provisions,¹⁸⁴ result in our arrival at a confounding position — the choice of jurisdiction and governing law clauses under the TOS are largely unenforceable against users in most of Europe, including the UK, due to the violation of the Rome I Regulation and the Brussels I Regulation.¹⁸⁵ The outcome is not dissimilar from what happens in practice in Australia, because of the improbability of a court of Australia turning a plaintiff away on grounds that such court is an ‘inappropriate forum’.¹⁸⁶

Where an English or Australian court adjudicates a dispute involving a user in the UK or Australia (as the case may be) arising from or relating to the TOS, such a court may find it challenging to identify the country of origin of a copyright work generated online on a social media site, to determine if copyright subsists. Additionally, in respect of foreign intellectual property rights including copyright, such a court may not possess the requisite subject matter jurisdiction for adjudication.¹⁸⁷

There are many possibilities regarding jurisdiction and governing law, whether users are from another state within the US or from other parts of the world — a reality with social media sites. What the discussion above demonstrates is that despite having made the choice of jurisdiction and governing law under the TOS, the court of another state¹⁸⁸ or country (and its law as well) may govern the dispute at hand. Even when the governing law is correctly ascertained, different laws may apply to questions of subsistence and infringement of copyright.¹⁸⁹ For instance, in respect of the originality requirement, a court in the US is not likely to apply the more lenient

183 Fawcett and Torremans, above n 177, [14.14].

184 Brussels I Regulation, [2012] OJ L 351/1, art 17. See also Rustad and Onufrio, above n 159, 1127.

185 See Rustad and Onufrio, above n 159, 1127–30. Though controversial, it has been submitted that courts apply these regulations beyond European boundaries and there are cases regarding the extraterritorial application of particularly the Brussels regime: see especially *ibid* n 256–7.

186 See, eg, *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370 (13 October 2006); *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 (29 September 2005).

187 For an Australian example, see *Potter v Broken Hill Proprietary Co Ltd* [1906] HCA 88 (20 March 1906), where it is held that an action cannot be maintained in Victoria for a New South Wales patent. See also Peter Edward Nygh and Martin Davies, *Conflict of Laws in Australia* (LexisNexis Butterworths, 7th ed, 2002) [7.48].

188 Even within a country such as Australia, there appears to be no uniformity in the application of private international law rules amongst the six states comprising the Commonwealth of Australia: see Andrew Dickinson, ‘The Future of Private International Law in Australia’ (2012) *Australian International Law Journal* 1, 3.

189 See Peter K Yu, *Conflict of Laws Issues in International Copyright Cases* (2001)

originality standard of a foreign country in a copyright matter.¹⁹⁰ With reference to the ownership requirement, the law of the country of origin, being the jurisdiction with the most significant relationship to the copyright work, could be the law applied by a court in the US.¹⁹¹ On the other hand, the law of the state where infringement has occurred may apply to the infringement issue.¹⁹² These examples are in no way intended to be exhaustive. What they demonstrate is that there will be foreseeable issues in other regions and countries, given the reach of social media sites in a flatter globalised world. Standard-form TOS such as those presently proffered by social media sites may need to be customised for broad enforceability in different jurisdictions.¹⁹³

In this respect, Facebook's provision of links to the World Intellectual Property Office directory so that users can learn of the scopes of copyright protection in other countries,¹⁹⁴ and further, YouTube's statement that users are responsible for compliance with laws in other jurisdictions,¹⁹⁵ indicate their awareness of the global reach of their services and the worldwide repercussions that ensue.

The choice of jurisdiction and law clauses under the TOS serve as evidence of the unsatisfactory attempts made by social media sites in ameliorating the risks posed by private international law issues. If social media sites were to adapt their TOS to ensure their validity across all jurisdictions, they may have to inquire comprehensively into the substance of private international law rules, and consumer and intellectual property protection in multiple jurisdictions. This inquiry falls beyond the ambit of this article.

Conclusion

This article has scrutinised the main provisions under the TOS that attempt to regulate generative activities on the four social media sites examined. In the process of doing so, it illustrates how control is ceded over the content of users to such sites, and exposes some limitations of the TOS in relation to their attempts to regulate generative activities on social media sites.

I argue that there are potential incompatibilities between the TOS and the copyright regime obscured by the oversimplification of complex contractual and copyright issues under the TOS. *First*, the 'ownership' conferred on a user of his or her content under the TOS is not consistent with the concept of ownership under the copyright regime. Social media sites in fact incorporate licence agreements under their TOS for precautionary purposes even prior to ascertaining that the content is copyright protectable — the alternative (ie, assessing such content on a case by case basis) is not viable because of the voluminous content generated in the social media environment. *Second*, the

<<http://www.peteryu.com/gigalaw0401.pdf>> (originally on Gigalaw.com), where it is submitted that different laws may apply to different elements of the infringement action.

190 See, eg, *Feist Publications Inc v Rural Telephone Service Co*, 499 US 340 (1991).

191 See, eg, *Itar-Tass Russian News Agency v Russian Kurier Inc*, 153 F 3d 82 (2nd Cir, 1998) which refers to the *lex originis*.

192 See *ibid*, which refers to the *lex loci delicti*.

193 See Rustad and Onufrio, above n 159, 1189.

194 Facebook, *Facebook Copyright Policy*, above n 17.

195 YouTube Terms, above n 18, cl 10.

extent of clarity that the TOS are required to have in order to benefit third party users desirous of using the content of another user, and hence availing themselves of exceptions to the doctrine of privity, is not typically achieved. Moreover, the inquiry is premised on the assumption that the content is copyright protectable in the first place. Thus the strict application of the doctrine of privity may undermine the attempt made by social media sites to confer permissions on third party users to use content. *Third*, the enforceability of jurisdiction and choice of law clauses under the TOS is put in doubt when one considers a user resident in another state of the US or in another country. The applicability of conventions, treaties or mandatory domestic laws that users from other jurisdictions are subject to may render the jurisdiction and choice of law clauses invalid. Further, an inquiry has to be made as to the choice of governing law for copyright-related matters. Additionally, when that is done, it is to be noted that different individual elements of a claim for copyright infringement may warrant the application of different laws. The short discussion on private international law issues illustrates that the laws on contract and copyright in other jurisdictions could be relevant when it comes to disputes arising from or related to the TOS.

Users who are unclear about their rights and obligations under either regime may be inclined to opt for a defensive approach to avoid any risk of legal liability and practice great restraint from using content.¹⁹⁶ On the other hand, users who are ignorant of the same rights and obligations may disregard both regimes altogether. Contracts can prove useful in tailoring rights to an environment in ways that copyright legislation cannot, and offer an alternative means of enforcement when the latter is not an available option.¹⁹⁷ This article has demonstrated how the TOS have sought to navigate around potential incompatibilities between the TOS and the copyright regime. Nonetheless, caution should be sounded against viewing TOS as appropriate substitutes for intellectual property protection.¹⁹⁸ Ultimately, copyright laws are intended to regulate property rights, while contracts regulate rights between contracting parties established by agreement — that the two separate systems are not equivalent is clearly recognised by courts which have consistently upheld that contracts are not preempted by copyright legislation.¹⁹⁹ Moreover, the choice of law for each of the two regimes is considered on its own merits. All in all, the private international law analysis will prove perplexing for users of social

196 See Matej Myska et al, 'Creative Commons and Grand Challenge to Make Legal Language Simple' in Monica Palmirani et al (eds), *AI Approaches to the Complexity of Legal Systems. Models and Ethical Challenges for Legal Systems, Legal Language and Legal Ontologies, Argumentation and Software Agents* (Springer Berlin Heidelberg, 2012) 271, 284.

197 Raymond T Nimmer, 'Information Wars and Challenges of Content Protection in Digital Contexts' (2010–2011) 13 *Vanderbilt Journal of Entertainment and Technology Law* 826, 830.

198 See Amanda Harmon Cooley, 'A Contractual Deterrence Strategy for User-Generated Copyright Infringement and Subsequent Service Provider Litigation' (2011) 64 *SMU Law Review* 691, 733.

199 Nimmer, above n 197, 861–2. See also *Telecom Technical Services Inc v Rolm Co*, 388 F 3d 820, 833 (11th Cir, 2004); *Grosso v Miramax Film Corp*, 383 F 3d 965, 968 (9th Cir, 2004); *Bowers v Baystate Techs Inc*, 320 F 3d 1317 (Fed Cir, 2003); *ProCD Inc v Zeidenberg*, 86 F 3d 1447 (7th Cir, 1996); *Ross, Brovins & Oehmke PC v LexisNexis*, 348 F Supp 2d 845 (ED Mich, 2004).

media sites, most of whom will never question which legal regime governs their actions.

Not surprisingly, the excessive ability derived contractually to freely utilise content, just as is the case with excessive copyright protection, can result in extreme concentration of power in a few companies.²⁰⁰ It is submitted, in the context of the discussion on social media, that the inherent cyclical nature of this feedback loop is such that it is no longer practicable to ascertain whether the contractual freedom to utilise content precedes the concentration of power in media companies or vice versa. In the course of analysing the TOS of specific social media sites, it is noted that contractual provisions can complement copyright legislation. The practice of implicit compliance with takedown notices and the threat of terminating the accounts of users who have been repeatedly at the receiving end of takedown notices enhance the chilling effect of the copyright regime. On the other hand, where it suits social media sites, indemnity clauses strengthening their bargaining position are flagrantly incorporated into the TOS of such sites.

In conclusion, copyright legislation is but 'one stitch in the fabric of law' applicable to creative content on social media sites.²⁰¹ This article has shown that there are critical contractual and copyright issues (in different jurisdictions) that have been buried from consideration by the TOS of social media sites. Such TOS unevenly reflects the interests of the prevalent media companies, at the expense of their users. While I acknowledge that the efficacies of the TOS studied are subject to even broader questions of enforceability, acceptability and tolerance,²⁰² my hope is for the article to stimulate further discussion in these areas.

200 See Guy Pessach, 'Deconstructing Disintermediation: A Skeptical Copyright Perspective' (2013) *Cardozo Arts and Entertainment Law Journal* 833, 849.

201 Nimmer, above n 197, 854.

202 *Ibid* 855.