

# De-Coding Indian Intellectual Property Law

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## Guest post: Copyright in Photographs vis-a-vis Social Networking Sites

by Swaraj Paul Barooah

December 4, 2013

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### Social Media Landscape 2013



We are happy to present Devika Agarwal's second post in the 2nd Ar SpicyIP Fellowship applicant series. You can view her previous post on the copyrightability of characters [here](#). [Edit: Incidentally, Gopika had cussed this development during its initial stages earlier last year in the course of her application to our fellowship.]

### Copyright in Photographs vis-a-vis Social Networking Sites

We live in the ripe age of digital photography where anybody with a point-and-shoot camera is easily a photographer; the unprecedented spurt in the number of photographs posted every day on social networking sites (like Facebook and Twitter prompted Oxford Dictionaries to declare 'selfie' as Word of the Year 2013. It was only a matter of time then that a case concerning the unauthorized use of photographs posted by users on SNS came up for consideration in the legal fraternity. Most recently, a Haitian photographer won a case for infringement of copyright in a photograph against

Agence France-Presse and its American distributor Getty Images. The main issue involved was that of the validity of the 'terms of use agreement' with social networking sites. In the course of the blog, we shall also explore the position of Indian law on the same.

That the photographer has copyright over his photographs has been established long before this case. However, what is noteworthy is the Court's ruling that notwithstanding a website's terms of use (which may include a term to the effect that the SNS is free to use the images posted by the user in any manner the site chooses), an agency by using/distributing that photograph must seek the permission of the photographer.

Arguments were made by both the parties where AFP asserted that anything uploaded to Twitter (the photograph in question had been uploaded by Morel via Twitpic which allows users to post to Twitter) was freely available for re-distribution by other Twitter users under the terms of service of the social networking service. [Morel counter-sued for copyright infringement](#).

The Court finally held that posting of the images by Morel to Twitter did not mean forfeiture of his rights.

## Click-wraps and Browse-wraps

Unilateral, one-sided agreements are not unique to Twitter; SNS like Instagram and Facebook equally partake in coming up with such contracts.

According to s. 2 of [Facebook's Statement of Rights and Responsibilities](#), by uploading content on Facebook, the user essentially licenses his intellectual property rights to Facebook which is in the nature of a ***non-exclusive, transferable, licensable, royalty-free, worldwide license***.

This means that even though you are the original right-holder over content posted by you on Facebook, through the act of posting online you are giving Facebook an "IP License" like the one also mentioned in [Instagram's Terms of Use agreement](#). Ironically, Facebook has a stringent policy when it comes to copyright infringement by its own users.

At this point, a distinction must be made between a 'click-wrap agreement' and a 'browse-wrap agreement'. Both are variants of the 'terms of use agreement' posted on websites. A click-wrap agreement requires the user to signify his assent (prior to using a product/service) by clicking on the 'I Agree' button, commonly found on sites which allow downloading of software. A browse-wrap agreement, on the other hand, **assumes 'implied assent'** by a user if he uses the website. A browse-wrap agreement is generally found in an obscure location of the website, such as the footer. **Terms of use agreements on social networking sites are browse-wrap agreements.**

Where a click-wrap agreement has been held to be legally enforceable by the US courts, the validity of browse-wrap agreements has been dubious. This is based on the argument that enforcing an agreement which does not offer 'a notice' of its existence to the users, will be unfair to them. Also, not every individual term within a browse-wrap agreement, which could otherwise be enforceable, is always enforceable; where a term in a browse-wrap agreement is unreasonably one-sided or a violation of public policy, the Court may hold that **term to be invalid**. This was also held in [Zappos.com, Inc., Customer Data Security Breach Litigation](#).

### **Indian Position?**

The Indian law on copyrights is similar to the US law which recognizes that rights to a photograph belong to the photographer unless there is an agreement to the contrary or the photograph is clicked by the photographer under duress. S.17 of The Copyright Act, 1957 recognizes that the photographer is the first owner of copyright in respect of a photograph. S.17 (a) makes the employer the first owner of copyright in a literary, dramatic or artistic work (which includes a photograph). S.30 of the 1957 Act allows for licensing of the copyrighted work by the owner through "writing to him or by his duly authorized agent." S.10 A of Information Technology Act 2000 recognizes electronic contracts.

It will be interesting to have such a case come to the Indian courts in future and to see whether the Courts decide in favour of the copyright holder or the social networking sites based on their terms of use agreement. The key question before the Courts in this aspect will be 'whether agreeing to the terms of use agreement by the user is a valid grant of license.'

In my opinion, it will be decided in a manner similar to *Daniel Morel*. This is because a contract to be legally binding must not be unfair or detrimental to any law/public policy; this principle is the same across all jurisdictions. Further, when posting to social media sites the users also look for appreciation for their work (evident from the 'likes' / 'comments') and the unilateral relinquishment of the right to be accredited for one's work is not in keeping with the public policy/copyright law of any State.

(At present, there is no Indian case law which examines the validity of browse-wrap agreements.)

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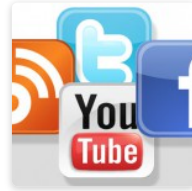
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## Swaraj Paul Barooah

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**R.S. Praveen Raj**

December 5, 2013 at 11:52 am

Good one. Congrats to Devika Agarwal.



**devika agarwal**

December 6, 2013 at 1:15 pm

Thank you 😊



**Anamika Goswamy**

December 7, 2013 at 2:02 pm

A useful piece of information, Knowing more about click-wraps and browse-wraps can definitely save you from viol photographic rights.



**devika agarwal**

December 7, 2013 at 7:53 pm

Thanks Anamika 😊



**Rishi Bansal**

December 7, 2013 at 3:34 pm

Nice article. Easy language. Easy to understand. Good work.

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**devika agarwal**



December 7, 2013 at 9:52 pm

Thank you Rishi

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Ila Vyas

December 12, 2013 at 6:06 pm

Amazing piece. many congrats to the author for the article. it is very helpful and clear. It really helped me in my ow search as well.

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devika agarwal

December 12, 2013 at 8:17 pm

Thank you 😊

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