

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 22 *Volume XXII*
Number 3 *Volume XXII Book 3*

Article 5

2012

Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere

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Adam S. Nelson, *Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere*, 22 *Fordham Intell. Prop. Media & Ent. L.J.* 697 (2012).
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Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere

Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 2012; B.A., Wesleyan University, 2002. I would like to thank everyone on the IPLJ for their hard work and insightful comments, and Professor Olivier Sylvain for his guidance, feedback, and encouragement. I'd also like to thank my wonderful wife and my fantastic family for their endless love and support.

Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere

Adam S. Nelson*

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INTRODUCTION

Imagine you write a clever post on your Twitter account. You check back the following day and see that it has been retweeted many times, and at first you feel pleased, satisfied that people wanted to share your ideas with their friends and followers. Then, the following day, you start seeing your tweet, the exact words and punctuation that you wrote, popping up on other people's feeds with no attribution back to you. At first you are just surprised, and then annoyed, and then maybe a bit hurt. But then you hear the line that you wrote repeated on late night television shows and

quoted by newscasters, and soon see it on t-shirts being sold around town.

How do you feel? Do you feel that your property has been taken from you? Or did you expect that by posting something to a public forum like Twitter, which is designed for re-posting and sharing other people's thoughts as well as your own, you were implicitly allowing access to your work? Did you expect to be credited for your work? Or was it the moment when someone commercialized your words that you felt a line had been crossed?

Online social media forums like Twitter and Facebook are so new that the law has not yet had an opportunity to catch up with popular practices or address copyright issues, and social expectations may be out of sync with legal precedent. The importance of Twitter and other social media in modern society cannot be overstated and the amount of original material being generated on Twitter and other social media platforms is staggering.¹ Inevitably, a conflict will arise regarding material posted through Twitter or a similar online platform, and the law offers no clear answer about how copyright protection will work in the web 2.0 space where the line between creators and consumers is blurred and restricting use of and access to one's content can be challenging, if not impossible.

This Note uses the social media forum Twitter as a test case because of the very constrained nature of the medium. The limited character length of tweets and narrow functionality of Twitter allow for a narrow case study, but the concepts explored are broadly applicable throughout the social media universe. The protection that creative expression in social media will receive is largely unexplored, and as more and more expression takes place through those media online, the issue is becoming increasingly important. This Note aims to show how existing law can be interpreted to support emerging creative practices and stay relevant even as technology changes at a breakneck speed.

This Note will consider the social norms that govern Twitter and examine how current copyright law reinforces some of those

¹ See *infra* Part I.A.

norms and fails to address others. Specifically, this Note argues that a significant number of tweets are protectable under copyright law, and that retweets of protected content should generally be considered a fair use under the exception in 17 U.S.C. §107. This Note will further explore how uses of protectable tweets outside of the context of the Twittersphere² might be treated under the Fair Use doctrine. Attribution will play a significant role in each of these analyses, despite its absence in copyright law. This Note suggests that attribution may even play a determinative role in many fair use defenses of infringements of protectable Twitter content.

Part I will review the doctrines of copyright law that are applicable to the world of Twitter, particularly how copyright law has treated short works in the past, finding that there is no threshold length for copyrightable works, and that even very short works are eligible for protection if they display the requisite level of originality. Part II applies copyright doctrine to Twitter and examines the fair use doctrine's results for retweets. The fair use defense plays a significant role in limiting an author's rights on and off Twitter, particularly in creating a legal protection for retweets. The presence of attribution also turns out to be significant in determining which uses of tweets are fair and which are not, both on and off Twitter.

Part III argues that allowing attribution to play a meaningful role in this fair use analysis will help bring law into line with social norms that are developing independently in online communities like Twitter. Attribution is already an important value in and out of the Twittersphere, and users expect to be credited for their work. Given that copyright law's goal is to promote progress in the arts and sciences and Twitter seems to be incentivizing massive levels of production, it seems beneficial for copyright law to reflect and reinforce the values and norms of the Twittersphere. In this way, the law can help push progress forward and avoid being an obstacle to creativity and free expression online.

² The Twittersphere is "postings made on the social networking site Twitter, considered collectively." *Twittersphere*, OXFORDDICTIONARIES.COM, <http://oxforddictionaries.com/definition/Twittersphere?region=us&q=twittersphere> (last visited Feb. 1, 2012).

I. BACKGROUND

In many ways, postings on Twitter are no different than any other short writings. In other ways, though, the nature of the social medium creates a unique set of expectations for both readers and writers on Twitter. Section A will discuss the architecture of Twitter to provide some insight into how it works and how it is used. Section B will explain the basics of relevant copyright law including the requirements for a writing to receive copyright protection, some limiting doctrines that narrow the field of copyrightable works, and the fair use exemption.

A. *@WhatIsTwitter?*

Twitter is a social networking website that allows users to post messages of up to one-hundred and forty characters called “tweets” and view tweets posted by others.³ While this sounds like a simple, obvious idea, the site has become one of the most popular destinations on the web, boasting over 200 million users as of August 2011.⁴ Twitter has been credited as a central tool in the Arab Spring revolutions,⁵ relied upon to coordinate the Occupy Wall Street protests,⁶ and used by celebrities, politicians, and news sources to convey information to their audiences.⁷ Twitter has spawned books⁸ and at least one television show⁹ and overall

³ *About Twitter*, TWITTER.COM, <http://twitter.com/about> (last visited Feb. 1, 2012).

⁴ See Josh Halliday, *Guardian Activate 2011: Live Coverage from New York*, THE GUARDIAN (Apr. 28, 2011, 5:03 PM), <http://www.guardian.co.uk/media/pda/2011/apr/28/guardian-activate-2011-new-york>.

⁵ *Open Closed Regimes: What Was the Role of Social Media During the Arab Spring?*, PROJECT ON INFO. TECH. AND POLITICAL ISLAM (Sept. 11, 2011), <http://pitpi.org/index.php/2011/09/11/opening-closed-regimes-what-was-the-role-of-social-media-during-the-arab-spring/>.

⁶ Jennifer Preston, *Social Media Gives Wall Street Protests a Global Reach*, N.Y. TIMES MEDIADECODER BLOG (Oct. 15, 2011, 3:10 PM), <http://mediadecoder.blogs.nytimes.com/2011/10/15/social-media-gives-wall-street-protests-a-global-reach/>.

⁷ See *Twitter*, N.Y. TIMES TOPICS, <http://topics.nytimes.com/top/news/business/companies/twitter/index.html?scp=1-spot&sq=twitter&st=Search> (last updated Dec. 19, 2011).

⁸ See Melanie Eversley, *Fake Rahm Emanuel Releases Book of Tweets*, USA TODAY ONDEADLINE (Sept. 7, 2011, 10:15 AM), <http://content.usatoday.com/communities/ondeadline/post/2011/09/fake-rahm-emanuel-releases-book-of-tweets/1>; Dave Larson, *Ranking of the Best Twitter Books*, TWEETSMARTER (Nov. 29, 2010), <http://blog.Tweetsmarter.com/gifts/twitter-books/>; Piya Sinha-Roy, *Steve Martin Turns*

become an integral part of our modern communication system. Tweets have resulted in a \$500,000 fine for a sports team owner,¹⁰ helped individuals find organ donors,¹¹ saved family businesses,¹² and warned civilians of imminent bombings.¹³ There is no denying that Twitter is both ubiquitous and important.

To get a sense of the amount of information being generated, consider the following passage from Twitter's blog:

Halfway through 2011, users on Twitter are now sending 200 million Tweets per day. For context on the speed of Twitter's growth, in January of 2009, users sent two million Tweets a day, and one year ago they posted 65 million a day. For perspective, every day, the world writes the equivalent of a 10 million-page book in Tweets or 8,163 copies of Leo Tolstoy's *War and Peace*. Reading this much text would take more than 31 years and stacking this many copies of *War and Peace* would reach the height of about 1,470 feet, nearly the ground-to-roof height of Taiwan's Taipei 101, the second tallest building in the world.

A billion Tweets are sent every five days. What's in them? Everything about every topic imaginable—whether it's a unique bird's-eye view of the Shuttle launch as seen from an airplane window or cheers of support for soccer teams in this

Tweets Into Book, REUTERS (Oct. 28, 2011, 3:06 PM), <http://www.reuters.com/article/2011/10/28/us-books-steve martinidUSTRE79R58O20111028>.

⁹ CBS Releases Preview of *'Shit My Dad Says'*, HUFFINGTON POST (May 23, 2010), http://www.huffingtonpost.com/2010/05/23/shit-my-dad-says-video_n_586374.html.

¹⁰ Chris Matyszczyk, *NBA Slaps Heat Owner with \$500,000 Tweeting Fine*, CNET (Nov. 1, 2011, 11:24 AM), [http://news.cnet.com/8301-17852_3-20128514-71/nba-slaps-heat-owner-with-\\$500000-tweeting-fine/?part=rss&subj=news&tag=2547-1_3-0-20](http://news.cnet.com/8301-17852_3-20128514-71/nba-slaps-heat-owner-with-$500000-tweeting-fine/?part=rss&subj=news&tag=2547-1_3-0-20).

¹¹ Hayley Tsukayama, *Twitter Stories Show Social Media's Impact*, WASH. POST (Nov. 1, 2011), http://www.washingtonpost.com/business/technology/twitter-stories-show-social-medias-impact/2011/11/01/gIQAITCMdM_story.html?wprss=rss_technology.

¹² *Id.*

¹³ David Axe, *Kenyan Air Force Tweets Somalis: We're About to Bomb You #Duck*, WIRED.COM (Nov. 2, 2011), http://www.wired.com/dangerroom/2011/11/kenya-tweets-air-raids/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wired%2Findex+%28Wired%3A+Index+3+%28Top+Stories+2%29%29.

year's Champions League tournament. Using Twitter helped a homeless man reunite with his daughter, sent two Cincinnati Reds fans to spring training on a player's dime, and even helped residents of a small city in Korea find fresh water after its supply was cut off.¹⁴

With this mind-boggling influx of creation, it seems inevitable that disputes will arise regarding the extent to which copyright law protects individual expression on Twitter and other social media.¹⁵ As authors get book deals based on their Twitter feeds,¹⁶ and celebrities are paid to endorse products on Twitter,¹⁷ the value of a tweet to an individual could become substantial. Thus, the right to exercise legal control over the expression embodied therein could play a significant role in incentivizing new, creative uses of the medium.¹⁸ One lawsuit has already been brought by a corporation against a former employee based on the employee's continued use of a Twitter account, with the corporation claiming that the account's followers were its property.¹⁹ Similar suits addressing ownership of Twitter pages and content are sure to follow as Twitter's commercial importance continues to grow. Further,

¹⁴ @twittereng, *200 Million Tweets Per Day*, TWITTERBLOG (June 30, 2011, 1:03 PM), <http://blog.twitter.com/2011/06/200-million-tweets-per-day.html>.

¹⁵ See, e.g., *Legal Guide for Blogger: Intellectual Property*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/bloggers/legal/liability/IP> (last visited Feb. 9, 2012).

¹⁶ See, e.g., Barb Dybwad, *From Twitter to TV: Sh*t My Dad Says Gets CBS Deal*, MASHABLE (Nov. 6, 2009), <http://mashable.com/2009/11/09/from-twitter-to-tv/>; Melanie Eversley, *supra* note; Sinha-Roy, *supra* note 9.

¹⁷ See, e.g., Emily Carr, *\$10,000 Tweets—The Growing Value of Celebrity Micro-Endorsements*, TWEED (Jan. 10, 2011, 12:27 PM), <http://ogilvyentertainmentblog.com/2011/01/10000-tweets-%E2%80%93-the-growing-value-of-celebrity-microendorsements/>; *Celebs Raking in the Moolah from Product-Endorsement Tweets*, ZEE NEWS.COM (Nov. 4, 2011, 1:50 PM), http://zeenews.india.com/entertainment/celebrity/celebs-raking-in-the-moolah-from-product-endorsement-tweets_99573.htm [hereinafter *Celebs Raking in the Moolah*].

¹⁸ See *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality.”).

¹⁹ *PhoneDog LLC v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) (declining to dismiss a conversion claim alleging \$340,000 in damages and holding that PhoneDog's allegations were sufficient to state a misappropriation of trade secrets claim).

creative mash-ups²⁰ using tweets that have already occurred could lead to intellectual property disputes; the repurposing of musician Kanye West's tweets as captions for New Yorker cartoons provides one such example.²¹ It is not difficult to imagine one of these situations resulting in objections and eventually a lawsuit by an unhappy celebrity seeking to use copyright law to prevent unflattering or offending usages of content he created.

Section 1 discusses the important features of Twitter to clarify how the medium is structured. Section 2 discusses how Twitter's own Terms of Service frame the issue of copyrightability of tweets and explores how that may shape user expectations.

1. #Features

Before analyzing the legal issues, a few features of Twitter should be explained. First, each user has a name for his or her individual account. For example, the *New York Times* goes by "nytimes,"²² and the magazine *Scientific American* goes by "sciam."²³ Each user can use Twitter to read and or write tweets. To read another user's posts, a user opts in to follow other users and see their tweets. Each user has an individualized feed wherein all posts from all users whom he has elected to follow appear chronologically in real time. For example, when the *New York Times* posts a tweet, that tweet will enter the feed of every user who has elected to follow the "nytimes" account. Next to the message will be the *New York Times*' profile photo. If *Scientific American* follows the *New York Times*, it will see all messages posted by the *New York Times* included in *Scientific American*'s feed. However, the *New York Times* will not see *Scientific American*'s posts unless the *New York Times* follows the "sciam" profile.

²⁰ Mashups collect information from a variety of external sources and compile them into a new feed. Duane Merrill, *Mashups: The New Breed of Web App*, IBM (July 24, 2009), <http://www.ibm.com/developerworks/xml/library/x-mashups/index.html>.

²¹ *Kanye West's Tweets Matched with New Yorker Cartoons*, HUFFINGTON POST (May 25, 2011, 6:15 PM), http://www.huffingtonpost.com/2010/08/03/kanye-west-new-yorker_n_668894.html?s122608.

²² *New York Times*, TWITTER, <https://twitter.com/#!/nytimes> (last visited Feb. 3, 2012).

²³ *Scientific American*, TWITTER, <https://twitter.com/#!/sciam> (last visited Feb. 3, 2012).

A second critical feature of Twitter is the retweet. Using the previous example, if the *New York Times* posted an article that *Scientific American* wanted to share with its own followers, *Scientific American* could retweet the message. Retweeting is essentially forwarding the message to one's own followers. This can be accomplished in two ways. The native retweet occurs through the retweet button and shares another user's post, including profile picture and attribution.²⁴ For example, by pushing the retweet button, *Scientific American* would share the original *New York Times* post with followers of "sciam," including the "nytimes" profile picture; then *Scientific American* followers would see the post as though they were "nytimes" followers.

The second type of retweet is the editable retweet, which was the only method of retweet available in Twitter's earlier days.²⁵ An editable retweet involves simply copying the message text and preceding it with a capital RT and an @ sign followed by the original tweeter's username. Thus, *Scientific American's* retweet would read RT @nytimes, followed by the message. If, for example, the *New York Times* had tweeted, "Copyright law challenged by online innovations," the *Scientific American* retweet would read, "RT @nytimes Copyright law challenged by online innovations."²⁶ Although pushing the retweet button on Twitter automatically attributes a quote, the editable retweet allows for manipulation of the quote such that any user can misappropriate it and present it as his own. The user is under no strict obligation to provide attribution.²⁷ Using the example above, *Scientific American* could easily copy the *New York Times* message and include no "RT @nytimes," thereby tweeting the text of the

²⁴ Dave Larson, *How Misunderstanding Retweets Can Get You Suspended From Twitter*, TWEETSMARTER (Mar. 28, 2011), <http://blog.tweetsmarter.com/retweeting/the-retweet-stylebook-a-short-collection-of-standards/>.

²⁵ *Id.*

²⁶ For more on retweets, see *What Is Retweet?*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/77606-what-is-retweet-rt> (last visited Apr. 1, 2012).

²⁷ *The Twitter Rules*, TWITTER, <http://support.twitter.com/articles/18311-the-twitter-rules> (last visited Apr. 1, 2012) ("We will respond to clear and complete notices of alleged copyright infringement."); *Terms of Service*, TWITTER, <https://twitter.com/tos> (last visited Apr. 1, 2012) ("In appropriate circumstances, Twitter will also terminate a user's account if the user is determined to be a repeat infringer.").

message as though it were original to *Scientific American*. The bulk of the discussion in this Note will regard editable retweets because native retweets are automatically attributed to the original author.

Retweeting is more than a convenient feature of Twitter; it is the mechanism by which ideas are shared between users and spread through the Twitter community. Often, a Twitter user's goal is to be retweeted widely and to reach as many readers as possible.²⁸ Whether it is a breaking news story or a clever quip, users retweet messages that they feel are worth sharing with their own followers, and the usual custom in the Twittersphere is to provide attribution to the original poster.²⁹ Doing so increases the exposure not only of the original post, but also of the original poster, and can help garner new followers for the original poster. A higher number of followers translates to a larger audience, which provides the user more social capital within the Twittersphere. Multiple websites offer a variety of "best-of Twitter" lists,³⁰ including a new Oscar-styled award forum for short format, real-time new media.

To illustrate how quickly an idea can be separated from its author in the world of Twitter, one user decided to track the spread of the highly original and entertaining tweet, "I once had a goldfish that would hump the carpet, but only for about 30 seconds."³¹ The phrase was properly credited to its author's account for a few days and received much attention, but after two users with substantial followings retweeted it without attribution, it began appearing almost exclusively without accreditation.³² This shows the importance of attribution for anyone who tweets creatively with the intention of garnering more followers and gaining recognition

²⁸ Dan Howard, *What is the Goal of Twitter?*, EHOW, http://www.ehow.com/info_8193672_goal-twitter.html (last visited Feb. 12, 2012).

²⁹ *Retweet Changes and Twitter Plagiarism*, PLAGIARISM TODAY (Aug. 14, 2009), <http://www.plagiarismtoday.com/2009/08/14/retweet-changes-and-twitter-plagiarism/>.

³⁰ See, e.g., *Honoring the Industry's Best Agencies and Social Media Leaders*, SHORTY INDUSTRY AWARDS, <http://industry.shortyawards.com/> (last visited Feb. 12, 2012).

³¹ Fun Flood, *Case Study: Tracking a Stolen Tweet*, @FUNFLOOD (Aug. 20, 2011, 9:22 PM), <http://fun-flood.blogspot.com/2011/08/case-study-tracking-stolen-tweet.html>.

³² *Id.* ("The potential audience for stolen copies of this tweet was almost twelve times the audience for correctly attributed ones.").

in the Twittersphere; only a few unattributed tweets can quickly remove any trace of authorship leading back to the originators of the tweet.

A final important feature of Twitter is the hashtag symbol, used to indicate that a tweet refers to a particular topic and to allow for searchability by topic. For example, a person might include the hashtag #IntellectualProperty to alert readers that the tweet is related to intellectual property. That tweet would also turn up in the search results for any Twitter user who did a search for #IntellectualProperty. Similarly, some conferences and events will choose a hashtag specific to that event to allow attendees to easily follow all Twitter activity related to the event. For example, Fordham University School of Law's Center on Law and Information Policy used the hashtag #CLIPconf for its 2011 symposium. All tweets related to the symposium included the hashtag so that simply searching Twitter for "#CLIPconf" would return all tweets related to the conference.³³

2. #TwittersPolicy

Twitter's own copyright policy states:

You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).³⁴

While Twitter clearly retains the right to appropriate a user's content however and in whatever context it likes, this language indicates that users retain a full copyright in their material subject to this non-exclusive license. Twitter recognizes the validity of a copyright claim in a tweet, and goes on to say that "what's yours is

³³ See *What Are Hashtags ("#" Symbols)?*, TWITTER, <https://support.twitter.com/articles/49309-what-are-hashtags-symbols> (last visited Jan. 21, 2012).

³⁴ See *Terms of Service*, TWITTER, <http://twitter.com/tos> (last visited Jan. 21, 2012).

yours—you own your Content.”³⁵ While Twitter has no direct influence over copyright law, its policy sends a clear message to its users about what they can expect; the message that users own the content of their tweets either creates or reflects a normative expectation of intellectual property rights in Twitter content.

Twitter’s Terms of Service clearly give Twitter and its content partners the right to modify and reuse content, but it is unclear what rights are granted to other users of Twitter.³⁶ The statement that “[e]xcept as permitted through the Services (or these Terms), you have to use the Twitter [application programming interface (API)] if you want to reproduce, modify, create derivative works, distribute, sell, transfer, publicly display, publicly perform, transmit, or otherwise use the Content” strongly suggests that each of the actions listed are permitted on Twitter, but are explicitly not permitted off Twitter.³⁷ However, the Terms of Service do not explicitly address the rights granted to other users or address what level of copyright control a user has over his content, with the exception of the assertion that a user owns his own content.³⁸ Instead, it is strongly implied that each user consents to other users’ reuse of content within Twitter only. The Terms of Service state that “[w]e encourage and permit broad re-use of Content. The Twitter API exists to enable this”; this clause clarifies what Twitter “encourages” without actually granting a license.³⁹ The statement that “[t]his license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same” is similarly narrow, as there is no explanation of what “let others do the same” actually means.⁴⁰ Whether this is limited to attributed retweets or includes unattributed retweets or even wholesale copying of a user’s every tweet is unclear.

Twitter’s online help center does address the problem of unattributed tweets, but only to state that Twitter will not intervene

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

in disputes.⁴¹ There is evidence that Twitter users do credit original posters for their work and that there is a social expectation in the Twitter community to be credited.⁴²

B. @CopyrightLaw

Copyright law draws its mandate from the Constitution, which grants Congress the power to “promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴³ The current copyright statute creates a two-pronged definition of copyrightable material as “original works of authorship” that are “fixed in any tangible medium of expression.”⁴⁴

Copyright has long struggled with the tension between two ways of promoting progress: on the one hand, by creating enforceable ownership rights for authors, and on the other, by maintaining a robust public domain.⁴⁵ Congress’s chief concern in

⁴¹ *Reposting Content without Attribution Policy*, TWITTER, <https://support.twitter.com/entries/16205> (last visited Jan. 31, 2012) (“As a policy, we do not intervene in personal disputes between users. If you believe your Tweet has been posted without proper attribution and the situations below are inapplicable to your case, you can use an @reply or direct message to contact the other user.”). *But see The Twitter Rules*, TWITTER, <http://support.twitter.com/articles/18311-the-twitter-rules> (last visited Feb. 12, 2012) (suggesting that if a user “repeatedly post[s] other users’ Tweets as [his/her] own” he/she may be permanently suspended from Twitter).

⁴² *See, e.g.*, David, *Going Viral And Twitter’s Attribution Issues*, GRUMPY TRAVELLER (July 15, 2011) <http://www.grumpytraveller.com/2011/07/15/going-viral-andtwitter%E2%80%99s-attribution-issues/>; Wesley Freyer, *Lessons Learned from Image Attribution & Twetribution Confusion*, SPEED OF CREATIVITY (Nov. 2, 2011), <http://www.speedofcreativity.org/2011/11/02/lessons-learned-from-image-attribution-twetribution-confusion-authorspeak-authorspeak2011/>; John Gruber, *On Attribution and Credit*, DARING FIREBALL (July 1, 2011), http://daringfireball.net/2011/07/attribution_and_credit.

⁴³ U.S. CONST. art. I, § 8, cl. 8.

⁴⁴ 17 U.S.C. § 102(a) (2006).

⁴⁵ *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are . . . intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of

crafting copyright policy has always been promoting progress rather than granting authors special or inherent rights.⁴⁶

There are several doctrines of copyright law that are particularly applicable to the world of Twitter.

1. #Originality

The Supreme Court has stated that “[t]he *sine qua non* of copyright is originality.”⁴⁷ In the context of copyright law, originality has two threshold requirements: independent creation and some minimal degree of creativity, where “the requisite level of creativity is extremely low; even a slight amount will suffice.”⁴⁸ Novelty is not required;⁴⁹ an independently created work that is substantially similar to a preexisting work is eligible for copyright protection.⁵⁰ This indicates that even those tweets that are mundane or matter of fact may be sufficiently original (independently created and displaying some creativity in their manner of expression) to qualify for copyright protection. The amount of creativity required for copyright eligibility is minimal, requiring merely a modicum of creativity.⁵¹

competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”).

⁴⁶ See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158, 68 S. Ct. 915, 929, 92 L. Ed. 1260) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”).

⁴⁷ *Feist*, 499 U.S. at 345.

⁴⁸ *Id.*

⁴⁹ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (“[N]othing in the Constitution commands that copyrighted matter be strikingly unique or novel”).

⁵⁰ See *Feist*, at 345–46 (“Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.”).

⁵¹ See *id.* at 345.

2. #Fixation

The “fixation” requirement in copyright states that a “work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁵² Copyright exists in a work upon the moment of its fixation, regardless of whether the work has been formally registered with the copyright office.⁵³ Courts have not been much more stringent with the fixation requirement than they have been with the originality requirement.⁵⁴ Various courts have held that the fixation requirement is met by both video games⁵⁵ and temporary copies of computer programs.⁵⁶ It has been “established that the loading of data from a storage device into RAM constitutes copying because that data stays in RAM long enough for it to be perceived,” a mere eleven days.⁵⁷ It is worth noting here that tweets, once posted, stay on Twitter’s servers and public pages indefinitely, and remain on user profile pages and the feeds of other users as well.

3. #LimitingDoctrines

The broad copyright ownership rights granted by the courts’ liberal interpretations of “originality” and “fixation” are balanced by several limitations on the copyright doctrine. First, the idea/expression dichotomy says that neither general ideas nor facts

⁵² 17 U.S.C. § 101 (2006).

⁵³ *Id.*

⁵⁴ *See, e.g., Williams Elecs., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 877 (3d Cir. 1982) (“By this broad language, Congress opted for an expansive interpretation of the terms ‘fixation’ and ‘copy’ which encompass technological advances such as those represented by the electronic devices in this case.”).

⁵⁵ *See id.* at 874.

⁵⁶ *See MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (holding that copies of a computer program made for repair purposes were sufficiently fixed as to constitute copyright infringement); *Religious Tech. Ctr. v. Netcom On-Line Comm’n Serv., Inc.*, 907 F. Supp. 1361, 1368 (N.D. Cal. 1995) (stating that there is no question that temporary copies of computer files online were sufficiently fixed).

⁵⁷ *Religious Tech. Ctr.*, 907 F. Supp. at 1368 (citing *MAI Sys.*, 991 F.2d at 518).

are protectable under copyright law⁵⁸ but particular expressions of facts or general ideas are, so long as they meet copyright's originality requirement and are fixed in a tangible medium of expression.⁵⁹ If the facts or ideas themselves are separable from the particular expression embodied in the work, that expression is protectable.⁶⁰ This dichotomy has allowed for copyrightability of compilations of facts,⁶¹ writings about history,⁶² and even headnotes and case synopses of Westlaw cases.⁶³ To receive copyright protection, a work simply needs to meet a nominal threshold showing that it is a product of some "creative intellectual or aesthetic labor."⁶⁴ This threshold is so low that Professor David Nimmer stated that "almost any ingenuity in selection, combination or expression, no matter how crude, humble or obvious, will be sufficient" to make the work eligible for copyright protection.⁶⁵ It has long been a tenant of copyright law that courts will not judge the artistic merit of a work in assessing its copyrightability.⁶⁶

⁵⁸ 17 U.S.C. §102(b) (2006) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

⁵⁹ See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980) ("While ideas themselves are not subject to copyright, . . . 'expression' of . . . idea[s] is copyrightable.").

⁶⁰ See *id.* at 978.

⁶¹ See, e.g., *Mason v. Montgomery Data*, 967 F.2d 135 (5th Cir. 1992).

⁶² See, e.g., *Hoehling*, 618 F.2d 972 (holding that the historical interpretation and facts in the book were not copyrightable material, while distinguishing these abstract ideas from the copyrightable expression embodied in the writing).

⁶³ *West Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 (8th Cir. 1986).

⁶⁴ *Goldstein v. California*, 412 U.S. 546, 561 (1973).

⁶⁵ 1 MELVILLE B. NIMMER AND DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.08[C][1] (Rev. Ed. 2011).

⁶⁶ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. . . . Yet if they command the interest of any public, they have a commercial value, it would be bold to say that they have not an aesthetic and educational value, and the taste of any public is not to be treated with contempt."); *American Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977, 979 (7th Cir. 1997) ("Term papers by college sophomores are as much within the domain of copyright as Saul Bellow's latest novel.").

Another limitation on the scope of copyright relevant to this discussion is the concept of *scenes a faire*, which excludes generic concepts from copyrightability.⁶⁷ For example, explosions and car chases are the basic building blocks of the action movie genre and because they are so inseparable from the genre itself, no action movie could use copyright to preclude others from using these same events. The basic elements of such scenes would be “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”⁶⁸ However, this doctrine also has its limits. In *Roth Greeting Cards v. United Card Co.*, the Ninth Circuit Court of Appeals held that greeting cards containing text that was uncopyrightable *scenes a faire* paired with copyrightable but non-infringed drawings were nonetheless infringed by a competitor’s greeting cards containing variants on the images and identical text.⁶⁹ The court reasoned that although no individual element of the cards was infringed, taken as a whole there was infringement because the “mood” and message were copied.⁷⁰ Therefore, while the general ideas are not copyrightable, a sufficiently creative combination and expression of general ideas may gain copyright protection.

4. #FairUse

The fair use doctrine, another limitation on copyright, is codified into law to allow unlicensed use of copyrighted works for certain purposes, including “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”⁷¹ Fair use is an affirmative defense, meaning that once a plaintiff has successfully demonstrated the two elements required for an infringement claim, ownership of a

⁶⁷ See *Hoehling*, 618 F.2d at 979 (“Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain ‘stock’ or standard literary devices, we have held that scenes a faire are not copyrightable as a matter of law.”).

⁶⁸ *Id.* (quoting *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)).

⁶⁹ 429 F.2d 1106 (9th Cir. 1970).

⁷⁰ *Id.* at 1110.

⁷¹ 17 U.S.C. § 107 (2006).

legitimate copyright and actual copying by the defendant,⁷² the defendant may respond by arguing that the use is nevertheless exempted under the fair use doctrine. Fair use is part of statutory copyright law, and Congress gave the courts four factors to consider in deciding whether a use falls under this statutory shelter. These factors are:

- (1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁷³

The four factors are not to be treated individually, but rather considered as four moving pieces in a holistic fair use analysis.⁷⁴ Fair use is often used to defend reviews, critiques, and educational uses of copyrighted material. Courts have generally found that a use that does not result in a reduction in the market for the original work is more likely to be a fair use.⁷⁵ For example, when *The Nation* magazine published sections of former President Ford's soon-to-be-released memoir, the Supreme Court found that the use was not covered by the doctrine in part because it materially impaired the marketability of the copied work.⁷⁶ The effect on the market for the original work was substantial because *The Nation* published many of the book's central passages, and that fourth factor is "undoubtedly the single most important element of fair

⁷² See, e.g., *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

⁷³ *Id.*

⁷⁴ See, e.g., *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1366 (E.D. Va. 1995) ("[W]e may not evaluate any single fair use factor in isolation.").

⁷⁵ See 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 19.E03[B] (Rev. Ed. 2011).

⁷⁶ See *Harper & Row Publishers, Inc. v. Nation Ents.*, 471 U.S. 539, 567 (1985) ("The trial court found not merely a potential but an actual effect on the market. Time's cancellation of its projected serialization and its refusal to pay the \$12,500 were the direct effect of the infringement. . . . The trial court properly awarded actual damages and accounting of profits.").

use.”⁷⁷ On the other hand, the First Circuit found that a newspaper’s publication of copyrighted nude photos of Miss Puerto Rico following a scandal was fair use because the use of the photos did not hurt the original market for the pictures (promoting her modeling career).⁷⁸ The court noted that the publication of the photograph in the newspaper “would have little effect on the demand for disseminated pictures because a newspaper front page is simply an inadequate substitute for an 8” x 10” glossy.”⁷⁹

In analyzing the first factor of fair use, the purpose and character of the work, courts look first at whether a use is “transformative” by asking “whether the new work merely ‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; . . .”⁸⁰ For example, the Supreme Court found that a version of “Pretty Woman” created by musical artists 2 Live Crew was fair use because it contained a sufficient amount of comment and criticism to constitute a parody.⁸¹ As to the question of whether a work is commercial or not, the Supreme Court has specified that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁸² Thus, where there is a customary price to be paid for a use, a profitable use is more likely to fail this fair use prong than cases in which there is no traditional licensing market.

The second factor of fair use, the nature of the work, requires courts to look at how close the work is to the core of copyright protection’s goals, such as the promotion of creative expression.⁸³ Works that are more creative and expressive, like music, art, or literature, tend to allow for less fair use than works that are more

⁷⁷ *Id.* at 566.

⁷⁸ *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000).

⁷⁹ *Id.*

⁸⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citation omitted).

⁸¹ *Id.* at 583.

⁸² *Harper & Row Publishers, Inc. v. Nation Ents.*, 471 U.S. 539, 562 (1985).

⁸³ *See, e.g., Campbell*, 510 U.S. at 586 (“[C]reative expression for public dissemination falls within the core of the copyright’s protective purposes.”).

factual in nature.⁸⁴ The expectations of the author of the underlying work play a role in determining fair use under this factor.⁸⁵ In other words, the reasonable expectations of the author, in terms of maintaining control over the work's use, artistic integrity, and financial value, are relevant.

The third factor, the amount and substantiality of the portion used, must be analyzed both in terms of the "quantitative and qualitative aspects of the portion of the copyrighted material taken."⁸⁶ The calculable, quantitative amount of the original work used is relevant, along with the extent to which a new work imitates the essence or core of the underlying work.⁸⁷ In other words, it is possible to take a large quantitative piece of a work without reaching the creative essence of the work, for example an exact copy of a large portion of Mark Rothko's painting "Red and Blue Over Red" might simply be an unrecognizable block of red and might not capture the essence of that painting's creative core. On the other hand, it is possible to take a relatively small quantitative piece of a work that captures the artistic essence of the work, for example a musical sample of a famous song's catchy hook. The qualitative measure of this test examines how deeply that creative core is infringed, whereas the quantitative measure is concerned solely with the amount copied.

However, in certain cases, courts have chosen to consider this factor to be neutral, most frequently in circumstances involving photographs where use of anything less than the entire work would be impractical.⁸⁸ In other words, the context of the use is

⁸⁴ See *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (citations omitted) ("Applying the second factor, the Court of Appeals pointed out that 'a use is less likely to be deemed fair when the copyrighted work is a creative product.' In general, fair use is more likely to be found in factual works than in fictional works.").

⁸⁵ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) ("To resolve this inquiry the court considers 'the protection of the reasonable expectations of one who engages in the kinds of creation/authorship that the copyright seeks to encourage.'" (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1122 (1990))).

⁸⁶ *Id.* at 613.

⁸⁷ See *id.*

⁸⁸ See, e.g., *Bill Graham Archives*, 448 F.3d at 613 ("[C]opying the entirety of a work is sometimes necessary to make a fair use of the image."); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) ("[A]lthough Arriba did copy each of Kelly's images as a

extremely important in determining this factor.⁸⁹ If a court decides that the use is one that required use of an entire original work, it will not consider the fact that the entire original work was copied to weigh against fair use. This distinction underlines the tension in copyright between the recognition that a parody, a presumptive fair use, must copy the original work sufficiently to be recognizable in order to be an effective parody.⁹⁰

Finally, the fourth factor, effect on the market for the original work, is considered “undoubtedly the single most important element of fair use.”⁹¹ This factor does not focus on the specific effect that parody or critique may have on the marketability of the underlying work, but rather on market substitution effects.⁹² This factor is not concerned with a parody that damages a work’s popularity through criticism, but instead with a parody that is so close to the original as to be a substitution for it rather than a commentary on it. The inquiry into this factor focuses on “(i) the extent of market harm caused by the particular actions of the alleged infringer and (ii) whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market.”⁹³ In cases where there is a relatively clear, demonstrable market effect such as the pre-publication of Ford’s memoirs by *The Nation* magazine, this factor weighs strongly against fair use.⁹⁴ This was also true when the court found no fair use for a publisher who created an unauthorized book of *Seinfeld* trivia, thereby superseding a market that *Seinfeld*’s owners had the right to exploit.⁹⁵ In cases where the new work does not infringe on any existing or probable market for the underlying work, the likelihood of market substitution is

whole, it was reasonable to do so in light of Arriba’s use of the images.”); *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000) (“[T]o copy any less [than the entire image] would have made the picture useless to the story.”).

⁸⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994) (citation omitted) (“In parody, as in news reporting, context is everything . . .”).

⁹⁰ *Id.* at 588–89.

⁹¹ *Harper & Row Publishers, Inc. v. Nation Ents.*, 471 U.S. 539, 566 (1985).

⁹² See *Nunez*, 235 F.3d at 24.

⁹³ *Id.* (citation omitted).

⁹⁴ See, e.g., *Harper*, 471 U.S. at 566–68.

⁹⁵ See *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp, Inc.* 150 F.3d 132, 145–46 (2d Cir. 1998).

lessened and this factor may lean more toward fair use. This is illustrated in cases such as a hip-hop parody that did not infringe the licensing market for the original song⁹⁶ or a newspaper's use of nude photos of Miss Puerto Rico that did not harm the model's portfolio.⁹⁷

A fair use analysis is always made on a case-by-case basis and outcomes can be difficult to predict, but generally courts look favorably on good faith fair uses and weigh the first and fourth factors most heavily.⁹⁸ In the end, though, "[t]he ultimate test of fair use . . . is whether the copyright law's goal of promoting the Progress of Science and useful Arts . . . would be better served by allowing the use than by preventing it."⁹⁹

5. #ShortWorks

While the Copyright Office has a stated policy that names, titles, and short phrases are not eligible for copyright protection, the Office uses "short phrases" to refer to names of products or services, titles of works, names of businesses or organizations, and catchphrases, mottoes, slogans, or advertising expressions.¹⁰⁰ Copyright law is designed to protect creative writings, not branding tools, and so creative slogans and brand names are generally protectable under trademark law rather than copyright. There is a surface similarity between "short phrases" as the Copyright Office uses it and tweets, but there is no need to finely parse this distinction, as courts have protected many short phrases, so long as the threshold requirements of fixation and originality are met. For example, in *Brilliant v. W.B. Productions, Inc.*, a valid copyright was declared in short but clever t-shirt catch phrases such as, "I may not be totally perfect, but parts of me are excellent" and "I have abandoned my search for truth and am now looking for a good fantasy."¹⁰¹ Both phrases are the product of

⁹⁶ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 593 (1994).

⁹⁷ See *Nunez*, 235 F.3d at 24–25.

⁹⁸ See *Castle Rock*, 150 F.3d at 141–46.

⁹⁹ *Id.* at 141 (citations omitted) (internal quotation marks omitted).

¹⁰⁰ U.S. COPYRIGHT OFFICE, CIRCULAR 34 (JAN. 2012), available at <http://copyright.gov/circs/circ34.pdf>.

¹⁰¹ 1979 U.S. Dist. LEXIS 9092 (C.D. Cal. Oct. 17, 1979).

creativity and originality that qualifies them for copyright protection, despite being short phrases. As the courts have shown and Professor Melvin Nimmer echoed, the test is how much creativity the phrase encompasses rather than its length, and in fact “[t]he smaller the effort (e.g., two words) the greater must be the degree of creativity in order to claim copyright protection.”¹⁰²

Many cases have similarly recognized protection for short phrases, including phrases under 140 characters. For example, in *D.C. Comics, Inc. v. Crazy Eddie, Inc.*, D.C. Comics blocked Crazy Eddie from imitating its Superman character in a commercial and using his famous catch phrase.¹⁰³ The phrase in *Crazy Eddie* (“Look . . . Up in the sky! . . . It’s a bird! . . . It’s a plane! . . . It’s . . . Crazy Eddie!”) is significantly less than 140 characters and would easily fit into a tweet with room to spare for hashtags and RTs.¹⁰⁴ The phrase received protection as part of a larger work, the Superman comics in this case, and many of the other cases granting protection to shorter works similarly grant independent protection to fragments of larger works.¹⁰⁵ The Eighth Circuit has held that short, declarative statements used on psychological tests may be protected by copyright when the requisite level of originality exists.¹⁰⁶ Many of these statements are quite capable of fitting into a tweet’s space restrictions, and are eligible for copyright protection as independent works, even if originally part of a larger work.

Courts have also held that copyright protection extends to Jeff Foxworthy’s famous “You might be a redneck if . . .” jokes, many of which are fewer than 140 characters.¹⁰⁷ This is an example of

¹⁰² 1 M. NIMMER, *NIMMER ON COPYRIGHT*, 2.01[B] (1988).

¹⁰³ 205 U.S.P.Q. 1177 (S.D.N.Y. 1979) (finding that the defendant’s filmed advertisements represented a detailed copy of the plaintiff’s Superman trailers).

¹⁰⁴ *Id.*

¹⁰⁵ *See, e.g.*, *Narell v. Freeman*, 872 F.2d 907, 912 (9th Cir. 1989) (“[W]e agree that the direct copying of all of the above lines, or even of the first two lines, might constitute infringement if the original held a valid copyright registration. . . .”); *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983); *D.C. Comics*, 205 U.S.P.Q. at 1178.

¹⁰⁶ *Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626, 634–35 (8th Cir. 1989).

¹⁰⁷ *See Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200 (N.D. Ga. 1995). A few of the jokes mentioned by the court included, “You might be a redneck if you’ve ever financed a tattoo,” “You might be a redneck if your two-year-old has more teeth than you

protection granted to short phrases that are not part of a larger work, but rather a series of independent jokes with similar themes. Other courts have indicated in dicta that short literary works like haikus are likely eligible for protection,¹⁰⁸ and there is no question that these are standalone works. Foxworthy was granted a preliminary injunction against the infringing t-shirt company, despite the brevity of his jokes, and his valid copyright interest justified enforcement of the full rights spelled out in 17 U.S.C. §106 because his expression evidenced a modicum of intellectual labor that was copied without permission by the defendants.¹⁰⁹

Counter-balancing these grants of protection are indications from the courts that there may be a higher threshold of originality for shorter works, or that there be a higher burden in showing infringement of copyrightable works consisting of common elements arranged in an original manner.¹¹⁰ For example, the court in *Stern v. Does* stated that “the copyrightability of a very short textual work—be it word, phrase, sentence, or stanza—depends on the presence of creativity. The opening sentence of a poem may contain sufficient creativity to warrant copyright protection whereas a more prosaic sentence of similar length may not.”¹¹¹ The court used the opening lines of Lewis Carroll’s *Jabberwocky*

do,” and “You might be a redneck if your dog and your wallet are both on a chain,” each of which is substantially less than 140 characters. In noting that Foxworthy’s jokes contained the required modicum of intellectual labor under the Feist standard, the court included quotes from Foxworthy’s testimony where he stated that “the whole trick is to take the smallest amount of words and put them in proper order. . . . I mean, it’s to get the maximum laugh from, you know, the shortest amount of material.” *Id.* at 1219. This indicates that the court appreciated how even very short works can contain substantial intellectual labor and appreciable originality.

¹⁰⁸ *Religious Tech. Ctr. v. Lerma*, CIV.A. 95-1107-A, 1996 WL 633131, at *4 (E.D. Va. Oct. 4, 1996). In addressing arguments unrelated to length issues in copyright, the opinion suggests that haikus and poems are literary works and eligible for copyright protection as such.

¹⁰⁹ *See Foxworthy*, 879 F. Supp. at 1219.

¹¹⁰ For a thorough discussion of length in copyright, see Justin Hughes, *Size Matters (Or Should) In Copyright Law*, 74 *FORDHAM L. REV.* 575 (2005), suggesting that there ought to be a size threshold in copyright law precluding “microworks” from protection and encouraging user-generated, web 2.0 “remix” culture.

¹¹¹ No. CV 09-01986 DMG PLAx, 2011 WL 997230, at *6 (C.D. Cal. Feb. 10, 2011).

poem¹¹² as an example of a very short phrase that clearly meets the creativity threshold for copyright.¹¹³ Other short phrases, if too common or ordinary, may risk being uncopyrightable.¹¹⁴ In *Salinger v. Random House*,¹¹⁵ the court acknowledged that while a cliché or ordinary phrase may fail copyright's originality threshold, "its use in a sequence of expressive words does not cause the entire passage to lose protection."¹¹⁶ The court went on to hold that even a paraphrase of Salinger's highly original "sequence[s] of creative expression" might constitute a violation of copyright.¹¹⁷ Standalone short works, on the other hand, by their very nature, do not sit in a sequence as Salinger's did, and thus must meet the creativity threshold in the short phrase alone.

If a particular short work does qualify for protection, it is as deserving of the full scope protection of copyright law as a longer work. The nature of Twitter and other online sharing mechanisms are such that ideas and expressions are quickly and easily shared and may quickly become ubiquitous—with or without attribution to their author. The courts have been quite clear that ubiquity of a phrase does not destroy its author's copyrights, stating that "[n]o matter how well known [sic] a copyrighted phrase becomes, its author is entitled to guard against its appropriation to promote the sale of commercial products" and is entitled to protection for the duration of the copyright span.¹¹⁸ On the other hand, phrases that are already well-known before being written by a particular author

¹¹² *Id.* (citing Lewis Carroll, *Through the Looking-Glass, and What Alice Found There*, in *THE ANNOTATED ALICE: THE DEFINITIVE EDITION* 148 (W.W. Norton and Co. ed., 2000).

¹¹³ *Id.*

¹¹⁴ *See, e.g.*, *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989) (citation omitted) ("Ordinary phrases are not entitled to copyright protection."); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (random duplications of phrases are not infringement); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.11[B] at 2-160 (Rev. Ed. 2011) (stating that factual work may only be granted protection if the form of expression evidences originality).

¹¹⁵ 811 F.2d 90 (2d Cir. 1987).

¹¹⁶ *Id.* at 98.

¹¹⁷ *Id.*

¹¹⁸ *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1982).

would clearly not qualify for protection, as they would fail the “independent creation” prong of copyright law.¹¹⁹

Courts do not judge the artistic merit or worth of a writing, and copyright protection should not be withheld merely because a writing is short, as long as the other requirements for copyright protection are met.¹²⁰ If a writing is sufficiently creative to surpass the elevated thresholds for originality in a shorter work, its author is entitled to exclusivity in the 17 U.S.C. § 106 rights.¹²¹

6. #Compilations

While an individual piece of factual information may not be eligible for copyright protection because of the idea/expression dichotomy, a compilation of facts may be partially protectable to the extent that its organizational elements are creative. Most famously, the Supreme Court held in *Feist Publications v. Rural Telephone Service* that, while individual listings in a phone book were unprotectable facts, the compilation within a phone book could be protectable. The Court held that because the phone book listings were alphabetical, they did not possess the required modicum of creativity to qualify for protection.¹²² The Court specified that “even a directory that contains absolutely no protectible [sic] written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.”¹²³ The Court went on to clarify that in such compilations, only “components of a work that are original to the author” will be granted copyright protection.¹²⁴

Although this Note focuses on the protectability of individual tweets, the compilation doctrine is relevant because in reality tweets are not published in a vacuum; they are always part of a user’s account. This discussion focuses on copyrightability of

¹¹⁹ See *Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 144 (2d Cir. 1998) (holding that the lyric “If you don’t stand for something you’ll fall for anything” existed in the public domain before the plaintiffs wrote their song, and the lyric therefore failed the originality prong of the copyright statute and was not entitled to protection).

¹²⁰ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

¹²¹ 17 U.S.C. § 106 (2006).

¹²² 499 U.S. 340, 348 (1991).

¹²³ *Id.*

¹²⁴ *Id.*

individual tweets, but the underlying purpose is to consider what level of protection the enormous amounts of casual social media being generated might receive under the law. Even if the arguments made below fail to convince a reader that individual tweets are eligible for protection, their potential copyrightability as part of a compilation remains. Given the many Twitter accounts that develop a unique and consistent theme or voice, it would not be unreasonable to consider each tweet to be an installment in the creation of that collective work.¹²⁵ If a particular Twitter account is considered to be a compilation, then it is possible that the tweets encompassed therein could get protection as parts of that compilation. When considered as pieces of a larger work, the legal analysis of tweets' copyrightability changes to the compilation analysis outlined above wherein even a collection of uncopyrightable elements may be granted some level of protection.¹²⁶

7. #Attribution

U.S. copyright law contains no general right of attribution, although there is a small number of statutes that provide for a limited attribution right in specific circumstances. First, section 43(a) of the Lanham Act, a trademark law, prevents an artist from having a work falsely attributed to him or her if it might harm the artist's reputation, though it does not address a right of attribution for a use of an artist's work.¹²⁷ Second, the Visual Arts Rights Act gives an author of a work of visual art the right to "claim

¹²⁵ For just a few examples of Twitter accounts that have transformed into ongoing works rather than random, unrelated statements, visit @shitgirlssay, @fakerahmmanuel, @BeyonceJayFetus, @God_Damn_Batman, or @FakeeEtiquette.

¹²⁶ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) ("[F]acts are not copyrightable . . . [but] compilations of facts generally are."); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970) ("[P]roper analysis . . . requires that all elements of each card, including text, arrangement of text, art work, and association between art work and text, be considered as a whole.").

¹²⁷ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–34 (2003) ("The rights of a patentee or copyright holder are part of a 'carefully crafted bargain,' under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.") (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989)).

authorship of that work.”¹²⁸ However, this right is expressly limited to works of visual art.¹²⁹ Thus, copyright law currently grants no right of attribution relevant to tweets.

II. APPLYING COPYRIGHT TO TWITTER

Now that the basic contours of copyright are clear, it must be applied to the context of tweets. The discussion will be primarily about individual tweets, but copyright protection for tweets as part of a user’s account may also arise as a distinct legal issue. Section A will discuss whether individual tweets can meet the basic statutory criteria of copyrightability, while Section B will delve into how retweets fit into the copyright scheme, assuming tweets are indeed copyrightable. Finally, Section C will discuss how uses of copyrightable tweets outside of the Twittersphere might be approached.

A. @Copyrightability

As discussed above, there are two threshold requirements for a writing to be considered eligible for copyright protection: fixation and originality.¹³⁰ Text posted on an online bulletin board system has been held as sufficiently fixed for the purposes of copyright law in light of the *MAI* holding,¹³¹ and this indicates that text posted to the online forum of Twitter also meets the threshold. In *MAI*, the digital writings existed for less than eleven days and were held to be sufficiently fixed, so a tweet, which could exist in

¹²⁸ 17 U.S.C. § 106A(a)(1)(A) (2006).

¹²⁹ *Id.*; see also *id.* § 101 (2006) (defining a work of visual art as “(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”).

¹³⁰ *Id.* § 102(a) (2006).

¹³¹ See *Religious Tech. Ctr. v. Netcom On-Line Commc’n Serv., Inc.*, 907 F. Supp. 1361, 1368 (N.D. Cal. 1995) (“Even though the messages remained on their systems for at most eleven days, they were sufficiently ‘fixed’ to constitute recognizable copies under the Copyright Act.”).

perpetuity on an individual user's account, should also be sufficiently fixed.¹³² A work is fixed at the time that it is put into a tangible medium of expression, so the very act of posting a tweet is its fixation, and copyright protection begins at the moment of fixation.¹³³

The originality prong, on the other hand, must be evaluated on a tweet-by-tweet basis. Given the Supreme Court's low threshold requirement of originality, it seems likely that many, if not most, tweets contain the "slight amount" of creativity necessary to be eligible for copyright protection.¹³⁴ As discussed, eligibility for protection is subject to the limiting doctrines of copyright law, and some tweets will undoubtedly be precluded from protection by those doctrines. For example, some tweets will be such straightforward statements of fact that they will fail the originality requirement under the idea-expression dichotomy. This Note will refer to these as "fact tweets."

Other tweets will fall into the category of *scenes a faire* if they contain nothing more than "ordinary phrases" or clichés. Such tweets will be referred to as "*scenes a faire* tweets." A clear *scenes a faire* tweet would contain minimal originality and no protectable expression, but would merely contain an idiom or common phrase. An example might be a tweet with a link to an article and text saying, "Great article on copyright and Twitter—very insightful."

Given that copyright makes no exemption for short works, the fact that tweets are 140 characters or less would not, in and of itself, preclude tweets from copyright protection, but makes any given tweet less likely to contain the requisite creativity that copyright law requires, especially because a short work does not have the opportunity to string together unprotectable, generic elements in a creative way, as in *Salinger*.¹³⁵ Whereas a longer work has more room to weave together generic elements that might

¹³² See *supra* note 56 and accompanying text.

¹³³ 17 U.S.C. § 101 (2006).

¹³⁴ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("the vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.").

¹³⁵ *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987).

otherwise be scenes a faire into something original, a tweet must fit that creativity and originality into very tight space constraints. Thus, tweets that do contain generic ideas are more likely to be *scenes a faire* than longer writings that might also contain equally generic ideas. It is worth noting that the Second Circuit has held that even if such a phrase becomes part of the popular vocabulary, it retains at least some of its copyright protection.¹³⁶ Thus, the fact that a tweet becomes popular or widely retweeted would not, in and of itself, make the tweet become a *scenes a faire* tweet.

Following the reasoning from the *Roth Greeting Cards* case, which allowed for infringement of the total look and feel of greeting cards where no individual element was directly copied, one could imagine that a tweet could be viewed as more than the sum of its parts.¹³⁷ A tweet is associated with a profile name and image, and often contains creative hashtags or associations with other twitter users through @ symbols that add context and meaning to the message. Take, for example, the phrase, “Dark chocolate is really good for you.” This seems to be an uncreative statement of questionable fact or possibly a *scenes a faire* tweet, and taken out of context seems to contain little, if any, copyrightable content. However, when taken in the context of the Twitter account “shitgirlssay”, a comedic account that tweets stereotypical phrases commonly said by teen or twenty-something females, the message takes on a meaning beyond the words themselves and becomes a unique bit of creative, minimalist comedy.¹³⁸ Even a tweet that consists only of public domain text could be copyrightable as part of a profile.¹³⁹

A third category of tweets is those that contain material that itself is already protected by copyright law. For example, when

¹³⁶ Warner Bros. Inc. v. Am. Broad. Cos., Inc., 720 F.2d 231, 242 (2d. Cir. 1982) (“Especially in an era of mass communications, it is to be expected that phrases and other fragments of expression in a highly successful copyrighted work will become part of the language. That does not mean they lose all protection in the manner of a trade name that has become generic.”).

¹³⁷ Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).

¹³⁸ @shitgirlssay, TWITTER (Nov. 23, 2011), <https://twitter.com/#!/shitgirlssay>.

¹³⁹ Again, for purposes of analysis, this Note will primarily address the copyrightability of individual tweets, as opposed to considering tweets as part of compilation in the form of a Twitter account.

the *New York Times* tweets a headline, that text is already protected by copyright as a literary work and is simply being retransmitted via Twitter.¹⁴⁰ There is no question as to its protectable status. The same could be said of *The Onion*, or any other publication that tweets the headlines and topics of articles that are already protected under copyright law. If Jeff Foxworthy were to tweet his already copyrighted jokes, there would similarly be no question as to the protection that copyright would offer these jokes.¹⁴¹ These tweets will be referred to as “pre-protected tweets.”

The remainder of tweets, those that are not fact tweets, *scenes a faire* tweets, or pre-protected tweets, may contain sufficient original expression to be copyrightable.¹⁴² This Note will refer to these as “likely-protectable tweets.” Applying the Court’s originality standard, nothing wildly original would need to be included in these tweets—they would require just enough originality to keep them from being facts or *scenes a faire*. However, copyright law does not protect all creations equally. The “thin” protection offered to compilations is an example of how copyright law adjusts to different formats of expression.¹⁴³ A tweet is protectable only insofar as it contains original, expressive elements. Without empirical evidence, there is no way to estimate what percentage of tweets might be protectable.

¹⁴⁰ See *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 234 (1918) (“No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands.”).

¹⁴¹ See *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1218–19 (N.D. Ga. 1995).

¹⁴² See Rebecca Haas, *Twitter: New Challenges to Copyright Law in the Internet Age*, 10 J. MARSHALL REV. INTELL. PROP. L. 230, 247 (2010) (“It is highly unlikely that a majority of Tweets could qualify for copyright protection. Nevertheless, there are some that do, and those require protection.”); Stephanie Teebagy North, *Twitterright: Finding Protection in 140 Characters or Less*, 11 J. HIGH TECH. L. 333, 357 (2011) (“[D]espite the Copyright Office’s position that the copyright code does not provide protection for short phrases, short statements posted on Twitter should be protected if the statement meets all other copyright thresholds.”).

¹⁴³ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive [which] inevitably means that the copyright in a factual compilation is thin.”).

B. @Retweets

Assuming that tweets can be protectable and that retweets are an integral component of the Twittersphere, it is necessary to explore how copyright law ought to treat a retweet of a protectable tweet. Copyright protection is not an absolute monopoly, but rather a grant of the exclusive rights enumerated in 17 U.S.C. § 106, subject to the limitations spelled out in §§ 107–22.¹⁴⁴ Several of the exclusive § 106 rights could be violated by a retweet. The right to “reproduce the copyrighted work in copies” seems to be necessarily violated when a user who is not the author causes electronic copies to be made of an author’s text.¹⁴⁵ The right to display the work publicly is also invoked by a retweet, particularly given the television shows and other media that now display live tweets.¹⁴⁶

A retweet could also be seen as a derivative work, though a derivative work requires a recasting, transformation, or adaptation of the original work.¹⁴⁷ Different Circuits have differing opinions on what constitutes a derivative work, so this question may not have a simple answer, but for purposes of this Note it is sufficient to accept that some exclusive § 106 rights are implicated by a retweet of a “likely-protectable tweet.”¹⁴⁸

Like many online outlets for expression, Twitter does not allow a user to prevent others from copying his or her writings.¹⁴⁹ In

¹⁴⁴ See 17 U.S.C. § 106 (2006) (stating that “[s]ubject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following” before listing the exclusive rights).

¹⁴⁵ *Id.* §106(1).

¹⁴⁶ *Id.* §106(5).

¹⁴⁷ *Id.* §101 (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”).

¹⁴⁸ Compare *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343 (9th Cir. 1988) (holding that a photo removed from a book and affixed to a block was a derivative work), with *Lee v. A.R.T. Co.*, 125 F.3d 580, 581 (7th Cir. 1997) (concluding with nearly identical facts that the photo affixed to the block was not a derivative work).

¹⁴⁹ There is a “private” setting for Twitter accounts which prevents unapproved users from viewing an account’s tweets. As a result, a private account’s tweets may not be

fact, Twitter has the retweet mechanism built into its DNA, and states in its Terms of Service that it “encourage[s] and permit[s] broad re-use of Content” and in fact “exists to enable this [re-use].”¹⁵⁰ Retweeting messages is an integral part of using Twitter and having one’s own messages retweeted by others is a goal for Twitter users. Retweets function as a status symbol and a validation that one’s tweets are interesting to one’s followers.¹⁵¹ As a result, a person uses Twitter not just with the understanding that messages will be reproduced and displayed, but with the hope and expectation that they will.

One plausible way to read these Terms of Service is that every Twitter user is giving explicit consent to every other Twitter user to reuse content freely and without limitation so long as the reuse takes place within the Twitter API. However, the Terms of Service limit themselves to Twitter and “other companies, organizations or individuals who partner with Twitter,” and remain somewhat ambiguous as to what license is being granted to other users and how far that license extends.¹⁵² Regardless of how the Terms of Service are interpreted, any consent given extends no further than the Twittersphere, and some type of consent, whether explicit or implied, is given for retweeting at least in a limited capacity.¹⁵³ It is worth noting that this consent may include an

retweeted (natively) and do not appear in the general public Twitter feed. However, even a private setting does not prevent an approved follower from making an editable retweet (copying the text of a tweet and posting it as a new tweet) either with or without attribution. Thus, this “private” setting is more about protecting a user’s anonymity than his or her intellectual property, though it may contain elements of that as well. It is unclear whether a private user would prefer to have his or her thoughts shared without attribution or not shared at all. This may have some effect on the fair use analysis to come later, but will be set aside for purposes of this Note, as the vast majority of Twitter accounts are public. See *About Public and Protected Tweets*, TWITTER (Feb. 13, 2012, 5:45 PM), <https://support.twitter.com/articles/14016-about-public-and-protected-accounts>.

¹⁵⁰ *Twitter Terms of Service*, *supra* note 27.

¹⁵¹ See *What Is Retweet?*, *supra* note 26 (“They look like regular Tweets, but they have the ‘Retweeted by’ text and icon at the bottom of the Tweet to let you know they’re not just any old Tweet!”) (emphasis in original).

¹⁵² *Id.*

¹⁵³ See *Types of Tweets and Where They Appear*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweetsmessages/articles/119138-types-of-tweetsand-where-they-appear> (last visited Feb. 8, 2012) (“By protecting your Tweets (making them

expectation of attribution, as generally this is automatically included in a retweet.¹⁵⁴

This type of consensual limitation of an author's copyright monopoly is built into copyright through the fair use defense, which historically was "predicated on the author's implied consent to 'reasonable and customary' use when he released his work for public consumption."¹⁵⁵ On Twitter, retweets are customary. The matter gets complicated when contemplating the myriad of possible appropriations of tweets outside the virtual walls of Twitter, whether on a blog, in a book, on a t-shirt, or in any of the countless other possibilities. It is unclear specifically what uses are being consented to and where that consent ends. In order to get at this more complicated question, it is important to examine how a court might apply the four factors of fair use defined in 17 U.S.C. § 107¹⁵⁶ to a retweet—assuming *arguendo* that the Terms of Service do not give express consent—and then use that analysis as a framework to proceed to more complicated scenarios.

1. The Purpose and Character of the Use, Including Whether Such Use is of a Commercial Nature or is for Nonprofit Educational Purposes¹⁵⁷

In evaluating this factor, courts often look to whether an unauthorized use of a copyrightable work is transformative.¹⁵⁸

private), you're telling us that you don't want anyone to see your updates unless you approve them, so your messages won't be public."). Making Tweets private will prevent other users from retweeting them, except those who the user has approved thus establishing consent.

¹⁵⁴ See *What Is Retweet?*, *supra* note 26 ("To credit a Tweet's author, Retweets show the profile picture, user name, and Tweet of the original author, with 'Retweeted by' information appended at bottom.") (emphasis in original).

¹⁵⁵ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985).

¹⁵⁶ 17 U.S.C. § 107 (2006).

¹⁵⁷ 17 U.S.C. § 107(1) (2006).

¹⁵⁸ See, e.g., *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) ("The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.' . . . [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.") (internal citations omitted).

Because a retweet is literally just a re-transmission of a tweet, one view might be that a retweet is not transformative of the content in any meaningful way. The medium is the same and the words are identical.¹⁵⁹ However, some cases have found exact reproductions of works to be transformative if the context and purpose is sufficiently different, for example reproducing image thumbnails in Google image searches¹⁶⁰ or photos for archival purposes.¹⁶¹

Another argument could be made that a retweet is a kind of commentary or news reporting function, two categories that are explicitly mentioned in the fair use statute.¹⁶² The purpose of a retweet is usually to express approval or interest in the original tweet, or to spread the information contained in it, and this could be viewed as a kind of comment on the original message. The very act of sharing a retweet is an implicit comment on the content. Tweets are not received in a vacuum; every tweet is read in the context of a user's persona and in the context of other tweets. Every article or quip or quote sent to one's followers comes with an implicit commentary, whether that be an endorsement or a sarcastic wink.

While tweeting is not traditional news reporting in that it often lacks explicit commentary, it is undoubtedly a new and novel form of information sharing and commentary. The reproduction of photos of Miss Puerto Rico in the *Nunez* case mentioned earlier, for example, did not alter the photos but was a fair use because it repurposed them into a news context.¹⁶³ That case differed from a

¹⁵⁹ It could be argued that a tweet is more than just the 140 characters of text, but includes the message, the profile name, and the profile picture. *But see About Tweets (Twitter Updates)*, TWITTER, <http://support.twitter.com/groups/31-twitterbasics/topics/109-tweets-messages/articles/127856-about-tweets-twitter-updates> (last visited Feb. 8, 2012) (“A Tweet is any message posted to Twitter, and all are 140 characters or less.”). Under this view, a retweet could be considered a derivative work or something more transformative, but this argument will not be addressed by this Note. Instead, I will only consider the content of the text itself, which by definition is an exact copy of the original.

¹⁶⁰ *See Perfect 10 Inc. v. Amazon.com*, 508 F.3d 1146, 1164 n.8 (9th Cir. 2007).

¹⁶¹ *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006).

¹⁶² 17 U.S.C. § 107 (2006).

¹⁶³ *See Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (“[T]he informative nature of the use, appellee's good faith, and the fact that it would have been

retweet because the photos were paired with a news story and served an informational newsworthy purpose, but it illustrates how the sharing of information is favored by the courts, despite the lack of a *per se* news exemption.¹⁶⁴ Another example is a case where incriminating internal emails leaked from an electronic voting machine company were posted all over the Internet “for the purpose of informing the public about the problems associated with Diebold’s electronic voting machines.”¹⁶⁵ The Ninth Circuit Court of Appeals concluded that although the plaintiff failed to show that emails were protected by copyright law, even if they were, the use was transformative and in the public interest.¹⁶⁶ This illustrates how information sharing can be a transformative use.

In the case of retweets, the very question of “whether the new work merely ‘supersede[s] the objects’ of the original creation or instead adds something new”¹⁶⁷ is a misleading one. That is, even if a retweet adds nothing new to the original—no new context or commentary—it does not supersede the original object. Instead, it shares the original writing and thereby increases its reach and its cultural impact and significance. In this way, an attributed retweet would not interfere with the original tweet’s ability to reach its audience. This reasoning may only hold for attributed retweets, though, as unattributed retweets are much more likely to supersede the original.

Alternatively, even if there is no attribution, the very act of a retweet may create something new, satisfying the transformative prong. The transformative test alone does not determine whether a use is a fair one, however. Given that tweets are freely accessible

difficult to report the news without reprinting the photograph suggest that on the whole, this factor is either neutral or favors a finding of fair use.”).

¹⁶⁴ *Id.* at 22 (“This is not to say that appellee’s use of the photographs was necessarily fair merely because the photographs were used for news purposes, nor does it establish a general “newsworthiness” exception.”). The Supreme Court explicitly declined to create a news exception in *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558, 561 (1985) (“The fact that an article arguably is ‘news’ and therefore a productive use is simply one factor in a fair use analysis.”).

¹⁶⁵ *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004).

¹⁶⁶ *See id.*

¹⁶⁷ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (citations omitted)).

to all and the purpose of Twitter is to share information quickly and widely, the purpose and character of a tweet or retweet is generally not of a commercial nature. That is, a Twitter user does not charge the public for access to the content. This point is more complicated for those celebrities who are paid to tweet endorsements, those who use Twitter strictly as a promotional medium, or those who maintain Twitter accounts strictly to generate interest in their publication or business. Still, even if an account on the whole is maintained with commercial concerns, an account that retweets these messages does not stand to “profit from exploitation of the copyrighted material without paying the customary price.”¹⁶⁸ In fair use, the question of commercial nature is not simply about whether the work is for profit,¹⁶⁹ because many of the examples of fair uses stated in § 107 can be profitable.¹⁷⁰

A retweet serves at least two purposes. First, it spreads information and shares ideas. Second, it boosts the social capital of the retweeter’s account and potentially garners followers. Neither of these uses can be said to be of a commercial nature in the sense that neither deprives the author of the original tweet of any customary price, although boosting one’s followers can have an eventual financial benefit,¹⁷¹ as discussed below. Given that there is no customary market to license tweets and that there is an implicit permission in Twitter allowing all other users to retweet with impunity, it would be impossible to say that a retweeter “stands to profit from exploitation of the copyrighted material without paying the customary price.”¹⁷² There is no customary price expected to be paid for retweeting another person’s content and no regime through which a Twitter user would even begin to consider doing so.

¹⁶⁸ Harper & Row Publishers, Inc. v. Nation Ents., 471 U.S. 539, 562 (1985).

¹⁶⁹ Nunez v. Caribbean Int’l News Corp., 235 F.3d 18, 25 (1st Cir. 2000) (“Before the Supreme Court’s decision in *Campbell*, several courts had suggested that any commercial use was presumptively unfair. As the Court noted, however, to follow such a presumption would contradict the examples of fair use provided for in the preamble to § 107.”) (citations omitted).

¹⁷⁰ *Id.*

¹⁷¹ See discussion *infra* Part III.B.1.

¹⁷² Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

Ultimately, free expression on Twitter requires the ability to retweet freely, to share and comment on the dialogue in the online town hall that is the Twitterverse. This interchange is what copyright law is supposed to be about—promoting expression and incentivizing creation, not giving overly restrictive protections to content owners. This is the same reason that the Second Circuit upheld a fair use defense for the show “The Greatest American Hero” against an infringement suit by the owners of the “Superman” franchise, who claimed that the show’s commercials parodying the Superman movies were infringing.¹⁷³ That case differed in that it dealt with a clear cut parody and an original work that had “already secured for its proprietor considerable financial benefit,”¹⁷⁴ and the court certainly considered those to be important factors in its reasoning. However, the court also discussed the fact that the parody exception exists to foster “the creativity protected by the copyright law.”¹⁷⁵ While making clear that a well-known phrase does not lose legal protection simply by virtue of its being well-known, the court also specified that the original author is “entitled to guard against its appropriation to promote the sale of commercial products.”¹⁷⁶ It would be a rare retweet that appropriates the original material to promote the sale of commercial products, and the use of retweets does not seem to be the type the courts are concerned about. As discussed, the very nature of a tweet defies the concept of receiving direct financial return, as it is freely and openly available to all, and the nature of a retweet is such that it contains some inherent comment on the original material.

In *Perfect 10 Inc. v. Amazon.com*, Google’s display of copyrighted thumbnail images that were illegally used on another site was considered a fair use.¹⁷⁷ Despite the fact that the images were used in their entirety, which the court considered reasonable

¹⁷³ Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231, 233, 242 (2d Cir. 1983) (“It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor.”).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ 508 F.3d 1146 (2007).

for a search engine to do,¹⁷⁸ and despite the fact that Google's use was commercial,¹⁷⁹ the use was still a fair one. The court found that use of a photo in a search engine was transformative because it gave the images new purpose and meaning by using them in a search context.¹⁸⁰ Moreover, the court weighed "Google's superseding and commercial uses of thumbnail images against Google's significant transformative use, as well as the extent to which Google's search engine promotes the purposes of copyright and serves the interests of the public."¹⁸¹ Given Twitter's popularity and substantial value as an emerging medium of expression, news reporting, and communication, this same reasoning ought to apply. Copyright law exists to promote creative expression, and the fair use doctrine is intentionally crafted to be a flexible, case-by-case doctrine that can be applied to facilitate new forms of creative expression.¹⁸² If retweets are not a *per se* fair use, it is difficult to imagine how the Twittersphere could continue to function as a vibrant and successful marketplace of ideas and expression.

In sum, this factor is either neutral or weighs in favor of a fair use finding for retweets. Attribution makes this factor much more likely to weigh in favor of fair use because it prohibits a retweet from superseding the original tweet. Although the use is likely not transformative, it is also likely not a commercial use.

2. The Nature of the Copyrighted Work

As discussed, not all tweets are necessarily creative, but assuming that a tweet is a potentially protectable expression displaying the requisite level of creativity, it should fall into the core of what copyright is intended to protect—creative expression.¹⁸³ Although a tweet is a short, written phrase, the

¹⁷⁸ *Id.* at 1167–68.

¹⁷⁹ *Id.* at 1166.

¹⁸⁰ *Id.* at 1165.

¹⁸¹ *Id.* at 1166.

¹⁸² *Id.* (noting the "importance of analyzing fair use flexibly in light of new circumstances.").

¹⁸³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) ("[C]reative expression for public dissemination falls within the core of the copyright's protective purposes.").

medium of Twitter itself distinguishes a tweet from other short phrases. Twitter is designed specifically to allow for easy sharing of tweets, and an author who does not want to participate in that culture has any number of other options for expression online. As a result, it is reasonable for any user of Twitter to assume, rightly or wrongly, that any other user is giving implicit consent to be retweeted; otherwise, there would be no reason for a person to publish messages on Twitter. Because the architecture of Twitter builds attribution into the system and a reasonable and customary practice has evolved around providing attribution for tweets that are not one's own, an attributed retweet likely passes this prong of the fair use test.¹⁸⁴

An unattributed retweet is more problematic insofar as it runs contrary to the nature and expectation of a tweet.¹⁸⁵ This may not be the customary practice to which an author consented. On the other hand, Twitter users know, or quickly learn, that their text will be accessible to an enormous community of readers and can be easily copied, reproduced, shared, and even altered or appropriated. There is no security, no way to prevent copying or lock one's content without also closing off public access to the content, and no easy, practical way to demand or police attribution.¹⁸⁶ Although every user hopes to be credited, it may not be true that every user expects to always be credited. This is not to say that a Twitter user actively, consciously consents to unattributed uses of posts, but it does indicate that authors are willing to risk the possibility of unauthorized uses occurring in order to participate in the Twitter community. Twitter is designed for sharing ideas freely and without financial compensation or control, and it would be unreasonable to expect any substantial level of control given the architecture of Twitter.

¹⁸⁴ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (stating that the court considers "the protection of the reasonable expectations of one who engages in the kinds of creation/authorship that the copyright seeks to encourage") (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1122 (1990)).

¹⁸⁵ *Id.*

¹⁸⁶ *About Public and Protected Tweets*, TWITTER, <http://support.twitter.com/articles/14016> (last visited Feb. 15, 2012).

All in all, retweets, including unattributed retweets, likely pass this prong of the fair use test.

3. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

Given that a tweet cannot exceed 140 characters, many retweets contain the entirety of the original tweet. Courts have allowed uses that reproduce works in their entirety in contexts where reproduction only makes sense if it encompasses an entire work, for example in making a fair use of a photograph.¹⁸⁷ Given the constrained nature of tweets, it is very possible that criticism of a tweet could similarly only take place after first retweeting the original tweet in its entirety. While text and photography clearly differ in nature, the point illustrates that use of an entire work does not necessarily make the use unfair.

Thus, this factor does not shed any light on the fair use analysis and is neutral.

4. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

This may be the most difficult factor in this Twitter context, and it is also the factor that the Supreme Court has characterized as “undoubtedly the single most important element of fair use.”¹⁸⁸ On the one hand, tweets have no “potential market” in any direct commercial sense, as they are intended to be distributed for free and Twitter has no mechanism for selling content to audiences.¹⁸⁹ On the other hand, there are substantial indirect benefits to having a strong following on Twitter and retweets could potentially dilute that value.

Twitter users gain economic value for their tweets in two ways: (1) by developing a popular following for the content and then monetizing that content in some way;¹⁹⁰ or (2) by being paid to

¹⁸⁷ See, e.g., *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000).

¹⁸⁸ *Harper & Row Publishers, Inc. v. Nation. Enters.*, 471 U.S. 539, 566 (1985).

¹⁸⁹ See discussion *supra* Part I.A.2.

¹⁹⁰ See Alexander Barbara, *How to Build (And Monetize) Twitter Content Channels*, SHOE MONEY (Apr. 11, 2009), <http://www.shoemoney.com/2009/04/11/how-to-build-and-monetize-twitter-content-channels/>.

send product-endorsing tweets.¹⁹¹ In the first case, a Twitter account can have two possible values. The content itself could be the value if an author generates enough interest to eventually turn the content into a book or other product, as Justin Halpern did and Steven Martin plans to do.¹⁹² Alternately, the content could be used to snag followers' attention and link them back to a target website for monetization.¹⁹³ Regardless of the monetization scheme, it is primarily unattributed retweets that can cause harm, and they can do so by serving as a barrier to building a following. If every clever tweet that might otherwise induce followers gets appropriated by other users, subsequent readers will have no way of tracing the origin back to the original author. Further, the author's original content may no longer seem original to a new reader and the author's labor will be unrewarded. Users may follow a copycat account and have no incentive to pay attention to the original author. After all, if users can get a popular tweeter's content elsewhere, those users have nothing to gain by following that popular tweeter's account. It is worth noting that attributed retweets have the opposite effect by reaching more users and pointing them back to the source of the content.

For example, the news parody publication *The Onion* enjoys great popularity on Twitter, and its frequent retweets have almost certainly generated new followers, new readers, and a wider audience to generate advertisers.¹⁹⁴ So although any given tweet is

¹⁹¹ Emily Carr, *\$10,000 Tweets—The Growing Value of Celebrity Micro-Endorsements*, TWEED (Jan. 10, 2011), <http://ogilvyentertainmentblog.com/2011/01/10000-tweets-%E2%80%93-the-growing-value-of-celebrity-micro-endorsements/>; Jakk, *Brands Paying Celebrities on Twitter to Endorse Their Products, Ethical?*, TECH. BLOGGED (Nov. 4, 2011), <http://twww.technologyblogged.com/editorial/brands-paying-celebrities-ontwitter-to-endorse-their-products-ethical>.

¹⁹² Dybwad, *supra* note 16; Sinha-Roy, *supra* note 8.

¹⁹³ Don Reisinger, *Twitter: A Self-Promotion Tool for Mainstream Media*, CNET NEWS (Nov. 14, 2011, 7:52 AM PST), http://news.cnet.com/8301-13506_3-57324189-17/twitter-a-self-promotion-tool-for-mainstream-media/.

¹⁹⁴ See Megan Gibson, *140 Best Twitter Feeds*, TIMESPECIALS (Mar. 28, 2011), http://www.time.com/time/specials/packages/article/0,28804,2058946_2058990_205897_5,00.html; Barnatude Thurston & Matt Kirsch, *Twitter Marketing According To The Onion—How We Won The #Oscars, The #Superbowl And Turned #HorseMasturbation Into A Trending Topic In Service Of Our TV Shows*, WEB2.0EXPO/NY (Oct. 13, 2011, 1:15 PM), <http://www.web2expo.com/webexny2011/public/schedule/detail/20400>.

not directly for profit purposes, the motivation for tweeting in general is driven by commercial rationales and serves commercial purposes. As a result, if another Twitter user were to plagiarize one of *The Onion*'s joke headlines and receive substantial attention on Twitter, that attention would have a commercial impact on *The Onion*. Whatever readership resulted from that plagiarism would be effectively taking away the returns of *The Onion*'s labor. The potential effect of unattributed retweets is illustrated by the previously noted study of plagiarism on Twitter.¹⁹⁵

In the second case, the most popular users of Twitter, generally celebrities, are often paid to endorse or mention products through their tweets.¹⁹⁶ These users need to have enough followers to make it worth an advertiser's money to purchase endorsements. Generally speaking, the most popular tweets earn their popularity based on the user's real-world fame rather than for the content of the messages alone.¹⁹⁷ These accounts are most likely helped by attributed retweets, and probably not greatly harmed by unattributed retweets because the contents of the tweets hold little value compared to the fame of the character. It is possible that unattributed retweets might dilute a follower's base and thereby affect his revenue, but the celebrity's popularity is not dependent on having original content as much as having a popular persona. In either case, the celebrity would have a copyright interest in the tweet only if the celebrity personally authored it, as opposed to receiving the content from a marketing company and simply typing it into Twitter.

Thus, retweets can be broken up into two categories: attributed retweets and unattributed retweets. Unattributed retweets can dilute the market value of a user's account name, which is a kind of brand name in the context of celebrities, while attributed retweets can actually increase the value and recognition of that

¹⁹⁵ See *supra* note 31 and accompanying text.

¹⁹⁶ See, e.g., Carr, *supra* note 191; *Celebs Raking in the Moolah*, *supra* note 17.

¹⁹⁷ At the time of this writing, five of the most popular Twitter users are Lady Gaga, Justin Bieber, Katy Perry, Kim Kardashian, and Barack Obama. The vast majority of the top 100 most popular users are celebrities who are well-known outside the world of Twitter. See *The Top 100 Most Followed on Twitter*, TWITTERCOUNTER.COM, <http://twittercounter.com/pages/100> (last visited Feb. 4, 2012, 1:20 PM).

name. The overall effect on the market is context dependent. As a result, this factor of fair use seems to depend on whether the retweet is attributed. Attribution does not enter into copyright law, though, so instead this factor seems to be neutral.

5. Fair Use Summed Up

Two of the four fair use factors indicate that a retweet is a fair use and two are neutral, so a retweet seems to generally pass the fair use analysis even if it is unattributed. A lack of attribution does seem to make a use less fair and less likely to pass, but does not seem to be sufficient to tip the scales in a typical case. A plausible case could be made that such unattributed copying ought to rise to the level of infringement, but the practical implications of such a policy are staggering and the inherent complications for Twitter users could be fatal to a vital and nascent medium of communication. The Second Circuit has stated that “[t]he ultimate test of fair use . . . is whether the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.”¹⁹⁸ There is no question that “Science and the useful Arts” are better served by allowing organic development free from legal constraint.

On the other hand, it is possible to imagine a use of retweets so egregious that it might fail the fair use test and constitute infringement. For example, it is possible to imagine a Twitter account run by a commercial enterprise that retweeted content without attribution and included a link back to its own commercial website. This would seem to be a commercial use of retweets that would violate the attribution norm and implicit bargain in the Twitterverse, and would harm the market for the original authors. Such an extreme use would likely tip the scales and fail the fair use test. However, in the more typical case where such commercial exploitation is abstract, a retweet is likely a fair use.

¹⁹⁸ *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 141 (2d Cir. 1998) (citations omitted) (internal quotation marks omitted).

C. @OffTwitter

The universe of possible uses of Twitter is enormous. Online, a tweet could be copied and reproduced on a personal blog or posted on a website with millions of readers around the globe. Offline, a quote could be used on a t-shirt and sold for profit, or adapted into a joke told at water coolers or on late-night comedy programs. This wide array of uses encompasses the commercial and noncommercial, both online and offline.¹⁹⁹

Before moving forward, it is worth observing that two of the four fair use factors are identical whether online or offline uses are considered, so it makes sense to analyze those first and then move on to look at how other possible uses are analyzed under the remaining two factors.

1. The Nature of the Copyrighted Work

No matter where a tweet is ultimately posted on Twitter, the nature of the medium remains the same. While different tweets may have different purposes, from sharing news and information to promoting products to creatively entertaining, the constraints of Twitter itself create a level of uniform formatting among all tweets. However, the analysis changes significantly when the reproduction and distribution of the tweet's content takes place off Twitter. In discussing this factor in the context of retweets, the fact that a tweet comes with implicit permission to retweet was significant. That implicit permission does not necessarily extend to uses off Twitter, whether they are online or offline, and there is no reason to assume that it would or should. This is evidenced by the fact that Twitter's own Terms of Service clearly state that each

¹⁹⁹ For purposes of this discussion, this Note will assume that, other than changing the context in which the tweeted text appears, the uses are not transformative and involve the specific text of the original tweet with no paraphrases or additional elements added. This discussion is limited to single tweets and might be complicated in the context of a larger work such as a compilation of tweets. *See, e.g.*, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 605 (2d Cir. 2006) (noting that the amount of a copyright protected work used in relation to the size of the infringing work used, such as seven protected images in a 480-page book, is relevant to the "purpose and character" prong of the fair use test).

user's content is his or her own property.²⁰⁰ This fact, in conjunction with the increasing trend toward Twitter users publishing books of their tweets, indicates that there is no implicit license given to any use of an author's tweets other than retweeting. This factor therefore is neutral or weighs against fair use for the copying of tweets outside of Twitter.

2. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

This factor's analysis is the same for a commercial use as it would be for a retweet, as the entire message would be reproduced. This factor remains neutral.²⁰¹

3. The Purpose and Character of the Use, Including Whether Such Use is of a Commercial Nature or is for Nonprofit Educational Purposes

The wide range of possible ways to infringe protectable tweets makes this factor difficult, if not impossible, to analyze in a blanket manner. Instead, a spectrum of uses should be examined to glean some guiding principles.

The first distinction to note is between commercial uses and noncommercial uses. The commercial nature of a work "tends to weigh against a finding of fair use."²⁰² There is a wide array of possible commercial uses, so it is worth noting that the Supreme Court does not consider monetary gain alone to be the dispositive issue but rather "whether the use stands to profit from exploitation of the copyrighted material without paying the customary price."²⁰³ Given that many commercial uses of an author's copyrighted material require the user to negotiate a license with the author, this would be the case for use of another author's tweet as well. Instead of sharing the words for free online as a tweet does, a plagiarist might be cashing in on an author's protected creation and thereby superseding the potential market for it, should the original

²⁰⁰ *Twitter Terms of Service*, *supra* note 27 ("You retain your rights to any Content you submit, post or display on or through the Services.").

²⁰¹ *See supra* Part II.B.3.

²⁰² *Harper & Row Publishers, Inc. v. Nation. Enters.*, 471 U.S. 539, 562 (1985).

²⁰³ *Id.*

author ever decide to publish the tweets in a derivative work of his or her own. This would not seem to be a fair use. On the other hand, a personal blog that quoted popular tweets and gained nothing financially would seem to pass this test.²⁰⁴ Blogs and websites that are not quite commercial enterprises but may operate for profit through ad revenue create a penumbra that would have to be evaluated on a case-by-case basis.²⁰⁵ These sites must be analyzed on a case-by-case basis to see whether they cross the threshold of “commercial use.”

The second distinction to make is between attributed and unattributed uses. Although copyright does not explicitly recognize attribution rights for authors, courts have brought factors like attribution into discussions of fair use. For example, the First Circuit Court of Appeals held that a defendant’s good faith belief that a use was fair works in a defendant’s favor,²⁰⁶ but that a failure to acknowledge the original author “counts against the infringer.”²⁰⁷ In the context of Twitter, it is very possible that a person could believe that any quote on Twitter is in the public domain or usable under the fair use doctrine, or not realize that there is any one author of a particular quote. Good faith could just as easily exist as not. On the other hand, every tweet appears from

²⁰⁴ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (“[A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.”).

²⁰⁵ See, e.g., MYLIKES, <http://mylikes.com/signup> (last visited Feb. 15, 2012); SPONSORED TWEETS, https://app.sponsoredtweets.com/referral/signup/7aded8037aa1f2747cc95e8fdc5d60fe?utm_source=sponsoredtwts&utm_medium=referral%20program&utm_campaign=tweeter%20referral (last visited Feb. 15, 2012); TWTBUCK, <http://twtbuck.com/publisher/register.php> (last visited Feb. 15, 2012).

²⁰⁶ Nunez v. Caribbean Int’l News Corp., 235 F.3d 18, 23 (1st Cir. 2000) (“Appellee’s good faith also weights in its favor on [the first] prong of the fair use test. . . . In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of the above factors.”).

²⁰⁷ *Id.* at 22.

someone's profile and some indication of authorship is facially apparent. Failure to credit an original author would certainly count against the use being fair, and in this way attribution takes on a pivotal role in determining this factor.

Ultimately, this factor is context dependent. As a rule, though, the more commercial a work is, the less likely it is to be fair, and the absence of attribution is much more likely to make a use unfair.

4. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

This is the most important factor in a court's analysis.²⁰⁸ Some guidance in approaching the analyses can be found in Nimmer's statement that "[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied."²⁰⁹ Given the new and still-evolving "market" for tweets and audiences on Twitter, it is difficult to say which uses will harm the work and which will not. However, this Note posits that attribution will play the central role in determining the outcome of this factor.

Beginning with the commercial/noncommercial distinction, a commercial use would likely not be a fair use because it would affect the potential market for the original author. Taking Steve Martin as an example, if an unauthorized person printed and sold shirts with unattributed Steve Martin tweets, it would diminish the value of Martin's work and spoil the creativity, humor, and originality of his expression for Martin's audience. The defendant would have the burden of proving fair use, in this case by showing that the market for Steve Martin's work was not superseded.²¹⁰ A similar shirt vendor whose shirts bore Martin's tweets but included attribution could argue that the shirts in fact increase awareness of the cleverness of Martin's writings and could function as free promotion for Martin. However, this argument would likely fail because Steve Martin has the right to this derivative market.

²⁰⁸ See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

²⁰⁹ 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.10[D], at 1-87 (Rev. Ed. 2011).

²¹⁰ See *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n. 22 (11th Cir. 1996) ("[I]t is clear the burden of proving fair use is always on the putative infringer.")

Unless these shirts were shown to be sufficiently transformative to outweigh their commercial nature,²¹¹ they would be simply crowding the market for Steve Martin tweet shirts, a derivative market reserved for the original author.²¹²

When it comes to noncommercial uses, fair use can be negated by a showing that widespread use of that sort would cause market harm.²¹³ For example, a single tweet quoted on a personal blog might not cause market harm, but if every writer on the Internet felt free to lift quotes from Twitter and use them without attribution, it is clear that any potential market for creative tweeters might be harmed. However, this argument spills over into the attribution/nonattribution discussion below. One useful guideline is the principle that only a good faith use may be a fair one, because “[f]air use presupposes ‘good faith and fair dealing.’”²¹⁴

By analogy, this could be compared to the *Foxworthy* case discussed earlier.²¹⁵ Foxworthy’s jokes are protected by copyright, and he delivers them to enormous crowds both live and on television, not unlike a Twitter user who transmits messages to the Internet masses. An audience member at one of Foxworthy’s performances might tell one of Foxworthy’s jokes to some friends without attribution and be shielded from copyright liability under the fair use doctrine, but if that audience member sold t-shirts with Foxworthy’s jokes, he would be infringing Foxworthy’s copyright. The commercial nature of that use combined with its infringement on Foxworthy’s market would be sufficient to defeat fair use. Even if the t-shirt seller did not know the joke’s origin, but had simply heard it told around the water cooler, the use could be

²¹¹ See *Perfect 10 Inc. v. Amazon.com*, 508 F.3d 1146, 1166 (9th Cir. 2007).

²¹² Further, showing such market effects would not help to defeat an infringement claim, as it would not undercut the copyright holder’s legitimate copyright nor the copying-in-fact allegation; it would only be a consideration in the fair use defense analysis.

²¹³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (“A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.”).

²¹⁴ *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (quoting John Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832, 832 (1968)).

²¹⁵ See *supra* note 107 and accompanying text.

infringing on Foxworthy's copyright-protected material and would not be a fair one.

Additionally, the hypothetical audience member who later retells Foxworthy's jokes without attribution would be unlikely to cause significant harm. However, the same scenario in a digital world where the audience member posts the jokes online as his own *could* cause significant market harm. The nature of the Internet is such that an individual's reach can extend far beyond anything conceivable in the physical world, and copyright law must adjust to reflect this reality. The courts have already used this reasoning to account for the scope of harms online in the context of file sharing.²¹⁶ Where an individual might have the fair use right to make a VHS recording of a television show and lend that VHS to a friend, that same user cannot post a copy of the show online.²¹⁷ The potential market harm online is exponentially greater.

Attribution plays a critical role in determining whether any use of a protectable tweet outside of the Twittersphere is a fair one. Whether or not a use harms the market for a tweet will be largely dependent on whether attribution is given. For example, if a writer were to quote the content of a tweet in a popular blog *without* attribution, that quote would dilute the value and novelty of the original tweet and diminish its value on the original author's account. If the same writer were to quote the same tweet in the same blog *with* attribution, that writer would likely induce some readers to view that Twitter profile and potentially follow it, thereby increasing its market value. This illustrates the vital role that attribution plays.

However, while attribution plays a substantial role, it is not necessarily the case that attribution alone makes a use fair. For example, a blog that lists every tweet by a particular user might provide attribution, but could also be a market substitution for that

²¹⁶ See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

²¹⁷ See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 913 (N.D. Cal. 2000) (“[A] Napster user who downloads a copy of a song to her hard drive may make that song available to millions of other individuals, even if she eventually chooses to purchase the CD. So called sampling on Napster may quickly facilitate unauthorized distribution at an exponential rate.”).

Twitter feed. Readers might go to that blog instead of following the author's Twitter account, and this reduction in followers could have a financial impact on that author and materially alter the marketability of the work, thereby superseding the purpose of the original. It is important to realize that there is no market for most users' tweets.²¹⁸ While celebrity users may have millions of followers, paid endorsements, and potential book deals, the average person's tweets most likely have little or no market value. Nonetheless, the exponential growth in popularity of blogs and social media like Facebook and Twitter show that people do place real value in having an audience.²¹⁹ Any violation of intellectual property that hurts the development of that audience or takes advantage of the difficulty of enforcement causes damage to a user's potential to reach readers. While this may not constitute direct economic harm, it may be sufficient that it would disincentivize creative expression on Twitter and work against the intent of the Constitution.

By way of analogy, using a band's song in a commercial without permission would clearly violate copyright law. It could be argued that the harm is greater if the band is more famous, because the use in one commercial supersedes uses in other commercials that may no longer want to license the song once it has already been used in a competitor's ad. This harm is clearly more substantial than it would be to an unknown band who had no present licensing opportunities and whose chances of having their material used were slim. The same could be said of appropriating a famous Twitter user's material as opposed to appropriating an average person's tweets. The economic harm might be greater to the celebrity, but the chilling effect on expression might be equal for both. Either way, an author whose writings satisfy the requirements for protection under copyright law is entitled to the rights, remedies, and causes of action that copyright law provides.

²¹⁸ Dan Howard, *What is the Goal of Twitter?*, EHOW (Apr. 9, 2011), http://www.ehow.com/info_8193672_goal-twitter.html.

²¹⁹ See *I Tweet, Therefore I Am*, GAWKER (Feb. 23, 2009), <http://gawker.com/5158699/i-tweet-therefore-i-am>; *Why Do People Really Tweet? The Psychology Behind Tweeting!*, THOUGHTPICK.COM (Aug. 28, 2009), <http://blog.thoughtpick.com/2009/08/why-do-people-really-tweet-the-psychology-behind-tweeting.html>.

If a work is protected by copyright, § 106 rights are enforceable unless a § 107–122 exception applies, and an author has the right to exclude unauthorized users.²²⁰

5. Fair Use Off Twitter Summed Up

Once again, the fair use argument comes down to the fact that “[t]he ultimate test of fair use . . . is whether the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.”²²¹ The law should view fair use as a mechanism to foster creative innovation according to the principles discussed above and continue the delicate balance between allowing authors to control their work and permitting creative experimentation and growth.

III. TWITTER NORMS AND INTELLECTUAL PROPERTY GOALS

The Constitution clearly articulates that copyright law is intended to incentivize creation,²²² and Twitter has certainly seen plenty of creation. Given that Twitter seems to have established an environment that successfully encourages expression and participation, it is worth exploring the dynamics of what is already occurring and how the goals of copyright law could best be achieved within that system. Section A will discuss the norms of the Twitter community, and Section B will consider how the Constitutional goals of copyright law can best be accomplished in the context of Twitter.

A. @TwitterNorms

There is no definitive way to say exactly what Twitter users expect, given the enormous number and diversity of users on Twitter,²²³ and without empirical study it would be impossible to

²²⁰ 17 U.S.C. § 106 (2006).

²²¹ *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 141 (2d Cir. 1998) (citations omitted) (internal quotation marks omitted).

²²² U.S. CONST. art. I, § 8, cl. 8.

²²³ As of 2010, there were 106 million Twitter users spanning at least 20 countries worldwide. At least fifty percent of the total number of Twitter users live in the United States. Demographic studies show these users to be of diverse age and income. See *Social Demographics 2010: A Fresh Look at Facebook and Twitter*, DIGITAL SURGEONS (Oct. 8,

say for certain that attribution is a general expectation. This Note can only state that, based on personal and anecdotal evidence, many users do expect to be credited for authoring and sharing their work. While copyright law does not directly recognize a right to attribution in the rights enumerated in § 106, some value to attribution is recognized in the fair use factors evaluated above and how courts have applied those factors.²²⁴

Specifically, in the world of Twitter, attribution (or a lack thereof) can influence the purpose and character of a work that copies a tweet, controvert the implied consent and authorial expectations of a poster, and most importantly, be the crucial factor in distinguishing which uses cause market harm and which do not. In this way, the fair use test actually can do a remarkable job of allowing copyright law to reflect the norms and values of a new, rapidly evolving online communication medium. It will be up to the courts to interpret this flexible statutory language in such a way as to reinforce the norms that have developed organically through social media; doing so will help to legitimize the law and incentivize creative expression online by allowing users to reinforce their rights, validating their expectations.

B. *@CopyrightGoals*

Congress's constitutional mandate is to promote progress of the arts, not to reward the individual accomplishments of any author.²²⁵ The protection of author's rights is incidental to the promotion of the progress of the arts.²²⁶ Nevertheless, it seems clear from the sheer volume of tweets being produced every day that tweets, and likely other social media, need little incentivizing. After all, 200 million tweets are produced every day²²⁷ without any certainty whatsoever as to the level of protection they may or may

2010), <http://www.digitalsurgeons.com/blog/design/social-demographics-2010-a-fresh-look-at-facebook-and-twitter/>; see also *Exploring the Use of Twitter Around the World*, SYSOMOS (Jan. 2010), <http://www.sysomos.com/insidetwitter/geography/>.

²²⁴ See discussion *supra* Part B.

²²⁵ U.S. CONST. art. I, § 8, cl. 8.

²²⁶ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (Rev. Ed. 2011).

²²⁷ See @twittereng, *200 Million Tweets Per Day*, TWITTERBLOG (June 30, 2011, 1:03 PM), <http://blog.twitter.com/2011/06/200-million-tweets-per-day.html>.

not receive. As tweets do seem to be copyrightable under current law, the determination of the level of protection tweets receive will fall to the courts who will need to decide the limits of fair use.

Twitter is an extremely new medium and it is just beginning to evolve. There are potential applications that have not yet been discovered, and an author who publishes through Twitter should have some sense of the limits of the law. If nothing else, certainty and predictability help ensure the progress of the arts because content producers know where they stand.²²⁸ The goals of copyright therefore do not favor more protection or less protection, but rather stability and predictability in the law as technology changes and evolves.

Twitter's Terms of Service validate the idea that users own what they tweet and are entitled to some protection, but Twitter itself does not provide this protection. Nevertheless, through the fair use analysis described above and the special importance placed on attribution, courts can use the law to reinforce the norms that have already developed on Twitter and that have helped incentivize massive levels of creative production. In this way, the law can serve to defend existing values. Not only would this be great news for the Twittersphere, but it would be doing justice to the law itself and demonstrating the relevance of law in the high-tech space. As copyright protection becomes increasingly difficult to police in the online space, greater attribution rights may help to provide a link between legal rules and customs online.

Until a copyright conflict emerges from a retweet situation, there is no way to know for certain how a court will view this type of problem. In the meantime, the fact that no suit has been brought and no major public accusations of copyright violation on Twitter have occurred says something in and of itself. That is, the norms seem to be working well enough on their own that users are not unhappy. If this is indeed the case, it would behoove the law, should it ever be involved, to understand, respect, and enforce the norms that are already serving to promote the progress of this new and, arguably, useful art. Congress and the courts place great emphasis on facilitating technology's progress. To do so

²²⁸ See, e.g., *Erickson v. Trinity Theatre*, 13 F.3d 1061, 1069 (7th Cir. 1994).

effectively, they must understand and reinforce the norms employed by those online communities.

CONCLUSION

Twitter is a powerful developing force in modern society, and until Congress specifically addresses it, the courts should read fair use in such a way as to be in accord with the norms of the Twittersphere. However, the underlying ideas expressed in this Note extend beyond Twitter. Individuals all over the world are posting ideas onto social media sites like Facebook, review sites like Yelp, comments on *New York Times* news articles, and countless other online destinations that allow user-generated content. The Internet users posting this content have their own expectations based on their experiences online and their own understandings of how the law ought to protect their property interests in their writing and their rights to draw freely on other online sources. This phenomenon is still relatively new, but the trend is clearly toward increasing amounts of user generated content in increasingly diverse contexts.

Although this Note confined its analysis to Twitter, the ideas explored can be applied to a variety of online spaces. Twitter happens to be a unique medium and a very active community at this moment, but new forums and new technologies will undoubtedly continue to evolve and displace the current ones. The law needs to address what exists now with an eye toward what may be coming in the future. This means beginning to craft broad, consistent principles of law that will be malleable across a range of technologies and continue the careful balance of power that Congress and the courts have maintained in copyright law.