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## “Going Viral” by Stealing Content: Can the Law Cure the Problem of Viral Content Farming?

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# “Going Viral” by Stealing Content: Can the Law Cure the Problem of Viral Content Farming?

## **Cover Page Footnote**

Editor-in-Chief, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXVII; J.D. Candidate, Fordham University School of Law, 2017; B.A., Journalism and Politics, New York University, 2012. I would like to thank Professors Irina Manta and N. Cameron Russell for their guidance and feedback in developing this Note, the IPLJ Editorial Board and staff for their hard work throughout the editorial process, and my friends in the journalism industry for encouraging me to write about this topic.

# “Going Viral” by Stealing Content: Can the Law Cure the Problem of Viral Content Farming?

Sara Gates\*

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## INTRODUCTION

Have you ever read an article online and noticed a link to another publication at the bottom? The credit—which may be stylized as a “hat tip” or a “h/t”—is a subtle nod to the source of the story.<sup>1</sup> In many cases, the link directs the reader to another article with a hat tip, which directs to another article, and sometimes to yet another.<sup>2</sup> Follow the hat tip trail to the beginning and you may find the original source of the story.<sup>3</sup> Or you may have just stepped into a spiraling Internet wormhole. While most journalists include this link—either for sourcing reasons or as a professional courte-

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<sup>1</sup> *Hat Tip*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/hat-tip](http://www.oxforddictionaries.com/us/definition/american_english/hat-tip) [<https://perma.cc/KG9D-L545>] (last visited Feb. 15, 2016).

<sup>2</sup> See, e.g., Sadot White, *Lady Rants on Facebook About Old Woman’s Heart Attack Ruining Her Dinner*, FAF MAG. (Jan. 6, 2016), <http://www.fafmag.com/news/heart-attack-ruined-girls-dinner/> [<https://perma.cc/K6UC-CM7C>]. The article links to DudeComedy, which links to Distractify, which links to the *Daily Mail*, which links to Facebook.

<sup>3</sup> See *id.*

sy<sup>4</sup>—some online writers forgo the hat tip, and even fail to include attribution altogether.<sup>5</sup> At best, failing to include attribution is lazy. At worst, it sets the stage for a potential copyright infringement claim.

With the widespread use and ease of social media, more and more pitches<sup>6</sup> and story ideas are originating on social media and user-generated content websites.<sup>7</sup> For example, a mother may post a video on Facebook of her child dancing,<sup>8</sup> or an anonymous Reddit user may share a heartwarming story about a celebrity surprising an ill fan.<sup>9</sup> Writers working under the pressure of quotas or pay-per-article freelance fees typically write up a quick piece, hope it goes viral, and move on to the next story. The tendency to follow this pattern is magnified by the twenty-four hour news cycle in which

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<sup>4</sup> See Jihii Jolly, *The Ethics of Linking*, FUTURE JOURNALISM PROJECT (Feb. 29, 2012), <http://tumblr.thefjp.org/post/18496496036/the-ethics-of-linking> [<https://perma.cc/F65Y-TNVH>]; Jonathan Stray, *Why Link Out? Four Journalistic Purposes of the Noble Hyperlink*, NIEMAN LAB (June 8, 2010, 9:30 AM), <http://www.niemanlab.org/2010/06/why-link-out-four-journalistic-purposes-of-the-noble-hyperlink/> [<https://perma.cc/E7Y8-URVE>].

<sup>5</sup> See, e.g., Joe Veix, *Can You Spot the Attribution in this Story BuzzFeed Allegedly Ripped from The Advocate?*, DEATH & TAXES (July 30, 2015), <http://www.deathandtaxes.com/257746/can-you-spot-attribution-buzzfeed-ripped-the-advocate/> [<https://perma.cc/Z5MP-9P8B>].

<sup>6</sup> Before writing an article, journalists usually must first pitch the idea to their editor, or, in the case of freelance writers, to a publication that accepts article submissions. See Ann Friedman, *The Rules of the Freelance Game*, COLUM. JOURNALISM REV. (Sept. 6, 2012), [http://www.cjr.org/realtalk/the\\_rules\\_of\\_the\\_freelance\\_gam.php](http://www.cjr.org/realtalk/the_rules_of_the_freelance_gam.php) [<https://perma.cc/ESA5-QQAS>]. Pitches typically focus on a particular trend or include the who, what, where, and when; the reporter then seeks out the why. See Tom Huang, *6 Questions Journalists Should Be Able to Answer Before Pitching a Story*, POYNTER (Aug. 22, 2012), <http://www.poynter.org/2012/6-questions-journalists-should-be-able-to-answer-before-pitching-a-story/185746/> [<https://perma.cc/9ZJC-WB86>].

<sup>7</sup> See Dave Lee, *Reddit for Journalists: Your Newest Super-Source*, MEDIUM (Sept. 10, 2014), <https://medium.com/@davelee/a-journalists-guide-to-reddit-your-newest-super-source-fa250e967b97> [<https://perma.cc/5CDF-9A2X>].

<sup>8</sup> See, e.g., David Lohr, *Little Girl and Her Pregnant Mom Dance Their Way to Viral Stardom*, HUFFINGTON POST (July 1, 2015, 4:16 PM), [http://www.huffingtonpost.com/2015/07/01/mother-daughter-dance-video\\_n\\_7706978.html](http://www.huffingtonpost.com/2015/07/01/mother-daughter-dance-video_n_7706978.html) [<https://perma.cc/A62D-W6FQ>].

<sup>9</sup> See, e.g., Kimberly Yam, *Patrick Stewart Surprises Trekkie Who Has Life-Threatening Illness with Out-of-This World Visit*, HUFFINGTON POST (Sept. 11, 2014, 6:11 PM), [http://www.huffingtonpost.com/2014/09/11/patrick-stewart-surprises-young-fan\\_n\\_5804830.html](http://www.huffingtonpost.com/2014/09/11/patrick-stewart-surprises-young-fan_n_5804830.html) [<https://perma.cc/W3G8-9EFN>].

stories become stale within days, or even hours, unless a fresh take breathes new life into a decaying piece of news.

If credit is not given where it is due, then the original content creators are cut out of the loop, leaving their content to be repeated again and again with little regard to where it originated. Originality may be the *sine qua non* of copyright,<sup>10</sup> but in the realm of the Internet it is difficult to express a truly original thought, let alone receive credit for it.

As the journalism industry continues to adjust to evolving online platforms—be it Snapchat’s Discover feature<sup>11</sup> or the next big social media website—the legality and ethics of some of the industry’s practices remain murky. This Note discusses viral content farming and aggregation by journalists and online writers, examines proposed solutions within the journalism industry and the law, and offers a possible legal resolution to the problem. It argues that certain content creators who post on Facebook, Twitter, and Reddit will be able to bring a copyright infringement action against an online writer who takes their creative content and republishes it with little-to-no attribution.

Part I introduces the concept of viral content farming, examines its origins, points out how it differs from aggregation, and considers the purpose behind the practice. The Part looks at how companies such as Google and Facebook have responded, and examines the overall impact on journalism and the Internet. Part II presents a possible ethical solution within the journalism industry and considers resolutions in the law by describing the “hot news” misappropriation doctrine and copyright law. Part III scrutinizes three proposals and discusses why copyright law is the most appropriate solution to the problem, then analyzes content farming within the framework of the U.S. copyright regime.

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<sup>10</sup> See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>11</sup> See *Introducing Discover*, SNAPCHAT BLOG (Jan. 27, 2015, 7:29 AM), <http://blog.snapchat.com/post/109302961090/introducing-discover> [https://perma.cc/87WZ-DE9Q].

## I. WHAT IS CONTENT FARMING?

Content farming cannot be defined without first addressing the underlying tenets of journalism and online media. Journalism is defined as both the product and “activity of gathering, assessing, creating, and presenting news and information.”<sup>12</sup> While the purpose of journalism in its simplest form is to provide citizen-readers with information,<sup>13</sup> writers and editors in the industry may offer dozens of different perspectives.<sup>14</sup> Online media—which may also be referred to as new media—is more difficult to define than journalism, but literally refers to media that is found on the Internet.<sup>15</sup> It may serve a similar purpose as journalism, but cannot, functionally, be equated to journalism,<sup>16</sup> which is guided by certain overarching principles, such as accuracy and objectivity.<sup>17</sup> However, with the rise of the Internet and online media, journalism has changed.<sup>18</sup> Although some of the underlying values have remained the same—“man bites dog” will always be newsworthy<sup>19</sup>—

<sup>12</sup> Walter Dean, *What Is Journalism?*, AM. PRESS INST., <http://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/> [https://perma.cc/BR7J-TY43] (last visited Feb. 15, 2016).

<sup>13</sup> See Walter Dean, *What Is the Purpose of Journalism?*, AM. PRESS INST., <http://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/purpose-journalism/> [https://perma.cc/LQQ6-2J3N] (last visited Feb. 15, 2016).

<sup>14</sup> See Editors, *Who, What, When, Where, Why, and How*, COLUM. JOURNALISM REV. (Sept. 3, 2013), [http://www.cjr.org/cover\\_story/who\\_what\\_when.php](http://www.cjr.org/cover_story/who_what_when.php) [https://perma.cc/5Y46-ZX5Z].

<sup>15</sup> See Bailey Socha & Barbara Eber-Schmid, *What Is New Media?*, NEW MEDIA INST., <http://www.newmedia.org/what-is-new-media.html> [https://perma.cc/VHN4-2ADS] (last visited Feb. 15, 2016).

<sup>16</sup> See Jonathan Stray, *What Is It That Journalists Do? It Can't Be Reduced to Just One Thing*, NIEMAN LAB (May 30, 2012, 10:30 AM), <http://www.niemanlab.org/2012/05/what-is-it-that-journalists-do-it-cant-be-reduced-to-just-one-thing/> [https://perma.cc/7FV3-N7PM].

<sup>17</sup> See Walter Dean, *The Elements of Journalism*, AM. PRESS INST., <http://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/elements-journalism/> [https://perma.cc/39TF-6SK4] (last visited Feb. 15, 2016).

<sup>18</sup> See Joshua Benton, *The Internet: How It Changes Everything About Journalism*, NIEMAN LAB (Oct. 10, 2008), <http://niemanreports.org/articles/the-internet-how-it-changes-everything-about-journalism/> [https://perma.cc/M2QN-4SVP] (“What was once an important role—making editorial choices—starts to feel more like a bottleneck in the system.”).

<sup>19</sup> “Man bites dog” is a common journalism expression which means that a weird or unusual news event, such as a man biting a dog, is more likely to be reported and widely

technological advances and the ease of accessing information has altered the relationship between the press and the public, exposing the industry to new threats.<sup>20</sup>

### A. Early Content Farms

Content farms—generally, websites with “shallow or low-quality content”<sup>21</sup>—began to sprout up as a way of exploiting new information technologies,<sup>22</sup> such as search engine optimization (“SEO”).<sup>23</sup> By reverse engineering how search engines work and packing an article with enough search keywords, websites can manipulate a search engine’s algorithm and propel their articles into the top search results for particular search terms.<sup>24</sup> Given that users rarely continue to the second page of search results,<sup>25</sup> the practice effectively stacks the deck in favor of these types of websites. If a user clicks on a link, the website receives traffic, which helps it maintain its position in the search results, and also helps it generate advertisement revenue.<sup>26</sup> Most online advertisement revenue is

read than an ordinary or commonplace event, such as a dog biting a man. *See* MITCHELL STEPHENS, *A HISTORY OF NEWS* 120 (Oxford Univ. Press 3d ed. 2007).

<sup>20</sup> *See* Editors, *What Is Journalism For?*, COLUM. JOURNALISM REV. (Sept. 3, 2013), [http://www.cjr.org/cover\\_story/what\\_is\\_journalism\\_for.php](http://www.cjr.org/cover_story/what_is_journalism_for.php) [<http://perma.cc/6E7J-VLLG>] (“The relationship between the press and the public has shifted in the new century. The one-way flow of information has become a free-for-all, and the professionals have lost some authority.”).

<sup>21</sup> Matt Cutts, *Google Search and Search Engine Spam*, GOOGLE OFFICIAL BLOG (Jan. 21, 2011), <http://googleblog.blogspot.com/2011/01/google-search-and-search-engine-spam.html> [<https://perma.cc/ECU4-6KGA>].

<sup>22</sup> *See* Dorian Benkoil, *Don’t Blame the Content Farms*, MEDIASHIFT (July 26, 2010), <http://mediashift.org/2010/07/dont-blame-the-content-farms207> [<https://perma.cc/F32C-FQQP>].

<sup>23</sup> *See generally Search Engine Optimization Starter Guide*, GOOGLE, <http://static.googleusercontent.com/media/www.google.com/en/webmasters/docs/search-engine-optimization-starter-guide.pdf> [<https://perma.cc/L9MA-CCQP>] (last visited Feb. 15, 2016).

<sup>24</sup> *See* Zoe Chace, *Web’s ‘Content Farms’ Grow Audiences for Ads*, NPR (Apr. 21, 2011, 12:01 AM), <http://www.npr.org/2011/04/21/135514220/webs-content-farms-grow-audiences-for-ads> [<https://perma.cc/D49C-5WCL>].

<sup>25</sup> *See The Value of Google Result Positioning*, CHITIKA (June 7, 2013), <https://chitika.com/google-positioning-value> [<https://perma.cc/YS6L-6QNJ>].

<sup>26</sup> *See* Janet Driscoll Miller, *Content Farms: What Are They—and Why Won’t They Just Go Away?*, MEDIAPOST: SEARCH INSIDER (Feb. 1, 2011, 10:45 AM), <http://www.media-post.com/publications/article/144020/content-farms-what-are-they-and-why-wont-they.html> [<https://perma.cc/M7G3-KMQ4>].



driven by clicks (on the advertisement) or impressions (each time the advertisement is displayed), regardless of whether or not the reader actually *sees* the advertisement.<sup>27</sup> So the more users who visit the webpage, the more money the website owner generates from the advertisements on the page.<sup>28</sup>

A typical content farm uses algorithms and any available data to determine the phrases that users search for the most, and then assigns writers to create content that includes those phrases.<sup>29</sup> The company usually has a team of freelance writers in place—oftentimes working from home, in their spare time—who can produce the content quickly and at a fraction of the cost it would take to employ a professional, full-time writer.<sup>30</sup> Writers are paid by the article, at minimal rates ranging from one to fifteen dollars per post.<sup>31</sup>

Early content farming companies like Demand Media, which launched in 2006, dealt in information or “commercial content,” and lacked any real reporting.<sup>32</sup> Their aim appeared to be purely financial. Although early content farms varied widely, most churned out posts devoted to answering questions or providing step-by-step how-tos.<sup>33</sup> While some posts may have been useful to readers, the bulk were created chiefly for the click.<sup>34</sup> As a result,

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<sup>27</sup> See generally *Learn How AdSense Works*, GOOGLE, <https://www.google.com/adsense/start/how-it-works/> [<https://perma.cc/ML87-HF5E>] (last visited Feb. 15, 2016).

<sup>28</sup> See Jack Marshall, *Fraudulent Traffic: Adventures in Ad Farming*, DIGIDAY (Mar. 4, 2014), <http://digiday.com/publishers/ad-farming-adventures/> [<https://perma.cc/JAQ5-YEWX>].

<sup>29</sup> See Daniel Roth, *The Answer Factory: Demand Media and the Fast, Disposable, and Profitable as Hell Media Model*, WIRED (Oct. 19, 2009, 3:00 PM), [http://www.wired.com/2009/10/ff\\_demandmedia/all/1](http://www.wired.com/2009/10/ff_demandmedia/all/1) [<https://perma.cc/5FQS-AT23>].

<sup>30</sup> See Jessanne Collins, *My Summer on the Content Farm*, AWL (Nov. 4, 2010), <http://www.theawl.com/2010/11/my-summer-on-the-content-farm> [<https://perma.cc/2U4Q-9LNV>].

<sup>31</sup> See Chace, *supra* note 24.

<sup>32</sup> See Nicholas Spanger, *In Demand*, COLUM. JOURNALISM REV. (Nov. 4, 2010), [http://www.cjr.org/feature/in\\_demand.php](http://www.cjr.org/feature/in_demand.php) [<https://perma.cc/9HAB-AWCS>].

<sup>33</sup> See R. Lee Sims & Roberta Munoz, *The Long Tail of Legal Information: Legal Reference Service in the Age of the Content Farm*, 104 L. LIBR. J. 411, 412–14 (2012).

<sup>34</sup> Kevin Morris, *The Future of Facebook as a Social Content Farm*, DAILY DOT (Feb. 19, 2013, 9:00 AM), <http://www.dailydot.com/business/future-facebook-spam-social-content-farm/> [<https://perma.cc/5ZNP-25SJ>] (“To content farms, quality and utility

poor writing quality and questionable information were rampant.<sup>35</sup> By 2010, several big-name companies, such as AOL and Yahoo, had adopted similar business models in order to produce content on a massive scale.<sup>36</sup> When Demand Media went public in January 2011, it was valued at \$1.5 billion.<sup>37</sup>

However, it was not long after early content farms sprouted up that Google became aware of content farming and, in response, changed its algorithm in order to “reduce rankings for low-quality sites” and promote websites with original content and research.<sup>38</sup> The algorithm update, and another adjustment in November 2012, severely affected Demand Media’s content-farming business,<sup>39</sup> and by 2013 it seemed that the booming days of content farms were over.<sup>40</sup>

### B. From Content Farms to Aggregation

Content farms were not the only websites benefiting from increased online readership due to the general decline of newspaper

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aren’t important. All that matters is your Google click-through—that brief moment when your eyes hover over their ads. The farms deflate the value of the entire Web through the sheer volume of their junk. They’re just another form of spam.”).

<sup>35</sup> See Sims & Munoz, *supra* note 33.

<sup>36</sup> See Davis Shaver, *Your Guide to Next Generation ‘Content Farms,’* MEDIASHIFT (July 19, 2010), <http://mediashift.org/2010/07/your-guide-to-next-generation-content-farms-200> [<https://perma.cc/S5QQ-DTY7>].

<sup>37</sup> See Julianne Pepitone, *Demand Media Shares Soar 33% in IPO*, CNN MONEY (Jan. 26, 2011, 5:35 PM), [http://money.cnn.com/2011/01/26/technology/demand\\_media\\_IPO/index.htm](http://money.cnn.com/2011/01/26/technology/demand_media_IPO/index.htm) [<https://perma.cc/K6JW-HLFD>].

<sup>38</sup> Amit Singhal & Matt Cutts, *Finding More High-Quality Sites in Search*, GOOGLE OFFICIAL BLOG (Feb. 24, 2011), <https://googleblog.blogspot.com/2011/02/finding-more-high-quality-sites-in.html> [<https://perma.cc/BTA7-XFR5>]; see also Steve Lohr, *Google Schools Its Algorithm*, N.Y. TIMES (Mar. 5, 2011), <http://www.nytimes.com/2011/03/06/weekinreview/06lohr.html> [<https://perma.cc/5VFN-7SHW>]. (“[I]ndustry analysts agree that the target seemed to be so-called content farms, often sites with listlike articles, filled with words that are frequently used as search terms.”).

<sup>39</sup> See Andrew Wallenstein & Todd Spangler, *Epic Fail: The Rise and Fall of Demand Media*, VARIETY (Dec. 3, 2013), <http://variety.com/2013/biz/news/epic-fail-the-rise-and-fall-of-demand-media-1200914646/> [<https://perma.cc/97R8-6R7B>].

<sup>40</sup> See Felix Gillette, *Digital Drought Wrecks the Great American Content Farm*, BLOOMBERG BUSINESSWEEK (Oct. 17, 2013), <http://www.bloomberg.com/bw/articles/2013-10-17/digital-drought-wrecks-the-great-american-content-farm> [<https://perma.cc/7Y2P-KK5X>].

subscriptions.<sup>41</sup> News websites, rushing to attract the audiences lost by newspapers,<sup>42</sup> also took advantage of new data-driven technologies.<sup>43</sup> Instead of just guessing the topics that readers would want to read, news websites could see trends in reader preferences played out before them in real time.<sup>44</sup> Data from search engines, and then, social media, told news websites what topics readers were both searching for and talking about online;<sup>45</sup> analytics data provided news websites with information about the types of articles readers clicked on, and how long they spent reading them;<sup>46</sup> and other tools like A/B testing headlines or photos allowed websites to determine which headline-photo combination was the most attractive, and therefore would accrue the most clicks.<sup>47</sup>

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<sup>41</sup> In a 2010 Pew survey, sixty-one percent of respondents said they get some kind of news online, as compared to the fifty percent who reported that they read news in a local newspaper and the seventeen percent who said that they read news in a national newspaper. See Kristen Purcell et al., *Understanding the Participatory News Consumer*, PEW RES. CTR. (Mar. 1, 2010), <http://www.pewinternet.org/2010/03/01/understanding-the-participatory-news-consumer/> [<https://perma.cc/MH77-JG4K>].

<sup>42</sup> See generally Eric Alterman, *Out of Print*, NEW YORKER (Mar. 31, 2008), <http://www.newyorker.com/magazine/2008/03/31/out-of-print> [<https://perma.cc/86AB-M3FL>].

<sup>43</sup> See Jeff Sonderman, *New Generation of Web Analytics Applies ‘Big Data’ to Newsroom Decisions*, POYNTER (Aug. 19, 2011), <http://www.poynter.org/2011/new-generation-of-web-analytics-applies-big-data-to-newsroom-decisions-visual-revenue-jumptime/143389/> [<https://perma.cc/5EVG-GEH2>].

<sup>44</sup> See Rich Julius, *Site Analytics: Intelligence Gathering for News Sites*, BLOGGING WRITES (Feb. 21, 2012), <http://bloggingwrites.com/site-analytics-intelligence-gathering-for-news-sites-298/> [<https://perma.cc/TCX8-9F7B>].

<sup>45</sup> See Amy Mitchell, Mark Jurkowitz & Kenneth Olmstead, *Social, Search and Direct*, PEW RES. CTR. (Mar. 13, 2014), <http://www.journalism.org/2014/03/13/social-search-direct/> [<https://perma.cc/QE8Q-6TSJ>].

<sup>46</sup> See Derek Thompson, *Why Audiences Hate Hard News—and Love Pretending Otherwise*, ATLANTIC (June 17, 2014), <http://www.theatlantic.com/business/archive/2014/06/news-kim-kardashian-kanye-west-benghazi/372906/> [<https://perma.cc/HV7K-YD4A>] (“You may not realize this, but we can see you. Yes, *you*. The human reading this article. We have analytics that tells us roughly where you are, what site you’ve just arrived from, how long you stay, how far you read, where you hop to next. We’ve got eyeballs on your eyeballs.”).

<sup>47</sup> Publishers use A/B testing to assess the potential success of one headline over another. See Lucia Moses, *How A/B Testing Became Publishers’ Go-To Traffic Builder*, DIGIDAY (Oct. 21, 2014), <http://digiday.com/publishers/publishers-using-ab-testing/> [<https://perma.cc/6B9Q-E TEZ>]; Amanda Walgrove, *How BuzzFeed, R29, and Other Top Publishers Optimize Their Headlines and Images*, CONTENTLY: THE CONTENT STRATEGIST (Feb. 4, 2015), <https://contently.com/strategist/2015/02/04/how-buzzfeed-r29-and-other-top-publishers-optimize-their-headlines-and-images/> [<https://perma.cc/98UU->

Online-only news websites, such as *The Huffington Post*, excelled at this and endeavored to grow their readership by building posts around what the public wanted to read.<sup>48</sup> But, instead of expending time and expense on original reporting, up-and-coming news websites sourced their news from other, more-established media companies.<sup>49</sup> It became known as “aggregation.”<sup>50</sup> Similar to content farms, writers reviewed search engine data and social media trends and then churned out content based on the popular topics of each day.<sup>51</sup> However, rather than original content, the information was instead amassed from multiple news sources.<sup>52</sup>

If done well, each article would never take too much information from one source, but would instead “aggregate” the news from a variety of sources and include callouts (for example, “CNN first reported”), credits (i.e., “according to ABC”), and links.<sup>53</sup> With information derived from several sources, in addition to added context, the content would not be “over-aggregated,”<sup>54</sup> an of-

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29G2]. During A/B testing, two headlines are offered so that some readers see the “A” headline and others see the “B” headline, and the publisher tracks which option attracts more readers. *See* Moses, *supra*; Walgrove, *supra*. A/B testing may also be used to gauge readers’ preferences on photos or other small changes to the formatting of an article. *See* Moses, *supra*; Walgrove, *supra*.

<sup>48</sup> *See* David Segal, *Arianna Huffington’s Improbable, Insatiable Content Machine*, N.Y. TIMES MAG. (June 30, 2015), <http://www.nytimes.com/2015/07/05/magazine/arianna-huffingtons-improbable-insatiable-content-machine.html> [https://perma.cc/5DQK-VZ4S]; Alyson Shontell, *Seven Secrets That Led to Huffington Post’s \$315,000,000 Success*, BUS. INSIDER (Feb. 7, 2011, 10:10 AM), <http://www.businessinsider.com/seven-secrets-that-led-to-huffington-posts-315000000-success-2011-2?op=1> [https://perma.cc/3LDQ-LTRE].

<sup>49</sup> *See* Michael Shapiro, *Six Degrees of Aggregation*, COLUM. JOURNALISM REV. (Apr. 16, 2012), [http://www.cjr.org/cover\\_story/six\\_degrees\\_of\\_aggregation.php](http://www.cjr.org/cover_story/six_degrees_of_aggregation.php) [http://perma.cc/H9YU-8EDU].

<sup>50</sup> *See* Bill Grueskin, Ava Seave & Lucas Graves, *Chapter Six: Aggregation*, COLUM. JOURNALISM REV. (May 10, 2011), [http://www.cjr.org/the\\_business\\_of\\_digital\\_journalism/chapter\\_six\\_aggregation.php](http://www.cjr.org/the_business_of_digital_journalism/chapter_six_aggregation.php) [http://perma.cc/A8PN-HGZK].

<sup>51</sup> *See* Shapiro, *supra* note 49.

<sup>52</sup> *See* Kimberly Isbell, *The Rise of the News Aggregator: Legal Implications and Best Practices*, BERKMAN CTR. FOR INTERNET & SOC’Y HARV. U. 2 (Aug. 30, 2010).

<sup>53</sup> *See* Mallery Jean Tenore, *The Aggregator’s Dilemma: How Do You Fairly Serve Your Readers & the Sources You Rely on?*, POYNTER (Dec. 6, 2011), <http://www.poynter.org/2011/the-aggregators-dilemma-how-do-you-fairly-serve-your-readers-the-sources-you-rely-on/154855/> [https://perma.cc/M3YQ-Z6T6].

<sup>54</sup> “Over-aggregation” refers to the practice of taking too much information from another publication. *See* Julie Moos, *The Journalistic Value of Aggregation Creates the*

fense that is frowned upon by “pro” aggregators.<sup>55</sup> Instead, aggregation is akin to asking for someone to read all of the newspaper clippings and articles on a particular topic and give the readers the most salient bits of information.<sup>56</sup>

Thus, smaller websites with limited resources were able to gain a foothold in the evolving journalism industry by capitalizing on the original reporting of larger, established news agencies, and then adding their own two cents.<sup>57</sup> By borrowing content farming practices, they were able to garner more readers and outpace traditional media companies who struggled to adjust to the new journalism model that favored the expediency of the online platform over the in-depth reported content that had previously thrived in the newspaper business.<sup>58</sup>

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*Business Value*, POYNTER (July 13, 2011), <http://www.poynter.org/2011/the-journalistic-value-of-aggregation-creates-the-business-value/139049/> [https://perma.cc/DG38-CU48]. For example, if a writer composes a lengthy article that summarizes another publication’s original reporting without adding any other sources or contextual information, that would be a prime case of over-aggregation. *See id.*

<sup>55</sup> *See* Alexis C. Madrigal, *Maybe Fareed Zakaria Should Be Punished with Aggregation Duty*, ATLANTIC (Aug. 14, 2012), <http://www.theatlantic.com/technology/archive/2012/08/maybe-fareed-zakaria-should-be-punished-with-aggregation-duty/261113/> [https://perma.cc/2VV4-QZQB]. *The Huffington Post* has, on at least one occasion, suspended a writer for an over-aggregated post. *See* Steve Myers, *Huffington Post Suspends Writer, Apologizes for Over-Aggregated Post*, POYNTER (July 11, 2011), <http://www.poynter.org/2011/huffington-post-suspends-writer-apologizes-for-over-aggregated-post/138730/> [https://perma.cc/PG9Q-MWEA].

<sup>56</sup> *See* Moos, *supra* note 54 (“[A] leading, respected aggregator has the power to influence an audience by proposing what matters, by guiding readers to reliable sources, and by keeping them company as they travel through the newsosphere.”).

<sup>57</sup> *See* Shapiro, *supra* note 49.

<sup>58</sup> *See* Editors, *Aggregated Robbery*, NEW REPUBLIC (Mar. 3, 2011), <https://newrepublic.com/article/84509/huffington-post-aggregation-google> [https://perma.cc/4GUK-TRUZ] (“[*The Huffington Post*] has been successful for the same reason that scrapers and content farms are frequently successful—a penchant for search-engine optimization.”); Joe Pompeo, *Gawker Media and HuffPo Are Crushing Every Newspaper Online Except the New York Times*, BUS. INSIDER (Sept. 8, 2010, 11:24 AM), <http://www.businessinsider.com/gawker-media-and-huffpo-are-crushing-every-newspaper-online-except-the-new-york-times-2010-9> [https://perma.cc/GR56-SZ3T]; *see also* Tess Saperstein, *The Future of Print: Newspapers Struggle to Survive in the Age of Technology*, HARV. POL. REV. (Dec. 6, 2014, 12:13 AM), <http://harvardpolitics.com/covers/future-print-newspapers-struggle-survive-age-technology/> [https://perma.cc/2DEC-F67G].

### C. “Going Viral”

As aggregation became more commonplace among Internet news sources, the term “going viral” was adopted to describe when a news story, photo, or video is widely shared at an almost exponential rate within a short period of time.<sup>59</sup> Likening a piece of content to an infectious disease, journalists use the phrase to describe how quickly a post spreads on the Internet—most often through sharing on social media, rather than through searches or access from a news website’s front page.<sup>60</sup>

While there is no clear formula for what will go viral, recent studies on the phenomenon suggest that content that evokes an intense emotion, such as awe or anger, tends to go viral.<sup>61</sup> Some of the most successful stories shared on Facebook and Twitter in 2014 involved quizzes (“What State Do You Actually Belong In?”) or suggestive headlines (“This Is Possibly The Most Dangerous Trail In The World. But The Shocking Part Is Where It Leads.”).<sup>62</sup> Such content, which is often referred to as “clickbait,” begs the reader to click on the link by creating a “curiosity gap.”<sup>63</sup> This is most often achieved by a headline that asks a question, employs a cliffhanger, or promises something astonishing.<sup>64</sup>

Websites like Upworthy<sup>65</sup> have thrived off of this practice.<sup>66</sup> Launched in early 2012, the media startup built up its business by

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<sup>59</sup> See Ann Friedman, *Going Viral*, COLUM. JOURNALISM REV. (Mar. 3, 2014), [http://www.cjr.org/feature/going\\_viral.php](http://www.cjr.org/feature/going_viral.php) [https://perma.cc/YTY4-PXED].

<sup>60</sup> See *id.*

<sup>61</sup> See Jonah Berger & Katherine L. Milkman, *What Makes Online Content Viral?*, 49 J. MARKETING RES. 192, 201 (Apr. 2012); Rui Fan et al., *Anger Is More Influential than Joy: Sentiment Correlation in Weibo*, 9 PLOS ONE, no. 10, Oct. 2014, at 1, 6; Rosanna E. Guadagno et al., *What Makes a Video Go Viral? An Analysis of Emotional Contagion and Internet Memes*, 29 COMPUTERS HUM. BEHAV. 2312, 2318 (2013).

<sup>62</sup> Alyson Shontell, *The 30 Most Viral Stories of 2014 Will Make You Shake Your Fists and Scream, ‘Why?!’*, BUS. INSIDER (June 23, 2014, 3:39 PM), <http://www.businessinsider.com/30-most-viral-stories-of-2014-2014-6> [https://perma.cc/8KPQ-DFYR].

<sup>63</sup> See James Hamblin, *It’s Everywhere, the Clickbait*, ATLANTIC (Nov. 11, 2014), <http://www.theatlantic.com/entertainment/archive/2014/11/clickbait-what-is/382545/> [https://perma.cc/3GHV-FSF9].

<sup>64</sup> *Id.*

<sup>65</sup> See *About*, UPWORTHY, <http://www.upworthy.com/about> [https://perma.cc/D4G6-ATEX] (last visited Feb. 16, 2016) [hereinafter UPWORTHY].

employing “curators” to find content on social media, write a short blurb about the image or video, and draft twenty-five headlines for each post.<sup>67</sup> During its first year, the website grew from no readers to 10.4 million in a single month.<sup>68</sup> The key to Upworthy’s success seems to be in the way the website’s curators dig up compelling content, repackaging it, and share it via social media.<sup>69</sup> While Upworthy seeks to share meaningful stories in hopes of educating, inspiring, and, in some cases, spurring social change,<sup>70</sup> until recently,<sup>71</sup> the company placed little emphasis on original content.<sup>72</sup>

Following the monumental growth of Upworthy, other media startups followed its lead and similarly tried to grow a business built purely around sharing viral content.<sup>73</sup> Like Upworthy, these websites sought to earn traffic from social media referrals, primarily derived from Facebook,<sup>74</sup> and realized that they could do so without creating original content. Typically, most content is derived from social media and user-generated content websites like Reddit.<sup>75</sup>

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<sup>66</sup> See Alyson Shontell, *How to Create the Fastest Growing Media Company in the World*, BUS. INSIDER (Nov. 5, 2012, 3:05 PM), <http://www.businessinsider.com/upworthy-how-to-create-a-fast-growing-media-company-2012-11> [<https://perma.cc/BKA7-FW3R>].

<sup>67</sup> See *id.*

<sup>68</sup> Alyson Shontell, *The Brilliant, Unusual Way Media Startup Upworthy Grew to 10.4 Million Monthly Readers in Its First Year*, BUS. INSIDER (Mar. 27, 2013, 1:44 PM), <http://www.businessinsider.com/how-upworthy-grew-to-104-million-monthly-readers-in-its-first-year-2013-3> [<https://perma.cc/H43E-W68J>].

<sup>69</sup> See David Oliver, *Is Upworthy Worthy of Your Attention?*, AM. JOURNALISM REV. (Dec. 30, 2013), <http://ajr.org/2013/12/30/upworthy-worthy-attention/> [<https://perma.cc/42JE-8C8J>]; Sam Grobart, *Upworthy Goes Viral by Optimizing Optimism*, BLOOMBERG BUSINESSWEEK (Aug. 1, 2013), <http://www.bloomberg.com/bw/articles/2013-08-01/upworthy-goes-viral-by-optimizing-optimism> [<https://perma.cc/V824-MZB8>].

<sup>70</sup> See UPWORTHY, *supra* note 65.

<sup>71</sup> See Mathew Ingram, *Upworthy Pivoted, and You’ll Never Guess What Happened Next*, FORTUNE (July 8, 2015, 2:58 PM), <http://fortune.com/2015/07/08/upworthy-pivots/> [<https://perma.cc/E9DH-AUJ9>].

<sup>72</sup> See *The Most We’ve Ever Said About Curation at Upworthy*, UPWORTHY INSIDER (June 13, 2014), <http://blog.upworthy.com/post/88657827841/the-most-weve-ever-said-about-curation-at> [<http://perma.cc/25M5-HH9D>].

<sup>73</sup> See Alyson Shontell, *Suddenly, Upworthy Clones Are Everywhere and Millions of People Are Reading Them*, BUS. INSIDER (Nov. 27, 2013, 2:28 PM), <http://www.businessinsider.com/media-startups-and-upworthy-2013-11> [<https://perma.cc/B9CL-E3AA>].

<sup>74</sup> *Id.*

<sup>75</sup> See Ben Branstetter, *How Reddit Ate the News Media*, KERNEL (Nov. 2, 2014), <http://kernelmag.dailydot.com/issue-sections/staff-editorials/10714/reddit-media->

However, unlike more prominent news aggregators and curators like *Gawker* and *The Huffington Post*, which sought to build up their brands, these websites had one aim in mind: traffic. Reminiscent of early content farms, websites like Dose and OMGFacts showed little regard for quality or sourcing.<sup>76</sup> Instead of dealing in information, these websites churned out viral content like logs in a mill, prompting the emergence of a new genre of content farming.<sup>77</sup>

#### D. Viral Content Farms

For viral content farms, the business model revolves around making posts go viral.<sup>78</sup> If one listicle<sup>79</sup>—an article presented in the form of a list—or video does not reach as far as intended, the websites try another, and so on and so forth. At the same time, the websites rely on data-analytics programs to break down traffic into different metrics and algorithms to test which headline is attracting clicks the most quickly.<sup>80</sup> By focusing on widespread exposure, viral content farms can develop a larger audience in order to grow their daily traffic, thereby generating more advertisement revenue.<sup>81</sup> The content may not need to be particularly fresh—“evergreen” posts can do well at any time of year and do not need to be pegged to a news event.<sup>82</sup> The content just needs to entertain.<sup>83</sup>

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aggregator/ [https://perma.cc/9GA4-N2W3]; Liam Corcoran, *How Viral Nova Stay on Top of the Social Web*, NEWSWHIP, <http://blog.newswhip.com/index.php/2014/11/viral-nova-interview#CE6ZZeSiyEvFs2wY.97> [https://perma.cc/34FN-6PM5] (last visited Feb. 16, 2016); Luke O’Neil, *Everyone’s Stealing Jokes Online. Why Doesn’t Anyone Care?*, WASH. POST (Jan. 27, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/01/27/everyones-stealing-jokes-online-why-doesnt-anyone-care/> [https://perma.cc/F3NC-SDRX].

<sup>76</sup> See Andrew Marantz, *The Virologist*, NEW YORKER (Jan. 5, 2015), <http://www.newyorker.com/magazine/2015/01/05/virologist> [https://perma.cc/C979-LTN2].

<sup>77</sup> See Muhammad Saleem, *Why ‘Viral Mills’ Like BuzzFeed & Upworthy Are Content Marketing at Its Worst*, VENTUREBEAT (Dec. 24, 2013, 2:30 PM), <http://venturebeat.com/2013/12/24/why-viral-mills-like-buzzfeed-upworthy-is-content-marketing-at-its-worst/> [http://perma.cc/UD4G-KPEE].

<sup>78</sup> See *id.*

<sup>79</sup> *Listicle*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/listicle](http://www.oxforddictionaries.com/us/definition/american_english/listicle) [https://perma.cc/PK8X-Y7TQ] (last visited Feb. 16, 2016).

<sup>80</sup> See Marantz, *supra* note 76.

<sup>81</sup> See Saleem, *supra* note 77.

<sup>82</sup> See Sarah Laitner & Robin Kwong, *Tips from the Financial Times on Evergreen Journalism*, POYNTER (Oct. 26, 2015), <http://www.poynter.org/2015/tips-from-the->



Because original content takes time, viral content farms can publish more posts, and thus maximize their potential of reaching more audiences, by taking content from the Internet.<sup>84</sup> Whether it is called farming, curating, scraping, or (mistakenly) aggregating, it does not matter: the practice is the same.<sup>85</sup> Similar to what is called “over-aggregation,” viral content farms often take too much from one source, or, in some of the more egregious cases, fail to offer any attribution to the original content creator (i.e., plagiarize).<sup>86</sup> As a writer for *The Washington Post* notes: “Much of the content on these websites is stolen verbatim from others, or is similar enough for the distinction between plagiarism and aggregating to be moot, with a “h/t” buried beneath a piece that leads to a Russian nesting doll-style chain of attribution.”<sup>87</sup>

Sometimes the websites are publicly called out, especially if they are taking content from other aggregators or news publications.<sup>88</sup> In 2014, Ashton Kutcher’s viral content website Aplus (stylized as “A+”) was accused of lifting entire articles (and listicles) from *BuzzFeed* and *The Huffington Post*, among others.<sup>89</sup> Once the website was confronted with the allegations, it appeared to scrub every post—on its website, Twitter page, and Facebook page—from the web.<sup>90</sup> Aplus’s reaction, while extreme, is not much different than how other websites have responded when caught taking too much of someone else’s content. Websites typi-

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financial-times-on-evergreen-journalism/379990/ [https://perma.cc/AKG8-4YAG] (providing several tips on how to create content about a particular news event that can also be timeless so that it continues to draw readers months or years later).

<sup>83</sup> The hybrid term “infotainment” is used to denote content that is meant to inform and entertain. See *Infotainment*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/infotainment> [https://perma.cc/ZL6X-EPNM] (last visited Feb. 16, 2016).

<sup>84</sup> See Marantz, *supra* note 76.

<sup>85</sup> For purposes of clarity, I will use the term “farming” throughout this Note.

<sup>86</sup> See Marantz, *supra* note 76.

<sup>87</sup> O’Neil, *supra* note 75.

<sup>88</sup> See, e.g., Adrian Chen, *Remix Everything: BuzzFeed and the Plagiarism Problem*, GAWKER (June 28, 2012, 4:05 PM), <http://gawker.com/5922038/remix-everything-buzzfeed-and-the-plagiarism-problem> [https://perma.cc/PRN9-LSRY].

<sup>89</sup> Rob Price, *Is Ashton Kutcher’s New Viral Empire Built off Stolen Content?*, DAILY DOT (Aug. 7, 2014, 1:18 PM), <http://www.dailydot.com/business/a-plus-ashton-kutcher-stolen-content/> [https://perma.cc/VR74-7CEW].

<sup>90</sup> *Id.*

cally respond by either removing the challenged post, or updating the post with proper attribution.<sup>91</sup>

Not all viral content farms have been successful. After all, making a post actually go viral can be a difficult, and seemingly random, feat. Many viral content farms are smaller in size and cater to niche audiences, while others follow Demand Media's decline and go out of business.<sup>92</sup> Similar to Google's changes to its search algorithm, Facebook has also sought to change the algorithms that power its news feed to deliver users more high-quality content.<sup>93</sup> Viral content farms and other websites that relied on Facebook for the vast majority of its page views faced constant threats—one tweak to Facebook's algorithm by Facebook's engineers could decimate a viral content farm's socially driven traffic.<sup>94</sup> However, there has been one website, ViralNova, which has stood out among the many viral content farms because the website was able to monetize its business, grow its readership in order to become a competitor with the major news websites, and eventually sell for millions.

#### *E. ViralNova*

In May 2013, a new website that clearly aimed to enter the viral game quietly began drawing traffic.<sup>95</sup> Following the Upworthy model, the website sought to inspire, shock, and make readers rethink everything.<sup>96</sup> But, unlike its predecessors, ViralNova was tak-

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<sup>91</sup> See, e.g., Veix, *supra* note 5.

<sup>92</sup> See, e.g., Keith Phipps, *The End*, DISSOLVE (July 8, 2015), <http://thedissolve.com/news/6187-the-end/> [<https://perma.cc/6C5B-ASQW>].

<sup>93</sup> See Varun Kacholia & Minwen Ji, *News Feed FYI: Helping You Find More News to Talk About*, FACEBOOK NEWSROOM (Dec. 2, 2013), <https://newsroom.fb.com/news/2013/12/news-feed-fyi-helping-you-find-more-news-to-talk-about/> [<https://perma.cc/8VGU-FQE4>].

<sup>94</sup> See Ezra Klein, *How Facebook Could Kill the New Wave of Viral Media*, WASH. POST: WONKBLOG (Dec. 3, 2013), <http://www.washingtonpost.com/news/wonkblog/wp/2013/12/03/how-facebook-could-kill-the-new-wave-of-viral-media/> [<https://perma.cc/DEA7-FN2D>].

<sup>95</sup> See Felix Gillette, *Scott DeLong's Success Formula for Viral Nova*, BLOOMBERG BUSINESSWEEK (Apr. 24, 2014), <http://www.bloomberg.com/bw/articles/2014-04-24/scott-delongs-viral-nova-success-formula> [<https://perma.cc/CF9H-FUXH>].

<sup>96</sup> See Oliver Burkeman, *What I Found at Viral Nova, the Future of the Internet, Will Shatter Your World*, GUARDIAN (Oct. 30, 2013, 10:29 AM), <http://www.theguardian.com/news/2013/oct/30/viral-nova-social-media-emotion> [<https://perma.cc/GMY5-2479>].

ing viral content farming to the next level.<sup>97</sup> The media’s reaction to the website was overwhelmingly negative,<sup>98</sup> and journalists questioned who was behind the obscure website that had crept into the industry overnight and was now making waves.<sup>99</sup> By the end of the year, a vigilant reporter pulled back the curtain and uncovered the person behind ViralNova’s success.<sup>100</sup>

The founder, Scott DeLong, was the same man behind several other viral content websites—some successful, others not.<sup>101</sup> ViralNova was his latest endeavor, a side project<sup>102</sup> that he started from his Ohio bedroom.<sup>103</sup>

There were no employees; no office space; no Keurig bars or beer fridges or other trappings of start-up glory. Every day, DeLong personally trawled the social web for content, slapped it with the type of impossibly effusive headline sites like Clickhole now exist to mock, and watched the traffic flood in.<sup>104</sup>

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<sup>97</sup> See *id.*

<sup>98</sup> See, e.g., Chaire Sicha, *Are These the Worst Sites on the Internet?*, AWL (Oct. 18, 2013), <http://www.theawl.com/2013/10/are-these-the-worst-sites-on-the-internet> [<https://perma.cc/5FXD-QEQU>].

<sup>99</sup> Caroline Moss, *Everyone Wants to Know Who’s Behind ViralNova. You Won’t Believe the Answer.*, BUS. INSIDER (Dec. 2, 2013, 10:34 AM), <http://www.businessinsider.com/everyone-wants-to-know-whos-behind-viralnova-you-wont-believe-the-answer-2013-12> [<https://perma.cc/5JB8-GT3J>].

<sup>100</sup> See Alex Litel, *A BuzzFeed in a Box: The Person Behind ViralNova*, WIRE (Dec. 2, 2013, 9:02 AM), <http://www.thewire.com/technology/2013/12/buzzfeed-box-person-behind-viralnova/71529/> [<https://perma.cc/M533-U5Y9>].

<sup>101</sup> See *id.*

<sup>102</sup> Alex Litel, ‘*This Haunts Me at Night*’: *The Man Behind ViralNova on the Viral Bubble*, ATLANTIC: WIRE (Jan. 15, 2014, 1:14 PM), <http://www.thewire.com/technology/2014/01/haunts-me-night-man-behind-viralnova-viral-bubble/355677/> [<https://perma.cc/76GN-NGR4>].

<sup>103</sup> See Jessica Roy, *Inside ViralNova, the Most Cynical, Amazing, Horrific, and Ingenious Media Company in New York*, N.Y. MAG. (May 13, 2015, 12:28 PM), <http://nymag.com/daily/intelligencer/2015/05/viralnova-new-yorks-most-cynical-media-company.html> [<https://perma.cc/ZM24-4HMV>].

<sup>104</sup> Caitlin Dewey, *How Clickbait Grew up and Got (Sort of) Serious*, WASH. POST: INTERSECT (Mar. 10, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/03/10/how-clickbait-grew-up-and-got-sort-of-serious/> [<https://perma.cc/4ZEF-FQ7P>]; see Meranda Adams, *Finally, Viral Content That’s Actually Funny: The Onion to Launch ClickHole.com*, FISHBOWLNY (Apr. 30, 2014, 12:45 PM), <http://www.ad>

Once the website's traffic skyrocketed, due largely to Facebook referrals,<sup>105</sup> DeLong sought to turn around and sell the website<sup>106</sup> — a move he may have contemplated because ViralNova was one of the viral publishers affected by Facebook's news feed tweaks.<sup>107</sup> In 2014, DeLong sold ViralNova to a digital media company for one hundred million dollars.<sup>108</sup>

The journalism industry's reaction to ViralNova has been a mixture of astonishment and criticism.<sup>109</sup> As one reporter remarked, at peak popularity, ViralNova was “widely regarded by people in New York media as the emblem of Everything That's Wrong With Journalism Today.”<sup>110</sup> Some derided the website's success based on its content farming strategy and accused ViralNova of killing the Internet.<sup>111</sup> Others saw the potential in ViralNova's ability to command such high social media traffic, and questioned why traditional news media outlets like *The New York Times* were not vying to buy social-born publishers.<sup>112</sup>

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week.com/fishbowl/viral-content-funny-the-onion-clickhole/268192

[<https://perma.cc/5W4L-WVDX>].

<sup>105</sup> See Litel, *supra* note 102.

<sup>106</sup> Steve Kovach, *Exclusive: One-Man Juggernaut Viral Nova Is up for Sale*, BUS. INSIDER (Jan. 14, 2014, 4:11 PM), <http://www.businessinsider.com/viral-nova-considering-a-sale-2014-1> [<https://perma.cc/6HVY-SFRU>].

<sup>107</sup> See Christie Barakat, *Facebook Killed the Viral Star: Upworthy's Traffic Plummets After News Feed Tweaks*, SOCIALTIMES (Feb. 11, 2014, 6:58 AM), <http://www.adweek.com/socialtimes/facebook-killed-viral-star-upworthys-traffic-plummets-news-feed-tweaks/143466> [<https://perma.cc/D8P6-8JZB>]; Alyson Shontell, *Building a Startup on the Back of Facebook Is Like 'Opening a McDonald's on an Active Volcano,'* BUS. INSIDER (Jan. 27, 2014, 12:17 PM), <http://www.businessinsider.com/startups-that-rely-on-facebook-2014-1> [<http://perma.cc/PKE8-UH7D>].

<sup>108</sup> Mike Shields & Steven Perlberg, *ViralNova Just Got Bought for \$100 Million—Has the Viral Publisher Shakeout Begun?*, WALL ST. J. (July 9, 2015, 9:00 AM), <http://blogs.wsj.com/cmo/2015/07/09/viralnova-just-got-bought-for-100-million-has-the-viral-publisher-shakeout-begun/> [<https://perma.cc/2552-T6J4>].

<sup>109</sup> Roy, *supra* note 103.

<sup>110</sup> *Id.*

<sup>111</sup> See, e.g., Carles Buzz, *The \$100 Million Content Farm That's Killing the Internet*, MOTHERBOARD (July 10, 2015, 2:45 PM), <http://motherboard.vice.com/read/the-100-million-content-farm-thats-killing-the-internet> [<https://perma.cc/RQ98-UEA7>] (“The core idea behind content farms like ViralNova is that there is an infinite amount of internet. Every human on the planet can be reached with strategically generated content that is usually just a re-headlined [YouTube] video.”).

<sup>112</sup> See Mathew Ingram, *Here's Why the New York Times Should Have Acquired ViralNova*, FORTUNE (July 9, 2015, 12:54 PM), <http://fortune.com/2015/07/09/new->

The ViralNova of today, however, is markedly different than its earlier iteration.<sup>113</sup> Although the website’s writers still curate content from social media, ViralNova has adopted a copyright policy in accordance with the Digital Millennium Copyright Act and established a notice-and-takedown regime.<sup>114</sup> Copyright owners now have a way to report potential infringements and request that the website remove the content.<sup>115</sup> Likely as a result of this regime, ViralNova has taken down many popular posts.<sup>116</sup> And, aside from a few lawsuits,<sup>117</sup> ViralNova appears to have come away relatively unscathed with a one hundred million dollar valuation.

#### F. *Impact on Journalism and the Internet*

While *ViralNova*’s meteoric rise and ultimate sale may seem like a fairytale ending for entrepreneurs who hope to make it big in the startup game, the company’s skirting of legal issues and accepted norms in the journalism industry present a larger issue. ViralNova is just one example of a small startup that has undertaken questionable practices to succeed (and entertain readers). Yet, unlike other viral content farms that have tried and failed, ViralNova became a mammoth traffic driver and inserted itself into an industry that prides itself on accuracy, objectivity, and fair play.<sup>118</sup>

By commanding high levels of daily traffic, viral content farms have established themselves as competitors to more reputable news websites. Readers may not look to viral content farms for investiga-

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york-times-viralnova/ [https://perma.cc/9PKM-8NTD] (“The point wouldn’t be to generate the same kind of content that ViralNova does, or use it as a revenue-generating machine to subsidize the serious journalism, but to try and figure out how to make more serious content operate in a similar way—to take advantage of the kinds of emotional triggers that ViralNova and others use.”); Shields & Perlberg, *supra* note 108.

<sup>113</sup> See Dewey, *supra* note 104.

<sup>114</sup> See *DMCA Policy*, VIRALNOVA, <http://www.viralnova.com/dmca-policy> [https://perma.cc/QXR9-VMWX] (last visited Feb. 27, 2016).

<sup>115</sup> See *id.*

<sup>116</sup> See Burkeman, *supra* note 96. Nine of the ViralNova posts linked to in the Burkeman article have since been taken offline.

<sup>117</sup> In 2015, there were at least two pending lawsuits against ViralNova alleging copyright infringement. See *generally* Complaint, Werner v. Viralnova LLC, No. 1:15-cv-05143 (S.D.N.Y. July 1, 2015); Complaint, Peter Menzel v. ViralNova, LLC, No. 2:15-cv-04252 (C.D. Cal. June 5, 2015).

<sup>118</sup> See *SPJ Code of Ethics*, SOC’Y PROF. JOURNALISTS, <http://www.spj.org/ethicscode.asp> [http://perma.cc/5XDM-FQ7P] (last visited Feb. 27, 2016).

tive reporting, or “hard” news, but in diverting traffic away from other websites, viral content farms are pressuring traditional news outlets to adapt new strategies to try to recapture audiences—strategies which may not be good for journalism, or beneficial for society.<sup>119</sup>

Online users may be consuming information differently,<sup>120</sup> but that does not imply that content providers have free reign to present any content however they like to grab readers’ attention. By mass-producing low-quality posts that only aim to entertain, viral content farms may be devaluing the Internet.<sup>121</sup> The Internet may be a marketplace of ideas, but by taking the creative content of others and reproducing it with a new headline, websites that employ viral content farming methods are manipulating the system for their own financial gain. News organizations that aggregate content may also be guilty of relying too heavily on the creative content of other Internet users,<sup>122</sup> so the question becomes where to draw the line.

## II. COMBATING CONTENT THIEVES

Given that industry-instituted responses, such as Google’s algorithm changes and Facebook’s news feed updates, have not been sufficient to thoroughly stem the flow of content farming, it is necessary to consider other possible resolutions. Whether derived

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<sup>119</sup> See Dewey, *supra* note 104 (“Meanwhile, traditional media are looking more and more like Viral Nova once did: building “curiosity gaps” into headlines and milking Facebook for every last trembling drop of social traffic. News sites from the *Huffington Post* to the *New York Times* have taken hits for baiting readers with overhyped headlines.”).

<sup>120</sup> See Monica Anderson & Andrea Caumont, *How Social Media Is Reshaping News*, PEW RES. CTR. (Sept. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/> [<https://perma.cc/6SKR-LG3C>]; Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, N.Y. TIMES (Oct. 26, 2014), <http://www.nytimes.com/2014/10/27/business/media/how-facebook-is-changing-the-way-its-users-consume-journalism.html> [<https://perma.cc/M4C5-P96J>]; Thompson, *supra* note 46.

<sup>121</sup> See Buzz, *supra* note 111.

<sup>122</sup> See, e.g., *PSA—HuffingtonPost Articles Are No Longer Welcome in r/UpliftingNews and Will Be Immediately Removed Moving Forward*, REDDIT (Sept. 12, 2014), [https://www.reddit.com/r/UpliftingNews/comments/2g669b/psa\\_huffingtonpost\\_articles\\_are\\_no\\_longer\\_welcome/](https://www.reddit.com/r/UpliftingNews/comments/2g669b/psa_huffingtonpost_articles_are_no_longer_welcome/) [<https://perma.cc/YV22-L9MU>] [hereinafter *PSA*].

from ethics or the law, the optimal solution would quell the growth of viral content farming and deter the underlying practices responsible for the surge in low-quality content. This Part introduces three possible sources for a solution to combat content thieves.

*A. An Ethical Solution Within a Self-Regulated Industry*

Arguably the most obvious solution would come from within the industry itself. After all, the journalism industry has a set of ethical standards and accepted norms in place that guide journalists on a day-to-day basis.<sup>123</sup> The Society of Professional Journalists (“SPJ”) Code of Ethics sets out four principles and encourages all people in media to use them in practice: (1) seek truth and report it, (2) minimize harm, (3) act independently, and (4) be accountable and transparent.<sup>124</sup> The American Society of News Editors (“ASNE”), another leading organization that promotes fair, principled journalism,<sup>125</sup> also established several principles that focus on responsible and accurate reporting, as well as fair play, to guide journalists.<sup>126</sup>

Although the SPJ Code of Ethics, ASNE Statement of Principles, and the many unspoken rules among journalists are not enforceable,<sup>127</sup> they may create enough impetus within the industry to encourage writers—particularly those who consider themselves to be professional journalists—to follow them.<sup>128</sup> For example, look at how the industry has treated cases of plagiarism.<sup>129</sup> In some cases,

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<sup>123</sup> See *SPJ Code of Ethics*, *supra* note 118; see also *Statement of Principles*, AM. SOC’Y NEWS EDITORS, <http://asne.org/content.asp?pl=24&sl=171&contentid=171> [<https://perma.cc/UVG6-K6C2>] (last visited Mar. 1, 2016).

<sup>124</sup> *SPJ Code of Ethics*, *supra* note 118.

<sup>125</sup> *About Us*, AM. SOC’Y NEWS EDITORS, <http://asne.org/content.asp?pl=24&contentid=24> [<https://perma.cc/Z2U5-RBJA>] (last visited Mar. 1, 2016).

<sup>126</sup> *Statement of Principles*, *supra* note 123.

<sup>127</sup> See Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 781 (2009).

<sup>128</sup> Failing to follow a widely accepted industry standard would likely have ramifications on the journalist’s reputation and future career prospects.

<sup>129</sup> Plagiarism is defined as “the act of using another person’s words or ideas without giving credit to that person.” *Plagiarism*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/plagiarism> [<https://perma.cc/FDS8-CPK3>] (last visited Mar. 1, 2016). Plagiarism is often treated as an ethical matter, but the unattributed copying sometimes constitutes a legal wrong. Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual*

news organizations have chosen to make an example of exposed plagiarists by suspending them or terminating their employment and either removing or amending the plagiarized passages.<sup>130</sup> This is true in many of the more deplorable cases, in which entire passages were copied, and in some of the minor instances, such as cases of accidental over-aggregation—although punishments may range widely from employer to employer.<sup>131</sup>

While some plagiarists have gotten off relatively scot-free, news of their transgressions may follow them for the rest of their career.<sup>132</sup> They may not have much trouble finding work in a different role within the industry, or in another field entirely, but their offense may obstruct them from working at some of the more reputable, traditional media companies.

Aside from the SPJ Code of Ethics and ASNE Statement of Principles, most news organizations also have their own ethical

*Property Rights*, 54 HASTINGS L.J. 167, 200 (2002) (discussing the circumstances in which unattributed copying might constitute copyright infringement, unfair competition, or a violation of moral rights).

<sup>130</sup> See, e.g., Paul Farhi, Washington Post *Suspends Reporter for Plagiarizing Stories on Tucson Shooting*, WASH. POST (Mar. 16, 2011), [https://www.washingtonpost.com/lifestyle/style/washington-post-suspends-reporter-for-plagiarizing-stories-on-tucson-shooting/2011/03/16/ABzKfHh\\_story.html](https://www.washingtonpost.com/lifestyle/style/washington-post-suspends-reporter-for-plagiarizing-stories-on-tucson-shooting/2011/03/16/ABzKfHh_story.html) [https://perma.cc/ZTW6-8SN8]; Peter Finocchiaro, *Wired Fires Jonah Lehrer: Magazine Discovers Even More Journalistic Misdeeds*, HUFFINGTON POST (Sept. 1, 2012, 2:13 AM), [http://www.huffingtonpost.com/2012/09/01/wired-fires-jonah-lehrer-\\_n\\_1848459.html](http://www.huffingtonpost.com/2012/09/01/wired-fires-jonah-lehrer-_n_1848459.html) [https://perma.cc/XW3H-GR2M]; Hadas Gold & Jennifer Shutt, *BuzzFeed Fires Benny Johnson for Plagiarism*, POLITICO (July 26, 2014, 1:05 AM), <http://www.politico.com/blogs/media/2014/07/buzzfeed-fires-benny-johnson-for-plagiarism-192886> [https://perma.cc/FT7B-BLWV]; Christine Haughney, *CNN and Time Suspend Journalist After Admission of Plagiarism*, N.Y. TIMES: MEDIA DECODER (Aug. 10, 2012, 3:26 PM), <http://mediadecoder.blogs.nytimes.com/2012/08/10/time-magazine-to-examine-plagiarism-accusation-against-zakaria/> [https://perma.cc/YJ4N-5R93].

<sup>131</sup> See David Uberti, *Journalism Has a Plagiarism Problem. But It's Not the One You'd Expect*, COLUM. JOURNALISM REV. (Nov. 18, 2014), [http://www.cjr.org/behind\\_the\\_news/journalism\\_has\\_a\\_plagiarism\\_pr.php](http://www.cjr.org/behind_the_news/journalism_has_a_plagiarism_pr.php) [https://perma.cc/K7VW-ETJD].

<sup>132</sup> See Vicki Salemi, *New Survey Reveals Job Interview Stats: 48 Percent of Employers Google Candidates*, ADWEEK: FISHBOWLNY (Oct. 17, 2013, 11:23 AM), <http://www.adweek.com/fishbowlny/new-survey-reveals-lessons-for-job-seekers-about-interviews/324836> [https://perma.cc/5UCF-4NN2].



standards in place.<sup>133</sup> A violation of one of the company-instituted standards, would then be cause for a possible disciplinary action.

### B. *Hot News Misappropriation*

One legal doctrine that has been proposed as a tool to be used by news organizations against online aggregators is hot news misappropriation.<sup>134</sup> Described by the Supreme Court in the landmark 1918 case *International News Service v. Associated Press*, hot news misappropriation, which was characterized as an unfair competition doctrine, was intended to protect “quasi property” rights in news.<sup>135</sup> A content provider (such as a newspaper or wire service), who had expended labor, skill, and money to gather information, could bring the claim in order to prevent a free-riding competitor from reaping what it had not sown.<sup>136</sup> However, the Court severely limited the precedential value of the decision in 1938 with its holding in *Erie Railroad Co. v. Tompkins*, which eliminated federal common law.<sup>137</sup> Hot news claims endured, but only in states that embraced it under state common law.<sup>138</sup>

In 1976, the doctrine encountered another hurdle with the passage of the Copyright Act, which included a provision preempting state law claims that involve rights “equivalent” to exclusive copy-

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<sup>133</sup> See, e.g., *AP News Values & Principles*, ASSOCIATED PRESS, <http://www.ap.org/company/News-Values> [<https://perma.cc/DP2A-9AK6>] (last visited Mar. 4, 2016); *Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments*, N.Y. TIMES (Sept. 2004), [http://www.nytc.com/wp-content/uploads/NYT\\_Ethical\\_Journalism\\_0904-1.pdf](http://www.nytc.com/wp-content/uploads/NYT_Ethical_Journalism_0904-1.pdf) [<https://perma.cc/LC3N-PS7W>].

<sup>134</sup> See John C. McDonnell, Case Comment, *The Continuing Viability of the Hot News Misappropriation Doctrine in the Age of Internet News Aggregation*, 10 NW. J. TECH. & INTEL. PROP. 255, 256 (2012).

<sup>135</sup> 248 U.S. 215, 236 (1918).

<sup>136</sup> See *id.*; see also Joseph A. Tomain, *First Amendment, Fourth Estate, and Hot News: Misappropriation Is Not a Solution to the Journalism Crisis*, 2012 MICH. ST. L. REV. 769, 793 (2012) (discussing the policy underlying hot news).

<sup>137</sup> 304 U.S. 64, 78 (1938); see also Jeffrey L. Harrison & Robyn Shelton, *Deconstructing and Reconstructing Hot News: Toward a Functional Approach*, 34 CARDOZO L. REV. 1649, 1655 (2013).

<sup>138</sup> Only five states recognize hot news misappropriation as a cause of action. See Harrison & Shelton, *supra* note 137, at 1663 n.96; Bruce W. Sanford, Bruce D. Brown & Laurie A. Babinski, *Saving Journalism with Copyright Reform and the Doctrine of Hot News*, 26 COMM. L., Dec. 2009, at 8, 9.

right protections.<sup>139</sup> The Second Circuit described the surviving doctrine in the 1997 case *National Basketball Association v. Motorola, Inc.*<sup>140</sup> In doing so, the court limited its application, holding that the hot news claim is limited to cases where:

(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.<sup>141</sup>

Yet, that was not the final blow for hot news. In *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, several financial services firms used the hot news misappropriation tort in an action against an Internet-based subscription news aggregator based on the aggregator's continual publication of the firms' recommendations from their research reports without authorization.<sup>142</sup> The Second Circuit concluded that "a Firm's ability to make news—by issuing a Recommendation that is likely to affect the market price of a security—does not give rise to a right for it to control who breaks that news and how."<sup>143</sup> The court also noted that the Supreme Court's decision in *International News Service* is "no longer good law" and only "maintains a ghostly presence as a description of a tort theory, not as precedential establishment of a tort cause of action."<sup>144</sup>

Despite the *Barclays* decision, some scholars have argued that the misappropriation tort should be revived by the courts and applied in cases of online news providers.<sup>145</sup> Others propose legisla-

<sup>139</sup> See 17 U.S.C. § 301 (2012).

<sup>140</sup> 105 F.3d 841, 845 (2d Cir. 1997).

<sup>141</sup> *Id.*

<sup>142</sup> 650 F.3d 876, 876, 885 (2d Cir. 2011).

<sup>143</sup> *Id.* at 907.

<sup>144</sup> *Id.* at 894.

<sup>145</sup> See Clay Calvert, Kayla Gutierrez & Christina Locke, *All the News That's Fit to Own: Hot News on the Internet & the Commodification of News in Digital Culture*, 10 WAKE FOREST INTELL. PROP. L.J. 1, 26–28 (2009); McDonnell, *supra* note 134, at 275.

tion as a better alternative and recommend that a federal hot news law, or a flexible statutory scheme based on the key elements of the doctrine, should be enacted.<sup>146</sup> However, the doctrine also has numerous critics. The most noteworthy criticism, perhaps, is that First Amendment freedom of expression interests render the doctrine “seriously suspect, if not nugatory.”<sup>147</sup>

### C. Copyright Law

Allegations of hot news misappropriation are often accompanied by copyright infringement claims. While it may seem like a no-brainer that news organizations would try to bring as many plausible claims as possible, hot news misappropriation may often be included to pick up where copyright leaves off—the “sweat of the brow.”<sup>148</sup> Although copyright law may not embrace the labor, skill, and money news-gatherers put into their work, it does incentivize creation.

#### 1. U.S. Copyright Regime

Flowing from the U.S. Constitution,<sup>149</sup> copyright law intends to give copyright holders some exclusive rights in their creative works, but not give them too much to balance the competing public interest in making literature, music, and other arts widely availa-

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<sup>146</sup> See Lauren M. Gregory, *Hot Off the Presses: How Traditional Newspaper Journalism Can Help Reinvent the “Hot News” Misappropriation Tort in the Internet Age*, 13 VAND. J. ENT. & TECH. L. 577, 611 (2011); Harrison & Shelton, *supra* note 137, at 1684–85; Jeena Moon, *The “Hot News” Misappropriation Doctrine, the Crumbling Newspaper Industry, and Fair Use As Friend and Foe: What Is Necessary to Preserve “Hot News,”* 28 CARDOZO ARTS & ENT. L.J. 631, 660–61 (2011).

<sup>147</sup> See Clay Calvert & Matthew D. Bunker, *Framing a Semantic Hot-News Quagmire in Barclays Capital v. Theflyonthewall.com: Of Missed Opportunities and Unresolved First Amendment Issues*, 17 VA. J.L. & TECH. 50, 54 (2012); see also Tomain, *supra* note 136, at 822; Zachary Davidson, Note, *The Next Balancing Act: Can the Law Save the Traditional News Media Without Eliminating News Aggregators?*, 85 S. CAL. L. REV. POSTSCRIPT 88, 105–06 (2012).

<sup>148</sup> See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 353 (1991).

<sup>149</sup> U.S. CONST. art. I, § 8, cl. 8. (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

ble.<sup>150</sup> Thus, while the immediate effect of copyright law “is to secure a fair return for an ‘author’s’ creative labor,” the ultimate aim is “to stimulate artistic creativity for the general public good.”<sup>151</sup>

Under the current statutory regime, a copyright exists as soon as an original work of authorship is fixed in a tangible medium of expression.<sup>152</sup> Registration with the U.S. Copyright Office is not required to obtain copyright protection,<sup>153</sup> but it does provide benefits,<sup>154</sup> and registration is necessary to bring a copyright infringement lawsuit.<sup>155</sup> Thus, to qualify for copyright protection, a work must meet certain requirements, such as originality, authorship, and fixation.<sup>156</sup>

While the statutes provide a general framework for U.S. copyright law, the statutes say little about what each requirement entails—for example, what does originality actually mean? The courts have filled in the blanks, and given more depth to Congress’ words. Originality requires independent creation by an author and a mi-

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<sup>150</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155–56 (1975); see also Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 644 (2006) (discussing the principles underlying utilitarian copyright law).

<sup>151</sup> *Twentieth Century Music*, 422 U.S. at 156.

<sup>152</sup> See 17 U.S.C. § 102 (2012).

<sup>153</sup> See § 408(a).

<sup>154</sup> For example, the certificate of registration—a publicly accessible record that lists the dates of creation and publication and the name of the copyright owner—can serve as proof of the validity of the copyright in a judicial proceeding. See § 410. Also, a copyright owner cannot recover statutory damages or attorney’s fees without timely registration. See § 412.

<sup>155</sup> See § 411. Content creators can register a copyright with the Copyright Office using the online application, which generally takes up to eight months to process, or the paper application, which can take up to thirteen months. See *eCO Registration System*, U.S. COPYRIGHT OFF., <http://copyright.gov/eco/> [<https://perma.cc/82X7-PUCS>] (last visited Mar. 4, 2016). However, “[w]hen the Copyright Office issues a registration certificate, it assigns as the effective date of registration the date it received all required elements in acceptable form, regardless of how long it took to process the application and mail the certificate of registration.” *Registering a Copyright with the U.S. Copyright Office*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/fls/sl35.pdf> [<https://perma.cc/8RV2-TMYF>] (last visited Mar. 16, 2016). The Copyright Office may also expedite registration under special circumstances, such as when litigation is anticipated. *Stopping Copyright Infringement*, U.S. COPYRIGHT OFF., <http://copyright.gov/help/faq/faq-infringement.html> [<https://perma.cc/VRB3-4VH2>] (last visited Mar. 4, 2016). Expedited registration applications may be processed within 5–10 working days. *Id.*

<sup>156</sup> See 17 U.S.C. § 102.

nimal amount of creativity.<sup>157</sup> The requisite level is extremely low,<sup>158</sup> and the creativity need not be artistic.<sup>159</sup> As the Supreme Court implied in *Bleistein v. Donaldson Lithographing Co.*, judges are not art critics and should not judge the artistic merit or worth of a work.<sup>160</sup>

Case law has established that an author is the originator or mastermind "who really represents, creates, or gives effect to the idea, fancy, or imagination."<sup>161</sup> In most cases, the requirement of authorship is not an issue. However, establishing authorship may become more complicated when there are multiple authors.<sup>162</sup>

A work is considered "fixed" when "its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>163</sup> Although this requirement becomes more complicated in instances of fleeting fixation,<sup>164</sup> it is clear-cut in cases of published works.<sup>165</sup> Courts have generally held that posting material on the Internet constitutes publication.<sup>166</sup>

It is important to point out that there are particular elements of a work that are not entitled to copyright protection, such as ideas, concepts, and procedures.<sup>167</sup> Words and short phrases also cannot

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<sup>157</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>158</sup> *Id.* ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. 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." (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 108[C][1] (1990))).

<sup>159</sup> See *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951) ("No matter how poor artistically the 'author's' addition, it is enough if it be his own.").

<sup>160</sup> See 188 U.S. 239, 251 (1903).

<sup>161</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884).

<sup>162</sup> See generally Scott C. Brophy, *Joint Authorship Under the Copyright Law*, 16 HASTINGS COMM. & ENT. L.J. 451 (1994).

<sup>163</sup> See 17 U.S.C. § 101 (2012).

<sup>164</sup> See, e.g., *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008) (finding that copyrighted programs were embodied in a cable company's data buffer for only a "transitory" period, which failed the duration requirement of fixation).

<sup>165</sup> See 17 U.S.C. § 104.

<sup>166</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167 (9th Cir. 2007); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401-02 (S.D.N.Y. 2002).

<sup>167</sup> 17 U.S.C. § 102.

be copyrighted.<sup>168</sup> Copyright employs the phrase “idea/expression dichotomy” to distinguish between the unprotectable idea and protectable expression that make up a work. As the Supreme Court noted in *Harper & Row Publishers, Inc. v. Nation Enterprises*, the distinction “strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.”<sup>169</sup>

Thus, the facts and underlying information in news stories are not copyrightable.<sup>170</sup> The news itself is a report of the history of the day, so it belongs to the public.<sup>171</sup> But, the expression of the news—the author’s particular word choice and narration—does qualify for copyright protection.<sup>172</sup> This may extend to a compilation, composed primarily of facts, if it possesses the requisite amount of originality.<sup>173</sup> Again, while the facts themselves are per se not copyrightable, the way they are structured within the compilation may be protected by copyright law if the facts have been “selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>174</sup>

Once a copyright is established, the owner has six exclusive rights to the work, such as the right to reproduce the copyrighted work and the right to distribute copies of the work.<sup>175</sup> Additionally, authors of a work of visual art have rights of attribution and integrity, which copyright law does not extend to authors of literary

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<sup>168</sup> 37 C.F.R. § 202.1 (1999).

<sup>169</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).

<sup>170</sup> *See id.*

<sup>171</sup> *See Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

<sup>172</sup> *See Harper & Row*, 471 U.S. at 556.

<sup>173</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 340 (1991).

<sup>174</sup> 17 U.S.C. § 101 (2012); *see also Feist*, 499 U.S. at 348 (“These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.”).

<sup>175</sup> *See* 17 U.S.C. § 106.

works.<sup>176</sup> However, the United States does not embrace these moral rights for literary works.<sup>177</sup>

## 2. Making a Case for Copyright Infringement

If a copyright owner is able to show that she has a valid copyright in an original work of authorship and that one of her six exclusive rights has been violated, she may have a case for copyright infringement.<sup>178</sup> Under the copyright regime, only the “legal or beneficial owner of an exclusive right under a copyright” has standing to sue for infringement of that right.<sup>179</sup> A third party who does not have an ownership interest or an exclusive right in the copyrighted work cannot bring an infringement claim.<sup>180</sup>

Direct infringement of a copyright is similar to strict liability in that the statute does not require a particular state of mind; however, willfulness may be relevant to an award of statutory damages.<sup>181</sup> While courts differ in their execution of the analysis, “[c]opyright infringement is established when the owner of a valid copyright demonstrates unauthorized copying.”<sup>182</sup>

To demonstrate unauthorized copying, the plaintiff must first “show that his work was actually copied”; second, he must establish “substantial similarity” or that “the copying amounts to an improper or unlawful appropriation,” i.e., (i) that it was protected expression in the earlier work that was copied

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<sup>176</sup> See § 106A (“[T]he author of a work of visual art shall have the right to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create.”).

<sup>177</sup> See *id.*; William Belanger, *U.S. Compliance with the Berne Convention*, 3 GEO. MASON INDEP. L. REV. 373, 383 (1995).

<sup>178</sup> See 17 U.S.C. § 501.

<sup>179</sup> See § 501(b).

<sup>180</sup> See *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1169 (9th Cir. 2013); *accord Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (en banc).

<sup>181</sup> See 17 U.S.C. § 504.

<sup>182</sup> *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997).

and (ii) that the amount that was copied is “more than de minimis.”<sup>183</sup>

Copying may be established through direct evidence, such as an admission or eyewitness testimony, or through a showing that the alleged infringer had access to the copyrighted work and that the two works are similar enough to make independent creation unlikely.<sup>184</sup> Access is often described as providing a “reasonable opportunity” or “reasonable possibility” of viewing the plaintiff’s work,<sup>185</sup> and can be proven by either establishing a chain of events between the plaintiff’s work and the defendant’s access to that work, or by showing that the plaintiff’s work was widely disseminated.<sup>186</sup> In addition, some courts recognize that access can be inferred if the two works are *strikingly* similar.<sup>187</sup>

After a court determines in the affirmative that the plaintiff’s work was copied, it turns to the question of whether the defendant copied too much. To prove substantial similarity, the plaintiff must establish “(i) that it was protected expression in the earlier work that was copied and (ii) that the amount that was copied is ‘more than de minimis.’”<sup>188</sup> While the federal circuits agree on the essence of substantial similarity, circuits differ in their approach to how substantial similarity is proven in court.<sup>189</sup> To determine whether the defendant’s work is “substantially similar,” the Second Circuit employs a subjective test that compares the copyrighted work’s “total concept and overall feel” to that of the challenged work.<sup>190</sup> The Ninth Circuit, on the other hand, undertakes a

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<sup>183</sup> *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003) (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’n Grp., Inc.*, 150 F.3d 132, 137–38 (2d Cir. 1998)).

<sup>184</sup> See *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 140 (2d Cir. 1992); accord *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

<sup>185</sup> 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.02[A] (1999).

<sup>186</sup> See 2 PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* § 8.3.1.1, at 90–91 (1989).

<sup>187</sup> See *Selle v. Gibb*, 741 F.2d 896, 904 (7th Cir. 1984).

<sup>188</sup> *Tufenkian*, 338 F.3d at 131.

<sup>189</sup> See Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 719 (2010); Douglas Y’Barbo, *The Origin of the Contemporary Standard for Copyright Infringement*, 6 J. INTELL. PROP. L. 285, 285 (1999).

<sup>190</sup> See *Tufenkian*, 338 F.3d at 133.



two-part test: “the ‘extrinsic’ test considers whether two works share a similarity of ideas and expression based on external, objective criteria,” while “the subjective ‘intrinsic test’ asks whether an ‘ordinary, reasonable observer’ would find a substantial similarity of expression of the shared idea.”<sup>191</sup>

### 3. Secondary Liability and Safe Harbors for Online Service Providers

In addition to direct infringement, as discussed above, copyright law also recognizes two types of secondary liability—vicarious liability and contributory liability.<sup>192</sup> To bring a case of secondary liability, a plaintiff must first establish that direct infringement of a § 106 right has occurred, even if the named defendant did not directly infringe.<sup>193</sup> Vicarious liability applies “[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired.”<sup>194</sup> Contributory liability may be established when “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”<sup>195</sup>

However, online service providers (“OSPs”) have certain immunities available to them, if they are able to meet specific requirements.<sup>196</sup> The Digital Millennium Copyright Act, which was enacted by Congress in 1998 to bring U.S. copyright up-to-date in the digital age, established several safe harbors for OSPs that en-

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<sup>191</sup> *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996) (quoting *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994)).

<sup>192</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433–35 (1984). (“The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.”)

<sup>193</sup> *See* 17 U.S.C. § 501 (2012).

<sup>194</sup> *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

<sup>195</sup> *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>196</sup> *See* 17 U.S.C. § 512.

gage in enumerated types of activity.<sup>197</sup> The limitations on liability may apply to service providers that engage in (1) transitory digital network communications, such as providing Internet access, (2) system caching, (3) storage of information on systems or networks at the discretion of users, or (4) information location tools, such as linking.<sup>198</sup> Each safe harbor lists precise statutory requirements that an OSP must meet in order to qualify for the immunity.<sup>199</sup> The third and fourth safe harbors, which are arguably the most important to user-generated content platforms and aggregation websites, are also the most relevant to the topic at hand.<sup>200</sup>

OSPs that provide “server space for a user’s website, for a chat room, or other forum in which material may be posted at the direction of users” may qualify for the third safe harbor.<sup>201</sup> To receive the safe harbor’s protection, an OSP must first show that it does not have actual knowledge of infringing activity on the network or system.<sup>202</sup> In the absence of this knowledge, the OSP may instead show that it “is not aware of facts or circumstances from which infringing activity is apparent,” or “upon obtaining such knowledge or awareness, [that it] acts expeditiously to remove, or disable access to, the material.”<sup>203</sup> Second, if the OSP has the right and ability to control such activity, the OSP must show that it “does not receive a financial benefit directly attributable to the infringing activity.”<sup>204</sup> Third, the OSP should establish a “notice and takedown” procedure to expeditiously remove or disable access to material that is claimed to be infringing.<sup>205</sup> Although § 512 does not *require* use of the procedure, if an OSP wishes to receive the benefit

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<sup>197</sup> See S. REP. NO. 105-190, at 2, 19 (1998).

<sup>198</sup> See 17 U.S.C. § 512; see also Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 235 (2009).

<sup>199</sup> See 17 U.S.C. § 512.

<sup>200</sup> See John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 CARDOZO L. REV. 1821, 1835 (2013).

<sup>201</sup> S. REP. NO. 105-190, at 43.

<sup>202</sup> 17 U.S.C. § 512(c)(1)(A)(i).

<sup>203</sup> § 512(c)(1)(A)(ii)-(iii).

<sup>204</sup> § 512(c)(1)(B).

<sup>205</sup> See § 512(c)(1)(C). To qualify for the safe harbor, the OSP must respond “expeditiously to remove, or disable access to” any material that is claimed to be infringing. *Id.* However, the statute also describes a process through which the user may challenge the OSP’s removal. See § 512(g).

of the safe harbor, it “must ‘take down’ or disable access to infringing material residing on its system or network of which it has actual knowledge or that meets the ‘red flag’ test, even if the copyright owner or its agent does not notify it of a claimed infringement.”<sup>206</sup> As part of the procedure, the OSP must designate an agent to receive notification of claimed infringement from copyright owners, and make that information publicly available by providing it to the U.S. Copyright Office and posting it on its website.<sup>207</sup>

The fourth safe harbor, which provides immunity for service providers that refer or link users “to an online location containing infringing material or infringing activity,” sets out nearly identical requirements as the third safe harbor.<sup>208</sup> The only difference is the notice and takedown regime, which does not include the same requirement of a designated agent.<sup>209</sup>

#### 4. What About Fair Use?

Even if a plaintiff is able to establish copyright infringement, there are limitations to copyright protection and exceptions to infringements that may apply. The most well known limitation, perhaps, is the judge-made fair use doctrine, which was codified in the Copyright Act of 1976.<sup>210</sup> Derived from the criteria set out by Justice Story in a decision penned in 1841,<sup>211</sup> the doctrine sets out four factors that courts should consider when examining the issue and

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<sup>206</sup> S. REP. NO. 105-190, at 45. Congress created the “red flag” test to evaluate whether the OSP had apparent knowledge of infringing activity, meaning that the OSP was aware of the circumstances associated with the infringing activity so that the infringement is *apparent* from the circumstances. Liliana Chang, Note, *The Red Flag Test for Apparent Knowledge Under the DMCA § 512(c) Safe Harbor*, 28 CARDOZO ARTS & ENT. L.J. 195, 201-02 (2010); *see also* *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (“[T]he actual knowledge provision turns on whether the provider actually or ‘subjectively’ knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”).

<sup>207</sup> *See* 17 U.S.C. § 512(c)(2).

<sup>208</sup> *See* § 512(d).

<sup>209</sup> *See* § 512(d)(3).

<sup>210</sup> *See* § 107.

<sup>211</sup> *See* *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841).

determining whether a finding of fair use would serve the underlying objectives of copyright.<sup>212</sup> The statutory factors include:

(1) the purpose and character of the user, 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.<sup>213</sup>

Criticism, comment, and news reporting are listed as examples within the statute.<sup>214</sup> However, there are no bright-line rules, so courts must use all the factors to evaluate uses on a case-by-case basis and weigh the results together, in light of the purpose of copyright.<sup>215</sup> “The 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.”<sup>216</sup> The fair use doctrine thus “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>217</sup>

The purpose and character of a fair use is often reasonable and customary or transformative.<sup>218</sup> For the first factor, a court asks “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, mean-

<sup>212</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

<sup>213</sup> 17 U.S.C. § 107.

<sup>214</sup> *See id.*

<sup>215</sup> *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

<sup>216</sup> Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 608 (2d Cir. 2006) (quoting Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., 150 F.3d 132, 141 (2d Cir.1998)).

<sup>217</sup> Stewart v. Abend, 495 U.S. 207, 236 (1990) (quoting Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980)).

<sup>218</sup> *See* Leval, *supra* note 212, at 1111 (“Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.”); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1159–60 (1990) (noting that a use should be found to be fair if it is “within . . . accepted norms and customary practice.”).

ing or message.”<sup>219</sup> However, not all alterations are considered transformative. As Judge Pierre Leval notes: “A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test.”<sup>220</sup> To be considered transformative, the secondary use must add value to the original.<sup>221</sup> So if the quoted work is used as raw material and “transformed in the creation of new information, new aesthetics, new insights and understanding,” then that would be considered transformative.<sup>222</sup> A court also considers whether the use is of a commercial nature.<sup>223</sup> The focus of this inquiry is not whether the use is profit-driven, but “whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price.”<sup>224</sup>

For the second factor, a court considers whether the copyrighted work is one of fact or fiction, and recognizes that creative works are “closer to the core of intended copyright protection.”<sup>225</sup> Thus, “the scope of fair use is broader with respect to factual works than it is with respect to works of fiction.”<sup>226</sup>

The third factor examines how much and what parts of the copyrighted work were copied. The inquiry “calls for thought not only about the quantity of the materials used, but about their quality and importance” within the copyrighted work.<sup>227</sup> For example, in *Harper & Row*, the Supreme Court noted that even though The Nation Magazine had only copied 300 words from President Ford’s memoir, the magazine had taken “essentially the heart of the book.”<sup>228</sup> Further, the magazine structured its article around

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<sup>219</sup> *Campbell*, 510 U.S. at 569.

<sup>220</sup> Leval, *supra* note 212, at 1111.

<sup>221</sup> *See id.*

<sup>222</sup> *See id.*

<sup>223</sup> 17 U.S.C. § 107(1) (2012).

<sup>224</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

<sup>225</sup> *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994); *see also Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006). The court may also consider whether the work is published or unpublished, given that the right of first publication is an important right held by the copyright owner. *See Harper & Row*, 471 U.S. at 553–44. However, that characteristic is not relevant to the subject of this Note.

<sup>226</sup> *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 557 (S.D.N.Y. 2013).

<sup>227</sup> *Campbell*, 510 U.S. at 587.

<sup>228</sup> 471 U.S. at 564–66.

the quoted excerpts so that the verbatim quotes served as key focal points in the article.<sup>229</sup> The Court noted: “[T]he fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else’s copyrighted expression.”<sup>230</sup>

The fourth and final factor is similar to the second prong of the first inquiry but focuses on the extent of the market harm caused by specific actions of the alleged infringer.<sup>231</sup> A court also asks “whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.”<sup>232</sup> It is important to note that the potential market harm should not include the loss of licensing fees from the infringing work, given that a loss would be a circumstance in almost case. Instead, a court should consider only the loss from “traditional, reasonable, or likely to be developed markets when examining and assessing a secondary use’s ‘effect upon the potential market for or value of the copyrighted work.’”<sup>233</sup>

## 5. Licensing

Though copyright ownership initially vests in the author of the work,<sup>234</sup> that person may transfer ownership of the copyright or give someone permission to use the copyrighted work by granting the party a license to exercise one or more of the § 106 rights.<sup>235</sup> The license may be exclusive, meaning that the licensee will be the *only* person who may exercise the rights, or non-exclusive, in which case the copyright owner reserves the rights and may still authorize others to exercise to them.<sup>236</sup> A transfer of ownership or exclusive license must be executed in writing and signed by the copyright owner,<sup>237</sup> while a non-exclusive license may be granted orally or by

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<sup>229</sup> See *Harper & Row*, 471 U.S. at 544–45, 564–65.

<sup>230</sup> *Id.* at 565.

<sup>231</sup> See *Campbell*, 510 U.S. at 590.

<sup>232</sup> *Id.*

<sup>233</sup> See *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994).

<sup>234</sup> 17 U.S.C. § 201(a) (2012).

<sup>235</sup> See §§ 101, 204.

<sup>236</sup> See § 101.

<sup>237</sup> See § 204(a); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990).

implication.<sup>238</sup> Issuance of a license may preclude a copyright owner from bringing a copyright infringement action against the licensee.<sup>239</sup>

Social media platforms and user-generated websites all have terms of services and user agreements which may affect the scope of copyright owner’s rights in the content they post on the service. Facebook, Twitter, and Reddit have similar copyright policies that grant the services a non-exclusive license to the content posted on its service, while the user retains all other rights.<sup>240</sup> For example, Twitter’s terms of services state:

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).<sup>241</sup>

While Facebook, Twitter, and Reddit may exercise many of the § 106 rights, the user still owns the copyright and may terminate the license at any time by deactivating his account and discontinuing use of the service.<sup>242</sup>

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<sup>238</sup> Foad Consulting Grp., Inc. v. Azzalino, 270 F.3d 821, 826 (9th Cir. 2001).

<sup>239</sup> The Second Circuit has held that a “copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement.” Graham v. James, 144 F.3d 229, 236 (2d Cir. 1998). However, the Ninth Circuit has said that a licensor can bring a copyright infringement action against a licensee in certain circumstances, such as if a licensee exceeds the scope of its license. See S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1088–89 (9th Cir. 1989).

<sup>240</sup> See *Reddit User Agreement*, REDDIT (Aug. 5, 2015), <https://www.reddit.com/help/useragreement> [<https://perma.cc/77XU-29T4>] (last visited Mar. 4, 2016); *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/terms.php/> [<https://perma.cc/U79T-DP2Z>] (last visited Mar. 4, 2016); *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos?lang=en> [<https://perma.cc/C6BS-2G2W>] (last visited Mar. 4, 2016).

<sup>241</sup> See *Twitter Terms of Service*, *supra* note 240.

<sup>242</sup> See 17 U.S.C. § 203 (2012). However, the website’s terms of service may survive the user’s termination of use. See Mihajlo Babovic, *The Emperor’s New Digital Clothes: The Illusion of Copyright Rights in Social Media*, 6 CYBARIS INTELL. PROP. L. REV. 138, 170 (2015).

### III. COPYRIGHT OWNERS NEED TO ACT

Viral content farming has become prevalent in online media—acknowledged, but not accepted—and should not be allowed to continue. Since the industry has yet to produce a practical solution to curb the rise and widespread influence of viral content farming, it is necessary to devise a legal solution to deter the practice. This Part evaluates the three proposals discussed in Part II and argues that copyright law offers the best solution to combat content thieves. This Part describes how a content owner might bring a copyright infringement case against a content farmer, considers fair use arguments, and discusses the benefits of technological protections.

#### *A. Non-Professional Online Writers Will Not Abide by Ethical Standards*

The journalism industry may be in the best position to curb content theft and discourage websites employing content farming practices from taking too much with little-to-no attribution, but it cannot force online writers to abide by ethical standards.<sup>243</sup> The SPJ Code of Ethics will never be legally enforceable under the First Amendment.<sup>244</sup> Although ethics codes may play a part in judicial decisions,<sup>245</sup> as some scholars have suggested, it would be counterproductive to create rules that would, in effect, privilege one journalistic business model over another.<sup>246</sup>

Further, many online writers may not be professional journalists—either they were not trained or educated as journalists, or they simply do not think of themselves as professionals.<sup>247</sup> So without the internal pressure to try and fit into the industry, or external impetus from other journalists, they do not feel the same impulse to abide by ethical standards. And the journalism industry can do little to stop them.

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<sup>243</sup> See Karcher, *supra* note 127, at 782–83.

<sup>244</sup> *SPJ Code of Ethics*, *supra* note 118.

<sup>245</sup> Clay Calvert, *The Law of Objectivity: Sacrificing Individual Expression for Journalism Norms*, 34 GONZ. L. REV. 19, 27 (1999).

<sup>246</sup> Isbell, *supra* note 52, at 21.

<sup>247</sup> See Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411, 411 (1999).



Although each individual website may impose its own standards on its writers, it is unlikely that small startups and viral content farms have adopted such policies. Take ViralNova, as an example: when DeLong first started the website, he was the sole employee, he was not following any ethical standards, and there was no copyright policy in place for the website.<sup>248</sup>

*B. Hot News Misappropriation is Not a Viable Option*

The severe limitations of the modern hot news misappropriation doctrine, lack of adoption by the states, and clear First Amendment issues would make it a difficult feat to use the doctrine to foil viral content farming.<sup>249</sup> Additionally, the crux of the hot news analysis is on the news element. Posts published using viral content methods generally do not report the current events of the day, as described in *International News Service*, but instead contain content meant to entertain. Oftentimes, the content is dug up from the underbelly of the Internet, or curated and compiled in a post meant to be evergreen, meaning it could be shared at any time of year. This is not the type of “news” the hot news doctrine was meant to protect, and in its current state, it is unlikely that the doctrine would apply. However, copyright law may provide a means of redress for content creators.

*C. Copyright Law is the Best Tool for Content Creators*

While copyright law has had to evolve and adapt with new technologies, it still retains its constitutional foundation “[t]o promote the Progress of Science and useful Arts.”<sup>250</sup> By granting authors certain exclusive rights in their creative works, and thereby incentivizing creation, copyright law furthers this objective. Content creators who post their creative works on social media or online forums should not be deprived of this protection, merely because they choose to share their creation on the Internet. If content creators are able to meet the statutory requirements, they should receive copyright protection for their creative works.

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<sup>248</sup> See Dewey, *supra* note 104; Roy, *supra* note 103.

<sup>249</sup> See *supra* Section II.B.

<sup>250</sup> U.S. CONST. art. I, § 8, cl. 8.

### 1. Does the Content Creator Have a Valid Copyright?

This may seem like an obvious question, but it is also the most important, given that a valid copyright is a necessary element in an infringement action.<sup>251</sup> If users who post creative content on Facebook, Twitter, and Reddit do not create works that would qualify for protection under the statute, then the suit would be over before it even started. To receive copyright protection under § 102, a work must meet the requirements of originality, authorship, and fixation.<sup>252</sup>

#### a) Originality

The first prong of the originality requirement—*independent creation by an author*—may be easy to meet, if a content creator is able to show that she alone created the work. The requisite level of creativity is extremely low and only requires that the work “possess some creative spark, ‘no matter how crude, humble or obvious’ it may be.”<sup>253</sup> This, too, should be fairly easy to meet, if a content creator is able to show that the writing contains some minimal amount of creative thought. Oftentimes, the writings posted on social media and Reddit are not cut-and-dry, but contain some opinion, commentary, or joke. Although some have commented that a 140-character tweet could never meet this requirement based on the size restriction alone,<sup>254</sup> copyright law does not draw any bright-line rules about how many words must be written for a work to pass muster.<sup>255</sup> The vast majority of tweets on the Internet may not possess the requisite level of creativity, but there may be some that do meet the requirement.<sup>256</sup>

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<sup>251</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>252</sup> *See* 17 U.S.C. § 102 (2012). If specific posts on social media and Reddit meet these requirements, they will likely qualify for protection within the category of literary works.

<sup>253</sup> *Feist*, 499 U.S. at 345.

<sup>254</sup> *See* Consuelo Reinberg, *Are Tweets Copyright-Protected?*, WIPO MAG. (July 2009), [http://www.wipo.int/wipo\\_magazine/en/2009/04/article\\_0005.html](http://www.wipo.int/wipo_magazine/en/2009/04/article_0005.html) [<https://perma.cc/KF47-NTJU>].

<sup>255</sup> *See* *Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., Inc.*, 768 F.2d 145, 148 (7th Cir. 1985).

<sup>256</sup> *See* Rebecca Haas, Note, *Twitter: New Challenges to Copyright Law in the Internet Age*, 10 J. MARSHALL REV. INTELL. PROP. L. 231, 247–48 (2010).

### b) Authorship

While authorship is usually not a difficult requirement to meet, it may be trickier for Reddit users who post content anonymously. Although a Reddit user may have proof that he is the “mastermind” behind the work,<sup>257</sup> the author would still need to be willing to come forward and identify him or herself as the owner of the username, and thus the author of the work, in copyright registration prior to an infringement action.<sup>258</sup> Given that a copyright registration is a publicly accessible record, this may be a nonstarter for Reddit users who wish to maintain their anonymity. Similarly, if social media users post content under a pseudonym or an account that does not otherwise contain their real name, they would face the same challenge in meeting the authorship requirement. However, Facebook and Twitter users who have received account verification (i.e., the blue check mark), will likely have an easier time establishing that they are the author or a creative work posted from the account.<sup>259</sup>

### c) Fixation

Fixation is rather straightforward when a work is posted (i.e., published) on social media or Reddit.<sup>260</sup> Courts have generally held that posting material to a website constitutes publication.<sup>261</sup>

### d) Requirements Considered

If all three of these requirements are satisfied, as discussed, the content creator will have copyright protection in the expression of the work, but not the underlying facts or information.<sup>262</sup> At this time, a content creator may be interested in registering the copyright to create a record, and therefore, put others on notice of the

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<sup>257</sup> See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884).

<sup>258</sup> See 17 U.S.C. § 104 (2012).

<sup>259</sup> See *Verified Page or Profile*, FACEBOOK, <https://www.facebook.com/help/196050490547892> [<https://perma.cc/V3HV-FXQ2>] (last visited Mar. 4, 2016); *FAQs About Verified Accounts*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/119135-about-verified-accounts> [<https://perma.cc/R7EA-25AJ>] (last visited Mar. 4, 2016).

<sup>260</sup> See 17 U.S.C. § 104.

<sup>261</sup> See *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401–02 (S.D.N.Y. 2002).

<sup>262</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

copyright.<sup>263</sup> The registration may serve as evidence of the validity of the copyright down the line, and would be required if a content creator seeks to bring an infringement action.<sup>264</sup>

Although the thirty-five dollar registration fee for one work may seem steep for a single tweet or a brief Facebook status, it may be worthwhile for certain users who regularly post creative content that they wish to protect.<sup>265</sup> For example, comedians who regularly tweet original jokes may find value in undertaking the up-front costs in order to protect their livelihood.<sup>266</sup> In that instance, if another comic lifted their joke and posted it as their own on Twitter, the copyright-holding user could present the joke's registration as proof of valid copyright to facilitate speedy removal. Additionally, a standard application (at the higher fee of fifty-five dollar) may be filed to register a collection of works, such as a serial publication or anthology.<sup>267</sup> A Twitter user who has a string of related tweets, which meet all the requirements under § 102, may be able to take advantage of this type of work to register all at once for a single fee.

## 2. Can the Content Creator Sue For Copyright Infringement?

If the owner of a valid copyright in a post on Facebook, Twitter, or Reddit discovers that one of the exclusive § 106 rights have been violated,<sup>268</sup> then he or she may be able to bring a case for cop-

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<sup>263</sup> Although the registration process may take several months, if approved, the registration becomes effective on the date the copyright owner filed the application and all the necessary materials with the Copyright Office. See *Registering a Copyright with the U.S. Copyright Office*, *supra* note 155.

<sup>264</sup> See 17 U.S.C. § 411.

<sup>265</sup> See *Fees*, U.S. COPYRIGHT OFF., <http://copyright.gov/about/fees.html> [<https://perma.cc/BP4T-QDQT>] (last visited Mar. 4, 2016).

<sup>266</sup> However, the content creator would only be able to register their work *after* it has been published. Although the Copyright Office offers preregistration for certain unpublished works, preregistration is only available for motion pictures, musical works, sound recordings, computer programs, books, and advertising photos. *Preregistration Information*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/prereg/help.html> [<https://perma.cc/P6UP-E29U>] (last visited Mar. 4, 2016).

<sup>267</sup> See *Have a Question About the Single Application?*, U.S. COPYRIGHT OFF., <http://copyright.gov/fls/sl04s.pdf> [<https://perma.cc/2MRR-H2QT>] (last visited Mar. 4, 2016).

<sup>268</sup> See 17 U.S.C. § 106.

wright infringement.<sup>269</sup> But first, it is necessary to consider the licensing issue.

Although the non-exclusive license that users grant to Facebook, Twitter, and Reddit limits what a content creator can do with the content she posts on one of these services, it does not defeat a potential claim for copyright infringement. As noted in the terms, it is only Twitter (or Facebook or Reddit) that has the license to the content—not other content providers that may seek to take the content.<sup>270</sup> Twitter may wield the license to make content submitted to its service available to “other companies, organizations or individuals who partner with Twitter,” but these types of partners will likely not include providers who employ viral content farming practices.<sup>271</sup> Further, by holding a license to the content, Twitter has some skin in the game, and may be a helpful ally to a copyright holder who seeks to enforce her copyright.

Similarly, with its license, Reddit is allowed to authorize others to “reproduce, prepare derivative works, distribute copies, perform, or publicly display your user content in any medium and for any purpose, including commercial purposes,”<sup>272</sup> but it is unlikely to grant this privilege to viral content farmers, given that Reddit has been quick to ban publications that take content from its website without attribution in the past.<sup>273</sup>

For Facebook, the scope of the licenses differs, depending on the user’s privacy settings. If a user is sharing his content on Facebook publicly, then, under Facebook’s terms of services, anyone in the world may use this content.<sup>274</sup> But, if a user is using a private or limited setting, only the people who the user shares with are able to access the content.<sup>275</sup>

Here, there would likely be no dispute over the licenses held by Facebook, Twitter, and Reddit or which of the exclusive rights under § 106 are implicated due to the explicitness of the terms of ser-

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<sup>269</sup> See § 501.

<sup>270</sup> See *Twitter Terms of Service*, *supra* note 240.

<sup>271</sup> *Id.*

<sup>272</sup> *Reddit User Agreement*, *supra* note 240.

<sup>273</sup> See, e.g., *PSA*, *supra* note 122.

<sup>274</sup> See *Statement of Rights and Responsibilities*, *supra* note 240.

<sup>275</sup> See *id.*

vice.<sup>276</sup> While Facebook, Twitter, and Reddit users grant the service providers a license to use their creative content in any way they choose, merely by signing up and agreeing to the terms of service, content creators could raise the argument that, in doing so, they did not implicitly grant a license to opportunistic content providers. Content creators could argue that they only granted a license to the service providers for the purpose of posting their content on *that* specific platform. Content farmers who copy and paste the text or screenshot the post are arguably taking the creative content without a license. Therefore, content creators may still bring a claim of copyright infringement on the basis that the content they posted on social media or Reddit was used by the content farmer without obtaining a license or permission from the copyright owner.

Given the medium, the right to reproduction and right to distribution are the most likely to be violated.<sup>277</sup> A viral content farmer may infringe the content creator's reproduction right by copying the content from social media or Reddit without permission and reproducing it in a post on its website. The distribution right would also be implicated just by the mere posting of the copied content onto the website without the copyright holder's permission, assuming that the online publication maintains a website that is visited by the public. The copyright holder's distribution right may be further violated if the viral content farmer takes affirmative actions to distribute the copied material, such as sharing it publicly on social media.

To demonstrate that unauthorized copying took place, the content creator "must first 'show that his work was actually copied.'"<sup>278</sup> Aside from an admission of guilt from the viral content

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<sup>276</sup> In case there is a dispute over the interpretation of the agreement purporting to grant a copyright license, state contract law would govern. *See Random House, Inc. v. Rosetta Books LLC*, 150 F. Supp. 2d 613, 617-18 (S.D.N.Y. 2001), *aff'd*, 283 F.3d 490 (2d Cir. 2002).

<sup>277</sup> *See* 17 U.S.C. § 106 (2012).

<sup>278</sup> *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003) (quoting *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 137-38 (2d Cir. 1998)).

farmer, a showing of direct evidence is unlikely.<sup>279</sup> Even if the content farmer linked to the copyrighted work in the alleged infringing work, an inferential step is still necessary.<sup>280</sup> Instead, the copyright holder would need to show a “reasonable possibility” that the content farmer viewed the copyrighted work, and that the two works are similar enough that independent creation is not likely.<sup>281</sup> Here, a link in the alleged infringer’s post to the copyrighted work would provide strong evidence of access. If there is no link, hat tip, or other evidence that the alleged infringer viewed the copyrighted work, access may be inferred if the works are strikingly similar.<sup>282</sup>

Next, the content creator must show that the copying amounts to an improper or unlawful appropriation. A court will employ the substantial similarity test to determine if too much of the protected elements of the work were copied. Depending on the circuit, the test may subjectively focus on the “total concept and overall feel,”<sup>283</sup> or include a two-prong analysis that considers the “similarity of ideas and expression based on external, objective criteria” and “asks whether an ‘ordinary, reasonable observer’ would find a substantial similarity of expression of the shared idea.”<sup>284</sup> Both tests are case-specific, and the result would likely depend on just how much of the content creator’s protected expression was included in the alleged infringing post. If the creator’s protected expression was copied word-for-word, almost akin to plagiarism, a

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<sup>279</sup> It would be difficult for a copyright holder to present direct evidence, such as witness testimony, that the content farmer copied the original work because “direct evidence of copyright is rarely, if ever, available.” Alan Latman, “*Probative Similarity*” as Proof of Copying: *Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1194 (1990) (quoting *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977)).

<sup>280</sup> *See id.*

<sup>281</sup> *See Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 140 (2d Cir. 1992); *accord* *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

<sup>282</sup> A copyright holder may present evidence that shows the degree of similarity between the two works in order to establish an inference of access. “What is required is that the similarities in question be so striking as to preclude the possibility that the defendant independently arrived at the same result.” NIMMER & NIMMER, *supra* note 185, § 13.02[B]. Some circuits refer to this as the inverse-ratio rule. *See Selle v. Gibb*, 741 F.2d 896, 903 (7th Cir. 1984).

<sup>283</sup> *See, e.g., Tufenkian*, 338 F.3d at 133.

<sup>284</sup> *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996) (quoting *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994)).

court would likely find that the test favored the creator. Because copyright law does not recognize a right of attribution for literary works, a link to the creator's article would likely not hold any sway for a court on a claim of copyright infringement.<sup>285</sup> The use of quotes by the alleged infringer, while relevant to the inquiry, may also not be cause for a finding of non-infringement.

### 3. Does a Farmed Post Qualify for Fair Use?

If a content creator is able to succeed in establishing a claim for infringement, she still faces the hurdle of fair use, which is a favored doctrine among news providers. Although news reporting is expressly listed as an example of fair use in the statute,<sup>286</sup> a court will still consider the facts, apply the four statutory factors (purpose and character of the use, nature of the copyrighted work, amount and substantiality of the use, and the effect on the market) to all the facts, and weigh the results together, in light of the purpose of copyright.<sup>287</sup>

For the first factor, a court considers the purpose and character of the use, including whether it was transformative and if the use was of a commercial nature.<sup>288</sup> To qualify as transformative, the new work must add something new the underlying copyrighted work, and not merely supersede it.<sup>289</sup> Simply repackaging or republishing the original creative content would likely fail the test, so some of the more egregious content farming practices probably do not constitute a transformation.<sup>290</sup> To transform the work, a writer would likely have to err on the side of aggregation and include other sources, in addition to added context. As for the commercial nature, viral content farmers most definitely stand to "profit from the exploitation of the copyrighted material without paying the customary price."<sup>291</sup> Thus, the first factor likely weighs against fair use.

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<sup>285</sup> See 17 U.S.C. § 106A (2012).

<sup>286</sup> See § 107.

<sup>287</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

<sup>288</sup> 17 U.S.C. § 107(1).

<sup>289</sup> *Campbell*, 510 U.S. at 569.

<sup>290</sup> Leval, *supra* note 212, at 1111.

<sup>291</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).



The second factor focuses on the nature of the copyrighted work,<sup>292</sup> including whether it was fact or fiction, and whether or not it has been published.<sup>293</sup> Here, publication is clear if the content was posted on the Internet,<sup>294</sup> so the consideration would fall to the fact-fiction distinction. Although the style of content would vary widely, many posts would likely consist of some factual work, depicting real life, which tends to receive a broader scope of fair use.<sup>295</sup> This factor would need to be evaluated on a case-by-case basis for a court to make a determination of fair use.

As for the amount and substantiality of the copyrighted work used,<sup>296</sup> the inquiry would call for the consideration of both the quantity of the material used and their quality and importance within the copyrighted work.<sup>297</sup> Again, the results of the analysis may vary widely. In the case of a tweet, the alleged infringer would likely be taking the entire work. However, in the case of a Facebook or Reddit post, the quantity may be more limited to excerpts. In either situation, the content farmer would probably take the essence of the work. During their workday, viral writers continually scan social media and Reddit in search of an inspiring story or humorous anecdote that has the potential to go viral.<sup>298</sup> As studies have shown, content that evokes intense emotions like awe or anger have the most potential to go viral,<sup>299</sup> so, if a Facebook or Reddit user posts such a story, it is more than likely that the content farmer would take the “heart” of the content creator’s work.<sup>300</sup> This factor would likely weigh against fair use.

In the final inquiry, which focuses on the extent of the market harm caused by specific actions of the alleged infringer,<sup>301</sup> a court

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<sup>292</sup> See 17 U.S.C. § 106(2).

<sup>293</sup> See *Harper & Row*, 471 U.S. at 563–64.

<sup>294</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167 (9th Cir. 2007); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401–02 (S.D.N.Y. 2002).

<sup>295</sup> *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 557 (S.D.N.Y. 2013).

<sup>296</sup> See 17 U.S.C. § 106(3).

<sup>297</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994).

<sup>298</sup> See Corcoran, *supra* note 75.

<sup>299</sup> See *supra* note 61 and accompanying text.

<sup>300</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–66 (1985).

<sup>301</sup> See *Campbell*, 510 U.S. at 590.

asks “whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.”<sup>302</sup> This is a tricky question. Although the purpose of this Note is to argue that the law should deter viral content farming practices, which have become arguably unrestricted and widespread, the market harm on the original content may be minimal in some cases. After all, the creator who originally posted it on the Internet likely did so with no expectation of receiving a financial benefit. However, a comedian who tests jokes on social media, or a professional writer who enjoys the freedom of posting publicly, may argue that the use of their copyrighted work may result in a loss on a likely to-be-developed market. As the Supreme Court notes in *Harper & Row*, “to negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work.’”<sup>303</sup> Also, if the comedian or professional writer is receiving any advertisement revenue from their creative content, they could show market harm by demonstrating a loss of viewers. Further, under *Sony Corp. of America v. Universal City Studios, Inc.*, there is a presumption of market harm in cases of “verbatim copying of the original in its entirety for commercial purposes.”<sup>304</sup> This is an argument that could only be used in limited, professional cases, but it would likely weigh in favor of fair use, especially with a balancing of the other factors.

#### 4. Is There Any Secondary Liability?

A copyright owner whose content was taken from social media or Reddit may also want to implicate the company that controls the website in the action—especially if the viral content farmer later shared the post with the infringing content on Facebook or Twitter to generate traffic. However, it is unlikely that the plaintiff would have much success in establishing secondary liability against one of the websites because Facebook, Twitter, and Reddit all have robust

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<sup>302</sup> *Id.*

<sup>303</sup> 471 U.S. at 568 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

<sup>304</sup> *Campbell*, 510 U.S. at 591 (discussing the presumption or inference of market harm in *Sony*).

notice-and-takedown regimes. So even if a copyright owner is able to establish direct infringement and show that the implicated website had the ability to control the infringing activity and received a direct financial benefit,<sup>305</sup> or had knowledge of the infringing activity and materially contributed to it,<sup>306</sup> the website would likely qualify for one of the OSP safe harbors.<sup>307</sup> Facebook, Twitter, and Reddit could also argue that, by signing up for the service, and thereby granting the website a non-exclusive license, the copyright owner waived her right to sue the licensee for copyright infringement.<sup>308</sup> However, a copyright owner may still be able to bring a copyright infringement action against a licensee in certain cases.<sup>309</sup> Although it is likely not worthwhile for a copyright owner to bring a secondary liability action against Facebook, Twitter, or Reddit, she could utilize the websites’ notice-and-takedown regimes, by requesting that any viral content farmed posts with infringing content be removed.

##### 5. Copyright Owners Should Not Abandon Their Rights

If the owner of a valid copyright is able to show: (1) unauthorized copying took place; (2) the copying amounted to an unlawful appropriation; and (3) the infringing post does not qualify for fair use, she should succeed in making a copyright infringement case against a viral content farmer. Yet, online content creators are often not bringing actions against clear infringers—most likely due to the expense of litigation, a lack of know-how, or, perhaps, because they do not think it is worth it.<sup>310</sup> Even though content creators have a viable legal theory to bring a claim against viral content farmers under copyright law, copyright owners must take action.

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<sup>305</sup> See *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

<sup>306</sup> See *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>307</sup> See 17 U.S.C. § 512 (2012).

<sup>308</sup> *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998).

<sup>309</sup> See *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088–89 (9th Cir. 1989).

<sup>310</sup> See Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 729 (2013) (discussing how copyright claims are systematically underenforced); Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 617 (2008) (“Today every man, woman, corporation and child has the technological ability to copy and distribute, and therefore to potentially infringe copyright in ways both harmful and harmless.”).

Under the copyright regime, a third-party cannot bring a claim on behalf of a copyright owner, so it is up to individual copyright owners to act.<sup>311</sup> Although that may not be feasible for the typical Internet user who is interested in protecting her creative content, those with the time and assets to bring a copyright infringement lawsuit against a website that wholly took his creative content with little-to-no attribution, should be encouraged to do so in order to set a precedent.<sup>312</sup> Content creators who sleep on their rights will continue to be exploited by opportunistic online writers.

## 6. Technological Protections

Copyright owners may also find assistance in technological protections, such as the embed options offered by Facebook and Twitter.<sup>313</sup> Instead of copying and pasting the text of a social media post, an online writer could simply copy the embed code and insert it into the article.<sup>314</sup> Then, if the Facebook or Twitter user chose to delete the original post, the content in any embedded posts would also be removed, leaving an error message in the display box. If an online writer copies and pastes a user's words, the user would not be able to delete that content from the Internet without contacting the writer.<sup>315</sup> However, if writers were to only rely on the embed option as a means of incorporating a social media post into an article, then social media users would still be able to maintain some control over how their content is used.<sup>316</sup> Also, instead of making the embed option a requirement for all public posts, a better system

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<sup>311</sup> See 17 U.S.C. § 501(b).

<sup>312</sup> There is still a lot of legal uncertainty surrounding content farming and news aggregation. See Isbell, *supra* note 52, at 3, 21 (“Only a small number of lawsuits have been brought against news aggregators, and all of them have settled before a final decision on the merits.”).

<sup>313</sup> See *Embedded Posts*, FACEBOOK, <https://developers.facebook.com/docs/plugins/embedded-posts> [<https://perma.cc/9A6L-HPKV>] (last visited Mar. 4, 2016); *Embed a Single Tweet*, TWITTER, <https://dev.twitter.com/web/embedded-tweets> [<https://perma.cc/73GP-AHTY>] (last visited Mar. 4, 2016).

<sup>314</sup> The Facebook post or a tweet can be embedded on any website within its own display box that includes links to the user's profiles and provides more information about the post, such as the date and time that it was published and whether anyone liked it or shared it. See *Embedded Posts*, *supra* note 313; *Embed a Single Tweet*, *supra* note 313.

<sup>315</sup> See *Embedded Posts*, *supra* note 313.

<sup>316</sup> While social media users may not be able to change the article itself, they can choose to remove their content from the story. See *supra* note 314 and accompanying text.

may be to offer an opt-out option so public users can choose which posts they would allow to be embedded.

Though many social media websites have adopted an embed option, certain user-generated content websites, such as Reddit, have not fully embraced embedding.<sup>317</sup> Reddit may want to maintain its user-generated content within the website, and encourage journalists to reach out the copyright owners directly, but the embed option may be a better way to keep online writers from taking content from Reddit verbatim.<sup>318</sup> Users could opt-in to allow embedding, or choose to prohibit it entirely. Given the attraction of Reddit’s anonymity for its user, it is unlikely that most users would be open to embedding. Instead, that is why Reddit has published a Press Etiquette page with rules for online writers who source their content from the website.<sup>319</sup> However, as Reddit could probably attest, many online writers—especially those who do not identify themselves as professional journalists—do not abide by the website’s rules.

#### CONCLUSION

The law should not allow writers using viral content farming strategies to prey on the creative content of others online and exploit it for a commercial benefit. Courts should recognize the opportunistic behavior of content farmers and, if all statutory requirements are met and a finding of fair use is unlikely, afford protection to content creators.

By deterring this practice, the law would encourage writers to add original reporting or their own creative insight, thereby transforming the content so that it qualifies for fair use. Not only would it be legally permissible under the copyright regime, but it would also encourage writers to take that extra step to add their own crea-

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<sup>317</sup> Reddit does allow online writers to embed comments from its website but does not allow users to embed a post in full. See *Reddit Comment Embeds*, REDDIT, [https://www.reddit.com/wiki/embeds#wiki\\_how\\_to\\_embed\\_a\\_reddit\\_comment](https://www.reddit.com/wiki/embeds#wiki_how_to_embed_a_reddit_comment) [<https://perma.cc/CS57-GUVM>] (last visited Mar. 4, 2016).

<sup>318</sup> After all, Reddit does allow writers to embed individual comments. The website just does not allow embedding of entire posts. See *id*; *Pressiquette*, REDDIT, <https://www.reddit.com/wiki/pressiquette> [<https://perma.cc/4VF8-3758>] (last visited Mar. 4, 2016).

<sup>319</sup> See *Pressiquette*, *supra* note 318.

tive thought, or reach out to the copyright owner to gather more information and verify the authenticity of the content before publishing.

Freelancers and writers under the pressure of quotas may feel the need to churn out articles but they should still be doing their journalistic duty—even if they do not consider themselves to be a journalist. If viral content farmers are catering to the same audiences and accruing as much traffic as professional journalists, then they should be held to the same standards and expectations.