

## Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal

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### ABSTRACT

Within the past decade, the Internet has played an increasingly central role in social dialogue and popular culture. Through the promulgation of “like” and “heart” features on online platforms such as Facebook and Instagram, individuals are encouraged to affirmatively engage with content posted by other users to share and debate their opinions in a public forum. Consequently, many consumers assume that content posted on the Internet is inherently free for the taking. This perceived free culture, however, materially conflicts with content creators’ interests in maintaining control over the reproduction and distribution of their works. Not surprisingly, a direct result of the increased popularity and relevance of social media websites has been an uptick in copyright infringement lawsuits brought by professional content creators against the downstream users of their copyrighted content. In response to such copyright infringement suits, several downstream users have asserted the fair use affirmative defense under § 107 of the Copyright Act.

In the face of this changing social media landscape, this Comment proposes that when analyzing the first factor of a fair use affirmative defense in a copyright infringement action, courts should broaden the conceptualization of transformative purpose in the digital environment. Specifically, courts should recognize social commentary as a presumptively transformative purpose. Additionally, this Comment proposes that courts should consider attribution when assessing market harm to the copyright owner, the fourth factor considered by courts in a fair use analysis. By including attribution as a factor weighing in favor of fair use, secondary users will be incentivized to follow best practices on the Internet. Furthermore, copyright holders will be better able to mitigate the financial exploitation of their works on social media, while simultaneously allowing the general public (who most often share content for noncommercial purposes) to engage in social dialogue on the web.

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## INTRODUCTION

Memes, emojis, hashtags. Within the past several years, these seemingly foreign words have become firmly rooted in the vocabularies of Internet users and mass media aficionados.<sup>1</sup> The explosion of the Internet's role in contemporary life over the past decade is reflected not only by the creation of a new lexicon, but also, more significantly, by an increase in unanswered questions regarding the legality of consumer behavior on the web. Specifically, the widespread practice of sharing photographs and user-generated content on social media websites has led to growing legal uncertainty regarding whether such activity violates established copyright law.<sup>2</sup> Consumers of social media are accustomed to an online environment that promotes conversation and collaboration. Specifically, online fora encourage individuals to share their own ideas and engage with the content shared by other users.<sup>3</sup> This back and forth open exchange of ideas creates an online culture where shared social media content is viewed as free for the taking. Yet, this perceived free culture materially conflicts with content creators' interests in maintaining control over the reproduction and distribution

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1. In fact, the term hashtag was added to the Merriam-Webster dictionary in 2014, and the terms meme and emoji were subsequently included in 2015. See Alejandro Alba, *Merriam-Webster Dictionary Adds 1,700 New Entries Including Clickbait, WTF, and Meme*, N.Y. DAILY NEWS (May 26, 2015, 6:13 PM), <http://www.nydailynews.com/news/national/merriam-webster-dictionary-adds-1-700-entries-including-wtf-article-1.2236223>. According to Merriam-Webster dictionary, a meme is "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media." *Meme*, MERRIAM-WEBSTER, [<https://perma.cc/W4HF-FYYH>]. An emoji is defined as "any of various small images, symbols, or icons used in text fields in electronic communication (as in text messages, e-mail, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words." *Emoji*, MERRIAM-WEBSTER, [<https://www.merriam-webster.com/dictionary/emoji>] [<https://perma.cc/6EZL-JDTW>]. Finally, a hashtag is defined as "a word or phrase preceded by the symbol # that classifies or categorizes the accompanying text (such as a tweet)." *Hashtag*, MERRIAM-WEBSTER, [<https://www.merriam-webster.com/dictionary/hashtag>] [<https://perma.cc/FJ29-VU2W>].
  2. See, e.g., Jessica Gutierrez Alm, Note, "*Sharing*" Copyrights: *The Copyright Implications of User Content in Social Media*, 35 HAMLINE J. PUB. L. & POL'Y 104, 115 (2014) ("[T]he Internet has also introduced unique problems to copyright jurisprudence. The unprecedented instant transfer of information allows rapid and large-scale infringement. Coupled with the Internet's sharing atmosphere, this has fostered a generation of users who freely disregard copyrights.").
  3. A hallmark of our new Internet culture is that websites themselves "encourage users to post content that is not their own." Alm, *supra* note 2, at 115. This practice is referred to as "linking." *Id.* at 116; see also Jean G. Vidal Font, *Sharing Media on Social Networks: Infringement by Linking?*, 3 U. P.R. BUS. L.J. 255, 256 (2012) ("This content includes, but is not limited to, Internet links, videos, web pages, photos, and any other content that a user can find on the Internet.").

of their works.<sup>4</sup> This tension between the downstream users of existing online content and the original creators of content has prompted numerous copyright infringement lawsuits within the past several years.<sup>5</sup>

In many of these suits, the downstream users of content assert their use is a fair use under the requirements set forth in 17 U.S.C. § 107.<sup>6</sup> Fair use is an affirmative defense to a copyright infringement suit that sanctions the unlicensed use of copyrighted works under certain circumstances.<sup>7</sup> For example, original works utilized for purposes of commentary or critique are considered fair uses and, therefore, not an infringement of copyright. Accordingly, this Comment argues that the tensions present online between content creators and downstream users can be resolved by viewing the new Internet practice of remixing, cultivating, and reposting content as social commentary and, thus, a presumptively fair use.<sup>8</sup> Because no court has specifically addressed this argument as of this Comment's publication, however, there is significant ambiguity regarding whether the now common online practice of sharing content is permissible.<sup>9</sup>

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4. One scholar notes:

There are two basic truths about copyright law: it is an area of law in which a complex web of interests must be reconciled, and it is an area of law that is constantly challenged by rapid technological developments. The combination of these two factors requires legal mechanisms to reconcile conflicting interests in the technological age. . . . The most familiar example of such a mechanism is the 'fair use' doctrine, although as case law has demonstrated, this doctrine is fact-specific and often unpredictable.

Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275, 276 (2009) (footnotes omitted).

5. Given the high cost of bringing a claim, the number of individuals who experience problems with the current system is likely vastly underrepresented by the number of lawsuits that are filed. For example:

As far back as 2003, litigating even a "low-stakes" copyright infringement suit through discovery typically exceeded \$100,000. These costs render an infringement suit out of the reach of all but the wealthiest content-creating users. For the typical user to contemplate bringing an infringement suit there must be relatively high stakes involved. Even then, the high cost is a massive barrier to bringing suit.

Will Clark, *Copyright, Ownership, and Control of User-Generated Content on Social Media Websites* 18 (2009) (unpublished seminar paper, Chicago-Kent College of Law) (footnote omitted), [<https://perma.cc/3XAK-RMMX>].

6. See 17 U.S.C. § 107 (2012) (setting forth limitations on a copyright owner's exclusive rights).

7. See *infra* Part II for a detailed discussion of fair use.

8. See U.S. Copyright Office, *More Information on Fair Use*, COPYRIGHT.GOV, <http://www.copyright.gov/fair-use/more-info.html> [<https://perma.cc/N2LD-C82B>]. See *infra* Part II for further explanation of the fair use doctrine.

9. See Alm, *supra* note 2, at 129 ("The manner in which social media is currently functioning within the parameters of copyright law is precarious, and it may only be a matter of time before it collapses into lawsuits, similar to the file-sharing suits of the early 2000s."); see also *id.* at 106 ("Copyright problems may arise when a user posts found content that is actually

The recent litigation in *North Jersey Media Group, Inc. v. Pirro*<sup>10</sup> exemplifies the practical impact of this ambiguity. In this case, a production assistant working on a television program starring Jeanine Pirro published a photograph originally taken by Thomas E. Franklin, a photographer working for North Jersey Media Group Inc. (NJMG), on the program's Facebook page.<sup>11</sup> Franklin captured the contested image near the ruins of the World Trade Center while completing an assignment to cover the aftermath of the September 11th attacks.<sup>12</sup> Franklin's image depicted three firefighters raising an American flag.<sup>13</sup> NJMG registered a copyright in the image with the U.S. Copyright Office and began licensing the photograph.<sup>14</sup> Since its first publication, Franklin has collectively licensed his image for more than \$1 million.<sup>15</sup>

On September 11, 2013, a production assistant posted an image on the Facebook account for Pirro's Fox News program *Justice with Judge Jeanine* that combined Franklin's photograph with the iconic *Raising the Flag on Iwo Jima* photograph.<sup>16</sup> The assistant found this image by inputting "9/11" into Google's search engine and posted the combined image with the hashtag "#neverforget."<sup>17</sup> Her expressed intent was to "convey Fox News' participation in the global conversation taking place on social media" in commemoration of the victims of the September 11th terrorist attacks.<sup>18</sup> In response to this unlicensed use of Franklin's image, NJMG brought a joint copyright infringement action against Fox News and Pirro. NJMG alleged that by posting the image on Pirro's Facebook page without first obtaining a license, Fox infringed NJMG's right to reproduce and distribute

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someone else's creative content. In the absence of clear legal standards, this has become a common and encouraged practice on the Internet.").

10. 74 F. Supp. 3d 605 (S.D.N.Y. 2015).

11. *Id.* at 609–11.

12. *Id.* at 609.

13. *Id.* Moreover, after the image was published in the newspaper, it gained considerable recognition for its poignant portrayal of American pride amidst unthinkable tragedy. *See id.* at 610.

14. *Id.*

15. Nicholas O'Donnell, *Fox News Seeks to Take Fair Use Questions Over 9/11 Photo to the Second Circuit*, SULLIVAN & WORCESTER: ART L. REP. (Mar. 23, 2015, 2:21 PM), <http://blog.sandw.com/artlawreport/2015/03/23/fox-news-seeks-to-take-fair-use-questions-over-911-photo-to-the-second-circuit> [<https://perma.cc/E7FW-Z6MM>].

16. *North Jersey Media Group*, 74 F. Supp. 3d at 610–11; O'Donnell, *supra* note 15.

17. *North Jersey Media Group*, 74 F. Supp. 3d at 610–11.

18. *Id.* at 611.

its copyrighted work.<sup>19</sup> Fox countered that its use of NJMG's image was a fair use.<sup>20</sup>

The Southern District of New York rejected Fox's fair use claim and denied its summary judgment motion.<sup>21</sup> In ruling against Fox's fair use defense, the court opined that the hashtag and minimal physical alterations to the image were not sufficiently transformative.<sup>22</sup> In other words, the court determined that a reasonable jury could find that the image Fox posted did not create "new information, new aesthetics, new insights and understandings" sufficient to warrant protection from a copyright infringement claim.<sup>23</sup> In rejecting Fox's motion for summary judgment, the court found it significant that Fox's use of the photograph circumvented NJMG's existing licensing revenue stream.<sup>24</sup> Nevertheless, the court determined that it could not rule as a matter of law regarding the purpose of the use.<sup>25</sup> Thus, though the court denied Fox's motion for summary judgment on its fair use claim, the court simultaneously left open the possibility that participation in a "global conversation" could be viewed as commentary, a factor weighing in favor of fair use.<sup>26</sup>

In fact, in Fox's motion for interlocutory appeal to the Second Circuit, Fox asked the court to recognize a new "context-sensitive test" for transformative use that would specifically address the fact that Facebook and other social media websites are used for purposes of comment and criticism by design.<sup>27</sup> Fox argued

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19. *See id.* at 612–13. The rights to reproduce and distribute a copyrighted work are included in the bundle of exclusive rights conferred on a copyright owner. 17 U.S.C. § 106(1), (3) (2012) (enumerating copyright owners' rights, which include the right "to reproduce the copyrighted work in copies or phonorecords" and the right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending").

20. *See North Jersey Media Group*, 74 F. Supp. 3d at 612–13. *See infra* Part II for a discussion of the fair use doctrine.

21. *North Jersey Media Group*, 74 F. Supp. 3d at 623.

22. *Id.* at 615.

23. *Id.* at 614 (quoting *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132,142 (2d Cir. 1998)).

24. *See id.* at 622.

25. *See id.* at 618–19. In its briefs, Fox argued the purpose of its use of the photograph was for social commentary, and therefore, the use was transformative. *See id.* at 615. Congress has enumerated six activities that are presumptively considered fair uses. Among these activities is commentary. 17 U.S.C. § 107 (2012). Conversely, North Jersey Media Group (NJMG) argued the purpose was for a commercial benefit and that Fox was reaping the value of the image without paying the customary price. *See North Jersey Media Group*, 74 F. Supp. 3d at 618.

26. *See North Jersey Media Group*, 74 F. Supp. 3d at 618, 611 (noting it was unclear whether Tanner's stated purpose of participating in a global conversation could be viewed as social commentary in light of the Facebook page's purpose to engage followers and promote Pirro's show).

27. One brief argued in support of Fox:

The type of use at issue in this action . . . [which is] the use of visual works on social media . . . is widespread. Under the Order's legal analysis, the

that because social media fundamentally involves a community of individuals sharing ideas and content, this environment yields inherently transformative expression.<sup>28</sup> Furthermore, Fox contended that denying social media users the fair use defense in these circumstances would stifle freedom of expression.<sup>29</sup> Ultimately, the parties settled before the court could weigh in on Fox's argument.<sup>30</sup> Thus, the question of whether Fox's argument could be accepted by the courts remains unanswered.

Importantly, Fox News is not facing this issue alone.<sup>31</sup> Within the past several years, the popular websites BuzzFeed and Pinterest have faced similar lawsuits from copyright owners regarding social media posts containing the owners' copyrighted photographs.<sup>32</sup> Furthermore, with the increasingly widespread use of applications like Instagram, issues regarding whether fair use enables users to freely repurpose memes originally posted by other accounts have

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unique, transformative qualities of social media are not taken into account when considering a fair use defense. In other words, the use's particular context does not factor into the equation. But that finding has massive implications for the millions of Americans who use social media on a regular basis. If social media's new and different aspects are not relevant to a fair use analysis, then users who share copyrighted content are far more likely to be infringing the copyrights of others. Such a regime would effectively proscribe a wide swath of ongoing online speech. The public has a strong interest in having these fundamental free-speech concerns addressed at the earliest possible juncture.

Memorandum of Law in Support of Defendants' Motion for Certification of February 10, 2015 Order for Interlocutory Appeal Under 28 U.S.C. § 1292(b) and for Issuance of Stay Pending Appeal at 2–3, *North Jersey Media Group*, 74 F. Supp. 3d 605 (No. 13-7153), [hereinafter Memorandum of Law].

28. *Id.* at 5–6.

29. *Id.* at 12–13.

30. See Andrew Chung, *Fox News, Publisher, Settle Copyright Dispute Over Iconic 9/11 Photo*, REUTERS (Feb. 16, 2016, 2:44 PM), <http://www.reuters.com/article/us-ip-fox-news-photo-idUSKCN0VP2HY> [<https://perma.cc/Y38N-NGGF>].

31. See Memorandum of Law, *supra* note 27, at 1 (“And the answer is anything but clear. Litigants and commentators alike have struggled to identify the proper fair-use test for visual works, and courts have grappled with the apparent tensions in the Second Circuit’s fair use jurisprudence. A square ruling from the Court of Appeals would bring much-needed clarity to this murky area of law.”); *infra* note 32 and accompanying text.

32. See Complaint, *Eiselein v. BuzzFeed, Inc.*, No. 13-3910 (S.D.N.Y. June 7, 2013) (involving a \$3.65 million lawsuit initiated by photographer Kai T. Eiselein against BuzzFeed in response to a BuzzFeed article that incorporated Eiselein’s photograph without permission); see also Michael Archambault, *Photographer Suing Pinterest in Federal Court Over Repeated Copyright Infringement*, PETAPIXEL (May 27, 2015), <http://petapixel.com/2015/05/27/photographer-suing-pinterest-in-federal-court-over-repeated-copyright-infringement> [<https://perma.cc/NT7V-VPXK>] (describing a copyright infringement lawsuit initiated by artist Christopher Boffoli against Pinterest, in which Boffoli alleges his photographs were illegally posted without attribution more than five thousand times on Pinterest).

arisen and are bound to continue.<sup>33</sup> These cases highlight the difficulty that follows when the law attempts to balance the needs of copyright owners against society's interest in free online speech, especially in a new world of shareable media and rapidly evolving technologies.

In the face of this changing digital and social media landscape, this Comment proposes that when analyzing the first factor of a fair use affirmative defense in a copyright infringement action, courts broaden the conceptualization of transformative purpose in the online social media environment.<sup>34</sup> Specifically, courts should recognize social dialogue, comment, and criticism as presumptively transformative expressive purposes. Additionally, this Comment proposes that courts should consider attribution when assessing market harm to the copyright owner, the fourth factor analyzed by courts in a fair use analysis. By including attribution as a factor weighing in favor of fair use, secondary users will be incentivized to follow best practices on the Internet. Furthermore, copyright holders will be better able to mitigate the financial exploitation of their works on social media while simultaneously allowing the general public (who most often share content for noncommercial purposes) to engage in social dialogue on the web.

Part I illustrates in further detail the changing media landscape and the clear need for clarification of copyright law in the online setting. Part II explores the judicial trends involving the transformative use inquiry associated with the first factor in a fair use analysis, specifically outlining a line of cases in which courts prioritize a transformative purpose as the basis for a fair use determination. Finally, Part III addresses a two-pronged proposal for both making social dialogue a presumptively transformative purpose and for implementing a judicially administered attribution analysis specifically tailored to address the market harm associated with content sharing on the Internet. This Part aims to demonstrate

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33. See, e.g., Oliver Herzfeld, *The Fat Jew, Plagiarism and Copyright Law*, FORBES (Aug. 24, 2015, 9:30 AM), <http://www.forbes.com/sites/oliverherzfeld/2015/08/24/the-fat-jew-plagiarism-and-copyright-law/#2715e4857a0b7a66bf701446> [https://perma.cc/BS74-V3LE] (explaining the copyright implications resulting from the recent controversy involving social media celebrity Josh Ostrovsky's practice of posting other users' content on his account); Nicholas O'Donnell, *Here We Go Again? Richard Prince Sued by Photographer Over Images of Rastafarian in Instagram Show*, SULLIVAN & WORCESTER: ART L. REP. (Jan. 4, 2016, 10:27 AM), <http://blog.sandw.com/artlawreport/here-we-go-again-richard-prince-sued-by-photographer-over-images-of-rastafarian-in-instagram-show> [https://perma.cc/B7TZ-3Q26] (describing a lawsuit against appropriation artist Richard Prince in response to a recent exhibition in which Prince took images from Instagram, included the comments, enlarged and cropped them, and sold the images for more than \$90,000 each).

34. In conducting an analysis of the fair use affirmative defense, courts have increasingly considered a demonstrated transformative purpose as a factor that strongly correlates to a fair use determination. See *infra* Part II.A.



that the combination of both measures provides a more effective way of balancing the competing interests of copyright holders and the general public in light of changing norms on the Internet.

## I. THE SCOPE OF THE PROBLEM

Copyright law and technological processes are inextricably intertwined.<sup>35</sup> As the U.S. Supreme Court averred in *Sony Corp. of America v. Universal City Studios, Inc.*:<sup>36</sup> “From its beginning, the law of copyright has developed in response to significant changes in technology.”<sup>37</sup> In fact, copyright laws initially developed in the eighteenth century in response to the creation of the printing press and the resulting explosion of written publications.<sup>38</sup> Subsequently, over the past three hundred years, the law has continually adapted to new technologies, recognizing that the role of copyright may change in the face of new economic environments and markets.<sup>39</sup> Not surprisingly, therefore, there have been numerous iterations of the Copyright Act and patterns in the case law that reflect the cultural and economic changes that arise in the face of new technology.

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35. See THE DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 6 (2013), <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf> [<https://perma.cc/MB3T-V3JB>] (opining that “the history of copyright is integrally entwined with and has always been shaped by technological change”).

36. 464 U.S. 417 (1984).

37. *Id.* at 430.

38. See *id.* at 430–31 (“Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.”); see also William C. Warren, *Foreword* to BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT, at vii–viii (1967) (“Copyright protection became necessary with the invention of the printing press and had its early beginnings in the British censorship laws. The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other. Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammelled dissemination of ideas.”).

39. In 1984, the U.S. Supreme Court noted:

Thus, for example, the development and marketing of player pianos and perforated rolls of music preceded the enactment of the Copyright Act of 1909; innovations in copying techniques gave rise to the statutory exemption for library copying embodied in § 108 of the 1976 revision of the copyright law; the development of the technology that made it possible to retransmit television programs by cable or by microwave systems prompted the enactment of the complex provisions set forth in 17 U.S.C. § 111(d)(2)(B) and § 111(d)(5) (1982 ed.) after years of detailed congressional study.

*Sony*, 464 U.S. at 430 n.11 (citations omitted).

Today we are experiencing a rise in participative technology, exemplified by an explosion of social media.<sup>40</sup> Specifically, Internet activity has evolved from primarily user-generated content to user-found content.<sup>41</sup> While user-generated content is original content posted by an individual on the Internet, user-found content is material that an Internet user finds online and reposts to others.<sup>42</sup> Some commentators argue, therefore, that the economic environment that prompted the development of copyright laws in the first place no longer applies in today's mass media environment.<sup>43</sup> These individuals contend that due to differing economic environments, modern copyright law unnecessarily stifles creativity.<sup>44</sup> This Comment aims to demonstrate that the manner in which individuals use the Internet today presents yet another example of technological change that necessitates a recalibration of copyright law.<sup>45</sup> The following Subparts outline the shifting Internet landscape and the parties aggrieved by these changes. The discussion asserts that a recalibration of copyright law is

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40. The term “participative technology” here refers to social media applications and platforms wherein users are encouraged to interact with each other and shared content.
41. See *infra* text accompanying notes 46–78 for further discussion of this trend exemplifying a shift from user-generated content to user-found content.
42. Alm, *supra* note 2, at 105.
43. One such scholar, William Patry, argues that the copyright laws of the eighteenth century arose out of markets and technologies centered on “artificial scarcity.” WILLIAM PATRY, HOW TO FIX COPYRIGHT 2 (2011). He contends that such “[a]rtificial scarcity was created by a small number of gatekeepers, by relatively high barriers to entry, and by analog limitations on unauthorized copying.” *Id.* Patry argues that today, however, the markets created by the Internet are instead characterized by low barriers to entry, low costs of production and distribution, global reach, and small transactions. *Id.* at 3.
44. For example, Patry argues that: “As a direct result of the failure of policymakers to make new laws consistent with the technologies and markets of the new world of digital abundance, our old laws are inhibiting rather than encouraging creativity.” *Id.* at 4. Patry worries that “our current copyright laws too often harm authors and the public.” *Id.* at 5.
45. For example, a recent report by the Department of Commerce states:  
Each of these developments provoked great anxiety as to the continued viability of copyright, and led to various statutory amendments. The development of the Internet is the current iteration of this evolutionary process—one that is both necessary and healthy for a vital copyright system. We are again in the midst of vigorous debate about the proper boundaries of copyright protection and enforcement.  
THE DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, *supra* note 35, at 6 (footnote omitted). For numerical evidence of this explosion of Internet usage, see ANDREW PERRIN, PEW RESEARCH CTR., SOCIAL MEDIA USAGE: 2005–2015, at 2 (2015), [http://www.pewinternet.org/files/2015/10/PI\\_2015-10-08\\_Social-Networking-Usage-2005-2015\\_FINAL.pdf](http://www.pewinternet.org/files/2015/10/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf) [<https://perma.cc/FS3S-HSBB>] (“Nearly two-thirds of American adults (65%) use social networking sites, up from 7% when Pew Research Center began systematically tracking social media usage in 2005.”). See also Julie Nichols Matthews et al., *Social Media in the Digital Millennium*, 5 LANDSLIDE 26, 26–27 (2013) (“Today, social media users, copyright holders, Internet service providers, and courts continue to wrestle with the consequences of the system established in simpler times.”).

essential to balance the needs of creators against the societal interest in a collaborative, free Internet.

#### A. The Changing Internet Landscape: From User-Generated to User-Found Content

As of 2015, 96 percent of young adults between the ages of eighteen and twenty-nine used the Internet, a 26 percent increase from the year 2000.<sup>46</sup> Specifically, social media platforms such as Facebook, Instagram, Snapchat, and Pinterest have seen enormous growth both in popularity and usage in recent years. In fact, “[t]he proportion of online adults who use Pinterest and Instagram has doubled [between 2012 and 2015].”<sup>47</sup> Importantly, much of this increase in usage can be attributed to mobile media applications on smartphone devices.<sup>48</sup> Many Internet platforms also have individualized mobile applications where consumers can access content from their mobile devices with the click of a button.<sup>49</sup> As a result, user engagement with digital content is possible twenty-four hours a day.<sup>50</sup>

Not surprisingly, statistics regarding Internet user behavior suggest that “41% of adult internet users take photos or videos that they have found online and repost them on sites designed for sharing images with many people.”<sup>51</sup>

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46. ANDREW PERRIN & MAEVE DUGGAN, PEW RESEARCH CTR., AMERICANS’ INTERNET ACCESS: 2000–2015, at 4 (2015), [http://www.pewinternet.org/files/2015/06/2015-06-26\\_internet-usage-across-demographics-discover\\_FINAL.pdf](http://www.pewinternet.org/files/2015/06/2015-06-26_internet-usage-across-demographics-discover_FINAL.pdf) [<https://perma.cc/XY2B-SJH6>]. Even greater growth is evident in Internet usage by adults over the age of sixty-five, which has increased by 44 percent in the same time period. *Id.*

47. MAEVE DUGGAN, PEW RESEARCH CTR., MOBILE MESSAGING AND SOCIAL MEDIA 2015, at 2 (2015), <http://www.pewinternet.org/files/2015/08/Social-Media-Update-2015-FINAL2.pdf> [<https://perma.cc/A5KQ-UKE7>] (“Some 31% of online adults use Pinterest (up from 15% in 2012), while 28% use Instagram (up from 13% in 2012).”).

48. As of 2015, approximately 85 percent of all young adults regularly access the Internet on their smartphone devices. *See* AARON SMITH, PEW RESEARCH CTR. U.S. SMARTPHONE USE IN 2015, at 5 (2015), [http://www.pewinternet.org/files/2015/03/PI\\_Smartphones\\_0401151.pdf](http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf) [<https://perma.cc/ZR3M-6RS3>]. Furthermore, 67 percent of this population uses their phones to “share pictures, videos, or commentary about events happening in their community.” *Id.* at 6.

49. *See id.* at 9 (finding that social networking tied with Internet use as the second most frequent smartphone behavior among young adults after text messaging). This suggests the importance of social media as the central force behind social commentary and dialogue on the Internet.

50. *See* DUGGAN, *supra* note 47, at 3 (“Fully 59% of Instagram users, 27% of Pinterest users and 22% of LinkedIn users visit these platforms daily.”).

51. *Social Networking Fact Sheet*, PEW RES. CTR. (Dec. 27, 2013), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet> [<https://perma.cc/2J7U-HVJ7>]. This practice is likely much more widespread today, as this statistic was the result of a study conducted in 2012.

These so-called curators<sup>52</sup> form communities centered around sharing content on social media applications.<sup>53</sup> The collaborative content sharing that is encouraged by these platforms is very different from the Internet activity that was prominent a decade ago. In the past, most users who posted content online uploaded photographs or videos that they independently created. In contrast, social media sites today “encourage users to post content that is not their own” in a process referred to as “linking.”<sup>54</sup> Scholars conceptualize these separate user behaviors as entirely different generations; the term “user-generated content” is used to refer to the first generation of social media, while “user-found content” is used to identify the second generation of social media.<sup>55</sup> The majority of the problems facing content creators today arises in connection with the second generation of social media because the ease with which Internet users can access and share content on the web conflicts with traditional notions of copyright protection.

Unlike user-generated content, user-found content—such as resharing of photographs found on the Internet—is primarily intended to achieve a cultural flow or start a social conversation.<sup>56</sup> Some scholars even equate this copying behavior to an extension of free speech, highlighting content sharing’s inherent conversational nature.<sup>57</sup> One such academic, Rebecca Tushnet, argues that

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52. Maeve Duggan, *Photo and Video Sharing Grow Online*, PEW RES. CTR. (Oct. 28, 2013), <http://www.pewinternet.org/2013/10/28/photo-and-video-sharing-grow-online/> [https://perma.cc/3SKL-SSK4] (“The curator group is made up of those who have taken *photos* they found online and posted them on a site used for sharing images with others (42% of internet users have done so) and those who have taken *videos* they found online and posted them to a video-sharing site (36% of internet users have done so). If a person did either of these activities (or both), we consider them an online image *curator*.”).
  53. This collaborative environment on the Internet is an example of what some scholars have coined a “remix culture.” See, e.g., Mary W. S. Wong, “Transformative” User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1084 (2009) (“In today’s remix culture, examples abound of this type of creativity, from hip hop music and digital mashups to appropriation art and machinima videos; all highlight the vibrancy and breadth of participatory culture, and thus challenge the utilitarian perspective of traditional copyright law.” (footnotes omitted)).
  54. Alm, *supra* note 2, at 115–16. For a list of content that is typically linked, see Font, *supra* note 2, at 256 (“This content includes, but is not limited to, Internet links, videos, web pages, photos, and any other content that a user can find on the Internet.”).
  55. Alm, *supra* note 2, at 105–06 (citing Craig C. Carpenter, *Copyright Infringement and the Second Generation of Social Media Websites: Why Pinterest Users Should Be Protected From Copyright Infringement by the Fair Use Defense*, 16 J. INTERNET L. 1, 10 (2013)).
  56. See Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 937 (2009) (“[O]nly when a commodity achieves a cultural flow does it gain value at all. In fact, culture industry products only become successful in the first place when people find social meaning in a work that transcends market value.”).
  57. Copyright scholar Rebecca Tushnet argues that the transformative inquiry that is central to fair use analysis can limit freedom of expression and speech. See generally Rebecca Tushnet, *Copy This*

because audiences benefit both from copied as well as original expressions, copyright doctrine should permit both important forms of creative expression.<sup>58</sup> In advocating for this viewpoint, Tushnet highlights the many ostensibly transformative functions of copying. She states that “[c]opying can serve as self-expression . . . can assist persuasion . . . and it can *work as affirmation*, a way of connecting to a larger group.”<sup>59</sup> Thus, Tushnet contends that recontextualizing a copyrighted work to spark a dialogue can serve the purposes of copyright, despite the fact that this kind of alteration would not fall under the traditional definition of transformative use.<sup>60</sup> Furthermore, because every individual interprets and understands a work of authorship differently, she argues that “there is no such thing as an identical copy.”<sup>61</sup> Rather copying creates a larger dialogue, adding new meaning and purpose, which completely transcends the original.<sup>62</sup>

Tushnet’s argument is extreme. Her contention that identical copies do not exist because individuals interpret and understand content differently risks completely eliminating the important protections copyright law affords to creators. Yet, Tushnet’s argument regarding the heightened value and transcendent nature of shared content is a claim that has significance in the social media environment. Unlike the case of a secondary user making an exact copy of an author’s novel and reprinting it for his own benefit, the ultimate purpose behind sharing and reposting content on social media is to form connections with other users. Typically, individuals use social media accounts to join in a conversation with other users regarding the subject matter of the original post. Thus, the Internet is unique because it is a place where freedom of expression proliferates and individuals with different perspectives can share content in order to communicate their beliefs, opinions, and thoughts to a wider audience.

Moreover, consumers who share content on the Internet often add additional creative material that further enhances the original expression.<sup>63</sup> The

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*Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

58. *Id.* at 566 (“Pure copying, or copying that is not sufficiently distinct to count as ‘transformation,’ serves vital social purposes.”).

59. *Id.* at 566–67 (emphasis added).

60. *See id.* at 572–73 (noting that a copyrighted work is not static and copying original works without incorporating major transformations can serve the functions of copyright law).

61. *Id.* at 572 & n.176.

62. *Id.* at 579 (“More than just a product of individual choice, however, repetition has extra value, both intrinsic and instrumental, that comes from public association with like-minded souls.”).

63. As one scholar describes:

Today’s “audience” no longer just passively consumes creative works. Nor are all works “fixed” in the sense that they never change once the original author produces them. Rather, the consumer is now often an *active* participant in the creative endeavor, interacting with, and continuously contributing new material to

comments that users attach to user-generated content on social media constitute one tangible way in which user-shared content generates social dialogue on the web. Consequently, some scholars argue that this characteristic should be considered when analyzing the transformative quality of a secondary user's sharing behavior. In a paper presented at the 2008 User-Generated Content, Social Networking and Virtual Worlds Roundtable, one such individual, Debora Halbert, described the impact of content sharing on the greater community in the context of a YouTube video depicting Steven Colbert's speech to the press at the White House Correspondents' Association dinner.<sup>64</sup> Halbert explained that numerous clips of this speech appeared on YouTube and were targeted as copyright infringement. Halbert argued, however, that because the purpose of the videos was to generate "discussion about the content," even though "[t]he clip itself is not transformed . . . the dialogue it generates seems important to consider."<sup>65</sup> Halbert, like Tushnet, found great social value in an online copyright culture that promotes sharing.<sup>66</sup> Though Halbert recognized the value in property ownership over one's copyrighted content, she lamented that "[d]espite the codification of fair use criteria, the lack of clarity regarding what is and is not a fair use and the bias of copyright law towards commercial interests often means fair use . . . does not go far enough towards protecting public uses of copyrighted materials."<sup>67</sup>

Memes exemplify both Tushnet and Halbert's arguments, as they are a form of user-found content that proliferates in Internet culture because of downstream sharing. A meme is defined as a "virally-transmitted cultural symbol or social idea."<sup>68</sup> Typically, memes are a combination of images and text meant to elicit a reaction from the community of online users and provoke social commentary.<sup>69</sup> Memes also reflect a new manner of civic participation in

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creative works. In fact, consumers may contribute as much creatively to some copyrightable works as the original producers.

Erez Reuveni, *Authorship in the Age of the Conducer*, 54 J. COPYRIGHT SOC'Y U.S.A. 285, 286 (2007).

64. Halbert, *supra* note 56, at 952.

65. *Id.* ("The viral viewing habits of people watching these videos led to a new form of public discourse that copyright now hinders."). Although her paper focused on viral videos, Halbert's argument with respect to user commentary applies to all content posted on the Internet. *Id.* at 957.

66. Halbert even quotes Tushnet's statement: "[D]emocracy requires more than democratically elected rulers; it requires democratic culture." *Id.* at 952 (quoting Tushnet, *supra* note 57, at 539).

67. *Id.* at 953.

68. Paul Gil, *What Is a 'Meme'?*, LIFEWIRE (Nov. 30, 2016), <http://netforbeginners.about.com/od/weirdwebculture/f/What-Is-an-Internet-Meme.htm> [<https://perma.cc/VW6C-ZHF4>].

69. See Brief of Amici Curiae Professors of Intellectual Property Law in Support of Defendant's Motion for Summary Judgment, at 3, *N. Jersey Media Grp. Inc. v. Fox News Network, LLC*, 74 F. Supp. 3d 605 (S.D.N.Y. 2015) (No. 14 Civ. 7630), 2015 WL 9942599 [hereinafter Brief of

which citizens can contribute to important discussions about social issues.<sup>70</sup> Often equated to a flu or virus for their ability to spread from one individual to the next, memes represent the core values that many individuals associate with the Internet because only when an image or meme is shared by many Internet users does it take on its heightened, socially significant persona.<sup>71</sup>

For example, in relation to the 2016 presidential election, Governor Chris Christie's expressionless face in the background of Donald Trump's Super Tuesday victory speech became a popular meme seemingly overnight.<sup>72</sup> Most of those who shared the video clip used a snippet from the television broadcast depicting Christie's pained expression. This image was shared over and over again with different musical backgrounds and captions to satirize Governor Christie's endorsement of Trump. While the image used was the same in every post, the cumulative impact of all the content together created an important political dialogue. No post alone could be as significant or meaningful without the others.

Similarly, in response to the shooting of Harambe, the Cincinnati Zoo gorilla, on May 28, 2016, hundreds of memes depicting the gorilla's likeness proliferated across social media platforms.<sup>73</sup> Harambe's image was pho-

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Amici Curiae] ("Today, 'memes'—usually combinations of images and text, easily understood and also easily changed and commented on—are some of the most significant ways in which ordinary people communicate online, often to greater effect than slickly produced, professional offerings.")

70. See LIMOR SHIFMAN, MEMES IN DIGITAL CULTURE 150 (2014); see also Sophie Lecheler, *Book Review: Memes in Digital Culture by Limor Shifman*, LONDON SCH. ECON. & POL. SCI.: REV. BOOKS (Jan. 18, 2014), <http://blogs.lse.ac.uk/lseviewofbooks/2014/01/18/book-review-memes-in-digital-culture-by-limor-shifman> [https://perma.cc/5YW2-CABJ] ("[Limor] Shifman argues that memes offer a new way of civic participation, one where citizens are able to express political opinions and participate in important debates. This argument connects with other studies in the field of new media, which also find that user generated content may function as a mobilizer for citizens who are not usually able or willing to convey their political opinions in the traditional mass media.")
71. See Brief of Amici Curiae, at 3 ("Visual memes are also particularly open to transformative reuses, because visuals have so many possible different meanings."); see also, SHIFMAN, *supra* note 70, at 150 ("[One] implication of the visual nature of Internet memes relates to their polysemic potential—that is, their tendency to be open to multiple readings. Whereas in verbal jokes the target of mockery and its scorned feature are often clear, visual images' openness and lack of a clear narrative may invoke contrasting interpretations.")
72. See Sage Lazzaro, *11 Hilarious Memes of Chris Christie Regretting His Decision to Endorse Donald Trump*, OBSERVER (Mar. 2, 2016, 11:31 AM), <http://observer.com/2016/03/11-hilarious-memes-of-chris-christie-regretting-his-decision-to-endorse-donald-trump> [https://perma.cc/5JUK-9VJL] (displaying several viral memes of Chris Christie's face overlaid with text or juxtaposed with images of television characters such as Gob from *Arrested Development*).
73. See Aja Romano, *The Harambe Meme Is Still Going Strong. And It's About a Lot More Than a Dead Gorilla*, VOX (Sept. 13, 2016, 12:02 PM), <http://www.vox.com/2016/8/17/12457468/harambe-meme-social-commentary-explained> [https://perma.cc/X8BX-Z62Z].

toshopped into places of honor such as Mount Rushmore,<sup>74</sup> included alongside Prince and Muhammed Ali in tributes paying respects to “legends” who died in 2016<sup>75</sup> and declared the “meme of the summer.”<sup>76</sup> Importantly, the abundance of posts utilizing Harambe’s image and lamenting his untimely death soon became a social commentary on the state of race relations in the United States and the American public’s seeming indifference to the plight of minorities.<sup>77</sup> By contrasting the shared outrage over Harambe’s death with the collective indifference over the daily deaths of people of color, the Harambe meme ultimately became a broader statement on American culture.<sup>78</sup> Yet the power and cumulative impact of this statement to spark dialogue could not have been achieved without the large quantity of memes posted on the Internet all utilizing the same image.

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On May 28, 2016 a three-year-old child scaled the fence surrounding the Cincinnati Zoo’s gorilla enclosure. A seventeen-year-old gorilla named Harambe made contact with the child. He “dragged the small child around by the ankle in the shallow water of the moat, carried him up the ladder out of the moat, and then dragged him several times on the ground of the gorilla enclosure.” Zoo officials determined the child’s life was in danger and subsequently shot Harambe. Shauna Steigerwald, *Report Faults Zoo’s Gorilla Barrier in Harambe Case*, USA TODAY (Nov. 18, 2016, 10:51 AM) (citing ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEPT OF AGRIC., INSPECTION REPORT 1 (2016)), <http://www.usatoday.com/story/news/nation-now/2016/11/17/report-cincy-zoos-gorilla-barrier-wasnt-compliance-but/94045870/> [https://perma.cc/9TRV-PUUA].

Following the shooting, nationwide protests erupted regarding the untimely killing of the beloved gorilla. See Jessica Roy, *Harambe Was the Meme We Couldn’t Escape in 2016*, L.A. TIMES (Dec. 30, 2016, 2:45 AM), <http://www.latimes.com/nation/la-na-harambe-meme-evolution-20161221-story.html> [https://perma.cc/3NVQ-FHL6] (“There was also a massive outpouring of public grief for a gorilla most people in the U.S. probably had never heard of while he was alive. More than half a million people signed a “Justice for Harambe” petition on Change.org.”).

74. Fred Delicious (@Fred\_Delicious), TWITTER (July 20, 2016, 1:32 PM), [https://twitter.com/Fred\\_Delicious/status/755863005120823298](https://twitter.com/Fred_Delicious/status/755863005120823298) [https://perma.cc/97ZS-Y8HE].
75. WORLDSTARHIPHOP (@WORLDSTAR), TWITTER (June 6, 2016, 10:05 PM), <https://twitter.com/WORLDSTAR/status/740046957595369474> [https://perma.cc/5ZGW-VEJU].
76. See Kaitlyn Tiffany, *What Is the Meme of the Summer?*, VERGE (Aug. 12, 2016, 10:33 AM), <http://www.theverge.com/2016/8/12/12426820/memes-summer-2016-arthur-dat-boi-harambe> [https://perma.cc/8S5K-E7JD].
77. Indeed one reporter notes:  
 Harambe’s death occurred the same week in which 1,000 people died attempting to cross the Mediterranean Sea to immigrate safely into Europe. Given that the gorilla’s death largely overshadowed the conversation about actual human life, backlash to the backlash was swift to follow. Cosmopolitan called the public’s reaction ‘sexist and racist,’ noting along with other outlets that the public seemed to value the life of a gorilla more than the life of the endangered child or the safety of his mother, both of whom are black.  
 See Romano, *supra* note 73.
78. *Id.* (“As a form of protest, black social media communities embraced the Harambe meme to comment ironically on the ways in which society tends to minimize and overlook the deaths of ordinary people of color.”).



These examples are only two of many that demonstrate the power user-found content sharing has to create conversations that are more significant collectively than individually. Like traditionally accepted fair uses such as critique or parody, the social dialogue sparked by memes serves the copyright values of encouraging creativity and expression. The cultural dialogue created on the Internet via sharing of content like memes directly threatens many original creators, however, who view the sharing of their original content as an infringement of their copyright. The next Part describes the parties aggrieved by content-sharing activity on the Internet.

### B. Parties Aggrieved by Social Media Sharing Behavior

Despite the positive cultural dialogue generated by shareable content, many content creators disapprove of an Internet environment in which content is free.<sup>79</sup> An important distinction between the copyright environment of the past and that of today is that the current ease of accessing content on the Internet has sparked a culture that encourages taking the works of others without paying any fees. Accordingly, the generational shift from user-generated to user-found content reflects not only a change in consumer behavior, but also a change in norms and accepted conduct on the Internet. By creating a “like” feature on Facebook, “heart” feature on Instagram, or “pin” feature on Pinterest, social media developers have conditioned Internet users to interact with content. Furthermore, this infrastructure fosters the conception that reposting content to other places on the Internet can be accomplished without consequence.

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79. As some scholars have observed:

For millions of individuals . . . the practice of appropriation is simply an everyday occurrence, and one that raised little or no conscious acknowledgment of copyright at the outset. As we have noted, however, copyright proprietors, alarmed by this new phenomenon, have intervened with efforts to curtail it. Given the direction in which the popular appetite for appropriation has been moving, however, the effect of this intervention, though no doubt unintended, has seemed at times (particularly in the past decade) to be regressive and counterintuitive . . .

David Lange & Jennifer Lange Anderson, Copyright, Fair Use and Transformative Critical Appropriation 138 (2001) (unpublished manuscript presented at the Conference on the Public Domain at Duke Law School), <https://law.duke.edu/pd/papers/langeand.pdf> [<https://perma.cc/2WCW-AGFX>]; see also Alm, *supra* note 2, at 104 (“The unprecedented instant transfer of information allows rapid and large-scale infringement.”); Jennifer Yeh, Note, *Bright Lights, Bright-Line: Toward Separation and Reformation of the Transformative Use Analysis*, 32 CARDOZO ARTS & ENT. L.J. 995, 1002 (2014) (“Given the relative ease and access with which one can now acquire an image shared by the photographer, as the volume of content made available on the Internet increases, the potential of violating copyright protections and subsequent threats of litigation accordingly rises.”).

Conceptualizing the Internet as an open environment, many consumers assume that it is not improper to copy an image from one domain and paste it to another.<sup>80</sup>

One commentator, Tanya Woods, analogizes this principle of widely accepted copying and reposting on the Internet to drivers on a highway. Woods aptly asserts, “content users still largely perceive copyright as a multitude of inconveniently placed stop signs on the Internet highway. Some might stop, others may yield, but the majority of content users still appear to be rolling right through.”<sup>81</sup> Woods characterizes this disregard for copyright as an inevitable result in the face of social norms that develop from “the informal, intuitive and global nature of the Internet.”<sup>82</sup> Woods fittingly articulates the tension that lies between the activities of social media users and black-letter copyright doctrine on the Internet today.

Content creators online can typically be split into two distinct groups: (1) professional photographers and artists who post content they have personally created, and (2) novices who use social media accounts to gain awareness and fame. Professional photographers and artists are the individuals most critically impacted by the prevalence of sharing in our Internet culture today because the career and profitability of professionals are typically sustained by charging licensing fees for the use of their creative works. Without a market of users willing to spend money to gain access to their creative works, these professionals have little recourse for monetizing their works on a digital platform. As discussed above, social media websites cause a proliferation of sharing activity.<sup>83</sup> Downstream sharers of an image frequently do not even realize that the image they are sharing is copyrighted.<sup>84</sup> Moreover, even if these sharers in fact knew

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80. Users are quick to see the Internet as a place with few consequences or rules. *New York Times* columnist John Leland interviewed Donald L. McCabe, a Rutgers professor who recognized this tendency in 2003. McCabe lamented: “In a sense, Internet technology is a metaphor for the new morality. As long as you can get it, it doesn’t matter how.” Leland also noted that “[i]n a nation that flaunts its capacities to produce and consume, much of the culture’s heat now lies with the ability to cut, paste, clip, sample, quote, recycle, customize and recirculate.” John Leland, *Beyond File-Sharing; A Nation of Copiers*, N.Y. TIMES (Sept. 14, 2003), <http://www.nytimes.com/2003/09/14/style/beyond-file-sharing-a-nation-of-copiers.html> [<https://perma.cc/ZHR2-CWSD>].

81. Tanya M. Woods, *Working Toward Spontaneous Copyright Licensing: A Simple Solution for a Complex Problem*, 11 VAND. J. ENT. & TECH. L. 1141, 1149 (2009).

82. *Id.* (quoting Daniel J. Gervais, *Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 517, 525 (Michael Geist ed., 2005)).

83. See *supra* text accompanying notes 46–78 for a discussion of the implications of user-found content on user behavior.

84. As some scholars have observed:

“Today our fragmented copyright system is ill-adapted to the real essence of art, which has no frontiers. Instead, that system has ended up giving a more promi-

that the original image was copyrighted, it is often difficult to ascertain whom to ask for permission because images typically have been shared by numerous prior users.

Not surprisingly, a direct result of the increased popularity and relevance of social media websites has been an uptick in copyright infringement lawsuits brought by these professional content creators against users of their copyrighted content. For example, content creators have clashed with individual users on numerous occasions regarding resharing of Internet memes.<sup>85</sup> These claims bring the propriety of Internet content sharing behavior into question.<sup>86</sup> Despite the fact that lawsuits are often financially impractical to bring in this realm given the high costs of litigation and low amount of statutory damages available,<sup>87</sup> creators continue to argue that their copyrights in their user-generated content are being infringed by the culture of sharing that now permeates the web. These lawsuits have touched all forms of online media platforms, from individually created blogs to popular websites such as BuzzFeed and Pinterest. Yet, a common theme in this litigation is that settlements are the predominant outcome. Consequently, courts have not specifically ruled on the arguments set forth by many creators of shared content.

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ment role to intermediaries than to artists. It irritates the public who often cannot access what artists want to offer and leaves a vacuum which is served by illegal content, depriving the artists of their well-deserved remuneration. And copyright enforcement is often entangled in sensitive questions about privacy, data protection or even net neutrality,” said European Commissioner Neelie Kroes in November 2010, summarizing the copyright challenges in the European environment. Given the global nature of the digital economy, many of these challenges increasingly face policy-makers and regulators in markets around the world.

*Intellectual Property Rights in Today's Digital Economy*, ITU NEWS (Sept. 2011) (citing ADAM DENTON, INT'L TELECOMM. UNION, GSR 2011 DISCUSSION PAPER: INTELLECTUAL PROPERTY RIGHTS IN TODAY'S DIGITAL ECONOMY (2011) as the basis of the online article), <http://www.itu.int/net/itunews/issues/2011/07/38.aspx> [<https://perma.cc/6ZDQ-MJ73>]

85. See, e.g., Nicole Martinez, *Posting an Internet Meme? You May Receive a Getty Letter*, ART L.J. (Oct. 1, 2015) <http://artlawjournal.com/internet-meme-getty-letter> [<https://perma.cc/V7BV-BQH2>] (noting that Getty Images has settled multiple copyright infringement suits with websites that post the Socially Awkward Penguin meme because the meme features a National Geographic photograph which is available for licensing on Getty Images).

86. Memes have even been created to mock the copyright lawsuits brought by content creators. See Caitlin Dewey, *How Copyright Is Killing Your Favorite Memes*, WASH. POST: THE INTERSECT (Sept. 8, 2015) [https://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes/?utm\\_term=.a27a782493bf](https://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes/?utm_term=.a27a782493bf) [<https://perma.cc/P4PG-P79E>] (including an image of the Socially Awkward Penguin meme with the text, “Posts a Meme. Lawsuit”). The caption underneath the image adds to the ridicule stating: “Meme by the Washington Post, photo by George Mobley for National Geographic. Yes, we had to pay to post this Socially Awkward Penguin.” *Id.*

87. See Clark, *supra* note 5, at 18.

For example, celebrity blogger Perez Hilton has been sued numerous times by photographers for photographs he posts on his blog *perezhilton.com*. Typically, Hilton argues under the fair use doctrine that his expression is protected because he “transform[s]” the photographs by “drawing captions, tears, or other scribbles.”<sup>88</sup> In one recent case, Hilton was sued by *New York Times* photographer Robert Caplin for publishing fourteen photographs on his blog without Caplin’s permission.<sup>89</sup> According to Caplin’s complaint, Caplin posted thirty-two photographs originally published in a *New York Times* story about Darren Criss’s Broadway debut in an online gallery.<sup>90</sup> Hilton allegedly took screenshots of fourteen of these images, directly circumventing control measures Caplin implemented to protect his copyright in the photographs pursuant to 17 U.S.C. § 1201(a)(1)(A).<sup>91</sup> Moreover, Hilton put his own commercial watermark “perezhilton.com” on the images.<sup>92</sup> Subsequent to Hilton’s blatant copying, Caplin brought a lawsuit alleging copyright infringement.<sup>93</sup> Nevertheless, Hilton’s fair use argument was never adjudicated because the parties settled.<sup>94</sup>

Similarly, the popular websites BuzzFeed and Pinterest have faced lawsuits over the past several years from professional photographers who claimed that their copyrighted works were infringed when featured on these websites without authorization. In 2013, BuzzFeed was embroiled in a \$3.6 million copyright lawsuit initiated by Idaho-based photographer Kai Eiselein.<sup>95</sup> Eiselein alleged that BuzzFeed infringed his copyright when it reposted his photo depicting a female soccer player being hit in the head by a soccer ball in a post called “The 30

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88. Allen Murabayashi, *The Economics of Copyright Infringement in Robert Caplin vs Perez Hilton*, PHOTOSHELTER BLOG (July 8, 2013), <http://blog.photoshelter.com/2013/07/the-economics-copyright-infringement-in-robert-caplin-vs-perez-hilton> [https://perma.cc/M24Q-L48Z].

89. Michael Zhang, *NYTimes Photographer Sues Perez Hilton for \$2.1M Over Copyright Infringement*, PETAPIXEL (June 29, 2013), <http://petapixel.com/2013/06/29/nytimes-photographer-sues-perez-hilton-for-2-1-million-for-copyright-infringement> [https://perma.cc/9A6G-ZD9X].

90. Complaint for Copyright Infringement and DMCA Violations & Demand for Jury Trial at 2–3, *Caplin v. Lavandeira*, No. 13-04638 (C.D. Cal. June 26, 2013).

91. See Zhang, *supra* note 89. These control measures protected Caplin’s images against drop and right-click and copy efforts. Thus, by taking a screenshot of Caplin’s photographs and placing his own commercial watermark on them, Hilton directly violated this statute. See 17 U.S.C. § 1201(a)(1)(A) (2012).

92. Zhang, *supra* note 89.

93. *Id.* Caplin requested \$150,000 in damages for each infringement, a total of \$2.1 million. *Id.*

94. See Mediation Report, *Caplin v. Lavandeira*, No. 13-04638 (C.D. Cal. July 10, 2014) (noting that the parties settled on July 9, 2014).

95. See Complaint, *supra* note 32; Christopher Zara, *Buzzfeed Copyright Lawsuit May Test Legal Limits of Fair Use in Listicles: Photographer Seeking \$3.6 Million*, INT’L BUS. TIMES (June 18, 2013, 4:59 PM), <http://www.ibtimes.com/buzzfeed-copyright-lawsuit-may-test-legal-limits-fair-use-listicles-photographer-seeking-36-million> [https://perma.cc/XNP2-PNV2].

Funniest Header Faces.”<sup>96</sup> BuzzFeed is a website that “derives much of its traffic from social media” and “has emerged in recent years as a leader in shareable online content.”<sup>97</sup> Consequently, many of the viral “listicles”<sup>98</sup> posted on the platform include both unlicensed images and licensed content from Reuters and Getty Images.<sup>99</sup> Nevertheless, BuzzFeed founder Jonah Peretti argued that BuzzFeed’s use of user-found images was protected under the fair use doctrine as a transformative use. Peretti claimed that a BuzzFeed list is an inherently transformative use of photographs due to the “sequencing” and “framing” that is employed.<sup>100</sup> Furthermore, Peretti suggested that despite creators’ grievances, it is “good for the world to have a broad definition of Fair Use where people can create new things that are transformative or that people can enjoy.”<sup>101</sup> Content creators such as Eiselein strongly disagree.<sup>102</sup> Yet the issue of whether Peretti’s listicle model could be deemed a transformative use was also never adjudicated in court, as the parties settled several months after Eiselein filed the complaint.<sup>103</sup>

A similar result occurred when a photographer sued Pinterest in federal court over alleged repeated copyright infringement. Seattle-based fine art photographer Christopher Boffoli, known for his photographs depicting miniature figures on food, claimed that his photographs were posted more than

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96. Zara, *supra* note 95. Eiselein stated in the complaint that he originally uploaded his image to his Flickr page in 2009 and registered the copyright in 2011. Complaint, *supra* note 32, at 1.
97. Zara, *supra* note 95; *see also* Yeh, *supra* note 79, at 999–1000 (“BuzzFeed’s success is attributed greatly to Peretti’s development of technology that helped identify viral media content that was being posted and shared widely, as well as his realization that people want to see content that someone else in their life that they care about will like, even if they don’t like it very much.” (internal quotations omitted)).
98. A listicle is defined as “an article in the form of a list.” Arika Okrent, *The Listicle as Literary Form*, U. CHI. MAG. (Jan.–Feb. 2014), <http://mag.uchicago.edu/arts-humanities/listicle-literary-form> [<https://perma.cc/FMH6-N2EP>]; *see, e.g.*, sources cited *supra* note 96 discussing a listicle entitled “The 30 Funniest Header Faces” which was the subject of a lawsuit between BuzzFeed and photographer Kai Eiselein.
99. Alexis C. Madrigal, *Where Do All Those BuzzFeed Cute Animal Pictures Come From?*, ATLANTIC (Apr. 30, 2012), <http://www.theatlantic.com/technology/archive/2012/04/where-do-all-those-buzzfeed-cute-animal-pictures-come-from/256547> [<https://perma.cc/529R-6Z4B>].
100. *Id.* (“It’s a question . . . of when lots of little things add up to a transformation as opposed to a copyright violation.”).
101. *Id.*
102. Interestingly, Eiselein suggests he would approve of sharing photographs on the Internet so long as it is done “properly.” Zara, *supra* note 95. In other words, Eiselein advocates for sharing of hotlinked photographs, which direct traffic to the original author’s website. “Hotlinking is a web behavior that links web resources on a hosting site into a webpage belonging to another site.” Zi Chu & Haining Wang, *An Investigation of Hotlinking and Its Countermeasures*, COMPUT. COMM’NS, April 2011, at 577. Eiselein states “hotlinking provides tangible benefits by helping to drive traffic and getting works in front of people.” Zara, *supra* note 95.
103. *See* Stipulation of Dismissal, *Eiselein v. BuzzFeed, Inc.*, No. 13-3910 (S.D.N.Y. Dec. 20, 2013).

5000 times on the public site and that Pinterest did not do enough to “protect photographers and their work.”<sup>104</sup> Boffoli argued not only that he was impacted by copyright infringement, but also that he suffered from the lack of attribution to his unique images that were “pinned.”<sup>105</sup> Like many lawsuits brought by independent photographers against profitable entities such as Pinterest and BuzzFeed,<sup>106</sup> however, the case was ultimately settled by the parties for an undisclosed amount.<sup>107</sup>

Lawsuits connected with the second group of content creators identified above (novice accounts that post content in order to gain fame or recognition) are significantly less common. Their creativity is derived not from the actual production of content but from the curation of content accompanied by original commentary. Yet these individuals still consider themselves to be content creators. Unlike the original content creators discussed above, this population relishes sharing of their content because it enhances their visibility. Thus, disputes arise when their material is shared without attribution.<sup>108</sup>

More often than not, individuals who fail to attribute the original source of the content used in their social media post are forced into compliance through public pressure. This result is exemplified by the recent controversy involving Instagram celebrity Josh Ostrovsky’s account, @thefatjewish. In the summer of 2015, Ostrovsky grew infamous when news circulated that the memes he posted on his Instagram account were skimmed from other users’ accounts.<sup>109</sup> The public was outraged that Ostrovsky posted these images without attribution to the original curators.<sup>110</sup> Ostrovsky argued that his use of these images was proper

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104. Archambault, *supra* note 32.

105. *Id.* (“Much of my work is pinned to Pinterest without attribution, which throws out the window the common trope about this kind of use gaining me ‘exposure.’”).

106. *See, e.g., supra* notes 87–103 and accompanying text.

107. *See* Stipulation and Order of Dismissal With Prejudice of All Claims, *Boffoli v. Pinterest, Inc.*, No. 14-01811-TSZ (W.D. Wash. Sept. 1, 2015).

108. *See infra* notes 109–110 and accompanying text. While attribution under traditional copyright law focuses on the creator of the content, social media norms have modified attribution to focus on the finder’s identity. This reflects a new user-found content norm in which the finder is entitled to attribution, not just the creator.

109. *See, e.g.,* Brian Feldman, *Instagram Created the Fat Jew*, THE AWL (Aug. 18, 2015), <http://www.theawl.com/2015/08/instagram-created-the-fat-jew> [<https://perma.cc/V6YV-NYN6>] (“Ostrovsky, who swipes material from others without credit and does not make much of what he posts, is arguably *the* native Instagram celebrity, with 5.7 million followers.”).

110. Jason Newman, *The Fat Jew’ Joke Theft Victims Speak Out*, ROLLING STONE (Aug. 20, 2015), <http://www.rollingstone.com/culture/news/the-fat-jew-joke-theft-victims-speak-out-20150820> [<https://perma.cc/7CMW-CNPF>] (“Ostrovsky’s chronic refusal to credit the original authors of his jokes has made him the target of comedians across the web, including high-profile attacks from Patton Oswalt, Michael Ian Black, Kumail Nanjiani, Norm Macdonald and Chelsea Peretti, among many others.”).

because his creativity came from selection of images and inclusion of commentary that resonated with users regarding the social mores and trends of the day.<sup>111</sup> Ostrovsky, calling himself a content “curator,” maintained that his success stems from his ability to find content that is topical and relatable to social media users.<sup>112</sup> By failing to attribute the account names of curators who had found the content before him, however, Ostrovsky destroyed the visibility of these original curators and in the process effectively hindered their ability to gain followers. While this controversy did not result in a lawsuit, public outcry ultimately forced Ostrovsky into compliance with the attribution norms.<sup>113</sup> When faced with a barrage of negative publicity calling Ostrovsky a joke stealer,<sup>114</sup> Ostrovsky’s immediate response was to begin attributing the accounts from which he discovered the content in his captions.<sup>115</sup> This change in behavior satiated the public and the

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111. See Jesse David Fox, *A Conversation with the Fat Jew: That’s Not Who I Am or What I’m About*, VULTURE (Aug. 21, 2015, 8:55 AM), <http://www.vulture.com/2015/08/exclusive-interview-the-fat-jew.html> [https://perma.cc/653C-8P4E].
112. *Id.* (“I’ve consistently maintained that I’m a commentator. I’m a curator. I’m at the forefront of what’s cool and what’s hot and what’s funny. It’s complicated in that some of the stuff is made by me, some of the stuff is submitted, some of the stuff is found. It’s a hodgepodge.”).
113. *Id.* In an interview following the controversy, Ostrovsky has said:  
 I’m working to add attribution to every one of my posts, and will continue to do so. My email address is up. I urge people to reach out and say, “That’s my thing.” I would love to give credit. I want people to shine on social media, I always have. And I will never again post something that doesn’t have attribution, because I realize now that when the stage is large enough, and the voice is large enough, these things matter.
- Id.*
114. See, e.g., Luke O’Neil, *The Internet Plagiarist Taking Over the World: The Fat Jewish Is Thriving, and Comedians Are Pissed*, DAILY BEAST (Aug. 17, 2015, 9:15 AM), <http://www.thedailybeast.com/articles/2015/08/17/the-internet-plagiarist-taking-over-the-world-the-fat-jew-is-thriving-and-comedians-are-pissed.html> [https://perma.cc/9AXN-WUUC] (“Under normal circumstances an Internet personality might be thrilled to find their name trending on Twitter. But for Josh Ostrovsky, a flurry of attention over the weekend came for all the wrong reasons—or all the right ones, depending on who you ask—as the man behind the extremely popular Instagram account @thefatjewish was being hammered from all corners for his constant and unapologetic history of plagiarism. Everyone from hundreds of aspiring comics to the likes of Patton Oswalt spent Saturday piling on.”); see also Kumail Nanjiani (@kumailn), TWITTER (Aug. 15, 2015, 4:20 PM), <https://twitter.com/kumailn/status/632693387007660032?lang=en> [https://perma.cc/CR73-TTC4] (“As @FATJEW once said, I have a dream.”); Ben Rosen (@Rosen), TWITTER (Aug. 14, 2015, 4:44 PM), <https://twitter.com/rosen/status/632337014499770368> [https://perma.cc/BYH2-4R5T] (“Thanks FatJewish for straight up stealing my tweet without any credit whatsoever.”); Timothy Simons (@timothymsimons), TWITTER, (Aug. 14, 2015, 10:41 PM), <https://twitter.com/timothymsimons/status/632426751121997824> [https://perma.cc/2EUS-UQZT] (“Fat Jew was signed by CAA. They are going to ask for his ideas and he’ll be like ‘yeah I’ve got a ton’ then surreptitiously open Twitter.” (mistakes in original)).
115. See Newman, *supra* note 110 (“Presumably responding to the criticism, Ostrovsky has begun adding credits to his most recent Instagram posts.”).

curators whose images he posted without attribution. Despite this negative publicity, Ostrovsky remains a dominant presence in the social media scheme, perhaps due to his willingness to attribute the curators whose images he uses.<sup>116</sup>

Thus, the remainder of this Comment focuses on those professional content creators who represent the class of individuals most aggrieved by content sharing on the Internet. The tension between protecting their creative works while maintaining an online culture that supports the hallmark values of freedom of expression presents a challenge for copyright doctrine. This Comment strives to establish a compromise between these seemingly opposed interests. The next Part evaluates whether fair use, the quintessential doctrine of compromise, can be reinterpreted in order to achieve this goal.

## II. THE FAIR USE DOCTRINE AND ITS LIMITATIONS IN THE NEW MEDIA LANDSCAPE

The fair use doctrine has been called “the most troublesome in the whole law of copyright.”<sup>117</sup> While often praised for its flexibility,<sup>118</sup> the ambiguity regarding what renders a secondary use transformative creates inconsistent judicial decisions and general confusion among everyday users of the Internet. Varying interpretations among different U.S. jurisdictions further complicate the

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116. See, e.g., Amanda Hess, *Laugh Factory*, SLATE (Aug. 26, 2015), [http://www.slate.com/articles/technology/users/2015/08/the\\_fat\\_jew\\_is\\_not\\_alone\\_the\\_shady\\_business\\_of\\_internet\\_joke\\_stealing.html](http://www.slate.com/articles/technology/users/2015/08/the_fat_jew_is_not_alone_the_shady_business_of_internet_joke_stealing.html) (“These days, it seems that the further Ostrovsky wades into the mainstream, the less people seem to understand or care what the comics are griping about. Earlier this week, Today show reporter Sheinelle Jones set out to interview Ostrovsky about the controversy and ended up lounging with him at the spa and downing glasses of White Girl Rosé. Back on the Today set, Jones absolved Ostrovsky of his sins: ‘He’s totally smart. He totally gets it. He frankly just likes to have fun. And he’s a fun guy to be with!’”).

Ostrovsky even received an invite to the 2016 White House Correspondents’ Association dinner, seated alongside Arianna Huffington. His title credited him as “Pop-Culture Commentator and Model,” highlighting the role the @thefatjewish account plays in the social media environment. See DJ Khaled, DJ Steve Aoki and Bill Nye, *The Science Guy to Make a Splash at Huffington Post’s Table at This Year’s White House Correspondents’ Association Dinner*, WHITE HOUSE CORRESPONDENTS INSIDER (April 25, 2016), <http://whcinsider.com/2016/04/25/dj-khaled-dj-steve-aoki-and-bill-nye-the-science-guy-to-make-a-splash-at-huffington-posts-table-at-this-years-white-house-correspondents-association-dinner> [https://perma.cc/F3FH-EX8H].

117. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam); see also Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 391 (2005) (“Even in light of extensive judicial interpretation, the gaps, overlaps, ambiguities, and inconsistencies in the statutory text prompt even one of the leading members of the copyright bar to view the fair use statute with equal parts despair and admiration.” (footnote omitted)).

118. Fritz Attaway, executive vice president and Washington general counsel for the Motion Picture Association of America, has even stated that “[t]he beauty of fair use is that it is a living thing . . . like our Constitution . . . that can adapt to new technology.” PATRY, *supra* note 43, at 213.



situation, given that the Internet transcends such artificial boundaries. Moreover, because many potentially instructive lawsuits settle before adjudication, courts have not had the opportunity to develop a concrete rule regarding when social commentary on social media websites and content sharing are permissible under the fair use defense. Consequently, there is substantial uncertainty regarding the legality of behaviors that are commonly exhibited and have become ingrained in our Internet culture.

The following Subparts explore the reasons why it is essential for social media commentary to be conceptualized as a transformative purpose. Subpart A illustrates the emphasis courts place on the transformativeness inquiry when conducting a fair use analysis and the likelihood that a transformative work will qualify as a fair use. Subpart B outlines a line of cases in which courts prioritize transformative purposes as the basis for a fair use determination. Based on this precedent, courts should characterize social media commentary as a transformative purpose, and, accordingly, a fair use.

#### A. The Weight of the Transformative Use Determination

Fair use is an affirmative defense to a copyright infringement claim that “permit[s] the unlicensed use of copyright[ed] works in certain circumstances.”<sup>119</sup> Section 107 of the Copyright Act permits the unauthorized use of a copyrighted work if it is “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.”<sup>120</sup> When conducting a fair use analysis under § 107, courts consider the following four factors on a case-by-case basis:

- (1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>121</sup>

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119. U.S. Copyright Office, *supra* note 8.

120. 17 U.S.C. § 107 (2012).

121. *Id.* With respect to the nature of the copyrighted work, courts tend to agree that “the more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff’s work the broader the scope of the fair use defense.” See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 A[2][a] (2013). Regarding the amount and substantiality of the portion used, courts inquire “whether the amount taken is reasonable in light of the purpose of the use and the likelihood of market substitution.” *Peter Letterese & Assocs. v. World Inst. of Scientology Enters., Int’l*, 533 F.3d 1287, 1314 n.30 (11th Cir. 2008). Finally, when analyzing the impact upon the potential market, courts balance the benefit the public will derive if the use is permitted and the personal gain the copyright owner

However, studies analyzing patterns in fair use case determinations suggest that the most dispositive factor is the purpose and character of the use.<sup>122</sup> Under this factor, courts typically determine whether the defendant's use of a copyrighted work was commercial<sup>123</sup> and, as articulated in the seminal fair use case *Campbell v. Acuff-Rose Music, Inc.*,<sup>124</sup> "to what extent the new work is 'transformative.'"<sup>125</sup> Over the past several decades, the transformative analysis has become the primary inquiry conducted to determine whether the purpose and character of the use factor weighs in favor of fair use.<sup>126</sup> In performing this analysis, courts generally ask whether "the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . ."<sup>127</sup> The *Campbell* court further emphasized that the more transformative a new work is, the less significance the other fair use factors should be in making a fair use determination.<sup>128</sup> Consequently, the transformative analysis has taken on a heightened degree of significance in fair use case law.

This crucial role is evidenced by the prominent correlation between a use's transformativeness and the ultimate fair use outcome. This pattern was first documented in Barton Beebe's empirical study of three hundred fair use opinions authored between 1978 and 2005.<sup>129</sup> Beebe's research demonstrated that in 90 percent of opinions where the court found the "purpose and character of the use" factor weighed in favor of fair use, the court ultimately determined the use was a

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will receive if the use is denied. Typically, the less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use. See NIMMER & NIMMER, *supra*, § 13.05.

122. See *infra* notes 129–137 for a discussion of this research.

123. See NIMMER & NIMMER, *supra* note 121, § 13.05 ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

124. 510 U.S. 569 (1994).

125. *Id.* at 579 (noting that the transformativeness of the defendant's use supersedes other factors, such as commercialism).

126. See *infra* notes 129–133.

127. *Campbell*, 510 U.S. at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (citation omitted)).

128. The Court noted:

Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

*Id.* (citations omitted)).

129. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008).

fair use.<sup>130</sup> This striking connection between the first factor determination and the ultimate fair use conclusion illuminates the significance of the transformative inquiry. Matthew Sag came to a similar conclusion after conducting a mathematical study of 280 fair use cases authored between January 1, 1978 and May 31, 2011.<sup>131</sup> Sag's work measured the statistical correlation between fair use outcomes and various fact patterns and also concluded that transformative uses are generally favored to be fair uses.<sup>132</sup> Sag noted that "the insignificance of commercial use overall reinforces the dominance of transformative use over other factors."<sup>133</sup>

Neil Netanel expanded upon this study in order to determine what constitutes such a transformative use. In studying seventy-nine opinions in fair use cases from 1996 to 2010, Netanel concluded that "a startling number of recent cases have held that the use was transformative when the defendant copied the plaintiff's work in its entirety without modification, but for a different expressive purpose."<sup>134</sup> For example, his study concluded that "over 40% of the [opinions between 2006 and 2010] where the defendant copied the entire work without alteration found that the defendant's use was transformative, and over 90% of those uses were held to be fair use."<sup>135</sup> Netanel's findings confirm that when defining transformative use, courts overwhelmingly look for "a use that is for a new, different purpose" rather than "a use that entails new expressive contributions per se."<sup>136</sup> Thus, courts can doctrinally conceptualize social media content sharing as transformative if a particular post demonstrates a new or different expressive purpose.<sup>137</sup>

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130. *Id.* at 597 (quoting 17 U.S.C. § 107(1) (2000 & Supp. IV 2004)).

131. Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012).

132. *Id.* at 84 ("[I]t appears that transformative use by the defendant is a robust predictor of a finding of fair use."). Sag further notes:

[H]olding everything else constant, the chances of a fair use win are almost double, increasing from 33% to 62%, when this kind of transformative use is present . . .

[N]ot knowing anything else about the defendant's use, a plaintiff can expect to win a clear majority of cases where there is no indication of transformative use, but otherwise expect to lose all but 38% of the time.

*Id.* at 76.

133. *Id.* at 84.

134. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 719, 748 (2011).

135. *Id.*

136. *Id.* at 747 (finding that while "[i]t can help if the defendant modifies or adds new expressive form or content as well . . . [a] different expressive purpose, not new expressive content, is almost always the key").

137. *See id.* at 770 ("[T]ransformative purpose is almost universally a sufficient condition for fair use . . .").

## B. Judicial Expansion of the Transformative Purpose Analysis

Under the current doctrine, there is great ambiguity regarding which factors will cause a court to grant a fair use defense.<sup>138</sup> Substantial correlations between a finding in the defendant's favor on the transformative use factor and an ultimate finding of fair use are evident, however. As articulated by Neil Netanel, courts predominantly analyze the purpose behind a particular defendant's use when determining whether or not it is sufficiently transformative.<sup>139</sup> In order for social media dialogue to be considered a transformative purpose, it must fit within the doctrinal boundaries established by precedent.

The Second Circuit's ruling in *Bill Graham Archives v. Dorling Kindersley Ltd.*<sup>140</sup> is one example in which the court focused on the secondary user's expressive purpose when applying the fair use factor analysis.<sup>141</sup> In this case, the court considered whether it was fair use for the defendant to reproduce a Grateful Dead concert poster and tickets in a book on the band's history without permission from the copyright owner of the artwork that appeared on the posters and tickets.<sup>142</sup> The court ultimately concluded that the defendant's copying was fair use.<sup>143</sup> Reasoning that the expressive purpose of the copyrighted images was significantly different from that of the book, the court ruled in favor of the defendant.<sup>144</sup> The court noted that the purpose of the artwork on the concert posters and tickets was for a "mere expressive use," whereas the use of the artwork in the biographical book was "to commemorate historical events."<sup>145</sup> Thus, under *Bill Graham*, fair use did not require a literal transformation of a work but rather solely a transformative purpose.

The Ninth Circuit adopted a similar rule in *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>146</sup> finding that a new work which transformed the function or purpose of the original work without actually altering or materially adding to it was a fair use.<sup>147</sup> In this case, the plaintiff argued that Google's search engine infringed its

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138. See Madison, *supra* note 117, at 408 ("If the defendant's work 'transforms' the plaintiff's work, then the defendant wins. It is possible to use this test to reach sensible results, but the reasoning in these cases seems tortured, and it's difficult to implement the rule on a universal basis. How transformative is transformative enough? No one ever knows until the appellate court sings.")

139. Netanel, *supra* note 134, at 748.

140. 448 F.3d 605 (2d Cir. 2006).

141. *Id.* at 608–12.

142. *Id.* at 607 & n.1.

143. *Id.* at 615.

144. *Id.* at 609, 615.

145. *Id.* at 609.

146. 508 F.3d 1146 (9th Cir. 2007).

147. *Id.* at 1164–67.

copyright because the search feature displayed the plaintiff's images as thumbnails.<sup>148</sup> In analyzing Google's fair use defense, however, the court concluded that Google's search engine was "highly transformative" because its purpose was to direct a user to a source of information.<sup>149</sup> This purpose was found to be different from the expressive purpose behind the plaintiff's images.<sup>150</sup> Thus, under *Perfect 10*, even making an exact copy of a protected work may be transformative, provided "the copy serves a different function than the original work."<sup>151</sup>

Applying the *Perfect 10* court's analysis, a California district court recently found it was fair use for a website to post an unaltered version of a copyrighted image because it was used for a different expressive purpose.<sup>152</sup> In *Dhillon v. Does 1-10*,<sup>153</sup> the website Mungergames.net posted a copyrighted image of plaintiff Harmeet Dhillon without her permission in a critical article titled "Meet Harmeet."<sup>154</sup> The court found that the original purpose of the headshot in question was to promote Dhillon, as it was taken in connection with her candidacy for member of the state assembly.<sup>155</sup> Conversely, the purpose of the article posted on the Munger Games website was the exact opposite—to criticize Dhillon and her political views.<sup>156</sup> Therefore, "the defendant's use of the headshot photo was transformative because it served the purpose of criticism, rather than identification."<sup>157</sup> Thus, the court concluded that "[s]uch a use is precisely what the Copyright Act envisions as a paradigmatic fair use" and, therefore, the purpose and character of the use factor "weighs heavily in favor of defendant."<sup>158</sup>

Other circuits throughout the United States have similarly adhered to the trend of holding that a transformative purpose satisfies the first fair use factor even without physical alterations to the original work. For example, in *Caner v. Autry*,<sup>159</sup> a district court in Virginia held that posting YouTube videos to criticize

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148. *Id.* at 1157.

149. *Id.* at 1165.

150. *Id.*

151. *Id.* (citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–19 (9th Cir. 2003)).

152. *Dhillon v. Does 1-10*, No. C 13-01465 SI, 2014 WL 722592, at \*5 (N.D. Cal. Feb. 25, 2014) (granting defendant's motion for summary judgment).

153. *Id.*

154. *Id.* at \*1.

155. *Id.*

156. *Id.* at \*5 ("Rather than using the headshot photo as a positive marketing tool as the plaintiff did, the defendant used the headshot photo as part of its criticism of, and commentary on, the plaintiff's politics.")

157. *Id.*

158. *Id.*

159. 16 F. Supp. 3d 689 (W.D. Va. 2014).

and expose someone as a liar qualified as fair use.<sup>160</sup> Under the facts of this case, the defendant posted a video of the plaintiff's copyrighted speech for the purpose of making "religiously based criticism against a public figure on a matter of public concern."<sup>161</sup> The court noted that while the plaintiff's purpose behind giving the speech in question was to support his career, the defendant's use was to expose inconsistencies in the plaintiff's record.<sup>162</sup> Thus, the purpose and character of the defendant's use was sufficiently transformative and "weigh[ed] strongly in favor of finding fair use."<sup>163</sup>

Similarly, in *Katz v. Google, Inc.*,<sup>164</sup> the Eleventh Circuit Court of Appeals found that the defendant's unlicensed use of a copyrighted photograph of the plaintiff on a blog was fair use.<sup>165</sup> The defendant, Irina Chevaldina, was a former tenant in one of Raanan Katz's shopping centers who created a blog devoted to criticizing Katz.<sup>166</sup> The defendant found the photograph at issue by conducting a Google image search, and she used the image on twenty-five blog posts. Plaintiff, a real estate mogul and minority owner of the Miami Heat, alleged that defendant's reproduction of this unflattering picture without his permission was copyright infringement.<sup>167</sup> Defendant argued in response that her use was fair. She used the image in three different ways: "(1) copied in its unaltered, original state; (2) accompanied by sharply worded captions; or (3) cropped and pasted into mocking cartoons."<sup>168</sup> In analyzing the purpose and character of the defendant's use, the court found all her uses were transformative because "in the context of the blog post's surrounding commentary, she used [plaintiff's]

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160. *See id.* at 710.

161. *Id.*

162. *Id.* ("Defendant transformatively used a video of Plaintiff's presentation to the Marines, not to disseminate or profit from its message about Plaintiff's background in Islam, but to 'expose' contradictions and 'dishonesty' in the testimony of a well-known evangelist and seminary dean.").

163. *Id.* at 712.

164. 802 F.3d 1178 (11th Cir. 2015).

165. *See id.* at 1184.

166. *Id.* at 1181.

167. *Id.* at 1180–81.

168. The court detailed some of the defendant's creations:

For example, in a September 18, 2011 blog post where the Photo was copied in its unaltered, original state, Chevaldina lambasted Katz for allegedly ripping off a "young American Jewish single mother of [a] special needs child," calling him "the most immoral human-being in the world." In a September 12, 2012, blog post, Chevaldina criticized Katz's litigation strategies as frivolous and copied the Photo with a caption across Katz's chest that says, "HE RIPPED-OFF SPECIAL NEEDS LITTLE JEWISH GIRL." In a February 19, 2012, post about Katz's preparation for a deposition, Chevaldina cropped Katz's face and superimposed it against a cartoon dunce hat.

*Id.* at 1181 (alteration in original)).

purportedly ‘ugly’ and ‘compromising’ appearance to ridicule and satirize his character.”<sup>169</sup> The court’s holding, therefore, supports the broader reading of transformative purpose followed by other circuits. Moreover, the case warrants a conclusion that surrounding commentary is relevant to the transformative use analysis.<sup>170</sup>

Finally, the Second Circuit’s recent rulings in *Authors Guild, Inc. v. HathiTrust*<sup>171</sup> and *Authors Guild v. Google, Inc.*<sup>172</sup> further affirm that courts are expanding rather than limiting the reach of the fair use doctrine. In both cases, the Second Circuit found that scanning and librarying<sup>173</sup> copyrighted books for use in a searchable digital database was a fair use of the copyrighted works.<sup>174</sup> The court held that the purpose behind the project differed from an original author’s purpose in writing a book.<sup>175</sup> In *HathiTrust*, the court held, for example, that “the creation of a full-text searchable database is a quintessentially transformative use” because “[t]here is no evidence that the Authors write with the purpose of enabling text searches of their books.”<sup>176</sup> Thus, the court reasoned that the purpose behind the database was sufficiently transformative. The court in *Google, Inc.* reached the same conclusion.<sup>177</sup> The court’s expansive interpretation of the transformative purpose test in these cases is significant because it suggests that courts are increasingly willing to recognize new expressive purposes as sufficiently transformative. Moreover, the holdings reinforce the notion that “[w]hile authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public.”<sup>178</sup>

Evaluating all these cases together, it is clear that courts are focusing their transformative analysis most heavily on the purpose behind a secondary use. Furthermore, the aforementioned line of cases and analytical studies demonstrate

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169. *Id.* at 1182–83.

170. See *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (“Courts often find such uses [of reproduced works] transformative by emphasizing the altered purpose or context of the work, as evidenced by the *surrounding commentary or criticism.*” (emphasis added)).

171. 755 F.3d 87 (2d Cir. 2014).

172. 804 F.3d 202 (2d Cir. 2015), *cert. denied* 136 S. Ct. 1658 (2016) (mem.).

173. The term “librarying” means that the defendants retained copies of the scanned text.

174. See *Google, Inc.*, 804 F.3d at 217–18; *HathiTrust*, 755 F.3d at 101.

175. See *Google, Inc.*, 804 F.3d at 217; *HathiTrust*, 755 F.3d at 97.

176. *HathiTrust*, 755 F.3d at 97.

177. See *Google, Inc.*, 804 F.3d at 207 (“Google’s making of a digital copy to provide a search function is a transformative use, which augments public knowledge by making available information about Plaintiffs’ books without providing the public with a substantial substitute for matter protected by the Plaintiffs’ copyright interests in the original works or derivatives of them.”).

178. Dan Cohen, *What the Google Books Victory Means for Readers*, ATLANTIC (Oct. 22, 2015), <http://www.theatlantic.com/technology/archive/2015/10/what-the-google-books-victory-means-for-readers-and-libraries/411910> [<https://perma.cc/ASX9-ZNBM>] (quoting Judge Pierre Leval).

that the secondary uses that satisfy the transformative inquiry are expanding rather than shrinking. Given the judicial broadening of the transformative inquiry, the time is ripe for social media commentary to be considered a transformative purpose. The next Part further expands on the way in which social media sharing can be considered a different expressive purpose under the fair use doctrine.

### III. JOINT PROPOSAL: MAKING SOCIAL MEDIA CONTENT SHARING FAIR

Online social media websites have dramatically transformed consumer behavior on the Internet. The social networking found on these domains has been deemed “the most vibrant location of the creation and dissemination of information today.”<sup>179</sup> Because online social networks represent a hub of modern-day creativity, they unequivocally “promote the Progress of Science and useful Arts.”<sup>180</sup> “[T]hrough their support of users’ ability to generate and share works,” online platforms clearly “serve the constitutional copyright purpose of advancing culture and society.”<sup>181</sup> Therefore, like photography’s challenge to copyright doctrine in the nineteenth century, Internet dialogue and social commentary reflect a new form of creative expression that must now be addressed by the courts.<sup>182</sup>

The following Subparts explore this Comment’s joint proposal for encompassing today’s social media norms within the bounds of copyright doctrine. Subpart A proposes that courts conceptualize social media dialogue as a

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179. Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843, 844 (2010).

180. U.S. CONST., art. I, § 8.

181. Jamar *supra* note 179, at 843–44.

182. See Yeh, *supra* note 79, at 1003 (“Photography was the technological development that posed the most serious challenge to copyright’s theoretical structure in the nineteenth century, and it did this because it challenged our understanding of creativity.” (quoting Justin Hughes, *The Photographer’s Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 341 (2012))). Another scholar notes:

[M]ost of the problem stems from the fact that copyright laws are nowhere near aligned with how people use the web. Content sharing is a huge part of how the internet works. Now, don’t get me wrong. We’re definitely against violating copyright law -- we never would’ve used those images had we known they were stock photos -- but I think we can agree that there’s a huge need for some internet-friendly copyright laws. . . . [T]here’s still a need for something *more* -- something that appeals to the users and the sharers, not just the originators.

Pamela Vaughan, *Copyright Law on the Internet Is a Total Train Wreck Right Now*, HUBSPOT (June 10, 2013, 9:00 AM), <http://blog.hubspot.com/marketing/internet-copyright-law-failure#sm.0000mfwep9x75dxe453g7ejxmq> [<https://perma.cc/Y96B-QR6S>].



presumptively transformative purpose. Subpart B recommends that courts also assess attribution under the market harm fair use factor. Finally, Subpart C examines a real-world application of the proposal through a case study.

### A. Social Dialogue as a Transformative Purpose

How do we define transformative use in the digital age? Today, much of our cultural awareness and social dialogue takes place on the Internet through content sharing. This sharing behavior is distinct from peer-to-peer file sharing or the impermissible posting of copyrighted content on websites for illegal streaming purposes. In the file sharing or illegal streaming category, the secondary user takes unaltered copyrighted content and posts it on the Internet for the same expressive purpose as the original. For example, if an individual takes a copyrighted movie and posts it free of charge online, the individual's purpose is the same as the authors: to facilitate the viewing of a film. Conversely, when an individual posts a copyrighted image on Instagram or on a blog, he or she generally does not have the same creative purpose as the original photographer. Photographers typically take photographs in order to capture a natural phenomenon or day-to-day occurrence. Downstream users of content on the Internet, however, utilize copyrighted content in order to comment on or critique societal events. The online environment is unique because users seek recognition and affiliation with other users. Thus, whether by adding a comment or contributing to an ongoing dialogue, users have the distinctive ability and desire to communicate their personal opinions and worldviews when sharing content on social media websites.<sup>183</sup>

Because courts have yet to rule definitively on whether the transformative use doctrine encompasses reposting on social media, however, social media users are unable to predict whether their actions can subject them to legal trouble. Content creators are also unable to anticipate the ways their creative works may be reproduced down the line. Thus, the fair use doctrine must be interpreted in the social media context. Section 107 of the Copyright Act lists several presumptively fair uses.<sup>184</sup> Of these enumerated uses, commentary and critique are most

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183. As discussed above, memes have become the alphabet of the Internet. These expressions are not uniquely photographed by each user, but rather selected and curated for a social commentary purpose. *See supra* Part I.A.

184. *See* 17 U.S.C. § 107 (2012) (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as *criticism, comment*, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” (emphasis added)).

applicable to the content-sharing behavior found online. If courts interpret social media re-sharing as a form of commentary and critique, they will be able to doctrinally account for the transformative nature of social dialogue.

This proposed judicial interpretation of the fair use doctrine is a logical extension of current transformative use doctrine and in line with precedent and the history of copyright law. First, copyright law is accustomed to recognizing that “creativity is in some sense always derivative.”<sup>185</sup> Building on the works of others is an endemic part of creative expression. More importantly, the line of fair use cases discussed above affirms that since the decision in *Campbell*, courts have consistently recognized that a new expressive purpose renders a secondary work sufficiently transformative.<sup>186</sup>

For example, in *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>187</sup> the Ninth Circuit held that a search engine’s direct copying of plaintiff’s images was transformative because the purpose of the use was to increase information for Internet users.<sup>188</sup> Google’s informative purpose was distinct from Perfect 10’s artistic purpose. Similarly, the court in *Dhillon v. Does 1–10*<sup>189</sup> recognized that a website’s use of the plaintiff’s copyrighted image in an unflattering article was transformative because the plaintiff used the photograph for her campaign, while the website used the image to criticize her political positions.<sup>190</sup> Despite the fact that the website used an unaltered image, the court recognized the use as a fair use by focusing on the secondary user’s intent and purpose. Lastly, the Second Circuit’s recent rulings in *Authors Guild, Inc. v. HathiTrust*<sup>191</sup> and *Authors Guild v. Google, Inc.*<sup>192</sup> support the judicial interpretation that exact copies used for a new expressive purpose are sufficiently transformative.<sup>193</sup> Thus, by placing less

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185. Wong, *supra* note 53, at 1084 (“At the same time, through grappling with legal issues surrounding parodies, ‘downstream’ authors and adaptations, and the idea/expression dichotomy, copyright law has also had to come to terms with the fact that creativity is in some sense always derivative, with expressive output inspired and built by ‘standing on the shoulders of a giant.’” (citation omitted)).

186. See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied* 136 S. Ct 1658 (2016) (mem.); *Katz v. Google, Inc.*, 802 F.3d 1178 (11th Cir. 2015); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Caner v. Autry*, 16 F. Supp. 3d 689 (W.D. Va. 2014); *Dhillon v. Does 1–10*, No. C 13-01465 SI, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014).

187. 508 F.3d 1146 (9th Cir. 2007).

188. *Id.* at 1165.

189. No. C 13-01465 SI, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014).

190. *Id.* at \*5.

191. 755 F.3d 87 (2d Cir. 2014).

192. 804 F.3d 202 (2d Cir. 2015), *cert. denied* 136 S. Ct 1658 (2016) (mem.).

193. See *supra* notes 171–178 and accompanying text.

emphasis on physical alterations and greater weight on the secondary user's intent, courts are able to justify a wider range of secondary uses as transformative.

In the face of technological changes reflected by the Internet's growing significance for creative expression, copyright laws must adapt. Stifling the creativity found on social media through content sharing would be the antithesis of copyright law.<sup>194</sup> In order to provide room for this kind of commentary within the bounds of the established doctrine and to ensure that lawsuits do not stifle this important new culture, this Comment proposes that courts broaden their conception of transformativeness on the web to recognize participation in a social dialogue as having a transformative purpose.<sup>195</sup> Copyright doctrine can seamlessly account for sharing in the context of social media as being transformative because this behavior necessarily invokes commentary and critique. Though content that is reposted on social media often involves modified expression in addition to a transformative expressive purpose, such as original dialogue or music, physical modifications are not required under the transformative use analysis. Because courts have concluded that a new expressive purpose is sufficient to justify a finding of transformative use, the mere reposting on social media for the purpose of commentary or social dialogue would meet this standard. Thus, given the statistical correlation between the transformative use determination and ultimate fair use analysis discussed above, reposting content on social media websites would likely be a fair use.<sup>196</sup>

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194. Moreover, courts have been reluctant before to proscribe as unlawful a common behavior of the public, specifically when this behavior produces societal benefits. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1983) ("One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible."); *see also* Madison, *supra* note 117, at 403 ("The point is that fair use is fair because the fair 'users' are doing *things that society wants done, even if—and possibly because—everyone does them.* . . . At the level of individual authors, one author is as deserving as the next, whatever our philosophical baseline for protection.").

195. *See* Madison, *supra* note 117, at 392 ("Fair use is one place in the law where an explicit shift in emphasis with that end in mind would be valuable, both in rationalizing the history of the doctrine and in making it more sensible prospectively."); *see also id.* ("[L]ike all law, copyright has to work out the relationship between its own formal structures, on the one hand, and the informal structures of social life, on the other, and it has to do so both in its day-to-day application and in its formal framing.").

196. *See supra* notes 119–137 and accompanying text. Scholar Jisuk Woo also supports this position. Users are now active participants in the process of dissemination and the production of knowledge and information. What the courts and even critical scholars of the transformative use principle tend to miss is that the creativity involved in the use of works of authorship is critical in digital environment. The relationship between the author and user is not only blurred, but the ways in which value is generated and the public obtains benefit from the information are

Notwithstanding this Comment's proposed presumption, because the transformative nature of sharing on social media would be analyzed only under the first prong of the fair use analysis, courts would remain capable of utilizing the other three factors, specifically the effect of the use upon the potential market for the copyrighted work, as a fairness backstop.<sup>197</sup> Regardless of the statistical relationship, transformative uses are not always fair uses. Thus, in certain circumstances in which the secondary user has, for example, completely usurped the creator's licensing scheme, courts would remain empowered to question whether the use was commercial or substituted the market for the original work in order to hold the secondary user liable. In this way, a balance would be struck between promoting the freedom of expression found on the Internet and protecting the important copyright interests of content creators.

This approach would address Pirro and Fox News's arguments in the case initially raised in the Introduction.<sup>198</sup> Under these facts, a court could reasonably conclude that because Franklin's purpose behind photographing the firefighters

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transformed. . . . Thus, transformative use should be interpreted to encompass more access, more usability, more personalization, more freedom to use existing works, more communication, and the building of more relationships using works of authorship.

Jisuk Woo, *Redefining the "Transformative Use" of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment*, 27 HASTINGS COMM. & ENT. L.J. 51, 73–74 (2004) (citation omitted); *see also id.* at 76 ("Still, individual users' use and creativity in the use, which seem to play the central role in the interactive digital environment, have not received proper attention.").

This idea is also in line with the proposal promulgated by David Lange and Jennifer Lange Anderson. Lange & Anderson, *supra* note 79, at 131 ("Our proposal would substantially limit the present ability of a copyright proprietor to employ infringement theories so as to impede social commentary arising from transformative appropriations of copyrighted work. It would do so by recognizing an affirmative presumption of fair use in the settings we describe, in terms more readily accessible to the creators of appropriative social criticism than is now the case. We believe that these changes would represent a significant improvement in the fair use doctrine itself."). This Comment's proposal, however, is more moderate than the one advocated by Michael Madison. *See* Madison, *supra* note 117, at 406 (advocating for an additional provision in § 107 of the Copyright Act specifying that "[e]xclusive rights in copyright shall not extend to any use of a copyrighted work that society regularly values in itself").

197. *See infra* Part III.B for discussion of this Comment's proposal for courts to consider attribution when analyzing the market harm fair use factor. This proposal is an additional way to protect original content creators because a downstream user's post that lacks attribution would make a fair use determination less likely. This would necessarily impact a court's fair use analysis, assuming the lack of attribution negatively impacts the market for the content creator's work.
198. *See supra* Introduction; *see also* N. Jersey Media Grp. Inc. v. Pirro, 74 F. Supp. 3d 605 (S.D.N.Y. 2015). In *North Jersey Media Group*, Pirro and Fox News contended that their unlicensed use of Thomas Franklin's photograph of firemen raising the American flag above the ruins of the World Trade Center was a fair use because the transformative purpose behind the use was to join a conversation commemorating the victims of the tragedy. Conversely, North Jersey Media Group (NJMG) argued that the unlicensed use of the image was not a fair use because the image was used in its entirety and circumvented an existing licensing scheme. *Id.*

on September 11th was to document the damage and bravery of the first responders, his creative purpose was different from that of Pirro, who posted the image in order to participate in a social dialogue commemorating the victims of September 11th. Applying the framework described above, under which courts presume a new expressive purpose when a secondary user is engaging in such social dialogue, Pirro's post would be presumptively fair. As detailed above, however, North Jersey Media Group (NJMG) would still maintain the right and ability to rebut this presumption under this Comment's proposal to prove that despite the transformative purpose, Pirro's use was not fair in the aggregate. By using a burden-shifting paradigm, courts would still maintain discretion to prohibit egregious copying and promote fairness if a secondary user has harmed the creator's market or usurped a licensing or commercial opportunity. Thus, because NJMG had an implemented licensing scheme in place and Fox likely benefitted commercially from its unlicensed use of Franklin's image, Fox would likely have difficulty succeeding on its claim that reposting the unlicensed image was a fair use.

Yet in order to promote freedom of expression and encourage users to interact with one another in a way that facilitates sharing of ideas and information, under this proposal, the majority of images found on the Internet would raise a presumption that a secondary user can utilize the image for a social commentary purpose under the fair use doctrine. This would allow novice Internet users to participate in social dialogue online without worrying that they will be sued or forced to pay fines. Nevertheless, this proposal does not preclude a content creator from instituting barriers to prevent the free use of his or her works. Content creators who want to prevent their works from being widely disseminated by Internet users would remain empowered to implement licensing requirements. For example, professional photographers like NJMG who make it clear from their website that downstream users must pay a fee to utilize their works would still likely prevail over a fair use argument in court because a court could find that the market harm factor outweighs the presumptive transformative purpose. Similarly, if a secondary user takes original content and utilizes it for the same purpose as the original creator, the transformative purpose argument would fail. Thus, despite a proposed presumption in favor of transformativeness, secondary uses of content that directly contravene the original creator's intent to protect his or her work would not be protected under the proposal set forth in this Comment.

## B. Attribution as a Market Harm Factor

In order to ensure that the market for original creators is protected in the face of a transformative proposed presumption, this Comment also proposes that courts consider whether or not the secondary user properly attributed the original creator when conducting their overall fair use analysis. This inquiry could be seamlessly enveloped under a court's analysis of the fourth fair use factor, which asks whether the secondary use usurped the market for the original.<sup>199</sup> This additional step in the analysis would further ensure that original creators continue to receive recognition for their creative works, even when their content is shared by downstream users.<sup>200</sup> This proposal would address one of the major challenges that original creators face when secondary users share their content: loss of the ability to personally profit from recognition of their works.

Implementing this proposal would require courts to question the fairness of an image posted on the Internet without attribution to the creator. This increased scrutiny would also apply to all downstream sharers. Thus, a court would be empowered to find that a failure to attribute content to the original creator is a factor weighing against fair use. Downstream users would, therefore, be incentivized to credit the original creators of the images that they share, recognizing that a failure to do so could ultimately impact a fair use determination.<sup>201</sup> Accordingly, including an attribution analysis under the fourth fair use factor would give courts the ability to acknowledge the reality that without a licensing scheme, attribution is one of the only ways that social media curators are able to develop larger bases of followers and, accordingly, larger incomes.<sup>202</sup>

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199. See 17 U.S.C. § 107 (2012) (stating that factor four of a fair use analysis involves inquiry into “the effect of the use upon the potential market for or value of the copyrighted work”).

200. This attribution analysis would not apply if there is a licensing requirement for the use of an image. Rather, this consideration would apply, for example, in the situation discussed above relating to Instagram celebrity Josh Ostrovsky's utilization of images posted by other accounts. See *supra* Part I.B.

201. Given that it is sometimes difficult to determine the origins of content online, courts would still be empowered to give a lack of attribution the relevant weight on a case-by-case basis.

202. See, e.g., Hannah Ellis-Petersen, *Instagram Users Turn Flash Into Cash, as Companies Eye New Advertising Market*, GUARDIAN (Nov. 27, 2014, 2:10 PM), <https://www.theguardian.com/technology/2014/nov/27/instagram-users-earn-income-advertising-brands> [<https://perma.cc/PG6J-AT69>] (“Instagram photography had become a day job from which ‘some people are making over six figures’ a year. It’s become a career. It’s taking what a traditional brand or ad photographer used to be and kind of pumping it with steroids because you own and control all distribution now too.” (quoting Jason Stein, founder of New York social media agency Laundry Service)); Lara Rutherford-Morrison, *How Do Instagram Stars Make Money? Here’s What Goes On Behind All the Valencia*, BUSTLE (Dec. 2, 2015), <http://www.bustle.com/articles/127110-how-do-instagram-stars-make-money-heres-what-goes-on-behind-all-the-valencia> [<https://perma.cc/U7YL-AF39>] (“Put simply, the more followers you have (and therefore the more views you have to

This inquiry would not be dispositive, however, and could be outweighed by an incredibly transformative purpose.<sup>203</sup> Furthermore, a court would be empowered to find that attribution is insufficient if a particular professional content creator had implemented a preexisting licensing scheme for the use of their works. Accordingly, the attribution analysis would primarily protect novice creators whose works are shared by downstream users by ensuring that attribution attaches. Moreover, because attribution would only be one factor considered in the market harm analysis, courts would still be able to find against fair use if the downstream use is otherwise problematic, despite the presence of attribution.<sup>204</sup> Thus, in the majority of cases, this attribution analysis would help courts ensure that the market for an original creator's work does not permanently disappear even when an image is routinely shared.<sup>205</sup>

### C. Application of the Joint Proposals

The value of both an expanded transformative purpose analysis and inclusion of attribution as a factor weighing in favor of fair use is illuminated when applying these inquiries to a real world example. The following case study demonstrates how the above-mentioned proposals can work in conjunction to promote freedom of expression while still protecting the interests of content creators.

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offer a brand), the more you can charge businesses to sponsor posts. Danielle Bernstein, of @weworewhat, told *Harper's Bazaar* in May that she usually charges between \$5 thousand and \$15 thousand for a single branded Instagram post. At the time, she had 992,000 followers, but thought she could raise her fees significantly once she passed the one-million-follower mark (which she now has).").

203. As discussed *supra* Part II, analysis of precedent indicates there is a significant correlation between a finding of transformative purpose and ultimately a finding of fair use.

204. For example, in cases in which attribution would not serve the interests of the content creator, such as when the creator has a licensing scheme that has been circumvented, a court would be able to find that despite attribution, the market harm factor still weighs against fair use.

205. As one scholar notes:

People posting content on self-created public websites must surely be seeking some sort of non-monetary recognition for their efforts since that is typically the only recognition they will receive. Attribution gives that poster this recognition yet allows others to use the post to create new material. And as the economy has changed to an information-based economy, attribution, or the recognition of being the creator of certain material, has value for the creator. Attribution builds or breaks down the reputation of a creator, which can affect employment and marketability of the creator's product, a consideration that factor four of the fair use analysis already directs courts to evaluate.

Catherine J. Cameron, *Reinvigorating U.S. Copyright With Attribution: How Courts Can Help Define the Fair Use Exception to Copyright by Considering the Economic Aspects of Attribution*, 2 BERKELEY J. ENT. & SPORTS L. 130, 149 (2013).

On February 8, 2015, professional photographer Jason Meritt captured an image of Kanye West and Kim Kardashian on the red carpet at the GRAMMY awards. The image featured Kim and Kanye passionately kissing one another. Following the publication of this image online, illustrator and designer Jen Lewis edited the photograph for a BuzzFeed article. Lewis's edited image superimposed Kanye's face and hands onto Kim's body so that it appeared that Kanye was kissing himself. Lewis posted this image on her personal Twitter account, and the photograph went viral.<sup>206</sup> As is typical in the world of social media content sharing, the photograph was shared by numerous accounts on different social media platforms without attribution.<sup>207</sup>

One year later, Lewis learned that graffiti artist Scott Marsh had painted her meme on the side of a wall in Sydney, Australia. After this mural art went viral, Marsh announced that he was selling a copy of his work for \$100,000 and that once he sold this piece, he would cover the mural in white paint. His offer was specifically directed to Kanye West.<sup>208</sup> In addition, Marsh sold smaller editions of the mural for \$40.<sup>209</sup> After three weeks on the market, an unnamed individual bought the mural copy for \$100,000 and the mural was whitewashed.<sup>210</sup>

One week after the mural was covered, Marsh contacted Lewis to tell her he had just become aware of her identity and to inquire as to whether she would like him to attribute her Instagram account handle when he posted content about his murals. Ironically, Marsh had followed Lewis's Instagram account months before this contact, yet had not reached out to her before he made this sizeable sum of money. Lewis commented that she "was ecstatic about the mural until [Marsh] used it to solicit all that money."<sup>211</sup> While Lewis was happy for her creative take on Garitt's photograph to be shared and reinterpreted by other

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206. Jen Lewis & Rachel Zarrell, *I Photoshopped Kanye Kissing Himself and a Famous Artist Reportedly Made \$100,000 Off It*, BUZZFEED (Apr. 18, 2016, 8:54 AM), [https://www.buzzfeed.com/jenlewis/the-life-of-kanye-kissing-kanye?utm\\_term=.pr1a91eVY#huNXOx48R](https://www.buzzfeed.com/jenlewis/the-life-of-kanye-kissing-kanye?utm_term=.pr1a91eVY#huNXOx48R) [<https://perma.cc/7UQZ-4LGV>].

207. For example, Josh Ostrovsky's account @thefatjewish, *see supra* Part I.B., posted Jen Lewis's edited image after the U.S. Supreme Court's landmark decision in *Obergefell v. Hodges* with the caption: "Finally, Kanye can legally marry himself absolutely anywhere in this great nation." Josh Ostrovsky (@thefatjewish), INSTAGRAM (June 26, 2015), <https://www.instagram.com/p/4aWfsRjuML> [<https://perma.cc/6GGL-XNWD>]. Ostrovsky's account did not credit the image to its creator. *See id.*

208. *See* Kyle Schnitzer, *Artist: I'll Paint Over Kanye Mural for \$100K and Lifetime Supply of Yeezys*, N.Y. POST (Mar. 31, 2016, 8:00 AM), <http://nypost.com/2016/03/31/artist-ill-paint-over-kanye-mural-for-100k-and-lifetime-supply-of-yeezys> [<https://perma.cc/RWW5-6F33>] ("It's an open invitation to Kanye," Marsh said. "If he buys that print, then I'll paint over the mural.").

209. *See* Lewis, *supra* note 206.

210. *Id.*

211. *Id.*



artists, Marsh's failure to attribute her identity combined with his personal profit seemed unjust.

This chain of events illustrates the value that creators place on attribution in a world of viral content sharing. Under the transformative expressive purpose paradigm described above, Lewis's adaptation of Meritt's photograph would undoubtedly qualify as transformative. Whereas Meritt's purpose was to document celebrities at the GRAMMY awards, Lewis's purpose was to mock Kanye West's self-absorbed attitude by depicting Kanye in a romantic relationship with himself. Furthermore, it could be argued that, by applying the presumption of transformative use for social dialogue or commentary, Marsh's mural would also constitute a fair use. His purpose was to join Lewis in her critique of Kanye. The problem in the above example arose when Marsh attempted to commercially benefit from the work, which necessarily invoked and built upon the works created before it, without an attempted attribution to Lewis. Under this Comment's proposal, courts analyzing whether or not Marsh's use was fair would take into account his economic benefit and lack of attribution when determining whether his use was proper.<sup>212</sup>

Encouraging attribution not only protects creators but also serves the goal of incentivizing creation because creators can produce works with the comfort that they will receive recognition for their works in the future.<sup>213</sup> Simultaneously, attribution serves Internet users' interests because it permits them to share images online without immediate copyright infringement liability. Thus, applying the presumption of transformative purpose for social dialogue along with an attribution analysis is a feasible method to facilitate a collaborative and free Internet culture.

## CONCLUSION

In response to litigation by a photographer whose image was used in a BuzzFeed article, BuzzFeed creator Jonah Peretti posed the following question: "Is it good for the world to have a broad definition of Fair Use where people can create new things that are transformative or that people enjoy?"<sup>214</sup> Peretti answered in the affirmative, arguing, "I think it is good for the world."<sup>215</sup> This

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212. Per this Comment's joint proposal, Lewis should have also attributed Garrit when she posted her transformed image.

213. Zara, *supra* note 95 (highlighting that some photographers do not have a problem with sharing photographs as long as there is a way to identify the original creator).

214. Madrigal, *supra* note 100.

215. *Id.*

Comment agrees that copyright law should encourage and support innovation, even when creativity involves secondary users utilizing copyrighted images. If content is used in order to join a cultural dialogue on the Internet, there is an important transformation that occurs wherein the network of conversations transcend the original content's value. This Comment proposes that courts recognize online social dialogue as a presumptive transformative purpose in their analysis of the first factor in a fair use inquiry. Because courts are more willing to find different expressive purposes as sufficiently transformative, the fact that the photographs are rarely altered on the Internet should not be a hurdle.

Moreover, this presumption would be rebuttable if an original user provided evidence to prove the use was not otherwise fair. Courts would still maintain discretion to find that the first fair use factor is outweighed by the other three. For example, this Comment also proposes that courts consider attribution when analyzing the market harm from a particular secondary use under the fourth fair use factor. This would help motivate secondary users to include the identity of the original creator, even after an image has been shared by numerous downstream users. By implementing these two proposals simultaneously, courts will ensure that Internet users enjoy the freedom of expression that makes social media today's most vibrant place for creativity and communication, while still guaranteeing that creators retain control over their works.