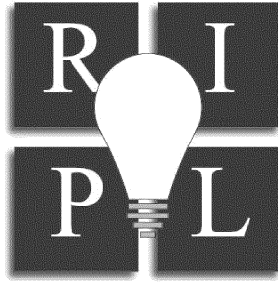


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



TWITTER: NEW CHALLENGES TO COPYRIGHT LAW IN THE INTERNET AGE

REBECCA HAAS

## ABSTRACT

Twitter is part of the new wave of internet communication. It is unique because messages sent via Twitter are limited to 140 characters. Many of these messages are about mundane details of daily life, but some are creative, even literary, and may qualify for copyright protection. The problem, then, is not necessarily whether a Tweet can qualify for copyright protection, but how that protection is enforced. Current infringement policies and procedures are not designed to effectively handle copyright infringement on the internet. Internet infringement is widespread and not easy to monitor or regulate, therefore there is a need for a regulatory agency. This agency should be international and designed to assist copyright holders with infringement actions, help service providers write their infringement policies and develop the best new methods of promoting copyright protection within the context of the growth of the internet and communication technology.

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# TWITTER: NEW CHALLENGES TO COPYRIGHT LAW IN THE INTERNET AGE

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## TWITTER: NEW CHALLENGES TO COPYRIGHT LAW IN THE INTERNET AGE

REBECCA HAAS\*

## INTRODUCTION

Hi. I'm in a staff meeting. There are 83 ceiling tiles in our meeting room.  
And 8 light fixtures, with 24 fluorescent bulbs. That is all.<sup>1</sup>

wine chocolate scotch pasta salad wine water pepper coke candles knives  
pesto frogs debates vinegar mango wine palms zebras and cameras . . .<sup>2</sup>

"Moon Writings" /If I were a God/The Moon in my hand/Would write you a  
love note/On the Sea of Tranquility . . . r<sup>3</sup>

Twitter is a website, offering real-time short text messaging service that works over multiple networks and devices.<sup>4</sup> The website began as a side project for Co-founder and Executive Chief Jack Dorsey.<sup>5</sup> He was interested in the idea of being able to know what his friends were doing at any given time and Twitter emerged from this simple concept.<sup>6</sup> *Obvious*, a San Francisco, California dotcom company, funded the first Twitter prototype, which was built in only two weeks during March of 2006.<sup>7</sup> The prototype was launched in March of 2006 with the first Tweet posted by Jack Dorsey.<sup>8</sup> This comment examines Twitter, the latest model for online social networking sites, and its relationship to copyright law, specifically raising the question "Are Tweets copyrightable?" Part I describes the growth of social media, offers an in-depth look at Twitter, and addresses developing online legal precedent. The section also provides information regarding copyright law, and specifically addresses the three major requirements that must be met to receive copyright protection. Part II analyzes whether Tweets meet copyright standards, addresses the specific challenges Twitter users face in regard to copyright law, and discusses the difficulties of copyright enforcement within social networking. Part III proposes the

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\* J.D. Candidate, May 2011, The John Marshall Law School. B.A. English, University of Virginia, May 2006. I would like to thank my editors Jonathan Pope, Michael McCray, Aleksandra Spevacek, and Brian Jones for their time, assistance, and insight throughout the writing of this comment. I would also like to thank my family and friends for their unwavering support.

<sup>1</sup> Posting of adamisacson to TWITTER (Aug. 3, 2009, 9:48 AM), <http://twitter.com/adamisacson/status/3105144040>.

<sup>2</sup> Posting of mager to TWITTER (June 6, 2008, 11:20 PM), <http://twitter.com/mager/status/828869386>.

<sup>3</sup> Posting of RabidPoet to TWITTER (Sept. 21, 2009, 9:53 AM), <https://twitter.com/RabidPoet>.

<sup>4</sup> Patrick May, *What Are You Doing? We're Chatting, Texting, Learning, Connecting—and Wasting Time—on Internet Craze Twitter*, SAN JOSE MERCURY NEWS, June 22, 2008, at 1A.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Steven Levy, *Twitter: Is Brevity the Next Big Thing?*, NEWSWEEK, Apr. 9, 2007, at 26; May, *supra* note 4.

<sup>8</sup> Wailin Wong, *Twitter goes to Washington*, CHI. TRIB., Apr. 15, 2010, at 2 (stating that the first Tweet was "just setting up my twttr" by Jack Dorsey on Mar. 21, 2006).

development of an official regulatory agency to assist Twitter users and all social network members with the task of managing infringement claims and enforcing their rights.

## I. BACKGROUND

This section provides background information on the growth of social networking sites. It offers a brief evolution of different sites as well as legal developments. It next provides a detailed explanation of the workings of Twitter. Finally, this section outlines the requirements needed for copyright protection.

### *A. Growth of Social Media*

#### *1. Special Networking Sites*

A social networking site is a web-based service where a user can create a profile and build a personal network that connects him or her to other users.<sup>9</sup> The backbone of these sites is the visible user-generated profile that displays a list of friends who also use the site.<sup>10</sup> SixDegrees.com, launched in 1997, was the first social networking site.<sup>11</sup> SixDegrees.com allowed its users to create profiles, list friends and eventually search friend lists.<sup>12</sup> While each of these features existed in some form on its own, SixDegrees.com was the first to combine them.<sup>13</sup>

Other web sites, including LinkedIn<sup>14</sup>, MySpace, and Friendster<sup>15</sup> soon followed SixDegrees.com. Friendster, launched in 2002, was designed to “help friends-of-friends meet, based on the assumption that friends-of-friends would make better romantic partners than would strangers.”<sup>16</sup> MySpace, one of the most popular social networking sites,<sup>17</sup> was initially directed toward musicians, artists, and fans.<sup>18</sup> Both MySpace and Friendster began as open services and allowed anyone to join.<sup>19</sup> Their

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<sup>9</sup> Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 1 (Oct. 2007), <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (defining social network sites as web-based services at that allow individuals to “(1) construct a public or semi-public profile within a bound system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system”).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; Jill Kelley, *AOL, SixDegrees.com Built Road to Facebook*, DAYTON DAILY NEWS, May 1, 2009, at D7.

<sup>12</sup> Boyd & Ellison, *supra* note 9; Kelley, *supra* note 11.

<sup>13</sup> Boyd & Ellison, *supra* note 9.

<sup>14</sup> *Id.*

<sup>15</sup> Meagan Dorsch & Pam Greenberg, *What You Need To Know About Social Networking*, 35 ST. LEGISLATURES 62, 62 (2009).

<sup>16</sup> Boyd & Ellison, *supra* note 9.

<sup>17</sup> Kelley, *supra* note 11.

<sup>18</sup> Boyd & Ellison, *supra* note 9 (grouping MySpace users into “three distinct populations . . . musicians/artists, teenagers, and the post-college urban social crowd”).

<sup>19</sup> *Id.*

open door policy made room for niche communities, including the Harvard-only social networking site Facebook, launched in 2004.<sup>20</sup> Facebook, now open to everyone, is still unique in that outside developers can build “applications,” specifically for use on Facebook only, which users employ to personalize their profiles.<sup>21</sup> Twitter also filled a niche market, allowing real-time, public contact between users and more frequent online postings and updates.<sup>22</sup> Over the past few years social networking sites have “rocketed from niche activity into a phenomenon that engages tens of millions of internet users.”<sup>23</sup>

## 2. Social Networking Laws and Precedent

The growth of the internet and social networking sites has given rise to new legal precedent.<sup>24</sup> The Digital Millennium Copyright Act (“DMCA”) and the Communications Decency Act (“CDA”) are two federal statutes that pertain to web content, including that produced by users of social networking sites.<sup>25</sup>

Congress enacted section 512 of the DMCA to give internet service providers “relief from copyright liability committed by third parties,” i.e., users of interactive web sites.<sup>26</sup> This section exempts a service provider from liability if it has a designated process by which the copyright owner can notify the site of infringing content and request its removal.<sup>27</sup> In 2007, Viacom, a media conglomerate, filed a complaint against YouTube and its parent company, Google, contending that 150,000 unauthorized clips of Viacom’s programming had been made available on YouTube.com, in violation of Viacom’s copyrights, and viewed more than 1.5 billion times on the site.<sup>28</sup> In response, YouTube and Google relied on section 512 of the DMCA to shield them from liability, and recently, the court found that YouTube qualified for protection under the DMCA and granted Google’s motion for summary

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Dorsch & Greenberg, *supra* note 15, at 64. The internet marketing blog Hubstop estimates that the average “Tweets” per day is four. *Id.*

<sup>23</sup> *Social Networking Sites Big with U.S. Youth*, WIS. ST. J., Feb. 1, 2007, at 18.

<sup>24</sup> Seth Cooper, *MyStates: Balancing Liberty and Safety in Social Networking*, INSIDE ALEC, 7 (Apr. 2008), available at <http://www.alec.org/am/pdf/apf/apfonlinesafety.pdf>.

<sup>25</sup> Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified as amended in §§ 5, 17, & 22 U.S.C. (2006)); Communications Decency Act of 1996, Pub. L. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. §§ 230, 560-61). Congress enacted the DMCA because it recognized the need to address modern copyright issues. Perry Viscounty, et al., *Social Networking and the Law*, 18 BUS. L. TODAY 58, 58 (2009).

<sup>26</sup> 17 U.S.C. § 512; Eric Goldman, *Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1169, 1175 (2006).

<sup>27</sup> 17 U.S.C. § 512.

<sup>28</sup> Complaint at 3, *Viacom Int’l Inc. v. YouTube, Inc.*, No. 07-2103 (S.D.N.Y. Mar. 13, 2010).

judgment.<sup>29</sup> Ultimately, the DMCA is still a young law and a “large body of case law establishing its breadth and limits has yet to be established.”<sup>30</sup>

Similar to section 512 of the DMCA, section 230 of the CDA shields websites from liability arising out of the publication of information on the website that was provided by another.<sup>31</sup> Courts generally interpret the CDA broadly and provide generous privileges to interactive service providers.<sup>32</sup> This generous interpretation is not universally accepted by all circuits,<sup>33</sup> however, providing room for further debate.

Recent figures show time spent on social networking sites is growing “at more than three times the rate of overall global internet growth.”<sup>34</sup> Facebook has 500 million users, making it the most populous of social networking sites.<sup>35</sup> Twitter currently has 105,779, 710 registered members and is growing at a rate of 300,000 per day.<sup>36</sup>

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<sup>29</sup> Answer at 10, *Viacom Int'l Inc. v. YouTube, Inc.*, No. 07-2103 (S.D.N.Y. Apr. 20, 2007); Andrew Albanese, *Google Defeats Viacom's \$1 Billion YouTube Suit*, PUBLISHERS WKLY. (June 24, 2010), <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/43626-google-defeats-viacom-s-1-billion-youtube-suit.html>.

<sup>30</sup> Declan McCullagh, *YouTube's Fate Rests on Decade-Old Copyright Law*, CNET NEWS (Mar. 13, 2007), [http://news.cnet.com/YouTubes-fate-rests-on-decade-old-copyright-law/2100-1028\\_3-6166862.html?tag=mncol:txt](http://news.cnet.com/YouTubes-fate-rests-on-decade-old-copyright-law/2100-1028_3-6166862.html?tag=mncol:txt); Viscounty, *supra* note 25, at 60 (“Copyright law in the social networking context remains in flux because courts are facing difficult issues arising out of rapidly advancing and evolving technology.”).

<sup>31</sup> 47 U.S.C. § 230; see Kevin Fayle, *Understanding the Legal Issues for Social Networking Sites and Their Users* (2007), [http://technology.findlaw.com/resources/scripts/printer\\_friendly.pl?page=/articles/00006/010966.html](http://technology.findlaw.com/resources/scripts/printer_friendly.pl?page=/articles/00006/010966.html); Viscounty, *supra* note 25, at 61. CDA provides safe harbor to social networking sites from defamation claims as long as “(1) the defendant is a provider or user of an interactive computer service, (2) the asserted claim treats the defendant as a publisher or speaker of information, and (3) the challenged communication is information provided by another information content provider. 47 U.S.C. § 230(c)(1). For a social network to shelter itself under the CDA, it is critical to avoid being classified as an ‘independent content provider.’” Viscounty, *supra* note 25, at 61.

<sup>32</sup> Viscounty, *supra* note 25, at 61. CDA case law is “fairly sparse and fact-specific” but as a general matter “providers will typically not lose their immunity if they merely exercise some control over the posting of information by others, such as enforcement of rules as to appropriate content or minor editing.” *Id.*

<sup>33</sup> *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (holding that the CDA does not provide immunity to Roommates.Com for all of the content of its website and email newsletters which includes the online matching questionnaire asking questions relating to age, gender, and sexual orientation); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1202 (N.D. Cal. 2009) (holding that Google must be extricated from this lawsuit now lest the CDA’s “robust” protections be eroded by further litigation); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009) (finding the facts of the case distinguishable from Roommates and granting MySpace’s motion to dismiss); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (involving a different subsection of the CDA but finding that Roommates approach remains instructive); *GW Equity LLC v. Xcentric Ventures LLC*, No. 07-9760, 2009 WL 62173, at \*5 (N.D. Tex. Jan. 9, 2009) (citing *Roommates.Com* decision positively and ultimately finding plaintiff’s claims were barred by the CDA).

<sup>34</sup> Dorsch & Greenberg, *supra* note 15, at 62.

<sup>35</sup> Mark Milian, *Business, Tech Trends*, L.A. TIMES, Aug. 29, 2010, at 1; Kelley, *supra* note 11.

<sup>36</sup> Benny Evangelista, *Developers vital to future, Twitter says*, S.F. CHRON., Apr. 15, 2010, at D1.

### B. What is Twitter?

Twitter is a web-based real-time, short-messaging service that allows users to exchange information with other users via short notes or “Tweets.”<sup>37</sup> Tweets are relatively simple. They must be under 140 characters in length and generally answer one question: “What are you doing?”<sup>38</sup> Twitter users’ answers vary, as some users’ Tweets are akin to stream of consciousness, while others Tweet facts, share stories, or just keep tabs on each other.<sup>39</sup> Twitter is also used to announce breaking news and provide updates on sports, entertainment and world events.<sup>40</sup> From the Twitter main page, a user can search for topics or people of interest and “follow” them.<sup>41</sup> Once another user is “followed” their Tweets appear on the follower’s home page, mixed in chronologically with the user’s own Tweets, although Twitter is working on new applications to present the more relevant Tweets first, rather than just the most recent Tweets.<sup>42</sup> A user’s Tweets can be read by anyone “following” the user, or by anyone who views the user’s profile page.<sup>43</sup> This public status is the default setting on all user accounts, but users have the option of making their Tweets private.<sup>44</sup> The Tweets posted by a private user are only visible to that user’s followers.<sup>45</sup> It is possible to link a Tweet to another user using the @reply function, the result of which is that the linked user’s profile page will include the @reply Tweet of the other user.<sup>46</sup> Unlike the @reply Tweet, which is publicly posted, a direct message, or “DM”, is a private Tweet, similar to an email, that is sent to only specific users and only they can view it.<sup>47</sup> Twitter user’s can also re-Tweet another user’s Tweet, which essentially posts the first user’s Tweet as that of the second user with attribution to the first.<sup>48</sup> As is the case with a normal Tweet, the re-Tweet can be viewed by any of the user’s followers.<sup>49</sup>

Twitter purports to respect “the intellectual property rights of others and expects users of Services to do the same.”<sup>50</sup> Twitter’s copyright policy explains that each user retains rights to any content “submit[ted], post[ed], or display[ed] on or through the Services.”<sup>51</sup> Services are defined as “use of the services and Twitter’s

<sup>37</sup> *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Sept. 30, 2010); Jennifer Benz, *Say it All in 140 Characters*, 23 EMP. BENEFIT NEWS 12, 14 (2009).

<sup>38</sup> Levy, *supra* note 7.

<sup>39</sup> *See generally* May, *supra* note 5.

<sup>40</sup> *Id.*

<sup>41</sup> Benz, *supra* note 37, at 12. “Hashtags” are a way to tag a tweet with a specific topic. *Id.* at 14.

<sup>42</sup> *Will Twitter Twist the Timeline?*, N.Y. TIMES BITS (Apr. 13, 2010, 7:13AM), <http://bits.blogs.nytimes.com/2010/04/13/will-twitter-twist-its-timeline>.

<sup>43</sup> Benz, *supra* note 37, at 12.

<sup>44</sup> *Twitter Support*, TWITTER, <http://help.twitter.com/forums/10711/entries/14016> (last visited Sept. 30, 2010).

<sup>45</sup> *Id.* (explaining that a user can also choose to unfollow other users and even block them).

<sup>46</sup> Benz, *supra* note 37, at 12. The “@” symbol, combined with the username of the person to whom you are tweeting, lets your followers know you are directing a tweet to someone specific. *Id.*

<sup>47</sup> *Id.* A “DM” is comparable to email as opposed to just a “chat.”

<sup>48</sup> *Id.*

<sup>49</sup> Ced Kurtz, *Geotagging and Unfriending Across the Twittersverse*, PITTSBURGH POST-GAZETTE, Aug. 15, 2010, at C2.

<sup>50</sup> *Twitter Terms of Service*, TWITTER, <http://twitter.com/tos> (last visited Sept. 30, 2010).

<sup>51</sup> *Id.*



websites.”<sup>52</sup> In short, “what’s yours is yours – you own your Content.”<sup>53</sup> Content includes “any information, text, graphics, or other materials uploaded, downloaded or appearing on the Services.”<sup>54</sup> However, by signing up for a Twitter account and displaying Content on or through the Services, each user grants Twitter a license<sup>55</sup> to the Content. The license includes Twitter’s right to make the Content available to “other companies, organizations, or individuals who partner with Twitter” for the purposes of “syndication, broadcast, distribution or publication of such Content on other media and services.”<sup>56</sup> The Twitter copyright policy also provides step-by-step instructions on how to address the use of Content that users believe constitutes infringement.<sup>57</sup> Twitter has a designated copyright agent and reserves the right to remove, at its discretion, any allegedly infringing content without providing notice to a user.<sup>58</sup>

### *C. Requirements to Qualify for Copyright Protection*

The Copyright Act (“the Act”)<sup>59</sup> outlines requirements for federal copyright protection and punishments for infringement.<sup>60</sup> The Act protects “original works of authorship fixed in any tangible medium of expression, now known or later developed.”<sup>61</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* The Twitter License states that individuals grant to Twitter:

a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).

*Id.*

<sup>56</sup> *Id.* Twitter encourages and permits broad re-use of Content and requires the use of Twitter API if “you want to reproduce, modify, create derivative works, distribute, sell, transfer, publicly display, publicly perform, transmit, or otherwise use the Content or Services.” *Id.*

<sup>57</sup> *Id.* Twitter infringement policy states:

If you believe that your Content has been copied in a way that constitutes copyright infringement, please provide us with the following information: (i) a physical or electronic signature of the copyright owner or a person authorized to act on their behalf; (ii) identification of the copyrighted work claimed to have been infringed; (iii) identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit us to locate the material; (iv) your contact information, including your address, telephone number, and an email address; (v) a statement by you that you have a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and (vi) a statement that the information in the notification is accurate, and, under penalty of perjury, that you are authorized to act on behalf of the copyright owner.

*Id.*

<sup>58</sup> *Id.*

<sup>59</sup> 17 U.S.C. §§ 101–1332 (2006).

<sup>60</sup> *Id.* §§ 102, 501.

<sup>61</sup> *Id.* § 102(a).

### 1. Originality

The term “original” is not expressly defined in the Act.<sup>62</sup> The United States Supreme Court, however, has reasoned that since an author is “the beginner . . . or first mover of anything . . . [its] creator, [and] originator,” a work is not the product of an author unless the work is original.<sup>63</sup> “Originality in the copyright sense means only that the work owes its origin to the author, i.e. is independently created, and not copied from other works.”<sup>64</sup> The measure of originality for copyright purposes generally amounts to “little more than a prohibition of actual copying.”<sup>65</sup> Courts, however, have instituted a requirement of minimal creativity in addition to the broad requirement of independent effort.<sup>66</sup> The standard for creativity is very low, “even a slight amount will suffice,”<sup>67</sup> although the smaller the effort the greater the degree of creativity must be in order to claim copyright protection.<sup>68</sup>

### 2. Work of Authorship

The second requirement for copyright protection to apply to a work is that the subject matter be a “work of authorship.”<sup>69</sup> A work can meet the “work of authorship” requirement by fitting into one of the eight statutorily defined categories.<sup>70</sup> One such category, literary works, is defined as “works, other than

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<sup>62</sup> See *id.* § 101 (providing definitions for many terms but not including a definition for “original”); H.R. REP. NO. 94-1476, at 51 (1976). The phrase was purposely left undefined because it was “intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute.” H.R. REP. NO. 94-1476, at 51. The 1909 Act did not define originality or expressly require a work be “original.” 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (2008). Courts have inferred the requirement because only “authors” may claim copyright protection. *Id.* A flexible definition was intended so that a definition would not “freeze the scope of copyrightable subject matter at the present stage of communications technology or . . . allow unlimited expansion into areas completely outside the present congressional intent.” H.R. REP. NO. 94-1476, at 51.

<sup>63</sup> *Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc.*, 290 F.3d 98, 107 (2d Cir. 2002); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351–52 (1991).

<sup>64</sup> *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951). “The originality necessary to support a copyright merely calls for independent creation, not novelty.” 1 NIMMER & NIMMER, *supra* note 62, § 2.01[A]. This distinguishes the standard for copyright protection from patents. *Id.* A work can pass the originality test and may qualify for copyright protection, even if it was identical to an earlier work, so long as it is a “product of the independent efforts of its author” and was not copied from that prior work. *Id.*

<sup>65</sup> *Alfred Bell*, 191 F.2d at 103 (noting it doesn’t matter how poor the “author’s” addition, it is enough if it is his own); Goldman, *supra* note 26, at 1178–79 (noting the standard for originality is low for copyrightable works); 1 NIMMER & NIMMER, *supra* note 62, § 2.01[B].

<sup>66</sup> *Feist*, 499 U.S. at 348; *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976); 1 NIMMER & NIMMER, *supra* note 62, § 2.01[B].

<sup>67</sup> *Feist*, 499 U.S. at 345.

<sup>68</sup> 1 NIMMER & NIMMER, *supra* note 62, § 2.01[B]; see *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 543 (6th Cir. 2004); *Alfred Bell*, 191 F.2d at 105 (establishing precedent as to how low the standard of originality can be by noting that a copyist’s bad eyesight, defective musculature, or a shock caused by a clap of thunder may yield sufficiently distinguishable variations for a valid copyright).

<sup>69</sup> 17 U.S.C. § 102(a) (2006); 1 NIMMER & NIMMER, *supra* note 62, § 2.03[A].

<sup>70</sup> 17 U.S.C. § 102(a).

audiovisual works, expressed in words . . . regardless of the nature of the material objects . . . in which they are embodied.”<sup>71</sup> The “use of the term ‘literary’ in this context does not connote any criterion of literary merit or qualitative value.”<sup>72</sup> Of the eight statutorily defined categories, the category of “literary works”<sup>73</sup> is most relevant to Tweets.

These eight categories are not exhaustive, however.<sup>74</sup> The Act was drafted in a way that allows the inclusion of the many new ways authors find to express themselves.<sup>75</sup> According to the 1976 House Report, the phrase “work of authorship” was purposely left undefined so as to promote a flexible definition that will neither “freeze the scope of copyrightable subject matter at the present stage of communications technology [n]or . . . allow unlimited expansion into areas completely outside the present congressional intent.”<sup>76</sup> Twitter and Tweets are part of the “next wave of communication”<sup>77</sup> technology that the fluid definition of “work of authorship” was intended to include.

### 3. Fixation in Tangible Form

Fixation in tangible form, the third element required for copyright protection, is both a statutory requirement and a constitutional necessity.<sup>78</sup> Once fixed for the first time a work is deemed created,<sup>79</sup> at which point copyright protection applies.<sup>80</sup>

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<sup>71</sup> *Id.* § 101.

<sup>72</sup> H.R. REP. NO. 94-1476, at 54 (1976).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 53, 189 (stating that the categories are “ ‘illustrative and not limitative,’ and . . . do not necessarily exhaust the scope of ‘original works of authorship’ that the bill is intended to protect”); 1 NIMMER & NIMMER, *supra* note 62, § 2.03[A].

<sup>75</sup> H.R. REP. NO. 94-1476, at 51 (noting two general categories of expansion as (1) technological developments that have made possible new forms of creative expression which never existed before and should be regarded as an extension of copyrightable subject matter Congress already intended to protect and (2) those cases such as photographs, sound recordings, and motion pictures where statutory to recognize them as copyright able works).

<sup>76</sup> *Id.* at 51; *see* *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (1980) (citing the House Report to explain the changes from the Copyright Act of 1909 to the Copyright Act of 1976); 1 NIMMER & NIMMER, *supra* note 62, § 2.03[A].

<sup>77</sup> Dominic Rushe, *Birds of a Feather*, QWEEKEND, July 4, 2009, at 20.

<sup>78</sup> U.S. CONST. art. I, § 8, cl. 8; 1 NIMMER & NIMMER, *supra* note 62, § 2.03[B] (“Unless a work is reduced to tangible form it cannot be regarded as a “writing” within the meaning of the constitutional clause authorizing federal copyright legislation.”); H.R. REP. NO. 94-1476, at 52 (explaining that the concept of fixation is important because it determines whether the provisions of the Act apply to a work, and also because it represents the dividing line between common law and statutory protection, i.e. an unfixed work of authorship would be subject to protection under State common law or statute, but is not eligible for Federal statutory protection).

<sup>79</sup> 17 U.S.C. § 101 (2006).

<sup>80</sup> *Montgomery v. Noga*, 168 F.3d 1282, 1288 (11th Cir. 1999) (“[C]opyright automatically inheres in the work at the moment it is created without regard to whether it is ever registered.”); *Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 210 F. Supp. 2d 147, 157 (E.D.N.Y. 2002) (“Registration with the United States Copyright Office is not required to obtain copyright protection.”). *But see* 17 U.S.C. § 107 (limiting copyright protection through “fair use”). Factors used to consider whether the use of a work is fair include “(1) the purpose and character of the use . . . (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used

Courts, utilizing the definition in the Act, determine fixation by asking two questions: “whether a work is ‘embodied’ in that medium . . . [and] whether it is embodied . . . for a period of more than transitory duration.”<sup>81</sup> The present Act makes it clear that to meet the criteria for ‘embodiment’ “it makes no difference what the form, manner, or medium fixation may be . . . [or] whether it is capable of perception directly or by means of any machine or device ‘now known or later developed.’”<sup>82</sup> A work that consists of “sounds, images, or both, that are being transmitted,” qualifies as fixed “if a fixation of the work is being made simultaneously with its transmission.”<sup>83</sup> There is no requirement that the fixation be permanent.<sup>84</sup> Currently, there is no bright line rule for the application of the “fixed” copyright requirement to technology and internet activity.<sup>85</sup> However, one court held that a software program, loaded into a computer’s RAM, that could be displayed on a screen or printed out on a printer was “stable enough to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration,” i.e., that it was fixed for purposes of copyright.<sup>86</sup>

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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.” *Id.*

<sup>81</sup> 17 U.S.C. § 101; *see* *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 129 (2d Cir. 2008) (outlining the two specific questions); *SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 167, 188–89 (S.D.N.Y. 2009) (utilizing the framework set out in *Cartoon Network*).

<sup>82</sup> *See* 17 U.S.C. § 101 (stating that the tangible medium of expression consists of either a copy or a phonorecord); H.R. REP. NO. 94-1476, at 52 (1976); 1 NIMMER & NIMMER, *supra* note 62, § 2.03[B].

<sup>83</sup> *See* 17 U.S.C. § 101 (explaining that to “transmit” a display “is to communicate it by any device or process whereby images . . . are received beyond the place from which they are sent”); H.R. REP. NO. 94-1476, at 53. In evaluating “transitory duration” the writer’s of the act provide that the “definition of “fixation” would exclude from the concept purely evanescent or transient reproductions.” H.R. REP. NO. 94-1476, at 53 (noting these included reproductions “projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the “memory” of a computer.”); 1 NIMMER & NIMMER, *supra* note 62, § 1.08 [C][2].

<sup>84</sup> *Peter Pan Fabrics, Inc. v. Rosstex Fabrics, Inc.*, 733 F. Supp. 174, 177 (S.D.N.Y. 1990) (finding that once a work is fixed destruction does not vitiate its copyright); *see* *Pac. & S. Co., Inc. v. Duncan*, 744 F.2d 1490, 1494 (11th Cir. 1984) (noting that 17 U.S.C. §§ 101, 102 only require “fixed” for a “transitory duration” and not for the length of the copyright).

<sup>85</sup> *Advanced Computer Servs. of Mich., Inc., v. MAI Sys. Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994). A software program loaded into a computer’s RAM, which can be displayed on a screen or printed out on a printer is “stable enough to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.*; *see also* *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511, 518 (9th Cir. 1993) (demonstrating that Peak’s ability to review the operating system software’s “error log” to diagnose the computer problem established that the representation created in RAM was sufficiently fixed); *Cartoon Network*, 536 F.3d at 130 (given that the data resides in the buffer for no more than 1.2 seconds and it is rapidly and automatically overwritten as soon as it is processed, the data is not “fixed”); *Williams Electronics, Inc. v. Artic Intern., Inc.*, 685 F.2d 870, 874 (3d Cir. 1982) (holding that a video game that whose audiovisual features repeat themselves is considered fixed).

<sup>86</sup> *Advanced Computer*, 845 F. Supp. at 363. This decision focuses on situations “where the computer is left on for time measured in minutes, if not longer.” *Id.*

### *D. Infringement of a Copyright*

To establish infringement of a copyright, two elements are required: ownership of a valid copyright and copying of elements of the work that are original.<sup>87</sup> It is the plaintiff's responsibility to prove both elements.<sup>88</sup> However, prior to filing an infringement action under the Copyright Act, the work must be either registered or preregistered with the United States Copyright Office.<sup>89</sup>

With respect to the first element, a certificate of registration constitutes "prima facie evidence of the validity of the copyright."<sup>90</sup> The evidentiary weight of the certificate, however, is within the discretion of the court.<sup>91</sup> Copying, the second element, can be inferred from a defendant's access to the "copyrighted work and substantial similarity between the copyrighted work and the alleged infringement."<sup>92</sup>

Actionable copying requires comparison at two stages of analysis: actual copying and unlawful appropriation.<sup>93</sup> Actual copying is established "by proving access and substantial similarity between the works."<sup>94</sup> Once actual copying is established, it is the plaintiff's responsibility to then show that the copying amounts to an "improper appropriation by demonstrating that substantial similarity to protected material exists between the two works."<sup>95</sup> The test for unlawful appropriation "asks whether substantial similarity as to protectable material exists between the works at issue."<sup>96</sup> Substantial similarities for unlawful appropriations are determined from the perspective of the ordinary observer rather than experts.<sup>97</sup> Once infringement is proven, there are several possible remedies including injunctions, and money damages.<sup>98</sup>

## II. ANALYSIS

Tweets pose a unique challenge to the application of copyright law. Under Twitter's copyright policy, Twitter users own their Tweets, and therefore, users, not Twitter, would have the right to sue for copyright infringement.<sup>99</sup> Each Tweet, however, must satisfy the elements of copyrightability: a Tweet must be original, it must qualify as a work of authorship as contemplated by the Act, and it must be

<sup>87</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>88</sup> *See Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir.1992).

<sup>89</sup> 17 U.S.C. § 411(a) (2006).

<sup>90</sup> 17 U.S.C. § 410(c).

<sup>91</sup> *Id.*; *see Durham Indus., Inc., v. Tomy Corp.*, 630 F.2d 905, 908 (2d Cir. 1980). ("[C]ertificate of registration creates no irrebuttable presumption of copyright validity and validity will not be assumed where other evidence casts doubt on question.").

<sup>92</sup> *Laureyssens*, 964 F.2d at 139.

<sup>93</sup> *Id.* at 140.

<sup>94</sup> *Id.* at 139; *Folio Impressions, Inc., v. Byer Cal.*, 937 F.2d 759, 765 (2d Cir. 1991).

<sup>95</sup> *Laureyssens*, 964 F.2d at 140.

<sup>96</sup> *Folio Impressions*, 937 F.2d at 765; *Laureyssens*, 964 F.2d at 140.

<sup>97</sup> *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *Laureyssens*, 964 F.2d at 140–41.

<sup>98</sup> *See, e.g.*, 17 U.S.C. §§ 502–05 (2006) (describing injunctions, impounding and disposition of infringing articles, damages and profits, costs and attorney's fees).

<sup>99</sup> *Twitter Terms of Service*, TWITTER, <http://twitter.com/tos> (last visited Sept. 30, 2010).

fixed in a tangible medium of expression.<sup>100</sup> This section first applies these requirements to the Tweets quoted in the Introduction in an effort to determine whether Tweets could be copyrightable. Next, this section considers the specific challenges Twitter users face in seeking copyright protection. Finally, this section discusses the difficulty with enforcing rights under copyright law and suits for infringement.

### *A. Copyright Requirements as Applied to Tweets*

#### *1. Originality: The Sine Qua Non of a Copyright*

The originality standard requires that the work be independently created by an author,<sup>101</sup> and that it has a minimum degree of creativity.<sup>102</sup>

##### *a. Independently Created*

To begin with, because Twitter users own their Tweets,<sup>103</sup> the users, not Twitter, are the authors.<sup>104</sup> Under copyright law's definition of originality, so long as a Tweet is not merely copied from another source, it can be deemed an independent work attributable to the Twitter user and therefore satisfies the requirement of independent creation.<sup>105</sup> Both Rabidpoet's "Moon Writings"<sup>106</sup> Tweet, as an original poem,<sup>107</sup> and mager's "wine chocolate scotch"<sup>108</sup> Tweet can qualify as independent creations. A basic problem with Tweets, however, is that they often contain mundane words and phrases.<sup>109</sup> Phrases and language with widespread usage will not qualify as independent works.<sup>110</sup> For example, in *Acuff-Rose Music, Inc. v. Jostens, Inc.* the court found that the phrase "If you don't stand for something, you'll fall for anything" had widespread usage and it was unlikely the phrase was

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<sup>100</sup> 17 U.S.C. § 102(a).

<sup>101</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351-52 (1991).

<sup>102</sup> See *id.* at 345; *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976).

<sup>103</sup> *Twitter Terms of Service*, TWITTER, <http://twitter.com/tos> (last visited Sept. 30, 2010).

<sup>104</sup> 17 U.S.C. § 201(b) (noting an "author" can be a company); see also *Urantia Found. v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997) (explaining a work must be created by a human).

<sup>105</sup> See *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 821 F.2d 800, 806 (D.C. Cir. 1987) (defining "originality" to mean only that "the work is independently created rather than copied from other works").

<sup>106</sup> Posting of RabidPoet to TWITTER (Sept. 21, 2009, 9:53 AM), <https://twitter.com/RabidPoet>.

<sup>107</sup> See generally *Stromback v. New Line Cinema*, 384 F.3d 283, 289 (6th Cir. 2004) (involving an original poem "The Keeper" that was copyrighted).

<sup>108</sup> Posting of mager to TWITTER (June 6, 2008, 11:20 PM), <http://twitter.com/mager/status/828869386>.

<sup>109</sup> Consuelo Reinberg, *Are Tweets Copyright Protected?*, WIPO MAGAZINE, July 2009, at 11 (noting that Tweets are mostly about facts – the weather, dinner, traffic etc.).

<sup>110</sup> *Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 144 (2d Cir. 1998); *Jean v. Bug Music, Inc.*, No. 00-4022, 2002 WL 287786, at \*6 (S.D.N.Y. Feb. 27, 2002) (finding that the lyrical excerpt "clap your hands" is not afforded copyright protection because the excerpt is a common phrase).

independently created by the author.<sup>111</sup> Similarly, Adamisacson's Tweet "Hi. I'm in a staff meeting . . ." utilizes common terms and phrases that make it highly unlikely that this Tweet would qualify as an independent creation.<sup>112</sup> Therefore, while all Tweets have an author, not all Tweets are independently created.

*b. Modicum of Creativity*

Tweets that qualify as independently created must also contain a modicum of creativity.<sup>113</sup> Although the threshold requirement of creativity is very low,<sup>114</sup> not all Tweets will meet standard. The work must possess some creative spark, "no matter how crude, humble or obvious' it might be."<sup>115</sup>

Rabidpoet's Tweet "Moon Writings"<sup>116</sup> contains a unique expression of words that form a poem, which satisfies the creative element.<sup>117</sup> On the other hand, adamisacson's Tweet "Hi. I'm in a staff meeting . . ." does not meet this standard.<sup>118</sup> This Tweet consists of shared public expressions which are too trivial to satisfy the creativity standard.<sup>119</sup> Mager's Tweet, "wine chocolate scotch,"<sup>120</sup> falls in the grey area. Its list of assorted words could be compared to the alphabetized telephone white pages in *Feist Publications, Inc. v. Rural Telephone Service Co.* which the Court found lacked the creative spark.<sup>121</sup> Alternatively, if the words were looked at as a whole, the modicum of creativity requirement could be met in the arrangement

<sup>111</sup> *Acuff-Rose Music*, 155 F.3d at 144.

<sup>112</sup> *See Stromback*, 384 F.3d at 289 (describing an original poem that was copyrighted).

<sup>113</sup> *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

<sup>114</sup> *Feist*, 499 U.S. at 361; *see* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903). It was suggested by Justice Oliver Wendell Holmes that very nearly any creative effort will suffice since, "the [work] is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright. . . ." *Id.* at 250.

<sup>115</sup> *Feist*, 499 U.S. at 345 (quoting 1 NIMMER & NIMMER, *supra* note 62, § 1.08 [C][1]).

<sup>116</sup> Posting of RabidPoet to TWITTER (Sept. 21, 2009, 9:53 AM), <https://twitter.com/RabidPoet>.

<sup>117</sup> *Becker v. Loew's, Inc.*, 133 F.2d 889, 891 (7th Cir. 1943) ("A poem consists of words, expressing conceptions of words or lines of thoughts; but copyright in the poem gives no monopoly in the separate words, or in the ideas, conception, or facts expressed or described by the words. . . . A copyright extends only to the arrangement of the words.").

<sup>118</sup> Posting of adamisacson to TWITTER (Aug. 3, 2009, 9:48 AM), <http://twitter.com/adamisacson/status/3105144040>.

<sup>119</sup> *See Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 710 (7th Cir. 1972) (noting words and phrases are not copyrightable); *see also* *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989, 990 (8th Cir. 1986) (finding that a soccer teams logo consisting of four lines that form arrows and the word "arrows" lacked the level of creativity needed for copyrightability).

<sup>120</sup> Posting of mager to TWITTER (June 6, 2008, 11:20 PM), <http://twitter.com/mager/status/828869386>.

<sup>121</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351–52, 363–64 (1991) (holding that alphabetized telephone white pages lacked the creative spark required by the Copyright Act and the Constitution, and, therefore, were not entitled to copyright protection despite the hard work that went into compiling the facts contained in the directory).

of the words.<sup>122</sup> Additionally, this Tweet meets the low originality threshold discussed in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, where the court decided the defendants would have been fine if they had made their own handmade versions of a work, but could not simply copy plaintiff's work.<sup>123</sup> Clearly, there is no definitive answer as to whether all Tweets meet the level of originality required. Nevertheless, it is possible for some Tweets to qualify as original.

## 2. Works of Authorship

The “work of authorship” requirement can be satisfied in two ways: if a work fits into one of the eight statutorily defined categories<sup>124</sup> or if it shows a modest amount of intellectual labor.<sup>125</sup>

### a. Literary Work: A Work of Authorship

Because the term “literary” in the context of copyright does not connote any requirement of literary merit or qualitative value,<sup>126</sup> as long as the 140-character Tweet consists of words it can qualify as a literary work.<sup>127</sup> Applying this standard, Rabidpoet's, adamisacson's and mager's Tweets all qualify as works of authorship.

### b. Intellectual Labor

Alternatively, to qualify as a “work of authorship” based on intellectual labor, the content of a Tweet must be examined. Due to the nature of the answer to the

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<sup>122</sup> 17 U.S.C. § 101 (2006) (defining a copyrightable compilation as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship”).

The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, . . . ; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas . . . .

Holmes v. Hurst, 174 U.S. 82, 86 (1899).

<sup>123</sup> *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 104–05 (2d Cir. 1951).

<sup>124</sup> 17 U.S.C. § 102(a).

<sup>125</sup> See *Atari Games Corp. v. Oman*, 888 F.2d 878, 882 (C.A.D.C. 1989); see *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 (7th Cir. 1986) (discussing the difference between originality, creativity and novelty).

<sup>126</sup> H.R. REP. NO. 94-1476, at 54 (1976).

<sup>127</sup> See, e.g., *Harcourt, Brace & World, Inc. v. Graphic Controls Corp.*, 329 F. Supp. 517, 523–24 (S.D.N.Y. 1971) (holding that the symbols designating questions or response spaces on exam answer sheets held to be copyrightable “writings” under 1909 Act); *Reiss v. Nat'l Quotation Bureau, Inc.*, 276 F. 717, 717 (S.D.N.Y. 1921) (noting that a code book of coined words designed for cable use is copyrightable); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983) (deciding that a computer program is a “literary work”).



question “what are you doing,”<sup>128</sup> a majority of Tweets contain mundane details of life.<sup>129</sup> Adamisacson’s Tweet about his staff meeting<sup>130</sup> and mager’s Tweet of everyday words and concepts are two such examples.<sup>131</sup> Courts have found that these mundane details do not contain the requisite level of intellectual labor to qualify as copyrightable material.<sup>132</sup> On the other hand, Rabidpoet’s “Moon Writings”<sup>133</sup> does satisfy the intellectual labor standard.<sup>134</sup> In summary, a Tweet can qualify as a “work of authorship” if they qualify as a literary work, and also under the intellectual labor review.

### 3. Fixation

The third element required for copyright protection is fixation.<sup>135</sup> Fixation has two elements: embodiment and duration.<sup>136</sup> The fixation requirement does not demand that the work “be written down or recorded somewhere exactly as it is perceived by the human eye.”<sup>137</sup> Expressed in this way, Tweets written on the internet could potentially satisfy the two elements of the fixed requirement.

#### a. Embodiment in a Tangible Medium

The first of the two requirements for fixation is embodiment in a tangible medium.<sup>138</sup> Tweets cannot be viewed without the assistance of a computer, or other

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<sup>128</sup> Levy, *supra* note 7.

<sup>129</sup> Reinberg, *supra* note 109, at 11.

<sup>130</sup> Posting of adamisacson to TWITTER (Aug. 3, 2009, 9:48 AM), <http://twitter.com/adamisacson/status/3105144040>.

<sup>131</sup> Posting of mager to TWITTER (June 6, 2008, 11:20 PM), <http://twitter.com/mager/status/828869386>.

<sup>132</sup> See *Wright v. Warner Brooks, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991) (stating that facts and ideas relating to life events are not entitled to copyright protection in the context of journal entries); see *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991) (noting that in no event are individual facts copyrightable).

<sup>133</sup> Posting of RabidPoet to TWITTER (Sept. 21, 2009, 9:53 AM), <https://twitter.com/RabidPoet>.

<sup>134</sup> See *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 48–49 (D. Mass. 1990) (discussing copyrightable works that do not fall into the set categories); *Nat'l Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1354 (S.D. Cal. 1988) (extending copyright protection to artistic features of masquerade costumes); *West Publ'g Co. v. Mead Data Central, Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986) (extending copyright protection to the arrangement of public-domain legal decisions in reporters); *Harcourt, Brace & World, Inc. v. Graphic Controls Corp.*, 329 F. Supp. 517, 523 (S.D.N.Y. 1971) (extending copyright protection to blank answer sheets for use with student achievement and intelligence tests that are designed to be corrected by optical scanning machines (applying the 1909 Act)).

<sup>135</sup> 17 U.S.C. § 102(a) (2006).

<sup>136</sup> *Id.*

<sup>137</sup> *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999, 1007 (N.D. Ill. 1982); *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982).

<sup>138</sup> 17 U.S.C. § 101; *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 129 (2d Cir. 2008) (detailing the court’s two-step analysis).

electronic device capable of connecting to the internet.<sup>139</sup> However, it does not matter, for embodiment purposes, whether a device is needed to perceive the Tweet.<sup>140</sup>

### *b. Transitory Duration*

The second requirement for fixation is “transitory duration.”<sup>141</sup> Works that do not meet the duration requirement are not embodied and do not receive copyright protection.<sup>142</sup> An analysis of this requirement is fact specific.<sup>143</sup>

While Tweets update constantly, they do not automatically delete<sup>144</sup>, nor do they overwrite<sup>145</sup> each other when a new Tweet is posted.<sup>146</sup> Tweets that are not on the immediate screen are archived and retrievable.<sup>147</sup> In addition, Tweets can be reproduced through re-Tweeting,<sup>148</sup> by using the basic cut and paste options on a computer<sup>149</sup>, or by simply printing a physical version of the screen view of the computer including the Tweet.<sup>150</sup> Thus, a Tweet is sufficiently “stable to be permitted to be perceived and reproduced”<sup>151</sup> and as such is embodied in the both the Twitter servers and a computer. In addition, Tweets that were posted over a year ago can still be found online.<sup>152</sup>

These characteristics distinguish Tweets from the works at issue in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, where the court held that data that existed

<sup>139</sup> Steven Johnson, *How Twitter Will Change the Way We Live (in 140 Characters or Less)*, TIME, June 15, 2009, at 32.

<sup>140</sup> 17 U.S.C. § 101 (stating it makes no difference whether a work can be perceived “directly or with the aid of a machine or device”).

<sup>141</sup> 17 U.S.C. § 101; *Cartoon Network*, 536 F.3d at 129–30.

<sup>142</sup> 17 U.S.C. § 101; *Cartoon Network*, 536 F.3d at 129.

<sup>143</sup> *Cartoon Network*, 536 F.3d at 130.

<sup>144</sup> *Twitter Support*, TWITTER, <http://help.twitter.com/forums/10711/entries/13920> (last visited Sept. 30, 2010) (stating that once you post a tweet it can’t be changed and can only be deleted by clicking the trash icon).

<sup>145</sup> *Will Twitter Twist the Timeline?*, *supra* note 42.

<sup>146</sup> TWITTER: Things Every Developer Should Know, [http://dev.twitter.com/pages/every\\_developer](http://dev.twitter.com/pages/every_developer) (last visited Sept. 30, 2010) (noting that old postings still exist and are searchable).

<sup>147</sup> TWITTER: Things Every Developer Should Know, <http://apiwiki.twitter.com/Things-Every-Developer-Should-Know>, [http://dev.twitter.com/pages/every\\_developer](http://dev.twitter.com/pages/every_developer) (last visited Sept. 30, 2010) (explaining that Twitter users can search old postings); Posting of Sarah Perez to READ WRITE WEB (Aug. 11, 2009, 6:48 AM), [http://www.readwriteweb.com/archives/10\\_ways\\_to\\_archive\\_your\\_tweets.php](http://www.readwriteweb.com/archives/10_ways_to_archive_your_tweets.php) (discussing 10 ways to archive Tweets).

<sup>148</sup> Benz, *supra* note 37, at 12.

<sup>149</sup> Sandy Berger, *Computer Tutorials: Cut, Copy & Paste*, COMPU-KISS, <http://www.compukiss.com/basics/cut-copy-paste.html> (last visited Sept. 30, 2010) (explaining that in the computer world, cut and paste, and copy and paste are functions that allow you to move or copy text, images, and web information from one location to another location).

<sup>150</sup> *Learn How to Make a Screenshot*, TAKE-A-SCREENSHOT.ORG, <http://www.take-a-screenshot.org/> (last visited Sept. 30, 2010) (explaining that the “PrtScn” button on the keyboard captures the entire screen and copies it to the clipboard which can then be pasted into a document using the paste function).

<sup>151</sup> 17 U.S.C. § 101 (2006).

<sup>152</sup> *See, e.g.*, Posting of mager to TWITTER (June 6, 2008, 11:20 PM), <http://twitter.com/mager/status/828869386>.

on the internet for no more than 1.2 seconds and was automatically rewritten was not fixed for more than a transitory duration.<sup>153</sup> Additionally, courts have found the “fixed” requirement satisfied for much shorter durations than the length of time a Tweet remains posted on the internet.<sup>154</sup>

### *c. Transmission*

Alternatively, under the Act, a “work consisting of sounds, images, or both, that are being transmitted, is “fixed . . . if a fixation of the work is being made simultaneously with its transmission.”<sup>155</sup> To “transmit” under the Act is to communicate “by any device or process whereby images . . . are received beyond the place from which they are sent.”<sup>156</sup> Tweets are posted through a device of the user’s choice and are capable of being perceived by Twitter users around the world,<sup>157</sup> therefore Tweets are transmitted. As a transmitted work, a Tweet can qualify as fixed if fixation is made simultaneously with its transmission.<sup>158</sup> Here, the transmission of the Tweet occurs when the user clicks the “update” button on their home page.<sup>159</sup> The Tweet is subsequently embodied in the Twitter servers and will exist there for a period of more than a transitory duration at the time of its posting/transmission.<sup>160</sup>

Consequently, a Tweet is fixed. It is embodied in the Twitter servers via devices such as computers, and it meets the criteria for “transitory duration.” Alternatively, it satisfies the requirements for “fixed” under the Act’s requirements for a transmitted work.

## *B. Challenges in Obtaining Copyright Protection*

Twitter users face several challenges in meeting the three requirements for copyright protection.<sup>161</sup> The analysis of the three sample Tweets illuminates some of the hurdles Twitter users face. While the length of a sentence is not dispositive of

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<sup>153</sup> *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008).

<sup>154</sup> *See, e.g., Advanced Computer Servs. of Mich., Inc., v. MAI Sys. Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994) (holding that where a copyrighted program is loaded into RAM and maintained there for minutes or longer, the RAM representation of the program is sufficiently “fixed”); *see also MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (establishing that the existence of an “error log” in the computer operating system was sufficient fixed for a repair person to turn on the computer and check the log).

<sup>155</sup> 17 U.S.C. § 101.

<sup>156</sup> *Id.*

<sup>157</sup> *See About Twitter*, TWITTER, <http://twitter.com/about> (last visited Sept. 30, 2010).

<sup>158</sup> 17 U.S.C. § 101.

<sup>159</sup> Posting of bender to HOWCAST (Feb. 23, 2009), <http://www.howcast.com/videos/149055-How-To-Use-Twitter> (providing step by step instructions on using Twitter and listing step 3 as “type your message into the box at the top of the screen and hit ‘update’” which posts your tweet).

<sup>160</sup> *Twitter Support*, TWITTER, <http://help.twitter.com/forums/10711/entries/13920> (last visited Sept. 30, 2010) (explaining that all tweets are maintained on Twitter).

<sup>161</sup> Reinberg, *supra* note 109, at 11 (outlining the issues include size, content and scènes à faire).

whether it is subject to protection,<sup>162</sup> the inherent nature of a Tweet, restricted to 140 characters or less,<sup>163</sup> triggers the need for a greater level of creativity to qualify as original.<sup>164</sup> Further, the concept behind the Tweet is to post life details and everyday activities.<sup>165</sup> Everyday facts, slogans and short phrases are not copyrightable material.<sup>166</sup> This content challenges the concept of what qualifies as a work of authorship.<sup>167</sup> Additionally, the internet as a medium poses an interesting proposition in terms of fixation. Social networking sites are not going away.<sup>168</sup> They represent a vital new communication technology that is the next generation of the internet.<sup>169</sup> The internet can fulfill the fixation requirement, mainly because fixation does not require permanence.<sup>170</sup> Due to these challenges, as the analysis indicates, Rabidpoet's Tweet<sup>171</sup> is the only one of the three sample Tweets that contains appropriate subject matter for a copyright. It is highly unlikely that a majority of Tweets could qualify for copyright protection. Nevertheless, there are some that do, and those require protection.

### *C. Infringement*

There are many ways to reproduce a Tweet and the internet medium offers infinite opportunities for a copyrighted Tweet to be infringed.<sup>172</sup> Twitter users who invest the time and money in registering their Tweets have the right to file a copyright claim against any alleged infringer.<sup>173</sup> As the copyright holder and plaintiff, the Twitter user can offer the copyright certificate to meet the first element required to prove copyright infringement.<sup>174</sup> A common form of proof of copying for the second element, actionable copying, is evidence of the defendant's opportunity to

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<sup>162</sup> See *Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., Inc.*, 768 F.2d 145, 148 (7th Cir. 1985).

<sup>163</sup> Levy, *supra* note 7.

<sup>164</sup> *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 542 (6th Cir. 2004) (noting that a very brief work is less likely to be copyrightable because it affords fewer opportunities for originality); 1 NIMMER & NIMMER, *supra* note 62, § 2.01.

<sup>165</sup> Johnson, *supra* note 139, 177.

<sup>166</sup> *Wright v. Warner Brooks, Inc.*, 953 F.2d at 736; see *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351 (1991) (noting that individual facts are not copyrightable).

<sup>167</sup> *Attia v. Soc'y of the N.Y. Hosp.*, 201 F.3d 50, 58 (2d Cir. 1999) (explaining that copyright does not give the author exclusive rights over the facts stated in her work of authorship); see *Feist*, 499 U.S. at 344–45.

<sup>168</sup> Viscounty, *supra* note 25, at 61 (stating that social networking is the “today and tomorrow of the internet”).

<sup>169</sup> Cooper, *supra* note 24, at 7.

<sup>170</sup> *Peter Pan Fabrics, Inc. v. Rosstex Fabrics, Inc.*, 733 F. Supp. 174, 177 (S.D.N.Y. 1990); see *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1494 (11th Cir. 1984) (noting only “fixed” for a “transitory duration” and not for the length of the copyright).

<sup>171</sup> Posting of RabidPoet to TWITTER (Sept. 21, 2009, 9:53 AM), <https://twitter.com/RabidPoet>.

<sup>172</sup> Carl A. Salisbury & Eugene Killian Jr., *Copyright Protection and the Internet: If You Can't Beat 'Em, Should You Join 'Em*, 8 N.J. LAW. WKLY. 45, Nov. 8, 1999, at 32 (noting that one of the stressed digital technology places on copyright law comes from the distinction between copying and distributing on one hand and displaying on the other).

<sup>173</sup> 17 U.S.C. § 501(b) (2006).

<sup>174</sup> 17 U.S.C. § 410(c).

come into contact with the plaintiff's work and the similarities between the works.<sup>175</sup> This test is fairly clear cut when applied to Tweets due to their position on the internet. The brevity of a Tweet<sup>176</sup> is helpful in this instance because an ordinary observer can look at the work in its entirety to determine similarity.<sup>177</sup>

The original purpose of Tweets is to answer the question "what are you doing" and to connect with friends,<sup>178</sup> not to accrue revenue. This limits remedies<sup>179</sup> for an infringement action. The main remedy for Twitter users would be an injunction,<sup>180</sup> although, as long as the copyright is registered before the infringement took place, statutory damages are also available.<sup>181</sup> While these remedies have a positive end result, the money and time required for infringement claims might prove too burdensome for a Twitter user to actually defend his copyrighted works.<sup>182</sup> This burden, however, is an issue not only for Twitter users, but for social networking members in general, and, as such this group should have a forum before which they can enforce their right to protect their works.

### III. PROPOSAL

The following section proposes that there should be an intermediary regulatory agency to provide assistance to those Twitter users and other social network members who are seeking to enforce their rights against the copyright infringement of their works. This section outlines the need for an independent regulatory agency and the support it needs to be successful. It also addresses the structure the agency should take and its value to the copyright system. Finally this section addresses the public policy reasons and the fact that inevitable future internet growth supports the creation of a copyright agency.

#### *A. The Need for an Agency*

A regulating agency is needed in the context of copyright law for several reasons. The most compelling reason is the need for a more formal management system for

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<sup>175</sup> *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir.1992).

<sup>176</sup> Levy, *supra* note 7.

<sup>177</sup> *See Kindergartners Count, Inc., v. Demoulin*, 249 F. Supp. 2d 1214, 1232 (D. Kan. 2003) (noting that the ordinary observer examines the work as a whole).

<sup>178</sup> Levy, *supra* note 7.

<sup>179</sup> *See, e.g.*, 17 U.S.C. §§ 502–05 (describing injunctions, impounding and disposition of infringing articles, damages and profits, costs and attorney's fees).

<sup>180</sup> 17 U.S.C. § 502.

<sup>181</sup> 17 U.S.C. § 504; William Horton, *Copyright Protection for Software*, 67 MICH. B. J. 964, 964 (1988) (explaining that one of the benefits to registering a copyright is the recovery of statutory damages).

<sup>182</sup> *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, Remedies for Small Copyright Claims*, 109th Cong. 2 (2006) [hereinafter Remedies for Small Copyright Claims].

regulating copyright infringement on the internet.<sup>183</sup> Due to its global reach, internet issues should be regulated by an international system,<sup>184</sup> not one restricted to United States federal laws. Further, the internet provides a forum for the increased occurrence of copyright infringement.<sup>185</sup> The Re-Tweet function on Twitter is one such example of the ease of possible infringement.<sup>186</sup> A regulatory agency would provide a mechanism to deal with the conflicts in a less expensive and less cumbersome manner.<sup>187</sup> Finally, the agency would be charged with promotion of public policy and future improvement of internet copyright enforcement.<sup>188</sup>

### *B. Prerequisite to an Agency: Endorsement*

The copyright agency should be loosely based on the Internet Corporation for Assigned Names and Numbers (ICANN)<sup>189</sup> Uniform Domain-Name Dispute-Resolution Policy.<sup>190</sup> This policy is in place for most types of trademark-based domain-name disputes.<sup>191</sup> The dispute-resolution is sanctioned by the United States government, and it is utilized on the international front.<sup>192</sup> Similar support is necessary for a copyright agency. Without government backing of the agency, enforcement against copyright infringement on the internet would be of little or no value.<sup>193</sup> The internet has global scope and therefore should have global regulation.

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<sup>183</sup> Ian Jay Kaufman, *ICANN, WIPO Address Domain Names*, 223 N.Y.L.J. S5 (Jan. 18, 2000) (noting one of the main reasons for the change in the domain name system to the development of ICANN was the call from commercial interests for a more formal system to regulate the internet).

<sup>184</sup> *ICANN Global Partnerships*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <http://www.icann.org/en/global-partnerships/> (last updated Aug. 13, 2010) (explaining ICANN's global partnerships promotes regional representation in a multi-stake environment).

<sup>185</sup> Salisbury & Killian Jr., *supra* note 172, at 32.

<sup>186</sup> *See generally* Kurtz, *supra* note 49.

<sup>187</sup> Kaufman, *supra* note 183 (noting that expense and the need for a streamline procedure were reasons for developing ICANN).

<sup>188</sup> *What Does ICANN Do?*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <http://www.icann.org/en/participate/what-icann-do.html> (last updated Aug. 13, 2010) (explaining that ICANN promotes public policy and plays an important role in the expansion and evolution of the internet).

<sup>189</sup> *Id.* (explaining that ICANN's role as coordinating the unique name and number computer identifiers to manage a global internet and promote competition and public policy).

<sup>190</sup> *Uniform Domain-Name Dispute-Resolution Policy*, INTERNET CORP FOR ASSIGNED NAMES & NUMBERS, <http://www.icann.org/en/udrp/udrp.htm> (last updated Aug. 13, 2010).

<sup>191</sup> *Id.*

<sup>192</sup> *ICANN: The Global Internet Community Working Together to Promote the Stability and Integrity of the Internet*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <http://www.icann.org/tr/english.html> (last updated Aug. 13, 2010) (discussing ICANN's evolution from U.S. Government contract services to its now private-public partnership led by a its president who directs an international staff working on three continents).

<sup>193</sup> *See generally* United States Copyright Offices, *Copyright Basics: What is Copyright?*, available at <http://www.copyright.gov/circs/circ1.pdf> (last visited Sept. 30, 2010) (noting that copyright is a form of protection provided by the laws of the United States under Title 17 of the U.S. Code).

*C. The Agency Structure: Assistance to the  
Copyright Holder and the Service Provider*

In addition, there must be a comprehensive scheme to promote universal resolvability of internet infringement claims. Only the owner of an exclusive right under a copyright can initiate an action for infringement.<sup>194</sup> If the infringement occurred on the internet the two potential causes of action might be against anyone who posted the item<sup>195</sup> or against the service provider who allowed means to post the item.<sup>196</sup> Part of the structure of the agency includes separate organizations which address the specialized needs of individuals as well as the needs of a service provider. The DMCA<sup>197</sup> and CDA<sup>198</sup> limit the second potential cause of action because they take some liability off of service providers. A regulatory agency needs to incorporate these laws into its foundation to be able to offer the assistance to service providers. The Service provider branch would offer counseling to providers to help develop comprehensive policies to prevent infringement.

The agency services branch for individuals would provide assistance with addressing infringement as well as a forum for resolving conflicts. When a user's protected work originates on the internet, the user will need additional help in addressing possible infringement.<sup>199</sup> This assistance and counseling is part of the individual services provided by the agency. The organization for individuals includes different subcommittees to address different aspects of an individual's claim. One committee would assist with contacting service providers to initiate the removal of protected materials from their sites.<sup>200</sup> Another committee would advise on strategy to prevent future infringement, and a third would develop additional forums to air out conflicts similar to the ICANN dispute resolution service providers.<sup>201</sup> This third committee is most valuable to copyright holders in positions similar to that of Twitter users whose valid claims to copyright infringement may not always be financially

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<sup>194</sup> 17 U.S.C. § 501(b) (2006).

<sup>195</sup> 17 U.S.C. § 501(a) (defining "anyone" to include any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity).

<sup>196</sup> Viscounty, *supra* note 25, at 61 (explaining that generally service providers will not lose their immunity under the CDA by merely facilitating expression of information but it's unclear the line relating to questions posted for users response).

<sup>197</sup> 17 U.S.C. § 512; Fayle, *supra* note 31; Viscounty, *supra* note 25, at 61 (stating that DMCA provides "safe harbor" for service providers).

<sup>198</sup> 47 U.S.C. § 230 (detailing the situations in which the CDA provides safe harbor to social networking providers); Viscounty, *supra* note 25, at 61.

<sup>199</sup> Richard Keyt, *Internet Copyright Law: A Rat Pilfered My Website Cheese—What Do I Do? Remedies for Web Site Copyright Infringement*, KEYTLAW (Nov. 9, 2002), <http://www.keytlaw.com/Copyrights/cheese.htm> (noting generally the investigation necessary to pursue a copyright claim, the options of cease and desist letter, notice to the service provider under the DMCA, and the preparation for litigation as possible avenues for a copyright holder to pursue).

<sup>200</sup> 17 U.S.C. § 512 (describing the circumstances where a service provider has immunity); *see generally* Twitter Terms of Service, TWITTER, <http://twitter.com/tos> (last visited Sept. 30, 2010) (explaining the detailed steps a user needs to take to request the infringing work be removed from the site).

<sup>201</sup> ICANN: *Approved Providers for Uniform Domain-Name Disputed-Resolution Policy*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <http://www.icann.org/en/dndr/udrp/approved-providers.htm> (last updated Aug. 13, 2010).

worth pursuing. This financial consideration is similar that of ICANN's Uniform Domain Name Dispute Resolution Policy.<sup>202</sup>

#### *D. The Agency Value*

A regulatory agency could provide additional methods for resolving infringement actions. The ICANN policy provides that the holder of a trademark initiates the administrative proceedings that arise from domain name violations by either filing a complaint in a court of appropriate jurisdiction, or filing a complaint with the appropriate dispute-resolution service provider.<sup>203</sup> The policy requires that disputes must be resolved by agreement, court action, or arbitration before any action is taken to alter a domain name.<sup>204</sup> The same could be done for copyright.

Copyright holders will still have the traditional federal litigation route, but the agency would provide dispute-resolution as an alternative. This system would allow the copyright holder options in the assertion of their rights. The dispute-resolution would be similar to the ICANN policy which requires administrative panels.<sup>205</sup> The copyright agency would provide the opposing parties the opportunity to raise their concerns in the presence of a panel well-versed in copyright law. The administrative panels and the parties involved in the dispute would be required to adhere to a reasonable timeframe in which to air out the issues and render a conclusion.<sup>206</sup> These panels provide for a less expensive alternative to a civil suit,<sup>207</sup> and offer a streamline manner to resolve an infringement issue. In addition, the dispute-resolution would help provide a process for handling infringement claims with little or no merit by keeping them out of the court system and saving the government and the parties money in the process.<sup>208</sup>

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<sup>202</sup> See generally *ICANN: The Global Internet Community Working Together to Promote the Stability and Integrity of the Internet*, *supra* note 192 (noting that the UDRP is designed to be efficient and cost effective).

<sup>203</sup> *Uniform Domain-Name Dispute-Resolution Policy*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS (Oct. 24, 1999), <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>.

<sup>204</sup> *Id.*

<sup>205</sup> *Rules for Uniform Domain-Name Dispute-Resolution Policy*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS (Oct. 30, 2009), <http://www.icann.org/en/dndr/udrp/uniform-rules.htm> (defining a panel as an administrative panel appointed by a provider to decide a complaint concerning domain-name registration).

<sup>206</sup> *Id.* (outlining the rules for a proceeding specifically identifying the time restraints on responses, filings and decisions).

<sup>207</sup> *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property, Comm. on the Judiciary*, H.R. Rep. 109th Cong. 62–68 (2009) (prepared statement of the United States Copyright Office) available at [http://commdocs.house.gov/committees/judiciary/hju26767.000/hju26767\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju26767.000/hju26767_of.htm) (last visited Sept. 30, 2010) (detailing cost of litigation to include tens of thousands of dollars or more for attorney services after pleadings, discovery, motion practice and trial including possible appeals and noting that contingency fee arrangements in copyright cases are relatively rare).

<sup>208</sup> See generally *ICANN: The Global Internet Community Working Together to Promote the Stability and Integrity of The Internet*, *supra* note 192 (noting that with the implementation of the Uniform Domain-Name Dispute-Resolution Policy, more than 5000 disputes have been resolved efficiently and cost effectively).



The Copyright Office itself is sympathetic to the costs of litigation for an individual copyright holder (like Twitter users) where the individual may have “little practical recourse in obtaining relief through the court system, particularly against infringements involving small amounts of actual damages.”<sup>209</sup> The agency would eliminate some of these costs by acting in part as the federal equivalent to a state level small claims court.<sup>210</sup> This role would open the door to the increase of effective enforcement of copyright protection.

### *E. Public Policy and Future Improvement*

It is in the public’s best interest to have a manageable method by which to resolve copyright disputes. Removal of some copyright infringement cases from the court system would allow greater efficiency in handling the remaining case load. The parties in the copyright cases would also benefit by the streamline process and alternate methods of resolution.<sup>211</sup> The evolution of the internet will be a constant factor in the development of an agency. Use of an agency will promote a future system and enforcement policy that has the flexibility to change with new technology.<sup>212</sup> Currently, Twitter is at the forefront of new communication technology.<sup>213</sup> Nevertheless, the copyright protection issues currently facing Twitter users will eventually be replaced with something new. An agency will be progressive and dynamic. One of its goals will be to always consider the best new methods of promoting copyright protection within the context of the growth of the internet and communication technology.

## CONCLUSION

Twitter is the latest model in social networking sites. Tweets are unique due to their short length and also the internet medium. It is possible, however, for some of them to meet the strict standards of copyright law and gain copyright protection. Creating a regulatory agency would aid Twitter users and internet users in general. It would help those users answer questions regarding potential copyright protection and also enforcing the copyright of their qualifying works by managing infringement claims. In addition, the agency would encourage service providers and users to work

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<sup>209</sup> *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property, Comm. on the Judiciary*, H.R. Rep. 109th Cong. 62–68 (2009) (prepared statement of the United States Copyright Office), available at [http://commdocs.house.gov/committees/judiciary/hju26767.000/hju26767\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju26767.000/hju26767_of.htm) (last visited Sept. 30, 2010) (noting that in many cases a copyright owner engaging in a rational analysis of the costs and benefits of litigation will conclude that in light of the modest value of his infringement claim and the high cost of litigation it makes no sense to pursue that claim).

<sup>210</sup> *Id.* (explaining that state court systems offer small claims courts, which handle claims of up to a few thousand dollars but the federal courts offer no such alternative so the copyright owners have no choice but to pursue their claims in federal court taking on the cost of federal litigation).

<sup>211</sup> *Id.*

<sup>212</sup> Viscounty, *supra* note 25, at 61 (stating that social networking is the “today and tomorrow of the internet” and the internet is both creating new legal issues and putting a spin on old ones).

<sup>213</sup> Angelo Fernando, *You’re no one if you’re not on Twitter*, 26 COMM. WORLD 10, Mar. 1, 2009.

together to protect copyrighted works. The agency will promote a future system that has the flexibility to change. This dynamic aspect is of utmost importance because copyright issues currently facing Twitter users will ultimately be replaced with new technology.