

Tweet Takers & Instagram Fakers: Social Media & Copyright Infringement

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I. INTRODUCTION

Social media is ubiquitous. There are more than 3.499 billion active social media users across hundreds of different platforms.¹ The average person uses 7.6 social media accounts and spends 142 minutes a day on social media.² Moreover, brands and companies rely on social media (e.g., Instagram, Twitter, Facebook, etc.) to drive site traffic and boost revenues. Reports estimate that “91% of retail brands use 2 or more social media channels,” while “81% of all small and medium businesses use some kind of social platform.”³

Social media users unknowingly face a litany of legal issues when they post content online, including copyright infringement. Users that merely link or share articles, pictures, or memes may actually be infringing on copyrighted content.⁴ As a result of social media, more copyright

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1. A new social media user joins a platform every 6.4 seconds. Kit Smith, *126 Amazing Social Media Statistics and Facts*, BRANDWATCH (June 13, 2019), <http://www.brandwatch.com/blog/amazing-social-media-statistics-and-facts/>.

2. *Id.*

3. *Id.*

4. Meme accounts are social media accounts that repost entertaining tweets, pictures, and videos, often without permission or attribution to the original creator. Brian Feldman, *FuckJerry's*

infringement claims have emerged. Popular social media accounts like FuckJerry, Betches Luv This, The Fat Jewish, Barstool Sports, and PopSugar have been criticized and sued for benefiting (e.g., increased Internet traffic and advertising revenue) from stolen user content.

Today, it is no longer clear what constitutes copyright infringement because developments in technology have outpaced changes in the law. For example,

when the Copyright Act was amended in 1976, the words “tweet,” “viral,” and “embed” invoked thoughts of a bird, a disease, and a reporter. Decades later, these same terms have taken on new meanings as the centerpieces of an interconnected world wide web in which images are shared with dizzying speed over the course of any given news day.⁵

Similarly, the Digital Millennium Copyright Act (DMCA) was enacted in 1998 to address copyright issues in the digital age; however, the Internet landscape today looks much different than it did over twenty years ago. The reality is that the Copyright Act and DMCA are no longer sufficient to protect copyrightable content, especially as it pertains to social media.

Using stolen words and images without permission or attribution was certainly a problem before the Internet and social media; however, the issues today are more nuanced. For example, does copyright infringement occur when a person posts an image on a public page? Or when a person retweets a tweet or an image? These questions are now being answered, as social media users demand that companies and brands stop stealing images, memes, and tweets. As a result, some brands now attribute the source of their content to avoid infringement allegations. Although attribution may be satisfactory for some creators, others have pursued litigation to enforce their exclusive intellectual property rights against companies that use stolen content.

Social media users as well as content curators, creators, and generators are becoming more conscious of how they use social media. It only takes one mouse click to generate protectable intellectual property, and just one more to steal it. Although brands are more mindful of infringement liability and users are more aware of their rights, there is still a need for clearer standards as to what constitutes misappropriation on the Internet. With greater consensus and heightened protection, lawyers can advise social media clients on how to avoid liability under current copyright law.

Success Is Instagram's Failure, N.Y. MAG. (Feb. 5, 2019), <http://nymag.com/intelligencer/2019/02/how-instagram-enables-fuckjerrys-success.html>.

5. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 586 (S.D.N.Y. 2018).

In this Comment, I explore the intersection of current copyright law and social media content creation and dissemination, with a focus on Twitter and Instagram. Part II of this Comment discusses recent Twitter and Instagram content controversies, by using examples of popular brands that were criticized for stealing other users' original content. Part III considers the copyright laws that govern all social media content. Specifically, I contemplate whether the current laws and avenues for redress adequately address the problems content creators and users face when they interact with Twitter and Instagram. Finally, Part IV offers recommendations for social media users and their legal representatives on how to navigate social media platforms lawfully.

II. THE SOCIAL MEDIA LANDSCAPE

A. *Instances of Infringement*

Until recently, popular social media accounts frequently stole content from other social media users without payment or permission.⁶ Even though this practice was widespread, nothing stopped various Instagram and Twitter accounts from gaining millions of followers and revenue from ad deals and endorsements. However, social media users composed of comedians, writers, and artists have since come together to call out big social media brands for copyright infringement. For example, comedy editor Megh Wright encouraged Twitter users to boycott the popular Instagram meme account FuckJerry. Jerry Media, the company behind FuckJerry, extensively promoted the Fyre Festival, a luxe music festival in the Bahamas that turned out to be a major scam. After users felt wronged by Jerry Media's lack of accountability for falsely advertising and marketing the Fyre Festival, they drew attention to FuckJerry's prolific use of stolen content on social media. The movement called #FuckFuckJerry started trending on Twitter, encouraging users to unfollow FuckJerry and other content thieves because they profited off others' work. The owners of the popular social media accounts claimed they were unaware that posted content, such as pictures and tweets, should include a source or attribution. However, this defense was not satisfactory to users and sponsors; the FuckJerry Instagram account alone lost sponsorship deals and over 250,000 followers in the fallout.⁷ As a result of the

6. Megh Wright, *How the #FuckFuckJerry Movement Was Born: The Notorious Instagram Joke Thief Was Never Brought to Justice Until Now*, VULTURE (Feb. 6, 2019), <http://www.vulture.com/2019/02/fuck-jerry-instagram-comedians-unfollow-campaign-elliott-tebele.html>.

7. *Id.*

#FuckFuckJerry movement, popular accounts have become more self-conscious and careful with crediting content.

Today, more Instagram and Twitter accounts attribute the source of their content to the original owner. However, the damage has already been done because brands have faced legal consequences in addition to social media backlash. For instance, Twitter user Olorunfemi Coker sued FuckJerry in federal court for copyright infringement. Coker claimed FuckJerry posted a screenshot of his tweet to the FuckJerry Instagram account without his permission.⁸ Coker's lawyers explained that "similar lawsuits have been filed before, including cases where brands posted photographs to social media without photographers' permission, that have set a precedent for how copyrightable material can be treated by companies on social media."⁹ The results of the lawsuit are still pending; however, FuckJerry deleted the post from its Instagram account.¹⁰

Some people may think, What's the harm in sharing other users' content on social media? Isn't that the point? It's just recreational, isn't it? Yet it is an unauthorized use of copyrighted material when a user directly copies the whole portion of the work. This mindset also ignores the fact that these brands generate enormous amounts of revenue from the commercial use of stolen content and destroy creators' ability to profit off their own work in the market. Also, the advertising that brands do with these images is often not apparent to viewers. Viewers sometimes believe they are looking at a picture and not an advertisement, and as a result, are misled as to the source of the content and the labor behind the work. For example, Betches Media, a popular Internet brand and blog for women, recently stumbled into controversy over stolen material. Twitter user Ira Madison III posted a photo of a friend's unique Goldfish-crust macaroni and cheese dish. Less than two days later, Betches reposted the same photo to their Instagram account along with a fake caption. The caption was attributed to a made-up Twitter username and was sponsored by Hinge, an online dating service. Betches assumed that the photo was original content created by Hinge's advertising team and issued an apology for the unintended misappropriation.¹¹

8. Megh Wright, *A Twitter User Is Suing FuckJerry for Copyright Infringement*, VULTURE (Mar. 22, 2019), <http://www.vulture.com/2019/03/fuckjerry-lawsuit-copyright-infringement-twitter-instagram.html>.

9. *Id.*

10. *Id.*

11. Johnny Lieu, *The Curious Case of a Stolen Photo, Turned into a Fake Tweet, Then an Ad*, MASHABLE (Oct. 10, 2018), <http://mashable.com/article/ira-madison-hinge-betches/>.

This example is just one of several that shows how misappropriated content spreads quickly on the Internet. Although many account holders do not know the origin of the content they repost, this does not stop them from exploiting it for monetary gain. Until now, social media users have mostly ignored copyright infringement, but Twitter and Instagram communities have become more vigilant about holding big brands accountable.

B. Social Media Platforms at Issue

Twitter and Instagram are the primary social media platforms where comedians, artists, and influencers allege copyright infringement. Twitter is an online platform where users share their thoughts, messages, and ideas, in 280 characters or less.¹² For a tweet to be protected by copyright, it must meet the usual threshold of originality and include a minimal amount of creativity. Although the short word limit of a tweet may seem prohibitive for copyright protection, it is not impossible.¹³

In general, copyright owners control the distribution rights to their material. However, these rights can be complicated in a social media context because the goal of social media is to share content. For example, tweets are easily shareable on Twitter. When a user “retweets” a tweet, the tweet is shared on the user’s personal feed and can be viewed indefinitely. Although the retweet still indicates the original source of the tweet, this shared tweet is still contrary to the owner’s right of distribution.

Twitter’s Terms of Service (ToS) states that “you retain your rights to any Content you submit, post or display on or through the Services. What’s yours is yours—you own your Content.”¹⁴ However, the ToS gives Twitter license to share content and permit other users to retweet content without committing copyright infringement.¹⁵ Problems occur when Twitter users borrow tweets and rewrite them under their own profile to give the impression that they are the originator. This process called “tweetdecking”

12. The previous limit was 140 characters. Will Oremus, *Remember When Longer Tweets Were the Thing That Was Going to Ruin Twitter?*, SLATE (Oct. 30, 2018, 8:26 AM), <http://slate.com/technology/2018/10/twitter-tweet-character-limits-280-140-effect.html>.

13. For example, Twitter users sometimes “thread” their tweets to connect their thoughts or to tell a story in a series of tweets. While a single tweet might not meet the threshold of originality, the thread’s series of thoughts arranged in an original manner could pass the threshold for copyright protection. *Can a Tweet Be Protected by Copyright? If So, Who Owns the Copyright?*, COPYRIGHT ALLIANCE, http://copyrightalliance.org/ca_faq_post/tweet-protected-copyright/ (last visited Mar. 24, 2019).

14. *Twitter Terms of Service*, TWITTER (May 25, 2018), <http://twitter.com/en/tos>.

15. *Id.*

occurs because users conspire on the platform Tweetdeck to make these tweets go viral.¹⁶ Another problem manifests when users repost screenshots of tweets or photos. This latter category of infringement is what FuckJerry and Betches have been accused of doing. Popular accounts borrow tweets and photos from Twitter and post them on their own Instagram accounts, often with no source attribution. As a result, viewers are unaware of the content's origination, and the creator misses out on attribution, notoriety, and opportunities to generate revenue via job prospects and advertising deals.

Instagram, another popular social media app, is considered the preeminent platform for sharing images. In fact, Facebook purchased Instagram to promote image-sharing as a dominant form of communication.¹⁷ Seventy-two percent of teenagers use Instagram, making it more popular than Facebook, Twitter, and Snapchat.¹⁸ Only YouTube, the prevailing platform for sharing and watching videos, is more popular than Instagram.

Instagram caters to large, public networks where users maintain a carefully curated portfolio of pictures and videos.¹⁹ This polished, public outlet has led to the rise of social media influencers—people who influence their large followings to buy certain products or services.²⁰ Influencers have a strong relationship with their audience and heavily sway their brand loyalty and purchasing habits.²¹

The rise of social media influencers makes social media platforms more problematic. An influencer's goal goes beyond sharing images—the goal of influencing is to make money off of photos, photos that are often owned by others. Both individual influencers and influential brands are guilty of benefiting from posting stolen content. Even if some Instagram

16. Adam Rosenberg, *Twitter Reportedly Suspended Users That Steal Memes and Force Viral Tweets*, MASHABLE (Mar. 10, 2018), <http://mashable.com/2018/03/10/twitter-suspends-tweetdeckers/>.

17. See Farhad Manjoo, *Why Instagram Is Becoming Facebook's Next Facebook*, N.Y. TIMES (Apr. 26, 2017), <http://www.nytimes.com/2017/04/26/technology/why-instagram-is-becoming-facebooks-next-facebook.html>.

18. Andy McDonald, *Facebook No Longer the Dominant Social Media Platform for Teens*, HUFFINGTON POST (May 1, 2018, 1:16 PM), http://www.huffingtonpost.com/entry/facebook-not-dominant-teen-social-media-platform_us_5b114301e4b010565aab40d6.

19. *Id.*

20. Dennis Kirwan, *Are Social Media Influencers Worth the Investment?*, FORBES (Aug. 21, 2018, 9:00 AM), <http://www.forbes.com/sites/forbesagencycouncil/2018/08/21/are-social-media-influencers-worth-the-investment/#719aa0b5f452>.

21. See Chavie Lieber, *How and Why Do Influencers Make So Much Money? The Head of an Influencer Agency Explains*, VOX (Nov. 28, 2018, 6:00 PM), <http://www.vox.com/the-goods/2018/11/28/18116875/influencer-marketing-social-media-engagement-instagram-youtube>.

posts do not advertise a product, influencers and companies still benefit from increased site traffic, brand loyalty, and potential revenue opportunities.²² Thus, when a brand steals another person's picture and posts it on Instagram, it is hardly an innocent, personal use.

Like Twitter, Instagram does “not claim ownership of [user] content” but receives a license to use it.²³ Infringement often occurs when users repost copyrighted photos. Posting a screenshot of a photo is considered infringement, even if the source is properly credited or the post does not generate any revenue. A user needs the original creator's express permission to license the photo and post it on Instagram. Therefore, brands that use a copyrighted photo and include the source in a caption are still infringing on the original creator's copyright. The user must seek permission to avoid copyright infringement. The only sanctioned way users can share photos is through Direct Messaging, the inter-app function that does not infringe on owners' rights.²⁴

III. LEGAL BACKGROUND & ANALYSIS

A. *The Foundation of Copyright Law*

In order to understand digital content theft on social media platforms, it is necessary to understand copyright law. Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, including literary works and pictorial and graphic works.²⁵ “Literary works” and “pictorial works” are defined and protected under 17 U.S.C. § 101.²⁶ A picture or written work is copyrightable subject matter if it is the product of independent creation and a small amount of

22. See Wright, *supra* note 6.

23. *Terms of Use*, INSTAGRAM (Apr. 19, 2018), <http://help.instagram.com/581066165581870>.

24. See Madeline Buxton, *What You Can & Can't Do with Other People's Instagram Photos*, REFINERY29 (Apr. 19, 2018, 11:00 AM), <http://www.refinery29.com/en-us/2018/04/196864/instagram-copyright-dos-donts>.

25. 17 U.S.C. § 102(a)(1), (5) (2012).

26.

Literary works are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied “Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.

Id. § 101.

creativity.²⁷ Accordingly, tweets and Instagram photos are protected under copyright law as literary works and pictorial works, respectively.²⁸

The contents of a tweet are copyrightable if it is original and there is a minimal amount of creativity in the commentary or analysis.²⁹ Under the idea-expression dichotomy, ideas are not copyrightable, but expressions of those ideas are.³⁰ Thus, on Twitter, alleged infringers must demonstrate that although the original and copied tweets have very similar content, they are slightly different.³¹ For example, users commonly repost screenshots of tweets, meaning someone will take a picture of a tweet and repost it on Twitter or Instagram. The material is an identical copy of the original joke or phrase.³² Although these are clear cases of infringement under the idea-expression dichotomy, they are not being policed as heavily because social media platforms are a newer media. As a result, copyright law does not currently protect the individuals that these brands mine their content from and profit off of in the marketplace.³³

Ownership rights exist the moment a work is created. A copyright holder has the exclusive right to reproduce, distribute, and display the work.³⁴ Similarly, the original creator of a photo or the writer of a work has the right to control where the photo goes on display or where that work is shared.³⁵ This means an owner controls who can repost their copyrighted material on the Internet.³⁶ Owners have complete control and authority over their copyrighted works, excluding use by licensees and the social media platforms themselves.

However, owners cannot exercise absolute control over works that fall under the Fair Use Doctrine. The Fair Use Doctrine permits limited use of copyrighted material without acquiring a license from the owner. The Fair Use Doctrine promotes freedom of expression but is limited in

27. *Id.* § 102(a).

28. Registering a copyright is not necessary for copyright protection to exist—filing with the U.S. Copyright Office is optional. However, an owner must register a copyright in order to sue for copyright infringement. *See id.*

29. *Can a Tweet Be Protected by Copyright? If So, Who Owns the Copyright?*, *supra* note 13.

30. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (“Copyright assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship.”).

31. 17 U.S.C. § 102(a) (2012).

32. Wright, *supra* note 6.

33. *Id.*

34. 17 U.S.C. § 106.

35. *See id.*

36. *See Twitter Terms of Service*, *supra* note 14; Buxton, *supra* note 24.

scope to allow the free use of copyrighted content for certain purposes.³⁷ Under copyright law, a use is fair use and not copyright infringement if it is used for purposes such as “criticism, comment, news reporting, teaching, . . . scholarship, or research.”³⁸

There are four nonexclusive factors to determine whether something falls under the fair use exception.³⁹ These factors are codified in 17 U.S.C. § 107 and were enunciated in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.⁴⁰ The four factors are the following: “(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work.”⁴¹

The first Fair Use factor is the “purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes.”⁴² For example, commercial uses are not considered fair uses, whereas educational uses are allowed.⁴³ The important inquiry for this factor is whether the use is transformative, or to what extent it gives the copyrighted work new meaning or expression.⁴⁴ In *Campbell v. Acuff-Rose Music*, the Supreme Court defined the transformative test to determine whether the creator added something new to the work, “with a further purpose or different character, altering the first with new expression, meaning, or message.”⁴⁵ The new work should contain significant creative elements that make it more than just a derivative of the underlying work.

The second factor, the nature of the copyrighted work, refers to the “value of the materials used.”⁴⁶ “This factor analyzes the degree to which the work that was used relates to copyright’s purpose of encouraging creative expression.”⁴⁷ This means that some works are more protected by

37. See Oliver Herzfeld, *Fair Use in the Age of Social Media*, FORBES (May 26, 2016, 9:34 AM), <http://www.forbes.com/sites/oliverherzfeld/2016/05/26/fair-use-in-the-age-of-social-media/#5980472e3300>.

38. 17 U.S.C. § 107.

39. Herzfeld, *supra* note 37.

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

41. *Id.* at 560-61.

42. *More Information on Fair Use*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/fair-use/more-info.html> (last visited Oct. 2, 2019).

43. See 17 U.S.C. § 107.

44. Herzfeld, *supra* note 37.

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

46. *Id.* at 586.

47. *More Information on Fair Use*, *supra* note 42.

copyright law than others. For example, the use of an imaginative work (e.g., fiction novels, songs, motion pictures, etc.) is less likely to support a claim of a fair use than the use of a factual work (e.g., news broadcasts, factual reports, etc.).

The third factor asks whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” is reasonable in relation to the purpose of the copying.⁴⁸ Under this factor, courts consider the quantity and quality of the copyrighted material used.⁴⁹

The fourth factor is the effect of the use on the market or value of the copyrighted work. This factor requires courts to consider how the alleged infringement could have a substantial adverse impact on the potential market for the original work.⁵⁰ According to the Supreme Court, this is the most important factor.⁵¹ However, each factor does not need to be present to consider an unlicensed use as a fair use. Each factor is analyzed individually and then weighed against each other.⁵² Moreover, courts evaluate fair use claims on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry.⁵³ Thus, there is no guarantee that an unlicensed use may be considered fair and not an infringing activity.

B. *The Digital Millennium Copyright Act*

The Digital Millennium Copyright Act of 1998 (DMCA) provides the quickest recourse for a content owner to remove content from a social media platform.⁵⁴ The DMCA was enacted to encourage cooperation between copyright owners and Internet service providers with an overarching goal to fight online copyright infringement.⁵⁵ Under the DMCA, a copyright owner can send a DMCA takedown notice to an Internet

48. *Id.*

49. *Id.*

50. *Campbell*, 510 U.S. at 590.

51. Herzfeld, *supra* note 37.

52. *Id.*; *More Information on Fair Use*, *supra* note 42.

53. *More Information on Fair Use*, *supra* note 42.

54. The DMCA implements two World Intellectual Property Organization (WIPO) Copyright treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. See *Digital Millennium Copyright Act of 1998*, U.S. COPYRIGHT OFF. (Dec. 1998), <http://www.copyright.gov/legislation/dmca.pdf>; David Kravets, *10 Years Later, Misunderstood DMCA Is the Law That Saved the Web*, WIRED (Oct. 27, 2008, 3:01 PM), <http://www.wired.com/2008/10/ten-years-later/>.

55. *The DMCA Notice and Takedown Process*, COPYRIGHT ALLIANCE, <http://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/> (last visited Mar. 31, 2019).

provider, website operator, search engine, web host, or other operator (e.g., Instagram, Twitter, Google, etc.).⁵⁶ A DMCA takedown notice can be submitted regardless of whether the copyright owner registered the work with the U.S. Copyright Office. The takedown notice is a “legal notice that is sent to the infringing website owners and service providers” that requests the content be taken down.⁵⁷ A takedown notice should include (1) the owner’s signature, (2) an identification of the alleged copyrighted work, (3) the infringing activity and its location on the Internet, (4) the contact information of the owner, (5) a statement that the owner has a good faith belief that the use of the content is not authorized by copyright law, and (6) a statement that the takedown notice is accurate.⁵⁸ If these elements are not met, a service provider may refuse to honor the notice and remove the content.⁵⁹

Many Internet hosts provide links to takedown notice forms on their websites. Alternatively, individuals can visit the U.S. Copyright Office website to see a list of web providers’ addresses where takedown notices can be sent. Upon receipt of a valid takedown notice, the web provider takes down the allegedly infringing material and notifies the alleged infringer.⁶⁰ The alleged infringer can respond with a counter notice if they have a good faith belief that their activity is not infringing.⁶¹ “After receiving a counter notice, the service provider is obligated to forward that counter notice to the person who sent the original takedown notice.”⁶² Upon receipt of the counter notice, the service provider must wait ten to fourteen days. During this time, the copyright owner must sue the alleged infringer to keep the content down; otherwise, the service provider must

56. See *Can a Tweet Be Protected by Copyright? If So, Who Owns the Copyright?*, *supra* note 13.

57. *What Is a DMCA Takedown?*, DMCA, <http://www.dmca.com/faq/What-is-a-DMCA-Takedown> (last visited Oct. 1, 2019).

58. *Elements of a Proper DMCA Takedown Notice*, COPYRIGHT ALLIANCE, <http://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/> (last visited Mar. 31, 2019).

59. *Can a Tweet Be Protected by Copyright? If So, Who Owns the Copyright?*, *supra* note 13.

60. *Where to Send a DMCA Takedown Notice*, COPYRIGHT ALLIANCE, <http://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/> (last visited Sept. 14, 2019).

61. The counter notice explains why the alleged infringer disagrees with the copyright owner. *Id.*

62. *Id.*

allow access to the content again.⁶³ Moreover, copyright infringement claims are limited by a three-year statute of limitations period.⁶⁴

By default, a web provider honors the copyright owner's takedown notice and removes the disputed content. For the content to remain permanently removed, the alleged infringer must fail to issue the counter notice and fight the claim, or the owner must sue the infringer in court.⁶⁵ Although the DMCA takedown notice provides copyright owners with one avenue for relief, it is not easy, immediate relief. Because this thorny process relies on burden of proof and litigation, this often means that it is too difficult or expensive for content owners to protect their property.

The DMCA safe harbor provision further complicates the process. The Online Copyright Infringement Liability Limitation Act, under Title II of the DMCA, is codified in section 512 of the Copyright Act.⁶⁶ This provision limits copyright infringement liability for web service providers if they meet the requirements for one of four safe harbors. Service providers are granted safe harbor for four types of activities: (1) providing networks and infrastructure; (2) caching infringing activities; (3) hosting and storing infringing activities; and (4) linking, directing, and providing other tools that point users to infringing activities.⁶⁷ Along with the 1996 Communications Decency Act, which provides immunity for claims such as defamation, the DMCA safe harbor provision makes it possible for Internet hosts to provide forums for users without the fear of constant liability. Generally, users have no recourse against the host site if they seek monetary damages for the loss of value of their content because of infringement.⁶⁸

Websites that participate in the DMCA takedown process are granted immunity from possible copyright infringement claims if they educate users about infringement, cooperate with copyright owners, and remove repeat offenders from their platforms.⁶⁹ Usually, an Internet service provider has to adopt and implement a policy of removing repeat

63. *Id.*

64. 17 U.S.C. § 507(b) (2012) ("No civil action shall be maintained under the [Act] unless it is commenced within three years after the claim accrued.")

65. See *Where to Send a DMCA Takedown Notice*, *supra* note 60.

66. Congress also passed this Act in 1998. *Online Copyright Infringement Liability Limitation Act*, CORNELL L. SCH., http://www.law.cornell.edu/wex/online_copyright_infringement_liability_limitation_act (last visited Sept. 14, 2019).

67. *Id.*

68. Kravets, *supra* note 54.

69. *Service Provider Safe Harbors*, COPYRIGHT ALLIANCE, <http://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/> (last visited Mar. 31, 2019).

infringers from their websites, notify users of this policy, and help copyright owners identify and protect their work. Providers must also designate agents to receive DMCA takedown notices from copyright owners and register those agents with the U.S. Copyright Office. Furthermore, Internet sites will only have a safe harbor for hosting and storing infringing activity if they comply with the DMCA takedown and counter notice process. They must also show that they were not aware of the infringement or the facts and circumstances that would make it apparent.⁷⁰ For example, in *Viacom International, Inc. v. YouTube, Inc.*, the United States Court of Appeals for the Second Circuit held that the “actual knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement” disqualifies service providers from safe harbor protection.⁷¹

Essentially, Internet companies are protected from copyright infringement liability if they comply with a minimum amount of cooperation with copyright owners and the law.⁷² If infringing material is posted on social media, the copyright owners have the burden of fighting for their right to have it removed. The creators may need to pursue litigation against the infringer—a time and money-intensive process.⁷³ Meanwhile, the people with the real money, the host sites, have no obligation to pay.

Creators that use a digital watermark or register a copyright have an easier time protecting their work.⁷⁴ Digital watermarks are invisible layers placed on top of an image that cannot be removed and can be read by software to track the image on the Internet and alert users to infringement. However, the average copyright creator does not use digital watermarks or register their works with the Copyright Office.⁷⁵ As a result, the people who benefit the most are the bigger content aggregators who participate in the alleged infringement, and have the resources to work around the legal process. In the end, this makes it harder for content creators to fight back and protect their rights.

70. *Id.*

71. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 32 (2d Cir. 2012).

72. See Nicole Martinez, *DMCA Safe Harbor: Why Artists Can't Sue Instagram*, ARTREPRENEUR ART L.J. (Feb. 7, 2016), <http://alj.artpreneur.com/dmca-safe-harbor-sue-instagram/>.

73. *Id.*

74. See Hal Berghel & Lawrence O'Gorman, *Protecting Ownership Rights Through Digital Watermarking*, 29 COMPUTER 101, 101-03 (1996) (“Its [digital watermarking] objective is to permanently and unalterably mark the image so that the credit or assignment is beyond dispute. In the event of illicit use, the watermark would facilitate the claim of ownership, the receipt of copyright revenues or successful prosecution.”).

75. See *id.*

C. *Current Case Law and Court Findings*

Recent jurisprudence has helped protect the rights of copyright owners on social media. It has also demonstrated the legal system's failure to catch up to the current realities of rampant copyright infringement on the Internet and to balance social media usage norms with copyright law. Stealing other peoples' art and work is against the law, but the purpose and core of social media is sharing content. Thus, it is inevitable that these diverging principles will collide, and that the courts will have to play catch up.⁷⁶

In *Agence France Presse v. Morel*, the United States District Court for the Southern District of New York addressed whether misappropriating photographs on social media constituted infringement.⁷⁷ There, a French news agency, Agence France Press (AFP), stole photos of the 2010 Haiti earthquake from photojournalist Daniel Morel's Twitter feed.⁷⁸ AFP distributed the photos without Morel's consent and licensed them to the major-licensing company, Getty Images. Morel alleged that AFP willfully or recklessly failed to use due diligence to verify the photographs' authenticity.⁷⁹ AFP argued they did not commit copyright infringement because Twitter's ToS made tweets available to the world and allowed others to use them.⁸⁰ However, the court found Twitter's ToS did not negate the author's copyright ownership. The ToS merely granted Twitter and its partners, not third parties (e.g., AFP), a license to use content.⁸¹ The court stated that while it is difficult to ascertain the owner and origin of many photos on Twitter, news providers have to be vigilant and attribute content properly. However, attribution is not enough to excuse unauthorized copying, because there is no right to take and use another person's content without obtaining the owner's explicit permission. The court found AFP willfully infringed on Morel's copyright and awarded Morel \$1.2 million in statutory damages.⁸²

In a separate case, the same court addressed copyright infringement of embedded tweets, which are tweets that are embedded with tweets that link to other content.⁸³ In *Goldman v. Breitbart News Network, LLC*, Justin

76. See Herzfeld, *supra* note 37.

77. See generally *Agence Fr. Presse v. Morel*, 769 F. Supp. 2d 295 (S.D.N.Y. 2011).

78. *Id.* at 300.

79. *Id.*

80. Herzfeld, *supra* note 37.

81. See *id.*

82. *Id.*

83. Louise Matsakis, *A Ruling over Embedded Tweets Could Change Online Publishing*, WIRED (Feb. 16, 2018, 5:38 PM), <http://www.wired.com/story/embedded-tweets-copyright-law/>.

Goldman's photo of Tom Brady went viral on Snapchat.⁸⁴ Several Twitter users tweeted Goldman's photo to their accounts.⁸⁵ News outlets then posted the tweets, featuring the photo by embedding the tweet into their articles.⁸⁶ The court ruled that embedded tweets that appear on websites can violate an owner's exclusive display right and can constitute copyright infringement.⁸⁷ When a user posts an embedded tweet of someone else's photograph on a webpage, they violate the content owner's exclusive display right.⁸⁸ It does not matter that the infringer only linked the content and did not upload or host it on their sites.⁸⁹ According to the court,

the plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have "displayed" a work within the meaning of the Copyright Act.⁹⁰

This decision is important because it prohibits an action that is commonplace on the Internet and means media companies will have to link content through embedded tweets without using unlicensed photos.⁹¹

The court in *Goldman* also acknowledged that a strong fair use defense existed, although they declined to address it.⁹² Of note, the ruling in *Goldman* does not apply to all tweets, only tweets that include photographs.⁹³ In regards to tweets without photos, "the fair use for quoting someone's public statement is overwhelming good," says The Electronic Frontier Foundation's senior staff attorney Daniel Nazer.⁹⁴ "Tweets are so short that they're often not even copyrightable."⁹⁵ Therefore, news organizations could possibly pursue a fair use defense if the federal circuit courts or Supreme Court codify this potential wrinkle.⁹⁶

84. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 586-87 (S.D.N.Y. 2018).

85. *Id.*

86. *Id.*

87. "Embedding" an image on a webpage is the act of a coder intentionally adding a specific "embed" code to the HTML instructions that incorporates an image, hosted on a third-party server, onto a webpage. *Id.*

88. *Id.* at 586.

89. Matsakis, *supra* note 83.

90. *Goldman*, 302 F. Supp. 3d at 593.

91. *Id.*

92. *Id.* at 585.

93. Matsakis, *supra* note 83.

94. *Id.*

95. *Id.*

96. *Id.*

Content aggregators like Breitbart and other news organizations can pursue other defenses.⁹⁷ First, they can claim that the owner's dissemination of the photograph on public social media channels placed it in the public domain and created an implied license. Second, there is the fair use newsworthiness defense.⁹⁸ It is encouraging that in a surprisingly restrictive ruling like *Goldman*, content creators have more protection from the unauthorized sharing of their content. But the lack of uniformity in enforcement and redress complicates navigating the social media landscape cautiously and prudently.

Similar to the defendants in *Agence French Presse* and *Goldman*, large media brands are facing backlash and retribution for misappropriating content culled from individual social media users. Social media influencers recently filed a class action lawsuit against media company PopSugar for stealing thousands of images and profiting off third-party links.⁹⁹ PopSugar allegedly copied Instagram users' images, removed the links to the products that enabled users to make money from their following, and reposted the same images with links to PopSugar's products. In *Batra v. PopSugar*, the U.S. District Court for the Northern District of California denied PopSugar's motion to dismiss, finding plausible copyright infringement after PopSugar removed identifying information to conceal potential infringement of other users' images.¹⁰⁰ The preliminary decision highlights a trend in judgments that favor social media content creators and puts reposters and sharers on notice about the potential liability they face through their Internet activity.

Alleged infringers can also pursue the defense that their use was transformative.¹⁰¹ The transformative test of whether new expression or meaning sufficiently changes the original work pertains to the first Fair Use factor codified in 17 U.S.C § 107.¹⁰² The transformative test explained in *Campbell* was recently adopted by the Southern District of New York

97. *See id.*

98. *Id.*

99. *Batra v. PopSugar, Inc.*, No. 18-CV-03752-HSG, 2019 WL 482492, at *1 (N.D. Cal. Feb. 7, 2019); Ashley Cullins, *PopSugar Can't Dodge Influencer's Class Action Lawsuit*, HOLLYWOOD REP. (Feb. 13, 2019, 1:54 PM), <http://www.hollywoodreporter.com/thr-esq/popsugar-cant-dodge-influencers-class-action-lawsuit-1186428>.

100. *Batra*, 2019 WL 482492, at *2.

101. *See* Mason Sands, *Why the Controversy over Jerry Media Will Shape Meme Culture*, FORBES (Feb. 7, 2019, 11:49 AM), <http://www.forbes.com/sites/masonsands/2019/02/07/the-fuck-jerry-controversy-will-shape-meme-culture-for-better-or-worse/#4304f7a56a6c>.

102. *Measuring Fair Use: The Four Factors*, STAN. U. LIBR., <http://fairuse.stanford.edu/overview/fair-use/four-factors/> (last visited Apr. 1, 2019).

in *North Jersey Media Group, Inc. v. Pirro*.¹⁰³ There, the court considered whether an altered picture posted to Facebook by a Fox News correspondent was fair use. The correspondent combined a famous 9/11 photograph containing the phrase “#neverforget” with the classic World War II photograph *Raising the Flag on Iwo Jima*.¹⁰⁴ The court held this usage was merely a minimal alteration without an original idea—not enough change or creativity existed to give the images new meaning. Taken with the market-value damage Fox News could potentially create, the alteration was not fair use.¹⁰⁵

A large media company like Fox News would not feel a significant monetary or publicity hit from an unfavorable ruling like the one in *Pirro*. However, many people on the Internet (e.g., smaller entities and individuals) engage in similar practices as the news correspondent by taking an image and adding their own commentary. In Europe, meme creators worry that the European Union’s Copyright Directive’s new guidelines could end the creation of memes in Europe and lead to hefty consequences.¹⁰⁶ Despite widespread resistance, the European Parliament passed the Copyright Directive in the Digital Single Market Directive in March 2019.¹⁰⁷ The Directive makes websites responsible for policing potential copyright infringement.¹⁰⁸ This is different from the U.S. DMCA Safe Harbor, which shields web providers from liability as long as they meet a minimal requirement of content regulation.¹⁰⁹

Thus far, content owners have settled lawsuits and successfully obtained DMCA takedown notices when their images were turned into memes.¹¹⁰ For example, the meme “Socially Awkward Penguin” contains an image of a penguin owned by *National Geographic* and their licensing

103. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994); *N.J. Media Grp., Inc. v. Pirro*, 74 F. Supp. 3d 605 (S.D.N.Y. 2015).

104. See *Pirro*, 74 F. Supp. 3d at 609.

105. Herzfeld, *supra* note 37.

106. Jokes superimposed on an image go viral and become a meme. Sands, *supra* note 101.

107. Michelle Kaminsky, *EU’s Copyright Directive Passes Despite Widespread Protests—but It’s Not Law Yet*, FORBES (Mar. 26, 2019, 1:15 PM), <http://www.forbes.com/sites/michellekaminsky/2019/03/26/eus-copyright-directive-passes-despite-widespread-protests-but-its-not-law-yet/#54c75ca82493>.

108. *Has the EU Killed Memes? How Do Article 13 and Article 11 Change Copyright Law?*, DAILY MAIL (June 20, 2018, 11:07 AM), <http://www.dailymail.co.uk/sciencetech/fb-5865955/has-eu-killed-memes-does-article-13-article-11-change-copyright-law.html>.

109. See *Service Provider Safe Harbors*, *supra* note 69.

110. Caitlin Dewey, *How Copyright Is Killing Your Favorite Memes*, WASH. POST (Sept. 8, 2015, 2:28 PM), <http://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes/>.

company Getty Images.¹¹¹ When the meme gained popularity, the media companies wanted users to pay to use the image. Getty stated, “[W]e believe in protecting copyright and the livelihoods of photographers and other artists who rely on licensing to earn a living and fund the creation of new works.”¹¹² Getty then discreetly pursued and settled multiple infringement cases.¹¹³

Courts have not yet determined whether memes are transformative cultural products. Culture is borrowing ideas and remixing content to make new things, and that is not something that anyone wants to tamper down or discourage to the detriment of society and innovation. Most meme creators delete the alleged infringing content when requested, because the costs of litigation are so high. Yet, because the Internet is vast and quick, new users share and regenerate memes almost instantaneously. It is futile for image-rights holders to grant a license to retain control over their work.¹¹⁴ Thus, we are still left with a social media environment that is operating and changing much faster than the legal system can adapt and consequences can be imposed.

IV. RECOMMENDATION & CONCLUSION

Where does all of this leave social media users, content creators, and big brands? It is clear that there is no emerging trend, one way or the other, that favors content creators over bigger social media brands who commit copyright infringement, or vice versa. Laws like the DMCA grant social media brands and Internet platforms more leniency and safe harbor from liability. Providers are protected as long as they take minimal steps to comply with making their websites, web pages, and applications more hospitable for content owners. But with these lax requirements, platforms like Instagram and Twitter are not truly incentivized to crack down on copyright infringers and misattributed content. Brands will not restrict sharing images and tweets freely over the Internet when it is part and parcel of the social media experience.

Whatever the reason, it appears that social media users fare better through the legal pursuit of their claims and class action lawsuits against bigger media brands and news outlets like FuckJerry, PopSugar, and Fox

111. Social media users superimposed the *National Geographic* photo with several different phrases. *Id.*

112. *Id.*

113. *Id.* (“All actions were carried out in secret, with blogs and other posters agreeing to non-disclosure.”).

114. *Id.*

News. Recent case law shows that if the legislature and corporate companies refuse to police social media misappropriation, then the courts will. Individuals can better protect their copyrights in the courtroom than in the chat room because courts have a better handle on foundational copyright law and the protection of images than the self-interested guardians of the Internet. The one caveat is that the prohibitive costs of litigation often stamp out a content owner's claim before it begins. Moreover, because the Internet moves and changes so quickly, misappropriated content will usually diminish in value and relevance by the time a claim advances through the courts.

Therefore, it appears that social media content creators and sharers are stuck in a stalemate where both types of users need to be careful when they interact with social media platforms. Original content owners should be aware of the consequences of sharing content on Instagram if they do not add warnings or watermarks to their content. Also, social media brands should know that they need permission to use another's content—it is not enough to attach the creator's name as attribution. It is so easy to post and share content with just a few quick clicks, but the consequences could lead to costly litigation and banishment from social media platforms.

How should the law respond and adapt to this growing problem? First, it should address the repeated offenses of infringement that many content creators experience when they share their own content. Not every infringer can be caught, but it is apparent that specific brands and users repeatedly and publicly profit off of stolen content. Thus, the law and Internet platforms should be more adaptive and responsive about punishing repeat offenders. Second, it should consider the relative enormity of the situation for giant social media companies like Instagram and Twitter. These brands cannot scour their platforms every second of every day looking for copyright infringement, but they should take note of user complaints against bad brands. If companies actually banned repeat offenders from using their platforms, there would be less infringement. Further, the DMCA should be updated to hold social media companies more accountable for the rampant infringement that occurs on their platforms. For example, updates to the DMCA could require that safe harbor protection is contingent on Internet sites and platforms actively purging bad users. The fact that the current level of intent necessary for safe harbor protection is anything below actual knowledge allows web providers to skate by with willful blindness. With so many transactions occurring daily, it is impossible for providers to be aware of all infringing activities, but that does not mean they should not have an affirmative duty

to police their sites. If the DMCA was more like European copyright laws that hold web providers responsible for cleaning up their sites, it could help protect users against infringement. But that could also negatively affect the free creation of memes and social media content that everyone enjoys.

It is easy to tell when brands like FuckJerry use content that they did not create or purposefully remove attribution. It would be easiest to hold these infringing users accountable, but it should not have to bankrupt copyright owners or drag out for years in order to do so. Currently, there may not be much apparent financial or legal incentive for large platforms to police their sites when they are shielded by DMCA safe harbor provisions. However, social media users notice unrestricted harmful content and lose faith in these brands. If social media brands lose user interest, they lose users, and ultimately money.

Social media brands are constantly trying to adopt new trends and the current trend appears to be accountability. Social media users, platforms, and the legal system should work in tandem to hold harmful brands accountable for stealing copyrighted content. If they do, social media can still be open, engaging, and collaborative in the way that fosters creativity and protects the intellectual property rights of all.