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“Sharing” Copyrights: The Copyright Implications of User Content in Social Media

*Jessica Gutierrez Alm**

I. INTRODUCTION

The Internet is a place of open communication and idea sharing. This both coincides and conflicts with the policy rationales of copyright law. The primary function of copyright law is “to promote the progress of science and the useful arts” by providing creators with economic incentive and security.¹ The Internet promotes collaboration and free expression, and thus advances the goal of copyright law: creativity. However, the Internet has also introduced unique problems to copyright jurisprudence. The unprecedented instant transfer of information allows rapid and large-scale infringement. Coupled with the Internet’s sharing atmosphere, this has fostered a generation of users who freely disregard copyrights. Some of these issues were addressed under the Digital Millennium Copyright Act (DMCA), which left courts to sort through a somewhat awkward melding of old law and new technology. Now, fifteen years after enactment of the DMCA, the law is still unclear, and the need for new legislation is evident in the face of the Internet’s expanding applications.²

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¹ U.S. CONST. art. I, § 8.

² See Julie Nichols Matthews et al., *Social Media in the Digital Millennium*, 5 LANDSLIDE 26, 26–27 (2013).

When the DMCA was signed into law in 1998, social media was still nascent, as was much of the World Wide Web. As a result, the legislation could not and did not take into account the drastic shift in online culture that would occur in the following 15 years. Today, social medial users, copyright holders, Internet

One such application is online social media. In recent years, social media has ingrained itself in popular culture, bringing with it a multitude of copyright complications. Social media changed the face of the Internet, and quickly became one of the web’s most prevalent outlets.³

As a requirement for using social media websites, users must agree to the websites’ Terms of Use (TOU), which govern the relationships between users and the sites. These website TOU often have similar terms that relate to and control the types of content that individuals may post.

The content that users post can generally be divided into two categories: user-found content and user-generated content. The difference lies in where the information originates; a user’s own creative product is user-generated, but information that a user finds

service providers, and courts continue to wrestle with the consequences of the system established in simpler times.

Id. Congress has enacted some legislation since the DMCA, but it is aimed primarily at minor modifications. *See, e.g.*, Copyright Cleanup Clarification and Correction Act of 2010, Pub. L. No. 111-295, 124 Stat. 3180 (2010) (clarifying certain phrases within the Copyright Act); Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218 (2010) (extending the length of statutory licenses for satellite carriers). Other enactments have focused on narrow piracy and enforcement issues. *See, e.g.*, Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (2005) (addressing unauthorized video recording in movie theaters); Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (2008) (enhancing certain criminal and civil remedies, improving funding for enforcement, and creating the Intellectual Property Enforcement Coordinator position); *see* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 319–20 (2013) (discussing the current need for new comprehensive copyright legislation).

³ Ylan Q. Mui & Peter Whoriskey, *Facebook Passes Google as Most Popular Site on the Internet, Two Measures Show*, WASH. POST (Dec. 31, 2010, 12:00 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/30/AR2010123004645.html> (stating that Facebook surpassed Google in Internet traffic); Sarah Kessler, *Americans Spend 23% of Internet Time on Social Networks*, MASHABLE (Sept. 12, 2011), <http://mashable.com/2011/09/12/23-percent-online> (reporting that social media is the most frequent use of the Internet).

elsewhere on the Internet and reposts or forwards on to others is user-found.⁴ Early social media leaders like Facebook, YouTube, and Twitter originally focused on user-generated content by offering platforms where users could post images, videos, and writings they create. Much of this user-generated content may be copyrightable, but by simply posting it online, users transfer broad rights to social media companies through the sites' TOU. This leaves users with little bargaining power and questionable ownership rights in their own content.

A recent shift in social media platforms led to what some refer to as "second-generation" social media.⁵ The second-generation platforms entered the market following the success of forerunners like Facebook, YouTube, and Twitter.⁶ Second-generation websites distinguish themselves by relying on the proliferation of user-found content, whereas the first generation relied primarily on user-generated content.⁷ Copyright problems may arise when a user posts found content that is actually someone else's creative content. In the absence of clear legal standards, this has become a common and encouraged practice on the Internet.

Historically, innovation has always challenged copyright law.⁸ Inevitably, the legal implications surrounding new

⁴ See Craig C. Carpenter, *Copyright Infringement and the Second Generation of Social Media: Why Pinterest Users Should be Protected from Copyright Infringement by the Fair Use Defense*, 16 No. 7 J. INTERNET L. 1, 10 (2013).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Technological innovations threaten copyright law by revolutionizing the ability to copy and distribute. See, e.g., *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908) (assignee of copyrights on music compositions brought suit against player piano sellers); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (owners of copyrights on motion pictures brought suit against television rebroadcasting company); *Sony v. Universal City Studios*, 464 U.S. 417 (1984) (owners of copyrights on television programs brought suit against manufacturers of videotape recorders). See generally Vincent J. Roccia, *What's Fair is (Not Always) Fair on the Internet*, 29 RUTGERS L.J. 155, 163–64 (1997) (discussing copyright law's response to such technologies as the VCR, photocopier, and tape recorder); *Sony*, 464 U.S. at 430–31 ("From its beginning,

technologies are at first unclear, and potentially infringing conduct becomes commonplace before courts or legislatures have the opportunity to address it. This can be seen through the recent example of online file sharing in the early 2000s.⁹ Illegal Internet file sharing became popular among millions of users before copyright holders brought massive waves of lawsuits against individual users and software providers.¹⁰ Similarly, sharing and linking to copyrighted user-found content has become an accepted Internet practice, with unclear copyright implications among users. One recent platform that saw rapid success after its launch, Pinterest, relies almost exclusively on user-found content.¹¹ As copyright law struggles to catch up to these new challenges, users are left only with the guidance of convoluted website TOU.

This article examines the copyright implications of both user-generated and user-found content posted to social media websites, and how the websites’ TOU affect copyrights in user content. Part II looks first to the copyrightability of user-generated content, and then to the broad copyright license that social media TOU impose on users. Part III discusses the rising culture of user-found content, the apparent conflict with website TOU, and the infringement issues that may arise with linking to others’ content, including possible defenses.

II. USER-GENERATED CONTENT

User-generated content consists of the text, images, and videos that social media users independently create and post online.¹² Much of this product is likely copyrightable.

the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of . . . the printing press that gave rise to the original need for copyright protection.” (citations omitted).

⁹ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios v. Grokster*, 545 U.S. 913 (2005).

¹⁰ Mohsen Manesh, *The Immorality of Theft, the Amorality of Infringement*, 2006 STAN. TECH. L. REV. 5, 34–35 (2006).

¹¹ See *infra* Section III.C.

¹² Carpenter, *supra* note 4, at 10.

A. Copyrightability

The 1976 Copyright Act (“Copyright Act”) defines copyrightable material as “original works of authorship fixed in any tangible medium of expression.”¹³ Section 102 further defines “works of authorship” to include a list of eight categories, though the list is non-exhaustive.¹⁴ To determine copyrightability, courts look to whether a work is both (1) “original” and (2) “fixed,” rather than focusing on whether it falls within one of the enumerated categories of Section 102.¹⁵

In defining the first element, originality, the Supreme Court stated the work must be an “independent creation” that exhibits a “modicum of creativity.”¹⁶ At least some user-generated content may pass the test of originality. User-generated content, as long as it is created by the individual user, fits the first requirement of “independent creation.”¹⁷ A user’s status updates, comments, and self-made videos and photos are all independent creations when generated by the individual user. However, much of the content on social media websites will not easily satisfy the modicum of creativity component.

¹³ 17 U.S.C. § 102 (2012).

¹⁴ *Id.* This list includes:

literary works;
musical works, including any accompanying works;
dramatic works, including any accompanying music;
pantomimes and choreographic works;
pictorial, graphic, and sculptural works;
motion pictures and other audiovisual works;
sound recordings; and
architectural works.

¹⁵ *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 48 (D. Mass. 1997) (“[T]he designation ‘works of authorship’ is not meant to be limited to traditional works of authorship such as novels or plays. Rather, Congress used this phrase to extend copyright to new methods of expression as they evolve.”).

¹⁶ *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁷ *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” (citations omitted)).

In addition to being independently created, content must have a “modicum of creativity” to be deemed original. Although the threshold for creativity is low, much of the content users post may not contain the requisite creativity. The Supreme Court specifically stated that not all photographs hold the creativity to be copyrightable.¹⁸ However, the court indicated that photographs would likely only need a small degree of composure and positioning to receive copyright protection.¹⁹ The same principles apply to user-created videos, but status updates and comments are less likely to receive protection.

The lengths for status updates and comments are sometimes limited and the majority consists only of short sentences of conversational words, from which creativity would be hard to find. Slogans, short phrases, and expressions of common words are generally not copyrightable because they do not show the necessary modicum of creativity.²⁰ Although, this does not mean that a written work has to fit a certain length before courts will find creativity. Poems, for example, qualify for copyright protection due to

¹⁸ *Burrow Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884).

¹⁹ *Id.* at 61. In holding that a photograph of Oscar Wilde was copyrightable, the court noted the photographer’s creativity seen through positioning the subject, arrangement of “costume, draperies, and other various accessories,” and “arranging and disposing the light and shade.” *Id.* at 60. The court stated that not all photographs may be copyrightable, because many may simply be “the mere mechanical reproduction of the physical features or outlines of some object animate or inanimate, and involve[] no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture.” *Id.* at 58–59. *See also* *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (holding that the photographer’s “inventive efforts” in posing subjects of the photograph met the requisite element of creativity); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 455 (S.D.N.Y. 2005) (holding that the photographer’s unusual angle, distinctive lighting, composition, and wardrobe instructions evidenced originality, rendering a photograph of a young man wearing a white t-shirt and a large amount of jewelry copyrightable).

²⁰ *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959). *See also* *Jean v. Bug Music, Inc.*, No. 00-4022, 2002 WL 287786, at *6 (S.D.N.Y. Feb. 27, 2002) (holding that the lyrical phrase “clap your hands” is not copyrightable because it is a common phrase).

creativity in the arrangement of the words.²¹ There are great works, of which copyright protection is unquestioned, that would fit comfortably within Twitter's 140-character limit.²² Accordingly, some status updates and comments will surely meet the creativity threshold of originality.

In addition to the element of originality, works must also be fixed in a tangible form in order to receive copyright protection. The Copyright Act defines "fixed" as an expression in which a work may be "perceived, reproduced, or otherwise communicated for a period of more than transitory duration."²³ The analysis of whether a work is sufficiently fixed for more than a transitory period is a fact-specific one,²⁴ but some technological cases shed light on what courts may deem "fixed."²⁵ In *Cartoon Network*, a court held that Internet data that existed for only 1.2 seconds before it was automatically rewritten was transitory and not fixed.²⁶ In *MAI Systems*, however, a court held that RAM, a computer's temporary memory that is erased upon shut down, is fixed in a tangible form.²⁷ In general, the content posted on social media websites is not automatically deleted or overwritten. It remains

²¹ See Rebecca Haas, *Twitter: New Challenges to Copyright Law in the Internet Age*, 10 J. MARSHALL REV. INTELL. PROP. L. 231, 243 (2010) (citing *Becker v. Loew's, Inc.*, 133 F.2d 889, 891 (7th Cir. 1943)). However, protection in the poem as a whole does not afford copyright protection to the individual words. *Becker*, 133 F.2d at 891.

²² See generally George Wei, *Certainty of Subject-Matter in the Development of Intellectual Property: "Please Sir, I Want Some More!"* 2009 SING. J. LEGAL STUD. 474, 502 n.58 (2009) (stating "[n]o doubt Haiku poems can be protected as original literary works applying basic copyright principles.").

²³ 17 U.S.C. § 101 (2012).

²⁴ See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008).

²⁵ See, e.g., *id.*; *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993).

²⁶ *Cartoon Network*, 536 F.3d at 130.

²⁷ *Advanced Computer Servs. of Mich., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 362–63 (E.D. Va. 1994) ("Although the contents of RAM are, in some respects, ephemeral or transient, it is important to remember that the Act does not require absolute permanence.").

stored, visible, and searchable. User-generated content is unlike the transitory information in *Cartoon Network*, and is even more permanent than the RAM memory in *MAI Systems*. A court would likely find social media content to be fixed in tangible form. Therefore, for those works that also meet the originality requirement, this renders at least some user-generated content copyrightable material.

When an original work of authorship is fixed in a tangible form, the author is granted six exclusive rights of ownership. These include the rights to: reproduce, prepare derivative works, distribute copies, perform audiovisual works publicly, perform sound recordings publicly, and display publicly.²⁸ For those user-generated works that are copyrightable, the act of fixation grants copyright protection for all six rights to the owner.²⁹ However, when the act of fixation occurs on a social media outlet, broad website TOU may automatically alter the author’s rights.

B. Terms of Use and Licensing User Rights

Social media platforms function by distributing user content to other users. In order not to infringe users’ copyrights, social media website TOU require the users to license the rights to their content. Agreement to the TOU is usually accomplished when the user clicks “agree” at the bottom of a page of dense text. This type of online contract formation, known as a “click-wrap” agreement,³⁰

²⁸ 17 U.S.C. § 106 (2012).

²⁹ The Berne Convention Implementation Act of 1988 did away with the formalities that authors had to comply with under earlier acts in order to receive copyright protection. Berne Convention Implementation Act of 1988, Pub. L. No. 100–568, 102 Stat. 2853 (1988). Formalities required for copyright protection under prior laws included publication of the work, notice of copyright date and ownership, registration with the Copyright Office, and deposit of copies with the Library of Congress. See generally Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311 (2010).

³⁰ A click-wrap agreement is defined as:

is usually upheld, because the act of clicking “agree” notifies the user of the terms and requires assent.³¹ The TOU of Facebook, Twitter, YouTube, Instagram, and Pinterest each state that the user retains the rights to any user-generated content.³² However, each platform then requires the user to agree to an extremely broad non-exclusive license. Facebook, for example, states that the user grants a “non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook.”³³ YouTube, Pinterest, and Twitter go further and state that the license permits the company specific rights.³⁴ YouTube’s license, for example, permits it to “reproduce, distribute, prepare derivative works of, display, and perform” user

[An] agreement [that] appears when a user first installs computer software obtained from an online source or attempts to conduct an Internet transaction involving the agreement, and purports to condition further access to the software or transaction on the user's consent to certain conditions there specified; the user “consents” to these conditions by “clicking” on a dialog box on the screen, which then proceeds with the remainder of the software installation or Internet transaction.

Kevin W. Grierson, *Enforceability of “Clickwrap” or “Shrinkwrap” Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R.5th 309, 317 n.1 (2003).

³¹ See Sharon K. Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements*, 26 HAMLIN L. REV. 499, 547 (2003); Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 579 (2007).

³² See Facebook, Statement of Rights and Responsibilities, <https://www.facebook.com/legal/terms> (last visited Nov. 27, 2013) (“You own all of the content and information you post on Facebook.”); YouTube, Terms of Service, <http://www.YouTube.com/t/terms> (last visited Nov. 27, 2013) (“You retain all of your ownership rights in your Content.”); Pinterest, Terms of Service, <http://about.pinterest.com/terms/> (last visited Nov. 27, 2013) (“You retain all rights in . . . the User Content you post.”); Twitter, Terms of Service, <https://twitter.com/tos> (last visited Nov. 27, 2013) (“You retain your rights to any Content you submit, post or display.”); Instagram, Terms of Use, <http://instagram.com/about/legal/terms/> (last visited Nov. 27, 2013) (“Instagram does not claim ownership of any Content that you post.”).

³³ Facebook, Statement of Rights and Responsibilities, *supra* note 32.

³⁴ YouTube, Terms of Service, *supra* note 32; Pinterest, Terms of Service, *supra* note 32; Twitter, Terms of Service, *supra* note 32.

content.³⁵ This carefully drafted language licenses to Youtube *all six* of the copyright owner’s exclusive rights granted by the Copyright Act, along with the right to sub-license all six rights.³⁶ These licenses are non-exclusive, and therefore do not transfer ownership.³⁷ However, the licenses are so broad that they permit the websites to do nearly anything with user-generated content, questioning what rights the user has in the face of such licenses.

Although some sites such as Pinterest detail specific uses for user content in their TOU,³⁸ other sites like Instagram have only vague language such as a “license to use the Content that you post.”³⁹ This ambiguous language does not state *how* users’ content will be exploited. Facebook’s terms present similar vagueness: a “license to *use* any IP content that you post.”⁴⁰ Facebook’s TOU do not define “use,” leaving an ill-defined license of unknown limits. As one commentator noted, Facebook could “surreptitiously sublicense user content to porno.com” and “this would fall squarely

³⁵ YouTube, Terms of Service, *supra* note 32. Pinterest and Twitter, however, license themselves rights that are not defined under copyright law, but are specific to the services. *See* Twitter, Terms of Service, *supra* note 32 (licensing the rights to “process, adapt, modify . . . [and] transmit” user content); Pinterest, Terms of Service, *supra* note 32 (licensing the right to “re-pin” user content). It is difficult to determine where these rights fit within copyright law. For example, in Pinterest, the right to “re-pin” would seem to simply include the collective rights to copy and distribute, rights that are also included in Pinterest’s terms, creating a duplicative effect. In Twitter’s TOU, the right to “process” is even more difficult to square with the Copyright Act’s six exclusive rights. This seems somewhat of an illusory right.

³⁶ *See* 17 U.S.C. § 106 (2012) (granting to copyright owners the rights to reproduce, prepare derivative works, distribute, perform (audiovisual works) publicly, perform (sound recordings) publicly, and display publicly). YouTube’s language parallels the statutory grant of rights.

³⁷ 17 U.S.C. § 101 (2012) (defining a “transfer of copyright ownership” to include exclusive licenses, but not nonexclusive licenses).

³⁸ Pinterest, Terms of Service, *supra* note 32 (licensing user content to Pinterest “solely for the purposes of operating, developing, providing, and using the Pinterest Products”).

³⁹ Instagram, Terms of Use, *supra* note 32.

⁴⁰ Facebook, Statement of Rights and Responsibilities, *supra* note 32) (emphasis added).

within the license Facebook purports to be granted by users.”⁴¹ The majority of users would likely be surprised to learn that they have licensed such broad latitude with their user-generated content. However, the licenses are often so vaguely defined that they may actually be unenforceable.

For example, in *Cohen*, plaintiffs alleged that Facebook misappropriated their names and likenesses for commercial purposes.⁴² The court found that, while users may have consented to Facebook’s use of their names and pictures, the TOU did not establish consent for Facebook to disclose what online services they had utilized or to endorse those services with the names and pictures.⁴³ The court went on to discuss that Facebook’s TOU did not provide a blanket license to exploit user content for any purpose: “Presumably, Facebook would not argue that its supposed license to use profile pictures ‘in any manner’ would insulate it from defamation claims were it to post the names and pictures of the named plaintiffs on every user’s Facebook home page, over a caption reading, ‘the FBI’s Most Wanted.’”⁴⁴

Facebook’s and other sites’ TOU may also be challengeable because, although the licenses purport to terminate when the user deletes her account, many of the licenses also incorporate an inconsistent grant of continued use. Facebook’s terms, for example, state “this IP License ends when you delete your IP content on your account *unless your content has been shared with others, and they have not deleted it.*”⁴⁵ Although Facebook expressly states that its license ends when a user terminates his account, the second half of

⁴¹ Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two—Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829, 848 (2008).

⁴² *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1092 (N.D. Cal. 2011).

⁴³ *Id.* at 1095–96.

⁴⁴ *Id.* at 1096; *see also* *Fraleigh v. Facebook, Inc.*, 830 F. Supp. 2d 785, 805–06 (N.D. Cal. 2011) (holding that it was a question of fact whether plaintiffs-Facebook users consented to have their names and likenesses used in Facebook’s “sponsored story” advertisements).

⁴⁵ Facebook, Statement of Rights and Responsibilities, *supra* note 32 (emphasis added).

the same sentence is contradictory. The attraction of Facebook (and other social media sites) is in “sharing” content with other users.⁴⁶ Thus, although Facebook claims to end its license, the fact that hundreds or thousands of shared copies may persist within Facebook’s site suggests that the license does not ever terminate. This inconsistency questions the nature of Facebook’s non-exclusive license and may render the license difficult to interpret and enforce.

While not all user-generated content is copyrightable, much of it may be, and that content is subject to automatic, extensive licenses as soon as it is posted. While these terms may not impact many users, they could have major implications for artists or authors who post their works on their social media profiles. According to the TOU, there is nothing stopping social media companies from selling copies of a user-photographer’s photos, for example, or placing them in advertisements. While the TOU may be unenforceable in some aspects for vagueness or broadness, they do aver to follow the Copyright Act, and leave the user with little bargaining power or remedies for her rights. Thus, social media licenses for user-generated content exemplify the problematic juxtaposition of technology with existing copyright law, demonstrating the need for new legislation.

III. USER-FOUND CONTENT

An array of copyright issues also arises with user-found content on social media. The second-generation of social media platforms includes both a shift among first-generation platforms, such as Facebook and Twitter, as well as a series of start-up sites that rely almost exclusively on user-found content. Through policies and operations, second-generation social media sites encourage users to post content that is not their own. Users are encouraged to post content created by other users or from different

⁴⁶ See *infra* Part III.

websites altogether: a practice often referred to as “linking”.⁴⁷ Facebook permits this linking activity through “sharing” of user posts or outside content, Twitter accomplishes it through allowing “retweets” of user posts, and Pinterest allows users to “pin” content from other websites.⁴⁸ However, the social media sites’ actions of encouraging such content squarely contradict their TOU.⁴⁹

A. Infringement through Linking

There are two possible avenues of infringement by user-found content: (1) sharing someone else’s original content, and (2) sharing content that is already infringing. A user may first be directly liable for infringing the exclusive rights of reproduction, distribution, and display or performance when sharing content created by others. For example, retweeting a copyrightable tweet, a poem perhaps, may leave the retweeter open to liability. The retweet copies the original by reposting the poem (in the same tangible form as the original), consequently violating the reproduction right.⁵⁰ Infringement of the right of reproduction requires a showing of two elements: copying and misappropriation.⁵¹ Misappropriation is present when copying goes so far as to constitute improper appropriation, and is easily met when the entire work is copied.⁵² In the case of retweeting, both

⁴⁷ See generally Jean G. Vidal Font, *Sharing Media on Social Networks: Infringement by Linking?*, 3 NO. 2 U. P.R. BUS. L.J. 255 (2012) (discussing third-party liability attributable to users who link to others’ content). “This [user-found] content includes, but is not limited to, Internet links, videos, web pages, photos, and any other content that a user can find on the Internet.” *Id.* at 256.

⁴⁸ Facebook, Links: Sharing Links, <https://www.facebook.com/help/335697046510763/> (last visited Nov. 27, 2013); Twitter, FAQs About Retweets, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/77606-what-is-retweet-rt#> (last visited Nov. 27, 2013); Pinterest, Pinterest Basics, <http://about.pinterest.com/basics/> (last visited Nov. 27, 2013).

⁴⁹ See Carpenter, *supra* note 4, at 10.

⁵⁰ See 17 U.S.C. § 106(1) (2012).

⁵¹ See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

⁵² See *id.*

elements are present because other users can see that the retweeter plainly copied the entire original from its source. The public distribution and public display rights are likely also violated as the retweeter has now made the poem available to all of the user’s online friends without authorization.⁵³ Violation of the display and distribution rights requires a public audience, which the Copyright Act defines as “a substantial number of persons outside of a normal circle of a family and its social acquaintances.”⁵⁴ With the average number of Twitter “followers” (i.e. friends who can see posts) at 208, the public audience standard is likely met.⁵⁵

Similarly, users may also share others’ copyrighted content from outside websites. If a user posts a link to an online news story, for example, a thumbnail-sized photo from the story is displayed, along with hidden Hypertext Markup Language (HTML) instructions that link to the original story. When the user clicks on the link, the HTML instructions direct the user to the original source of the image. This process of displaying a thumbnail image from another website and using HTML instructions directing users

⁵³ See 17 U.S.C. § 106(3)–(6) (2012).

⁵⁴ 17 U.S.C. § 101 (2012).

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, *by means of any device or process*, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id. (emphasis added). This definition encompasses public display and performances via computer.

⁵⁵ *An Exhaustive Study of Twitter Users Across the World*, BEEVOLVE (Oct. 10, 2012), <http://www.beevolve.com/twitter-statistics>. See also Lars Backstrom, *Anatomy of Facebook*, FACEBOOK (Nov. 21, 2011), <https://www.facebook.com/notes/facebook-data-team/anatomy-of-facebook/10150388519243859> (finding that the average number of Facebook friends is 190); Sudip Mittal et al., *The Pin-Bang Theory: Discovering the Pinterest World*, (July 18, 2013), <http://arxiv.org/pdf/1307.4952v1.pdf> (finding that the average number of Pinterest followers is 176).

to the original is known as “in-line linking.”⁵⁶ Like the tweeted poem, the photo from the news story is likely copyrightable. The thumbnail photo shared by the user, a copy from the original website, may directly infringe reproduction, distribution, and display rights, as does the retweeted poem. These actions at least create a prima facie case of direct copyright infringement.

The second type of infringement that may occur with user-found content is via third-party liability, which may arise when a user links to content that already constitutes an infringement. For example, if a Facebook user shares an in-line link to a music video on YouTube to which the original YouTube poster did not have the rights, the Facebook user may be contributorily liable. Contributory liability arises when an individual who has knowledge of infringing activity “induces, causes or materially contributes to the infringing conduct of another.”⁵⁷ As an initial requirement, there must be an underlying direct infringement by another party before contributory liability can attach.⁵⁸ When the user’s friends download or even view the unauthorized music video, they may be directly infringing a copyright holder’s rights.⁵⁹ The Facebook user may then be contributorily liable if she has knowledge that the video is infringing, because her act of making it available to her friends arguably “induces, causes or materially contributes” to their infringing activity.⁶⁰

After the Supreme Court’s contributory liability analyses in *Sony* and *Grokster*,⁶¹ and the Ninth Circuit’s decision in *Perfect 10*,⁶² there are still questions as to the level of knowledge required

⁵⁶ IP Due Diligence in Corp. Transactions § 8:83 (2013); see *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1155–56 (9th Cir. 2007).

⁵⁷ *Perfect 10*, 508 F.2d at 1171 (quoting *Gershwin Publ’n Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

⁵⁸ *A&M Records*, 239 F.3d at 1013.

⁵⁹ *Perfect 10*, 508 F.3d at 1171.

⁶⁰ See *id.* (citations omitted).

⁶¹ See *Sony*, 464 U.S. 417; *Grokster*, 545 U.S. 913.

⁶² In 2007, the Ninth Circuit actually decided a trilogy of related cases brought by *Perfect 10*. See *Perfect 10*, 508 F.3d 1146; *Perfect 10, Inc. v. Visa Int’s Serv. Ass’n*, 494 F.3d 788 (9th Cir. 2007); *Perfect 10, Inc. v. CCBill, L.L.C.*, 488 F.3d

to prove contributory liability, and as to what may constitute inducement, causation, or material contributions in technology cases.⁶³ However, if the video or other infringing content is something that the user should know is not a legal online post—it was from an unofficial source, for example—the knowledge requirement is likely met.⁶⁴ Additionally, the Facebook user’s act of sharing the video with her friends may be considered “inducing” infringing activity if her friends further infringe copyrights on the video. Therefore, not only might the Facebook sharer in this scenario be directly liable for violating reproduction, distribution, and performance rights, she would also likely be contributorily liable for any infringing activity that arises out sharing the video.

Two federal appellate courts recently considered issues of infringement liability with respect to linking to online content.⁶⁵ In *Perfect 10 v. Amazon.com*, the Ninth Circuit reviewed Perfect 10’s request for a preliminary injunction against Google based on its claim that Google infringed Perfect 10’s copyrights to certain

1102 (9th Cir. 2007). All three touched on the issue of contributory liability. In *Perfect 10, Inc. v. Amazon.com, Inc.*, the court considered Perfect 10’s attempt to hold Google liable for direct and indirect infringement of Perfect 10’s copyrights through use of Google’s image search function. 508 F.3d at 1154. The *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n* case involved Perfect 10’s attempt to impose vicarious and contributory liability on financial institutions for processing credit card payments on websites that sold unauthorized copies of Perfect 10’s images. 494 F.3d at 792. In *Perfect 10, Inc. v. CCBill, L.L.C.*, the court reviewed Perfect 10’s attempt to hold companies liable for providing web hosting and other services to allegedly infringing websites. 488 F.3d at 1108. See generally Robert A. McFarlane, *The Ninth Circuit Lands a “Perfect 10” Applying Copyright Law to the Internet*, 38 GOLDEN GATE U. L. Rev. 381 (2008).

⁶³ See David Ludwig, *Shooting the Messenger: ISP Liability for Contributory Copyright Infringement*, 2006 B.C. INTELL. PROP. & TECH F. 110701 (2006) (discussing the varying approaches to contributory liability taken by courts in recent technology cases).

⁶⁴ Additionally, some courts have held that constructive knowledge is enough to satisfy this element. See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995).

⁶⁵ See *Perfect 10*, 508 F.3d 1146; *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012).

images.⁶⁶ The case involved Google's image search function, which displays thumbnail images, along with HTML instructions directing users to the original image, in response to a user's search queries.⁶⁷ The Ninth Circuit analyzed the thumbnail images separately from the HTML in-line link.⁶⁸ The court held that the thumbnail images that Google displayed in response to a user's search queries were likely direct infringements of Perfect 10's display right.⁶⁹ However, the court also held that Google likely had an adequate fair use defense to its direct infringement of the copyrighted images.⁷⁰

Regarding in-line linking, the court held that the process of in-line linking to an original image through HTML instructions was not direct infringement.⁷¹ The court reasoned that the in-line links were not copies of the original images "fixed in a tangible medium of expression," because they only consisted of HTML instructions that directed the user to the original image.⁷² Without a fixed copy, there could be no infringement. Although Google's in-line linking did not *directly* violate Perfect 10's copyrights, the court held that the process may create *contributory* liability where the links directed users to already infringing copies on third-party sites.⁷³ The process of in-line linking was directing more user traffic to the

⁶⁶ *Perfect 10*, 508 F.3d at 1154.

⁶⁷ *Id.* at 1155.

⁶⁸ *See id.* at 1159–62.

⁶⁹ *Id.* at 1160.

⁷⁰ *Id.* at 1168; *see infra* Part III.D.

⁷¹ *Perfect 10*, 508 F.3d at 1160–61.

⁷² *Id.*

⁷³ *Id.* at 1172–73 ("Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps."); *see also* *Batesville Servs., Inc. v. Funeral Depot, Inc.*, No. 1:02-CV-01011-DFH-TA, 2004 WL 2750253 (S.D. Ind. Nov. 10, 2004) (holding that an issue of fact existed regarding defendant's potential direct or contributory liability for creating links to unauthorized photographs of plaintiff's products and reproducing thumbnails of the photographs).

infringing material, which could be inducing, causing or materially contributing to direct infringements.⁷⁴

Similarly, in *Flava Works, Inc. v. Gunter*, the Seventh Circuit considered whether a website that allows users to post links to infringing material incurs contributory liability.⁷⁵ In that case, a video production company, Flava Works, sued a video bookmarking website, myVidster, which allowed users to post links to outside videos.⁷⁶ Flava argued that the bookmarking website was contributorily liable for providing links by which viewers could access infringing copies of Flava’s videos.⁷⁷ In contrast to the Ninth Circuit’s decision, the Seventh Circuit Court held that the links to infringing copies of Flava’s videos did not create contributory liability.⁷⁸

The myVidster site was not contributorily liable for infringing the right of reproduction because the conduct that myVidster induced—watching copyrighted material without paying for it—was not infringing.⁷⁹ With no underlying infringement, there could be no contributory liability. After struggling to define the meaning of “performance” in the Internet context, the court held that myVidster also did not incur contributory liability for violation of the performance right.⁸⁰ Although viewers who clicked on the link may have violated the performance right, the court held that myVidster was not significantly contributing to the infringing activity.⁸¹

⁷⁴ *Perfect 10*, 508 F.3d at 1172.

⁷⁵ *Flava Works*, 689 F.3d at 757.

⁷⁶ *Id.* at 756.

⁷⁷ *Id.* at 757–58.

⁷⁸ *Id.* at 762.

⁷⁹ *Id.* at 757–58 (holding that viewing Flava’s videos for free through the myVidster site, and thus avoiding Flava’s fees, is the equivalent of “stealing a copyrighted book from the bookstore and reading it” or “sn[eking] into a moving theater and watch[ing] a copyrighted movie without buying a ticket. The facilitator of conduct that doesn’t infringe copyright is not a contributory infringer.”).

⁸⁰ *Flava Works*, 689 F.3d at 760–62.

⁸¹ *Id.* But see *Live Nation Motor Sports, Inc. v. Davis*, No. 3:06-CV-276-L, 2007 WL 79311 (N.D. Tex. Jan. 9, 2007) (holding that creating links to a stream of a

Perfect 10 and *Flava Works* exemplify courts' difficulty with applying existing copyright laws to Internet practices.⁸² The two outcomes are not easily reconciled, and the Seventh Circuit's analysis in *Flava Works* has been criticized for straying too far from the Copyright Act.⁸³ In spite of, or perhaps due to, the uncertain application of the copyright laws to these issues, linking to copyrighted material on social media platforms persists.

B. Terms of Use Regarding Infringement

While social media practices and policies encourage sharing and linking with user-found content, the TOU simultaneously discourage it in a likely attempt to protect the websites from liability. First, social media TOU require users to own the rights to all posted content.⁸⁴ Additionally, the TOU contain language either

live webcast of motor races shown in real time was infringing on the plaintiff's public performance right).

⁸² In wrestling with application of the performance right, the Seventh Circuit even requested legislative guidance in its opinion: "Legislative clarification of the public-performance provision of the Copyright Act would therefore be most welcome." *Flava Works*, 689 F.3d at 761.

⁸³ See *Copyright Law - Contributory Infringement - Seventh Circuit Holds That - Social Bookmarking- of Infringing Content Alone Is Insufficient to Support Grant of Preliminary Injunction. - Flava Works, Inc. v. Gunter*, 689 F.3d, 126 HARV. L. REV. 2479 (2013).

The Seventh Circuit's reasoning deviated from the text of the Copyright Act and focused largely on the motives of allegedly contributory infringers. . . . Even if one concedes that intent is relevant to the question of contributory infringement, the Seventh Circuit's inquiry in *Flava* remains unconvincing because it neglected to account adequately for technical advances that have upended the behavior, and thus the motives, or both providers and consumers of copyrighted content.

Id. at 2485.

⁸⁴ See Facebook, Statement of Rights and Responsibilities, *supra* note 32 ("You own all of the content and information you post on Facebook."); YouTube, Terms of Service, *supra* note 32 ("You affirm, represent, and warrant that you own or have the necessary licenses, rights, consents, and permissions to publish Content you submit."); Twitter, Terms of Service, *supra* note 32 ("You represent and warrant that you have all the rights, power and authority necessary to grant the rights granted herein to any Content that you submit."); Instagram, Terms of

requiring users not to infringe others’ copyrights, or at least stating that accounts may be terminated if users infringe copyrights. For example, Facebook, YouTube, and Instagram each require users to agree that they will not post infringing material.⁸⁵ Conversely, Twitter’s TOU state that “[the company] respects the intellectual property rights of others and expects [users] to do the same,” without any express language requiring users *not* to infringe copyrights.⁸⁶ While this statement does not appear to be more than a mere suggestion, the site also states that infringing material may be removed and users’ access may be terminated after repeat infringements.⁸⁷ By openly inviting users to disregard copyrights through the use of linking, while requiring users to agree to TOU that disallow and condemn the practice, social media websites are squarely placing liability with the unknowing users.

Use, *supra* note 32 (“You represent and warrant that: (i) you own the Content posted by you on or through the Service or otherwise have the right to grant the rights and licenses set forth in these Terms of Use.”). Until June 2012, Pinterest had similar language in its TOU. See Kirsten Kowalski, *Why I Tearfully Deleted My Pinterest Inspiration Boards*, DDK PORTRAITS BLOG (Feb. 24, 2012), <http://ddkportraits.com/v2/2012/02/why-i-tearfully-deleted-my-pinterest-inspiration-boards/> (quoting Pinterest’s earlier TOU as including the phrase “you either are the sole and exclusive owner of all Member Content that you make available through the Site, Application and Services, or you have all rights, license, consents and releases that are necessary.”).

⁸⁵ Facebook, Statement of Rights and Responsibilities, *supra* note 32 (“You will not post content or take any action on Facebook that infringes or violates someone else’s rights.”); YouTube, Terms of Service, *supra* note 32 (“Content you submit to the Service will not contain third party copyrighted material, or material that is subject to other third party proprietary rights, unless you have permission.”); Instagram, Terms of Use, *supra* note 32 (“the posting and use of your Content on or through the Service does not violate, misappropriate or infringe on the rights of any third party, including . . . copyrights, trademark, and/or other intellectual property rights.”).

⁸⁶ Twitter, Terms of Service, *supra* note 32.

⁸⁷ *Id.*

C. The Pinterest Problem

The issues of infringement by linking to user-found content are particularly troublesome with respect to second-generation social media platforms like Pinterest. Pinterest, launched in 2010 and already boasting 48.7 million users, relies almost exclusively on user-found content.⁸⁸ The site allows users to create multiple pages (“boards”) on which they can “pin” links to material on outside websites.⁸⁹ After registering with Pinterest, the user can install a “pin it” button to the web browser toolbar, allowing the user to pin virtually any online content.⁹⁰ Each pin appears on the user’s board as a thumbnail image, taken from the outside website. Other Pinterest users can see the pinned images and click on them to be directed to the outside websites via an in-line link.⁹¹ Pinterest pins create the same issues of direct and contributory liability seen with retweeting, Facebook sharing, and other methods of linking material, primarily due to the copied thumbnail images and in-line linking. However, the level of infringement associated with Pinterest is greater because the site relies almost exclusively on users’ willingness for, or ignorance of, infringement. Until April 2012, Pinterest expressly discouraged users from posting their own content, suggesting that *only* outside material should be pinned.⁹² While Pinterest users may now more freely pin user-generated content, the site still relies primarily on user-found content, and therefore is likely filled with unauthorized copies of and links to copyrighted content.

As with other sites that allow user-found content, Pinterest’s TOU are inconsistent on this point. Pinterest’s TOU reserve the

⁸⁸ Sarah McBride, *Start-up Pinterest Wins New Funding, \$2.5 Billion Valuation*, REUTERS (Feb 20, 2013, 8:12 PM), <http://www.reuters.com/article/2013/02/21/net-us-funding-pinterest-idUSBRE91K01R20130221>.

⁸⁹ Pinterest, Pinterest Basics, *supra* note 48.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Kirsten M. Koepsel, *Social Networks and the Uneasy Relationship with Copyright Law*, 45 MD. B.J. 20, 29–30 (2012) (discussing Pinterest’s previous TOU and “Pin Etiquette” policy).

right to remove infringing content, and in a separate “Acceptable Use” policy, the site requires users to agree not to pin content they do not have the right to post.⁹³ After a lawyer blogged about the inconsistencies in Pinterest’s TOU regarding infringement, Pinterest received backlash from users, prompting the site to initiate an “opt-out” policy whereby other websites can prevent material on their websites from being pinned.⁹⁴ Of course this is inconsistent with the existing copyright regime; copyright licenses are not automatic contracts that require opting out.⁹⁵ Though this displays an attempt on Pinterest’s part to acknowledge copyright owners’ rights, the site still relies on copyright infringement as a basic premise, apparently placing all liability on users.⁹⁶

D. Defenses

Social media websites’ conflicting TOU and policies regarding infringement by linking leave users open to substantial liability, both for direct and third-party infringement. The websites invite and encourage infringing activity from their users, leaving users to believe that their actions are legal, or at the very least shielded by the websites. The sites claim protection for themselves through indemnity terms and under the safe harbor provision of the DMCA.⁹⁷ The DMCA’s safe harbor provision protects “innocent”

⁹³ Pinterest, Terms of Service, *supra* note 32; Pinterest, Acceptable Use Policy, <http://about.pinterest.com/use/> (last visited Nov. 27, 2013).

⁹⁴ Tia Fisher, *Pinterest – Are The New Terms Better? The Legal View*, SOCIAL MEDIA TODAY (March 29, 2012), <http://socialmediatoday.com/emoderation/480219/pinterest-are-new-terms-better-legal-view>. See Kowalski, *supra* note 84.

⁹⁵ 17 U.S.C. §§ 201(d), 204 (2012).

⁹⁶ See generally Julie Nichols Matthews et al., *supra* note 2, at 29 (discussing the copyright infringement issues associated with Pinterest).

⁹⁷ See, e.g., Facebook, Statement of Rights and Responsibilities, *supra* note 32 (indemnify); Facebook, About Intellectual Property, <https://www.facebook.com/help/www/399224883474207> (last visited Nov. 27, 2013) (DMCA notice); Pinterest, Terms of Service, *supra* note 32 (indemnify); Pinterest, Copyright, <http://about.pinterest.com/copyright/> (last visited Nov. 27, 2013) (DMCA notice); YouTube, Terms of Service, *supra* note 32 (indemnify); YouTube, Copyright Infringement Notification Basics, <http://www.youtube.com/yt/copyright/>

Internet service providers who do not have actual or constructive knowledge of infringing activities.⁹⁸ To receive protection and remain innocent, the service providers must implement a policy for receiving and complying with complaints of infringement (“takedown notices”) from copyright holders.⁹⁹ To comply with a takedown notice, websites must “remove or disable access to” the infringing material.¹⁰⁰ This protects the sites from the contributory or vicarious liability they would most likely face due to the constant infringing activities happening through users’ linking and sharing.¹⁰¹ Without the DMCA safe harbor provision, Pinterest would be especially at risk because the entire site may not be “capable of substantial non-infringing uses.”¹⁰² With the safe harbor provision protecting social media platforms, a copyright holder’s only redress after his content is shared across the Internet is to sue the individual users who did the sharing.

There may be some defenses available to social media users who link to copyrighted material. The *Flava Works* opinion suggests that social media users who link to infringing content may escape contributory liability, because linking is not a significant contribution to the infringing activity and because other users’ act of viewing infringing material may not be a direct infringement itself.¹⁰³ Additionally, the *Perfect 10* case suggests that where the link consists only of HTML instructions and does not include a thumbnail image or other copied representation, the user may be free from direct liability.¹⁰⁴ Although the analyses in these cases

copyright-complaint.html (last visited Nov. 27, 2013) (DMCA notice).

⁹⁸ *ALS Scan, Inc. v. RemarQ Cmty. Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (citing 17 U.S.C. 512(c)(1) (2012)); see 17 U.S.C. § 512(k)(1) (2012) (defining a “service provider” to include a broad range of Internet companies).

⁹⁹ *ALS Scan*, 239 F.3d at 625; 17 U.S.C. § 512(c) (2012).

¹⁰⁰ 17 U.S.C. § 512(c)(1)(A)(ii) (2012).

¹⁰¹ See *A&M Records*, 239 F.3d 1004.

¹⁰² *Sony*, 464 U.S. at 442.

¹⁰³ See *supra* notes 79-81 and accompanying text (discussing the court’s holding regarding contributory liability).

¹⁰⁴ See *supra* notes 71-74 and accompanying text (discussing the court’s treatment of in-line linking).

were factually driven and the law remains unsettled, these cases may offer defense arguments for social media users who link to third-party content.

Additionally, the fair use defense may be a possible argument for social media users who infringe through user-found content; however the success of the argument is by no means certain. Fair use is an affirmative defense to infringement that “permits the use of copyrighted works without the copyright owner’s consent under certain situations.”¹⁰⁵ In *Perfect 10*, the Ninth Circuit vacated a preliminary injunction against Google for its use of unauthorized thumbnail images, finding that fair use may be an adequate defense to direct liability.¹⁰⁶ Fair use, as set forth in Section 107 of the Copyright Act, requires consideration of four factors: (1) the purpose and character of the defendant’s use; (2) the nature of the plaintiff’s copyrighted work; (3) the amount and substantiality of the original that was used; and (4) the effect of the defendant’s use upon the plaintiff’s market.¹⁰⁷ These factors are not exclusive, and courts will weigh them together “in light of the purposes of copyright.”¹⁰⁸

The first and fourth factors likely weigh in users’ favor. When the purpose for using the copyrighted content is not commercial and where the use is somehow transformative from the copyright holder’s original use, a fair use argument is strong.¹⁰⁹ The purpose for linking on social media is usually non-commercial and is transformative, in that the purpose of sharing interesting content is different than the copyright holder’s purpose for creating and

¹⁰⁵ *Perfect 10*, 508 F.3d at 1163.

¹⁰⁶ *Id.* at 1168.

¹⁰⁷ 17 U.S.C. § 107 (2012).

¹⁰⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

¹⁰⁹ *See Sony*, 464 U.S. at 449 (stating that a finding of non-commercial use creates a presumption in favor of fair use); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2002) (holding that a search engine’s use of copyrighted photographs was transformative because the search engine used the photographs to “improve access to images on the internet”).

placing it online.¹¹⁰ Additionally, because the use is transformative, the act of sharing links to copyrighted content likely will not have a negative effect on the copyright holder's market.¹¹¹ If the original copyright holder's purpose is to make a profit, the social media links may actually have a positive effect on the owner's purpose by directing additional traffic to the original site.

Conversely, the second and third factors seem to weigh against a finding of fair use. When the copyrighted work is artistic in nature, the second factor weighs against fair use.¹¹² The majority of the works linked to on social media sites, such as photographs and videos, are likely artistic in nature.¹¹³ Finally, fair use is less likely found where the alleged infringer copies the entire work as a whole.¹¹⁴ Social media sharing generally requires use of the entire copyrighted work.¹¹⁵

The four factors are not often weighed equally, making predictions difficult, but with two factors for and against a finding of fair use in this case, it would be a risky defense. Clearly, there is no certain defense that would apply to infringement by user-found content on social media sites, which further illustrates the need for new legislation.

¹¹⁰ Cf. *Perfect 10*, 508 F.3d at 1167 (holding that the transformative nature of Google's thumbnail images made the first factor weigh in Google's favor, despite any minor commercial aspect).

¹¹¹ Cf. *id.* at 1168 (holding that Google's thumbnail-sized images did not hurt Perfect 10's market for full-sized images).

¹¹² See *Campbell*, 510 U.S. at 586 (recognizing that where the copyrighted work is most creative, fair use is less likely because those works are "closer to the core of intended copyright protection than others").

¹¹³ Cf. *Perfect 10*, 508 F.3d at 1167 (holding that although Perfect 10's images were artistic in nature, the fact that they were "previously published" left the second factor weigh only slightly in Perfect 10's favor).

¹¹⁴ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) ("copying an entire work militates against a finding of fair use" (quotation marks and citations omitted)).

¹¹⁵ Cf. *Perfect 10*, 508 F.3d at 1167–68 (holding that although Google copied Perfect 10's images in their entirety, complete copying was necessary due to the nature of a visual image search engine).

IV. CONCLUSION

Copyright law in America, in its current stage of development, does not sit well with widespread social media practices. Users’ authored works are instantly subject to broad licenses, leaving users without any bargaining power over how their works are used. Moreover, the second-generation of social media that incorporates user-found content both encourages and prohibits copyright infringement. Despite the unfair licenses and rampant infringement, however, courts have not seen many lawsuits over copyrights in social media content. This is likely because copyright owners either enjoy the exposure to their works that social media provides, or because those who dislike it submit DMCA takedown notices with which sites quickly comply in order to remain within the safe harbor provision. With the social media platforms likely protected under the DMCA safe harbor, liability falls on the social media users, which leaves copyright owners with the unprofitable option to sue individual users.¹¹⁶

The manner in which social media is currently functioning within the parameters of copyright law is precarious, and it may only be a matter of time before it collapses into lawsuits, similar to the file-sharing suits of the early 2000s.¹¹⁷ Once again, technology has outpaced development of the law, and the best way to address

¹¹⁶ See Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 442 (2002) (“Chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem . . .”).

¹¹⁷ See *supra* notes 8-10 and accompanying text (discussing the file sharing lawsuits); Manesh, *supra* note 10, at 20–32 (discussing the stages of litigation that record companies and other copyright owners of sound recordings brought against different types of peer-to-peer file sharing software companies, and the waves of lawsuits brought against individual users); see also Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, <http://online.wsj.com/article/SB122966038836021137.html> (discussing the recording industry’s plan to end litigation after suing tens of thousands of individuals for illegally downloading music).

the copyright implications of social media is through the legislative process.