

Making Protection Against Copyright Infringement More Accessible in the Social Media Era

Ayesha Syed*

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*J.D., May 2019, The George Washington University Law School; B.A., Economics and International Relations, May 2015, Indiana University. Thank you to the staff of the Federal Communications Law Journal staff for all their patience, hard work, and assistance with this publication.

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I. INTRODUCTION

With the increased use of various social media platforms like Twitter and Instagram, the process of sharing ideas has become progressively easier and more widespread. These platforms have also become spaces where creators can publish their work.¹ Whether it be a comedian sharing originally written jokes, a writer sharing stories, or an artist posting a graphic, these platforms have become creative hubs for artists having access to fast publication of their work.² While these forums are pretty remarkable ways to create and consume culture, they also create problems.³

One of the problems created by this method of sharing is social media users taking the original works of other users, commercializing them, and profiting off this commercialization without any attribution to or compensation for the original authors.⁴ The current mechanisms in place for collecting damages for copyright infringement are either impractical or inapplicable for Twitter users who do not seek to obtain registration for the works they publish through the social media platform and other platforms like it due to the high cost of attorney's fees.⁵

As the way we create and consume culture changes, the nature of the mechanisms we have in place for protecting original content creators against copyright infringement must change as well. One barrier that needs to be eliminated to better protect these authors is the registration prerequisite for

1. See Haydn Symons, *3 Expert Tips to Showcase Your Art on Twitter*, AGORA GALLERY (June 27, 2018), <https://www.agora-gallery.com/advice/blog/2018/06/27/3-expert-tips-to-showcase-your-art-on-twitter/> [<https://perma.cc/44DM-BNGZ>] (providing tips to artists who share their work on Twitter).

2. See Erik Abriss, *The 15 Funniest Twitter Accounts of 2017*, VULTURE (Dec. 26 2017), <https://www.vulture.com/2017/12/the-15-funniest-twitter-accounts-of-2017.html> [<https://perma.cc/AN9Z-NVC5>] (providing a list of well-known and up and coming comedians on Twitter along with examples of joke tweets they've posted); MJ Franklin, *18 Twitter Short Stories that Prove Tweets Can Be Literary Too*, MASHABLE (Oct. 2, 2014), <https://mashable.com/2014/10/02/twitter-short-stories-bone-clocks/#wE3l2Eipy5qA> [<https://perma.cc/U9EZ-U969>]; Anna Washenko, *9 Amazing Artists to Follow on Twitter*, MASHABLE (Feb. 1 2014), <https://mashable.com/2014/02/01/twitter-artists-to-follow/#BW4OLWDSrPqn> [<https://perma.cc/SBM5-PWUJ>].

3. See Samuel P. Kovach-Orr, *What You Should Know Before Posting Your Art to Social Media*, BURNAWAY (Aug. 28, 2017), <https://burnaway.org/feature/posting-art-social-media/> [<https://perma.cc/Y6B4-CV2B>] (discussing potential infringement of artists' intellectual property rights as a result of posting their work on social media).

4. See Daniel Kreps, *Frank Ocean T-Shirt at Center of Debate Over Tweet Copyright*, ROLLING STONE (Aug. 2, 2017), <https://www.rollingstone.com/music/music-news/frank-ocean-t-shirt-at-center-of-debate-over-tweet-copyright-200235/> [<https://perma.cc/B9K9-2B89>].

5. See 17 U.S.C. § 412 (stating that copyright holders without registration are precluded from collecting statutory damages and costs and attorney's fees); see also Terrica Carrington, *A Small Claims Court is On the Horizon for Creators*, THE COPYRIGHT ALLIANCE BLOG (Oct. 4, 2017), https://copyrightalliance.org/ca_post/small-claims-on-the-horizon/ [<https://perma.cc/Y3TX-9FS7>] (pointing to the high cost of copyright infringement litigation lawsuits as one reason for the creation of a small claims court).

copyright owners to collect statutory damages and attorney's fees under the Copyright Act of 1976.⁶ Authors will be better protected if this barrier is eliminated because they will have easier access to adequate relief. The collection of attorney's fees specifically would enable authors who couldn't previously bring suit due to financial concerns to bring suit once the barrier is eliminated. This Note will present complementary approaches aimed at amending the registration requirement in order to eliminate this barrier. Congress should create an exception to the registration requirement in the Copyright Act in instances where commercialization of the content of a stolen tweet has occurred. In these cases, the tweet itself usually offers the information a registration of the work would require, thereby serving the purpose of registration of "establishing a public record of a copyright claim"⁷ without obtaining actual registration from the Copyright Office. It is also necessary to consider a new bill, titled the CASE Act, aimed at creating a small claims court for copyright holders when attempting to eliminate the registration barrier.⁸ As part of the approach presented in this Note, eliminating the registration barrier would also involve providing an alternative to plaintiffs in situations where cases qualify to be tried in the CASE Act-presented small claims court⁹ but are instead tried in front of a jury due to the defendant's preference. If a defendant were to opt for a jury trial instead, the plaintiff would have to bear the cost of an attorney in a situation where she would not have had been required to have the case tried in a small claims court.¹⁰ Therefore, this proposal aims to allow prevailing plaintiffs to collect attorney's fees for cases tried in federal court that could have instead been tried in the small claims court presented by the CASE Act bill to avoid attorney's fees to begin with.

Although the problem discussed in this Note is prevalent among a variety of social media platforms, the focus will be on how the issue of copyright infringement has manifested through the use of Twitter. However, the solutions presented in this Note could be applicable to a variety of social media platforms and should not be limited to the scope of Twitter. While applying this Note's proposal to other social media platforms would need more analysis and research, for the purposes of this Note, it is important to keep in mind that the implications of the proposals presented may extend beyond Twitter.

Due to the increasing ability of creators to share their works online on social media platforms, Congress must amend the registration requirement of

6. *Id.*

7. *Circular 1: Copyright Basics*, U.S. COPYRIGHT OFF., 5 <https://www.copyright.gov/circs/circ01.pdf#page=7> [<https://perma.cc/W3WH-4WG7>] (last visited Jan. 27 2018) [hereinafter *Circular 1: Copyright Basics*].

8. H.R. Rep. No. 3945, 111 (2017) https://www.scribd.com/document/360778251/Copyright-Alternative-Small-Claims-Enforcement-Act#fullscreen&from_embed [<https://perma.cc/5XBX-4HTM>] [hereinafter CASE Act].

9. See Michael Zhang, *House Bill Introduced for Copyright Small Claims*, PETAPIXEL (Oct. 5, 2017), <https://petapixel.com/2017/10/05/house-bill-introduced-copyright-small-claims/> [<https://perma.cc/LRS9-ZH46>].

10. See *id.*

Copyright Act in order to better protect copyright owners against infringement and to provide access to better enforcement of their copyright protection rights. This Note will first lay out the issue of commercialization of tweets without compensation for or attribution to their original authors. Next, it will briefly discuss the legal basis surrounding the copyrightability of content posted on Twitter followed by an in-depth discussion of the current legal framework in place meant to protect original content creators in these instances and why they are insufficient. Finally, it will present a two-pronged solution aimed at relaxing the registration requirement to provide creators with access to the courts and attorney's fees in the event of a lawsuit, enabling creators to defend themselves against copyright infringement even without formal registration of their work. The first prong proposes that Congress amend the Copyright Act to allow a social media post like a tweet to serve as informal registration that allows the plaintiff to bring suits and have access to the other benefits of registration, such as the awarding of attorney's fees, until formal registration can be obtained. The second prong proposes that, even if the CASE Act passes, the prevailing plaintiff may still be awarded attorney's fees without formal registration if the defendant prefers to have the case heard in a federal court rather than the small claims court created by the bill. In order to eliminate the registration barrier that prevents many individual creators who post their work on social media from bringing suit against infringers, Congress must first amend the Copyright Act to allow creators' social media posts, such as tweets, to serve as registration for the purpose of filing infringement lawsuits and second provide a way for prevailing plaintiffs to recuperate attorney's fees in certain cases tried in the small claims court proposed by the CASE Act should the bill pass.

II. BACKGROUND

The following Section will illustrate relevant factual and legal background to provide a better understanding of the issue this Note attempts to resolve. The first Subsection will provide general information on how Twitter works along with examples of creators' work posted on social media being commercialized without their permission. The second Subsection will then go into the relevant legal background surrounding the current legal mechanisms available to creators like those who post their work on social media.

A. The Following Section Provides an Overview of the General Mechanics of Twitter as Well as a Few Examples That Illustrate the Issue This Note Addresses.

The social media platform Twitter is a website where users sign up, free of charge, to create accounts where they are able to post (or "tweet") whatever they wish within the limits of 280 characters and Twitter's terms and

conditions.¹¹ Twitter users have the option of setting their Twitter profiles as private, where only the people they have allowed to follow them can view the content they post, or public, where anyone, regardless of whether they follow the account, is able to view the content they have posted.¹² When a Twitter user (“tweeter”)’s profile is public, other users are able to “retweet” that user’s tweet so that it is reposted on the retweeter’s page for all of her followers to view as well.¹³ This process enables users who may not follow the original tweeter to view the tweet.¹⁴ This retweeting process is one way for a Twitter user to reach a wide-spread audience. It may also be relevant to know that Twitter gives a portion of its users, such as celebrities, public figures, and news accounts, a blue checkmark next to their Twitter names to indicate that user’s authenticity.¹⁵

The content posted on Twitter varies tremendously. For example, companies use Twitter to advertise, news agencies use the platform to break stories, celebrities tweet to maintain an online presence, and other individuals use the platform to interact with online phenomena and post both original and unoriginal content.¹⁶ The focus of this Note is primarily on the last group of Twitter users. The type of content these individuals post varies further. Many users limit themselves to posting thoughts or observations, which range from being insightful or witty to simply being ridiculous.¹⁷ On the other hand, many use Twitter as a public forum to showcase their talents.¹⁸ These talents come in the form of carefully crafted jokes, poems, original sayings, original graphics, links to original music, original lyrics, and more.¹⁹ For many artist

11. See *Twitter Rules*, TWITTER, <https://support.twitter.com/articles/18311> [<https://perma.cc/KR8F-YP38>] (last visited Nov. 21, 2017); Aliza Rosen, *Tweeting Made Easier*, TWITTER BLOG (Nov. 7, 2017), https://blog.twitter.com/official/en_us/topics/product/2017/tweetingmadeeasier.html [<https://perma.cc/L6HE-QU2J>].

12. See *About Public and Protected Tweets*, TWITTER: HELP CENTER, <https://help.twitter.com/en/safety-and-security/public-and-protected-tweets> [<https://perma.cc/VF2U-5KAN>] (last visited March 27, 2019).

13. See *id.*

14. See *Retweet FAQs*, TWITTER, <https://help.twitter.com/en/using-twitter/retweet-faqs> [<https://perma.cc/6CAW-MFPX>] (last visited Nov. 11, 2018).

15. See Hamza Shaban, *Twitter Wants to Open Verification to Everyone*, THE SWITCH (Mar. 9, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/03/09/twitter-says-it-will-open-verification-to-everyone/?utm_term=.21724832ed04 [<https://perma.cc/7Q8L-BR4L>].

16. See *About Different Types of Tweets*, TWITTER: HELP CENTER, <https://help.twitter.com/en/using-twitter/types-of-tweets> [<https://perma.cc/R2NZ-MG3D>] (last visited Mar. 27, 2019); see also Aaron Mak, *How Twitter is Changing to Become More Relevant for News and Sports*, SLATE (June 13, 2018), <https://slate.com/technology/2018/06/how-twitter-changing-timeline-relevant-news-sports.html> [<https://perma.cc/APD3-DXPZ>]; Megan Donley, *Fans Connect With Celebrities on Twitter*, SOUTH SOURCE (Feb. 2011), <http://source.southuniversity.edu/fans-connect-with-celebrities-on-twitter-32784.aspx> [<https://perma.cc/VLL6-3JB7>].

17. See *supra* note 2.

18. *Id.*

19. *Id.*

Twitter users, Twitter serves as important mechanism they can use to reach a wide audience quickly through the spread of their work.²⁰

Although it is rather remarkable how artists can publish their work on online platforms with the click of a button, this fast publication process has also resulted in problems that can ultimately harm the original author of the work being shared. Because so many people have access to the content of a tweet once it is shared, it can be easy for other users, or even people outside of Twitter who have seen the content of the tweet elsewhere, to then steal that content and use it for their own commercial gain without asking for permission, attributing the work to the original author, or providing the original author with compensation.²¹

A recent example of this is when teenager Kayla Robinson lifted the content of Twitter user Brandon Male's tweet and printed it on t-shirts she sold for profit.²² Renowned R&B artist Frank Ocean later wore one of these t-shirts during a performance, which resulted in the sales of the shirt skyrocketing.²³ The phrase on the t-shirt read, "Why be racist, sexist, homophobic, or transphobic, when you could just be quiet."²⁴ Male's tweet, from 2015, read, "Why be racist, sexist, homophobic, or transphobic, when you could be quiet?"²⁵ Male reached out to Robinson's company, Green Box, after seeing that a photo of someone wearing the shirt had gone viral prior to Frank Ocean wearing the shirt.²⁶ This attempt at some sort of resolution resulted in Green Box informing Male he was given credit for the saying on the company's Instagram page without offering Male anything else.²⁷ The second time Male tried to resolve the matter after seeing Frank Ocean wearing the t-shirt, Robinson paid Male \$100 by way of Venmo.²⁸ As Robinson was selling each shirt for \$18.99,²⁹ this payment hardly seems adequate to compensate Male for his work. Male and Robinson eventually came to an arrangement on their own to settle the matter without legal recourse.³⁰ Although the two were able to resolve the matter, this may not always be the

20. See *supra* note 1.

21. See De Elizabeth, *Twitter Suspends Accounts Known for Stealing Tweets*, TEEN VOGUE (Mar. 11, 2018), <https://www.teenvogue.com/story/twitter-suspends-accounts-known-for-stealing-tweets> [https://perma.cc/AUN8-WZJX]; see also Carla Herreria *Twitter Bans Popular Accounts Accused of Stealing Jokes and Selling Retweets*, HUFFINGTON POST (Mar. 10, 2018), https://www.huffingtonpost.com/entry/twitter-suspends-accounts-stolen-tweets-sell-retweets_us_5aa44bc0e4b086698a9e427e [https://perma.cc/6MHN-8A67].

22. See Daniel Kreps, *Frank Ocean T-Shirt at Center of Debate Over Tweet Copyright*, ROLLING STONE (Aug. 2, 2017), <https://www.rollingstone.com/music/music-news/frank-ocean-t-shirt-at-center-of-debate-over-tweet-copyright-200235/> [https://perma.cc/4AVX-VFUR].

23. *Id.*

24. *Id.*

25. Brandon Male (@avogaydro), TWITTER (Aug. 8 2015 11:43 AM), <https://twitter.com/avogaydro/status/630056636523094016> [https://perma.cc/NAR3-MZ8L].

26. See *id.*

27. See *id.*

28. See *id.*

29. See *id.*

30. See *id.*

case for other creators. Robinson and Male were able to talk the matter over amicably,³¹ but this Note attempts to provide a solution for individuals who are unable to do so. It may be more difficult to come to an amicable solution without using legal mechanisms when the dispute occurs within a more inequitable dynamic, for example, between an individual creator and a large company such as an online magazine, where the parties would have access to very different resources.

Writer Ayesha Siddiqi has garnered a robust following on Twitter due to her brilliantly crafted and often hilarious tweets.³² On multiple occasions, Siddiqi's followers have pointed her attention to merchandise displaying her tweets without her permission, such as tote bags with her tweets printed on them.³³ Siddiqi also knows people have printed her original tweets on artwork sold on Etsy.³⁴ When asked if the legal mechanisms proposed in this Note would be of interest to content creators like herself, Siddiqi was rather receptive to the idea.³⁵ Although Siddiqi has not taken action against the individuals who have used her tweets for their own commercial gain, she can imagine why some content creators who may not have a job or other source of income outside their content creation would want to be compensated in such instances.³⁶ Siddiqi has expressed that because she does not rely on Twitter for her livelihood, she does not feel the need to go after those who have infringed upon her works.³⁷ However, she does believe the mechanism proposed here would be useful for people whose creation of art serves as their livelihood.³⁸

Another area of Twitter where this issue is present is the world of popular Twitter accounts, such as those with a following of over 100,000.³⁹ Owners of these popular accounts will often take the tweets of other Twitter users who have less of a following and post the tweets on their own accounts as though they were the original owners of the tweets.⁴⁰ Often, these larger Twitter accounts make a profit off these other accounts through a phenomenon known as "tweetdecking," where owners of larger accounts receive payment from brands and individuals in exchange for posting tweets

31. *See id.*

32. Sara Galo, *Interview: Ayesha Siddiqi: 'We need to stop waiting for permission to write'*, THE GUARDIAN (Dec. 9, 2014), <https://www.theguardian.com/books/booksblog/2014/dec/09/ayesha-siddiqi-we-need-to-stop-waiting-for-permission> [<https://perma.cc/9YJR-5NDH>].

33. Telephone Interview with Ayesha Siddiqi, writer (Nov. 20, 2017).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. This number does not come from any particular source but is just an observation from using Twitter and seeing that most users have significantly less than 100,000 followers; *see also* Cent Muruganandam, *Average Number of Twitter Followers is 208: Twitter Stats Infographic*, BLOGGING & INFOGRAPHICS (Jan. 4, 2016), <https://yourescapefrom9to5.com/average-number-of-twitter-followers-is-208-infographic> [<https://perma.cc/YA6Q-65LT>].

40. *See supra* note 18.

and retweets.⁴¹ This Note takes the position that using other people's tweets without permission, attribution, or contribution to attract a large following and maintain the popularity of Twitter pages, thereby attracting more advertisements, is an unfair use of other users' original content. An example of a Twitter account that uses others' original content is the "Common White Girl" Twitter account run by the Twitter handle @girlhoodposts.⁴²

The widespread use of Twitter and other social media platforms like it have resulted in unintended consequences such as the infringement on copyright illustrated by the examples above. As the online social media universe is still relatively new, the legal world has some catching up to do when it comes to governing the use of these platforms and their unintended consequences. The current legal framework that individuals like Male and Siddiqi have access to is either impractical or inapplicable, requiring legal minds to find and implement a solution.

B. Current Legal Framework

The following Subsection will outline the relevant legal background to provide a better understanding of the current legal mechanisms available to creators and why they are inadequate. Specifically, this Section discusses the copyrightability of tweets, copyright infringement as it relates to tweets, registration of copyrights, and the current legal mechanisms available to protect creators against copyright infringement.

1. Copyrightability of Tweets

First, it is important to establish that the scope of copyright-protected works for the purposes of this Note includes both tweets of the actual work, such as Male's tweet discussed above,⁴³ and tweets that provide a link to the actual work, such as instances when a creator has tweeted a link to the photo or music she has created. Although the copyrightability of tweets is beyond the focus of this Note, it will be useful to provide a brief overview of what, if any, legal framework is available to assess whether tweets can be protected. The issue of whether tweets are considered protectable under copyright law is not one that has been legally resolved. Although there is currently no case law or statute governing the matter of tweets' copyrightability specifically, many have written about the copyrightability of tweets in legal academia, providing compelling cases for why tweets may be protectable under

41. See *id.*; see also Julia Reinstein, "Tweetdecking" is Taking Over Twitter. Here is Everything You Need to Know., BUZZFEED NEWS (Jan. 12, 2018), <https://www.buzzfeednews.com/article/juliareinstein/exclusive-networks-of-teens-are-making-thousands-of-dollars> [<https://perma.cc/Q9K4-LJT7>].

42. Common White Girl (@GirlHoodPosts), TWITTER, <https://twitter.com/girlhoodposts> [<https://perma.cc/VEC2-DX3F>].

43. Brandon Male (@avogaydro), TWITTER, (Aug. 8 2015, 11:43 AM), <https://twitter.com/avogaydro/status/630056636523094016> [<https://perma.cc/3YMZ-QGBS>].

copyright law.⁴⁴ Additionally, the recent decision by the United States District Court for the Southern District of New York in *Goldman v. Breitbart News Network, LLC* seems to suggest that a tweet could be copyrightable, as the court's decision held that an unauthorized display of a tweet on a news website is in violation of the copyright owner's exclusive right to publicly display her work.⁴⁵

In order to establish copyright protection of her works, an author must fix the works "in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated."⁴⁶ Thus, the author owns copyright of her original work as soon as she fixes the work in a tangible medium.⁴⁷ A work is arguably fixed in a tangible medium when it is published as a tweet on Twitter with the tweet itself being the tangible medium. However, there are some limitations as to what is considered copyrightable. For example, copyright usually does not protect "words and short phrases,"⁴⁸ which must be taken into account here. Additionally, it is unlikely that jokes posted on Twitter would be protected by copyright because many copyright academics believe this type of content is instead protected by social norms.⁴⁹ This is not to say jokes are never copyrightable, only that it may be more difficult to obtain copyright protection for jokes posted on Twitter when many academics believe copyright protection of jokes in the comedy world to be thin.⁵⁰ However some jokes may still be protected in some instances.⁵¹ Taking these limitations and the current literature surrounding the copyrightability of tweets into account, this Note assumes that the courts would find an original author of a tweet would have copyright ownership of her tweets.

2. Copyright Infringement

Assuming that a court would find the content at issue copyrightable, the violation of any of the exclusive rights granted to the content's copyright owners would result in infringement of copyright.⁵² Although the violation of any of the exclusive rights granted to a copyright owner would result in

44. See generally Stephanie Teebag North, *Twitterright: Finding Protection in 140 Characters or Less*, 11 J. HIGH TECH. L. 333 (2011).

45. See generally *Goldman v. Breitbart News Network, LLC*, No. 17-CV-3144 (KBF), 2018 WL 911340 (S.D.N.Y. Feb. 15, 2018).

46. 17 U.S.C. § 102(a).

47. *Id.* § 102.

48. See Copyright Off., Copyright Compendium Chapter 300- Copyright Authorship: What Can Be Registered (2014).

49. See generally Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA L. REV. 1787 (2008) (claiming that social norms such as mutual respect among comedians serves as protection for jokes).

50. *Id.* at 1802.

51. See Scott Alan Burroughs, *Surely, You Jest: Copyright and Comedy*, ABOVE THE LAW (Sept. 20, 2017), <https://abovethelaw.com/2017/09/surely-you-jest-copyright-and-comedy/> [<https://perma.cc/LX6N-SQ2Z>].

52. See 17 U.S.C. § 501(a).

copyright infringement,⁵³ it may be useful to take a look at some of the rights most relevant to Twitter users who have had their content stolen and commercialized. The first exclusive right granted to a copyright owner is the right “to reproduce the copyrighted work in copies or phonorecords.”⁵⁴ This right is most clearly violated when owners of Twitter accounts like “Common White Girl” repost content created by others and pass it off as their own.⁵⁵ The second exclusive right granted to copyright owners is the right “to prepare derivative works based upon the copyrighted work.”⁵⁶ In the context of this Note, the exclusive right of reproduction is most clearly violated when individuals take content from the original author, slightly alter the content, and commercialize it by putting it on a t-shirt, tote bag, or other merchandise. The third exclusive right granted is the right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”⁵⁷ This exclusive right would be violated in instances such as those illustrating the violation of Section 106(1) and 106(2) rights,⁵⁸ where the infringer obtains commercial benefit from the sale or rental of the copy or its derivatives.

Additionally, while the right of attribution is not an exclusive right guaranteed by Section 106 of the Copyright Act, it is a moral right recognized by The Berne Convention (“Convention”), of which the United States is a member.⁵⁹ Under this section of the Convention, the United States is obligated to recognize the author’s right to “claim authorship of the work.”⁶⁰

C. Current Remedies for Infringement, and Why They Are Not Always Applicable/Effective

Generally, under Title 17, Chapter 5 of the Copyright Act of 1976, the remedies for a plaintiff who prevails on her claim of copyright infringement are as follows: an injunction that prevents the respondent from continuing to infringe; disposition and impounding of the products made through infringement; general damages, which are calculated by looking at the profits the respondent made by selling the infringed works; statutory damages; and

53. *See id.*

54. 17 USCA § 106(1).

55. Common White Girl (@GirlHoodPosts), *supra* note 42.

56. 17 U.S.C. § 106(2).

57. *Id.* § 106(3).

58. *See id.* § 106(1) (stating that the copyright owner has the exclusive right “to reproduce the copyrighted work in copies or phonorecords”); *id.* § 106(2) (stating that the copyright owner has the exclusive right “to prepare derivative works based upon the copyrighted work”).

59. *See* The Berne Convention, art. § 6*bis*. This is an international convention among various countries containing provisions focused on protecting the works and rights of creators of the country parties to the Berne Convention. *See Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELLECTUAL PROP. ORG., <https://www.wipo.int/treaties/en/ip/berne/> [<https://perma.cc/QWS6-KTNE>] (last visited Mar. 27, 2019).

60. *Id.*

costs and attorney's fees.⁶¹ As a result of the current system in place, copyright owners who have obtained registration for their works with the Copyright Office can make use of all of these remedies.⁶² However, original authors who have not registered their works prior to bringing suit against an infringer are precluded by Section 412 of the Copyright Act from receiving statutory damages and costs and attorney's fees as remedies for infringement.⁶³ Because it is unlikely that most Twitter users will be registering the works they tweet with the Copyright Office before someone steals them and makes a profit, these individuals would not have access to remedies that require the registration of copyright.

However, seeing that the original author would still have access to the other remedies available, such as general damages and injunctions, one may wonder why it matters whether or not they are also eligible for statutory damages and attorney's fees.

At first glance, this may not seem like much of an issue. While these copyright holders are unable to obtain statutory damages, they still have the option of obtaining actual damages, which can be calculated from looking at how much profit the infringer has made off of the copyright owner's work.⁶⁴ Under Section 501 of the Copyright Act, if a copyright owner chooses to accept statutory damages in lieu of actual damages, she can receive anywhere from \$750 to \$30,000, but no more, contingent on what the court finds to be appropriate for the infringement.⁶⁵ If the copyright owner is able to prove that the infringer willfully infringed upon her works, she could be awarded up to \$150,000 in statutory damages depending on what the court finds is appropriate.⁶⁶

However, there is no substitute for retaining the costs and attorney's fees that come with bringing a copyright infringement suit. Unless a plaintiff is able to find an attorney to litigate the matter on a pro-bono basis, a plaintiff must pay the costs and attorney's fees inherent in the litigation process. Thus, it is this remedy that highlights the problem with the current legal framework for compensating those whose works have been infringed. Many individuals who tweet their original content on Twitter likely do not have the resources or capacity to bring copyright infringement suits in court.⁶⁷ Having to bear the cost of bringing such a lawsuit and paying for an attorney likely deters individuals whose works have been infringed upon from going up against the infringer in court for just compensation. This factor may also be one of the

61. See 17 U.S.C. §§ 502-505.

62. See *id.* § 412.

63. See *id.*

64. See 17 U.S.C. § 504.

65. See *id.*

66. See *id.*

67. See Balganash Shyamkrishna, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013) [hereinafter *Copyright Infringement Markets*]; see also Shannon Greenwood et al., *Social Media Update 2016: Facebook Usage and Engagement Is on the Rise, While Adoptions of Other Platforms Remain Steady*, PEW RES. CTR. (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016/> [https://perma.cc/FP9M-C53E].

reasons we have yet to see individuals bringing suits in these instances. As a result, costs and attorney's fees could end up indirectly excluding these individuals from the remedies they should have access to without obtaining registration.

In some cases, statutory damages may be greater than those calculated by the amount of profit made for the purposes of actual damages.⁶⁸ Thus, in cases where the plaintiff did not register her work, she may have to settle for less than she would otherwise be entitled to by statute.⁶⁹ Even so, the lack of attorney's fees is more problematic and one of the main motivations behind this Note's proposal to restructure the way we view registration. Bringing a copyright infringement suit in federal court for litigation can cost anywhere between \$384,000 and \$2,000,000.⁷⁰ Based on the high cost of litigation, it is unlikely that low-income creators with a lack of resources who post their work on social media will be able to afford litigation. A Pew Research Center study that examined the demographics of social media users found that both Twitter and Instagram users are more likely to be younger adults than older adults.⁷¹ According to Business Insider, as of April 2017, the average annual salary for 16-19 year-olds was \$21,840, and it was \$27,456 for 20-24 year-olds, \$39,416 for 25-34 year-olds, and \$49,400 for 35-44 year-olds.⁷² Given these statistics, it is likely that users of Twitter and other social media sites who seek infringement remedies for their original works would have a difficult time litigating their cases in federal court.⁷³ Without access to attorney's fees as a remedy, bringing a suit for copyright infringement in federal court would be impractical. The remedies plaintiffs would have access to without registration are then also effectively barred if the plaintiff cannot afford an attorney. These high costs are likely discouraging to young creators seeking a remedy for infringement, and therefore they likely indirectly act as a deterrent for such creators who seek to litigate their cases.

D. A Look at Registration

Due to this barrier, this Note proposes that The Copyright Act should be amended so that registration is no longer a barrier for individuals who own

68. These are situations in which the possible actual damages was less than the statutory damages amount, which ranged from \$750 to \$30,000, as outlined in 17 U.S.C. § 504.

69. This Note concedes the point that creators' need for attorney's fees is much stronger than their need for statutory damages, given that they are still entitled to actual damages without registration as permitted by 17 U.S.C. § 504. Despite this concession, this Note still advocates that having access to statutory damages can sometimes provide more appealing relief than actual damages would, and creators should therefore have the option of obtaining statutory damages.

70. See Copyright Infringement Markets, *supra* note 67 at 2280 (citations omitted).

71. See Greenwood et al., *supra* note 67.

72. See Amelia Josephson, *The Average Salary for Americans at Every Age*, BUS. INSIDER (Apr. 28, 2017), <http://www.businessinsider.com/the-average-salary-for-americans-at-every-age-2017-4> [<https://perma.cc/G6AP-XDV6>].

73. *Id.*

copyrights of the works they have posted on Twitter and other similar social media platforms.⁷⁴ This Note proposes a few different ways that work together to eliminate the registration requirement barrier, but before doing so, it would be helpful to look at copyright registration in further detail.

Obtaining copyright registration requires filing a registration application with the Copyright Office indicating: “the title of the work, the author of the work, the name and address of the claimant or owner of the copyright, the year of creation, whether the work is published, whether the work has been previously registered, and whether the work includes preexisting material.”⁷⁵ Along with this application, the registration applicant must pay a registration filing fee that is nonrefundable and deposit a copy of the work they are registering with the Copyright Office.⁷⁶ Registration filing fees range from \$25 to \$400⁷⁷ depending on what is being registered and the type of registration.⁷⁸ After all these components are given to the Copyright Office, the office either issues a certificate of registration or refuses to grant the registration to the applicant.⁷⁹ If a certificate is issued, this signifies that the author’s registration application is in a public record that others can access through a request.⁸⁰ Such a registration certificate is valuable in copyright infringement litigation suits because it serves as *prima facie* evidence that the plaintiff bringing suit owns a valid copyright in her original work.⁸¹

Although this may sound rather simple, it is not. Processing a registration application and coming to a decision of granting or denying a registration certificate can take up to, on average, six months and can be

74. How to determine what social media platforms are like Twitter is out of the scope of this Note, but it is unlikely that Congress would consider amending the Copyright Act to consider Twitter users only and specifically. Thus, this Note proposes including other social media platforms as Congress sees fit. The focus of this discussion is on Twitter, but Instagram is mentioned as well because of the likenesses between the platforms in terms of creators posting their work.

75. *Circular 2: Copyright Registration*, U.S. COPYRIGHT OFF., 1 <https://www.copyright.gov/circs/circ02.pdf> [<https://perma.cc/2HX7-6D2M>] (last visited Jan. 27, 2018).

76. *Circular 1: Copyright Basics*, *supra* note 9.

77. Although these fees may not seem excessive to some, it is important to consider that these fees would stack up if a copyright owner on Twitter or another social media platform was required to pay a registration filing fee for each tweet or post.

78. *Circular 4: Copyright Office Fees*, U.S. COPYRIGHT OFF., 7 <https://www.copyright.gov/circs/circ04.pdf> [<https://perma.cc/M875-MR4Y>] (last visited Nov. 11, 2018).

79. *Circular 2: Copyright Registration*, U.S. COPYRIGHT OFF., 6 <https://www.copyright.gov/circs/circ02.pdf> [<https://perma.cc/2WFY-SRKF>] (last visited Jan. 27, 2018).

80. *Id.* at 1.

81. *Id.*

significantly longer depending on the method of registration.⁸² This time period is important because a copyright owner cannot bring suit “until preregistration or registration has been made.”⁸³ If an original creator trying to bring a copyright infringement suit against an infringer has to wait, on average, six months before being able to do so, that is six more months of potential infringement harm the original owner could suffer. Another issue with the registration approach is that, because the statute of limitations to bring a copyright infringement lawsuit is three years,⁸⁴ cases in which a plaintiff is late to register her work may result in the statute of limitations running out before her registration application is granted or denied. This issue is precisely why there is a circuit split among courts regarding when a copyrighted work is considered to be registered for the purposes of filing suit.⁸⁵

In a case called *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, the Ninth Circuit took what is referred to as the application approach, which considers the application of registration to be proof of registration.⁸⁶ Conversely, the Tenth and Eleventh Circuits have opted to take what is referred to as the registration approach,⁸⁷ which stands for the proposition that only the Copyright Office’s approval of a registration application can serve as proof of registration.⁸⁸ The benefit of the application approach is that the plaintiff wanting to file suit would not have to wait through the entire processing period before being able to file suit. This could thereby prevent the infringer from continuing to infringe during the processing period.⁸⁹ The question of which approach is the correct one resurfaced in the *Fourth Estate Public Benefit Corp. v. Wall-Street.com* case, which was decided by the Eleventh Circuit Court in May of 2017.⁹⁰ If the Supreme Court were to decide that the registration approach is the proper approach, this could intensify the need for the proposal presented by this Note because creators would have to wait the on average six-month period to get their registration approved before bringing

82. See *Registration Processing Times* (as of Oct. 2, 2018), U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf> [https://perma.cc/LC2K-HNE6] (last visited Mar. 27, 2019); see also *Frequently Asked Questions*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/> [https://perma.cc/UL5B-7552] (last visited Jan. 27 2018); *Registering a Work*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-register.html#length> [https://perma.cc/UG74-LDPR] (last visited Mar. 27, 2019).

83. 17 U.S.C. § 411(a).

84. *Id.* § 507(b).

85. See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.Com, LLC*, 856 F.3d 1338, 1339 (11th Cir. 2017) (reflecting the position of the Tenth and Eleventh Circuit Courts that only the Copyright Office’s approval of registration can serve as proof of registration); *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 619 (9th Cir. 2010) (standing for the proposition on the other side of the circuit split that considers application of registration to be proof of registration).

86. See *Cosmetic Ideas, Inc.*, 606 F.3d at 619.

87. See *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1339.

88. See *id.*

89. See *id.* at 1342.

90. See *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1338.

suit, opening their work up to further instances of potential infringement during this waiting period.

Although this Note's purpose is not to determine when registration is considered effective, the question is still generally relevant to this Note, because the decision of when registration is established affects the harm suffered by a creator. The longer it takes to establish registration, the longer the period in which other users can infringe upon the creator's work before the creator can file an infringement suit. Such potential for infringement due to the long registration processing period further illustrates the need for the solution presented in this Note. Even if the Supreme Court were to decide the application approach is the correct approach, the need for the solution presented by this Note would still exist because registration would remain a precondition to filing a lawsuit.

E. The Following Section Provides Background Information on the CASE Act.

Part of the solution presented by this Note to eliminate the registration barrier ties into the proposed legislation, the CASE Act, for creating a small claims court for copyright disputes.⁹¹ This bill proposes to create a small claims court as a branch inside the Copyright Office where claim officers, as opposed to a federal judge, would preside over copyright cases brought by copyright owners.⁹² The bill is meant to propose an alternative to the costly federal litigation route that is currently available to creators seeking to resolve their copyright claims.⁹³ As previously mentioned, copyright owners choosing this route would be able to receive up to \$30,000 in damages if they are able to prove their claim.⁹⁴ Seeking an amount higher than this requires the claimant to use the regular federal litigation route to find relief.⁹⁵ Although the CASE Act would be beneficial to the copyright community, there are still barriers to relief presented by this solution that this Note's proposal hopes to address. For example, although attorneys are not required to present copyright owners' cases to the small claim courts, each party is allowed representation by either an attorney or student attorney.⁹⁶ If a copyright owner chooses to have representation in either of these ways, the cost of that representation is to be covered by each respective party.⁹⁷ Thus, if a copyright owner does not feel like she can present her own case and elects to be represented by an attorney, she is again faced with the high cost of attorney's fees.

The registration requirement remains a precondition to bringing a claim in the small claims court.⁹⁸ Furthermore, the proposed bill specifically states

91. CASE Act of 2017, H.R. 3945, 115th Cong. (2017).

92. See Zhang, *supra* note 9.

93. See *id.*

94. *Id.*

95. *Id.*

96. CASE Act § 1405(d).

97. *Id.* § 1403 (e)(1)(D).

98. *Id.* § 1404(a).

that registration will only be considered sufficient to bring suit if the Copyright Office register has issued a certificate granting registration or a denial.⁹⁹ Here, the issue of having to wait six months or more before being able to bring suit remains. Finally, the limited damage recovery amount of \$30,000¹⁰⁰ may be an issue for copyright owners suffering infringement of a higher value.

If the CASE Act were to pass, it would be relevant to this proposal because it too proposes an alternative to the current federal litigation method for copyright infringement suits.¹⁰¹ Another barrier presented by the bill is that both parties in the copyright claim are to agree to have their case heard in the small claims court in order to use this dispute resolution method.¹⁰²

III. NEED FOR REFORM

Reform is necessary to honor the purpose of copyright protection itself. The purpose of copyright protection is to promote creativity and the sharing of ideas.¹⁰³ Without such protection, creators would likely be more reluctant to share their work and ideas because of a concern about the risk of people infringing on their work and profiting off of it.¹⁰⁴ Social media platforms like Twitter allow creators who may not have other resources or connections to have their work seen by a wide audience that would otherwise not be accessible. If United States society chooses not to afford these creators with appropriate, practical protection, we risk suffering the consequences of creators not sharing their work, a general disregard for copyright law, and reduced incentive for creators to continue creating. This is problematic if we, as a society, hope to perpetuate a rich culture that we and other societies can learn from, produced by creators who are confident that there are mechanisms in place to protect their work from infringement. This confidence can, in turn, give creators the opportunity to make a living off the content they produce. If the amendment proposed in this Note seems drastic, it is because the recent changes in the way we consume and create culture have also been drastic.¹⁰⁵ It is unlikely that the people drafting Copyright Act in 1976 and those who have amended it since could have foreseen the presence and impact social media has today, as there is no mention of such platforms in the Copyright

99. *Id.* at 17–18.

100. *Id.* at 16–17.

101. For clarification, this Note is not proposing a separate small claims court. The solution presented in this Note only builds upon the small claims court proposal of the CASE Act, as it is relevant to the issue addressed here.

102. *See* CASE Act at 10.

103. *See U.S. Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFF. INFO. CTR, <https://www.copyright.gov/circs/circ1a.html> [<https://perma.cc/T5KN-SC84>] (last visited Nov. 21, 2017).

104. *See id.*

105. *See* Serena Kutchinsky, *Has Technology Changed Cultural Taste?*, THE GUARDIAN (Oct. 31, 2014), <https://www.theguardian.com/culture-professionals-network/2014/oct/31/-sp-technology-cultural-taste-youtube-vloggers-vice> [<https://perma.cc/F3TE-6LHG>].

Act.¹⁰⁶ Further, courts have not yet really dealt with the copyright issues that have arisen from widespread use of social media.¹⁰⁷

Another important consideration for why such a reform is now necessary is the recent increase in the character limit of tweets by Twitter.¹⁰⁸ Prior to the increase, tweets could only consist of 140 characters, whereas now, the new limit is 280 characters.¹⁰⁹ With the increased character limit, it is possible that we may be seeing more copyrightable works that need protection against infringement. According to Chapter 300 of the Copyright Compendium, copyright protection is generally not awarded to works considered to be “words and short phrases.”¹¹⁰ This compendium did not address tweets specifically at the time it was written.¹¹¹ Thus, as previously discussed, it is still unclear if a 140-character tweet, without a graphic or a link to a graphic or song or other work, would be protectable on its own. Now, with the increased character limit, tweets may be considered by courts to be more than just “words and short phrases.”¹¹² The character limit increase and its possible implications make now a good time to reevaluate how content creators are able to enforce copyright protections.

IV. SOLUTION

Congress should relax the registration requirement that acts as a potential barrier to creators who want to file legal claims against individuals who have infringed upon the works they have published on social media.

A. Prong I: Eliminate the Registration Requirement to Collect Statutory Damages and Costs and Attorney’s Fees in Instances Where the Publication of the Content on Twitter and/or Other Social Media Platforms Serves the Purpose the Copyright Registration Would Have Served.

One way to eliminate this barrier is to eliminate the registration requirement to collect statutory damages and costs and attorney’s fees in instances where the publication of the content on Twitter and/or other social media platforms serves the purpose the copyright registration would have served. The purpose of registering a copyright with the Copyright Office is

106. *See id.*

107. *See generally* U.S.C.: Title 17- Copyrights.

108. Angela Watercutter, *280 Characters Are Forcing Twitter Users to be Creative All Over Again (Kinda)*, WIRED (Nov. 9, 2017), <https://www.wired.com/story/twitter-280-characters-creativity/> [https://perma.cc/MTM3-VSTW].

109. *Id.*

110. *Copyright Compendium Chapter 300- Copyright Authorship: What Can Be Registered*, U.S. COPYRIGHT OFF., (2014).

111. *Id.*

112. *See id.* (hypothesizing the idea that because tweets can be longer now, they may not be considered “words and short phrases” that are not copyrightable).

largely so that the ownership of the copyright can be on public record.¹¹³ This way, when an author of an original work goes to file suit for infringement, the registration can be referred to in order to verify the “validity of the copyright.”¹¹⁴ However, it would be useful to know whether the social media platform allows retroactive editing because the potential for people tampering with the date of the post would make ascertaining the actual date of the post more difficult. When an someone posts a tweet on Twitter, the tweet shows who posted the actual content, as well as the date and time the content was posted.

An issue here may be that although the tweet itself does indicate who posted it, that indication may be the individual’s Twitter name or handle as opposed to her actual name. In these cases, however, this issue could be resolved by the copyright owner showing proof that the account is hers, given she has the proper Twitter account information such as the Twitter account login information and access to the email address linked to the account. Whether or not a user is Twitter verified could also help here. However, verification would not be required in this situation under this proposal, because although Twitter verification would help show the authenticity of the copyright owner, Twitter is also able to verify who owns an account through the account owner’s account information. Unlike actual registration, the tweet does not include the address of the original author, whether the content includes preexisting material, or whether the work has been published. However, the fact that the content was posted on Twitter for the public to view and access could serve as an indication that the content was published.¹¹⁵ Courts may not consider tweets from accounts on private settings¹¹⁶ to be published because the tweets are not actually available to the general public.¹¹⁷ This issue depends on whether a post on a private account would constitute distribution to the public under the Copyright Act,¹¹⁸ which is beyond the scope of this Note.

In cases where the individual’s account is on the public setting, the definition of publication¹¹⁹ would likely be met,¹²⁰ given that the tweet would be available to the general public. Therefore, with respect to the information formal registration provides, only the address of the copyright owner and whether the content includes preexisting material are not provided by the

113. See *Circular 1: Copyright Basics*, *supra* note 9 at 5.

114. *Id.*

115. See *Definitions*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq-definitions.html> [<https://perma.cc/T2MQ-QTSZ>] (last visited Jan. 27, 2018) (stating “[g]enerally, publication occurs on the date on which copies of the work are first made available to the public”).

116. Courts may not consider tweets from accounts on private settings, meaning only those who follow the account can view the user’s tweets, to be published because the tweets are not actually available to the general public. See *id.* (stating “[g]enerally, publication occurs on the date on which copies of the work are first made available to the public”).

117. See *id.*

118. See 17 U.S.C. § 106(3).

119. See *id.* § 101.

120. See *id.* § 101.

tweet. The address of the copyright owner does not seem particularly useful in determining whether copyright infringement exists. In any case, this is also information that could be easily obtained before filing the lawsuit if needed.

Trying to address whether the content posted includes preexisting material¹²¹—a question traditional registration proposes to answer—is more complicated. This information is likely relevant to whether the author's copyrighted work is original, which is a requirement for copyrighted works,¹²² and perhaps it is relevant in determining whether the work is a derivative work. Although this information is important, it is likely that this information would be addressed in the actual suit itself when the original owner proves her ownership of the original work. Therefore, although whether the content posted contains preexisting material is valuable information, the main purpose of registration with Copyright Office—creating a public record of who posted the work and when she posted it¹²³—can be achieved without this piece of information by looking at the information provided by the tweet or social media post.

This Note proposes that Congress should amend chapter four of the Copyright Act¹²⁴ so that a tweet or social media post can serve as evidence of registration in instances in which each of the following conditions are met:

(1) It is clear who (the author of the tweet) is claiming copyright. The name of the author

can be learned from author's Twitter handle or account information.

(2) It is clear when the tweet was published. This can be observed from the time and date stamp that is automatically denoted on the tweet once it is posted.

(3) There is proof that the content of the tweet has been published. Here, the posting of the tweet would serve as publication.

In using this method, the copyright would not be on record with the Copyright Office. This issue can be resolved by requiring the copyright owner to provide this information to the Copyright Office or file formal registration at some time during the proceeding. This way, the Copyright Office can have the information for its own records and feel comfortable knowing the unofficial registration—the information provided by the post or tweet—was sufficient for the purposes of filing a copyright infringement suit.

121. See *Circular 1: Copyright Basics*, *supra* note 9 at 5.

122. 17 U.S.C. § 102.

123. See *Circular 1: Copyright Basics*, *supra* note 9 at 5.

124. 17 U.S.C. § 412 (This section of the Copyright Act deals with registration.).

1. The Amendment in Prong I Should Include a Maximum Amount of Damages to Be Collected.

In order to encourage creators to protect their more lucrative works by registering early on, this proposed amendment should also include a cap on the amount of damages a creator could collect if the work has not been registered. The rationale here is that a stolen tweet accumulating an outrageously large sum of money may reflect that the original author of the tweet failed to assert her rights to the tweet; therefore, content creators should register in instances where a large amount is at stake. One way to set the maximum damage amount would be to choose a number between actual damages and statutory damages. The actual damages suffered will differ case by case depending on the actual profits made by the infringer. The damage amounts found in the Copyright Act and the CASE Act proposal indicate a wide, varying range of damages a copyright owner could recover.¹²⁵ Therefore, determining a damage amount creators would be satisfied with, for the purposes of the solution presented here and in cases where social media publication has replaced traditional registration is beyond the scope of this Note. Thus, this Note proposes forming a committee that could conduct the proper economic analysis required to determine what amount of damages a plaintiff would be entitled to if she were able to show actual damage.

In cases where a large amount of actual damages is likely to be accrued, it does not seem fair to say that the original copyright owner neglected to assert her rights. Because of the nature of Twitter and social media in general, most people probably do not see Frank Ocean wearing a t-shirt with your tweet on it as a foreseeable consequence of the tweet. It is difficult to know whether, if at all, your tweet will be popular until you actually tweet it and see the public's reaction. Therefore, rather than choosing an arbitrary number based on the damage amounts provided in the Copyright and CASE Acts,¹²⁶ it seems more appropriate for a committee of individuals to analyze the economics of potential actual damages that can accrued from the commercial misuse of tweets and other posts.

B. Prong II: The CASE Act Should Award Prevailing Plaintiffs Attorney's Fees in Cases Where the Defendant Prefers to Have the Case Heard in Court as Opposed to Having It Heard in the Small Claims Court Proposed by the Bill.

This Note proposes that in instances where a copyright infringement case qualifies to be heard in the small claims court but the defendant refuses to have it heard through this method and prefers to take the matter to trial to

125. See 17 U.S.C. § 504 (providing damage amounts awarded under Title 17); see also CASE Act at 14-17 (providing damage amounts that would be awarded under CASE Act if passed).

126. CASE Act at 14-17.

have the input of a jury, the plaintiff could retain the costs and attorney's fees should she prevail, despite not having copyright registration. In this type of case, if the tweet or social media post served the purpose of registration as discussed earlier in Section IV of this Note,¹²⁷ the plaintiff would be able to recuperate the cost of attorney's fees if she were to prevail in the federally-litigated suit. The reasoning behind this proposal is that if the defendant decides to make the case more difficult by requiring attorneys, it is not fair to make the plaintiff bear the burden of paying for an attorney, especially in instances where the defendant clearly and willfully infringed upon the plaintiff's original work. Some may argue that in cases where the defendant is facing \$30,000 in damages or more in a matter governed by federal law, she should have the right to be heard in federal court. However, this proposal and the small claims court do not take away the right of the defendant to do so; they only intend to provide protections to plaintiffs who would be effectively forced out of litigating the matter because of the costs of litigation.

On the other hand, the defendant would also be able to receive attorney's fees should she prevail. Allowing plaintiffs to collect attorney's fees is intended to make it easier for copyright owner plaintiffs to bring suits against infringers. At the same time, however, not awarding attorney's fees to defendants should they prevail may encourage frivolous lawsuits, and awarding attorney's fees to prevailing defendants could serve as a disincentive to bringing such suits.

1. Congress Should Adopt Prong I Without Any Contingencies and Adopt Prong II Contingent Upon the Passing of the CASE Act.

As both prongs presented address different aspects of the issue, this Note advocates for the adoption of both. The second prong, which is dependent on the CASE Act, will only be applicable if the proposed legislation passes, and it would not need to be adopted if the bill does not pass. Although it is impossible to say whether the bill will pass, it does currently have the support of Representatives Hakeem Jeffries, Ted Lieu, Lamar Smith, Judy Chu, Doug Collins, and Tom Marino,¹²⁸ as well as the support of several artist groups and trade associations such as the American Society of Media Photographers¹²⁹ and the Copyright Alliance.¹³⁰ Regardless of whether the CASE Act passes, this Note urges Congress to amend the Copyright Act to

127. *Supra* Section IV. Solution (A) Prong I: Eliminate the Registration Requirement to Collect Statutory Damages and Costs and Attorney's Fees in Instances Where the Publication of the Content on Twitter and/or Other Social Media Platforms Serves the Purpose the Copyright Registration Would Have Served.

128. *See* Zhang, *supra* note 9.

129. *See id.*

130. *See* Copyright Small Claims, COPYRIGHT ALLIANCE, <http://copyrightalliance.org/news-events/copyright-news-newsletters/copyright-small-claims/> [https://perma.cc/QGG7-X7DR] (last visited Jan. 27, 2018).

relax the registration requirement for the purpose of bringing suit so that a tweet or post could be sufficient for the registration precondition.

V. POLICY NEED

The policy need for the solution presented by this Note is largely grounded in the need to promote a society that values culture and the individuals who create it.

Some people may believe that prohibiting others from using an original author's tweet to create derivative works stifles creativity. However, this isn't a matter of preventing the creation of derivative works but a matter of ensuring the original author has given permission and will receive just compensation in the event derivative works are created.¹³¹ Requiring the permission of the original author before creating a derivative work is not something new; it is something that has always been required of those who want to create derivative works based off an original copyrighted work.¹³² Creating derivative works requires obtaining a license to use the original work.¹³³ Therefore, adopting this proposal would not stifle creativity, and instead it would ensure creators of tweets and other social media posts receive protection already afforded to original authors by the Copyright Act.

In the same vein, some may think adopting the proposal would too strictly regulate a social media platform. However, this measure would not regulate Twitter itself, and instead it would provide an option for authors of original works to protect their work should they want or need this protection. Additionally, it seems unreasonable to make a creator to suffer thousands of dollars of harm for the sake of trying to limit regulation while allowing other users to profit off work that is not theirs.

Finally, some have made the argument that using an original author's content in this way constitutes fair use.¹³⁴ However, it is difficult to make a blanket statement saying that all instances of this type of use would constitute fair use. Determining if something is fair use requires assessing each infringed work case by case using the four factors of fair use, which look at: "the purpose and character of your use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and the effect of the use upon the potential market."¹³⁵ An analysis of each of these factors would have to be done in each instance of infringement to determine if such use was fair use.¹³⁶ However, even without knowing the specific situation, it seems like

131. See 17 U.S.C. § 102.

132. See *id.*

133. See *id.*

134. See generally Adam S. Nelson, *Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697 (2012).

135. 17 U.S.C. § 107; see *Measuring Fair Use: The Four Factors*, COPYRIGHT & FAIR USE CTR., <https://fairuse.stanford.edu/overview/fair-use/four-factors/> [<https://perma.cc/97EV-J5GE>] (last visited Jan. 27, 2018).

136. *Id.*

the third factor, “the amount and substantiality of the portion used in relation the copyrighted work as a whole,”¹³⁷ and the fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,”¹³⁸ would cut against fair use for the examples discussed in this Note. This is relevant because the solution proposed by this Note is limited to commercial uses. In looking at the third factor, the entire amount of the tweet is usually taken. A significant amount of the original work taken cuts against fair use, while taking smaller portions tends to suggest fair use.¹³⁹ Considering the fourth factor, if an infringer were to take an entire tweet and put it on a t-shirt or tote, such a product would likely displace any subsequent similar product made by the original author. Displacing the original author’s place in the market also cuts against fair use.¹⁴⁰ However, again, not much else can be said without individually assessing each case of infringement for fair use.

VI. CONCLUSION

Due to the impracticality and inapplicability of the current mechanisms in place to protect individuals against copyright infringement, the registration requirement as a prerequisite to collecting statutory damages and costs and attorney’s fees should be restructured. The registration requirement should be eliminated in cases where the purpose of registration is served by the publication of the tweet or social media post, and, should the proposed CASE Act legislation pass, when the defendant refuses to have the case assessed in a copyright small claims court.

137. *More Information on Fair Use*, U.S. COPYRIGHT OFF.: COPYRIGHT.GOV <https://www.copyright.gov/fair-use/more-info.html> [<https://perma.cc/NA2G-2TP6>] (last visited Nov. 11, 2018).

138. *Id.*

139. *See id.*

140. *Id.*