COPYRIGHTABILITY OF A TWEET AND THE FAIR USE DEFENSE WHEN THE TWEET IS COPIED FOR COMMERCIAL GAIN

By
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I. INTRODUCTION

On July 28, 2017, Frank Ocean, a popular avant-garde R&B artist with a cult following performed an hour long headlining set at Panorama Music Festival in New York City. Frank Ocean rarely performs in the United States and the Panorama performance was long awaited by his devoted fans.1 During his set, Frank Ocean wore a unique, attention grabbing statement t-shirt which read “WHY BE RACIST, SEXIST, HOMOPHOBIC OR TRANSPHOBIC WHEN YOU CAN JUST BE QUIET?”2

The shirt was purchased from an online boutique clothing store, Green Box Shop, owned and operated by eighteen year old Kayla Robinson of Florida.3 Though Green Box Shop screen printed the phrase on apparel for profit, Ms. Robinson was not the original author of the quote. The phrase was first made public in August of 2015 when Brandon Male of New York, also eighteen, posted a tweet with the exact quote.4 Green Box Shop subsequently copied the phrase and printed it on t-shirts like the one worn by Frank Ocean during his set at Panorama.5 After Frank Ocean wore the shirt with the phrase originating from Mr. Male’s tweet, Frank Ocean fans flocked to Green Box Shop’s online store for the sole purpose of purchasing the exact shirt. Green Box Shop received over

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1 Daniel Kreps, Frank Ocean Performs First Concert in Three Years in Denmark, Rolling Stone, (June 9, 2017), http://www.rollingstone.com/music/news/frank-ocean-performs-first-concert-in-three-years-in-denmark-w487159. (Highlighting that Frank Ocean only performed twice in the United States in 2017. His first performance occurred in Los Angeles a week prior to the Panorama Festival in New York. Prior the Los Angeles show, Frank Ocean had not performed in the United States since June of 2014.)


3 Id.


5,500 new orders for the shirt that weekend alone, when an average month would only bring a few hundred orders.⁶ Although the phrase originated from Mr. Male, he would not be the economic beneficiary of its popularization through Frank Ocean’s very public endorsement of the quote on the shirt sold through Green Box Shop. Though this matter involves a number intellectual property issues, this comment focuses on the copyright implications of the situation. Because U.S. Copyright Law is born of experience and not logic, no clear answers to the questions presented currently exist.

This comment will first discuss copyright law in the United States and consider the copyrightability of content created and first made public through social media. Next, this comment will evaluate the potential copyrights of the parties involved in the Green Box Shop situation, potential claims or defenses of the parties, and the likelihood of success of the claims or defenses using Second Circuit precedent. This comment concludes by arguing that in light of the utilitarian purpose of copyright law in the United States, a court would likely find that Green Box Shop’s copying of Mr. Male’s tweet is fair use.

II. COPYRIGHT LAW IN THE SOCIAL MEDIA AGE

Federal Copyright Law arises from Article I Section 8 Clause 8 of the United States Constitution⁷ and is utilitarian in nature, as its purpose is to promote the arts in order to enrich society as a whole.⁸ As Justice Stewart once articulated, “[t]he immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the public good.”⁹ For a work to be copyrightable, it must be an “original work of authorship . . . fixed in any tangible medium of expression now known or later developed.”¹⁰


⁷ U.S. Const. art. I § 8 cl. 8 (“The Congress shall have Power…To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

⁸ U.S. Const. art. I § 8 cl. 8.

⁹ Twentieth Century Music Corp. v. Aiken 422 U.S. 151, 156 (1975).

¹⁰ 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”)
An owner of a valid copyright, depending on the expression, will have the exclusive right to reproduce, adapt, distribute, perform publicly, and display publicly the copyrighted work. Additionally, copyright protection is an “opt-out” system in which the owner of the copyright retains all rights unless he or she has licensed out or otherwise sold or assigned the rights to another party.

Infringement of a copyrighted work occurs when a third party copies the work without authorization. However, not all unauthorized copying will amount to an infringement. An otherwise prima facie case of infringement may be excused through the judicially created, now congressionally codified doctrine of fair use. The purpose of the fair use doctrine runs along the same vein as the purpose of copyright, to promote public access and use of the arts so that not every act of copying will justify infringement.

The first instance of the fair use doctrine appears in Folsom v. Marsh. Justice Story, in a succinct yet dynamic opinion, established the foundations for the modern factors of the fair use doctrine used today:

[W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

Section 107 of the Copyright Act of 1976 codified the common law doctrine of fair use. The statute provides that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright” and requires courts to analyze the otherwise infringing use through four factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational

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16 Id. at 348.


18 Id.
purposes; (2) the nature of the copyrighted work; (3) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{19}

In Campbell v. Acuff-Rose, Justice O’Connor eruditely articulated that the fair use exception should “not be simplified with bright-line rules, for the statute . . . calls for case-by-case analysis . . . [n]or may the four statutory factors be treated in isolation, one from another. All are to be explored and the results weighed together in light of the purposes of copyright.”\textsuperscript{20} Therefore, courts are required to consider all factors with no particular weight to any one factor when evaluating whether an infringement is excusable as fair use.

The relevant copyright issue in today’s technologically saturated culture of oversharing is whether users of social media who publish their original works through social media are entitled to copyright protection of the works and, assuming copyrightability, whether third party prima facie infringements are defensible through the fair use doctrine.

A. Copyrightability of Social Media Posts

The prevalence and popularity of social media platforms has grown exponentially in the past fifteen years. These platforms grant any individual with internet access the means to publicly share original thoughts, photos, stories, or any combination thereof. Artists and musicians utilize social media platforms as necessary tools to promote their work with the expectation that their work will not be copied. Often times, however, the material in a post is copied by a third party and shared without attributing credit to the original poster or creator.

Should an original work creatively articulated and expressed online through social media be the subject of copyright protection? Copyright law is intended to adapt to the ever changing technological, societal, and cultural advancements. Courts have yet to come to a consensus on the extent of copyright protection of social media posts.

1. Twitter’s Terms of Service and Copyright Policy.

An appropriate place to start when considering these questions is Twitter’s own terms of service and copyright policy. In its terms of service, Twitter alludes to the notion that the subject matter posted in a tweet may be copyrightable:

You retain your rights to any Content you submit, post or display on or through the Services. What’s yours is yours — you own your Content (and your photos and videos are part of the Content). By

\textsuperscript{19} 17 U.S.C. § 107 (2016).

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

This statement indicates that the material in a tweet may be subject to copyright protection, however, the terms of service further states that an individual’s use of the platform grants Twitter the right to “use, copy, reproduce, process, adapt, modify, public, transmit, display, and distribute” the content.

Additionally, Twitter allows any member of the public to submit a complaint regarding copyright infringement occurring on its site. Twitter expressly lists subject matter commonly protected by copyright and therefore may be infringed through unauthorized use. The type of content Twitter is likely referring to in this section are “pre-protected tweets,” or tweets that contain material which is already the subject of copyright protection prior to the sharing on Twitter.

It is unclear, however, whether short phrases like the one tweeted by Mr. Male would be subject to copyright protection. The Terms of Service and Twitter’s Copyright Policy leave open the question of whether short phrases first published on the site may be copyrightable subject matter. As Twitter’s Copyright Policy suggests, the next place to look when evaluating the copyrightability of a particular post would be an attorney, the statute itself, and case law.

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21 “Twitter will respond to reports of alleged copyright infringement, such as allegations concerning the unauthorized use of a copyrighted image as a profile or header photo, allegations concerning the unauthorized use of a copyrighted video or image uploaded through our media hosting services, or Tweets containing links to allegedly infringing materials. Note that not all unauthorized uses of copyrighted materials are infringements (see our fair use article for more information).” Terms of Service, Twitter, https://twitter.com/en/tos (last visited December 19, 2017).

22 Id.


25 See Rules and Policies, Copyright, Twitter https://help.twitter.com/en/rules-and-policies/copyright-policy (last accessed December 19, 2017) “If you are unsure whether you hold rights to a particular work, please consult an attorney or another adviser as Twitter cannot provide legal advice. There are plenty of resources to learn more about copyright law including http://copyright.gov, https://lumendatabase.org/, and http://www.eff.org/issues/bloggers/legal/liability/IP, to name a few.”
2. Originality: Size Matters

In order to be copyrightable, a work must be an original work of authorship and be fixed in a tangible medium. Tweets posted online are arguably “fixed” under the meaning of the statute. The second constitutional requirement of a valid copyright – originality – must be determined “on a tweet-by-tweet basis.” The Supreme Court has interpreted that the constitutional requirement of originality only necessitates a minimal amount of originality, holding that a “creative spark” will often suffice.

The copyrightability of an original short phrase published in a tweet is most vulnerable to the United States Copyright Office’s policy of denying copyright protection to short phrases. The Copyright Office states that words and short phrases, such as names, titles, and slogans, are uncopyrightable because they contain an insufficient amount of authorship. The Office will not register individual words or brief combinations of words, even if the word or short phrase is novel, distinctive, or lends itself to a play on words.

Nevertheless, Professor Melvin Nimmer contends that the Copyright Office’s policy is limited to phrases of very few words and phrases that are “common.” Professor Nimmer purports that the copyrightability of a short phrase rests on “the reciprocal relationship between creativity and independent effort: the smaller the effort (e.g., two words) the greater the degree of creativity in order to claim copyright protection.”

Following Professor Nimmer’s reasoning, and despite the Copyright Office’s policy, some courts have held that short phrases, in some instances, may be subject to

26 17 USC §101.


29 Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (“[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be.”).

30 37 C.F.R. § 202.1 (Lexis Advance through the December 13, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review. See Publisher’s Note under affected rules. Title 3 is current through December 4, 2017).


32 1 Nimmer on Copyright § 2.01 (2017)

33 1 Nimmer on Copyright § 2.01 (2017) (internal citations omitted).
copyright protection. Although the Ninth Circuit in Narell v. Freemen reiterated the fact that “[o]rdinary phrases are not entitled to copyright protection,” the court conceded that “the direct copying of all of [a phrase of 185 characters], or even of the first two lines, might constitute infringement if the original held a valid copyright registration.”

Further support for the copyrightability of short phrases like those composed in a tweet can be found in the Eighth Circuit’s holding in Applied Innovations, Inc. v Regents of the University of Minnesota. The court held that “short, simple, declarative sentences” may be copyrighted when the phrases are sufficiently original and when they “are not merely fragmentary words and phrases.” Additionally, lower courts have also held that short phrases such as epigrams and jokes are subject to valid copyright protection as well.

Most analogous to the situation with Green Box Shop is the Foxworthy v. Custom Tees case. Famous comedian Jeff Foxworthy authored and owned the copyrights to a series of jokes known as the “you might be a redneck if...” series, many of which were shorter than 140 characters. Foxworthy sued Custom Tees for copyright infringement after Custom Tees had copied the jokes and printed them on t-shirts for commercial sale. The court held the copyrights valid, despite the brevity of many of the jokes, by finding that the jokes were authored using at least the minimum amount of intellectual labor as required by Feist.

Through these opinions, one can assert that the common law supports the notion that as long as a tweet meets the requisite requirements of fixation and originality, the tweet may be subject to copyright registration. Therefore, the fact that a tweet is limited

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34 Narell v. Freeman, 872 F.2d 907, 911 (9th Cir. 1989).
35 Id. (citing Alberto-Culver Co. v. Andrea Dumon, Inc., 466 F.2d 705, 711 (7th Cir. 1972)).
36 Narell v. Freeman, 872 F.2d 907, 912 (9th Cir. 1989).
37 See Applied Innovations, Inc. v. Regents of Univ. of Minn., 876 F.2d 626, 626 (8th Cir. 1989).
38 Applied Innovations, Inc. v. Regents of Univ. of Minn., 876 F.2d 626, 635 (8th Cir. 1989).
41 Id.
42 Id at 1219. The court quotes Mr. Foxworthy’s testimony regarding the intent and creative process behind creating jokes, “the whole trick is to take the smallest amount of words and put them in proper order . . . I mean, it’s to get the maximum laugh from, you know, the shortest amount of material.”
to 140 characters or less (until recently)\textsuperscript{43} is not likely to be an absolute bar to copyright protection.

B. Fair Use in Relevant Case Law

Although no court has ever faced the specific question of whether an original tweet is subject to copyright protection, some courts have considered whether the unauthorized copying of a “pre-protected” social media post would be excused through a finding of fair use.\textsuperscript{44} A case analysis of the Second Circuit’s holdings regarding fair use is particularly relevant to the potential litigation arising from the Mr. Male and Green Box Shop situation.

1. Cariou v Prince

Recently, the Second Circuit considered copyright infringement claims arising from appropriation art and analyzed whether the appropriation may be exempted from liability though fair use.\textsuperscript{45} Richard Prince, the subject of many copyright lawsuits, is notorious in the industry for “pushing the legal limits of artistic appropriation for decades.”\textsuperscript{46} By admission on his own website, Mr. Prince has been appropriating the works of others and gaining commercially from said appropriations since 1977.\textsuperscript{47}

In one famous case arising out of the Second Circuit, Mr. Prince copied photographs taken by Patrick Cariou which were first published in Mr. Cariou’s book Yes Rasta.\textsuperscript{48} The photos depicted Mr. Cariou’s personal experience of living in Jamaica among the Rastafarians for six years.\textsuperscript{49} Mr. Prince copied the photographs and incorporated them into his own public exhibitions\textsuperscript{50} and garnered more than $10 million


\textsuperscript{44} See discussion supra Part II.A.2.

\textsuperscript{45} See Cariou v. Prince, 714 F.3d 694, 694 (2d Cir. 2013).

\textsuperscript{46} Andrew R. Chow, Copyright Case Over Richard Prince Instagram Show to Go Forward, THE NEW YORK TIMES, (July 20, 2017), https://www.nytimes.com/2017/07/20/arts/design/richard-prince-instagram-copyright-lawsuit.html?_r=0.


\textsuperscript{48} Cariou v. Prince, 714 F.3d 694, 694 (2d Cir. 2013).

\textsuperscript{49} Id.

\textsuperscript{50} Id.
In a controversial decision, the Second Circuit reversed the district court and granted partial summary judgment for Mr. Prince on the basis of fair use as a matter of law. In the decision, the Second Circuit lays out the method for how the four fair use factors should be applied in a fair use analysis of appropriation art. More specifically, the Court demonstrates that the determination of “whether or not a use is transformative will have a significant impact on the remainder of the fair use inquiry.”

Regarding the first factor, the purpose and the character of the use, the majority adopted an “objective viewer” test to determine whether a work is transformative. The court also noted that the first factor requires a consideration of whether the infringing work is commercial or non-profit in nature. Although the court recognized that the purpose of the commercial/nonprofit inquiry is to address the unfairness of potential lost profits of the appropriated art, it reasoned that this factor must be applied with caution because the more transformative the new work, the less importance the other factors have in finding of fair use.

With respect to the second factor, “the nature of the copyrighted work,” the court reasoned that an in depth analysis was of “limited usefulness” because Mr. Cariou’s works were creative and published, but Mr. Prince’s use was undoubtedly transformative. However, the court noted that its previous decision in Blanch (Randy Kennedy, Court Rules in Artist’s Favor, THE NEW YORK TIMES, (Apr. 25, 2013), http://www.nytimes.com/2013/04/26/arts/design/appeals-court-ruling-favors-richard-prince-in-copyright-case.html).


See Cariou v. Prince, 714 F.3d 694, 694 (2d Cir. 2013).

Id.

Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013) (“What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”)

Cariou, 714 F.3d at 708 (citing Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006)).

Cariou, 714 F.3d at 708 (“The commercial dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work.”) ( citations omitted) (internal quotation marks omitted).


Cariou, 714 F.3d at 710.
established that a greater leeway for a finding of fair use is allowed when the work is more informal or factual, rather than expressive or creative.61

The court considered the third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”62 and reasoned that this consideration is also dependent upon the degree of transformativeness of the copy.63 The court held that even when an entire work is copied, the third factor requires a consideration of “whether the quantity and value of the materials used are reasonable in relation to the purpose of the copying.”64

The court then considered the fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work”65 and held that even though Mr. Prince’s use garnered commercial success, the fourth factor weighed in favor of Mr. Prince.66 In its reasoning, the majority considered whether Mr. Prince’s use usurped the direct market or derivative markets of Mr. Cariou’s work.67 The court considered evidence that another art gallery decided not to work with Mr. Cariou once the gallery owner learned that Mr. Cariou’s photos from Yes Rasta were already displayed through Prince’s appropriation art.68 The court reasoned that the original target audience of Mr. Cariou’s work was different compared to that of Mr. Prince’s and that Mr. Prince’s use was so different that it was unlikely that Mr. Cariou would have ever entered that market.69 The court also considered whether evidence in the record indicated that Mr. Cariou had ever marketed or intended to market or create derivative markets of his work in the future.70 Absent this evidence, the court held that the fourth factor weighed in favor of Mr. Prince.71

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61 Cariou, 714 F.3d at 709-10 (citing Blanch, 467 F.3d at 256).
63 Cariou, 714 F.3d at 710.
64 Id. (quoting Blanch, 467 F.3d at 257) (emphasis added).
66 Cariou, 714 F.3d at 710.
67 Cariou, 714 F.3d at 708-9.
68 Id.
69 Cariou, 714 F.3d at 708-9 (“[O]ur court has concluded that an accused infringer has usurped the market for copyrighted works, including the derivative market, where the infringers target audience and the nature of the infringing content is the same as the original.”).
70 Cariou, 714 F.3d at 709.
71 Id.
Although the Second Circuit held for Mr. Prince in light of the fair use analysis, the court conceded that “[a] secondary work may modify the original without being transformative. For instance, a derivative work that merely presents the same material but in a new form . . . is not transformative.” 72 This dicta seems inconsistent with the holding, and may help Mr. Male’s potential claim of infringement when evaluating the Green Box Shop matter.

2. Graham v. Prince

After Mr. Prince’s apparent victory in the Second Circuit in Cariou, he once again appropriated the original works of others. This time, Mr. Prince created a new installation in 2015 titled New Portraits that featured photos taken from Instagram posts, all without consent of the owners of the material in the posts. 73 Mr. Prince used screen shots of the Instagram posts, changed some of the comments and captions, replicated the posts onto poster boards, displayed the new creations in art exhibitions, and subsequently sold the new creations for $90,000. 74 Upon Mr. Prince’s unveiling of New Portraits, he was hit with multiple copyright infringement suits brought by the original owners of the photos in the Instagram posts. 75

One particularly relevant case arising from the New Portraits exhibition was brought by Donald Graham, a photographer whose photograph (which coincidentally features a Rastafarian man) was posted to Instagram by a third party. 76 Mr. Prince subsequently copied the Instagram post featuring Mr. Graham’s copyrighted photograph and featured the photo in the New Portraits exhibition. 77 The Defendants, including Mr. Prince, moved for dismissal and, in the alternative, summary judgment arguing that Mr. Prince’s appropriation of Mr. Graham’s photo is transformative and constitutes fair use,

72 Cariou, 714 F.3d at 708 (citations omitted) (internal quotations omitted).

73 Anna Shaw, Other People’s Instagram Posts – Yours For $90,000, THE TELEGRAPH, (June 15, 2015, 3:13 PM) http://www.telegraph.co.uk/culture/photography/11675287/Other-peoples-Instagram-posts-yours-for-90000.html.

74 Id.

75 Beatrice Kelly, Note, ARTICLE: The (Social) Media is the Message: Theories of Liability for New Media Artists, 40 COLUM. J. L. & ARTS 503, 505 (2017) (“Four lawsuits have been filed against Prince as a result of New Portraits: photographer Donald Graham filed a complaint at the end of 2015; photographer Dennis Morris filed suit in June 2016, followed by makeup artist Ashley Salazar two weeks later; and photographer Eric McNatt in November 2016”).


77 Id.
citing the Second Circuit’s decision in the previous case involving Mr. Prince, Cariou v. Prince.\textsuperscript{78}

On July 18, 2017 the District Court rejected both the Defendant’s motion to dismiss and motion for summary judgment.\textsuperscript{79} The court held that a motion to dismiss and motion for summary judgment based on the affirmative defense of fair use is inappropriate in this case because discovery will be required in order to employ a proper fair use analysis.\textsuperscript{80} The District court cited Wright v. Warner Brothers which advised that “the fact driven nature of the fair use determination suggests that a district court should be cautious in granting [summary judgment] in this area.”\textsuperscript{81}

In its decision, the District Court departs from the decision in Cariou where partial summary judgment was granted on the basis of fair use and reasons that “the Second Circuit’s precedents do not support a finding that [Prince’s Untitled] is transformative as a matter of law.”\textsuperscript{82} The Graham decision further discusses the important limitation of fair use on a copyright holder’s monopoly of rights and highlights the Second Circuit’s established policy of weighing each factor in light of the extent to which the use is transformative.\textsuperscript{83}

\textsuperscript{78} Id. at *11.


\textsuperscript{80} Id. at *3.

\textsuperscript{81} Id. at *15 (citing Wright v. Warner Books, Inc., 953 F.2d 731, 735 (2d Cir. 1991)).

\textsuperscript{82} Id. at *12

\textsuperscript{83} Id.
C. What If: Male v. Green Box Shop

Brandon Male’s tweet was originally posted at 9:43 a.m. on August 8, 2015 and reads “why be racist, sexist, homophobic, or transphobic when you could be QUIET.”\(^84\) Assuming Mr. Male authored the phrase himself, the tweet is sufficiently original and fixed for purposes of this analysis. When tweeting the phrase, Mr. Male knew that there was a possibility that the phrase would be re-tweeted by other Twitter users. In fact, the tweet was re-tweeted tens of thousands of times. It is important to note, however, that each retweet attributes the phrase to Mr. Male’s twitter account, essentially giving him credit each time the tweet is shared. After Mr. Male’s tweet went “viral,” the phrase was subsequently copied by Kayla Robinson for commercial purposes when she printed the phrase on t-shirts and sold the shirts through her online boutique, Green Box Shop.

In the best case scenario, Mr. Male would have applied for federal trademark registration of the phrase, as long as he intended to market the phrase commercially.\(^85\) Because trademark protection is based on first use, Mr. Male would have had to have commenced sale of clothing branded under the phrase prior to the date Green Box Shop began selling t-shirts with the phrase. However, because Green Box Shop beat Mr. Male to first use, Mr. Male is unlikely to have a successful claim under federal trademark and unfair competition law.\(^86\)

Mr. Male’s safest bet at this point would be to file a claim of copyright infringement. In order to commence litigation in the matter, Mr. Male would need to first obtain a valid copyright registration of the phrase\(^87\) and would likely file for copyright registration as §102(1) an original literary work.\(^88\) This registration would grant him the exclusive right to reproduce, adapt, distribute, perform, and display his work\(^89\) and any unauthorized use under these categories would constitute an infringement of his right. However, as previously discussed, the copyrightability of the phrase in the tweet is questionable.

1. Copyrightability of Mr. Male’s Tweet

Assuming Mr. Male is granted a copyright registration and litigation ensues, Green Box Shop would likely raise questions regarding the copyrightability of the phrase. The phrase “why be racist, sexist, homophobic or transphobic when you can just be

\(^84\) Brandon Male (@avogaydro), Twitter (Aug. 8, 2015, 9:43 AM), https://twitter.com/avogaydro/status/630056636523094016;

\(^85\) 15 U.S.C. §1051 et seq.

\(^86\) Id.


\(^88\) 17 U.S.C. § 102(1)

quiet” is undeniably short, may lack originality, and could arguably be perceived as an idea.\textsuperscript{90} With respect to the length of the phrase, courts have granted copyright protection to short phrases despite the Copyright Office’s express policy of denying copyright protection to such works.\textsuperscript{91}

Green Box Shop would likely argue that the phrase did not meet the requisite “modicum of intellectual labor”\textsuperscript{92} because the inherent impulsive nature of Twitter is to publish short phrases on a whim. Further, the phrase appears to be an idea or opinion and ideas are not copyrightable apart from the exact, unique expression of the author.\textsuperscript{93} Assuming that the court finds the copyright valid, Green Box Shop will defend its copying as fair use under §107.\textsuperscript{94}

2. Green Box Shop Fair Use Defense

The Second Circuit has stated that the “ultimate test of fair use . . . is whether the copyright law’s goal of ‘promoting the progress of science and useful arts’ . . . would be better served by allowing the use than by preventing it.”\textsuperscript{95} The Second Circuit in the Cariou and Graham decisions weighed each fair use factor in light of the extent of the transformative nature of the infringing work. It is important to note the significant difference between the Green Box Shop situation and the Cariou and Graham cases, however, in that Cariou and Graham involved the infringement of pictorial works while the Green Box Shop situation is based on a literary work. In light of the Second Circuit’s heavy consideration of the extent of transformativeness of the copying, it is unclear whether an entire taking of a phrase and printing it on a t-shirt would constitute transformativeness.

\hspace{1cm} a. Factor One: Purpose and Character of the Use

When considering the first factor, a court will evaluate the extent to which the use is transformative and whether the use is commercial in nature. The transformative inquiry

\textsuperscript{90} 17 U.S.C. § 102(b) (2016) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

\textsuperscript{91} See infra section II.A.2.


\textsuperscript{93} 17 U.S.C. § 102(b) (2016) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

\textsuperscript{94} 17 U.S.C. § 107.

\textsuperscript{95} Castle Rock Entm’t, Inc. v. Carol Publ’g Grp, Inc. 150 F.3d 132, 141 (2d Cir. 1998).
is evaluated in light of whether the new work employs “new information, new aesthetics, [or] new insights and understandings”\textsuperscript{96} and for the use to be fair, the work “must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”\textsuperscript{97} Additionally, the Second Circuit has adopted a “reasonable observer” standard which examines how an individual would perceive the works when placed side by side.\textsuperscript{98}

Ms. Robinson copied the phrase in its entirety and printed it on t-shirts for commercial purposes through her online boutique, Green Box Shop. Any reasonable observer can attest that the phrase itself is not transformed at all. Her copying of the phrase “exploit[s] the creative virtues of the original work.”\textsuperscript{99} The transformative aspect of the use is arguably the taking of the phrase from an online social media platform and placing it on clothing for socially expressive and commercial purposes. Regardless, the message and the phrase is exactly the same and the Second Circuit has reasoned that “a secondary work may modify the original without being transformative”\textsuperscript{100} and that “a derivative work that merely presents the same material but in a new form . . . is not transformative.”\textsuperscript{101}

The first factor also requires an inquiry into whether the new work is commercial or nonprofit in nature, and “the greater the private economic rewards reaped by the secondary users, the more likely the first factor will favor the copyright holder.”\textsuperscript{102} However, less weight is placed on the commercial nature of the second use when the use is found to be significantly transformative.\textsuperscript{103} Green Box Shop’s use is unquestionably commercial in nature, and the extent to which the commercial nature of the work affected Mr. Male’s potential market is discussed at length under the fourth factor.

Ms. Robinson did not transform Mr. Male’s quote other than placing it on a t-shirt, and the use is clearly commercial in nature. Without considering the extent of copyright protection for Mr. Male’s phrase, the first factor likely weighs against a finding of fair use and favors the copyright holder, Mr. Male.

\textsuperscript{96} Castle Rock, 150 F.3d at 142.
\textsuperscript{98} Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013) (“What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”).
\textsuperscript{99} Blanch, 467 F.3d at 252.
\textsuperscript{100} Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013).
\textsuperscript{101} Id.
\textsuperscript{102} Blanch, 467 F.3d at 253.
b. Factor Two: The Nature of the Copyrighted Work

An evaluation of the nature of the copyrighted work “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequences that fair use is more difficult to establish when the former works are copied.”104 Additionally, the inquiry considers whether the work is expressive or creative and “greater leeway [for a finding of fair use is] allowed . . . when the work is factual or informal.”105

By its very nature, Twitter is an informal social media platform designed to allow its users to share their thoughts and ideas with the click of a mouse or a tap on a smartphone. The tweet shared by Mr. Male was likely a quick thought shared without the expectation that the tweet would go viral. Additionally, Mr. Male’s tweet is arguably an idea or opinion being factual in nature and therefore granted less copyright protection. Facts themselves are not copyrightable, but may be copyrighted in the exact manner they are presented.106

As previously discussed, short phrases may be the subject of copyright protection. However, the shorter the phrase, the more originality is required in order to warrant copyright protection. Unlike Mr. Male’s tweet, the short phrases that have been the subject to copyright protection have arguably been the product of artistic intent, creativity, and effort.107 Copyrighted haiku poems written by poets and jokes written by comedians require a particular creative process and intent.108 This precise creative process was likely absent when Mr. Male published the tweet. This analysis reveals that the second factor will likely weigh against Mr. Male and in favor of Ms. Robinson.

c. Factor Three: The Amount Copied

The third factor analyzes “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”109 The Second Circuit views this inquiry in light of “the proportion of the original work used, and not how much of the secondary work compromises the original.”110 Additionally, the Second Circuit predominantly holds that “verbatim copying of an entire copyrighted work militates against a finding of fair

105 Blanch, 467 F.3d at 256.
107 See infra section II.C.2.d.
108 See infra section II.C.2.d.
110 Cariou, 714 F.3d at 710.
use.” Nevertheless, a finding of fair use of a work copying an entire original may be appropriate when the second work transforms the original. Whether the entirety of the work is incorporated into the second work and how much the work is transformed if taken in its entirety greatly affects how a court will conclude on the fair use analysis.

There is no question that Ms. Robinson took the entirety of Mr. Male’s work and printed it on t-shirts. Ms. Robinson’s purpose of taking the phrase was to capitalize on the popularity of the idea as specifically expressed in Mr. Male’s tweet. Ms. Robinson’s use does not convey any “new expression, meaning, or message.”

Mr. Male’s counsel will likely argue that Ms. Robinson could have created a new phrase to place on her t-shirts that conveyed the same message through a number of different expressive words without infringing on Mr. Male’s phrase. Mr. Male’s tweet had been seen by thousands of people and garnered a great deal of attention through its particular phrasing. The idea behind the tweet is undoubtedly popular to a particular set of individuals. However, ideas, opinions, and hypothesis are not the subject of copyright protection, and the copyright only extends to the precise way the message is conveyed. Ms. Robinson took the entire phrase to convey the same message when she could have created her own new phrase and conveyed a similarly powerful statement. In light of these considerations, it is likely that this factor of the fair use analysis will weigh against Ms. Robinson.

d. Factor Four: The Effect on the Potential Market

The fourth factor requires a court to analyze “the effect of the use upon the potential market for or value of the copyrighted work.” As established in Cariou and Graham, the Second Circuit considers this factor by (1) evaluating the extent of the transformativeness of the second work, (2) whether both works appeal to the same target audience, and (3) whether the owner of the original copyrighted work licensed the work for similar purposes and whether the original artist would have entered into the market of the second work. The court will consider whether Ms. Robinson’s copying of the phrase usurped the primary or derivative market of Mr. Male’s phrase.


113 Campbell, 510 U.S. at 579.

114 Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) (”[T]hers may copy the underlying facts from the publication, but not the precise words to present them.”).

As previously established, Ms. Robinson’s exact appropriation Mr. Male’s phrase is arguably not transformative, regardless of the fact that she printed the phrase on t-shirts, as the court in Foxworthy did not indicate that the copying of jokes onto t-shirts for sale was transformative.¹¹⁶ A court would likely view the remaining subfactors under the fourth fair use factor in light of the fact that the entire phrase was copied verbatim.

Next, a court would consider the target audience of each work. The t-shirts produced and sold by Green Box Shop arguably appeal to the same audience or consumer as Mr. Male’s original online post. Those who re-tweeted the post are individuals who likely agree with the sentiment of the phrase and want to express that same sentiment with their friends and followers. The wearing of a t-shirt with the exact, unaltered phrase prominently displayed on the front debatably serves the same purpose. The only distinction is that one is shared online and the other is shared in person. This subfactor would likely weigh against Ms. Robinson.

The next subfactor the court will consider is whether Mr. Male licensed his work to be used by others for similar purposes and whether evidence exists that he would have entered into the same market as Green Box Shop. It is unclear whether Mr. Male planned on capitalizing on the popularity of the tweet and Ms. Robinson would likely argue that Mr. Male’s claim only arose once he realized the marketability of the phrase. Perhaps Mr. Male had no intention for the phrase to be copyrighted until Green Box Shop benefited monetarily from the phrase’s popularity. Additionally, unlike the Foxworthy case, Mr. Male is not a famous comedian and the artistic inspiration behind the tweet is lacking. A court will likely consider this fact when evaluating the market effect of Ms. Robinson’s use.

Mr. Male’s potential customer and Green Box Shop’s actual customer are arguably the same person, unlike the situation in Cariou. Nevertheless, there is no clear evidence whether Mr. Male actively marketed the phrase. A court would likely find this factor weighs against Mr. Male because of the apparent lack of marketing evidence and the hindsight realization of the monetary value of the phrase.

3. Public Policy

The purpose of copyright law in the United States is to “stimulate artistic creativity for the public good”¹¹⁷ and the court will evaluate the copyrightability, the actual infringement, and the fair use defense in light of this purpose. As previously discussed, the United State Copyright law is based less on artist’s rights and more on the dissemination of arts and information for the public good.

Mr. Male’s purpose for composing the tweet was to share his thoughts on a social media platform. The phrase inherently lacks the usual artistic purpose and intent that most short phrases need in order to garner copyright protection. Ms. Robinson of Green Box Shop likely shared the same sentiment of the phrase and gave like-minded individuals the opportunity to share this sentiment on an article of clothing, rather than


¹¹⁷ Twentieth Century Music Corp. v. Aiken 422 U.S. 151, 156 (1975)
just through social media. Ms. Robinson’s use furthers Mr. Male’s use to a new audience and spreads the “art” with the public just as U.S. copyright law intends. The minimal scope of protection likely afforded to Mr. Male’s phrase coupled with his lack of marketing and the public policy considerations of the use would likely sway a court hold that Green Box Shop’s use was fair.

III. Conclusion

As an artist, Frank Ocean certainly places significant value on his own original musical compositions, performances, and intellectual property. Nevertheless, Frank Ocean likely had no idea of the copyright implications that would subsequently arise when he wore the Green Box Shop t-shirt during his headlining set at the Panorama Music Festival.

With respect to the parties involved, I would suggest that Mr. Male seek copyright registration after creating a short phrase in order to protect his rights under §106 of the Copyright Act. I would advise Ms. Robinson of Green Box Shop to ask for permission before copying another’s work for monetary gain. These practices will give an author protection of their work and prevent unnecessary and expensive copyright infringement litigation.

The open issue of whether a short phrase published in a tweet may be the subject of copyright has no clear answers. The common law’s trend toward the copyrightability of short phrases suggests that short phrases may be granted protection when the phrase exhibits particular artistic intent and increased amount of originality. Copyright law is built from experience, not logic, so a court would need to consider the facts of a particular case in order to evaluate the copyrightability of a particular social media post.

The fair use analysis in this situation is similarly fact intensive. Relevant case law arising out of the Second Circuit places significant weight on the level of transformativeness of the use of the original copyrighted work when considering whether an alleged interloper’s use is fair. These cases, however, have involved appropriation and use of pictorial or photographic works rather than literary works, like the short phrase composed in a tweet. In this particular situation, the nature of Mr. Male’s copyright is arguably weak, therefore a court would likely place more weight on the second factor, the nature of the copyrighted work. Considering Mr. Male’s weak copyright and the public policy, utilitarian nature of U.S. Copyright Law, a court would likely find Green Box Shop’s use of the phrase on t-shirts fair use.