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## "You'll LOL @ This Tweet": Copyright Protection for Hashtag Gamers

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# “YOU’LL LOL @ THIS TWEET”: COPYRIGHT PROTECTION FOR HASHTAG GAMERS

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## ABSTRACT

*Hashtag games combine the fun of quick, incongruous exchanges with the work of creative expression and do so online through microblogging, predominantly (if not exclusively) on Twitter. Currently, hashtag-game participants face two main obstacles to copyright protection for their fun expressions: the expressions’ brevity and Twitter’s terms of service. To protect the copyrights that Internet users acquire by participating in hashtag games, courts should focus on the creativity rather than the brevity of the resulting expressions. Furthermore, Congress should amend the Digital Millennium Copyright Act (DMCA) to prevent Internet service providers, like Twitter, from encroaching on users’ rights through broad licensing and sublicensing schemes in their terms of service.*

*This Note will introduce hashtag games and argue for the copyright protection of short, humorous works such as expressions deriving from hashtag games. It will also provide an overview of microblogging and intellectual property rights by examining the terms of service of Twitter and other Internet service providers that enable microblogging and by considering internal and external limitations on the licensing schemes presented in such terms of service. Because Twitter’s terms lack sufficient internal limitations and the external limitations of offer and acceptance and unconscionability that contract law supplies do not suffice to protect users’ copyrights in the hashtag-game context, this Note will conclude that Congress should safeguard the rights of hashtag-game participants by amending the DCMA to prevent licensing schemes broader than necessary for the proper functioning of the Internet.*

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## I. INTRODUCTION

Hashtag games combine the fun of quick, incongruous exchanges with the work of creative expression and do so online through microblogging, predominantly (if not exclusively) on Twitter.<sup>1</sup> Currently, hashtag-game participants face two main obstacles to copyright protection for their fun expressions: the expressions’ brevity and Twitter’s terms of service.<sup>2</sup> To protect the copyrights that Internet users ac-

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1. Disclaimer: I have been playing hashtag games on Twitter for years now.

2. See *Twitter Terms of Service*, TWITTER (Sept. 30, 2016), <https://twitter.com/en/tos> [<https://perma.cc/X2PG-UUP9>].

quire by participating in hashtag games, courts should focus on the creativity rather than the brevity of the resulting expressions. Furthermore, Congress should amend the Digital Millennium Copyright Act (DMCA)<sup>3</sup> to prevent Internet service providers, like Twitter, from encroaching on users' rights through broad licensing and sublicensing schemes in their terms of service.

This Note will introduce hashtag games and argue for the copyright protection of short, humorous works such as expressions deriving from hashtag games. It will also provide an overview of microblogging and intellectual property rights by examining the terms of service of Twitter and other Internet service providers that enable microblogging and by considering internal and external limitations on the licensing schemes presented in such terms of service. Because Twitter's terms lack sufficient internal limitations and the external limitations of offer and acceptance and unconscionability that contract law supplies do not suffice to protect users' copyrights in the hashtag-game context, this Note will conclude that Congress should safeguard the rights of hashtag-game participants by amending the DCMA to prevent licensing schemes broader than necessary for the proper functioning of the Internet.

## II. HASHTAG GAMES

Given the lack of legal scholarship on hashtag games,<sup>4</sup> you are probably wondering just what a hashtag game is. According to Hashtag Roundup cofounder and comedian Jeffrey Dvoskin, hashtag games are "live events that take place on Twitter, created by individuals who want to share their hashtag with the world."<sup>5</sup> They are also "a call to action, and a challenge to add your creative idea to that hashtag."<sup>6</sup> The hashtag for a game establishes a topic, and "[h]ashtag games generate 1,000s of tweets (sometimes 10's of thou-

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3. 17 U.S.C. § 512 (2012).

4. As I write this Note, only one result (excluding ten key numbers) comes up in a search for "hashtag game" (with the quotation marks) in all state and federal content in Westlaw: the secondary source *Tagmarks*. This source mentions hashtag games only twice—once when giving the particular game #NewHarryPotterBooks as an example of a consumer-generated hashtag and once when giving the particular games #UpdatedTVShows, #BreakfastFilms, or #LessInterestingBooks as examples of citizen-created hashtags. Alexandra J. Roberts, *Tagmarks*, 105 CAL. L. REV. 599, 617, 620 (2017) (examining the protectability of hashtag trademarks, or tagmarks). The same search in LexisNexis returns only the same result along with three directory entries, though some intellectual property records for the musician Casey Horn, whose songs include # (*Hashtag*) and *Game of Love*, also appear by accident.

5. Jeffrey Dvoskin, *Looking to Tweet Great Stuff? Play Hashtag Games*, HUFFINGTON POST (July 31, 2015, 2:33 PM), [http://www.huffingtonpost.com/jeffrey-dvoskin/you-should-be-playing-has\\_b\\_7910728.html](http://www.huffingtonpost.com/jeffrey-dvoskin/you-should-be-playing-has_b_7910728.html) [<https://perma.cc/LK83-BF9Z>].

6. *Id.*

sands) focused on that topic.”<sup>7</sup> Because “[p]layers of the game search the hashtag to keep up with the funny,” an individual user “[does not] need to have a huge following to get tons of retweets and favorites”; at the same time, the user is “exposed to a whole community of people playing the same game.”<sup>8</sup> Besides being fun, participation in hashtag games allows users “to comment on current events.”<sup>9</sup> Thus, some hashtag-game responses have value as creative commentary, while others derive value in the way that apolitical literary witticisms do.

Pop culture critic Jeff Alexander defines hashtag games similarly as “a call/response form of tweeting wherein a user will post some kind of gag within a tightly defined genre, usually some kind of pun-based mashup of two very different things, like #UpdatedTVShows or #BreakfastFilms.”<sup>10</sup> Alexander uses Twitter as “a form of micro-entertainment,” and hashtag games play to that purpose.<sup>11</sup> Under the right circumstances, participation in hashtag games can produce “a rapidly growing collection of minor comic gems.”<sup>12</sup> Alexander equates a response’s success with how much it is retweeted and finds that the most successful responses “come at the concept from an unexpected angle, work on more than one level[,] and take a second or two for the reader to get.”<sup>13</sup> In other words, the best responses are the most clever and creative.

Technically, any Twitter user can post a tweet using a hashtag and an example of the sort of results sought, thereby starting a hashtag game if enough other users see the tweet and want to offer their own responses. In the most organized body of hashtag games, however, each particular game is associated with three sets of Twitter handles<sup>14</sup>: umbrella,<sup>15</sup> host, and general game. The handle for the general game

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7. *Id.*

8. *Id.*

9. *Id.*

10. Jeff Alexander (@mgiant), *The Hashtag Game: Waste of Time or Art Form?*, TIME (Nov. 11, 2011), <http://ideas.time.com/2011/11/11/the-hashtag-game-waste-of-time-or-art-form> [<https://perma.cc/U5FF-YA57>].

11. *Id.*

12. *Id.*

13. *Id.*

14. I use the term “handle” in a slightly broader sense than it is usually used in the context of social media, where it is often synonymous with the term “username,” but I do so only to the extent that I refer to hashtags for general games as handles when these general games lack their own usernames.

15. It is by accident (perhaps a happy accident) that my combination of the term *umbrella*, having the sense of covering many different elements (like an *umbrella organization*), and the social media word *handle* evokes that which one grasps for protection in a storm.

may take the form of a hashtag, such as #SaturdaySchmooze, or a username, such as @SockItTBTMe or @HashtagZoo. For explanatory purposes, I will focus on the particular game #BeachTheatre—a specific instance of the general hashtag game Saturday Schmooze. Rose (@Gamiliell) hosts Saturday Schmooze every time it is played, every Saturday at 7:00 p.m. (ET).<sup>16</sup> As is typical of hashtag-game hosts, if Rose cannot host Saturday Schmooze one Saturday, Saturday Schmooze does not go on that week; another game, from another host, goes on instead. When Rose was off on September 2, 2017, FastLaugh (@FastLaugh) hosted the particular game #LongWeekendsAreFor—a game affiliated with the umbrella handle Hashtag Roundup, but not with the general game Saturday Schmooze.<sup>17</sup>

A host kicks off a particular game by revealing the hashtag for it at exactly the right time, 7:00 p.m. (ET), on the dot, every Saturday for Saturday Schmooze.<sup>18</sup> Often, the host participates in the particular game at the same time as announcing it by posting an example response along with the hashtag. In the kickoff tweet for #BeachTheatre, Rose said, “All the world’s a stage and every beach a #BeachTheatre! tonight on @HashtagRoundup’s #SaturdaySchmooze!”, and added, “the plastic glass menagerie,” after a space.<sup>19</sup> Rose’s example, “the plastic glass menagerie,” shows that responses for the #BeachTheatre game should combine something theatrical, like a play’s title (here *The Glass Menagerie* by Tennessee Williams), with something somehow related to the beach (the plastic glasses people use when drinking by the water).<sup>20</sup> A host keeps playing a particular game by tweeting new responses and liking, retweeting, and replying to some participants’ responses. Throughout the game for #BeachTheatre, Rose offered the following additional responses, among others, each with a picture or gif: “hamlet burgers on the barbie,”<sup>21</sup> “priscilla, queen of the décolletage,”<sup>22</sup> and

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16. See, e.g., Rose (@Gamiliell), TWITTER (July 22, 2017, 7:00 PM), <https://twitter.com/Gamiliell/status/888896511941193728> [<https://perma.cc/RB56-ZLV4>].

17. FastLaugh (@FastLaugh), TWITTER (Sept. 2, 2017, 7:51 PM), <https://twitter.com/FastLaugh/status/904129581040377856> [<https://perma.cc/RC85-WK2T>].

18. See, e.g., Rose (@Gamiliell), TWITTER (July 22, 2017, 7:00 PM), <https://twitter.com/Gamiliell/status/888896511941193728> [<https://perma.cc/XA8D-C96C>].

19. *Id.* Part of the tweet is a picture of a community theatre on a beach with “#BeachTheatre” in fancy, big, blue font above the theatre, and “@HashtagRoundup” and “#SaturdaySchmooze” in the same font but smaller, yellow, and below the theatre. *Id.* Pictures are common overall in hashtag-game tweets, as are gifs.

20. *Id.*

21. Rose (@Gamiliell), TWITTER (July 22, 2017, 7:00 PM), <https://twitter.com/Gamiliell/status/888896584020373504> [<https://perma.cc/27ET-SZQK>].

22. Rose (@Gamiliell), TWITTER (July 22, 2017, 7:06 PM), <https://twitter.com/Gamiliell/status/888898068149673985> [<https://perma.cc/GAP8-65BK>].

“rosencrantz and guildenstern are red!”<sup>23</sup>

Besides playing their games, hosts post check-in messages. Such messages include reminding users a few times before a game starts of when it is starting, telling users a half hour or so after the start to keep playing, saying how the hashtag is trending (if it is), and thanking users (after a couple of hours, more or less) for having played. Before she announced #BeachTheatre, Rose posted reminders that day at 10:01 a.m. (ET), 6:01 p.m. (ET), and 6:59 p.m. (ET) that #SaturdaySchmooze would be starting at 7:00 p.m. (ET).<sup>24</sup> After announcing #BeachTheatre as the particular game at 7:00 p.m. (ET), Rose posted two check-in messages throughout the game: one encouraging users to keep playing and another thanking users for having played.<sup>25</sup> Specifically, at 7:36 p.m. (ET), she posted, “We are loving your #BeachTheatre tweets, they are, like, #totallyawesome! Don’t stop playing #SaturdaySchmooze on @HashtagRoundup! #yourock,”<sup>26</sup> and at 9:26 p.m. (ET), she posted, “Thanks to all who played & continue to play #BeachTheatre on @HashtagRoundup and thanks for joining the #SaturdaySchmooze! @TheHashtagGame.”<sup>27</sup> After a particular game, a host might publish a list of the top responses to its hashtag. #BeachTheatre does not seem to have a list, but if it did, the list would appear on the webpage for the Saturday Schmooze top ten lists, which also include honorable mentions, and Rose would share a link to the list in a tweet.<sup>28</sup> Lists for other general games appear through the Hashtag Roundup app or on HashtagRoundup.com.<sup>29</sup> These lists attribute each of the included responses to the host or player who tweeted it.<sup>30</sup>

23. Rose (@Gamiliell), TWITTER (July 22, 2017, 7:17 PM), <https://twitter.com/Gamiliell/status/888900939591110656> [<https://perma.cc/6EDC-X2HS>].

24. Rose (@Gamiliell), TWITTER (July 22, 2017, 10:01 AM), <https://twitter.com/Gamiliell/status/888761021707538432> [<https://perma.cc/RL4E-PWN6>]; Rose (@Gamiliell), TWITTER (July 22, 2017, 6:01 PM), <https://twitter.com/Gamiliell/status/888881802739404800> [<https://perma.cc/62UD-EF44>]; Rose (@Gamiliell), TWITTER (July 22, 2017, 6:59 PM), <https://twitter.com/Gamiliell/status/888896313470984192> [<https://perma.cc/KQG9-K4J4>]. These times are Eastern, but she gave them in Pacific and British times, as well. Internet sites, like Twitter, allow people all over the world to come together after all.

25. Rose (@Gamiliell), TWITTER (July 22, 2017, 7:36 PM), <https://twitter.com/Gamiliell/status/888905500397629440> [<https://perma.cc/WTL5-CSCR>]; Rose (@Gamiliell), TWITTER (July 22, 2017, 9:26 PM), <https://twitter.com/Gamiliell/status/888933326584729601> [<https://perma.cc/7PRM-SZPE>].

26. Rose (@Gamiliell), TWITTER (July 22, 2017, 7:36 PM), <https://twitter.com/Gamiliell/status/888905500397629440> [<https://perma.cc/5Q65-ANLJ>].

27. Rose (@Gamiliell), TWITTER (July 22, 2017, 9:26 PM), <https://twitter.com/Gamiliell/status/888933326584729601> [<https://perma.cc/QJ6A-4GG9>].

28. Saturday Schmooze, *Top Ten List*, WORDPRESS, <https://saturdayschmoozetopten.wordpress.com/> [<https://perma.cc/MLV3-NPTB>].

29. HASHTAG ROUNDUP, <http://hashtagroundup.com/> [<https://perma.cc/6B5M-3L2G>].

30. *Id.*

The umbrella handle for many hashtag games, including Saturday Schmooze, is the Hashtag Roundup app, powered by The Hashtag Game.<sup>31</sup> Every day, the umbrella handle reminds Twitter users what general game is happening, at what time, and from what host, and it publicizes changes for general games; for example, if a game moves to a new time or if a new game is added to a daily lineup. This information is obviously useful for first-time participants, but even a regular player may want a reminder since each day has its own set of games. Logically, a game called Saturday Schmooze occurs only on Saturdays, but nothing about a name like Cupcake Tags tells users that that game falls on Friday mornings.<sup>32</sup> In addition to sharing useful information about general games, the umbrella handle retweets hosts' posts announcing particular games or, after a host has announced, makes its own tweet announcing the information. For #BeachTheatre, The Hashtag Game took the latter option and tweeted, "#BeachTheatre is this week's #SaturdaySchmooze hosted by @Gamiliell."<sup>33</sup> Frequently, in addition to or instead of The Hashtag Game, Hashtag Roundup will make such an announcement.<sup>34</sup> An umbrella handle's retweets also include some responses to whatever particular game is happening at the moment. Unlike hosts and players, the umbrella handle does not tweet original responses to any of the hashtag games; it simply retweets responses and provides information.<sup>35</sup>

By their very nature, hashtag games impose a time crunch on their participants: not only does a participant want to share an idea that no one has yet shared, but also participant interest generally

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31. *Id.*

32. See #HashtagWags (@HashtagWags), TWITTER (Oct. 27, 2017, 7:22 AM), <https://twitter.com/HashtagWags/status/923872413644935168> [<https://perma.cc/ZUH4-3BEU>].

33. The Hashtag Game (@TheHashtagGame), TWITTER (July 22, 2017, 7:00 PM), <https://twitter.com/TheHashtagGame/status/888896602844409857> [<https://perma.cc/49MC-RDXK>].

34. See, e.g., Hashtag Roundup (@HashtagRoundup), TWITTER (July 22, 2017, 7:00 PM), <https://twitter.com/HashtagRoundup/status/888896543843024896> [<https://perma.cc/K68J-EWL9>].

35. Unrelated to hashtag games, The Hashtag Game has been posting humanitarian support for Puerto Rico of late. For a while, it had pinned the tweet, "As a public and humanitarian service in support of our sisters and brothers in #PuertoRico, we'll be amplifying the call to action for help," which showed people with Puerto Rican flags. The Hashtag Game (@TheHashtagGame), TWITTER (Sept. 30, 2017, 10:52 AM), <https://twitter.com/TheHashtagGame/status/914140819178741761> [<https://perma.cc/29ZV-CN64>]. Pinning meant that the tweet would show up at the top of the page no matter how many other tweets The Hashtag Game posted subsequently. Along a similarly humanitarian line, The Hashtag Game and friends are hosting the general game #SocialGoodSaturdays for six Saturdays at 9:00 p.m. (ET) starting on October 21, 2017. The Hashtag Game (@TheHashtagGame), TWITTER (Sept. 30, 2017, 11:28 PM), <https://twitter.com/TheHashtagGame/status/914331242102890496> [<https://perma.cc/TXC9-ZPPU>]. With #SocialGoodSaturdays, The Hashtag Game acted as a host handle in addition to an umbrella handle.

ebbs about an hour and a half after a new hashtag game begins.<sup>36</sup> To quote Alexander, though “there are no barriers to entry,” “[hashtag games] tend to run their course in just a few hours or less.”<sup>37</sup> During its run, a hashtag game facilitates the development and distribution of creative expressions. The nature of hashtag games is such that a participant may share a uniquely, ingenious gem or may come up with a game response independently of other participants who nonetheless come up with the same response for the same game.

The United States Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.* noted (in dicta) that the identical poems of two poets, who wrote independently of each other, would be original for purposes of copyright;<sup>38</sup> likewise, similar expressions arrived at independently during a hashtag game should be eligible for copyright protection despite duplication. That said, duplication makes unique gems stand out as particularly rare and precious in the hashtag-game context. One example of such a gem came through the power of the SockItTBtMe game #TraumatizingKidBooks.<sup>39</sup> The children’s classic *The Little Engine That Could* became *The Teen Engine That Could Not Even*, complete with a picture of a Little Golden Book cover showing the “can’t even” feeling on the anthropomorphized train’s face.<sup>40</sup> As of the publication of this Note, the post has received over nine hundred likes, over three hundred retweets, and thirteen replies.<sup>41</sup> These numbers are exceptionally high for a hashtag-game result.

Other examples of potentially worthy expressions—on account of creativity, not popularity—include the following responses: for #SongsAboutFilms, “Star Wars, What Is It Good For,”<sup>42</sup> and “Only

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36. On one Wednesday, typical of a hashtag-game day, the first game started at 6:00 a.m. (ET), the second started two hours later, the third started an hour and a half after that, the fourth started an hour and a half after that, the fifth started two hours later, the sixth started two hours after that, the seventh started an hour and a half later, the eighth started just an hour later, the ninth started an hour and a half later, the tenth started two and a half hours later, and the eleventh (and final game) started an hour and a half after that. Hashtag Roundup (@HashtagRoundup), TWITTER (Oct. 4, 2017, 6:50 AM), <https://twitter.com/HashtagRoundup/status/915529554046980096> [<https://perma.cc/CQU3-UAXY>]. Thus, for that day, the mean time between games was 1 hour and 42 minutes, and the median, mode, and range were 1 hour and 30 minutes.

37. Alexander, *supra* note 10.

38. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

39. SockItTBtMe (@SockItTBtMe), TWITTER (Mar. 2, 2017, 7:00 PM), <https://twitter.com/SockItTBtMe/status/837452564941668352> [<https://perma.cc/6YFT-LJFJ>].

40. *Id.*

41. *Id.* Credit for the picture seems to belong to howtobeadad.com. Andy, *Children's Classic Books Ruined with Modern Times*, HOW TO BE A DAD, <http://www.howtobeadad.com/2016/32473/childrens-classic-books-ruined-with-modern-times> [<https://perma.cc/5AS4-ZZ69>].

42. Luke, Deft (@LukeWheeler01), TWITTER (Sept. 8, 2017, 8:02 PM), <https://twitter.com/LukeWheeler01/status/906306704559747072> [<https://perma.cc/2CPJ-BKNQ>].

The Good, The Bad and The Ugly Die Young”;<sup>43</sup> for #MuppetDestinations, “Waka Waka, Washington” (with a gif of Fozzie Bear in front of a microphone with his mouth open, and his face moving from one side of his audience to the other);<sup>44</sup> for #RuinATVShow, “Orange is the New Xenophobic, Misogynistic, Privileged White” (including the hashtag “#trumpbudget”);<sup>45</sup> for #MoreStoriesFromTheBatcave, “I wish I knew how to quit you, Robin” (an allusion to the critically acclaimed film *Brokeback Mountain*, which portrays a homosexual relationship between two cowboys);<sup>46</sup> and for #AwfulThemeParkIdeas, “Jurassic Parking Lot,”<sup>47</sup> and “Thelma & Louise World [which] only has one ride, but no one’s complained yet” (the ride being, per an accompanying gif, *Thelma & Louise*’s famous ending: the car flying through the sky after going over the edge of a cliff).<sup>48</sup>

Concededly, not every result of a hashtag game will demonstrate sufficient creativity to merit copyright protection. Some results will fail to cross the divide separating idea and expression;<sup>49</sup> others will

43. Lola (@lola\_bee), TWITTER (Sept. 8, 2017, 8:00 PM), [https://twitter.com/\\_lola\\_bee/status/906306379513700352](https://twitter.com/_lola_bee/status/906306379513700352) [<https://perma.cc/95G5-V6H5>].

44. JustASouthernBelle (@CrazyMetalGal), TWITTER (Sept. 8, 2017, 11:12 PM), <https://twitter.com/CrazyMetalGal/status/906354520703291392> [<https://perma.cc/RS5C-V5G4>].

45. ThatGuy (@PfftorMeh), TWITTER (May 23, 2017, 9:25 PM), <https://twitter.com/PfftorMeh/status/867189795096850432> [<https://perma.cc/6FD5-Q7LC>].

46. For the tweet, see Rick Howton (@RHowton), TWITTER (June 17, 2017, 9:57 PM), <https://twitter.com/RHowton/status/876257583346184193> [<https://perma.cc/923T-KXL4>]. For the movie, see *BROKEBACK MOUNTAIN* (River Road Entertainment 2005).

47. qwerty (@adoltadult), TWITTER (Aug. 30, 2017, 1:02 PM), <https://twitter.com/adoltadult/status/902939566792773632> [<https://perma.cc/84XY-5RAV>].

48. For the tweet, see CK (@charley\_ck14), TWITTER (Aug. 30, 2017, 10:28 AM), [https://twitter.com/charley\\_ck14/status/902946144321449988](https://twitter.com/charley_ck14/status/902946144321449988) [<https://perma.cc/5KQ5-4H92>]; For the movie, see *THELMA AND LOUISE* (Pathé Entertainment 1991).

49. The idea-expression divide, or idea-expression dichotomy, reflects the principle in copyright law that although expressions of ideas may receive protection, the ideas so expressed may not. 17 U.S.C. § 102(b) (2012) (emphasis added) (“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.”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45 (1991) (“The most fundamental axiom of copyright law is that ‘[n]o author may copyright his ideas or the facts he narrates.’” (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985))). The Court in *Baker v. Selden* explained the prohibition against protecting ideas in terms of copyright’s knowledge-promoting function: “The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.” 101 U.S. 99, 103 (1879). Yet, the Court went on to limit its rationale with respect to works of artistic expression:

Of course, these observations are not intended to apply to ornamental designs, or pictorial illustrations addressed to the taste. Of these it may be said, that their form is their essence, and their object, the production of pleasure in their contemplation. This is their final end. They are as much the product of genius and the result of composition, as are the lines of the poet or the historian’s periods.

simply restate someone else's creative work—outside of a context that could render the restatement creative in and of itself. Regarding the particular game #ReallyFunEquations, from the general game Brainwave Bonanza, no one posted just an ordinary equation, but a result such as “ $a^2+b^2=c^2$ ” would have been more of an idea (that the Pythagorean Theorem is a really fun equation) than a protectable expression.<sup>50</sup> Meanwhile, the thrice-posted result consisting solely of a picture with the words “GAGA = (RAH)<sup>2</sup> (AH)<sup>3</sup> + [ROMA (1+MA)] + (GA)<sup>2</sup> + (OOH)(LA)<sup>2</sup>,” in white text on a purple background,<sup>51</sup> seems to fail for simply restating another's work since the picture comes directly from a DonkeyTees' shirt design<sup>52</sup> (it fails, that is, unless one or more of the participants who posted the picture had designed the shirt in the first place).<sup>53</sup> The game #ReallyFunEquations created no new context for this equation, which represents part of Lady Gaga's song *Bad Romance*,<sup>54</sup> for the original, shirt-related context was already a really fun equation.<sup>55</sup> Under the Constitution, only works demonstrating creativity are entitled to copyright protection.<sup>56</sup>

The constitutional purpose of copyright is “[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited

*Id.* at 103-04.

50. See TED-Ed, *How Many Ways Are There to Prove the Pythagorean Theorem? - Betty Fei*, YOUTUBE (Sept. 11, 2017), <https://www.youtube.com/watch?v=YompsDIEdtc> [<https://perma.cc/6CEA-56KE>].

51. Nolene Dougan #I Believe Her (@NoleneDougan), TWITTER (Oct. 3, 2017, 6:06 AM), <https://twitter.com/NoleneDougan/status/915201511533236224> [<https://perma.cc/7N8K-FB24>]; Scott Evins (@ScottEvins), TWITTER (Oct. 3, 2017, 7:32 AM), <https://twitter.com/ScottEvins/status/915223078539587584> [<https://perma.cc/AUH8-N9V8>]; JillyBean (@JillVerHey), TWITTER (Oct. 3, 2017, 8:36 AM), <https://twitter.com/JillVerHey/status/915239062813978625> [<https://perma.cc/3QXG-8VNU>].

52. *Math*, TSHIRTVORTEX, <http://www.tshirtvortex.net/tag/math/> [<https://perma.cc/54BF-ZQAB>].

53. I suspect that the three participants who posted the picture posted it independently of one another after finding it online. Regardless, unless all three designed the shirt together, and then posted the design separately, someone simply restated someone else's work and therefore attained no copyright interest in the hashtag-game response.

54. LADY GAGA, *Bad Romance*, on THE FAME MONSTER (Interscope Records 2009).

55. Another participant posted an extremely similar equation as text. MollyPop (@TheGhostOfMolly), TWITTER (Oct. 3, 2017, 6:38 AM), <https://twitter.com/TheGhostOfMolly/status/915209502412214272> [<https://perma.cc/4WPT-HSM8>] (“(RAH)<sup>2</sup> (AH)<sup>3</sup> + [ROMA (1+MA)] + (GA)<sup>2</sup> + (OOH)(LA)<sup>2</sup> = Bad Romance”). Responding at 9:44 a.m. (ET) to another user's reply, MollyPop downplayed the originality of the post and renounced ownership of the expression by calling the equation “an old joke” and said that it was “[n]ot [hers].” *Id.* Nonetheless, I can imagine the situation wherein a #ReallyFunEquations player, indulging in a structuralist streak, arrives at a similar result without ever having been exposed to it before, by reducing the main part of a really fun, repetitive song to a mathematical form to fit the hashtag. In that case, working the transformation from one form to another should generate a copyright interest in the resulting expression.

56. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (“Originality is a constitutional requirement.”).

[t]imes[,] to [a]uthors and [i]nventors[,] the exclusive [r]ight to their respective [w]ritings and [d]iscoveries.”<sup>57</sup> Given the historical context of the Framers, this “[s]cience” refers to knowledge and learning generally.<sup>58</sup> By this definition, copyright protects literary works,<sup>59</sup> including poems,<sup>60</sup> and it should likewise protect the results of hashtag games, provided the results show sufficient creativity.<sup>61</sup> Both literary

57. U.S. CONST. art. I, § 8, cl. 8.

58. *Id.*; see also Senator Orrin G. Hatch & Thomas R. Lee, “To Promote the Progress of Science”: *The Copyright Clause and Congress’s Power to Extend Copyrights*, 16 HARV. J.L. & TECH. 1, 7-8 (2002) (“[T]he notion of ‘science’ in the founding era referred generally to all forms of knowledge and learning.”); Joshua I. Miller, *The Unitary Progress Clause: District of Columbia v. Heller and the Structural Interpretation of the Progress Clause*, 28 SANTA CLARA COMPUT. & HIGH TECH. L.J. 241, 257 (2012) (“‘[S]cience,’ at the time of the Framing, meant learning in general.”); Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of Eldred v. Ashcroft*, 44 IDEA—J.L. & TECH. 331, 342 (2004) (“[I]n the latter part of the 18th century [‘science’] was synonymous with ‘knowledge’ and ‘learning.’”). Cf. Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 51 (2002) (“[S]cience was usually understood in a broader sense, so as to include knowledge, especially systematic or grounded knowledge of enduring value. Thus, the meanings of ‘learning’ and ‘science’ would be closely related.”); Joshua N. Mitchell, Note, *Promoting Progress with Fair Use*, 60 DUKE L.J. 1639, 1644 n.24 (2011) (“The Framers’ understanding of [‘s]cience’ was broader than the commonly accepted modern meaning of the term: it encompassed all forms of knowledge acquired by study or training, including, for example, philosophy and literature.”). *But see* Barton Beebe, *Bleistein, The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 323 (2017) (“[T]he late eighteenth century had not definitively settled the meanings of the terms ‘science’ and ‘useful arts,’ but the former was generally understood to refer to systematic theoretical and empirical knowledge . . . the latter to technology or commercial practices. . . . [N]either category encompassed the fine arts.”); Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 B.Y.U. L. REV. 259, 306 (“Science in the Copyright Clause did not mean general knowledge of anything. The modern interpretation of the original meaning is simply incorrect. Science connoted a system of knowledge that derives from branches of study. It represented subjects that were worthy of study.”).

59. The federal copyright statute defines “literary works” quite broadly. 17 U.S.C. § 101 (2012) (“‘Literary works’ are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.”).

60. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 703 (3d ed. 2017) (including poetry in the list of literary works), <https://www.copyright.gov/comp3/docs/compendium.pdf> [<https://perma.cc/ZF87-W7RR>]; see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-46 (1991) (contemplating copyrightable poems).

61. Ned Snow disagrees that the purpose of copyright is to promote creative expression; to him, copyright should focus on promoting useful knowledge instead. Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. DAVIS L. REV. 1, 36-37 (2013). Nonetheless, in explaining how modern courts have moved toward a focus on creativity, Snow succinctly articulates a rationale—which he opposes—linking the protection of creative works to copyright’s constitutional purpose: “Creativity supports the understanding of [s]cience as mere *general* knowledge because creative expression gives rise to some sort of knowledge, i.e., creative expression adds to the general store of knowledge. Creativity as the focus of copyright therefore implies that copyright exists to promote expression for its own sake.” *Id.* at 40. Admittedly, if Snow is right and copyright is supposed to promote useful, as opposed to general,

works and hashtag-game results are forms of creative expression, and a trend in both literature and social media has been toward brevity,<sup>62</sup> as seen in haiku<sup>63</sup> and flash fiction<sup>64</sup> on the one hand and microblogging<sup>65</sup> and microvlogging<sup>66</sup> on the other. Witty writers should

knowledge, hashtag-game results probably receive little to no protection. That said, I see no need to subscribe to Snow's position and no problem with promoting creative expression for creative expression's sake.

62. In recent American literature, at least, "speed, convenience, instant availability, consumption, disposability, planned obsolescence, fashion turnover, and *twitteresque brevity*" go hand in hand with "capitalism, globalization, standardization, mass production, new media, and other new technologies," which represent one trend, while "deceleration, deliberateness, sustainability, reuse, reappropriation, recycling, and deep engagement" represent the countertrend. Ursula K. Heise, *Slow-Forward to the Future*, in *POSTMODERN|POSTWAR—AND AFTER* 251 (Jason Gladstone et al. eds., 2016) (ebook) (emphasis added). With respect to social media, Twitter's recent decision to double its character limit does little to contest a trend toward brevity, for Twitter's CEO Jack Dorsey saw the move as "maintaining [Twitter's] brevity, speed, and essence." Jack (@jack), TWITTER (Sept. 26, 2017, 2:00 PM), <https://twitter.com/jack/status/912784057863245824> [<https://perma.cc/37T8-FSET>]. Twitter's product manager, Aliza Rosen, noted that during the test period for the 280-character limit, "[o]nly 5% of Tweets sent were longer than 140 characters and only 2% were over 190 characters." Aliza Rosen (@alizar), *Tweeting Made Easier*, TWITTER: BLOG (Nov. 7, 2017), [https://blog.twitter.com/official/en\\_us/topics/product/2017/tweetingmadeeasier.html](https://blog.twitter.com/official/en_us/topics/product/2017/tweetingmadeeasier.html) [<https://perma.cc/Q32K-PPLZ>].

63. Probably the best example of a brief poetic form, the haiku derives from Japanese literary tradition; haiku are compact expressions of natural imagery composed according to a syllabic pattern: "17 syllables divided into 3 lines of 5, 7, and 5 syllables." *Haiku*, *DICTIONARY.COM*, <http://www.dictionary.com/browse/haiku> [<https://perma.cc/9LZP-799D>].

64. We may be in "a flash-fiction moment" as short, short works—in the tradition of the six-word story (purportedly by Ernest Hemingway) "For sale: baby shoes, never worn"—are increasing in popularity. *Ultra-Short Fiction: Flash Mob*, 415 *ECONOMIST* 8932, Apr. 4, 2015, at 78, 78 (reviewing *FLASH FICTION INTERNATIONAL: VERY SHORT STORIES FROM AROUND THE WORLD* (James Thomas et al. 2015) (book review)). In 2010, the Texas Bar got in on the fun of flash fiction with a contest combining the (then) 140-character limit of Twitter with the narrative form. Michael P. Maslanka, *The 140-Character Novel*, 73 *TEX. B.J.* 316, 316 (2010) (describing 140-character novels as similar to regular novels in terms of character and plot and calling on lawyers to show they are "poets at heart").

65. One digital media consultant practiced what he preached and composed a brief blog post about social media brevity, the entirety of which says, "When blogging, why write 400 words if you can make your point in 14?" Paul Sutton, *The Art of Brevity in Social Media*, *PAUL SUTTON* (July 25, 2012), <https://paulsutton.co/2012/07/25/the-art-of-brevity-in-social-media/> [<https://perma.cc/2FHN-ELX2>]. Another such consultant resisted the urge to perform brevity himself so he could advise his readers to tweet in 120 characters (twenty fewer than those then allowed), use an URL shortener, and grab a web surfer's attention in five seconds. Antony Francis, *A to Z of Social Media #A2ZofSoMe : B is for Brevity*, *HEAD OF LETTUCE MEDIA* (Mar. 8, 2013), <http://headoflettucemedia.com/a2zofsome-brevity/> [<https://perma.cc/PHV9-RCGH>]. At the time, tweeting in 120 characters facilitated retweeting. *Id.*

66. Snapchat and Instagram stories, as well as the now defunct app Vine, are examples of microvlogging services, which allow users to share videos of a few seconds' length. See Stuart T. Lewis, *Micro-Vlogging: Can You Tell a Story in 6 Seconds?*, *CYBERVID* (June 4, 2015), <https://cybervid.wordpress.com/2015/06/04/micro-vlogging-can-you-tell-a-story-in-6-seconds/> [<https://perma.cc/8WD2-MGK7>] (explaining Vine); Stuart T. Lewis, *Micro-Vlogging: Can You Do It if the Story Disappears?*, *CYBERVID* (June 11, 2015), <https://cybervid.wordpress.com/2015/06/11/micro-vlogging-can-you-do-it-if-the-story-disappears/> [<https://perma.cc/H8MK-R8QY>] (explaining Snapchat); Stuart T. Lewis, *Micro-Vlogging: When 15 Seconds is Longform*,

not be penalized for embracing the latest trend, yet the briefer a work is, the less likely it is to receive copyright protection given the difficulties for brief works to keep ideas and expressions separate, as well as demonstrate originality.

### III. COPYRIGHT FOR SHORT WORKS

Although courts may grant copyright protection to short sentences, and tweets can reach the length of a sentence, many (but not all) of the clever expressions inspired by hashtag games are short phrases; these phrases are often accompanied by photos or gifs (or possibly videos),<sup>67</sup> and they often play on familiar titles to make quick jokes. Under *Applied Innovations, Inc. v. Regents of the University of Minnesota*, “short, simple, declarative sentences,” like “I am a good mixer,” and “No one seems to understand me,” may be protectable while “merely fragmentary words and phrases,” like names, titles, and slogans, are not.<sup>68</sup> The Copyright Office justifies its position—that short phrases are not entitled to copyright protection—on the grounds that short phrases lack sufficient authorship or creativity.<sup>69</sup> Even when a short phrase demonstrates creativity through novelty, distinctiveness, or “a play on words,” the Office deems this creativity insufficient to overcome the brevity of the expression.<sup>70</sup> A brevity bar makes sense for the shortest of phrases, that is, “individual words or brief combinations of words,”<sup>71</sup> but there is a world of difference between one word and six, for example, especially when the six are arranged with great care.<sup>72</sup> The Office’s characterization of names as

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CYBERVID (June 24, 2015), <https://cybervid.wordpress.com/2015/06/24/micro-vlogging-when-15-seconds-is-longform/> [<https://perma.cc/SMU6-K569>] (explaining Instagram).

67. Courts should presume fair use of the photos, gifs, and videos used in hashtag-game expressions. *Equals Three, LLC v. Jukin Media, Inc.* concerned an online program that used video clips, not of its own recording, to tell humorous stories; hence, the decision could go to participants’ posting of (audio)visual media along with / as part of hashtag-game expressions. 139 F. Supp. 3d 1094 (C.D. Cal. 2015) (finding fair use when something transformative, such as commentary on a video, was added to the video). For other issues of fair use on Twitter, see Adam S. Nelson, Note, *Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697 (2012) (regarding retweets as fair use and emphasizing the role of attribution in fair-use analysis).

68. *Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626, 634-35 (8th Cir. 1989) (holding that the short sentences used as test statements in the Minnesota Multiphasic Personality Schedule were original enough to merit copyright protection as derivative works).

69. U.S. COPYRIGHT OFFICE, CIRCULAR 33: WORKS NOT PROTECTED BY COPYRIGHT 2-3 (2017), <https://www.copyright.gov/circs/circ33.pdf> [<https://perma.cc/5VWW-ZYZD>].

70. *Id.*

71. *Id.*

72. The need to draw a line based on brevity is not clear, but if such a line is to be drawn, a six-word length seems like a good place to start affording copyright protection. The six-word

insufficiently creative<sup>73</sup> fits with barring only the briefest of expressions, since names rarely exceed three words. The fact that the Office lists “[t]he title or subtitle of a work” as an example of an expression “not contain[ing] a sufficient amount of creativity to support a claim in copyright”<sup>74</sup> is harder to justify, for many titles are designed to maximize creativity to engage audiences, and though short—even one-word—titles are common, some popular titles contain more than a few words. For example, the *Millennium* novel series to date includes five titles: *The Girl with the Dragon Tattoo*, *The Girl Who Played with Fire*, *The Girl Who Kicked the Hornet’s Nest*, *The Girl in the Spider’s Web*, and *The Girl Who Takes an Eye for an Eye*.<sup>75</sup> Most of these titles contain six words; all contain at least six. Similarly, the *Harry Potter* series includes three titles of six words, three of seven, and one of eight.<sup>76</sup> The 2016 sequel play (*Harry Potter and the Cursed Child*) and prequel film (*Fantastic Beasts and Where to Find Them*) contain six and seven words, respectively.<sup>77</sup> Also, the longest titles on the American Film Institute’s original list of *100 Greatest American Films* contain six words: *The Bridge on the River Kwai*, *One Flew Over the Cuckoo’s Nest*, *The Treasure of the Sierra Madre*, *The Best Years of Our Lives*, *Snow White and the Seven Dwarfs*,

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story is something of a genre. *SMITH Magazine* has made a business of soliciting six-word memoirs and compiling them into books in their “bestselling book series.” *Six Words Gets to the Point*, SIX WORDS (2017), <http://sixwordmemoirs.com/about/> [<https://perma.cc/W975-PRTL>]. An author whose six words are selected for publication receives a free copy of the published book as payment. *FAQ*, SIX WORDS (2017), <https://www.sixwordmemoirs.com/faq/> [<https://perma.cc/3UX2-H5UP>]. The magazine’s terms of service make clear that authors “retain their copyrights” to their own six-word stories, though each author must include the phrase “First appeared in SMITH Magazine, smithmag.net” in the stories if they later publish them elsewhere. *Terms of Service*, SIX WORDS (2017), <https://www.sixwordmemoirs.com/terms-of-service/> [<https://perma.cc/X5AA-MEQRJ>]. Whereas many of the six-word memoirs consist of one or even two complete sentences, some are more fragmentary. *See, e.g., Can You Tell Your Life Story in Exactly Six Words?*, NAT’L. PUB. RADIO (Feb. 3, 2010, 12:00 PM), <http://www.npr.org/templates/story/story.php?storyId=123289019>.

73. U.S. COPYRIGHT OFFICE, *supra* note 69, at 2.

74. *Id.* at 2-3. One wonders whether a title and subtitle together—or, more germane to hashtag games, a creative combination of titles—could be long enough for the Copyright Office to recognize a copyright claim.

75. *Stieg Larsson’s Millennium Series*, BARNES & NOBLE (2017), [https://www.barnesandnoble.com/s/%22Stieg+Larsson’s+Millennium+Series%22?Ntk=P\\_Series\\_Title&Ntx=mode+matchall](https://www.barnesandnoble.com/s/%22Stieg+Larsson’s+Millennium+Series%22?Ntk=P_Series_Title&Ntx=mode+matchall) [<https://perma.cc/3P4P-DYQ7>].

76. *Harry Potter*, BARNES & NOBLE (2017), [https://www.barnesandnoble.com/s/harry%20potter/\\_/N-8qh](https://www.barnesandnoble.com/s/harry%20potter/_/N-8qh) [<https://perma.cc/NC4J-VRF3>] (Harry Potter and the Sorcerer’s [or Philosopher’s] Stone, Harry Potter and the Half-Blood Prince, and Harry Potter and the Deathly Hallows; Harry Potter and the Chamber of Secrets, Harry Potter and the Prisoner of Azkaban, and Harry Potter and the Goblet of Fire; and Harry Potter and the Order of the Phoenix).

77. *Id.*; *see Harry Potter and the Cursed Child*, BARNES & NOBLE (2017), [https://www.barnesandnoble.com/s/harry%20potter%20and%20the%20cursed%20child/\\_/N-w](https://www.barnesandnoble.com/s/harry%20potter%20and%20the%20cursed%20child/_/N-w) [<https://perma.cc/S5DT-MG9Z>].

*Butch Cassidy and the Sundance Kid*, *All Quiet on the Western Front*, and *Close Encounters of the Third Kind*.<sup>78</sup> Such book and movie titles provide ready fodder for hashtag-game participants.

Besides brevity, the very function of names and titles is a strike against their creativity, for names and titles exist only to refer to something else. The names that the Copyright Office lists as insufficiently creative refer to individuals, businesses, organizations, bands, performing groups, products, services, and characters; likewise, the job of a title, with or without a subtitle, is to refer to a creative work.<sup>79</sup> The creative work deserves copyright protection, but if the title simply refers to the work, the title need not receive the same protection. The intellectual property regime for symbols (those words and phrases whose function is to refer) is not copyright but trademark. Indeed, the Copyright Office itself notes that “[u]nder certain circumstances, names, titles, or short phrases may be protectable under federal or state trademark laws.”<sup>80</sup> Over a century ago, the Supreme Court distinguished trademark from copyright by describing trademark as “[t]he right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons.”<sup>81</sup> Unlike copyright, which protects “*the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like,” “[t]he ordinary trade[]mark has no necessary relation to invention or discovery.”<sup>82</sup> A trademark’s function is to refer, not to demonstrate originality. In *Scandia Down Corp. v. Euroquilt, Inc.*, Judge Easterbrook articulated an economically informed rationale for trademarks: “By identifying the source of the goods, they convey valuable information to consumers at lower costs.”<sup>83</sup> This rationale continues to cast trademarks as symbols.

The other items on the Copyright Office’s list—“[a] domain name or URL,” “[c]atchwords or catchphrases,” and “[m]ottos, slogans, or other short expressions”<sup>84</sup>—provide further support that the function of referring unites these short expressions and contributes to the Office’s view of their insufficient creativity. Domain names refer to online entities and tell Internet users what to type in to visit associ-

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78. *AFI's 100 Greatest American Films - 1998 List*, AMC FILMSITE (2017), <http://www.filmsite.org/afi100filmsA.html> [<https://perma.cc/5QEE-EFT8>].

79. U.S. COPYRIGHT OFFICE, *supra* note 69.

80. *Id.* at 3.

81. *In re Trade-Mark Cases*, 100 U.S. 82, 92 (1879).

82. *Id.* at 94.

83. *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1429 (7th Cir. 1985).

84. U.S. COPYRIGHT OFFICE, *supra* note 69, at 3.

ated websites;<sup>85</sup> catchwords and catchphrases refer to those individuals or characters known for uttering them and serve sometimes as slogans;<sup>86</sup> and mottos and slogans refer to the groups that espouse them and that use them in advertising.<sup>87</sup> These expressions may be creative, but their primary purpose is to refer; they use creativity to be better at referring, in the way that a catchier slogan is more likely to stick in a consumer's mind and remind the consumer of the company whose slogan it is. Hashtag games call for the inverse. The primary purpose of a hashtag game, like most games, is to entertain. Hashtag games entertain by calling on participants to exercise their creativity. Participants use short expressions, like titles, to refer to artifacts of culture, such as songs, movies, and television shows, but they refer in service of the creative objective. They make references to tell better jokes. In the hashtag-game context, the same phrases that commonly act as titles, whose function is to refer to creative works, become creative works in and of themselves.

The rule against protecting short works serves to (1) avoid merger between unprotectable ideas and protectable expressions, and (2) preserve the public domain. When a brief combination of words serves a primarily referring function, it is difficult to separate the idea expressed and the expression. To the extent that “Just Do It” and “Nike,” “Finger Lickin’ Good” and “KFC,” or “Snap! Crackle! Pop!” and “Rice Krispies” are synonymous, merger occurs. Free speech requires that citizens be able to communicate ideas; protecting the expression of an idea, but not the idea itself, presents no undue hindrance to this communication, while protecting a short phrase—wherein idea and expression merge—may well stifle speech.<sup>88</sup> With hashtag games, however, the idea and expression are unlikely to merge because the point of the game is usually to put something familiar, like a title, in a new context so that creativity comes through the distance between idea and expression. In this way, hashtag-game results are like poems.

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85. *Domain Name*, DICTIONARY.COM, <http://www.dictionary.com/browse/domain-name> [<https://perma.cc/4QUL-VM4S>].

86. *Catchword*, DICTIONARY.COM, <http://www.dictionary.com/browse/catchword> [<https://perma.cc/5Z8Q-X73Q>]; *Catchphrase*, DICTIONARY.COM, <http://www.dictionary.com/browse/catchphrase> [<https://perma.cc/7HHJ-UYJ4>].

87. *Motto*, DICTIONARY.COM, <http://www.dictionary.com/browse/motto> [<https://perma.cc/9KF8-7YDX>]; *Slogan*, DICTIONARY.COM, <http://www.dictionary.com/browse/slogan> [<https://perma.cc/NL2Z-ZFFR>].

88. See *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994) (“[S]imilarities derived from the use of common ideas cannot be protected; otherwise, the first to come up with an idea will corner the market.” (citing *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971))).

Even though titles are not copyrightable, short poems can be, and some titles are as long as, or longer than, short poems, especially when the titles include subtitles. In keeping with the Copyright Office's position, the court in *Prunté v. Universal Music Group, Inc.* explicitly tied the lack of copyright for short expressions to a lack of originality: "[I]ndividual words and short phrases are generally not protected because they lack the requisite originality."<sup>89</sup> Some very short works, such as haiku, are nonetheless capable of originality and thus should be protected. As reported in *Authors Guild, Inc. v. Google Inc.*, Google excludes books of haiku (as well as dictionaries and cookbooks) from "snippet view," which would show users "verbatim excerpt[s]" from the books.<sup>90</sup> Presumably, this exclusion seeks to prevent someone from using Google Books to violate the copyright of a haiku. Haiku and poems inspired by the haiku tradition toward brevity, the most famous example of which is probably *In a Station of the Metro*,<sup>91</sup> deserve copyright protection in recognition of their creativity. Even with the poem's title and the poet's name, at 116 characters, *In a Station of the Metro* easily fits in a tweet.<sup>92</sup> Far from diminishing the poem's originality, this brevity heightens the impact of its imagery. Clearly, brevity and originality may go hand in hand. Thus, though hashtag games call for brevity, they may generate brief works sufficiently original to merit copyright protection.

#### IV. COPYRIGHT FOR SHORT, HUMOROUS WORKS

A difference between hashtag-game results and brief poems, like haiku, is humor: whereas the tweets produced in response to hashtag games tend to be humorous, poetry tends to be serious. Insofar as poems contribute to discussions of serious themes, they may be said to promote learning, in obvious fulfillment of copyright's constitutional purpose. Not all poetry concerns itself with weighty matters, however. Some poems have more entertainment value than educational significance. The best, of course, have both. Despite its humor, or perhaps because of it, short, witty verses merit copyright protection. Testimony in *Silverstein v. Penguin Putnam, Inc.* illustrates this point. The case involved the poetry of wit Dorothy Parker, known for

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89. *Prunté v. Universal Music Group, Inc.*, 699 F. Supp. 2d 15, 23 (D.D.C. 2010), *aff'd*, 425 F. App'x 1 (D.C. Cir. 2011).

90. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 287 (S.D.N.Y. 2013), *aff'd sub nom. Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

91. Ezra Pound, *In a Station of the Metro*, POETRY FOUND., <https://www.poetryfoundation.org/poetrymagazine/poems/12675/in-a-station-of-the-metro> [<https://perma.cc/SL99-J634>] (the two lines, "The apparition of these faces in the crowd: / Petals on a wet, black bough," make up the entire poem).

92. *Id.*

a variety of writings including her 1925 couplet *News Item*, the entirety of which comprises the lines, “Men seldom make passes / At girls who wear glasses”; at eighty characters, it fits even more easily in a tweet than does *In a Station of the Metro*.<sup>93</sup> At issue in *Silverstein* was not whether Parker had earned a copyright in her verse but whether the plaintiff had earned a compilation copyright through the decisions he made while assembling Parker’s previously uncollected poems into a book entitled *Not Much Fun*.<sup>94</sup> Though not the focus of the case, the copyright stemming from Parker’s creativity was acknowledged during the bench trial when Kathryn Court, the president and publisher of Penguin Books, testified that the company obtained the copyrights to Dorothy Parker’s poems from the Parker Estate<sup>95</sup> and that the NAACP controls those poems by Parker not in the public domain.<sup>96</sup> As poems, Parker’s short, humorous works get copyright protection. The short, humorous works produced during hashtag games deserve the same.

Humor in and of itself should be no obstacle to copyright. After all, courts have recognized the copyrightable value of jokes. The court in *Foxworthy v. Custom Tees, Inc.* gave examples of Jeff Foxworthy’s humor: “You might be a redneck if . . . you’ve ever financed a tattoo,” “You might be a redneck if . . . your two-year-old has more teeth than you do,” “You might be a redneck if . . . your dog and your wallet are both on a chain,” and “You might be a redneck if . . . your dad walks you to school because you’re in the same grade.”<sup>97</sup> In requesting relief, the comedian broke his jokes into two parts: “As to the phrase ‘you might be a redneck,’ [the] plaintiff claim[ed] a common-law trademark. As to the joke portion, e.g., ‘you’ve ever cut your grass and found a car,’ [the] plaintiff claim[ed] a copyright.”<sup>98</sup> The court held that he had shown a likelihood of success on the merits as to both the trademark<sup>99</sup> and copyright claim.<sup>100</sup> At a hearing, the comedian ex-

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93. Dorothy Parker, *News Item*, POEMHUNTER.COM (Jan. 3, 2003), <https://www.poemhunter.com/poem/news-item/> [<https://perma.cc/2UM5-2PT8>]; see *supra* notes 91-92 and accompanying text.

94. *Silverstein v. Penguin Putnam, Inc.*, 522 F. Supp. 2d 579, 581 (S.D.N.Y. 2007).

95. Transcript of Testimony of Kathryn Court at 596, *Silverstein v. Penguin Putnam, Inc.*, 522 F. Supp. 2d 579 (S.D.N.Y. 2007) (No. 01 Civ. 309 (JFK)), <http://www.dorothyparker.com/legal/trial0724.pdf> [<https://perma.cc/Y878-M2L7>].

96. *Id.* at 605.

97. *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1204 (N.D. Ga. 1995); see also *id.* at 1211 (“You might be a redneck if . . . you consider a six pack of beer and a bug zapper quality entertainment . . .”).

98. *Id.* at 1209.

99. *Id.* at 1217.

100. *Id.* at 1219.

plained his creative process, which emphasized brevity and care in the arrangement of words:

[W]e all [that is, comedians] have the same bowl of words to work with, and the whole trick is to take the smallest amount of words and put them in the proper order. You know, I've sat backstage with [fellow comedian] Jay Leno or Gary Shandling and sometimes[,] for ten or fifteen minutes[,] argued about a particular one line in a joke, which word should go where, should you delete this, which word should go to the end of the joke, and so that's why it changes. I mean, it's to get the maximum laugh from, you know, the shortest amount of material.<sup>101</sup>

This explanation shows that not only does effective humor entail time and effort, which deserves acknowledgment in the form of copyright protection, but also that jokes work in part because they are short, for brevity helps punchlines land punches. In hashtag games, the humor of an expression counterbalances its brevity, thereby packing a creative punch.

The applicability of copyright to jokes is the rule across the country, from the Northern District of Georgia in the East to the Southern District of California in the West. In *Kaseberg v. Conaco, LLC*, Kaseberg (@AlexKaseberg) posted original jokes to his blog and Twitter account and then claimed that comedian Conan O'Brien (or people working for Conan) stole them for use on the late-night show *Conan*.<sup>102</sup> The five jokes by Kaseberg at issue were a UAB joke ("The University of Alabama–Birmingham is shutting down its football program. To which the Oakland Raiders said; 'Wait, so you can do that?' ");<sup>103</sup> a Delta joke ("A Delta flight this week took off from Cleveland to New York with just two passengers. And they fought over control of the armrest the entire flight.");<sup>104</sup> a Tom Brady joke ("Tom Brady said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy that truck, Pete Carroll.");<sup>105</sup> a Washington Monument joke ("The Washington Monument is ten inches shorter than previously thought. You know the winter has been cold when a monument suffers from shrinkage.");<sup>106</sup> and a Jenner joke ("Three towns, two in Texas, one in Tennessee, have streets named after Bruce Jenner and now they have to consider changing them to Caitlyn. And one will have to change from a Cul–De–Sac to a Cul–

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101. *Id.*

102. *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229, 1232-33 (S.D. Cal. 2017).

103. *Id.* at 1233.

104. *Id.* at 1233-34.

105. *Id.* at 1234.

106. *Id.*

De-Sackless.”)<sup>107</sup> The court remarked, “In the present case, there is little doubt that the jokes at issue merit copyright protection.”<sup>108</sup> The court in *Kaseberg* framed the constitutional purpose of copyright as “‘promot[ing] the progress of’ the creative arts.”<sup>109</sup> Humor’s place as a creative art is perhaps clearer than its place as a science or useful art; but to the extent that science refers generally to knowledge and learning and that humor requires the honing of a comedic craft, the copyright clause applies to humorous works.

The court held that under the circumstances—aimed at “mass appeal,” “[e]ach joke beg[an] with a factual sentence and then immediately conclude[d] with another sentence providing humorous commentary on the preceding facts”—Kaseberg’s jokes merited only thin copyright protection, meaning that he had to show that the jokes aired on *Conan* were “virtually identical” to the jokes he had posted.<sup>110</sup> The reasons for the “virtually identical” standard in *Kaseberg* also apply in the hashtag-game context, where brevity increases the risk for merger, for “an extremely limited amount of protectable content” is the “issue-controlling feature.”<sup>111</sup> Of course, “virtually identical” does not mean “identical.”<sup>112</sup> Conan said, “cul-de-no-sack” instead of “Cul-De-Sackless,” “the monument’s blaming the shrinkage on the cold weather” instead of the monument “suffer[s] from shrinkage,” and “Brady’s giving his truck to Seahawks coach Pete Carroll” instead of Tom Brady said he wants “to give his MVP truck to the man who won the game for the Patriots,” so enjoy that truck, Pete Carroll.<sup>113</sup> Even though Conan’s on-air comments differed slightly from Kaseberg’s posts, the court held that a jury could find the Jenner, Washington Monument, and Tom Brady jokes to be virtually identical in expression.<sup>114</sup> Even minor additions that Conan improvised during his performances, such as “[y]eah” and “[p]enis joke” in the Washington Monument joke and “nice” in the Tom Brady joke, “would not . . . alter the [c]ourt’s conclusion.”<sup>115</sup> On the other hand, the court granted summary judgment for *Conan* on the UAB joke.<sup>116</sup> Conan’s “When they heard the news, New York Jets fans said, ‘Wait

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107. *Id.* at 1234-35.

108. *Id.* at 1245.

109. *Id.* at 1246 (quoting U.S. CONST. art. I, § 8, cl. 8).

110. *Id.* at 1245.

111. *Id.* at 1244.

112. *Id.* at 1246-47.

113. *Id.*

114. *Id.*

115. *Id.* at 1250 n.5.

116. *Id.* at 1249.

can you do that?”<sup>117</sup> simply differed too much from Kaseberg’s “To which the Oakland Raiders said; ‘Wait, so you can do that?’ ” to be virtually identical.<sup>118</sup> The identities of the speakers in the jokes, Jets fans versus the Raiders’ team, made the expressions distinct; the court reasoned, “[t]o hold otherwise would grant [p]laintiff’s UAB [j]oke the power to preclude any expression of disbelief and desire for a beloved but beleaguered sports team to also shut down their operations upon hearing the UAB news.”<sup>119</sup>

## V. MICROBLOGGING AND INTELLECTUAL PROPERTY RIGHTS

Hashtag games have developed through microblogging, the sharing of brief posts over the Internet.<sup>120</sup> Although Twitter is by far the most popular site for hashtag games, in theory other Internet service providers may meet microblogging needs, either as microblogging sites or through status-update features. The heavy hitters in the microblogging arena include Twitter, Facebook, Google (through Google+), Microsoft (through Yammer), and Tumblr. Though Microsoft’s service Yammer is not as well-known as the other services, Microsoft itself is a heavy hitter in cyberspace. Lesser-known applications in microblogging are Gab and Tout. Among decentralized alternatives, Mastodon stands out as recognizable, though Micro.blog and Twister also exist.<sup>121</sup>

117. *Id.* at 1233.

118. *Id.* at 1245-46.

119. *Id.* at 1246. The court granted summary judgment for *Conan* on the Delta joke because creation of the show’s Delta joke preceded Kaseberg’s posting of his own Delta joke by mere hours. *Id.* at 1238-39.

120. The brevity of the posts separates microblogging from just plain blogging.

121. Compared to centralized Internet service providers (here, the heavy hitters as well as Gab and Tout), decentralized platforms purportedly give users more control over their own content and make government censorship more difficult. See *Why I Created Micro.blog*, MICRO.BLOG (Aug. 19, 2015), <http://help.micro.blog/2015/why-i-created-this/> [<https://perma.cc/QV4H-QZVE>] (“Instead of yet another social network, Micro.blog is designed to work with the open web. It’s built on RSS [Rich Site Summary, a common blogging format] and independent microblogs. . . . Micro.blog encourages publishing at your own domain name, where you can control your own content.”); see Miguel Freitas (mfreitas), *FAQ, TWISTER* (Nov. 24, 2013), [http://twister.net.cc/?page\\_id=25](http://twister.net.cc/?page_id=25) [<https://perma.cc/4PDD-HBFG>] (“Being completely decentralized means that no one is able to shut [Twister] down, as there is no single point to attack. The system is also designed so it cannot be censored . . .”). According to Mastodon, “[t]he world’s largest free, open-source, decentralized microblogging network,” being decentralized means that “[t]here is no monopoly by a single commercial company, no ads, and no tracking. *Mastodon works for you*, and not the other way around.” *How It Works*, MASTODON, <https://joinmastodon.org/#how-it-works> [<https://perma.cc/JE2K-9QC9>]. In explaining the operation of its decentralized service, Mastodon describes how its servers are run: “Anyone can run a server of Mastodon. . . . Servers are run independently by different people and organizations. They can apply wildly different moderation policies, so you can find or make one that fits your taste perfectly. . . . If one server goes bankrupt or starts acting unethically, the network persists . . .” *Id.*

As seen among the current terms of service for these Internet service providers, the consensus is for users to retain ownership over the content that they post<sup>122</sup> but for each provider to hold a worldwide,<sup>123</sup> royalty-free<sup>124</sup> license to use that content. It is also fairly common for the license to be transferable<sup>125</sup> and non-exclusive,<sup>126</sup> and for the provider to have a right to sublicense<sup>127</sup> the content. Providers vary as to what their licensed use entails and whether their license ever ends.<sup>128</sup> Regardless, these licenses tend to have some limits.

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122. With the exception of Microsoft, all of the microblogging heavy hitters include in their terms of service a direct statement that users own their own content, as does Tout. *Twitter Terms of Service*, supra note 2 (“You retain your rights to any [c]ontent you submit, post or display on or through the [s]ervices. What’s yours is yours — you own your [c]ontent (and your photos and videos are part of the [c]ontent).”); *Statement of Rights and Responsibilities*, FACEBOOK (Jan. 30, 2015), <https://www.facebook.com/legal/terms> [<https://perma.cc/KZZ9-UP96>] [hereinafter *Facebook Statement of Rights*] (“You own all of the content and information you post on Facebook . . . .”); *Google Terms of Service*, GOOGLE (Oct. 25, 2017), [https://www.google.com/intl/ALL\\_us/policies/terms/regional.html](https://www.google.com/intl/ALL_us/policies/terms/regional.html) [<https://perma.cc/K4SS-68VV>] (“Some of our [s]ervices allow you to upload, submit, store, send or receive content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours.”); *Terms of Service*, TUMBLR (May 15, 2018), <https://www.tumblr.com/policy/en/terms-of-service> [<https://perma.cc/P49L-QKM9>] (“You retain ownership you have of any intellectual property you post to Tumblr.”); *Terms of Service*, MARKETDOCS, <https://documents.marketo.com/toutapp/terms> [<https://perma.cc/X54B-84BG>] [hereinafter *Tout Terms of Service*] (“You retain copyright and any other intellectual property and other proprietary rights you already hold in your [c]ontent, and you are solely responsible for protecting those rights, as you deem appropriate.”).

123. All of the heavy hitters, as well as Gab and Tout, claim a worldwide license. *Twitter Terms of Service*, supra note 2; Facebook *Statement of Rights*, supra note 122; *Google Terms of Service*, supra note 122; *Yammer Terms of Use*, MICROSOFT (Dec. 1, 2014), <https://products.office.com/en-us/yammer/terms-of-use> [<https://perma.cc/C8DX-YYQ8>]; *Terms of Service*, supra note 122; *Terms*, GAB (Aug. 18, 2016), <https://gab.ai/about/tos> [<https://perma.cc/24F6-2A7P>] [hereinafter *Gab Terms*]; *Tout Terms of Service*, supra note 122.

124. Along with Gab and Tout, all of the heavy hitters, except for Google, claim that the license is royalty-free. Twitter, Facebook, Tumblr, Gab, and Tout use the word “royalty-free.” *Twitter Terms of Service*, supra note 2; Facebook *Statement of Rights*, supra note 122; *Tumblr Terms of Service*, supra note 122; *Gab Terms*, supra note 123. Tout further describes the license as “fully-paid-up.” *Id.* Microsoft says that the users of its service Yammer give, “without charge,” the right to use content. *Yammer Terms of Use*, supra note 123.

125. Facebook, Tumblr, and Gab describe the license as “transferable.” Facebook *Statement of Rights*, supra note 122; *Tumblr Terms of Service*, supra note 122; *Gab Terms*, supra note 123.

126. Twitter, Facebook, Tumblr, and Tout describe the license as “non-exclusive.” *Twitter Terms of Service*, supra note 2; Facebook *Statement of Rights*, supra note 122; *Tumblr Terms of Service*, supra note 122.

127. Twitter, Facebook, Tumblr, and Gab claim a right to sublicense user content. *Twitter Terms of Service*, supra note 2; Facebook *Statement of Rights*, supra note 122; *Tumblr Terms of Service*, supra note 122; *Gab Terms*, supra note 123.

128. The terms of service for Google and Tumblr contain explicit statements that the license to a user’s content continues even if the user stops using the service. *Google Terms*

### A. Internal Limitations

Internal limitations on these licensing schemes stem from privacy, application settings, and lists of service-related purposes mentioned in the terms of service. Facebook's terms make its license subject to its users' privacy and application settings,<sup>129</sup> while Google's terms refer to options "that narrow the scope of [its] use of the content" in certain of its services.<sup>130</sup> Except for Twitter and Facebook, all of the centralized providers, and even Mastodon, limit their licensed use of their users' content to achieving a list of purposes; they use content to provide, maintain, improve, and develop services and to adapt to different media, networks, or devices as necessary.<sup>131</sup> Facebook offers other limitations; for example, provided a user has not shared content with someone who is still posting it, Facebook's license to the content terminates when the user deletes the content or the Facebook account.<sup>132</sup> Twitter's terms say no such thing.

In fact, Twitter's licensing scheme is especially broad. Twitter

*of Service*, *supra* note 122 ("This license continues even if you stop using our [s]ervices (for example, for a business listing you have added to Google Maps)."); *Tumblr Terms of Service*, *supra* note 122; ("[T]his license to your [s]ubscriber [c]ontent continues even if you stop using the [s]ervices, primarily because of the social nature of [c]ontent shared through Tumblr's [s]ervices — when you post something publicly, others may choose to comment on it, making your [c]ontent part of a social conversation that can't later be erased without retroactively censoring the speech of others.").

129. *Facebook Statement of Rights*, *supra* note 122 ("[Y]ou can control how [the content you post] is shared through your privacy and application settings.").

130. *Google Terms of Service*, *supra* note 122.

131. *Id.* ("The rights you grant in this license are for the limited purpose of operating, promoting, and improving our [s]ervices, and to develop new ones."); *Yammer Terms of Use*, *supra* note 123 ("When you transmit or upload [c]ontent to the [s]ervices, you are giving Microsoft the worldwide right, without charge, to use [c]ontent as necessary: to provide the [s]ervices to you, to protect you, and to improve Microsoft products and services."); *Tumblr Terms of Service*, *supra* note 122 ("The rights you grant in this license are for the limited purposes of allowing Tumblr to operate the [s]ervices in accordance with their functionality, improve and promote the [s]ervices, and develop new [s]ervices."); *Gab Terms*, *supra* note 123 ("By making any [u]ser [c]ontent available through [s]ervices you grant to Gab a worldwide, royalty-free, transferable license, with the right to sublicense, to use, copy, modify, create derivative works, display, perform and distribute your [u]ser [c]ontent in order to operate and provide the [s]ervices and [c]ontent to you and other [a]ccount holders. *TL:DR: we will use your [u]ser [c]ontent to run the [a]pp; we won't take your [u]ser [c]ontent and sell it to others.*"); *Tout Terms of Service*, *supra* note 122 ("[Y]ou hereby grant Tout a . . . license to . . . use such [c]ontent for the purpose of enabling Tout to provide the [s]ervice to you, including, without limitation, storing and retrieving the [c]ontent, making the [c]ontent available through the [s]ervice, adapting the [c]ontent for technical display and transmission, conforming the [c]ontent to the limitation and terms of the [s]ervice, and any other use related to the maintenance, provision and improvement of the [s]ervice."); *Privacy Policy*, MASTODON (May 31, 2013), <https://mastodon.social/terms> [<https://perma.cc/9WQ4-GB98>] ("What do we use your information for? Any of the information we collect from you may be used in one of the following ways: [t]o personalize your experience . . . [.] [t]o improve our site . . . [.] [t]o improve customer service . . . [or] [t]o send periodic emails . . .").

132. *Facebook Statement of Rights*, *supra* note 122.

stakes out for itself “a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute [user] [c]ontent in any and all media or distribution methods (now known or later developed).”<sup>133</sup> Twitter asserts that the license gives it the authority “to make [user] [c]ontent available to the rest of the world and to let others do the same.”<sup>134</sup> Twitter mentions the purpose is “to provide, promote, and improve the [s]ervices,” but it may go well beyond that purpose when “mak[ing] [c]ontent submitted to or through the [s]ervices available to other companies, organizations[,] or individuals for the syndication, broadcast, distribution, promotion[,] or publication of such [c]ontent on other media and services.”<sup>135</sup> The terms continue, “[s]uch additional uses by Twitter, or other companies, organizations[,] or individuals, may be made with no compensation paid to [the user] with respect to the [c]ontent.”<sup>136</sup> The publication of tweets in other media, such as print books, is a reality, as is illustrated by the tools available to turn tweets into books<sup>137</sup> and the fact that two-tweet collections have enjoyed national attention. *Tweets from Tahrir* tells the story of how Twitter-fueled protests led to Egyptian President Hosni Mubarak’s resignation,<sup>138</sup> while *Working on My Novel* explores the creative process in today’s technological world.<sup>139</sup> The people behind both tweet collections received permission to use the tweets from the original tweeters;<sup>140</sup> however, they could have just worked

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133. *Twitter Terms of Service*, *supra* note 2.

134. *Id.*

135. *Id.*

136. *Id.*

137. *See, e.g.*, Dianna Dilworth, *5 Tools That Will Turn Your Twitter Page into a Book*, ADWEEK (May 23, 2013), <http://www.adweek.com/digital/5-tools-that-will-turn-your-twitter-page-into-a-book/> [<https://perma.cc/87XA-QG8G>].

138. *See* Michael Matthews, *‘Tweets from Tahrir’ Captures Egypt’s Social Media-Led Revolution in a Book*, FORBES (Mar. 8, 2011, 2:08 PM), <https://www.forbes.com/sites/michaelmatthews/2011/03/08/tweets-from-tahrir-captures-egypts-social-media-led-revolution-in-a-book/#4d3e18f54fd8> [<https://perma.cc/AR9D-NC7R>]; *see also* Yasmina Jraissati, *Who Is the “Author” of This Book of Tweets?*, PUB. PERSP. (Mar. 15, 2011), <http://publishingperspectives.com/2011/03/who-is-the-author-of-this-book-of-tweets/> [<https://perma.cc/P9F8-WZYZ>].

139. *See* Mark O’Connell, *Why Tweet About Your Novel?*, NEW YORKER (Aug. 8, 2014), <https://www.newyorker.com/culture/cultural-comment/working-novel-tweeting-writing> [<https://perma.cc/5ZN3-VL65>]; Cory Arcangel, *Working on My Novel*, <http://novel.coryarcangel.com/> [<https://perma.cc/K9GW-D6W3>].

140. Jraissati, *supra* note 138 (“While in the process of producing the book, OR [B]ooks [the publisher of “Tweets from Tahrir”] did not seek Twitter’s approval. Instead, they went directly to the tweeters themselves and asked their permission.”); Matthews, *supra* note 138 (“Roughly fifty Twitter users featured [in “Tweets from Tahrir”] were also contacted by [tweet archivists] [Alex] Nunns or [Nadia] Idle and granted permission to be included in the collection. A spokesman for Twitter said that if all of the people gave permission, the

out deals with Twitter to use the tweets.<sup>141</sup>

The concern for hashtag-game participants seeking to assert the copyrights of the expressions they post on Twitter is that Twitter may undermine their business position with respect to such expressions. Sure, Twitter acknowledges that the participants own the expressions, but it also claims that without having to pay participants, it may not only use the expressions but also sublicense use to third parties that may publish the expressions, also without having to pay participants.<sup>142</sup> The concern is compounded by Twitter's position as a big business, which is likely to give it more of an upper hand in business dealings than a typical hashtag-game participant would have. Twitter may not have made the Fortune 500 list in 2017, but Fortune ranked it at 844.<sup>143</sup> Although that ranking puts Twitter far behind Google's parent company Alphabet (ranked at 22),<sup>144</sup> Microsoft (30),<sup>145</sup> and Facebook (76),<sup>146</sup> Twitter is still considered a big business.<sup>147</sup> For reference, Twitter has a ranking comparable to Domino's Pizza (776)<sup>148</sup> or Cheesecake Factory (892).<sup>149</sup> Twitter may use its position to undercut the participant as to the price of the expression. At the same time, it may offer a third party a bundle of expressions produced by multiple participants—something no individual participant can do on his or her own. With its broad terms, Twitter is an outlier among microblogging service providers, yet Twitter is currently the

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book would not violate Twitter's terms of service."); Arcangel, *supra* note 139 ("All of the tweets collected in [*Working on My Novel*] are used with the permission of the original authors."). Publishing companies need to do rights clearances on books of tweets as on other books and, for now, may feel most comfortable securing permissions from all original tweeters.

141. Speaking of "Tweets from Tahrir" and its publisher OR Books, Jraissati observes, "Twitter could have sold the tweets of Tahrir to OR, and, legally at least, that would have been fine." Jraissati, *supra* note 138. Though the original tweeters gave their permission, she assumes that none of them received royalties from the book—something she finds "troubling." *Id.* Given how the Internet has changed creative expression, she sees a need to rethink authorship, licensing, and copyright. *Id.*

142. *Twitter Terms of Service*, *supra* note 2.

143. *Fortune 500: Twitter*, FORTUNE (2017), <http://fortune.com/fortune500/twitter/> [https://perma.cc/YBY3-DGPN].

144. *Fortune 500: Alphabet*, FORTUNE (2017), <http://fortune.com/fortune500/alphabet/> [https://perma.cc/76YN-8FKZ].

145. *Fortune 500: Microsoft*, FORTUNE (2017), <http://fortune.com/fortune500/microsoft/> [https://perma.cc/VUZ5-L2JW].

146. *Fortune 500: Facebook*, FORTUNE (2017), <http://fortune.com/fortune500/facebook/> [https://perma.cc/8527-JZCA].

147. Incidentally, neither Tumblr nor its parent company Oath Inc. appears on the list.

148. *Fortune 500: Domino's Pizza*, FORTUNE (2017), <http://fortune.com/fortune500/dominos-pizza/> [https://perma.cc/3D27-X36U].

149. *Fortune 500: Cheesecake Factory*, FORTUNE (2017), <http://fortune.com/fortune500/cheesecake-factory/> [https://perma.cc/WW85-32HE].

place for hashtag games. Thus, participants must rely on external, rather than internal, limitations to protect their copyrights.

### B. External Limitations

Contract law puts external limitations on Internet terms of service through the requirement of offer and acceptance and the defense of unconscionability.<sup>150</sup> In context, however, the offer-and-acceptance requirement likely puts no limit on Twitter. In a perfect world, individuals would never be held to private terms to which they did not agree, but to accommodate reality, courts have imposed terms of which individuals were only constructively aware:

Constructive knowledge of, and assent to, a website's terms of services may arise where the user has not affirmatively indicated his or her agreement to the site's terms – such as by clicking a button labeled “I agree” – and cannot be proven to have accessed the website with actual knowledge of those terms. The determination of constructive knowledge turns on whether the user's assent to the terms of service was reasonably communicated to be a condition precedent to the use of the website. This generally depends on the level of notice that the user is given as to the existence of those terms.<sup>151</sup>

Under *Fteja v. Facebook, Inc.*, Facebook's terms bind users at the outset by notifying them that by creating an account, they are agreeing to the terms; additionally, this notice of the terms contains a hyperlink to the very terms to which users are agreeing.<sup>152</sup> Given the chance to look at the terms before creating an account, the user is bound to them regardless of having actually read them.<sup>153</sup> Recently, the Second Circuit cited *Fteja* with approval as an example of reasonable communication of terms to users.<sup>154</sup> Though “the enforceability of a web-based agreement is clearly a fact-intensive inquiry,”<sup>155</sup> Twitter's notice of terms resembles Facebook's so highly that a different result is implausible.<sup>156</sup> Anyone who posts on Twitter must first

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150. See generally Erin Canino, Note, *The Electronic “Sign-in-Wrap” Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability*, 50 U.C. DAVIS L. REV. 535 (2016).

151. Jack Blum, *Offer and Acceptance in Cyberspace: Ensuring That Your Client's Website is Protected by Enforceable Terms of Service*, 47 MD. B.J. 18, 23 (2014).

152. *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 838-40 (S.D.N.Y. 2012).

153. *Id.* at 839 (“Whether or not the consumer bothers to look is irrelevant.”).

154. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017).

155. *Id.*

156. Compare TWITTER, <https://twitter.com/i/flow/signup?lang=en> [<https://perma.cc/C5KS-XJE6>] (“By signing up, you agree to the [t]erms of [s]ervice and [p]rivacy [p]olicy, including [c]ookie [u]se. Others will be able to find you by email or phone number when provided.”), with FACEBOOK, <https://www.facebook.com/> [<https://perma.cc/U4PJ-QDF9>] (“By

create a Twitter account, thus constructively assenting to its terms. Accordingly, courts will likely hold that players of hashtag games, who post creative expressions on Twitter, have accepted the terms it has offered about its rights to use and sublicense the expressions.

Nor does it matter for offer and acceptance that Twitter, Facebook, and other microblogging sites may change their terms unilaterally from time to time; having constructively assented to the unilateral reordering clauses<sup>157</sup> in the terms of service, users are often bound to the changes, provided they keep using the sites upon notice of the new terms.<sup>158</sup> Among microblogging providers, such clauses are the rule rather than the exception.<sup>159</sup> According to their terms of ser-

clicking [c]reate [a]ccount, you agree to our [t]erms and that you have read our [d]ata [p]olicy, including our [c]ookie [u]se. You may receive SMS [n]otifications from Facebook and can opt out at any time.”).

157. I follow Jake Linford’s practice in *Unilateral Reordering in the Reel World* and call the clauses in terms of service that allow service providers to make unilateral changes to the terms “unilateral reordering clause[s]” instead of “change of terms clause[s],” so as to emphasize the lack of input from users regarding the changed terms. Jake Linford, *Unilateral Reordering in the Reel World*, 88 WASH. L. REV. 1395, 1407 n.56 (2013) (“This [e]ssay uses the term ‘unilateral reordering clause’ instead of ‘change of terms clause’ because there are cases where parties negotiate a change in the terms of a contract at arm’s length, and those changes can be recorded in a ‘[c]hange of [t]erms [a]greement.’”).

158. Notice to users is key. See *Asmus v. Pac. Bell*, 99 P.2d 71, 79 (Cal. 2000) (“[T]he fact that one party reserves the implied power to terminate or modify a unilateral contract is not fatal to its enforcement, if the exercise of the power is subject to limitations, such as fairness and reasonable notice.”).

159. In fact, all of the centralized microblogging providers include unilateral reordering clauses in their terms of service. See *Twitter Terms of Service*, *supra* note 2 (“We may revise these [t]erms from time to time. . . . By continuing to access or use the [s]ervices after those revisions become effective, you agree to be bound by the revised [t]erms.”); *Facebook Statement of Rights*, *supra* note 122 (“Your continued use of the Facebook [s]ervices, following notice of the changes to our terms, policies[,] or guidelines, constitutes your acceptance of our amended terms, policies[,] or guidelines.”); *Google Terms of Service*, *supra* note 122 (“We may modify these terms or any additional terms that apply to a [s]ervice to, for example, reflect changes to the law or changes to our [s]ervices. . . . If you do not agree to the modified terms for a [s]ervice, you should discontinue your use of that [s]ervice.”); *Yammer Terms of Use*, *supra* note 123 (“From time to time, Microsoft may change or amend these terms. . . . If you use the [s]ervices after the date the change becomes effective, you consent to the changed terms.”); *Tumblr Terms of Service*, *supra* note 122 (“Tumblr reserves the right to modify this [a]greement . . . . Your use of the [s]ervices . . . constitutes your acceptance of the terms and conditions of this [a]greement as modified.”); *Gab Terms*, *supra* note 123 (“We may modify the [t]erms at any time, in our sole discretion. . . . [I]f you continue to use the [s]ervices after we have posted modified [t]erms, you are indicating to us that you agree to be bound by the modified [t]erms.”); *Tout Terms of Service*, *supra* note 122 (“Tout reserves the right to change any of the terms and conditions contained in these [t]erms, including the [s]ervice and/or any policies or guidelines governing the [s]ervice, at any time and in its sole discretion. . . . Your continued use of the [s]ervice following any revision to these [t]erms will constitute your acceptance of the changes or modifications to these [t]erms.”). Twitter, Google, and Tumblr emphasize that the changes will not apply retroactively (as if they could). *Twitter Terms of Service*, *supra* note 2; *Google Terms of Service*, *supra* note 122; *Tumblr Terms of Service*, *supra* note 122. Changes for Google and Tumblr take effect, at the earliest,

vice, most of the centralized providers, Twitter included, will try to notify their users via E-mail or in-service notification when terms change.<sup>160</sup> However, the centralized providers Google and Gab and the decentralized provider Mastodon do not appear to extend such direct notice. Google offers a number of services, such as Google Search, Gmail, YouTube, Google Maps, and Google+.<sup>161</sup> It tells its users to check its terms-of-service page for changes applicable to its services generally, though it will provide in-service notice of service-specific changes.<sup>162</sup> Gab will inform its users of changes to its terms by “posting the modified [t]erms on the [a]pp” but may change its

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fourteen days after the changes are posted, unless legality or functionality compels immediate effect for a change to Google’s terms, or Tumblr’s new terms take immediate effect because its users must explicitly accept them to keep using the service. *Google Terms of Service*, *supra* note 122; *Tumblr Terms of Service*, *supra* note 122. As for the decentralized provider Mastodon, users may infer unilateral reordering from its terms of service, which state both that users indicate their consent to Mastodon’s privacy policy through their use of the site and that should Mastodon “decide to change [its] privacy policy, [it] will post those changes” on the page where its terms are located. *Mastodon Privacy Policy*, *supra* note 131.

160. The unilateral reordering clauses for Twitter, Yammer, Tumblr, and Tout mention attempts at E-mail or in-service notification. *Twitter Terms of Service*, *supra* note 2 (“We will try to notify you of material revisions, for example via a service notification or an email to the email associated with your account.”); *Yammer Terms of Use*, *supra* note 123 (“If we do [change or amend these terms], we will notify you, either through the user interface, in an email message, or through other reasonable means.”); *Tumblr Terms of Service*, *supra* note 122 (“Tumblr reserves the right to modify this [a]greement by (1) posting a revised [a]greement on and/or through the [s]ervices and (2) providing notice to you that this [a]greement has changed, generally via email where practicable, and otherwise through the [s]ervices (such as through a notification on your Tumblr [d]ashboard or in our mobile applications).”); *Tout Terms of Service*, *supra* note 122 (“[W]e will provide written notice to you of any significant changes to these [t]erms or [p]rivacy [p]olicy (including notices posted on the [s]ite or sent to your registered [E]-mail address).”). Facebook’s unilateral reordering clause states, “We’ll notify you before we make changes to these terms and give you the opportunity to review and comment on the revised terms before continuing to use our [s]ervices,” and “[i]f we make changes to policies, guidelines[,] or other terms referenced in or incorporated by this [s]tatement, we may provide notice on the Site Governance [p]age.” *Facebook Statement of Rights*, *supra* note 122. Facebook does not specify how it will “notify” users of changes other than that it “may provide notice” on that page; however, it mentions E-mail and in-service notification in another context as options for contacting users who, upon “violat[ing] the letter or spirit” of Facebook’s terms, lose access to Facebook’s services. *Id.*

161. See, e.g., *Google Product Privacy Guide*, GOOGLE, [https://www.google.com/intl/ALL\\_us/policies/technologies/product-privacy/](https://www.google.com/intl/ALL_us/policies/technologies/product-privacy/) [<https://perma.cc/6LDY-XL9A>].

162. *Google Terms of Service*, *supra* note 122 (“You should look at the terms regularly. We’ll post notice of modifications to these terms on this page. We’ll post notice of modified additional terms in the applicable [s]ervice.”). Cf. *Facebook Statement of Rights*, *supra* note 122 (“Because Facebook provides a wide range of [s]ervices, we may ask you to review and accept supplemental terms that apply to your interaction with a specific app, product, or service. To the extent those supplemental terms conflict with this [statement], the supplemental terms associated with the app, product, or service govern with respect to your use of such app, product[,] or service to the extent of the conflict.”).

services “without notice.”<sup>163</sup> Mastodon will do no more than change its terms of service, letting the new page of terms speak for itself.<sup>164</sup>

In actuality, the notification practices of Google, Gab, and Mastodon may differ only slightly, if at all, depending on what Gab means by on-app posting and on what changes to Gab’s services mean for changes to its terms. Yet, where Google’s terms use the magic words “[w]e’ll post notice,”<sup>165</sup> Gab’s terms signal the opposite with the phrase “without notice” (for changes to services, at least).<sup>166</sup> Meanwhile, Mastodon’s terms remain largely silent, forcing users to read between the lines.<sup>167</sup> Google’s description of changing the terms on its terms-of-service page as providing “notice” to users may explain why the court in *Rudgayzer v. Google, Inc.* assumed the enforceability of Google’s unilateral reordering clause.<sup>168</sup> Perhaps Google’s provision for service-specific changes helped. Regardless of whether other courts will find Google’s practice to be reasonable notice, the more direct notice (via E-mail or in-service notification) of Twitter and most other microblogging sites will likely suffice to bind users to changed terms.

Unconscionability does not present any more of a limitation on Twitter’s terms of service than does the offer-and-acceptance requirement. Courts may eliminate terms from contracts if the terms are “unconscionable at the time the contract is made.”<sup>169</sup> Here, users make the contract when they sign up for a Twitter account. The Uniform Commercial Code applies to goods, not services, but has been

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163. *Gab Terms*, *supra* note 123 (“We may modify the [t]erms at any time, in our sole discretion. If we do so, we’ll let you know by posting the modified [t]erms on the [a]pp. . . . Because our [s]ervices are evolving over time we may change or discontinue all or any part of the [s]ervices, at any time and without notice, at our sole discretion.”). Gab’s terms discuss changes to terms and services under one heading in a five-sentence paragraph. *Id.*

164. *See Mastodon Privacy Policy*, *supra* note 131. Mastodon’s minimalist approach to terms of service makes sense in light of its status as a decentralized, rather than centralized, provider. Notably, it has the ability to inform at least some users via E-mail of changes to its terms given that it “may” ask for users’ E-mail addresses as part of its verification process and “may” periodically contact users via E-mail to give them information, including—at a user’s request—information about “changes to topics” (whatever these “topics” may encompass). *Id.* Nonetheless, Mastodon’s terms do not say anything explicit about E-mailing users about changes to the terms. *See id.*

165. *Google Terms of Service*, *supra* note 122.

166. *Gab Terms*, *supra* note 123.

167. *See Mastodon Privacy Policy*, *supra* note 131.

168. *Rudgayzer v. Google, Inc.*, 986 F. Supp. 2d 151, 154 n.1 (E.D.N.Y. 2013) (citations omitted) (“It’s unclear when the plaintiffs signed up for their Gmail accounts and first agreed to this clause, but it doesn’t matter; the earlier version provides that a user would be bound by future changes to the terms . . . and such contract provisions are enforceable.”), *withdrawn on other grounds*, No. 13 CV 120(ILG)(RER), 2014 WL 12676233 (E.D.N.Y. Feb. 10, 2014); *see also* Linford, *supra* note 157, at 1410 n.72.

169. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

persuasive on the issue of unconscionability; it gives the “basic test” as “whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”<sup>170</sup> Unequal bargaining power is a factor but only insofar as it signals oppression or unfair surprise.<sup>171</sup> For example, by showing that “the transaction involved elements of deception or compulsion” or “the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms,”<sup>172</sup> a party may plead unconscionability. Moreover, when a stronger party uses its position to impose “terms unreasonably favorable” to itself, this circumstance supports a finding of unconscionability.<sup>173</sup>

As a big business, Twitter has a bargaining position superior to its users’ positions, and it is tempting to feel that in the hashtag-game context, this inequality of bargaining power leaves users with “no meaningful choice” or “real alternative” but to assent to Twitter’s terms of service.<sup>174</sup> As hashtag games are now structured, participation in them requires the creation of a Twitter account. To move the existing network of games wholesale to another microblogging site, either the umbrella handle would have to exercise its scheduling authority to direct participants to the new site, probably at least in part via tweet (no doubt an awkward situation), or a user exercising less authority would have to undertake a massive coordination of disparate participants. Either way, moving the games would require combating the inertia of participants’ online habits. Still, moving them is possible, as is starting from scratch on another site. A hashtag-game host could even start a website devoted to a game and offer the players terms different from Twitter’s, as by charging the players a small monthly fee to publish their responses under a licensing scheme more protective of their copyrights: a scheme under which the site retains no rights in the responses, for instance.

As we have seen, Twitter is but one of many microblogging providers. What’s more, considering that Twitter works hard to facilitate the sharing of countless tweets from which its deriving profits is unlikely—tweets of dog owners celebrating their four-legged friends, best buds exchanging in-jokes, or students venting about exams, for

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170. U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

171. *Id.* (“The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.”).

172. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (AM. LAW INST. 1981).

173. *Id.*

174. *Id.*

example<sup>175</sup>— and that Twitter does not charge its users for this work, the terms that Twitter imposes are not “unreasonably favorable” to Twitter.<sup>176</sup> Of course, Twitter is no charity: it makes most of its money by advertising to users and some by selling user-generated data to third parties.<sup>177</sup> These revenue streams are part and parcel of the social media business and pose no threat to hashtag gamers’ copyrights. Copyright protects expression, not information, so third parties can use information obtained from a mass of tweets without violating a user’s copyright.

Were a hashtag-game participant to challenge Twitter’s terms as unconscionable, such challenge would probably not succeed. For the sake of argument, in light of recent decisions on constructive assent to online terms, claims of oppression could fare better than claims of unfair surprise, though Twitter’s status as an outlier among microblogging providers could speak to the latter issue, as well. Unconscionability can be procedural, involving the process of forming the contract, or substantive, involving the content of the contract. By its own terms, Twitter wants to resolve disputes by applying California law,<sup>178</sup> which in its civil code provides for an unconscionability de-

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175. See, e.g., Greta J., *15+ of the Best Dog Tweets of All Time*, BORED PANDA, <https://www.boredpanda.com/funny-dog-tweets/> [<https://perma.cc/A2WT-EBWN>] (showing pictures of dogs in various settings); Ferrett Steinmetz, *Three Ways of Chronicling Your Life on Twitter*, FERRETT (Dec. 9, 2013), <http://www.theferrett.com/ferrettworks/2013/12/three-ways-of-chronicling-your-life-on-twitter/> [<https://perma.cc/QW2F-WBQU>] (describing in-joke tweets as well as factual and performance tweets); April Hautea, *British Students Create Memes to Vent About a Ridiculous Biology Exam Question*, MASHABLE (May 17, 2017), <http://mashable.com/2017/05/17/students-memes-ridiculous-biology-exam-question/#UFO7fjJTEaqD> [<https://perma.cc/XAL5-P6AG>] (sharing tweets by students reacting to a biology exam question on “why was [Charles] Darwin drawn as a monkey?”).

176. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (AM. LAW INST. 1981).

177. Pia Gadkari, *How Does Twitter Make Money?*, BBC NEWS (Nov. 7, 2013), <http://www.bbc.com/news/business-24397472> [<https://perma.cc/D7FT-5VKT>] (“Almost all of Twitter’s revenue - about 85% of it - comes from advertising on its site. . . . Data licensing is Twitter’s second major revenue stream. . . . Companies can dive deep into the data to analy[z]e consumer trends and sell their insight on to other brands and companies. Because the tweets are public, consumers also have access to this data.”); *How Does Twitter Make Money?*, INVESTOPEDIA (Oct. 26, 2017, 9:39 AM), <https://www.investopedia.com/ask/answers/120114/how-does-twitter-twtr-make-money.asp> [<https://perma.cc/LM68-HYJG>] (“Twitter (TWTR) earns 85% or more of its revenue from advertising. In the second quarter of 2017, Twitter posted an advertising revenue of \$503 million, which was a [ ] 4% decrease of what the social media site brought in during the same time in 2016. . . . Twitter makes additional money through data licensing.”).

178. *Twitter Terms of Service*, *supra* note 2 (“The laws of the State of California, excluding its choice of law provisions, will govern these [t]erms and any dispute that arises between you and Twitter. All disputes related to these [t]erms or the [s]ervices will be brought solely in the federal or state courts located in San Francisco County, California, United States, and you consent to personal jurisdiction and waive any objection as to inconvenient forum.”).

fense in keeping with the general principles described above,<sup>179</sup> and in its jurisprudence requires a showing of both procedural and substantive unconscionability, though not necessarily in equal degrees.<sup>180</sup> If a term is highly substantively oppressive, then only a minimal showing of procedural unconscionability is required; if a term is highly procedurally oppressive, then only a minimal showing of substantive unconscionability is required.<sup>181</sup>

Twitter's terms are neither procedurally nor substantively oppressive for hashtag-game participants. Procedurally, users have the opportunity to view Twitter's terms before being held to them, and they receive direct notices to changes in the terms. Substantively, users may write, share, and read tweets for free. The best arguments to the contrary, arguments that the unconscionability defense sufficiently limits Twitter's terms, would note that procedurally, users do not negotiate the terms—the terms are a contract of adhesion, putting users in a take-it-or-leave-it position—and substantively, the terms let Twitter do what it wants with its users' content to an extent far greater than other microblogging providers deem necessary. Even in the unlikely event that a court strikes one or more of Twitter's terms as unconscionable, unconscionability would operate as an external limitation on Twitter reactively on a case-by-case basis. A better solution would apply proactively and uniformly throughout the nation, as through congressional legislation. The DMCA already covers the relevant area of law—copyright in cyberspace<sup>182</sup>—so amending it makes the most sense as a solution.

Congressional intervention is called for since a broad licensing and sublicensing scheme, such as Twitter's, puts users across the country at a major disadvantage by allowing the exploitation of their creative input. Twitter's average user does not read its terms of service, yet courts have consistently bound Internet users to such terms.<sup>183</sup> If it chooses, under the current scheme, Twitter can use its business position to dominate dealings and render its users' content economically worthless through price competition. The DMCA provides a "safe harbor" for Internet service providers, like Twitter, so that they do not have to worry about whether their users' content violates copyright.<sup>184</sup> Now, however, users must safeguard their

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179. See CAL. CIV. CODE § 1670.5 (1979).

180. *Pinnacle Museum Tower Ass'n. v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1232 (Cal. 2012).

181. *Id.*

182. 17 U.S.C. § 512 (2012).

183. See, e.g., *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012).

184. 17 U.S.C. § 512 (2012).

rights from Twitter. The purposes of the DMCA are “to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for ‘passive,’ ‘automatic’ actions in which a service provider’s system engages through a technological process initiated by another without the knowledge of the service provider.”<sup>185</sup> To receive immunity, providers must prove their innocence by showing that “they do not have actual or constructive knowledge of the infringement.”<sup>186</sup> Even then, “[t]he DMCA’s protection of an innocent service provider disappears at the moment the service provider loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe.”<sup>187</sup>

Twitter would not be infringing on copyright if it exercised valid contractual rights to a user’s original content, but its action would still go against the spirit of the DMCA, which regards providers as passive with respect to user content. The proper functioning of the Internet may well require service providers to use content for the limited purposes specified in the terms of service of most microblogging sites (providing, maintaining, improving, and developing services and adapting services to different, emerging technologies) and to generate revenue from user data, but Twitter’s terms go beyond what is necessary for proper functioning. A provider “loses its innocence,” thereby forfeiting the DMCA’s safe harbor, when it knows that a user is using its service to infringe copyright and lets the infringement occur.<sup>188</sup> The same result should befall those providers who use their own services to wield unnecessary control over their users’ creative content, whether or not such control technically constitutes infringement in light of constructively assented-to terms of service. Obviously, just because Twitter can exploit its users’ content under its broad terms of service does not mean that it will. Still, prudence and grace demand that we remove the temptation. Consequently, Congress should amend the DMCA so that protected providers must limit their use of content to those purposes necessary for the proper functioning of the Internet.

## VI. CONCLUSION

Through an amendment to the DMCA, Congress should make it impossible for Internet service providers like Twitter, which benefit from the act’s safe harbor provisions, to include broad licensing and sublicens-

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185. *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (citations omitted).

186. *Id.*

187. *Id.*

188. *Id.*

ing schemes in their terms of service. At the same time, courts should emphasize creativity over brevity and do all they can to protect users' rights in the short, humorous expressions derived through participation in hashtag games.

Played almost exclusively through Twitter for now, hashtag games are inventive and interactive online experiences that invite players to compose, publish, read, and respond to clever tweets for fun. Just as pressure makes diamonds, the time crunch inherent in hashtag games produces some comic gems. The network of hashtag games on Twitter involves umbrella, host, and general game handles: the umbrella handle (the Hashtag Roundup app or sometimes The Hashtag Game) oversees the scheduling, and the host handle (Rose and the other hosts) manages the general games (for example, Saturday Schmooze) by kicking off and encouraging participation in particular games (for example, #BeachTheatre). The Copyright Office has a policy against protecting brief works, but provided that a hashtag-game response crosses the idea-expression divide and does more than simply restate someone else's creative work, it deserves copyright protection regardless of its brevity. After all, brevity has been a trend in literature and social media, and hashtag games reside at the intersection of these areas. Since short verses and quick jokes are eligible for copyright protection, the creative expressions tweeted for hashtag games should get the same chance. Unlike the brief expressions that the Copyright Office highlights as unprotectable—expressions like names, titles, and slogans which serve primarily to refer and thus belong more to trademark than to copyright—hashtag-game responses aim to entertain through ingenuity.

Unfortunately for hashtag gamers, Twitter's terms of service pose a potential threat: Twitter claims rights in its users' original content that rival the users' own rights. The broad licensing (and sublicensing) scheme in these terms of service sets Twitter apart from other microblogging service providers, whose terms put internal limits on the use of user-generated content. The main limit is for the service providers to use the content only as needed to provide the services, while retaining at least some leeway for technological development and the like. In the absence of internal limitations, hashtag-game players may turn to contract law to impose the external limitations of offer and acceptance and unconscionability on Twitter's terms. However, given the notice that Twitter gives users of its terms and the possibility of playing a hashtag game somewhere other than Twitter, these players will likely lose. To protect hashtag gamers from the superior bargaining power of big businesses like Twitter, Congress should amend the DMCA. If and when Internet service providers actively exploit the creative expressions of their users, these providers no longer deserve the special sheltering of the Act's safe harbor provisions. The Internet can run perfectly fine without broad licensing schemes like Twitter's.