

Twitterright: Finding Protection in 140 Characters or Less

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*“The act of publishing on Twitter is so friction-free—a few keystrokes and hit send—that you can forget that others are out there listening.”*²

I. The Rise of the 140 Phenomenon

Nearly every day people around the globe are posting millions and millions of tiny statements called “Tweets” online.³ To be more precise, as of January 2011, nearly 200 million accounts had been registered on Twitter and over 130 million tweets were being posted each day.⁴ Twitter updates are comprised of short and sweet statements made up of no more than 140 characters, encompassing everything from the mundane, like sports statistics, to the catastrophic, like the January 2009 earthquake in Haiti,⁵ to the historic, like the 2011 revolution in Egypt.⁶

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² David Carr, *Why Twitter Will Endure*, N.Y. TIMES, Jan. 1, 2010, *archived at* <http://www.webcitation.org/5ovGDTJDn>.

³ See Noam Cohen, *Refining the Twitter Explosion*, N.Y. TIMES, Nov. 9, 2009, *archived at* <http://www.webcitation.org/5ovGFHEJ2> (noting that as of November 2009, nearly twenty-six million tweets a day were being posted); Leena Rao, *Twitter Seeing 90 Million Tweets Per Day, 25 Percent Contain Links*, TECHCRUNCH.COM, Sept. 14, 2010, *archived at* <http://www.webcitation.org/5wTMUNeXI> (explaining the rapid rise in posts on Twitter to ninety million tweets per day by September 2010); Scott Morrison, *Twitter CEO Says Co is ‘Already Making Money,’* WALL ST. J., Feb. 14, 2011, *archived at* <http://www.webcitation.org/5wUq3VKA4> (commenting on the growth and popularity of Twitter).

⁴ See Morrison, *supra* note 3 (noting that Twitter has seen steady growth).

⁵ *Twitter Comes in Handy as Haitians Pick Up the Pieces*, BUSINESS DAILY, Jan. 20, 2010, *archived at* <http://www.webcitation.org/5ovGYB1wc> (explaining the utility of Twitter during the January 2010 earthquake in Haiti). According to one estimate, in the days following the disaster in Haiti, forty new tweets containing the word “Haiti” were posted to twitter every five seconds. *See id.*

⁶ See *The Face of Egypt's Social Networking Revolution*, CBS NEWS, Feb. 12, 2011, *archived at* <http://www.webcitation.org/5wTPZhH3j> (noting that protestors used Facebook and Twitter to incite the revolution). In fact, early reports credited protestor Wael Ghonim’s initial Facebook.com posts and subsequent tweets with sparking the first protests. *See id.*; *see also* Benny Evangelista, *Facebook, Twitter and Egypt's Upheaval*, S.F. CHRON., Feb. 13, 2011,

Since its inception, users have integrated Twitter into everything from presidential debates⁷ to daily newscasts where viewers use the site to participate in live discussions.⁸ In January 2009, Twitter even made the history books when President Barack Obama became the first President in United States history to tweet.⁹

As the popularity of the site grows, so does the question of whether the statements posted by users are protectable intellectual property or whether users posting on the site are left out in the cold, without protection, under the current United States copyright statute.¹⁰ This paper analyzes the ever-more-popular tweets under the framework of current U.S. copyright law and

archived at <http://www.webcitation.org/5wUsiwcjm> (positing that Facebook and Twitter played a major role in inciting protests in Egypt in early 2011). Soon after the first protests, Twitter confirmed that its services had been blocked in Egypt. *See* David Kravets, *Twitter Blocked in Egypt Amid Street Protests*, CNN, Jan. 26, 2011, *archived at* <http://www.webcitation.org/5wTPlouqw>.

⁷ TWITTER.COM, *archived at* <http://www.webcitation.org/5ovGkQnvb> (demonstrating the myriad topics discussed on Twitter). According to Twitter, during the first Presidential debate of 2008, which took place on September 26, 2008, tweets increased by 160 percent over the previous week. *See Debate Effect on Twitter*, TWITTER.COM, Oct. 1, 2008, *archived at* <http://www.webcitation.org/5wTQ6tWk8>.

⁸ *See* Howard Kurtz, *Anchors Oblige Public's Craving for Tweets*, WASH. POST, Feb. 23, 2009, *archived at* <http://www.webcitation.org/5ovGt13Rf> (discussing CNN's Rick Sanchez's three p.m. daily broadcast structured around social-network sites like Twitter and Facebook). Prior to leaving CNN in October 2010, Sanchez read viewer tweets on air and added his own updates during the broadcast to encourage more viewer participation. *See id.*

⁹ *See* MG Siegler, *President Obama Finally Tweets—For Haiti—In Third Person*, TECHCRUNCH.COM, Jan. 18, 2010, *archived at* <http://www.webcitation.org/5ovH70lFO> (confirming President Obama's first tweet in the aftermath of the January 2010 earthquake in Haiti). The President, while in Haiti at the Red Cross' Earthquake Relief base used the organization's twitter account, and typed "President Obama and the First Lady are here visiting our disaster operation center right now." *Id.* The President hit "send," posting the message to Twitter and making Presidential history. *See id.*

¹⁰ *See, e.g.,* Kyle-Beth Hilfer, *Tweet Tweet, Can I Copyright That?*, LAW TECH. NEWS, Jan. 19, 2010, *archived at* <http://www.webcitation.org/5ovHc7j9z> (noting that numerous blogs are questioning Twitter's potential for copyright protection and addressing the possible reasons why tweets will not gain protection); Brock Shinen, *Twitterlogical: The Misunderstandings of Ownership*, SHINEN L. CORP. (2009), *archived at* <http://www.webcitation.org/5ovHZMUQR> (providing the advice given by one attorney to his clients on whether he thinks their tweets are protected).

suggests protection is likely in some circumstances. Part II analyzes the foundations of copyright law in the United States from its Constitutional origins to the evolution of the originality standard in case law. While the courts traditionally held that only minimal originality is needed to protect a work of authorship, more recent decisions have begun calling for a higher level of creativity.

Part III analyzes how the courts treat short phrases, in particular, the protection of haikus, despite the Copyright Office's refusal to register short phrases or slogans. While courts traditionally held that short phrases, titles and slogans are generally not copyrightable content, the courts have conceded that while short, haikus are potentially protectable original works of authorship. This is far from a clear issue and one that could have a major impact on the interpretation of micro-blogs.

Part IV explores Twitter itself as well as analyzes its importance as an emerging technology in Web 2.0. Following that, Part V applies the current copyright tenets to the Twitter structure. While the majority of tweets are most likely non-copyrightable content, there is growing sentiment that some tweets, depending on their structure and content, are in fact protectable. Finally, the author posits in Part VI how Twitter may find protection and why doing so is critical to continuing protection in a Web 2.0 world.

II. A Constitutional Right

The debate facing sites like Twitter is one based on some of the most elemental foundations of copyright law.¹¹ While the thresholds and requirements for protection under the current regime are frequently applied to traditional works, application to micro-blogs will bring

¹¹ See Rebecca Haas, *Twitter: New Challenges to Copyright Law in the Internet Age*, 10 J. MARSHALL REV. INTELL. PROP. L. 231, 240 (2010) (reviewing the application of the fixation requirement to current technology).

copyright law into a new era.¹² To understand how this application may proceed, an overview of current copyright law is essential.

Congress derived the power to create the copyright code in Article I, Section 8 of the United States Constitution.¹³ Specifically, the Constitution granted the legislature the right to “promote the Progress of Science and useful Arts.”¹⁴ Known as the intellectual property clause, scholars have long stated that copyright law should stick to this original tenet and provide protection only so that it benefits society and social welfare.¹⁵ As one critic described, “[s]ociety has no interest in protecting unoriginal works that effect no advancements in art, literature, science, education, or other useful endeavors.”¹⁶

While the copyright code is of statutory creation, the courts have played a major role in promulgating the view that copyright is for the public good.¹⁷ In *Mazer v. Stein*, 347 U.S. 201 (1954), the Court reinforced the idea that the purpose of copyright is to promote the arts and

¹² See Edward Lee, *Developing Copyright Practices for User-Generated Content*, 13 No. 1 J. INTERNET L. 1, 19 (2009) (opining that the growth of Web 2.0 media, specifically user generated content, requires new forms of copyright protection).

¹³ See U.S. CONST. art. I, § 8, cl. 8. Specifically, the Constitution states “The Congress shall have power. . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.*

¹⁴ U.S. CONST. art. I, § 8, cl. 8.

¹⁵ See Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1517 (2009) (explaining that the purpose of copyright protection is to advance the public good); see also Alina Ng, *The Author’s Rights in Literary and Artistic Works*, 9 J. MARSHALL REV. INTELL. PROP. L. 453, 456 (2010) (arguing that the original intention of the copyright clause was to reward and incentivize authors even at the expense of a societal benefit). Giving authors the incentive to constantly create, even when it restricts the rights of authors, actually benefits society. *See id.*

¹⁶ Parchomovsky & Stein, *supra* note 15, at 1517.

¹⁷ See, e.g., *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (1984) (holding that copyright protection provides only a secondary benefit to the individual owner); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (finding that in copyright law, the reward to the author is only a secondary consideration to the public benefit).

thereby promote the public good.¹⁸ The *Mazer* Court, in fact, said that the reward to the owner is a “secondary consideration.”¹⁹ More recently, the Court in *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984), reiterated this point, stating that copyright law is not intended to provide private privileges, but rather to promote the public good.²⁰

III. The Law in Thresholds

At its most elemental level, copyright in the United States is the right of authorship.²¹ The current United States copyright code provides protection for “original works of authorship fixed in any tangible medium of expression. . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²² To understand how the copyright code treats Web 2.0 authorship, it is important to understand the threshold requirements for copyright protection.

A. An Intellectual Fixation

¹⁸ See *Mazer*, 347 U.S. at 219. The Court held that copyright protection is intended to encourage the production of creative works by granting authors and publishers valuable and enforceable rights without burdensome requirements. See *Id.*

¹⁹ See *Id.* (exploring the economic policies behind the copyright clause of the Constitution).

²⁰ See *Sony Corp.*, 464 U.S. at 429. Further, the court posited that copyright protection “is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Id.*

²¹ Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L. JOURNAL 186, 188 (2009) (providing the theory of authorship as the earliest reasoning behind copyright protection). Bracha refers to authorship as “copyright’s ghost in the machine.” *Id.*

²² 17 U.S.C. § 102 (2008). “Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” *Id.*

Perhaps the easiest requirement, and most easily understood, is fixation. The Copyright Act leaves wide berth for what qualifies as fixed.²³ It can be a novel, or something only fixed for a few moments, such as creating a copy of a program on your computer, which is not stored when the computer is turned off.²⁴ For example, in *MAI Sys. Corp. v. Peak Computer, Inc.*, the court found that software that is briefly copied in a computer's RAM and then deleted when a computer is turned off, was sufficiently fixed.²⁵ This wide scope provides the courts with the flexibility to find protection for a wide range of works.²⁶

In addition to singular works, compilations fixed in a tangible medium of expression are also copyrightable.²⁷ Copyright in a compilation extends only to the original material contributed by the author, and not other copyrighted material compiled, and likely licensed, for a compilation.²⁸ This means that while it does receive protection, the protection granted to a compilation is far thinner than that granted to a singular creative work.²⁹

²³ Parchomovsky & Stein, *supra* note 15, at 1510 (explaining the low requirements courts typically set to determine if a work is fixed for purposes of copyright protection).

²⁴ See 17 U.S.C. § 102 (2008); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993).

²⁵ See *MAI Sys. Corp.*, 991 F.2d at 519. In *MAI*, the plaintiff software manufacturer sued a defendant who utilized the plaintiff's software when fixing computers. See *id.* at 513. The plaintiff claimed that each time a computer is turned on, a copy of their software is created, and therefore the defendant copied illegally because they were not licensed. See *id.* at 513-14. The court found this copy in the computer's RAM was sufficiently fixed to be an infringing copy even though it was only on the computer system transiently. See *id.* at 518.

²⁶ See Parchomovsky & Stein, *supra* note 15, at 1510 (inferring the permissive nature of copyright law); Haas, *supra* note 11, at 247 (concluding that Tweets meet the fixation requirement under the Copyright Act of 1976). In addition, "courts have found the 'fixed' requirement satisfied for much shorter durations than the length of time a Tweet remains posted on the Internet." *Id.*

²⁷ See 17 U.S.C. § 103(a) (2008). The statute states that "[t]he subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully." *Id.*

²⁸ See *id.* § 103(b) (2008).

B. Make It Original

Under the *MAI Sys.* holding, it appears fixation would not to be an issue when it comes to posting on sites like Twitter given that content becomes fixed on these sites at the time a user posts it.³⁰ However, critics and courts alike continue to debate the originality requirement for authorship.³¹ In an early interpretation, the Court in *United States v. Steffens (Trademark Cases)*, 100 U.S. 82 (1879), described originality as a combination of novelty, invention, discovery and the work of the author's own mind.³² In other words, the court viewed originality as the product of something novel done by the author.³³ While courts formerly viewed authorship mainly in the context of the written word, in 1884 the Supreme Court expanded the view to include any creative work.³⁴ In that case, the Court held that a photograph of Oscar

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

Id.

²⁹ See *id.* (describing the protection granted to compilations).

³⁰ See Haas, *supra* note 11, at 247 (concluding that tweets meet the fixation requirement under the Copyright Act of 1976). In addition, “courts have found the ‘fixed’ requirement satisfied for much shorter durations than the length of time a Tweet remains posted on the Internet.” *Id.*

³¹ See Parchomovsky & Stein, *supra* note 15, at 1510 (citing *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991) as a relatively recent change to the originality requirement). The authors call originality the “sin qua non of copyrightability.” *Id.* at 1505. They argue that the current model of what is original fails to provide adequate protection. See *id.* at 1506. Instead, like other critics, they seek a system that will measure an author's rights by the level of creativity embodied in the work. See *id.*

³² See *U.S. v. Steffens (Trademark Cases)*, 100 U.S. 82, 94 (1879) (describing the Court's conception of originality in a general intellectual property context). The court elaborated that copyrighted works did not need an ingenious amount of imagination to find protection. See *id.*

³³ See Diane Leenheer Zimmerman, Note, *It's an Original!(!): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 200-01 (2005) (explaining the early reliance on the theory that an author's labor is a basis for a finding of originality).

³⁴ See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (holding that a photograph was an original work of authorship protectable under the copyright statute);

Wilde, taken by Napoleon Sarony, was an original work of authorship, because when taking the photo, Sarony conceived, manipulated, and captured the scene itself.³⁵

While the views of authorship evolved, so did the threshold for what is considered original.³⁶ For many years, only a low standard of originality was necessary to find authorship.³⁷ In *Bleistein v. Donaldson Lithographing Co.*, the Court clarified that when ruling on a work's originality, judges are not to pass aesthetic determinations on works of art.³⁸ Because the Court said it is not up to the justices to judge artistic merit, they instead must find a modicum of originality in the work in order to afford it copyright protection.³⁹ Perhaps this decision, more than any other, has had the greatest impact in lessening the courts' focus on the constitutional guidelines of promoting the arts and sciences.⁴⁰ This language, once thought to protect creative

Zimmerman, *supra* note 33, at 203 (discussing the expansion of protectable works in early copyright cases).

³⁵ See *Burrow-Giles*, 111 U.S. at 60 (reasoning that the author made the photo original by “posing Oscar Wilde in front of the camera, selecting and arranging . . . various accessories in said photograph . . . and evoking the desired expression . . .”).

³⁶ See Zimmerman, *supra* note 33 at, 200-02 (following the evolution from a minimal standard of creativity to a newer higher standard for copyright protection).

³⁷ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250-52 (1903) (adopting a minimalist standard for originality to determine copyright protection); Zimmerman, *supra* note 33 at 202 (criticizing the predictability of a minimalist standard of originality). In adopting such a low standard, the court ceded some of its intellectual authority to so-called creators. See *id.*

³⁸ See *Bleistein*, 188 U.S. at 251. The court stated “it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” *Id.*

³⁹ See *id.* The court was concerned that judges were not properly qualified in the arts to make aesthetic determinations and because of that failing, works of actual genius could potentially miss out on protection. See *id.*

⁴⁰ See Zimmerman, *supra* note 33, at 204. Zimmerman argues that the decision, along with acts of Congress, largely forced the “progress of science” test to give way to a broader vision of copyright that provided protection for any work of authorship. See *id.*

advances, has now seemed to bow down to a broader scope of protection for any work that is even mildly original.⁴¹

In recent years, the courts have begun to redefine originality, which will likely have a larger impact on how originality will be treated in the Web 2.0 realm.⁴² In a landmark decision, the Court in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, appeared to set a higher standard of originality when it found that a telephone directory could not be copyrighted.⁴³ While facts have never been copyrightable, the Court here determined that in some circumstances even the expression of those facts will not be protectable, bucking a long-held notion of copyright protection.⁴⁴ Instead, the Court stated that something more is necessary to be original.⁴⁵ Despite these steps forward, the failure of the *Feist* Court was to raise the bar for originality without directing future courts on how to implement the heightened originality standard.⁴⁶ The Court claimed it was not seeking a new creation entirely, but instead said there

⁴¹ See Zimmerman, *supra* note 33, at 204-205 (analyzing the need for protection even for works of “questionable value”).

⁴² See Lee, *supra* note 12 (stating that new forms of copyright protection will be needed to cope with Web 2.0 media).

⁴³ See *Feist*, 499 U.S. at 361 (holding that “[t]he originality requirement ‘rules out protecting . . . names, addresses, and telephone numbers of which the plaintiff by no stretch of the imagination could be called the author.’”).

⁴⁴ See *id.* at 344-45, 363 (barring protection where the selection and arrangement of facts so mechanical that they lack any creativity); Zimmerman, *supra* note 33, at 187-88 (detailing the impact of the *Feist* Court’s decision on how originality is viewed).

⁴⁵ See *Feist*, 499 U.S. at 345 (claiming that some compilations of facts may be protectable, without setting a bright line bar for protection).

⁴⁶ See Zimmerman, *supra* note 33, at 208-09. The Court determined that something more must exist than the traditional low level of originality, but never defined what the “more” was. See *id.* The *Feist* Court stated that “[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.” *Feist*, 499 U.S. at 345.

must be a “minimal creative spark.”⁴⁷ However it will be up to later courts to determine exactly what will qualify as original.⁴⁸

C. The Length Debate

In addition to meeting an originality threshold, there is also essentially a length threshold for written works.⁴⁹ The current copyright code states that “names, titles, and other short phrases” or expressions are not copyrightable.⁵⁰ In numerous cases, the court has held that plaintiffs have no grounds for infringement when only a short phrase is at issue.⁵¹ Specifically, in *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, the court denied copyright protection for the serving directions on Sara Lee’s labels, stating “...it must contain an appreciable amount of

⁴⁷ *Feist*, 499 U.S. at 363. The Court claimed that because *Feist* was required by law to create the telephone directory, the resulting creation was not the result of original creativity. *See id.* Further, the Court held that even the expression of the facts, which in this case was the particular arrangement of the names, addresses and telephone numbers, was not a creative choice but rather an inevitable arrangement. *See id.*

⁴⁸ *See Zimmerman, supra* note 33, at 208 (criticizing the *Feist* Court for allowing the process of redefining originality to stall by failing to clarify its decision). Zimmerman posits the failure of the court was that it was “unsure about or unwilling to tell us either why more is demanded or how we can tell when the “more” exists.” *See id.*

⁴⁹ *See, e.g., Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (1951) (holding that short phrases cannot be protected even when “distinctively arranged or printed.”); *N.Y. Mercantile Exch., Inc. v. Intercont’l Exch., Inc.*, 497 F.3d 109, 118 (2d Cir. 2007) (holding short phrases in the form of commodities pricing were not copyrightable).

⁵⁰ Circular 34, U.S. Copyright Office, Copyright Protection Not Available for Names, Titles, or Short Phrases, (2009), *archived at* <http://www.webcitation.org/5wTY7L1vi>. In a circular, the U.S. Copyright Office explains that it will not register:

[n]ames of products or services, names of businesses, organizations, or groups (including the names of performing groups), pseudonyms of individuals (including pen or stage names), titles of works, catchwords, catchphrases, mottoes, slogans, or short advertising expressions, listings of ingredients, as in recipes, labels, or formulas. [However, w]hen a recipe or formula is accompanied by an explanation or directions, the text directions may be copyrightable, but the recipe or formula itself remains uncopyrightable.

Id.

⁵¹ *See Sara Lee*, 266 F.2d at 544 (holding that a competing bakery did not infringe the directions on Sara Lee’s label). *See also Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (1992) (denying protection for short words or phrases that do not have minimal creativity).

original text or pictorial material and brand names, trade names, slogans and other short phrases cannot be copyrighted even if they are distinctively arranged or printed.”⁵² The court reiterated this stance more recently in *New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc.*, finding that the settlement prices for a commodity futures exchange were non-protectable short phrases.⁵³

However, while the traditional view of copyright found no protection for short phrases, in a recent summary judgment motion before the Federal District Court in California, the court recognized the potential for copyright protection of short sentences.⁵⁴ The *Stern* court stated the focus when analyzing the copyrightability of a short sentence must be on the presence of creativity.⁵⁵

While a shorter work . . . is less likely to possess the creative spark necessary to be accorded copyright protection, that will not always be the case. A single sentence may be singular . . . Thus, the copyrightability of a very short textual work—be it word, phrase, sentence, or stanza—depends on the presence of creativity.⁵⁶

⁵² *Sara Lee*, 266 F.2d at 544.

⁵³ *See N.Y. Mercantile*, 497 F.3d at 118. *New York Mercantile* dealt with securities exchange numbers, but the court said that the numbers were analogous to short phrases. *See id.*

⁵⁴ *See Stern v. Does*, No. 09–01986 DMG, 2011 WL 997230, at *4-6 (C.D. Cal. Feb. 10, 2011) (stating that short statements can meet the originality standard). The *Stern* court was faced with a copyright claim in a listserv posting. *Id.* at *2. While the court admitted a short statement could be copyrightable, it found the statement at issue “displayed no creativity whatsoever” and was thus, not protected. *Id.* at *6.

⁵⁵ *Id.* at *4-6. To illustrate its opinion, the court noted that “[t]he opening sentence of a poem may contain sufficient creativity to warrant copyright protection whereas a more prosaic sentence of similar length may not. *Id.* at *6, quoting *Narell v. Freeman*, 872 F.2d 907, 911–12 (9th Cir.1989).

⁵⁶ *Id.* at *5-6. The court stressed that short phrases and sentences must be analyzed for their creative effort and their ability to be expressed in multiple ways, thereby avoiding the idea-expression dichotomy. *Id.* at *8.

Further, other courts have held that haikus or short statements in scientific studies, short phrases are protectable works.⁵⁷ The court in *Religious Technology Center v. Lerma*, noted in dicta that short phrases like haikus and musical works would be protectable if sufficiently original.⁵⁸ While the court mentioned the possibility of protecting haikus when explaining that even creative works that are derived out of a particular process are protectable, critics and scholars have taken this to signal that haikus in general will be registerable.⁵⁹ The barrier is simply that there be an “appreciable amount of original text,” and while very short, haikus seem to fit this description.⁶⁰

⁵⁷ See *Applied Innovations, Inc. v. Regents of the Univ. of Minn.* 876 F.2d 626, 635 (1988) (holding that short statements used in a scientific study were copyrightable). The *Applied* Court found that the test statements, though short and declarative, were not merely fragmentary words and were therefore eligible for copyright protection. See *id.* at 635; see also *Religious Tech. Center v. Lerma*, No. 95-1107-A, 1996 WL 633131, at *4 (E.D. Virginia Oct. 4, 1996) (stating in dicta that some short phrases may be copyrightable).

⁵⁸ See *Religious Tech.*, 1996 WL 633131, at *4 (stating haikus and other short, repetitive works are copyrightable).

⁵⁹ See Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 378 (2005) (discussing that haikus may be sufficiently original to be protectable under copyright law); George Wei, *Certainty of Subject-Matter in the Development of Intellectual Property: “Please Sir, I Want Some More!”*, 2009 SING. J. LEGAL STUD. 474, 502 n.58 (2009) (stating “[n]o doubt Haiku poems can be protected as original literary works applying basic copyright principles.”); Jonathan Bailey, *Copyright and Twitter*, THE BLOG HERALD, May 5, 2008, archived at <http://www.webcitation.org/5ovHP7wKN> (noting that haikus may receive copyright protection).

⁶⁰ See *Religious Tech.*, 1996 WL 633131, at *4. In *Religious Tech.*, literary works such as a poem or haiku and musical works such as a symphonic score possess the same quality—the desired effect cannot be achieved without precise repetition. This does not make poems, haikus, and musical scores uncopyrightable, and it should likewise not preclude copyrightability of the Works. Denying copyright protection to RTC on this basis would rapidly destroy the protection and incentive for the likes of Wagner and Brahms—an outcome that is most certainly contrary to the goals of copyright law.

Id.

The Eighth Circuit, in *Applied Innovations, Inc. v. Regents of the University of Minnesota*, also broke from the standard rule that short statements are not copyrightable.⁶¹ In that instance, the court found that short, declarative statements that researchers administered during a scientific test to assess major personality characteristics were copyrightable despite their brevity.⁶² In this instance, the court held that even though these were short statements, they were protectable because they “were not merely fragmentary words and phrases.”⁶³ While the court did limit its holding to the use of the statements in the context of the psychological tests, it was a step forward in finding sufficient creativity in short statements.⁶⁴ The decision stressed that the level of originality necessary is minimal, though it is important to note that this decision was before *Feist*.⁶⁵ In *Applied*, the court’s distinction that short statements are copyrightable, while short phrases may not be, is a clear break from the tenet that no short works can be found to have sufficient originality to be copyrighted.⁶⁶

D. The Battle Between Ideas and Expressing Ideas

Another major hurdle to copyright protection for micro-blogging is the idea/expression dichotomy. In an effort to “promote the arts and sciences” and further the public good, courts

⁶¹ See *Applied*, 876 F.2d at 635 (allowing for protection of short, declarative statements used in scientific testing).

⁶² See *id.* at 635. For example, one of the test statements was “I am a good mixer.” David Goldberg, Mary L. Kevlin, Sheri L. Rosenfeld & Jane DeFavero, *Judicial Developments in Literary and Artistic Property*, 37 J. COPYRIGHT SOC'Y U.S.A. 502, 509 (1990).

⁶³ *Applied*, 876 F.2d at 635. In total, *Applied Innovations* had 550 test statements that were not titles or slogans, which the court therefore found qualified for protection. *Id.* at 628, 635.

⁶⁴ See *id.* at 635. The court clearly stated that the minimal standard for original works of authorship was met. See *id.*

⁶⁵ See *id.* In *Feist*, the Court stated that originality alone is not enough and some minimum degree of creativity will also be needed. See *Feist*, 499 U.S. at 345. However, this decision in no way overturned *Applied*. See *Applied*, 876 F.2d at 635.

⁶⁶ See *Applied*, 876 F.2d at 635 (establishing a new standard regarding the length of copyrightable phrases).

have long sought to refrain from chilling future creation.⁶⁷ A large part of this effort is ensuring early creators do not monopolize knowledge and facts to the detriment of future creators.⁶⁸

While the expression of facts is typically protected, when the idea and the expression of that idea merge, the author will not find protection.⁶⁹

The Supreme Court first explained the merger doctrine in *Baker v. Selden*.⁷⁰ There, the plaintiff was left without remedy against a defendant who created bookkeeping forms that closely resembled those that the plaintiff had created as part of a new bookkeeping system manual.⁷¹ The Court essentially found that while the plaintiff held a copyright in the literal composition of his work, the knowledge he set out in those forms—the new system—was not copyrightable.⁷² The merger doctrine states that where only one or a limited number of ways exist to express an idea, the idea and the expression merge into an uncopyrightable whole.⁷³ The

⁶⁷ See Bracha, *supra* note 21, at 236-38 (discussing courts' concerns that overly-broad protection would remove too much knowledge from the public domain).

⁶⁸ See Bracha, *supra* note 21, at 236 (arguing that copyright law does not grant creators the exclusive right to words or the right to ideas alone, but rather the arrangement of words to express ideas).

⁶⁹ See *Baker v. Selden*, 101 U.S. 99, 104 (1879) (holding that when the expression of an idea becomes inseparable from the idea itself the expression loses copyright); Bracha, *supra* note 21, at 236-37 (discussing the significance of *Baker* in establishing the idea/expression dichotomy).

⁷⁰ See *Baker*, 101 U.S. at 104 (finding a work that set out a new bookkeeping system was not copyrightable because the idea of the system was so merged with the actual expression).

⁷¹ See *Baker*, 101 U.S. at 106-07. The plaintiff had created a double-entry system for bookkeeping. See *id.* The defendant's system mirrored the plaintiff's, although the defendant made some changes to the arrangement of columns and headings. See *id.*

⁷² See *id.* The Court further stated that "the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book." *Id.* at 107.

⁷³ See *id.* at 104 (laying the foundations for the merger doctrine in the context of the case).

idea/expression dichotomy, in its most elemental interpretation, lessens the right of the author in an effort to ensure that all ideas and knowledge remain in the public domain.⁷⁴

E. Keeping the Everyday in the Public Domain

In addition to ensuring individual creators do not remove limited forms of expression from the public domain, courts have strived to protect descriptions of everyday scenes by preventing their copyrightability.⁷⁵ In *A.A. Hoehling v. Universal City Studios, Inc.*, the court said that stock scenes, called “*scenes a faire*,” cannot be protected under copyright law without removing popular expression elements from the public domain.⁷⁶ The *Hoehling* court further held that when discussing historical events, an author cannot gain copyright protection in historical theories without imposing the much-feared chilling effect on future authors.⁷⁷ This restriction on copyrightability is another attempt by courts to keep the careful balance between copyright protection and maintaining an expansive public domain.

IV. A Small Idea, A Huge Phenomenon

⁷⁴ See Bracha, *supra* note 21, at 236-38. Post-*Baker*, the copyright debate became even more focused on the battle between private control over knowledge in original works of authorship and the public’s right to access that knowledge. See *id.* at 238.

⁷⁵ See *A.A. Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (1980) (holding that stock scenes from historical period pieces cannot be copyrighted); Hartwell Harris Beall, Comment, *Can Anyone Own a Piece of the Clock?: The Troublesome Application of Copyright Law to Works of Historical Fiction, Interpretation, and Theory*, 42 EMORY L.J. 253, 269 (1993) (explaining that facts and scenes a faire should not be copyrighted because doing so would permanently give that authority sole ownership of things that rightfully belong in the public domain).

⁷⁶ See *Hoehling*, 618 F.2d at 979. In this case, the plaintiff had written about his theories of the Hindenburg explosion and sued a movie producer for making a film that featured similar scenes, including Germans in a beer hall using Nazi greetings. See *id.* The plaintiff claimed the scenes should be copyrightable, but the court held that they were typical scenes that would likely appear in any work on that time period, and therefore could not be monopolized by one author. See *id.*

⁷⁷ See *id.* at 977. The court said broad latitude was necessary for future authors to ensure that more works are created. See *id.*

While courts have applied the above cases to early advancements in the digital millennium, how these traditional foundations will hold up against the new surge of micro-blogging in the Web 2.0 era is a growing debate on blogs across the web and at conferences around the world.⁷⁸ The Twitter phenomenon started in the spring of 2006, when Jack Dorsey, then working for a podcasting company, announced in a brainstorming meeting that he wanted to create a dispatch service that utilized mobile texting.⁷⁹ Soon after, Dorsey, along with co-founders Evan Williams and Biz Stone, gave birth to Twitter.⁸⁰ Since then, nearly every major news network has launched their own Twitter feed, posting stories and comments from their reporters.⁸¹ Major companies have also realized the value of using Twitter as a place to

⁷⁸ See, e.g., Bailey, *supra* note 59 (noting that some tweets may receive copyright protection); Hilfer, *supra* note 10 (noting the growing confusion about Twitter's copyright challenges); Shinen, *supra* note 10 (giving a brief overview of why this attorney believes users will seldom achieve copyright protection for their tweets); see also Shane Richmond, *SXSW 2010: Can You Copyright a Tweet?*, THE DAILY TELEGRAPH, Mar. 14, 2010, *archived at* <http://www.webcitation.org/5ovHmtfvD>. The issue of Twitter and copyright was addressed at a forum at the 2010 South By Southwest event in Texas. See *id.* See also Haas, *supra* note 11, at 249 (opining that tweets may see limited copyright protection and proposes an agency model to provide for and enforce such protection).

⁷⁹ DOM SAGOLLA, 140 CHARACTERS: A STYLE GUIDE FOR THE SHORT FORM xviii (2009). In the book, Twitter co-founder Dom Sagolla remembers Dorsey stating, "I want to have a dispatch service that connects us on our phones using text." *Id.* At the time, Dorsey and Sagolla were working for Odeo, Inc., a podcasting company. *Id.* at xvii.

⁸⁰ See *id.* at xix. The first Twitter prototype was built in just two weeks in March 2006, and was launched soon after in August of that year under the name Twtr Alpha. See *id.* Initially, the only users were members of the beta company and their family and friends. See *id.* Twitter was officially launched to the public as Twtr.com in July 2006. See *id.* at xx. Initial funding was provided by California company Obvious, but by May 2007, Twitter broke off from obvious and formed its own corporation. See *id.* at xxiii.

⁸¹ See Kurtz, *supra* note 8 (noting that many popular journalists chronicle their days on Twitter for viewers). See also Rick Sanchez, *Twitter Page of Rick Sanchez, CNN Anchor*, *archived at* <http://www.webcitation.org/5ovHsM5IZ>. Rick Sanchez designed his daily CNN news program around sites like Twitter and Facebook, using them to get instant viewer feedback on the broadcast. See *id.* Sanchez not only tweeted during his show, but also read many of the viewer responses on air to generate a more diverse discussion of the day's news. See *id.* This program ended with Sanchez' firing for an unrelated issue in October of 2010. See Brian Stelter, CNN

advertize new products by attracting consumers who want to “follow” their favorite brands.⁸²

Celebrities have also joined the network, using the site to network directly with fans and build their image.⁸³ Twitter has even spawned a number-one New York Times Bestseller book and a major network television show based on that book.⁸⁴

At the time Twitter launched, social networking was already commonplace with Facebook and MySpace leading the industry.⁸⁵ Those two sites allow users to create profiles, post long status updates, photos, and video, while Twitter allows its users to create a “stream” of short statements, thoughts, or other prose.⁸⁶ Like many Internet trends, the majority of early

Fires Rick Sanchez for Remarks in Interview, N.Y. TIMES, October 1, 2010, archived at <http://www.webcitation.org/5xqm7k7fc>.

⁸² See Anne Simons, *The Marketing Tool that The White House, Oprah, Sarah Palin and Ashton Kutcher Use to Build Their Brands (and Why You Should Use it to Build Yours)*, ATLANTA TRIB., Mar. 1, 2010, at 20 (proffering that “[s]ocial-savvy brands are getting in on the status-update act.”); see also Claire Cain Miller, *Twitter Serves Up Ideas From Its Followers*, N.Y. TIMES, Oct. 26, 2009, archived at <http://www.webcitation.org/5ovI7NQNp> [hereinafter *Twitter Serves Up*] (noting that companies are increasingly using Twitter to gauge customer interest in products).

⁸³ See Simons, *supra* note 82. Simons points out that because Twitter allows brands to immediately connect with customers, it is an effective, popular tool in brand building. See *id.*

⁸⁴ See JUSTIN HALPERN, *SH*T MY DAD SAYS* (2010) (referencing the book inspired by Twitter); *Best Sellers*, N.Y. TIMES, June 20, 2010, archived at <http://www.webcitation.org/5wTgr8fFX> (noting the popularity of Halpern’s book). Halpern garnered more than one million followers for his Twitter page where he posted tweets based on the off-beat and often profanity-laced comments made by his elderly father. See Brian Stelter, *First Came the Tweets, and Then the Sitcom*, N.Y. TIMES, May 18, 2010, archived at <http://www.webcitation.org/5wTh2u8zy>. After the tweets gained popularity, Halpern compiled them into a book. See *id.* CBS optioned the book and the tweets, and began broadcasting a show based off the Twitter page in 2010. See *id.*

⁸⁵ See Pete Cashmore, *Social Networking Awards – The Top Social Networks of 2006*, MASHABLE.COM, Dec. 24, 2006, archived at <http://www.webcitation.org/5wtCAPa3f> (indicating the largesse of My Space and the rising popularity of Facebook around the time Twitter launched).

⁸⁶ See SAGOLLA, *supra* note 79, at xviii. Jack Dorsey explained, when first brainstorming Twitter, that he wanted to create a program that would allow users to simply type a message and send it to multiple phones and the Web at the same time. See *id.* Of those “streams of thought,” currently eighty percent are composed of status updates about the users themselves. See Mor Naaman, Jeffrey Boase & Chih-Hui Lai, *Is it Really About Me? Message Content in Social*

Facebook and MySpace users were teens and twenties, whereas Twitter has found popularity with older adult users.⁸⁷ Though a free service, in December 2010, Twitter announced that the company was valued at 3.7 billion dollars.⁸⁸

A. Twitter's View On Copyright

While the debate rages over how courts may view copyright protection of 140-character tweets, Twitter's own terms of service assure users that their posts are their own.⁸⁹ On their terms of service page, the platform states that users own their content, but grants Twitter a license to use it:

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

....

...This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same. *But what's yours is yours – you own your content.*⁹⁰

B. Web 2.0

Awareness Streams, 2010 ACM CONF. ON COMPUTER SUPPORTED COOPERATIVE WORK SESSION 4A [hereinafter Naaman et al.], *archived at* <http://www.webcitation.org/5wt9ZsjlR>.

⁸⁷ See Amanda Lenhart & Susannah Fox, *Twitterpated: Mobile Americans Increasingly Take to Tweeting*, PEW INTERNET & AM. LIFE PROJECT, Feb. 12, 2009, *archived at* <http://www.webcitation.org/5ovISGtuO>. In a study, Pew found that the median age of Twitter users is thirty-one, several years older than the median age for fellow social networking site Facebook, whose users have a median age of twenty-six. *See id.*

⁸⁸ See Amir Efrati, *Profit Elusive, but Twitter Gets \$3.7 Billion Value*, WALL ST. J., Dec. 15, 2010, *archived at* <http://www.webcitation.org/5wTiqJy3Q>. Twitter has also made deals with Google and Microsoft's Bing allowing Twitter's messages to be searchable on the two search engines. *See id.*

⁸⁹ *See Terms of Service: Your Rights*, TWITTER.COM, *archived at* <http://www.webcitation.org/5wTjIfT8Y> (reserving rights for the author for the content of tweets).

⁹⁰ *Id.* (emphasis added).

Twitter is just the latest creation in what is popularly known as Web 2.0, the name given to the various web platforms and technological innovations that enable users to generate their own content on the Internet.⁹¹ More specifically, Web 2.0 applications allow the everyday user to create their own works online and share them with millions of other users.⁹² These works vary from profile pages on sites like Facebook, to blogs connected with any topic, to videos posted on YouTube.⁹³ In fact, since 2002, Technorati.com, which tracks the creation and use of blogs across the Internet, has indexed 133 million blogs.⁹⁴

The emergence of Web 2.0 has enabled everyday users to become both creators of Internet content and potential copyright holders.⁹⁵ While once the film, publishing and music industries held the vast majority of copyrights, and therefore possessed greater bargaining power for copyright reform, now anyone can be a copyright holder when he or she posts original creations on the net.⁹⁶ While many currently argue that the greatest danger of Web 2.0 is the violation of other people's copyrights through platforms like illegal music downloads, video postings and so-called content mash-ups, the issue of whether posters themselves have copyright

⁹¹ See Lee, *supra* note 12, at 13 (addressing the various incarnations of Web 2.0 user content).

⁹² Lee, *supra* note 12, at 13 (describing the user-driven programs that are popularly referred to as Web 2.0).

⁹³ See Robert Goldstone & James Gill, *Web Site Operators & Liability for UGC - Facing Up to Reality?*, SOC'Y FOR COMPUTERS & L., Mar. 12, 2008, *archived at* <http://www.webcitation.org/5x0kCXojm> (illustrating the various social media sites that are fueled by user-generated content).

⁹⁴ See Adam Singer, *Social Media, Web 2.0 and Internet Stats*, THE FUTURE BUZZ, Jan. 19, 2009, *archived at* <http://www.webcitation.org/5ovIyRo87> (tracking the number of blogs cataloged by Technorati, as well as other social media statistics).

⁹⁵ See Lee, *supra* note 12, at 1 (discussing how users in the Web 2.0 world are able to post their own content). “Web 2.0 culture encourages users to engage, create, and share content online.” *Id.*

⁹⁶ See Lee, *supra* note 12, at 13-14 (indicating the shift of media-controlled content ““from institutions to individuals.””).

in their original content is also growing.⁹⁷ Recently, one critic went as far as to call for the creation of an intermediary regulatory agency to assist Twitter users and users of other social media sites in protecting their Internet content through copyright.⁹⁸ In contrast, this Note posits that such an agency would give users a place to initiate infringement actions without having to go to court.⁹⁹

While still not the most popular social networking site, more and more adults are logging on to Twitter each month.¹⁰⁰ User-generated content has already given rise to a host of litigation in the copyright arena, mainly dealing with cases in which the content itself allegedly infringes someone else's copyright.¹⁰¹ More recently, a post on Twitter became the focus of a defamation case.¹⁰² Specifically, a property management company took issue with a tenant's Twitter post

⁹⁷ See Lee, *supra* note 12. Lee posits that new informal copyright practices are necessary for the law to meet the needs of today's Web 2.0 authors. See *id.*

⁹⁸ See Haas, *supra* note 11, at 249-251 (claiming that the emergence of Web 2.0 user-based content requires regulatory change). However, the author of this Note posits that such an agency is wholly unnecessary as the courts have precedent in place to handle such claims. See analysis *infra* Part V. Introduction.

⁹⁹ See analysis *infra* Part V. Introduction (criticizing the idea that a regulatory agency is the best way to protect user-generated content).

¹⁰⁰ See Claire Cain Miller, *Who's Driving Twitter's Popularity? Not Teens*, N.Y. TIMES, Aug. 26, 2009, archived at <http://www.webcitation.org/5ovJEtF2A> [hereinafter *Who's Driving Twitter*] (interviewing teens that do not use Twitter and citing the popularity of the site among adults). Miller has also posited that Twitter is so popular with adults because by the time it came out, teens were already busy on sites like Myspace and Facebook. See also Claire Cain Miller, *Why Adults Have Fed Twitter's Growth*, N.Y. TIMES, Aug. 26, 2009, archived at <http://www.webcitation.org/5ovJI3Ye0> [hereinafter *Why Adults*] (discussing the heavy adult-user base that Twitter has drawn); Adam Ostrow, *11 Percent of Online Adults Now Use Status Updates*, MASHABLE.COM, Feb. 12, 2009, archived at <http://www.webcitation.org/5ovJMQQ3X> (explaining adults are not only flocking to Twitter, but to all status-posting sites). Currently, eleven percent of online adults are posting status updates, which is nearly double the amount of adults using this technology in 2008. See *id.*

¹⁰¹ Lee, *supra* note 12, at 13 (discussing the rise in users posting infringing material on the Internet regardless of already litigated cases). "Some practices, such as music file-sharing, flourish in spite of clear copyright decisions finding them illegal." *Id.*

¹⁰² Karen Sloan, *Dismissal in Early Test of Twitter Libel Liability*, NAT'L L.J., Jan. 25, 2010, archived at <http://www.webcitation.org/5ovJZj5JH>. A Chicago-based real estate management

about alleged poor conditions in the apartment she rented, and brought suit for defamation.¹⁰³

While it is widely recognized that users of social networking sites like Twitter may be liable for copyright infringement if they post copyrighted material, the issue that remains to be addressed is whether original material posted by users on Twitter is copyrightable.

V. Finding Protection for Tweets

Given the current treatment of the copyright statute by the courts, it is likely that in limited circumstances, Twitter users will find protection.¹⁰⁴ However, for a great many “tweeters,” it is a tweet-at-your-own-risk world.¹⁰⁵ While copyright law has traditionally left some creators in the cold in furtherance of social utility, a greater danger is arising in the Web 2.0 world, where more people are “creating” on a larger scale with little to no protection.¹⁰⁶ Many argue that Twitter is not the right forum for a new copyright battle, given that the vast majority of tweets are simply not worth protecting,¹⁰⁷ Twitter is just the latest signal that our vision of what copyright is, and should be, will change as the Internet revolution turns into a lifestyle.

company sued a former tenant who tweeted about mold in her apartment. *See id.* The company sued for more than \$50,000 in damages, claiming that the tweet was defamatory. *See id.* The court said that tweets were considered mere opinions and did not rise to Illinois’ standard for defamatory content. *See id.*

¹⁰³ *See id.* (summarizing the defamation suit fueled by a Twitter posting).

¹⁰⁴ *See Shinen, supra* note 10 (positing that while the chances are small, there may be a rare tweet that will be deserving of copyright protection); *see also Religious Tech.*, 1996 WL 633131, at *4 (granting copyright protection to haikus). This Note suggests that the rationale the court in *Religious Tech.* used to provide copyright protection to haikus should likewise be applied to tweets in some circumstances. *See infra* Part V.B.

¹⁰⁵ *See Haas, supra* note 11, at 232 (exploring the Twitter copyright debate); Richmond, *supra* note 78 (reporting experts believe some tweets will be protectable, but cannot opine as to which ones); Hilfer, *supra* note 10 (describing the complexity of determining whether tweets will be protectable); Shinen, *supra* note 10 (questioning the copyrightability of tweets).

¹⁰⁶ *See Lee, supra* note 12, at 1 (finding that Web 2.0 culture encourages users to be creators despite the failure of the current copyright standards to provide protection).

¹⁰⁷ *See Shinen, supra* note 10 (questioning the utility of copyrighting tweets).

To understand why a new approach to copyright protection may be necessary, it is important to understand the massive impact Web 2.0 has had on the state of authorship in the last two decades.¹⁰⁸ Where once authorship was the realm of literary authors, artists, musicians and an infinite number of other non-Internet creators, authors now include the everyday person logging online to post video mixes, blogs and even, possibly, status updates.¹⁰⁹ Now people can log on to Twitter and post 140 characters about their personal thoughts, news commentary, and a host of other topics.¹¹⁰ While a study did find that eighty percent of Twitter postings are simply so-called “meformers,” or postings simply relating what a person is feeling, doing, or thinking at any given moment, there are still many types of posts that are potentially creative.¹¹¹

Some argue that given the rapid development of online authorship, new copyright standards are needed to protect the authors, both from infringement and from infringement suits when their work “remixes” prior works.¹¹² Some have even argued that given the rapid rise of user-generated content, an entirely new agency structure must be introduced to deal with this.¹¹³ Author Rebecca Haas suggests that such an agency is needed to provide a formal management

¹⁰⁸ See Lee, *supra* note 12, at 13-15 (describing the various ways users have become authors using Web 2.0 technology).

¹⁰⁹ See Tanya M. Woods, *Working Toward Spontaneous Copyright Licensing: A Simple Solution For a Complex Problem*, 11 VAND. J. ENT. & TECH. L. 1141, 1144-46 (2009) (exploring the growth of user-generated content and the users who post it, thereby becoming authors); Lee, *supra* note 12, at 13 (listing the various remix technologies that allow the everyday teen, young adult, and adult to become unknowing online authors).

¹¹⁰ See Carr, *supra* note 2 (illustrating the wide variety of posts on Twitter and the various functional uses followers of those posts can employ); Cohen, *supra* note 3 (describing various Twitter users and suggesting techniques for refining the technology to make it more effective).

¹¹¹ See Naaman et al., *supra* note 86, at 4. The study analyzed the message streams of 350 Twitter users, applying human coding and quantitative analysis to determine what type of tweets were most common. See *id.*

¹¹² See Woods, *supra* note 109 (arguing that new licensing theories are necessary to keep up with current technology).

¹¹³ See Haas, *supra* note 11, at 249 (calling for the creation of a social-media, copyright-focused agency).

system for regulating and prosecuting copyright infringement in the Web 2.0 arena.¹¹⁴ However, such a structure may be unnecessary and overly burdensome given that the courts have always dealt directly with copyright infringement suits.¹¹⁵ In fact, this Note posits that the current copyright statute and case law is well-equipped to handle suits that may arise out of Twitter postings. While it is important to provide the public with an easy way to protect their copyrights, such an agency may only complicate matters and usurp the power of the court.

The current U.S. copyright statute sufficiently provides coverage for many popular Web 2.0 staples of creation, like blogs.¹¹⁶ Courts analyze blogs, like books and other forms of literature, for their originality, fixation and the various other copyright thresholds.¹¹⁷ Original videos and musical works posted online are also protectable under the current copyright laws.¹¹⁸ What is questionable, however, is whether newer forms of expression are protectable, such as micro-blogs, and specifically the 140-character statements on Twitter.

A. The Current Statute Applied

¹¹⁴ See Haas, *supra* note 11, at 249-50 (claiming such an agency would be charged with the promotion of public policy).

¹¹⁵ See Haas, *supra* note 11, at 252-53 (mentioning that a regulatory system would be both more streamlined and less expensive); *but see* Cavalier v. Random House, Inc., 297 F.3d 815 (9th Cir. 2002); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); Steinberg v. Columbia Pictures Ind., Inc., 663 F. Supp. 706 (S.D.N.Y. 1987) (providing cases where courts ruled on instances of copyright infringement and established historical and still-followed precedent).

¹¹⁶ See Lee, *supra* note 12, at 13 (including blogs as part of the larger group of technology-driven forms of creation as copyrightable elements of Web 2.0).

¹¹⁷ See Eric Goldman, *Bloggership: How Blogs are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1169, 1178-79 (2006) (explaining that some user-generated content like blogs, when original, will be protected); 17 U.S.C. § 102 (proscribing that copyright protection will be given to original works of authorship fixed in a tangible medium of expression).

¹¹⁸ See Andrew Hartman, *Don't Worry, Be Happy! Music Performance and Distribution on the Internet is Protected After the Digital Performance Rights in Sound Recordings Act of 1995*, 7 DEPAUL-LCA J. ART & ENT. L. 37, 45 (1996) (explaining that the 1995 Act provides protection for original works of music first published online).

Given that eighty percent of tweets are just updates about a person's current status, such as what they are doing at the time they are posting, then arguably the majority of tweets are comprised of facts that are not copyrightable under U.S. copyright law.¹¹⁹ The *Hoehling* court was correct in reserving facts and scenes a faire, or stock scenes, for the public domain.¹²⁰ If an individual author could monopolize a fact or a public domain mainstay, each and every tweet could arguably be eligible for copyright protection and slowly eat away at the available areas in which creators can freely create online, or in any other arena.¹²¹ In many ways, this would severely restrict freedom of speech.¹²² Therefore, by eliminating the vast majority of tweets that are pure facts, like ones stating the weather, the day of the week, or the tweeter's activities, we are able to narrow down which micro-blog postings may be eligible for protection.¹²³ However, the court may have overreached in holding that there can be no protection of the expression of scenes a faire.¹²⁴ This holding will resonate when courts eventually take up the copyrightability of tweets, and likely find there can be no protection of statements describing popular events and happenings, regardless of how original or creative those expressions are.

¹¹⁹ See Naaman et al., *supra* note 86, at 4. By dividing tweets into "meformers" and "informers", the study identified the large number of tweets that will likely not find protection under copyright law. See also Shinen, *supra* note 10 (claiming that while most tweets are not protectable, the individual analysis will vary depending on each tweet).

¹²⁰ See *Hoehling*, 618 F.2d at 979 (holding that stock scenes used widely in creative works cannot be copyrighted).

¹²¹ See *id.* at 974. The *Hoehling* court explained that "a grant of copyright in a published work secures for its author a limited monopoly over the expression it contains." *Id.* See also Beall, *supra* note 75 (explaining why facts and scenes a faire should not be copyrighted because doing so would give that authority sole ownership of something rightfully in the public domain); Shinen, *supra* note 10 (describing the monopoly giving to owners of copyright).

¹²² See *Hoehling*, 618 F.2d 972 (addressing the need to ensure that some forms of expression remain in the public domain).

¹²³ See Shinen, *supra* note 10 (narrowing down the various tweets that would be disqualified from protection).

¹²⁴ See Beall, *supra* note 75, at 291 (claiming that the *Hoehling* court failed to recognize that some protection in scenes a faire should be recognized).

Further narrowing the area of possible protected tweets is the merger doctrine, which is the theory that when there are only a limited number of ways to express a certain idea, the expression and the idea merge.¹²⁵ For example, a posting on Twitter stating, “that door is gigantic,” while a creative way of describing a door, would arguably be unprotectable under the *Baker* merger doctrine.¹²⁶ Given the intrinsically limited number of ways to state that a door is large in size, the merger doctrine would likely bar protection of such a statement.¹²⁷ In the case of Twitter, many tweets are disqualified simply because it is difficult to express a novel idea using only 140 characters in a way that is still sufficiently original, and does not violate the merger doctrine by limiting future expressions.

B. Finding Safety as a Short Phrase

Tweets will likely find protection—and should find protection— under cases that allow for protection of particular short statements and haikus.¹²⁸ Given the prevalence of Web 2.0 technology, there is an imperative need for copyright law to find a way to work in tandem with the many new forms of authorship.¹²⁹ Twitter is just one popular example of the various

¹²⁵ See *Baker*, 101 U.S. at 100-01 (explaining that when an idea may only be expressed in a limited number of ways, the expression may not be protected).

¹²⁶ See *id.* The *Baker* Court stressed that when the expressions are “necessary incidents to the arts,” allowing protection would prevent future authors from creating in this area. See *id.* at 103. This would counter promotion of the arts and sciences and therefore cannot be allowed under copyright law. See *id.* at 105.

¹²⁷ See *id.* at 104-05 (explaining that when there is a finite number of ways in which a creative idea may be expressed, the merger doctrine may prevent copyrightability).

¹²⁸ See *Applied*, 876 F.2d at 635 (allowing for protection of short statements in scientific testing); see also *Religious Tech.*, 1996 WL 633131 at *4 (offering that haikus are among the short phrases and statements that may be sufficiently original so as to gain copyright protection).

¹²⁹ See Lee, *supra* note 12, at 1-8 (discussing the prevalence of Web 2.0 technology in everyday culture).

authorship outlets in need of proper legal guidance.¹³⁰ A haiku is a three line, structured poem, and given its inherent brevity, it is very possible that some haikus could be similar in length to 140-character tweets.¹³¹ Using the court's dicta in *Religious Technology* that haikus would be protectable, it can be inferred that a sufficiently creative Twitter status update would also be protectable.¹³²

Furthermore, the court's insistence that short statements may be creative enough for copyright protection adds credence to the argument that tweets will find protection.¹³³ Therefore, despite the Copyright Office's position that the copyright code does not provide protection for short *phrases*, short *statements* posted on Twitter should be protected if the statement meets all other copyright thresholds.¹³⁴

As critics have noted, not all tweets are created equal.¹³⁵ Therefore, even tweets that are more than simply facts or scenes a faire and are not caught in the idea expression dichotomy will

¹³⁰ See Lee, *supra* note 12, at 1-8. Lee calls for greater acceptance of informal copyright practices to fill in the gray areas of copyright law created by the growing reliance on Web 2.0 technology. See *id.* at 8.

¹³¹ See MERRIAM WEBSTER ONLINE, archived at <http://www.webcitation.org/5ovJgcKW4> (defining a haiku as "an unrhymed verse form of Japanese origin having three lines containing usually five, seven, and five syllables respectively.").

¹³² See *Religious Tech.*, 1996 WL 633131 at *4. While only mentioned in dicta, the court firmly declared that haikus would be protectable works of authorship. See *id.* at *4.

¹³³ See *Stern*, 2011 WL 997230, at *4-6 (explaining that creativity, not size, should be the main focus in an originality analysis).

¹³⁴ See Circular 34, U.S. Copyright Office, *supra* note 50 (summarizing the Copyright Office's position regarding the copyrightability of short phrases). Circular 34 provides that, "[e]ven if a name, title, or short phrase is novel or distinctive or lends itself to a play on words, it cannot be protected by copyright." *Id.*

¹³⁵ See Shinen, *supra* note 10, quoting:

Tweets range from boring and useless facts (e.g., 'wow, it's cold in Toledo,' 'my plane is late again,' 'I'm going to poison the neighbor's dog') . . . to interesting facts (e.g., 'Americans consume 1.7 billion pounds of lard every year,' 'the average burp contains 1.6 liters of gas'), to references to other facts (e.g., 'check out this article in New York Post: tinyurl.com/183*&%,' 'Michael Jackson auction canceled: whocares.com'), and everything in between.

not be protected by copyright law unless they are sufficiently original.¹³⁶ When courts were still adhering to the *Bleistein* minimal degree of creativity standard, tweets may have had an easier time gaining protection.¹³⁷ However, in the wake of *Feist*, it is unclear what exactly the courts will be looking for if, and when, they address the copyrightability of a tweet.¹³⁸ In *Feist*, Justice O'Connor called for some minimal creative spark, but never clarified what that spark may be.¹³⁹ Therefore, even if a tweet is sufficiently creative, which could be protectable under the dicta of *Religious Technology* and the holding in *Applied*, just how creative that tweet must be is still up in the air.¹⁴⁰

VI. Tweet it, Compile It

One way for a Twitter user to seek protection for their updates is to register them as a compilation of updates.¹⁴¹ To avoid the likely struggle in protecting a single tweet, an author

Id.

¹³⁶ See 17 U.S.C. § 102 (providing the originality standard for copyright protection).

¹³⁷ See *Bleistein*, 188 U.S. at 250 (declaring a minimal amount of creativity is necessary to satisfy the originality requirement in the copyright statute).

¹³⁸ See *Feist*, 499 U.S. at 345 (failing to define or qualify the requisite degree of creativity); Zimmerman, *supra* note 33, at 188 (criticizing the failure of the *Feist* Court to fully define what extra creativity is needed for copyright protection under the copyright statute).

¹³⁹ See Zimmerman, *supra* note 33, at 188 (remonstrating the *Feist* Court for failing to answer what satisfies the minimal degree of creativity standard).

¹⁴⁰ See *Religious Tech.*, 1996 WL 633131 at *4 (referencing that haikus are copyrightable as sufficiently creative short statements); *Applied*, 876 F.2d at 635 (noting again that short statements are copyrightable because they are more than compilations of fragmentary words and phrases).

¹⁴¹ See 17 U.S.C. § 103(a) (allowing for registration of compilations and derivative works). While creators do not need to register their work to be protected, they must register before initiating an infringement suit. See 17 U.S.C. § 411(a). This section provides that:

Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.

Id.

could attempt to register the entirety of their tweets either as one larger body of work or a compilation.¹⁴² However, the author would only have protection over tweets that are significantly original as to qualify for general copyright protection.¹⁴³ As explained in *Feist*, there is no copyright protection in a mere compilation of facts that “are selected, coordinated, and arranged in a way that utterly lacks originality.”¹⁴⁴ With this in mind, a Twitter user seeking a copyright for a larger body of tweets as one complete copyrighted work would have to ensure that the compilation has sufficient originality.

While Twitter users may very well find protection under the same theories that allow for protection of haikus,¹⁴⁵ protection as a compilation may be easier.¹⁴⁶ By registering as a compilation, users would avoid questions about whether the length of the work is sufficient to qualify for copyright protection.¹⁴⁷ While it is unknown whether Justin Halpern registered his tweets before publishing his book, a chronicle of tweets of humorous things his father said, it is clear he gained protection for his book.¹⁴⁸ Given that his book is essentially a collection of tweets, along with some additional explanatory portions, it appears that compilations of tweets

¹⁴² See 17 U.S.C. § 103(a) (noting that larger bodies of works can be registered as compilations).

¹⁴³ See 17 U.S.C. § 103(b) (providing protection only to the work in a compilation contributed by the author). As established in *Hoehling*, scenes a faire are not portions that may be granted protection. See *Hoehling*, 618 F.2d at 979.

¹⁴⁴ *Feist*, 499 U.S. at 363-64. The Court held that the act of alphabetizing subscriber information in a phonebook lacked the requisite originality. See *id.* at 363.

¹⁴⁵ See *Religious Tech.*, 1996 WL 633131 *4 (stating in dicta that haikus are copyrightable content).

¹⁴⁶ See 17 U.S.C. § 103(b) (creating copyright protection for compilations).

¹⁴⁷ See 17 U.S.C. § 103(b). Given that a compilation is a grouping of shorter works, it appears that length would not be an issue in finding statutory protection of such a work. See *id.*

¹⁴⁸ See HALPERN, *supra* note 31. As a book, the literal embodiment of Halpern’s work is protected.

may be successfully registered.¹⁴⁹ Of course whether or not this theory would hold up in an infringement suit will be for the courts to decide.

VII. Tweeting as a Right?

It is essential to recognize the importance of micro-blogs as just the latest incarnation of authorship if the courts are to continue fulfilling the original purpose of copyright law, which is “to promote the Progress of Science and the useful Arts.”¹⁵⁰ The intention of the Framers of the Constitution was to ensure that the United States was a fertile ground for scientific and artistic evolution.¹⁵¹ In theory, our current copyright code promotes these ideals by providing protection to authors while still maintaining the careful balance of leaving some creative outlets in the public domain.¹⁵²

If Congress and the courts are to continue promoting the useful arts, then providing protection to Web 2.0 technologies is essential. Twitter is just the most publicly visible example of a major Web 2.0 technology for which copyright law is an issue.¹⁵³ By allowing authors of creative content on Twitter to find protection as protectable short statements, the promotion of the science and useful arts will continue.¹⁵⁴ While there is some danger to the public domain when statements are shorter, the goal of promoting the progress of the arts justifies the monopoly

¹⁴⁹ See HALPERN, *supra* note 31 (inferring the copyrightability of compilations of tweets).

¹⁵⁰ U.S. CONST. art. I, § 8, cl. 8; *see also* Ng, *supra* note 15 (exploring the original purpose of copyright law to promote further creation).

¹⁵¹ See Ng, *supra*, note 15 at 464-65 (summarizing the intent of the Framers when formulating the copyright clause in the Constitution); *see also Sony Corp.*, 464 U.S. at 429 (holding that copyright protection is not intended to provide a special benefit to the author, but rather a benefit to the public); *Mazer*, 347 U.S. at 219 (finding that the reward to the author is secondary to that of the public).

¹⁵² See *also* Ng, *supra*, note 15 at 456, 464-65 (furthering the argument that the original intent of copyright law is to incentivize further creation).

¹⁵³ See Singer, *supra* note 94 (citing the rapidly growing number of users logging on to Twitter).

¹⁵⁴ See Ng, *supra* note 15 (discussing the importance of promoting the sciences and arts to ensure copyright's true purpose).

power given to copyright holders for the duration of their protection.¹⁵⁵ In many ways, this is a utilitarian argument that the ends, promoting more creation, justifies the means, providing a limited monopoly to the copyright holder for the duration of the protection on the work in question.¹⁵⁶

VIII. Tweeting: Here to Stay

From a purely practical prospective, with more than fifty-eight million monthly users worldwide posting more and more updates by the minute, Twitter and future micro-blogs are likely to remain a mainstay in American culture.¹⁵⁷ With every new technology comes a new legal question for protection and use, both for the creator and the public. In the instance of micro-blogs, the question of what happens when users themselves infringe is already being hotly debated, but the protection of those authors themselves is a question just unfolding.¹⁵⁸ Without allowing some leeway for protection of original content posted on Twitter and similar short form publishing sites, the law will leave authors seeking to create works in these new Web 2.0 formats

¹⁵⁵ Ng, *supra*, note 15 at 464 (arguing the need for continuing to promote future creation). Promoting future creation is the goal of copyright law, though it does grant a limited monopoly to creators. *See id.*

¹⁵⁶ Ng, *supra*, note 15 at 464. “The social costs of inaccessibility and negotiation for the use of the work is high but it is a price that the copyright system is willing to bear to ensure the production of creative works to benefit society” *Id.*

¹⁵⁷ *See* Efrati, *supra* note 88 (noting growing funding efforts are perpetuating Twitter’s popularity); Singer, *supra* note 94 (citing the rapid growth of Twitter’s popularity).

¹⁵⁸ *See* Laura M. Holson, *Short Outbursts on Twitter? #Big Problem*, N.Y. TIMES, Oct. 8, 2009, *archived at* <http://www.webcitation.org/5ovJsWV0u> (discussing new infringement and defamation suits arising out of Twitter posts by various parties); *see also* Haas, *supra* note 11 (proposing regulatory body to assist Twitter users with copyright protection); Richmond, *supra* note 78 (comparing tweets to haikus in terms of copyrighting); Bailey, *supra* note 59 (questioning if tweets rise to the level of copyrightable work); Hilfer, *supra* note 10 (contending current trend disfavors copyrighting tweets, with minor exceptions); Shinen, *supra* note 10 (arguing dangers of providing copyright protection for tweets).

out in the cold.¹⁵⁹ If authors begin to realize that Twitter has been left as a no-man's copyright land, they will begin to stop using it. Allowing new technologies to die because of a lack of willingness to provide protection is a dangerous path to begin down.

Further, the widespread use of Twitter and similar sites by manufacturers to reach consumers is further evidence that this is a technology that is not only here to stay, but one that the courts will soon have to deal with in a copyright setting.¹⁶⁰ While trademark law will provide much of the protection for manufacturers posting slogans on Twitter, there is still room for original copyrightable content in this area.¹⁶¹ Like all other original content, even that on Twitter deserves protection.

IX. An Ego Driven Exercise

While the argument in this Note supports providing protection to the rare copyrightable tweet, there is a large counter-argument on the blogosphere.¹⁶² Many critics simply point out that given that more than eighty-percent of tweets are just "social [or] ego driven," Twitter updates in general do not comport with the U.S. Constitution's theory of promoting the arts and sciences.¹⁶³ These critics claim that the majority of tweets are pointless, mindless drivel.¹⁶⁴

¹⁵⁹ See Hilfer, *supra* note 10 (noting that numerous blogs are questioning Twitter's potential for copyright protection and addressing the possible reasons tweets will not gain protection). See also Bailey, *supra* note 59 (discussing the need for copyright interpretation for Twitter updates).

¹⁶⁰ See Simons, *supra* note 82 (discussing the popularity of Twitter among celebrities and manufacturers seeking to advertise and increase visibility of their brands).

¹⁶¹ See *Applied*, 876 F.2d at 635 (holding short statements in a psychiatric test were sufficiently creative for the purposes of copyright protection).

¹⁶² See Shinen, *supra* note 10 (arguing that the vast majority of tweets are not worth being concerned about).

¹⁶³ See Shinen, *supra* note 10.

Arguably (and I'm not sure I entirely agree with this argument I'm making), Tweets do not even comport with the Copyright Clause of the US Constitution because they are often social/ego driven and would be created even if there was absolutely no benefit to the arts and sciences (and the financial potential arising therefrom).

While this argument is not entirely incorrect, these critics fail to accord credit to the few tweets that are credible works of authorship. Some have also pointed out that copyright protection of tweets will be problematic because it is too difficult to determine what fair use of those tweets are.¹⁶⁵ While the critics' arguments are not wrong in all cases, this no protection, across-the-board approach does a disservice to the goals and history of copyright law.

X. Conclusion

Every time a new technology becomes a mainstay for creators, it forces the U.S. copyright code to evolve. Twitter is just the latest in a surge of new user-generated creation tools to take hold in the Web 2.0 world that currently exists. In just one hundred-forty characters, a user is able to give mundane facts or lines of poetry. While users can post nearly anything on Twitter, it is only the truly original postings that must be protected.

It is inevitable that as more and more people post their creative content to Twitter, someone will eventually attempt to protect their tweets or bring an infringement suit against an infringer. As explained, in analyzing the copyrightability of tweets the court will first need to weed out those tweets that are clearly not eligible for copyright protection. Using existing case law as a guide, the nearly eighty-percent of tweets that are ego-driven, meaning those the user posts to inform the world at large about their day, their feelings or their dreams, will be noncopyrightable ideas and facts. The next step is in weeding out the tweets that are creative,

Id.

¹⁶⁴ See Timothy O'Neil-Dunne, *Why Twitter is Starting to Annoy Me*, 4HOTELIERS.COM, Mar. 24, 2010, *archived at* <http://www.webcitation.org/5ovJz72c5> (questioning Twitter's usefulness).

¹⁶⁵ See Hilfer, *supra* note 10 (analyzing applicability of a fair use defense). When making a fair use argument, the court looks at the purpose of the alleged infringing use, the nature of the work, the amount of the work used and the market effect of the use. *See id.* When looking at the third factor, it may be difficult to determine how much of a one-hundred forty character work is too much to go beyond fair use. *See New Era Publ'ns Int'l v. Carol Publ'g Grp.*, 904 F.2d 152, 158 (2d Cir. 1990).

but whose creative expression so merges with the idea being expressed that the idea and the expression become an indivisible unit. Once we weed out these tweets, we may be left with actual creative statements in just one hundred-forty characters.

The courts should interpret these creative tweets as they would haikus- short, but still protectable forms of original authorship. In doing so, the court would be furthering the mission of the Framers of the Constitution and the traditional tenets of U.S. copyright law- to promote the progress of the sciences and the useful arts. Failure to recognize the importance of this new Web 2.0 technology, and provide it protection, would send a dangerous signal to authors that new technologies are not yet safe for them to use. If this belief grows, it could halt the promotion of the arts and sciences by prematurely causing new technologies to go off-line.

As the world rapidly morphs from a Web 2.0 to Web 3.0, where nearly everything will happen in the annals of the internet, allowing for advanced protection for online authors, while still maintaining the delicate balance of protecting the public domain, is critical. Twitter is just a smaller example of a larger trend. As one author put it, “the history of the Internet suggests that there have been cool Web sites that go in and out of fashion and then there have been open standards that become plumbing... Twitter is looking more and more like plumbing, and plumbing is eternal.”¹⁶⁶

¹⁶⁶ Carr, *supra* note 2 (referring to Steven Johnson’s opinion of the lasting power of Twitter). See also Steven Johnson, *How Twitter Will Change the Way We Live*, TIME, June 5, 2009, archived at <http://www.webcitation.org/5xNYuuLw9> (predicting the future impact of Twitter).