

THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



WHO OWNS ELLEN'S OSCAR SELFIE? DECIPHERING RIGHTS OF ATTRIBUTION CONCERNING USER GENERATED CONTENT ON SOCIAL MEDIA

MICHAEL REED

ABSTRACT

One of the most memorable moments of the 2014 Academy Awards was Ellen DeGeneres's famous selfie taken with Bradley Cooper, Meryl Streep, and other famous friends. This so-called "Oscar Selfie" has been estimated to be worth millions of advertising dollars for the event's sponsor, Samsung. DeGeneres' use of selfies as a promotional tool was novel method of documenting Hollywood's greatest night which proved an undeniable successful. However, the fact that Bradley Cooper actually captured the Oscar Selfie raises a number of important questions about how user-generated content distributed through social media fits into existing intellectual property law. At the heart of this investigation is the question of authorship, specifically who has the right to exploit a work posted to social media, and how the circumstances under which the work was created may affect the rights attached to it. I used the Oscar Selfie as an example in order to explore issues in rights management and the potential outcome of controversies arising out of content shared over social media with ambiguous authorship. Examining these issues through the lens of a series of hypothetical suits, this article concludes that existing copyright laws provide a finding of co-authorship, implied-license, and the applicability of fair use defenses to permit many forms of expression distributed through social media. Legal practitioners need to understand how intellectual property and creative expression are used in this arena and how the law is best applied if they are to keep pace with the wellspring of creativity and controversy that is social media. In general, it is better to respect the intentions of the parties when the distributed work was created and to ensure that the fluid exchange of ideas over social media is maintained. Superimposing restrictions which may favor one party over the other when there is not a clear case of infringement is largely incompatible with the common use social media platforms and contradicts the bulk of existing intellectual property law.

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Cite as Michael Reed, Who Owns Ellen's Oscar Selfie? Deciphering Rights of Attribution Concerning User Generated Content on Social Media, 14 J. MARSHALL REV. INTELL. PROP. L. 564 (2015).

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MICHAEL REED*

I. INTRODUCTION

“If only Bradley’s arm was longer. Best photo ever. #oscars” – Ellen DeGeneres¹

One of the more memorable moments of the 2014 Academy Awards telecast was when its unconventional host, Ellen DeGeneres, and a small crowd of celebrity friends took a photo of themselves in the front row² of the Dolby Theatre.³ The digital self-portrait, otherwise known as a “selfie,”⁴ was taken using a sponsored Samsung Galaxy smartphone⁵ and then uploaded to DeGeneres’s account on the social media website Twitter. The selfie was so popular that Twitter crashed sometime during the ceremony due to the high volume of web traffic the photo received.⁶ By the following morning, the record-breaking selfie, better known as the “Oscar Selfie,”⁷ had been retweeted 2.4

* © Michael Reed 2015. Michael Reed is currently seeking a Juris Doctor from The John Marshall Law School. He majored in Philosophy at St. Norbert College in De Pere, WI. It was during these formative years that he developed a strong appreciation for human expression and the power of ideas. He would like to thank his parents and friends (but mostly his parents) for listening to his theories on culture and social structures over the years. I will always be grateful for your patients and guidance.

¹ Luchina Fisher, *Ellen’s Oscar Selfie Most Retweeted Tweet Ever*, ABC News (Mar. 2, 2014, 10:57 PM), <http://abcnews.go.com/blogs/entertainment/2014/03/ellens-oscar-selfie-most-retweeted-tweet-ever/> (quoting the caption posted along with the now famous Oscar Selfie).

² *Id.*

³ Luchina Fisher, *What to Expect From Ellen DeGeneres Hosting the Oscars*, ABC News: Good Morning America (Feb. 28, 2014), <http://abcnews.go.com/Entertainment/expect-ellen-degeneres-hosting-oscars/story?id=22585110> (the 86th Academy Awards were hosted at the Dolby Theater in Los Angeles, California).

⁴ Steve Brown, *Times Are Changing: ‘Twerk’ and ‘Selfie’ Officially Added To Oxford Dictionary*, Digital Afro (Nov. 19, 2013), <http://www.digitalafro.com/twerk-and-selfie-officially-added-to-oxford-dictionary/> (“The next time a parent asks their child to explain what . . . a ‘selfie’ is, they can give them this definition: . . . noun. (informal) a photograph that one has taken of oneself, typically one taken with a smartphone or webcam and uploaded to a social media website.”); see also Oxford English Dictionary (online ed.), *selfie* http://www.oxforddictionaries.com/us/definition/american_english/selfie (last visited Dec. 22, 2014).

⁵ See Warner Crocker, *Oscar Host Uses Sponsored Samsung Onstage, iPhone Off*, Gotta Be Mobile (Mar. 2, 2014), <http://www.gottabemobile.com/2014/03/02/oscar-host-uses-sponsored-samsung-phone-onstage-iphone-off/> (Samsung was a major sponsor of the 2014 Academy Awards and provided DeGeneres with a Samsung smart phone to tweet and take selfies during the ceremony, although she apparently preferred to use her iPhone while tweeting backstage).

⁶ Gabriela Motroc, *Ellen DeGeneres’ Oscar Selfie Causes Twitter to Crash*, Liberty Voice (Mar. 3, 2014), <http://guardianlv.com/2014/03/ellen-degeneres-oscar-selfie-causes-twitter-to-crash/>.

⁷ See, e.g., Lisa Baertlein, *Ellen’s Oscar ‘Selfie’ crashes Twitter, Breaks Record*, Reuters (Mon. Mar. 3 2014, 12:58 AM) <http://www.reuters.com/article/2014/03/03/us-oscar-selfie-idUSBREA220C320140303> (“We got an email from Twitter and we crashed and broke Twitter. We have made history,” DeGeneres said shortly after access to the social media site was disrupted due to sharing of her star-studded picture.”).

million times and viewed over 32.8 million times.⁸ The selfie is estimated to be worth as much as \$1 billion in exposure for the event's sponsor, Samsung.⁹

Coupled with the highest rating for an Oscar telecast in over a decade, the 86th Academy Awards were a success by almost any measure.¹⁰ However, there is one ingredient to this story that could have caused this sweet victory to turn into a sour trudge into the courtroom; DeGeneres did not actually take the record-smashing selfie, Bradley Cooper did.¹¹ While it is unlikely this possible case of copyright infringement will see a date in court,¹² the legal question of who has the right to display, distribute, and reproduce images and other user-generated content ("UGC")¹³ posted to social media has not been definitively answered by Federal Courts in the United States.¹⁴

This Comment will consider what rights are attributable to social media users where the rightful copyright holder of posted content is ambiguous. Using the Oscar Selfie as a guide, this Comment will explore copyright law as it currently applies to social media in order to provide appropriate context and definitions where the application of current law is somewhat unclear.

Part I will examine some key concepts in contemporary copyright law and shed light on the significance that UGC plays in the context of social media, paying special attention to selfies. Part II examines grey areas of the law concerning rights of attribution and authorship of UGC through hypotheticals inspired by the 86th Academy Awards. Part III argues that where proper attribution or authorship of UGC is ambiguous, courts should intervene in the least invasive way possible to preserve

⁸ Michael Fleischman, *The Reach and Impact of Oscars 2014 Tweets*, Twitter Blog (Mar. 5, 2014, 5:17 PM), <https://blog.twitter.com/2014/the-reach-and-impact-of-oscars-2014-tweets>.

⁹ Rhonda Richford, *MIPTV: Ellen DeGeneres' Oscar Selfie Worth as Much as \$1 Billion*, *The Hollywood Reporter* (Apr. 8, 2014), <http://www.hollywoodreporter.com/news/miptv-ellen-degeneres-oscar-selfie-694562> (global advertising firm Publicis estimates that the Oscar Selfie is worth between \$800 million and \$1 billion in marketing expenses to Samsung).

¹⁰ Gary Lavin, *Nielsen Ratings: Academy Awards Hands Big Win to ABC*, USA Today (Mar. 4, 2014, 8:07 PM), <http://www.usatoday.com/story/life/tv/2014/03/04/nielsen-tv-weekly-ratings-highlights/6013087/> ("ABC's Academy Awards won 43.7 million viewers Sunday, up more than 3 million from last year to its biggest crowd since 2000. . ."); See also Joanna Crawley, *Ellen DeGeneres is a Hit! The 2014 Oscars score Highest Ratings in 10 Years*, Entertainment Wise (Mar. 4, 2014), <http://www.entertainmentwise.com/news/142606/Ellen-DeGeneres-Is-A-Hit-The-2014-Oscars-Score-Highest-Ratings-In-10-Years->.

¹¹ See Philip Bump, *Paging Bradley Copper's Lawyer: He Might Own Ellen's Famous Oscar Selfie*, *The Wire* (Mar. 3, 2014, 3:58 PM), <http://www.thewire.com/politics/2014/03/paging-bradley-coopers-lawyers-you-might-own-ellens-famous-oscar-selfie/358758/>. In the caption accompanying the Oscar Selfie, DeGeneres identifies Cooper as the one who took the now famous photo. "If only Bradley's arm was longer," she joked. DeGeneres had handed her iPhone off to Cooper, after realizing her arms were too short to capture everyone who wanted to be in the picture.

¹² *Id.* ("Luckily for all involved, ownership of popular images isn't the sort of thing that Hollywood types get litigious about.").

¹³ Tricia Ellis-Christensen, *What is User Generated Content?*, Wise Geek, (Oct. 5, 2014), <http://www.wisegeek.org/what-is-user-generated-content.htm> ("User generated content (UGC) is material on websites. . . that is produced by the users of the website. This is different than. . . a website designed by a company that puts forth material produced by professionals. [With] UGC, it is [usually]. . . amateur[s]. . . who contribute[] the content.").

¹⁴ Consuelo Reinberg, *Are Tweets Copyright-Protected?*, WIPO Magazine, (Jul. 2009), http://www.wipo.int/wipo_magazine/en/2009/04/article_0005.html ("Can a tweet ever be copyrighted?. . . Most experts agree the response should not be an all-or-nothing answer, but rather 'it depends.' While most tweets would not pass the 'copyrightability' test, some might meet the minimum amount of originality demanded by copyright law.").

the free flow of information and low barrier of access to content that exists on social media platforms and the Internet in general.

II. BACKGROUND

While UGC posted to social media is different from other tangible mediums, it is undoubtedly subject to current copyright law.¹⁵ Part A of this section will review the current state of copyright law in the United States. Part B will examine the user agreements for three social media platforms (Twitter, Facebook, and Instagram) and how these agreements conform and overlap with current copyright law. Part C of this section will examine selfies more closely to provide some analysis and context to UGC that will be useful in our analyses in Parts II and III.

A. Copyright Law in the United States

1. Statutory

The authority to grant copyright protection lies within the Constitution, which mandates that Congress has the responsibility to “[p]romote the progress of Science and the useful Arts,” by permitting authors and inventors the exclusive right to profit from and exploit their works for a length of time stipulated by statute.¹⁶ Presently, 17 U.S.C. § 102(a) permits the creator of a work¹⁷ to benefit from this exclusive license so long as the original work is fixed in a tangible medium.¹⁸ This includes those

¹⁵ Adam S. Nelson, *Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twitter Sphere*, 22 Fordham Intell. Prop. Media & Ent. L.J. 697, 2014 at 725.

Given that copyright makes no exemption for short works, the fact that tweets are 140 characters or less would not, in and of itself, preclude tweets from copyright protection, but makes any given tweet less likely to contain the requisite creativity that copyright law requires, especially because a short work does not have the opportunity to string together unprotectable, generic elements in a creative way[.]

¹⁶ See, e.g., U.S. Const. art. I, § 8, cl. 8 (“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[.]”).

¹⁷ 17 U.S.C. § 102(a)(2006). Works of authorship deemed to be affixed under this statute, include: “literary works; musical works, including any accompanying words; dramatic work, including any accompanying music; . . . pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.” See also, *Religious Tech. Ctr. v. Netcom On-Line Comm’n Serv., Inc.*, 907 F. Supp. 1361, 1368 (N.D. Cal. 1995) (affirming that computer files and electronically stored documents were sufficiently affixed expression as to be granted copyright protection).

¹⁸ 17 U.S.C. § 102(a)-(b)(2006). The statute makes clear that an original expression must be affixed somehow to an accessible medium, declaring that no protection will be granted to any “idea, procedure, process, system, method of operation, concept, principle, or discovery” regardless of how it is “explained. . . or embodied” in the work; see also *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980) (affirming that it was not the ideas themselves which are subject to protection, but the “expression” of these ideas).

mediums recognized at the time the statute was passed, as well as those later developed.¹⁹

Copyright protection grants to authors an exclusive monopoly²⁰ over a bundle of rights in the use of the protected work, including: reproduction, preparation of derivative works, distribution, performance, and display.²¹ The exercise of a Congressionally-granted monopoly over a work is intended to add incentive to the generation of new works and spur innovation by providing an exclusive right to profit from a work for a statutorily mandated period of time.²² The present term of a copyright lasts for the life of the author plus 70 years.²³ For works of joint authorship, the length of this term may be slightly longer.²⁴

The bundle of rights granted to authors may be transferred to others under 17 U.S.C § 201 of the Copyright Act.²⁵ Such conveyances must be in writing in order to be valid.²⁶ As in a “work for hire”²⁷ scenario, the hired author is still the creator of the work, with the statute carving out an exception allowing all rights to a work created within the scope of the author’s employment to vest with that employer.²⁸ This is how the rights to a film come under the control of a movie studio instead of remaining with the film’s individual contributors.²⁹

¹⁹ 17 U.S.C. § 102(a)(2006). “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, *now known or later developed*, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” (emphasis added); *see also* H.R. REP. NO. 94-1476 at 52 (1976) (congressional record makes clear that the broad language of the statute is meant to “avoid the artificial and largely unjustifiable distinctions. . . under which statutory copyrightability. . . [based] upon the form or medium in which the work is fixed.” Under this bill the medium in which a work is fixed makes no difference so long as it is a stable form capable of being perceived, either directly or with the aid of a device or machine. *Id.*

²⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are. . . 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.”)

²¹ 17 U.S.C. § 106(2006). The copyright owner may exercise a bundle of allotted rights, exclusively, or assign these rights and benefits to another. *Id.*

²² *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)(granting of copyright protection has never been a validation of an author’s efforts at creation, but a limited right to profit from the tangible expression they have created in order to promote progress in the arts and sciences).

²³ 17 U.S.C. § 302(2006)(the length of copyright protection lasting the life of the author plus 70 years, only applies to works created after January 1, 1978).

²⁴ 17 U.S.C. § 302(b)(2006)(stating that works of joint authorship, not involving work for hire, are copyrighted for the length of the life of the last surviving author, plus 70 years).

²⁵ 17 U.S.C § 201(2006)(“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law. . .”).

²⁶ *See* 17 U.S.C § 204(a)(2006)(transfer of copyright ownership is only valid if the transfer agreement is in writing).

²⁷ 17 U.S.C. §§ 101, 201(b)(2006)(where a work is made for hire, the employer, or other person who commissioned, the work is considered the author).

²⁸ *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-751 (1989)(where a work is created outside of the scope of employment, the rights to that work do not vest with others who are not the author).

²⁹ *See Aal Muhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000)(Warner Brothers required director Spike Lee to sign a ‘work for hire’ agreement when it contracted with him to make the film *Malcom X*, this was done so that Lee would not be a co-author and all rights would vest with Warner Brothers)

The infringement of a right holder's copyright is governed by 17 U.S.C § 501, and occurs whenever there is an unauthorized reproduction or distribution of a copyrighted work.³⁰ In order to establish that an infringement occurred, a party must first prove that her copyright for a work is valid and that the portions copied were original to the work in question.³¹ Where an infringement is discovered, the courts may permit the unauthorized use of the work to stand if it determines the use to be fair under certain circumstances.³² A fair use defense permits the unauthorized reproduction of a work for the purposes of criticism, comment, news reporting, teaching, scholarship, or research.³³ Factors that must be considered in determining whether a use is fair, include: "(1)the purpose and character of the use. . . , (2)the nature of the copyrighted work, (3)the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4)the effect of the use upon the potential market for or value of the copyrighted work."³⁴ Courts will not permit a fair use defense to succeed where the use supersedes rather than transforms the work it copies.³⁵

Under the Communications Decency Act of 1996, no internet service provider or interactive computer service can be held liable for infringing content created or displayed by a third party using its service.³⁶

No registration of a copyright is required in order for an author to exercise or defend her right to a work.³⁷ Registration with the Copyright Office creates a presumption that the registering party's claim to a work is prima facie valid.³⁸ This presumption is rebuttable where other evidence brings the legitimacy of the registration into doubt.³⁹ The primary advantages to registration are that it places would-be infringers on notice that a work is copyrighted,⁴⁰ permits the registering

³⁰ 17 U.S.C. § 501(a)(2006)("Anyone who violates any of the exclusive rights of the copyright owner. . . is an infringer of the copyright or right of the author. . .")

³¹ 17 U.S.C. § 501(b)(2006)(beneficiary of an exclusive right of ownership of a copyrighted work is entitled to institute an action against a party believed to have infringed on her claim); *See also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)(in order for infringement to have taken place the copied elements must be original to the work they were copied from).

³² *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994)("The fair use doctrine thus permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.")(internal quotations omitted).

³³ *Id.*

³⁴ *Id.*(statutory factors are not meant to be considered in isolation from each other, rather the result of each are to be weighed together in light of the Copyright Act); *See also*, *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 551 (1985)(courts will never permit a fair use where it can be shown that the infringing work supersedes rather than transforms the work it copies); *See also* 17 U.S.C. § 107 (use of a copyrighted work which falls within the scope of Fair Use is not considered infringement of the rights holders claim).

³⁵ 17 U.S.C. § 107(2006); *See also*, *Campbell*, 510 U.S. at 579.

³⁶ 47 U.S.C. § 230(c)-(e)(2006); *See also*, *Westlake Legal Group v. Schumacher*, 2014 U.S. Dist. LEXIS 118788(E.D. Va. Aug. 19, 2014).

³⁷ *See* 17 U.S.C. § 101(2006).

³⁸ 17 U.S.C. § 410(c)(2006)(registration of the work is valid, so long as it is done within five years of its publication).

³⁹ *Fonar Corp. v. Domenick*, 105 F.3d 99, 104 (2d Cir. 1997)(presumption that work is copyrightable is rebuttable based on evidence that work was copied from public domain or is utilitarian and non-copyrightable); *See also*, *Aalmuhammed v. Lee*, 202 F.3d 1227, 1236(9th Cir. 2000) (presumption is rebutted by evidence that registrations conflict with previous claims to the work).

⁴⁰ 17 U.S.C. § 401(c)(2006).

party to sue to protect their claim to the work, and allows for the collection of statutory damages instead of actual damages where an infringement is demonstrated.⁴¹

2. Case Law

Courts in the United States have held that unauthorized reproduction of a copyrighted image through a website gives rise to a cause of action for copyright infringement,⁴² unless it can be shown that the use was transformative in some respect.⁴³ This requirement has often been interpreted broadly, for example, images reproduced from a webpage during an image search using the search engine Google have been held to be transformative.⁴⁴

Courts have held that a copyright may be held by more than one author,⁴⁵ and that the conduct of contributing authors may create an implied, non-exclusive license for their collaborators to exploit the work.⁴⁶ When works have more than one author, the right to exercise control over the work applies equally to each of its creators.⁴⁷ Co-authors must therefore forfeit the right to bring suit against each other for infringement.⁴⁸ The granting of a non-exclusive or implied license to a work can often be a shield from copyright infringement for the grantee.⁴⁹ If a party presents itself as having the authority to grant permission to use a copyrighted work, and thus induces another party to infringe upon a valid copyright, courts have held that the inducer will be liable for the other party's infringement.⁵⁰

⁴¹ 17 U.S.C. § 504(c)(1)(2006); *See also*, *Agence France Presse v. Morel*, 934 F. Supp. 2d 584, 587, (S.D.N.Y. 2013)(copyright holder may elect before final judgment is entered, to recover an award of statutory damages for all infringements involved in the action for the amounts no less than \$750 and no more than \$30,000 per work which has been infringed).

⁴² *Playboy Enters. v. Webbworld Inc.*, 991 F. Supp. 543, 551-553 (N.D. Tex.1997)(defendant violated plaintiff's copyright when it reproduced, distributed, and displayed images belonging to the plaintiff on its website without authorization).

⁴³ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (“[I]n Justice Story’s words, whether the new work merely ‘supersedes the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks. . . whether and to what extent the new work is ‘transformative[.]’”, in general the more transformative a work is the less significant its commercial aspects are).

⁴⁴ *See Perfect 10 Inc. v. Amazon.com*, 508 F.3d 1146, 1164-1165 (9th Cir. 2007)(exact reproductions of works have been found to be fair and transformative if the context and purpose is sufficiently different, such as when thumbnails images are created for a Google image search).

⁴⁵ *Brod v. Gen. Publ’g Group, Inc.*, 32 Fed. Appx. 231, 234(9th Cir. 2002)(a copyright vests equally in each of its authors, provided that each made an independently copyrightable contribution); *See also* 17 U.S.C. § 101; *See also*, 17 U.S.C. § 201(a).

⁴⁶ *See Effects Assocs. v. Cohen*, 908 F.2d 555, 558-559 (9th Cir. 1990)(court found that where a company created a special effects scene exclusively for use in a film, the company had “impliedly granted [a] nonexclusive license” to the film’s director to incorporate the scene into his film).

⁴⁷ *See Brod*, 32 Fed. Appx. at 235.

⁴⁸ *Id.* at 234.

⁴⁹ *See Effects*, 908 F.2d at 559.

⁵⁰ *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 830 (8th Cir. 1992)

Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his

B. User Agreements

The user agreements of Twitter, Facebook, and Instagram warn their users that they are not responsible for the use of these services and that they cannot be held liable for any laws that are broken as the result of user activity.⁵¹ The copyright policies of each of these agreements are similarly aligned, although with slightly different language.

Twitter claims that its website respects the intellectual property rights of others and expects its users “to do the same.”⁵² Twitter reserves the right to remove infringing content from its site.⁵³ Facebook claims that its users are the owners of any content they post on the site, and therefore users can control the distribution of their content via the site’s privacy policy. However, all of its users must agree that Facebook has a “non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that [users] post on or in connection with Facebook[.]”⁵⁴ Similarly, Instagram does not claim ownership of any content posted to its site by users, but requires users to agree to a non-exclusive license.⁵⁵ Instagram also states that it has no obligation to prescreen content for infringement.⁵⁶

All three social media websites provide a means for rights holders to flag content as infringing on their claim to a work and state that any content removed in this way is subject to review.⁵⁷

C. What is a Selfie?

As extensions of the “attention economy”⁵⁸ that has developed in the digital age, social media platforms tend to live and die based on the amount of attention received by UGC.⁵⁹ A particularly notorious type of UGC, the selfie, was officially recognized

behalf by the person purporting to act for him(quotting the Restatement (second) of Agency § 27).

⁵¹ *Terms of Service*, Twitter, <http://twitter.com/tos>; *See also Statement of Rights and Responsibilities*, Facebook, <https://www.facebook.com/legal/terms>; *See also Terms of Use*, Instagram, <http://instagram.com/legal/terms/#>.

⁵² *Terms of Service*, 9. *Copyright Policy*, Twitter, <http://twitter.com/tos>

⁵³ *Id.*

⁵⁴ *Statement of Rights and Responsibilities*, 2. *Sharing Your Content and Information*, Facebook, <https://www.facebook.com/legal/terms>.

⁵⁵ *Terms of Use, Rights*, Instagram, <http://instagram.com/legal/terms/#>.

⁵⁶ *Id.*

⁵⁷ *See, e.g., Terms of Service*, *supra* note 52.

⁵⁸ *See* Michael H. Goldhaber, *Attention Shoppers!*, *Wired* (Dec. 1997), at Page 1, http://archive.wired.com/wired/archive/5.12/es_attention.html. Economics is the study of how societies deal with the problem of scarcity. *Id.* Information in the Internet age is hardly scarce and the distribution of information on the web is not meant to attract more information but is uploaded in order to attract attention to the content’s creator. *Id.* It is this understanding which the Internet is realized as an economy of attention, not information. *Id.*

⁵⁹ *See* Corey Eridon, *Why User-Generated Content is More Important Than You Think*, Hubspot: Inbound Hub, Inbound Marketing (Feb. 7, 2012, 2:33 PM), <http://blog.hubspot.com/blog/tabid/6307/bid/31258/Why-User-Generated-Content-Is-More-Important-Than-You-Think.aspx>. Millennials have spent the better part of their lives on the Internet. *Id.* They have developed sophisticated methods for filtering through information companies publish and solicit

by the Oxford dictionary in 2013,⁶⁰ and now has solidified its status as one of the most high profile forms of UGC on social media.⁶¹

While some have derided the selfie as a sign of mental illness,⁶² or as an overt expression of sexism and misogyny,⁶³ others have argued that it is more accurately understood as a digital speech act.⁶⁴ In other words, the selfie has been equated to a non-verbal communicative gesture, similar to a quizzical look or a head nod, only in the digital realm.⁶⁵ As the web-savvy television and film actor James Franco noted: “[i]n a visual culture, the selfie quickly and easily shows, not tells, how you’re feeling, where you are, what you’re doing.”⁶⁶ The selfie may therefore, best be described as a “hyper-effective block of text, with the dual intent of depicting the photographer and explaining something about them to the viewer.”⁶⁷

As New York Times contributor Jenna Wortham observed, our society is becoming increasingly accustomed to interacting online, and a large percentage of these interactions involve the sharing of images as a means of expression.⁶⁸ Wortham wrote, “selfies strongly suggest that the world we observe through social media is more interesting when people insert themselves into it. . .”⁶⁹ This idea has seized social

on blogs and social media. *Id.* If the content offered by a company isn’t of a desired quality, the company is discarded by the user, and will likely not be reconsidered as a viable source of products and information. *Id.*

⁶⁰ Brown, *supra* note 4.

⁶¹ Amanda b., *Selfie*, Know Your Meme, (2013) <http://knowyourmeme.com/memes/selfie>. “Throughout 2012, the term “Selfie” began making headlines on sites including the Wall Street Journal, the Atlantic, Gawker and BuzzFeed, many of which highlighted celebrities taking these types of photos. *Id.* In December, TIME named Selfie #9 on their Top 10 list of 2012 Buzzwords.” *Id.*

⁶² Chris O’Shea, *The Selfie Trend Is Officially Out of Control*, Daily Lounge (2013) <http://dailylounge.com/the-daily/entry/selfie-trend-is-out-of-control> (arguing that the trend of selfie taking has hit epidemic proportions, and negatively impacts people’s body image).

⁶³ Olympia Nelson, *Dark Undercurrent of Teenage Girls’ Selfies*, The Age, (Jul. 11, 2013), <http://www.theage.com.au/comment/dark-undercurrents-of-teenage-girls-selfies-20130710-2pqbl.html>. Olympia Nelson is a high school aged student in England who documented, in widely distributed essay, her and her schoolmates’ lives since selfies became a popular mode of expression on social media. *Id.* She views the proliferation of the selfie as reinforcing gender roles in a way that negatively impacts young girls’ sense of self-worth as they attempt to gain acceptance from their peers. *Id.*

⁶⁴ Mike Rugnetta, *Why do We Hate Selfies?*, PBS Idea Channel, 3:00-3:58 (Feb. 5, 2014), <https://www.youtube.com/watch?v=2j7SIxMGj5Q&list=PL69BD06CC757E1D61&index=27>. Rugnetta makes a strong argument for identifying certain non-verbal actions as equivalent to speech. *Id.* Skeptically furrowed eye-brows and recognition of another via a slight head nod can be as effective of a communication of mood as an equivalent verbalization. *Id.* They are a kind of verbal performance as they allow the viewer to infer a certain mood or intent without accompanying verbal cues. *Id.* He extends this categorization to status updates on social media arguing that they are performative in the way the surrounding context of the post is relied on by the viewer to imbue the communication with information about the poster that is not otherwise apparent solely from the text. *Id.* Many Instagram images and nearly all selfies appear to have the same communicative qualities as a status update, and so he concludes, that these images are better understood as speech acts than they are simply as standalone photos. *Id.*

⁶⁵ *Id.*

⁶⁶ See James Franco, *The Meanings of the Selfie*, The New York Times (Dec. 26, 2013), http://www.nytimes.com/2013/12/29/arts/the-meanings-of-the-selfie.html?_r=0.

⁶⁷ See Rugnetta, *supra* note 63, at 4:24-4:47.

⁶⁸ Jenna Wortham, *My Selfie, Myself*, The New York Times, Sunday Review (Oct. 19, 2013), http://www.nytimes.com/2013/10/20/sunday-review/my-selfie-myself.html?pagewanted=all&_r=0.

⁶⁹ *Id.*

media and contributed to its dynamic potential as a form of electronic communication, making the selfie one of the most visibly striking and controversial forms of digital expression.⁷⁰

III. ANALYSIS

Since the 19th century, the protections allotted to photographs and the persons who author them have been fairly well-defined and not widely disputed.⁷¹ While the exclusive bundle of rights photographers can rely upon are rarely questioned, the electronic distribution of photographs has caused some framing issues.⁷²

Information on the internet is shared fluidly between users and can quite often lead to copyright infringements,⁷³ but not every instance of media changing hands without an author's express consent is a violation of the law.⁷⁴ While it may appear that current copyright law struggles to keep up with the advancements of the digital age, this is somewhat of a misconception.⁷⁵ Twitter's user agreement acknowledges the difficulty in bringing online activities under the umbrella of copyright law but it does not dismiss the applicability of these laws to UGC.⁷⁶ If one of the major cultural forces in cyber-space recognizes the compatibility of present copyright laws with its services, it is reasonable then for our justice system to be comfortable in defining the

⁷⁰ Fleischman, *supra* note 8; *See also*, Franco, *supra* note 65; *See also*, Paul Martinka, *My Selfie with Brooklyn Bridge Suicide Dude*, New York Post (Dec. 4, 2013, 5:41 AM), [http://nypost.com/2013/12/04/selfie-ish-woman-snaps-cellphone-shot-with-suicidal-man/\(a women was caught by the New York post snapping a photo of herself with a man attempting to commit suicide by leaping from the Brooklyn bridge and declined to comment when the news agency sought her input on the photo\).](http://nypost.com/2013/12/04/selfie-ish-woman-snaps-cellphone-shot-with-suicidal-man/(a%20woman%20was%20caught%20by%20the%20New%20York%20post%20snapping%20a%20photo%20of%20herself%20with%20a%20man%20attempting%20to%20commit%20suicide%20by%20leaping%20from%20the%20Brooklyn%20bridge%20and%20declined%20to%20comment%20when%20the%20news%20agency%20sought%20her%20input%20on%20the%20photo).)

⁷¹ *See* Burrow-Giles Lithographic Co. v. Sarony, 111 US 53, 60(1884)(the Supreme Court of the United States found that the photograph was material of the kind that the Constitution intended Congress should secure for its author the exclusive right to publish and sell, the author being the one who arranged or envisioned the composition of the photograph and caused the shutter of the camera to be pulled, thereby capturing the image).

⁷² *See* Bump, *supra* note 11.

⁷³ Pamela Vaughan, *Copyright Law on the Internet Is a Total Train Wreck Right Now*, HubSpot (Jun. 10, 2013, 9:00 AM), <http://blog.hubspot.com/marketing/internet-copyright-law-failure>. ("Content sharing is a huge part of how the internet works", the ubiquity of copyright infringement on the internet has been likened to jaywalking, it is illegal, but every instance does necessarily warrant a fine).

⁷⁴ *See* Nelson, *supra* note 15 at 732-733. In the case of retweets, the question of whether the new work merely 'supersedes' the original or adds something new is misleading. Even if a retweet adds no new context or commentary it does not supersede the original object. Instead, it shares the original writing and thereby increases its reach and its cultural impact. In this way, an attributed retweet would not interfere with the original tweet's ability to reach its audience. This reasoning may only apply to attributed retweets as unattributed retweets are much more likely to supersede the original. Where there is no attribution, the very act of retweeting may create something new, satisfying the transformative requirement of a fair use defense.

⁷⁵ Twitter, *supra* note 51 (Twitter claims to respect the intellectual property rights of others and expects its users to do the same, stating that it will respond to notices of alleged infringement that comply with applicable law when these notices are provided by users).

⁷⁶ *Id.*

proper application of current copyright law rather than creating new statutes that may not be as compatible with the frontiers of digital expression.⁷⁷

This section seeks to illustrate various ways in which current copyright law may be applied to materials posted and shared via social media platforms. In order to demonstrate that cases of possible copyright infringement on social media can be resolved fairly under existing copyright law, a set of hypothetical disputes will be examined using facts from the 86th Academy Awards.

Part A will begin by examining the applicable laws and possible outcomes of a dispute between Bradley Cooper and Ellen DeGeneres over the authorship of the Oscar Selfie, paying close attention to the defenses that may be raised. Part B will focus on DeGeneres's possible liability to Academy Award sponsor Samsung and whether DeGeneres's use of the Oscar Selfie could violate any enforceable agreements between the two parties. Lastly, Part C will look to determine whether there is any liability between the Associated Press and DeGeneres in a hypothetical dispute brought either by Cooper or Samsung for the unauthorized media distribution of the Oscar Selfie.

A. In re Cooper v. DeGeneres

Who has the right to post a picture to Twitter that two people have taken together is not likely to be a hotly contested legal issue between successful professional entertainers like Ellen DeGeneres and Bradley Cooper.⁷⁸ However, the legal question implicated here still lingers. Has an infringement occurred when two or more people have taken a photo together and the photo is uploaded to social media by someone who was not the photographer?⁷⁹

The Oscar Selfie at the center of this inquiry instantly went viral, smashed records,⁸⁰ and was estimated to be worth upwards of a billion dollars in exposure to Samsung.⁸¹ In a different world, it is foreseeable that Cooper would initiate a suit to recapture control of one of the most valuable pieces of UGC created in 2014.⁸² This Comment will demonstrate, under current copyright law, that this course of action would not be fruitful for Cooper should he consider it.

⁷⁷ Nelson, *supra* note 15 at 750. Twitter is an extremely new medium of expression, and the interpretation of copyright law concerning it should provide content creators with certain and predictable boundaries within which their rights will vest and be defensible. *Id.* Even as the technologies employed in social media change and evolve, it is possible to accomplish this within the scope of existing copyright law. *Id.*

⁷⁸ See Bump, *supra* note 11.

⁷⁹ *Id.*

⁸⁰ See Baertlein, *supra* note 7.

⁸¹ See Richford, *supra* note 9.

⁸² See Fleischman, *supra* note 8; Debra Cassens Weiss, *Who Owns the Copyright to Monkey's Selfie? Wikimedia Denies Photographer's Takedown Request*, ABA Journal (Aug. 7, 2014), http://www.abajournal.com/mobile/article/who_owns_the_copyright_to_macaques_selfie_wikimedia_denies_photogs_take_dow. A single photo can be worth a lot to an artists or entertainer. *Id.* David Slater, the photographer who sued Wikimedia to force them to take down the photo taken by the macaque monkey had a strong financial interest in doing so. *Id.* His trip to Indonesia had been expensive and he had made very little money off the other photos he had taken. *Id.* He claimed that for every 10,000 photos taken, one makes enough money to finance his whole operation. *Id.* The "monkey selfie" was that 1 in 10,000 photo. *Id.*

It is worth noting at the outset of this discussion, that Twitter cannot be held liable for the infringing conduct of its users.⁸³ This is a standard application of the US Copyright Act which allows a host-site to avoid liability, provided it does not actively encourage its users to utilize its services to break the law.⁸⁴ What is being considered here is whether there was any transgression by DeGeneres, not whether others' retweeting of the Oscar Selfie from her account constituted an infringement. Furthermore, retweeting is permissible under the nonexclusive licensing agreement provided for in Twitter's Terms of Service.⁸⁵

1. Case for Co-authorship

In a dispute for copyright infringement by Cooper, there is a strong case to be made that DeGeneres is a co-author of the Oscar Selfie.⁸⁶ Co-authorship is one of the means by which an individual can claim a defensible right to use copyrighted materials without committing an infringement.⁸⁷

This principle of co-authorship is examined closely in *Brod v. General Publishing Group*.⁸⁸ In *Brod*, a photographer sued his collaborator when images from a photo shoot they had worked on were published as part of a calendar.⁸⁹ The photos were attributed to the photographer, but his collaborator had not sought permission before

⁸³ See Twitter, *supra* note 51 (content posted to Twitter is the sole responsibility of the person it originates with, Twitter will not monitor or control the dissemination of content via its service, and any use or reliance on content obtained through the service is at the users own risk); *ee also*, 47 U.S.C. § 230(c)-(e)(2006).

⁸⁴ See, e.g., *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 317(D. D.C. 2012).

⁸⁵ Twitter, *supra* note 51.

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See also Nelson, *supra* note 15 at 732-733. Sharing information is one of the primary goals of Twitter. *Id.* Retweets do not supersede the original when they are attributed with a "@RT", as a retweet shares the original tweet and increases its reach and cultural impact. *Id.* It does not interfere with the original tweet's ability to reach its audience but expands it. *Id.* Even unattributed tweets serve this purpose or have some transformative characteristic that would bring it under the umbrella of fair use. *Id.*

⁸⁶ See Motroc, *supra* note 6 (producers of the 86th Academy Awards credit DeGeneres with coming up with the idea to take selfies during the ceremony, she received training during rehearsal for the use of a Samsung smart phone, and there is some evidence by which to conclude that the seemingly spontaneous Oscar Selfie was planned).

⁸⁷ See *Brod v. Gen. Publ'g Group, Inc.*, 32 Fed. Appx. 231, 234(9th Cir. 2002), (a copyright vests equally in each of its authors).

⁸⁸ *Id.* at 233.

⁸⁹ *Id.*

publishing the photos.⁹⁰ Upon learning of the publishing, the photographer registered the photos with the Copyright Office, and initiated a suit for infringement.⁹¹

In ruling that the photos had been published by a co-author, the court declared that there was sufficient evidence to prove that no actionable infringement had taken place.⁹² The court relied on the fact that the photo-shoot had been the collaborator's idea; he had procured the subjects, scouted the locations, and had played a large role in directing the composition of the photos.⁹³ The evidence characterizing the collaborator's contributions demonstrated sufficient artistic control over the photographs to denote co-authorship.⁹⁴ Salient to the court's determination was the fact that the collaborator never relinquished complete creative control to his co-author.⁹⁵

The facts in *Brod* closely track the circumstances under which the Oscar Selfie was taken.⁹⁶ As the producers of the 86th Oscars have disclosed, it was DeGeneres who decided that celebrity selfies would be a part of the broadcast.⁹⁷ The Oscar Selfie in particular resulted from DeGeneres inviting Meryl Streep to take a photo with her.⁹⁸ DeGeneres invited other celebrities to join in on the photo and the participants gathered together in the aisle.⁹⁹ When DeGeneres could not get everyone in the photo, Cooper offered to take it for her.¹⁰⁰ Her smartphone was then positioned with the screen facing DeGeneres so that she could see the image before it was taken.¹⁰¹ Cooper positioned the lens until DeGeneres verbally approved of what she saw, at which point the photo was taken.¹⁰²

⁹⁰ *Id.* Brod had contacted his collaborator, Collins, on multiple occasions to learn if a publisher had been found, Collins had not contacted him back, and Brod first learned of the publication of the photos he and Collins had taken together when he received the published calendar in the mail. *Id.*

⁹¹ *Id.* at 233-34. Brod did not list any co-authors when he registered the copyright for the photos. *Id.*

⁹² *Brod v. Gen. Publ'g.*, 32 Fed. Appx. at 233-34.

⁹³ *Id.* at 234. Collins conceived of the idea to photograph vintage televisions and located the actual televisions for the shoot. *Id.* He then invited Brod to employ his skills as a photographer. *Id.* Collins effectively collaborated on the composition of the photographs by selecting and positioning subjects and suggesting camera angles before Brod triggered the shutter for each shot. *Id.*

⁹⁴ *Id.* Collins' contributions were deemed sufficiently original and expressive to constitute a copyrightable contribution to the photos in the calendar. *Id.*

⁹⁵ *Id.* at 235. The court found that Collins had inspired and directed the production of the photographs and maintained sufficient artistic control over the product of the photo-shoot to be considered a co-author as a matter of law. *Id.*

⁹⁶ See Bump, *supra* note 11.

⁹⁷ See Motroc, *supra* note 6.

⁹⁸ Oscars, *Ellen DeGeneres Takes a Selfie at The Oscars*, 0.34, (Mar. 11, 2014), <https://www.youtube.com/watch?v=G5SWj51uGnI>.

⁹⁹ *Id.* at 0.54-1.10.

¹⁰⁰ *Id.* at 1.01-1.27. Cooper offered to take the photo for DeGeneres multiple times, to which DeGeneres responded "No, I'm taking it", before asking Streep to take the photo of them. *Id.* When no one else could reach far enough to take the photo, DeGeneres finally handed her smartphone off to Cooper. *Id.*

¹⁰¹ *Id.* at 1.27-1.31.

¹⁰² *Id.* DeGeneres stated while Cooper was positioning the lens "Hey, that's good, look at us!" *Id.* This indicated that image on the smartphone was the one she wanted to capture and that he should to take the photo. *Id.*

It is evident from these facts that DeGeneres was responsible for initiating the photo and at no point relinquished creative control to Cooper.¹⁰³ In line with the reasoning in *Brod*, DeGeneres demonstrated significant artistic control since she conceived the idea for the photo,¹⁰⁴ invited its participants to gather with her in the aisle,¹⁰⁵ suggested the camera angle of the shot,¹⁰⁶ chose her collaborators,¹⁰⁷ and instructed Cooper as to the exact moment the photo should be taken.¹⁰⁸ Also like *Brod*, DeGeneres attributed the photo to the person who captured it when she “published” it via her Twitter account.¹⁰⁹

Exhibiting this level of creative control over the photo quite likely creates conditions sufficient to constitute a copyrightable interest in the photo and a finding of co-authorship between DeGeneres and Cooper.¹¹⁰

¹⁰³ Bump, *supra* note 11 (while Cooper was ultimately the one who took the famous photo, it was only with DeGeneres's permission and final approval that the image was uploaded to Twitter); *See also*, *Brod v. Gen. Publ'g Group, Inc.*, 32 Fed. Appx. 231, 235(9th Cir. 2002)(Collins maintained creative control throughout the photo shoot).

¹⁰⁴ *Oscars*, *supra* note 97 at .34-.50 (Speaking with Meryl Streep, DeGeneres stated “I'm going to take the photo right now, and then we'll see if we can break the record for the most retweets.”); *Brod*, 32 Fed. Appx. at 324.(Collins conceived of the vintage television photo-shoot and solicited a collaborator to help him realize it).

¹⁰⁵ *Id.* at 1.01-1.10; *See also Brod*, 32 Fed. Appx. at 324.

¹⁰⁶ *Id.* at 1.09-1.25; *See also Brod*, 32 Fed. Appx. at 324. (Collins suggested camera angles and other changes to be made before Brod took each picture).

¹⁰⁷ *Id.* at 1.15-1.25; *See also Brod*, 32 Fed. Appx. at 324 (Collins reached out to Brod, suggesting that they photograph vintage televisions for a book he hoped to publish).

¹⁰⁸ *Id.* at 1.28; *See also Brod*, 32 Fed. Appx. at 235. (Collins had inspired and directed the production of the photographs and maintained sufficient artistic control over the product of the photo-shoot to be considered a co-author as a matter of law).

¹⁰⁹ *See* Luchina, *supra* note 1 (“If only Bradley's arm was longer. Best photo ever. #oscars” DeGeneres tweeted this caption along with the Oscar Selfie when she displayed the image via her Twitter account).

¹¹⁰ *Brod*, 32 Fed. Appx. at 234-235. The court relied on the reasoning from *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000), to determine whether the collaboration was meant to bestow equal claim to both of the works creators as “authors”, it listed three factors to guide this determination in the absence of a contract explicitly stating which rights were reserved for whom, these factors were: “(1) whether the putative author controls the work and is ‘the inventor or master mind who creates, or gives effect to the idea’; (2) whether the ‘putative coauthors make objective manifestations of a shared intent to be coauthors’; and (3) whether ‘the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised.” The court observed that: “Control in many cases will be the most important factor.” Each of these factors favor a finding of co-authorship in the hypothetical suit between Cooper and DeGeneres; DeGeneres did not relinquish creative control to Cooper as she was the one who came up with the idea for the photo, decided who would be in it, gathered the photo's subjects around her, and after handing the smartphone off to Cooper, watched the phones screen for the image she wanted captured and informed Cooper when to snap the photo in order to capture that image. Cooper actions at the time the photo was taken objectively manifest a shared intent with that of DeGeneres as he joined other celebrities in the photo and offered to execute the photo for DeGeneres following the hosts verbal declaration that she intended to take a photo to post on Twitter in an attempt to break a record for retweets. After Cooper offered multiple times to take the photo for DeGeneres she finally assented, with Cooper assuming control of the smart phone just long enough to snap the photo, after which he said “Nice!” passed the phone back to DeGeneres so that she could upload it to Twitter. Finally, the success of the photo was attributable to the star power which was behind it, with DeGeneres's orchestration of the photo and Cooper's arm length being key to holding camera at a distance at which all of the participating celebrities could get in the shot. The contributions of each DeGeneres and Cooper were inseparable

2. Implied License

If the argument for a shared co-authorship interest between Cooper and DeGeneres is not found to be compelling, the argument for infringement may still be countered by demonstrating that the conduct of the parties taking the photo implied a non-exclusive license to its collaborators to exploit the work for a specific purpose.¹¹¹

Implied licenses to exploit and distribute a work within certain parameters are a common business practice between collaborators in Hollywood.¹¹² The concept has even extended into Silicon Valley, and such stipulations are fixtures of the service agreements for social media platforms.¹¹³ These agreements allow users to exchange content and information within the website without infringing upon the rights of other members.¹¹⁴ These types of licenses are typically enforceable even when there is no written agreement between the parties,¹¹⁵ provided the conduct of the parties demonstrates that any artistic contributions were made in service of the work as a whole, or with the intent of granting a license of use to the other party to exploit the contribution.¹¹⁶

from the production and appeal of the photo as to provide no clear delineation that would permit authorship of the photo to be attributed to either DeGeneres or Cooper to the exclusion of the other.

¹¹¹ See Bump, *supra* note 11. Eric Spiegelman, an entertainment lawyer in Los Angeles, puts forward the theory that the arrangement Cooper and DeGeneres entered into when DeGeneres agreed to allow Cooper to take the Selfie was like an extension of the standard Hollywood business practice, where various artists contribute to a work, but their contribution does not give them an exclusive copyright to the final work. *Id.* According to Spiegelman, this arrangement typically functions with or without a written contract. *Id.*

¹¹² *Id.*

¹¹³ Twitter, *supra* note 51 (by submitting or displaying content on Twitter, users grant it 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 [c]ontent in any and all media or distribution methods. . .”); see also Facebook, *supra* note 53 (“[C]ontent that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission. . . you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License).”); see also Instagram, *supra* note 54 (“Instagram does not claim ownership of any Content that you post on or through the Service. Instead, you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the [c]ontent that you post on or through the Service. . .”); see also, Nelson, *supra* note 15, at 708 (“While Twitter has no direct influence over copyright law, its policy sends a clear message to its users about what they can expect; the message that users own the content of their tweets either creates or reflects a normative expectation of intellectual property rights in Twitter content.”).

¹¹⁴ Twitter, *supra* note 51; Facebook, *supra* note 53; Instagram, *supra* note 54.

¹¹⁵ *Effects Assocs. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990. “The leading treatise on copyright law states that ‘nonexclusive license may be granted orally, or may even be implied from conduct.’”; *Id.* see also Bump, *supra* note 11 (suggesting that, according to Spiegelman, a creative collaboration can assume the weight of an enforceable contract with nothing more than an oral agreement between the parties).

¹¹⁶ See *Effects Assocs. V. Cohen*, 908 F.2d at 558-559. (asserting that where a party creates a work at the request of another, with the intent of handing the work over to the other party to be copied and distribute, a license to use the work for these purposes has been created); see also, Bump, *supra* note 11.

[W]hen an individual creative contribution becomes part of a ‘work made for hire,’ it’s clearly spelled out in a written contract. . . As such, Bradley Cooper is aware of the standard business practice of this industry and can be reasonably expected to operate in the same way in the absence of a written contract.

The concept of an implied license to use a copyrighted work is explored succinctly in the case of *Effects Assocs. v. Cohen*, 908 F.2d 555 (9th Cir. 1990). In *Effects*, a Hollywood director of a science fiction horror film commissioned a special effects scene from a small effects company.¹¹⁷ The agreement commissioning the footage was made orally and there was no discussion of who would own the copyright for the scene.¹¹⁸ When the scene was completed and shown to the director, he expressed his dissatisfaction with its quality and refused to pay the effects company the full amount of agreed-upon compensation.¹¹⁹ Despite the director's refusal to honor his agreement with the effects company, he edited the effects footage into the final cut of the film before handing it over to the studio for distribution.¹²⁰ As a result, the effects company initiated a suit for copyright infringement.¹²¹

Typically, when a contribution is made to a film, the rights to that contribution are transferred to the studio, permitting it to "copy, distribute, or display the copyrighted work publicly" under 17 U.S.C. § 106.¹²² As Section 204 of the Copyright Act makes clear, such agreements are not enforceable unless they are put into writing.¹²³ These arrangements are typically referred to as "work for hire" agreements.¹²⁴ The court rejected the director's argument that his right to use the footage was enforceable based on his oral agreement with the effects company because, "it is customary in the motion picture industry. . . not to have written licenses".¹²⁵

The court in *Effects* found that an exclusive right to use the effects footage did not transfer to the director by virtue of his oral agreement but concluded that no infringement had occurred.¹²⁶ Because the effects company had created the footage at the request of the director and allowed it to pass into his possession with the intent that it be copied and distributed, the effects company could not prevent the footage from being used in the film.¹²⁷ To hold otherwise, the court reasoned, would be to deprive the effects company's work of its value.¹²⁸ Accordingly, the court found that

¹¹⁷ *Effects Assocs. v. Cohen*, 908 F.2d 555-556 (9th Cir. 1990). Cult film-maker Larry Cohen wrote, directed, and produced a low budget science fiction horror movie called "The Stuff", where an alien life form attempts to conquer Earth by posing as a low-fat frozen yogurt. *Id.* Effects Associates was hired by Cohen to create the special effects for the film's climax where a derelict factory serving as the alien headquarters is destroyed. *Id.*

¹¹⁸ *Id.* at 556.

¹¹⁹ *Id.* The unpaid remainder of the agreement was around \$8000. *Id.*

¹²⁰ *Id.* The final cut of the film was distributed by New World Entertainment. *Id.*

¹²¹ *Id.*

¹²² 17 U.S.C. § 106; *see also*, *Effects Assocs. v. Cohen*, 908 F.2d at 556 (stating that "[t]he law couldn't be clearer: The copyright owner of a motion picture or other audiovisual work has the exclusive rights to copy, distribute or display the copyrighted work publicly.").

¹²³ 17 U.S.C. § 204; *see also* *Effects Assocs. v. Cohen*, 908 F.2d at 556 (asserting that the owner of a copyright can sell or license his rights as she pleases, but § 204 of the Copyright Act does not recognize these transfers as valid unless they are in writing).

¹²⁴ 17 U.S.C. § 201(b). In a work for hire scenario, the employer or other person who commissioned the work is considered the author. *Id.*

¹²⁵ *Effects Assocs. v. Cohen*, 908 F.2d at 555-557.

¹²⁶ *Id.* at 559. The court ultimately found that an implied license of use had been granted to Cohen for the effects footage. *Id.* It also found that Cohen could still be held liable for breach of contract resulting from his refusing to pay what he had promised to Effects. *Id.* Lastly, Effects retained the right to distribute and sell the footage as it saw fit. *Id.*

¹²⁷ *Effects Assocs. v. Cohen*, 908 F.2d at 558-559. "Effects created a work at defendant's request and handed it over, intending that defendant copy and distribute it." *Id.*

¹²⁸ *Id.* at 559.

the company granted an implied license for the use of the footage in question when it handed its product over with the knowledge that the director intended to distribute the product as part of the final film.¹²⁹

Similar to *Effects*, there is sufficient evidence to find that an implied license was granted to DeGeneres for the limited use of a work, in this case, to upload the Oscar Selfie to her Twitter account.¹³⁰ Like the plaintiff in *Effects*, it would be difficult for Cooper to argue that he had no knowledge of DeGeneres's intended purpose for the Oscar Selfie.¹³¹ She had expressed her intent to upload the photo to Twitter shortly before inviting Cooper to join the photo.¹³² Furthermore, she had been taking selfies earlier in the night,¹³³ including one on stage during the telecast,¹³⁴ and she continued to solicit selfies after Cooper took the now famous photo.¹³⁵ Even if he did not have specific knowledge that the particular photo he took for DeGeneres would be uploaded to Twitter, it would be reasonable to believe that at least some of the selfies DeGeneres took would be posted on Twitter, and the Oscar Selfie could be one of them.¹³⁶

Like the special effects footage in *Effects*,¹³⁷ the Oscar Selfie was created expressly for the purpose of reproduction and distribution.¹³⁸ After DeGeneres stated her desire to break the record for retweets, Cooper offered to take the photo for her.¹³⁹ Cooper then waited for her direction as to when to hit the shutter button.¹⁴⁰ Afterwards, Cooper handed the phone back to DeGeneres, at which point DeGeneres, quite visibly, uploaded the photo to her Twitter account.¹⁴¹

While there was no written contract transferring the rights to the Oscar Selfie to DeGeneres, the surrounding circumstances should provide sufficient evidence to conclude that Cooper either intended the Selfie to be uploaded to DeGeneres's Twitter, or was aware that this was her intent at the time the photo was taken.¹⁴² As the actual photographer behind the Oscar Selfie, Cooper would still retain some rights to the photo, however his ability to hold DeGeneres liable for uploading the photo to her Twitter account would not be one of his remaining rights.¹⁴³

¹²⁹ *Id.*

¹³⁰ *Id.* at 558. “[N]on[-]exclusive license[s] may be granted orally, or may even be implied from conduct.” *Id.*

¹³¹ *Id.*

¹³² Oscars, *supra* note 97, at 0.40-1.00 and 1.04-1.05.

¹³³ *Id.* at 0.01-0.25.

¹³⁴ See Crocker, *supra* note 5.

¹³⁵ Oscars, *supra* note 97, at 1.45-1.52.

¹³⁶ *Id.* at .01-1.33; See also Bump, *supra* note 11. “Ellen Degeneres came up with the idea for the selfie and proceeded to execute it. In the process of producing the selfie, it became apparent that she needed a crew, and Bradley Cooper took it [sic] upon himself to be this photographer. . .” *Id.*

¹³⁷ *Effects Assocs. v. Cohen*, 908 F.2d 555, 558-559 (9th Cir. 1990). “Effects created a work at defendant’s request and handed it over, intending that defendant copy and distribute it.” *Id.*

¹³⁸ Oscars, *supra* note 97, at 0.35-0.50.

¹³⁹ *Id.* at 1.01-1.05.

¹⁴⁰ *Id.* at 1.28-1.30.

¹⁴¹ *Id.* at 1.35-1.37.

¹⁴² See *Effects*, 908 F.2d at 558 (stating “[T]he leading treatise on copyright law states that ‘non-exclusive license may be granted orally, or may even be implied from conduct.’”).

¹⁴³ *Id.* at 559. A copyright holder’s power of enforcement is comprised of a bundle of rights. *Id.* In creating a nonexclusive license of use through its agreement with Cohen, Effects had given one stick from that bundle. *Id.* Effects had lost right to sue Cohen for copyright infringement. *Id.* Similarly,

The surrounding circumstances therefore provide a firm basis for a court to find that an implied license had been granted to DeGeneres to copy and distribute the photo via her Twitter account.¹⁴⁴ Similar to the reasoning of the court in *Effects*, to claim otherwise would deprive the photo of its intended purpose and value.¹⁴⁵

3. *Speech Act - Fair Use*

If the court in a hypothetical dispute is not inclined to find that either a claim of co-authorship or an implied license of use exists, a fair use defense could still be successful in helping DeGeneres avoid liability.¹⁴⁶

A fair use defense was successfully employed in *Campbell v. Acuff-Ross Music*, 510 U.S. 569 (1994).¹⁴⁷ In *Campbell*, a 90's hip-hop music group¹⁴⁸ used portions of a well-known pop ballad by the name of "Oh, Pretty Woman"¹⁴⁹ in one of their songs.¹⁵⁰ The hip-hop group claimed their song was a parody¹⁵¹ of the original and initially sought approval from the rights holders of "Oh, Pretty Woman" for the use of the original's chorus.¹⁵² After the rights holders refused to grant permission to use the

when Cooper agreed to take the Oscar Selfie for DeGeneres, he forfeited his right to prevent the photo from being uploaded to her Twitter account. *Id.*

¹⁴⁴ *Id.* at 558.

¹⁴⁵ *See Id.* To deny that a non-exclusive license of use was created in the collaboration between *Effects* and Cohan, would be to deny the value of *Effects* work product and reduce it far below the value Cohan had promised for it. *Id.* Similarly, without DeGeneres' initiative, there likely would not have been a photo in which a valid copyright could vest. *Id.* To denying DeGeneres the right to use the selfie she had commissioned, would reduce the value of Cooper's contributions to the completed work to the extent that his contributions might be totally negligible. *Id.*

¹⁴⁶ *See Campbell v. Acuff-Rose Music*, 510 U.S. 576-577(1994). The fair use of a copyrighted work like copying portions of a recording for purposes of criticism, comment, news reporting, teaching, scholarship, or research is not considered copyright infringement. *Id.* To determine whether a use of a work is fair, the following factors should be considered: (1) the purpose and character of the use, including whether such use is of a commercial nature;(2) the nature of the work copied;(3) whether the amount copied is substantial in relation to the copyrighted work as a whole; and(4) the effect of the use upon the potential market for or value of the work. *Id.*

¹⁴⁷ *Id.* at 594. The Supreme Court found that 2 Live Crews appropriation of elements of Roy Orbison's original "Oh, Pretty Women" was fair and did not involve an excessive copying that supplanted the original and was sufficiently transformative overall. *Id.* The Court also found that the Appellate Court had erred when they emphasized the commercial appeal of the derivative work in finding that a fair use defense was not applicable under the circumstances. *Id.*

¹⁴⁸ *Id.* at 572 ("Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group.").

¹⁴⁹ *Id.* ("In 1964, Roy Orbison and William Dees wrote a rock ballad called "Oh, Pretty Woman" and assigned their rights in it to respondent Acuff-Rose Music, Inc.").

¹⁵⁰ *Id.* "In 1989, Campbell wrote a song entitled 'Pretty Woman,' which he later described in an affidavit as intended, 'through comical lyrics, to satirize the original work. . .'" *Id.*

¹⁵¹ *Id.*

¹⁵² *Campbell v. Acuff-Rose Music*, 510 U.S. at 572. 2 Live Crew's manager provided Acuff-Rose with notice that the rappers had written a parody of "Oh, Pretty Woman" and that they were willing to afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison. *Id.* Additionally, 2 Live Crew was willing to pay a fee for the use the portions of the song they wished to appropriate. *Id.*

song, the hip-hop group proceeded to publish and distribute the parody,¹⁵³ and the rights holders filed suit for copyright infringement.¹⁵⁴

After weighing the applicable fair use factors the District Court found that the use was permissible.¹⁵⁵ The Court of Appeals reversed this decision, ruling that the District Court did not give significant weight to the commercial appeal of the parody.¹⁵⁶ The Supreme Court reversed the Court of Appeals, reasoning that the Appeals Court had placed too much emphasis on the parody's commercial appeal.¹⁵⁷

The Supreme Court reasoned that although seemingly confounding circumstances applied: the parody was created for commercial purposes,¹⁵⁸ copied portions of the expression fell within the core of potential copyright protections,¹⁵⁹ and the use took the heart of the original work it copied;¹⁶⁰ the definitive use was still fair. This determination was owed primarily to the fact that there was no discernable impact on the potential market for the original.¹⁶¹

While DeGeneres's copying and display of the Oscar Selfie on her Twitter page was not a parody, the reasoning of the court in *Campbell* is still applicable and may

¹⁵³ *Id.* at 572-573. After Acuff-Rose refused permission to publish the song using the chorus form "Oh, Pretty Woman", 2 Live Crew proceed to released their version on their 1989 album *As Clean As They Wanna Be*, crediting Obinson and Dees as authors and Acuff-Rose as the publisher on the track "Oh, Pretty Woman". *Id.*

¹⁵⁴ *Id.* at 573 "Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skywalker Records, for copyright infringement." *Id.*

¹⁵⁵ *Id.* The District Court granted summary judgment for 2 Live Crew, reasoning that the commercial nature of 2 Live Crew's song did not preclude a finding of fair use, and the parody would be unlikely to supplant the market for the original. *Id.* The Court also found that 2 Live Crew's version was a parody relying on a substitution of predictable lyrics with shocking ones, demonstrating the banality of the original. *Id.* It additionally found that the rappers had taken no more than was necessary to parody it. *Id.*

¹⁵⁶ *Id.* at 573-574(reasoning that even though the Court of Appeals found that 2 Live Crew's song was a parody, the District Court had put too little emphasis on the commercial potential of the derivative work, ruling that where an unauthorized derivative work had a commercial use, the derivative work was presumptively unfair).

¹⁵⁷ *Campbell v. Acuff-Rose Music*, 510 U.S. at 583 ("In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred."); *Id.* at 577 (1994) ("The fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'").

¹⁵⁸ *Id.* at 583.

¹⁵⁹ *Id.* at 586. The second statutory factor, the nature of the copyrighted work, calls for recognition that some works are closer to the core of what was intended to be protected by copyright law than other works. *Id.* In *Campbell*, "Oh, Pretty Women" met that criteria. *Id.* A viable fair use argument still prevailed. *Id.*

¹⁶⁰ *Id.* at 586-587. The third factor, the amount and substantiality of the portion copied, requires the court to determine whether the new work copies the heart of the original. *Id.* The Court found that the heart of "Oh, Pretty Women" was taken and appropriated by 2 Live Crew. *Id.* This did not ultimately prevent the Court from finding in favor a fair use defense. *Id.*

¹⁶¹ *Id.* at 590- 595. The fourth fair use factor is the effect that the alleged fair use has on the potential market of the original work. *Id.* The Court should not consider only the extent the copied work damages demand for the original, but whether the derivative work would have a substantial adverse effect on the market of the original as a whole. *Id.* Mere copying will not meet the standard for fair use, but if the derivative work is transformative, harm to the market of the original will not be inferred. *Id.* The Court ultimately found that the original and the 2 Live Crew parody did not occupy the same market and that a finding of fair use was proper. *Id.*

create a stronger basis on which to mount a fair use defense when applied in this hypothetical.

If it were not for the fact that the Oscar Selfie was created in order to be made available for distribution, it never would have acquired its present value or notoriety.¹⁶² Almost all of the Selfie's present value was derived from this particular use and such a use was made possible by the nature of the work itself.¹⁶³ Essentially, DeGeneres's use did not supplant the market for the image, but rather, it created it.¹⁶⁴

Even if a court is reluctant to find a co-authorship or an implied license to reproduce the Oscar Selfie, a fair use defense may still produce the amicable results of the earlier postulated theories.¹⁶⁵ The fair use defense would also recognize the essential purpose and character of the Oscar Selfie as a work meant to be uploaded and distributed via social media by the celebrity who commissioned it.¹⁶⁶ It would in turn recognize that this star power and attendant appeal is what gives the work its attributable value and exploitability.¹⁶⁷ Such a revelation should vindicate the rights of the collaborators to the work equally, as would a finding of co-authorship or an implied license.¹⁶⁸

As a standalone photo, the Oscar Selfie would likely represent to Cooper a proud moment shared with friends for which he would have a protectable claim permitting him to distribute or profit from as he saw fit.¹⁶⁹ But permitting a fair use defense to succeed would allow DeGeneres to use the work as it was intended to be used¹⁷⁰ and vindicate the transformative nature of the work itself.¹⁷¹ This outcome would be

¹⁶² Fleischeman, *supra* note 8 (“[DeGeneres] tweeted during the show. By 5 a.m. ET on Monday, it had been retweeted 2.4 million times (it’s currently well above 3 million).”); *see also* Richford, *supra* note 9 (Oscar Selfie is valued at between \$800 million and \$1 billion dollars).

¹⁶³ Fleischeman, *supra* note 8.

¹⁶⁴ *Id.*; *see also* Campbell v. Acuff-Rose Music, 510 U.S. 590(1994) (“whether unrestricted and widespread conduct of the sort engaged in by the defendant. . . would result in a substantially adverse impact on the potential market’ for the original.”).

¹⁶⁵ 17 U.S.C. § 107 (the fair use of a copyrighted work does not constitute copyright infringement).

¹⁶⁶ Brown, *supra* note 4; *see also* Fleischeman, *supra* note 8.

¹⁶⁷ Rugnetta, *supra* note 63, at 3.00-3.58; *see also*, Franco, *supra* note 67; *see also*, Richford, *supra* note 9.

¹⁶⁸ 17 U.S.C. § 107 (the fair use of a copyrighted work does not constitute copyright infringement); Brod v. Gen. Publ’g Group, Inc., 32 Fed. Appx. 231, 235(9th Cir. 2002)(co-authors forfeit the right to bring suit against the each other for infringement; retain other rights); Effects Assocs. v. Cohen, 908 F.2d 555, 558-559 (9th Cir. 1990)(where a work is created for an exclusive purpose and upon request of another party, there is an impliedly non-exclusive license granted to the commissioning party to use the work for that purpose without acquiring liability for infringement).

¹⁶⁹ Brod, 32 Fed. Appx. at 235(9th Cir. 2002).

¹⁷⁰ Oscars, *supra* note 97, at 0.33-0.50.

¹⁷¹ Rugnetta, *supra* note 63, at 3.00-3.58; *see also* Nelson, *supra* note 15, at 732-733. Discussing the transformative nature of UGC distributed on social media platforms retweets and other derivative content, the question of whether a work supersedes the market of the original can be misleading. *Id.* Especially, on Twitter where copying and distribution of content by users, from whom the work did not originate, is the means by which the market for a tweet is generated. *Id.* Sharing derivatives of the original writing or photo, even unattributed, increases the reach, cultural impact, and significance of that work in the culture. *Id.* Distribution via this platform, even while unattributed, does not impair the ability of the original work to reach its audience or negatively impact the market for the original. *Id.* The very act of a retweet may create something new, as it is a reflection of the retweeter, while simultaneously enhancing the cultural presence of the original work. *Id.*

reasonable, as there is at least as much evidence applicable under a fair use defense in this hypothetical dispute as there was under *Campbell*.¹⁷²

B. *Cooper v. Samsung*

Samsung was a major sponsor of the 86th Academy Awards.¹⁷³ Part of that promotional effort for the company was DeGeneres's use of a Samsung smartphone to tweet and upload selfies during the ceremony.¹⁷⁴ Therefore, we may foresee that Samsung could seek to have DeGeneres transfer the rights to photos taken during the ceremony with her sponsored Samsung smartphone to the company via written agreement.¹⁷⁵

If DeGeneres had signed such an agreement, would that change the balance of any of the theories discussed thus far towards a finding of infringement? Likely not. DeGeneres would be acting as Samsung's agent,¹⁷⁶ but this would not nullify any of the rights she would share with Cooper to exploit the Oscar Selfie.¹⁷⁷ These rights would simply transfer to Samsung rather than remain with DeGeneres.¹⁷⁸

If the Oscar Selfie was produced as a "work for hire," any claim Cooper had to the photo would be extinguished.¹⁷⁹ This conclusion could be drawn from the nature of DeGeneres's contract with Samsung.¹⁸⁰ A contract which would not allow any protectable claim to accrue to DeGeneres certainly would not have contemplated that any such right should vest with one of her collaborators. Such arrangement would likely reduce Cooper's role to little more than a valued contributor with no defensible claim to the commissioned Selfie.¹⁸¹

DeGeneres's only potential liability under this contract would be if she improperly granted the right of use to another party that was not Samsung, and therefore granted a right to the work she herself did not have.¹⁸² Under the facts of this scenario, that party would be the Associated Press.¹⁸³

¹⁷² See *Campbell v. Acuff-Rose Music*, 510 U.S. 594(1994).

¹⁷³ Crocker, *supra* note 5.

¹⁷⁴ *Id.*

¹⁷⁵ 17 U.S.C. § 101; 17 U.S.C. § 201(b) (2006) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author. . .").

¹⁷⁶ 17 U.S.C § 201(b). Contract law permits an individual to hire another to create a work, with the copyright to the work accruing to the employer as if she were the author. *Id.*

¹⁷⁷ *Id.*; See also, *Brod v. Gen. Publ'g Group, Inc.*, 32 Fed. Appx. 231, 235(9th Cir. 2002).

¹⁷⁸ *Id.*

¹⁷⁹ See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² 17 U.S.C § 201(b); see also *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 830 (8th Cir. 1992).

¹⁸³ Andrew Beaujon, *Ellen DeGeneres Grants AP Rights for Editorial Use of Oscar Selfie*, Poynter (Mar. 3, 2014, 3:02 PM), <http://www.poynter.org/latest-news/mediawire/241886/ellen-degeneres-grants-ap-rights-for-editorial-use-of-oscar-selfie/>.

C. Rights Holder v. Associated Press

If an argument that DeGeneres's use of the Selfie to be permissible under any of the theories postulated above was not found to be compelling, then her granting permission to the Associated Press to publish the Oscar Selfie in its reporting of the 86th Academy Awards would be an infringement of either Cooper's or Samsung's rights.¹⁸⁴ The Associated Press may have a fair use argument that they could successfully deploy to avoid liability, as the use of works for reporting on current events is generally considered acceptable.¹⁸⁵ DeGeneres would likely not be able to rely on the same defense.

Although, if the court in this case were to find DeGeneres's use of the Oscar Selfie permissible, there would be no liability for her in granting the Associated Press the right to reproduce the Oscar Selfie.¹⁸⁶ Given the nature of the circumstances surrounding the creation of the Oscar Selfie¹⁸⁷ and the nature of the work itself,¹⁸⁸ this would be the most reasonable outcome, as it would vindicate the manifest intent of the parties to the Oscar Selfie's creation, and generate the least onerous litigation potential.¹⁸⁹

IV. PROPOSAL

The prospect of a dispute like the hypothetical at the center of this comment may be remote,¹⁹⁰ yet the questions raised by these hypotheticals go towards the heart of the rights of attribution in the digital age.¹⁹¹ Social media is interwoven within nearly every aspect of modern life.¹⁹² The driving force behind social media is the uploading and sharing of intellectual property in the form of brief statements, images, and videos.¹⁹³ The accumulation of page views received by an Internet post drives the

¹⁸⁴ Pinkham, 983 F.2d at 830.

¹⁸⁵ 17 U.S.C. § 107 ("the fair use of a copyrighted work, including such use by reproduction in copies... or by any other means... for purposes such as... news reporting... is not an infringement. . .").

¹⁸⁶ 17 U.S.C § 201.

¹⁸⁷ Oscars, *supra* note 97, at 0.33-0.50.

¹⁸⁸ Rugnetta, *supra* note 63, at 4.24-4.47.

¹⁸⁹ See e.g. Brod v. Gen. Publ'g Group, Inc., 32 Fed. Appx. 231, 235(9th Cir. 2002) (holding there can be no liability for infringement where the defending party is a co-owner of the work in question).

¹⁹⁰ Bump, *supra* note 11.

¹⁹¹ Vaughan, *supra* note 72 ("[C]opyright laws are nowhere near aligned with how people use the web. Content sharing is a huge part of how the internet works. . .").

¹⁹² PewResearch, *Social Networking Fact Sheet*, PewResearch: Internet Project (Jan. 26, 2014), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>. As of January 2014, 74% of adults online are active on social media websites. *Id.* 71% of these adults were on Facebook, 19% of these were on Twitter. *Id.*

¹⁹³ Ellis-Christensen, *supra* note 13.

Content created by users has become tremendously popular, and some of the most frequently visited sites on the Internet are primarily user generated. This is the case with sites like Wikipedia, where anyone can write an article with sufficient expertise. Other users may evaluate the content, suggest changes, or even make changes. Some material on the site carries warnings that an author is now espousing opinion, or that certain statements are not verifiable or have been called into question by other users.

spread of information,¹⁹⁴ and the attention this information accrues is worth a lot to advertisers.¹⁹⁵ It is therefore foreseeable that a suit may be brought between parties when it is unclear who has the right to benefit from the attention that a piece of UGC generates.¹⁹⁶

When determining who should have the right to claim authorship of a photo which was taken in collaboration with another person and posted online, the court should look for evidence which may serve to vindicate the rights of both the collaborating parties in the use and exploitation of the photo.¹⁹⁷ For example, if a man is at a sports bar and has the idea to take a photo of himself watching the game and hands his phone off to a friend to actually take the photo, then a collaboration has occurred.¹⁹⁸ Extending the hypothetical, if the man whose photo was taken, after getting his phone back and approving the picture, uploads it to Facebook, this action would be within his rights as a co-author of the photo.¹⁹⁹ His friend would not be able to enjoin this use of their collaborative work.²⁰⁰

If the bar's owner later sees the photo online and decides he wants to use it in an advertisement for his bar, he may reach out to the man pictured in the photo for permission to do so.²⁰¹ Even though it was the man's friend who actually took the photo, this friend should not be able to prevent the man from granting the bar owner permission to use the photo and he should not be allowed to succeed in a suit for copyright infringement.²⁰² If any money changes hands between the bar owner and the man pictured in the photo, he should be entitled to these profits.²⁰³ However, he may not keep these funds to the exclusion of his co-author who may pursue these profits up to the amount of half the gross take.²⁰⁴ Such a finding by the court would

¹⁹⁴ Vaughan, *supra* note 72; *see also* Goldhaber, *supra* note 59 (stating that attention is the natural economy of cyberspace).

¹⁹⁵ *See* Joyce Cutler, *Zuckerberg: Many Small Businesses Use Facebook, Not Websites*, Bloomberg: BNA (Nov. 7, 2014), <http://www.bna.com/zuckerberg-small-businesses-b17179911407/>; *see also* Richford, *supra* note 9 (Oscar Selfie is valued at between \$800 million and \$1 billion dollars); Fleischman, *supra* note 8 (“[DeGeneres] tweeted during the show. By 5 a.m. ET on Monday, it had been retweeted 2.4 million times (it’s currently well above 3 million).”).

¹⁹⁶ Drenna Armstrong, *Homie Don’t Play That: Prince Files \$22 Million Lawsuit Against Facebook & Blogger Users*, Madame Noire (Jan. 25, 2014), <http://madamenoire.com/344208/homie-dont-play-prince-files-22-million-lawsuit-facebook-blogger-users/>; *see also* Li, *supra* note 74 (being able to profit from one photo can mean the difference between the success and failure for an artist).

¹⁹⁷ *Brod v. Gen. Publ’g Group, Inc.*, 32 Fed. Appx. 231, 234(9th Cir. 2002) (defendant had to show “that he made an independently copyrightable contribution and qualified as an “author” of the joint work.”).

¹⁹⁸ *Id.* at 235 (defendant “inspired and directed the production. Under these circumstances, he exercised sufficient artistic control over the photographs to be considered a co-author as a matter of law.”).

¹⁹⁹ *Id.* (co-authors are free to display or distribute their work as they see fit, cannot be prevented by other authors of the work from doing so).

²⁰⁰ *Id.* (plaintiff was prohibited from preventing defendant co-author from placing photos from their collaborative photo-shoot in a calendar and allowing a publisher to distribute it).

²⁰¹ *Id.*; *see also*, Bump, *supra* note 11 (AP asked DeGeneres for permission to use the Oscar Selfie in its reporting of the success of the photo and the awards ceremony, this Comment argues that it could have requested such permission from either DeGeneres or Cooper, and that a grant by either would be sufficient to allow for the reproduction of the Selfie through their publication).

²⁰² Bump, *supra* note 11.

²⁰³ *Id.*

²⁰⁴ *See* 17 U.S.C. § 101; § 201(a).

not only vindicate the manifest intent of the collaborating parties at the time the photo was created²⁰⁵ but also ensure that work could be fluidly shared and profited by both parties whose collaboration caused the work to come into being.²⁰⁶

When a work is created for a particular purpose and then shared online by one of its collaborators within the scope for which it was created, the court should look for evidence that will vindicate this right of use through an implied license.²⁰⁷ For example, if a woman and her friend go on vacation together and the woman explains that she intends to be tweeting updates about their trip (or her friend is aware that the woman is often online and frequently shares information via social media)²⁰⁸ and then hands over her iPad to her friend and asks her to take a photo of them on the beach, the friend will not be able to enjoin the woman from uploading the photo to Instagram.²⁰⁹ Agreeing to take the photo creates an implied license of use,²¹⁰ and uploading it to social media would be within the scope of the implied use for which the work was created.²¹¹ Similar to the previous example, if one of these women later grants permission to a third party to use and distribute the photo, either collaborator is within her rights to do so.²¹²

If the use of some work that is created as a product of collaboration is used beyond its intended purpose, the court should look for evidence that the use was transformative in some way.²¹³ As the nature of posting most content online

²⁰⁵ *Brod*, 32 Fed. Appx. at 234.

²⁰⁶ *Id.*

²⁰⁷ *Effects Assocs. v. Cohen*, 908 F.2d 555, 559 (9th Cir. 1990) (concluding that Effects impliedly granted a non-exclusive license to Cohen and his to incorporate the footage it created into "The Stuff" and distribute it along with the rest of the film).

²⁰⁸ *Id.* at 558 ("The leading treatise on copyright law states that 'nonexclusive license may be granted orally, or may even be implied from conduct.'").

²⁰⁹ *Id.* at 559 ("Copyright ownership is comprised of a bundle of rights; in granting a nonexclusive license to Cohen, Effects has given up only one stick from that bundle. . .").

²¹⁰ *Id.* at 558 ("Effects created a work at defendant's request and handed it over[.]").

²¹¹ *Id.*; *Twitter*, supra note 51 (Twitter claims that its website respects the intellectual property rights of others and expects its users "to do the same").

²¹² *Id.* at 559 ("Effects created a work at defendant's request and handed it over, intending that defendant copy and distribute it... Effects impliedly granted nonexclusive licenses to Cohen and his production company to incorporate the special effects footage. . .").

²¹³ *Campbell v. Acuff-Rose Music*, 510 U.S. 582-583(1994).

Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, 'it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.

(particularly if the platform is social media) tends to transform the work's character in some way,²¹⁴ evidence for a fair use defense should be easy to find.²¹⁵

UGC tends to be a reflection on, and a personal statement of, the person who uploads it.²¹⁶ In this way, UGC typically transcends the uploaded work's initial purpose as a statement of value or incident of commentary,²¹⁷ particularly if it is accompanied by a comment in the form of text or is manipulated in some way to elicit an additional reaction from its audience.²¹⁸ The use of an image online does not always overlap with or significantly eclipse the use of a work elsewhere.²¹⁹ As such, selfies and other UGC which have been created as a part of a collaborative process should always be protected against claims of infringement made by individual collaborators.

²²⁰

Whenever the authorship of UGC is in dispute and there is some evidence that the content was a product of collaboration,²²¹ was created for a particular purpose,²²² or the product was transformative,²²³ courts should vindicate the rights of the party to justly use the work in controversy.²²⁴ In doing so, the court's reasoning will support and enhance the dynamic cultural exchanges that currently characterize social media²²⁵ and make the internet an efficient and powerful tool for connecting people and businesses across the globe.²²⁶

V. CONCLUSION

Social media and the sharing of content over the Internet dominate the way cultural trends spread, how businesses reach out to their customers, and how friends stay in touch. These are all important reasons for the courts to take a soft touch approach when interpreting the law as it applies to UGC. Just as courts should be

²¹⁴ *Id.* at 579 (“The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely ‘supersede[s] the objects’ of the original creation... (supplanting the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. . .”); Rugnetta, *supra* note 63, at 3.00-3.58 (“What [speech acts] share [are] the performance of the utterance, the things referenced by the utterance, and the intention of the utterance. . . Status updates, not just the text, but the whole set of actions and context comprising them are more like speech acts. . .”).

²¹⁵ *Id.* (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”); *see also* 17 U.S.C. § 107 (fair use of a copyrighted work is not considered an infringement of a right holder's claim).

²¹⁶ Franco, *supra* note 65 (“[I]n a visual culture, the selfie quickly and easily shows, not tells, how you're feeling, where you are, what you're doing.”).

²¹⁷ *Campbell*, 510 U.S. at 579.

²¹⁸ *Id.*; *see also* Rugnetta, *supra* note 63, at 4.24-4.47.

²¹⁹ *Campbell*, 510 U.S. at 591 (“[W]hen, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”).

²²⁰ *Effects Assocs. v. Cohen*, 908 F.2d 555, 558-559 (9th Cir. 1990).

²²¹ *Brod*, 32 Fed. Appx. at 235.

²²² *Effects*, 908 F.2d at 558-559.

²²³ *Campbell v. Acuff-Rose Music*, 510 U.S. 593(1994).

²²⁴ Rugnetta, *supra* note 63, at 3.00-3.58 (a selfie is a kind of speech act and is transformative in nature because of what it communicates to the viewer).

²²⁵ *Id.*

²²⁶ PewResearch, *supra* note 203.

reluctant to pass judgment on the quality of a work, courts should support the interconnectedness that the Internet makes possible, as a single poorly reasoned precedent could seriously curtail free expression.

Courts should be equally cautious in awarding rights to only one party in a collaborative effort, passing judgment on the value of each party's contribution, and making any ruling which may quell the rich exchange which defines digital communication and makes social media platforms a dominant cultural and economic force. Collaboration is an essential part of the way the Internet and our culture work and courts should be amiable towards protecting these partnerships.