

THE COLUMBIA JOURNAL OF
LAW *& the* **ARTS**

A QUARTERLY JOURNAL OF LAW AND THE ARTS,
ENTERTAINMENT, COMMUNICATIONS, AND INTELLECTUAL PROPERTY

Regulating Algorithmic Disinformation
Haochen Sun

Kings, Treasures, and Looting:
The Evolution of Sovereign Immunity and the Foreign Sovereign Immunities Act
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CONTENTS

ARTICLES

Regulating Algorithmic Disinformation
Haochen Sun 367

Kings, Treasures, and Looting: The Evolution of Sovereign Immunity
and the Foreign Sovereign Immunities Act
Leila A. Amineddoleh 419

NOTES

I Did You a Favor By Taking Your Work: Reconsidering
the Harm-Based Approach To the Fourth Fair Use Factor
Casey Sandalow 457

A Chance at the Arts: Assessment of NYC Department of Education’s
ArtsCount as a Violation of Title VI Implementing Regulation
Siena Stanislaus 487

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Regulating Algorithmic Disinformation

Haochen Sun*

ABSTRACT

Disinformation is endemic in the digital age, seriously harming the public interest in democracy, health care, and national security. Increasingly, disinformation is created and disseminated by social media algorithms. Algorithmic disinformation, a new phenomenon, thus looms large in contemporary society. Recommendation algorithms are driving the spread of disinformation on social media networks, and generative algorithms are creating deepfakes, both at unprecedented levels. The regulation of algorithmic disinformation is therefore one of today's thorniest legal problems.

Against this backdrop, this Article proposes a novel approach to regulating algorithmic disinformation effectively. It first explores why transparency, intelligibility, and accountability should be adopted as the three major principles of the legal regulation of algorithmic disinformation. Because of its market-based technology development and regulation policy, the United States has yet to adopt any laws regulating algorithmic disinformation, let alone these three principles. The Article then examines legislative reforms in France and China, where the three principles have been translated into legal rules requiring social media companies to disclose their disinformation-related algorithms, render them intelligible to users, and assume legal responsibility for curbing the spread of disinformation on their platforms.

Based on a critical discussion of the major problems with these legal rules, the Article puts forward a multi-stakeholder approach to better implement the three principles. It argues that the United States should take the lead in creating and piloting an algorithmic disinformation review system. This new system would empower the administrative oversight of algorithmic disinformation and promote the dynamic engagement of social media users and experts in policing algorithms that generate and disseminate disinformation. The ADRS would thus promote the transparency and intelligibility of algorithms and hold social media platforms accountable for curbing disinformation.

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TABLE OF CONTENTS

Introduction.....	369
I. Algorithmic Disinformation.....	373
A. Types of Disinformation	374
1. Recommendation Algorithms.....	374
2. Generative Algorithms	377
a. Visual Deepfakes	378
b. Textual Deepfakes	379
B. Major Challenges to Effective Legal Regulation	381
1. Transparency	381
2. Intelligibility.....	382
3. Accountability.....	383
II. Current Regulatory Approaches	385
A. United States' Market-Based Approach	385
B. France's Moderate Legislative Regulation	389
1. Background and Purpose.....	389
2. Nature and Scope	391
3. Implementation	394
C. China's Stringent Legislative Regulation.....	396
1. Background and Purpose.....	396
2. Nature and Scope	399
III. A Multi-Stakeholder Approach	403
A. Assessing Major Problems with the Three Approaches	403
1. Death of the Market-Based Approach?.....	403
2. Inadequacies of the French and Chinese Approaches	406
B. Creating a Multi-Stakeholder Approach	407
1. The Algorithmic Disinformation Review System (ADRS)	408
a. Formation of the ADRS.....	408
b. The Scope of the Review Process	409
i. Transparency	410
ii. Intelligibility.....	410
iii. Accountability.....	411
c. Oversight by the FCC	412
2. Advantages of the ADRS	414
IV. Conclusion.....	416

INTRODUCTION

Disinformation is a defining problem of the digital age. Its amplification on social media reflects “humanity’s worst impulses.”¹ Disinformation erodes democracy.² Research suggests that the disinformation swirling on Facebook swayed the outcomes of both the Brexit referendum and 2016 U.S. presidential election.³ It also harms public health. The “infodemic”⁴ accompanying the COVID-19 pandemic has radiated throughout the Internet, spreading fake news and conspiracy theories that have caused mental distress, bred mistrust in health authorities, and undermined pandemic relief measures.⁵ Disinformation threatens other public interests as well, ranging from national security⁶ to racial equality.⁷

Disinformation is not new, but it is now created and spread to an unprecedented extent through social media algorithms.⁸ Owing to the amplification power of their algorithms, social media platforms can spread disinformation faster than the truth,⁹ disrupting their users’ sense of reality.¹⁰ A recent study has revealed that it is the algorithms applied by social media platforms that play a larger role in spreading

1. Ella Lee, *Humanity’s Worst Impulses: Obama Says Online Disinformation Puts Democracy at Risk*, USA TODAY (Apr. 22, 2022), <https://www.usatoday.com/story/news/politics/2022/04/22/obama-online-disinformation-democracy-at-risk/7408070001> [<https://perma.cc/X462-B9PX>] [<https://web.archive.org/web/https://www.usatoday.com/story/news/politics/2022/04/22/obama-online-disinformation-democracy-at-risk/7408070001>].

2. See generally YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: DISINFORMATION, MANIPULATION, AND RADICALIZATION IN AMERICAN POLITICS (2018); PHILIP N. HOWARD, LIE MACHINES: HOW TO SAVE DEMOCRACY FROM TROLL ARMIES, DECEITFUL ROBOTS, JUNK NEWS OPERATIONS, AND POLITICAL OPERATIVES (2020); JOSHUA A. TUCKER ET AL., SOCIAL MEDIA, POLITICAL POLARIZATION, AND POLITICAL DISINFORMATION: A REVIEW OF THE SCIENTIFIC LITERATURE (2018).

3. See BENKLER ET AL., *supra* note 2, at 28.

4. See *Infodemic*, WORLD HEALTH ORGANIZATION, https://www.who.int/health-topics/infodemic#tab=tab_1 [<https://perma.cc/7C2A-NQTM>] [<https://web.archive.org/web/20230220233320/https://www.who.int/health-topics/infodemic>].

5. See Michael A. Gisondi et al., *A Deadly Infodemic: Social Media and the Power of COVID-19 Misinformation*, 24 J. MED. INTERNET RES. e35552 (2022).

6. See Steven Lee Myers & Eileen Sullivan, *Disinformation Has Become Another Untouchable Problem in Washington*, N.Y. TIMES (July 6, 2022), <https://www.nytimes.com/2022/07/06/business/disinformation-board-dc.html> [<https://perma.cc/EX8P-5AN5>] [<https://web.archive.org/web/20230220233451/https://www.nytimes.com/2022/07/06/business/disinformation-board-dc.html>] (“The Department of Homeland Security added the threat of false information to its periodic national terrorism advisory bulletins for the first time in February.”); Danielle K. Citron & Robert Chesney, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753 (2019).

7. See generally Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023 (2017); Deborah Hellman, *Measuring Algorithmic Fairness*, 106 VA. L. REV. 811 (2020); Thomas B. Nachbar, *Algorithmic Fairness, Algorithmic Discrimination*, 48 FLA. ST. U. L. REV. 509 (2021).

8. See NOAH GIANIRACUSA, HOW ALGORITHMS CREATE AND PREVENT FAKE NEWS xi (2021) (“There has also been an increasing awareness of the role played by data-driven algorithms in the creation, dissemination, and detection/moderation of fake news.”).

9. See Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146 (Mar. 9, 2018).

10. See Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2628 (2019).

disinformation.¹¹ Against this backdrop, a judge has gone so far as to criticize disinformation-laden social media platforms such as Facebook as “a tool for evil.”¹² The United Nations High Commissioner for Human Rights has denounced disinformation as “a symptom of global diseases,” lamenting that legal regulation is still “insufficient.”¹³

The regulation of disinformation, particularly that spread by algorithms, is one of today’s thorniest legal problems.¹⁴ Social media companies develop and utilize their algorithms as black boxes, rarely disclosing any information about their internal functioning and external ill effects.¹⁵ Thus, regulators and the public alike lack access to the informatics of how social media platforms use algorithms.¹⁶ The “trade secret” status of algorithms has made it exceedingly difficult to legally regulate the disinformation they create and/or disseminate.

Against this backdrop, this Article puts forward the concept of “algorithmic disinformation” to enhance comprehension of the severe harms brought about by algorithmically amplified disinformation on social media networks. Differing from the conventional wisdom,¹⁷ this concept breaks disinformation into two categories: disinformation created and/or disseminated through algorithms and that created/disseminated without the use of algorithms. The Article demonstrates how recommendation algorithms have been utilized to spread disinformation via social

11. Pamela Madrid, *USC Study Reveals the Key Reason Why Fake News Spreads on Social Media* (Jan. 17, 2023), <https://news.usc.edu/204782/usc-study-reveals-the-key-reason-why-fake-news-spreads-on-social-media> [<https://perma.cc/NSN8-LJED>] [<https://web.archive.org/web/20230512032943/https://news.usc.edu/204782/usc-study-reveals-the-key-reason-why-fake-news-spreads-on-social-media>].

12. *Facebook is a “Tool for Evil”, Says Judge as Mother Trolled Over Fake Claims She Tried To Kill a Baby Is Found Dead*, THE TELEGRAPH (Feb. 7, 2017), <https://www.telegraph.co.uk/news/2017/02/07/facebook-tool-evil-says-judge-mother-trolled-fake-claims-tried> [<https://perma.cc/U87T-66CA>] [<https://web.archive.org/web/20230224173625/https://www.telegraph.co.uk/news/2017/02/07/facebook-tool-evil-says-judge-mother-trolled-fake-claims-tried>].

13. *Rise of Disinformation A Symptom of ‘Global Diseases’ Undermining Public Trust: Bachelet*, UN NEWS (Jun. 28, 2022), <https://news.un.org/en/story/2022/06/1121572> [<https://perma.cc/X393-68D7>] [<http://web.archive.org/web/20230224173928/https://news.un.org/en/story/2022/06/1121572>].

14. See Mark Verstraete et al., *Identifying and Countering Fake News*, 73 HASTINGS L.J. 821, 858 (2022) (“Fake news presents a complex regulatory challenge in the increasingly democratized and intermediated on-line information ecosystem.”); Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating “Fake News” and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1225 (2018) (“Untraceable online political advertising undermines key democratic values, and the problem is exacerbated by disinformation.”).

15. See FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 191 (2015) (arguing that the black box society is unjust because “[d]ata is becoming staggering in its breadth and depth, yet often the information most important to us is out of our reach, available only to insiders”).

16. See *infra* Part I.A.2.

17. Conventional wisdom divides the term “fake news” into three categories and then compares their differences: misinformation (false or misleading information disseminated without harmful intent); disinformation (false information disseminated with harmful intent); and mal-information (genuine information disseminated to cause harm). See, e.g., Claire Wardle & Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, COUNCIL EUR. (Sept. 27, 2017), <https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c> [<https://perma.cc/2F8C-JFVX>] [<http://web.archive.org/web/20230120110652/https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c>].

media networks,¹⁸ and artificial intelligence (“AI”)-powered generative algorithms used to create deepfake videos and convincingly journalistic fake news articles.¹⁹

The Article then suggests three legal principles for achieving the effective legal regulation of algorithmic disinformation: transparency, intelligibility, and accountability. It argues that to be effective such legal regulation must require social media companies to make their disinformation-related algorithms public, render them appropriately intelligible to users, and assume legal responsibility for curbing disinformation on their platforms.²⁰ Because of its market-based technology development and regulation policy, the United States has yet to adopt any laws regulating algorithmic disinformation, let alone these three legal principles.²¹ In contrast, France and China recently passed laws aimed at regulating algorithmic information.²² The Article evaluates the extent to which these laws have translated the principles of transparency, intelligibility, and accountability into legal rules and discusses the major problems with the principles’ implementation.²³

Based upon this discussion, the Article then proposes a new approach to regulating algorithmic disinformation. It recommends the launch of a multi-stakeholder governance mechanism that engages a suitable administrative agency with social media users and experts to examine the algorithmic treatment and policing of disinformation on social media platforms. In addition to Meta’s Oversight Board, which deals primarily with content moderation,²⁴ the new mechanism would become another legal innovation in the regulation of algorithmic disinformation.

To carry out the proposed multi-stakeholder approach, the article proposes that the U.S. should take the lead in establishing an algorithmic disinformation review system (“ADRS”) as a pilot program. Under the ADRS, the Federal Communications Commission (“FCC”) would take charge of creating review panels comprising social media users and experts who volunteer to serve. Every two years, each panel would meet with two social media companies selected by the FCC and review their efforts to render their disinformation-related algorithms transparent and intelligible, as well as the effectiveness of their measures to reduce disinformation spread through their

18. See *infra* Part I.A.1.

19. See *infra* Part I.A.2.

20. See *infra* Part I.B; MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 108–09 (2021) (discussing social media platforms’ responsibilities); HAOSHEN SUN, TECHNOLOGY AND THE PUBLIC INTEREST 121–55 (2022) (proposing three major responsibilities that should be imposed on technology companies).

21. See *infra* Part II.A.

22. See *infra* Part II.B–C.

23. See *infra* Part III.A.1.

24. See Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution To Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2425 (2020) (“Following his spring 2018 statement about a ‘Supreme Court’-like structure, and in response to longstanding and increasingly vocal criticism demanding user accountability, Zuckerberg announced in November 2018 that Facebook would create an ‘Independent Governance and Oversight’ committee by the close of 2019 to advise on content policy and listen to user appeals on content decisions.”); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603 (2018) (arguing that “platforms should be thought of as operating as the New Governors of online speech”).

algorithms. Once the panels had issued their review reports and had them approved by the FCC, the social media company concerned would be required to take prompt action in accordance with the recommendations therein. Should the company fail to comply, the FCC would impose penalties.²⁵

This Article makes three contributions to the scholarship on the legal regulation of disinformation in the digital age. First, it presents new legal principles as theoretical bases for developing legal rules regulating algorithmic disinformation. Having detected the growing danger of information pollution facilitated by algorithms, some scholars have called for the introduction of legal reforms to regulate algorithmic disinformation.²⁶ However, they have not suggested concrete regulatory principles for governing the legal treatment of such disinformation. This Article fills that void by articulating transparency, intelligibility, and accountability as the three major principles of a new legal mechanism for combating algorithmic disinformation.

Second, the Article constitutes the first attempt to conduct a comprehensive, systematic review of the legal regulatory approaches that various countries have adopted to tackle algorithmic disinformation. Scholars have highlighted the lack of any laws regulating online disinformation in the U.S.²⁷ and examined the anti-disinformation laws adopted in other jurisdictions such as Germany²⁸ and Singapore.²⁹ However, these laws do not entail legal rules that directly target algorithmic treatment and the policing of disinformation. The aforementioned laws recently passed in France and China steer legislative efforts toward the direct legal regulation of the algorithmic amplification of disinformation. The Article discusses the legislative purposes and major rules of these new laws and reveals their inadequacies in rendering disinformation-related algorithms sufficiently transparent and intelligible.

Third, the Article puts forward a new legal governance model aimed at effectively curbing algorithmic disinformation. Drawing upon fiduciary doctrine,³⁰ a number of

25. See *infra* Part III.B.

26. See, e.g., PHILIP M. NAPOLI, SOCIAL MEDIA AND THE PUBLIC INTEREST: MEDIA REGULATION IN THE DISINFORMATION AGE 188–93 (2019) (calling for legal and regulatory reforms aimed at curbing disinformation in the public interest).

27. See Michael P. Goodyear, *Is There No Way To the Truth? Copyright Liability as a Model for Restricting Fake News*, 34 HARV. J.L. & TECH. 279, 282 (2020) (“Fake news is undoubtedly a problem in the United States, yet there are few legal constraints to stop it.”).

28. See Ryan Kraski, *Combating Fake News in Social Media: U.S. and German Legal Approaches*, 91 ST. JOHN’S L. REV. 923, 923–24 (2017); Brittany Finnegan, *The Cost of Free Speech: Combating Fake News or Upholding the First Amendment?*, 75 U. MIAMI L. REV. 572, 579–605 (2021).

29. See Rebecca K. Helm & Hitoshi Nasu, *Regulatory Responses To ‘Fake News’ and Freedom of Expression: Normative and Empirical Evaluation*, 21 HUM. RTS. L. REV. 302, 316–17 (2021) (“Singapore has adopted a more interventionist approach with information correction. Under the Protection from Online Falsehoods and Manipulation Act 2019, Singaporean authorities can issue a correction direction to require a person who has made a false statement, or the internet intermediary service provider, to make a correction notice in the specified form and manner.”).

30. See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1209 (2016) (“An information fiduciary is a person or business who, because of their relationship with another, has taken on special duties with respect to the information they obtain in the course of the relationship.”).

eminent scholars have suggested that social media companies can be trusted to police disinformation in good faith because they can be deemed trustees of the large swathes of user data they collect.³¹ In this Article, I contend that it is the algorithms they use that are a main contributory force to the worsening disinformation chaos. Hence, my multi-stakeholder approach advocates for regulators to target the internal black-box informatics of such algorithms by exposing them to the light of day (the transparency principle) and to minimize their external ill effects by enabling users to understand them from the inside out (the intelligibility principle). My approach suggests the establishment of the ADRS to oversee algorithmic disinformation and to empower users' dynamic engagement in policing algorithms that generate and disseminate disinformation.³²

The remainder of the Article proceeds as follows. Putting forward the new concept of algorithmic disinformation, Part I suggests transparency, intelligibility, and accountability as three principles for the legal regulation of such disinformation and discusses the challenges to bringing them to fruition. Part II then examines the regulatory approaches that the United States, France, and China have adopted to cope with algorithmic disinformation, with a focus on the laws recently passed in the latter two countries. Based on a critical evaluation of these approaches, Part III proposes a multi-stakeholder approach as an alternative means of achieving the effective legal regulation of such disinformation. It also presents a pathway toward establishing the ADRS in the United States and elsewhere.

I. ALGORITHMIC DISINFORMATION

In the age of social media and AI, companies are utilizing algorithms in their products, services, processes, and decision-making to an increasing extent. For example, platforms such as Facebook, YouTube, and Twitter use recommendation algorithms to target users with specialized content, while credit rating agencies use credit score algorithms to predict consumers' likelihood of a loan default.³³

Algorithms also have tremendous power to create and disseminate disinformation. In this part, I define and discuss the new phenomenon of "algorithmic disinformation,"

31. See Philip M. Napoli & Fabienne Graf, *Social Media Platforms as Public Trustees: An Approach To the Disinformation Problem*, in *ARTIFICIAL INTELLIGENCE AND THE MEDIA* 108 (Taina Pihlajarinne & Anette Alén-Savikko eds., 2022) ("In the approach outlined here, we propose treating the massive aggregations of user data that serve as the economic foundation of these platforms as a *public resource*. Within the context of the public trust framework, this means treating aggregate user data as the *trust property* which effectively triggers the classification of the digital platforms as public trustees."); Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1162 (2018).

32. See Niva Elkin-Koren et al., *Social Media as Contractual Networks: A Bottom Up Check on Content Moderation*, 107 IOWA L. REV. 987, 994 (2022) (arguing that it is very important to "enable users to restrain platforms' discretion and safeguard their private interests").

33. See PASQUALE, *supra* note 15, at 4–6; SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 63–97 (2019); see generally DAVID SUMPTER, *OUTNUMBERED: FROM FACEBOOK AND GOOGLE TO FAKE NEWS AND FILTER-BUBBLES—THE ALGORITHMS THAT CONTROL OUR LIVES* (2018).

focusing in particular on the role played by recommendation algorithms and generative algorithms. I further consider how principles can be formed to govern the legal regulation of algorithmic disinformation.

A. TYPES OF DISINFORMATION

1. Recommendation Algorithms

Social media companies use recommendation algorithms to sort through vast amounts of content and present it to platform users in a manageable, appealing way that optimizes attention.³⁴ This automated service promotes news or other content based on users' membership of a particular demographic, their prior history of engagement on the platform, and/or the conduct of their family members or circle of friends.³⁵

Recommendation algorithms can be divided into three major categories according to the filtering method employed. First, they can use collaborative filtering, which identifies the preferences of a large group of users and recommends content based upon the "underlying intuition . . . that if users A and B have similar taste in a product, then A and B are likely to have similar taste in other products as well."³⁶ Second, recommendation algorithms can employ content-based filtering, which focuses more specifically on the preferences and history of the individual user being targeted, recommending content similar to that in which the user has previously demonstrated interest.³⁷ Third, recommendation algorithms can employ hybrid systems. These use elements of both collaborative and content-based filtering, either by providing inputs to multiple algorithms in parallel and combining the results or by providing inputs to a single algorithm before passing on the output to further systems in sequence.³⁸

Recommendation algorithms can easily spread and amplify fake news. One way in which they do so is by prioritizing the promotion of content that is aligned with a social media company's platform policy over content that users might be most interested in. For instance, in one of its earlier forms, Facebook's algorithm was designed to recommend content that received a large number of likes and clicks. Once it was discovered that this design had led to a rise in "clickbait," the algorithm target was changed to content that users were spending the most time consuming.³⁹ Then, after

34. TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 1–21 (2018).

35. Botambu Collins et al., *Trends in Combatting Fake News on Social Media—A Survey*, 5 J. INFO. & TELECOMM. 247, 250 (2021).

36. Vatsal, *Recommender Systems Explained*, TOWARDS DATA SCI. (July 12, 2021), <https://towardsdatascience.com/recommendation-systems-explained-a42fc60591ed> [https://perma.cc/V4J4-45KT] [<https://web.archive.org/web/20230303221117/https://towardsdatascience.com/recommendation-systems-explained-a42fc60591ed?gi=755e28c89511>].

37. *Id.*

38. *Id.*

39. Will Oremus et al., *How Facebook Shapes Your Feed*, WASH. POST (Oct. 26, 2021), <https://www.washingtonpost.com/technology/interactive/2021/how-facebook-algorithm-works> [https://perma.cc/

realizing that users were consuming content passively and increasingly taking their more active forms of communication to other platforms, Facebook again redesigned its algorithm to target “meaningful social interactions” by amplifying posts that attracted a large number of comments and replies. In reality, such posts were often those that had offended or angered users.⁴⁰ Facebook has reportedly conducted multiple studies indicating that the types of content most likely to promote engagement in the form of comments and replies can be considered harmful, such as politically divisive speech and misinformation.⁴¹ Nevertheless, Facebook has continued to use this algorithm, even pushing pages with “engaging” content onto the feeds of users who do not follow those pages.⁴² This dynamic has been exploited by troll farms that create fake news stories specifically designed to generate engagement so that the algorithm amplifies the content, in turn generating more clicks and thus ad revenue.⁴³

Powered by technologies such as deep learning, recommendation algorithms have grown increasingly complex, with potentially negative consequences. Following a recent major policy change, YouTube shifted focus away from video clicks toward watch time.⁴⁴ Taken at face value, the new policy appears to benefit users by recommending videos that others are watching at length. Then, in 2015, YouTube developed a new algorithm incorporating deep learning technology to narrow down the vast pool of potential recommendations to a few hundred based on a user’s “watched video history, keyword search history . . . the geographic region the user is logged in from, the type of device they are using, and the user’s age and gender if they have provided that information,” ranked according to both user-specific predictors and “a few hundred video-specific predictors, including details on the user’s previous interactions with the channel the video is from.”⁴⁵ The algorithm demotes a video each time it is recommended to a user but not clicked on.⁴⁶ The technology developed further in 2018 when YouTube introduced a deep reinforcement learning model designed to predict how long a user might spend watching the next recommended video, with the aim of hooking viewers into watching a succession of videos.⁴⁷ The algorithm operates through a reward function based on “something like the total amount of watch time each user spends in a sequence of up next recommendations

67D2-NG2P] [<https://web.archive.org/web/20230303221141/https://www.washingtonpost.com/technology/interactive/2021/how-facebook-algorithm-works/>].

40. *Id.*

41. Karen Hao, *Troll Farms Reached 140 Million Americans a Month on Facebook Before 2020 Election, Internal Report Shows*, MIT TECH. REV. (Sept. 16, 2021), <https://www.technologyreview.com/2021/09/16/1035851/facebook-troll-farms-report-us-2020-election> [<https://perma.cc/J2QX-763T>] [<https://web.archive.org/web/20230303192427/https://www.technologyreview.com/2021/09/16/1035851/facebook-troll-farms-report-us-2020-election>].

42. *Id.*

43. *Id.*

44. See NOAH GIANSIRACUSA, *HOW ALGORITHMS CREATE AND PREVENT FAKE NEWS* 71 (2021).

45. *Id.* at 73.

46. *Id.*

47. *Id.* at 75.

before leaving the site.”⁴⁸ This function encourages recommendations that might not initially generate much watch time but expose the user to a whole new topic or category of content, potentially leading them to remain active for longer than if they had consumed only familiar content.⁴⁹

These advanced algorithmic designs have made fake news an endemic problem on YouTube. For instance, after a rise in the popularity of far-right politicians in Brazil, a 2019 Harvard study conducted for *The New York Times* found that following the chain of top recommendations from a video on a popular channel often led to videos on right-wing, conspiracy-filled channels on YouTube, including that of former President Jair Bolsonaro.⁵⁰ In a similar manner to Facebook, this effect is credited to the YouTube algorithm’s emphasis on watch time, as people are drawn “in to content . . . [through] fear, doubt, and anger . . . the same emotions that right-wing extremists and conspiracy theorists have relied on for years.”⁵¹ In 2016, an engineer who had previously worked on YouTube’s recommendation algorithm team designed a computer program to track where the platform would take a user from “seed” videos discovered after making what the engineer considered to be common or important searches relating to the U.S. presidential election.⁵² His findings suggested that “divisive, sensational, and conspiratorial” content was systematically amplified by the platform, with, for example, the search “Who is Michelle Obama?” leading mostly to videos falsely claiming that she is a man.⁵³

Falsehoods diffuse “significantly farther, faster, deeper, and more broadly than the truth in all categories of information” on social media.⁵⁴ According to a study looking at diffusion through retweets and the independent tweeting of true, false, and mixed rumors, the veracity of which were agreed upon by six independent fact-checking organizations,⁵⁵ the truth took about six times as long to reach 1500 people as falsehoods.⁵⁶ The study did not look specifically at the role of recommendation algorithms in structuring the presentation of content. Instead, it explained the difference in speed as a consequence of human behavioral tendencies, as false news evokes emotion and is more novel, and novel information is more likely to be retweeted.⁵⁷ Nevertheless, commentators have noted the importance of engagement to

48. *Id.*

49. *Id.*

50. *Id.* at 77; see, e.g., Max Fisher & Amanda Taub, *How YouTube Radicalized Brazil*, N.Y. TIMES (Apr. 11, 2019), <https://www.nytimes.com/2019/08/11/world/americas/youtube-brazil.html> [<https://perma.cc/SU7V-RURX>] [<https://web.archive.org/web/20230303221357/https://www.nytimes.com/2019/08/11/world/americas/youtube-brazil.html>].

51. See GIANIRACUSA, *supra* note 44, at 79.

52. *Id.* at 86.

53. *Id.*

54. Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146, 1147 (2018).

55. *Id.* at 1146 (“Here we investigate the differential diffusion of true, false, and mixed (partially true, partially false) news stories using a comprehensive data set of all of the fact-checked rumor cascades that spread on Twitter from its inception in 2006 to 2017. The data include ~126,000 rumor cascades spread by ~3 million people more than 4.5 million times.”).

56. *Id.* at 1148.

57. *Id.* at 1149.

recommendation algorithms, suggesting that the aforementioned study demonstrates the dangers of such an approach.⁵⁸ If false information is more likely to generate emotional reactions and retweets, then it is possible that Twitter's algorithm has played a role in recommending tweets containing false rumors or will do so in the future.

Recommendation algorithms can also amplify disinformation to influence user beliefs by creating echo chambers and filter bubbles. Echo chambers refer to homogenous information environments resulting from users' own choices to follow like-minded individuals on social media, whereas filter bubbles are similar information environments created surreptitiously by a platform's automated efforts to understand individual user preferences and reflect them in its recommendations.⁵⁹ Recommendation algorithms can distort the character and form of our social capital, that is, our connections to others and, most relevantly here, "the level of trust (and trustworthiness) and the informal rules and common understandings that facilitate communication."⁶⁰ Filter bubbles trick us "into thinking our social and political 'bubbles' are representative."⁶¹ Furthermore, filter bubbles can enable confirmation bias, as "human beings are wired to trust familiar sources that confirm their existing world view."⁶² Social media platforms that amplify disinformation can be particularly problematic, as studies have shown that people are more inclined to accept information when they engage with it in the passive environment created by social media.⁶³

2. Generative Algorithms

As the preceding section demonstrates, recommendation algorithms spread and amplify algorithmic disinformation. Algorithms can also generate disinformation in the form of deepfake news. I refer to algorithms of this type in general as generative algorithms.

58. Robinson Meyer, *The Grim Conclusions of the Largest-Ever Study of Fake News*, ATLANTIC (Mar. 8, 2018), <https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104> [<https://perma.cc/VAR2-WV27>] [<https://web.archive.org/web/20230303221531/https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104>] ("Tromble, the political-science professor, said that the findings would likely apply to Facebook, too. 'Earlier this year, Facebook announced that it would restructure its News Feed to favor 'meaningful interaction,' she told me. 'It became clear that they would gauge 'meaningful interaction' based on the number of comments and replies to comments a post receives. But, as this study shows, that only further incentivizes creating posts full of disinformation and other content likely to garner strong emotional reactions,' she added.")

59. Samuel C. Rhodes, *Filter Bubbles, Echo Chambers, and Fake News: How Social Media Conditions Individuals To Be Less Critical of Political Misinformation*, 39 POL. COMMUN 1, 4–5 (2022).

60. See ELISABETH COSTA & DAVID HALPERN, THE BEHAVIOURAL SCIENCE OF ONLINE HARM AND MANIPULATION AND WHAT TO DO ABOUT IT 24 (2019), https://www.bi.team/wp-content/uploads/2019/04/BIT_The-behavioural-science-of-online-harm-and-manipulation-and-what-to-do-about-it_Single.pdf [<https://perma.cc/N4HT-QUBY>] [https://web.archive.org/web/20230216160800/https://www.bi.team/wp-content/uploads/2019/04/BIT_The-behavioural-science-of-online-harm-and-manipulation-and-what-to-do-about-it_Single.pdf].

61. *Id.*

62. See Rhodes, *supra* note 59, at 6.

63. *Id.*

a. *Visual Deepfakes*

Deepfakes are a type of media in which a person's likeness in an existing image or video is replaced with that of someone else using technologies such as deep learning algorithms.⁶⁴ Toward the end of 2017, for example, an anonymous Reddit user posted a deepfake video on the platform⁶⁵ that he or she had created using deep learning algorithms to replace the face of an actress in a pornographic video with the face of the actress Gal Gadot. The video went viral, encouraging the user to create similar videos through algorithmic face-swapping.⁶⁶

There are two main steps involved in producing deepfakes. First, deep learning algorithms are used to digitally draw artificial faces. The algorithm is fed numerous photographs of people with a box manually drawn around each face, and the algorithm eventually learns how to draw the boxes on its own. Second, a face-mapping algorithm is applied. Called an autoencoder, this algorithm can learn whatever it needs to describe a face with the aid of data. It might, for example, note the locations of different facial features, quantify their shape, and represent different hairstyles and colors numerically.⁶⁷

Visual deepfakes are intended to spread disinformation.⁶⁸ In early November 2020, amid the contentions of voter fraud in the U.S. presidential election, a video was edited to make it appear that Joe Biden was admitting to voter fraud when in fact he was discussing his campaign's efforts to prevent it. The video was viewed more than 17 million times on social media platforms.⁶⁹ Another video aired by a British television station in December 2020 featured a deepfake Queen Elizabeth delivering her Christmas message while dancing.⁷⁰ Other examples include deepfake videos depicting

64. Riana Pfefferkorn, *The Threat Posed By Deepfakes To Marginalized Communities*, BROOKINGS (Apr. 21, 2021), <https://www.brookings.edu/techstream/the-threat-posed-by-deepfakes-to-marginalized-communities> [<https://perma.cc/B8MT-KFVF>] [<https://web.archive.org/web/20230303222039/https://www.brookings.edu/techstream/the-threat-posed-by-deepfakes-to-marginalized-communities>].

65. GIAN SIRACUSA, *supra* note 44, at 46 ("This event marked the ominous beginning of a dark saga in the history of artificial intelligence that continues to unfold today.").

66. *Id.* at 46.

67. GIAN SIRACUSA, *supra* note 44, at 47.

68. Nina I. Brown, *Deepfakes and the Weaponization of Disinformation*, 23 VA. J.L. & TECH. 1, 9–13 (2020) (describing how deepfakes create "war on reality" by confirming preconceived notions and causing individuals to question authenticity of any audiovisual record); Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1762–63 (2019); *Deepfake Queen to Deliver Channel 4 Christmas Message*, BBC (Dec. 23, 2020), <https://www.bbc.com/news/technology-55424730> [<https://perma.cc/BQ37-K6XS>] [<https://web.archive.org/web/20230224234227/https://www.bbc.com/news/technology-55424730>].

69. Sheera Frenkel, *Deceptively Edited Video of Biden Proliferates on Social Media*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/2020/11/02/technology/biden-video-edited.html> [<https://perma.cc/97NR-AJDS>] [<https://web.archive.org/web/20230224234526/https://www.nytimes.com/2020/11/02/technology/biden-video-edited.html>].

70. Zamira Rahim, *'Deepfake' Queen Delivers Alternative Christmas Speech, In Warning About Misinformation*, CNN (Dec. 25, 2020), <https://www.cnn.com/2020/12/25/uk/deepfake-queen-speech-christmas-intl-gbr/index.html> [<https://perma.cc/6NTN-MZ9T>] [<https://web.archive.org/web/https://edition.cnn.com/2020/12/25/uk/deepfake-queen-speech-christmas-intl-gbr/index.html>].

“an Israeli soldier committing an atrocity against a Palestinian child, a European Commission official offering to end agricultural subsidies on the eve of an important trade negotiation, and a Rohingya leader advocating violence against the security forces in Myanmar.”⁷¹

The number of visual deepfakes has been growing exponentially on social media, with the number doubling roughly every six months.⁷² As of June 2020, approximately 50,000 deepfake videos had been identified.⁷³ A range of applications equipped with sophisticated algorithms, including DFaker, faceswap, faceswap-GAN, FakeApp, and DeepFaceLab, have been made available to the public, enabling the quick and easy production of deepfake video and audio.

Deepfake videos can cause enormous harm. Given the right timing and a convincing script, they can spark violence in cities, bolster insurgent narratives of alleged atrocities, and even exacerbate the political divisions within a society. They can also present opportunities for sabotage, say, in the context of sensitive international trade deal negotiations conducted via digital means.⁷⁴

b. Textual Deepfakes

AI algorithms can be used to create entirely false or misleading news articles or to detect them. GROVER, for example, is an AI system that employs algorithms to create fake news articles but can also be used to identify articles written by machines. In a recent study, digital technology experts found GROVER to have churned out news articles falsely asserting that vaccines are linked to autism spectrum disorder written in the distinctive style of specific news outlets. According to the study, readers found these articles to be more convincing than those written by human beings.⁷⁵

Writing in the style of *The New York Times* science section, for example, GROVER generated a headline, an author name, and the opening of an article crediting the discovery of the aforementioned link to scientists from the University of California-San Diego and to those working for the federal government. The article began as follows:

Those who have been vaccinated against measles have a more than 5-fold higher chance of developing autism, researchers at the University of California San Diego School of Medicine and the

71. Robert Chesney & Danielle K. Citron, *Disinformation on Steroids: The Threat of Deep Fakes*, COUNS. ON FOREIGN RELATIONS (Oct. 16, 2018), <https://www.cfr.org/report/deep-fake-disinformation-steroids> [<https://perma.cc/PXZ8-JF6C>] [<https://web.archive.org/web/https://www.cfr.org/report/deep-fake-disinformation-steroids>].

72. GIANIRACUSA, *supra* note 44, at 49.

73. *Id.*

74. Chesney & Citron, *supra* note 71.

75. Dan Robitzski, *New AI Generates Horrifyingly Plausible Fake News*, FUTURISM (May 31, 2019), <https://futurism.com/ai-generates-fake-news> [<https://perma.cc/A8N7-DQ6S>] [<https://web.archive.org/web/https://futurism.com/ai-generates-fake-news>].

Centers for Disease Control and Prevention report today in the *Journal of Epidemiology and Community Health*.⁷⁶

The study also demonstrated GROVER's ability to refine its output over time to better match specific publications.⁷⁷ The researchers supplied the system with a headline claiming that vaccines cause autism and instructed it to write a full article in the style of *Wired*, which it duly did. Another example cited by the researchers was an article that GROVER "wrote" in the style of *The Washington Post* claiming that Donald Trump had been impeached based on new evidence from the Mueller Report:

WASHINGTON—The House voted to impeach President Donald Trump Wednesday after releasing hundreds of pages of text messages that point to clear evidence of obstruction of justice and communication with the head of the Trump Organization about a potential business deal in Russia. The 220-197 vote came after weeks of debate over whether new evidence released by special counsel Robert Mueller's office signaled sufficient grounds for Trump's removal from office. The president personally denounced the move, announcing his intent to veto the resolution and accusing Democrats of plotting to remove him from office through a "con job."⁷⁸

Although deepfake video and audio may be used in the future to create sensational stories that come to dominate the news, perhaps to distract from a scandal, the potential of "textfakes" is arguably even more sinister. These fraudulent texts, when distributed among and disguised as real posts on Twitter, Facebook, and/or Reddit, could be used to manufacture opinion in "sophisticated, extensive influence campaigns." If produced in sufficiently large numbers by more powerful generative AI systems such as ChatGPT, textfakes have the potential to warp the social communication ecosystem, with algorithmically generated content receiving algorithmically generated responses that, in turn, feed into recommendation algorithms.⁷⁹

76. *Id.*

77. *Id.*

78. *Id.*

79. Renee Diresta, *AI-Generated Text Is the Scariest Deepfake of All*, WIRED (July 31, 2020), <https://www.wired.com/story/ai-generated-text-is-the-scariest-deepfake-of-all> [https://perma.cc/WL6C-6R9N] [https://web.archive.org/web/https://www.wired.com/story/ai-generated-text-is-the-scariest-deepfake-of-all]; Luke Hurst, *Rapid Growth of "News" Sites Using AI Tools like ChatGPT is Driving the Spread of Misinformation*, EURONEWS (May 2, 2023), <https://www.euronews.com/next/2023/05/02/rapid-growth-of-news-sites-using-ai-tools-like-chatgpt-is-driving-the-spread-of-misinforma> [https://perma.cc/ZX6U-69AP] [https://web.archive.org/web/20230512033630/https://www.euronews.com/next/2023/05/02/rapid-growth-of-news-sites-using-ai-tools-like-chatgpt-is-driving-the-spread-of-misinforma].

B. MAJOR CHALLENGES TO EFFECTIVE LEGAL REGULATION

Given that technology companies develop and apply recommendation algorithms and generative algorithms, they can and should be legally required to regulate algorithmic disinformation. They are the entities best placed to do so because they can detect and remove disinformation. In this section, I put forward three major legal principles for governing the effective regulation of algorithmic disinformation by technology companies and also explore potential challenges to the implementation of these principles.

1. Transparency

Appropriate disclosure of information on social media algorithms that shape the experience of platform users is an essential step in neutralizing algorithmic disinformation. By allowing the public to monitor and scrutinize algorithms' functioning and potential for harm, a transparency requirement would likely push technology companies to develop and apply algorithms in a manner less conducive to the spread of disinformation.⁸⁰

Algorithms will constitute a critical component of virtually every business in the future because almost all of the business insights and decisions of tomorrow will be data driven.⁸¹ In reality, however, there are commercial barriers to achieving algorithmic transparency. The value of algorithms means that technology companies routinely develop and operate them in a "black box" manner. In 2002, for example, Google's search algorithm earned the company half a billion dollars, while the latest version earns it that much in just three days.⁸² Technology companies defend the confidentiality of their algorithms on the grounds that they need to protect such commercially valuable systems and maintain security to protect both their own gatekeeping role and the privacy of users.⁸³ Although it is widely known that the Google search algorithm influences web positioning, no one outside Google knows all of the parameters that influence the ranking of a web page or the percentage weighting of those parameters.

80. See Nicholas Diakopoulos & Michael Koliska, *Algorithmic Transparency in the News Media*, 5 DIGIT. JOURNALISM 809 (2017) ("The growing use of difficult-to-parse algorithmic systems in the production of news, from algorithmic curation to automated writing and news bots, problematizes the normative turn toward transparency as a key tenet of journalism ethics. Pragmatic guidelines that facilitate algorithmic transparency are needed.")

81. Salim Ismail, *Why Algorithms Are The Future Of Business Success*, GROWTH INST., <https://blog.growthinstitute.com/exo/algorithms> [<https://perma.cc/4JZN-YY3W>] [<https://web.archive.org/web/https://blog.growthinstitute.com/exo/algorithms>].

82. Megan Graham & Jennifer Elias, *How Google's \$150 Billion Advertising Business Works*, CNBC (May 18, 2021), <https://www.cnbc.com/2021/05/18/how-does-google-make-money-advertising-business-breakdown-.html> [<https://perma.cc/9KK6-BKAZ>] [<https://web.archive.org/web/https://www.cnbc.com/2021/05/18/how-does-google-make-money-advertising-business-breakdown-.html>].

83. See Paddy Leerssen, *The Soap Box as a Black Box: Regulating Transparency in Social Media Recommender Systems*, EUROPEAN J.L. & TECH., Sept. 30, 2020, at 13.

Given Google's governance of the main activities on the web, understanding this part of its operation would confer a valuable competitive advantage.

In the case of Twitter's recommendation algorithm, little is known with respect to the exact science behind it, which made Elon Musk's stated intention to disclose the secret formula to the public a major talking point before his purchase of the platform.⁸⁴ Both ends of the political spectrum had expressed concern about the algorithm's potential for manipulation. For instance, conservative media outlets are still echoing Musk's claims about Twitter's capacity for manipulation and sharing with audiences his instructions for configuring timelines to display tweets in chronological order rather than based on recommendations.⁸⁵ Although some studies have asserted that right-leaning political content is more likely to be amplified by Twitter's algorithm,⁸⁶ concerns about the spread of disinformation on Twitter exist across the political divide.

2. Intelligibility

Even if technology companies publicize their algorithms, people still need help understanding how these algorithms operate to amplify disinformation or prevent its dissemination. Publicizing algorithms in and of itself may be insufficient to allow users to learn much of great value about the operations of platforms. For instance, whereas the microblogging platform Mastodon, which was launched in response to concerns over Twitter's dominance, has posted its code on the software repository GitHub, users remain in the dark about the business structures and processes involved in Twitter's development.⁸⁷ Therefore, making algorithms appropriately intelligible is another essential step in regulating algorithmic disinformation.

However, making algorithms intelligible is exceedingly difficult for several reasons. First, there are technological difficulties. The decisions of algorithms are guided by

84. Reed Albergotti, *Elon Musk Wants Twitter's Algorithm To Be Public. It's Not That Simple*, WASH. POST (Apr. 16, 2022), <https://www.washingtonpost.com/technology/2022/04/16/elon-musk-twitter-algorithm/> [<https://perma.cc/88UW-QGKW>] [<https://web.archive.org/web/https://www.washingtonpost.com/technology/2022/04/16/elon-musk-twitter-algorithm/>].

85. See, e.g., Anders Hagstrom, *Elon Musk Says Twitter 'Manipulating' Users, Issues a How-To on Fixing Your Feed*, FOX BUS. (May 15, 2022), <https://www.foxbusiness.com/politics/elon-musk-twitter-algorithm-advice-manipulated/> [<https://perma.cc/E5ZA-49TA>] [<https://web.archive.org/web/https://www.foxbusiness.com/politics/elon-musk-twitter-algorithm-advice-manipulated/>]; Brian Freeman, *Musk Tells Users To Switch Off Manipulative Twitter Algorithm*, NEWSMAX (May 15, 2022), <https://www.newsmax.com/newsfront/elon-musk-twitter-news-feed-algorithm/2022/05/15/id/1069981/> [Perma.cc link is unavailable.] [<https://web.archive.org/web/https://www.newsmax.com/newsfront/elon-musk-twitter-news-feed-algorithm/2022/05/15/id/1069981/>].

86. Shoaib Jameel, *Twitter's Algorithm Favours the Political Right, a Recent Study Finds*, CONVERSATION (Jan. 31, 2022), <https://theconversation.com/twitters-algorithm-favours-the-political-right-a-recent-study-finds-175154> [<https://perma.cc/6VM4-VY7Z>] [<https://web.archive.org/web/https://theconversation.com/twitters-algorithm-favours-the-political-right-a-recent-study-finds-175154/>].

87. Chris Stokel-Walker, *The Problem With Elon Musk's Plan To Open-Source the Twitter Algorithm*, MIT TECH. REV. (Apr. 27, 2022), <https://www.technologyreview.com/2022/04/27/1051472/the-problems-with-elon-musks-plan-to-open-source-the-twitter-algorithm/> [<https://perma.cc/XQV3-SZBW>] [<https://web.archive.org/web/https://www.technologyreview.com/2022/04/27/1051472/the-problems-with-elon-musks-plan-to-open-source-the-twitter-algorithm/>].

complex machine learning processes that are inscrutable to outside observers.⁸⁸ Social media recommendation algorithms include an array of inputs and mechanisms such as moderation and filtering, the promotion of paid content, and user profiles.⁸⁹ Second, the importance of user behavior in steering the operation of recommendation algorithms, such as user likes, comments, ratings, and clicks, means that the systems are not fully pre-determined or controlled by their platforms.⁹⁰ This complexity means that efforts such as Facebook's "Why am I seeing this?" have been criticized for failing to adequately explain algorithm functioning.⁹¹

3. Accountability

Another major challenge for the effective legal regulation of algorithmic disinformation is how to make technology companies accountable.⁹² As social media are increasingly becoming people's main source of news, this accountability issue looms large in the face of the social and political controversies, disputes, conflicts, and even catastrophes caused by disinformation. For example, with respect to the 2021 U.S. Capitol attack, a leading commentator has lamented:

[Social media companies] have not only allowed [politicians] to lie and sow division for years, their business models have exploited our biases and weaknesses and abetted the growth of conspiracy-touting hate groups and outrage machines. They have done this without bearing any responsibility for how their products and business decisions affect our democracy; in this case, including allowing an insurrection to be planned and promoted on their platforms.⁹³

Indeed, social media companies' failure to prevent the spread of algorithmic disinformation necessitates urgent consideration of how and why they should be held accountable for such failure. Two major accountability issues arise. The first issue concerns the basis on which a social media company should be held legally accountable for amplifying a specific piece of disinformation. The enormous amount of disinformation circulating on any given social media platform makes such a case-by-

88. Leerssen, *supra* note 83, at 3.

89. Matthew Gooding, *Elon Musk's Plan for an Open-Source Algorithm Won't Solve Twitter's Problems*, TECH MONITOR (Apr. 26, 2022), <https://techmonitor.ai/technology/ai-and-automation/open-source-twitter-algorithm-elon-musk> [<https://perma.cc/8VGX-P25G>] [<https://web.archive.org/web/https://techmonitor.ai/technology/ai-and-automation/open-source-twitter-algorithm-elon-musk/>].

90. See Leerssen, *supra* note 83, at 4–5.

91. *Id.* at 13.

92. See generally HAOCHEN SUN, TECHNOLOGY AND THE PUBLIC INTEREST 121–55 (2022); Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 60 (2019).

93. Yaël Eisenstat, *How To Hold Social Media Accountable for Undermining Democracy*, HARV. BUS. REV. (Jan. 11, 2021), <https://hbr.org/2021/01/how-to-hold-social-media-accountable-for-undermining-democracy> [<https://perma.cc/7ZFA-XGTE>] [<https://web.archive.org/web/20230217145518/https://hbr.org/2021/01/how-to-hold-social-media-accountable-for-undermining-democracy>].

case approach difficult to sustain. As algorithms are the major vehicle for creating and disseminating disinformation on social media, it would make more sense to hold social media companies accountable for the algorithms they develop or apply. Should such an approach be adopted, a follow-up issue would be how to ascertain whether their algorithms have actually led to disinformation. This issue is closely intertwined with the transparency and intelligibility principles discussed above because both principles are necessary for determining how the algorithms concerned have contributed to the creation and spread of disinformation.

The second issue relates to which party should be held accountable if a case involves both a social media platform and its user(s). Policy-wise, it makes sense to assert that organizations using algorithms must be held accountable for the decisions made by those algorithms.⁹⁴ In reality, however, it is very difficult to ascertain how and why they should be deemed accountable. Take recommendation algorithms as an example. They themselves are susceptible to manipulation. One risk comes from bots: software-controlled social media accounts designed to emulate human activities but at a much higher volume of output.⁹⁵ Research into bots has found their capabilities to include searching Twitter for keywords or phrases and automatically retweeting posts containing them; automatically following users who follow a particular account or make posts containing certain keywords or phrases; automatically replying to tweets meeting certain criteria; and searching Google to find news articles meeting certain criteria and linking them in automatic replies to other users.⁹⁶ Given recommendation algorithms' focus on engagement, bots have the potential to harness these systems to generate synthetic virality by automating these forms of engagement.⁹⁷ For instance, one empirical study of Twitter found that, after being particularly active in amplifying content in the very early spreading moments before an article goes viral and targeting "influential users through replies and mentions," bots are able to amplify low-credibility content "to the point that it is statistically indistinguishable" from fact-checked

94. See Nicholas Diakopoulos, *Algorithmic Accountability: Journalistic Investigation of Computational Power Structures*, 3 DIGIT. JOURNALISM 398 (2015); Megan Rose Dickey, *Algorithmic Accountability*, TECHCRUNCH (Apr. 30, 2017), <https://techcrunch.com/2017/04/30/algorithmic-accountability> [<https://perma.cc/HP9T-FSHN>] [<https://web.archive.org/web/20230216225641/https://techcrunch.com/2017/04/30/algorithmic-accountability>].

95. Emilio Ferrara, *Bots, Elections, and Social Media: A Brief Overview*, in DISINFORMATION, MISINFORMATION, AND FAKE NEWS IN SOCIAL MEDIA 95–96 (Kai Shu et al. eds., 2020).

96. Alessandro Bessi & Emilio Ferrara, *Social Bots Distort the 2016 U.S. Presidential Election Online Discussion*, FIRST MONDAY (Nov. 7, 2016), <https://firstmonday.org/ojs/index.php/fm/article/view/7090/5653> [<https://perma.cc/6DTQ-J8Z6>] [<https://web.archive.org/web/20230216225736/https://firstmonday.org/ojs/index.php/fm/article/view/7090/5653>].

97. Chengcheng Shao et al., *The Spread of Low-credibility Content by Social Bots*, 9 NATURE COMM'NS 1 (2018); Lisa-Maria Neudert, *Future Elections May Be Swayed by Intelligent, Weaponized Chatbots*, MIT TECH. REV. (Aug. 22, 2018), <https://www.technologyreview.com/s/611832/future-elections-may-be-swayed-by-intelligent-weaponized-chatbots> [<https://perma.cc/QM3N-N2M2>] [<https://web.archive.org/web/20230216225746/https://arxiv.org/abs/1707.07592>].

articles.⁹⁸ Against this backdrop, it is quite difficult to determine whether a platform such as Twitter or the bot account user should be held accountable for the disinformation concerned.

II. CURRENT REGULATORY APPROACHES

How can governments effectively curb algorithmic disinformation by responding to the challenges of transparency, intelligibility, and accountability presented above? In this part, I show that governments, in general, have developed three regulatory approaches. The United States has adopted a market-based approach, allowing technology companies to regulate algorithmic disinformation by themselves. In contrast, France has enacted a law requiring technology companies to report their efforts to combat disinformation and publicize their algorithms. As this part shows, this French law represents a modest legislative approach to regulating algorithmic disinformation. China, in contrast, has adopted a stringent legislative approach that requires technology companies to not only publicize their algorithms but also to make them relatively intelligible.

A. UNITED STATES' MARKET-BASED APPROACH

In the United States, Congress has enacted no specific law to regulate the creation and spread of algorithmic disinformation despite its enormous potential to disrupt American society, and nor has any federal agency adopted administrative regulations or strategic measures to counter algorithmic disinformation.⁹⁹ Instead, the United States relies on self-regulation by social media platforms. We can call the U.S. approach a market-based approach to regulating disinformation because it allows market actors to regulate in line with their own cost and benefit calculations.

This market-based approach is attributable to three legal and policy aspects of the platform economy in the United States. First, shareholder value theory dominates the corporate policy-making process and has to date prevented social media companies from taking on additional responsibilities to proactively curb disinformation.¹⁰⁰ According to shareholder value theory, a company's sole social responsibility is to make

98. *Id.* at 10. A further analysis found that bots were employed to distort online discussion in the runup to the 2016 U.S. presidential election and 2018 midterms, and to push the "MacronLeaks" disinformation campaign in the runup to the 2017 French presidential election. See Ferrara, *supra* note 95, at 109–10.

99. Philip M. Napoli & Fabienne Graf, *Social Media Platforms as Public Trustees: An Approach To The Disinformation Problem*, in ARTIFICIAL INTELLIGENCE AND THE MEDIA 94 (Taina Pihlajarinne & Anette Alén-Savikko eds., 2022) ("Yet, from a regulation and policy standpoint, the federal government in the USA has done virtually nothing to confront the social media disinformation problem. None of the many pieces of social media-related legislation that are at various stages of consideration within Congress address the disinformation problem in any direct way. Nor have any of the regulatory agencies with potential jurisdiction in this space (such as the Federal Trade Commission (FTC), the Federal Communications Commission (FCC), and the Federal Election Commission (FEC)) introduced substantive regulatory interventions.").

100. SUN, *supra* note 92, at 105–106.

as much profit as possible for its shareholders. The theory's main champion, Milton Friedman, stated in *Capitalism and Freedom* that

[t]he view has been gaining widespread acceptance that corporate officials and labor leaders have a "social responsibility" that goes beyond serving the interest of their stockholders or their members. This view shows a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.¹⁰¹

As a result of shareholder value theory, U.S. corporate law treats companies as profit-maximizing institutions with virtually no social responsibilities.¹⁰² With the rise of the platform economy, the use of recommendation algorithms to provide advertising services has become the most significant source of revenue for most social media companies. In 2017 alone, \$200 billion was spent on advertising in the United States. An estimated 437 billion hours of ad-supported content was consumed in the United States in 2016.¹⁰³ Social media platforms have become key targets for investment in advertising, largely because their algorithms can keep users engaged, thereby increasing the amount of attention available for sale.¹⁰⁴ Platforms utilize recommendation algorithms to determine the order in which content is presented or suggested to users on the platform interface. To keep users engaged, Facebook, for example, draws upon an estimated twenty-five times the computational power of that used by IBM's Deep Blue supercomputer in the operation of News Feed's presentation of content posted by friends, shared by paying advertisers, and suggested by the platform's recommendation algorithms.¹⁰⁵ Shareholder value theory has encouraged social media companies to use recommendation algorithms to maximize shareholder interests through advertising

101. *Id.* at 106.

102. See, e.g., *Francis v. United Jersey Bank*, 432 A.2d 814, 824 (N.J. 1981); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986); Thomas A. Smith, *The Efficient Norm for Corporate Law: A Neotraditional Interpretation of Fiduciary Duty*, 98 MICH. L. REV. 214, 214 (1999); Gregory S. Crespi, *Rethinking Corporate Fiduciary Duties: The Inefficiency of the Shareholder Primacy Norm*, 55 SMU L. REV. 141, 141 (2002).

103. Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 784 (2019).

104. COSTA & HALPERN, *supra* note 60, at 20 (“[L]ikes or retweets capture attention and prompt frequent rechecking, bottomless pages keep users scrolling, and swipes and streaks make browsing feel like a game, removing breaks that might otherwise prompt a natural end to the task and our attention to shift elsewhere.”).

105. *Id.* YouTube initially sought to increase video views through its recommendation algorithm, but, in 2012, it made the decision to instead focus on increasing watch time in order to maximize user attention and increase potential advertising revenue. In 2018, YouTube's Chief Product Officer indicated that its system was having the desired effect by announcing that seventy percent of the total time users spent watching videos came from recommendations. See GIANIRACUSA, *supra* note 44, at 70–71.

profits. Curbing disinformation is not considered a major responsibility for these companies.¹⁰⁶

Second, Section 230 of the Communications Decency Act¹⁰⁷ does not obligate social media platforms to monitor and remove disinformation. Rather, it prevents them from being treated as the publishers of user-generated content, thereby protecting them from any legal liability for such content.¹⁰⁸ In other words, social media companies enjoy broad immunity against civil lawsuits over online content on their networks or platforms unless they materially contributed to the creation of unlawful content.¹⁰⁹ Therefore, Section 230 allows platforms to evade responsibility for amplifying or recommending disinformation created or disseminated by users.¹¹⁰

Third, the First Amendment to the U.S. Constitution may present legal challenges to the active regulation of algorithms. The First Amendment guarantees freedom of speech by prohibiting Congress from enacting any law restricting the right of the press or individuals to speak freely.¹¹¹ Under First Amendment jurisprudence, computer code¹¹² and search engine results produced by algorithms are protected speech.¹¹³ Underlying the ranking and recommendation algorithms that amplify disinformation on online platforms is computer code. In addition, such algorithms perform in a similar way to those producing search results. The regulation of ranking and recommendation algorithms would therefore be subject to a judicial review that might well find it to be in violation of the First Amendment.¹¹⁴

106. See SUN, *supra* note 92, at 106.

107. Telecommunications Act of 1996, Pub. L. No. 104–104, §§ 501–61, 110 Stat. 56, 133–43 (codified as amended in scattered sections of 18 and 47 U.S.C.).

108. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (holding that Section 230 granted AOL an affirmative defense of immunity and that AOL was not liable for defamatory statements posted on the platform).

109. Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 655–56 (2014).

110. Danielle K. Citron & Robert Chesney, *Disinformation on Steroids: The Threat of Deep Fakes*, CYBER BRIEF (2018), [https://scholarship.law.bu.edu/shorter_works/30] [<https://perma.cc/V9VF-J4DF>] [https://web.archive.org/web/20230309142235/https://scholarship.law.bu.edu/shorter_works/30] (“Social media platforms have long been insulated from liability for distributing harmful content. Section 230 of the Communications Decency Act of 1996 broadly immunizes online service providers in relation to harms caused by user-generated content, with only a few exceptions.”).

111. U.S. CONST. amend. I.

112. See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *Green v. U.S. Dep’t of Just.*, 392 F. Supp. 3d 68 (D.D.C. 2019); *Bernstein v. U.S. Dep’t of State*, 922 F. Supp. 1426 (N.D. Cal. 1996).

113. See, e.g., *E-ventures Worldwide, LLC v. Google, Inc.*, 188 F. Supp. 3d 1265, 1273–75. (M.D. Fla. 2016) (“Google’s PageRanks are pure opinions of the website’s relevancy to a user’s search query, incapable of being proven true or false.”); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437–39 (S.D.N.Y. 2014); *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at *13–15 (N.D. Cal. Mar. 16, 2007) (finding Google not liable for alleged First Amendment violation because it was not a government actor); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *2–3 (W.D. Okla. May 27, 2003).

114. Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 WM. & MARY L. REV. 357, 361 (2020) (“One reason for this may be that the First Amendment’s Free Speech Clause likely represents a significant barrier to such efforts. State regulation of fake news dissemination would be inherently content-based, and therefore suspect under current doctrine, particularly since the Supreme Court has rejected the proposition that lies are categorically exempt from First Amendment protection.”).

Any potential disinformation regulation in the United States would have to be reconciled with the “marketplace of ideas” doctrine underpinning the constitutional protection of free speech.¹¹⁵ This doctrine holds that the best test of truth is for an idea to be accepted in the marketplace through free competition with other ideas.¹¹⁶ There is a strong belief in the U.S. that the government must remain neutral in the exchange of ideas, avoiding discrimination based on differing viewpoints.¹¹⁷ The U.S. Supreme Court has therefore ruled that free speech protection extends to false speech. For example, in *United States v. Alvarez*,¹¹⁸ the Stolen Valor Act criminalizing falsehoods about the receipt of military honors was struck down owing in part to concerns that it would create a dangerous precedent for the overly broad regulation of ideas and allow the state to become the arbiter of truth.

Because of the market-based approach that prevails in the United States, social media companies are not legally bound to actively tackle disinformation and enjoy nearly complete latitude in deciding what kinds of disinformation to remove from their platforms. Owing to the proliferation of disinformation in recent years, however, social media companies have come under mounting pressure from the public to tackle disinformation and have become more proactive in this regard. Following the Cambridge Analytica scandal, for example, Facebook enhanced the transparency of its takedown procedures, publishing internal enforcement guidelines stating that disinformation would not be removed but simply presented lower down in news feeds to reduce the economic incentives for disinformation.¹¹⁹ Facebook also established an appeal body overseen by an independent board to review the most challenging content decisions, committed itself to being fully bound by the board’s decisions, and suggested that the board could set policy moving forwards.¹²⁰ The establishment of an independent external appellate body responsible for the private transnational Internet adjudication of online speech is a major example of self-regulation in the disinformation context.¹²¹

YouTube, too, has adopted several measures to address the issue of fake news on its platform. First, it reviews problematic content identified by machine learning and users. Second, machine learning systems are used to elevate information from authoritative sources. Third, fact check information panels are used to display third-party fact-checked articles above search results for relevant queries to give more context

115. Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 99–100 (2018); Philip M. Napoli, *What if More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 58–59, 97–98 (2018); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 847–48 (2018).

116. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

117. Irini Katsirea, “Fake News”: *Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty*, 10 J. MEDIA L., 159, 184 (2018).

118. *United States v. Alvarez*, 567 U.S. 709 (2012).

119. Amélie Heldt, *Let’s Meet Halfway: Sharing New Responsibilities in a Digital Age*, 9 J. INFO. POL. 355, 357 (2019).

120. *Id.* at 356.

121. See generally Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution To Adjudicate Online Free Expression*, *supra* note 24.

for videos across YouTube.¹²² Twitter, meanwhile, advocates a community-driven approach to content moderation, allowing users to report misinformation and to provide informative context for tweets in the form of notes.¹²³

B. FRANCE'S MODERATE LEGISLATIVE REGULATION

1. Background and Purpose

In contrast to the United States, France has abandoned the market-based approach and adopted a law that actively regulates technology companies' dealings with disinformation. Drawing upon general principles gleaned from global commentary, French commentators have expressed serious concerns about algorithmic disinformation. For instance, they have examined the role of algorithms in creating echo chambers and filter bubbles that accentuate confirmation bias and reinforce prejudices or preconceptions by exposing users to content they are already inclined to agree with and consume.¹²⁴ They have also paid attention to the possibility that these algorithms might be manipulated by bots or click workers, such as those based in Thailand and Macedonia, that generate synthetic virality.¹²⁵ Concerning algorithmic disinformation's negative impacts on political polarization, they have suggested that time away from social media or greater exposure to opposing views leads to a slight reduction in such polarization.¹²⁶

In response, French regulators have focused on how disinformation spreads and influences political discourse for two main reasons. The first is the potential impact of disinformation on major elections in France. A study into narratives of the "fake news" present in French media found that the term first emerged about a week after the 2016 U.S. presidential election, with articles discussing the role that Facebook had played in the victory of Donald Trump.¹²⁷ During the 2017 presidential election in France, clickbait and false information posted by satirical news sites were co-opted and spread by right-wing websites and user profiles.¹²⁸ In one case, *Le Gorafi*, a satirical news site likened to *The Onion*, shared an article claiming that presidential candidate Emmanuel Macron had expressed disdain for the disadvantaged and wiped his hands after coming

122. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, *supra* note 24, at 1621.

123. *Id.* at 1621.

124. Patrick Troude-Chastenet, *Fake News et Post-Vérité. De l'Extension de la Propagande au Royaume-Uni, aux États-Unis et en France* [*Fake News and Post-Truth. Of the Extension of Propaganda in the United Kingdom, the United States and France*], 96 *QUADERNI* 87, 91–92 (2018).

125. *Id.*

126. Rémy Demichelis, *Médias et Sphères de Justice: Réduire la Prédominance des Plateformes Internet de Recommandation* [*Media and Spheres of Justice: Reducing the Dominance of Internet Recommendation Platforms*], 2 *LES CAHIERS DU JOURNALISME* 67, 74 (2021); *see also* Hunt Allcott et al., *The Welfare Effects of Social Media*, 110 *AM. ECON. REV.* 629 (2020) (the study referenced by Demichelis).

127. Angeliki Monnier, *Narratives of the Fake News Debate in France*, 5 *IAFOR J. ARTS & HUMANITIES* 3, 7 (2018).

128. *See* Troude-Chastenet, *supra* note 124, at 88.

into contact with the poor.¹²⁹ In advance of the second round of voting, this article was shared more than 600,000 times.¹³⁰ Like their counterparts in the United States, French politicians brought disinformation into the mainstream discourse by referencing fringe Internet conspiracies and reports. For instance, Macron's 2017 opponent Marine Le Pen regularly referenced false reports originating from 4chan that Macron was benefitting from offshore bank accounts in the Bahamas.¹³¹ Macron faced further false accusations that he was financially backed by Saudi Arabia, wanted to introduce Sharia Law in the French territory of Mayotte, and so forth.¹³²

The second reason that French regulators have focused on how disinformation spreads and influences political discourse is the interference in French politics by Russia and Russian news organizations. Prior to announcing the proposed anti-disinformation legislation, Macron criticized *Russia Today* and *Sputnik*, stating that they were "organs of influence" responsible for spreading "deceitful propaganda,"¹³³ and he also aired such views during a joint news conference with Russian President Vladimir Putin. The French authorities have even gone so far as to create difficulties for Russian outlets attempting to secure accreditation to cover French government events.¹³⁴ It has also been suggested that Russian-backed Twitter accounts were part of the alleged manipulation efforts.¹³⁵

Against this backdrop, the French legislature in 2018 proposed a bill to prevent online disinformation from disturbing the electoral process.¹³⁶ The belief that disinformation was already having serious consequences for the functioning of democracy was reflected in the initial bill's stated intention to address the current electoral climate, with reference made to both the 2016 U.S. presidential election and U.K. referendum on EU membership.¹³⁷ In its advisory opinion, the Council of State was receptive to the bill's provisions designed to target online platforms, noting such platforms' capacity to amplify false information and create echo chambers. Although

129. *Id.*

130. *Id.*

131. James McAuley, *France Weighs a Law To Rein in 'Fake News,' Raising Fears for Freedom of Speech*, WASH. POST (Jan. 10, 2018, 3:58 PM), https://www.washingtonpost.com/world/europe/france-weighs-a-law-to-rein-in-fake-news-raising-fears-for-freedom-of-speech/2018/01/10/78256962-f558-11e7-9af7-a50bc3300042_story.html [<https://perma.cc/NVD9-CJJB>] [https://web.archive.org/web/20230213043401/https://www.washingtonpost.com/world/europe/france-weighs-a-law-to-rein-in-fake-news-raising-fears-for-freedom-of-speech/2018/01/10/78256962-f558-11e7-9af7-a50bc3300042_story.html].

132. See Troude-Chasteney, *supra* note 124, at 93.

133. Jan van der Made, *Russian Outlets Sparked Macron's Fake News Law Plan, Analysts*, RFI (Jan. 4, 2018, 5:15 PM), <https://www.rfi.fr/en/europe/20180104-france-fake-news-law-macron-russia-angry-deny-sputnik-rt> [<https://perma.cc/F8C4-Q3ZC>] [<https://web.archive.org/web/20230213043516/https://www.rfi.fr/en/europe/20180104-france-fake-news-law-macron-russia-angry-deny-sputnik-rt>].

134. See McAuley, *supra* note 131.

135. See van der Made, *supra* note 133.

136. Irène Couzigou, *The French Legislation Against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression*, 20 ELECTION L.J. 98, 103 (2021).

137. Ciara Nugent, *France Is Voting on a Law Banning Fake News. Here's How It Could Work*, TIME (Jun. 7, 2018, 1:09 PM), <https://time.com/5304611/france-fake-news-law-macron> [<https://perma.cc/D5NK-JQVQ>] [<https://web.archive.org/web/20230213043646/https://time.com/5304611/france-fake-news-law-macron>].

the Council challenged some aspects of the proposals, noting in particular that the sharing of false information is not necessarily unlawful, it was supportive of the requirement for platforms to publicize the resources they devote to combatting the spread of misinformation.¹³⁸

However, some critics in the French Senate argued that platform regulation should be carried out at the European Union rather than national level.¹³⁹ Representatives in the National Assembly raised an instrumental criticism of the bill, charging that the platform-focused components of the proposed law needed to target more specifically the role played by algorithms in the dissemination of fake news.¹⁴⁰ Following this criticism, on July 8, 2018 the National Assembly adopted Amendment No. 136, which requires Internet platforms that employ recommendation algorithms to publish statistics on their operation.¹⁴¹ This led to the final adoption of Law No. 2018-1202 of December 22, 2018 relating to the fight against the manipulation of information (known as the Manipulation of Information Law).

2. Nature and Scope

The Manipulation of Information Law establishes France's new approach to regulating disinformation through amendments and additions to existing legislation and several standalone provisions. Before outlining the duties established for online platforms under Title III of the law, I will first discuss the broader regime within which they exist.

Title IV of the Manipulation of Information Law introduces several changes to the French Code on Education, requiring greater consideration of the Internet and online communication in schools, with a particular focus on fostering a critical attitude toward the reliability of online information.¹⁴² Title II introduces provisions designed to curb the broadcast of misinformation by foreign states, with Article 5 revising Article 33-1

138. *Avis Consultatif: Lutte Contre les Fausses Informations* [Advisory Opinion: Fight Against False Information], CONSEIL D'ÉTAT (May 4, 2018), <https://www.conseil-etat.fr/avis-consultatifs/derniers-avis-rendus/a-l-assemblee-nationale-et-au-senat/lutte-contre-les-fausses-informations> [https://perma.cc/8DUD-KXKW] [https://web.archive.org/web/20230512165621/https://www.conseil-etat.fr/avis-consultatifs/derniers-avis-rendus/a-l-assemblee-nationale-et-au-senat/lutte-contre-les-fausses-informations].

139. Djazia Tiourtite, *What Does the Future Hold for French Anti Fake News Laws?*, MEDIAWRITES (Jan. 3, 2019), <https://mediawrites.law/what-does-the-future-hold-for-french-anti-fake-news-laws> [https://perma.cc/LL9A-DVAZ] [https://web.archive.org/web/20230403192002/https://mediawrites.law/what-does-the-future-hold-for-french-anti-fake-news-laws].

140. Paula Forteza, *La Proposition de Loi sur la Lutte Contre les Fake News* [The Proposed Law on the Fight Against Fake News], FORTEZA (Jul. 13, 2018), <https://forteza.fr/2018/07/13/la-proposition-de-loi-sur-la-lutte-contre-les-fake-news> [https://perma.cc/99ZL-X7E9] [https://web.archive.org/web/20230213043825/https://forteza.fr/2018/07/13/la-proposition-de-loi-sur-la-lutte-contre-les-fake-news].

141. *Amendement n°136* [Amendment No. 136], ASSEMBLÉE NATIONALE, <https://www.assemblee-nationale.fr/dyn/15/amendements/0990/AN/136> [https://perma.cc/69U9-49N5] [https://web.archive.org/web/20230213043918/https://www.assemblee-nationale.fr/dyn/15/amendements/0990/AN/136].

142. See Rachael Craufurd Smith, *Fake News, French Law and Democratic Legitimacy: Lessons for the United Kingdom?*, 11 J. MEDIA L. 52, 63 (2019).

of Law 86-1067 on Freedom of Communication to empower the French broadcasting authorities to refuse to enter into broadcast agreements that pose a grave risk to certain important interests.¹⁴³ Moreover, Article 6 of the Manipulation of Information Law introduces Article 33-1-1 of the Freedom of Communication Law, empowering the authorities to suspend distribution by any electronic means of a television or radio service owned or controlled by a foreign state during electoral periods.¹⁴⁴ Articles 33-1 and 33-1-1 initially specified the Superior Audiovisual Council (CSA) as the authority responsible for overseeing Title II. However, following the CSA's merger with the Higher Authority for the Dissemination of Works and the Protection of Rights on the Internet, it was clarified in a 2021 amendment that responsibility would pass to the new Regulatory Authority for Audiovisual and Digital Communication (ARCOM).¹⁴⁵

Some of the most substantial provisions, however, are introduced in Title I of the Manipulation of Information Law. First, Article 1 inserts the new Article L163-2 into the French Electoral Code, establishing that during “the three months preceding the first day of the month of general elections and until the date of the ballot,” when inaccurate or misleading allegations likely to affect the integrity of an election result are disseminated in a “deliberate, artificial or automated and massive way through an online public communication service,” an application can be made for interim measures to stop the dissemination.¹⁴⁶ The judge in chambers is required to rule within forty-eight hours of the referral, and, in the case of an appeal, the court is similarly expected to rule within forty-eight hours.¹⁴⁷

Second, Article 1 of the Manipulation of Information Law adds Article L163-1 to the Electoral Code. This provision holds that, during the same three-month period, online platform operators with users exceeding a particular threshold are required to (i) provide transparent information regarding the identity of the person or company paying for the promotion of content relating to a debate of general interest; (ii) provide users with transparent information on the use of their data in this context; and (iii) publicize the amount of remuneration received in cases where the amount received is over a particular threshold.¹⁴⁸ Article D102-1 of the Electoral Code clarifies that the threshold for platforms is 5 million unique users each month and that that for remuneration is 100 euros excluding tax. When platforms publicize this information,

143. *Id.* at 58 (“These include the dignity, liberty and property of others; maintenance of a diverse flow of thoughts and opinions in society; protection of children; safeguarding of public order; and protection of the fundamental interests of the nation, including the proper functioning of the nation’s institutions. The transmission of false information can threaten a number of these interests, notably the last. Refusal of a convention is also possible where this would lead to a breach of existing law and, as noted above, a number of French laws explicitly tackle the publication of false news.”).

144. *Id.* at 59.

145. LOI n° 2021-1382 du 25 octobre 2021 relative à la régulation et à la protection de l'accès aux œuvres culturelles à l'ère numérique [Law 2021-1382 of October 25, 2021 relating to the Regulation and Protection of Access to Cultural Works in the Digital Age], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 26, 2021.

146. Code électoral [C. électoral] [Electoral Code] art. L163-2 (Fr.).

147. *Id.*

148. Code électoral [C. électoral] [Electoral Code] art. L163-1 (Fr.).

they are required to do so electronically in an open format and to regularly update the information during the three-month election period.¹⁴⁹ As user profiles containing personal data can constitute one of the many inputs considered by recommendation algorithms,¹⁵⁰ the Article L163-1 Electoral Code requirement that platforms publicize how they have employed user data in the promotion of content during election periods relates to algorithms. However, algorithms are addressed more directly and specifically within the duties of cooperation established by Title III of the new law.

The primary Title III duties established in Article 11 of the Manipulation of Information Law are that online platform operators must “implement measures to combat the dissemination of false information likely to disturb public order or alter the sincerity” of ballots and set up an accessible system for users to report such information. The article does not state that these duties are limited to the three months preceding an election in order to encourage platforms to engage more generally with misinformation beyond that period.¹⁵¹ Article 12 inserts a new provision into the Freedom of Communication Law stating that these duties will be overseen by the CSA, which will do so by issuing recommendations and publishing periodic reviews.¹⁵² As platforms can only be named and shamed, this provision suggests that the duties are not constraining.¹⁵³ Although the latest version of the law no longer specifies the form of oversight, it clarifies that ARCOM is the agency responsible for regulating relevant matters.¹⁵⁴ The broad duty to combat the dissemination of false information provides platforms with a wide margin of discretion as to the measures they can take.¹⁵⁵ However, Article 11 of the Manipulation of Information Law specifies several potential actions, including promoting reliable content, fighting accounts that massively propagate false information, informing users about the origin of content, and implementing measures relating to the transparency of their recommendation algorithms.¹⁵⁶

Article 14 of the Manipulation of Information Law provides more information on the transparency requirement concerning platforms’ algorithms. It targets operators falling under Article L163-1 of the Electoral Code (those exceeding 5 million unique users each month, as described above) that use algorithms for the recommendation,

149. *Id.*

150. Engin Bozdog, *Bias in Algorithmic Filtering and Personalization*, 15 ETHICS INFO. TECH. 209, 213 (2013).

151. See Smith, *supra* note 142, at 62 (2019).

152. LOI n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard) [Law 86-1067 of September 30, 1986 on Freedom of Communication (Léotard Law)], art. 17-2 (Version in force from December 24, 2018, to December 24, 2020) (Fr.).

153. Marine Guillaume, *Combating the Manipulation of Information—a French Case*, 16 HYBRID COE STRATEGIC ANALYSIS 1, 5 (2019).

154. See LOI n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard) [Law 86-1067 of September 30, 1986 on Freedom of Communication (Léotard Law)], art. 17-2 (Version in force from October 27, 2021) (Fr.).

155. See Irène Couzigou, *The French Legislation Against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression*, 20 ELECTION L.J. 98, 110 (2021).

156. *Id.*

classification, or referencing of information content relating to debates of general interest.¹⁵⁷ The aim of this high threshold is to target only platforms with a large audience, and thus only those capable of influencing opinion through their recommendation algorithms.¹⁵⁸ Article 14 of the Manipulation of Information Law further clarifies that the statistics published should include 1) the share of direct access made to content without recourse to recommendation and 2) the share of indirect access attributable to either the platform's internal search engine algorithm or recommendation algorithm. Finally, Article 14 also states that the statistics should be published online and made accessible to all using a free and open format.

3. Implementation

Implementation of the Manipulation of Information Law has met with a number of difficulties. Famously, the French government saw its own social media voter registration campaign blocked by Twitter, as the platform claimed that it did not know how to effectively comply with the requirement that it publish information concerning content sponsorship in this context and was thus choosing to avoid the problem altogether.¹⁵⁹ The French government denied that the law had backfired, criticizing Twitter's conduct and arguing that the register to vote message should not be considered a political campaign.¹⁶⁰

Before responsibility was transferred from the CSA to ARCOM, the CSA published two annual reports on the efforts made by platforms to fulfil their obligations. The gist of the 2020 report was that platforms' efforts in 2019 could be greatly improved upon, with the CSA raising criticisms concerning the limits of the information and statistics provided to it, for example on content moderation.¹⁶¹ With respect to algorithm transparency, the CSA complained that the information provided by platforms differed very little from the information already available on their websites and expressed concern over the lack of clarity on platforms' efforts to make their algorithms intelligible and understandable.¹⁶² For their part, platforms have proved resistant to

157. LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information [LAW No. 2018-1202 of December 22, 2018 Relating to the Fight Against the Manipulation of Information], art. 14 (Fr.).

158. See Couzigou, *supra* note 155, at 109.

159. *Twitter Blocks French Government with Its Own Fake News Law*, BBC NEWS (Apr. 3, 2019), <https://www.bbc.com/news/world-europe-47800418> [<https://perma.cc/7S4A-2D64>] [<https://web.archive.org/web/20230226193125/https://www.bbc.com/news/world-europe-47800418>].

160. *Id.*

161. Alexandre Piquard, *Loi «Fake News»: le CSA Veut Davantage de Transparence des Réseaux Sociaux* [*"Fake News" Law: The CSA Wants More Transparency of Social Networks*], LE MONDE (Jul. 30, 2020), https://www.lemonde.fr/economie/article/2020/07/30/loi-fake-news-le-csa-veut-davantage-de-transparence-des-reseaux-sociaux_6047715_3234.html [<https://perma.cc/WHK3-GWL6>] [https://web.archive.org/web/20230303165532/https://www.lemonde.fr/economie/article/2020/07/30/loi-fake-news-le-csa-veut-davantage-de-transparence-des-reseaux-sociaux_6047715_3234.html].

162. Summary—*Combating the Dissemination of False Information on Online Platforms: An Evaluation of the Application and Effectiveness of Measures Implemented by Operators in 2019 (English Version)*, CONSEIL SUPÉRIEUR L'AUDIOVISUEL 1, 7 (2020), <https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Lutte-contre->

providing further information in this respect, citing concerns over business secrets and the risk of sharing information that could assist their competitors.¹⁶³ As commentators have noted, the CSA was not granted sanctioning powers under the Manipulation of Information Law, meaning that its only available recourse was to put pressure on platforms through the publication of its reports.¹⁶⁴

The 2020 report therefore proceeded to outline several recommendations on how platforms could improve their compliance. First, it asked platforms to provide more information concerning the intelligibility and accountability of their algorithms, inviting them to provide the CSA with the principles of their recommendation approaches and lists of the criteria and data used by their algorithms.¹⁶⁵ Second, the CSA encouraged platforms to provide greater transparency to users concerning the operation of their algorithms, noting that the density and complexity of the information provided thus far was not conducive to understanding.¹⁶⁶ Third, the CSA recommended that platforms provide users with greater transparency concerning how they could adjust algorithm settings.¹⁶⁷ Finally, the CSA noted an analysis of platform practices that appeared to suggest increased reliance on algorithmic curation, inviting platforms to provide more information “on the respective roles and extent of human and algorithmic curation, in both the detection and processing of false information.”¹⁶⁸

In its subsequent 2021 report, the CSA noted that eleven platforms, including Facebook, Twitter, Google (Google Search and YouTube), and Verizon Media (Yahoo Search), had made a declaration concerning their overall compliance efforts.¹⁶⁹ However, it stated that the quality of the information provided was inconsistent, with Verizon Media singled out for its “particularly poor declaration.”¹⁷⁰ With respect to algorithm transparency in particular, the CSA noted that there had been a “considerable increase in the amount of information provided by certain operators,” but stressed that in some cases a lack of transparency remained concerning the operations and consequences of recommendation algorithms.¹⁷¹ Moreover, the CSA requested

les-infox-le-CSA-publie-son-premier-bilan [https://perma.cc/9WFM-DNFY] [https://web.archive.org/web/20230303170007/https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Lutte-contre-les-infox-le-CSA-publie-son-premier-bilan].

163. See Piquard, *supra* note 161.

164. *Id.*

165. See CONSEIL SUPÉRIEUR L'AUDIOVISUEL, *supra* note 162, at 8.

166. *Id.*

167. *Id.*

168. *Id.*

169. Summary—*Combating the Dissemination of False Information on Online Platforms: An Evaluation of the Application and Effectiveness of Measures Implemented by Operators in 2020 (English Version)*, CONSEIL SUPÉRIEUR L'AUDIOVISUEL 1, 3 (2021), <https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Lutte-contre-la-manipulation-de-l-information-le-CSA-publie-le-bilan-des-mesures-mises-en-oeuvre-par-les-plateformes-en-ligne-en-2020> [https://perma.cc/V42X-YSQ8] [https://web.archive.org/web/20230303170710/https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Lutte-contre-la-manipulation-de-l-information-le-CSA-publie-le-bilan-des-mesures-mises-en-oeuvre-par-les-plateformes-en-ligne-en-2020].

170. *Id.*

171. *Id.* at 5–6.

additional information regarding ethical issues implicated by algorithms, such as the efforts taken to counter bias.¹⁷² It concluded by emphasizing the impact of recommendation algorithms on the manipulation of information and stressing that, despite considerable improvements, more information (confidential if necessary) should be supplied in order to counter these effects.¹⁷³

The 2021 annual report identified two major areas for improvement. First, it suggested that platforms should provide users with features enabling them to understand the effects of algorithms “in a personalized and context-driven way if possible.”¹⁷⁴ Second, it recommended that platforms provide information concerning their fight against algorithmic bias, including “dedicated resources, tools, subsequent modifications, [and] results.”¹⁷⁵ It remains to be seen whether ARCOM will be satisfied with the steps taken by platforms in this respect when it publishes its first annual report on the efforts made in 2021.

C. CHINA’S STRINGENT LEGISLATIVE REGULATION

1. Background and Purpose

For several years now, China has been implementing a crackdown on online platforms.¹⁷⁶ In a 2016 speech, President Xi Jinping outlined the government’s intention to further the development of China’s information industry, albeit with an increased emphasis on making the Internet “better” for the people of China.¹⁷⁷ Since 2016, China has implemented several measures aimed at achieving this goal. For instance, the Provisions on the Ecological Governance of Network Information Content came into effect in 2020 with the aim of creating a good network ecology, protecting the rights and interests of citizens, and safeguarding national security and public interests.¹⁷⁸ The Chinese government has also penalized online platforms for such conduct as false advertising and monopolistic behavior, accusing the major companies of mistreating their users.¹⁷⁹

172. *Id.* at 6.

173. *Id.*

174. *Id.* at 8.

175. *Id.*

176. See generally, Angela Huyue Zhang, *Agility Over Stability: China’s Great Reversal in Regulating the Platform Economy*, 63 HARV. INT. LAW J. 457 (2022).

177. Xi Jinping, *Zai Wangluo Anquan He Xinxi Hua Gongzuo Zuotan Hui Shang De Jianghua* [Speech at the Symposium on Network Security and Informatization], GUOJIA HULIANWANG XINXI BANGONGSHI [CYBERSPACE ADMIN. OF CHINA] (Apr. 25, 2016), http://www.cac.gov.cn/2016-04/25/c_1118731366.htm [<https://perma.cc/XA6U-2H5H>] [https://web.archive.org/web/20230303171425/http://www.cac.gov.cn/2016-04/25/c_1118731366.htm].

178. Wangluo Xinxi Neirong Shengtai Zhili Guiding [Provisions on the Ecological Governance of Network Information Content] (adopted at the executive meeting of the Cyberspace Administration of China Dec. 15, 2019, effective Mar. 1, 2020), art. 1.

179. Brenda Goh & Josh Horwitz, *Factbox: How China’s Regulatory Crackdown Has Reshaped Its Tech, Property Sectors*, REUTERS (Apr. 30, 2022), <https://www.reuters.com/world/china/education-bitcoin-chinas-season-regulatory-crackdown-2021-07-27> [<https://perma.cc/AYC9-58V2>] [<https://web.archive.org/web/>

A recent addition to these efforts is the adoption of the Provisions on the Administration of Algorithm Recommendations for Internet Information Services (Recommendation Algorithm Provisions),¹⁸⁰ a new law designed to regulate the algorithms applied by technology companies. Starting in around 2018, and influenced by the broader international discourse, Chinese commentators began discussing the potential harms of recommendation algorithms.¹⁸¹ For instance, they have raised concerns about the risk of “information cocoons” filled with vile and vulgar content, the promotion of exaggerated advertisements, and the dissemination of “extremely emotional” articles.¹⁸² Commentators have acknowledged the risks of algorithmic disinformation, claiming that recommendation algorithms are making it difficult to distinguish between true and false information and presenting users with “inferior information” containing insufficient depth and confusing value orientations.¹⁸³ They have also argued that recommendation algorithms are imbued with the values of the platforms on which they operate, contending that the “traffic is king” approach needs correction and replacement with more positive and healthy guiding values.¹⁸⁴

The issues that China faces are not merely theoretical. Like the U.S. and France, it has had to grapple with instances of disinformation spreading on Internet platforms. For instance, the authorities have cracked down on “self-media accounts,” which post sensational or fabricated stories with clickbait headlines to attract advertisers.¹⁸⁵ One particularly prolific account, which earned a reported USD 112,000 in ad revenue, was shut down after attracting controversy for sharing a story about a young man from a disadvantaged background who had graduated from a top university and then failed to find employment before dying of cancer, a story that was discovered to be false.¹⁸⁶ In November 2018, the Cyberspace Administration of China claimed to have shut down more than 9,800 similar accounts.¹⁸⁷ Tencent, the owner and operator of WeChat, was forced to launch a fake news debunking initiative after the widespread circulation of

20230226205648/<https://www.reuters.com/world/china/education-bitcoin-chinas-season-regulatory-crackdown-2021-07-27>].

180. Hualianwang Xinxi Fuwu Suanfa Tuijian Guanli Guiding [Provisions on the Administration of Algorithm Recommendations for Internet Information Services] (adopted at the 20th office meeting of the State Internet Information Office Nov. 16, 2021, effective Mar. 1, 2022) [hereinafter *Recommendation Algorithm Provisions*].

181. Gilad Abiri & Xinyu Huang, *The People's (Republic) Algorithms*, 12 NOTRE DAME J. INT. & COMP. L. 16, 22 (2022).

182. Wangluo Shidai Yinggai Ruhe Guifan [*How To Regulate Algorithm in the Era of Internet*], RENMIN WANG [PEOPLE. CN] (July 4, 2018), <http://it.people.com.cn/n1/2018/0704/c1009-30124289.html> [<https://perma.cc/L4A7-SFJF>] [<https://web.archive.org/web/20230403192420/http://it.people.com.cn/n1/2018/0704/c1009-30124289.html>].

183. *Id.*

184. *Id.*

185. Celia Chen, *China's 'Social Media Queen' Mimeng Closes WeChat Account With 13 Million Followers After Outrage Over Fake Story*, S. CHINA MORNING POST (Feb. 22, 2019), <https://www.scmp.com/tech/apps-social/article/2187225/chinas-social-media-queen-closes-wechat-account-13-million> [<https://perma.cc/PT7Q-9RUE>] [<https://web.archive.org/web/20230226205344/https://www.scmp.com/tech/apps-social/article/2187225/chinas-social-media-queen-closes-wechat-account-13-million>].

186. *Id.*

187. *Id.*

disinformation, including a story claiming that onions could kill the flu virus that was shared more than 400,000 times.¹⁸⁸ Most notably, in early 2020, following the initial outbreak of COVID-19, Chinese Internet platforms faced the rapid proliferation of rumors that large numbers of patients in the United States were committing suicide and that a Russian government official had confirmed that the virus was synthetically created.¹⁸⁹

Commentators in China have also highlighted a more specific concern about the spread of information through recommendation algorithms. Building on the previously stated concern that recommendation algorithms promote news with a “confusing value orientation,” the focus has been not only on preventing the spread of disinformation but also on promoting correct messages. For instance, commentators have expressed concern that algorithms overwhelm and undermine the influence and cohesion of the top-down dissemination of mainstream ideological values through official newspapers and media.¹⁹⁰ Although commentators in the United States have expressed similar concerns about the marketplace of ideas potentially being overwhelmed or bastardized by the proliferation of disinformation,¹⁹¹ their counterparts in China have clearly gone much further because there is a strongly held belief in the United States that the government should remain value-neutral in relation to the marketplace.¹⁹² Emphasizing the promotion of a mainstream value orientation would likely raise objections overseas, as international commentators have accused China of itself engaging in disinformation campaigns. For instance, an Atlantic Council report claims that China’s state-run media are involved in spreading disinformation and propaganda.¹⁹³

188. Iris Deng, *Tencent’s Fake News Debunkers Reached Nearly 300 Million WeChat Users Last Year*, S. CHINA MORNING POST (Jan. 22, 2019), <https://www.scmp.com/tech/apps-social/article/2183124/tencents-fake-news-debunkers-reached-nearly-300-million-wechat> [https://perma.cc/CGV2-FB62] [https://web.archive.org/web/20230226205107/https://www.scmp.com/tech/apps-social/article/2183124/tencents-fake-news-debunkers-reached-nearly-300-million-wechat].

189. Grace Ye, *The Chinese Fact Checkers Taking on the Covid Infodemic—a Rumour at a Time*, S. CHINA MORNING POST (June 26, 2022), <https://www.scmp.com/news/china/politics/article/3183102/chinese-fact-checkers-taking-covid-infodemic-rumour-time> [https://perma.cc/HP7T-AAH8] [https://web.archive.org/web/20230309153257/https://www.scmp.com/news/china/politics/article/3183102/chinese-fact-checkers-taking-covid-infodemic-rumour-time].

190. Dongde Hou & Liping Zhang, *Suanfa Tuijian Yishi Xingtai Fengxian De Falu Fangfan [Legal Prevention of the Ideological Risk of Algorithmic Recommendation]* (2021) 321 CHONGQING SHEHUI KEXUE [CHONGQING SOC. SCIENCES] 77, 80 (2021); see also Bao Wu, *Suanfa Tuijian Shidai Zhuliyi Yishi Xingtai Chunabo Mianlin de Tiaozhan Ji Qi Yingdui [Challenges and Countermeasures of Mainstream Ideology Propagation in the Era of Algorithmic Recommendation]*, 37 ZHONGGUO SHIYOU DAXUE XUEBAO (SHEHUI KEXUE BAN) [J. OF CHINA UNIV. OF PETROLEUM (SOC. SCIENCE EDITION)] (2021), <http://dx.doi.org/10.13216/j.cnki.upcjess.2021.04.0014>.

191. See, e.g., Irini Katsirea, *“Fake News”: Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty*, 10 J. MEDIA L. 159, 184 (2018).

192. See, e.g., Ari Ezra Waldman, *The Marketplace of Fake News*, 20 J. CONST. L. 845, 866–869 (2018).

193. DEXTER ROBERTS, ATLANTIC COUNCIL, *CHINA’S DISINFORMATION STRATEGY—ITS DIMENSIONS AND FUTURE*, (Dec. 2020), <https://www.atlanticcouncil.org/wp-content/uploads/2020/12/CHINA-ASI-Report-FINAL-1.pdf> [https://perma.cc/S385-P388] [https://web.archive.org/web/20230225235132/https://www.atlanticcouncil.org/wp-content/uploads/2020/12/CHINA-ASI-Report-FINAL-1.pdf].

In response to concerns about recommendation algorithms, China published an opinion-seeking draft of the Recommendation Algorithm Provisions in August 2021.¹⁹⁴ The draft provisions were quickly reviewed and approved at the twentieth meeting of the State Internet Information Office in November 2021, passed by the Cyberspace Administration of China, and then came into force in March 2022. The aim of the Recommendation Algorithm Provisions are to increase the transparency of algorithm functioning, grant Internet users more control over the data employed in recommendation decision-making, and ensure that recommendation systems do not produce negative social and moral consequences.¹⁹⁵ Article 1 of the Provisions clarifies the latter goal as including the promotion of pure socialist values and the safeguarding of national security and social public interests.¹⁹⁶ One commentator has claimed that the Provisions have broken new regulatory ground and that China has pioneered a new approach that empowers people over algorithms.¹⁹⁷

2. Nature and Scope

Part 1 of the Recommendation Algorithm Provisions offers a brief introduction to the purpose, scope, and definitions of the regulatory regime thereunder. Article 2 subjects the Internet platforms that use algorithms for the generation and synthesis, personalized push, sorting and selection, and filtering of content to the various requirements set out in the Provisions.¹⁹⁸ It also targets platforms using algorithms to schedule decision-making,¹⁹⁹ including assigning such work as the delivery of food.²⁰⁰ The platforms defined by Article 2 are required to abide by laws and regulations, respect social morality and ethics, and follow principles of fairness and transparency and are encouraged to strengthen industry standards and self-discipline.²⁰¹

Part 2 of the Recommendation Algorithm Provisions establishes specific duties for platforms providing algorithm services, while Part 3 introduces provisions designed for the protection of users. As not all of the harms caused by recommendation algorithms are related to the spread of disinformation, the other articles of the Provisions are not relevant to this article. For instance, Article 15 holds that platforms shall not use

194. See Abiri & Huang, *supra* note 181, at 2.

195. Arendse Huld, *China's Sweeping Recommendation Algorithms in Effect From March 1*, CHINA BRIEFING (Jan. 6, 2022), <https://www.china-briefing.com/news/china-passes-sweeping-recommendation-algorithm-regulations-effect-march-1-2022> [<https://perma.cc/6KV6-E8C9>] [<https://web.archive.org/web/20230303183848/https://www.china-briefing.com/news/china-passes-sweeping-recommendation-algorithm-regulations-effect-march-1-2022>]; see also Abiri & Huang, *supra* note 181, at 25–26.

196. See *Recommendation Algorithm Provisions*, *supra* note 180, at art. 1.

197. *Id.*; Alberto Romero, *China Has Pioneered a Law To Empower People Over Algorithms*, ONEZERO (Mar. 9, 2022), <https://onezero.medium.com/china-has-pioneered-a-law-to-empower-people-over-algorithms-70b29ba6285f> [<https://perma.cc/8C4E-5RBS>] [<https://web.archive.org/web/20230309154954/https://onezero.medium.com/china-has-pioneered-a-law-to-empower-people-over-algorithms-70b29ba6285f>].

198. See *Recommendation Algorithm Provisions*, *supra* note 180, at art. 2.

199. *Id.*

200. See Abiri & Huang, *supra* note 181, at 25.

201. See *Recommendation Algorithm Provisions*, *supra* note 180, at art. 4–5.

algorithms for the purpose of restricting other platforms or hindering competition.²⁰² Moreover, Articles 18 and 19 introduce specific cautions for platforms that provide services to minors or the elderly. Finally, given that gig-work platforms fall within the scope of the Recommendation Algorithm Provisions, Article 20 introduces a provision protecting the legitimate rights and interests of gig-workers.

Several articles of the Provisions do not specifically address disinformation, but they could still have an impact on its reduction given the major role recommendation algorithms play in the spread of disinformation. For instance, Article 7 establishes the responsibilities of platforms, including the establishment and improvement of algorithm mechanism review and scientific and technological ethics review and the formulation and publication of norms relating to the operation of their recommendation services. Article 8 establishes further responsibilities, including the regular assessment of algorithm mechanisms, data, and outcomes to ensure that they are not contrary to public order or positive customs. By encouraging self-assessment and ethical standards, the Provisions may help platforms to detect and prevent the unintended amplification of fake news.

More notably, Article 9(1) requires the strengthening of content management through the creation and operation of databases used for the identification of illegal or harmful information, also noting that “synthetic information” must be marked as such before dissemination can continue. Article 9(2) clarifies that when illegal information is identified, transmission must be stopped entirely, records must be made, and measures such as deletion should be taken to prevent its spread, while harmful information is to be dealt with as required under the Provisions on the Ecological Governance of Network Information Content.²⁰³ These provisions indicate what constitutes illegal and harmful information.²⁰⁴ Illegal information includes, but is not limited to, content that jeopardizes national security, subverts state power, undermines national unity, damages the reputation or interests of the state, or spreads rumors that disturb the economic and social order.²⁰⁵ Examples of harmful information include misleading clickbait, content hyping gossip or scandals, and content promoting indecency.²⁰⁶ Although other jurisdictions may disagree with these definitions, platforms in China are at least given clear guidance on the types of content they must avoid recommending and develop strategies to manage, as well as on how they should respond when they discover such content being recommended on their platforms.

Article 10 further states that platforms should not use illegal or harmful information as keywords for user interests or user tags for the basis of recommending content. Finally, Article 12 states that platforms should implement strategies to avoid creating harmful consequences for users, such as content de-duplication and optimization of the transparency and comprehensibility of search, ranking, and selection criteria. Although

202. *Id.* at art. 15.

203. *See* Provisions on the Ecological Governance of Network Information Content, *supra* note 178.

204. *Id.* at art. 6–7.

205. *Id.* at art. 6.

206. *Id.* at art. 7.

none of these provisions is specifically designed to combat disinformation, they all provide specific technical guidance that can help platforms to mitigate the risks of recommendation algorithms, including the dissemination of disinformation. Moreover, Article 14 prohibits platforms that provide recommendation services from using algorithms to falsely register users, generate false likes, shares, and comments, or manipulate topic lists or search rankings. Although this article appears to address some of the recommendation manipulation problems associated with bots, because its wording refers specifically to “algorithmic recommendation service providers,” it is unclear how it will address the use of bots by entities other than platforms themselves.²⁰⁷

The most substantial provisions targeting recommendation algorithms with respect to disinformation include transparency requirements and requirements to offer users genuine choice. Article 28(2), for example, introduces a provision requiring platforms to preserve network records and cooperate with relevant government departments when conducting security assessment, supervision, and inspection work in accordance with the law. Article 16 establishes a transparency obligation, stating that users must be told clearly what algorithmic services are being provided and requiring platforms to publish “the basic principles, purposes, and main operating mechanisms of algorithmic recommendation services in an appropriate manner.”²⁰⁸ Given the black box nature of recommendation algorithms and the probable difficulty of forming clear explanations from complex computer science, compliance with this particular provision may prove challenging. Nevertheless, if Chinese platforms are able to do so, lawmakers elsewhere may be encouraged to introduce similar requirements.

Moreover, the Recommendation Algorithm Provisions follow up the transparency obligation with opportunities for users to exercise choice in response to the information communicated to them. Article 11 provides that platforms have an obligation to establish mechanisms for manual interventions and autonomous user choice. Article 17 goes further by clarifying that users must be provided with the option not to have their personal characteristics targeted or to switch off recommendations entirely, as well as the option to choose or delete user tags related to their personal characteristics. Article 17 has drawn significant interest from commentators worldwide, with some noting the user autonomy it could provide and proposing it as something worth implementing or at least considering elsewhere.²⁰⁹ However, some have questioned the potentially substantial investment that would be required to develop a working opt-out system capable of translating user profile inputs “into a form understandable to users and then adjust the AI profile in a way that fits the choices made

207. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

208. See *Recommendation Algorithm Provisions*, *supra* note 180, at art. 16.

209. See, e.g., Romero, *supra* note 197; Jonathan Keane, *China and Europe Are Leading the Push To Regulate A.I.—One of Them Could Set the Global Playbook*, CNBC (May 26, 2022), <https://www.cnbc.com/2022/05/26/china-and-europe-are-leading-the-push-to-regulate-ai.html> [<https://perma.cc/MYP9-5QXB>] [<https://web.archive.org/web/20230303185317/https://www.cnbc.com/2022/05/26/china-and-europe-are-leading-the-push-to-regulate-ai.html>].

by the user.²¹⁰ While identifying and presenting users with the tags that make up their recommendation profile may prove challenging, the option to turn down recommendation services entirely is certainly less so. It remains to be seen whether Article 17 will price out smaller platforms but, by mid-March 2022, many of the major Chinese platforms had already implemented an opt-out system.²¹¹ Another concern is that Article 17 might undermine platforms such as Douyin, which have built their business models and entire user experience around a highly personalized recommendation service.²¹² However, this concern should be lessened by the fact that users will initially be presented with the ordinary recommendation model, only opting out if they object to it. Moreover, users unhappy with the new service will always have the option to opt back into the old model.

Part 4 of the Recommendation Algorithm Provisions establishes two liability standards for the various principles established in the regime. First, Article 31 establishes that violation of the various provisions, including Articles 7, 8, 9(1), 10, 14, 16, and 17, will result in the issue of warnings, reports containing criticism, and orders to rectify the conduct in question within a specified period of time. Second, under grave circumstances or when a platform refuses to comply with a rectification order, a provisional suspension of service may be ordered and a fine of between RMB 10,000 and RMB 100,000 issued.²¹³ In contrast to France's algorithm regime, China's appears to be backed by real consequences for non-compliance. The provisions contained within Article 31 focus primarily on the technical standards expected of recommendation systems. The fact that an opportunity to rectify violations is included is important for platforms employing recommendation systems, because recommendation algorithms continuously respond to new data and are therefore "in constant metamorphosis" and "hard to pin down."²¹⁴ As platforms cannot be aware of the content their algorithms are recommending at all times, they need some leeway in identifying and correcting harmful recommendation practices.

For those provisions that specifically target disinformation or require platforms to uphold certain mainstream values, including Articles 6, 9(2), 11, and 13, it is established in Article 32 that violations will be dealt with by relevant government departments under relevant rules or regulations. Such broad wording leaves it unclear how each individual provision will be dealt with by regulators, whether fines will be issued, and whether platforms will be given any opportunities to rectify mistakes. However, the wording of the Ecological Governance of Network Information Content Provisions indicates that where "illegal information" is involved platforms may be required to issue warnings and demand rectification, restrict functions, suspend updates, or terminate

210. See Abiri & Huang, *supra* note 181, at 29.

211. Claudia Vernotti, *Digital Policy Experts Weigh in on China's New Algorithm Regulation*, TECHNODE (Apr. 5, 2022), <https://technode.com/2022/04/05/digital-policy-experts-weigh-in-on-chinas-new-algorithm-regulation> [<https://perma.cc/U7BN-K847>] [<https://web.archive.org/web/20230303185649/https://technode.com/2022/04/05/digital-policy-experts-weigh-in-on-chinas-new-algorithm-regulation>].

212. See Abiri & Huang, *supra* note 181, at 29.

213. See *Recommendation Algorithm Provisions*, *supra* note 180, at art. 31.

214. See Abiri & Huang, *supra* note 181, at 30.

accounts in a timely manner.²¹⁵ Such wording suggests an approach that focuses on the removal of content and users rather than on affording platforms the leeway to identify and correct harmful recommendation practices.

III. A MULTI-STAKEHOLDER APPROACH

In this part, I first assess the merits and demerits of the three approaches described in Part II. I argue that the United States should scrap the market-based approach to regulating algorithmic disinformation because it has failed completely to accommodate the transparency, intelligibility, and accountability principles. With respect to the French and Chinese legislative approaches, both have advantages and disadvantages in meeting these principles.

I then put forward a multi-stakeholder approach as a legal and policy strategy for effectively regulating algorithmic disinformation. Drawing on the merits of the French and Chinese laws, this approach would dynamically engage social media users, experts, and governmental agencies, such as the U.S. Federal Communications Commission (“FCC”), in curbing the creation and dissemination of algorithmic disinformation.

A. ASSESSING MAJOR PROBLEMS WITH THE THREE APPROACHES

1. Death of the Market-Based Approach?

As demonstrated in Part II, the market-based approach adopted by the United States leaves social media platforms with the power to tackle algorithmic disinformation. Neither Congress nor any federal administrative agency has adopted regulatory rules or measures aimed at countering algorithmic disinformation and constraining social media companies’ considerable discretion in the self-regulation of such disinformation.²¹⁶ Accordingly, there is no legal requirement for social media platforms to publicize the recommendation and generative algorithms that are so instrumental in spreading disinformation. Absent such a transparency requirement, platforms need take no action to make the operation of their algorithms intelligible to affected parties or the public.²¹⁷

As a result, the U.S. market-based approach has rendered algorithms black boxes, with none of the transparency, intelligibility, or accountability principles needed to alleviate algorithmic disinformation. Without being subject to these principles, social media companies remain far from adequately responsive in blocking and removing

215. See Provisions on the Ecological Governance of Network Information Content, *supra* note 178, at art. 34.

216. Philip M. Napoli & Fabienne Graf, *Social Media Platforms as Public Trustees: An Approach To the Disinformation Problem*, in *ARTIFICIAL INTELLIGENCE AND THE MEDIA* 94 (Taina Pihlajarinne & Anette Alén-Savikko eds., 2022) (“Yet, from a regulation and policy standpoint, the federal government in the USA has done virtually nothing to confront the social media disinformation problem.”).

217. See Fernando Nuñez, *Disinformation Legislation and Freedom of Expression*, 10 U.C. IRVINE L. REV. 783 (2020).

disinformation.²¹⁸ In fact, as we have seen, disinformation is instead being amplified by social media algorithms. According to a Mozilla Foundation report, seventy-one percent of all videos containing disinformation, violent content, hate speech, and/or scams reported as “regrettable” were actively recommended by social media algorithms.²¹⁹ Viewers were forty percent more likely to regret watching a recommended video than one they had searched for.²²⁰ It has also been revealed that Facebook’s algorithm enabled mass-scale foreign propaganda campaigns during the 2020 U.S. presidential election, and Eastern European troll firms run Facebook’s most popular pages for Christian and Black American content, reaching 140 million U.S. users per month.²²¹

A key reason for social media companies’ failure to curb algorithmic disinformation is that they place their commercial interests above the interests of the public. Facebook is a textbook example. In 2021, whistle-blower Frances Haugen testified before the Senate Committee on Commerce, Science and Transportation on the dangers of Facebook’s algorithms.²²² According to Haugen, Facebook knowingly promotes harmful content that amplifies “division, extremism, and polarization.”²²³ She accused Facebook of consistently putting its profits above users’ health and safety, and urged Congress to resolve the Facebook-created crisis.²²⁴ Facebook’s own internal research

218. Paul Barrett, *Social Media Can Be an “Arbiter of the Truth” After All*, POLITICO (Apr. 14, 2020), <https://www.politico.com/news/agenda/2020/04/14/social-media-coronavirus-184438> [<https://perma.cc/9CTF-MJLZ>] [<https://web.archive.org/web/20230303190405/https://www.politico.com/news/agenda/2020/04/14/social-media-coronavirus-184438>]; Ellen P. Goodman & Karen Kornbluh, *Social Media Platforms Need To Flatten the Curve of Dangerous Misinformation*, SLATE (Aug. 21, 2020), <https://slate.com/technology/2020/08/facebook-twitter-youtube-misinformation-virality-speed-bump.html> [<https://perma.cc/9A82-MUQJ>] [<https://web.archive.org/web/20230303190756/https://slate.com/technology/2020/08/facebook-twitter-youtube-misinformation-virality-speed-bump.html>].

219. MOZILLA FOUNDATION, *YOUTUBE REGRETS: A CROWDSOURCED INVESTIGATION INTO YOUTUBE’S RECOMMENDATION ALGORITHM 3* (2021), https://assets.mofoprod.net/network/documents/Mozilla_YouTube_Regrets_Report.pdf [<https://perma.cc/6AHU-S4DR>] [https://web.archive.org/web/https://assets.mofoprod.net/network/documents/Mozilla_YouTube_Regrets_Report.pdf].

220. *Id.*

221. Karen Hao, *Troll Farms Reached 140 Million Americans a Month on Facebook Before 2020 Election, Internal Report Shows*, MIT TECH. REV. (Sept. 16, 2021), <https://www.technologyreview.com/2021/09/16/1035851/facebook-troll-farms-report-us-2020-election> [<https://perma.cc/739M-ZYKV>] [<https://web.archive.org/web/20230303192427/https://www.technologyreview.com/2021/09/16/1035851/facebook-troll-farms-report-us-2020-election>].

222. Karen Hao, *The Facebook Whistleblower Says Its Algorithms Are Dangerous. Here’s Why*, MIT TECH. REV. (Oct. 5, 2021), <https://www.technologyreview.com/2021/10/05/1036519/facebook-whistleblower-frances-haugen-algorithms> [<https://perma.cc/GR8K-ZW5L>] [<https://web.archive.org/web/20230303192748/https://www.technologyreview.com/2021/10/05/1036519/facebook-whistleblower-frances-haugen-algorithms>].

223. Statement of Frances Haugen: Hearing Before the Subcomm. on Consumer Protection, Product Safety, and Data Security of the Comm. on Commerce, Science and Transportation, 117th Cong. (Oct. 4, 2021), <https://www.commerce.senate.gov/services/files/FC8A558E-824E-4914-BEDB-3A7B1190BD49> [<https://perma.cc/5QF7-FU24>] [<https://web.archive.org/web/20230512043939/https://www.commerce.senate.gov/services/files/FC8A558E-824E-4914-BEDB-3A7B1190BD49>].

224. *Id.*

has also revealed that “misinformation, toxicity, and violent content are inordinately prevalent” in material reshared by users and promoted by the company’s algorithms.²²⁵

In response to this dire situation, scholars and policymakers alike are increasingly rejecting the market-based approach and calling for proactive governmental interventions:

[T]ackling the disinformation problem on social media remains purely within the completely voluntary efforts undertaken by the platforms themselves. Given their disappointing track record thus far, many have questioned whether the platforms are sufficiently incentivized to perform as well as they could; which raises the question of whether some sort of government oversight could provide further incentive.²²⁶

Legislators have taken action to fill the gigantic loopholes arising from market-based policy, proposing new laws to regulate algorithms in the United States.²²⁷ One set of legislative proposals is intended to deal with the black box nature of recommendation algorithms, with bipartisan efforts in the Senate and the House of Representatives to introduce the Filter Bubble Transparency Act.²²⁸ If passed, the act would require online platforms such as Facebook and Google to notify their users that they use algorithms to determine the order or manner in which information is delivered and provide users with an option to use the platforms without the operation of algorithms,²²⁹ thereby giving users the right to opt out of content selection by personal data-driven algorithms.²³⁰

Other legislative proposals relate to disclosure. The Algorithmic Justice and Online Platform Transparency Act²³¹ proposes requiring online platforms to disclose to users the types of algorithmic processes they employ and the categories of personal information they collect to power their algorithms. Similarly, the Algorithmic Fairness

225. Jeff Horwitz, *The Facebook Whistleblower, Frances Haugen, Says She Wants To Fix the Company, Not Harm It*, WALL ST. J. (Oct. 3, 2021), <https://www.wsj.com/articles/facebook-whistleblower-frances-haugen-says-she-wants-to-fix-the-company-not-harm-it-11633304122> [<https://perma.cc/53SW-EC82>] [<https://web.archive.org/web/20230309161932/https://www.wsj.com/articles/facebook-whistleblower-frances-haugen-says-she-wants-to-fix-the-company-not-harm-it-11633304122>].

226. Philip M. Napoli & Fabienne Graf, *Social Media Platforms as Public Trustees: An Approach To The Disinformation Problem*, in ARTIFICIAL INTELLIGENCE AND THE MEDIA 100 (Taina Pihlajarinne & Anette Alén-Savikko eds., 2022).

227. Tony Samp et al., *US Congress Tries To Decode Algorithms*, DLA PIPER (Jan. 27, 2022), <https://www.dlapiper.com/en/insights/publications/ai-outlook/2022/us-congress-tries-to-decode-algorithms> [<https://perma.cc/YH3T-XKA4>] [<https://web.archive.org/web/20230309162311/https://www.dlapiper.com/en/insights/publications/ai-outlook/2022/us-congress-tries-to-decode-algorithms>].

228. Filter Bubble Transparency Act, S. 2024, 117th Cong. (2021).

229. *Id.*

230. *Id.*

231. Algorithmic Justice and Online Platform Transparency Act, H.R. 3611, 117th Cong. (2021); S. 1896, 117th Cong. (2021).

Act²³² would make it mandatory for platforms to notify users who have been the subject of an algorithmic eligibility determination and provide them with the data employed to make the determination and an opportunity to correct the data.

While these legislative initiatives may have sounded the death knell for the market-based approach, none has yet been passed by Congress despite a sufficient lapse of time. Worse still, these emerging regulations have not incentivized social media companies to alter the way in which they self-regulate algorithmic disinformation.

2. Inadequacies of the French and Chinese Approaches

As the preceding part demonstrates, France and China have acted as forerunners in legislating to regulate algorithmic disinformation. Both countries have introduced legal rules that obligate social media companies to meet the algorithmic transparency requirement. Although France's Manipulation of Information Law does not have explicit rules holding social media companies accountable for failing to meet the transparency requirement, the French authority ARCOM can still make recommendations on how such companies can improve their practices to meet it.²³³ China's Recommendation Algorithm Provisions, in contrast, contain a range of penalties that render social media companies accountable for their failure to meet various requirements under the provisions.²³⁴

Both laws are pathbreaking but have major problems. First, despite explicitly championing transparency, the French Manipulation of Information Law has not adopted measures to promote the intelligibility of the algorithms that create and/or spread disinformation. Information on the operation of algorithms offers no meaningful value to users if they cannot do anything with the information.²³⁵ Platform users tend to be time- and resource-poor and to lack the expertise necessary to interpret and act upon information provided through a platform's duty of transparency.²³⁶ Article 11 of the French Manipulation of Information Law simply creates a duty for platforms to combat disinformation dissemination through measures that may include algorithmic transparency. It is essential to explore whether the French regime provides sufficient guidance on what should be done with the transparency required. Otherwise, this approach to combatting disinformation ultimately seems to do little more than place a burden on users to "to seek out information about a system, interpret it, and determine its significance, only then to find out they have little power to change things anyway."²³⁷

Other provisions of the Manipulation of Information Law itself require social media companies to make their recommendation and generative algorithms intelligible to

232. Algorithmic Fairness Act of 2020, S. 5052, 116th Cong. (2020).

233. See *supra* Part II.B.

234. See *supra* Part II.C.

235. Lillian Edwards & Michael Veale, *Slave To the Algorithm? Why a 'Right to Explanation' Is Probably Not the Remedy You Are Looking for*, 16 DUKE L. & TECH. REV. 18, 67 (2017).

236. *Id.*

237. *Id.*

users. As outlined in the preceding part, the original wording of the CSA's oversight responsibilities included the issuing of reports and recommendations in response to the information that platforms provide.²³⁸ In its first annual report, for instance, the CSA encouraged platforms to provide users with greater transparency on how to personalize or adjust algorithm settings.²³⁹ Commentators have argued that choice architecture of this nature, that is, architecture allowing users to opt in or out of algorithm inputs, or opt out of recommendations altogether, can counter some of the negative effects of algorithmic amplification.²⁴⁰ However, as the CSA's recommendations are only advisory, the regime itself clearly does little to ensure algorithmic transparency.

Second, both the French and Chinese laws have given rise to concerns about freedom of expression. The Manipulation of Information Law has faced substantial criticism concerning its provisions addressing elections and the broadcast of foreign media, especially with respect to their impacts on free speech. However, owing to the law's prioritization of transparency or intelligibility rules and minimal focus on the potential harms of algorithms, less commentary has been directed toward the adequacy of its provisions for addressing the latter.

The French law's impact on free speech is likely to be limited. However, the Chinese Recommendation Algorithm Provisions may seriously curb free speech activities on social media platforms by requiring platforms to control the diversity of opinions. Article 6, for example, states that platforms must uphold mainstream value orientations, vigorously disseminate positive energy, use algorithms in the direction of good, and not use recommendation services to engage in activities that harm national security or the public interest. Article 11 requires platforms to vigorously present information that conforms to mainstream values in key areas of their services, such as on their home pages, in hot search terms, and in selected topics. Finally, Article 13 states that platforms providing news information services must be licensed in accordance with the law, must standardize their news collation services, must not generate or synthesize fake news information, and must not "disseminate news information not published by work units in the State-determined scope." This provision is not entirely new, as, under Article 11(2) of the 2019 Provisions on the Administration of Online Audio and Video Information Services,²⁴¹ platforms are already prohibited from using AI to create, publish, or disseminate disinformation in audio or video form.

B. CREATING A MULTI-STAKEHOLDER APPROACH

How can we create a regulatory regime that effectively curbs algorithmic disinformation? As I demonstrate in Section A, scholars, policymakers, and legislators

238. See, e.g., Léotard Law, *supra* note 154.

239. See *supra* Part II.B.

240. Jennifer Cobbe & Jatinder Singh, *Regulating Recommending: Motivations, Considerations, and Principles*, 10 EUROPEAN J.L. & TECH., Dec. 30, 2019, at 18.

241. Wangluo Yin Shipin Xinxi Fuwu Guanli Guiding [Provisions on the Administration of Online Audio and Video Information Services] (Promulgated by the State Internet Information Office, Ministry of Culture and Tourism, and State Administration of Radio and Television, Nov. 18, 2019).

have repudiated the market-based approach on the grounds that self-regulation by social media platforms is problematic and damaging to society.²⁴² Legislative intervention and administrative oversight, which both France and China have initiated, are needed to effectively regulate algorithmic disinformation. However, the approaches adopted by France and China have major limitations, as noted.

Against this backdrop, I propose that the United States should take the lead by adopting a multi-stakeholder approach to legislating and administering the legal regulation of algorithmic disinformation in the public interest. This approach, as I will demonstrate, would be better equipped than current approaches to promote the principles of transparency, intelligibility, and accountability through the more dynamic engagement of social media users and experts and more robust oversight by the relevant administrative agencies.

In a nutshell, the multi-stakeholder approach would engage panels of social media users and experts in reviewing the transparency and intelligibility of the social media company algorithms involved in the creation and dissemination of disinformation every two years. After each review exercise, each panel would make recommendations on how the social media company concerned should improve or rectify its algorithms. Governmental agencies such as the FCC would operate the panel review system and impose penalties on social media companies that failed to meet the review requirements or follow approved recommendations.

1. The Algorithmic Disinformation Review System (ADRS)

a. Formation of the ADRS

The FCC should take the initiative in establishing an algorithmic disinformation review system (“ADRS”) comprising panels of social media users and experts. The ADRS is to be tasked with conducting a biennial review of the transparency and intelligibility of a social media company’s disinformation-related algorithms. Each review panel is to consist of seven social media users and three experts who will write recommendations on improvements based on the review results.

To this end, the FCC may issue a call for participation, inviting members of the public to volunteer to serve on the review panels. Any adult U.S. citizen who is an active social media user would be eligible to apply. Applicants would be asked to supply information on their social media experience, including the duration of their use of specific accounts, and personal particulars such as age, gender, and ethnicity. Provided that applicants can prove their social media knowledge in the application and subsequent interview, the FCC should make selection decisions to ensure that the panel membership is as diverse as possible in terms of gender, race, sexual orientation, geographic location, education, age, disability, wealth, and political views.²⁴³ The seven

242. See *supra* Part III.A.

243. Meta applies a similar diversity standard to select experts to serve on its Oversight Board. See Oversight Board, *Ensuring Respect for Free Expression, Through Independent Judgement*, <https://www.oversightboard.org/en/ensuring-respect-for-free-expression-through-independent-judgement>.

applicants selected for each review panel would be asked to serve on the condition that they agree to participate in reviews once every two years at a place and time designated by the FCC and serve for four consecutive years without remuneration.

Each review panel is also to be staffed by three experts: a journalist, a computer scientist, and a legal professional. Applicants would be required to demonstrate their journalistic, computer science, or legal expertise that is most relevant to the regulation of algorithmic disinformation. Again, the FCC should choose applicants with the aim of promoting diversity, with the selected experts asked to sign an agreement with terms similar to those for the social media users. After participating in the panel review process along with the chosen social media users, the experts would write a report containing recommendations on how the social media company under review should improve the transparency and intelligibility of its disinformation-related algorithms.

I envision each panel being asked to review the operation of the disinformation-related algorithms of several social media companies to allow a comparison of the practices and standards adopted to deal with disinformation and further understanding of how algorithms are developed and applied to deal with disinformation. I suggest that the FCC should consider subjecting social media companies with more than 30 million users in the United States (approximately ten percent of the U.S. population) to this biennial review exercise. This benchmark would cover the most used social networking platforms in the United States, namely, Facebook, Instagram, TikTok, Twitter, Pinterest, LinkedIn, and Reddit,²⁴⁴ as well as smaller social networking platforms such as Nextdoor²⁴⁵ and video-sharing and messaging platforms such as YouTube and WhatsApp.²⁴⁶

b. The Scope of the Review Process

For each review, the social media companies subject to review would have to prepare materials about the algorithms they have developed and apply in relation to disinformation, submit them to the FCC ahead of the review period, and supply officials

oversightboard.com [https://perma.cc/9535-MKNW] [https://web.archive.org/web/20230303203454/https://www.oversightboard.com] (“When fully staffed, the board will consist of 40 members from around the world that represent a diverse set of disciplines and backgrounds.”).

244. See *US Social Media Statistics 2022*, THE GLOBAL STATS., <https://www.theglobalstatistics.com/united-states-social-media-statistics> [https://perma.cc/JW7J-MHJ6] [https://web.archive.org/web/20230303203917/https://www.theglobalstatistics.com/united-states-social-media-statistics]. (“Facebook is the most used social media platform in the United States, with 74.20% of the internet users enrolled. In numbers, it is 227.94 active users. It saw a statistically significant growth since 2019. This tells that the reach is growing rapidly. US is the biggest market for Facebook, both in terms of views and subscribers. The second most liked Social Media Platform by the Americans is Instagram with 186.47 million users[.]”).

245. Nextdoor has about 38 million U.S. users in 2022. See *id.*

246. See *id.* (“FB Messenger is the most popular Messenger App in the US with 187.70 million active users. Facebook-owned FB Messenger has 61.10% of the country’s total internet users. The second most popular on the list is iMessage, an instant messaging service developed by Apple Inc., with 40.20% penetration. It has 123.49 million active users. The third is Snapchat (118.89 million), which is really popular among teenagers, has 38.70% users. Forth in the list of 2022 social media chat apps is WhatsApp with 28.60% penetration.”).

to participate in the review process. The review panel would then host cross-examining sessions, giving the officials the opportunity to clarify the three following aspects of their companies' algorithms.

i. Transparency

The review panel may inquire into whether and how the social media company in question has publicized its disinformation-related algorithms. In particular, the panel may ask the company to provide a textual description of each algorithm employed, covering its objective or objectives; its main operating principles, the data used, and weighting given to each criterion; its effects; whether it is customizable by users; and the number of changes made to it during the year.²⁴⁷

Based on this written description and company officials' verbal clarification, the panel would then determine whether the company's disclosure meets the transparency requirement. For example, after reviewing social media companies' disclosure of information on their algorithms in 2020, the French authority criticized them for making statements that were too broad to be understood without complete contextual knowledge of platform operations.²⁴⁸ More specifically, it pointed out that Microsoft and Facebook had focused their reports merely on "algorithms used to combat disinformation in general or that related to the COVID-19 health crisis" rather than supply comprehensive information that would allow meaningful comparison of platform efforts.²⁴⁹

ii. Intelligibility

The panel may also review whether the social media company's disclosure of algorithmic information is suitably intelligible. The intelligibility requirement, according to the French authority, refers to information concerned with the various principles underlying algorithm operations.²⁵⁰ China's Recommendation Algorithm Provisions explicitly require platforms to publish "the basic principles, purposes, and main operating mechanisms of algorithmic recommendation services in an appropriate manner."²⁵¹

247. COMBATTING THE DISSEMINATION OF FALSE INFORMATION ON ONLINE PLATFORMS: AN EVALUATION OF THE APPLICATION AND EFFECTIVENESS OF MEASURES IMPLEMENTED BY OPERATORS IN 2019, CONSEIL SUPÉRIEUR L'AUDIOVISUEL 80 (2020), <https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Lutte-contre-les-inox-le-CSA-publie-son-premier-bilan> [<https://perma.cc/PP5G-2WDD>] [<https://web.archive.org/web/20230309165004/https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Lutte-contre-les-inox-le-CSA-publie-son-premier-bilan>].

248. *Id.* at 37.

249. *Id.*

250. See 2019 CSA Report, *supra* note 247, at n.46 (including "elements relating to the purpose of the processing for which the algorithms have been programmed . . . rules defining this processing, the main characteristics of their implementation, the data processed and their sources, the processing parameters and their weighting").

251. *Recommendation Algorithm Provisions*, *supra* note 180, at art. 16.

Such principles of operation include information on the data used by recommendation algorithms and where this information is made available. In particular, the principles should offer users modification or personalization settings, such as an option to opt out of recommendation algorithms' tracking of their preferences and data. Platforms should also provide users with a tool for real-time interaction with platform operators to obtain more personalized and precise information.²⁵² The French authority has shed light on how a review panel might assess whether a social media company's articulation of these principles has resulted in the intelligibility of its algorithms. After reviewing the information submitted to it, the French authority in its 2019 report identified LinkedIn, the Wikimedia Foundation, and Verizon Media as operators that provided no declaration or indication that algorithm personalization settings were available.²⁵³ It also made a statement of intent to look more closely at the "usage and user feedback data that will be provided by these operators" to further assess the impact of user organization choices "on improving knowledge and understanding by users of the algorithmic recommendation of content."²⁵⁴

iii. Accountability

After inquiring into the transparency and intelligibility requirements, the review panel may further consider whether the social media company in question has taken measures to make its algorithms capable of detecting and removing disinformation. To prove such capability, the company may submit data relating to the performance of its algorithms and the virality of the content detected, as well as provide information on how the algorithms work in suppressing such content.²⁵⁵ For example, in its 2020 report, the French authority identified Google, Snapchat, and Twitter as providers of sparse data in relation to their moderation algorithms, and Microsoft, LinkedIn, and Verizon Media as providers of no information, although it offered no further detail.²⁵⁶

Moreover, social media companies should also be required to submit information showing how they have worked together with fact-checking institutions to filter out disinformation.²⁵⁷ Companies that offer applications with generative algorithms should be further required to demonstrate that their applications are capable of detecting and deleting disinformation.

252. *Id.*

253. *Id.* at 36.

254. *Id.*

255. *Id.* at 34.

256. *Id.*

257. See YALE INFORMATION SOCIETY PROJECT, FIGHTING FAKE NEWS 10, https://law.yale.edu/sites/default/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf [<https://perma.cc/YFF2-VU6F>] [https://web.archive.org/web/20230309174202/https://law.yale.edu/sites/default/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf] ("To the extent statements are labeled as false, it is preferable for content distributors to present fact checks as the product of the organization (like an unattributed editorial), rather than relying on individual journalists, speaking in their personal capacities, to do so.")

c. *Oversight by the FCC*

In addition to setting up review panels, what other roles should the FCC play in the ADRS? The FCC is a governmental agency that regulates communications by radio, television, wire, satellite, and cable across the United States.²⁵⁸ In particular, as the primary authority in U.S. communications law, the FCC has the power to “[r]evis[e] media regulations so that new technologies flourish alongside diversity and localism” and “[d]evelop[] and implement[] regulatory programs.”²⁵⁹ It also maintains jurisdiction over broadband access, fair competition, radio frequency use, *media responsibility*, public safety, and homeland security.²⁶⁰

The FCC thus has the *legal* power to make rules and regulations dealing with algorithmic disinformation, as well as the *policy-making* power to ensure that social media companies take sufficient responsibility for effectively tackling such disinformation. Relying upon such broad-based powers, the FCC can take the following actions to implement the ADRS.

First, the FCC can make new rules to govern the operation of the ADRS. The FCC adopts new communications rules through the so-called “notice and comment” process. Under that process, it gives the public notice that it is considering adopting or modifying rules on a particular subject and seeks comments from the public. It then examines the comments received in developing final rules.²⁶¹ The FCC can avail itself of this process to adopt a new set of rules for the ADRS. The rules may elucidate such matters as the form of the review panels, the subjects of the review process, the issuance of review reports, social media companies’ obligations to comply with the reports, and the penalties to be imposed on them if they fail to comply.

Second, the FCC should take charge of the logistics for implementing the ADRS. Well before each review exercise, the FCC should organize meetings to provide panel members with up-to-date information on algorithms and disinformation and offer them ample opportunities to interact and share their thoughts and expertise. The FCC should also arrange the schedule and location for each review, and subsequently liaise with the panel experts on the issuance of their report.

Third, the FCC should take measures to improve the ADRS and promote other potential regulatory schemes. It may consider organizing a major conference every five years to examine the system’s operation, inviting stakeholders such as policymakers, technology professionals, legal experts, journalists, and media activists to participate and put forward proposals on how to make the ADRS a better mechanism for fighting

258. *The FCC’s Mission*, FCC, <https://www.fcc.gov/about/overview> [<https://perma.cc/947U-ZHA4>] [<https://web.archive.org/web/20230218181041/https://www.fcc.gov/about/overview>].

259. *What We Do*, FCC, <https://www.fcc.gov/about-fcc/what-we-do> [<https://perma.cc/9B84-BQDB>] [<https://web.archive.org/web/20230218181132/https://www.fcc.gov/about-fcc/what-we-do>].

260. FEDERAL COMMUNICATIONS COMMISSION, 2008 PERFORMANCE AND ACCOUNTABILITY REPORT (SEPTEMBER 2008).

261. *Rulemaking Process*, FCC, <https://www.fcc.gov/about-fcc/rulemaking-process> [<https://perma.cc/Y6NR-ZLTF>] [<https://web.archive.org/web/20230218181309/https://www.fcc.gov/about-fcc/rulemaking-process>].

algorithmic disinformation. As the FCC will gain disinformation-regulation experience and insights from handling panel reports, conferences, and other activities, it should be proactive in making recommendations to Congress on how to legislate anti-disinformation laws.

Fourth, the FCC should oversee social media companies' compliance with the expert reports and impose penalties for any compliance failures. After the FCC receives the expert reports, it should first review their fairness. If the recommendations presented in the reports are deemed fair, the FCC should then require the social media companies in question to take concrete actions to follow the recommendations and update it in a timely manner on the results of those actions. The FCC would then review whether the company had met its compliance requirements and, if not, order it to make expeditious corrections and impose penalties according to its anti-disinformation rules.

Finally, the FCC should collaborate with relevant governmental agencies to augment the effectiveness of the ADRS. Because disinformation can harm trade and electoral operations, the FCC should make every effort to fight algorithmic disinformation in close partnership with other regulatory agencies such as the Federal Trade Commission (FTC) and Federal Election Commission (FEC). For example, the FCC may invite officials from the FTC and FEC to review the fairness of the expert reports and the results of social media companies' compliance actions with respect to trade- and election-related disinformation. Such a dynamic partnership would create a more effective institutional framework to combat disinformation through concerted regulatory interventions.

With respect to financial support, the FCC's expenditures on implementing the ADRS should be modest, primarily because panel members would serve on a voluntary, unpaid basis, an engagement model that would also ensure impartiality and genuine interest on panel members' part. Expenditures on hosting panel reviews and reform conferences and enforcing expert reports would also likely be modest. Therefore, the proposed ADRS is a cost-effective system.

Figure 1 illustrates the holistic operation of the ADRS.

Figure 1. Algorithmic Disinformation Review System



2. Advantages of the ADRS

To improve its content policy and enforcement, Meta approved the establishment of an Oversight Board in November 2018, consisting of 20 founding members who are experts in free speech, Internet governance, and human rights.²⁶² The Oversight Board is by nature a dispute resolution system that allows Meta users to appeal content moderation decisions made by Meta officials. After hearing an appeal, the Board determines whether the decision should be upheld or overturned.²⁶³ However, the Board does not review the validity of Meta's content moderation rules, and nor does it make recommendations on how such rules could be improved.²⁶⁴

Although the ADRS would actively engage experts, it would be fundamentally different from the Meta Oversight Board. First and foremost, it would be a regulatory regime created by a governmental agency, not an internal dispute resolution system established by a private company. The ADRS would require social media companies to make their disinformation-related algorithms transparent and intelligible to the public, thereby paving the way toward more effective curbs on algorithmic disinformation. Its aim would be to alleviate the disinformation problems caused by the development and application of algorithms as black boxes through the acquisition and release of information on how such algorithms create and spread disinformation.

Second, the ADRS would ensure that social media companies have broader, more forward-looking accountability for their involvement in creating and/or spreading disinformation. On a case-by-case basis, the Meta Oversight Board holds Facebook and Instagram responsible only for removing or recovering content subject to their moderation systems. The ADRS would not deal with the removal or recovery of a particular piece of news. Rather, drawing on review panels' engagement and expertise, it would delve into the systemic problems caused by a social media company's algorithms and order their rectification if necessary. Failure to comply would result in an FCC-imposed penalty. Such penalties are intended to motivate social media companies to take forward-looking measures to curb disinformation without requiring them to look backwards to remove disinformation that has already been disseminated.

If designed and implemented in the manner proposed, the ADRS can promote the platform economy in the public interest. The rise of the platform economy has hugely benefited social media companies with skyrocketing revenues accrued from online advertising services and their public listings' financial contributions to corporate development.²⁶⁵ As a result, companies such as Google and Meta are among the world's

262. Elizabeth Culliford, *Facebook Names First Members of Oversight Board That Can Overrule Zuckerberg*, REUTERS (May 6, 2020, 1:12 PM), <https://www.reuters.com/article/us-facebook-oversight-idUSKBN22I2LQ> [<https://perma.cc/NSY5-6PPK>] [<https://web.archive.org/web/20230218181401/https://www.reuters.com/article/us-facebook-oversight-idUSKBN22I2LQ>].

263. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, *supra* note 24, at 1603.

264. *Id.*

265. See JAMIE BARTLETT, *THE PEOPLE VS TECH: HOW THE INTERNET IS KILLING DEMOCRACY (AND HOW WE SAVE IT)* 1 (2018) ("In the coming few years either tech will destroy democracy and the social order

most financially powerful.²⁶⁶ Complying with the ADRS would require of these companies only modest expenditure, with a correspondingly modest decrease in profits. Hence, the ADRS would not have significantly negative effects on the platform economy that is so crucial to the United States and many other countries. Rather, it would encourage the platform economy to develop in the public interest through the generation and dissemination of far less disinformation.²⁶⁷

The ADRS can also raise public awareness of the problems caused by the rapid spread of disinformation and pervasive use of algorithms on social media networks and empower social media users to take part in addressing those problems.²⁶⁸ As suggested above, if the ADRS is implemented as envisioned the FCC will call for applications from social media users and select suitable applicants to serve on review panels. This arrangement is likely to arouse users' interest in learning more about the impact of disinformation and encourage them to seek out information on algorithmic transparency and accountability. The application and selection processes are also very likely to attract the media spotlight, thereby inducing public discourse on disinformation and algorithms. The more such discourse there is, the more the public will be engaged in brainstorming ways to curb algorithmic disinformation.²⁶⁹

However, the ADRS may give rise to concerns over its potential to adversely affect freedom of expression.²⁷⁰ It should be noted that it would target only disinformation that was willfully created and disseminated to cause harm to a person, institution, or

as we know it, or politics will stamp its authority over the digital world. It is becoming increasingly clear that technology is currently winning this battle, crushing a diminished and enfeebled opponent.”).

266. Stephen Johnston, *Largest Companies 2008 vs. 2018, A Lot Has Changed*, MILFORD (Jan. 31, 2018), <https://milfordasset.com/insights/largest-companies-2008-vs-2018-lot-changed> [<https://perma.cc/D7JM-PAP8>]

[<https://web.archive.org/web/20230218181604/https://milfordasset.com/insights/largest-companies-2008-vs-2018-lot-changed>] (“Technology companies not only dominate our daily lives (how many times have you checked your iPhone today?) but also the ranking of world’s biggest companies.”).

267. See Niva Elkin-Koren et al., *Social Media as Contractual Networks: A Bottom Up Check on Content Moderation*, 107 IOWA L. REV. 987, 991 (2022) (“Users of social media platforms are important stakeholders in the platform economy.”).

268. See *id.* at 994 (arguing that it is very important to “enable users to restrain platforms’ discretion and safeguard their private interests”); NICHOLAS NICOLI & PETROS IOSIFIDIS, *DIGITAL DEMOCRACY, SOCIAL MEDIA AND DISINFORMATION* 73–76 (2021) (discussing the importance of empowering social media users).

269. See Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. F. 337 (2017) (“For example, once we understand amplification as a relevant concept, we should account for the psychology of how people actually come to believe what is true—not only through rational deliberation, but also by using familiarity and in-group dynamics as a proxy for truth.”); Gilad Abiri & Johannes Buchheim, *Beyond True and False: Fake News and the Digital Epistemic Divide*, 29 MICH. TELECOMMS. & TECH L. REV. 59, 62–68 (2022).

270. See, e.g., Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1357 (2018) (cautioning that technology “corporations’ power over public discourse today is so concentrated and far-reaching that it resembles and arguably surpasses state power within its sphere”); Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 105 (2018) (concluding that “we’ve created a new generation of *surveillance intermediaries*: large, powerful companies that stand between the government and our data and, in the process, help constrain government surveillance”).

society at large.²⁷¹ Its regulation of disinformation would therefore be in line with the Supreme Court's First Amendment jurisprudence.²⁷² For example, the Court has proclaimed that “[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas.”²⁷³ Therefore, false statements “are not protected by the First Amendment in the same manner as truthful statements”²⁷⁴ given that they involve a “legally cognizable harm associated with a false statement.”²⁷⁵

IV. CONCLUSION

In the social media age, technology companies' advertising policies and sophisticated algorithms have made the dissemination of disinformation quick, easy, and profitable. As this article shows, by distorting reality, algorithmic disinformation causes and inflames social, economic, and political problems.

Unfortunately, the United States and many other countries have yet to adopt laws that directly regulate algorithmic disinformation, although France and China recently adopted laws containing legal rules requiring social media companies to publicize their disinformation-related algorithms and make them intelligible to users. However, as this Article has also revealed, these laws are still in their infancy. Administrative agencies are required to better enforce them, and users need to be robustly engaged in the policing of disinformation.

Absent effective legal regulation, the dangers of algorithmic disinformation are likely to continue to escalate, with untold harm to society, widespread mental distress, and even the loss of lives.²⁷⁶ My multi-stakeholder approach constitutes a response to the urgent need to design a regulatory mechanism to combat algorithmic disinformation.²⁷⁷ It advocates for the adoption of transparency, intelligence, and accountability as the three major principles of the new regulatory mechanism. To further implement these principles, it also calls for the establishment of an algorithmic

271. Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J.L. & TECH. 388, 396 (2020) (“We need, in short, to find ways to discourage the spread of statements that are at once false and damaging.”).

272. See Michael P. Goodyear, *Priam's Folly: United States v. Alvarez and the Fake News Trojan Horse*, 73 STAN. L. REV. ONLINE 194 (2021) (“As shown by the utter failure of the *Alvarez* decision to plan for or restrain the fake news disasters of the 2016 and 2020 elections and COVID-19, robust protections for the vast majority of false statements are not in the best interests of the United States.”).

273. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

274. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

275. *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

276. Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J. L. & TECH. 388, 395–96 (2020) (“Some falsehoods can hurt or even ruin individual lives. For all these reasons, it is sensible to hope that social norms and even laws will chill them.”).

277. Melissa De Witte et al., *Regulation Has To Be Part of The Answer' To Combating Online Disinformation, Barack Obama Said at Stanford Event* (Apr. 21, 2022), <https://news.stanford.edu/2022/04/21/disinformation-weakening-democracy-barack-obama-said> [https://perma.cc/36CV-485U] [https://web.archive.org/web/https://news.stanford.edu/2022/04/21/disinformation-weakening-democracy-barack-obama-said].

2023]

REGULATING ALGORITHMIC DISINFORMATION

417

disinformation review system to effectively empower administrative oversight and dynamically engage social media users.

Kings, Treasures, and Looting: The Evolution of Sovereign Immunity and the Foreign Sovereign Immunities Act

Leila A. Amineddoleh*

TABLE OF CONTENTS

Introduction.....	420
I. Foreign Sovereign Immunity	420
A. The History of Sovereign Immunity	420
B. U.S. Application of Sovereign Immunity.....	421
C. The Foreign Sovereign Immunity Act.....	423
D. Exceptions to the FSIA and Their Drafting.....	424
II. The FSIA’s Application in Fine Art Disputes	424
A. Sovereign Immunity in Cases Concerning Nazi-Looted Art	424
1. Resolving Disputes Involving Nazi Thefts	424
2. U.S. Jurisprudence Addressing Nazi Loot	428
3. Expropriation Exception and the FSIA’s Application to Nazi-Looted Art.....	430
4. The Re-evaluation of FSIA Claims in Nazi-Looted Art Cases	433
III. Antiquities Disputes.....	439
A. Looted Antiquities and Efforts to Protect and Repatriate Them	439
B. Ownership Claims Against Governments and in Contravention of Repatriation.....	444
1. Greeks and Their Horses.....	444
2. A Purportedly Not-So-Neutral Switzerland.....	447
3. Alexander or a Parthian Barbarian?	449
C. The FSIA and the Antiquities Market Today.....	452
IV. Conclusion.....	454

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*I think the King is but a man, as I am. The violet smells to him as it doth to me. The element shows to him as it doth to me. All his senses have but human conditions. His ceremonies laid by, in his nakedness he appears but a man.*¹

INTRODUCTION

Last year witnessed the conclusion of a long-fought dispute between a private party and a foreign government over an art collection with significant cultural value. It involved a treasure of ecclesiastical objects dating back to Medieval Germany that had once belonged to the royal House of Guelph and housed in the muralled medieval Brunswick Cathedral in Braunschweig, Germany. Ultimately, after over a decade of fighting, the controversy's resolution did not involve an ownership determination by a U.S. court. Rather, the high court abstained from making a determination and instead declined to exercise jurisdiction over Germany. The lack of decision was not surprising, particularly in light of delicate foreign policy issues at play and the importance of keeping the judiciary out of international political disputes. The court's unanimous decision was consistent with prior holdings, and so perhaps it was foreseeable that the court did not examine the merits of the ownership claims. However, a line of cases against Greece, Switzerland, and Italy did come as a shock, because they involved claims against foreign countries for asserting ownership interests in antiquities that were suspected of having been looted. Never before had governments been sued for their actions regulating the antiquities market and working to protect cultural artifacts.

I. FOREIGN SOVEREIGN IMMUNITY

A. THE HISTORY OF SOVEREIGN IMMUNITY

The Golden Rule: do unto others as you would have them do unto you. The international law equivalent is sovereign immunity: simply put, keep out of our courts and we will keep you out of ours. The doctrine of sovereign immunity provides that a foreign sovereign government is not susceptible, without its consent, to the judicial process of adjudicative bodies in other states. In other words, a foreign sovereign is not compelled to defend itself in a foreign court without its consent. Although foreign sovereign immunity has been respected by courts since the early years of the U.S. Republic, this concept dates back even farther, with its origins founded in the earliest common law.

Derived from the Latin *Rex Non Potest Peccare*, the principle that the sovereign was immune from legal action, either by right, lack of jurisdiction, or simple inability to provide remedy, was absolute under Roman common law. Support can be found in Justinian's *Corpus Juris Civilis*, attributed to the jurist Ulpian: "*Princeps Legibus Solutus Est*," meaning "the emperor is not bound by statute."² The principle was later adopted

1. WILLIAM SHAKESPEARE, *HENRY V* act 4, sc. 1, ll. 105–09.

2. DIG 1.3.31 (Ulpian, *Lex Julia et Papia* 13).

into British common law, distilled into the oft-cited maxim “the King can do no wrong,” first recorded in the thirteenth century.³ During this time, the King was accorded a special status separate from the conventional law and could not be sued in his own courts.⁴ Ironically, the phrase was first used to describe King Henry III during his reign as a minor; until he came of age in 1224, he lacked full authority for any action, right or wrong.⁵ Over time, however, this phrase evolved into an unquestionable exemption of the monarch from ordinary legal action.⁶

Absolute immunity persisted under the influence of the Enlightenment. England developed a dualist view of the monarchy as comprising “two bodies:” the royal person and the representative of the state, whereby only the latter was immune from suit.⁷ In the 1562 *Duchy of Lancaster* case, this dual view was used to defend land grants made by King Edward VI while underage. Despite any natural infirmity he may have had at the time, crown lawyers argued the King’s “body politic” was infallible and free of any natural defects.⁸ Over the next few centuries, courts struggled to delineate between the King’s individual self and his perfect political authority as succeeding monarchs exerted varying levels of control over government actions.⁹ In place of the monarchy, Parliament became the controlling authority in England and, operating under the authority of the Crown, inherited its immunity for official government acts.¹⁰ The practice would remain unquestioned until the mid-twentieth century. As nations around the world took on a host of social and commercial functions and rendered traditional sovereign immunity impracticable, the doctrine was once again ripe for review.

B. U.S. APPLICATION OF SOVEREIGN IMMUNITY

The United States Supreme Court first articulated its recognition of foreign sovereign immunity over two centuries ago in *Schooner Exchange v. McFaddon*.¹¹ This case involved a libel action brought by owners of a vessel seized by French naval forces during a transatlantic trip.¹² Chief Justice John Marshall recognized that wrongs committed by foreign sovereigns were more appropriately addressed by diplomatic—rather than judicial—means.¹³ Granting deference to the executive branch, Chief Justice

3. See A. LAWRENCE LOWELL, *GOVERNMENT OF ENGLAND* 27 (1908).

4. 1 W.S. HOLDSWORTH, *A History of English Law* 464–65 (3d ed. 1923).

5. See LOWELL, *supra* note 3.

6. *Id.*

7. Guy I. Seidman, *The Origins of Accountability: Everything I Know about the Sovereign’s Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 429 (2005).

8. *Id.* at 454.

9. *Id.* at 455–56.

10. *Id.* at 456.

11. 11 U.S. 116 (1812).

12. *Id.* at 117.

13. James E. Berger & Charlene Sun, *Sovereign Immunity: A Venerable Concept In Transition?*, PAUL HASTINGS (May 3, 2011), <https://www.paulhastings.com/docs/default-source/PDFs/1902.pdf> [<https://perma.cc/ZDG9-J6NV>] [<https://webstorage.paulhastings.com/Documents/PDFs/1902.pdf>].

Marshall determined that the United States did not have jurisdiction over the French government.¹⁴ The Court found that a nation's power within its own borders is exclusive.¹⁵

The Court recognized sovereign immunity as a common-law doctrine with its roots in international comity. Accordingly, it placed authority over immunity determinations with the executive branch, consistent with its role as the government branch with primary responsibility for the conduct of foreign affairs.¹⁶ The decision emphasized that as a matter of grace and comity, members of the international community had implicitly agreed to waive jurisdiction over other sovereigns in certain classes of cases.¹⁷ The Court stated, “[the] perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”¹⁸ Since its inception, courts have relied on the *Schooner* opinion for guidance.¹⁹

However, this decision was problematic because immunity determinations were made inconsistently over the centuries. In an attempt to resolve this inconsistency, the Department of State issued a letter (the “Tate Letter”) in 1952. The letter abandoned absolute immunity and replaced it with the “restrictive theory” of sovereign immunity.²⁰ This theory reflected the view that customary international law had evolved to permit adjudication of disputes arising from a state's commercial activities (*acta jure gestionis*) while preserving immunity for sovereign, or “public,” acts (*acta jure imperii*).²¹ Essentially, states were granted immunity only for their governmental or public acts, not their private or commercial ones.²² Unfortunately though, the Tate Letter did not fully resolve the ambiguities in jurisdictional determinations because it did not effectively distinguish between private and commercial acts.²³ As a result, the State Department continued reaching jurisdictional determinations on a case-by-case

14. See *Schooner Exch.*, 11 U.S. at 117.

15. See *Schooner Exch.*, 11 U.S. at 116.

16. Berger & Sun, *supra* note 13.

17. See *Schooner Exch.*, 11 U.S. at 137.

18. *Id.*; see also *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (referring to Chief Justice Marshall's opinion in *Schooner Exch.*, 11 U.S. and stating in footnote 9, “Chief Justice Marshall went on to explain, however, that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign.”).

19. See *Republic of Austria*, 541 U.S. at 686 (stating “Chief Justice Marshall's opinion in *Schooner Exchange v. McFaddon* is generally viewed as the source of our foreign sovereign immunity jurisprudence.”).

20. See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dep't State Bull. 984–85 (1952).

21. Under the “restrictive” theory, foreign states retain immunity for sovereign public acts but not for private commercial acts. See *Republic of Austria*, 541 U.S. at 689–91.

22. *Id.*

23. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 271–72 (S.D.N.Y. 2001).

basis, which courts generally accepted without conducting their own analysis.²⁴ The Tate Letter “thr[ew] immunity determinations into some disarray,” since “political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory.”²⁵ The courts’ inconsistent application of foreign sovereign immunity signaled the need for a more formal rule.²⁶

C. THE FOREIGN SOVEREIGN IMMUNITY ACT

To ensure that consistent jurisdiction determinations were made, Congress “abated the bedlam” in 1976 with the passage of the Foreign Sovereign Immunities Act’s “comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.”²⁷ The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (the “FSIA”), was enacted “to codify a ‘restrictive theory’ of sovereign immunity that had been the State Department’s policy since 1952; the theory provided that foreign sovereigns would be immune with respect to public acts of state but not with respect to act that were commercial in nature of those which private persons normally perform.”²⁸ As such, the FSIA provides the sole and exclusive basis for jurisdiction over foreign states, and their instrumentalities and political subdivisions.²⁹ The Supreme Court has consistently held that the FSIA’s structure and text indicate Congress’ intention for this statute to be the only means of obtaining jurisdiction over a foreign sovereign.³⁰ The Court recognized that after the FSIA’s enactment, it (and not pre-existing common law) “indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.”³¹ Hence, the FSIA “must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.”³²

24. Berger & Sun, *supra* note 13; see Brief for the United States as Amici Curiae Supporting Petitioners, *Samantar v. Yousef*, 130 S. Ct. 2278 (2010) (No. 08–1555).

25. *Republic of Arg. v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014) (citing *Republic of Austria*, 541 U.S. at 690).

26. Ikenna Ugboaja, *Exhaustion of Local Remedies and the FSIA Takings Exception: The Case for Deferring to the Executive’s Recommendation*, 87 U. CHI. L. REV. 1937, 1940–41 (2020).

27. *Republic of Arg.*, 134 S. Ct. at 2255.

28. *Williams v. Nat’l Gallery of Art, London*, No. 16-CV-6978 (VEC) 2017 WL 4221084, at *4 (S.D.N.Y. Sept. 21, 2017).

29. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989); *Af-Cap v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006) (citing *Republic of Austria*, 541 U.S. 677, 691 (2004)).

30. See *Amerada Hess Shipping Corp.*, 488 U.S. at 434.

31. *Republic of Arg.*, 134 S. Ct. at 2256 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)).

32. *Amerada Hess Shipping Corp.*, 488 U.S. at 434–35 (quoting *Verlinden B.V. v. Capital Bank of Nigeria*, 461 U.S. 480, 493 (1983)).

D. EXCEPTIONS TO THE FSIA AND THEIR DRAFTING

A foreign state is presumptively immune from the jurisdiction of U.S. courts, unless a specified exception to the FSIA applies.³³ These exceptions include actions involving waiver of immunity, commercial activity, rights in property taken in violation of international law, rights in property in the United States, tortious acts occurring in the United States, and actions brought to enforce arbitration agreements with a foreign state, all outlined in 28 U.S.C. § 1605(a) (2006). A federal court cannot hear claims against sovereign nations unless the claims fall within one of these enumerated exceptions.³⁴

II. THE FSIA'S APPLICATION IN FINE ART DISPUTES

The FSIA's application in fine art disputes has typically involved the expropriation exception (as discussed below). The first case that stripped a sovereign of its immunity in the context of an art dispute was *Republic of Austria v. Altmann*, a litigation that arose from a property dispute resulting from atrocities committed during the Second World War, including the looting of art by the Nazi Party.³⁵ However, case law, legislation, and international efforts addressing the restitution of Nazi-looted art date back nearly eighty years.

A. SOVEREIGN IMMUNITY IN CASES CONCERNING NAZI-LOOTED ART

1. Resolving Disputes Involving Nazi Thefts

The Second World War led to the vast displacement of property in Europe. It has been estimated that the Nazi Party looted twenty percent of all the art and cultural property in Europe (this figure includes jewelry, musical instruments, porcelain, and other items with market value).³⁶ The Nazis not only confiscated and stole property but required their targets to pay exorbitant flight taxes, made them abandon their homes and belongings when fleeing from the Third Reich, and threatened property owners with death or deportation to concentration camps in order to force them to sell items at a fraction of their worth. The toll of deprivation on such a massive scale is still felt decades later. After the end of conflict, European nations began the long post-war

33. 28 U.S.C. § 1330(a); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

34. *Altmann v. Republic of Austria*, 317 F.3d 954, 962 (9th Cir. 2002) (quoting *Verlinden*, 461 U.S. at 497).

35. *Republic of Austria*, 541 U.S. 677 (2004).

36. Greg Bradsher, *Documenting Nazi Plunder of European Art*, THE NAT'L ARCHIVES OF THE U.S. (Nov. 1997), <https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html> [<https://perma.cc/29M3-6S5B>] [<https://web.archive.org/web/20230214101647/https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html>].

recovery process as they attempted to recover stolen property, reconstruct damaged cities and sites, and rebuild their economies.³⁷

Recovery efforts and restitutions were conducted for private actors as well. As Allied forces moved through German territory in the final days of the Second World War, they took possession of hordes of art that had been illicitly seized by the Nazi Party in an effort to reunite property with rightful owners.³⁸ However, returning the works to owners would require a Herculean effort, as this involved finding the artwork, locating the rightful owners, and moving through the legal channels to reunite the property with theft victims or their heirs (in the case that the original owner perished during the war or after).³⁹ To facilitate this process, the artworks were gathered at ‘collecting points’ where they could be cataloged, sorted, and intended to be restituted.⁴⁰ This process required legislation to allow original owners to reclaim property under domestic law.⁴¹

Some artworks were returned during the years immediately following the war, but many works languished in storage after military occupation ended in 1955.⁴² As more

37. See generally LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND SECOND WORLD WAR 407–44* (2009) (discussing the first fifty years of returning stolen artwork to countries of origin following World War II); see also PAUL BETTS, *RUIN AND RENEWAL: CIVILIZING EUROPE AFTER WORLD WAR II* (2020) (discussing the humanitarian efforts, peace campaigns, welfare policies, and attempts to salvage cultural heritage following the war); see also HARALD JÄHNER, *AFTERMATH: LIFE IN THE FALLOUT OF THE THIRD REICH, 1945–1955* (2019) (discussing Germany’s national reckoning with the corruption and horror of the war through personal accounts); see also BEN SHEPHARD, *LONG ROAD HOME: THE AFTERMATH OF THE SECOND WORLD WAR* (2012) (discussing the refugee crisis and relocation of refugees in the years after the war); see also Deirdre Pirro, *The Night the Bridges Come Falling Down*, *THE FLORENTINE* (Feb. 8 2007), <https://www.theflorentine.net/2007/02/08/the-night-the-bridges-come-falling-down> [<https://perma.cc/MT6P-F4AY>] [<https://web.archive.org/web/20230425212550/https://www.theflorentine.net/2007/02/08/the-night-the-bridges-come-falling-down>] (discussing the destruction of a Florentine bridge, the Ponte Santa Trinita, by German bombing in 1944, and its subsequent reconstruction by Riccardo Gizdulich in 1955).

38. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE U.S., *PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS’ ASSETS SR-142-45* (2000).

39. See *Introduction to The National Archives’ Records on Nazi-Era Looted Cultural Property, 1939–1961*, *THE UK NAT’L ARCHIVES*, <http://www.nationalarchives.gov.uk/dol/images/examples/looted-art/in-depth-intro.pdf> [<https://perma.cc/AG44-JYYA>] [<https://web.archive.org/web/https://webarchive.https://perma.cc/MT6P-F4AYnationalarchives.gov.uk/ukgwa+/https://www.nationalarchives.gov.uk/dol/images/examples/looted-art/in-depth-intro.pdf>].

40. See ROBERT M. EISEL, *MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY* (2009) (illustrating the tactics, strategies, and success stories resulting from the herculean efforts of the Monuments Men and related military forces); see also ROBERT M. EISEL, *SAVING ITALY: THE RACE TO RESCUE A NATION’S TREASURES FROM THE NAZIS* (2013) (focusing on the effort to save art and cultural heritage in Italy); see also Jim Morrison, *The True Story of the Monuments Men*, *SMITHSONIAN MAG.* (Feb. 7, 2014) <https://www.smithsonianmag.com/history/true-story-monuments-men-180949569> [<https://perma.cc/6NVV-RZNV>] [<https://web.archive.org/web/20230326145319/https://www.smithsonianmag.com/history/true-story-monuments-men-180949569>] (further explaining the roles of the professors and curators in saving works of art during World War II).

41. NORMAN PALMER, *MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE* 118 (2000).

42. Anne Rothfeld, *Nazi Looted Art*, 34 *PROLOGUE MAG.*, no 2, Summer 2002, <https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1> [<https://perma.cc/N6WY-PPZ4>] [<https://web.archive.org/web/20230410121512/https://www.archives.gov/publications/prologue/2002/>

time passed, the numerous challenges associated with reclaiming property continued to mount. The task of returning stolen property resumed even after occupying nations withdrew. Individual nations then took the lead in establishing committees and passing laws aimed at restituting stolen property taken from within their borders or stolen from their citizens. As could be expected after the end of a wide-scale and devastating global conflict, nations struggled to properly address the loss and horrors that accompanied World War II. As a result (and perhaps also due to opportunistic behavior), the mechanisms available for restitution involved bureaucratic complexities, short deadlines, and challenging hurdles that proved burdensome or insurmountable to many claimants. Ultimately, many works were not returned, and some unclaimed property made its way into private collections and national museums.⁴³

In some instances, claimants were unable to recover property after being told that they had sold their artwork to the Nazis, even when those items were sold under duress at prices well below market value.⁴⁴ Other claimants received exorbitantly low values for their stolen or displaced property.⁴⁵ And in other instances, theft victims were simply unaware that they had title to artwork or they lacked documentation sufficient

summer/nazi-looted-art-1]. Allied forces maintained a nearly ten-year occupation that ended on May 5, 1955, with a proclamation declaring an end to the military occupation of West Germany. *The Army and the Occupation of Germany*, NAT'L ARMY MUSEUM, <https://www.nam.ac.uk/explore/occupation-and-reconstruction-germany-1945-48> [<https://perma.cc/7823-7UF7>] [<https://web.archive.org/web/20230410221604/https://www.nam.ac.uk/explore/occupation-and-reconstruction-germany-1945-48>].

43. After the war, some national museums took advantage of the displacement of art by nationalizing private citizens' personal property put onto the art market through forced sales orchestrated by the Nazis. When surviving families who sold under these conditions brought ownership claims, some museums responded with the defense that their acquisitions were the result of legitimate business transactions. For example, the Dutch nationalized the private collection of the family of Simon Goodman, whose grandparents' art collection was sold under the threat of death during Nazi occupation. Goodman's family's collection was vast, and included highly valuable pieces, such as an 1890 Degas landscape, that the Dutch government was loath to part with. The struggle the Goodman family has faced in subsequent generations to reacquire ownership of the collection illuminates how the Dutch government used the confusion following the war and the death of Goodman's grandparents in the concentration camps to add priceless works to Dutch museums. See Phil Hirschhorn, *70 Years On, the Search Continues for Artwork Looted by the Nazis*, PBS (Apr. 30, 2016, 2:43 PM), <https://www.pbs.org/newshour/show/70-years-on-the-search-continues-for-artwork-looted-by-the-nazis> [<https://perma.cc/BV3C-WPPH>] [<https://web.archive.org/web/20230216004912/https://www.pbs.org/newshour/show/70-years-on-the-search-continues-for-artwork-looted-by-the-nazis>]. Another example involves the Ephrussi family. The family, a renowned Russian-Jewish banking and oil dynasty, lost its prized art collection during the Nazi annexation of Austria in 1938. Works owned by the Ephrussi family were retained by the Austrian government following the war, including the Franz Adam painting *Camp Scene from 1848 in Italy*. The painting was given to the Austrian Gallery in 1938 and later sold to the Museum of Military History. The work remained there until 2021 when it was finally restored to the rightful heir of Viktor Ephrussi (the family member from whom the work was stolen). At the time of the restitution, Defense Minister Klaudia Tanner stated that the delay was due to the lengthy proceedings required to formally confirm the recipient as Viktor's rightful heir. See *Jewish Museum Vienna: Restitution to Ephrussi Family After Decades*, VINDOBONA VIENNA INT'L NEWS (Sept. 14, 2021, 2:45 PM), <https://www.vindobona.org/article/jewish-museum-vienna-restitution-to-ephrussi-family-after-decades> [<https://perma.cc/SQ3Y-JPRZ>] [<https://web.archive.org/web/20230216005430/https://www.vindobona.org/article/jewish-museum-vienna-restitution-to-ephrussi-family-after-decades>].

44. See generally NICHOLAS, *supra* note 38, at 407–44.

45. *Id.*

to support their claims.⁴⁶ Luckily, information about the displacement of property became more readily available after the end of the Cold War when details about Nazi looting and other war-time transactions became publicly available.⁴⁷ This information led to the passage of new laws and national commissions. Unfortunately, these efforts were also imperfect, in part because navigating bureaucratic channels was an impracticable hurdle. These processes have been criticized with accusations that nations profited from the displacement of property by taking the opportunity to nationalize valuable artworks that had previously been in private hands.

For example, the Dutch Restitutions Committee faced criticism over its refusal to return works in its collection to the families from whom they were stolen during World War II. The famous “Kandinsky refusal,”⁴⁸ for example, illustrates the reluctance of the Dutch Commission to return valuable pieces to private citizens, even when its own members themselves openly recognize that they may be unjustly retaining ownership by refusing to part with the artwork. In the Kandinsky matter, the painting at issue was not returned to the family of a Holocaust survivor for decades, even though the Committee agreed that its restitution process was “fault[y].”⁴⁹ The Committee stated an intention to be more empathetic to private owners in the future, though the results of this illusory promise took years to come to fruition.⁵⁰ As rightful owners were unable to reclaim their lost or stolen property through national commissions or courts in Europe, claimants began filing cases in other jurisdictions. Eventually, as art moved across the globe, restitution demands and complaints were filed across the Atlantic.

46. Saskia Hufnagel & Dunkin Chappell, *The Gurlitt ‘Collection’ and Nazi-Looted Art*, in THE PALGRAVE HANDBOOK ON ART CRIME 587–606 (Hufnagel & Chappell eds., 2019).

47. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, PLUNDER AND RESTITUTION: THE UNITED STATES AND HOLOCAUST VICTIMS’ ASSETS SR-139-4 (2000).

48. In the Kandinsky refusal, Amsterdam’s Stedelijk Museum was not required to return a 1909 painting by Wassily Kandinsky to the claimant heirs. The painting, *Painting with Houses*, was acquired by the museum at a significantly reduced price, five months after the German occupation of the Netherlands in 1940. In refusing to return the work to the heirs of the original Jewish owner, the museum claimed that the sale by the original owners was both voluntary and precipitated by their change in financial circumstances, rather than by the pressures of German occupation. See Sarah Hucal, *Disputed Kandinsky Won’t Be Returned to Jewish Heirs*, DW (Dec. 16, 2020), <https://www.dw.com/en/nazi-looted-art-trial-disputed-kandinsky/a-55957434> [<https://perma.cc/MT6A-ZHUU>] [<https://web.archive.org/web/20230216013315/https://www.dw.com/en/nazi-looted-art-trial-disputed-kandinsky/a-55957434>]. The work was finally returned in August 2021, after the museum cited a “moral obligation” to return it. Angelica Villa, *Amsterdam To Restitute Kandinsky Painting To Heirs After Years-Long Dispute*, ARTNEWS (Aug. 30, 2021), <https://www.artnews.com/art-news/news/amsterdam-restitutes-wassily-kandsinky-painting-1234602572> [<https://perma.cc/X98U-GL4Z>] [<https://web.archive.org/web/20230222025144/https://www.artnews.com/art-news/news/amsterdam-restitutes-wassily-kandsinky-painting-1234602572>].

49. Nina Siegal, *Dutch Court Rules Against Jewish Heirs on Claim for Kandinsky Work*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/12/16/arts/design/kandinsky-stedelijk-museum-restitution.html> [<https://perma.cc/78GL-QE2L>] [<https://web.archive.org/web/20230216015831/https://www.artnews.com/art-news/news/amsterdam-restitutes-wassily-kandsinky-painting-1234602572>].

50. *Id.*

2. U.S. Jurisprudence Addressing Nazi Loot

The first case in a U.S. court for the recovery of Nazi-looted property, *Menzel v. List*, was filed in 1962 when a Jewish woman sued American collectors for the return of a Marc Chagall painting.⁵¹ Ms. Menzel had her art collection seized by the Nazis after she and her husband fled from their home in Brussels, Belgium. The work eventually made its way to the reputable Perls Gallery in Paris, France where it was purchased by seemingly good faith purchasers, the Lists. The Lists urged the court to dismiss the case due to time limitations. In a monumental move, the court crafted a new exception to toll the statute of limitations from running. The demand and refusal rule, now followed by New York courts, holds that a cause of action does not occur until the rightful owner demands return of property and the good faith purchaser refuses to return it.⁵² At that point, the good faith purchaser becomes a malfeasor.⁵³ The exception is a powerful tool for rightful owners because it allows them to recover stolen property that might have been hidden from view and impossible to claim for years or even decades. Once the court rejected the Lists' motion to dismiss based on the expiration of the statute of limitations, the court examined ownership issues complicated by the backdrop of World War II, ultimately determining that the Menzels did not abandon their property when fleeing for their lives.⁵⁴ Abandonment is a voluntary relinquishment of a known right, and the court likened Ms. Menzel's relinquishment of the painting to the movement of property during a holdup, not a voluntary transfer.⁵⁵

The court further held that title never legitimately passed to the Nazi Party under the Act of State Doctrine.⁵⁶ (The Act of State doctrine says that a nation is sovereign within its own borders, and its domestic actions may not be questioned in the courts of another nation; the United States refrains from examining the validity of acts of foreign governments where those acts take effect within the territory of the foreign State.⁵⁷) The Act of State doctrine was not applicable because the Third Reich was never a foreign sovereign government recognized by the United States. Further, the painting was taken from Belgium, a sovereign nation outside of the Third Reich's borders.⁵⁸ Finally, the court held that the artwork was plundered in violation of international

51. *Menzel v. List*, 49 Misc. 2d 300 (Sup. Ct. 1966), *modified*, 28 A.D.2d 516 (1967), *rev'd*, 24 N.Y.2d 919 (1969).

52. *Id.* at 305.

53. *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F. 2d 1150, 1161 (2d. Cir. 1982) (explaining that the good faith purchaser is innocent until he or she refuses to deliver property to "the true owner").

54. *Menzel*, 49 Misc. 2d at 305.

55. *Id.*

56. *Id.* at 308–14.

57. *The Act of State Doctrine Article*, U.S. LEGAL, <https://actsofstatelaws.uslegal.com/the-act-of-state-doctrine-article> [<https://perma.cc/AM3V-L2UH>] [<https://web.archive.org/web/20230216020914/https://actsofstatelaws.uslegal.com/the-act-of-state-doctrine-article>].

58. *See Menzel*, 49 Misc. 2d at 311.

treaties.⁵⁹ Because the Nazi's seizure was a theft, good title never passed to any subsequent purchasers, including the Lists.⁶⁰

Menzel v. List is a landmark Nazi restitution matter, and one that challenged the court to consider ownership disputes in the context of a horrific period in human history. Understandably, the court struggled with its decision to recognize that the controversy was between two innocents, and that one of two innocent parties would ultimately bear the loss.⁶¹ “[t]he resolution of these problems is made the more difficult in view of the fact that one of two innocent parties must bear the loss.”⁶² In deciding between the parties, the court may have been influenced by the Menzels' victimization by the Nazis.⁶³ In addition, the Lists had other remedies available. Although the painting itself was returned from the Lists to the Menzels, the couple recovered the value of the painting's fair market value after they impleaded the Perls Gallery. Not only were the Lists made whole, but they received the fair market value of the Chagall work, a price substantially higher than what they had paid for it a decade prior.⁶⁴

In the following decades, a number of cases came before U.S. courts, opening legal pathways for victims and their heirs to file replevin claims for art stolen during the Second World War. In another precedent-setting case, the Federal District Court of Rhode Island was the first U.S. court that equated a forced sale (a situation in which an owner is forced to sell or liquidate property) during WWII to a theft.⁶⁵ The First Circuit affirmed the district court's ruling that the heirs of Max Stern (a Jewish art dealer) satisfied the three requirements of a replevin action for an artwork: (1) Stern owned the painting and never voluntarily relinquished his ownership; (2) there was an unlawful taking; and (3) Bissonette (the possessor) was in wrongful possession of the work because his step-father had purchased the painting at a forced sale and thus never acquired good title to it.⁶⁶ The court ruled that Stern's “relinquishment of his property was anything but voluntary” and thus the Nazi's actions were properly classified as looting or stealing.⁶⁷ With that case as ammunition, owners required to sell property could file for replevin based on the fact that a forced sale to the Nazis was invalid.

59. *Id.*

60. *Id.* at 315.

61. *Id.* at 304.

62. *Menzel v. List, modified*, 279 N.Y.S.2d 608 (App. Div. 1967) (per curiam), *modification rev'd*, 246 N.E.2d 742 (N.Y. 1969).

63. Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 72 (1995).

64. *Menzel v. List*, 24 N.Y.2d 91, 94 (1969).

65. *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300 (D.R.I. 2007); *aff'd*, 548 F.3d 50 (1st Cir. 2008).

66. *Id.* at 307–08.

67. *Id.* at 307.

3. Expropriation Exception and the FSIA's Application to Nazi-Looted Art

Claims for the restitution of Nazi-looted art do not involve only private party defendants. Some have named foreign governments as both complicit and active in the role of looting. As noted earlier, looted artworks have entered both national and public collections. With national ownership in dispute, the FSIA became an important consideration in arts disputes. In particular, the expropriation exception has been the focus in Nazi-looted art cases due to the fact that the Third Reich quite literally expropriated private property to either nationalize it or transfer it into the private collections of Nazi officials.

The Woman in Gold (Adele Bloch-Bauer)

Perhaps the best-known art battle involving an immunity determination was the litigation for the famed *Portrait of Adele Bloch-Bauer I* (now also known as *Woman in Gold*) by Gustav Klimt. The woman portrayed in the painting is Adele Bloch-Bauer, the wife of Ferdinand Bloch-Bauer. Bloch-Bauer had a large art collection, including a number of works by Klimt. Adele had asked her husband to donate the Klimt works to the Austrian Gallery Belvedere upon her death.⁶⁸ Adele Bloch-Bauer passed away in 1925.⁶⁹ Unbeknownst to her, Austria would later fall to the Nazis, leading Ferdinand to ignore his wife's wishes and not gift the Klimt works to the Austrian government.

When Ferdinand fled from Vienna in 1938, the Nazis seized his home and his personal property. He attempted to recover everything after World War II, but he died in 1945 and the property remained with the Austrian government. The terms of his will bequeathed all his property interests to his heirs. After the war, Ferdinand's heirs sought the recovery of the paintings, but the Austrian gallery in possession of them claimed that it rightfully owned them. Finally, in 1999, an heir of Bloch-Bauer, Maria Altmann (through the work of journalist Hubertus Czernin), discovered information about the paintings' transfer.⁷⁰ Just the year prior, the nation passed the Austrian Art Restitution Law, intended to return works that had been donated in exchange for

68. Although Adele was the subject of some of the works, they actually all belonged to her husband. Patricia Cohen, *The Story Behind 'Woman in Gold': Nazi Art Thieves and One Painting's Return*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html> [<https://perma.cc/L5KL-Y78X>] [<https://web.archive.org/web/20230323041906/https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html>].

69. *Id.*

70. *Restitution of Looted Arts*, AUSTRIAN EMBASSY, <https://www.bmeia.gv.at/en/austrian-embassy-london/bilateral-relations/restitution-measures-for-victims-of-national-socialism/restitution-of-looted-arts/#:~:text=In%201998%20the%20so%2Dcalled,Austrian%20Federal%20Museums%20and%20Collections> [<https://perma.cc/TP8Q-G9VS>] [<https://web.archive.org/web/20211109142045/https://www.bmeia.gv.at/en/austrian-embassy-london/bilateral-relations/restitution-measures-for-victims-of-national-socialism/restitution-of-looted-arts>]; Christopher Reed, *Obituary: Hubertus Czernin*, GUARDIAN (Jul. 3, 2006, 19:06), <https://www.theguardian.com/news/2006/jul/04/guardianobituaries.austria> [<https://perma.cc/JR36-PDAG>] [<https://web.archive.org/web/20220419103136/https://www.theguardian.com/news/2006/jul/04/guardianobituaries.austria>].

export permits.⁷¹ Altman appealed to the national committee tasked with making restitution decisions. Although the committee issued the return of some Klimt drawings, it decided against the return of the paintings. Altmann then requested an arbitration, but that was also rejected by the Austrian gallery.⁷² Unable to file suit in Austria due to procedural limitations, Altmann filed suit against the state-owned Austrian gallery and the Republic of Austria in the U.S. District Court for the Central District of California.⁷³

The Republic of Austria moved to dismiss the complaint by asserting, amongst other things, its sovereign immunity. The nation argued that the U.S. District Court lacked subject matter jurisdiction due to the doctrine of sovereign immunity. Austria argued that even if the activities alleged by Altmann were an expropriation, they occurred prior to both the passage of the FSIA in 1976 and the State Department's adoption of a restrictive policy on immunity in 1952, and thus the nation was presumed immune. Altmann asserted that Austria lost its immunity because its acts fell under the expropriation exception of the FSIA. The exception is satisfied when a dispute involves: (1) property rights; (2) a taking; (3) the taking done in violation of international law; and (4) a commercial nexus with the United States.⁷⁴ Altman asserted that all of these requirements were met. The district court agreed and denied Austria's motion to dismiss. Austria appealed and the Ninth Circuit affirmed, holding that Altmann's allegations fell within the exception.⁷⁵ First, "rights in property" (the ownership rights to a collection of paintings) were at issue. Second, the artwork was taken when the Nazis seized Ferdinand Bloch-Bauer's property in contravention of his will. Third, the taking was in violation of international law; the Nazis took the paintings not for a public purpose, but for personal gain. Further, the taking was discriminatory because it was based upon Ferdinand fleeing under anti-Semitic laws. Additionally, the taking was in violation of international law because the works were never returned to Ferdinand or his heirs and they were never compensated for their loss. Finally, the Ninth Circuit found that Altmann proved the requisite commercial nexus with the United States. The Austrian gallery had authored, edited, published, and marketed *Klimt's Women*, a book featuring the property in question, in the United States. In addition, the Gallery

71. *The Austrian Art Restitution Law*, COMM'N FOR ART RECOVERY, <http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf> [<https://perma.cc/39V2-7AN4>] [<https://web.archive.org/web/20230216022126/http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf>].

72. *Six Klimt Paintings—Maria Altmann and Austria*, ARTHEMIS, <https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria#:~:text=The%20request%20was%20rejected%20in,i.e.%20around%20%24%201.6%20million> [<https://perma.cc/9MN6-G6CV>] [<https://web.archive.org/web/20230123110956/https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria>].

73. If Altmann pursued the lawsuit in Austria, she would have been required to pay a filing fee that was a percentage of the amount in suit. Due to the artworks being valued at approximately \$135 million, Altmann would have been required to pay about \$1.6 million to sue in Austria. *Altmann v. Republic of Austria*, 317 F.3d 954, 961 (9th Cir. 2002).

74. 28 U.S.C. § 1605(a)(3).

75. *Altmann*, 317 F.3d at 968.

advertised within the United States to increase the number of visitors for the gallery (a commercial purpose).

Austria appealed the decision, and the U.S. Supreme Court granted a *writ of certiorari*. The Supreme Court addressed a narrow question: does the FSIA apply to events that occurred prior to the Act's enactment, and even before the adoption of the 'restrictive theory' of sovereign immunity in 1952?⁷⁶ The court took an expansive approach to the FSIA to apply it retroactively. The court found that the Act, and thus the expropriation exception, applies to takings that occurred years before its enactment. The court relied upon the FSIA's preamble, structure, and purposes, reasoning that "Congress' purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if, in post-enactment cases concerning pre-enactment conduct, courts were to continue to follow the same ambiguous and politically charged 'standards' that the FSIA replaced."⁷⁷ Although the decision ruled that the FSIA applies retroactively, enabling Altmann to sue Austria (and in turn, providing other plaintiffs with the opportunity to sue foreign governments for past acts), the Supreme Court never made an ownership determination. Before that analysis could be made on remand, the Republic of Austria voluntarily entered into a binding arbitration proceeding.⁷⁸

While the outcome of the case was widely lauded a success in the battle for restitution, the Supreme Court noted the "deference" given to the U.S. government, which filed an amicus brief on behalf of Austria arguing that claims against a foreign country were appropriately addressed diplomatically and not through litigation. Additionally, Justice Kennedy's dissent warned that the majority's opinion "injects great uncertainty into our relations with foreign countries."⁷⁹ *Altmann* has continued to be celebrated (particularly as it led to the restitution of the *Woman in Gold* that is on permanent display in the Neue Galerie intended to recount the challenges in restitution actions), but the case left some questions unanswered as the parties ultimately resolved their dispute *via* arbitration, not a decision based on the merits in a U.S. court.

76. Republic of Austria v. Altmann, 541 U.S. 677, 681 (2004).

77. *Id.* at 699–700 (quoting *Verlinden*, 461 U.S. at 487–88).

78. An Austrian arbitration panel unanimously ruled that Altmann was the owner of five of the six paintings in dispute. They were returned to Altmann in 2004. Four of the paintings sold at auction that year, while the fifth was purchased for the Neue Galerie in New York City for \$135 million (at the time, it was said to be the highest price paid for a painting). Christopher Reynolds & Anne-Marie O'Connor, *Klimt Painting Sells for Record Amount*, L.A. TIMES (June 19, 2006) <https://www.latimes.com/archives/la-xpm-2006-jun-19-me-klimt19-story.html> [<https://perma.cc/4TH6-VC2M>] [<https://web.archive.org/web/20230217172545/https://www.latimes.com/archives/la-xpm-2006-jun-19-me-klimt19-story.html>].

79. *Altmann*, 541 U.S. at 702 n.23 (2004).

4. The Re-evaluation of FSIA Claims in Nazi-Looted Art Cases

In 2020, the U.S. Supreme Court agreed to examine two property disputes, both involving the horrors of World War II and the return of Holocaust-looted property.⁸⁰ The Court considered two questions: first, whether suits concerning property taken as part of the Holocaust are within the expropriation exception of the FSIA and second, whether a foreign state may assert a comity defense that is outside of the FSIA's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state."⁸¹ In answering these questions, the Court analyzed the FSIA against the backdrop of facts presented in *Federal Republic of Germany v. Philipp* and simply released a one-line ruling in *Republic of Hungary v. Simon* stating, "The judgment of the United States Court of Appeals for the D.C. Circuit is vacated, and the case is remanded for further proceedings consistent with the decision in *Federal Republic of Germany v. Philipp*."⁸² So what was the ruling in *Philipp*?

The Guelph Treasure (Philipp v. Germany)

Philipp v. Germany involved the battle for a collection of ecclesiastical treasures that came into the possession of the princely House of Guelph held in Germany since 1671. It is known as one of the most important collections of medieval German ecclesiastical art. In 1929, the collection of eighty-two objects was sold to a consortium of Jewish art dealers for 7.5 million Reichsmark. During the next five years, the consortium sold forty of the pieces for 2.5 million Reichsmark.⁸³ Forty-two pieces remained with the consortium.⁸⁴

The litigation over ownership of the Treasure stems from a long-running dispute between the claimants (heirs of the consortium's members) against the German government and the Prussian Cultural Heritage Foundation (*Stiftung Preussischer Kulturbesitz*) ("SPK"), a government instrumentality controlling the Museum of Decorative Arts in Berlin where the remaining pieces of the priceless collection are

80. See *Republic of Hung. V. Simon*, 141 S. Ct. 691 (2021); see also *Fed. Republic of Ger. V. Philipp*, 141 S. Ct. 703 (2021).

81. Coleman Saunders, *Summary: Supreme Court Oral Argument in Federal Republic of Germany v. Philipp*, LAWFARE (Jan. 12, 2021), <https://www.lawfareblog.com/summary-supreme-court-oral-argument-federal-republic-germany-v-philipp> [<https://perma.cc/V49S-Z9MJ>] [<https://web.archive.org/web/20230217213155/https://www.lawfareblog.com/summary-supreme-court-oral-argument-federal-republic-germany-v-philipp>].

82. *Simon*, 141 S. Ct. 691 (2021).

83. Henri Neuendorf, *Battle Over \$250 Million Guelph Treasures Rages as Germany Files Motion To Dismiss U.S. Lawsuit*, ARTNET NEWS (Nov. 2, 2015), <https://news.artnet.com/art-world/guelph-treasure-germany-to-dismiss-us-lawsuit-352982> [<https://perma.cc/X5YE-Z7BE>] [<https://web.archive.org/web/20230217214300/https://news.artnet.com/art-world/guelph-treasure-germany-to-dismiss-us-lawsuit-352982>].

84. *Id.*; Graham Bowley, *Court Rules for Germany in Nazi-Era Dispute Over the Guelph Treasure*, N.Y. TIMES (Aug. 31, 2022), <https://www.nytimes.com/2022/08/31/arts/design/germany-nazi-era-dispute-guelph-treasure.html> [<https://perma.cc/4ALB-WUPU>] [<https://web.archive.org/web/20230331134209/https://www.nytimes.com/2022/08/31/arts/design/germany-nazi-era-dispute-guelph-treasure.html>].

displayed.⁸⁵ The claimants allege that SPK wrongfully possesses the remaining objects in the collection because the German-Jewish owners purportedly sold them under duress for 4.25 million Reichsmark (a price they claim was well below market value) during the Nazi Era.⁸⁶ They assert that, starting in 1933, Nazi-imposed boycotts caused the bankruptcy of the consortium's businesses and that unfair "negotiations" with SPK led them to sell the most valuable pieces of the collection for well below market value.⁸⁷ They also allege that two of the consortium owners fled Germany and paid "flight taxes" while the other died in Germany, after which time the Nazi Party seized the remaining member's property and froze his assets, including proceeds from the Treasure's sale.⁸⁸

In 2008, two of the Consortium's heirs contacted SPK seeking the Treasure's return. SPK conducted an internal investigation and determined that the coveted objects had been legally acquired. The parties then brought their dispute before a mediation panel created to issue non-binding recommendations to German museums, known as the Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property (the "Limbach Commission"). In March 2014, the Limbach Commission rejected the restitution claim; it found that due to the economic situation at the time (the Great Depression), the Prussian state had paid a fair-market price for works that the dealers had unsuccessfully attempted to sell for several years. The Limbach Commission found that "the sale of the Guelph Treasure can not [sic] be considered a forced sale."⁸⁹

In February 2015, the heirs filed suit against Germany and SPK in the United States, seeking the return of the Guelph Treasure as well as \$250 million in damages. The heirs asserted that a U.S. court has subject matter jurisdiction under the FSIA under the expropriation exception because the works were sold under duress. They argued that international law holds that "any sale of property by a Jew in Nazi Germany . . . carries a presumption of duress," and thus the sale was an expropriation.⁹⁰ Unsurprisingly,

85. *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406 (D.C. Cir. 2018), *cert. denied*, 141 S. Ct. 188 (2020), *cert. granted*, 141 S. Ct. 185 (2020).

86. *Id.* at 409.

87. Brief for Appellees at 27, *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406 (D.C. Cir. 2018) (No. 17-7064, consolidated with No. 17-7117) (claiming that "[t]he Consortium members entered into the transaction only because of that pressure, and for a price that the Nazi conspirators themselves described as a small fraction of the actual value.").

88. Brief for Appellees, *supra* note 81, at 14 (claiming that "[the Consortium member] Rosenberg had to pay 47,815 RM in Reich Flight Tax, and was expelled from Germany and paid an additional 60,000 RM, plus 591.67 RM in interest to leave").

89. Sarah Cascone, *In a Bid To Keep the \$275 Million Guelph Treasure, Germany Appeals Nazi Restitution Case To the US Supreme Court*, ARTNET NEWS (June 24, 2019), <https://news.artnet.com/art-world/guelph-treasure-appeal-1582630#:~:text=The%20German%20Advisory%20Commission%20on,onset%20of%20the%20Great%20Depression> [<https://perma.cc/HN3V-CGN5>] [<https://web.archive.org/web/20230217214057/https://news.artnet.com/art-world/guelph-treasure-appeal-1582630>].

90. Complaint at 52, *Philipp v. Fed. Republic of Ger.*, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 15-cv-00266). Paragraph 186 of *Philipp* Complaint here: [https://f.hubspotusercontent40.net/hubfs/878449/First%20Amended%20Complaint%20w%20ECF%20Stamp\(S2483099\).pdf](https://f.hubspotusercontent40.net/hubfs/878449/First%20Amended%20Complaint%20w%20ECF%20Stamp(S2483099).pdf) [<https://perma.cc/X5E2-46X8>] [<https://web.archive.org/web/20230217180724/https://f.hubspotusercontent40.net/hubfs/878449/First%20Amended%20Complaint%20w%20ECF%20Stamp%28S2483099%29.pdf>].

Germany filed a motion to dismiss under four main theories: (1) comity (a party cannot seek redress in US courts until it exhausts all legal remedies in Germany, or demonstrates that those efforts would be futile); (2) forum non conveniens (a discretionary power allowing courts to dismiss a case where another court, such as one in Germany, is better suited to hear the case); (3) the expiration of the statute of limitations (Germany's filings also alluded to the affirmative defense of laches—that an unreasonable delay in filing a claim or asserting a right would prejudice the proceedings and thus the case should be dismissed) and; (4) perhaps most importantly, Germany never lost its sovereign immunity because the expropriation exception of the FSIA did not apply (Germany argued that the expropriation exception only applies to foreign nationals, and the consortium's owners were Germans).

The District Court denied in part and granted in part Germany's motion, finding that seizures from a country's nationals are a violation of international law when the seizures are part of a policy of "genocide," and the allegedly coerced sale bore a "sufficient connection to genocide."⁹¹ The District Court also rejected Germany's forum non conveniens argument. The court noted that two of the three plaintiffs were U.S. residents, the German Embassy could represent Germany in the United States, and U.S. courts regularly apply foreign laws in judicial disputes.

Germany appealed. The D.C. Circuit Court affirmed, in part, ruling that the claims against Germany and the SPK fell within the expropriation exception. However, the D.C. Circuit Court noted that the expropriation exception requires a showing of "an adequate commercial nexus."⁹² When the defendant is a foreign state, the nexus requirement can only be satisfied if the property at issue (here, the Treasure) "is present in the United States."⁹³ As the Treasure has always been in Germany, the court dismissed Germany as a defendant. However, the case proceeded against SPK because the commercial nexus requirement is less stringent for a sovereign's agency; thus, the requirement could be satisfied by any of SPK's commercial activity in the United States, not just activity related to the Treasure. The case was remanded back to the district court.

Notably, the Circuit Court's opinion included a lengthy dissent. Agreeing with Germany, Judge Katsas pointed out that the court's ruling created conflicting decisions in different U.S. circuits, and it could effectively turn the district court into a war crimes tribunal adjudicating World War II genocide claims.⁹⁴ In September 2019, Germany and SPK filed a *writ of certiorari* with the U.S. Supreme Court. They argued that the expropriation exception was inapplicable and that there is a framework for resolving these types of claims within Germany. They also argued that U.S. judicial involvement would raise sensitive diplomatic issues. Furthermore, it would contradict the stance

91. *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406, 411 (D.C. Cir. 2018), *cert. denied*, 141 S. Ct. 188 (2020), *cert. granted*, 141 S. Ct. 185 (2020).

92. *Id.* at 410.

93. *Id.* at 414.

94. *Philipp v. Fed. Republic of Ger.*, 925 F.3d 1349, 1350 (D.C. Cir. 2019). The U.S. Supreme Court would eventually cite Judge Katsas on this point. *Fed. Rep. of Germany v. Philipp*, 141 S. Ct. 703, 709 (2021).

taken by the U.S. government in its amicus brief supporting Germany's rehearing petition, arguing that the court of appeals had erred in allowing the case against SPK to go forward. Its brief argued that "[t]he United States deplores the atrocities committed against victims of the Nazi regime, and supports efforts to provide them with remedies for the wrongs they suffered. . . . Nevertheless, in permitting respondents to proceed with their suit against the SPK, the court of appeals reached two erroneous conclusions regarding the application of the FSIA."⁹⁵ In addition, the U.S. Department of Justice also urged the Supreme Court to consider the "sensitive foreign-policy question." The Supreme Court granted *certiorari*.

The case was watched closely. The Supreme Court heard arguments concerning two questions: (1) whether lawsuits concerning property taken as part of the Holocaust are within the expropriation exception and (2) whether a foreign state may assert a comity defense. The U.S. Department of State opined that the claimants' interpretation of the expropriation exception was too expansive. The State Department contended that claimants' broad reading of the exception contradicts the "restrictive theory" of sovereign immunity codified in the FSIA in that "[a] sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act (a '*jure imperii*') that the restrictive theory of sovereign immunity ordinarily leaves immune from suit."⁹⁶ On the other hand, during the argument, the heirs argued that an expropriation occurred because the Nazis took property as part of the effort to commit genocide (an obvious violation of international law), and thus the alleged forced sale was part of the commission of genocide and the treasure was "taken in violation of international law."⁹⁷ The Court disagreed.

The justices were skeptical about U.S. courts being "in the business of making sensitive judgments about the conduct of foreign governments."⁹⁸ A lawyer for the U.S. government warned that it could implicate some of our "closest allies," and invite other countries to open their courts to claims based on situations in the United States' own "unfortunate past."⁹⁹ The judges' questions signaled their concerns that the U.S. judiciary would be caught in the middle of foreign affairs and international policy, issues more appropriately addressed by the State Department.

95. Brief for the United States as Amicus Curiae at 6, *Fed. Republic of Ger. v. Philipp*, 141 S. Ct. 703 (2021) (Nos. 19-351 and 19-520) https://www.supremecourt.gov/DocketPDF/19/19-351/144249/20200526202844311_19-351%20and%2019-520%20Republic%20of%20Germany.pdf [<https://perma.cc/SG2C-NZUQ>] [https://web.archive.org/web/20230217182307/https://www.supremecourt.gov/DocketPDF/19/19-351/144249/20200526202844311_19-351%20and%2019-520%20Republic%20of%20Germany.pdf].

96. Brief for the United States as Amicus Curiae, *supra* note 86, at 10 (citing *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017)).

97. Transcript of Oral Argument at 5–6, *Fed. Republic of Ger. v. Philipp*, 141 S. Ct. 703 (2021) (No. 19-351), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-351_o7jq.pdf [<https://perma.cc/G8KU-84XC>] [https://web.archive.org/web/20221125131045/https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-351_o7jq.pdf].

98. *Id.* at 48.

99. *Id.*

In February 2021, the Supreme Court handed down its decision and vacated the Court of Appeals' ruling. In a unanimous decision, the U.S. Supreme Court agreed with Germany that the FSIA is based on the law of takings, an international law doctrine *only* applicable to a government taking foreign (not domestic) property. In making its decision, the Court restricted its analysis to the law of property and not the law of genocide. The FSIA mentions only property related offenses, and thus the expropriation exception does not apply to human rights violations. This is because international law tends to abide by the "domestic takings rule," which holds that a government's seizure of the property of its own citizen is not a matter governed by international law; "[A] foreign sovereign's taking of its own nationals' property remains a domestic affair," beyond the purview of international law.¹⁰⁰

The FSIA embodies strong policy considerations, and it is meant to keep courts out of foreign policy issues. There is a risk that reading the FSIA's exceptions too broadly will instigate retaliatory suits and leave the United States vulnerable to lawsuits abroad. The Court expressed concern over these issues. Justice Roberts noted that finding subject matter jurisdiction in *Philipp* would open U.S. district courts to lawsuits from other countries for human rights violations involving property confiscation.¹⁰¹ Roberts felt that if the Court sided with the heirs, it would undermine other provisions of FSIA, and open the United States itself to claims from foreign courts.¹⁰²

Yet the Court left an option available to the claimants. The expropriation exception does not apply to takings from a sovereign's own nationals. As Jews living during the Nazi Era, the consortium's owners were denied full citizenship, and so they may not have been considered German citizens at the time of the sale, and thus the forced sale may not have been a domestic taking outside the purview of the expropriation exception. The Court did not address that issue, but remanded the case back to the district court to determine whether that question was properly preserved for appeal.

Unfortunately for the claimants in *Philipp*, the district court did not rule in their favor on remand. On August 25, 2022, the U.S. District Court for the District of Columbia found that it lacked subject matter jurisdiction over SPK and it granted the agency's motion to dismiss the amended complaint. The district court noted that the Supreme Court did not require the district court to allow another amendment to the complaint, but only mandated the court to "consider whether the sale of the Welfenschatz [the Guelph Treasure] is not subject to the domestic takings rule because

100. Fed. Republic of Ger. v. Philipp, 141 S. Ct. 703, 709 (2021).

101. *Id.* at 713. The Court feared that under a certain line of jurisprudence, all manner of sovereign public acts could potentially blur the distinction between private and public acts, making both subject to judicial review under the FSIA. The Court anticipated that this could thus turn the expropriation exception into a multi-use path to adjudicate human rights.

102. *Id.* at 713–14. The Court further explained, "What is more, the heirs' interpretation of the phrase 'taken in violation of international law' is not limited to violations of the law of genocide but extends to any human rights abuse. Their construction would arguably force courts themselves to violate international law, not only ignoring the domestic takings rule but also derogating international law's preservation of sovereign immunity for violations of human rights law." *Id.* at 713.

the Consortium members were not German nationals at the time of the transaction, including whether this argument was adequately preserved in the District Court.”¹⁰³

The district court found that SPK had in fact raised the domestic takings argument earlier in the litigation, but the plaintiffs had never responded to it and instead relied on a theory involving a claim of genocide.¹⁰⁴ Accordingly, the court held that the claimants’ arguments against the domestic takings rule were not preserved because they never raised such challenges in opposition to SPK’s motions to dismiss. However, the court found that even if the plaintiffs had preserved a domestic takings rule argument, they would have needed to establish an exception to the rule in their complaint and that the alleged taking was an actual violation of international law, and the plaintiffs had failed to do so.¹⁰⁵

The court found that under international law, a corporation has the nationality of the state under the laws of which the corporation is organized. “Since the complaint alleges that the consortium’s only members were three Frankfurt-based firms, and the consortium’s business activities were centered in Germany, it must be treated as [a] German corporate entity.”¹⁰⁶ Thus, any taking of property of the consortium falls under the domestic takings rule. SPK asserted therefore that the nationality of the individuals at issue in this case is irrelevant because the property was owned by the German consortium or the art dealership firms.¹⁰⁷ The district court agreed. Furthermore, the district court was not required to consider whether a state violates the customary international law of takings when it takes property from an allegedly stateless person unless the court finds that plaintiffs have demonstrated that any of the Consortium members were anything other than German nationals at the time of the sale. Because this transaction falls within the domestic takings rule, it is not within the scope of the FSIA’s expropriation exception, and the court granted SPK’s motion to dismiss the second amended complaint. The president of SPK stated, “We are pleased with the decision of the U.S. District Court, which confirms the SPK’s longstanding view that this lawsuit for the restitution of the Guelph Treasure does not belong in an American court. The SPK is also of the opinion that the sale of the Guelph Treasure in 1935 was not a forced sale as a result of Nazi persecution and that the lawsuit for restitution is therefore also unfounded in substance.”¹⁰⁸ The claimants attorney stated that his team is “reviewing the decision and options to appeal.”¹⁰⁹

103. See *Philipp v. Fed. Republic of Ger.*, 839 Fed. App’x 574 (D.C. Cir. 2021) (Mem.).

104. *Philipp v. Stiftung Preussischer Kulturbesitz*, No. 15-00266, 2022 U.S. Dist. LEXIS 153297 (D.D.C. Aug. 25, 2022).

105. *Id.*

106. Def.’s Mem., ECF No. 63-1, at 34 (citing Prof. Armbruster Op. ¶¶ 22–26).

107. Def.’s Mem., ECF No. 63-1, at 37.

108. Graham Bowley, *Court Rules for Germany in Nazi-Era Dispute Over the Guelph Treasure*, N.Y. TIMES (Aug. 31, 2022), <https://www.nytimes.com/2022/08/31/arts/design/germany-nazi-era-dispute-guelph-treasure.html> [https://perma.cc/DT72-624K] [https://web.archive.org/web/20220920043506/https://www.nytimes.com/2022/08/31/arts/design/germany-nazi-era-dispute-guelph-treasure.html].

109. Sarah Cascone, *The \$250 Million Guelph Treasure Will Not Be Returned To the Heirs of Jewish Collectors, a U.S. Court Has Ruled*, ARTNET (Aug. 30, 2022), <https://news.artnet.com/art-world/the-250-million-guelph-treasure-will-not-be-returned-to-the-heirs-of-jewish-collectors-a-u-s-court-has-ruled-2167352> [https://

III. ANTIQUITIES DISPUTES

While *Philipp v. Germany* was winding its way through the court system, another litigation involving an immunity dispute was filed and it made waves in the cultural heritage sector. While the FSIA's exceptions had been applied to assert jurisdiction over foreign governments in fine art disputes, there had not been attempts to haul foreign governments into U.S. courts for cultural heritage controversies. That all changed in May 2018. Since that date, two additional cases have been filed (as of the time of the writing of this article), and the plaintiffs in all three cases were unsuccessful in asserting subject matter jurisdiction over the targeted nations.

A. LOOTED ANTIQUITIES AND EFFORTS TO PROTECT AND REPATRIATE THEM

The collecting of cultural heritage items and antiquities dates back millennia.¹¹⁰ During the Renaissance in Europe, the thirst for antiquities grew as wealthy families and aristocrats sought to acquire masterpieces from the past. Then, during the Enlightenment, the establishment of large private collections¹¹¹ and the founding of public museums¹¹² fueled the desire for antiquities. It was during this time that hoards of objects were excavated and sold to private collectors seeking to bring home a piece of history from the "Grand Tour."¹¹³ Today, the antiquities market continues to thrive

perma.cc/8JGY-Q8M2] [<https://web.archive.org/web/20230129074042/https://news.artnet.com/art-world/the-250-million-guelph-treasure-will-not-be-returned-to-the-heirs-of-jewish-collectors-a-u-s-court-has-ruled-2167352>].

110. Looting, forgery, and smuggling have long since been tactics used by collectors to both build private collections and to add to famous museums. The history of smuggling encompasses a fascinating breadth of well-known politicians, leaders, and other public figures, including the Roman Emperor Tiberius, who looted Grecian works, and Queen Christina of Sweden, who frequently stole small antiquities from her friends. See ERIN THOMPSON, *POSSESSION: THE CURIOUS HISTORY OF PRIVATE COLLECTORS FROM ANTIQUITY TO THE PRESENT* (2016).

111. Like those of Sir William Hamilton (1730–1803), whose collecting inspired a wave of vase-mania in Britain or the Torlonia family that amassed one of the best-known antiquities collections still in existence. Mia Forbes, *9 Famous Antiquities Collectors from History*, *THE COLLECTOR* (Apr. 2, 2021), <https://www.thecollector.com/famous-antiquities-collectors> [<https://perma.cc/E6UL-SHV9>] [<https://web.archive.org/web/20221001205552/https://www.thecollector.com/famous-antiquities-collectors>].

112. "The modern museum, as a secular space for public engagement and instruction through the presentation of objects, is tightly bound to several institutions that arose simultaneously in 18th and 19th-century Europe: nationalism fused with colonial expansion; democracy; and the Enlightenment." Elizabeth Rodini, *A Brief History of the Art Museum*, KHAN ACAD., <https://www.khanacademy.org/humanities/approaches-to-art-history/tools-for-understanding-museums/museums-in-history/a/a-brief-history-of-the-art-museum-edit> [<https://perma.cc/YHT6-YDH3>] [<https://web.archive.org/web/20221024041032/https://www.khanacademy.org/humanities/approaches-to-art-history/tools-for-understanding-museums/museums-in-history/a/a-brief-history-of-the-art-museum-edit>].

113. *Antiquarianism: The Construction of Museum Studies in Eighteenth Century Grand Tour Collecting, PIRANESI IN ROME* (Feb. 21, 2023), <http://omeka.wellesley.edu/piranesi-rome/exhibits/show/grand-tour-beyond/antiquarianism-museum-studies> [<https://perma.cc/79QU-B5FS>] [<https://web.archive.org/web/20230217001141/http://omeka.wellesley.edu/piranesi-rome/exhibits/show/grand-tour-beyond/antiquarianism-museum-studies>].

with the global market for art and antiquities estimated to be approximately \$50 billion annually.¹¹⁴

But for as long as people have collected antiquities, there has also been looting. In the modern era, British leaders recovered art and heritage items after the conclusion of the Napoleonic Wars. They treated the objects with special consideration by ordering that plundered works be returned to their homes.¹¹⁵ Unfortunately, those efforts did not put an end to looting. The 20th century was ripe for looting: in addition to stealing fine art, the Nazi Party also targeted cultural heritage;¹¹⁶ the Civil Wars in Cambodia in the 1970s was accompanied with extensive looting of temples and other cultural sites;¹¹⁷ and cultural sites in South America were targeted for their wealth of gold riches.¹¹⁸ Sadly, the plunder of antiquities continues around the world today, with widespread looting occurring in conflict zones such as Iraq and Syria.¹¹⁹

Treaties and international instruments addressing the protection of cultural heritage date back as early as the 19th century and new legal instruments continue to be passed.¹²⁰ Incorrectly, people often refer to 1970 as the “cutoff” date for the acquisition of antiquities, meaning that they believe it is legal to acquire objects with provenances

114. Guy Shone & Cyril Fournier, *Art and Crime - the Dark Side of the Antiquities Trade*, EURONEWS (Apr. 13, 2022), <https://www.euronews.com/next/2022/04/13/art-and-crime-the-dark-side-of-the-antiquities-trade> [<https://perma.cc/4HVZ-YRRV>] [<https://web.archive.org/web/20230126102422/https://www.euronews.com/next/2022/04/13/art-and-crime-the-dark-side-of-the-antiquities-trade>].

115. DIANA ROWELL, *PARIS: THE “NEW ROME” OF NAPOLEON I* (2012).

116. Milton Esterow, *New Research Tracks Ancient Artifacts Looted by the Nazis*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/2022/01/18/arts/design/nazis-antiquities-looted.html> [<https://perma.cc/FV2C-ZX4H>] [<https://web.archive.org/web/20221207050529/https://www.nytimes.com/2022/01/18/arts/design/nazis-antiquities-looted.html>].

117. Delphine Reuter & Malia Politzer, *How We Tracked Cambodian Antiquities To Leading Museums and Private Galleries*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Oct. 5, 2021), <https://www.icij.org/investigations/pandora-papers/how-we-tracked-ancient-cambodian-antiquities-leading-museums> [<https://perma.cc/53QH-V4C7>] [<https://web.archive.org/web/20230203051916/https://www.icij.org/investigations/pandora-papers/how-we-tracked-ancient-cambodian-antiquities-leading-museums>].

118. ROGER ATWOOD, *STEALING HISTORY: TOMB RAIDERS, SMUGGLERS, AND THE LOOTING OF THE ANCIENT WORLD* (2006).

119. U.S. GOV’T. ACCOUNTABILITY OFF., GAO-16-673, *CULTURAL PROPERTY: PROTECTION OF IRAQI AND SYRIAN ANTIQUITIES* (2008), <https://www.gao.gov/assets/gao-16-673.pdf> [<https://perma.cc/T3DH-WYFF>] [<https://web.archive.org/web/20221208233145/https://www.gao.gov/products/gao-16-673>].

120. See generally Ana Filipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, in INT’L HUM. RTS. & HUMANITARIAN L. 250 (Orna Ben-Naftali ed., 2011). The United States’ Lieber Code from 1853 influenced the Brussels Declaration on the Law of War (1874) and led to the first major international meetings in The Hague in 1899 and 1907, which prompted further refinement of cultural property protection in times of armed conflict. This resulted in the Hague Conventions, which were among the first formal international proclamations on the laws of war. International militaries did not abide by the conventions during the First World War, but the Hague Conventions of 1899 and 1907 have been updated and superseded by other treaties, including the 1935 Washington Treaty, the 1949 Universal Declaration of Human Rights, the 1949 Geneva Convention, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1995 UNESCO Convention on Stolen or Illegally Exported Cultural Objects, the 2003 UNESCO Declaration on the International Destruction of Cultural Heritage, and the 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society.

dating back to 1970 or earlier. Yet, the year 1970 does not actually have any legal significance.¹²¹ The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the “1970 UNESCO Convention”) did not create a blanket law that allows any pre-1970 item to be freely traded. In fact, individual nations had enacted cultural heritage laws prior to the 1970 UNESCO Convention, and some of those laws are still enforceable today.

Nations enacted patrimony laws to regulate the ownership, trade, and movement of cultural heritage. While these laws vary from country to country, their goal is to prevent the exploitation and theft of cultural objects and assist nations in protecting their national treasures. Efforts to protect national heritage date back to at least as early as the 16th century in Europe, when the Papal States instituted legislation for these materials.¹²² In fact, some of the oldest patrimony laws dates back to the Italian peninsula, with regional laws¹²³ predating the unification of modern day Italy.¹²⁴ This is no surprise due to the extensive artistic and archaeological riches found within the Italian borders that have appealed to voracious collectors for centuries.¹²⁵

Just as collectors were fascinated with Ancient Rome, they also had a thirst for Greek artifacts. The Hellenic Republic of Greece passed the world’s first modern patrimony law in 1834, banning the export of antiquities without a permit and outlining penal sanctions. This was groundbreaking for its time.¹²⁶ A year later, Egyptian authorities sought to pass similar legislation. Egypt has long fascinated treasure hunters, leading to the looting and destruction of cultural sites. In response, Egyptian authorities passed the nation’s first heritage decree in 1835 to prevent the removal of treasures and human remains, and those laws have been continuously updated over the decades.¹²⁷

121. Patty Gerstenblith, *The Meaning of 1970 for the Acquisition of Archaeological Objects*, 38 J. FIELD ARCHAEOLOGY 364, 364 (2013).

122. At which time successive Popes began issuing norms and bans to limit the export of art and antiquities. This continued for centuries, culminating in the Edicts of Pacca in 1819-1820, following Carlo Fea’s (Pontifical Commissioner of Antiquities) notion that heritage should be conserved because it is “nourishment of the arts.” See Salvatore Settis, *The Cultural Heritage of the Church in Contemporary Culture*, in TWENTY YEARS OF THE PONTIFICAL COMMISSION FOR THE CULTURAL PATRIMONY OF THE CHURCH (Libreria Editrice Vaticana 2011).

123. TOMMASO ALIBRANDI & PIERGIORGIO FERRI, *I BENI CULTURALI E AMBIENTALI* (4th ed. 2001).

124. See generally Donata Levi, *The Administration of Historical Heritage: The Italian Case*, in NATIONAL APPROACHES TO THE GOVERNANCE OF HISTORICAL HERITAGE OVER TIME: A COMPARATIVE REPORT 103, 109–11 (IOS Press 2008).

125. Constanza Ontiveros Valdés, *The Story of Art Collecting: from Rome To the Rise of Museums*, ART COLLECTION (June 25, 2022), <https://artcollection.io/blog/history-of-collecting-art-part-one> [<https://perma.cc/R6DR-7CPJ>] [<https://web.archive.org/web/20230215204810/https://artcollection.io/blog/history-of-collecting-art-part-one>].

126. Daphne Voudouri, *Greek Legislation Concerning the International Movement of Antiquities and Its Ideological and Political Dimensions*, in A SINGULAR ANTIQUITY: ARCHAEOLOGY AND HELLENIC IDENTITY IN TWENTIETH-CENTURY GREECE 125, 126 (Benaki Museum, 3d ed. Supp. 2008).

127. *Emergency Red List of Egyptian Cultural Objects at Risk*, INT’L COUNCIL OF MUSEUMS, <https://icom.museum/wp-content/uploads/2019/03/Emergency-Red-List-Egypt-English.pdf> [<https://perma.cc/4MB2-TCUB>] [<https://web.archive.org/web/20230215211218/https://icom.museum/wp-content/uploads/2019/03/Emergency-Red-List-Egypt-English.pdf>].

Patrimony laws are enforced by other nations. For example, U.S. courts have applied patrimony laws in proceedings and have found them enforceable;¹²⁸ courts have found that property taken in violation of a patrimony law are deemed stolen under the National Stolen Property Act of 1934 or actionable under the common law of property.¹²⁹ This determination was made in the landmark decision of *United States v. McClain* and it is now known as the McClain Doctrine for a number of cases subsequently following this reasoning.¹³⁰ For a foreign government to succeed in a replevin action, it must prove that the object in question was stolen from within its territory, and that there was a national ownership law in place at the time of the theft (this law must clearly vest ownership in the government and it must not violate due process under U.S. law).¹³¹

The challenge facing nations is a hurdle inherent to all disputes concerning stolen property—thieves conceal the nature of their pilfered objects by hiding the circumstances under which property was stolen. However, this problem is much greater for antiquities that were looted from the ground or discovered in previously unknown locations. In the case of an illicitly-excavated antiquity, the object likely hadn't seen the light of day for centuries or millennia, meaning that its existence was probably unknown before its discovery by looters. Furthermore, an illicitly-removed antiquity has little to no provenance (ownership history), meaning that it is extremely difficult or impossible to trace back to its origin.¹³² With this vacuum of information, it is often impossible for nations to demand the restitution of stolen antiquities because they may be unable to pinpoint or prove from where the object originated. Unfortunately for archaeologists and others studying these important objects, artifacts without context have little to no educational or historical value.

Some objects carry clear indications of their origin and their plundered past.¹³³ When these items appear on the market or are discovered in either private or public

128. See, e.g., *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (interpreting Egypt's law); *U.S. v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999) (interpreting Italy's law); *U.S. v. McClain*, 545 F.2d 988 (5th Cir. 1977) (interpreting Mexico's law); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (interpreting Guatemala's law).

129. *United States v. McClain*, 551 F.2d 52, (5th Cir. 1977), *rev'd*, 545 F.2d 988 (5th Cir. 1977), *aff'd in part, rev'd in part*, 593 F.2d 658 (5th Cir. 1979), *cert. denied*, 44 U.S. 918 (1979).

130. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *Gov't of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989).

131. See Alessandro Chechi, *Examining the Existing Legal Regime*, in *THE SETTLEMENT OF INT'L CULTURAL HERITAGE DISP.* 66, 69 (2014) (citing *McClain*, 545 F.2d at 1001–02).

132. Of course, there are exceptions, as in cases where looters leave their mark on the objects or document their thefts. See Matthew Campell, *An Art Crime for the Ages*, BLOOMBERG BUSINESSWEEK (June 29, 2022, 12:01 AM), <https://www.bloomberg.com/features/2022-cambodia-met-museum-art-heist> [<https://perma.cc/8GCH-7GKF>] [<https://web.archive.org/web/20230215220843/https://www.bloomberg.com/features/2022-cambodia-met-museum-art-heist>] (detailing a high-scale looting operation in which the ringleader produced receipts for buyers to accompany transactions).

133. Some objects bear markings that are distinctive and could have only been found in one place. See, e.g., *Cycladic Art—A Look at the Marble Figures and Sculptures of This Era*, ART IN CONTEXT (Apr. 13, 2022), <https://artincontext.org/cycladic-art> [perma.cc/PPS9-P6XT] [<https://web.archive.org/web/20230215222051/https://artincontext.org/cycladic-art>] (explaining that Cycladic figurines could have only originated from the Aegean). Others have suspicious or impossible provenances that defy reality. In 2019,

collections, origin nations (the nations from where the objects originate) have historically worked to recover the works through one of the following methods: (1) litigation;¹³⁴ (2) communications and negotiations;¹³⁵ (3) law enforcement actions;¹³⁶ or (4) diplomacy.¹³⁷

the Metropolitan Museum of Art forfeited a nearly \$4 million golden sarcophagus to U.S. authorities after it was revealed that its provenance was forged and the coffin was recently looted. See Eileen Kinsella, *Last Year the Met Spent \$4 Million on a Golden Sarcophagus. It Turned Out To Be Looted. Now They Had To Send It Back*, ARTNET (Sept. 26, 2019), <https://news.artnet.com/art-world/new-york-returns-ancient-4m-mummy-1661824> [perma.cc/PC9T-MNBY] [<https://web.archive.org/web/20230322151125/https://news.artnet.com/art-world/new-york-returns-ancient-4m-mummy-1661824>]; and others appear out of thin air, although they are valuable and coveted, like the Euphronios Krater. See Neil Brodie, *Euphronios (Sarpedon) Krater*, TRAFFICKING CULTURE (Sept. 6, 2012), <https://traffickingculture.org/encyclopedia/case-studies/euphronios-sarpedon-krater> [perma.cc/59RW-CLUA] [<https://web.archive.org/web/20230215222330/https://news.artnet.com/art-world/new-york-returns-ancient-4m-mummy-1661824>].

134. See, e.g., *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 284 (7th Cir. 1990) (a replevin case for a group of 4 Byzantine mosaics in which the court ordered returned from a dealer to Cyprus); *Republic of Turk. v. Metro. Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990) (a litigation for the return of a hoard of coins looted from Turkey in which the parties settled after the court ruled that Turkey's complaint was not time-barred); *Republic of Turk. v. Christie's, et al.*, No. 17-cv-3086 (S.D.N.Y. 2021) (a lawsuit for the return of a rare marble "stargazer" idol that was auctioned for over \$14 million), *aff'd*, 62 F.4th 64 (2d Cir. 2023).

135. The widely lauded repatriation of the Euphronios Krater from the Metropolitan Museum of Art to Italy was the result of long negotiations (supported by irrefutable documentation of the work's looted past). Sarah Keim, *The Euphronios Krater Controversy*, PA. STATE U. MUSEUM STUD. (Feb. 1, 2015), <https://sites.psu.edu/museumstudies2015/2015/02/01/the-euphronios-krater-controversy> [<https://perma.cc/N55Y-ESH6>] [<https://web.archive.org/web/20230217015853/https://sites.psu.edu/museumstudies2015/2015/02/01/the-euphronios-krater-controversy>].

136. *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12 Civ. 2600(GBD), 2013 WL 1290515, at *1 (S.D.N.Y. Mar. 28, 2013) (after receiving information from the Cambodian government, the U.S. Attorney's Office seized a sandstone statue from a temple in Koh Ker, where it had been looted in or around 1972); See *Turnover Order In re An Application for a Warrant to Search the Park Avenue Armory*, 643 Park Avenue, N.Y.C., N.Y. 10065 (N.Y. Sup. Ct. 2018); see also *Fight To Return Plundered Persian Limestone Relief*, AMINEDDOLEH & ASSOCIATES LLC (June 3, 2018), <https://www.artandiplawfirm.com/right-for-plundered-persian-relief> [<https://perma.cc/EM7P-QD92>] [<https://web.archive.org/web/20230217015927/https://www.artandiplawfirm.com/right-for-plundered-persian-relief>] (the Manhattan District Attorney's Office successfully returned a marble relief stolen from an archaeological site in the 1930s and for sale at an art fair in New York City in 2017).

137. Christi Parsons, *The Chalice That Helped Make Possible the Iran Nuclear Deal*, L.A. TIMES (Nov. 30, 2013, 12:00 AM), <https://www.latimes.com/world/la-xpm-2013-nov-30-la-fg-iran-griffin-20131130-story.html> [<https://perma.cc/HR4Q-4NTR>] [<https://web.archive.org/web/20230415025330/https://www.latimes.com/world/la-xpm-2013-nov-30-la-fg-iran-griffin-20131130-story.html>] (after an ancient artifact from Iran was seized by US law enforcement agents and after it sat in storage for nearly a decade former President Obama returned the piece to Iran after the nations engaged in negotiations over the nuclear deal); Gareth Harris, *"The Benin Bronzes Are Returning Home": Germany and Nigeria Sign Historic Restitution Agreement*, ART NEWSPAPER (July 4, 2022), <https://www.theartnewspaper.com/2022/07/04/the-benin-bronzes-are-returning-home-germany-and-nigeria-sign-historic-restitution-agreement> [<https://perma.cc/5CEP-MXY6>] [<https://web.archive.org/web/20230217015926/https://www.theartnewspaper.com/2022/07/04/the-benin-bronzes-are-returning-home-germany-and-nigeria-sign-historic-restitution-agreement>] (quoting claim that the return of artifacts stolen from Benin is a "New era in cultural diplomacy."); Toby Sterling, *Dutch Ready To Give Back Seized Colonial Art—But To Whom?*, REUTERS (Oct. 13, 2020), <https://www.reuters.com/article/us-netherlands-colonial-artwork/dutch-ready-to-give-back-seized-colonial-art-but-to-whom-idUSKBN26Y1A8> [<https://perma.cc/6F8E-N8VR>] [<https://web.archive.org/web/>

B. OWNERSHIP CLAIMS AGAINST GOVERNMENTS AND IN CONTRAVENTION OF REPATRIATION

Historically, cultural heritage disputes have involved nations asserting claims for the repatriation of works removed in contravention of patrimony laws or international conventions. However, a line of recent cases has arisen in which litigations have been filed by private parties *against* foreign nations. In those matters, private parties have urged courts to exercise subject matter jurisdiction over foreign sovereigns, claiming that actions taken to repatriate objects leave nations vulnerable to suit in U.S. courts. The first in this line of cases was a lawsuit filed against the Greek government after it sent a letter to an auction house about a purportedly looted antiquity.¹³⁸

1. Greeks and Their Horses

In May 2018, Sotheby's Inc. and a family of consignors (Howard J. Barnet, Peter L. Barnet, and Jane L. Barnet, as Trustees of the 2012 Saretta Barnet Revocable Trust) sued the Hellenic Republic of Greece ("Greece") via the Ministry of Culture & Sports of the Hellenic Republic in the District Court for the Southern District of New York.¹³⁹ The controversy stemmed from a letter sent by the Greek Ministry of Culture to Sotheby's concerning an imminent sale. The auction house was selling an 8th-century B.C. Corinthian Bronze on behalf of the Barnet family in an April 2018 auction, and after seeing an advertisement for the sale, the Greek Ministry had a number of concerns.¹⁴⁰ Accordingly, the Ministry wrote to Sotheby's, asserting its ownership interest under Greece's patrimony law.¹⁴¹ In response to Greece's letter, the auction

20230217015940/<https://www.reuters.com/article/us-netherlands-colonial-artwork/dutch-ready-to-give-back-seized-colonial-art-but-to-whom-idUSKBN26Y1A8>]; News Desk, *Netherlands Returns 1,500 Historical Artifacts To Indonesia*, JAKARTA POST (Jan. 7, 2020), <https://www.thejakartapost.com/news/2020/01/07/netherlands-returns-1500-historical-artifacts-to-indonesia.html> [<https://perma.cc/RAL4-CPWY>] [<https://web.archive.org/web/20221218042927/https://www.thejakartapost.com/news/2020/01/07/netherlands-returns-1500-historical-artifacts-to-indonesia.html>].

138. The author of this paper represented the Hellenic Republic in this matter. *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 391 F. Supp. 3d 291 (S.D.N.Y. 2019), *rev'd and remanded sub nom. Barnet as Tr. of 2012 Saretta Barnet Revocable Tr. v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193 (2d Cir. 2020).

139. *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193 (2d Cir. 2020).

140. These concerns were outlined in filings with the SDNY. Memorandum of Law in Support of Defendant's Motion to Dismiss, *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 391 F. Supp. 3d 291 (S.D.N.Y. 2019) (18 Civ. 4963 (KPF)).

141. *Id.* The ban on exporting antiquities without a permit, enforced by penal sanctions, was enshrined in the first national archaeological legislation of 1834, which was pioneering for its time. See Daphne Voudouri, *Greek Legislation Concerning the International Movement of Antiquities and Its Ideological and Political Dimensions*, in A SINGULAR ANTIQUITY: ARCHAEOLOGY AND HELLENIC IDENTITY IN TWENTIETH-CENTURY GREECE 125 (Damaskos & Plantzos eds., 2008), <https://ejournals.epublishing.ekt.gr/index.php/benaki/article/view/17982/15985> [<https://perma.cc/D27R-X7RU>] [<https://web.archive.org/web/20230215210509/https://ejournals.epublishing.ekt.gr/index.php/benaki/article/view/17982/15985>].

Ownership determinations are contained in the First Chapter of the 1834 statute, specifically in Articles 61-64. *Id.* at 126. Decades later, the 1834 law was updated in 1899 with an even stricter law: Law 2646/1899 'On Antiquities.' *Id.* Article 1 of Law 1899 declares that the Greek State is the owner of every moveable or

house withdrew the bronze. Shortly after the withdrawal, Sotheby's and its consignor filed a declaratory action against the Greek Ministry of Culture. Greece moved to dismiss the case due to lack of subject matter jurisdiction. Sotheby's countered, arguing that the commercial activity exception applied, and that Greece lost its immunity because its letter to the auction house was commercial.

The commercial activity exception provides that a foreign state loses its immunity from suit in any case in which "the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."¹⁴² The language from the exception begs the question: What is "commercial?" Courts have answered this query by finding that commercial activity is an activity that is commercial in "nature."¹⁴³ As explained by the U.S. Supreme Court, the nature of an act is commercial when a state "acts in the manner of a private player within the market, or, put differently, where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns."¹⁴⁴ Essentially, when a sovereign state behaves like a private party, not as a sovereign, then the nation loses its immunity. In *Barnet*, the district court agreed with the plaintiffs' contention that Greece's letter was commercial because it intervened in commerce, leading to the withdrawal of the bronze.¹⁴⁵ The court reasoned that any private party could assert property interests, stating that "[w]hen title to a work of art is disputed, private parties

immoveable cultural property found in any form of possession, whether municipal, religious or private, on national territory. *Id.* at 127. The principle of state ownership applies to antiquities dating back to 1453, the year of the Fall of Constantinople. *Id.* Punishments for cultural-property related offenses, including imprisonment, are also outlined in the law.

Chapter E of the 1899 law regulates export of cultural heritage. Specifically, Article 22 stipulates that a person is strictly prohibited from exporting antiquities which have been discovered in Greek territory, unless they obtain a prior permit by the Ministry of Religious Affairs. Pursuant to Article 23, any person who illicitly exports materials shall be prosecuted to the fullest extent of the law, including imprisonment for a minimum of three months to a maximum of five years. Furthermore, the antiquities in that person's possession will be confiscated, and, if the confiscation is ineffective, the offender must pay a sum equal to the value of the antiquities. This Article also provides for the deprivation of civil rights for a period leading up to five years.

Greece's patrimony law was updated again in 1932 through Act No. 5351 of August 9, 1932. *Id.* The law continued the regime of state ownership of antiquities, and again defines antiquities as types of cultural property dating back to 1453. The most current Greek patrimony law is from 2002 (Law 3028/2002, "On the protection of antiquities and cultural heritage in general"), and it continues to vest title in the Greek State for the ownership of antiquities and strictly regulate the export of those items. *Id.* at 130.

142. 28 U.S.C. § 1605(a)(2).

143. *Saudi Arabia v. Nelson*, 507 U.S. 349, 356 (1993).

144. *Petersen Energia Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 205 (2d Cir. 2018) (internal quotations omitted).

145. *Barnet v. Ministry of Culture & Sports of Hellenic Republic*, 391 F. Supp. 3d 291, 300–301 (S.D.N.Y. 2019).

routinely assert their property rights in the disputed piece, oftentimes triggering declaratory judgment actions.”¹⁴⁶

Greece appealed the decision, and in June 2020, the Second Circuit reversed in a landmark decision. The appeals court unanimously held that a nation’s regulation of property by way of a patrimony law is not commercial, but inherently sovereign activity. The Court found that Greece’s act of sending a letter was not in connection with a commercial activity outside of the United States. Greece sent its letter in connection with an ownership claim pursuant to its patrimony laws—something the court characterized as sovereign, stating—“[n]ationalizing property is a distinctly sovereign act.”¹⁴⁷ Greece was acting in its sovereign capacity by enforcing laws that regulate ownership and export of nationalized artifacts, which made it immune from suit.

Additionally, the appeals court held that to satisfy the direct-effect clause of the commercial activity exception, the suit must be (1) based upon an act outside the territory of the United States; (2) that was taken in connection with a commercial activity of Greece outside this country; and (3) that caused a direct effect in the United States. The predicate “act” in this case was Greece’s act of sending the demand letter. In assessing whether that act was taken “in connection with a commercial activity,” the Second Circuit found that the district court erroneously concluded that sending a letter claiming ownership was commercial. The district court made an error in its analysis when it treated Greece’s act of sending the letter as *both* the predicate “act” *and* the related “commercial activity.”¹⁴⁸ The Court found that: “a single act cannot be undertaken in connection with itself.” Accordingly, the case was dismissed. The outcome supports foreign governments’ role in the art market regarding the protection of objects falling under their patrimony laws.

Barnet was a case of first impression and a major win for foreign nations because the decision allows nations, including Greece, to continue monitoring the market for looted items and communicating with dealers, auction houses, and collectors about suspect items. However, the case emboldened other plaintiffs to sue foreign governments. In late 2018, a dealer and an art collecting couple sued Switzerland.¹⁴⁹ The couple, the Beierwaltes, became known in the 1990s for curating what the press described as “one of, if not, the finest private collections of antiquities in the United

146. *Barnet*, 391 F. Supp. 3d at 300 (first citing *Coffaro v. Crespo*, 721 F. Supp. 2d 141, 144 (E.D.N.Y. 2010); then citing *Kamat v. Kurtha*, No. 05 Civ. 10618(KMW)(THK), 2008 WL 5505880, at *3 (S.D.N.Y. Apr. 14, 2008)).

147. *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193, 201 (2d Cir. 2020).

148. *Id.* at 200.

149. *Aboutaam v. L’Office Federale de la Culture de la Fed. Suisse*, No. 1:18-cv-08248 (RA), 2019 WL 4640083 (S.D.N.Y. 2019).

States.”¹⁵⁰ Notably though, the couple had previously faced legal issues involving looted antiquities.¹⁵¹

2. A Purportedly Not-So-Neutral Switzerland

In August 2018, the Beierwaltes sued the Swiss government in Colorado.¹⁵² Two months later, antiquities dealer Hicham Aboutaam (of Phoenix Ancient Art,¹⁵³ from

150. Amanda Pampuro, *Colorado Couple Seek To Reclaim Artifacts From Swiss*, COURTHOUSE NEWS SERVICE (Aug. 8, 2018), <https://www.courthousenews.com/colorado-couple-seeks-to-reclaim-artifacts-from-swiss> [<https://perma.cc/Q8SU-WRPV>] [<https://web.archive.org/web/20230216223137/https://www.courthousenews.com/colorado-couple-seeks-to-reclaim-artifacts-from-swiss>].

151. In 2017, the couple was involved in a high-profile forfeiture proceeding in New York concerning a 2,400-year-old marble bull's head stolen from Lebanon. Although they purchased it for over \$1 million from Phoenix Ancient Art, it was revealed to have been looted during Lebanon's civil war. Ultimately, the work (along with two other items from their collection) was repatriated to Lebanon. Georgi Kantchev, *Stolen 'Bull's Head' Headed Back To Lebanon*, WALL ST. J. (Oct. 11, 2017), <https://www.wsj.com/articles/stolen-bulls-head-headed-back-to-lebanon-1507741187> [<https://perma.cc/LC5Z-9ED7>] [<https://web.archive.org/web/20230303180218/https://www.wsj.com/articles/stolen-bulls-head-headed-back-to-lebanon-1507741187>].

152. *Aboutaam*, 2019 WL 4640083 at *3.

153. Phoenix Ancient Art has faced its fair share of legal issues. One example is the forfeiture of a Persian rhyton to Iran Barry Meier. *Art Dealer Pleads Guilty In Import Case*, N.Y. TIMES (June 24, 2004), <https://www.nytimes.com/2004/06/24/arts/art-dealer-pleads-guilty-in-import-case.html> [<https://perma.cc/2AA2-XUJL>] [<https://web.archive.org/web/20230303163007/https://www.nytimes.com/2004/06/24/arts/art-dealer-pleads-guilty-in-import-case.html>]. Another is a case filed for the “forged provenance” of a Fayum portrait. Vincent Noce, *Antiquities trafficking case escalates as Louvre Abu Dhabi Joins Civil Action and Swiss Collector Files Criminal Complaint*, THE ART NEWSPAPER (June 10, 2022), <https://www.theartnewspaper.com/2022/06/10/antiquities-trafficking-case-escalates-as-louvre-abu-dhabi-joins-civil-action-and-swiss-collector-files-criminal-complaint> [<https://perma.cc/72A5-4FN8>] [https://web.archive.org/web/20230217211250/https://www.cleveland.com/arts/2013/09/the_cleveland_museum_of_art_wa.html]. A third is the Manhattan District Attorney's seizure of six antiquities from Phoenix Ancient Art. Henri Neuendorf, *In a Crackdown on 'Illicit' Antiquities, the Manhattan DA Seizes 6 Statues From Phoenix Fine Art*, ARTNET (Jan. 11, 2008), <https://news.artnet.com/art-world/phoenix-ancient-art-illicite-antiquities-1197380> [<https://perma.cc/H6ML-6VB2>] [<https://web.archive.org/web/20230217211304/https://www.theartnewspaper.com/2004/03/01/how-the-aboutaams-tried-and-failed-to-sue-the-kimbell-art-museum-over-a-roman-torso>]. Finally, Ali Aboutaam was convicted in absentia in Egypt in 2003 on charges of smuggling and sentenced to 15 years in prison. Steven Litt, *The Cleveland Museum of Art Wades into Global Controversy Over Antiquities Collecting with Exhibition and Catalog on Its Ancient Bronze Apollo*, CLEVELAND.COM (Sept. 27, 2013), https://www.cleveland.com/arts/2013/09/the_cleveland_museum_of_art_wa.html [<https://perma.cc/552G-YBDM>] [https://web.archive.org/web/https://www.cleveland.com/arts/2013/09/the_cleveland_museum_of_art_wa.html]. Phoenix Ancient Art was unsuccessful in requiring the Kimbell Art Museum to purchase an ancient torso. Martha Lufkin, *How the Aboutaams Tried, and Failed, To Sue the Kimbell Art Museum Over a Roman Torso*, THE ART NEWSPAPER (Feb. 29, 2004), <https://www.theartnewspaper.com/2004/03/01/how-the-aboutaams-tried-and-failed-to-sue-the-kimbell-art-museum-over-a-roman-torso> [<https://perma.cc/64KC-2XDX>] [<https://web.archive.org/web/20230303181548/https://www.theartnewspaper.com/2004/03/01/how-the-aboutaams-tried-and-failed-to-sue-the-kimbell-art-museum-over-a-roman-torso>]. Hicham Aboutaam was also unsuccessful in its attempt to sue the Wall Street Journal for defamation, and the court refused to hear Aboutaam's appeal. Rebecca Davis O'Brien, *New York Court Declines To Take Up Appeal in Libel Case Against Dow Jones*, WALL ST. J. (Sept. 2, 2020), <https://www.wsj.com/articles/new-york-court-declines-to-take-up-appeal-in-libel-case-against-dow-jones-11599093080> [<https://perma.cc/6T94-AWGL>] [<https://web.archive.org/web/20230303181435/https://www.wsj.com/articles/new-york-court-declines-to-take-up-appeal-in-libel-case-against-dow-jones-11599093080>].

whom the Beierwaltes purchased the problematic Bull's Head referred to in footnote 142) sued the Swiss government in New York, in a matter stemming from the same set of facts.¹⁵⁴ On February 28, 2017, Swiss authorities seized approximately 1,200 of Aboutaam's antiquities, including the eighteen owned by the Beierwaltes, part of a larger seizure of 12,000 objects in a Geneva warehouse.¹⁵⁵ The seizures were effected pursuant to search and seizure orders. Swiss authorities had been investigating unusual movements of antiquities with suspicious provenances, being imported and exported, potentially in violation of Swiss law.¹⁵⁶ The Beierwaltes and Aboutaam attempted to secure the release of the property, but failed.¹⁵⁷ In response, they filed claims in U.S. courts, and the cases were consolidated in the Southern District of New York.¹⁵⁸

The Plaintiffs asserted jurisdiction over Switzerland based on its allegation that the nation's actions were tantamount to an expropriation because the seizure of the artifacts was a taking in violation of international law.¹⁵⁹ The district court disagreed, ruling that a lawful seizure by law enforcement does not constitute a taking under any definition of the term, let alone one in violation of international law.¹⁶⁰ Relying on Second Circuit authority, the court held that seizing property during a criminal investigation, and pursuant to a valid warrant, is not an unlawful taking of property that would strip a sovereign of its immunity.¹⁶¹ The court found that, "[a] violation of international law . . . requires . . . that the taking not be for a public purpose, or that the taking be discriminatory, or not accompanied by provision for just compensation."¹⁶² The seizure of property during the course of a criminal investigation had a public purpose and so it did not violate international law. The seizure was also not arbitrary or discriminatory, but was based upon a search and seizure warrant.¹⁶³ Moreover, because the property was only temporarily seized pending the results of the investigation, and it was not frozen for an "extended or indefinite period," plaintiffs were not owed compensation.¹⁶⁴ The antiquities were seized in connection with an ongoing criminal investigation, which served a public purpose, not a commercial or private one.¹⁶⁵ The case against Switzerland was dismissed.

The Beierwaltes and Aboutaam unsuccessfully appealed the decision. The Second Circuit noted that the expropriation exception is "concerned only with illegal takings,"

154. *Aboutaam*, 2019 WL 4640083 at *2.

155. *Id.* at *1.

156. *Id.* at *2.

157. *Id.*

158. *Id.*

159. *Aboutaam v. L'Office Federale de la Culture de la Fed. Suisse*, No. 1:18-cv-08248 (RA), 2019 WL 4640083, at *3 (S.D.N.Y. 2019).

160. *Id.* at *5.

161. *Id.* at *4.

162. *Id.* at *3.

163. *Id.* at *4.

164. *Id.*

165. *Aboutaam v. L'Office Federale de la Culture de la Fed. Suisse*, No. 1:18-cv-08248 (RA), 2019 WL 4640083, at *4 (S.D.N.Y. 2019).

according to “customary international law.”¹⁶⁶ Interestingly, the court quoted *Philipp* on this point: “Put more colorfully, ‘United States law governs domestically but does not rule the world.’”¹⁶⁷ The court noted, “we expect that law enforcement seizures will be declared to be illegal in only rare and egregious circumstances.”¹⁶⁸ When applying the law to the facts of this case, the court found that the seizure was not an expropriation. The investigation in the case bore a “rational relationship to a public purpose.”¹⁶⁹ The court noted that Swiss officers observed Phoenix Ancient Art’s employees and Aboutaam’s sister-in-law engaging in what “appeared to be criminal violations of customs laws and the unlawful importation of art.”¹⁷⁰ “Curtailling criminal activity is in the public interest, and stopping the illegal importation of cultural property is important to Switzerland’s efforts to comply with its obligations under the UNESCO Convention.”¹⁷¹ The court addressed the public purpose of criminal investigations and acknowledged the public interest in curtailing illicit activities related to cultural property.¹⁷² The court held that “law enforcement seizures will be declared to be illegal in only rare and egregious circumstances.”¹⁷³ The court also chastised the plaintiffs, noting that they “thus far refused to cooperate with the investigation and have not otherwise taken advantage of domestic Swiss remedies that could potentially speed things along.”¹⁷⁴ The case was dismissed and Switzerland was permitted to continue its investigation.

3. Alexander or a Parthian Barbarian?

Finally, the third litigation in the series of antiquities disputes involving the FSIA was a matter filed against Italy.¹⁷⁵ During the time that Greece was appealing the district court decision in *Barnet* in which the court erred in holding that Greece had lost its immunity, a New York-based antiquities dealer sued the Italian government for communicating with the Manhattan District Attorney’s Office about a marble bust (erroneously referred to by the dealer as the “Head of Alexander”) long missing from an Italian museum.¹⁷⁶ The dispute involves facts dating back many decades.

166. *Beierwaltes v. L’Office Federale De La Culture De La Confederation Suisse*, 999 F.3d 808, 821 (2d Cir. 2021).

167. *Id.* at 821 (citing *Fed. Republic of Ger. v. Philipp*, 141 S. Ct. 703, 713 (2021)) (internal quotations omitted).

168. *Id.* at 825.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Beierwaltes v. L’Office Federale De La Culture De La Confederation Suisse*, 999 F.3d 808, 825 (2d Cir. 2021).

173. *Id.*

174. *Id.* at 827.

175. The author of this paper represented the Republic of Italy in this litigation. *Safari Gallery, Inc. v. The Italian Republic*, 19-CV-10507 (VSB) (S.D.N.Y. 2021).

176. *Id.*

The “Head of Alexander” is a misnomer, according to Italian academics, and thus the object was traded on the international market with a false label.¹⁷⁷ Records indicate that it was excavated from the Roman Forum during a state-sponsored excavation over a century ago, and then it was transferred to an Italian museum, the Antiquarium Forense.¹⁷⁸ It disappeared, but was listed (along with a photo) as “perdute” (i.e., “missing”) in the museum’s official inventory that was compiled in 1960. Before the advent of the internet, it was sold at Sotheby’s in 1974, and then it was sold again in 2011, both times mislabeled as “the Head of Alexander.” The Safani Gallery eventually purchased it from a private party, intending to sell it at The European Fine Art Fair (TEFAF) in Maastricht in 2018. To promote the sale, the gallery posted a photo of it on Instagram.

Someone from the Italian museum recognized the marble bust as the long-lost missing piece from its collection and contacted the Comando Carabinieri Tutela Patrimonio Culturale (the “TPC” or the “Carabinieri Command for the Protection of Cultural Heritage”), Italy’s Art Crime Squad.¹⁷⁹ In turn, in February 2018 the TPC provided the Manhattan District Attorney’s Office with a tip about the bust. The District Attorney investigated the claim, found that it was meritorious, and seized the valuable artifact before it left from within New York’s borders.¹⁸⁰

Criminal proceedings took place in court between February 2018 and November 2019.¹⁸¹ During that time, discovery was held.¹⁸² Then, after over a year and a half in state court, and after Greece lost its motion to dismiss in *Barnet* in district court, the Safani Gallery sued the Republic of Italy, and requested that the state court stay its criminal proceedings while jurisdictional determinations were made by the District Court for the Southern District of New York. The gallery’s complaint asserted that Italy’s phone call to law enforcement authorities made the sovereign vulnerable to suit

177. Motion to Dismiss the Complaint at 2, *Safari Gallery, Inc. v. The Italian Republic*, 19-CV-10507 (VSB) (S.D.N.Y. 2021) (Italian experts believe it is a Parthian Barbarian).

178. *Id.*

179. *Id.* The TPC has long been celebrated for successfully protecting works of art, investigating thefts and lootings, cooperating with international law enforcement agencies on restitution matters, and training other governments on art and heritage protection initiatives. See Laurie Rush, *The Carabinieri TPC: An Introduction and Brief History. Perché l’Italia? Why Italy?*, CAMBRIDGE UNIV. PRESS (May 21, 2021), <https://www.cambridge.org/core/books/abs/carabinieri-command-for-the-protection-of-cultural-property/carabinieri-tpc-an-introduction-and-brief-history-perche-litalia-why-italy/77582644F984A622ACF258FD9BC21D96> [https://perma.cc/RP3M-5HJ2] [https://web.archive.org/web/20230303225121/https://www.cambridge.org/core/books/abs/carabinieri-command-for-the-protection-of-cultural-property/carabinieri-tpc-an-introduction-and-brief-history-perche-litalia-why-italy/77582644F984A622ACF258FD9BC21D96].

180. Motion to Dismiss the Complaint, *Safari Gallery, Inc. v. The Italian Republic*, 19-CV-10507 (VSB) (S.D.N.Y. 2021) (Italian experts believe it is a Parthian Barbarian).

181. In the Matter of the Safari Gallery Inc. Search Warrant, No. GJF2017-11212F (N.Y. Sup. Ct. Nov. 13, 2019).

182. *Id.* (Italy sharing thousands of pages of documents, including the answers to all 135 interrogatories posed by the plaintiff).

in the United States.¹⁸³ The dealer alleged that the phone call was commercial.¹⁸⁴ It was evidently an attempt to broaden the commercial activity exception even further after the district court in *Barnet* erroneously held that Greece's letter to Sotheby's was commercial.

Prior to the deadline for Italy's answer to the Safani Gallery's complaint, the Second Circuit reversed the *Barnet* decision, holding that Greece's letter to Sotheby's was not commercial activity. Italy moved to dismiss the *Safani* matter, arguing that a phone call to law enforcement is not commercial. With the *Barnet* decision as support, Italy argued that if the Second Circuit held that Greece's letter to an auction house was not commercial, then a call to law enforcement certainly was not commercial. But the court never made a decision on the motion because the Safani Gallery amended its complaint to invoke different bases for jurisdiction. The gallery asserted that Italy's phone call to law enforcement agents in the U.S. was (1) a tort; (2) a waiver of immunity; and (3) an expropriation.¹⁸⁵

Italy moved to dismiss the case for a second time,¹⁸⁶ arguing that the call made by Italian representatives in Italy was not a tort¹⁸⁷ and that Italy never waived its sovereign immunity by simply placing a phone call.¹⁸⁸ In addition, Italy argued there was no expropriation because there was no taking made in violation of international law with a commercial nexus to the United States. Rather, U.S. law enforcement agents (prosecutors within the Manhattan District Attorney's Office, who are not agents of Italy) effectuated the seizure of the marble bust as part of a law enforcement action.

In August 2021, the district court dismissed the defendant, finding it did not have subject matter jurisdiction over the Republic of Italy.¹⁸⁹ The court held that there was no waiver of immunity because a waiver must be "clear and unambiguous," and a phone call communicating a tip is neither of those things.¹⁹⁰ Further, there was no tortious

183. Complaint at 6, *Safani Gallery Inc. v. The Italian Republic*, No. 19-10507 (S.D.N.Y. Nov. 12, 2019) (describing the February 22, 2018 phone call in which a member of law enforcement acting as an agent of the Defendant Italian Republic contacted the Manhattan District Attorney's Office).

184. Complaint at 2, *Safani Gallery Inc. v. The Italian Republic*, No. 19-10507 (S.D.N.Y. Nov. 12, 2019).

185. Amended Complaint at 3, 16, & 21, *Safani Gallery Inc. v. The Italian Republic*, No. 19-10507 (S.D.N.Y. 2020). *Id.* at 3 (alleging all actions taken by Italy were done "acting in the scope of their office, employment and agency, were tortious acts occurring entirely in the United States (through telephonic and electronic communications into the United States)"). *Id.* at 16 (alleging "[a]ny claim by Defendant to ownership of the Head of Alexander is barred by waiver"). *Id.* at 21 (alleging that "[b]y seizing or causing to be seized the Head of Alexander, through its agent, the DA, Defendant has received and seeks to receive a benefit, including the expropriation of Safani's property for its own use and gain").

186. Memorandum of Law in Support of Defendant's Motion to Dismiss Plaintiff's Amended Complaint, *Safani Gallery Inc. v. The Italian Republic*, No. 19-CV-10507 (S.D.N.Y. 2020).

187. The "tort exception" applies to wrongful death, personal injury, or property rights where money damages are sought, in instances where "a negligent or wrongful act took place in the United States." Here, no act took place in the U.S. The only action taken by Italy was a call between law enforcement agencies. *Id.*

188. Italy explained that the art gallery asserted "waiver," but never explained how it applied. Normally, a foreign sovereign can explicitly waive its immunity or do so by implication. It must be "clear, complete, unambiguous, and unmistakable in order to be effective." In *Safani*, Italy did not waive its immunity explicitly or through implication; appearing in court to request a dismissal is not a waiver. *Id.*

189. *Safani Gallery, Inc. v. The Italian Republic*, 19-CV-10507 (VSB) (S.D.N.Y. 2021).

190. *Id.* at 3.

activity because the DA was not acting as Italy's agent, and the DA's handling of the marble bust fell within its discretionary function.¹⁹¹ Rather, the court analogized Italy's relationship to the DA's office as someone who reports a crime or stolen item.¹⁹²

Finally, the court found that the expropriation exception was also inapplicable. The judge ruled that there was no "taking" by Italy because the Safani Gallery failed to show that "the DA acted subject to Italy's direction and control."¹⁹³ Further, even if it had, the "alleged taking was not in violation of international law." The court held that "in general, a seizure of property 'in connection with an ongoing [] investigation' does not count 'within the meaning of § 1605(a)(3).'"¹⁹⁴ The district court dismissed the Republic of Italy from the litigation, but it allowed the gallery to renew its motion for leave to amend by filing "for leave that explains how any newly pleaded facts cure the identified deficiencies."¹⁹⁵ Since the judge's ruling in August 2021, the Safani Gallery has submitted an amended pleading to name the Manhattan District Attorney and the Italian Ministry of Culture as defendants. The Manhattan District Attorney has already submitted a Motion to Dismiss, while the court advised the Ministry of Culture to await a determination on whether the judge will allow the plaintiff to add it as a named defendant in the litigation.

C. THE FSIA AND THE ANTIQUITIES MARKET TODAY

When Sotheby's and its consignor sued the Greek Ministry of Culture, it was worrisome to some participants in the art market. Sovereign governments, through ministries or cultural representatives, monitor the market for potentially stolen antiquities. As discussed in Section III(A), these sovereign entities often privately and discreetly communicate about questionable objects before sales. This is done to avoid problems with subsequent purchasers or to prevent a looted object from disappearing into a private collection where its location becomes unknown and unrecoverable. Discreet communications also avoid the costly and time-consuming litigation process. In fact, some sellers often choose to communicate with foreign governments while conducting due diligence in order to ensure that items for sale are not problematic or vulnerable to legal claims.

The line of cases filed against foreign sovereigns was troubling because if private parties could successfully haul governments into U.S. courts, it would prevent government entities, like ministries of culture, from communicating with art market participants and fulfilling their sovereign responsibility to protect heritage. It would silence nations due to the fear that communications would subject them to jurisdiction in U.S. courts, rendering them unable to effectively protect cultural heritage items stolen or illicitly removed from their borders. This anxiety by foreign nations was

191. *Id.* at 6.

192. *Id.* at 4.

193. *Id.* at 4–5.

194. *Safani Gallery, Inc. v. The Italian Republic*, 19-CV-10507 (VSB), at 5 (S.D.N.Y. 2021) (quoting *Chettri v. Nepal Rastra Bank*, 834 F.3d 50, 58 (2d Cir. 2016)).

195. *Id.* at 6.

evidenced by the amicus brief filed on behalf of a handful of signatories in the Second Circuit appeal in *Barnet*. In support of Greece's appeal, a number of sovereigns and non-profit organizations¹⁹⁶ submitted a brief urging the court to consider the fact that cultural heritage subject to a patrimony law is "fundamentally and materially different from other property that is not subject to such laws."¹⁹⁷ The amici also feared that they could be hauled into court to defendant themselves: "[F]oreign states wishing to pursue civil (non-treaty, non-criminal) remedies will have to choose between forfeiting their right to pursue their cultural heritage property pursuant to their patrimony laws (thereby leaving the property in the hands of those who may have traded in looted antiquities), or waive their sovereign immunity in U.S. court by being sued or suing."¹⁹⁸

Thus, Greece's victory was an important win for foreign nations. In fact, the trio of cases ensures that sovereigns cannot be subject to jurisdiction for monitoring the market for loot as the cases protect them from the nuisance of litigations impeding international communications and law enforcement actions. Ultimately, this also helps the art market and provides some level of comfort to buyers. If the art and antiquities markets were to go unchecked, illicit items would enter onto the marketplace. The role of sovereign nations communicating and investigating suspicious works is important for a healthy and robust art market.

Unfortunately, some legal analysts asserted that Greece's victory in *Barnet* provides foreign governments too much power. That is untrue. One blogger wrote, "[t]he Second Circuit's *Barnet* decision puts auction houses and other sellers of antiquities potentially subject to cultural patrimony claims at a distinct disadvantage, as they now must either negotiate a resolution with a sovereign claimant—from a position of weakness, no longer able to wield the 'stick' of threatened litigation—or sell under inauspicious circumstances and run the risk of subjecting themselves to a post-sale suit."¹⁹⁹ However, *Barnet* does not actually put sellers at a disadvantage; it does not alter

196. The group comprise of the Hellenic College Holy Cross Greek Orthodox School of Theology, the Antiquities Coalition, the Ministry for Cultural Activities and Heritage and for Tourism for Italy (Ministro per i beni e le attività culturali), the Department of Antiquities, Ministry of Transport, Communications and Works of Cyprus, and the United Mexican States. See Brief for the Hellenic College Holy Cross Greek Orthodox School of Theology, et al. as Amici Curiae Supporting Defendants, *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 391 F. Supp. 3d 291 (2019) (No. 19-2171-cv) 2019 WL 5149895.

197. *Id.* at *3-4.

198. *Id.* at *4.

199. Nicolas Rodriguez, *Second Circuit Holds that FSIA Bars Suit Against Sovereign Asserting Cultural Patrimony Claim*, HUGHS, HUBBARD, & REED (July 23, 2020), <https://www.hhrartlaw.com/2020/07/second-circuit-holds-that-fsia-bars-suit-against-sovereign-asserting-cultural-patrimony-claim> [https://perma.cc/R5JP-DD5K] [https://web.archive.org/web/20230220222751/https://www.hhrartlaw.com/2020/07/second-circuit-holds-that-fsia-bars-suit-against-sovereign-asserting-cultural-patrimony-claim]. Another law firm blog states, "The effect [of the *Barnet* decision] is to give foreign claimants and their enablers license to stand offshore and lob bad faith claims into the United States, disrupt the public antiquities market and "burn" licit material acquired in good faith, while avoiding the jurisdiction of U.S. courts, thus depriving U.S. auction houses, dealers, collectors and museums of an effective remedy in the United States, the jurisdiction where the harm was inflicted." The author takes umbrage with referring to claimants and "their enablers" and other provocative terms, such as "bad faith claims" and "burning" licit material. It is important to note that the author of the cited blog represented the Aboutaams and Beierwaltes in their case against Switzerland. See William G. Pearlstein, *P&M In-Depth: Barnet v. Ministry of Culture and Sports of the Hellenic Republic*, PEARLSTEIN

the playing field, rather it maintains the status quo. The court never granted additional powers to foreign governments. It does not provide that sovereign ownership claims are infallible, but simply that plaintiffs cannot haul foreign governments into U.S. courts for communicating about property falling within the scope of a patrimony law. Rather, auction houses and sellers were trying to capture an advantage by creating legal precedent that would broaden the scope of the FSIA's exceptions. The Second Circuit wisely rejected that attempt. The outcome in *Barnet* allows governments to continue with their activities, communicating about objects on the market and raising concerns without fear of losing their immunity. The subsequent decisions in *Beierwaltes* and *Safani* continue to guard a foreign sovereign's presumed immunity to protect that same archetypal sovereign activity while keeping courts out of delicate issues concerning foreign relations.

Ultimately, the work done by sovereign entities to protect antiquities is essential because it protects humanity's shared heritage. By preventing the illicit excavation of objects (which most often results in damage to objects and the loss of information about the archaeological record) and their trade on the market,²⁰⁰ sovereign nations work to preserve and protect cultural heritage. Furthermore, sovereigns that are victims of thefts should have the opportunity to pursue the repatriation of heritage and celebrate their returns to honor the past and celebrate a rightful homecoming. Rather than being subject of a lawsuit, foreign sovereign entities should be celebrated, and they should be honored for fulfilling their sovereign obligations to protect heritage.

IV. CONCLUSION

"The King can do no wrong." But as proven throughout human history, that phrase is not accurate. Sovereign leaders and sovereign states are also not infallible. With this in mind, Congress carefully crafted the long overdue Foreign Sovereign Immunities Act in 1976 to address when sovereign entities could be hauled into a U.S. courtroom. The FSIA embodies the "restrictive theory" of immunity; foreign sovereigns are susceptible to subject matter jurisdiction when they engage in private or commercial activity. Essentially, a foreign sovereign cannot escape culpability when that nation behaves like a private party, not a public sovereign.²⁰¹ In this way, foreign sovereigns have been sued in the United States for art thefts. However, foreign sovereigns have remained immune from jurisdiction in instances in which lawsuits are filed for

MCCULLOUGH, LLP (Aug. 3, 2020), <https://pmcounsel.com/barnet-v-ministry-of-culture-and-sports-of-the-hellenic-republic> [<https://perma.cc/AM8M-WBPN>] [<https://web.archive.org/web/20230220222947/https://pmcounsel.com/barnet-v-ministry-of-culture-and-sports-of-the-hellenic-republic>].

200. Many experts assert that the demand for antiquities creates the incentive to look the objects. See Neil Brodie, *How To Control the Internet Market in Antiquities? The Need for Regulation and Monitoring*, THE ANTIQUITIES COALITION (July 2017), <https://thinktank.theantiquitiescoalition.org/how-to-control-the-internet-market-in-antiquities-the-need-for-regulation-and-monitoring> [<https://perma.cc/Q3PC-T274>] [<https://web.archive.org/web/20230220223112/https://thinktank.theantiquitiescoalition.org/how-to-control-the-internet-market-in-antiquities-the-need-for-regulation-and-monitoring>].

201. See generally *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992).

activities related to the protection of cultural heritage via a patrimony law (something the court characterized in *Barnet* as archetypical sovereign activity) or law enforcement action (something protected once again under *Beierwaltes*).

The FSIA embodies long held principles of international law. Dating back over two centuries, the U.S. Supreme Court recognized that wrongs committed by foreign sovereigns were more appropriately addressed by diplomacy, rather than by judicial means.²⁰² And thus today, U.S. courts continue to balance diplomatic considerations, international relations, and justice when making jurisdictional determinations.

“Uneasy lies the head that wears a crown.”²⁰³ But the king’s head should rest a bit easier when engaging in public activities with a recent line of U.S. cases confirming the presumption of a sovereign’s immunity and protecting those nations from courts interfering in sensitive foreign policy questions.

202. *Schooner Exch. v. McFaddon*, 11 U.S. 116, 146 (1812).

203. WILLIAM SHAKESPEARE, *HENRY IV*, PART 2, act 3, sc. 1, l. 31.

I Did You a Favor By Taking Your Work: Reconsidering the Harm-Based Approach To the Fourth Fair Use Factor

Casey Sandalow*

INTRODUCTION

American copyright law is predominantly utilitarian.¹ Fair use—codified to promote copyright’s utilitarian goals—has emerged as one of the most nebulous doctrines in American law. This is partially by design. Passing the Copyright Act of 1976 (the “Act”), Congress sought to endorse “the purpose and general scope of the judicial doctrine of fair use,” but made clear that “there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.”² This judicial deference—combined with the case-by-case nature of fair use determinations—has led to evolving and inconsistent applications of section 107.³

Interpretation of section 107(4), which instructs courts to consider “the effect of the use upon the potential market for or value of the copyrighted work,”⁴ is illustrative. Though a plain reading of section 107(4) leaves room for consideration of all market effects,⁵ most courts and commentators agree that the inquiry into this factor concerns

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1. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107–12 (1990) (stating that copyright law exists “to stimulate activity and progress in the arts for the intellectual enrichment of the public” and that “[t]his utilitarian goal is achieved by permitting authors to reap the rewards of their creative efforts”); see also 1 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 1:1 (rev. ed. 2022) (“[C]opyright in the United States is not a property right, much less a natural right. Instead, it is a statutory tort, created by positive law for utilitarian purposes: to promote the progress of science.”). *But see* THE FEDERALIST No. 43 (James Madison) (offering a natural rights-based justification for the Progress Clause).

2. H.R. REP. No. 94-1476, at 66 (1976).

3. See, e.g., Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, 2020 SING. J. LEGAL STUD. 265 (2020) (cataloging the shifting fair use landscape, including the dwindling supremacy of transformative use and the reinvigoration of the fourth factor).

4. 17 U.S.C.A. § 107 (West).

5. See generally David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359 (2014) (advocating for a plain reading of § 107(4) that includes considerations of market help: infringing behavior that boosts the value of a copyrighted work).

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only deleterious effects on the copyright owner's actual or potential markets.⁶ Some have expressed hostility toward consideration of positive market effects on the ground that an infringing use that might improve sales of a copyrighted work is also likely to invade the market for derivative works.⁷

In limited circumstances, courts and commentators have recognized the relevance of an unauthorized use providing financial gain for a copyright holder. In *Authors Guild, Inc. v. Google Inc.*, Judge Chin indicated that Google Books increased exposure and sales for the copyright holders, concluding that “the fourth factor weighs strongly in favor of a finding of fair use.”⁸ While the Second Circuit declined to adopt Judge Chin's explicit reasoning,⁹ *Authors Guild* remains a powerful endorsement of the plain reading of section 107(4). In *Google LLC v. Oracle Am., Inc.*, the Supreme Court indicated that analysis of the fourth factor should weigh public benefits against private harms, endorsing a more holistic balancing of interests.¹⁰ In the wake of a reinvigorated fourth factor,¹¹ it is worth reassessing whether economic benefits from infringement have any place in the market impact inquiry.

This Note addresses the current status of market benefits: monetary gains conferred upon a copyright holder by a third party's unauthorized use of a copyrighted work. While courts are still unwilling to treat market benefits as dispositive, they are moving away from the view that the fourth factor concerns only market harm. Expanded analysis of a fourth factor now balances private economic effects, public benefits, and in some cases, non-monetary concerns¹² related to the value of a work.¹³ Market benefit proponents assert that their inclusion is more in line with the text and history 1976 Act, as well as the overall goals of copyright.¹⁴ Further, weighing market benefits against market harms helps to address problems related to circularity.¹⁵

This Note considers the viability of market benefits as both a dispositive and a relevant component of fourth factor interpretation. Part I provides a basic overview of the traditional approach to the fourth factor before defining and distinguishing

6. *But see* Jane C. Ginsburg, *Fair Use Factor Four Revisited: Valuing the “Value of the Copyrighted Work”*—*Essay*, 67 J. COPYRIGHT SOC'Y USA 19 (2020) (advocating that “the value of the copyrighted work” should be analyzed separately from market substitution).

7. 17 U.S.C. § 106(2) (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following . . . (2) to prepare derivative works based upon the copyrighted work[.]”).

8. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013), *aff'd*, 804 F.3d 202 (2d Cir. 2015).

9. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223–24 (2d Cir. 2015).

10. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1206–08 (2021).

11. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3.

12. Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019, 1019 (2019) (“In a wide range of copyright cases, plaintiffs use economic and market-based theories to achieve goals that have little to do with economic rights.”).

13. Ginsburg, *Fair Use Factor Four Revisited: Valuing the “Value of the Copyrighted Work”*—*Essay*, *supra* note 6.

14. *See, e.g.*, Fagundes, *supra* note 5; Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615 (2015).

15. *See, e.g.*, 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:152 (rev. ed. 2022).

between different types of market benefits. Part II analyzes recent caselaw acknowledging market benefits and proposes a framework for proving market benefits as part of a reinvigorated fourth factor. Part III addresses the viability of market benefit arguments across different sectors of copyrighted works and the possible implications of increased acceptance. It concludes that, despite enhanced recognition, market benefits still lack widespread applicability and are unlikely to change the outcome of any present fair use determination.

I. THE RELATIONSHIP BETWEEN SECTION 107(4) AND MARKET BENEFITS

A. THE TRADITIONAL APPROACH TO MARKET EFFECTS IN FAIR USE

1. A Brief Overview

The Constitution grants Congress authority to “[p]romote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁶ Protecting authorship enriches the public by encouraging the creation and dissemination of original works. However, this is a delicate balance. Too much protection for authors stifles innovation by discouraging new works, while too little protection stifles innovation by removing economic incentives for creation.

Fair use is designed to further copyright’s dual aims. Originating in common law,¹⁷ fair use is an affirmative defense¹⁸ to copyright infringement that expressly limits authors’ exclusive rights related to their copyrighted works. Carve-outs for education and criticism encourage “productive thought and instruction without excessively diminishing the incentives for creativity.”¹⁹ Determining whether a particular use is fair, courts are instructed to weigh four non-exclusive factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁰

16. U.S. CONST. art. I, § 8, cl. 8.

17. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). Justice Story introduced several factors with modern equivalents in 17 U.S.C. § 107, including “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” *Id.* at 348.

18. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

19. Leval, *supra* note 1, at 1110.

20. 17 U.S.C. § 107.

While this may seem like a relatively straightforward four-prong test, these overlapping factors reflect the doctrine's heterogenous, common-law origins.²¹ Enshrining fair use in section 107, Congress intended to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."²²

Section 107 instructs courts to consider at least four factors but does not assign relative weight or importance to any particular factor. The first and fourth statutory factors—closely related to one another²³—emerged as the dominant considerations in fair use determinations.²⁴ The fourth factor enjoyed early supremacy, bolstered by the Supreme Court's proclamation in *Harper & Row Publishers, Inc. v. Nation Enterprises* that it was "undoubtedly the single most important element of fair use."²⁵

Almost a decade later, *Campbell v. Acuff-Rose Music, Inc.* altered the judicial approach to fair use. The Court emphasized the importance of the first factor and a finding of a "transformative use."²⁶ Lower courts followed the Supreme Court's lead in subsequent decades, expanding the importance of the first statutory factor.²⁷ Though technically not dispositive,²⁸ a "finding of 'transformativeness' often foreordained the ultimate outcome, as the remaining factors, especially the fourth . . . withered into restatements of the first."²⁹ Essentially, a transformative use, by definition, occupied a nontraditional market. Accordingly, the presence or lack of transformativeness emerged as an excellent predictor of fair use.³⁰

21. Fagundes, *supra* note 5, at 371 ("In the roughly 135 years between Story's opinion in *Folsom* and the passage of the Copyright Act of 1976, the fair use doctrine developed in the absence of any centralized statutory guidance. This development was heterogeneous by design, and thus did not give rise to a uniform fair use standard.")

22. H.R. REP. NO. 94-1476, at 66 (1976).

23. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978–2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 18 (2020) ("[t]he outcomes of factors one and four are also strongly correlated with each other. Indeed, in 72.5% of the 579 opinions, the court arrived at exactly the same outcome under both factors (out of six possible coded outcomes per factor).")

24. *See, e.g., id.* at 4 ("The same two factors that drove the test through 2005 have continued to do so: the first factor, going to the 'purpose and character' of the defendant's use, including whether it qualifies as 'transformative,' and the fourth factor, going to 'the effect of the [defendant's] use upon the potential market for or value of the copyrighted work.'")

25. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

26. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing Leval, *supra* note 1, at 1111).

27. *See, e.g.,* Ginsburg, *Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work"—Essay*, *supra* note 6, at 19 ("In the decades after the U.S. Supreme Court's adoption of 'transformative use' as a criterion for evaluating the first statutory fair use factor ('nature and purpose of the use'), a spate of lower court decisions enlarged the ambit of 'transformative use' analysis to engulf all of fair use.")

28. *Campbell*, 510 U.S. at 581 ("[p]arody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.")

29. Ginsburg, *Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work"—Essay*, *supra* note 6, at 19.

30. *See, e.g.,* Beebe, *supra* note 23, at 25 ("[o]f the 78 core opinions since *Campbell* in which a court found transformativeness, in all but three the court went on to find fair use.")

2. *Campbell* and the Harm-Based Approach To the Fourth Factor

After *Campbell*, the market effect inquiry became subordinate to a finding of transformativeness. Perhaps even more significant for the purposes of this Note, *Campbell* popularized “market harm”³¹ as shorthand for the fourth factor.³²

Since *Campbell*, courts applying section 107(4) have primarily considered economic harm resulting from an infringing use. The key to this inquiry is whether the secondary use constitutes a market substitute for the original or its derivatives.³³ To determine this, courts look to “not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘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.”³⁴

Courts are not concerned “whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work.”³⁵ This reflects the observation from *Campbell* that “there is no protectible derivative market for criticism.”³⁶ Similarly, even though the “taking of unprotectable material such as important ideas, laboriously researched facts, or the copying of the work’s overall style may cause lower sales, such losses should not be considered. The harm must be caused by the use of expression.”³⁷

Section 107(4) instructs courts to consider the effects on the “potential market” for a work, which includes revenue generated from derivative works and licensing fees.³⁸ One does not need to prove actual market harm, as “some meaningful likelihood of future harm”³⁹ is sufficient. The party raising a fair use defense has the burden to prove that their use has not, and will not, harm the potential market for the copyrighted work

31. Fagundes, *supra* note 5, at 365 (“*Acuff-Rose* is significant also for its introduction of the term ‘market harm’ as shorthand for the fourth fair use factor. The Court not only used that term throughout its opinion, but observed in summarizing its holding that ‘the fourth [fair use factor is] market harm.’ In so doing, the Court not only solidified the conceptual equivalence between market effect and adverse economic impact that its earlier opinions had introduced, but it popularized ‘market harm’ as the quick-reference term for this take on the fourth factor that swiftly became (and remains) ubiquitous among courts and commentators alike.”).

32. *Campbell*, 510 U.S. at 590 n.21 ([t]he Court acknowledges—though ultimately rejects—market benefit arguments: “Even favorable evidence, without more, is no guarantee of fairness. Judge Leval gives the example of the film producer’s appropriation of a composer’s previously unknown song that turns the song into a commercial success; the boon to the song does not make the film’s simple copying fair. This factor, no less than the other three, may be addressed only through a ‘sensitive balancing of interests.’ Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.”) (citations omitted).

33. *Id.* at 590–94.

34. *Id.* at 590.

35. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 482 (2d Cir. 2004).

36. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592(1994)

37. PATRY, *supra* note 15, at § 10:150.

38. *Id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 n.4, 592–93 (1994)

39. *Sony Corp. Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (emphasis in original).

or any derivatives.⁴⁰ It is not entirely clear how defendants can meet this burden without speculation, leading some to conclude that “placing the burden on defendant is tantamount to ruling against it.”⁴¹

The fourth factor faces circularity problems. The mere fact that a fair use defense is raised demonstrates that there is a potential market for a copyrighted work. As Nimmer explains:

[A] potential market, no matter how unlikely, has always been supplanted in every fair use case, to the extent that the defendant, by definition, has made some actual use of plaintiff’s work, which use could in turn be defined in terms of the relevant potential market. In other words, it is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar.⁴²

Though broad, the scope of potential markets is not unlimited. In *American Geophysical Union v. Texaco Inc.*, after bemoaning the “vice of circular reasoning” and declaring that it “arises only if the availability of payment is conclusive against fair use,”⁴³ the Second Circuit declared that a market must be “traditional, reasonable, or likely to be developed” to receive protection against usurpation.⁴⁴ In *Castle Rock Ent., Inc. v. Carol Pub. Grp., Inc.*, the Second Circuit explained that copyright owners may not expand their potential market by attempting to license or develop markets for fair uses:

[C]opyright owners may not preempt exploitation of transformative markets, which they would not “*in general* develop or license others to develop,” by actually developing or licensing others to develop those markets. Thus, by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets.⁴⁵

In many contexts, courts consider an artist’s decision not to enter a particular market strategic or artistic. In 1998, the Second Circuit held that an unauthorized *Seinfeld* trivia book did not constitute fair use, despite the fact that “Castle Rock has evidenced little if any interest in exploiting this market for derivative works based on *Seinfeld*,

40. *Campbell*, 510 U.S. at 590 (1994). (“Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”).

41. MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.05 (rev. ed. 2021).

42. *Id.*

43. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994).

44. *Id.* at 930.

45. *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 145 n.11 (2d Cir. 1998) (emphasis in original).

such as by creating and publishing *Seinfeld* trivia books.⁴⁶ Even explicit rejection of a certain market does not grant a third party immunity to usurp that derivative market.⁴⁷ In a case regarding unpublished letters from J.D. Salinger, the Second Circuit noted that “the need to assess the effect on the market for Salinger’s letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime.”⁴⁸ In another case concerning J.D. Salinger, the court declared that an unauthorized sequel to *Catcher in the Rye* was not fair use even though “Salinger has publicly disclaimed any intention of authorizing a sequel.”⁴⁹ The court noted that “Salinger has the right to change his mind and, even if he has no intention of changing his mind, there is value in the right *not* to authorize the derivative work.”⁵⁰

Together, these cases demonstrate that the fourth factor is not necessarily limited to monetary loss. If it were, it would be hard to justify protecting a market that a copyright holder has disavowed any intention to exploit.⁵¹ Andrew Gilden cites the Salinger cases as examples of “market gibberish,” in which “plaintiffs use economic and market-based theories to achieve goals that have little [to] do with economic rights.”⁵² Gilden suggests that, by denying fair use of Salinger’s letters or an unauthorized sequel, the Second Circuit was “manipulating market interests in order to variably protect privacy concerns.”⁵³ This is problematic because courts engaged in market gibberish “obscure the diverse range of economic, emotional, and cultural interests at stake within copyright law.”⁵⁴ This in turn creates undesirable distributive consequences, as “famous and wealthy individuals can more easily cloak themselves in business narratives in order to vindicate personal interests.”⁵⁵ To address this problem, courts should utilize an “interest-transparent approach,” in which they “openly and explicitly discuss the range of interests they are weighing when deciding whether a given use is infringing.”⁵⁶

46. *Id.* at 145.

47. *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), *op. supp. On den. Of reh'g*, 818 F.2d 252 (2d Cir. 1987).

48. *Id.* at 99.

49. *Salinger v. Colting*, 607 F.3d 68, 74, 83 (2d Cir. 2010).

50. *Id.* at 74 (emphasis in original).

51. PATRY, *supra* note 15, at § 10:152 (“[I]f there is no longer a licensing market, it is hard to see how a non-existent market can be harmed.”).

52. Gilden, *supra* note 12, at 1019.

53. *Id.* at 1040.

54. *Id.* at 1019.

55. *Id.* at 1062.

56. *Id.* at 1023.

B. MARKET BENEFITS

Expanding the fourth factor inquiry beyond market harm may help address problems related to circularity⁵⁷ and the protection of non-economic interests.⁵⁸

1. Defining Market Benefits

Market benefits consist of monetary gains conferred upon a copyright holder by a third party's unauthorized use of a copyrighted work. To be clear, proof of market benefits does not mandate—or even suggest—a finding of fair use.

Consider Leval's classic example of a famous director taking an unknown tune, putting it into her movie without permission from the composer, and turning the tune into a commercial success.⁵⁹ The fact that the composer receives a financial windfall from the attention conferred by the unauthorized inclusion of the tune does not render the use fair, as it is still "unjustified under the first factor."⁶⁰ Although the secondary use is commercial, non-transformative, and not protected as fair use, it still provides a market benefit: a monetary gain caused by an unauthorized use.

A highly transformative search engine that stimulates book sales by providing snippet views with links to copyright holders' websites also provides a market benefit. Although the use is not authorized, it confers a financial benefit upon the copyright holder. These examples illustrate that the presence of market benefits depends on the monetary effect to a copyright holder's work, not a commercial or transformative use or purpose.

2. Distinguishing Market Benefits

There are two general types of market benefit arguments. While there is overlap, these arguments should be considered distinct.

The first type of argument, which I term "dispositive market benefits," suggests that a use should be fair if an infringer can show that an unauthorized use made the copyright holder more money than it cost her, even if the secondary use is commercial and non-transformative. This echoes "the long-spurned argument that defendant's copying does the plaintiff a favor by bringing the work to greater public attention."⁶¹ Acceptance of dispositive market benefits would reward lawbreakers and restrict a copyright holder's ability to produce derivative works. This is precisely the type of argument that courts have long rejected,⁶² and are likely to continue to reject in the future.

57. PATRY, *supra* note 15, at § 10:152.

58. *See generally* Gilden, *supra* note 12.

59. Leval, *supra* note 1, at 1124 n.84.

60. *Id.* at 1124.

61. Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1412 (2014).

62. *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 n.21 (1994).

The second type of argument, which I deem “relevant market benefits,” is more in line with current jurisprudence. This argument suggests that a court should balance market benefits, market harms, and additional factors for a more holistic assessment of the fourth statutory factor. Though relevant, the existence of market benefits does not rescue an otherwise infringing use. Rather, it should be one of several considerations germane to a court’s determination of market impact.

Like many other aspects of fair use, market benefits ought to be relevant, not dispositive.

3. Deriving Market Benefits

Balancing market benefits against market harms is arguably more compatible with the language, purpose, and legislative history of section 107(4) than the current judicial approach.

The beginning point for any statutory interpretation is the text of the statute.⁶³ Section 107(4) instructs courts to consider “the effect of the use upon the potential market for or value of the copyrighted work.”⁶⁴ An ordinary reading suggests that courts should consider all potential effects, not just harmful ones. There are no positive or negative words that might imply a limited consideration of market harms.

Despite the straightforward reading of section 107(4), courts may consult the legislative history to resolve ambiguities of interpretation.⁶⁵ The legislative history of the Copyright Act of 1976 contains limited discussion of fair use and the fourth factor,⁶⁶ but offers some valuable insights.⁶⁷ The general intention behind section 107 can be interpreted broadly, as “there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.”⁶⁸ While this seems to clash with the suggestion that section 107 is “intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way,”⁶⁹ both of these statements reflect the common law origin and flexible nature of fair use. Due to “the endless variety

63. See, e.g., *Sebelius v. Cloer*, 569 U.S. 369 (2013) (“As in any statutory construction case, ‘[w]e start, of course, with the statutory text,’ and proceed from the understanding that ‘[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.’” (citing *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006))).

64. 17 U.S.C. § 107(4).

65. “The commonest bridge from text to legislative history is a finding that the statutory language is not plain, but instead is unclear or ‘ambiguous.’” LARRY M. EIG, *CONG. RSCH. SERV.*, 97-589, *STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS* 44 (2014). See also *id.* at 44 n.303 (“‘In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress.’” *United States v. Great Northern Ry.*, 287 U.S. 144 (1932). On the other hand, ‘we do not resort to legislative history to cloud a statutory text that is clear.’ *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994).”).

66. H.R. Rep. No. 94-1476 (1976).

67. *Id.*

68. *Id.* at 66.

69. *Id.*

of situations” that can arise related to fair use, “the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”⁷⁰

Nothing in the legislative history seems to foreclose consideration of market benefits, nor endorse exclusive consideration of all market harms.⁷¹ Tracing the history of section 107(4), Fagundes notes that Alan Latman’s Congressionally commissioned study on fair use contained “several different versions of the fair use factors.”⁷² Although these versions included “various market-harm formulations,” the drafters of the fair use test deliberately “chose the market neutral language” attributed to Judge Leon Yankwich and Professor Saul Cohen.⁷³ The drafters had access to “no shortage of alternative phrasings” that would have covered only “negative economic impacts of unauthorized use,” but still chose to use market neutral language.⁷⁴ Fagundes notes that “the sole economic impact considered during the pre-codification history of fair use was indeed a harmful one: reduced demand for the plaintiff’s work due to the unauthorized use,” but insists that this does not foreclose the relevance of market benefits.⁷⁵

Looking beyond the text of the statute and legislative history, Fromer argues that balancing market benefits and market harms “advances copyright’s goal of promoting the creation of artistic and cultural works from which society can benefit.”⁷⁶ On the other hand, consideration of only market harms distorts the incentives/access tradeoff because “infringement—and no fair use—can be found too readily.”⁷⁷ She suggests that balancing all market effects “solves a longstanding concern with circular and short-circuited reasoning in consideration of the fourth fair use factor.”⁷⁸ This argument has some instinctive appeal. A nuanced approach to the fourth factor could reduce tautological problems by eliminating the almost dispositive impact of a finding of market harm. It may be easier to balance dual aims of promoting creativity and protecting authorship in a regime where market harms do not largely dictate an outcome.⁷⁹

70. *Id.*

71. For a more thorough discussion of the relevant legislative history, including preliminary drafts and language, see Fagundes, *supra* note 5, at 370–77.

72. *Id.* at 373.

73. *Id.* at 374.

74. *Id.* at 375.

75. *Id.*

76. Fromer, *supra* note 14, at 615.

77. *Id.* at 649.

78. *Id.* at 640.

79. This is not to suggest that market harms are dispositive, only that a finding of market harm strongly correlates with a lack of fair use. See Beebe, *supra* note 23, at 33 (“Of the 169 core opinions that found that factor four disfavored fair use from 1978 through 2019, all but three ultimately found no fair use, and none of the three outlying opinions that found fair use offers particularly compelling analysis to explain its divergence between factor four and the overall outcome.”).

II. MARKET BENEFIT CASE LAW AND PROOF

A. DEVELOPING MARKET BENEFITS

1. Pre-Campbell Market Benefits

Amsinck v. Columbia Pictures Indus., Inc.,⁸⁰ highlights the importance of market effects prior to *Campbell*. This case considered whether Defendant Columbia Pictures Industries, Inc. (“CPI”) had infringed Plaintiff Carola Amsinck’s copyright in her “pastel-colored teddy bears” artwork by displaying the work in a motion picture without seeking permission, and whether CPI was entitled to a fair use defense.⁸¹ Beginning its analysis with the fourth factor,⁸² the court found that “the defendants’ use of Amsinck’s artwork did not prejudice sales of her design or of the Mobile bearing the design” and “could not be used as a substitute.”⁸³ The court also referenced a market benefit argument: “Indeed, the Court believes that, notwithstanding the lack of identification of the Mobile, its use in the film might actually increase the demand for mobiles in general, thereby benefitting plaintiff indirectly.”

Amsinck relied on the fourth factor as the dispositive consideration in its fair use analysis:

While the other three factors may lean toward the plaintiff, their significance in this case is outweighed by this most important factor [section 107(4)]. Because this key factor all but requires a finding of fair use, defendants will be entitled to a finding of fair use unless all the other factors weigh strongly against such a finding.⁸⁴

While the court’s reliance on the fourth factor may seem unusual in a post-*Campbell* landscape, it was not as controversial at the time.⁸⁵ In this case, the lack of market harm appears to serve a similar role to transformativeness under *Campbell*: saturating the court’s assessment of each other factor and determining the ultimate outcome.⁸⁶ In *Amsinck*, the court’s analysis of the first factor focused on the commercial nature of the film, rather than any sort of transformative use or purpose.⁸⁷ The court also mentioned

80. *Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044 (S.D.N.Y. 1994).

81. *Id.* at 1045–46.

82. *Id.* at 1048.

83. *Id.* at 1049.

84. *Id.*

85. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985) (the fourth factor is considered “undoubtedly the single most important element of fair use.”).

86. See also Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3, at 266 (“[T]ransformative use’ analysis has engulfed all of fair use, becoming transformed, and perhaps deformed, in the process. A finding of ‘transformativeness’ often foreordained the ultimate outcome, as the remaining factors, especially the fourth (impact of the use on the market for or value of the copied work), withered into restatements of the first.”) (footnote call number omitted).

87. *Amsinck*, 862 F. Supp. at 1049.

the lack of substitutive value in its discussion of the third factor.⁸⁸ Weighing the fourth factor more than the other three combined, the court considered Defendant's use fair.⁸⁹

Interestingly, *Amsinck* presents a market benefits scenario similar to the one contemplated and rejected by Leval and, in turn, the Supreme Court in *Campbell*. Leval's example involves a movie's unlicensed use of a song from an unknown artist, garnering attention and profits for the artist.⁹⁰ Similarly, the *Amsinck* court suggests that the attention conferred upon Plaintiff's artwork by Defendants' unauthorized use in a movie would drive up demand, benefitting Plaintiff, and permitting a fair use defense.⁹¹

2. Subsequent Market Benefit Cases

Though courts typically remain hostile to market benefits due to clashes with derivative work rights and conferral of benefits upon lawbreakers, cases from varied district and circuit courts may suggest growing acceptance of relevant market benefits. Alternatively, these cases may signal reluctance to extend copyright owners limited monopoly to non-existent and hypothetical markets. In each of these cases, the court found the use fair, and the secondary work transformative. As a result, each of these cases concerns relevant market benefits, not dispositive market benefits.

In *Nunez v. Caribbean Int'l News Corp.*, the court found fair use where a newspaper reprinted three photos of Miss Puerto Rico Universe without the photographer's permission on the grounds that the images served an informative—albeit commercial—purpose.⁹² Acknowledging that a market may have existed for licensing controversial photos to news outlets, and that “El Vocero's use of the photograph without permission essentially destroys this market,”⁹³ the court nonetheless found that Nunez had not suffered market harm because there was no evidence that such a market existed in this case. Noting that “the only discernible effect of the publication in El Vocero was to increase demand for the photograph,” the court found that the fourth factor favored fair use.⁹⁴ In this case, unlike others discussed in this section, the court suggested that the first factor may have been “neutral.”⁹⁵

Hofheinz v. AMC Prods., Inc., presents a similar example of relevant market benefits.⁹⁶ The issue in this case was whether AMC's unauthorized use of copyrighted clips in documentary about James Nicholson, Hofheinz's late husband, constituted fair use.⁹⁷ Determining the use was fair, the court noted that the documentary was both transformative and unlikely to reduce the potential market for Hofheinz's works.⁹⁸

88. *Id.* at 1050.

89. *Id.*

90. Leval, *supra* note 1, at 1124 n.84.

91. *Amsinck*, 862 F. Supp. at 1049.

92. *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000).

93. *Id.* at 25.

94. *Id.*

95. *Id.* at 23.

96. *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 140 (E.D.N.Y. 2001).

97. *Id.* at 129–30, 137.

98. *Id.* at 141.

Analyzing the fourth factor, the court suggested that the documentary may actually confer a benefit upon the copyright holder:

I find at this point that it the [sic] Documentary may increase market demand for plaintiff's copyrighted works and make more people aware of the influence that AIP had in developing the 'B' movie genre. Moreover, defendants' brief display of the photographs, poster, and model monsters at issue should only increase consumer demand as well as the value of those items after the Documentary heightens public awareness of AIP's role in shaping Hollywood productions.⁹⁹

The court rejected Hofheinz's argument that future lost licensing revenue should prevent a determination that the use is fair, suggesting that this would "eviscerate the affirmative defense of fair use." This reasoning, however, seems to ignore the word "potential" in section 107(4). Copyright holders are afforded protection over both their works and any derivative works,¹⁰⁰ so the likely effects on a licensing market are relevant.

Corbello v. DeVito, provides another pertinent example of relevant market benefits.¹⁰¹ In this case, the widow of the ghostwriter for Tommy DeVito's unpublished autobiography ("the Work") alleged copyright infringement by DeVito and his bandmates for using the Work to create the Broadway musical "Jersey Boys."¹⁰² Ultimately, the court found that defendants were "entitled to a judgment as a matter of law on the fair use issue."¹⁰³

Corbello stands out for its recent insistence that the "fourth, *most important* factor strongly favors a finding of fair use."¹⁰⁴ Beginning its fair use analysis with the fourth factor, the court noted that "before [Jersey Boys] debuted, the Work had no market value."¹⁰⁵ It endorsed the idea that Jersey Boys may have positively impacted the market for the Work it allegedly infringed: "To the extent the Work may be profitable today, it is almost certainly only because of the Play . . . If anything, the Play has increased the value of the Work."¹⁰⁶

Confusingly, the *Corbello* court found both that the secondary work was transformative for its "change of purpose" and "character,"¹⁰⁷ and that the "first factor weighs against fair use in the present case as it does in most cases, because the producers

99. *Id.* at 140.

100. 17 U.S.C.A. § 106(2) (West).

101. *Corbello v. DeVito*, 262 F. Supp. 3d 1056 (D. Nev. 2017), *aff'd sub nom.* *Corbello v. Valli*, 974 F.3d 965 (9th Cir. 2020).

102. *Id.* at 1059–1065.

103. *Id.* at 1079.

104. *Id.* at 1069 (emphasis added).

105. *Id.* at 1068.

106. *Id.* at 1069.

107. *Id.* at 1076.

of the Play have profited from exploitation of copyrighted material without paying the customary price.¹⁰⁸ The court did not explain its decision to separate the first factor from transformation.¹⁰⁹ While the court did note that “the transformative nature of the use diminishes the significance of the sole factor weighing against fair use,” it at no point suggested that the first factor may in fact favor a finding of fair use.¹¹⁰ It is not clear whether this is an error, a deliberate attempt to reinvigorate the fourth factor at the expense of the first, or something else entirely. As a result of the nontraditional opinion, it is difficult to suggest that this case should be seen as instructive.

A small sampling of other federal cases may demonstrate growing acceptance of market benefits as a viable component of fair use analysis. In a case regarding a manuscript’s admission into evidence, the Fourth Circuit noted that “the use would have ‘absolutely zero’ detrimental effect on the potential market for the copyrighted work and could, ‘in a perverse way,’ actually increase its market value.”¹¹¹ In a case regarding a South Park parody of an online video, the Seventh Circuit noted that the allegedly infringing work’s “likely effect, ironically, would only increase ad revenue.”¹¹² In a case addressing the unauthorized submission of a plaintiff’s resume in a litigation matter, the Eastern District of Virginia asserted that the “effect of that use, if anything, would seem to aid plaintiffs by increasing their prominence or visibility in the field.”¹¹³ Finally, the Northern District of Mississippi expressed openness to arguments related to enhanced market value in a case about an unauthorized use of a William Faulkner quote in a Woody Allen movie.¹¹⁴ The acknowledgement of possible market benefits in each of these cases is significant, even if the benefits did not change the outcome.

There are at least three common elements of each of the cases introduced in this section: (1) a finding of fair use, (2) acknowledgement of potential market benefits, and (3) a transformative use or purpose. Taken together, these cases do not suggest that discussion of market benefits guarantees a finding of fair use. Courts routinely raise the issue of market benefits before dismissing them as irrelevant.¹¹⁵ Rather, these cases demonstrate that a finding of transformativeness continues to dictate both the outcome of the fourth factor and the overall fair use determination. Therefore, even in market

108. *Id.* at 1069.

109. On appeal, the Ninth Circuit did not address the fair use issue. (“[w]e affirm on the sole ground that Jersey Boys did not infringe DeVito’s biography, and so do not reach the district court’s fair use rationale”). *Corbello v. Valli*, 974 F.3d 965, 971 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2856 (2021).

110. *Corbello v. DeVito*, 262 F. Supp. 3d 1056, 1069 (D. Nev. 2017).

111. *Bond v. Blum*, 317 F.3d 385, 392 (4th Cir. 2003).

112. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012).

113. *Devil’s Advoc., LLC v. Zurich Am. Ins. Co.*, No. 1:13-CV-1246, 2014 WL 7238856, at *7 (E.D. Va. Dec. 16, 2014), *aff’d*, 666 F. App’x 256 (4th Cir. 2016).

114. *Faulkner Literary Rights, LLC v. Sony Pictures Classics, Inc.*, 953 F. Supp. 2d 701 (N.D. Miss. 2013).

115. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 n.21 (1994) (citing and rejecting example from *Leval*, *supra* note 1).

benefit cases, courts appear to retain the “*Cariou*-era formula, if transformative, then no market harm, therefore fair use.”¹¹⁶

3. Digital Copying and Market Benefits

Cases discussing search engines, snippet views, and other mass digitalization technology are strong candidates for consideration of market benefits. Courts have found fair use in cases where a defendant has not necessarily produced a transformative work, but has used a work for a transformative purpose.¹¹⁷ Digital copying is especially relevant in a market benefits context, as several mass databases convey information about copyrighted works without risking usurpation.¹¹⁸ Nonetheless, transformativeness still controls; all the successful fair use defenses discussed in this section relied on a finding of transformativeness more than a demonstration of market benefits (or lack of market harm).

In *Kelly v. Arriba Soft Corp.*, the Ninth Circuit considered whether Arriba’s reproduction of Kelly’s copyrighted photographs as lower-quality thumbnails was fair use.¹¹⁹ Despite the fact that “Arriba made exact replications of Kelly’s images,” the court held that Arriba’s use was transformative because it served “a different function than Kelly’s use—improving access to information on the internet versus artistic expression.”¹²⁰ By creating “a different purpose for the images, Arriba’s use is transformative.”¹²¹ The court reasoned that this determination was in line with the goals of copyright, noting that “[t]he thumbnails do not stifle artistic creativity because they are not used for illustrative or artistic purposes and therefore do not supplant the need for the originals. In addition, they benefit the public by enhancing information-gathering techniques on the internet.”¹²²

Regarding the fourth factor, the court held that Arriba’s use did “not harm the market for or value of Kelly’s images.”¹²³ It did not matter that “Kelly could sell or license his photographs to other websites or to a stock photo database,” because “the search engine would guide users to Kelly’s web site rather than away from it.”¹²⁴ Thus, despite an existing market for online photo licensing, the thumbnails did not serve as a market substitute for the higher quality, larger photos. Concluding that the fourth

116. Jane C. Ginsburg, *Letter from the US, Part I: The Fair Use Pendulum Oscillates*, REVUE INTERNATIONALE DU DROIT D’AUTEUR (Nov. 15, 2021), <https://la-rida.com/sites/default/files/2021-12/270-CEVA.pdf> [perma.cc link unavailable] [Wayback Machine link unavailable].

117. See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) (“[w]e must determine if Arriba’s use of the images merely superseded the object of the originals or instead added a further purpose or different character. We find that Arriba’s use of Kelly’s images for its thumbnails was transformative.”).

118. See, e.g., *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013).

119. *Kelly*, 336 F.3d at 821.

120. *Id.* at 818–19.

121. *Id.*

122. *Id.* at 820.

123. *Id.* at 822.

124. *Id.* at 821.

factor weighed in favor of fair use, the court noted that Arriba's thumbnails directed users to Kelly's website, the only place where someone could access the full photos.¹²⁵

The Ninth Circuit reached a similar result in *Perfect 10 v. Amazon*, finding that Google's display of thumbnail images was fair use.¹²⁶ Relying on *Kelly*, the court held that Google's use was "highly transformative," and therefore the first factor weighed "heavily in favor of Google."¹²⁷ The court compared search engines to parody in terms of their social benefit and transformative value, suggesting that search engines "may be more transformative."¹²⁸ Unlike the plaintiff in *Kelly*, *Perfect 10* demonstrated that they had "a market for reduced-sized images."¹²⁹ However, this was not sufficient to demonstrate market harm, as the court reasoned that any potential harm "remains hypothetical." Ultimately, Google's transformative use outweighed its commercial nature and any "unproven use of Google's thumbnails for cell phone downloads."¹³⁰

Authors Guild, Inc. v. Google, Inc. represents one of the strongest endorsements of market benefit arguments to date. In that case, plaintiffs brought a class action suit against Google for scanning and displaying "snippets" of copyrighted books via Google Books.¹³¹ Circuit Judge Denny Chin (sitting by designation) found that the use was fair and granted Google's motion for summary judgment.¹³² Judge Chin rejected assertions by the copyright holders that Google Books served as a market replacement for their works, noting that "a reasonable factfinder could only find that Google Books enhances the sales of books to the benefit of copyright holders."¹³³ By providing "convenient links to booksellers to make it easy for a reader to order a book," there is "no doubt but that Google Books improves books sales."¹³⁴ Judge Chin concluded that the fourth factor "weighs strongly in favor of a finding of fair use."¹³⁵ The discussion did not contain any mention of market harm.

Affirming the motion for summary judgment, Second Circuit Judge Pierre Leval did not explicitly adopt Judge Chin's reasoning.¹³⁶ After acknowledging the potentially

125. *Id.* at 822.

126. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

127. *Id.* at 1167–68.

128. *Id.* at 1165. ("Just as a 'parody has an obvious claim to transformative value' because 'it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one,' a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.") (internal citations omitted). *But see* *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 742 (9th Cir. 2019) (finding no fair use where Zillow's photos served as a market substitute, despite the fact that they were delivered via search engine; "the label 'search engine' is not a talismanic term that serves as an on-off switch as to fair use. Rather, these cases teach the importance of considering the details and function of a website's operation in making a fair use determination.").

129. *Perfect 10*, 508 F.3d at 1168.

130. *Id.* at 1168.

131. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

132. *Id.* at 283.

133. *Id.* at 293.

134. *Id.*

135. *Id.*

136. *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

harmful economic effects of snippet view, Judge Leval declared that “the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original.”¹³⁷ Judge Leval then characterized Google’s use as supplying information about copyrighted works, thus falling outside the scope of section 106(2).¹³⁸ While the judges offered alternate justifications to reach the same result, it is significant that neither considered suggestions (though no evidence) of lost book sales or licensing fees dispositive.

In the mass digitalization context, transformativeness remains the benchmark for a finding of fair use. Although information delivering sources like search engines may serve complementary market functions with existing copyrighted works, that is not enough to sustain a fair use defense.

4. Shifting Fair Use Landscape

Some recent cases suggest that “transformativeness” may be losing its dominant status in the fair use calculus. In *Fox News Network, LLC v. Tveyes, Inc.*, the Second Circuit held that TVEyes’ searchable media database infringed plaintiff’s copyrights and was not a fair use.¹³⁹ The court characterized TVEyes’ database, which redistributed news in 10-minute clips, as “somewhat transformative,”¹⁴⁰ noting that the first factor “favors TVEyes only slightly.”¹⁴¹ Despite recognition of transformativeness, the court declined to find fair use because the third and fourth factors strongly favored Fox.¹⁴² This represents a very rare case in which the first and fourth factors are not in alignment.¹⁴³ Professor Ginsburg argues that this characterization “strains the concept of transformativeness,” though it “is significant that the courts rejected the fair use defense notwithstanding a finding of transformative use.”¹⁴⁴

Though *Fox* indicated a shift away from traditional transformativeness, it may still be dispositive. “In other words, ‘transformativeness’ may remain decisive, but the equation has flipped. The formula ‘if transformative work/purpose, then no market harm’ meets its corollary: [*if commercial and not transformative, then market harm.*] Thus, fair use continues to reduce to a one-factor test, but one that cuts both ways.”¹⁴⁵

While *Authors Guild* failed to usher in an era of market benefits, another recent Google case may alter the fair use inquiry in a way that leads to a more holistic

137. *Id.* at 224.

138. *Id.* at 226.

139. *Fox News Network, LLC v. Tveyes, Inc.*, 883 F.3d 169 (2d Cir. 2018).

140. Judge Kaplan took issue with this characterization in his concurrence, arguing that somewhat transformative “is entirely immaterial to the resolution of this case” because “the other factors relevant to the fair use determination carry the day in favor of Fox regardless of whether the Watch function is or is not transformative.” *Id.* at 181.

141. *Id.* at 181.

142. *Id.* at 179–81.

143. Beebe, *supra* note 23, at 18.

144. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3, at 284.

145. *Id.* at 287 (emphasis added).

assessment of the fourth factor. In *Google LLC v. Oracle Am., Inc.*, the Supreme Court held that Google's unauthorized copying and use of Oracle's API was fair.¹⁴⁶ Justice Breyer balanced public benefits against private harms in his discussion of the fourth factor.¹⁴⁷ Though Oracle may forgo significant profit based on Google's use, any loss is more than made up for by the public benefits of enhanced creativity and interoperability.¹⁴⁸ While public benefits are not always relevant, they are relevant in this case "to determine the likely market effects of Google's reimplementation."¹⁴⁹ Following *Google*, other courts have reconfigured their fourth factor analysis to balance public benefits with harms to the copyright holder.¹⁵⁰

One should not conflate market benefits and public benefits. However, to the extent that *Google* contemplates a more holistic fourth factor assessment, market benefits and public benefits may both be important. Market benefits, unlike public benefits, are entirely monetary and limited to the copyright holder. Public benefits, on the other hand, concern matters such as access to information and resources, and are largely unaffected by the copyright holder's financial situation. As an illustration, in *Authors Guild*, any author who enjoyed enhanced sales from snippet view received market benefits.¹⁵¹ Each person who benefited from the Google Books service as an informational tool received a public benefit. As market benefits still lack dispositive value, the most realistic path to relevance may be a reconfigured fourth factor assessment that balances private economic effects and public benefits.¹⁵²

146. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

147. *Id.* at 1206. ("we must take into account the public benefits the copying will likely produce. Are those benefits, for example, related to copyright's concern for the creative production of new expression? Are they comparatively important, or unimportant, when compared with dollar amounts likely lost (taking into account as well the nature of the source of the loss)?").

148. *Id.* at 1208. ("given programmers' investment in learning the Sun Java API, to allow enforcement of Oracle's copyright here would risk harm to the public. Given the costs and difficulties of producing alternative APIs with similar appeal to programmers, allowing enforcement here would make of the Sun Java API's declaring code a lock limiting the future creativity of new programs. Oracle alone would hold the key.").

149. *Id.* at 1206.

150. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 50 (2d Cir. 2021) ("our analysis of the fourth factor also 'take[s] into account the public benefits the copying will likely produce.' *Google*, 141 S. Ct. at 1206.").

151. The fact that the authors may have lost some sales or licensing fees does not affect the applicability of market benefits. Market benefits refer to any monetary gain, not necessarily one that exceeds monetary loss. By the same token, market harm refers to any monetary loss, not necessarily one that exceeds monetary gain.

152. Fromer asserts that the presence of market benefits suggests societal benefits: "when there are market benefits to the copyright owner, there tends also to be societal benefit. All in all, policies weighing in favor of fair use suggest that market benefits to the copyright holder offer a signal that there is a societal benefit favoring fair use, which might also benefit the copyright holder." Fromer, *supra* note 14, at 633.

B. PROVING MARKET BENEFITS

Since *Campbell*, there have not been any cases in which market benefits overcame a lack of transformativeness to establish fair use. While proving dispositive market benefits may not be possible under present standards, it is possible to prove relevant market benefits. Anyone raising a market benefit argument should have to satisfy at least two elements: (1) enhanced profitability of a copyrighted work (2) caused directly by an unauthorized use of that work.

1. Enhanced Profitability

As part of an affirmative defense, the defendant bears the burden of proof¹⁵³ to show that their unauthorized use conferred a financial benefit upon the copyright holder. This burden of proof is problematic in cases of alleged market harm, as it is inherently speculative to argue that one's use will not have future deleterious effects on the market for a given work or its potential derivative markets.¹⁵⁴ However, for the sake of statutory consistency, it is preferable to apply similar empirical standards to both market harms and market benefits. Therefore, to empirically demonstrate a market benefit, a defendant must show "by a preponderance of the evidence that some meaningful likelihood of future"¹⁵⁵ benefit exists.

One can demonstrate "meaningful likelihood"¹⁵⁶ of monetary gain in several ways. Much like market harm, showing that the copyright holder had already benefitted financially would confirm the presence of market benefits. Proof of enhanced sales, or a meaningful likelihood of enhancement, could be sufficient, albeit difficult to prove a causal connection. Unless one can demonstrate that they directed people to a place in which they could purchase the product in question,¹⁵⁷ and correlate that with increased sales data, it may not be possible to prove enhanced sales.

If other empirical methods are unavailable, proof of enhanced exposure may be sufficient to demonstrate a market benefit. One way to estimate this would be to measure the cost of advertising required to achieve the same increase in exposure. Every dollar saved on advertising could be considered a market benefit. This can be problematic in a copyright regime, as the wealth and fame that occasionally accompany authorship create disparities in both the cost and effectiveness of advertising. Further, exposure does not necessarily result in increased sales, and it may also be difficult to assess what constitutes standard exposure.¹⁵⁸

153. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) ("Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.").

154. See generally NIMMER & NIMMER, *supra* note 41, at 74.

155. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

156. *Id.*

157. For example, by providing links to purchase full books after displaying a snippet. See *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

158. Returning to the Leval example of a movie director using an unknown song, would different genres require different levels of exposure? For example, one can imagine someone looking up the lyrics to a

Ongoing business practices provide both a framework and an obstacle for measuring profitability. Businesses regularly engage in market-benefit like calculations when deciding whether to bring copyright infringement actions, and this could provide insight into what courts should consider.¹⁵⁹ Businesses weigh the financial benefits of enhanced community engagement and exposure against the potential cost of diminished sales and litigation. The notoriously protective Disney engaged in this sort of calculation when they decided not to bring suit against unauthorized third-party uses of their movie *Frozen*. Disney decided that “fan created content—even in cases where that content is generating revenue that is not captured by Disney—is cross-promotional marketing that money can’t buy.”¹⁶⁰ It appears that Disney is making a profitable bet that the unauthorized uses create brand loyalty and other market benefits that outweigh lost licensing fees. Though the “dividing line” between a permissible and impermissible use is “increasingly blurry,”¹⁶¹ Disney’s strategic decision represents an excellent example of an unauthorized but permitted use.

Tim Wu describes the strategic decisions by Disney and others as “tolerated use,” defined as “technically infringing, but nonetheless tolerated, use of copyrighted works.”¹⁶² While there is significant overlap, tolerated use and fair use are distinct because the former is infringement and the latter is not.¹⁶³ Nonetheless, many of these tolerated uses consist of unauthorized uses that confer monetary gain upon a copyright holder in the same manner as a market benefit. In this sense, a tolerated use or a market benefit can both be a complement: “a good that makes another good more valuable.”¹⁶⁴ Using fan created websites as examples,¹⁶⁵ Wu argues that treating complementary uses

song they like from a movie rather than trying to figure out the name of an instrumental track. On the other hand, the instrumental track may be “exposed” on screen much longer, as it is more compatible with spoken dialogue. So, what really matters—exposure or the results of exposure? The lack of certainty is illustrative of several problems related to empirical determinations.

159. However, if copyright owners are best suited to determine when to bring an infringement suit, why should a court second guess their judgement? Would bringing an infringement suit not demonstrate that the owner feels she is not receiving adequate market benefits?

160. Andrew Leonard, *How Disney Learned to Stop Worrying and Love Copyright Infringement*, SALON (May 23, 2014), https://www.salon.com/2014/05/23/how_disney_learned_to_stop_worrying_and_love_copyright_infringement [https://perma.cc/DG9S-UVW5] [https://web.archive.org/web/20230216225808/https://www.salon.com/2014/05/23/how_disney_learned_to_stop_worrying_and_love_copyright_infringement].

161. *Id.*

162. Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008).

163. *Id.* at 620.

164. *Id.* at 630. (“Examples are easy to describe. The sale of screws makes a screwdriver more valuable. My coffeemaker becomes more valuable the more varieties of coffee are available.”); *id.* at 631.

165. *Id.* at 630 (“For example, if I create a film that is obscure, and a fan creates a loving website for the film that uses images from the film, it is probably the case that the fan has infringed. Nonetheless it is also obvious that the web site creates value for the owner of the original work. In fact, many fan websites and other tolerated uses are exactly the kind of thing that content creators pay for when it is called ‘marketing.’”). As further illustration of this critical point, consider “the fan site for the popular TV show *Lost*, broadcast by ABC, which is called the ‘Lostpedia.’ Among other things, the Lostpedia posts full transcripts of the program; such postings are almost certainly copyright infringement. But nothing is done, not because ABC is lazy, but because it doesn’t think suing the Lostpedia is a good idea. Such lack of enforcement against fan sites seems

as fair “might solve some of the problems of tolerated use.”¹⁶⁶ Similar principles can be helpful in the application of market benefit arguments.

Kristelia Garcia catalogues a similar choice by Microsoft to embrace network effects via piracy:

Microsoft tolerated rampant piracy of its operating system (‘OS’) in China because, as then-CEO Bill Gates famously said, ‘As long as they’re going to steal [software], we want them to steal ours.’ Today, the company actively rewards pirates by offering upgrades of all outdated Microsoft operating systems—legitimate and pirated—to the latest version for free. Why? Because ‘Microsoft is making a strategic play to get as many users hooked on the Windows 10 platform as possible . . . The more users Microsoft gets now, the more services it can sell downstream—and it’s hoping even pirates can be flipped into paying customers.’¹⁶⁷

On the other hand, copyright holders’ voluntary choice to engage in tolerated use or other similar practices may confirm that they are better positioned than anyone else to determine when to bring an infringement suit. In that regard, it is difficult to justify supplanting the copyright holder’s economic calculation with the court’s view that the market effect is beneficial.

2. Causation

Causation presents a difficult issue that does not have an analogue in the market harms calculation, in which the defendant bears the burden of proof to show that their use did not cause the alleged harm. To prove market benefits, however, a defendant would need to prove that their unauthorized use directly caused (or was likely to cause) the alleged benefit to the market for the plaintiff’s work.

Causation may be easier to prove in cases of mass digitalization, in which technology companies often keep extensive user records that may indicate increased web traffic, sales, and more. For example, in *Authors Guild*, assuming, *arguendo*, that Google maintained comprehensive book sale data, they may have been able to demonstrate that participants’ books sold better than similarly situated non-participants (isolating for other variables). This may be wishful thinking, as enhanced exposure is no guarantee of enhanced profit, and correlation does not equal causation. That said, extensive user

to represent copyright owners’ judgment that the infringing uses are complementary to the main copyrighted products—or put more simply, that fan sites will increase, not hurt, demand for the show.” *Id.* at 619.

166. *Id.* at 631.

167. Kristelia Garcia, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265 (2020).

records demonstrating improved sales may demonstrate causation by a preponderance of the evidence.¹⁶⁸

It is important to delineate attention conferred by unauthorized use from attention conferred by legal controversy. Market benefits apply only to monetary gains conferred directly by an allegedly infringing use, not notoriety generated by possible public interest in the litigation. A quintessential example comes from the controversy surrounding Marvin Gaye's "Got to Give It Up" and the modern pop hit "Blurred Lines." The Gaye family brought suit for copyright infringement against the owners of "Blurred Lines," and the jury found for the Gaye family and awarded millions in damages.¹⁶⁹ While "Got to Give It Up" saw some increased attention after the release of "Blurred Lines," it did not regain national prominence until people caught wind of the copyright infringement suit.¹⁷⁰ This would not be a case of market benefits.

III. THE PRESENT AND FUTURE OF MARKET BENEFITS

Explicit consideration of market benefits appears to fundamentally alter the inquiry into the fourth fair use factor. In practice, however, market benefits are unlikely to change the outcome of most fair use cases. Existing case law suggests that market benefit arguments may only hold weight in the limited context of search engines and other snippet technologies.¹⁷¹ Nonetheless, any carveout for consideration of market benefits represents a significant change to fourth factor analysis.

A. SEARCHING FOR DISPOSITIVE MARKET BENEFITS

It remains to be seen if market benefits alone can overcome a non-transformative, commercial use.¹⁷² In the cases where courts have acknowledged market benefits as

168. Objections that this standard conflicts with rules of evidence against speculation must be equally applied to market harm and the speculation required to prove that one's infringement (if it were to become widespread) will not have deleterious effects on potential and derivative markets.

169. *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

170. *Id.* See also Victoria Kim et al., Ruling That 'Blurred Lines' Copied Marvin Gaye Song Rocks Music World, LA TIMES (Mar. 10, 2015), <https://www.latimes.com/local/california/la-me-blurred-lines-trial-20150311-story.html> [<https://perma.cc/8DTN-B37Q>] [<https://web.archive.org/web/20230220015817/https://www.latimes.com/local/california/la-me-blurred-lines-trial-20150311-story.html>].

171. See *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (finding Google and Amazon's display of copyrighted thumbnails was transformative, fair use); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (fair use to display copyrighted thumbnails in search results because "Arriba's use of Kelly's images in its thumbnails does not harm the market for Kelly's images or the value of his images. By showing the thumbnails on its results page when users entered terms related to Kelly's images, the search engine would guide users to Kelly's web site rather than away from it.").

172. Fagundes provides an example of a non-profit fan site that enhances exposure to a work: "On one hand, *Matters of Grey's* verbatim taking of audio clips was only weakly transformative, and *Arrested Development* is a highly creative work. But on the other hand, *Matters of Grey* took no more of Fox's work than it needed to make ringtones, and it posted the ringtones without any profit motivation in mind (indeed, *Matters of Grey* is not a for-profit operation)." Fagundes, *supra* note 5. Unfortunately, this example has

relevant, they have also found a transformative use or purpose. In *Author's Guild*, for example, Judge Chin's assertion that "there can be no doubt but that Google Books improves books sales" was not dispositive.¹⁷³ Though market benefits were relevant, tipping the fourth factor to weigh heavily in Google's favor, there was no indication that this finding could overcome a lack of transformative use.

One narrow possibility for dispositive market benefits is a work that falls on the border between parody and satire. While neither label is dispositive in itself,¹⁷⁴ courts typically find that a parody is transformative while a satire is not.¹⁷⁵ This has always been a fraught line, as "parody often shades into satire."¹⁷⁶

Satires, unlike parodies, impermissibly borrow expressive elements of a copyrighted work to comment on something unrelated to the underlying work.¹⁷⁷ However, there is no definitive rule about how much a parody can address society at large before it crosses into satire. What if eighty percent of a parody song ridicules the original work, but twenty percent lampoons society at large?

The importance of this distinction is reflected in the relevance of commercial status. A parody, like criticism, cannot harm the market for the original work, even if it suppresses demand for the original.¹⁷⁸ Parody, like any transformative work, will not be considered a market replacement because transformative works do not occupy traditional markets.

What about a famous satirist? One of the reasons satire does not enjoy fair use protection is that it borrows fame from an existing work to advance an unrelated message.¹⁷⁹ However, what if a satire conferred fame rather than borrowed it? In this scenario, a court may find that the satire is non transformative and commercial, tipping the first factor in favor of the original artist. However, the court may find that the satire exposed the original work to a much larger audience than it would have been otherwise exposed to. Using a market benefit approach, the court may find that the profits conferred by the unauthorized satire significantly outweigh any actual loss of licensing

minimal applicability because the use in question was not commercial. The more difficult question is whether a non-transformative, commercial use can rely on market benefits to achieve fair use.

173. *Authors Guild*, 954 F. Supp. 2d at 293.

174. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994) ("parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.").

175. *Id.* at 579 ("[P]arody has an obvious claim to transformative value," while "satire can stand on its own two feet and so requires justification for the very act of borrowing.").

176. *Id.* at 580.

177. *Id.* at 579.

178. *Campbell*, 510 U.S. at 591–92 ("We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,' B. Kaplan, *An Unhurried View of Copyright* 69 (1967), the role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.'")

179. *Campbell*, 510 U.S. at 579; see also *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020).

fees or potential loss of ability to profit off derivative works. As such, while there is clear market harm in the form of lost licensing fees, the market benefits are far greater.

Similarly, imagine a scenario where a celebrity comedian covers a song from an unknown YouTube artist with distinctive characteristics, changing the lyrics make fun of both the unknown artist and the internet music industry as a whole. The previously unknown artist becomes an overnight sensation, with views on their YouTube videos skyrocketing. The unknown artist signs a deal to record more music, and then brings a copyright infringement suit against the comedian for unauthorized use of their work. Is this a case like *Cabello*, in which the lack of market value before infringement would weigh in favor of fair use?¹⁸⁰

In this scenario, it is an open question as to whether the comedian's use is transformative or not. While both songs use the same beat, they are arguably different genres (comedy vs. anything else) and made for different audiences (fans of the comedian vs. YouTubers). Licensing song covers is a traditional market, but it's not clear there was any market for licensing before the comedian's unauthorized use.

Perhaps there is room for dispositive market benefits in a case where a work is "somewhat transformative."¹⁸¹ Imagine the facts of *TV Eyes* were altered: assume TV Eyes service included links to each channel's streaming platform, which users had to click on in order to get full context for a desired video. Otherwise, they could only view a 30 second clip.¹⁸² Further imagine that data showed most TV Eyes users did click the links, significantly increasing viewership on the plaintiffs' channels and generating ad revenue. But for TV Eyes' service, users would have no idea that their desired clip was located on plaintiffs' channels and would be less likely to visit. In that case, a "somewhat transformative" work—in the sense that it fully reproduced copyrighted material in a slightly different online context—could be fair use if market benefits are considered.

Both scenarios come close, but they appear to suffer from fatal flaws. Either a work is transformative, and therefore does not compete as a market substitute, or it is not transformative, and therefore impedes a copyright holders derivative work rights. A "somewhat transformative" work may not be a helpful distinction because it likely usurps the derivative work right.¹⁸³ So long as "transformativeness" dictates outcomes, it is not clear that dispositive market benefits are possible.

B. WHY NOT ALSO LICENSE THE WORK?

An unauthorized use can improve the market for a copyrighted work through enhanced public attention and reputation, though the effects vary case by case. Is it necessary to demonstrate that an unauthorized use made the copyright holder more

180. *Corbello v. DeVito*, 262 F. Supp. 3d 1056 (D. Nev. 2017) ("[B]efore [Jersey Boys] debuted, the Work had no market value.")

181. *Fox News Network, LLC v. Tveyes, Inc.*, 883 F.3d 169, 180 (2d Cir. 2018).

182. *Id.*, designed to contrast actual ten minutes. However, this change may enhance transformative value if the court agrees that shorter clips are equivalent to snippets from *Authors Guild* or low-quality thumbnails from *Kelly*.

183. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3.

money than an authorized use would have? While initially appealing in theory, this is almost impossible to prove in practice because an authorized use does not necessarily diminish the financial benefits of an unauthorized use. Consider the Leval example¹⁸⁴ of a movie popularizing an unfamiliar song: the songwriter gets the same financial benefits from enhanced exposure regardless of whether the use is authorized or not. The difference is that the songwriter loses out on licensing and royalty fees if the use is unauthorized. Even in cases of substantial financial benefit, a copyright holder will almost always make more from an authorized use.

Put another way, the enhanced exposure or attention conferred by a secondary work does not depend on whether that secondary work is authorized or not. An artist that profits from the attention conferred by an unauthorized use would receive the same profits for an authorized use, plus any royalties or licensing fees. The only scenario in which an unauthorized use can be more profitable is if the other option is no use at all. Of course, rewarding an otherwise unwilling creator for an infringing work may benefit a lawbreaker without actually serving copyright's dual aims.

One way to understand this and frame the issue is to ask, why not also license the work? Typical responses demonstrate the difficulty of establishing dispositive market benefits.

1. It Was Too Expensive To License

A familiar response for up-and-coming artists—especially musicians looking to sample famous music—this argument rests on the idea that one should still be able to use a work without authorization so long as they make the copyright holder money. Imagine, for example, a small band who cannot afford to sample the opening guitar riff of the Rolling Stones “Paint It Black,” but uses it anyway. Further imagine that the small band produces an improbable hit, landing both the unknown artist and “Paint It Black” on the Billboard 100. Unusually high streaming for “Paint it Black” generates thousands of dollars more than the Rolling Stones anticipated for that year. While many assume that the unknown artist propelled the revival of “Paint it Black,” it is also possible that the resurgence is attributable to something else (such as people interested in possible litigation involving Mick Jagger).

Despite the mutual financial benefit, this should not be considered fair use. Licensing samples is a well-established and lucrative market for musicians. Denying a copyright holder a substantial ability to profit off their creative work will disincentivize future creation. In this scenario, it does not matter that Mick Jagger is ultra-wealthy and the small band is not. Allowing market benefits to outweigh market harms in these cases could diminish authorial protection enough to discourage the creation of future works, thereby harming the public. It does not matter if unauthorized sampling typically

184. Leval, *supra* note 1, at 1124 n.84.

enhances the sampled song's sales and exposure¹⁸⁵ because the owner of the sampled song would always make more money through licensing or royalties. This demonstrates that many cases of market benefit do not alter the fair use calculation. However, one should not confuse a lack of determinativeness with a lack of importance.

2. We Tried To Obtain a License and They Said No

If a creator tries to license another work and fails, they are left with two options: use the work without permission, or do not use the work. This argument suggests that using a work without permission is justified so long as one confers a monetary benefit upon the copyright holder. However, this argument clashes with an author's exclusive derivative works right under § 106(2). The case law is clear that an author may exercise control over whether or if she wishes to enter a particular market.¹⁸⁶ While exceptions exist for things like parody and criticism, control extends over any "traditional, reasonable, or likely to be developed market."¹⁸⁷ If someone writes a bestselling novel and declines to turn it into a movie, a director cannot justify ignoring the author to develop a movie just by sharing profits. In a case like *Campbell*, assuming the song was not found to be a parody or otherwise transformative, the fact that 2 Live Crew only used "Oh Pretty Woman" after Acuff-Rose rebuffed their license request¹⁸⁸ would weigh heavily against a finding of fair use.¹⁸⁹

3. Too Impractical To License

In cases of mass infringement, this argument implies that individual licensing would be so burdensome that the licensing party is forced to produce an inferior product or abandon creation altogether. Consider *Authors Guild*, in which Google would have to acquire permission to reproduce insignificant snippets of every single available book. The combined cost and effort of this acquisition may outweigh any expected benefits from Google Books by so much that they decide to scrap the whole project, depriving public access to a valuable research tool.¹⁹⁰ This argument likely only fits with mass digital infringement, demonstrating the still narrow applicability of market benefits.

185. Mike Schuster et al., *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177 (2019) (relying on data demonstrating a correlation between sampling and increased music sales to argue that sampling should be considered fair use).

186. *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987); *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998).

187. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994).

188. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572–73 (1994).

189. See, e.g., *Fox News Network, LLC v. Tveyes, Inc.*, 883 F.3d 169, 180 (2d Cir. 2018) ("[i]t is of no moment that TVEyes allegedly approached Fox for a license but was rebuffed: the failure to strike a deal satisfactory to both parties does not give TVEyes the right to copy Fox's copyrighted material without payment.").

190. "In my view, Google Books provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders. It has become an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate

To understand the carveout, it may be helpful to compare search technology to free samples at stores. A candy store owner that gives a free piece of fudge to everyone who enters is not doing so out of altruism; she is doing so because she believes that offering free samples will cause people to buy more than they might have otherwise. Of course, she will attract some people who only come in for the free piece of fudge, but it is fair to assume that she would not continue the practice if it cost her more than it made. Search engines and thumbnail displays achieve a similar effect. Some consumers will be satisfied by the limited results in front of them, but others will be persuaded to spend money they might not have otherwise. So long as Google Books does not provide more than a snippet of the copyrighted work, it is merely identifying sources without necessarily diminishing sales.¹⁹¹

It is difficult to imagine another present context in which market benefits might have the same impact. Translating easily to other types of searches or similar musical software like Shazam, the impracticality argument falls apart with smaller data sets. An album that samples hundreds of songs may make individual license acquisition seem difficult, but pales in comparison to the millions of books or songs available on Google or Shazam. Of course, there is something perverse about immunizing mass infringers instead of medium or small-scale infringers. It almost amounts to permission to break the law, provided one breaks it over and over again. Professor Ginsburg describes this problem with mass digitalization fair use as an “obvious anomaly: the fewer works one copies, the weaker the case for market-failure fair use; but vast, immodest, copying entitles the copyist to persist, without permission and without paying.”¹⁹²

It is also difficult to separate this argument from a consideration of public benefits. Though distinct, market benefits and public benefits share utilitarian justifications rooted in copyright’s underlying goals. Following Justice Breyer’s analysis in *Google*, the fourth factor now includes a balancing of private harms against public benefits.¹⁹³ Expanding the inquiry to balance all market effects against all public effects is more holistic but could also give the fourth factor outsize influence. The benefits of diminishing the dispositive nature of the first factor may disappear if the fourth factor simply takes its place.

books. It has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. It preserves books, in particular out-of-print and old books that have been forgotten in the bowels of libraries, and it gives them new life. It facilitates access to books for print-disabled and remote or underserved populations. It generates new audiences and creates new sources of income for authors and publishers. Indeed, all society benefits.” *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013).

191. It may also help to think of this in terms of Dale Cendali’s distinction between “finding” and “delivering” non-transformative works. See Memorandum of Law in Support of Plaintiff Fox News Network, LLC’s Renewed Motion for Summary Judgment at 1, *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014) (No. 1:13-cv-05315-AKH), 2015 WL 4656263, Document No. 134 (advocating that providing a substantial portion of a work in response to a search (delivering) should not be fair use, but simply identifying (finding) a work in response to a search can be a fair use); see also Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3, at 293–94 (discussing the finding/delivering distinction).

192. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, *supra* note 61, at 1407.

193. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

C. IMPLICATIONS OF ACCEPTANCE

The beneficiaries of market benefits depend on the scope of their acceptance. Widespread adoption is unlikely anytime soon due to lack of dispositive capability, and clash with existing rights. While a balance of market harms and market benefits better reflects the text of section 107(4), it not likely to change results in many cases.

Accepted widely, it is possible that consideration of market benefits would enrich established businesses more than newcomers because it would be easier to justify unauthorized use of less popular works. If a major tech company—like Google—can shield itself from copyright infringement by making someone money, it will be incentivized to routinely misappropriate others' works for its own purposes. In a musical context, a popular band or artist might feel emboldened to steal their favorite beats and lyrics from unknown artists, knowing that they can justify their theft if they bring attention to the unknown.

Alternatively, one could imagine a mixed market benefits regime in which some smaller artists and authors benefit as much or more than established ones thanks to enhanced exposure and sales conferred by infringers. Small artists may also be able to borrow from established works without as much fear, though it will be more difficult to prove that their largely unknown use enhanced the profitability or exposure of an already famous work. Further, it is possible that widespread acceptance of market benefits will erode small artists control of their work, thereby diminishing derivative work rights under section 106(2).

IV. CONCLUSION

Courts are poised to expand their inquiry into the fourth fair use factor, but not necessarily by including market benefits. Nonetheless, market benefits can serve an important role in an interpretative regime that weighs both public effects and market effects. If courts embrace Justice Breyer's fair use approach from *Google*, then it is only a matter of time before the holistic balancing of market and public effects becomes mainstream.¹⁹⁴ While *Google* may not signal increased acceptance of market benefit arguments, it does continue the trend reinvigorating the fourth factor.¹⁹⁵ If some benefit (to society or the copyright holder) can overcome market harm in fourth factor analysis, then a demonstration of market harm is not dispositive. Any sort of fourth factor balancing test is likely to diminish circularity by recognizing that infringement can have positive and negative effects.

It is important to reiterate that relevant market benefits are not the same as dispositive market benefits. While dispositive market benefits are not yet feasible,

194. After *Google*, the Second Circuit issued a new opinion in the Andy Warhol case, noting that "analysis of the fourth factor also 'take[s] into account the public benefits the copying will likely produce.'" *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021). While this did not alter the outcome, it did alter the approach. Compare with *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir.), *opinion withdrawn and superseded on reh'g sub nom.*

195. See generally Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3.

relevant market benefits are increasingly applicable. Any court should weigh market harms against market benefits for the sake of thoroughness and adherence to the plain meaning of § 107(4), but failure to do so is unlikely to affect the outcomes of most cases.

It seems unlikely at the moment, but one cannot fully dismiss the potential acceptance of market benefit arguments in the future. Fair use is an evolving doctrine, and eventually these arguments may develop relevance outside of a search context, or in a case of non-transformative, commercial use. Companies like Google are incentivized to push the limits of fair use and attempt to shape the contours to their benefit. For now, however, American copyright law remains hostile to the idea that taking someone's work without permission should be regarded as a favor.

A Chance at the Arts: Assessment of NYC Department of Education's ArtsCount as a Violation of Title VI Implementing Regulation

Siena Stanislaus*

INTRODUCTION

The City of New York has historically struggled with equitable funding in its public education system.¹ As a result, funding for arts education in New York City public schools has steadily declined.² This trend further perpetuates a widespread cultural attitude that undervalues the academic benefits of arts education for students. This lack of support for the arts has particularly impacted schools located in low-income neighborhoods which suffer from low engagement with—and participation in—arts programs and arts instruction.³ Rocco Landesman, Former Chairman of the National Endowment for the Arts, wrote in his study on arts and achievement for at-risk youth that “the only outcomes we should need to measure for a music class is whether the

* J.D. Candidate, Columbia Law School, Class of 2023. Thank you to my Note advisor, Philippa Loengard, for very thoughtful guidance during the Note-writing process. Thank you to JLA's wonderful 2021–2022 Notes Editors, Cameron Turkzadeh and Gershon Johnson, for their thorough feedback. Thank you to JLA's 2022–2023 editorial board for their assistance and revisions. Finally, thank you to my parents, Gregory and Ruth Stanislaus, for their unwavering love and support. This Note would not be what it is without their insights and decades of dedication to the New York City public school system.

1. ALL FOR QUALITY EDUC., RECORD SETTING INEQUALITY: NEW YORK STATE'S OPPORTUNITY GAP IS WIDER THAN EVER 3, <http://www.aqeny.org/wp-content/uploads/2015/01/final-final-record-setting-inequality.pdf> [<https://perma.cc/Q7LC-C2ZL>] [<https://web.archive.org/web/20230404190146/http://www.aqeny.org/wp-content/uploads/2015/01/final-final-record-setting-inequality.pdf>] (“New York State has long been a national leader in educational inequity and the inequality gap is growing.”).

2. Sarah Cascone, *New York City's 2021 Budget Slashes Already Modest Funding for Public Schools Arts Education by 70 Percent*, AMERICANS FOR THE ARTS (July 6, 2020), <https://www.americansforthearts.org/news-room/new-york-citys-2021-budget-slashes-already-modest-funding-for-public-school-arts-education-by-70> [<https://perma.cc/8PJF-EV32>] [<https://web.archive.org/web/20230310045626/https://www.americansforthearts.org/news-room/new-york-citys-2021-budget-slashes-already-modest-funding-for-public-school-arts-education-by-70>].

3. Jacoba Urist, *The Country's Cultural Capital Has a Big Arts-Education Problem*, THE ATLANTIC (May 28, 2014), <https://www.theatlantic.com/education/archive/2014/05/the-countrys-cultural-capital-has-a-big-arts-education-problem/371658> [<https://perma.cc/86TL-8K44>] [<https://web.archive.org/web/20221206070616/https://www.theatlantic.com/education/archive/2014/05/the-countrys-cultural-capital-has-a-big-arts-education-problem/371658>] (“Arguably, students in lower-income schools need exposure to creative subjects the most, but . . . the city's arts programs are sharply divided by neighborhood.”).

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child had the chance to create, enjoy, and understand music.”⁴ The New York City Department of Education has attempted to offer all students the chance to participate in arts education through various policy initiatives. In particular, New York City’s Blueprint for the Arts curriculum initiative and its supplemental accountability program, ArtsCount, were implemented to enhance students’ access to arts instruction.⁵ The decade following their implementation, however, revealed obvious shortcomings and failures. Moreover, the lack of reform of these initiatives perpetuates the culture of unequal access that is so commonly associated with arts education.

Title VI of the 1964 Civil Rights Act states: “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁶ Particularly, Title VI imposes regulations for the implementation of federal funds. Such regulations require that recipients may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”⁷

In 2014, the NYC Comptroller released a report describing the failures of ArtsCount, focusing in part on inequities in the distribution of arts instruction across New York City school districts.⁸ The results demonstrate a positive correlation between the presence of art instructors, art classrooms, and art programs to socioeconomic status and racial makeup of particular districts.⁹ These results are especially problematic as the very purpose of these initiatives is to enhance access to arts education for New York City students. This Note will explore several possible explanations for these failures, including societal and policy-based influences on school leaders in low-income neighborhoods, and how those influences were exacerbated by inefficient systems of reporting such as New York City’s ArtsCount.

Prior to the implementation of BluePrint for the Arts and ArtsCount, New York City provided arts funding through Project ARTS, a grant program that provided schools with dedicated arts funding. This program required that Project ARTS funding

4. JAMES S. CATTERALL ET AL., NAT’L ENDOWMENT FOR THE ARTS, *THE ARTS AND ACHIEVEMENT IN AT RISK YOUTH: FINDINGS FROM FOUR LONGITUDINAL STUDIES* (2012), <https://www.arts.gov/sites/default/files/Arts-At-Risk-Youth.pdf> [https://perma.cc/CG7K-S42E] [https://web.archive.org/web/20230215214515/https://www.arts.gov/sites/default/files/Arts-At-Risk-Youth.pdf].

5. N.Y.C. DEP’T OF EDUC., *ARTSCOUNT: A GUIDE FOR PRINCIPALS* (2006), https://www.weteachnyc.org/media2016/filer_public/00/72/00722669-5051-4b19-9744-4cae979a1932/arts_count_principals_guide.pdf [https://perma.cc/64K9-MWM2] [https://web.archive.org/web/20230310050421/https://www.weteachnyc.org/resources/resource/artscount-a-guide-for-principals].

6. 42 U.S.C. § 2000d.

7. *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 1995).

8. SCOTT M. STRINGER, BUREAU OF POLICY AND RESEARCH, STATE OF THE ARTS: A PLAN TO BOOST ARTS EDUCATION IN NEW YORK CITY SCHOOLS (2014).

9. *Id.* at 9–12.

was spent in areas related directly to the arts.¹⁰ Transitioning to Blueprint for the Arts and ArtsCount allows the New York City Department of Education to take a passive approach to implementing arts education funding. With ArtsCount, funding that would have previously been dedicated to the arts is now provided to school leaders through general school budgets using ArtsCount as a method to ensure accountability for investing in arts programs.¹¹ However, the inadequacy of ArtsCount has led to many students in areas of lower socioeconomic status—primarily students of color—having to go without the necessary arts education curriculum as put forth by BluePrint for the Arts, the very curriculum that ArtsCount was meant to ensure.

The inadequacy of this accountability program poses the question of possible Title VI violations. The several years following the Comptroller report have seen little change, despite recommendations for how to mitigate such discriminatory effects.¹² In order to prove a violation of Title VI's implementing regulations, proof of discriminatory *effect* will suffice to establish liability and proof of discriminatory *intent* is not needed.¹³ While it could be argued that such a funding structure is necessary and justified, offering less discriminatory alternatives would demonstrate that this structure is still indeed a Title VI violation. This Note explores potential alternatives to the current accountability framework, including reframing how arts education should and may be spent, and rethinking the way that data regarding arts education instruction is collected.

Overall, the goal of this Note is to assess the current status of arts education in New York City Public Schools and how its current funding structure and accountability program impacts the presence of arts education across New York City school districts. This assessment will focus primarily on the New York City public school system, as New York City is a cultural hub of the world with communities of different races, ethnicities, and many socioeconomic backgrounds. Part I of this Note provides background information on Title VI of the Civil Rights Act, societal conceptions on the value of arts education, the history of arts education funding in New York City, and

10. OFF. COMPTROLLER, N.Y.C., STATE OF THE ARTS: A PLAN TO BOOST ARTS EDUCATION IN NEW YORK CITY SCHOOLS 5 (2014), https://comptroller.nyc.gov/wp-content/uploads/documents/State_of_the_Arts.pdf [<https://perma.cc/4PQ7-3FC6>] [https://web.archive.org/web/20230213220615/https://comptroller.nyc.gov/wp-content/uploads/documents/State_of_the_Arts.pdf] (“Project ARTS funds were targeted for direct instruction in core arts areas, related equipment, resource materials and supplies and partnerships with arts and cultural services.”).

11. *Id.* at 5.

12. See Isabel Song Beer, *New York City Teachers Push for More Arts Education Funding in School Budget*, AMNY (May 10, 2022), <https://www.amny.com/politics/teachers-push-for-more-arts-education-funding-in-school-budget> [<https://perma.cc/8MT4-99WT>] [<https://web.archive.org/web/20230202182346/https://www.amny.com/politics/teachers-push-for-more-arts-education-funding-in-school-budget>]; Becky Stern, *Coalition Rallies for Arts Education Funding in the City Budget to Improve Student Well Being*, READMEDIA (Mar. 30, 2023), <http://readme.readmedia.com/Coalition-Rallies-for-Arts-Education-Funding-in-the-City-Budget-to-Improve-Student-Well-Being/19238422> [<https://perma.cc/F6AX-7P96>] [<https://web.archive.org/web/20230330180404/http://readme.readmedia.com/Coalition-Rallies-for-Arts-Education-Funding-in-the-City-Budget-to-Improve-Student-Well-Being/19238422>] (demonstrating how further change is needed, especially while navigating the impact of COVID-19).

13. *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 1995).

the implementation of ArtsCount. Part II of this Note assesses New York City's current accountability framework in context of Title VI's implementing regulation, considering the history of race disparities within arts education at the national and local levels. Part III of this Note proposes an alternative which may mitigate such discriminatory implications and increase access to arts education among New York City Public School students. This solution involves a more detailed system of reporting, a mid-level compromise for discretion offered to school leaders over arts funding, and education initiatives offering incentives to increase arts integration in daily common core subject areas. Essentially, this Note articulates the need for reform of the current framework meant to create equal access to arts education for New York City public school students. While focusing on the prevalent racial and socioeconomic disparities that continue under this regime, this Note utilizes the protection offered by Title VI of the 1964 Civil Rights Act to validate the right to reformation.

I. BACKGROUND INFORMATION

A. THE CIVIL RIGHTS ACT OF 1964, TITLE VI, AND IMPLEMENTING REGULATIONS

The Civil Rights Act of 1964 was enacted in response to the race and gender discrimination engrossed in daily American culture.¹⁴ Sections of this Act address discrimination broadly, though they apply in various contexts to the American education system. Generally, Title VI of the Civil Rights Act of 1964 focuses on discrimination within federally funded programs.¹⁵ First, in Section 601, Title VI prohibits discrimination based on "race, color, or national origin" within any program or activity that receives funding from the Federal government, or other types of federal financial aid.¹⁶ Secondly, in Section 602, Title VI authorizes federal agencies to provide funding for programs and is "directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability."¹⁷

Discriminatory practices are separated into two primary categories: intentional discrimination and disparate impact. Intentional discrimination requires that the recipient of federal funding acts "because of the actual or perceived race, color, or national origin of the alleged victims of discriminatory treatment."¹⁸ Disparate impact focuses on less explicit factors and pertains to the consequences of the recipient's actions rather than the motivation behind them. Specifically, Title VI prohibits practices that have "the effect, even if unintentional, of subjecting individuals to discrimination

14. Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 et seq. (2006)).

15. Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq.

16. *Id.*

17. *Id.*

18. *Id.*

because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program's objectives."¹⁹

A discriminatory practice that yields disparate impact alone is not prohibited, though it will require an assessment of “whether [the] challenged practice has a *sufficiently adverse racial impact*—in other words, whether it falls significantly more harshly on a minority group than on the majority—and, if so, whether the practice is nevertheless adequately justified.”²⁰ Several factors may be taken into account when assessing the disparate impact of a practice, including “statistics comparing benefit distribution or access patterns among members of the protected class and the overall population.”²¹ Further, in this assessment, even if there is a sufficient justification for the discriminatory practice, if a less discriminatory alternative is provided, it must be considered. Not considering such an alternative, or sufficiently justifying lack of consideration, would constitute disparate impact under Title VI.²²

Implementing regulations for this Title describe specific discriminatory practices that are prohibited. Included in those practices is the act of “restricting an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.”²³ As enforced by the Supreme Court in the 2001 case *Alexander v. Sandoval*, there is no private right to action under Title VI of the 1964 Civil Rights Act for discrimination of disparate impact. The Court noted in *Sandoval*, however, that “it must be assumed for purposes of deciding this case that regulations promulgated under § 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.”²⁴ Thus, while there is no private right to action under section 601, federal agencies are directed to implement regulations enforcing disparate impact claims according to the protections offered under section 601.²⁵ In fact, as described in “Title

19. *Civil Rights Requirements- A. Title VI of the Civil Rights Act of 1964*, 42 U.S.C. 2000d et seq. (“Title VI”), U.S. DEP’T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/civil-rights-requirements/index.html> [<https://perma.cc/V6PP-E5WA>] [<https://web.archive.org/web/20230310051505/https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/civil-rights-requirements/index.html>].

20. *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 1995).

21. *Id.* at 670.

22. U.S. DEP’T OF TRANSP., WHAT TYPES OF DISCRIMINATION ARE PROHIBITED BY TITLE VI? <https://www.fhwa.dot.gov/civilrights/programs/docs/Title%20VI%20-%20Types%20of%20Discrimination.pdf> [<https://perma.cc/G56R-6YAJ>] [<https://web.archive.org/web/20230213224614/https://www.fhwa.dot.gov/civilrights/programs/docs/Title%20VI%20-%20Types%20of%20Discrimination.pdf>].

23. *Title VI and Education*, FINDLAW (July 12, 2017), <https://corporate.findlaw.com/litigation-disputes/title-vi-and-education.html> [<https://perma.cc/U3PQ-T2CN>] [<https://web.archive.org/web/20230310071053/https://corporate.findlaw.com/litigation-disputes/title-vi-and-education.html>].

24. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

25. U.S. DEP’T OF JUST., THE CIVIL RIGHTS DIVISION’S TITLE VI LEGAL MANUAL (2021), <https://www.justice.gov/crt/book/file/1364106/download> [<https://perma.cc/ZAJ7-6ZT8>] [<https://web.archive.org/web/20230310074239/https://www.justice.gov/crt/book/file/1364106/download>] (stating that “[t]he agencies’ Title VI disparate impact regulations continue to be a vital administrative enforcement mechanism.”). *But see* Sarah Hinger & Jennifer Bellamy, *Trump Administration Recommends Slashing Civil Rights Protections for Students of Color*, ACLU (Dec. 19, 2018), <https://www.aclu.org/blog/juvenile-justice/school-prison-pipeline/trump-administration-recommends-slashing-civil-rights> [<https://perma.cc/PZT3-MNRQ>].

VI Legal Manual,” a report by the U.S. Department of Justice, “federal funding agencies play a vital role in enforcing the prohibition on disparate impact discrimination through complaint investigations, compliance reviews, and guidance on how to comply with Title VI.”²⁶

1. Arguing Disparate Impact Discrimination in the Education Context

In the context of education, the Office of Civil Rights (OCR) is responsible for enforcing Title VI and regulating funding provided by the Education Department.²⁷ Previous cases employ Title VI of the Civil Rights Act as a source of redress in the education context to promote equal access through disparate impact claims.²⁸ While arguing disparate impact, especially in the context of education, “fewer or inferior resources or benefits” have been recognized by the courts as a sufficient adversity/harm under Title VI.²⁹ Within the state of New York, fewer or inferior resources as sufficient adversity under Title VI is demonstrated by the case of *Campaign for Fiscal Equity v. The State of New York*.³⁰

The Campaign for Fiscal Equity was an organization that primarily fought to protect the constitutional right to education for all students.³¹ In *CFE*, Campaign for Fiscal Equity argued that the State’s funding system underfunded New York City public schools, thus violating the New York State Constitution, as well as Title VI of the Civil Rights Act.³² Specifically, the “complaint challenges the manner in which the State allocates education aid, alleging that the present methodology has a disparate impact on the state’s racial and ethnic minorities, the vast majority of whom attend New York

[<https://web.archive.org/web/20230310074456/https://www.aclu.org/news/juvenile-justice/trump-administration-recommends-slashing-civil-rights>].

26. *Id.*

27. *Education and Title VI*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> [<https://perma.cc/5YVY-LRPT>] [<https://web.archive.org/web/20230214014539/https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>]; *Title VI and Discrimination in Education*, JUSTIA, <https://www.justia.com/education/discrimination-in-education/title-vi> [<https://perma.cc/K2MF-QNJH>] [<https://web.archive.org/web/20230214014427/https://www.justia.com/education/discrimination-in-education/title-vi>].

28. *See* Ga. State Conf. of Branches of NAACP v. State of Georgia 775 F.2d 1403 (1985) (stating that plaintiffs in a claim against the State of Georgia met their burden of establishing a prima facie case using statistics that demonstrate inequities in racial composition of classrooms in comparison to compositions derived by random distribution); *see also* Sharif v. N.Y. State Dep’t of Educ., 709 F. Supp. 345 (S.D.N.Y. 1989) (meeting this standard with “persuasive statistical evidence and credible expert testimony that the composition of scholarship winners tilted decidedly toward males and could not have occurred by a random distribution.”).

29. *Section VII—Proving Disparate Impact*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fcs/T6Manual7#8> [<https://perma.cc/6ZYS-SG8J>] [<https://web.archive.org/web/20230217220510/https://www.justice.gov/crt/fcs/T6Manual7>].

30. *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 1995).

31. *Equity*, ALL. FOR QUALITY EDUC., <https://www.aqeny.org/equity> [<https://perma.cc/NUM4-AJW8>] [<https://web.archive.org/web/20230405123736/https://www.aqeny.org/equity>].

32. *Campaign for Fiscal Equity*, 655 N.E.2d at 663.

City public schools.³³ The New York Court of Appeals ruled that the plaintiffs stated a cause of action in that the adversity suffered by students of color was sufficient under Title VI.³⁴ This ruling was supported by statistical evidence supplementing the plaintiffs' allegations which serve to meet the plaintiff's burden of proof. This evidence consisted of "statistics comparing benefit distribution or access patterns among members of the protected class and the overall population."³⁵ While this Title VI claim was ultimately dismissed under *Sandoval*, as this was brought as a private claim, this case demonstrates the relative level of adversity needed to establish a valid disparate impact claim in the context of education. Further, this case demonstrates the use of statistical evidence to show requisite adversity. Had this case been brought through legally viable means under *Sandoval*—as Title VI enforcement by an administrative agency and not a private action claim—the court may have decided differently.

Further cases demonstrate the use of Title VI as a method to pursue educational equity. The case of *Larry v. Riles* establishes improper placement of students into special education classes based on race as sufficient adversity under Title VI.³⁶ Additionally, in the case of *Meek v. Martinez*, sufficient adversity was established when minority seniors received less financial aid for their community service work than their non-minority peers.³⁷ These cases demonstrate the broad reach of "sufficient adversity," allowing us to confidently explore the possibility that the discriminatory impact left by New York City's current arts education funding structure may also constitute sufficient adversity under Title VI. Further, these cases collectively demonstrate the relationship between education access and civil rights, as a struggle between the two has existed consistently throughout this country's history. To properly assess New York City's funding structure in context of Title VI, this Note will discuss societal treatment of arts education as it impacts students of different socioeconomic backgrounds.

B. APPROACHING TITLE VI IN CONTEXT OF ARTS EDUCATION— WHY SHOULD WE CARE?

To appropriately address regulatory concerns under Title VI, it is necessary to sufficiently recount the sociocultural setting which surrounded arts education decades prior to the implementation of ArtsCount. Throughout history, there have been consistent disparities in arts education among schools that correlate strongly with the socioeconomic profile of their surrounding neighborhoods.³⁸ Based on a study conducted by the National Assessment of Educational Progress, national disparities in

33. *Id.* at 670.

34. *Id.* at 663.

35. *Id.* at 670.

36. *Larry P. v. Riles*, 793 F.2d 969 (1981).

37. *Meek v. Martinez*, 724 F. Supp. 888, 906 (1989).

38. Maya Pottiger, *Black Students Deserve Equitable Access To Arts Education*, WORD IN BLACK (Feb. 6, 2023), <https://wordinblack.com/2023/02/black-students-deserve-equitable-access-to-arts-education> [https://perma.cc/QA52-2SEV] [https://web.archive.org/web/20230405124810/https://wordinblack.com/2023/02/black-students-deserve-equitable-access-to-arts-education].

access to arts education persist across racial groups.³⁹ This study took place in 2016 and compared the arts fluency of students during that year to that of students in the year 2008. This study administered an assessment to eighth grade students across the country, measuring their proficiency in arts-related topics.⁴⁰ The assessment prompted students to answer questions analyzing, describing, or judging music or art and students were graded on a points-based scale.⁴¹ Responses regarding music and visual arts were recorded on a scale of 0–300, with average scores of 150. The results showed a gap between white and black students that was statistically significant: black students scored twenty-nine points lower in music and thirty points lower in visual arts.⁴² This report also recognized that exposure to the arts outside of school may have played a role, as such luxuries are often unavailable to children from low-income families unless provided through their schools.

Further pervading a culture which neglects arts instruction is the devaluation of the arts across varying cultural groups. Common notions of what it means to be “an artist” in particular racial groups have impacted the readiness of youth to engage in arts instruction.⁴³ On the one hand, societal perceptions which distance financial success from careers in the arts dissuade individuals from financially disadvantaged backgrounds from seriously pursuing artistic passions. On the other hand, cultural capital that comes with arts education and exposure perpetuates social structure that associates fine art exploration with the upper class.⁴⁴

These factors together demonstrate a sociological concept relevant in arts education disparities, that “arts education operates as a mechanism of White privilege through socioeconomic and racialized sorting that helps to maintain a two-tiered, separate but unequal system of schooling and reproduce social inequalities.”⁴⁵ Overall, lack of arts instruction, particularly in low-income neighborhoods, further supports a culture of elitism and separation that already exists beyond the classroom.

From this assessment, a history of racial disparities in arts education is clear. While it is widely accepted that arts education provides benefits to students in several areas of academic achievement,⁴⁶ the arts are still treated with neglect in terms of funding and

39. *The Nation's Report Card*, ARTS ASSESSMENT (2016), https://www.nationsreportcard.gov/arts_2016/# [<https://perma.cc/V3QG-MTFJ>] [https://web.archive.org/web/20230218013756/https://www.nationsreportcard.gov/arts_2016].

40. *Id.*

41. *Id.*

42. *Id.*

43. Amelia M. Kraehe, Joni B. Acuff & Sarah Travis, *Equity, the Arts, and Urban Education: A Review*, 48 URBAN REV. 220, 238 (2016).

44. *Id.*

45. *Id.* at 231.

46. Andrew Warner, *The Benefits of Arts Education for K–12 Students*, U.S. NEWS & WORLD REP. (Aug. 30, 2022, 4:55 PM), <https://www.usnews.com/education/k12/articles/the-benefits-of-arts-education-for-k-12-students> [<https://web.archive.org/web/20230405125634/https://www.usnews.com/education/k12/articles/the-benefits-of-arts-education-for-k-12-students>]; Randy Kennedy, *Guggenheim Study Suggests Arts Education Benefits Literacy Skills*, N.Y. TIMES (July 27, 2006), <https://www.nytimes.com/2006/07/27/books/27gugg.html> [<https://perma.cc/T9ZT-JSSF>] [<https://web.archive.org/web/20230405130020/https://www.nytimes.com/2006/07/27/books/27gugg.html>]; Grace Chen, *How the Arts Benefit Your Children*

accountability at the city level, as well as across socioeconomic groups. This neglect of arts education by said groups allows accountability programs like ArtsCount to continue unchallenged as other areas of academic development are deemed more productive and valuable.

C. UNDERSTANDING THE NEW YORK EDUCATION HIERARCHY AND FUNDING STRUCTURE

In order to productively assess the inequities of New York City arts education funding, a high-level understanding of the Department of Education is necessary. The 10th Amendment of the United States Constitution establishes the authority of state and local governments over the function and structure of education in their state.⁴⁷ State and local governments also serve as the primary source of funding for education in their state, allocating funds from state, local, and private resources.⁴⁸ However, the federal government also provides funding for education systems through the Department of Education and other federal agencies.⁴⁹ Although contributing a minority amount of funding, the role of the federal government is described as an “emergency response system” to fill gaps between state and local support.⁵⁰ Further, as previously described, the federal government has authority to implement statutes that place responsibilities on state and local governments (e.g., No Child Left Behind, Every Student Succeeds). However, primary control over the function of local governments is maintained by individual states.⁵¹

The New York State Department of Education functions with a similar hierarchical structure. The New York State Constitution establishes the authority of the Board of Regents and Legislature to “provide for the maintenance and support of public schools.”⁵² The State government delegates particular authority over educational functions to local governments and school districts. New York City is one of five City School Districts in New York—their “boundary lines are identical with that of a city.”⁵³ Further, New York City is one of few major cities whose educational system is

Academically and Behaviorally, PUB. SCHOOL REV. (Feb. 13, 2023), <https://www.publicschoolreview.com/blog/how-the-arts-benefit-your-children-academically-and-behaviorally> [<https://perma.cc/FZD6-HPUY>] [<https://web.archive.org/web/20230405130526/https://www.publicschoolreview.com/blog/how-the-arts-benefit-your-children-academically-and-behaviorally>].

47. *The Federal Role in Education*, U.S. DEP’T OF EDUC. (June 15, 2021), <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/UEB9-UDLK>] [<https://web.archive.org/web/20230217053932/https://www2.ed.gov/about/overview/fed/role.html>]; U.S. CONST. amend. X.

48. Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (June 15, 2022), <https://educationdata.org/public-education-spending-statistics> [<https://perma.cc/X88Y-DHET>] [<https://web.archive.org/web/20230405131521/https://educationdata.org/public-education-spending-statistics>].

49. *Id.*

50. U.S. DEP’T OF EDUC., *supra* note 47.

51. *Structure of NY State School System*, LEXIS NEXIS, <http://www.lexisnexis.com/schoollaw/images/Sample.pdf> [<https://perma.cc/35S5-CMED>] [<https://web.archive.org/web/20210124131838/http://www.lexisnexis.com/schoollaw/images/Sample.pdf>].

52. N.Y. Const. art. XI, § 1.

53. *Id.* at 7.

controlled by the city's mayor, granting the mayor the right to appoint the school Chancellor and a majority of members to the Panel for Educational Policy that oversees the New York City Department of Education ("NYCDOE").⁵⁴ This centralized authority is called "Mayoral Control" and shifts control of the local education system from the Board of Education and local school districts to the city Mayor.⁵⁵

While education in New York City functions under this centralized framework, local schools are still expected to meet Instructional Requirements set by the New York State Education Department ("NYSED"). The NYSED publishes *Instructional Requirements for the Arts* that outline the "continuum of educational experiences students need for their academic and social development."⁵⁶ New York City Schools' compliance is assessed annually through a series of review processes and qualitative reports. These standards for the arts provide guidance on the percentage of weekly hours students should spend receiving arts instruction, allocated evenly throughout various art disciplines, including dance, music, theater, and visual arts.⁵⁷ School leaders and administrators are responsible for complying with these standards through the implementation of in-school and out-of-school programming, hiring and retaining arts teachers, and allocating necessary school funding to these goals.

Similar to other regions, New York City public schools receive funding for arts education—and education in general—from various sources, including New York City government (providing fifty-one percent), New York State (providing thirty-four percent), and the federal government (providing fifteen percent) for the 2021–2022 fiscal year.⁵⁸ School budgets are created with money from these sources using two mechanisms: Fair Student Funding ("FSF") and School Allocation Memoranda ("SAM").⁵⁹ Generally, FSF funding differs from SAM funding in that it allows school leaders to determine how such funds will be spent based on the specific educational

54. Amanda Luz Henning Santiago, *Understanding Mayoral Control*, CITY AND STATE N.Y. (2020), <https://www.cityandstateny.com/politics/2020/12/understanding-mayoral-control/175347> [https://perma.cc/N982-LLKM] [https://web.archive.org/web/20230218010522/https://www.cityandstateny.com/politics/2020/12/understanding-mayoral-control/175347].

55. The current NY governor has proposed to extend Mayoral Control for another 4 years to newly inaugurated NYC Mayor, Eric Adams. There is continued controversy over the fairness of Mayoral Control, and local campaigns to end this centralized power and return it to the local school boards. See Laura Nahmias, *NYC Mayor To Keep Control of City Schools in State Proposal*, BLOOMBERG (Jan. 18, 2022), <https://www.bloomberg.com/news/articles/2022-01-18/nyc-mayor-to-retain-control-of-city-schools-under-state-proposal> [https://perma.cc/6P8W-55GP] [https://web.archive.org/web/20230425044542/https://www.bloomberg.com/news/articles/2022-01-18/nyc-mayor-to-retain-control-of-city-schools-under-state-proposal]; COALITION TO FINALLY END MAYORAL CONTROL, RESOLUTION ON NEW YORK CITY SCHOOL GOVERNANCE (2022), <https://www.nycmayoralcontrolnot.org/resolution> [https://perma.cc/63NF-MT62] [https://web.archive.org/web/20230217024410/https://www.nycmayoralcontrolnot.org/resolution].

56. N.Y.C. DEP'T OF EDUC., ANNUAL ARTS IN SCHOOLS REPORT (2023), <https://infohub.nyced.org/reports/academics/annual-arts-in-schools-reports> [https://perma.cc/N2DU-EMF7] [https://web.archive.org/web/20230217024721/https://infohub.nyced.org/reports/academics/annual-arts-in-schools-reports].

57. *Id.*

58. N.Y.C. DEP'T OF EDUC., FUNDING OUR SCHOOLS (2023), <https://www.schools.nyc.gov/about-us/funding/funding-our-schools> [https://perma.cc/Q7ZH-JLSD] [https://web.archive.org/web/20230217024721/https://infohub.nyced.org/reports/academics/annual-arts-in-schools-reports].

59. *Id.*

needs of their students. SAM funding is allocated to schools for specific purposes, each coming with a SAM report describing the required usage of the funds.⁶⁰

Arts education funding is allocated to New York City public schools through Fair Student Funding, which allows school leaders to decide which art programs their schools will engage in. As enforced by the New York State Education Department, school leaders are required to direct funding as to fulfill arts education mandates set for each grade level. As previously explained, the NYSED mandates specific percentages of weekly instruction time that should be allocated to arts classes and requires schoolteachers to cover a standard arts education curriculum. While these mandates are required at the state level, leeway and discretion in funding—as well as lack of accountability for arts education—allow many schools to operate out of compliance with these standards.

D. PRE-ARTSCOUNT FUNDING IN PUBLIC SCHOOLS

In 1997, former Mayor Rudy Giuliani implemented Project ARTS (Arts Restoration to the Schools) with the intention of enhancing the arts education for New York City students of all grades.⁶¹ Project ARTS provided schools with funding dedicated specifically to the arts, requiring that such grants were spent on “direct instructional services, professional development for educators, curriculum development, equipment, art materials and supplies, as well as cultural services.”⁶² Funding for arts education through Project ARTS peaked at \$75 million in the 2000–2001 fiscal year.⁶³

In 2002, President George W. Bush passed the No Child Left Behind Act as an attempt to increase federal intervention in the public school system and hold teachers accountable for the academic development of all students. No Child Left Behind enforced Common Core State Standards (“CCSS”) in the form of initiatives meant to establish “a national set of criteria where all students are solely knowledgeable making them college and career ready.”⁶⁴ CCSS subject areas include mathematics and English

60. James W. Guthrie, *United States Education Policy: The Basics of Educational Policy, the Pressure for Reform in American Education, Defining Policy*, EDUCATION.STATEUNIVERSITY.COM (2023), <https://education.stateuniversity.com/pages/1937/Educational-Policy-United-States.html> [<https://perma.cc/WV7F-EV23>] [<https://web.archive.org/web/20230217030124/https://education.stateuniversity.com/pages/1937/Educational-Policy-United-States.html>].

61. Project ARTS: A Brief History, STUDYLIB, <https://studylib.net/doc/5856222/project-arts-a-brief-history> [<https://perma.cc/CG3P-WYNL>] [<https://web.archive.org/web/20230217030319/https://studylib.net/doc/5856222/project-arts-a-brief-history>].

62. New York City, N.Y., Res. No. 158-2010 (2017).

63. BETSEY GOTBAUM, *OUT OF TUNE: A SURVEY ON NYC STUDENTS' ACCESS TO ARTS EDUCATION* (2008).

64. Toni Ann Hernan, *The Impact of No Child Left Behind Act and Common Core Standards on Curriculum and the Diverse Learner*, 2 INT'L J. EDUC. & HUM. DEV. 15, 15 (2016).

language arts (“ELA”).⁶⁵ States that did not comply with these mandates would risk losing federal funding.⁶⁶

No Child Left Behind negatively impacted several aspects of art education, including curriculum, instructional practice, teacher workloads, and resource allocation. In a study conducted by the National Art Education Foundation, No Child Left Behind negatively impacted art teachers by decreasing their resources, increasing their workloads, and modifying their curricula by requiring them to teach common core subjects in place of the arts.⁶⁷ Sixty-seven percent of teachers surveyed reported to have been teaching fewer art classes because they were required to teach language arts, provide remediation, or conduct test preparation. Further, funds were redirected from their art programs toward test preparation for core subjects.⁶⁸ A key element of No Child Left Behind was the pressure on states to measure these standards through state implemented examinations.⁶⁹ Ultimately, increased funding was directed toward programs that trained students in taking and succeeding on these tests, and attention and resources were diverted away from the arts. No Child Left Behind resulted in racially discriminatory effects, as well. Examination benchmarks and CCSS proved to widen, instead of close, the achievement gap between students of diverse backgrounds and their counterparts.⁷⁰

E. BLUEPRINT FOR THE ARTS AND ARTSCOUNT: WHAT ARE THEY?

In 2004, closely following the passage of No Child Left Behind, the New York City Department of Education implemented city-wide standards for arts education in New York City public schools called Blueprint for the Arts. Blueprint of the Arts provides subject specific curriculum standards in several areas of the arts including visual arts, theater, music, dance, and moving image. The purpose of Blueprint for the Arts is to “provide teachers with a path to follow for developing curriculum in all arts disciplines, and provide benchmarks for what children should know, understand, and be able to do.”⁷¹ Blueprint for the Arts standards provides recommendations to art teachers similar to those of the NYSED Instructional Requirements—including recommended

65. *Common Core State Standards*, CCSSO, <https://learning.ccsso.org/common-core-state-standards-initiative> [<https://perma.cc/USN7-NVPH>] [<https://web.archive.org/web/20230405132417/https://learning.ccsso.org/common-core-state-standards-initiative>].

66. Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04> [<https://perma.cc/4GMM-L7EH>] [<https://web.archive.org/web/20230217031657/https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04>].

67. F. ROBERT SABOL, *NO CHILD LEFT BEHIND: A STUDY OF ITS IMPACT ON ART EDUCATION* (2010).

68. *Id.* at 10.

69. Hernan, *supra* note 64, at 16.

70. *Id.* at 17.

71. N.Y.C. DEP’T OF EDUC., *BLUEPRINT FOR TEACHING AND LEARNING IN THE ARTS*, <https://www.weteachnyc.org/resources/collection/blueprint-for-teaching-and-learning-in-the-arts> [<https://perma.cc/ZRD3-QWK5>] [<https://web.archive.org/web/20230217032610/https://www.weteachnyc.org/resources/collection/blueprint-for-teaching-and-learning-in-the-arts>].

hours of arts instruction, detailed curriculum, and recommended measurements for student benchmarks. These standards serve as recommendations to school leaders as a way to comply with NYSED Instructional Requirements and are not specifically mandated.

In 2007, as a supplement to Blueprint for the Arts, New York City Department of Education eliminated Project ARTS and implemented ArtsCount. By replacing Project ARTS with ArtsCount, funding was no longer dedicated specifically to arts education but instead was provided through general school budgets. ArtsCount is meant to serve as an accountability framework for arts education in public schools specifically because of the newly given discretion provided to school leaders in how to allocate their general school budgets.

The system of reporting within ArtsCount is referred to as the Annual Arts in Schools Report, which consists of a System-Wide Report and Individual School Reports.⁷² The System-Wide Report consolidates data pertaining to the retention of art teachers, budgeting, partnerships with cultural organizations, and parent involvement. Individual School Reports provide “baseline information for arts education accountability,” and are meant to demonstrate areas of potential development for individual schools.⁷³ In the Individual School Reports, schools are required to provide a ‘School Arts Program Description,’ allowing a level of detail at the school’s discretion describing their involvement in the arts. They are also required to provide the number of “Arts Learning Opportunities” that took place at their school as well as at off-campus locations during that fiscal year, the number of full-time and part-time art teachers, the names of partnered cultural organizations, and number of classrooms used for arts education. Nowhere in this report are schools required to provide dollar amounts allocated toward the arts. Further, while this new form of reporting addresses specifically arts education access, during this time, the New York City Department of Education decided to omit arts education review from the broader school accountability system.⁷⁴ This broader accountability system during this time was School Progress Reports, which was narrowed to assess the progress of schools in the common core No Child Left Behind subject areas—ELA and math.⁷⁵

The funding structure of ArtsCount consists of several measures, including empowerment through the Fair Student Funding formula, as previously described, and Children First supplemental funding.⁷⁶ The premise behind this format is to empower school leaders with discretion over their budgets. Principals have the ability to decide

72. N.Y.C. DEP’T OF EDUC., ANNUAL ARTS IN SCHOOLS REPORT, *supra* note 56.

73. *Id.*

74. OFF. COMPTROLLER, N.Y.C., STATE OF THE ARTS: A PLAN TO BOOST ARTS EDUCATION IN NEW YORK CITY SCHOOLS 5 (2014), https://comptroller.nyc.gov/wp-content/uploads/documents/State_of_the_Arts.pdf [<https://perma.cc/4PQ7-3FC6>] [https://web.archive.org/web/20230213220615/https://comptroller.nyc.gov/wp-content/uploads/documents/State_of_the_Arts.pdf].

75. *Quality Review*, NYC DEP’T OF EDUC., <https://www.schools.nyc.gov/about-us/reports/school-quality/quality-review> [<https://perma.cc/N46N-DSME>] [<https://web.archive.org/web/20230228015106/https://www.schools.nyc.gov/about-us/reports/school-quality/quality-review>].

76. *Id.*

the programs in which they will invest in order to meet the NYSED standards for arts education. As an incentive, New York City informs school leaders that failure to meet the guidelines articulated in ArtsCount would “factor into principal’s eligibility for bonuses.”⁷⁷

Although ArtsCount was meant to address the disparities within arts education programs, reports and academic feedback demonstrate that it did not fulfill such high standards. In 2008, Public Advocate for the City of New York published *A Survey on NYC Students’ Access to Arts Education*, which noticed immediate declines in arts education funding just one year after the implementation of ArtsCount.⁷⁸

Shortcomings are also seen through an assessment of the first Annual Arts in Schools Report published for the fiscal year 2006–2007. This report highlights that the lack of detail included in the Annual Arts in Schools report raises concerns over the accuracy and relevance of its data. Specifically, this report claims that while the Annual Arts in Schools report provides information regarding the availability of programs, it does not require information on the length of time students spend receiving arts instruction.⁷⁹ Because of this, “it is impossible to judge whether the reported availability of an arts discipline in a school has any significant bearing on students’ access to arts education.”⁸⁰ To further prove this point, the Office of the Public Advocate conducted a survey soliciting additional information from New York City public schools regarding arts education access. This information specifically included the number of hours that students spend receiving arts instruction of all disciplines at varying grade levels. Through this survey, the Office of the Public Advocate found that “the vast majority of schools surveyed are in violation of New York State arts education requirements.”⁸¹ This survey took place in January of 2008, just one year following the implementation of ArtsCount, and the same year the first Annual Arts in Schools Report was published.

Approximately six years later, in April of 2014, the New York City Comptroller, Scott Stringer, published his “State of the Arts” report detailing the failures of ArtsCount.⁸² This report also includes statistics exposing the disproportionate presence of arts programs throughout the city by analyzing data after six years of arts education being funded under ArtsCount. It was clear that the very mechanisms put in place to ensure accountability demonstrated that ArtsCount was yielding the opposite of its desired results. Specifically, the Annual Arts in Schools report during this time showed a “47 percent decline in spending to hire arts and cultural organizations to provide educational services for students.”⁸³ Additionally, there was an eighty-four percent drop in spending on supplies and equipment for arts programs between 2006 and 2013.⁸⁴

77. ARTSCOUNT: A GUIDE FOR PRINCIPALS, *supra* note 5, at 10.

78. GOTBAUM, *supra* note 63.

79. *Id.*

80. *Id.* at 14.

81. *Id.* at 15.

82. STRINGER, *supra* note 8.

83. *Id.* at 1.

84. *Id.* at 3.

Further, this report emphasizes the inequities based on poverty rates and income. It was found that neighborhoods in the South Bronx and Central Brooklyn consistently fell short in measurements of compliance, including retaining a full-time or part-time certified arts teacher, engaging in arts or cultural partnerships, and having dedicated arts rooms. Specifically, “of the 22 Bronx schools and 21 Brooklyn schools that have no arts or cultural organization partnerships and no certified arts teacher, 68 percent are in the South Bronx and 86 percent are in Central Brooklyn, respectively.”⁸⁵ South Bronx and Central Brooklyn are home to some of the lowest median household incomes in New York City.⁸⁶ To state it plainly, this report articulated that ArtsCount proved “ineffective at ensuring that schools provided children with robust education in the arts.”⁸⁷

This report directly credits the lack of accountability in funding for these stark declines.⁸⁸ Specifically, the elimination of Project ARTS left arts education without guaranteed funding or accountability necessary to ensure optional funding would be allocated to the arts. Additionally, restricting arts education accountability to the Annual Arts in Schools Report and removing arts from the broader, higher-stakes School Progress Report forces school leaders to “make difficult choices about where to invest scarce resources.”⁸⁹

The city responded to the Comptroller report with a \$23 million boost to Arts education, but no changes in accountability infrastructure.⁹⁰ Further, the former mayor, Bill DeBlasio, pledged to hire 120 new art teachers. This increase is likely to counter the statement made by the Comptroller that “supplying a full-time, state-certified art teacher to every school that does not have one would cost about \$26 million, which represents about a tenth of a penny for every dollar spent by the Education Department.”⁹¹ This money was meant to help pay for “improving studio facilities, auditoriums, and dance floors, as well as on art supplies for teachers.”⁹² However, due to the lack of accountability in reporting, it is unclear whether that money served its intended purpose. Responding to these failures with more money and no accountability reform does not address the core issues present.

85. *Id.* at 11.

86. Andy Kiersz, *Here's a Block-by-Block Look at Who's Making How Much Across NYC's 5 Boroughs*, BUS. INSIDER (Dec. 11, 2014, 5:37 PM), <https://www.businessinsider.com/new-york-city-income-maps-2014-12> [<https://perma.cc/R3UP-C2AQ>] [<https://web.archive.org/web/20230228021915/https://www.businessinsider.com/new-york-city-income-maps-2014-12>].

87. STRINGER, *supra* note 8, at 5.

88. *Id.* at 1.

89. *Id.*

90. Sarah Cascone, *Mayor DeBlasio Gives \$23 Million Dollar Boost to arts Education in NYC*, ARTNET NEWS (July 3, 2014), <https://news.artnet.com/art-world/mayor-de-blasio-gives-23-million-boost-to-arts-education-in-nyc-54635> [<https://perma.cc/R6N9-ZTFV>] [<https://web.archive.org/web/20230228022428/https://news.artnet.com/art-world/mayor-de-blasio-gives-23-million-boost-to-arts-education-in-nyc-54635>].

91. *Id.*

92. *Id.*

II. PROBLEM: ARTSCOUNT AS A VIOLATION OF THE CIVIL RIGHTS ACT OF 1964'S TITLE VI IMPLEMENTING REGULATION

A. THE PROBLEMS WITH ARTSCOUNT AND THE FAILURE TO ADEQUATELY RESPOND

The implementation of Blueprint for the Arts and ArtsCount in conjunction with No Child Left Behind presented unique issues for students of color that require adequate accountability to be solved. While pressures to sufficiently perform on state-wide standardized testing were minimized through the replacement of No Child Left Behind with the Every Student Succeeds Act, lack of accountability in arts education funding allows these disparities to continue.

Looking to the present, reform of this accountability structure has yet to take place and funding for arts education continues to decrease. The budget for the 2021–2022 fiscal school year included a \$15 million cut from the \$21.5 million budget for the arts.⁹³ These budget cuts arise essentially due to the devastating impacts of the COVID-19 pandemic and loss in tax revenue that resulted from the pandemic shutdown.⁹⁴

It is an unfortunate reality that arts education is one of the first to lose funding in moments of financial crisis. This reality further perpetuates the secondary status of arts instruction in the grander institution of education. An implication of this structure is that with budget cuts in any of the other core curriculum areas, arts education will suffer. The schools that struggle the most in any area will struggle the most in supporting arts education. This structure does not support a sustainable statewide arts education program. With further 2021 budget cuts due to Covid, because arts education funding is easily reallocated in other places, it will be the first to deteriorate.

Similar to the previously described negative impact of No Child Left Behind, the culture of “teaching to the test” was further perpetuated through the ArtsCount framework.⁹⁵ With discretion over budgets and funding in the hands of school leaders, there is little incentive to dedicate funding to the arts over programs that target students test-taking skills directly. The NYC Comptroller said in an interview with the New York Times that “we’ve spent so much time over the last 10 years teaching to the test, and lost in the shuffle were arts teachers, arts curriculum and arts space.”⁹⁶ This

93. Cascone, *supra* note 2.

94. Hakim Bishara, *NYC's Public Arts Education Budget Reduced to 70% of Previous Year*, HYPERALLERGIC (July 2, 2020), <https://hyperallergic.com/574726/nyc-2021-budget-arts> [<https://perma.cc/S9K3-R8AZ>] [<https://web.archive.org/web/20230228022738/https://hyperallergic.com/574726/nyc-2021-budget-arts>].

95. Jennifer L. Jennings & Jonathan Marc Bearak, “Teaching to the Test” in the NCLB Era: How Test Predictability Affects Our Understanding of Student Performance, EDUC. RESEARCHER (Nov. 2014), <https://teacherprep.princeton.edu/sites/g/files/toruqf5276/files/pdf/Jen%20Jennings%20Teaching%20to%20the%20Test%20Educational%20Researcher%20Nov.%202014.pdf> [<https://perma.cc/M38C-88TZ>] [<https://web.archive.org/web/20230405133107/https://teacherprep.princeton.edu/sites/g/files/toruqf5276/files/pdf/Jen%20Jennings%20Teaching%20to%20the%20Test%20Educational%20Researcher%20Nov.%202014.pdf>] (demonstrating the counterproductive effects of “teaching to the test” on student learning).

96. Vivian Yee, *Arts Education Lacking in Low Income Areas of New York City, Report Says*, N.Y. TIMES (Apr. 7, 2014), <https://www.nytimes.com/2014/04/07/nyregion/arts-education-lacking-in-low-income-areas-of-new-york-city-report-says.html> [<https://perma.cc/P58L-Y4CG>] [<https://web.archive.org/web/>

emphasis on teaching students based on meeting state exam requirements creates a unique impact on students in low-income neighborhoods. As previously explained in the context of No Child Left Behind, low-income schools face greater challenges regarding statewide exams. In conjunction with greater discretion over funding, arts education programs are naturally a low priority in schools focusing on preparing students for these examinations.

In addition to teaching to the test, schools in low-income neighborhoods also face the additional challenge of hiring and retaining arts-certified teachers to implement Blueprint for the Arts curriculum. Several societal forces impact the shortage of quality certified teachers, including “rising poverty, segregation, and insufficient public investment.”⁹⁷ Specifically for teachers in high-poverty schools, additional challenges reported consist of “threats to physical safety and attacks, lack of supportive relationships, and little autonomy in the classroom.”⁹⁸ In the context of arts education, with this restraint, it is increasingly difficult for school leaders in low-income communities to retain arts-certified teachers. Aside from fulfilling curriculum and arts instruction recommendations, retention of such teachers also opens the door to additional arts funding. The schools that are unable to attract and retain talented arts educators, such as those within low-income neighborhoods, are naturally at a significant disadvantage.

Demonstrated by previous reports and scholarship, it is clear that disparities exist between schools and neighborhoods based on socioeconomic status. New York City neighborhoods are historically segregated based on income and, ultimately, based on race.⁹⁹ A Center for Urban Research report demonstrates that the exact areas which arts education is lacking are those with the highest concentrations of black and brown residents. These areas include neighborhoods within Central Brooklyn and South Bronx, as well as Central Harlem and Southeast Queens.¹⁰⁰ Ultimately, ArtsCount yields discriminatory results not only based on socioeconomic status through low-income communities, but also on the bases of race. The inadequate system of reporting and the extreme discretion given to school leaders allows principals in lower-income, academically disadvantaged school districts to redistribute funds away from the arts and

20230228023003/<https://www.nytimes.com/2014/04/07/nyregion/arts-education-lacking-in-low-income-areas-of-new-york-city-report-says.html>].

97. EMMA GARCÍA & ELAINE WEISS, ECONOMIC POLICY INSTITUTE, CHALLENGING WORK ENVIRONMENTS (‘SCHOOL CLIMATES’) ESPECIALLY IN HIGH-POVERTY SCHOOLS, PLAY A ROLE IN THE TEACHER SHORTAGE (May 30, 2019), <https://www.epi.org/publication/school-climate-challenges-affect-teachers-morale-more-so-in-high-poverty-schools-the-fourth-report-in-the-perfect-storm-in-the-teacher-labor-market-series> [<https://perma.cc/ZX46-Z7LX>] [<https://web.archive.org/web/20230228023205/https://www.epi.org/publication/school-climate-challenges-affect-teachers-morale-more-so-in-high-poverty-schools-the-fourth-report-in-the-perfect-storm-in-the-teacher-labor-market-series>].

98. *Id.*

99. Richard Alba & Steven Romalewski, *The End of Segregation? Hardly*, CUNY GRADUATE CENTER, <https://www.gc.cuny.edu/center-urban-research/research-projects/end-segregation-hardly> [<https://perma.cc/LBM9-6XFT>] [<https://web.archive.org/web/20230228023341/https://www.gc.cuny.edu/center-urban-research/research-projects/end-segregation-hardly>].

100. *Id.*

towards more traditional, common core subjects. ArtsCount is inadequate at holding New York City public schools accountable for essentially limiting the ability of students to participate in arts instruction largely because of factors prohibited by Title VI of the Civil Rights Act.

Amelia Kraehe, in her article *Equity, the Arts, and Urban Education: A Review*, explained that “making the arts accessible does not necessarily mean that historically underrepresented groups and those peripherally involved in the arts will automatically avail themselves of arts educational opportunities as they are currently configured.”¹⁰¹ To succeed, ArtsCount must demand a level of accountability that would sustain participation in the arts by school leaders for all students.

B. ARTSCOUNT IN CONTEXT OF TITLE VI OF THE CIVIL RIGHTS ACT

As previously described, elements of a Title VI Implementing Regulation claim include “whether a challenged practice has a sufficiently adverse racial impact—in other words, whether it falls significantly more harshly on a minority group than on the majority—and, if so, whether the practice is nevertheless adequately justified.”¹⁰² While carrying out a Title VI investigation, agencies must assess whether the identified harm is enough to be actionable.¹⁰³ This threshold has previously been met in education-related Title VI cases—including *CFE*, *Larry v. Riles*, and *Meek vs. Martinez*. In addition to sufficient adversity, it is also necessary to demonstrate causation. In the context of Title VI, causation may be demonstrated with statistical evidence, and must be strong enough to “raise an inference of causation.”¹⁰⁴ Cases which use statistical evidence to demonstrate causation involve quantitative assessments that do not require inquiry into external societal factors or factors outside of the education process.¹⁰⁵

Similar to these cases, the discriminatory effects imposed by ArtsCount demonstrate fewer or inferior services or benefits. Further, causation between the implementation of ArtsCount—as a supplement to Blueprint for the Arts and replacement of Project ARTS—is demonstrated through the previously discussed reports. While ArtsCount and additional efforts to encourage arts instruction across public schools may be justified in some way, Title VI provides that if there is an equally effective alternative which results in less racial disproportionality, that is sufficient to demonstrate disparate impact. The following section will explore potential elements of reformation which may counteract societal forces and mitigate current discriminatory results.

101. Amelia M. Kraehe et al., *Equity, the Arts, and Urban Education: A Review*, 48 URBAN REV. 220, 224 (2016).

102. Campaign for Fiscal Equity v. New York, 655 N.E.2d 661 (N.Y. 1995).

103. U.S. DEP’T OF JUST., TITLE VI LEGAL MANUAL § C(1)(B) (2021), <https://www.justice.gov/crt/fcs/T6Manual7#F> [<https://perma.cc/T6WU-5HQN>] [<https://web.archive.org/web/20230228023830/https://www.justice.gov/crt/fcs/T6Manual7>].

104. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990).

105. See *Campaign for Fiscal Equity*, 655 N.E.2d; *Larry P. v. Riles*, 793 F.2d 969, 983 (1981). See also *Lau v. Nicholes*, 414 U.S. 563, 569 (1974).

III. SOLUTION: RECONFIGURING ARTSCOUNT AS A LESS DISCRIMINATORY ALTERNATIVE

After demonstrating sufficient adversity in a Title VI violation claim, an agency will look for less discriminatory alternatives to mitigate this harm. This Note proposes an alternative framework that would support the reformation necessary to minimize these discriminatory effects. The proposed methodology behind a reformed accountability program would involve a reformed system of funding arts education for schools and modifying the reporting system associated with ArtsCount. Essentially, these two primary elements contribute to the inadequacy of ArtsCount at the high level. The discretion given to school leaders in terms of arts education funding allows them to willingly opt out of arts education investment for traditionally higher-stake subject areas—this must be addressed through the current system of funding. The lack of detailed reporting keeps parents and the central Department of Education from highlighting the issues and lack of access present. Further, this lack of detailed reporting perpetuates the culture that remaining out of compliance with arts education standards is not as serious a violation as non-compliance with other more traditional school requirements—progress in common-core subjects. This should be addressed through a modified system of reporting. Together, this alternative may address, at least in part, the system failures that contribute to the lack of arts education access throughout New York City Public Schools.

Historically, the New York City Department of Education has gone through several phases of implementing various initiatives, particularly those that have garnered popularity and excitement during their time. Such initiatives include discrete trial instruction, the workshop model, and the balanced literacy approaches.¹⁰⁶ Currently, there is a continued emphasis on data-driven instruction and social-emotional learning incorporated into everyday curriculum.¹⁰⁷ These forms of teaching employ the use of data and socio-cultural backgrounds, respectively, to enhance student learning.¹⁰⁸

106. Discrete trial instruction is “an educational strategy based on the principles of applied behavior analysis.” See *Fact Sheet—Discrete Trial*, FLORIDA ATLANTIC UNIVERSITY, <https://www.fau.edu/education/centersandprograms/card/documents/discretetrial.pdf> [https://perma.cc/U4XG-KFGK] [https://web.archive.org/web/20230310152742/https://www.fau.edu/education/centersandprograms/card/documents/discretetrial.pdf]. The workshop model is “an instructional practice that consists of three parts: a mini-lesson, a workshop, and a debrief.” See Paul Emerich France, *How to Use the Workshop Model to Foster Independence*, EDUTOPIA (Nov. 11, 2020), <https://www.edutopia.org/article/using-workshop-model-foster-independence> [https://perma.cc/Q722-9ADX] [https://web.archive.org/web/20230310152955/https://www.edutopia.org/article/using-workshop-model-foster-independence]. And language balancing literacy is a method of teaching that balances “explicit language instruction with independent learning and language exploration. It aims to strike a balance between both whole language and phonics when learning to read.” See *What is the Balanced Literacy Approach*, PROF. LEARNING BD., <https://k12teacherstaffdevelopment.com/tlb/what-is-the-balanced-literacy-approach> [https://perma.cc/VDX9-AWVN] [https://web.archive.org/web/20230310153402/https://k12teacherstaffdevelopment.com/tlb/what-is-the-balanced-literacy-approach].

107. See generally Anne Gregory & Edward Fergus, *Social & Emotional Learning & Equity*, 27 *FUTURE CHILD*. 113 (2017).

108. See Emily Tate, *Why Social Emotional Learning is Suddenly in the Spotlight*, *EDSURGE* (May 7, 2019), <https://www.edsurge.com/news/2019-05-07-why-social-emotional-learning-is-suddenly-in-the-spotlight>

ArtsCount, as well as Blueprint for the Arts, was developed during an era where arts education was extremely popular and highly favored by the most influential figures in New York City public education. During this time, funding for these programs was at a historic high. Though currently, with the popularity of the aforementioned teaching methods, emphasis on the arts has decreased. However, with the ever-changing nature of public-school education, arts education does not have to suffer, it can grow. Restructuring ArtsCount instead to focus on and emphasize a broader, intersectional implementation of arts education would allow arts education to thrive in conjunction with these popular methods of teaching. Thorough methods of reporting and modified funding structure would provide the environment conducive for that growth.

Ultimately, this proposed structure would differ from ArtsCount, and the previously implemented Project ARTS, in that it would serve as a middle ground of discretion for school leaders when it comes to arts education funding. Further, this framework would increase information gathered through reporting compared to that of ArtsCount, promoting a culture of higher stakes for school leaders to develop and sustain access to arts education.

A. RESTRUCTURED SYSTEM OF FUNDING TO MITIGATE ARTSCOUNT'S DISCRIMINATORY EFFECTS

This proposed alternative would include a system of reporting that dedicates money to arts education programs. This funding structure would align more closely to New York City's previously implemented Project ARTS, however discretion for school leaders will be maintained. As previously discussed, there are various mechanisms through which school leaders receive funding from the central NYC Department of Education—including Fair Student Funding and School Allocation Memoranda. Through this alternative, arts education funding would be given to schools with a school allocation memorandum requiring it to be spent in areas of arts instruction. This alternative would serve as a middle ground with the goal of guaranteeing investment in the arts, transferring money for arts education from general school budgeting to dedicated school funding.

Empowerment for school leaders to decide where their funds were going was a major element of the implementation of ArtsCount.¹⁰⁹ The proposed alternative would maintain this feature by continuing to allow school leaders to decide the programs in which they will invest their funds. However, opposed to providing arts education through general school budgets, New York City will enforce a system which requires arts education funding to be spent in arts related programming. It may be essential, however, to emphasize a broad scope regarding what may qualify as arts programming—broad, though defined. Requiring schools to spend money directly on the arts would not mitigate the difficulties previously discussed that schools face in

[<https://perma.cc/2CNJ-LZJH>] [<https://web.archive.org/web/20230310153520/https://www.edsurge.com/news/2019-05-07-why-social-emotional-learning-is-suddenly-in-the-spotlight>].

109. GOTBAUM, *supra* note 63.

preparing their students for state-wide examination in common core areas. In addition to arts programming which targets arts education directly through various arts mediums, school leaders are encouraged to invest in arts education programming that utilizes teaching through arts integration. Arts integration is a method of learning in which students obtain an understanding of one subject through the use of art.¹¹⁰ Through this process, students are able to utilize their creative abilities while also expanding knowledge of more traditional subjects, like reading and language arts, math, science, and social studies. Arts integration programming may include professional development for common core teachers focusing on the use of arts mediums in traditional subject areas, and the implementation of an arts-integrated curriculum. By maintaining a broad scope of arts education programming, school leaders maintain an even stronger level of discretion while still being required to dedicate this funding to arts specific areas and activities.

The proposed structure would prioritize professional development for teachers of all subjects with emphasis on arts integration. Professional development is a strategy for “schools to strengthen teacher’s performance levels” and typically involves a “formal process, such as a conference, seminar, or workshop; collaborative learning among members of a work team.”¹¹¹ In the context of education, professional development provides teachers with tools to improve their skills overtime and enhance the classroom experience for all students.¹¹² In the context of arts integration, professional development would arm teachers with tools to integrate arts education in their daily lesson plans and curriculum. As part of this alternative, and as an incentive to participate in arts integration professional development initiatives, teachers will be given general Continuing Teacher and Leader Education (“CTLE”) credits. The CTLE Requirement is a standard to which educators holding particular certificates are held where they must complete 100 clock hours of instruction with CTLE-approved sponsors.¹¹³ Teachers are required to complete this number of hours per every five-year period. Offering such credit in exchange for participation may encourage teachers to gain this form of arts instruction training.¹¹⁴

Additionally, as an incentive for administrators to endorse teacher participation in these programs, additional funding could be offered for participating schools. This funding will come with SAM reports requiring that it is spent only on arts-related programs as well. This practice will essentially, in part, return to the pre-ArtsCount

110. *What is Arts Integration?*, North Central Educational Service District (Aug. 26, 2021), <https://www.ncesd.org/news/what-is-arts-integration> [<https://perma.cc/4XCE-NCFA>] [<https://web.archive.org/web/20230310153823/https://www.ncesd.org/news/what-is-arts-integration>].

111. HAYES MIZELL, *LEARNING FORWARD, WHY PROFESSIONAL DEVELOPMENT MATTERS* 5 (2010).

112. *Id.* at 6.

113. *Continuing Teacher and Leader Education (CTLE) Requirement*, NYSED, <https://www.highered.nysed.gov/tcert/resteachers/ctle.html> [<https://perma.cc/Z4JM-E7K5>] [<https://web.archive.org/web/20230405134607/https://www.highered.nysed.gov/tcert/resteachers/ctle.html>].

114. *Fulfilling Your CTLE Credits*, UNITED FED’N TCHRS. (Dec. 17, 2020), <https://www.uft.org/news/you-should-know/qa-on-issues/fulfilling-your-ctle-requirements> [<https://perma.cc/4U5P-AUGU>] [<https://web.archive.org/web/20230310154234/https://www.uft.org/news/you-should-know/qa-on-issues/fulfilling-your-ctle-requirements>].

funding structure that directed funding specifically for arts education. Mandating initiatives for school and district leaders to endorse implementation of arts education in their daily instruction would encourage participation at the school and district levels, while maintaining school leader discretion and allowing teachers to simultaneously prepare their students in common core areas.

B. RESTRUCTURED SYSTEM OF REPORTING TO MITIGATE ARTSCOUNT'S DISCRIMINATORY EFFECTS

As previously explained, the current system of reporting lacks thorough inquiries that provide the Department of Education, as well as parents and school district leaders, with information on arts education available to students in the area. A restructured system of reporting would modify the current Arts in Schools Report as well as incorporate arts education assessments into current, high-stakes, yearly reports. Maintaining the current yearly Arts in Schools Report is essential as a tool to provide the great New York City public with insight into the arts education available to students. Incorporating arts education into additional, high-stakes reports would increase accountability for principals regarding investing in arts programming.

The current Arts in Schools Survey solicits general information on the makeup of each school that completes the survey. This information is consolidated in the school summary section. In the alternative framework, the Annual Arts in Schools Report, which summarizes the information collected by each school's survey and is published yearly, would include the socioeconomic and racial makeup of each school in the distribution of this information. While this report provides information of all schools at the large scale, it is difficult to address the issues of inequity and accessibility when they are provided out of that socioeconomic context. By including a racial assessment of all responding schools, this would essentially provide a report similar to the Comptroller's, but on a yearly basis. Effectively, the way the Comptroller report highlighted inequities and need for change, this element of the Annual Arts in Schools report would emphasize the importance of arts education equity and access as well as keep those socioeconomic needs at the forefront beside the other metric and assessments included in the yearly report.

This proposed framework would also expand upon both the qualitative and quantitative nature of this survey, requiring more detail in the School's Arts Program Description, as well as more detail as to what students are engaging in during individual arts programs. Schools are required to provide the names of partner organizations, arts events attended, and rooms dedicated to these activities, but the survey lacks substantive information on what these activities truly are. Further, this survey would require more thorough quantitative information, specifically about the amount of money being spent on arts programming and a breakdown of the distribution of those funds, as well as the percentage of weekly hours spent dedicated to the arts, as required by the NYS Arts Education standards. As reflected in the responses immediately following the Comptroller Report, such specific data highlights areas of needed growth and creates room for public scrutiny. If these specific data points are never recorded,

shortcomings and discriminatory impact may go unnoticed. The proposed framework aims to highlight this growth through detailed reporting, as the Comptroller Report did, on a frequent basis.

C. THE PROPOSED STRUCTURE IN COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT

In agency Title VI administrative investigations, the evidentiary burden rests with the investigating agency rather than with the complainant.¹¹⁵ The agency carrying out the investigation is responsible for inquiring potential alternatives that may mitigate the discriminatory effects of the agency funded program. Thus, while this less-discriminatory alternative may be considered, it is by no means necessary in establishing a valid claim of adversity imposed on the protected group as a Title VI violation. However, in assessing the adequacy of a less discriminatory alternative, agencies should “thoroughly review the evidence provided regarding potential alternatives.”¹¹⁶

This proposed structure would serve as a valid alternative to ArtsCount under Title VI of the Civil Rights Act. As previously described, a less discriminatory alternative under Title VI would “adequately meet the established need.”¹¹⁷ Further, previous case law demonstrates that less discriminatory alternatives may take the form of “mitigation measures to be applied to the original challenged practice.”¹¹⁸ The established need in the context of New York City’s ArtsCount is to address the disparities of access to arts education among students in neighborhoods of varying socioeconomic backgrounds through budgeting accountability. The proposed alternative meets the established need by addressing the lack of accountability by reforming the current framework to address the system failures specifically pertaining to access on the basis of racial and socioeconomic makeup of students. The proposed framework takes the form of mitigation efforts, requiring school leaders to dedicate funding to arts and reporting to include assessments of disparities based on race on a yearly basis to reflect the impact of this change.

D. POLICY CONSIDERATIONS

Several policy considerations are taken into account while attempting to reform ArtsCount, especially the use of arts integration in everyday subjects. A primary

115. TITLE VI LEGAL MANUAL, *supra* note 25.

116. *Id.*

117. TITLE VI: INTENTIONAL DISCRIMINATION AND DISPARATE IMPACT, FED. HIGHWAY ADMIN. <https://www.fhwa.dot.gov/civilrights/programs/docs/Title%20VI%20-%20Intentional%20Discrimination%20and%20Disparate%20Impact.pdf> [https://perma.cc/LJC7-B7CV] [https://web.archive.org/web/20230215211438/https://www.fhwa.dot.gov/civilrights/programs/docs/Title%20VI%20-%20Intentional%20Discrimination%20and%20Disparate%20Impact.pdf].

118. TITLE VI LEGAL MANUAL, *supra* note 25; Nat’l Ass’n For Advancement of Colored People v. Med. Ctr., Inc., 657 F.2d 1322, 1325 (3d Cir. 1981).

difference between this proposed alternative and the currently existing ArtsCount is the treatment of the arts as an individual subject necessitating its own instruction time, as opposed to an emphasis on incorporation of the arts into daily curriculum. The two schools of thought expressed are defined as the aesthetic view and instrumentalist view, respectively.¹¹⁹ A proposed alternative to the discriminatory implications of ArtsCount would endorse an instrumentalist view of arts education. Instead of treating arts education as a separate subject, to be utilized and taught mainly by those with arts education certification, arts education could be implemented at every level of education by all educators.¹²⁰ An instrumentalist view would allow the allocation of funds to support already existing programs and teachers, with art being incorporated into the already existing structure.

In fact, this funding structure, which endorses the instruction of the arts in daily curriculum, demonstrates extremely efficient use of funds as the arts are proven to contribute greatly to topics and initiatives currently popular within the New York City public education regime. Two widely recognized teaching frameworks—social emotional learning and culturally responsive-sustaining education (“CR-S”)—can both be supported through incorporation of the arts.

Social emotional learning is an educational framework meant to provide students with learning environments that “affirm cultural identities and . . . develop students’ ability to connect across lines of difference, (and) elevate historically marginalized voices.”¹²¹ An element of this framework is creating a welcoming and affirming environment that “highlight[s] works of art designed by students and members of the broader community.”¹²² It is seen through many studies, however, that the impact of arts education on social emotional learning goes far beyond the appreciation of artworks.¹²³ A 2017 study conducted by the William Penn Foundation explores the impact of arts education on social emotional development of children.¹²⁴ Particularly, this study focused on areas of development within children of color, with a student sample including 32% African American students and 29% Latinx students. This study

119. *Learning Through the Arts: A Guide to the National Endowment for the Arts and Arts Education*, NAT’L ENDOWMENT ARTS (2002).

120. Emily H. Plotkin, *Arts Education: A Fundamental Element of Public School Education*, 26 COLUM. J. L. & ARTS 75, 89–90 (2002) (stating that “In this approach to arts education, the arts are infused into every subject in the curriculum, with the intent to develop ‘high order thinking skills, such as comparison, restructuring, and innovation.’ An arts education is then a vehicle for learning other subjects, but in the process students learn foundational skills in art as well.”).

121. *Culturally Responsive-Sustaining Education Framework*, NYSED.GOV, <http://www.nysed.gov/common/nysed/files/programs/crs/culturally-responsive-sustaining-education-framework.pdf> [https://perma.cc/3Z8F-BE7T] [https://web.archive.org/web/20230405135909/http://www.nysed.gov/common/nysed/files/programs/crs/culturally-responsive-sustaining-education-framework.pdf].

122. *Id.* at 33.

123. Steven J. Holochwost et. al, *The Social Emotional Benefits of the Arts: A New Mandate for Arts Education*, THE WILLIAM PENN FOUND. (Apr. 2017), https://williampennfoundation.org/sites/default/files/reports/Socioemotional%20Benefits%20of%20the%20Arts_Summary.pdf [https://perma.cc/C8FP-7P9Y] [https://web.archive.org/web/20230215212834/https://williampennfoundation.org/sites/default/files/reports/Socioemotional%20Benefits%20of%20the%20Arts_Summary.pdf].

124. *Id.*

found that students who participated in arts programs experienced “increases in their tolerance for others’ perspectives[,] . . . areas of growth mindset and academic goal orientation.” This impact was seen especially among younger students.

CR-S is an educational framework that emphasizes the importance and usefulness of multiple expressions of diversity in the process of teaching and learning.¹²⁵ Elements of the CR-S framework address the presence of cultural diversity in all aspects of the classroom. A welcoming and affirming environment requires “collective responsibility to learn about students’ cultures and communities.”¹²⁶ High expectations and rigorous instruction require critical examination of power structures, inclusive curriculum and assessment require students as co-designers of curriculum, and Diversity, Equity, and Inclusion training necessitate ongoing professional and learning support. Essentially, CR-S instruction will “identify gaps where current curriculum does not address multiple perspectives, cultures, and backgrounds [and] advocate for fair representation of these absent backgrounds.”¹²⁷ Several strategies for implementing arts instruction within the CR-S framework demonstrate the benefits that such collaboration could have for the enhancement of student learning. Artistic activities such as painting, drawing, movement, and music, all contribute to the cultural competence of students through their ability to inform in “ways that do not heavily rely on language.”¹²⁸

Overall, there is great impact that arts instruction can have on currently popular and well supported educational initiatives. Redirecting funding to support arts education, especially in ways that incorporate arts instruction in daily common core subjects, would also prove to be a further investment in many respected and prioritized initiatives.

E. CONCERNS

Concerns of practicality regarding this alternative may be posed. As New York City has the largest public school system in the country, how could policy reformation of this scale take place? However, similar structures of funding have been implemented in the past, at the national level, for arts instruction training programs, in addition to other types of arts-related grants. For example, the Arts in Education – Model Development and Dissemination Grants Program implemented a similar structure at the national level. This program was implemented from 2004–2014, and offered grants to organizations with arts expertise to “further create and develop materials for the replication or adaptation of current comprehensive approaches to integrating a range of arts disciplines into elementary and middle school curricula.”¹²⁹ Essentially, this

125. *Id.*

126. *Id.* at 12.

127. *Id.*

128. Sarah Travis & Emily Jean Hood, *Troubling Socio Cultural Narrative Pedagogy: Implications of Arts Educators*, 57 I. ISSUES & RSCH. 318 (2016).

129. *Arts in Education Model Development Dissemination Grants Program*, U.S. DEP’T EDUC. (2017) <https://www2.ed.gov/programs/artsedmodel/index.html> [<https://perma.cc/XM6T-T5HR>] [<https://web.archive.org/web/20230215213907/https://www2.ed.gov/programs/artsedmodel/index.html>].

program consisted of key elements of what this reformed ArtsCount would include, specifically regarding its funding to New York City-based consulting companies for partnering with public schools to offer instruction training. This element of the framework existed at the national level for a decade, demonstrating its practicality.

Other elements of this proposed framework are seen in their individual capacity in previous implementation efforts by other state departments. For example, a 2009 study assessed arts integration professional development with K-12 teachers in Washington, D.C. They found that integration of arts-based learning in the common core curriculum allowed teachers a deeper understanding and appreciation of their own and their students' artistic capabilities.¹³⁰ Further, teachers expressed that utilizing art helped facilitate "understanding of abstract concepts among previously struggling students."¹³¹ This demonstrates that integration of arts instruction in the common curriculum could coincide with the standard objectives of common core mandates while sustaining exploration in the arts.

What this newly imagined framework proposes is a less discriminatory alternative to the current accountability program, ArtsCount. In context of Title VI of the 1964 Civil Rights Act, this alternative demonstrates that, although it may be argued our current funding structure and accountability programs are justified, they are not necessary. The discriminatory implications they yield are not inevitable and can be avoided with a more instrumentalist approach that narrows the chain between funding being allocated and funding being spent.

IV. CONCLUSION

Ultimately, we return to the words of Rocco Landesman, Former Chairman for the National Endowment for the Arts: "As the arts are forced to compete for scarce resources, there is no harm in pointing out once again that an investment in the arts will pay extensive dividends."¹³² A reassessment of the current accountability framework, ArtsCount is necessary in reforming access to arts education for children at all levels. This reassessment will not only provide our education system with a refreshed view of the impact funding accountability has on arts education, but it will also provide all children with a supported and unthreatened chance at the arts.

130. Amelia M. Kraehe, Joni B. Acuff, & Sarah Travis, *Equity, the Arts, and Urban Education: A Review*, 48 URBAN REV. 220 (2016).

131. *Id.* at 235.

132. CATTERALL ET AL., *supra* note 4.

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