The (Social) Media is the Message: Theories of Liability for New Media Artists

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ABSTRACT

Artists have always challenged the limits of the legal, but in recent years, there has been a shift from works of art that offend or upset to those that merely run afoul of something very mundane: online terms of service. This Note argues that new media artists working primarily with social media must be aware of the potential liability inherent in any project that involves a violation of user agreements. If artists continue to violate the user agreements of social media websites—whether purposefully or by accident—there are serious implications for legal liability. With Richard Prince standing at the helm of a new breed of artist-plaintiff, the new media movement is beginning to witness the very tangible presence of litigation in even the most intangible of artworks.

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INTRODUCTION

> "[T]he only way left to shock is not through controversial content, but by subverting the very form and structure of the artwork itself."
>
> Peter Rojas[1]

For lawyers, artist Richard Prince has become the undeniable enfant terrible of the "Pictures" generation.[2] As an appropriation artist, Prince "lifts" portions of preexisting works, appropriating and combining others' images to create new, unique works of art. In the 1980s, Prince began "rephotographing" cigarette advertisements depicting the famous Marlboro man.[3] Neither Marlboro nor Sam Abell, photographer of the original Marlboro man, sued Prince for these appropriative works,[4] so students of copyright law are more likely to know Prince's 2008 work *Canal Zone*.[5] In *Canal Zone*, Prince cut out and modified photographs of Jamaican Rastafarians from a book by photographer Patrick Cariou.[6] Unlike his predecessor Abell, Cariou sued Prince

1. *Copies*, RHIZOME ART (2005), https://perma.cc/T7S6-DY2U.

2. "Pictures" was the title of a 1977 exhibition organized by art historian Douglas Crimp. The term is now used to describe that group and others of the era whose "work is not confined to any particular medium; instead, it makes use of photography, film, performance, as well as traditional modes of painting, drawing, and sculpture." Douglas Crimp, *Pictures*, 8 OCTOBER 75, 75 (1979).

3. *See, e.g.*, *Untitled (cowboy*) Description, *Heilbrunn Timeline of Art History*, THE METROPOLITAN MUSEUM OF ART, https://perma.cc/C3AS-GST3. Sotheby's has described the series as "emblematic": "By re-appropriating images from Marlboro advertisements and presenting them unbranded, blown-up to the point of pixelation and refocused, Prince not only challenges the nature of photography and its authorship but more importantly deconstructs and interrogates romanticized images that shape American identity." *Richard Prince, Untitled (cowboy) Catalogue Note*, SOTHEBY'S, https://perma.cc/E9R2-SY9U.

4. Abell noted that "[i]t's obviously plagiarism," but not illegal. Liron Samuels, *Photographer Sam Abell Talks About 'Cheeky' Richard Prince After Prince Sold His Photo for Millions*, DIY PHOTOGRAPHY (May 29, 2015), https://perma.cc/ZVR3-D4WU.

5. *See* Richard Prince, *Canal Zone Exhibition Description*, GAGOSIAN GALLERY, https://perma.cc/5RBN-P7S8.

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

for copyright infringement.[7] Prince asserted a fair use defense,[8] rejected by the district court but ultimately validated by the Second Circuit on appeal.[9]

Prince spent nearly four years defending himself against Cariou's claims, with the case finally coming to a close in 2013. In autumn 2014, Prince pushed the legal limits yet again and reproduced others' Instagram posts on six-by-six foot canvases.[10] He replaced the actual comments on the posts with his own bizarre ones, such as: "DVD workshops. Button down. I fit in one leg now. Will it work? Leap of faith."[11] A number of the selected posts depict young women in semi-nude poses, while others show celebrities; none of the original posters were asked for consent.[12] The show, titled *New Portraits* and shown at the Gagosian Gallery in New York, faced serious backlash.[13] Many users whose works were reproduced were angered by Prince's assertion that his addition of frustratingly oblique and seemingly mocking comments could render apparent copyright infringement legal.[14] Four lawsuits have been filed against Prince as a result of *New Portraits*: photographer Donald Graham filed a complaint at the end of 2015; photographer Dennis Morris filed suit in June 2016, followed by makeup artist Ashley Salazar two weeks later; and photographer Eric McNatt in November 2016.[15]

New Portraits, through its reliance on a violation of Instagram's terms of use, draws attention to a rich, but far less well-known, movement in the art world where

7. Amended Complaint and Demand for Jury Trial, Cariou v. Prince, No. 08-Civ-11327, 714 F.3d 694 (2d Cir. 2013).

8. Answer, Cariou v. Prince, No 08-Civ-11327, 714 F.3d 694 (2d Cir. 2013).

9. Cariou, 714 F.3d at 712. *See* Brian Sites, *Fair Use and the New Transformative*, 39 COLUM. J.L. & ARTS 513, 529-34 (2016); Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559 (2016).

10. Press Release, *Richard Prince: New Portraits*, GAGOSIAN GALLERY (June 9, 2015), https://perma.cc/NNA9-NLAR.

11. Anny Shaw, *Other People's Instagram Posts – Yours for $90,000*, THE TELEGRAPH (June 15, 2015), https://perma.cc/F9TN-V2JA.

12. *Id.*

13. Nate Harrison, *How to Sue Richard Prince and Win*, AM. SUBURB X (July 13, 2015), https://perma.cc/6RQQ-5FW3; Noah Dillon, *What's Not the Matter With Richard Prince*, ARTCRITICAL (July 9, 2015), https://perma.cc/YR6B-RLZD; Paddy Johnson, *Richard Prince Sucks*, ARTNET NEWS (Oct. 21, 2014), https://perma.cc/3GCF-M47W.

14. *See, e.g.*, Katrina Clarke, *Richard Prince's use of her Instagram image angers Toronto woman*, THE TORONTO STAR (June 1, 2015), https://perma.cc/2EAS-N6QZ ("Instagram, meanwhile, doesn't mince words about photo ownership. 'People in the Instagram community own their photos, period,' an Instagram spokesperson said in an email to the Star. 'On the platform, if someone feels their copyright has been violated, they can report it to us and we will take appropriate action. Off the platform, content owners can enforce their legal rights.'"). One user, Anna Collins, stated: "Appropriation without consent is not at all OK. For an upper-class white man who felt entitled enough to take younger girls' photos and sell them for a ridiculous amount of money, [it] strips us from the sense of security we have in the identity that we put out there." *Id.*

15. Complaint and Jury Trial Demanded, Graham v. Prince, No. 1:15-cv-10160, 2015 WL 9875187 (S.D.N.Y. Dec. 30, 2015); Complaint for Copyright Infringement and Demand for Jury Trial, Dennis Morris, LLC v. Prince, Docket No. 2:16-cv-03924 (C.D. Cal. June 3, 2016); Complaint for Copyright Infringement and Demand for Jury Trial, Salazar v. Prince, Docket No. 2:16-cv-04282 (C.D. Cal. June 15, 2016); Complaint and Jury Trial Demanded, McNatt v. Prince, Docket No. 1:16-cv-08896 (S.D.N.Y. Nov. 16, 2016). The first two have since settled, and McNatt's case was at the motion to dismiss stage as of January 2017.

such contractual violations constitute the medium of the work. This Note will examine three works of art on three different social media platforms: *McNugget* by Chris Alexander, a massive compilation of tweets containing the word "McNugget"; *Face to Facebook* by Paolo Cirio and Alessandro Ludovico, a mock dating website that used scraped Facebook user data as its base; and *High Retention, Slow Delivery* by Constant Dullaart, a performance work that involved the creation and distribution of robot followers on Instagram.

Prince's latest spectacle should make these artists and others working in the medium of social media wary. The artists discussed in this Note have stepped away from *Canal Zone* and into a gray zone, purposefully breaching user agreements online. Networks of liability emerge when an artist undertakes conceptual social media based work, mandating *ex ante* legal considerations for those who wish to avoid prolonged legal battles. Given the thorny landscape of user agreements, these artists need alternative structures in place to avoid serious liability and maintain their proprietary and monetary interests. This Note will suggest that if contracts are the root of an artist's problem, so too can they be the solution in the form of contract-based best practices: entering into indemnification agreements with collectors or galleries before executing the work; instituting takedown measures to maintain the privacy of unwilling, non-consenting third parties; and using alternative monetization and licensing schemes for such works.

I. ART HISTORICAL GROUNDINGS: NEW MEDIA AND SOCIAL MEDIA

Before discussing the legal implications of social media art, it is important to situate the works amongst its predecessors in "new media," digital art, and Internet art.[16] New media now seems an almost meaningless category, given that "new" always refers to subjective periods of time.[17] Digital art is a broad term referring to works that use digital technologies such as video projection, computers, or coding.[18] Under the umbrella of digital art is Internet art, which refers to works that use the Internet and its capabilities as the medium.[19] Internet art includes websites, Internet-based games, or email art. Internet art in general is strongly connected to earlier conceptual art movements, including Dada and Fluxus.[20] Christiane Paul, Adjunct Curator of New Media Arts at the Whitney Museum of Art, explains that "[t]he importance of these movements for digital art resides in their emphasis on formal instructions and in their focus on concept, event, and audience participation, as

16. Rhizome, an online resource for new media art, is restaging many of these early Internet-based works as part of a project titled "Anthology." *Net Art Anthology,* RHIZOME ART, https://perma.cc/U7NC-TH9M.

17. Joel Laylin Larson Richert, The Materialization of the Internet Art Object: the evolution of Internet art and its contemporary market (2014) (unpublished M.A. thesis in Art Business, Sotheby's Institute of Art) (on file with ProQuest) at 5.

18. *See, e.g.*, CHRISTIANE PAUL, DIGITAL ART (2003).

19. Not to be confused with works of art made in traditional mediums and then hosted on the Internet.

20. *Id.* at 11.

opposed to unified material objects."[21] Within Internet art there numerous groups of artists working on and with the Internet, such as net.art.[22]

Art historians distinguish between works of art that use digital technology as a *tool* and works that use the digital as a *medium*.[23] Art where digital is a tool utilizes technology in the production of the work. Consider photographer Brandon Stanton, whose images of subjects on the streets of New York reach millions through his blog titled "Humans of New York."[24] He cross-posts the images to many social media websites, including Instagram, Facebook, and Twitter.[25] Stanton takes the photographs using a digital camera, and puts the photographs on the Internet, meaning that his project could be considered digital art. References to social media art in this Note do not refer to these projects. Christiane Paul explains that "[t]he employment of digital technologies as an artistic medium implies that the work exclusively uses the digital platform from production to presentation, and that it exhibits and explores that platform's inherent possibilities."[26] Stanton does use the Internet and social media platforms as tools to display and disseminate his artwork, but Humans of New York is not a work of "social media art" within the parameters of this Note.

A frequent site of exploration for new media art was the perceived incompatibility of traditional legal structures and the Internet. American poet John Barlow has expressed this tension beautifully: "This vessel, the accumulated canon of copyright and patent law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. It is leaking as much from within as from without."[27] Now well past the advent of Web 2.0, the artists discussed in this Note have removed the rose-colored glasses from social networks, and instead use their artworks to highlight social media's inherent limitations and pitfalls. Internet art is not necessarily a material object, but rather a situation.[28]

For instance, American technology writer Nicholas Carr has theorized a uniquely Web 2.0 phenomenon he terms "digital sharecropping."[29] Carr argues that Web 2.0:

> by putting the means of production into the hands of the masses but withholding from those same masses any ownership over the product of their work, provides an incredibly

21. *Id.*

22. *See, e.g.*, JULIAN STALLABRASS, INTERNET ART: THE ONLINE CLASH OF CULTURE AND COMMERCE 11 (2003).

23. *See, e.g.*, PAUL, *supra* note 18, at 8.

24. Brandon Stanton, *About: Humans of New York,* HUMANS OF NEW YORK, https://perma.cc/6WMN-4DEE.

25. "@humansofny," INSTAGRAM, https://perma.cc/7HJT-UVQH; *Humans of New York*, FACEBOOK, https://perma.cc/RM9N-QJUJ; Brandon Stanton ("@humansofny"), TWITTER, https://perma.cc/K7NE-Z4WZ.

26. PAUL, *supra* note 18, at 67.

27. V.A. SHIVA, ARTS AND THE INTERNET: A GUIDE TO THE REVOLUTION 156 (1996).

28. CRAIG J. SAPER, NETWORKED ART ix (2001).

29. Nicholas Carr, *Digital Sharecropping*, ROUGH TYPE (Dec. 19, 2006), https://perma.cc/4EB8-BQZ4.

> efficient mechanism to harvest the economic value of the free labor provided by the very many and concentrate it in the hands of the very few.[30]

Sharecroppers of the digital landscape put forth information whose value they do not realize, and receive only access in exchange. In a blog post now only accessible via the Internet Archive's Wayback Machine, Lawrence Lessig articulated Web 2.0 as an ethical label, arguing that not all user generated content sites are created equal.[31] For Lessig, Web 2.0 represents an Internet of sharing and communality; therefore, only websites that allow free access to content fulfill the values of Web 2.0.[32]

While this privatization of content is made clear in each social media website's terms of service, the latent sharecropping aspects of Web 2.0 are made visible by the artworks discussed in this Note. "[P]ersonal information is the fuel that powers the social media engine," and these artists seize upon terms of use—contracts that dictate the rights and responsibilities of Internet users—as their medium to reveal the digital sharecropping landscape for what it is.[33] Art historian Cadence Kinsey warns against accidentally rendering the potentially liberating information exchange of new media into yet another reified aspect of late capitalism.[34] One of the results of this "ideology of equivalence" proselytized by late capitalism is the assumption by Internet users that their inputs (postings on social media) and outputs (access to social media) are fungible. What the artists discussed in this Note attempt to explore is the fallacy of such an assumption. Although users do indeed exchange their inputs for outputs, achieving fungibility, this exchange is unequal: users are bound by terms they do not understand, with little recourse and seemingly endless policing of the contractual boundaries by Internet conglomerates.

The artists discussed in this Note have either received or could reasonably receive cease and desist letters from social media platforms as a result of their violation of the platforms' terms of use. Simona Lodi, an Italian art critic and curator, has thus termed this particular breed of art "cease and desist art," a title that also acknowledes many of the artists' goal of receiving a cease and desist letter.[35] Cease and desist art takes uses not only the digital platform but the contractual landscape thereof as its medium. In another article, Lodi uses a more general term—"illegal art"—to define

30. *Id.*

31. Lawrence Lessig, *The Ethics of Web 2.0: YouTube vs. Flickr, Revver, Eyespot, blip.tv, and even Google*, LESSIG BLOG (Oct. 20, 2006), https://perma.cc/6KZ4-RF97.

32. *Id.*

33. Woodrow Hartzog, *Privacy and Terms of Use*, *in* SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATION STUDENTS AND PROFESSIONALS 50 (Daxton R. "Chip" Stewart ed., 2013).

34. Cadence Kinsey, *From Post-Media to Post-Medium: Rethinking Ontology in Art and Technology*, *in* PROVOCATIVE ALLOYS: A POST-MEDIA ANTHOLOGY 68, 72 (Clemens Apprich et al. eds., 2013).

35. *See* Simona Lodi, *Cease & Desist Art: Yes, this is illegal!*, *in* 30-40 REFF—ROMA EUROPA FAKE FACTORY. LA REINVENZIONE DEL REALE ATTRAVERSO PRATICHE CRITICHE DI REMIX, MASHUP, RICONTESTUALIZZAZIONE, REENACTMEN (Cary Hendrickson et al. eds., 2010), https://perma.cc/J8FD-6M5C.

"artworks that target Facebook, Twitter, and other centralized social networks" and "turn[] breaking the law into an art form."[36]

A. EARLY INTERNET ART LAWSUITS

In 1995, artist Kenneth Aronson registered the domain name "hell.com," hoping to create a "parallel Web" that was "fascinating, exciting, dangerous, interesting."[37] Hell.com was an invitation only platform, hosted on a private server, where conceptual artists could host and display digital artworks away from the rest of the Internet.[38] In a 1998 interview with *The New York Times*, Aronson acknowledged the project's consonance with more mainstream goals of the early Internet: "In many ways, it's very utopian and the first response would be, why not call it heaven? . . . Hell represents chaos. It's a world of its own design that disregards the implications of a complete abandonment of the rules."[39] Aronson found rules very much abandoned in February 1999, when artist duo Eva and Franco Mattes (known as "0100101110101101.ORG") obtained a password to access Hell.com and promptly downloaded and then re-uploaded the contents to their own website.[40] Apparently enraged, Aronson sent the Matteses a cease and desist letter that they ignored.[41] The Matteses went on to copy two more art websites, each time modifying less and less of the copied site.[42]

Guy McMusker, spokesperson for Les Liens Invisible, "an imaginary italy-based [sic] artists [sic] duo,"[43] says:

> The point is that an artist, especially a hacker, cannot bow to the rationale of power that lies behind these machinations; by going beyond it, you inevitably attract injunctions and legal action. Therefore we don't believe so much in antagonism as a choice for making a stance; rather it is a necessity dictated by the desire for self-assertion, so we welcome turning the rationale of legal action on its head so that it becomes a trophy, if this can in some way incite people, rather than inhibit them for once, to question these so-called limits of the law.[44]

Similarly, Paul Garrin began a project titled "Name.Space" in 1996, which aimed to expand the number of available URL components (e.g., .com, .net, .edu).[45] Garrin utilized a lawsuit to break the domain-name monopoly, and while the work is not

36. Simona Lodi, *Illegal Art and Other Stories About Social Media*, *in* UNLIKE US READER: SOCIAL MEDIA MONOPOLIES AND THEIR ALTERNATIVES 250-51 (Geert Lovink, Miriam Rasch eds., 2013).

37. Matthew Mirapaul, *Artists Open Door to Private Underworld*, N.Y. TIMES (Apr. 23, 1998), https://perma.cc/V599-YYUG.

38. *Id.*

39. *Id.*

40. *Copies*, RHIZOME (2005), https://perma.cc/T7S6-DY2U.

41. *Copies (1999)*, EVA AND FRANCO MATTES, https://perma.cc/BS54-WLQ9.

42. *Id.*

43. *About*, LES LIENS INVISIBLE (2007), https://perma.cc/U625-UX9S.

44. Lodi, *supra* note 36, at 245-46.

45. Rachel Greene, *Web Work: A History of Internet Art*, ARTFORUM 162.

explicitly an *art*work, it does share with other early net.art and Internet art a desire to make cyberspace more democratic.[46]

Some of the moralizing themes addressed in the contemporary works discussed later in this Note—the danger of clickwrap and browsewrap contracts or the ignorance of Internet users to how their data is collected and used—were also at play in early Internet works. For instance, artist Julia Scher set up a website titled *Security Land* in 1995. The site informed visitors of the type of computer they had, which software they were using, and what their email address was. It then prompted them to answer the question: "How do you feel now?," drawing attention to the surveillance of users on the Internet.[47]

Cease and desist artists were unfazed by the dot com bust. In 2010, Perkins Coie sent a cease and desist letter on behalf of Facebook to the creators of an artwork titled *Web 2.0 Suicide Machine* that allowed users of social media sites to "commit suicide," permanently deleting their accounts.[48] The letter alleged that the artists' actions, among other things, "violate Facebook's Statement of Rights and Responsibilities," specifically the prohibitions against solicitation of users' login information, accessing another's account, collecting user's content or information using automated means without permission, and using Facebook's intellectual property.[49] In a mailing list discussion of the cease and desist letter, another artist advises: "you should search for a good dutch [sic] lawyer with knowledge in the digital field, go through the facebook terms&conditions [sic] and see if they actually apply for the netherlands [sic][.]"[50]

Simona Lodi remarks: "Earning oneself a cease and desist letter has become the new frontier in art, a symbol of the cause for the freedom to create in the Corporation Era. Artists keen to take part go find themselves a good lawyer, rather than a good art dealer."[51] In the mailing list discussion of the *Web 2.0 Suicide Machine* cease and desist letter, one artist actually began his email with: "Congrats on the cease+ decist;.)".[52] The artists on the mailing list tried to parse the language of the cease and desist and Facebook's terms and conditions. One artist raises the point that "it is the user who agrees the Terms of Use [sic] . . . paradoxically Facebook should send a letter to each user[.]" While the artist behind the *Suicide Machine* insists that they "didn't actually bow down to Facebook," the website is no longer active.[53]

46. *Id.* at 165.

47. STALLABRASS, *supra* note 22, at 74.

48. Florian Cramer, "***SPAM*** Re: Facebook Demands Cease & Desist for the 'Web 2.0 Suicide Machine'", Posting to *nettime mailing list* (Jan. 13, 2010), https://perma.cc/TWD5-QVX4.

49. Hans Bernhard, "Re: <nettime> Facebook demands Cease & Desist for the 'Web 2.0 Suicide Machine'", Posting to *nettime mailing list* (Jan. 11, 2010), https://perma.cc/XT96-8FB9.

50. *Id.*

51. *Id.*

52. Posting to the *nettime mailing list* (Jan. 11, 2010), https://perma.cc/DQ29-VX3S.

53. Network Cultures, *Walter Langelaar (NL) – Web 2.0 Suicide Machine*, VIMEO (Mar. 20, 2012), https://perma.cc/V5LN-RMWX (discussing the cease and desist letter at 10:23: "I'm very happy that we didn't actually bow down to Facebook. The only weird thing they actually made us do was on the Suicide Machine website, we were not allowed to use the little 'F' anymore. . . . This is what they accused us of: soliciting users' login information, accessing accounts . . . They actually suggest that had we made our project on Facebook's Connect Platform, which is basically the development platform . . . then they might

Internet art also raises interesting questions of protection under the U.S Copyright Act. Copyright protection extends to "original works of authorship fixed in any tangible medium of expression[.]"[54] The Copyright Office has explicitly stated that copyright law does not, however, "protect names, titles, or *short phrases or expressions*[,]" reasoning that they do not contain the "certain minimum amount of authorship" to qualify for protection.[55] Thus, tweets with their modest 140 characters may be too short to be copyrighted. Moreover, current moral rights legislation seems unlikely to help a digital artist. First, the Visual Artists Rights Act ("VARA") only applies to works produced in a limited edition.[56] This requirement seems nearly impossible to overcome in the digital context, where nearly perfect copies may be endlessly replicated.[57] Second, although there is a serious risk of technological obsolescence in Internet art, natural deterioration is not actionable under VARA.[58]

Having established the artistic and litigious legacy contemporary cease and desist artists are working within, this Note will now examine the social media user agreements at issue in the particular works discussed in Part III. Against this backdrop of unusual media and glamorized legalese, it seems only fitting that the Internet contract would itself become the work of art. The next Section will provide a brief overview of social media platforms, their typical terms of use, and the user agreements that govern the discussed works of art.

II. SOCIAL MEDIA USER AGREEMENTS

Social media platforms have become so ubiquitous as to suggest a new era in Internet use. Between 2005 and 2012, the number of American adults with Internet access using social media exploded from 8 to 70 percent.[59] What exactly are we doing on these websites? Historically, a distinction is drawn between social *networking* sites, which allow users to interact with each other and maintain connections, and social *media* sites, which focus on the production of user-generated content.[60] This distinction has begun to collapse as more and more users post content on their networking pages, or network through their generated content. Furthermore,

have actually been okay with the Web 2.0 Suicide Machine."). *See* suicidemachine.org, which is no longer active as of Feb. 12, 2017. Another work of art titled *Seppukoo* closed due to similar threats; a pop-up message on the website reads: "February 2011 – Due to the paradoxical controversy between the giant Facebook and Seppukoo, our suicidal services are now useless."

54. 17 U.S.C. § 102(a).

55. U.S. Copyright Office, *Copyright Protection Not Available for Names, Titles, or Short Phrases*, CIRCULAR 34, https://www.copyright.gov/circs/circ34.pdf.

56. 17 U.S.C. § 101.

57. *See* Note, *Visual Artists' Rights in a Digital Age*, 107 HARV. L. REV. 1977 (1994); Llewellyn Joseph Gibbons, *Visual Artists Rights Act ("VARA") and the Protection of Digital Works of "Photographic" Art*, 11 N.C. J. L. & TECH. 531 (2010).

58. JUDITH B. PROWDA, VISUAL ARTS AND THE LAW: A HANDBOOK FOR PROFESSIONALS 109 (2013).

59. Doug Bock Clark, *The Bot Bubble: How click farms have inflated social media currency*, NEW REPUBLIC (Apr. 20, 2015).

60. Mihajlo Babovic, *The Emperor's New Digital Clothes: The Illusion of Copyright Rights in Social Media*, 6 CYBARIS AN INTELL. PROP. L. REV. 138, 141 (2015).

social networking and social media sites present shared legal issues—such as privacy, contracts, and intellectual property—and their terms of use reflect this growing similarity.

French critical theorist Alain Badiou has theorized that those who cannot spend money or otherwise participate in larger capitalist structures are deemed to not exist.[61] The artists discussed in this Note are responding to this connection between visibility in Web 2.0 and existence in the eyes of late capitalism. Given the relative anonymity of participation online, "identity tricks are relatively easy to pull off and effective at destabilizing (complacent or boring) communities."[62]

A number of artists now use social media at least as part of their publicity, if not as part of their practice.[63] The prolific use of social media by artists has shaped what we view as an artwork. Art has traditionally consisted of singular, exclusive objects that could be owned by individuals. A series of such objects could serve to define their artist. Now, however, artists use social media to create "a constant broadcast of one's artistic identity as a recognizable, unique brand."[64] Artist and writer Brad Troemel deems this an "ongoing self-commodification," and it is perhaps this convergence of the previously anti-capitalist Internet with the commercialized Web 2.0 that has resulted in this niche area of social media visual critique.[65] Troemel also views the production of art online as consisting of not simply digital (Internet) as medium, but actually enfolding the audience into the medium as well.[66]

This Note examines three works of art that, in various ways, manipulate social media accounts and content to create further meaning. Aesthetic systems legitimize the value of a work of art, as do terms of service.[67] By following the terms of service of a social media platform, you are legitimizing your user-generated content; by disobeying those terms, you unlock the potential to delegitimize the platform itself.

The artworks discussed below use Instagram, Facebook, and Twitter as their media. Instagram is a photo sharing mobile application (with desktop compatibility) where users can edit and post photographs, view and comment on other users' photographs, and directly message other users.[68] Instagram is owned by Facebook, a social media platform where users can "friend" one another and share a wide variety of content with those friends.[69] Facebook has become almost ubiquitous;

61. Alain Badiou, Radical Grace: A Conversation with Alain Badiou at Columbia Law School (Dec. 14, 2015).

62. Greene, *supra* note 45, at 167.

63. *See* April R. Swanson, Defining Identity, Redefining Relationships: The potential of artists' online presence to effect collectors' buying decisions (2012) (unpublished M.A. thesis, Sotheby's Institute of Art) (accessed online). Swan surveyed 164 artists represented by Manhattan galleries, finding that 94 percent had at least some type of online presence. *Id.* at 25. One participant wryly noted that "If you don't exist on the Internet, you don't exist." *Id.* at 35.

64. Brad Troemel, *Athletic Aesthetics*, NEW INQUIRY (May 10, 2013) https://perma.cc/3V7E-DYW7.

65. *Id.*

66. *Id.*

67. Richert, *supra* note 17, at 3.

68. *FAQ*, INSTAGRAM, https://perma.cc/L7GK-8PLQ. *See also* Robert L. Haig, N.Y.Prac., Com. Litig. In New York State Courts § 113:3 (4th ed.).

69. Robert L. Haig, N.Y.Prac., Com. Litig. In New York State Courts § 113:3 (4th ed.).

seventy-nine percent of Internet-using American adults have accounts.[70] Lastly, Twitter is a "micro-blogging" website, where individuals can post and re-post "tweets," messages of up to 140 characters.[71]

Each user agreement includes sections addressing privacy, sharing of content, safety and security, copyrighted material, third party applications, advertising, termination, and disputes. These are relatively basic contract provisions. Contracts like these traditionally must be in writing, negotiated between two parties with equal bargaining power, with clear offer and acceptance.[72] However, individuals approach agreements on the Internet very differently from those on paper, and may bind themselves to terms whose seriousness is not obvious from the simple "click" of assent.[73] Few Internet users read terms of service, and a layperson would likely not realize that the terms have the same binding quality as, for instance, a physical employment contract.[74]

A contract is "a promise, or set of promises that the law will enforce."[75] The two parties to the contract must reach a "meeting of the minds," and one party must make an offer that the other party accepts.[76] Under the Uniform Commercial Code, which governs commercial transactions in most states in the United States, a contract for the sale of goods "may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[77] Acceptable conduct includes handshakes, but typically does not include inaction.[78] As contracts, user agreements are governed by applicable state law; jurisdiction is universally detailed in the body of the agreement.

However, while online users must affirmatively agree to a website's terms of use as they are creating an account, their continued use of the website is generally deemed to indicate that they continue to accept and abide by those terms. These terms of use are treated by courts as analogous to traditional, paper contracts, despite their digital makeup.[79] Thus, the "touchstone of contract"—mutual manifestation of assent—remains pertinent, and a user's assent to a user agreement may be invalid "if the offer did not make clear to the consumer that clicking on the . . . button would

70. Shannon Greenwood et al., *Social Media Update 2016*, PEW RESEARCH CENTER (Nov. 11, 2016), https://perma.cc/RBZ7-VL6L.

71. Haig, *supra* note 69.

72. *See, e.g.*, Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307 (2005).

73. *Id.*

74. Online contracts are frequently over 70,000 words long, and only one in a thousand users spend more than one second reading an online contract. Alina Tugend, *Those Wordy Contracts We All So Quickly Accept*, N.Y. TIMES (July 12, 2013), https://perma.cc/K2AJ-GDEY. Furthermore, 52% of Internet users believe that a privacy policy "ensures that the company keeps confidential all the information it collects on users"—which is false. Aaron Smith, *Half of online Americans don't know what a privacy policy is*, PEW RESEARCH (Dec. 4, 2014), https://perma.cc/XX77-U33J.

75. Moringiello, *supra* note 72, at 1311.

76. *Id.*

77. U.C.C. § 2-204(1) (2002).

78. Moringiello, *supra* note 72, at 1311 (citing 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.1, at 160 (1999)).

79. *See, e.g.*, Fteja v. Facebook, Inc., 841 F. Supp.2d 829, 835 (S.D.N.Y. 2012).

signify assent to those terms."[80] In 2012, the Southern District of New York analogized between Facebook's Terms of Use and terms of use found in other, more traditional media.[81] In both situations, "the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant."[82]

Computer and online-based agreements are commonly labeled "clickwrap" or "browsewrap," terms that refer to the action of clicking or browsing one's way into a binding contract.[83] "Browsewraps can take various forms but basically the website will contain a notice that—by merely using the services of, obtaining information from, or initiating applications within the website—the user is agreeing to and is bound by the site's terms of service."[84] Given the passive nature of assent, courts require that users have reasonable notice of the website's terms of use and exhibit "unambiguous assent" to those terms before finding a browsewrap contract binding.[85] Clickwrap contracts involve the user affirmatively clicking a box acknowledging the terms of service, an act active enough for courts to generally find them enforceable.[86]

Social media user agreements fall somewhere between clickwrap and browsewrap licenses. Both are electronically transmitted, but clickwrap agreements require a user to "click" a button assenting to the terms, while browsewrap licenses claim to bind the user but do not require an express manifestation of assent.[87] Typically, social media agreements require a user to assent with an affirmative click upon creating his or her account, and continued use of the platform is deemed to indicate continued assent to the terms of use.[88] With that click, the user not only assents to the terms of use, but also agrees—whether knowingly or not—to be disciplined by the website.[89] Consider the many cases parsing the enforceability of clickwrap and browsewrap contracts with mandatory arbitration or venue selection clauses.[90]

80. *Id.* (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29 (2d Cir. 2002)).

81. *Fteja*, 841 F. Supp.2d at 839 ("[F]or those to whom the internet is an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century of equivalent of turning over the cruise ticket.").

82. *Id.*

83. Note that some courts have also recognized distinct types of agreements terms "scrollwrap," where users scroll through the agreement before assenting, and "sign-in-wrap," where users assent to the agreement by signing up to use the website. *See* Berkson v. Gogo LLC, 97 F. Supp.3d 359, 395 (E.D.N.Y. 2015).

84. U.S. v. Drew, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009).

85. Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002).

86. *Drew*, 259 F.R.D. at 462 n.22.

87. Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 799 (2007).

88. *See, e.g.*, Facebook, *Statement of Rights and Responsibilities*, https://perma.cc/PU8C-WFCS ("Your continued use of the Facebook Services, following notice of the changes to our terms, policies or guidelines, constitutes your acceptance of our amended terms, policies or guidelines.").

89. MICHEL FOUCAULT, DISCIPLINE AND PUNISH.

90. *See, e.g.*, Jerez v. JD Closeouts, LLC, 943 N.Y.S.2d 392 (N.Y. Dist. Ct. 2012) (forum selection clause); Fteja v. Facebook, Inc., 841 F. Supp.2d 829 (S.D.N.Y. 2012) (forum selection clause); Nguyen v. Barnes & Noble, Inc., 2012 WL 3711081 (C.D. Cal. 2012) (arbitration clause); Hines v. Overstock.com, Inc., 380 Fed.Appx. 22 (2d Cir. 2010) (arbitration clause). *See also* Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984 (2008).

Users seem to be waking up to the precarious status of their intellectual property on social media. All three agreements—Instagram, Facebook, and Twitter—retain a non-exclusive license over users' content even after the voluntary termination of service. Many users may not realize that the content they post on social media platforms is copyrighted, and so will not fully understand the license they are granting.[91] Additionally, social media companies may actually be "lowering the incentive of users to create original work and post it to these online communities."[92]

Instagram provides a good case study of just how confusing social media terms of use can be. It is one of the most popular social media sites, particularly for teens,[93] and its user agreement has more than 5,000 words.[94] In 2013, Instagram changed its terms of use and made clear to users that their continued use indicated agreement to be bound by the updated terms.[95] One individual brought a lawsuit against the social media platform, alleging that the changes constituted a breach of contract.[96] She were unsuccessful, as the court found that she did not have standing.

The Office of the Children's Commissioner in England published a report in 2017 titled "Growing up Digital," which includes a "simplified version" of Instagram's terms of use.[97] One of the lawyers responsible for drafting this simplified version stated that understanding the terms of use requires a postgraduate level of reading comprehension.[98] The simplified version was targeted specifically at children—who are estimated to spend more than a third of each day consuming media online[99]—but most adults do not have the requisite postgraduate degree apparently required to understand the terms and conditions that they are contractually binding themselves to obey.[100]

III. "CEASE AND DESIST" ART: WORKS IN VIOLATION OF SOCIAL MEDIA TERMS OF USE

Artists are seizing upon the perceived inequity of these "clickwrap" user agreements, harkening back to the early days of Internet art to create new cease and desist works. This Section begins with *McNugget* by Chris Alexander, a work based

91. Babovic, *supra* note 60, at 189-90.

92. *Id.* at 189.

93. Amy B. Wang, *A lawyer rewrote Instagram's terms of use 'in plain English' so kids would know their privacy rights*, THE WASH. POST (Jan. 8, 2017), https://perma.cc/LD5D-53CW.

94. Instagram, *Terms of Use*, https://perma.cc/PG4B-Q9EY.

95. Nicole Cocozza, *Instagram Sets a Precedent by an 'Insta' Change in Social Media Contracts & Users' Ignorance of Instagram's Terms of Use May Lead to Acceptance by a Simple 'Snap'*, 15 J. HIGH TECH. L. 363, 382 (2014).

96. Rodriguez v. Instagram, LLC, No. C 12-06482, 2013 U.S. Dist. LEXIS 98627 (N.D. Cal. July 12, 2013).

97. Growing Up Digital Taskforce, *Growing Up Digital: A report of the Growing Up Digital Taskforce* (Jan. 2017), https://perma.cc/S5HD-HT5X.

98. Wang, *supra* note 93.

99. Hayley Tsukayama, *Teens spend nearly nine hours every day consuming media*, THE WASH. POST (Nov. 3, 2015), https://perma.cc/3884-2VFP.

100. Camille L. Ryan & Kurt Bauman, *Educational Attainment in the United States: 2015*, U.S. CENSUS BUREAU (Mar. 2016), https://perma.cc/B4FY-LVKD (finding that only 12 percent of the United States population held a graduate degree as of 2015).

on Twitter that does not intentionally violate Twitter's user agreement, but may in fact be violative. The next work, *Face to Facebook*, by Alessandro Ludovico and Paolo Cirio, is an overt attack on Facebook's data collection policies. *Face to Facebook* faced extensive backlash, triggering not only cease and desist letters but actual lawsuits (against Facebook, not the artists). The last, *High Retention, Slow Delivery*, by Constant Dullaart, breaches Instagram's prohibition of automated bots to draw attention to the inequality of the art world. For each, this Note will describe the work, discuss its violation of the governing user agreement, and detail any legal action taken against the artist by the social media platform.

A. MCNUGGET

1. The Work

McNugget is a work of conceptual art by artist Chris Alexander. Alexander describes the work as an "experiment in data-mirroring."[101] *McNugget* catalogs all publicly available mentions of the word "mcnugget" on Twitter between February 6 and March 4, 2012. It exists both online and in print form, with a PDF available to freely download and a link for a 124-page paperback version for those who wish to own a physical copy. The book contains almost no original contributions by Alexander beyond the title pages and graphic design. An earlier, limited edition of the work included what Alexander has termed a "lost" tweet, but that does not seem to be included in the currently available edition.[102]

McNugget is comical in its comprehensiveness, the relentless references to "McNuggets" grounding conceptual art in a signal perceptible to laypeople. The assembled tweets have not been visibly edited, and they are displayed in a rigidly uniform fashion: day, month, user's name, handle, options, and the text of the tweet. One section reads:

> 24 Feb EbayPro @EbayPros Reply Retweet Favorite • Open silverguppy Nebraska presidential McNugget back on eBay – The Oshkosh Northwestern bit.ly/yJzoE8
>
> 24 Feb Chryssa Zola Ong @chryssazola Reply Retweet Favorite • Open Ahyah, chicken mcnugget. Should have taken the carrrrr
>
> 24 Feb Daily Times @DailyTimesPk Reply Retweet Favorite • Open Woman claims Chicken MgNugget resembles George Washington's face – Pakistan Daily Times dlvr.it/1FD26Q[103]

There are no page numbers in *McNugget*, leaving the reader to plow through a seemingly endless stream of content, eyes moving quickly across the page as you would an online feed. There is no contextualization or explanation accompanying the printed edition, mandating a preexisting knowledge of Twitter for a full

101. Chris Alexander, *McNugget Mini*, UNITED PLASTICS (Sept. 7, 2012), https://perma.cc/C9UQ-CW4X.
102. *Id.*
103. Chris Alexander, *McNugget* (2012), https://perma.cc/GP6U-G9LY.

understanding of what is on the page. It seems highly unlikely that Alexander contacted the various users whose tweets have been compiled into *McNugget*. There are thousands of tweets, many of which seem to be automated or produced by robots rather than humans.

2. Terms of Use

Section 3 of Twitter's terms of use, "Content on the Services," explains that "Twitter respects the intellectual property rights of others and expects users of the Services to do the same."[104] While users grant to Twitter "a worldwide, non-exclusive, royalty-free license . . . to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute" their content, that license does not extend to other users.[105] Twitter has also promulgated a set of "Twitter Rules" that includes the catch-all of not using the "service for any unlawful purposes."[106]

The penalties for violation of both the terms of use and rules seem to be low: "temporary locking and/or permanent suspension of account(s)."[107] Alexander does not seem to have faced any repercussions, although it is unclear whether he maintains—or did maintain—a Twitter account, or simply accessed publicly available tweets to create *McNugget*. If the latter, he was not in privity with Twitter and could only face non-contractual complaints, making serious liability less likely.

3. Legal Liability

One's first instinct might be that Alexander is infringing copyright with *McNugget*.[108] Given the enormous amount of content that is posted on social media websites every day, it may seem absurd that each tweet could potentially be protected by copyright.[109] One legal practitioner asks, "Do 140 characters have a heart?"[110] This question seems particularly pertinent when examining tweets whose common thread is the inclusion of the word "McNugget." Copyright and comedy are difficult bedfellows, and comedians traditionally opt for informal IP enforcement through social norms over legal remedies.[111] Yet the combination of short-form jokes, the only ones allowed by Twitter's 140 character limit, and the viral rhythm of social

104. *Terms of Service*, TWITTER, https://perma.cc/23A3-HU5U.

105. *Id.*

106. *The Twitter Rules*, TWITTER, https://perma.cc/GG45-WHJ3.

107. *Id.*

108. As always, a fair use argument could be made. However, I will not address such an argument as there is not room in this Note for a full fair use analysis. *See* 17 U.S.C. § 107.

109. *See, e.g.*, Peter L. Skolnik, *Navigating Social Media Copyrights*, 284 N.J. LAW. 5, 5 (2013).

110. *Id.* at 7.

111. *See* Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1790 ("[C]opyright law does not provide comedians with a cost effective way of protecting the essence of their creativity . . . . .in stand-up comedy, social norms substitute for intellectual property law."). *Cf.* Andrew Greengrass, *Take My Joke . . . Please!* Foxworthy v. Custom Tees *and the Prospects for Ownership of Comedy*, 21 COLUM.-VLA J. L. & ARTS 273 (1997).

media has caused more than a few problems for comedy writers.[112] In summer 2015, Twitter made the news when it actively deleted tweets that reposted a freelance writer's joke.[113] Twitter has a built-in function that allows users to "re-tweet" tweets posted by other users. Re-tweeting maintains the integrity of the original tweet, as well as the attribution information detailing who posted the tweet, and when. In this situation, the offending tweets simply copied the text of the original tweet and posted it as the infringing user's own. Twitter replaced the supposedly infringing tweets with a statement explaining that the tweets had been "withheld in response to a report from the copyright holder."[114] Regardless, a copyright infringement claim would need to be brought by the copyright owner, not Twitter, and thus *McNugget*'s potential copyright infringement does not explicitly impact Alexander's contractual obligations to Twitter.

A second thought might be that Alexander's commercial use of the tweets (by selling copies of *McNugget*) somehow renders them in violation of the user agreement. Twitter's Terms of Use do not explicitly address commercial use of users' content without permission, but they seem to suggest that commercial use outside of the parameters of the website itself is not permitted.[115] In a 2011 case in the Southern District of New York, the court found that while Twitter's Terms of Service "encourage and permit broad re-use of Content," that provision "does not clearly confer a right on other users to re-use copyrighted postings."[116] The Court explained that while Twitter's Terms of Service do require users to grant a license to Twitter's partners and sublicensees, other users do not qualify as licensees.[117]

B. FACE TO FACEBOOK

1. The Work

Face to Facebook is a 2011 artwork developed by artists Paolo Cirio and Alessandro Ludovico as part of their "Hacking Monopolism Trilogy."[118] Cirio is well known for integrating illegal Internet behavior—such as hacking, denial of service ("DOS") attacks, or "doxing,"[119] and copyright infringement—into his works.[120] In 2014, he encouraged individuals to obtain articles protected by paywalls

112. *See, e.g.*, *Caught in the Act: Joke-Stealing In The Age Of Twitter*, NAT'L PUB. RADIO (Aug. 2, 2015), https://perma.cc/RB28-DXP5.

113. Dante D'Orazio, *Twitter is deleting stolen jokes on copyright grounds*, THE VERGE (July 25, 2015), https://perma.cc/PD98-JXVH.

114. Hannah Jane Parkinson, *Twitter removes lifted jokes over copyright infringement claims*, THE GUARDIAN (July 27, 2015), https://perma.cc/5C7U-VJYH.

115. Skolnik, *supra* note 109, at 6.

116. Agence France Presse v. Morel, 769 F. Supp.2d 295, 303 (S.D.N.Y. 2011).

117. *Id.*

118. "Face to Facebook," https://perma.cc/42BA-S2YL.

119. *See* Mat Honan, *What is Doxing?*, WIRED (Mar. 6, 2014), https://perma.cc/JMD3-N2DV (defining doxing as "compiling and releasing a dossier of personal information on someone").

120. Alena Sokhan, *Exhibition: More Than Legal: Paolo Cirio's Overexposed*, BERLIN ART LINK (May 27, 2015), https://perma.cc/MRB6-GFT6.

and release them in violation of their subscription agreements (*Daily Paywall*).[121] In his works, Cirio addresses the inability of current legal frameworks to adequately "distinguish between artistic interventions and criminal acts."[122] Legal dramas resulting from his works are, thus, integrated into the work itself, becoming a part of the conceptual fabric. Speaking about one of his works, Cirio bemoans: "Although we have more information than ever before, how that information is distributed is broken and people are not motivated to understand and make good use of valuable information for social advancement."[123]

Cirio and Ludovico describe *Face to Facebook* as a "social experiment" addressing "surveillance and the economy of social media monopolies as well as art interventions within social networks and global media."[124] They used custom software to collect data—including names, countries, groups, pictures, and "friends"—from more than a million Facebook users.[125] They then used a face recognition algorithm to group the users' photographs and data into categories that broadly denote personalities, like "easy going" and "smug."[126] This process extracted 250,000 faces that Cirio and Ludovico used to populate a new dating website ("www.Lovely-Faces.com").[127] Their conceptual reasoning for this was very clearly related to Facebook's basic structure, which implicates privacy concerns:

> The project talks about the consequences of posting sensitive personal data on social network platforms, and especially consequences in real life. These consequences are always underestimated because we still instinctively tend to confine what we do online in the visual space of the screen. Face-to-facebook practically questions online privacy through one of the web's most iconic platforms. . . . Everyone can steal personal data and re-contextualize it in a completely unexpected context. And that shows, once more, how fragile and potentially manipulable [sic] the online environment actually is.[128]

The artists placed the user data on a dating website as an homage to Facebook's roots in "facemash.com," a website that "allow[ed] viewers to vote for the 'hotter' of two randomly chosen photos or rate the looks of students in a particular [Harvard resident] House against fellow-residents."[129] Cirio and Ludovico even cheekily claimed that "we are going to contact all these one million persons whose data was taken] to sign a petition and make a class action so that we finally have Facebook as

121. Liz Flyntz, *Takedown Notice: A Conversation with Paolo Cirio*, AFTERIMAGE 16.
122. Sokhan, *supra* note 120.
123. Flyntz, *supra* note 121, at 19.
124. "Face to Facebook" (2011), https://perma.cc/TGK2-ZEV8.
125. "How we did it," Face to Facebook, https://perma.cc/7H7T-Z9VM.
126. *Id.*
127. *Id.*
128. *Id.*
129. Bari M. Schwartz, *Hot or Not? Website Briefly Judges Looks*, THE H. CRIMSON (Nov. 4, 2003), https://perma.cc/D53H-KV4E.

a proper dating website, as it should be."[130] The artists allowed individuals whose data had been used in the art to request that their information be removed.[131]

2. Terms of Use

Face to Facebook clearly violates Facebook's terms of use. Section 3, clause 9 states that, "You will not use Facebook to do anything unlawful, misleading, malicious, or discriminatory." Furthermore, Section 5, clause 7 states, "If you collect information from users, you will: obtain their consent, make it clear you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it." Cirio and Ludovico purposefully did not obtain consent from the users, although they did maintain a website explaining how the data were being used.

Cirio and Ludovico were attempting to draw attention to what they claim are secretive exploitations of users' data by Facebook. On the "Theory" page of *Face to Facebook*'s posthumous website, they explain:

> Facebook, an endlessly cool place for so many people, becomes at the same time a goldmine for identity theft and dating - unfortunately, without the user's control. But that's the very nature of Facebook and social media in general. If we start to play with the concepts of identity theft and dating, we should be able to unveil how fragile a virtual identity given to a proprietary platform can be.[132]

In a statement at Berlin arts festival transmediale in 2011, Ludovico acknowledged that the artists took data that they did not own, but also posited that in reality, "neither us nor the users own" that data.[133] Cirio then argued that, "it's completely immoral and undemocratic that you guys [Facebook] own all of this data without really asking us."[134]

The violation of the user agreement is clear, acknowledged, and chronicled in documentation relating to the project. In fact, on the website that still remains from *Face to Facebook* ("Lovely-Faces" being long gone), there is a section titled "Legal" where viewers can read the communication between Facebook and the artists' counsel.[135]

3. Legal Liability

Cirio and Ludovico received cease and desist letters from Facebook, and were contacted by a few Facebook users who requested that their data be removed from

130. Alessandro Ludovico & Paolo Cirio, artists, Face to Facebook, Artist Statement at transmediale (Feb. 5, 2011), https://perma.cc/8XGG-3NGD.

131. "If your identity has been hurt by this website, just write to us and we'll remove your data instantly. This website is a work of art and we're committed to avoiding any related annoyances." *Legal*, FACE TO FACEBOOK, https://perma.cc/5F3S-7LVC (last visited Mar. 8, 2017).

132. *Theory*, FACE TO FACEBOOK, https://perma.cc/UF4D-AFXU.

133. Ludovico & Cirio, *supra* note 130, at 1:10.

134. *Id.* at 2:02.

135. *Legal*, FACE TO FACEBOOK, *supra* note 131.

the work.[136] One commentator posited that the takedown mechanism—whereby Cirio and Ludovico would remove the images of any users who requested takedowns—would certainly help the founders' legal defense."[137] However, this anticipates a lawsuit from the user, rather than Facebook itself.

Cirio interprets legal action against an artist as "evidence of having raised a problem concerning freedom of speech. I see it more as the conclusion of an action rather than its ultimate purpose."[138] As this comment suggests, and the lack of on-point complaints confirms, not many artists are pushing their works past the cease and desist stage; they obey. But how does one display, collect, or monetize such a work? Even licit digital art is notoriously difficult to collect.[139] Perhaps the answer is to sell or collect the physical ephemera of the project: the cease and desist letter, the code, screenshots of the work being "performed."

C. HIGH RETENTION, SLOW DELIVERY

1. The Work

Dutch artist Constant Dullaart is no stranger to incorporating social media into his practice. In 2012, he gave away his Facebook username and password during a performance at the New Museum in New York.[140] Dullaart drafted a standardized terms of service agreement and had a woman read it out loud, ostensibly binding the audience to the terms of the performance in the same way they bind themselves to contracts online every day.[141] He then gave away his Facebook password, requesting that an audience member change it, an intervention that he describes as being

136. *Id.*

137. Jackie Cohen, *Dating Startup Steals One Million Profiles from Facebook*, ADWEEK (Feb. 3, 2011), https://perma.cc/U54W-3VWR.

138. Simona Lodi, *Illegal Art and Other Stories About Social Media*, *in* UNLIKE US READER: SOCIAL MEDIA MONOPOLIES AND THEIR ALTERNATIVES 245 (Geert Lovink and Miriam Rasch, eds., 2013), https://perma.cc/F6M4-CXFH.

139. Magdalena Sawon, owner of New York's Postmasters Gallery, which specializes in new media and net artists, explains: "Selling memes, GIFs, and other internet-based material is complicated and at this point frankly next to nonexistent because if the work itself belongs and functions exclusively online; it is counter to its nature to have it removed from that 'habitat.'" Katie Notopoulos, *What Is the Actual Market Value of a Rare Pepe?*, IPHONE EINSTEIN (Oct. 27, 2015), https://perma.cc/GE7U-X79T. Michael Duca, co-founder and CEO of NeonMob, a digital art sharing and trading site adds: "Ownership and viewability when it comes to digital art are two separate things. Ownership is who legally owns a particular work of digital art. Viewability is who has the ability to see it. Programmers can limit viewability with some tricks, but completely preventing people from sharing digital art is close to impossible . . . . You'd want for the original work to be sold on a platform that recorded the buyer and allowed for future transactions of the digital work (e.g., via trade or resale). You would want to authenticate the work was original and ideally the artist would be the one selling the work. You would have to be OK with assuming the image would be shared more widely." *Id.*

140. Dan Duray, *New Project Boosts Instagram Followers for Art World Accounts*, ARTNEWS (Sept. 30, 2014), https://perma.cc/U54W-3VWR.

141. Nadja Sayej, *Constant Dullaart, URL Killer*, MOTHERBOARD (May 8, 2013), https://perma.cc/P667-K7BJ.

"hacked with . . . permission."[142] His frustration with the terms of use on Facebook, which prohibit sharing one's login information, is clear:

> Since I started the account and I have the agreement, I would be responsible for the identity. I don't want to be responsible, and I feel as though I should have the poetic liberty to give that identity away to someone who wants to have it.[143]

At the time of this performance, Dullaart was already frustrated by social media's emphasis on superficial markers of popularity.[144] He stated in one interview that "[a]udience is a commodity," and that while this commodity is frequently exploited in the political realm, it can also "add relevance to art."[145]

Then, in 2014, he created a website titled "Terms of Service" that displays an animated Google search box reading Google's terms of service out loud.[146] Dullaart wanted to problematize Google's outward protestations of transparency by drawing attention to how hidden and inaccessible online user agreements are.[147] He stated in one interview:

> I thought it was interesting because a lot of the Internet is viewed as public space but it's not. The Internet is basically private spaces linked together. And Google's private space is made to make a profit.[148]

The website's voice at first sounds like a cheerful woman, speaking with gusto. However, as the terms of use are read out loud, it becomes apparent that the voice is not human, but rather robotic, with certain words coming far too quickly, and phrases tumbling awkwardly out of the computer's speakers. Her manufactured personality grows into something uncanny, mimicking how, in Dullaart's opinion, Google obscures its corporate purpose with a "subtle extra-legal layer of reality."[149]

In one of his recent works, *High Retention, Slow Delivery*, Dullaart purchased 2.5 million Instagram bots and deployed them as followers of artists' accounts.[150] A bot is "a device or piece of software that can execute commands, reply to messages, or perform routine tasks, as online searches, either automatically or with minimal human intervention," and is frequently used in combination with huge numbers of other bots.[151] They can be used to do a variety of things, and individuals frequently use them on Instagram to either automatically comment on other user's photographs,

142. *Id.*
143. *Id.*
144. Duray, *supra* note 140.
145. *Id.*
146. Constant Dullaart, *Terms of Service*, THE REVOLVING INTERNET (2012), https://perma.cc/LZ23-BLCU.
147. Sayej, *supra* note 141.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Bot*, DICTIONARY.COM, https://perma.cc/F9NS-6QP4 (third definition).

or to automatically follow other user's accounts.[152] Both of these tactics draw attention to their own account.

Dullaart wanted to use his bots to boost the public profile of lesser-known artists, "equalizing" an art world that he fears is increasingly focusing on personal branding at the expense of quality work. The value of the global art market was estimated to be around $65.7 billion in 2013.[153] Artists and dealers have sold works online since the "dot-com" boom in the 1990s, resulting in the development of a hearty e-commerce market for fine art.[154] Even the online market for art is estimated to be in the billions.[155]

The relationship between art sales and social media has not been thoroughly studied, but there are instances where Instagram in particular seems to have played a role. For instance, in April 2015, actor Pierce Brosnan posted on Instagram a selfie in front of a Marc Newson chaise longue for sale at the Phillips auction house in London.[156] The lounge went on to break the world record for a design object sold at auction, bringing Phillips £2.4 million.[157] Increasing numbers of collectors themselves maintain Instagram accounts.[158]

Dullaart purchased his bots on eBay from a website based in Lithuania that he has jokingly called "buysocialmedia.com."[159] The bots' profiles were populated with enough falsified information and content to resemble real people, and Dullaart paid $5,000 for them.[160] Upon closer inspection, it would become apparent to a human that the "army of profiles" was fake, but Dullaart carefully crafted their accounts to ensure that they avoided detection by Instagram's automatic deletion filters.[161]

With the bots, Dullaart "equalized" a number of artists on Instagram, bringing each artist's follower count up to 100,000 followers.[162] The purposeful violation of Instagram's terms of use, which prohibit the use or creation of bots, was an attempt to push back against social media's "attention economy":

> Knowing that fake followers are often used to boost the images of brands, political parties, recording artists, and celebrities, I had long since developed an interest in this

152. Bob Hutchins, *Why You Should Never Use Instagram Bots to Get More Likes & Followers*, BUSINESS 2 COMMUNITY (Apr. 20, 2015), https://perma.cc/6J2L-85ZL.

153. GEORGINA ADAM, BIG BUCKS: THE EXPLOSION OF THE ART MARKET IN THE TWENTY-FIRST CENTURY 9 (2014).

154. *Id.* at 121.

155. *Id.* at 122.

156. Nina Siegal, *Instagram Takes on Growing Role in the Art Market*, N.Y. TIMES (Aug. 9, 2015), https://perma.cc/EB5D-Q6MB.

157. *Id.*

158. *Id.* (finding that a recent survey by online platform Artsy.net suggests that as many as half of collectors have purchased works of art through artists they discovered on Instagram).

159. Duray, *supra* note 140; Constant Dullaart, *Why I'm Amassing an Army of Fake Social Media Followers*, HYPERALLERGIC (Nov. 4, 2015), https://perma.cc/W3YP-HB5S.

160. Dullaart, *Why I'm Amassing*, *supra* note 159.

161. Constant Dullaart, *Constant Dullaart: 100,000 Followers for Everyone!*, DIS MAGAZINE, https://perma.cc/MTE3-2N89.

162. *Id.*

> artificial audience, the profiles and identities that are formed from appropriated images and copied bios with spelling errors attached.[163]

Dullaart continues to work with social media violations, seemingly heartened by the absence of any serious consequences from his completed works. He has expressed a desire to "clone" himself using Instagram, "by trying to find a way to incorporate his own photos into the kinds of bots he's hired for this current project."[164]

2. Terms of Use

Section 15 of Instagram's "Basic Terms" instructs users: "You must not create accounts with the Service through unauthorized means, including but not limited to, by using an automated device, script, bot, spider, crawler or scraper."[165] The penalty for violation is the potential termination of the user's Instagram account.[166]

Bots are being used in a number of sectors, from commercial advertising on Facebook to propaganda distribution by the United States government.[167] In December 2014, the so-called "Instagram Rapture" took place. Instagram began to delete all suspected fake accounts, resulting in many users losing huge numbers of followers.[168] Some celebrities lost millions of their followers, causing public outcry.[169] As one journalist wryly commented, "[s]ocial media is now the engine of the Internet, but that engine is running on some pretty suspect fuel."[170] It is not particularly difficult to, as Dullaart did, purchase social media bots:

> Google "buy Facebook likes" and you'll see how easy it is to purchase black-market influence on the Internet: 1,000 Facebook likes for $29.99; 1,000 Twitter followers for $12; or any other type of fake social media credential, from YouTube views to Pinterest followers to SoundCloud plays.[171]

Social media accounts not only allow companies to connect on a seemingly personal level with potential customers, but also to boost their rankings in the eyes of search engine algorithms.[172] There is an enormous global market for falsified social media accounts estimated in the hundreds of millions.[173] Italian researchers

163. *Id.*
164. Duray, *supra* note 140.
165. *Terms of Use*, INSTAGRAM, https://perma.cc/WX72-ZN72.
166. *Id.*
167. Andy Isaacson, *Are You Following a Bot?: How to manipulate social movements by hacking Twitter*, THE ATLANTIC (May 2011), https://perma.cc/E9TY-84AN.
168. *See, e.g.*, Taylor Lorenz, *'Instagram Rapture' Claims Millions of Celebrity Instagram Followers*, BUS. INSIDER (Dec. 18, 2014), https://perma.cc/5P4R-NY8U.
169. *Id.*
170. Doug Bock Clark, *The Bot Bubble: How click farms have inflated social media currency*, NEW REPUBLIC (Apr. 20, 2015), https://perma.cc/M33U-H5K2.
171. *Id.*
172. *Id.*
173. *Id.* ("Researchers estimate that the market for fake Twitter followers was worth between $40 million and $360 million in 2013, and that the market for Facebook spam was worth $87 million to $390 million.").

have estimated that around eight per cent of Instagram accounts are, in fact, bots.[174] Companies termed "click farms" exist solely to provide these fake Internet presences, challenging the assumption that interactions on social media are with real, authentic people.[175] As one journalist asked, "[i]f social media is no longer made up of people, what is it?"[176]

There is a sense among click farm workers of "beating the system," which is also present in *High Retention, Slow Delivery*.[177] Although Dullaart has not publicly spoken about the Richard Prince controversy, we can read his work as a response to Prince's own Instagram intervention. Prince has more than 100,000 followers on Instagram—quite a few for an artist—although one reporter reminds readers that, "[p]opular doesn't mean interesting or clever but it might mean saleable."[178]

3. Legal Liability

Dullaart did not receive any cease and desist letters from Instagram about *High Retention, Slow Delivery*, and estimates that roughly half of the bot accounts he created are still live on the app.[179]

IV. BEST PRACTICES: STRATEGIES FOR NEW MEDIA ARTISTS

This Section proposes that artists working in the cease and desist form adopt best practices to ensure that both they and their work minimize exposure to legal liability. Social media artists may choose not to modify their practice to reflect the legal landscape, which is understandable given the centrality of contractual breaches to many of the works' conceptual groundings. To an extent, the artists discussed in this Note propose that user agreements are meaningless: they violate them and face no permanent criminal or civil liability. However, artists should consider the previously discussed areas of liability and then choose whether or not to disregard the following best practices. *High Retention, Slow Delivery* evidently still lives in part on Instagram, but *Face to Facebook*'s demise suggests that not all "cease and desist" artworks have perpetual lifespans.

There are two distinct spheres of liability at issue in any social media-based work. First, an artist should consider his or her responsibilities under the social media website's terms of use. These include conduct towards other users, privacy policies, and use of protected intellectual property. Second, an artist must also consider his or her duties towards other users of the social media website. For instance, violating the terms of use by pulling another user's information off of the website and using it

174. Deepa Seetharaman, *Fake Accounts Still Plague Instagram Despite Purge, Study Finds*, WALL ST. J. (June 30, 2015), https://perma.cc/C5QB-78NW.

175. Clark, *supra* note 170.

176. *Id.*

177. *Id.*

178. Hannah Duguit, *Instagram art: How artists are cashing in on social media*, THE INDEPENDENT (Nov. 7, 2014), https://perma.cc/93Q7-E5SS.

179. Instagram direct message with artist, on file with author ("About half of them are left. I still have minimum 50k fake accounts.").

in a work of art not only exposes the artist to lawsuits from the host website, but also lawsuits from the user whose information was taken.

There are three steps that artists can take to minimize their liability in these two spheres. First, artists should clarify the peripheral legal status of their artworks before entering into a display or consignment agreement with a museum or gallery. This may require the execution of mutual indemnification agreements, or at least memoranda of understanding reflecting that all parties involved recognize the potential risks. Second, artists using other social media users' potentially copyrighted postings should put in place takedown measures to address privacy and copyright violations. Although the social media website itself may not prosecute the artist for the violation, other users may. Third, artists should consider alternative monetization and licensing schemes to account for the loss of value that may result from potential legal liability and unauthorized source material.

A. INDEMNIFICATION AGREEMENTS

Artists should clarify the peripheral legal status of their works before displaying, consigning, or selling them. Indemnification agreements and provisions within contracts are a good way to achieve this clarity, as although the First Amendment protects a wide range of artistic expression, it does not entitle an artist to violate the law as part of their artistic process.[180] It is possible that artists may expose themselves to not just contractual liability, and thus civil prosecution, but also criminal liability. For instance, some terms of use violations have been attacked under the Computer Fraud and Abuse Act ("CFAA"), which criminalizes "the unauthorized access, or use in excess of authorization of, a computer."[181] The CFAA attempts to prevent computer fraud executed by "unauthorized users," which a user may be if he or she breaches a social media website's terms of use.[182] This theory has thus far been unsuccessful, but may have more impact in the future.[183]

There is also the possibility that users could be liable for duties under tort law, such as "the duty to refrain from public disclosure of privacy facts and intentional infliction of emotional distress."[184] *Face to Facebook* publicly disclosed private data obtained through questionable means. Moreover, the artists arguably inflicted emotional distress when they uploaded that data—including photographs of the users' faces—to a fake dating website, encouraging visitors to find love.

180. Tad Crawford, LEGAL GUIDE FOR THE VISUAL ARTIST (5th ed.) (2010).

181. Hartzog, *supra* note 33, at 64.

182. *Id.*

183. *See* U.S. v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (explaining that a misdemeanor conviction under CFAA based on defendant's violation of terms of service would violate void-for-vagueness doctrine); A.V. ex rel. Vanderhye v. iParadigms, L.L.C., 562 F.3d 630 (2009) (remanding for further consideration of CFAA claim); Southwest Airlines Co. v. BoardFirst, L.L.C., 2007 WL 4823761 (N.D. Tex. Sept. 12, 2007) (declining to rule on whether use of website in violation of that website's terms of use constitutes use "without authorization" under the CFAA); Facebook, Inc. v. Power Ventures, Inc., 2010 WL 3291750 (N.D. Cal. July 20, 2010) (finding a genuine issue of material fact as to whether defendant's use of Facebook was "without permission" under a California statute like the CFAA).

184. Hartzog, *supra* note 33, at 66.

This complex web of non-contractual liability raises the solution of indemnification agreements. Collectors of digital artworks are already using contracts to which indemnification provisions can be easily added. Magdalena Sawon, owner and director of Postmasters Gallery, represents Rafael Rozendaal, a Dutch-Brazilian visual artist. Sawon explains that when one of Rozendaal's websites is sold, "[t]he buyer's name appears in the browser header, but the sale comes with a contract that the new owner must keep it online."[185]

Social media artists who intend to violate user agreements should inform potential buyers or galleries of the fringe legal status of their work, and clearly allocate the risks between the parties. The artist may want to take out insurance to cover any potential lawsuits by copyright owners or the social media platform. It may also be helpful to discuss action plans with the gallery in the event that litigation is pursued for either breach of contract or copyright infringement. For instance, the gallery may want to have a plan in place to remove the artwork immediately, have a lawyer who is prepared to defend them pro bono, and/or an insurance company who will insure against any monetary damages.

B. TAKEDOWN MEASURES

Face to Facebook illustrates neatly how implementing takedown measures can help protect a potentially violative work of art. Allowing third parties some measure of control over their data keeps the focus of the work on the commentary on the social media platform, rather than the exploitation of innocent bystanders. Moreover, setting up an infrastructure for individuals to request that their data be removed from a work enables those persons to enjoy the work and experience the big data critique, while nevertheless protecting their personal information.

Right to privacy has intersected with the production of art very recently, with a court ruling in favor of photographer Arne Svenson's controversial series titled "The Neighbors."[186] Svenson took photographs of fellow Manhattan residents using a telephoto lens, drawing the ire of neighbors Matthew and Martha G. Foster.[187] The Fosters were deeply upset that Svenson had photographed their children without their consent.[188] The court held for Svenson, concluding that "Defendant's use of the photos falls within the ambit of constitutionally protected conduct in the form of a work of art."[189] Although this ruling bodes well for artists, like Cirio and Ludovico, whose work peeks into the private lives of others, it is not clear that the violation of terms of use would be similarly excused.

Privacy is a global concern, and American social media conglomerates are facing extraterritorial regulatory attention. The Clinton Administration and the European Commission formed a "Safe Harbor" agreement that allowed United States

185. Notopoulos, *supra* note 139.

186. Foster v. Svenson, 128 A.D.3d 150 (N.Y. App. Div. 2015).

187. Hili Perlson, *Voyeuristic Photographer Arne Svenson Wins New York Appellate Court Case*, ARTNET NEWS (Apr. 10, 2015), https://perma.cc/55F8-L27R.

188. *Id.*

189. *Svenson*, 128 A.D.3d at 160.

companies to self-certify that their data protections followed the laws of European countries.[190] In 2013, Austrian privacy activist Max Schrems filed a complaint with the Ireland Data Protection Commissioner, concerned that Facebook might provide his data to the United States National Security Agency.[191] He took the case to the European Court of Justice, which ruled in January 2016 that the Safe Harbor Agreement itself was invalid.[192] Schrems has since filed new complaints with parallel data protection authorities in Ireland, Belgium, and Germany, calling into question Facebook's transfer of data.[193] New European regulations introduced in December 2015 strengthen the repercussions against companies who misuse users' data; these regulations would apply to Facebook.[194] Moreover, the Belgian Privacy Commission won a ruling in Brussels banning Facebook from using cookies to track non-users.[195]

We can look to the Digital Millennium Copyright Act ("DMCA") for an example of how takedown measures would work domestically. The DMCA allows copyright owners to report infringing content and request that the infringing material is taken down from the Internet.[196] It also includes a "safe harbor" provision, whereby Internet Service Providers ("ISPs") cannot be monetarily liable for infringing material before they have received notice of its existence.[197] This safe harbor provision suggests that artists could function analogously, using other social media user's copyrighted material or private data, but immediately removing the relevant portions for users who request takedown. The DMCA would not give anyone a cause of action against the cease and desist artists discussed here: it covers ISPs and deals with secondary liability, while these works are created by other users and are directly infringing, if infringing at all. Nevertheless, the DMCA demonstrates that Internet users are aware of concepts like takedown and notice, and thus would feel comfortable participating in such structures if they were built into a cease and desist artwork.

C. ALTERNATIVE MONETIZATION AND LICENSING SCHEMES

Artists whose works potentially violate user agreements—thus exposing them to contractual liability—should pursue alternative means of monetizing their works. Non-commerciality has an established role in various legal tests, most notably fair

190. Joseph Cox, *The Activist Fighting Silicon Valley for Europe's Privacy*, MOTHERBOARD (Jan. 1, 2016), https://perma.cc/JM7N-U2JT.

191. *Id.*

192. *Id.*

193. *Id.*

194. Mark Scott, *Europe Approves Tough New Data Protection Rules*, N.Y. TIMES (Dec. 15, 2015), https://perma.cc/BP7E-2ERP.

195. Peter Sayer, *Belgian ban on Facebook cookies should apply to all of Europe, privacy watchdogs say*, PCWORLD (Dec. 7, 2015), https://perma.cc/T2X3-XA88.

196. 17 U.S.C. § 512.

197. *Id.* at § 512(a).

use.[198] Much of the backlash against Richard Prince's "*New Portraits*" focused on just how high the asking price was ("Artist Richard Prince Sells Instagram Photos That Aren't His For $90K," "Artist Richard Prince makes $90,000 selling someone else's Instagram picture," "Meet the artist who sells Instagram pictures for $90,000").[199] One does not need to be a lawyer to appreciate that exploiting works on the legal fringe for huge monetary gain may not induce gratitude among one's peers.

Interestingly, early net.art artists feared that selling their works—beyond being difficult to do—was antithetical to the utopian ideals of early Internet.[200] However, artists must survive, and those working with Internet-based works have found ways to make a living from their works. Some commentators have criticized the transfer of ownership of, for instance, a website artificial, but the ritual does at least transfer cultural value.[201] Furthermore, artists have developed means of imitating the limited editions of traditional media, such as closed-systems hardware.[202]

One way to strike a balance between working in the digital medium and making a living is to use the Internet art as a means of branding one's artistic identity and growing a following, with the hopes of then selling more traditional works offline. Artist and writer Brad Troemel posits that social media artists—he uses the term "aesthletes," a portmanteau combining "athletic" and "aesthetics," to reference these artists' seemingly endless stream of works posted online—are selling their personality rather than an actual good.[203] They thus participate in what he terms an "attention economy," whereby the works are produced in mass quantity, made available for free, and allow an artist to gamble their personality-infused works in hopes of a large return in publicity.[204]

Constant Dullaart does in fact sell his websites through his gallery.[205] He posits that "there are more people looking at a screen rather than out the window or at a painting," thus there must exist a market for websites.[206] Dullaart analogizes to performance art, acknowledging Internet art's ephemerality and volatility, while still believing that young collectors in particular will want to purchase "a piece of

198. *Id.* at § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.").

199. Katie Sola, *Artist Richard Prince Sells Instagram Photos That Aren't His For $90K*, THE HUFFINGTON POST (May 27, 2015), https://perma.cc/WL7M-D9TG; Amy Corderoy, *Artist Richard Prince makes $90,000 selling someone else's Instagram picture*, THE SYDNEY MORNING HERALD (May 24, 2015), https://perma.cc/ZTM3-2VMB; Chidumga Izuzu, *Meet the artist who sells Instagram pictures for $90,000*, PULSE (June 1, 2015), https://perma.cc/6UCP-FNXU.

200. Richert, *supra* note 17, at 27.

201. *Id.*

202. "Other methods include closed systems, i.e., artist-designed, wall mounted screens or hardware, which collectors can buy, as well as editioned archival pigment or inkjet prints on aluminum due to its ability to '[reference] the hard, reflective flatness of the screen.'" *Id.* at 30.

203. Troemel, *supra* note 64.

204. *Id.*

205. Sayej, *supra* note 141.

206. *Id.*

history."[207] However, it is Chris Alexander's dual-class sale of *McNugget* that epitomizes the approach this Note recommends to other new media artists who may be breaching social media user agreements. There are options to "purchase" or "download" *McNugget*, allowing viewers to either download the original PDF of the work or purchase a printed version from a self-publishing website.[208] At the time of writing, a printed edition of *McNugget* cost about $18—roughly 0.02% of the cost of one of Prince's *New Portraits*. Alexander's free digital version of *McNugget* takes alternative monetization to its non-controversial end-point, but assumes that artists can receive income from other sources.

Alexander's need to be indiscriminate in his selection of tweets, and the resulting mammoth volume, calls to mind Tim Wu's concept of tolerated use.[209] In a seminal paper, Professor Wu coined this term to refer to "technically infringing, but nonetheless tolerated, use of copyright works."[210] He sets forth five "traditional categories" comprehended by copyright: (1) infringing use, (2) non-infringing use, (3) privately licensed use, (4) publicly licensed or statutory use, and (5) fair use.[211] Putting aside the argument that *McNugget* is non-infringing because tweets may not be copyrightable, Alexander's artwork is not privately or publicly licensed. It may be a fair use of the underlying work, but it more comfortably falls into the two new categories of copyright usage Professor Wu lists: (1) implicitly licensed use, where "usage is licensed not by explicit contract but by an implied contract created by conduct or notice of one kind or another," and (2) tolerated use.[212]

Professor Wu explains that "[t]he critical aspect of [tolerated use] are uses of works that are of a mass quantity and low value per transaction."[213] *McNugget*, with its large-scale digital distribution, low price point, and unabashed mimicry of the underlying source tweets, most closely resembles a tolerated rather than a fair use. Wu recommends using fair use or "no action" policies to protect tolerated users, which resonates with Alexander's alternative monetization best practice.[214] Moreover, given the uncomfortable relationship between contemporary conceptual artists, fair use, and the courts, tolerated use seems the best "defense" available.[215] While a fair user ordinarily must be one who uses the original copyrighted work not for profit, a tolerated user seemingly needs just to ensure that their asking price is low enough so as to not upset the copyright holder. The lack (or lower amount) of commerciality may not be dispositive in any legal defense, but it will certainly encourage a dialogue among aggrieved parties, rather than instant recourse to litigation.

207. *Id.*

208. Chris Alexander, *McNugget*, TROLL THREAD (Feb. 11, 2013), https://perma.cc/N8DX-BS4A; Chris Alexander, *McNugget*, LULU.COM (Feb. 11, 2013), https://perma.cc/B43U-QSTY.

209. Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008).

210. *Id.* at 617.

211. *Id.* at 618.

212. *Id.* at 619.

213. *Id.*

214. *Id.* at 630-35.

215. *See supra* pp. 1-3 and accompanying text on Richard Prince.

V. CONCLUSION

Other artists are violating social media terms of use, whether they are aware or unaware of the violations. For instance, over a period of three months in 2011, Ed Fornieles executed an online performance piece titled *Dorm Daze*.[216] He invented characters and caused them to interact with each other on Facebook, playing out a semi-scripted narrative.[217] "Hacktivism," the convergence of Internet hacking with activism,[218] does not seem to appropriately describe the work: Fornielas describes his work as being performance, and non-technology-specific.[219] Nevertheless, *Dorm Daze* does violate Facebook's terms of use: under section four, "Registration and Account Security," clause 1 states, "You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission," and clause 2 states, "You will not create more than one personal account."[220] A set of normative best practices must be adopted so as to protect these artists to the greatest extent, allowing them to continue to push digital and Internet art towards new horizons.

The artists discussed above are not stopping, nor should they. Following *High Retention, Slow Delivery*, Constant Dullaart took his bot-based escapades to Facebook, creating an "army" of fake Facebook profiles based on American Revolution soldiers.[221] The piece, titled *The Possibility of an Army*, involved thousands of fake profiles, nearly all of which were removed by the website.[222] Elsewhere, Dullaart has stated—whether flippantly or seriously—that "Pirate Bay is one of the best artworks engaging with the politics of our time. It's the Woodstock of our time."[223]

Part of what makes the Internet in general, and social media in particular, so intriguing to artists is the very real potential for unexpected outcomes. The Internet has expanded far beyond its seemingly utopian origins into a living, breathing creature that invites person-to-person communication on an unprecedented scale. Social media has taken this excess of communication and pushed it to its limits, allowing artists to communicate with audiences more quickly and more frequently than ever before. Conceptual artists working in social media, like their post-modern peers before them, likely do not consider the legal implications of their work. In fact, it may be the subconscious idea of legal haziness that draws an artist to social media in the first place. Appropriation and compilation art can reach new extremes on

216. Richert, *supra* note 17, at 32.

217. *Id.*

218. Dorothy Denning, *The Rise of Hacktivism*, GEO. J. INT'L AFFAIRS (Sept. 8, 2015), https://perma.cc/7MPL-XGNG.

219. Joanne McNeil, *Artist Profile: Ed Fornieles*, RHIZOME (Apr. 2, 2012), https://perma.cc/2EWP-XGCF.

220. *Statement of Rights and Responsibilities*, FACEBOOK (rev. Jan. 30, 2015), https://perma.cc/F5Q3-LTFD.

221. Zoe Kleinman, *Facebook 'fake army' launched by artist*, BBC NEWS (Nov. 10, 2015), https://perma.cc/2ML8-DJVU.

222. Dullaart termed these "casualties." Constant Dullaart, *The Possibility of an Army*, E-FLUX (Mar. 25, 2016), https://perma.cc/5PLE-MCMN.

223. Sayej, *supra* note 141.

platforms like Tumblr, while Twitter bots breathe new life into the post-human. Yet copyright and contract law stay the same. Artists must consider the legal implications of their social media based works to successfully protect and monetize them.