Meet Your New Overlords: How Digital Platforms Develop and Sustain Technofeudalism

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TABLE OF CONTENTS

Introduction....455
I. Defining User-Generated Content....456
II. The Illegitimate Suppression of User-Generated Content....458
III. Algorithmic Governance and the European Union's New Copyright Directive....469
IV. Digital Labor and Technofeudalism....476
V. Looking to the Future....480
VI. Conclusion....485

INTRODUCTION

Much has been written about the free speech quasi-jurisprudence being developed by social media platforms through content moderation policies unconstrained by constitutional limits.[1] This Article focuses on a specific subset of that content moderation—namely, the takedown of user-generated content in the name of copyright enforcement. This Article argues that the unlimited power of online platforms to regulate access to user-generated content through antipiracy algorithms leads to three perverse outcomes. First, the removal of lawful content falsely flagged as "infringing" results in the suppression of legitimate speech and a reduction in the diversity of online discourse. Second, the erosion of lawful exceptions and limitations to copyright protection through algorithmic adjudication alters the fundamental social contract established by copyright legislation, displaces decades of carefully developed fair use jurisprudence, and transfers adjudicatory power from courts to corporations. Third, the monetization of user-generated content not by users, but by copyright owners (following the flagging of content as "infringing"), is

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1. *See, e.g.*, Jonathan Peters, *The Sovereigns of Cyberspace and State Action: The First Amendment's Application—or Lack Thereof—to Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989, 1026 (2017).

symptomatic of a broader, systemic exploitation of users that is occurring on digital platforms, also known as "technofeudalism."[2]

Several structural factors have contributed to these outcomes: the sheer volume of user-generated content uploaded to digital platforms each day; the conditionality of platform immunity under the safe harbors established by the Digital Millennium Copyright Act; and the increasing reliance by corporations on algorithmic administration. Meredith Broussard describes the blind faith placed by corporations in algorithms as "technochauvinism," or the belief that technology is inherently and always superior to human decisionmaking.[3] It's a sticky belief in a society still internally marveling at all of the technological conveniences of modern life: one-click ordering, two-day shipping, drone-delivered coffee. But, Broussard warns, blind optimism and an abundant lack of caution about new technologies ("the hallmarks of technochauvinism") will ultimately lead us astray.[4] Self-driving car crashes and the abuse of facial recognition for minority surveillance are two particularly chilling examples.[5]

This Article will focus on a less existential, but still significant, threat posed by technochauvinism: the suppression of free speech, the displacement of the judiciary, and the exploitation of digital labor that are brought about by algorithmic copyright adjudication. Part I will define user-generated content and describe its social significance. Part II will explain how the democratizing effects of copyright law, digital technologies, and digital platforms are diluted by the unlawful removal of user-generated content. Part III will explore how automated antipiracy systems preclude user enjoyment of lawful copyright exceptions and limitations and displace the gains made by users through the evolution of fair use jurisprudence. It will examine the increasing pressures placed on platforms to engage in algorithmic copyright adjudication, including the European Union's new copyright directive. Part IV will explain how content filtering algorithms such as YouTube's Content ID allow copyright owners to exploit user labor, and will situate this exploitation within the broader context of technofeudalism and data colonialism. Part V will discuss solutions for the future.

I. DEFINING USER-GENERATED CONTENT

The phrase "user-generated content" generally refers to noncommercial forms of expression created by everyday consumers of creative works, such as memes, GIFs,

2. *See* ERIC POSNER & GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 231 (2018) (defining "technofeudalism").

3. MEREDITH BROUSSARD, ARTIFICIAL UNINTELLIGENCE: HOW COMPUTERS MISUNDERSTAND THE WORLD 7–8 (2018).

4. *Id.* at 69.

5. *See, e.g.*, Nick Belay, *Robot Ethics and Self-Driving Cars: How Ethical Determinations in Software Will Require a New Legal Framework*, 40 J. LEGAL PROF. 119 (2015); Sven Nyholm & Jilles Smids, *The Ethics of Accident-Algorithms for Self-Driving Cars: An Applied Trolley Problem?*, 19 ETHIC THEORY MORAL PRAC. 1275 (2016); Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, N.Y. TIMES (Apr. 14, 2019), https://perma.cc/YKE4-R862.

and fan fiction.[6] The increasing prevalence of user-generated content reveals a sharp dissonance between the origins of copyright law and the manner in which many works are created in the digital environment. The collective authorship of many user-generated works rejects Romantic constructs of individual authorship and demonstrates that everyone is a user first, and a creator second.[7] The diffuse and indeterminate authorship of memes, for example, often under digital pseudonyms, resists their interpretation as the unique expression of an individual author.[8] Just as "[t]o give a text an Author is to impose a limit on that text, to furnish it with a final signified,"[9] to acknowledge the collective creation of a meme is to release the work into an interpretive wilderness. User-generated works subvert the ideology of "the original author" bestowing culture upon the uncreative masses by proving that anyone with a smartphone can also be a creator.[10] They disrupt the commercial paradigm of tightly controlled creative universes by democratizing the meaning-making process.[11] Through the promotion of diverse self-expression, user-generated works dismantle traditional hierarchies of knowledge production and ownership. They decommodify cultural works by removing them from a monopoly distribution model and transforming them into new works with new cultural significance.[12]

In addition to their market-destabilizing effects, user-generated works provide significant value for marginalized social groups that are often excluded from or caricatured by mainstream cultural works. Fan fiction, for example, has long been lauded for its ability to challenge the social and racial assumptions of popular mythology by repositioning characters of color or diverse sexual orientation with narrative prominence and reclaiming their agency and complexity.[13] Fan fiction recognizes the social power associated with narrative control and wrests it back from a Caucasian heteropatriarchy to amplify minority voices. Given the impact of social conditioning on self-esteem,[14] access to positive cultural representations is critical for the self-actualization of marginalized groups.[15] This recalibration of mainstream

6. *See* Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 924–26 (2009).

7. Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1179 (2007).

8. *See generally* Stacey M. Lantagne, *Mutating Internet Memes and the Amplification of Copyright's Authorship Challenges*, 17 VA. SPORTS & ENT. L.J. 221 (2018); Cathay Smith, *Beware the Slender Man: Intellectual Property and Internet Folklore*, 70 FLA. L. REV. 601 (2018); David J. Gunkel, *What Does it Matter Who is Speaking? Authorship, Authority, and the Mashup*, 35 J. POPULAR MUSIC & SOC. 71 (2012).

9. ROLAND BARTHES, IMAGE, MUSIC, TEXT 147 (Stephen Heath trans., Hill & Wang ed., 1978) (1977).

10. Halbert, *supra* note 6, at 928–29.

11. *Id.*

12. *Id.* at 929, 940.

13. Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 601 (2007).

14. *See generally* Paul McGhee & Terry Frueh, *Television Viewing and the Learning of Sex-Role Stereotypes*, 6 SEX ROLES 179 (1980); Chander & Sunder, *supra* note 13, at 597 (referring to CAMILLE O. COSBY, TELEVISION'S IMAGEABLE INFLUENCES: THE SELF-PERCEPTIONS OF YOUNG AFRICAN-AMERICANS 25 (1994)).

15. Chander & Sunder, *supra* note 13, at 607.

cultural works satisfies consumer demand for personalization and rejects the cultural authority of institutional creativity. Although many fans regard their contributions as anticonsumerist and eschew the notion of monetary compensation, Abigail de Kosnik argues that the meaning-making work carried out by fans, to recontextualize and customize mass commodities by infusing them with nonnormative meanings, should be recognized as labor.[16] In addition to these forms of so-called "commodity resistance,"[17] user-generated works help to maintain the cultural relevance of copyrighted works through continuous commentary, thereby delaying their cultural obsolescence.[18] In short, user-generated content offers far more social and cultural value than is often recognized.

II. THE ILLEGITIMATE SUPPRESSION OF USER-GENERATED CONTENT

As a cornerstone of democratic society, the ability to speak freely has long received special protection under Western common law. Naturally, however, free speech protections have always been subject to limitations designed to serve other social needs, such as the desire to avoid promoting criminal activity or damaging personal reputations.[19] Copyright represents another such limitation: You are able to speak freely, provided that you do not reproduce the protected expression of another. This impingement on free speech has long been accepted in return for the financial incentive copyright provides to authors and artists to contribute to the marketplace of ideas. Two fundamental copyright limitations—the idea-expression dichotomy and fair use—are often invoked to quell concerns about the free speech implications of copyright enforcement. For this reason, copyright law has largely escaped First Amendment scrutiny.[20]

But what if the historical rationale for this uneasy compromise had faded? And what if copyright's built-in free speech safeguards were failing? The abundance of uncompensated user-generated content online with no single, identifiable author (for

16. *See generally* Abigail De Kosnik, *Fandom as Free Labor*, *in* DIGITAL LABOR: THE INTERNET AS PLAYGROUND AND FACTORY 108 (Trebor Scholz ed., 2012).

17. Commodity resistance is the contestation of cultural stereotypes through the resignification of common goods—in this case, artifacts of popular culture. *See* Chander & Sunder, *supra* note 13, at 601.

18. Abigail de Kosnik, *Interrogating "Free" Fan Labor*, SPREADABLE MEDIA, https://perma.cc/W5LP-5KVV.

19. *See, e.g.*, Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMP. L. REV. 903 (1989); Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57 (2005).

20. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) ("The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them."); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) ("[I]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.").

example, memes and GIFs) demonstrates the declining importance of copyright as an incentive for digital creativity. And digital platforms' increasing reliance on algorithmic copyright enforcement is slowly eroding the space previously occupied by judicially determined fair use. This Part will explain the historical justifications for the uneasy truce between copyright and free speech, and demonstrate that many of the initial assumptions under which that truce was formed are slowly being eroded.

The democratic copyright paradigm, encapsulated by the work of Neil Netanel, emphasizes the critical role copyright plays in underwriting nonstate sociopolitical discourse. By providing individuals with a means of monetizing their creative works without relying on state or elite patronage, copyright decentralizes the production and dissemination of information that is critical for civic discourse. By sustaining a nonstate sector of normative influencers, copyright promotes discourse outside official spheres of political power, thereby counteracting state-led efforts to control community beliefs and supporting the development of robust and pluralist civil societies.[21] Childish Gambino's "This is America" music video, for example, was widely lauded for its powerful commentary on race relations in the United States—specifically, White fetishization of performative Blackness and willful ignorance of the conditions of everyday life for African Americans.[22] Soon after "This is America" dropped on YouTube, Nigerian rapper Falz replicated many of the video's audiovisual elements in his own version, titled "This is Nigeria," which highlighted the similarities and differences between social and political issues in Nigeria and the United States.[23] Remixes of "This is America" have appeared in countries as disparate as Iraq,[24] Sierra Leone,[25] Brazil,[26] and France,[27] illustrating that transformative uses of copyrighted works promote dialogue by increasing opportunities for individual participation in meaning-making processes.[28] In light of this important social function, the democratic copyright paradigm advocates for limits on the proprietary entitlements of copyright owners in order to promote civic discourse.[29]

21. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society,* 106 YALE L.J., 215, 283 (1996).

22. The repeated juxtaposition of black children dancing against a backdrop of violence has been described as "a powerful portrait of black-American existentialism, a powerful indictment of a culture that circulates videos of black children dying as easily as it does videos of black children dancing in parking lots." Doreen St. Felix, *The Carnage and Chaos of Childish Gambino's "This is America*,*"* THE NEW YORKER (May 7, 2018), https://perma.cc/HH7V-2L8W. *See also* Renbourn Chock, *The Continued Relevance of the "Carnivalesque" ("This is America")*, 10 ANTHROPOLOGY NOW 116, 116–19 (2018); Spencer Kornhaber, *Donald Glover is Watching You Watch Him*, THE ATLANTIC (May 7, 2018), https://perma.cc/7CBJ-NS85; Kimberly Eison Simmons, *Race and Racialized Experiences in Childish Gambino's "This is America*," 10 ANTHROPOLOGY NOW 112, 112–15 (2018).

23. Linus Unah, *Not Everyone is Happy with Nigeria's Viral Version of "This is America*,*"* NPR: GOATS AND SODA (June 1, 2018), https://perma.cc/JP4T-5THM.

24. I-NZ, *This Is Iraq*, YOUTUBE (July 4, 2018), https://perma.cc/SND8-TYQZ.

25. Xzu B, *This Is Sierra Leone*, YOUTUBE (June 7, 2018), https://perma.cc/R75C-V9ZE.

26. Porta dos Fundos, *This Is Brazil*, YOUTUBE (June 4, 2018), https://perma.cc/LKT3-JRTT.

27. bad vibes, *ZEF This Is France*, YOUTUBE (Oct. 27, 2018), https://perma.cc/FHZ2-YJJ7.

28. *See* Netanel, *supra* note 21, at 284; Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 236 (1996).

29. Netanel, *supra* note 21, at 288.

Digital technologies have transformed users from passive consumers of cultural works to active cocreators by radically enhancing their ability to reproduce, modify, and transform copyrighted works.[30] At the same time, digital platforms have enhanced users' ability to share these transformative works with each other, facilitating unprecedented social mobilization. Recent examples include the social media activity surrounding the 2011 Arab Spring and the 2017 impeachment of South Korean President Park Geun-hye.[31] The willingness of platforms to host transformative works has largely been underwritten by legislative safe harbors from copyright infringement liability. The Digital Millennium Copyright Act ("DMCA") established four safe harbors for online service providers ("OSPs") which host, transmit, cache, or hyperlink user-generated content containing copyrighted material.[32] By immunizing these platforms from copyright infringement liability, statutory safe harbors preserve digital spaces for individuals to share transformative works.

Unfortunately, the DMCA also created perverse incentives for OSPs to overpolice their platforms in order to preserve their statutory immunity.[33] OSPs receive immunity in exchange for the "expeditious"[34] removal of impugned material upon notification of claimed infringement "regardless of whether the material or activity is ultimately determined to be infringing."[35] Removing legitimate content before notifying the alleged infringer effectively operates as an "extra-judicial temporary restraining order" based solely on an unverified claim by a copyright owner.[36] The DMCA does not require OSPs to disclose the copyright owner's identity or details of the alleged infringement or to explain to users the ramifications of filing a counter-notice, making it difficult for users to contest content removals.[37] Moreover, the fear of losing a safe harbor for "knowingly" hosting infringing content encourages OSPs to err on the side of false positives, further diminishing due process.[38]

Within this environment, many OSPs have turned to algorithms to review the tremendous amount of material circulating on their platforms each day. YouTube's Content ID algorithm scans newly uploaded videos against a database of copyrighted

30. *See generally* Elkin-Koren, *supra* note 28.

31. On the role of digital platforms in the Arab Spring, see generally Nezar AlSayyad & Muna Guvenc, *Virtual Uprisings: On the Interaction of New Social Media, Traditional Media Coverage and Urban Space During the 'Arab Spring'*, 52 URB. STUD. 2018 (2015); Axel Bruns, Tim Highfield & Jean Burgess, *The Arab Spring and Social Media Audiences: English and Arabic Twitter Users and Their Networks*, 57 AM. BEHAV. SCIENTIST 871 (2013). On social media and the impeachment of President Park, see generally Sangwon Lee, *The Role of Social Media in Protest Participation: The Case of Candlelight Vigils in South Korea*, 12 INT'L J. COMMC'N 1523 (2018).

32. *See* 17 U.S.C. § 512 (2017).

33. *See generally* John Tehranian, *The New Censorship,* 101 IOWA L. REV. 245 (2015).

34. 17 U.S.C. § 512(b)(2)(E), (c)(1)(A)(iii), (c)(1)(A)(C), (d)(1)(C), (d)(3) (2017).

35. *Id.* § 512(g)(1).

36. Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 501 (2016).

37. *Id.*

38. *Id.* at 502.

content.[39] If an algorithmic match occurs, YouTube flags the video and sends the right holder a notification of the (presumptively) unauthorized use. Upon receiving such notice, the right holder has the option to either block, monetize, or track the relevant video. Blocking it will make it unavailable for viewing within the territory in which the right holder asserts exclusive rights. Monetizing the video places advertisements on the user's video, and the revenue generated from these ads is split between the right holder and YouTube.[40] Tracking the video allows it to remain available for viewing on YouTube without the right holder generating any commercial benefit.[41] Users can dispute Content ID claims, after which the copyright owner has thirty days to respond, either by releasing the claim, upholding the claim, or issuing a DMCA takedown request.[42] If the copyright owner upholds the Content ID claim, the user can then appeal this decision. Again, the copyright owner has thirty days to respond to this appeal, either by releasing the claim or issuing a DMCA takedown request. When YouTube receives a takedown request, it must remove the content "expeditiously."[43] In response to a takedown request, the user can submit a counter-notification, after which YouTube must restore access to the content within ten to fourteen business days unless a lawsuit is filed.[44]

Content ID has paid out over $3 billion to right holders for "unauthorized" uses of their works,[45] with no accountability or transparency regarding the determination of an "infringing" work.[46] Fewer than one percent of Content ID claims are disputed,[47] reflecting the chilling effect on uploaders who feel disempowered to dispute allegations of infringement.[48] Yet the evidence of false positives is overwhelming.[49] Justin Bieber, for example, was blocked by YouTube from

39. Note that Content ID is available only to copyright owners who have submitted copyrighted content to YouTube's reference database; all other copyright owners must identify instances of infringement on their own and submit a takedown notice under the DMCA. *See The Difference Between Copyright Takedowns and Content ID Claims*, YOUTUBE HELP, https://perma.cc/C8S3-U67U (last visited Mar. 29, 2020).

40. Nicholas Thomas DeLisa, *You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms*, 81 BROOK. L. REV. 1275, 1281 (2016).

41. *Id.* at 1282.

42. If no response is received within thirty days, the claim will expire. *See Dispute a Content ID Claim*, YOUTUBE HELP, https://perma.cc/X5B6-XTPZ (last visited Apr. 14, 2020).

43. 17 U.S.C. § 512(c)(1)(C) (2017).

44. 17 U.S.C. § 512(g)(2)(C) (2017).

45. GOOGLE, HOW GOOGLE FIGHTS PIRACY 25 (2018), https://perma.cc/42MY-WYPK.

46. YouTube's Content ID system automatically scans newly uploaded videos against a database of reference files and metadata, offering copyright owners the option to block, track, or monetize matched content and thereby creating a de facto compulsory licensing system. Uploaders never negotiate a license for use, yet right holders are able to monetize user-generated content through ex post ratification of infringing uses. *See* DeLisa, *supra* note 40, at 1293–94.

47. GOOGLE, *supra* note 45, at 28.

48. DeLisa, *supra* note 40, at 1287.

49. *See generally* Toni Lester & Dessislava Pachamanova, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation*, 24 UCLA ENT. L. REV. 51 (2017). This is consistent with broader data on the high rate of false positives produced by automation; a 2016 study found that nearly a third of takedown requests (28.4 percent) raised questions about their validity. JENNIFER M. URBAN, JOE KARAGANIS & BRIANNA L. SCHOFIELD, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 12 (2d rev. 2017), https://ssrn.com/abstract=2755628.

uploading his official music video for his song "Pray" because it matched content from Universal Music Group (the parent company of his record label), which had set its default response to all flagged content as "block."[50] Political advertisements produced by the McCain-Palin campaign in 2008 were removed from YouTube at the height of election season as a result of default claims by media outlets over news snippets.[51]

The high number of false positives flagged by Content ID is largely the product of automation. Copyright owners are able to set a "default" response when Content ID recognizes a match with their copyrighted content, which means that the "infringing content" is never reviewed by a human before it is removed. In this way, Content ID replicates the vulnerabilities to abuse created by the DMCA's digital architecture. Under the DMCA, there is no penalty of perjury for a false allegation of infringement; the only statement that must be sworn is the assertion of authority to act on behalf of the copyright owner.[52] All allegations of infringement are unsworn and are not required to be served on the alleged infringer. Wendy Seltzer argues that the ease of filing a DMCA takedown notice, relative to the cost and risk associated with filing a complaint in federal court, facilitates more frequent abuse.[53] Numerous corporations, including Wal-Mart and Best Buy, have made spurious claims of copyright infringement under the DMCA in order to remove the prices of their products from comparison shopping websites.[54] Foreign copyright owners, including Ecuadorian president Rafael Correa and the right-wing extremist group English Defence League, have also abused the DMCA takedown regime to suppress critical commentary.[55] In the U.S., where statutory penalties can be as high as $150,000 per willful act of infringement,[56] copyright owners have long recognized their ability to silence their critics by waging proxy wars through the prism of copyright enforcement.[57] Unmeritorious infringement claims have been used by many copyright owners to scrub "unfavorable" online content ranging from same-sex marriage advocacy to information on abortion.[58] Content ID, which requires a copyright owner to do nothing other than set a default response, makes this process even easier.

50. Oliver Chiang, *Justin Bieber Swears off YouTube for Facebook, Unwittingly Steps in Copyright Minefield*, FORBES (Nov. 30, 2010), https://perma.cc/X57K-QQYM.

51. Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J. L. & TECH. 171, 172 (2010).

52. 17 U.S.C. § 512(c)(3)(A)(vi) (2017) (requiring that a notification of claimed infringement include "[a] statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed").

53. Seltzer, *supra* note 51, at 176.

54. *Id.* at 216.

55. Tehranian, *supra* note 33, at 274.

56. 17 U.S.C. § 504(c)(2) (2017).

57. For example, in 2008, conservative talk show host Michael Savage filed a takedown notice with YouTube demanding that the site remove a documentary on Islamophobia that had featured an excerpt from his radio broadcast, and YouTube dutifully complied. Tehranian, *supra* note 33, at 258.

58. *Id.* at 286.

The false positives produced by Content ID result in the suppression of legitimate speech. This impairs the capacity of users to engage in the kind of discourse that platforms claim to promote. The chief executive officers of Twitter and Facebook have described their platforms as a "digital public square" and "a platform for all ideas," respectively.[59] The use of social media to exchange political ideas has been acknowledged by the Supreme Court.[60] In 2018, the Pew Research Center reported that fourteen percent of Americans had changed their mind about a political or social issue based on content they saw on social media.[61] The Second Circuit recently held that President Trump engaged in unconstitutional viewpoint discrimination when he blocked specific users from his Twitter account, because the "interactive space" associated with each presidential tweet constituted a "public forum" for First Amendment purposes.[62] Neither the private ownership of Twitter nor the account's original creation in a personal capacity could dilute its current, public nature.[63] Similarly, New York Congresswoman Alexandria Ocasio-Cortez regularly leverages the immediacy, intimacy, and ephemerality of Instagram Stories to communicate her political agenda to her 3.7 million followers.[64]

As Internet connectivity swells globally, cyberspace is increasingly the forum in which political and social norms are shaped and contested. Since these norms ultimately determine the collective political agenda, participation in these spaces is critical for self-governance.[65] Discursive will formation through free and diverse dialogue is just as essential to democratic governance as is the expression of that will

59. *Foreign Influence Operations' Use of Social Media Platforms: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. 19 (2018) (statement of Jack Dorsey, CEO of Twitter); *Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Commerce, Sci. & Transp.*, 115th Cong. 48 (2018) (statement of Mark Zuckerberg, CEO of Facebook). *See also* VALERIE BRANNON, CONG. RESEARCH SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 2 (2019).

60. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017) (recognizing that social media platforms are increasingly used for "a wide array of protected First Amendment activity").

61. Kristen Bialik, *14% of Americans Have Changed Their Mind About an Issue Because of Something They Saw on Social Media*, PEW RESEARCH CTR. (Aug. 15, 2018), https://perma.cc/PPU2-DVH8.

62. *See* Knight First Amendment Inst. v. Trump, 928 F.3d 226, 234, 237 (2d Cir. 2019).

63. *Id.* at 234–36; *see also* Brief for Knight First Amendment Inst. at Columbia Univ. as Amicus Curiae at 1–2, Knight First Amendment Inst. v. Trump, 928 F.3d 226 (2d Cir. 2019) ("[W]hen a government official opens a space to the public and invites citizens to share their thoughts with the official and other interested citizens, he creates a public forum for speech. The official may not then selectively restrict access to that forum by barring viewpoints he does not like because, for example, a speaker makes comments critical of the official or his policies . . . [T]he interactive space for replies and retweets created by each tweet sent by the @realDonaldTrump account qualifies as a public forum."); Joshua Geltzer & Laurence Tribe, *When Trump Blocks You on Twitter, He's Violating the First Amendment*, POLITICO (Mar. 20, 2019), https://perma.cc/44PH-93X7.

64. *See, e.g.*, An Xiao Mina & Ray Drainville, *Trump Has Twitter. Alexandria Ocasio-Cortez is Winning Instagram*, FAST COMPANY (Nov. 6, 2018), https://perma.cc/VX3B-EF5V; Christina Cauterucci, *Instant Pot Politics*, SLATE (Nov. 20, 2018), https://perma.cc/DZH7-UUNX; Talya Minsberg, *How Alexandria Ocasio-Cortez Is Bringing Her Instagram Followers into the Political Process*, N.Y. TIMES (Nov. 16, 2018), https://perma.cc/3H6V-WEDU; Andrea Gonzalez-Ramirez, *How Alexandria Ocasio-Cortez's Obsession-Worthy Instagram Is Changing the Game*, REFINERY29 (Apr. 17, 2019), https://perma.cc/QH2M-ETTZ.

65. *See generally* Netanel, *supra* note 21.

through equal voting rights.[66] Platforms are fully aware of the role that they play in facilitating sociopolitical discourse, and they actively encourage such use for profit-generating purposes. The revenue generated through advertising and data collection is highly correlated with the volume of user traffic.[67] Arguably, the more a property owner, to his advantage, opens up his property for use by the general public, the more his property rights should be circumscribed by the expressive rights of users.[68]

Unfortunately, however, the options for expressive protection currently offered by digital platforms are limited. The process for disputing Content ID claims or DMCA takedown requests is complex, onerous, and thoroughly inadequate.[69] Even if a user counters with a noninfringement notice, the DMCA requires the service provider to keep the impugned content offline for at least ten business days.[70] Ironically, the user faces more stringent counter-notification requirements than the copyright owner: He or she must swear, under penalty of perjury, to a "good faith belief" that the material was removed in error;[71] consent to U.S. jurisdiction; and accept service of process from the copyright owner.[72] The service provider bears no liability for a wrongful takedown provided that it occurred in "good faith,"[73] and the copyright owner is equally protected provided that the infringement was not "knowingly" materially misrepresented.[74] Moreover, a user who receives a takedown request (regardless of whether or not the request is legitimate) receives a "copyright strike" from YouTube, three of which can result in the loss of a user's entire account. Given the difficulties associated with disputing a Content ID claim, it is often easier for a user to simply acquiesce to the copyright owner's demands and "trim" the claimed content using YouTube's trimming tool.[75]

Recourse to freedom of contract is unhelpful, given the power asymmetry between users and platforms. As Henning Grosse Ruse-Khan explains, the "argument that users are free not to use the platform neglects the fact that many of these platforms nowadays function as essential facilities in accessing and communicating content online."[76] Indeed, the reason critics argue that "[t]he private

66. *See* Elkin-Koren, *supra* note 28, at 221, 231.

67. Albrecht Enders, *The Long Tail of Social Networking: Revenue Models of Social Networking Sites*, 26 EUR. MGMT. J. 199, 206 (2008).

68. *See* Marsh v. Alabama, 326 U.S. 501, 506 (1946) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."). *See also* Peters, *supra* note 1, at 1026.

69. DeLisa, *supra* note 40, at 1292. *See generally* Corinne Hui Yun Tan, *Lawrence Lessig v. Liberation Music Pty Ltd: YouTube's Hand (or Bots) in the Over-Zealous Enforcement of Copyright*, 36 EUR. INTELL. PROP. REV. 347 (2014).

70. 17 U.S.C. § 512(g)(2)(C) (2017).

71. 17 U.S.C. § 512(g)(3)(C) (2017).

72. 17 U.S.C. § 512(g)(3)(D) (2017).

73. 17 U.S.C. § 512(g)(1) (2017).

74. 17 U.S.C. § 512(f) (2017).

75. *See Remove Claimed Content from Your Video,* YOUTUBE HELP, https://perma.cc/HY2H-8FTD (last visited Apr. 14, 2020).

76. Henning Grosse Ruse-Khan, *Global Content Protection Through Automation—A Transnational Law Perspective*, 49 INT'L REV. INTELL. PROP. & COMPETITION L. 1017, 1017–21 (2018).

sector has a shared responsibility to help safeguard free expression"[77] is precisely because "[w]hat many consider the largest public space in human history is not public at all."[78]

Here, at last, we turn to the uneasy relationship between copyright and the First Amendment. The free speech protections afforded by the U.S. Constitution mitigate only against the censorial activities of the state, not those of private parties. Since copyright enforcement is commonly carried out by private parties, it generally fails to meet the state action requirement for First Amendment scrutiny.[79] Additionally, the Supreme Court has consistently held that copyright promotes free speech by incentivizing participation in the marketplace of ideas.[80] Accordingly, as long as copyright's free speech "safeguards" (fair use and the idea-expression dichotomy)

77. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on Internet Freedom at the Newseum, Washington, D.C. (Jan. 21, 2010).

78. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOYOLA L. REV. 373, 377 (2010).

79. The First Amendment's state action requirement provides constitutional protection only against actions of the state, not actions of private parties. *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 569–70 (1972) (stating, in reference to the distribution of handbills in a shopping center, "Nor does property lose its private character merely because the public is generally invited to use it for designated purposes . . . . We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights"); BRANNON, *supra* note 59, at 5–9. In limited circumstances, the Supreme Court has been willing to permit First Amendment claims against seemingly private parties, but only where they embody a "public function" and exercise "powers traditionally exclusively reserved to the State." *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) ("It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself . . . ."); Marsh v. Alabama, 326 U.S. 501 (1946) (concerning a company-owned town). The Supreme Court has also been willing to scrutinize private parties that have a "sufficiently close relationship" with the State such that the action of the private party "may be fairly treated as that of the State itself." *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (considering a restaurant operated by a private corporation under lease in a building financed by public funds and owned by a parking authority which was an agency of the state); Pub. Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (considering a privately owned public utility corporation); Fitzgerald v. Mountain Laurel Racing Inc., 607 F.2d 589 (3d Cir. 1979) (concerning a privately owned racetrack whose manager met with the State Racing Commission prior to expelling a driver and a trainer for violating state racing commission rules).

80. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("[C]opyright's purpose is to *promote* the creation and publication of free expression."); Harper & Row Publishers, Inc. v. Nation Enters. 471 U.S. 539, 558 (1985) ("[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas . . . ."); Sony Corp. v. Universal City Studios, Inc. 464 U.S. 417, 429 (1984) ("[T]he limited grant [of copyright] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired . . . ."); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good . . . .").

remain "undisturbed," copyright legislation generally escapes First Amendment scrutiny.[81]

There are several reasons why this situation is unsatisfying. First, there is a long jurisprudential history of scrutinizing content-neutral speech regulations where they have an intolerable impact on speech interests,[82] particularly where alternative channels for communication are limited.[83] For this reason, the "content-neutral" DMCA regime should be scrutinized for its impact on free speech. The "expeditious" removal of flagged content based on an unverified copyright infringement claim effectively acts as a prior restraint, "silencing speech before an adjudication of unlawfulness" has occurred.[84] This violates First Amendment due process, which requires judicial determination before free speech is restrained.[85] Should this behavior escape constitutional scrutiny because it is privately administered by service providers? Arguably, no. If anything, precisely *because* the DMCA regime "operates in the shadow of the law, silencing speech indirectly through private intermediaries where the government could not do so directly,"[86] it should be subject to greater scrutiny. Moreover, the incentives for private intermediaries to suppress free speech have been mandated *by* federal legislation. Even if takedowns are effected by private corporations such as Google, they are "motivated by the state action that established copyright liability and the DMCA."[87] Accordingly, Congress cannot escape responsibility for the chilling effects of the

81. Golan v. Holder, 132 S.Ct. 873 (2012) (affirming *Eldred*, 537 U.S. 186); *Eldred*, 537 U.S. at 221 ("The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.' But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."); *Harper & Row*, 471 U.S. at 560 ("In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.").

82. Alan Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169, 1198 (2007). *See, e.g.*, Watchtower Bible & Tract Soc'y v. Stratton, 536 U.S. 150 (2002) (striking down a municipal ordinance requiring door-to-door solicitors to obtain a permit); Martin v. City of Struthers, 319 U.S. 141 (1943) (invalidating a ban on door-to-door solicitations because the distribution of literature in this manner is "essential to the poorly financed causes of little people"); Schneider v. New Jersey, 308 U.S. 147 (1939) (deeming unconstitutional a law banning leafleting because it banned a form of grassroots communication).

83. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid, provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

84. Seltzer, *supra* note 51, at 176.

85. *See* Henry P. Monaghan, *First Amendment "Due Process*,*"* 83 HARV. L. REV. 518, 519 (1969) ("Like the substantive rules themselves, insensitive procedures can 'chill' the right of free expression.").

86. Seltzer, *supra* note 51, at 176.

87. *Id.* at 190.

DMCA "by routing its influence through third-party service providers."[88] Censorship by proxy is more, not less, dangerous than direct regulation due to the lack of visibility and procedural regularity.[89]

Second, it's not clear that copyright's free speech safeguards do, in fact, remain "undisturbed." The algorithmic copyright adjudication employed by YouTube is actively eroding the space previously occupied by fair use and precluding users from enjoying lawful copyright exceptions and limitations. YouTube itself acknowledges that "[a]utomated systems like Content ID can't determine fair use, which is a subjective, case-by-case decision that can only be made by a court."[90] Its algorithm operates as a blunt instrument, flagging any use of copyrighted material without any human assessment or review. The first opportunity to assert fair use is provided *after* user content has been flagged by Content ID: "If you believe that your video falls under fair use, you can defend your position through the Content ID dispute process. This decision shouldn't be taken lightly. Sometimes, you may need to carry that dispute through the appeal and DMCA counter notification process."[91] Given the inability of algorithms to replicate the complex fair use analysis carried out by courts, can the automatic removal of content without a fair use analysis truly be considered "good faith" behavior by digital platforms?[92]

Third, a blanket First Amendment immunity for private copyright enforcement would be willfully ignorant of ongoing abuse of copyright owners' exclusive rights.[93] As we have seen, the enforcement by copyright owners of their exclusive rights not to protect their economic interests, but to suppress unwanted speech, is well documented.[94] Given this knowledge, relieving copyright owners of the burden of proving copyright infringement (and shifting the burden to users to prove fair use) "reflects a pattern of ongoing realignment in the distribution of legal power and

88. *Id. See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 563 (6th ed. 2019) ("There are two exceptions to the state action doctrine. One is the "public function exception," which says that a private entity must comply with the Constitution if it is performing a task that has been traditionally, exclusively done by the government. The other is the "entanglement exception," which says that private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct.").

89. Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 50 (2006).

90. *Frequently Asked Questions About Fair Use*, YOUTUBE HELP, https://perma.cc/JVL6-EB8J (last visited Apr. 14, 2020).

91. *Id.*

92. *See, e.g.*, Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1156 (2008) ("The purpose of Section 512(f) is to prevent the abuse of takedown notices. If copyright owners are immune from liability by virtue of ownership alone, then to a large extent Section 512(f) is superfluous. As Lenz points out, the unnecessary removal of non-infringing material causes significant injury to the public where time-sensitive or controversial subjects are involved and the counter-notification remedy does not sufficiently address these harms. A good faith consideration of whether a particular use is fair use is consistent with the purpose of the statute.").

93. Garfield, *supra* note 82, at 1189.

94. *See, e.g.*, Online Policy Grp. v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204–05 (N.D. Cal. 2004) ("Diebold sought to use the DMCA's safe harbor provisions—which were designed to protect ISPs, not copyright holders—as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property."). *See generally* Tehranian, *supra* note 33.

privilege in response to the asserted needs of powerful actors in the emerging information economy."[95] Julie Cohen argues that the privileging of property rights over expressive rights robs free speech doctrine of its "animating spirit of expressive equality" and creates "zombie free speech jurisprudence," "enslaved in the service of economic power."[96] This "zombie" jurisprudence conflates spending and speaking, with the result that "speech advancing economic interests receives the strongest protection of all."[97]

Finally, state courts have increasingly recognized that private property can assume public characteristics, and that conditioning free speech protections on the identity of the property owner can produce absurd and arbitrary results.[98] California, for example, provides that the state action required for free speech scrutiny is satisfied when private property is "freely and openly accessible to the public," supporting more expansive free speech rights than the First Amendment.[99] Jonathan Peters argues that courts should engage in a case-by-case assessment of whether a private space is *functionally* public, recognizing that the more a property owner, to his advantage, opens up his property for use by the general public, the more his property rights should be circumscribed by the rights of users.[100] This approach, Peters argues, would allow judges "to characterize a space as public for state action purposes, even if the space would not qualify as a traditional public forum."[101] Many social media platforms function effectively as public squares: Their primary purpose is to serve as a forum for public expression, they are designated for that purpose, and they are completely open to the public at large.[102] In recognition of this reality, the Supreme Court recently framed access to social media platforms as a First Amendment right.[103]

The foregoing analysis does not presume that conceiving platforms as state actors is the only means of protecting free speech. Indeed, there are many reasons why platforms should not be interpreted as such. Kate Klonick helpfully explains that categorizing digital platforms as state actors for First Amendment purposes would "create an internet nobody wants. Platforms would no longer be able to remove

95. Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1156 (2015).

96. *Id.* at 1120.

97. *Id.*

98. Peters, *supra* note 1, at 994–96, 998.

99. Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 26 Cal. 4th 1015, 1033 (2001), *quoted in* Peters, *supra* note 1, at 1003.

100. *See* Peters, *supra* note 1, at 1022–24 (discussing Marsh v. Alabama, 326 U.S. 501 (1946)).

101. *Id.* at 1024.

102. Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 168 (2014).

103. Packingham v. North Carolina, 137 S. Ct. 1730 (2017) ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more . . . . While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general . . . and social media in particular . . . . [T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."). *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1612–13 (2018).

obscene or violent content. All but the very basest speech would be explicitly allowed and protected—making current problems of online hate speech, bullying, and terrorism, with which many activists and scholars are concerned, unimaginably worse."[104] Rather, this Part has sought to disentangle the historical immunity afforded to copyright in order to understand how YouTube and other platforms are able to suppress legitimate speech without consequence, in the name of copyright enforcement. Even if YouTube is never considered a state actor for First Amendment purposes (and this seems increasingly unlikely),[105] it is important to understand the impact of algorithmic adjudication on free speech interests. Given the important role played by copyright in facilitating democratic discourse, its overzealous enforcement should not be permitted to snuff that discourse out.

III. ALGORITHMIC GOVERNANCE AND THE EUROPEAN UNION'S NEW COPYRIGHT DIRECTIVE

As we have seen, YouTube has not attempted to translate the complex discretionary standard of fair use into computer code, as it would inevitably be "affected by a variety of extrajudicial considerations, including the conscious and unconscious professional assumptions of program developers, as well as various private business incentives."[106] Instead, Content ID simply flags all "unauthorized" uses of copyrighted content without distinguishing between lawful and unlawful use.[107] At their present level of sophistication, algorithms like Content ID are woefully inadequate guardians of user rights, and this inadequacy is likely to worsen as digital technologies enhance our ability to seamlessly blend original and copyrighted content. Deepfake technology, for example, uses machine-learning algorithms to mimic facial expressions, gestures, and voices in order to create audiovisual content that appears highly authentic.[108] After the final season of HBO's *Game of Thrones* aired, fans used copyrighted footage from the series to recreate a scene in which Kit Harington's character, Jon Snow, apologizes for the inadequacy

104. Klonick, *supra* note 103, at 1659.

105. See Prager University v. Google LLC, 951 F.3d 991, 998 (2020) ("YouTube does not perform a public function by inviting public discourse on its property. . . That YouTube is ubiquitous does not alter our public function analysis. . . . YouTube also does not conduct a quintessential public function through regulation of speech on a *public forum*.").

106. Perel & Elkin-Koren, *supra* note 36, at 518. *See also* Joanne Gray, Governed by Google: Algorithmic Enforcement and Private Copyright Regulation (Oct. 1, 2017) (unpublished submission to University of New South Wales 2017 Law, Technology and Innovation Junior Scholars Forum) (on file with Allens Hub for Technology, Law & Innovation University of New South Wales).

107. For more in-depth discussion on the inability of algorithms to accommodate individual circumstances, see, for example, Eric Meyer, *Inadvertent Algorithmic Cruelty*, MEYERWEB (Dec. 24, 2014), https://perma.cc/6HY2-6UJLc; MARY GRAY & SIDDHARTH SURI, GHOST WORK: HOW TO STOP SILICON VALLEY FROM BUILDING A NEW GLOBAL UNDERCLASS 67–68 (2019). *See also* DeLisa, *supra* note 40, at 1293–94 (2016) ("[T]hose manually reviewing the content in the user appeals process are often not qualified to do so. . . . . It seems preposterous that fair use copyright adjudications are being made by anyone other than a judge, let alone in such large numbers.").

108. *See generally* Marie-Helen Maras & Alex Alexandrou, *Determining Authenticity of Video Evidence in the Age of Artificial Intelligence and in the Wake of Deepfake Videos*, 23 INT'L. J. OF EVID. & PROOF 255 (2019).

of the final season.[109] The inauthenticity of this "deepfake" Jon Snow was imperceptible. As deepfake techniques facilitate the so-called "collapse of reality," platform algorithms such as Content ID will face an exponentially difficult task differentiating between lawful and unlawful uses of copyrighted content.[110]

The unsuitability of algorithms as adjudicators of legal rights is further compounded by their proprietary nature. The use of privately developed algorithms by private corporations creates a system of "black box governance" in which copyright adjudication is carried out by opaque entities with minimal transparency or accountability.[111] This opacity is exacerbated by the fact that YouTube's appeal process is not available in certain circumstances by virtue of private contractual arrangements with specific copyright owners.[112] This convergence of law enforcement and adjudicatory powers in the hands of a private corporation represents a significant departure from the due process standards to which our legal institutions have historically been held.[113]

Yet recent developments in Europe have ensured that platforms will increasingly perform quasi-judicial functions. The Directive on Copyright in the Digital Single Market ("DSM"), adopted on April 17, 2019, renders online content-sharing service providers *directly* liable for user-uploaded content, holding that they communicate to the public when they provide access to such content.[114] Service providers are also expressly excluded from the hosting safe harbor previously available to them under the e-Commerce Directive.[115] As a result, in order to avoid direct liability for copyright infringement, service providers are required to conclude licensing agreements with copyright owners, or failing that, to make "best efforts" to ensure the unavailability of infringing works of which they have notice, and to act "expeditiously" to remove infringing content and prevent its future upload.[116] Given the volume of content circulating on these platforms daily, and the low probability of concluding licensing agreements that would cover this volume of content, the requirements imposed by the DSM will push platforms to adopt content filtering technologies.[117] Although the Directive explicitly states that its application "shall not lead to any general monitoring obligation,"[118] it is unclear how intermediaries could feasibly comply with its requirements without continuously monitoring the

109. Alyssa Newcomb, *Jon Snow's Deepfake Apology Video Is a Parody. But the Problem Is No Laughing Matter*, FORTUNE (Jun. 17, 2019), https://perma.cc/U2TK-76EM.

110. Franklin Foer, *The Era of Fake Video Begins*, THE ATLANTIC (May 2018), https://perma.cc/LB8T-FYM4.

111. *See generally* Maayan Perel & Niva Elkin-Koren, *Black Box Tinkering: Beyond Disclosure in Algorithmic Enforcement*, 69 FLA. L. REV. 181 (2017).

112. Gray, *supra* note 106, at 5–6.

113. Perel & Elkin-Koren, *supra* note 36, at 481.

114. Council Directive 2019/790, art. 17, 2019 O.J. (L 130) 119 (EU).

115. *Id.* at 119–20. Article 14 of the e-Commerce Directive provided hosting platforms with immunity from liability for unlawful content posted by users, depending upon the fulfilment of certain conditions. Council Directive 2000/31/EC, art. 14, 2000 O.J. (L 178) 13.

116. Council Directive 2019/790*, supra* note 114, at 120.

117. João Pedro Quintais, *The New Copyright in the Digital Single Market Directive: A Critical Look*, 42 EUR. INTELL. PROP. REV. 28, 38 (2020).

118. Council Directive 2019/790*, supra* note 114, at 120.

content on their platforms. The active monitoring required to not only remove infringing content but *prevent its future upload* effectively transforms intermediary liability from a negligence regime based on actual or constructive knowledge to a strict liability scheme based on the existence of infringing content on digital platforms.[119]

The general monitoring obligation created by the DSM appears to violate the e-Commerce Directive in a number of ways. First, it conflicts with the Directive's prohibition of general monitoring obligations,[120] as interpreted by the Court of Justice of the European Union ("CJEU"),[121] and second, it conflicts with the Directive's requirement that hosting providers respect freedom of expression when responding to a takedown request.[122] At their present level of sophistication, automated filtering technologies do not respect users' expressive rights because they cannot distinguish between legal and infringing content; they simply flag all "unauthorized" uses of copyrighted content without determining if they fall within lawful exceptions and limitations. As a result, these algorithms disproportionately elevate property rights over other fundamental rights, such as freedom of expression. High rates of false positives flagged by these algorithms have chilling effects on free and diverse discourse. Worryingly, despite these concerns, the pressure placed on platforms to utilize content filtering technologies in order to comply with the new Directive is likely to entrench the market power of established players, such as YouTube, who developed their own filtering algorithms years ago.[123] Whether these effects can be mitigated by the Directive's limited recognition of user rights will depend on national implementations, which are required by June 7, 2021.[124]

Similarly, the General Data Protection Regulation ("GDPR"), adopted on April 14, 2016, requires platforms to perform quasi-judicial functions by facilitating users'

119. Giancarlo Frosio, *To Filter, or Not to Filter? That Is the Question in EU Copyright Reform*, 36 CARDOZO ARTS & ENT. L.J. 331, 352 (2018).

120. Council Directive 2000/31/EC, *supra* note 115, at 13 ("Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.").

121. The CJEU has said that monitoring obligations to prevent copyright infringement would be in violation of the e-Commerce Directive. Case C-324/09, L'Oréal SA v. eBay Int'l. AG, 2011 E.C.R. I-06011. *See also* Case C-360/10, SABAM v. Netlog NV, EU:C:2012:85 (Feb. 16, 2012).

122. Council Directive 2000/31/EC, *supra* note 115, at 6 ("In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level.").

123. Frosio, *supra* note 119, at 361.

124. Council Directive 2019/790, *supra* note 114, at 119–20, 125 (stating that licensing agreements negotiated between platforms and copyright owners shall also cover acts carried out by users which are noncommercial or do not generate "significant" revenues; that users shall still be able to rely on existing copyright exceptions and limitations; and that users must have access to an effective and expeditious complaint and redress mechanism with respect to the disabling of access to, or removal of, their content).

realization of the right to be forgotten.[125] Specifically, search engines are required to determine whether data subjects have specific rights, and whether those rights are overridden by the engines' economic interests and the interest of the general public in access to the impugned search results.[126] Google, for example, decides whether the search results are inadequate, irrelevant, no longer relevant, or excessive, and whether there is a public interest in the information, effectively becoming both "judge and jury with respect to the right to be delisted."[127] Often, these decisions are made without full and complete information, by Google employees with limited or no expertise in privacy law.[128] The codification of the right to be forgotten within the GDPR not only confers traditional judicial authority upon private corporations, but delegates the enforcement of legal rights to proprietary technology. "Forgetting," in the human sense, is technically difficult to implement in complex databases where "every data record added to the database might not only reside at one specific point in the file system, but might be stored at various locations inside internal database mechanisms, as well as across different replicated databases, in log-files and backups."[129] Deletion in these circumstances may be technically infeasible or inadequate, depending on the precise legal requirements of the right to be forgotten.[130] Yet the CJEU continues to show surprising deference to Google's adjudication of legal rights and interests, despite evidence of its inadequacy.[131]

Both the GDPR and the DSM transform private corporations such as Google into public interest arbiters, counterbalancing property rights, on the one hand, and

125. Council Directive 2016/679, art. 17, 2016 O.J. (L 119) 43–44. *See generally* Eldar Haber, *Privatization of the Judiciary*, 40 SEATTLE U. L. REV. 115 (2016).

126. Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, EU:C:2014:317 (May 13, 2014) ("[P]rocessing of personal data . . . carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results . . . information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty . . . the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous . . . . In the light of the potential seriousness of that interference, it is clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing. However, inasmuch as the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, in situations such as that at issue in the main proceedings a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter.").

127. Haber, *supra* note 125, at 137.

128. *Id.* at 143–44.

129. Eduard Villaronga et al., *Humans Forget, Machines Remember: Artificial Intelligence and the Right to Be Forgotten*, 34 COMP. L. & SECURITY REV. 304, 309 (2018).

130. *Id.* at 313.

131. On September 24, 2019, the CJEU held that, in response to an individual request for the removal of specific links, search engines are "not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States" despite significant evidence that individuals based in the EU can access de-referenced links on non-EU domains by using virtual private networks (VPNs). *See* Case C-507/17, Google v. Commission Nationale de l'Informatique et des Libertés, EU:C:2019:772 (Sept. 24, 2019).

fundamental freedoms such as privacy and free speech, on the other. Eldar Haber argues that the long-term consequence of this transformation is the privatization of the judiciary, with an associated diminishing of the accountability, transparency, and due process traditionally expected of its functions.[132] It is important to acknowledge here that the institution of the judiciary is not without its faults or critiques, as reflected in the ongoing constitutional debates in the United States about the "undemocratic" nature of judicial review.[133] However, the democratic legitimacy of nine unelected individuals striking down Congressional legislation is a separate node of inquiry from the displacement of the judiciary by the mysterious workings of a proprietary algorithm.

Despite the flaws of the judicial system, it represents a process to which the majority of Americans would say that they have consented.[134] And the deliberations of the courts receive substantial media scrutiny and coverage. Proprietary algorithms, in contrast, operate largely in the dark, slowly eroding, in some cases, the rights and freedoms secured by Congress. The operation of fair use, for example, is excluded by an algorithm which presumes that uploaded content which matches files within YouTube's reference database is infringing. This presumption shifts the burden of proof from copyright owners to users, requiring users to dispute automated claims rather than requiring copyright owners to identify acts of infringement and assert their exclusive rights. Users flagged by Content ID are presumed guilty, and punished with the loss of speech, before they can contest these claims.[135] The result is a reduction in the freedoms afforded to users by copyright exceptions and limitations, and thus a degradation of the social bargain struck by Congress between copyright owners and users. For many users, these freedoms do not simply facilitate self-actualization or digital community-building; they are a significant source of revenue.[136] And since commerciality no longer creates a presumption against fair use, the revenue-generating capacity of YouTube users should be increasing, not decreasing.

132. Haber, *supra* note 125, at 134.

133. *See generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7 PERSPECTIVES ON POLITICS 805 (2009).

134. *See, e.g.*, James Gibson & Michael Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. SOC. SCI. 201 (2014).

135. Seltzer, *supra* note 51, at 229.

136. *See, e.g.*, Julie Alexander, *Creators Finally Know How Much Money YouTube Makes, and They Want More of It*, THE VERGE (Feb. 4, 2020), https://perma.cc/U8U3-7LG5. Twitch is another example of a YouTube-style platform which provides user-creators with a significant source of revenue; the affective labor of live-streaming on Twitch involves engaging spectators in parasocial intimacy, providing continuous humor and commentary, and even performing a specific character or personality. Audience monetization occurs through subscription fees, donations, advertising, and sponsorships. Jamie Woodcock & Mark Johnson, *The Affective Labor and Performance of Live Streaming on Twitch.tv*, 20 TELEVISION & NEW MEDIA, 813, 814, 819–20 (2019). It is estimated that the top ten streamers on Twitch earn over $20 million per year between them. *How Much Do Twitch Streamers Make?*, INFLUENCER MKTG. HUB, https://perma.cc/D2NQ-WWET (last visited Mar. 19, 2020).

Recent years have witnessed the declining importance of commerciality to a judicial determination of fair use.[137] In *Campbell v. Acuff-Rose Music,* the Supreme Court found that the commercial nature of parodies does not preclude their qualification as fair use, and held that "[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[138] In reviewing the "purpose and character" of a secondary use, courts have focused less on the market effect of a secondary use, and more on the extent to which it "transforms" the original copyrighted work.[139] In the decades following *Campbell*, courts expanded the scope of the first factor to assess whether the secondary work "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message."[140] *Campbell* elevated the transformative nature of a secondary work as the most probative factor in fair use analysis, and this remains the dominant approach today.[141] Indeed, post-*Campbell* courts have pushed the boundaries of the transformative factor to cover secondary uses which have no anchor in the original work at all, and may reproduce it in its entirety, provided that this is done for a new purpose.[142] The secondary work is no longer required to comment on, or criticize, the original work in order to qualify as fair use.[143] The result is that the complete reproduction of a copyrighted work, without alteration, for profit, can, in certain circumstances, qualify as a highly transformative fair use.[144]

Perhaps this shift in fair use jurisprudence can be best demonstrated by the differential treatment of two copyrighted works by Dr. Seuss: *The Cat In The Hat* and *Oh, The Places You'll Go!*. In 1997, the Ninth Circuit held that *The Cat NOT in the Hat!* infringed the copyright in Dr. Seuss's *The Cat in the Hat* because the

137. *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008); Pierre Leval, Campbell v. Acuff-Rose*: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19 (1994); Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

138. *Campbell*, 510 U.S. at 579, 584.

139. Laurie Tomassian, *Transforming the Fair Use Landscape by Defining the Transformative Factor*, 90 S. CAL. L. REV. 1329, 1339 (2017).

140. *Campbell*, 510 U.S. at 579. *See, e.g.*, Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 96 (2014); Cariou v. Prince, 714 F.3d 694, 705 (2013); Blanch v. Koons, 467 F.3d 244, 253 (2006); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114 (1998) ("Applying *Campbell* to the first-factor analysis, we inquire whether Paramount's advertisement 'may reasonably be perceived,' . . . as a new work that 'at least in part, comments on' Leibovitz's photograph . . . . Plainly, the ad adds something new and qualifies as a 'transformative' work.").

141. Tomassian, *supra* note 139, at 1339.

142. *See*, *e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015) (holding that the reproduction of copyrighted works for the purpose of creating a searchable database of books to help individuals identify whether books were useful to them qualified as fair use, notwithstanding Google's commercial nature and profit motivation); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014) (deeming fair use the scanning of books for the creation of an accessible, full-text searchable database for disabled library users); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (holding that Google's reproduction of copyrighted images in their entirety for the purpose of creating reference thumbnails to enhance the utility of their Image search engine qualified as fair use because the copies served a different function from the original works).

143. Tomassian, *supra* note 139, at 1343.

144. *Id.* at 1345.

original work was not the object of the parody in the second work; rather, the authors had simply mimicked the style and language of the original work to parody the O.J. Simpson trial.[145] As a result, the court concluded, there was "no need to conjure up the original work," and the parodic work was not sufficiently "transformative."[146] Twenty-two years later, the District Court for the Southern District of California denied a copyright infringement claim by Dr. Seuss's estate against the creators of *Oh, The Places You'll Boldly Go!*, which again mimicked the artistic style and language of Dr. Seuss's original work, *Oh, The Places You'll Go!*, without commenting on the original work (it was simply a *Star Trek* mash-up).[147] In an earlier order, Judge Janis Sammartino referred to the "mash-up" culture of combining two fictional universes and noted that "if fair use was not viable in a case such as this, an entire body of highly creative work would be effectively foreclosed."[148] Sammartino described *Oh, The Places You'll Boldly Go!* as a "highly transformative work that takes no more than necessary to accomplish its transformative purpose and will not impinge on the original market for the Plaintiff's underlying work."[149] This analysis of the transformativeness of a parody, the object of which was not the original work, but an entirely separate fictional series, stands in stark contrast to the Ninth Circuit's decision two decades earlier and reflects the shift in fair use jurisprudence that has occurred within this time frame.

As we have seen, fair use jurisprudence has blurred the boundary between a derivative work (to which the copyright owner has exclusive rights), and a secondary work which largely reproduces the original but is considered "transformative" rather than infringing.[150] This development has created significant opportunities for amateur creativity. Commerciality no longer creates a presumption against fair use. Of the appellate cases reported between 2010 and 2015 which found fair use, seventy-three percent of the secondary uses were commercial.[151] The generous affordances of fair use inquiries focused on transformative use should not be withheld from the average YouTube user. Yet Content ID ensures that they are. This reduction in legislatively enshrined freedoms reflects an appropriation of lawmaking power not just from Congress, but from the judiciary. Armed with vast quantities of highly sensitive information and newly-acquired adjudicatory powers, online platforms exert significant normative influence. Their reliance on algorithms to perform quasi-judicial functions (including the adjudication of competing fundamental rights) effectively transforms the process of system and algorithmic design into a quasi-legislative process. Online platforms are, in effect, our new lawmakers.

145. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).

146. *Id.* at 1401 (quoting Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992)).

147. Dr. Seuss Enters., L.P. v. ComicMix LLC, 372 F. Supp. 3d 1101 (S.D. Cal. 2019), *appeal docketed*, No. 19-55348 (9th Cir. Mar. 28, 2019).

148. Dr. Seuss Enters., L.P. v. ComicMix LLC, 256 F. Supp. 3d 1099, 1106, 1109 (S.D. Cal. 2017).

149. *Id.* at 1109.

150. *See*, *e.g.*, Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, 2020 SING. J. LEGAL STUD. (forthcoming 2020).

151. Tomassian, *supra* note 139, at 1350.

IV. DIGITAL LABOR AND TECHNOFEUDALISM

Copyright has always promoted diversity of discourse by financing the expressive works of nonstate authors and artists. Naturally, then, when independent creators no longer receive compensation for their work, many of them are likely to stop creating. This is especially the case when their compensation is being redirected to an undeserving party. YouTube allows copyright owners to monetize any "unauthorized" use of their content that is flagged by Content ID, whether or not that use is, in fact, unlawful. As we have seen, since Content ID cannot distinguish between lawful and infringing content, a copyright owner can generate advertising revenue from effectively any use of their material that is flagged by the algorithm, even if it would qualify as fair use.[152] Content ID therefore allows copyright owners to monetize the labor of third parties. In contrast to the Copyright Act, which strives to balance the deterrence of infringement and the promotion of creativity by disgorging only those profits of the infringer that are "attributable to the infringement,"[153] a claim under Content ID allows the copyright owner to monetize the labor of users, with no judicial determination of unlawfulness.[154] Fan-made meme videos of Baauer's "Harlem Shake," for example, generated over $4.5 million in advertising revenue for Baauer's label, Mad Decent, despite the fact that most of these videos likely would have qualified as fair use. Content ID allowed Mad Decent to monetize millions of hours of free fan labor, giving it de facto ownership of the meme's collective production.[155]

The unjust enrichment of copyright owners by the transformative labor of users has several important consequences.[156] First, amateur creators experimenting with low-cost means of content production (for example, parodies of or commentaries on copyrighted content) are unable to finance their fledgling creativity once their content is claimed by YouTube's algorithm.[157] As a result, diminished opportunities for amateur creativity reduce the diversity of digital content. For example, popular YouTuber Jimmy Donaldson, who operates under the pseudonym "MrBeast" and has over 30 million subscribers, has frequently complained about the loss of advertising revenue from his videos sustained by Content ID claims. He claims to

152. *How Content ID Works (Common Questions About Content ID: What Options Are Available to Copyright Owners?)*, YOUTUBE HELP, https://perma.cc/H7FE-WC72 (last visited Mar. 5, 2020).

153. 17 U.S.C. § 504(b) (2010).

154. *See* Benjamin Boroughf, *The Next Great Youtube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation*, 25 ALB. L.J. SCI. & TECH. 95, 112 (2015).

155. Michael Soha & Zachary J. McDowell, *Monetizing a Meme: YouTube, Content ID and the Harlem Shake*, SOC. MEDIA + SOC'Y, Jan.–Mar. 2016, at 1.

156. Boroughf, *supra* note 154, at 113.

157. In 2016, YouTube announced a new monetization policy in which it would hold any revenue generated on a claimed video throughout the dispute process, and then pay the revenue to the appropriate party once the dispute had been resolved. Although this is a positive step, it still renders the receipt of advertising revenue conditional on: (a) the content creator continuing to dispute the Content ID claim, and potentially a DMCA takedown notice (and many creators are likely to give up if they lack an understanding of fair use law); and (b) the content creator's ability to resolve the dispute in his or her favor. *See Improving Content ID for Creators*, YOUTUBE CREATOR BLOG (Apr. 28, 2016), https://perma.cc/NYD4-GCFD.

have lost more than "five figures" on a video for simply saying a famous lyric from a copyrighted song.[158] Second, the devaluation of user labor entrenches the elite status and market power of institutional creators such as film studios and record labels, reducing opportunities for social mobility through remote forms of labor.

The exploitation of user labor on digital platforms has received extensive scholarly attention. As early as the turn of the twenty-first century, Tiziana Terranova described the "increasing degradation of knowledge work" facilitated by the disintermediation of the Internet.[159] Users' ability to provide free labor directly (through, for example, fan fiction and forum discussions) stripped them of traditional labor protections. Collective cultural labor was voluntarily channeled through capitalist structures, eroding the distinction between production and consumption and allowing advertisers and platform owners to generate significant revenues from user labor.[160] Terranova cautioned against "naïve technological utopianism" by distinguishing between the cultural elite of compensated knowledge workers (writers, journalists, graphic designers) and a second, subjugated class of unpaid knowledge workers who delayed the obsolescence of websites through continual use, representing "a new form of proletarianized labor."[161] Numerous conditions sustain this flow of free labor: a desire to belong to virtual communities; the difficulty of valorizing continuous, cumulative, creative work (as opposed to fixed physical commodities); ignorance or misinformation about copyright exceptions and limitations; and the chilling effects of automated copyright enforcement.[162]

For users who derive joy and personal satisfaction from contributing to virtual communities, monetary compensation for their labor may seem unnecessary or even offensive. It is important to consider whether the nonpecuniary benefits which users derive from their engagement on social media platforms preclude any assessment of the user-platform relationship as one of exploitation. Does "exploitation" simply refer to a discrepancy between the compensation afforded to labor and the economic value generated by it, or does it require some mental element—an individual's sense that he or she is being exploited? Dal Yong Jin and Andrew Feenberg argue that the derivation of profit from a human activity does not automatically create a situation of exploitation; telephone companies, they argue, profit from conversations on their telephone lines, but those conversations cannot be regarded as "labor."[163] Jin and Feenberg argue that "[i]t is simply wrong to qualify every activity from which capitalists draw a profit as labor and reduce it to its economic function," particularly when those activities "do not do the harms nor have the political implications of the expropriation of surplus value in capitalist production."[164] They point, in particular,

158. Julia Alexander, *YouTubers and Record Labels Are Fighting, and Record Labels Keep Winning*, THE VERGE (May 24, 2019), https://perma.cc/B48A-4PJX.

159. Tiziana Terranova, *Free Labor: Producing Culture for the Digital Economy*, 18 SOC. TEXT 33, 33 (2000).

160. *Id.* at 39.

161. *Id.*

162. *Id.* at 48.

163. Dal Yong Jin & Andrew Feenberg, *Commodity and Community in Social Networking: Marx and the Monetization of User-Generated Content*, 31 THE INFO. SOC'Y 52, 57 (2015).

164. *Id.*

to the democratizing effect of platforms in facilitating civic discourse and social mobilization within a digital public sphere.

Regardless of where one falls on the spectrum of user-generated content as either exploitation or participation, there is a significant group of digital entrepreneurs who actively seek revenue from the content they create and upload to digital platforms. For these individuals, the monetization of their labor by copyright owners through algorithms like Content ID is deeply unfair. The financial suffocation of amateur creativity on digital platforms partially explains why the "metamorphosis of users into authors" has not been accompanied by a "commensurate disaggregation of economic power."[165] The copyright behemoths who continue to hold and enforce exclusive rights to vast amounts of copyrighted content use algorithms such as Content ID to monetize the transformative content of users.[166]

The unscrupulous treatment of user-generated content on YouTube is symptomatic of a broader asymmetry of power between platforms and users. The billions of users who log in to Facebook and other social media platforms daily supply highly valuable data in return for access to these services. The labor of data production, like user-generated content, is supplied for free, partially because users are unaware of the scope, or financial worth, of their data extraction.[167] Stymied by information asymmetry, users continue to provide vast amounts of free data in return for access to digital services, just as serfs were granted land use rights in return for their agricultural output.[168] Google and Facebook have no incentive to disrupt this burgeoning "technofeudalism" because the network effects of their addictive platforms have successfully eliminated any competitive forces that might counter their monopsony power.[169] In the absence of any consciousness of their data production as labor, any organizing vehicle for their collective bargaining power, or any clear ownership rights over their data, users continue to be exploited by the data titans.[170]

Nick Couldry and Ulises Mejias describe the emerging forms of dependency cultivated by digital platforms as "data colonialism."[171] Platforms reproduce or mimic social interactions (for example, the ephemerality of human conversation is reflected in Instagram Stories, which disappear after twenty-four hours) in a manner that optimizes data extraction by fostering addiction to, and continual use of, the

165. Benjamin Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45, 87 (2017).

166. *Id.*

167. Posner & Weyl, *supra* note 2, at 237.

168. *Id.* at 231.

169. *Id.*

170. Although this may change with the advent of the GDPR and the California Consumer Privacy Act, most users are still unaware of the nature and scope of their legal rights with respect to their personal data. A 2019 Pew Research Center poll found that fifty-nine percent of U.S. adults understand very little or nothing about what companies do with their personal data, and sixty-three percent said that they have very little or no understanding of the laws and regulations protecting their privacy. *See Americans and Privacy: Concerned, Confused and Feeling Lack of Control over Their Personal Information*, PEW RES. CTR. (Nov. 15, 2019), https://perma.cc/6BMM-VBGX.

171. NICK COULDRY & ULISES A. MEJIAS, THE COSTS OF CONNECTION: HOW DATA IS COLONIZING HUMAN LIFE AND APPROPRIATING IT FOR CAPITALISM 102 (2019).

platform. Network effects compel platform usage as a necessary precondition for social interaction and the maintenance of social status. The new social order, mediated by data relations, "limits the possibility of life outside the data regime: refusing to generate data means exclusion."[172] Social relations, Couldry and Mejias argue, become a direct factor of capitalist production, where data is the output. Users participating in social life (via platforms) are essentially data workers excluded from both the means of production and their benefits.[173] This exclusion entrenches the power asymmetry between users, who provide the "raw" data, and platforms, who engage in "all the capturing, the processing, the analysis, and the creation of value-added products that the colonized cannot develop on their own and which they must buy at a disadvantage."[174] If colonialism is understood as "a process that allows one party to occupy the living space of another and appropriate his resources," the datafication of our social relations represents a new form of exploitation.[175]

As people continue to socialize online, human life becomes subject to continuous surveillance and data extraction, colonizing the space of the self. This constant surveillance, Couldry and Mejias argue, does violence to Hegelian notions of the minimal integrity of the self, the sacred space that is necessary for human flourishing.[176] A continuously trackable life, they argue, is "a dispossessed life, whose space is continuously invaded and subjected to extraction by external power."[177] It violates the freedom to "be with oneself in the other."[178] Jia Tolentino agrees that selfhood is "capitalism's last natural resource."[179] Capitalism, she argues, "has no land left to cultivate but the self," leading to the commodification of "personality and relationships and attention."[180] We observe the same datafication of human intimacy through virtual assistants and other "smart home" devices which capture and valorize domestic life. The smart home's configuration of the family unit is permanently in "service of the platform and its generation of surplus value."[181] For example, given the threat to product sales posed by in-group sharing, the size and location of the "family" is necessarily constrained, regardless of the realities of separated, migrant, or transnational families.[182] The shared credit card becomes the "metric of intimacy" for the digital consummation of domestic life, and where heterogeneity in family structure implicates the profitability of the platform, it

172. Paola Ricaurte, *Data Epistemologies, the Coloniality of Power, and Resistance*, 20 TELEVISION & NEW MEDIA 350, 352 (2019).

173. COULDRY & MEJIAS, *supra* note 171, at 102.

174. *Id.* at 104.

175. *Id.* at 45.

176. *Id.* at 156–57.

177. *Id.* at 157.

178. *Id.* at 167.

179. JIA TOLENTINO, TRICK MIRROR: REFLECTIONS ON SELF-DELUSION 12 (2019).

180. *Id.* at 33.

181. Murray Goulden, *'Delete the Family': Platform Families and the Colonisation of the Smart Home*, INFO., COMMC'N, & SOC'Y 1, 15 (2019).

182. *Id.* at 13.

imposes a single, codifiable reality, erasing the diversity and dynamism of family units.[183]

The technofeudalism developed and sustained by platform architecture contextualizes the ongoing exploitation of user-generated content on YouTube; it helps us to understand why users keep returning to these platforms even after their content has been improperly removed or deprived of monetization. Users' relative ignorance of copyright law, their desire to retain access to the platform, and the burdensome nature of the Content ID appeal process collectively create an environment in which copyright owners are able to extract value from the labor of users largely without consequence. Nicholas Carr refers to this pattern of exploitation as "digital sharecropping," in which production is distributed between many hands, but economic rewards are concentrated in very few.[184] The users, or "sharecroppers," feel rewarded by self-expression and socialization, "operat[ing] happily in an attention economy while their overseers operate happily in a cash economy."[185] While the current arbiters of labor justice remain, understandably, preoccupied with modern-day slavery and other issues of significance, the silent exploitation of amateur creators on digital platforms is likely to continue.

V. LOOKING TO THE FUTURE

The primary motivation of this Article has been to protect user-generated content from two harms: (a) unjustified removal from a digital platform; and (b) the deprivation of user revenue. As we have seen, existing legal frameworks offer unsatisfactory and inadequate protection from these harms. Invoking constitutional protection for free speech, for example, seems futile, given its state action requirement and the preference of courts to lean on copyright's "built-in" free speech safeguards. Similarly, copyright law affords little protection to the creators of user-generated content, even those whose works would qualify as fair use, because copyright adjudication is increasingly carried out by an algorithm rather than a court. This appropriation of adjudicatory power from the judiciary to private corporations is only likely to worsen under the content filtering obligations of the DSM, particularly as U.S. politicians pressure YouTube to expand the use of Content ID to smaller copyright owners.[186]

Certainly, there are short-term solutions to the specific inadequacies of Content ID that we could discuss, such as imposing penalties on platforms for the removal of noninfringing content; framing copyright exceptions and limitations (like fair use) as user rights rather than defenses; legislating a specific exception for noncommercial

183. *Id.* at 15.

184. Nicholas Carr, *Digital Sharecropping*, ROUGH TYPE (Dec. 19, 2006), https://perma.cc/AY8C-H263.

185. *Id.*

186. Bryan Pietsch, *Republican, Democratic U.S. Lawmakers Ask Google to Expand Copyright Protections*, REUTERS (Sept. 4, 2019), https://perma.cc/8NG4-FWCK.

user-generated content;[187] splitting platform monetization more equitably between user and copyright owner based on the percentage of matched content; or establishing an alternative dispute resolution mechanism akin to the Uniform Domain Name Dispute Resolution Policy, which has successfully adjudicated several thousand cybersquatting disputes since its inception.[188] But none of these Band-Aid solutions would address the underlying imbalance of power that facilitates the ongoing exploitation of users. Why do users keep returning to these platforms even after their content has been improperly removed or deprived of monetization? How are platforms' network effects fostering user dependency? As we have seen, the

187. Canadian copyright law provides:

> It is not an infringement of copyright for an individual to use an existing work . . . which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual . . . to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes; (b) the source . . . of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so; (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter—or copy of it—or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

Copyright Act, R.S.C. 1985, c. C-42 § 29.21 (2012). This provision, while innovative, suffers from a number of flaws. First, it remains wedded to outdated ideas of individual authorship, ignoring the diffuse, interactive, and collaborative creativity facilitated by digital platforms and technologies. In the summer of 2018, Drake's "In My Feelings" gave the Canadian artist the most "Hot 100" No. 1 hits of any rapper, largely due to a fan-initiated dance challenge that went viral on social media. Over 450,000 fan-made videos were posted to Instagram with the hashtag #InMyFeelingsChallenge, many of which would later appear in Drake's official music video, mashing together Drake's original composition, sound recording, and fan-made choreography and audiovisual content to receive over 186 million views. Second, the Canadian provision only protects user-generated works "in which copyright subsists," meaning that the user's contribution to the new work must represent a sufficient exercise of "skill and judgment." Does this requirement exclude compilations or annotated works from protection? Third, the requirement for "non-commercial" use is interpreted from the perspective of the user, not the disseminator, creating a peculiar scenario in which users are unable to receive compensation for their transformative works, but the commercial platforms which had no hand in their creation are. Finally, the Canadian provision requires that the user-generated work not have "a substantial adverse effect, financial or otherwise" on the exploitation of the existing work or its potential market(s). The inclusion of the open-ended "otherwise" allows copyright owners to sue for a broad range of impacts that user-generated works may have, such as reputational harm. *See generally* ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? (2015); Niva Elkin-Koren, *Copyright in a Digital Ecosystem: A User Rights Approach*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth L. Okediji ed., 2017); L. RAY PATTERSON & STANLEY LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS (1991); Teresa Scassa, *Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law*, *in* THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW (2013); Peter K. Yu, *Can the Canadian UGC Exception be Transplanted Abroad?*, 26 INTELLECTUAL PROP. J. 175 (2014); David Vaver, *Copyright Defenses as User Rights*, 60 J. COPYRIGHT SOC'Y USA 661 (2013).

188. Jacques de Werra, *Alternative Dispute Resolution in Cyberspace: The Need to Adopt Global ADR Mechanisms for Addressing the Challenges of Massive Online Micro-Justice*, 26 SWISS REV. INT'L EUR. L. 289, 289–90, 297–306 (2016).

inseparability of the self from its curated digital double has real and significant effects on human dignity and autonomy.[189] Recent months have witnessed an emerging discourse around "breaking up Big Tech," led by both academics and politicians.[190] Yet the focus of these discussions has centered around antitrust enforcement, rather than dismantling the digital labor architectures which continue to facilitate user exploitation and the algorithmic adjudication of legal rights and interests. How might a fundamental reconceptualization of the platform-user relationship shift the balance of power?

The current power asymmetry between platforms and users is facilitated by asymmetrical information. Users are unaware of both the scope and the financial worth of the data extraction to which they are constantly subjected. They accept a vastly unequal bargain—data for platform services—because they do not conceive of their data as their own. And platforms are able to monopolize user data through a thin web of legal mechanisms: private contracts, copyright, trade secrets, and *sui generis* database protection.[191] How would a fundamental reconceptualization of user data shift the balance of power towards users? Here is where the process of flag planting begins: Economists claim data as "labor" and argue that the quantification of the marginal value of data points could facilitate transparent and efficient payments to data workers.[192] A "data labor union" with collective bargaining power could filter platform access to user data, certify data quality, and help users develop their earning potential—becoming, effectively, a data gatekeeper.[193] Economists argue that this structure would not only facilitate data work as a new source of "digital dignity" but would promote productivity growth by efficiently directing high-quality data to machine-learning algorithms, something which the current system fails to achieve.[194] Additionally, users could leverage their labor power by engaging in "data strikes," or the withholding of their data (for example, by deleting their data; using private browsing windows; or refusing to provide behavioral data through comments, ratings, and likes). Early empirical evidence suggests that a moderately-sized data strike could reduce the performance of recommendation algorithms to 1999 levels, with significant consequences.[195] On Netflix, the margin between personalized and nonpersonalized algorithms represents a 200 to 400 percent increase in engagement with recommended content, and $1 billion in

189. Tolentino, *supra* note 179, at 33.

190. *See, e.g.*, Elizabeth Warren, *Here's How We Can Break up Big Tech*, MEDIUM (Mar. 8, 2019), https://perma.cc/4NFB-9NYE.

191. Council Directive 96/9/EC, art. 7, 1996 O.J. (L 77) 25, 26. *See also* J. H. Reichman & Paul F. Uhlir, *Database Protection at the Crossroads: Recent Development and Their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793 (1999); Samuel E. Trosow, *Sui Generis Database Legislation: A Critical Analysis*, 7 YALE J.L. & TECH. 534 (2004).

192. Imanol Arrieta-Ibarra, Leonard Goff, Diego Jimenez-Hernandez, Jaron Lainer & E. Glen Weyi, *Should We Treat Data as Labor? Moving Beyond "Free,"* 108 AEA PAPERS & PROC. 38, 39–42 (May 2018).

193. *Id.* at 41.

194. *Id.* at 39–40.

195. Nicholas Vincent, Brent Hecht & Shilad Sen, *"Data Strikes": Evaluating the Effectiveness of a New Form of Collective Action Against Technology Companies*, WWW '19: WORLD WIDE WEB CONF. 1931, 1932 (2019).

revenue.[196] On YouTube, roughly thirty percent of views are derived from the recommendation algorithm.[197] A reduction in recommender performance could reduce use of a particular platform, as users switch to competing services.[198]

Critics of the "data as labor" approach argue that current asymmetries of information and power would persist under this framework because users would still lack critical valorizing information and bargaining power.[199] Moreover, the quantification of data labor would involve staggering information and transaction costs, likely exacerbating existing inequities.[200] In contrast, other commentators argue that data should be conceived of as personality, so that the maintenance of individual control over data stems not from the ownership of an external resource (data), but from the need to preserve the integrity of identity.[201] In this way, the defining characteristic of user rights over data would not be their capacity for commodity exchange, but their inalienability.[202] Resolution of the controversy over data as property or personality (or something else entirely) lies beyond the scope of this Article. However, regardless of where we land on the question of data propertization (would data portability and interoperability mandates be sufficient?), it is clear that a fundamental paradigm shift is necessary to recalibrate the user-platform relationship.[203]

Regulatory frameworks such as the GDPR show early, promising signs of this paradigm shift. Recital 68 of the GDPR emphasizes the importance of strengthening the data subject's "control over his or her own data," and the Article 29 Data Protection Working Party has framed data portability as a tool to redress "the economic imbalance between large corporations on the one hand and data-subjects/consumers on the other."[204] Article 20 frames the data portability right in terms of three interrelated rights: the right to receive data concerning the data subject which he or she has provided; the right to transmit that data to another controller; and the right to have this data transmitted directly from one controller to another, where technically feasible.[205] Although the provision suffers from some textual

196. *Id.* at 1937.

197. Renjie Zhou, Samamon Khemmarat & Lixin Gao, *The Impact of YouTube Recommendation System on Video Views*, IMC '10: PROC. 10TH ACM SIGCOMM CONF. ON INTERNET MEASUREMENT (2010) at 404, 406.

198. Data strikes by homogenous groups (such as horror movie fans) may be particularly effective at diminishing the user experience for nonstrikers that share the same characteristic as the striking group, through a significant reduction in recommender accuracy. *See* Vincent, Hecht & Sen, *supra* note 195, at 1936, 1938, 1940.

199. *See* Dylan Gilbert, *Federal Privacy Legislation Should Not Be Based on Data Ownership*, PUB. KNOWLEDGE (June 27, 2019), https://perma.cc/VA26-DJUN.

200. *Id.*

201. Henry Pearce, *Personality, Property and Other Provocations: Exploring the Conceptual Muddle of Data Protection Rights under EU Law*, 4 EUR. DATA PROT. L. REV. 190, 198 (2018).

202. *Id.* at 194.

203. Gus Rossi & Charlotte Slaiman, *Interoperability = Privacy + Competition*, PUB. KNOWLEDGE (Apr. 26, 2019), https://perma.cc/6GKE-7L9D.

204. Paul De Hert Vagelis Papkonstantinou, Gianclaudio Malgeri, Laurent Beslay & Ignacio Sanchez, *The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services*, COMP. L. & SECURITY REV. 193, 195, 201 (2018).

205. *Id.* at 197.

weaknesses (for example, does it cover only data that has been explicitly "provided," as opposed to data that was observed, inferred, or predicted?) and lingering uncertainties (for instance, if the data is inseparable from other subjects' data, does the requirement of portability preclude such data from ever being erased?), it nevertheless represents a significant stepping stone on the path to default ownership by users of their personal data.[206] Similarly, the California Consumer Privacy Act, which entered into force on January 1, 2020, grants users the right to request information about commercial uses of their data, to request the deletion of that data, and to opt out of the sale of that data without discrimination.[207] Seventeen other states are considering similar legislation.[208] Outside the United States, numerous countries have either strengthened or are developing data protection legislation inspired by the GDPR.[209]

Setting aside, briefly, the ways in which new regulatory and legal frameworks might shift the balance of power between users and platforms, and thus reduce the exploitation of user-generated content, it is important to remember the other fundamental shift taking place on digital platforms—namely, the appropriation of adjudicatory power from courts to corporations. Although the privatization of governance has been a longstanding political agenda,[210] the further delegation of adjudication to proprietary algorithms represents an unprecedented deterioration of our standards of due process. It reflects the magnetism of technochauvinism,[211] and the desperation of institutions that have fallen into disrepair. Increasingly, overwhelmed institutions are turning to algorithms to reduce their overflowing caseloads, with unfortunate results.[212] Lawsuits triggered by flawed algorithmic

206. *Id.* at 199.

207. A.B. 375, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

208. Paul Breitbarth, *The Impact of GDPR One Year On*, NETWORK SECURITY, July 2019, at 11, 13.

209. *Id.*

210. *See, e.g.*, YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); Linda Lobao, Mia Gray, Kevin Cox & Michael Kitson, *The Shrinking State? Understanding the Assault on the Public Sector*, 11 CAMBRIDGE J. REGIONS, ECON. AND SOC'Y 389, 389–90 (2018); Sidney A. Shapiro, *Outsourcing Governmental Regulation*, 53 DUKE L.J. 389, 389 (2003); Aras Coskuntuncel, *Privatization of Governance, Delegated Censorship, and Hegemony in the Digital Era: The Case of Turkey*, 19 JOURNALISM STUD. 690, 692, 700, 704 (2018).

211. BROUSSARD, *supra* note 3, at 7–9, 69, 75.

212. *See generally* Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, U.N. Doc. A/74/493 (Oct. 11, 2019); HANNAH FRY, HELLO WORLD: BEING HUMAN IN THE AGE OF ALGORITHMS (2018); Anna Brown, Alexandra Chouldechova, Emily Putnam-Hornstein, Andrew Tobin & Rhema Vaithianathan, *Toward Algorithmic Accountability in Public Services: A Qualitative Study of Affected Community Perspectives on Algorithmic Decision-Making in Child Welfare Services*, CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS PROCEEDINGS 2019 (CHI 2019) 1 (May 4–9, 2019); Philip Alston & Christiaan Van Veen, *How Britain's Welfare State Has Been Taken over by Shadowy Tech Consultants*, THE GUARDIAN (June 27, 2019), https://perma.cc/2886-XXDC; Steve Gray & Casey Farrington, *Opinion: Undoing the Harm of MiDAS' Fraud Designations*, DETROIT NEWS (Oct. 16, 2018), https://perma.cc/6WFR-9KR6; Luke Henriques-Gomes, *The Automated System Leaving Welfare Recipients Cut off with Nowhere to Turn*, THE GUARDIAN (Oct. 16. 2019), https://perma.cc/YS8Z-DJCV; Daniel Huang, *Automated System Often Unjustly Boosts Veterans' Disability Benefits*, WALL STREET J. (May 11, 2015); Dan Hurley, *Can an Algorithm Tell When Kids Are in Danger?*, N.Y. TIMES (Jan. 2,

determinations of welfare benefits by state agencies demonstrate that our blind faith in technology is misguided.[213] Similar trends can be observed in predictive policing and criminal sentencing.[214] Yet legislatures continue to outsource the adjudication of fundamental rights and interests to corporate algorithms, even as the latter prove to be incapable of the task.

VI. CONCLUSION

As Internet connectivity grows and platform traffic swells, platforms will continue to delegate to algorithms the responsibility of fulfilling their statutory obligations. At the volume of content at which many platforms are currently operating, human review is neither efficient nor cost-effective. Technochauvinism, as Meredith Broussard warned, will continue to dictate platform behavior. In these circumstances, it is important to remain vigilant of the losses and harms caused by algorithmic governance. Content ID alone has resulted in the suppression of free speech, the displacement of fair use jurisprudence, and the exploitation of digital labor. What other harms might be caused by algorithmic appropriation of lawmaking power? What do we lose as a society by displacing our judicial institutions in favor of proprietary algorithms? We must carefully consider not only the discrete and specific ways in which these harms may be redressed, but larger, systemic changes that would fundamentally alter the balance of power between platforms and the users whose rights and interests they now adjudicate. Whether it is a reconceptualization of user data as labor, or personality, or something else entirely, the time has come to interrogate these digital spaces and reclaim our dignity and autonomy.

2018), https://perma.cc/UE62-K2FD; Ed Pilkington, *Digital Dystopia: How Algorithms Punish the Poor*, THE GUARDIAN (Oct. 14, 2019), https://perma.cc/P3M9-XN85.

213. RASHIDA RICHARDSON, JASON M. SCHULTZ & VINCENT M. SOUTHERLAND, AI NOW INST., LITIGATING ALGORITHMS 2019 US REPORT 3, 5–9 (2019).

214. *See, e.g.*, Sascha van Schendel, *The Challenges of Risk Profiling Used by Law Enforcement: Examining the Cases of COMPAS and SyRI*, *in* REGULATING NEW TECHNOLOGIES IN UNCERTAIN TIMES: INFORMATION TECHNOLOGY AND LAW SERIES 32 (2019); Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), https://perma.cc/D9A9-VP4W.