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Privatizing Copyright

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PRIVATIZING COPYRIGHT

*Xiyin Tang**

Much has been written, and much is understood, about how and why digital platforms regulate free expression on the internet. Much less has been written—and even much less is understood—about how and why digital platforms regulate creative expression on the internet—expression that makes use of others' copyrighted content. While § 512 of the Digital Millennium Copyright Act regulates user-generated content incorporating copyrighted works, just as § 230 of the Communications Decency Act regulates other user speech on the internet, it is, in fact, rarely used by the largest internet platforms—Facebook and YouTube. Instead, as this Article details, creative speech on those platforms is governed by a series of highly confidential licensing agreements with large copyright holders.

Yet despite the dominance of private contracting in ordering how millions of pieces of digital content are made and distributed on a daily basis, little is known, and far less has been written, on just what the new rules governing creative expression are. This is, in fact, by design: these license agreements contain strict confidentiality clauses that prohibit public disclosure of any and all of their contents. This Article, however, pieces together clues from publicly available court filings, news reports, and leaked documents. The picture it reveals is a world where the substantive law of copyright is being quietly rewritten. Agreements between digital platforms and rightsholders remove the First Amendment safeguard of fair use, insert a new moral right for works previ-

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ously deemed ineligible for moral rights protection, and use other small provisions to influence and reshape administrative, common, and statutory copyright law. Further still, recent changes or lobbied-for changes to copyright's public law seek to either enshrine the primacy of such private governance or altogether remove copyright rulemaking processes from government oversight, cementing the legitimacy of the new private governors.

Changing copyright's public law to enshrine the primacy of such private governance insulates the new rules of copyright from the democratic process, transforming public participation in, and public oversight of, the laws that shape our daily lives. Creative expression on the internet now finds itself at a curious precipice: there is a seeming glut of low-cost or free content, much of it created directly by and distributed to users—yet increasingly regulated by an opaque network of rules created by a select few private parties. An understanding of the internet's democratizing potential for creativity is incomplete without a concomitant understanding of how the new private rules of copyright may shape, and harm, that creativity.

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INTRODUCTION

In recent years, a growing body of literature has turned public attention to the role that online intermediaries play in regulating free speech. These digital platforms have been described in internet law scholarship as "nonstate regulators" of the public sphere,[1] as private law enforcers acting within the "shadow[s]" of the state,[2] and as "new gatekeepers" controlling free expression.[3] Indeed, the role that large internet platforms like Facebook play in regulating free expression looms so outsized in the literature that it has even, according to some, rendered the old dyadic model of speech regulation—in which the nation-state regulates the speech of those living within its borders—obsolete.[4] Instead, as Professor Jack Balkin argues, "freedom of speech increasingly depends on a third group of players: a privately owned infrastructure of digital communication composed of firms that support and govern the digital public sphere that people use to communicate."[5] This digital infrastructure, Balkin has argued, "is important, if not crucial, to people's practical ability to speak."[6]

Yet there is, as this Article details, a fourth dimension to Professor Balkin's triadic model of speech regulation: copyright owners who control not the infrastructure of the communication but much of its contents. That is, large swaths of user speech on digital platforms are not wholly original to the speaker. Instead, they incorporate bits and pieces of others' copyrighted content: audio or audiovisual content that is owned not by the speaker, and not by the digital platform, but instead by large copyright holders like Disney,

1. Kyle Langvardt, *A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341, 379 (2018).

2. Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 33 (2019).

3. Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467 (2020).

4. Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2011–12 (2018).

5. *Id.* at 2012.

6. *Id.* at 2014–15.

Warner Music, or Sony. How and why platforms moderate this type of user expression differs markedly, and hence requires a very different analytical framework, from traditional content moderation frameworks that have been well explored in the literature.[7]

Understanding this little-explored intersection of copyright and digital speech has important ramifications for the explosion of so-called "platform law" literature.[8] Rudimentary lay beliefs that digital platforms will block any user speech incorporating copyrighted content, for example, have led police to play Disney songs in an attempt to keep citizen-deployed accountability videos off social media.[9] Similarly, even scholars studying digital platforms mostly assume that copyright content moderation occurs under a statutory framework (§ 512 of the Digital Millennium Copyright Act[10]), which allows for the "mass and easy removal of allegedly infringing copyrighted content, ending up with a significant chilling effect to freedom of speech."[11] But neither of these accounts is wholly accurate. User-generated content containing copyrighted works is neither completely blocked nor removed en masse pursuant to a statutory framework. Instead, as this Article details, user speech that incorporates copyrighted content on large digital platforms like Google[12] and Facebook[13] is governed by a series of highly confidential, private licensing agreements entered into between platforms and large copyright holders. Unlike the copyright statute, the use of private contracting gives copyright owners, in concert with platforms, power to create new rules that govern how millions of people share copyrighted content—without any need to resort to the legislative process.

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7. *See, e.g.*, James Grimmelmann, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42, 63–70 (2015) (describing a "taxonomy" of content moderation systems); Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913, 925–28 (2021) (discussing the moderation of political speech online and "offer[ing] a model framework for nonpartisan content moderation"); Matthias C. Kettemann & Wolfgang Schulz, *Setting Rules for 2.7 Billion: A (First) Look into Facebook's Norm-Making System; Results of a Pilot Study* 21–22 (Hans-Bredow-Inst., Works in Progress No. 1, 2020), https://doi.org/10.21241/ssoar.71724 (describing how the rules of content moderation are developed at Facebook with an inside look at the Product Policy Team).

8. Professor Molly Land has defined the term "platform law" as "not just contractual provisions embodied in a platform's terms of service but also community standards, content moderation practices and decisions, and internal guidance provided to employees." Molly K. Land, *Against Privatized Censorship: Proposals for Responsible Delegation*, 60 VA. J. INT'L L. 363, 407 (2020).

9. Julian Mark, *Police Under Review for Blasting Disney Songs in Alleged Attempt to Keep Videos off Social Media*, WASH. POST (Apr. 12, 2022, 7:28 AM), https://www.washingtonpost.com/nation/2022/04/12/santa-ana-police-disney-music [perma.cc/6MH2-YRAW].

10. Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512.

11. *See* Orit Fischman-Afori, *Online Rulers as Hybrid Bodies: The Case of Infringing Content Monitoring*, 23 U. PA. J. CONST. L. 351, 367 (2021).

12. *See infra* Section II.A.1.

13. *See infra* Section II.A.2. References to Facebook herein refer to the recently rebranded "Meta." *Introducing Meta: A Social Technology Company*, META (Oct. 28, 2021), https://about.fb.com/news/2021/10/facebook-company-is-now-meta [perma.cc/5MBF-F98Y].

This system of privatized copyright—in which large copyright holders leverage the power of platforms to enforce a preferred set of copyright policies that are passed down to the platform's users through expansive platform terms of service[14]—presents a new and different example of the phenomenon of platforms acting as quasi-state actors.[15] But the new private copyright has ramifications beyond the content moderation literature as well. For copyright scholars, insights into the new private copyright suggest that substantive, public copyright law[16]—such as the oft-repeated mantra that the United States does not recognize moral rights outside of the fine arts[17] or that fair use is the most important First Amendment safeguard in copyright law[18]—matters little in the online sphere. By piecing together clues from publicly available news reporting and digital platforms' own internal and external documents, including from one particularly pertinent leaked agreement that was entered into between Facebook and copyright holders, this Article instead reveals a world where the substantive law of copyright is being quietly rewritten and reshaped. Agreements between digital platforms and rightsholders remove the First Amendment safeguard of fair use, insert a new moral right for works previously deemed ineligible for moral rights protection, and use other small provisions to influence and reshape administrative, common, and statutory copyright law.

And finally, for contract law scholars and those who have long studied how private parties may contract around the substantive law,[19] the new private copyright poses a fascinating question: how should we think about private contracts that govern the activities and behaviors of millions of nonparties to

14. This is not dissimilar from what internet law scholars have pointed out as governments using platform terms of service for their own purposes, such as government censorship. *See, e.g.*, Land, *supra* note 8, at 379.

15. *See, e.g.*, Bloch-Wehba, *supra* note 2, at 29 (noting that digital platforms are increasingly being leveraged by local governments to act as private regulators or bureaucracies); Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1269 (2017) (arguing that digital intermediaries regulate "by influencing behavior in ways similar to public actors").

16. While a traditional conception of copyright law may envision it as a form of "private law," this Article uses the term "public law" both in the sense that statutory, common, and administrative copyright law is "public" because it is visible to the public writ large and subject to public oversight, but also, more importantly, because this Article conceives of copyright law in its modern conception as a form of public law, with public-facing goals. *See* Shyamkrishna Balganesh, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101, 1102 (2020) (arguing that while copyright was originally conceived of as a form of private law, copyright today is largely understood as a form of public law).

17. *See* Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 269 (2009) ("[W]hy do we grant moral rights only to the rarified category of 'visual art' and not to other objects?").

18. *See* Art of Living Found. v. Does 1–10, No. 10-CV-05022, 2011 WL 5444622, at *6 (N.D. Cal. Nov. 9, 2011).

19. Much of this work in the copyright space, in particular, has centered on the legitimacy of end-user agreements—so-called "clickwrap" agreements that users agree to upon purchasing a copyrighted work such as computer software. *See, e.g.*, Guy A. Rub, *Against Copyright Customization*, 107 IOWA L. REV. 677 (2022).

the original agreement[20]—nonparties that are forbidden, by nature of the confidentiality clauses, from reading its terms? The very scale and reach of digital platforms as fundamentally public fora challenge traditional justifications for private ordering as "generally affect[ing] only their parties."[21] As Judge Easterbrook put it in an early case vindicating the use of "shrinkwrap" agreements for computer software: "[S]trangers may do as they please, so contracts do not create 'exclusive rights.' "[22] Instead, the rights that copyright holders have obtained through contracts with powerful digital intermediaries are beginning to look precisely like the exclusive rights created by the Copyright Act—applying to millions of strangers who have never seen, or even know, that such contracts exist.[23]

This Article proceeds in four parts. Part I outlines the statutory framework that governs the distribution of user-generated content on the internet. Commonly referred to as the "safe harbor," § 512 of the Digital Millennium Copyright Act establishes what's known as a notice-and-takedown system, in which copyright holders can request the removal of user content upon a good faith belief that such use is not permitted by statutory copyright law.[24] The content moderation scholarship that has touched on copyright issues has focused overwhelmingly on § 512, with some describing it as a "federally mandated procedural system" that puts platforms in the role of copyright adjudicators.[25]

Yet even as legal scholarship has continued to focus on § 512 as exemplary of copyright content moderation on the internet, the largest digital platforms—Google and Facebook—have been quietly moving away from reliance on the statute. Instead, as Part II details, copyright content moderation on those platforms is governed by a series of confidential private contracts that expressly dictate what users can and cannot do with copyrighted material. Part II details licensing agreement terms that create new substantive rights not present in the Copyright Act or that directly contravene existing statutory rights, as well as other privately negotiated terms that might even come to influence and reshape the common and administrative law of copyright.

20. Of course, platforms pass down the contracts' terms to their users through expansive terms of service, which are worded generally and broadly. *See, e.g.*, *Music Guidelines*, FACEBOOK, https://www.facebook.com/legal/music_guidelines [perma.cc/6HXS-TBA7].

21. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996). In *ProCD*, the Seventh Circuit held that end-user agreements—or "shrinkwrap" agreements—on purchases of copyrighted software are enforceable. *Id.* ("Contracts . . . generally affect only their parties; strangers may do as they please, so contracts do not create 'exclusive rights.' Someone who found a copy of [the software] on the street would not be affected by the shrinkwrap license . . . .").

22. *Id.*

23. *Compare* 17 U.S.C. § 106 (creating a host of exclusive rights for copyright holders, including those of reproduction, adaptation, and publication), *with, e.g.*, *Music Guidelines*, *supra* note 20 (indicating that user posts on Facebook may be reviewed and restricted by copyright holders).

24. *See infra* Part I.

25. Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829, 860 (2021).

While calls to reform platform content moderation practices outside of copyright have focused on more transparency and more restrictions on private power,[26] copyright law, on the other hand, has moved in much the opposite direction. As Part III discusses, the passage in Europe of Article 17 *requires* technology platforms to enter into private agreements and implement privately developed monitoring and filtering systems that automatically scan and remove certain user-generated content. While Article 17 may or may not serve as a model for similar changes to U.S. copyright law, the very global nature of internet platforms means European laws invariably become global laws as multinational companies voluntarily extend E.U. rules to govern their global operations.[27] Part III concludes with discussions of two other recent changes or lobbied-for changes in U.S. copyright law: one that removes all mentions of "public policy" in setting the compulsory licensing rates paid by digital streaming companies and another that would remove licensing negotiations between large music publishers and technology platforms from antitrust oversight by the Department of Justice, which had been overseeing such licensing activity since the 1940s.

Part IV concludes with some proposals for how to address the two biggest problems this Article has identified with regard to the privatized copyright regime: (1) a lack of transparency and (2) the supplanting of substantive law with private rules made without any input from those the rules govern. Part IV first argues that existing calls for reform, accountability, and greater transparency in content moderation practices are incomplete unless they sweep in copyright moderation practices as well. It then considers legislation that might make certain statutory rules of copyright, such as fair use, immutable rules that cannot be contracted around, similar to those enacted in Europe. And finally, it argues that nonparties to platform copyright contracts—users—can reinsert themselves in the process by bringing litigation to challenge the enforceability of certain contractual provisions. A celebration of the digital renaissance's[28] abundance of creative content is incomplete without a concomitant understanding of how the new private rules of copyright are shaping, and may come to harm, that creativity.

I. THE § 512 STATUTORY SCHEME: PLATFORMS AS PRIVATE COURTHOUSES

To understand how and why the largest internet platforms began entering into private agreements with copyright holders, it is important first to understand the statutory scheme that preceded it. Indeed, as discussed further below, certain quirks and inefficiencies in the statutory scheme were what led, in part, to platforms' decisions to enter into private contracts and cease reliance on the statute entirely.

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26. *See infra* Section IV.A.

27. *See infra* Section III.A; *see also* ANU BRADFORD, THE BRUSSELS EFFECT (2020) (studying how EU laws invariably become global laws as multinational companies voluntarily extend EU rules to govern their global operations).

28. *See generally* JOEL WALDFOGEL, DIGITAL RENAISSANCE (2018).

Whereas much of online expression is regulated (or insulated, as the case may be) by § 230 of the Communications Decency Act,[29] user expression that incorporates copyrighted content falls not under § 230's purview but instead under the Digital Millennium Copyright Act (DMCA)'s safe harbor. Codified at 17 U.S.C. § 512, the copyright safe harbor is much like § 230 in that it insulates platforms like YouTube from copyright liability based on infringing content uploaded by its users, so long as certain conditions are met.[30] That is, § 512 sets forth a detailed "notice and takedown" procedure for resolving copyright owner claims of infringement based on user-uploaded content.[31] Upon discovering infringing content on an online platform such as YouTube or Facebook, the copyright owner must first send a takedown notice to the platform, stating that the "use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law."[32] After receiving such a notice, the platform must expeditiously remove the infringing content in order to avoid exposing itself to infringement liability.[33]

Takedowns are, in theory, subject to dispute by the user whose video was removed—an almost mini-adversarial, extra-judicial proceeding on the merits of the infringement claim.[34] Users can, for example, argue that the alleged infringing video in fact makes "fair use" of the copyrighted work. Perhaps the most well-known defense in copyright law,[35] fair use has been described as a built-in First Amendment safeguard,[36] allowing for uses of copyrighted works for purposes such as "criticism, comment, news reporting, teaching . . . , scholarship, or research."[37] (When the *New Yorker* quotes from Sally Rooney's *Normal People* in a profile on the author's uncanny knack for documenting contemporary dialogue,[38] for example, this use would otherwise constitute copyright infringement were it not for the statutory right of fair use.)[39] Courts

29. *See* 47 U.S.C. § 230(c)(2).

30. *Compare* 17 U.S.C. § 512(c) (limiting liability for service providers that store online content so long as certain conditions are met), *with* 47 U.S.C. § 230(c)(2) (limiting liability for providers and users that act in good faith to restrict access to online material).

31. 17 U.S.C. § 512(c).

32. *Id.* § 512(c)(3)(A)(v).

33. *Id.* § 512(b)(2)(E).

34. *See id.* § 512(g).

35. *See* Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 686 (2015).

36. *E.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003).

37. 17 U.S.C. § 107.

38. Lauren Collins, *Sally Rooney Gets in Your Head*, NEW YORKER (Dec. 31, 2018), https://www.newyorker.com/magazine/2019/01/07/sally-rooney-gets-in-your-head [perma.cc/WC5Z-2U43] (discussing SALLY ROONEY, NORMAL PEOPLE (2018)).

39. There has been much debate on whether fair use is a defense or an affirmative defense, a right or merely a privilege. *See generally* Loren, *supra* note 35. I call it the "right of fair use" because the copyright statute elsewhere refers to the "right of fair use." 17 U.S.C. § 108(f)(4) ("Nothing in this section . . . in any way affects the *right of fair use* as provided by section 107 . . . ." (emphasis added)).

have held that § 512 requires a copyright holder to consider fair use prior to sending a takedown notification, because the statute requires all takedown notifications to include a "statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, *or the law*."[40] Thus, a "copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary" is subject to liability under § 512.[41]

Nonetheless, in practice, rightsholders seldom consider fair use in demanding takedowns—and platforms likewise largely acquiesce to the thousands of takedown notices that they receive on a daily basis.[42] And, despite the availability of the counter-notice procedure, a study conducted in 2016 by researchers at Berkeley Law School and Columbia University found that users, often legally unsophisticated, rarely took advantage of the provision.[43]

Section 512 is by far the most well-understood—and, overwhelmingly, disliked—mechanism of copyright content moderation. Indeed, the platform law scholarship that has touched on copyright issues has focused almost exclusively on § 512.[44] Much of this scholarship uses § 512 as an example of the privatization of copyright law, as it delegates substantive infringement disputes that would normally be decided by a judge to digital platforms, who are incentivized to side with the copyright holders rather than the users for fear of exposing themselves to infringement liability.[45] Professor Rory Van Loo, for example, calls § 512 a "federally mandated procedural system" that puts platforms in the role of "copyright adjudicators."[46] Van Loo argues that § 512 treats platforms as private courthouses, rendering default judgments against defendant users.[47]

Other scholars, in line with the analogy to private judiciaries, argue that the adversarial process of notice-and-takedown suffers from an accountability deficit. Professors Maayan Perel and Niva Elkin-Koren write that "[r]emoving

40. 17 U.S.C. § 512(c)(3)(A)(v) (emphasis added).

41. Lenz v. Universal Music Corp., 815 F.3d 1145, 1154 (9th Cir. 2016).

42. JENNIFER M. URBAN, JOE KARAGANIS & BRIANNA L. SCHOFIELD, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 35 (2017), https://osf.io/preprints/socarxiv/59m86 [perma.cc/D7L6-C59J]. Rightsholders largely automated the notice and takedown process with the use of bots. *Id.* at 31–34; *see also* Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUT. & HIGH TECH. L.J. 621, 673 n.193 (2006) ("Such errors [in the notice process] are likely when copyright holders attempt to automate the process of locating copyright infringement, by sending notices in bulk in reliance on automatic searches of keywords or filenames.").

43. URBAN ET AL., *supra* note 42, at 44–45.

44. *See, e.g.*, Van Loo, *supra* note 25; Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 477 (2016); Fischman-Afori, *supra* note 11, at 367.

45. *See* Perel & Elkin-Koren, *supra* note 44, at 490–91.

46. Van Loo, *supra* note 25, at 858–60.

47. *Id.*

material that may qualify as fair use before notifying the alleged infringer and before giving her the opportunity to contest the removal in a hearing may result in 'an extra-judicial temporary restraining order, based solely on the copyright holder's allegation of copyright infringement.' "[48] They argue that § 512 fails to promote accountability in online copyright enforcement because the enormous number of takedowns on a daily basis renders it "impossible for the public as a whole to promptly identify and contest inappropriate content removals."[49]

If, by 2002, the notice-and-takedown process had largely been automated to meet the challenge of the sharing of millions of works incorporating copyrighted content on a daily basis, then it may seem only natural that private parties would soon begin evolving away from what many have argued was a broken statutory process to begin with.[50] Indeed, it's not just scholars who dislike § 512—large digital platforms and copyright holders find little to like about the statute as well.

For copyright holders, because the statute puts the onus on the copyright holder, rather than the digital platform, to monitor for infringement, early user-generated sites like YouTube became a haven for infringing content.[51] Copyright holders often likened the process of issuing takedown notices for copyright infringement to a game of whack-a-mole: as soon as one infringing video was removed, ten new ones would pop up in its place.[52] By the time a consortium of copyright holders filed a putative class action lawsuit against YouTube in 2007, it was estimated that "75–80% of all YouTube streams contained copyright material."[53]

For digital platforms, the litigation that ensued over § 512 was certainly one reason they may have chosen to cease reliance on the statute and move into a world of private contracting instead. About a year before the class action litigation was officially filed against YouTube, the digital platform had already

48. Perel & Elkin-Koren, *supra* note 44, at 501 (quoting Urban & Quilter, *supra* note 42, at 639).

49. *Id.* at 502.

50. *See, e.g.*, Brief of Amici in Support of Verizon's Opposition to RIAA's Motion to Enforce at 7, *In re* Verizon Internet Servs., Inc., 240 F. Supp. 2d 24 (D.D.C. 2003) (No. CIV.A.02-MS-00323) ("These massive copyright-enforcement programs have unleashed automated software ('bots') that speed across the information superhighway, reviewing all available filenames and related information.").

51. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 28–29 (2d Cir. 2012); Ben Ratliff, *A New Trove of Music Video in the Web's Wild World*, N.Y. TIMES (Feb. 3, 2006), https://www.nytimes.com/2006/02/03/arts/music/a-new-trove-of-music-video-in-the-webs-wild-world.html [perma.cc/5WWN-SVHY]; *see also* JEAN BURGESS & JOSHUA GREEN, YOUTUBE: ONLINE VIDEO AND PARTICIPATORY CULTURE (2d ed. 2018).

52. Amir Hassanabadi, Note, Viacom v. YouTube—*All Eyes Blind: The Limits of the DMCA in a Web 2.0 World*, 26 BERKELEY TECH. L.J. 405, 406 (2011) ("Echoing the concerns of many copyright owners, Viacom refused to continue playing a game of 'whac-a-mole'—using DMCA takedown notices to remove content only to see it pop up somewhere else.").

53. *Viacom*, 676 F.3d at 33.

begun exploring the option of moving away from reliance on § 512.[54] Section 512, after all, creates a statutory exemption from infringement liability for digital platforms. But litigation to determine the exact contours of that exemption is expensive and time-consuming. A platform might prefer the certainty that comes with private contracting and a contractual release from infringement liability, instead. As discussed *infra* in Part II, the private agreements that arose in the wake of § 512 replaced a statutory public law scheme—with all its attendant litigation and uncertainty—with a privately determined set of rights and remedies that applied to content generated by users on the platforms.

Replacing uncertainty from litigation with certainty from contractually determined rights is likely one of the two main reasons digital platforms moved away from reliance on public law and into privately negotiated agreements. For example, Professor Matthew Sag posits that YouTube chose private contracting over reliance on the statutory safe harbor regime due to uncertainty generated by expensive and time-intensive rightsholder litigation over the contours of § 512's application.[55] Other scholars have likewise pointed to litigation-related uncertainty as the main animating factor behind YouTube's pivot from reliance on statutory protections to negotiated licenses.[56]

Yet others have suggested that, in YouTube's case, it arose specifically out of Google's desire to monetize YouTube videos, as described above—that is, to sell targeted advertising to viewers based on their watch patterns.[57] Because the DMCA specifically requires that the technology platform have no knowledge of the infringement in order for the safe harbor to apply,[58] targeted advertising, which would require the platform to track user activity to better sell ads tailored to their behavior, would substantially weaken any argument that the platform lacked actual knowledge of infringing user activity.

Both of the above explanations converge under a common theme: while initially seemingly counterintuitive, technology platforms and copyright holders will often choose to enter into agreements that are more restrictive and more expensive than the statutory requirements precisely because they

54. *See History of Content Management*, YOUTUBE5YEAR, https://www.sites.google.com/a/pressatgoogle.com/youtube5year/home/history-of-copyright [perma.cc/S4H2-PHQ8].

55. Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 541 (2017) ("Most obviously, YouTube's development of Content ID appears to have been spurred by the Viacom litigation that began almost as soon as Google acquired the video-sharing company in 2006.").

56. *See, e.g.*, Kristelia García, *Super-Statutory Contracting*, 95 WASH. L. REV. 1783, 1820 (2020) (suggesting that YouTube entered into licenses with content holders rather than relying on the safe harbor "in order to forego responding to a never-ending and costly barrage of notices while also avoiding unpredictable litigation").

57. *See, e.g.*, Sag, *supra* note 55, at 541.

58. 17 U.S.C. § 512(c)(1)(A).

ultimately better serve both parties' business objectives—many of them unapparent or highly technical to all but the most seasoned industry experts.[59] And at bottom, one explanation needs little specialized knowledge to ring true: dealmaking is better politics than adversarial litigation. As Professor Kristelia García puts it, a "copacetic working relationship can lead to content exclusives, more listeners, and more revenue for both parties."[60] "Artist-friendly" is good PR.

If scholars liken the notice-and-takedown procedure of § 512 to one-sided adjudication, then the privatized copyright described in the following Part might be more akin to private legislation. Internet law scholars largely define the term "platform law" to encompass the privately developed set of rules—such as terms of service, community standards, content moderation practices and decisions, and internal guidance provided to employees—that digital intermediaries have developed to regulate user activity on their platforms.[61] Because of the sheer scale of the largest digital platforms, their massive number of users, and the breadth of user activity that takes place on them daily, scholars have likened companies like Meta and Google to sovereign states—each developing unique "laws" to govern its myriad users.[62] If § 512 in theory required copyright holders to consider whether a user's video constituted fair use—but few did in practice—then perhaps, when it came time to supplant the statute with private agreements, fair use should be written out of the equation completely. As discussed below, that is precisely what copyright holders, working in concert with digital platforms, did.

II. THE NEW PRIVATE COPYRIGHT LAW: PLATFORMS AS LEGISLATORS

While a number of scholars have pointed out the adjudicatory role of platforms under § 512, the most powerful digital platforms today do not rely on the statute.[63] Instead, as this Part discusses, companies like Meta and Google have chosen to enter into a series of private, highly confidential agreements

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59. *See* García, *supra* note 56, at 1787, 1809 (discussing a deal struck between Taylor Swift's record label, Big Machine, and radio giant Clear Channel, noting that the private deal contained several business advantages over the statutory regime that better comported with both parties' business models, including moving from a per-play model—in which Clear Channel pays copyright holders each time it plays a song—to a revenue share model).

60. *Id.*

61. *See* David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 1, U.N. Doc. A/HRC/38/35 (Apr. 6, 2018).

62. *See* Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 199 (2017) (analyzing how platforms' "role in the international legal order increasingly resembles that of sovereign states").

63. *See, e.g.*, Perel & Elkin-Koren, *supra* note 44, at 476–77, 481 (describing § 512's notice-and-takedown process as an example of what they call "algorithmic law enforcement," which "effectively converges law enforcement and adjudication power[]"); Van Loo, *supra* note 25, at 860 (using the DMCA as an example of a federally mandated dispute resolution system).

with copyright holders that determine how users can share content incorporating copyrighted works—what this Article refers to as a new private copyright law.

A. *The Rise of Private Contracting*

This Section details the development and rise of private contracting to moderate user-generated content containing copyrighted works—contracts that supplant the statutory § 512 practice. These private agreements that digital platforms and powerful content holders enter into create the web of rules that govern how nonparties to the agreements—the platforms' millions of users—share, use, and distribute creative expression containing copyrighted content.

1. YouTube's Content ID

In 2006, YouTube began exploring the option of moving away from reliance on § 512 by negotiating license agreements with several large content owners, including Time Warner, Disney, and EMI.[64] A year later, Content ID, "a proprietary, voluntary agreement between YouTube and a select group of content owners" that would make it such that YouTube no longer needed to rely on § 512, "was up and running."[65]

Under YouTube's licensing agreements, copyright holders first submit to YouTube large datasets of audio-only or audiovisual content owned by them—called "reference files"—and accompanying metadata.[66] Content ID's database has now expanded to include more than eighty million files of audio and visual content.[67] When a YouTube user uploads a video, the video is first scanned against Content ID's digital database of reference files to determine if there is a match, and, if so, it applies one of three actions to it. The rightsholder specifies the action up front: (1) allow the video to remain up and for YouTube to run ads against it in exchange for splitting the ad revenue with the copyright holder (a practice known as "monetization"); (2) allow the video to remain up and track how users are engaging with the content; or (3) block it from YouTube altogether.[68] None of these three options is a right allotted to copyright holders under the DMCA,[69] which only provides copyright holders

64. Yafit Lev-Aretz, *Second Level Agreements*, 45 AKRON L. REV. 137, 155–61 (2012).

65. García, *supra* note 56, at 1801.

66. GOOGLE, HOW GOOGLE FIGHTS PIRACY 25 (2018), https://blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf [perma.cc/3M5S-W3HV].

67. *Id.*

68. *Id.*; *How Content ID Works*, YOUTUBE HELP, https://support.google.com/youtube/answer/2797370?hl=en [perma.cc/8QE5-TN22].

69. *See* García, *supra* note 56, at 1801 (noting that the blocking and monetization rights afforded to copyright holders by Content ID are not contemplated or imposed by the governing statute, § 512).

the ability to request the takedown of infringing videos.[70] Specifically, with regard to the third option available under Content ID, under the DMCA, a user firsts upload a video incorporating infringing content onto the site—only then would a rightsholder be able to request that it be taken down.[71] Meanwhile, before YouTube processes the takedown notice, the content remains up for anyone to view. Content ID turns the DMCA on its head by allowing a rightsholder to block the video before it's posted at all—what others have argued constitutes a potential private prior restraint of speech.[72]

Nonetheless, publicly available statistics from YouTube's Content ID program show that the vast majority of infringing content on YouTube is monetized rather than blocked.[73] Yet YouTube's monetization program is the exception, not the norm. Even a company as well resourced as Meta, while having made some strides towards monetization, is nonetheless unable to monetize large swaths of user-generated content, as discussed in more depth below.

2. Meta's Rights Manager

While YouTube's process of entering agreements with content holders and its development of Content ID is by far the most well-known and oft-discussed example of a technology platform opting out of a statutory copyright regime in favor of private contracting,[74] it is far from the only one. Unsurprisingly, in the two decades following the enactment of the DMCA, more and more platforms hosting user-generated content shifted to some version of private rulemaking and dispute resolution rather than following the letter

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70. 17 U.S.C. § 512(c).

71. *See id.*

72. *See* Sag, *supra* note 55, at 541, 556 ("Whereas the DMCA made prior restraint possible, DMCA-plus arrangements could serve to make it indisputable."). The DMCA authorizes courts to grant injunctive relief pursuant to 17 U.S.C. § 512(j), which, if granted on a preliminary basis, may also constitute a prior restraint on speech. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (arguing that speech that incorporates copyrighted content should not be enjoined until a final court adjudication on the merits and that injunctive relief prior to final adjudication often constitutes unconstitutional prior restraint on speech).

73. Perel & Elkin-Koren, *supra* note 44, at 512; GOOGLE, *supra* note 66, at 14. *But see* Sag, *supra* note 55, at 542 (noting that most rightsholders implement a mix of blocking and monetization on YouTube).

74. *See generally* Ira S. Nathenson, *Civil Procedures for a World of Shared and User-Generated Content*, 48 U. LOUISVILLE L. REV. 911 (2010); Diane Leenheer Zimmerman, *Copyright and Social Media: A Tale of Legislative Abdication*, 35 PACE L. REV. 260 (2014); Benjamin Boroughf, *The Next Great YouTube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation*, 25 ALB. L.J. SCI. & TECH. 95 (2015); Sag, *supra* note 55; 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); Mary LaFrance, *An Ocean Apart: Transatlantic Approaches to Copyright Infringement by Internet Intermediaries*, 47 AIPLA Q.J. 267 (2019).

of the statute. One of the most notable examples is Meta (formerly Facebook)—which owns, among others, Facebook and Instagram.[75] Like YouTube, beginning in the late 2010s, Facebook began the process of moving away from the statutory § 512 scheme by choosing instead to enter into a slate of deals with major record labels, music publishers, and performing rights organizations.[76] In conjunction with these deals, Meta developed its own, similar version of Content ID, called Rights Manager.[77]

Like YouTube's Content ID, Rights Manager is an algorithmic copyright management tool that scans content uploaded to Facebook and Instagram and then runs it against a database of copyrighted content.[78] Using Rights Manager, publishers can "[e]asily upload and maintain a reference library of the video content they want to monitor and protect;" "[c]reate rules about how individual videos may be used;" "[i]dentify new matches against protected content;" "Whitelist specific Pages or profiles to allow them to use their copyrighted content;" and "[p]rotect their reference library at scale with the . . . Rights Manager API."[79] In short, content owners can choose to block content, monetize content, have video content automatically credited to the owner, or report videos that the Rights Manager algorithm has flagged as potentially infringing. In September 2020, Rights Manager was expanded to include not just audio content but images as well, allowing for the digital fingerprinting of user-uploaded image content at scale.[80]

Unlike YouTube's monetization success story,[81] monetization on Meta's applications has long been problematic. To begin, consider how different

75. *See Introducing Meta: A Technology Company*, *supra* note 13.

76. *See* Chris Welch, *Facebook Now Has Music Licensing Deals with All Three Major Labels*, THE VERGE (Mar. 9, 2018, 11:46 AM), https://www.theverge.com/2018/3/9/17100454/facebook-warner-music-deal-songs-user-videos-instagram [perma.cc/FN4E-AFMP].

77. *See generally Copyright Management Tools*, META BUS. HELP CTR., https://www.facebook.com/business/help/932705380468613?id=237023724106807 [perma.cc/LLK3-VLLM]. Before introducing Rights Manager, Facebook announced in 2015 that it had partnered with a third-party digital fingerprinting, Content ID–like technology called Audible Magic to detect user uploads of copyrighted videos. Mike Masnick, *Facebook Announces Its ContentID Attempt . . . Using Audible Magic*, TECHDIRT (Sept. 1, 2015, 3:34 PM), https://www.techdirt.com/articles/20150827/16421932087/facebookannounces-contentid-attempt-using-audible-magic.shtml [perma.cc/ZT6S-PBML]. According to news outlets, Facebook had been using Audible Magic even prior to the September 2015 announcement, and critics characterized the move as a "censor first" approach that would be available to only few creators and would be inferior to an in-house solution. *Id.*

78. Analisa Tamayo Keef & Lior Ben-Kereth, *Introducing Rights Manager*, META: META FOR MEDIA (Apr. 12, 2016), https://www.facebook.com/formedia/blog/introducing-rights-manager [perma.cc/RD8R-EJP5].

79. *Id.*

80. *See* Dave Axelgard, *Helping Creators and Publishers Manage Their Intellectual Property*, META (Sept. 21, 2020), https://about.fb.com/news/2020/09/helping-creators-and-publishers-manage-their-intellectual-property [perma.cc/WBT6-W5UC].

81. *See supra* note 73 and accompanying text.

YouTube is as a product compared to Facebook or Instagram. YouTube videos appear on a discrete page and are usually at least a few minutes long, allowing advertisers to place ads either at the beginning or in the middle of these longer-format videos.[82] On the other hand, the vast majority of videos posted on Instagram are short—often under a minute[83]—appearing in quick succession as a user views them not on a discrete page but rather as part of a continuous social feed. As one industry commentator puts it: "[M]onetizing short-form content remains problematic, because you can't attribute pre or mid-roll ads to specific clips, like you can with longer posts."[84] Currently, according to Meta's website, only videos that contain so-called "in-stream ads" (ads that play either before or during a video) are eligible for monetization.[85] And because the company only places in-stream ads in videos three minutes or longer, and, on the Facebook platform, only from business pages, this excludes the vast majority of videos posted on the platform. The majority of videos posted on Instagram fall under the one-minute mark, and no video posted on what one would think of as a traditional Facebook page—a user profile—is eligible for monetization.[86] And indeed, Facebook's 2018 agreement explicitly disclaims any monetization ability, providing payment not based on usage but rather on a single "non-recoupable lump sum" fee—a one-time payment to be made to rightsholders up front.[87]

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82. *See Explaining the 5 Different Types of YouTube Ads*, SNAPSHOT, https://snapshotinteractive.com/explaining-the-5-different-types-of-youtube-ads [perma.cc/2GJP-DETV].

83. Jennifer Still, '*How Long Can Instagram Videos Be?*': *A Breakdown of the Length Requirements for Every Type of Instagram Video*, INSIDER (July 25, 2019, 1:01 PM), https://www.businessinsider.com/how-long-can-instagram-videos-be [perma.cc/J7MQ-V23Q] (noting that videos appearing as Instagram posts must be under sixty seconds, and videos appearing as stories must be fifteen seconds or less).

84. Andrew Hutchinson, *Meta Launches Facebook Reels to All Users, Expanding Its Short-Form Video Push*, SOC. MEDIA TODAY (Feb. 22, 2022), https://www.socialmediatoday.com/news/meta-launches-facebook-reels-to-all-users-expanding-its-short-form-video-p/619175 [perma.cc/5JS2-TNVV].

85. *See Content Eligible for Collect Ad Earnings Match Action*, META BUS. HELP CTR., https://www.facebook.com/business/help/985332875266274?id=237023724106807 [perma.cc/V6WQ-TSXN] ("Not all matching videos are eligible for the Collect Ad Earnings match action. Matching videos must be: [a]t least 1 minute in length, and . . . [i]f published on Facebook, published from a Facebook Page enabled for in-stream ads and not a profile, or . . . [i]f published on Instagram, published from an account enabled for monetization with In-Stream Video Ads."). A Facebook Page is, unlike a traditional Facebook user profile, for "artists, public figures, businesses, [and] brands" to "connect with their fans or customers." *Compare Profiles, Pages and Groups on Facebook*, FACEBOOK: HELP CTR., https://www.facebook.com/help/337881706729661 [perma.cc/8AVW-SPF3]. Further, as Section II.C.1.a discusses *infra*, such commercial pages are excluded from the scope of the blanket license.

86. Anthony Ha, *Facebook Tests Topic Targeting for In-Stream Video Ads*, TECHCRUNCH (Apr. 22, 2021, 9:00 AM), https://techcrunch.com/2021/04/22/facebook-video-ad-growth-targeting [perma.cc/9GKL-GMAN] (discussing Facebook's vice president of global business stating that "the company only places in-stream ads in videos that are three minutes or longer, with the ad only playing after a viewer has watched at least 45 seconds (or more, depending on the video)").

87. FACEBOOK–PUBLISHER LICENSE AGREEMENT 3 (2018), https://www.digitalmusicnews.com/wp-content/uploads/2018/01/HFA-Facebook.pdf [perma.cc/XS29-CW4L]. That the fee is

3. Other Platforms Follow Suit

While well-resourced technology giants like Meta and YouTube are able to build their own copyright management systems, other less-resourced internet platforms today have also chosen private contracting and private content management tools over reliance on the DMCA.[88] As just one example, SoundCloud—which, like early YouTube, once served as an anything-goes mecca for remixes and mash-ups, and as a platform for artists to bypass the lengthy and prohibitive process of obtaining rights for unauthorized samples or covers of other copyrighted works[89]—began publicly (and proudly) striking deals with music labels and publishers.[90] As one news outlet lamented, the move signaled the end of "the SoundCloud [we] once knew—an audio playground filled with unexpected surprises and treasures"—to a conventional streaming service with an established, approved catalog of songs.[91] Other platforms that have struggled with user and rightsholder complaints over repeated takedowns and alleged infringement, respectively, under the DMCA have also begun to explore private licensing avenues, touting such deals as "productive partnerships" with the music industry.[92]

B. *How the New Private Copyright Is Rewriting Substantive Law*

How does copyright's new private law—entered into behind closed doors between large, sophisticated business entities that are each driven by their own hidden motivations and agendas—differ markedly from statutory copyright? Of course, it is impossible to uncover, let alone detail, every single one of the divergences from publicly available law, as each of the agreements is subject

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paid up front also presents another issue: what portion of the fee, if any, actually gets paid to musicians, instead of kept by the music publisher. As discussed *infra* in Part III, the agreement provides for no procedure under which individual musicians will be paid.

88. *See* Adriana Saldaña, *Audible Magic the First to Surpass 100 Million Music Tracks*, BUSINESS WIRE (Feb. 23, 2021, 5:00 AM), https://www.businesswire.com/news/home/20210223005327/en/Audible-Magic-the-First-to-Surpass-100-Million-Music-Tracks [perma.cc/TJ86-DLHK] ("[Audible Magic] works with a wide range of platforms and rights holders, including Facebook, Twitch, SoundCloud, Dailymotion, ShareChat, Vimeo, NBC Universal, Universal Music Group, Sony Music Group, Warner Music Group, The Orchard, CDBaby, and DistroKid.").

89. *See* Lauretta Charlton, *Bowing to Pressure from Labels, SoundCloud Makes Dramatic Changes*, VULTURE (June 5, 2015), https://www.vulture.com/2015/06/soundcloud-trusted-music-resource-is-changing.html [perma.cc/CAG6-WMZS] (noting that historians often cited SoundCloud as the most obvious choice to find archives of obscure music, including everything from "random Italian disco edits" to Drake's remix of Fetty Wap's "My Way").

90. *See id.*

91. *Id.*

92. Jay Peters, *Twitch Is Finally Making Some Friends in the Music Industry*, THE VERGE (Sept. 21, 2021, 4:04 PM), https://www.theverge.com/2021/9/21/22686404/twitch-national-music-publishers-association-nmpa-agreement-music [perma.cc/U8WW-KR9B].

to strict confidentiality clauses. But one particularly pertinent leaked agreement between Facebook and rightsholders is illustrative of the new private copyright—and just how expansive such confidentiality clauses can be.[93]

The agreement, published by the industry website Digital Music News under the headline *Here's the Entire Facebook Contract for Music Publishers & Songwriters*, was a standard form Facebook contract that it had, in this case, entered into with independent music publishers—sometimes called "indies."[94] Despite the fact that the "CONFIDENTIAL" stamp clearly appears on every single page of the agreement, and notwithstanding the broad confidentiality provision on page 4, the agreement was likely leaked because of the sheer number of licensors at issue.[95]

The confidentiality clause, on page 4 of the agreement, provides:

> Each Party will keep the terms of this Agreement and the data provided or generated pursuant to this Agreement (including any reports provided pursuant to this Agreement) confidential . . . .
>
> . . .
>
> Without prejudice to the generality of the foregoing, Publisher, without the prior written approval of Facebook, may not publicize, in a press release or otherwise, the existence or terms of this Agreement or any other aspect of the relationship between the Parties.[96]

That last excerpted sentence should give us pause. That is, not only are all of the agreement's terms *and any and all data generated pursuant to it* confidential—such as, for example, any information about which, how many, or why videos were blocked or muted for rights violations—*so too, is the mere fact that the agreement, or any contracting relationship between Facebook and rightsholders, exists at all.*

And, as this Section details, these highly confidential agreements are quietly rewriting public copyright law.

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93. While it is impossible to say with certainty whether this one agreement mirrors Facebook's other agreements with large content holders like record labels and music publishers, it is almost certain that large record labels and music publishers have obtained rights *at least as* expansive as the ones outlined in this agreement. And that is because large record labels and publishers insist on "most favored nation," or MFN, clauses in their agreements, which require licensees like Facebook to provide them terms at least as favorable as those it has provided to other copyright holders with comparable (or less) market share. *See* Micah Singleton, *This Was Sony Music's Contract with Spotify*, THE VERGE (May 19, 2015, 10:05 AM), https://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract [perma.cc/Y2HD-FW76] ("Having an MFN clause in a contract is standard for music licensing contracts, according to multiple sources.").

94. Paul Resnikoff, *Here's the Entire Facebook Contract for Music Publishers & Songwriters*, DIGITAL MUSIC NEWS (Jan. 26, 2018), https://www.digitalmusicnews.com/2018/01/26/facebook-agreement-music-publishers [perma.cc/K666-JXJP].

95. FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 4.

96. *Id.*

1. Creating New Substantive Rights

It is often said that U.S. copyright law, unlike European copyright law, is rooted in economic, rather than personhood, justifications.[97] Indeed, the United States had long resisted joining the primary treaty governing international copyright law, the Berne Convention,[98] in part because of its expansive moral rights provisions,[99] which granted copyright owners wide-ranging rights to challenge modifications, distortions, and, in broad language appropriate of the personhood nature in which moral rights springs, "other derogatory action" to their works that are "prejudicial to [their] honor or reputation," as well as a right of attribution.[100] When the United States finally ratified the Berne Convention in 1988,[101] Congress enacted just a limited form of moral rights, choosing to limit it to visual works of art only—specifically, "a painting, drawing, print, or sculpture, existing in a single copy, [or] in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."[102] Indeed, the legislative history surrounding the passage of the Visual Artists Rights Act of 1990 (VARA) specifically emphasizes the "limited application" of the Act to works of visual art only, noting that Congress had considered, but ultimately decided to reject, a more expansive moral right covering other types of copyrighted works.[103] Notably, while other industries had lobbied for the right to prevent the distribution of modified copyrighted works in manners that they objected to, Congress specifically chose to reject a broader moral right for copyrighted works beyond the narrowly defined set of visual artworks.[104]

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97. *See, e.g.*, Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 95, 102 (1997).

98. Doriane Lambelet, Note, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467 (1987).

99. Adler, *supra* note 17, at 266.

100. Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*(1), *opened for signature* Sept. 9, 1886, *revised* July 24, 1971, 1161 U.N.T.S. 31 (amended Sept. 28, 1979).

101. Adler, *supra* note 17, at 266.

102. *See* 17 U.S.C. §§ 101, 106(a).

103. *See* H.R. REP. NO. 101-514, at 13 (1990) ("The definition of a work of visual art specifically excludes certain works and thus helps ensure the limited application of the legislation. . . . [Subparagraphs (B) and (C)] of the definition[] work in tandem with the exclusions set forth in proposed section 106A. They are self-explanatory and reinforce the premise of the bill: to cover only those works described in the definition of a work of visual art and therefore to protect only originals of those works of art. Proposed subsections (A) and (B) distinguish covered works of visual art from other works that are denied protection, such as newspapers, audiovisual works, applied art, and maps.").

104. *See id.* at 8–9 ("Directors, screenwriters, and other creative contributors to motion pictures, have complained that without their consent, films originally shot with the special characteristics of the wide screen in mind are being electronically recomposed for viewing on smaller television screens (panned and scanned), and films are being speeded up or slowed down (time compressed or expanded) to fit into television broadcast slots. Where an individual creating a work typically retains the economic rights in it, such as a visual artist does, an additional grant

Courts have subsequently rejected moral rights–like claims brought by copyright owners not covered by VARA's narrow ambit.[105] The Supreme Court, in its decision rejecting a right of attribution brought by the owner of an audiovisual work, noted that the moral right of attribution is "carefully limited and focused: [i]t attaches only to specified 'work[s] of visual art,' . . . is personal to the artist, . . . and endures only for the 'life of the author.' "[106] Other courts have noted that no federal cause of action for moral rights exists, precisely because VARA "protects only authors of a work of visual art."[107]

But what copyright holders like music publishers or record labels did not receive in the statute, they are now receiving, at scale, with the new private copyright.

Specifically, a section titled "Blocking" on page 2 of the agreement between Facebook and rightsholders provides rightsholders with the right to request takedowns of user-generated content incorporating copyrighted works "due to a bona fide [song]writer objection."[108] While the agreement purports to limit the music publisher to exercise its "Blocking Right in a manner that will [not] have more than a *de minimis* impact in quantity and quality of Publisher Compositions on the Facebook Properties," publicly available data suggest that labels and publishers are, in fact, submitting thousands of takedown requests at the behest of their artists, per day.[109]

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of rights such as those accorded by [VARA] will not impede distribution of the work. By contrast, those who participate in a collaborative effort, such as an audiovisual work, do not typically own the economic rights. Instead, audiovisual works are generally works-made-for-hire. Granting these artists the rights of attribution and integrity might conflict with the distribution and marketing of these works." (footnote omitted)).

105. *E.g.*, Lee v. A.R.T. Co., 125 F.3d 580, 583 (7th Cir. 1997) ("Lee's note cards and lithographs are not works of visual art under this definition, so she could not invoke § 106A even if A.R.T.'s use of her works to produce kitsch had damaged her reputation. It would not be sound to use § 106(2) to provide artists with exclusive rights deliberately omitted from the Visual Artists Rights Act."); Choe v. Fordham Univ. Sch. of L., 920 F. Supp. 44, 49 (S.D.N.Y. 1995) ("There is no federal claim for violation of plaintiff [copyright holder]'s alleged 'moral rights.' . . . VARA . . . protects only authors of a work of visual art."), *aff'd*, 81 F.3d 319 (2d Cir. 1996).

106. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34–35 (2003) (citations omitted).

107. *Choe*, 920 F. Supp. at 49.

108. FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 2; *see, e.g.*, Andrew Magnotta, *Eagles Have 60 People Policing the Internet for Unlawful Use of Their Music*, IHEART (July 22, 2020), https://www.iheart.com/content/2020-07-22-eagles-have-60-people-policing-the-internet-for-unlawful-use-of-their-music [perma.cc/HAQ4-3VZ8]. *See generally* Elizabeth Moody, *How Easy Is It to Take Down Music from Streaming Platforms?*, HOLLYWOOD REP. (Mar. 2, 2022, 6:15 AM), https://www.hollywoodreporter.com/business/digital/removing-music-from-spotify-1235093457 [perma.cc/58RW-A3FJ] ("As a practical matter, in most cases, the record label will generally defer to artist interests, so if an artist wants to pull down content, the label will usually comply.").

109. FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 2–3; Glyn Moody, *Copyright as Censorship: Abuse of the DMCA to Try to Delete Online News Is Rampant*, TECHDIRT (May 24, 2022, 3:37 PM), https://www.techdirt.com/2022/05/24/copyright-as-censorship-abuse-of-the-dmca-to-try-to-delete-online-news-is-rampant [perma.cc/5YZR-FNVQ].

Consider, for example, the testimony of the Eagles' Don Henley before the Senate Judiciary Subcommittee on Intellectual Property in June of 2020—well after the music licensing agreement between Facebook and publishers was signed.[110] Henley noted that his record label, Universal Music Group, which also handles music publishing rights for both the Eagles and for his solo catalog, has a team of

> sixty people who sit in a room with computers, and all they do all day long, five days a week—sometimes six days a week—is deal with the platforms such as YouTube and Facebook. They file claims and they issue takedown notices for the Eagles and for myself. Those amount to between 200 and 500 claims a week.[111]

While Henley is one of the most vocal opponents of making his music available on social media, he is certainly not the only artist issuing hundreds of takedown objections per week. It has been publicly reported that other artists who famously refuse to make their music available on the two largest user-generated video platforms, Facebook and YouTube,[112] include "Fleetwood Mac, AC/DC, Pink Floyd, Black Sabbath, [and] Ozzy Osbourne," all of whom "regularly block videos that use any amount of their music, regardless of the context."[113]

The artists that object to making their music available on large social media platforms might have very strong, visceral views about Facebook or Google. Roger Waters of Pink Floyd, for example, has been publicly reported as strongly (to put it lightly) criticizing Facebook and its founder, Mark Zuckerberg.[114] For all these reasons, artists, as well as those scholars who have criticized the United States' restrictive stance on moral rights, likely welcome the artists' objection clause as a contractual expansion of moral rights to more types of artists and works.[115] In this sense, the artists' objection clause is doing

110. *Don Henley Testimony*, C-SPAN (June 2, 2020), https://www.c-span.org/video/?c4879142/user-clip-don-henley-testimony.

111. *Don Henley Answers Question*, C-SPAN (June 9, 2020), https://www.c-span.org/video/?c4893285/user-clip-don-henley-answers-question.

112. Lianne Neiger, *Battle of Video: Facebook vs. YouTube Ads*, IMPROVADO (Jan. 21, 2022), https://improvado.io/blog/battle-of-video-facebook-vs-youtube [perma.cc/E2LM-RRT4] (noting that Facebook and YouTube have the greatest share of the user-generated video market).

113. Magnotta, *supra* note 108.

114. *See, e.g.*, Lindsey Ellefson, *Pink Floyd's Roger Waters Denies Facebook's Request to Use Song in Ad: 'F- You,'* THE WRAP (June 15, 2021, 7:14 AM), https://www.thewrap.com/pink-floyd-roger-waters-facebook-instagram-zuckerberg [perma.cc/9H5Y-9Q8X].

115. *See, e.g.*, Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 410 (2006) (noting that the Supreme Court, in its decision *Dastar Corp. v. Twentieth Century Fox*, "opened the door for lower courts to apply the . . . decision and its flawed moral rights logic to deny [moral rights] relief for authors"); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1946 (2006).

exactly what proponents of moral rights argue we *should* be giving an artist: a greater opportunity to refuse uses of her work that deeply offend her.[116]

But, as the following Section discusses, in many instances, the artists' objection clause does not just provide greater substantive rights than what the Copyright Act affords—it might also directly *contravene* existing substantive rights in the Copyright Act.

2. Contravening Existing Substantive Rights

The doctrine of fair use is considered so integral to copyright law that even earlier efforts at private self-governance, such as the Principles for User Generated Content Services (UGC Principles), explicitly provided for fair use accommodations. The UGC Principles were a set of industry guidelines for managing the uploading and distribution of user-generated content on the internet that had been voluntarily agreed to among several large internet companies and several large copyright holders in 2007. Unlike the new private copyright, the UGC Principles were made publicly available online and included, as one of their four core objectives, the "accommodation of fair use of copyrighted content on UGC Services."[117] The enumerated fifteen-paragraph principles that follow require copyright owners to consider fair use prior to sending takedown notices and require platforms that use filtering technology to implement such technology in a way that considers fair use.[118] Accordingly, the UGC Principles were lauded by commenters as evidence of private ordering that complemented existing laws such as "the fair use doctrine."[119]

Of course, in practice, it is notoriously difficult to accommodate fair use at the scale the new digital age of information sharing demands.[120] And so, perhaps because of this very difficulty, and in sharp contrast to the UGC Principles, nothing in the Facebook agreement with music publishers mentions fair use at all.[121] And, in fact, the artists' objection clause discussed in the previous Section may directly conflict with fair use doctrine.

Imagine, for example, that a video uses a few seconds of John Lennon's song *Imagine* juxtaposed against images of a secular world torn apart by war.

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116. *See, e.g.*, Kwall, *supra* note 115, at 1946 (arguing that the "law governing authors' rights in the United States reflects an incomplete understanding of the dynamics motivating the artistic soul").

117. *Principles for User Generated Content Services*, UGC PRINCIPLES, https://ugcprinciples.com [perma.cc/Y7F8-9KDS].

118. *Id.* ¶¶ 3(d), 6.

119. Note, *The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance*, 121 HARV. L. REV. 1387, 1403 (2008) ("The Principles take existing copyright law and the fair use doctrine as background law, thus impliedly consenting to their application."). The Principles "ultimately fizzled out due to Internet services' lack of enthusiasm for the weak benefits." Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1, 21–22 (2021).

120. *See generally* Perel & Elkin-Koren, *supra* note 44, at 487–88 (detailing the disagreement among scholars on whether algorithms can be trained to make fair use determinations).

121. *See* FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87.

This was the precise use—but in the form of a full-length film, rather than in a social media use—that resulted in a filing of a copyright infringement suit by Lennon's heirs.[122] The court held that the use constituted fair use, because the purpose was "to criticize the song's message," and thus refused to enjoin the film from nationwide distribution (including theatrical release).[123] But if the distribution had occurred solely on Meta's platforms rather than in theaters, Lennon's heirs could simply exercise their artists' objection right to remove the video from distribution. The artists' objection need only be "bona fide"—it is not subject to any fair use carve-out.[124] (Whether the filmmakers would be able to bring a lawsuit arguing that the video was wrongfully removed, on the other hand, will be discussed *infra* in Section IV.B.)

Ultimately, there is a bigger problem in all of this, beyond just the point that the new private law of copyright directly contravenes statutory law by allowing rightsholders to block and remove videos that would otherwise constitute permissible fair uses. And that is that it does so with no public visibility, let alone accountability, into the removal and blocking process: freed of the need to send a specific DMCA notice pursuant to § 512, the new takedowns occur in the shadows, without fear of being entered into some public archive somewhere for academic researchers or reporters to scrutinize and critique. After all, the agreements have classified takedown data effectuated under the agreements as confidential information that must not be disclosed.[125] As a result, users have little idea who, or what, is even animating these decisions—whether it was removed because of some action on the part of a *copyright holder* rather than the platform's own capriciousness and censorship, or whether it is a public statute such as the DMCA that allows for these removals, rather than private contracting.[126] Indeed, internet law scholars who regularly research and write on this very topic confuse just *who* is responsible for initiating takedowns for copyright infringement. They often attribute responsibility single-handedly to *platform* overreach rather than *copyright holder* overreach. Ironically, they also often attribute responsibility largely to the DMCA rather than private agreements—a fact that does not bode well for how

122. Lennon v. Premise Media Corp., 556 F. Supp. 2d 310, 323 (S.D.N.Y. 2008).

123. *Id.* at 327.

124. FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 2.

125. *E.g.*, *id.* at 4; *cf. supra* Part I (highlighting the extensive academic research report compiled by scholars at Berkeley Law School and Columbia Law School, in part made possible by takedown notices that were sent to, and compiled by, a public archive called the Chilling Effects Clearinghouse).

126. Andrew Rossow, *Facebook Live's New Music Terms of Service Unfairly Impact Artists*, BLOOMBERG L. (Sept. 24, 2020, 4:00 AM), https://news.bloomberglaw.com/ip-law/facebook-lives-new-music-terms-of-service-unfairly-impact-artists [perma.cc/U5BK-CRJK]; *see also* u/ImMalteserMan, *Video Wrongfully Removed, Is There Anything I Can Do?*, REDDIT (Mar. 16, 2015, 7:11 AM), https://www.reddit.com/r/youtube/comments/2z7z7c/video_wrongfully_removed_is_there_anything_i_can [perma.cc/W82K-AHNS] ("[A] video I have had on YouTube for 2 1/2 years has been removed for 'inappropriate content.' . . . I have absolutely no idea why, [it's] a tutorial on how to do something, that's it, straight up tutorial, do this do that etc[.], no music, nothing that could be taken the wrong way.").

much we can expect everyday users to understand the laws animating blocking decisions.[127]

C. *Private Copyright as Influencing and Shaping Public Law*

This Part has so far discussed examples of how the new private copyright law may provide rights that Congress had specifically considered but declined to provide in the Copyright Act—rights which may simultaneously conflict with important substantive defenses that *are* present in the Copyright Act, like fair use.

But these privately negotiated agreements do more than simply provide greater substantive rights by contract (or route around statutory rules by contract). Instead, because certain doctrines—most notably, fair use—and administrative copyright proceedings specifically take industry practice into account, what parties privately contract for may also eventually affect the public, substantive law of copyright.

1. Private Copyright Influences and Changes Public Common Law

Fair use, as a common law doctrine developed through the accretion of case law, is notoriously susceptible to industry practices.[128] This is especially so because the critical fourth factor of the four-factor fair use test looks to "traditional, reasonable, or likely to be developed" licensing markets.[129] Pro-

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127. *See, e.g.*, Niva Elkin-Koren, Giovanni De Gregorio & Maayan Perel, *Social Media as Contractual Networks: A Bottom Up Check on Content Moderation*, 107 IOWA L. REV. 987, 992 (2022) ("Currently, under U.S. law, users cannot do much—legally—to protect their rights and interests on social media. . . . Platforms currently enjoy . . . limited liability under the system of notice and takedown established by the Digital Millennium Copyright Act ('DMCA'). Consequently, so long as they presumably moderate in 'good faith,' and comply with takedown procedures in the case of alleged copyright infringements, they are immune from liability." (footnote omitted)). Of course, the scholars omit to mention that in a world without the DMCA, content would either be blocked before posting pursuant to automatic filtering tools like Content ID, because the platform would otherwise be liable for hosting infringing content—or else subject to the expanded power of copyright holders to block and mute content for any reason they please under the new private copyright law discussed in this Section. *See* Perel & Elkin-Koren, *supra* note 44, at 513 (arguing that "figuring out how Content ID exercises its power is extremely challenging because it operates behind the veil of a proprietary code that primarily adheres to YouTube's business interests," while omitting the fact that YouTube is required, by nature of their licensing arrangements with copyright owners, to keep the specifics of Content ID, including who has access to its backend to mute and block videos, confidential).

128. *See* Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1930–37 (2007).

129. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929–30 (2d Cir. 1994). Fair use's fourth factor has sometimes been referred to as the single most important fair use factor. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) (describing the fourth factor as "undoubtedly the single most important element of fair use"); Monge v. Maya Mags., Inc., 688 F.3d 1164, 1180 (9th Cir. 2012) (quoting *Harper & Row*, 471 U.S. at 566); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 96 (2d Cir. 2014) (same).

fessor James Gibson calls the practice of licensing within areas where the common law is still developing—in which judges are still deciding how best to allocate entitlements—"gray areas."[130] The industry practice of licensing within these gray areas, however, "eventually makes those areas less gray, as the licensing itself becomes the proof that the entitlement covers the use."[131] Or, as Professors Christina Bohannan and Herbert Hovenkamp bluntly put it: "[T]he existence of [a] license[] tends to reify the notion that the right to control such uses exists."[132] As discussed below, two such "gray areas" that the new privatized copyright is skewing ever less gray are (1) commercial uses and (2) reproductive uses.

a. Commercial Uses as Infringing

One such gray area in copyright law has long been commercial use—uses of copyrighted works that happen to make money for the secondary user. While it may now seem noncontroversial that works sold for profit—such as a movie or an album—could still be eligible for the fair use defense, this was not always a foregone, or obvious, conclusion. The statutory text merely provides that courts shall consider "whether [the secondary use] is of a commercial nature" in its evaluation of the first factor.[133] In two successive fair use decisions, *Sony Corp. of America v. Universal City Studios, Inc.* and *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Supreme Court repeatedly stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[134] Yet almost a decade later, the Court changed tack. In *Campbell v. Acuff-Rose Music, Inc.*, it specifically overturned the lower appellate court's holding that gave "virtually dispositive weight to the commercial nature" of the infringing song at issue, holding instead that the "commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character."[135]

Yet Facebook's agreement with rightsholders does something different. It gives dispositive weight to the commercial nature of the use, holding that any "commercial use" constitutes a presumptive "unauthorized" use.[136] Commercial uses—defined in the agreement as videos "uploaded by business page (on Facebook) or business account (on Instagram) holders ('Business Users')"—are funneled into a separate so-called "commercial content review queue,"

130. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007).

131. *Id.*

132. Christina Bohannan & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 973–74 (2010).

133. 17 U.S.C. § 107(1).

134. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984); *Harper & Row*, 471 U.S. at 562.

135. 510 U.S. 569, 584 (1994).

136. FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 2.

with the explicit purpose of "identifying to [the copyright holder] *potential licensing opportunities*."[137] So, for example, a *New York Times* business page that wished to post a critique of a musician's latest album by using a snippet of the song would be engaged in an "unauthorized" use, as determined by the agreement. If it wishes to use copyrighted music, it must obtain a license.

The *Times*'s decision to obtain a license might seem inconsequential and uncontroversial, in and of itself. But combine enough of these isolated instances of obtaining licenses for for-profit uses, and what you have is private practice influencing public, substantive law. Courts making fair use determinations have expressly found that the existence of an available licensing market, as well as a plaintiff's successful licensing practice, makes a use less likely to be fair.[138] If a music publisher can show, for example, that it has always been able to receive licensing revenue for uses of its music by magazines or newspapers on digital platforms regardless of the content, a court might be persuaded that such uses must always be licensed, shifting fair use doctrine as a whole back towards an emphasis on commerciality. Professor Gibson calls this phenomenon "doctrinal feedback," in which the "aggregate effect" of isolated, "unobjectionable, even laudable" decisions to obtain licenses results in "an expansion in the reach of intellectual property rights—an expansion completely unconnected to lobbying successes and courtroom victories."[139]

In a further testament to the opaque nature of the new private copyright, Facebook itself has never confirmed the limitation on business account posts in any of its public-facing communications. Instead, confused users are left to speculate amongst themselves, in internet forums, through Instagram direct messaging, and cries for help to other Instagram users, on if, and why, business pages are blocked from accessing music.[140] And this is not the only instance in which the confidentiality clauses governing the new private copyright have resulted in few clear user guidelines for creative speech. As the following Section discusses, the COVID-19 pandemic unexpectedly created a

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137. *Id.* (emphasis added).

138. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 50 (2d. Cir. 2021), *cert. granted*, 121 S. Ct. 1412 (2022) (mem.); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 926–31 (2d Cir. 1994); Bouchat v. Balt. Ravens Ltd. P'ship, 619 F.3d 301, 312–13 (4th Cir. 2010) (finding that the copyright holder's granting of "licenses and other forms of permission" established a de facto market for the copyrighted work, thus weighing against fair use).

139. Gibson, *supra* note 130, at 884–85.

140. *See, e.g.*, Alexandra, *Don't Have Instagram Music Sticker? Try These Tricks*, PREVIEW (Dec. 16, 2019), https://thepreviewapp.com/instagram-music-sticker [perma.cc/9XYP-HHV6] ("Some people have the Music sticker on one of their accounts, but not on the other one. Other people had the Music sticker and then it disappeared. I searched the whole Internet to find some solutions. I also asked our community on Instagram . . . . Some people lost the Music sticker after they switched to a Business Account. And other people got the Music sticker back after switching back to a personal account."); Manu Muraro, *How to Get Music on Instagram Reels If You Don't Have the Full Audio Selection*, YOUR SOC. TEAM, https://yoursocial.team/blog/how-to-get-music-on-instagram-reels-if-you-dont-have-the-music-button [perma.cc/496U-6JZV] ("Most business accounts on Instagram do not have music from recording artists . . . because of this 'little thing' called copyright.").

rare public outcry—and resulting attempt at clarification—over Facebook's copyright policies.

b. Reproductive Uses as Infringing

As individuals found themselves staying home during the start of the COVID-19 pandemic and ensuing lockdowns, a rare bright spot emerged. Churches that had formerly held services in person started live streaming them instead, using Facebook Live.[141] Isolated friends joined dance parties on Instagram Live.[142] Fireside chats, too, moved onto Instagram Live.[143] Indeed, the formerly embattled Live product, which Facebook had mostly sidelined for lack of popularity, saw an astounding spike in usage as quarantined individuals everywhere convened in virtual rooms.[144]

The surge in popularity also brought to light, to many for the first time, the new private copyright. Church organizations found their prayer services muted—and soon realized it was because the songs that played during those virtual services were copyrighted.[145] DJs who invited their fans for a virtual set found their live streams suddenly blocked and muted.[146] Notably, in a testament to just how obscured the new private law of copyright is, several news outlets reported that Facebook was introducing "new" music terms of service starting October 1, 2020.[147] Other blog posts, however, felt the need to explain to their audiences that while "[t]he internet is buzzing with the 'new' restrictions on music embedded in videos," the "truth is that Facebook has had these music guidelines in force since 2018."[148] It just took a global pandemic and lockdown to surface it. In a rare public post, Facebook addressed the situation:

> Music is a bonding force in normal times. During difficult and isolating times like this, we know it can be even more important. As social distancing

141. Elizabeth Dias, *Facebook's Next Target: The Religious Experience*, N.Y. TIMES (Aug. 31, 2021), https://www.nytimes.com/2021/07/25/us/facebook-church.html [perma.cc/8LDE-QMLM]; *see also* Kenny Lamm, *Is Facebook Shutting Down Livestreams That Include Music?*, RENEWING WORSHIP, https://www.renewingworshipnc.org/is-facebook-shutting-down-live streams-that-include-music [perma.cc/ENT4-HMBT].

142. Amy Kover, *Instagram Live Rooms Invites More People to the Party*, TECH AT META (May 10, 2021), https://tech.fb.com/engineering/2021/05/ig_live_rooms [perma.cc/3N3T-BZ42].

143. *Id.*

144. *See* Seb Joseph, *It Took a Global Pandemic, but Facebook Live Is Back in Favor*, DIGIDAY (Apr. 1, 2020), https://digiday.com/marketing/it-took-a-global-pandemic-but-facebook-live-is-back-in-favor [perma.cc/3FVX-HR7K].

145. Lamm, *supra* note 141.

146. Rachel Black, *Could the DJ Livestreaming Renaissance Be Over?*, DJ TECHTOOLS (Sept. 24, 2020), https://djtechtools.com/2020/09/24/could-the-dj-livestreaming-renaissance-be-over [perma.cc/3KDZ-FM6V].

147. *See* Rossow, *supra* note 126; Joe DiVita, *Facebook Clarifies Livestreaming Music Policy [Update]*, LOUDWIRE (Sept. 12, 2020), https://loudwire.com/facebook-rule-change-bands-livestream-show-delete-account [perma.cc/YVM8-K6NB].

148. Lamm, *supra* note 141.

> has forced everyone to stay apart, more people have turned to Instagram and Facebook Live to stay connected with their communities. This rapid rise in usage has created a lot of good during this crisis—raising money for frontline workers and underserved communities, driving awareness of healthy habits, encouraging people to stay safe by staying home, and bringing people together through new forms of entertainment. But it's also highlighted some confusion across the community—especially around the use of recorded music in Live on both Facebook and Instagram.[149]

Yet, the company stated, because "the specifics of our licensing agreements are confidential," it could only "share[] some general guidelines to help you plan your videos better."[150] The guidelines, however, did not set out clear parameters for when and why a live stream would be blocked for a copyright violation. Instead, they only provided vague guidance, stating, for example, that "[t]he greater the number of full-length recorded tracks in a video, the more likely it may be limited," that "recorded audio should not be the primary purpose of the video," and that "shorter clips of music are recommended."[151]

But these guidelines created scant workable standards for communities hoping to use the popular social media platform during the pandemic. Churches were advised, for example, that due to the possibility of muting for copyright violations, it was "too risky to [only] stream to Facebook," and religious worship sites argued that "[c]hurches should have alternate, more reliable sites host their services."[152]

The leaked Facebook agreement, however, begins to add some clarity to the publicly available guidelines. In a section titled "Specifications and Product Restrictions" on page 3 of the agreement, it is revealed that Facebook has agreed, "pursuant to commercial agreements with record label partners," to "implement certain abuse prevention mechanisms to inhibit abusive use of User Videos as an audio-only music listening experience . . . as set forth in Exhibit B."[153] Moving to Exhibit B, then, we can see that the "abuse prevention mecasures" Facebook will put in place include the blocking of "User Videos . . . that contain one or more nearly complete [songs] with a static image" and the blocking of "any . . . User Video . . . that contains five or more nearly complete [songs]."[154] These deal terms, then, help explain why Facebook publicly advised that "recorded audio should not be the primary purpose of the video" (because audio-only videos are not permitted under the agreement)

149. *Updates and Guidelines for Including Music in Video*, INSTAGRAM (May 20, 2020), https://about.instagram.com/blog/tips-and-tricks/updates-and-guidelines-for-including-music-in-video [perma.cc/GD5N-JM9L].

150. *Id.*

151. *Id.*

152. Lamm, *supra* note 141.

153. FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 3.

154. *Id.* at 7.

and why Facebook advised that "[t]he greater the number of full-length recorded tracks in a video, the more likely it may be limited."[155] The agreement tells us exactly how many tracks may appear in a video before it will be blocked: five.[156]

The agreement, in essence, has taken a position against rote copying: reproductive copying that merely reproduces the original.[157] Whereas reproductive copying is deemed abuse under the agreement, leading to its automatic blocking, copying that transforms the original work—so-called "productive" uses—are permissible.[158] Yet the question of whether reproductive copying should in certain instances be permitted as fair use has long been an area of contested debate. Appropriation art, for example, true to its name, slavishly reproduces the original, and courts have vacillated between holding that such rote copying constitutes clear-cut infringement or else paradigmatic fair use.[159] Likewise, scholars have fought for the idea that pure copying, rote copying, and simple reproductive copying can serve important First Amendment values.[160] Certainly, the examples from the pandemic bolster the point that reproductive uses, even ones that utilize multiple copyrighted works, may be good candidates for arguing for the continued viability of fair use as applied

155. *Updates and Guidelines for Including Music in Video*, *supra* note 149.

156. FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 7.

157. *See* Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) ("A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the [fair use] test . . . .").

158. *See* FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 1–3; Leval, *supra* note 157, at 1111 (arguing that in fair use determinations, judges should primarily evaluate whether the work is "transformative," meaning the use "must be productive and must employ the quoted matter in a different manner or for a different purpose from the original").

159. *See, e.g.*, Rogers v. Koons, 960 F.2d 301, 305, 311 (2d Cir. 1992) (finding no fair use and noting that the appropriation artist Jeff Koons gave instructions to copy the plaintiff's photographic work exactly, telling his artisans "the work must be just like [the] photo" (emphasis omitted)); Blanch v. Koons, 467 F.3d 244, 248, 252 (2d Cir. 2006) (noting that defendant had "scanned the [copyrighted image] into his computer and incorporated a version of the scanned image into [the infringing work]," but that the copying was fair use because the defendant's "*purposes* in using [the plaintiff's] image [were] sharply different from [the plaintiff's] goals in creating it" (emphasis added)).

160. *See, e.g.*, Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (arguing that pure copying can serve important First Amendment values); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred*,* 44 Liquormart*, and* Bartnicki, 40 HOUS. L. REV. 697, 726 (2003) ("[R]epublished work is materially more valuable to readers than the original that they can't get, that costs too much, or that they don't know about . . . ."); Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 5 (2004) (noting that purely iterative copying can be an important means in which users contribute to democratic culture and participation); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 406–20 (2003) ("Copyrighted works are . . . not only individual consumer goods, but also social goods, consumed in a social manner. . . . Although we might prefer it if consumers always skillfully expressed themselves in their own creative terms, sometimes individual creative ability falls short of expressive desire. Copyrighted works can thus serve an important role in enabling individuals to express themselves.").

to reproductive copying. A priest may wish to illustrate his sermon with a selection of songs that speak on hope, loss, and grief, even if the songs themselves are not otherwise transformed and even if there is no commentary upon the songs themselves. By deeming such a use de facto unauthorized, the new private copyright is, just as it did with commercial uses, closing more and more secondary uses off from any colorable claim to fairness.

While fair use decisions have always been less receptive to reproductive uses of copyrighted works,[161] they may begin to swing even further in the direction of only permitting productive rather than reproductive uses. Just as with commercial uses that are subject to separate licensing negotiations under Facebook's agreement, rightsholders may likewise point to the fact that reproductive uses have traditionally constituted unauthorized uses for which separate licenses are required, making market harm more likely and a claim to fair use, in turn, less likely.[162]

2. Private Copyright Creates Public Copyright Regulations

While this Article focuses, for the most part, on user-generated content—content created by and for users, uploaded to sites like YouTube and Facebook—it is important to emphasize that this phenomenon is not just limited to user-generated platforms. All across the digital space, rightsholders are negotiating for substantive rights that will come to reshape what the public law of copyright looks like. And just as with the common law doctrine of fair use, administrative copyright proceedings, too, take industry practice into account. One example involving the definition of a "stream" in public copyright rulemaking illustrates how privately determined definitions in industry agreements have a role to play in creating substantive public copyright law.

It began with uproar from fans of the Korean pop group BTS over uncounted Spotify streams.[163] Following the release of its new single, the pop group's fans launched a campaign to boost the song's popularity by playing it

161. *See supra* notes 157–158 and accompanying text. *But cf.* Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003) (holding that search engine displays of entire copyrighted images constituted fair use); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007) (noting that a search engine "may be more transformative than a parody because a search engine provides an entirely new use for the original work"); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014) (applying fair use to mass-scale scanning of copyrighted books); Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015) (holding that Google's unauthorized digitizing of copyright-protected works does not infringe on fair use); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 427, 456 (1984) (holding that rote copying of copyrighted works for purposes of time-shifting constituted fair use, reversing the Court of Appeals' holding that such copying was not fair because it was not a "productive use").

162. *See* FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 1–2; Leval, *supra* note 157, at 1111.

163. *See* Ed Browne, *BTS Fans Make 'Investigate Spotify' Twitter Trend, Claim 'Butter' Streams Not Being Counted*, NEWSWEEK (May 25, 2021, 11:51 AM), https://www.newsweek.com/bts-investigate-spotify-twitter-streams-butter-1594627 [perma.cc/XC6T-YEV2] (noting that an apparent failure by Spotify to track multiple streams of BTS songs has led to a "call[] for more transparency over how the platform filters out certain streams").

on repeat, including on popular streaming platforms like Spotify.[164] Yet something odd happened with the streaming count for the BTS single *Butter*. Fans began noticing that not all streams were being counted.[165] Angry fans reached out to Spotify's support team, which confirmed that the streaming service has systems in place to filter out what the platform considers to be illegitimate streams.[166] Fans, in turn, began demanding greater transparency over how Spotify filters out certain streams, giving rise to the hashtag #InvestigateSpotify.[167]

Each stream on Spotify implicates two copyrighted works: a sound recording and a musical composition.[168] The former is licensed to Spotify pursuant to a series of confidential licensing deals. However, as discussed *infra* in more detail in Section III.B, streaming royalties for musical compositions are set by an administrative proceeding before the Copyright Royalty Board (CRB). Accordingly, public filings in those proceedings might provide one clue as to how Spotify tracks streams. As it turns out, those filings and the ultimate decision in the most recent rate-setting revealed that streaming services' own internal policies eventually translated to substantive, public copyright regulations that now govern all digital streams of musical works.

In the streaming rate-setting proceeding for the 2018–2022 rate period, Apple's music streaming service proposed, for the first time, an exemption for a "fraudulent stream," which it defined as "a stream that a service reasonably and in good-faith determines to be fraudulent."[169] Apple further proposed defining a royalty-bearing stream as any "play of a sound recording of a copyrighted work lasting 30 seconds or more," thus omitting streams of under thirty seconds from being counted or tracked as a proper stream.[170] Notably, in discussing these requests to omit certain types of streams from the royalty-bearing calculus, the final opinion in the rate-setting proceeding states: "Apple contends that the [thirty-second] time threshold is a feature of [REDACTED]."[171]

Redactions in the public opinion are made for confidential information—which the Protective Order in the case defines as "commercial or financial information" that is competitively sensitive.[172] Thus, the very fact that the information was redacted speaks volumes about Apple's proposal. Apple's

164. *Id.*

165. *See id.*

166. *See id.*

167. *Id.*

168. *See infra* notes 245–246 and accompanying text.

169. Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1923 (Feb. 5, 2019) (codified at 37 C.F.R. pt. 385).

170. *Id.*

171. *Id.* at 1961 (second alteration in original).

172. Protective Order at 1, *In re* Determination of Royalty Rates & Terms for Making & Distrib. Phonorecords (Phonorecords III), No. 16-CRB-0003-PR (2018–2022) (U.S. Copyright & Royalty Bd. July 27, 2016).

proposal to limit royalty-bearing streams to nonfraudulent streams of thirty seconds or longer must have some basis in either how Apple actually tracked and accounted for streams, or in its confidential deals with record labels, in order to constitute commercially sensitive information warranting redaction. And realistically, it is the latter that drives the former: Apple almost certainly would not be able to avoid paying record labels for certain streams—that is, those they deem to be "fraudulent," or those under thirty seconds—without a provision affirming their right to do so in their licensing deals.

The administrative copyright rulemaking board ultimately adopted Apple's proposal excluding streams under thirty seconds in full and adopted a modified version of Apple's proposal to exclude fraudulent streams (those "not . . . initiated or requested by a human user") from royalty-bearing streams.[173] This is fascinating, as previously, the § 115 compulsory license recognized no such carve-out for streams under thirty seconds, and it did not give a platform the ability to use algorithms to determine what constitutes a proper stream initiated by a "human user."[174] That the regulations now do both[175] is a direct example of how provisions from private agreements are being translated directly into public law.

And in fact, as the following Part will discuss, public copyright law is changing to either *require*, or else defer to, the new private copyright.

III. Enshrining the New Private Copyright in the Public Laws

The previous Part detailed why and how digital platforms like YouTube and Facebook began shifting away from relying on statutory copyright law—the DMCA safe harbor—in favor of a series of confidential licensing agreements that rewrote statutory and common law copyright. More worryingly, these agreements, by nature of their confidentiality clauses, are obscured from public oversight. But while such license agreements were once voluntary, and perhaps even extraordinary, changes to copyright laws could make such private contracting a requirement, enshrining the new private copyright in the public law.

This Part begins by reviewing Europe's recently adopted Article 17, exploring how and why a European law that mandates private contracting has massive ripple effects for user-generated expression in the United States. It will then discuss two recent changes or lobbied-for changes in U.S. copyright law: one that would remove licensing negotiations between large music publishers and technology platforms from antitrust oversight by the Department of Justice, which had been overseeing such licensing activity since the 1940s,

173. *See* Phonorecords III, 84 Fed. Reg. at 2032–33 ("[A] Play means an Interactive Stream . . . lasting 30 seconds or more . . . . A Play excludes an Interactive Stream . . . that has not been initiated or requested by a human user. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user." (emphasis omitted)).

174. *See id.* at 1961, 2032–33.

175. 37 C.F.R. § 385.2 (2021).

and another that removed all considerations of public policy or the public interest in setting the compulsory licensing rates paid by digital streaming companies. Both of these changes or contemplated changes share, with Europe's Article 17, the same contours of the new privatization: a press release–ready tale of remuneration for artists that obscures the deeper implications of replacing public copyright law with privately made agreements.

A. *Article 17 and Mandated Private Licensing*

At the beginning of the new millennium, Europe had also adopted its own, similar version of the DMCA's § 512.[176] Like § 512 of the DMCA, Article 14 of the Directive on Electronic Commerce provides that service providers are "not liable for the information stored at the request of" users, so long as the platform lacks knowledge of infringing activity and it removes infringing content when notified.[177]

And just as copyright holders dislike § 512, they, too, have long lobbied for changes to Article 14 in Europe.[178] In 2015, the push to make a change to a law viewed as unduly friendly to technology behemoths gained greater traction. In a press release issued that December, the European Commission (EC) set forth an action plan to modernize European Union (EU) copyright rules, citing a "growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly shared, especially where right holders cannot set licensing terms and negotiate on a fair basis with potential users."[179]

Finally, in early 2019, the European Parliament adopted Article 17 of the Digital Single Market Directive (DSM), which replaced the existing regime of

176. *E.g.*, Miquel Peguera, *The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems*, 32 COLUM. J.L. & ARTS 481, 482 (2009) ("The 1998 Proposal of Directive suggested safe harbors for the activities of 'mere conduit,' 'caching,' and 'hosting,' which were obviously inspired by those set forth in the DMCA. With only a few minor changes, those safe harbors made their way to the final text of the Directive. The E-Commerce Directive seemed to adopt the basic idea of section 512, namely, a grant of safe harbors from liability for specific intermediary activities, and indeed closely tracked the language of the DMCA in places—particularly with regard to the descriptions of those activities and the conditions for limiting liability." (footnotes omitted)).

177. Council Directive 2000/31, art. 14, 2000 O.J. (L 178) 1, 13 (EC).

178. *See, e.g.*, INT'L FED'N OF THE PHONOGRAPHIC INDUS., IFPI DIGITAL MUSIC REPORT 2015, at 22–23 (2015) [hereinafter IFPI DIGITAL MUSIC REPORT], https://www.riaa.com/wp-content/uploads/2015/09/Digital-Music-Report-2015.pdf [perma.cc/4XQM-CPH8] ("The key to addressing the 'value gap' is to create a fair licensing environment. Currently, this does not exist. This is because certain content platforms (that is services such as YouTube and DailyMotion) claim that they are merely neutral hosting services entitled to benefit from exemptions to copyright law (akin to internet service providers) . . . .").

179. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Modern, More European Copyright Framework*, at 9, COM (2015) 626 final (Dec. 9, 2015).

safe harbor protection with a direct licensing obligation.[180] The DSM's stated purpose centered on licensing: the Directive was clear that it was intended to "facilitate the clearance of rights"[181] and to "facilitate certain licensing practices."[182] By doing so, the DSM reasoned that it was "stimulat[ing] innovation, creativity, investment and production of new content"[183] and "keeping a high level of protection of copyright."[184] By requiring certain service providers—namely, only those whose primary business model is to "store and enable users to upload and share a large amount of copyright-protected content,"[185] in essence, the YouTubes and the Facebooks of the world—to get licenses to cover the conduct of their users, the DSM inverted the statutory safe harbor rules that have long governed the internet.[186] In essence, it turned the rising prominence of privately made copyright laws that Part II of this Article described into a statutorily mandated requirement.

While it remains to be seen whether the United States will follow suit in its own § 512 reform—and current hearings on § 512 reform suggest *some* changes to § 512, perhaps remade in the European image, are possible[187]—the fact is, in our new global economy, changes to ex-U.S. law inevitably create

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180. *Compare* Council Directive 2019/790, art. 17, 2019 O.J. (L 130) 92, 119–20 (EU) (requiring digital services to license all content made available on its platform), *with* Council Directive 2000/31, art. 14, 2000 O.J. (L 178) 1, 13 (EC) (providing that online service providers are not liable for information stored at the request of users).

181. Council Directive 2019/790, 2019 O.J. (L 130) 92, 92 (EU).

182. *Id.*

183. *Id.*

184. *Id.* (recitals 2–3).

185. *Id.* at 106 (recital 62).

186. *See* Letter from Vint Cerf et al. to Antonio Tajani MEP, President of the Eur. Parliament, Article 13 of the EU Copyright Directive Threatens the Internet, at 1 (June 12, 2018), https://www.eff.org/files/2018/06/13/article13letter.pdf [perma.cc/GN56-BK8D]. A group of three hundred opponents to the DSM, including numerous law professors, sent a letter to the European Council arguing against the change. *Id.* ("Europe has been served well by the balanced liability model established under the Ecommerce Directive, under which those who upload content to the Internet bear the principal responsibility for its legality . . . . By inverting this liability model and essentially making platforms directly responsible for ensuring the legality of content in the first instance, the business models and investments of platforms large and small will be impacted. The damage that this may do to the free and open Internet as we know it is hard to predict, but in our opinions could be substantial."). Note that the letter references "Article 13," which subsequently became Article 17.

187. *See Tillis Releases Landmark Discussion Draft to Reform the Digital Millennium Copyright Act*, THOM TILLIS: U.S. SENATOR FOR N.C. (Dec. 22, 2020), https://www.tillis.senate.gov/2020/12/tillis-releases-landmark-discussion-draft-to-reform-the-digital-millennium-copyright-act [perma.cc/8W43-NJLB] (arguing that the DMCA should be reformed and that new legislation should include changes such as "[i]ncreasing roles for various federal agencies," including through instating the U.S. Copyright Office as its own agency, "[c]larifying knowledge requirements for OSPs," creating a "copyright small claims tribunal," and creating a cause of action against those who alter rights attribution, among other adjustments to the current DMCA); THOM TILLIS, 12/18 DISCUSSION DRAFT FOR STAKEHOLDER COMMENTS ONLY (2020), https://www.tillis.senate.gov/services/files/97A73ED6-EBDF-4206-ADEB-6A745015C14B [perma.cc/MKQ3-XBEG] (attaching the draft legislation that would incorporate these changes).

ripple effects within the United States as well. The general idea that EU laws invariably become global laws as multinational companies voluntarily extend EU rules to govern their global operations has been termed by Professor Anu Bradford as the "Brussels effect."[188] Certainly, companies will need to develop effective global content management tools that can accommodate more expansive laws, such as Article 17. The largest companies, such as YouTube and Facebook, already have such measures in place. Facebook's Rights Manager, for example, has digital fingerprinting and matching technology for images, audio-only, *and* audiovisual works.[189] Further still, the tool allows individual (small) content owners to upload their works and accompanying metadata to the Rights Manager database, specifying whether rights apply on a worldwide basis or only in certain territories.[190] Giving individual creators the ability to authorize and manage copyright permissions through Rights Manager on a global basis thus cannily solved the concern, voiced by some scholars prior to Article 17's adoption, that obtaining rights for millions of images would prove to be impossible.[191]

Though such developments may be heralded as achieving precisely what the architects of Article 17 intended—remuneration, or at least some form of control, for the millions of little creators, authors, and artists who can now benefit from the extra royalties generated by a mandatory licensing system[192]—the biggest beneficiaries are not individual creators, but large corporate content-holders, whose licensing deals are worth hundreds of millions of dollars.[193] Indeed, as discussed in greater depth *infra* in Part III.B, when parties choose direct licensing instead of government-regulated licensing, there

188. BRADFORD, *supra* note 27.

189. *See* Axelgard, *supra* note 80; *Request Access to Rights Manager*, FACEBOOK, https://www.facebook.com/rights_manager/apply [perma.cc/XV6K-77XH].

190. Axelgard, *supra* note 80.

191. Pamela Samuelson, *Pushing Back on Stricter Copyright ISP Liability Rules*, 27 MICH. TECH. L. REV. 299, 321 (2021).

192. A European Commission proposal explains the purpose of the DSM. *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, at 3, COM (2016) 593 final (Sept. 14, 2016) ("Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. In this new framework, rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content.").

193. *See* Lucas Shaw & Sarah Frier, *Facebook Said to Offer Hundreds of Millions for Music Rights*, BLOOMBERG L. (Sept. 5, 2017, 3:42 PM), https://www.bloomberglaw.com/bloomberglawnews/ip-law/X426LK1C000000 [perma.cc/Y6NZ-JECP].

is little accountability or requirement as to how individual songwriters or artists actually get paid.[194]

For example, a major complaint upon the leak of the Facebook music publishing contract for indie artists was that the flat-fee deal made payouts to each music publisher based upon their pro-rata market share, meaning indie music publishers received a total pool of $45 million to divide amongst all independent music publishers.[195] Another pool of money, deemed the "Major Pool," for the major music publishers—Sony, Warner, and Universal—was comprised of an undisclosed amount.[196] That payments were made on a flat-fee, market-share basis squares perfectly with the fact that Facebook has had a difficult time monetizing content.[197] More importantly, the deals explicitly disclaimed any procedure for just how the music publishers would pay the individual songwriters and musicians whose works were being exploited. Indeed, in a section titled "Downstream Payment," the agreement states: "Facebook will not be in a position to provide track-level or composition-level reporting during the Term. It shall be Publisher's responsibility to determine how to allocate, *if necessary*, any Fee it receives to all downstream royalty participants in respect of Publisher Compositions."[198]

Yet as the following Section discusses, rather than distribute royalties downstream to songwriters, publishers often keep—for a variety of reasons—large amounts of the proceeds from direct deals for themselves. Indeed, that is the very reason they prefer unregulated direct deals rather than more regulated markets.

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194. The largest performing rights organizations in the United States, ASCAP and BMI, are subject to government regulation and judicial court oversight through DOJ consent decrees. *See infra* Section III.B. Parties are always free, however, to enter into direct deals with music-publisher members of ASCAP or BMI directly and request reduced rates from ASCAP or BMI to account for those deals. *See* Broad. Music, Inc. v. DMX Inc., 683 F.3d 32, 46 (2d Cir. 2012) (holding that a reasonable fee for a performance license from ASCAP and BMI would take into account direct license fees already paid through individual music publisher licensing deals and reduce the license fee for ASCAP or BMI accordingly). Likewise, while the Music Modernization Act, discussed *infra*, established a compulsory blanket licensing mechanism for interactive digital streaming, the statute is clear that "[l]icense agreements voluntarily negotiated at any time . . . shall be given effect in lieu of any [rate] determination by the Copyright Royalty Judges." 17 U.S.C. § 115(c)(2)(A).

195. FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 6.

196. *Id.* at 3.

197. *See supra* notes 81–87 and accompanying text.

198. FACEBOOK–PUBLISHER LICENSE AGREEMENT, *supra* note 87, at 4 (emphasis added). Of course, if Facebook cannot generate and provide reports tracking usage on the platform, it is hard to imagine where else music publishers would be able to obtain such information for purposes of distributing downstream royalties. The lack of any firm commitment by the music publishers to share royalties with songwriters has led to songwriter campaigns for commitments from music publishers that the benefits of any direct deal "will be shared transparently and fairly with the writers [the publishers] represent." Chris Cooke, *Songwriters Call for Publisher Commitments on Spotify and Facebook Cash*, COMPLETE MUSIC UPDATE (Mar. 20, 2018), https://completemusicupdate.com/article/songwriters-call-for-publisher-commitments-on-spotify-and-facebook-cash [perma.cc/JMK6-KGHK].

B. *Removing Streaming Rights from Department of Justice Oversight*

Musical composition owners enjoy the right to publicly perform their copyrighted works.[199] The right is implicated any time a song is played in a restaurant, a stadium, a hotel lobby, on terrestrial radio, or streamed on a digital service like Spotify. The market for public performance rights is heavily regulated, as the majority of these rights[200] are held by two performing rights organizations (PROs), ASCAP and BMI, both of which have been subject to consent decrees since the 1940s.[201] These decrees are overseen by the Department of Justice's Antitrust Division and were entered into because of investigations into anticompetitive practices of both PROs.[202] Under the decrees, ASCAP and BMI must grant a blanket license to all the works in their repertoires and to any user that applies for one—whether it is a restaurant, a television station, or Spotify.[203] In the event the parties cannot agree on a reasonable royalty for the license, they can seek relief in court before one of two district court judges in the Southern District of New York.[204] As an additional restriction imposed by the DOJ, the SDNY judge, in setting rates, was originally barred from considering certain evidence from the "marketplace," like sound recording royalties (which are negotiated on the free market)—a prohibition that has since been repealed by the Music Modernization Act (in order to, what else? Better approach marketplace rates).[205] The combination of these two DOJ consent decree features—the license-on-demand provision and the rate-court provision—was intended to address the DOJ's concern that ASCAP and BMI were subjecting licensees to a devil's choice: "[A]ccept a license from the [performing rights organization] upon any terms and conditions imposed by [that organization] or subject themselves to numerous infringement suits."[206]

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199. 17 U.S.C. § 106(4).

200. Collectively, the repertoires of ASCAP and BMI comprise about 90 percent of the market. *See Public Performance Rights Organizations: Hearing Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 8 (2005) (statement of Stephen Swid, Chairman and Chief Executive Officer, SESAC Inc.).

201. *Id.* at 12; *see* United States v. Am. Soc'y of Composers, Authors, & Publishers, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. Dec. 29, 1966), *modified*, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994).

202. *See* Div. for Enf't of Antitrust L., U.S. Dep't of Just., United States v. American Society of Composers, Authors and Publishers, et al.: Statement of Grounds for Action (1941) [hereinafter DOJ Statement] (on file with the *Michigan Law Review*).

203. *See* Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 197–98 (S.D.N.Y. 2014) (discussing the consent decree's restrictions on ASCAP, including the license-on-request provision).

204. *Am. Soc'y of Composers, Authors, & Publishers*, 2001 WL 1589999, pt. XIV; *Broad. Music, Inc.*, 1966 U.S. Dist. LEXIS 10449, pt. XIII.

205. *See* 17 U.S.C. § 114(i), *repealed by* Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 103(b), 132 Stat. 3676, 3724 (2018).

206. DOJ Statement, *supra* note 202, at 1–3.

Beginning in 2011, however, three of the United States' four largest music publishers[207] began pursuing a strategy of selective, or partial, withdrawal of "new media" rights from ASCAP and BMI.[208] Withdrawing "new media" rights means that digital services like Pandora and Spotify would no longer be able to take advantage of ASCAP and BMI's blanket licenses-on-demand. Streaming rates instead must be negotiated in the free market, removed from DOJ oversight and the restrictions of the consent decrees.[209]

The direct negotiations that occurred in the aftermath of the partial withdrawals resulted in dramatic rate increases for digital services, which led the services to challenge the permissibility of withdrawal in court.[210] The district court, and then the Second Circuit, agreed with the digital services that, under the consent decrees, partial withdrawal was prohibited.[211]

If the current consent decrees prohibited partial withdrawal, then perhaps what was needed to better effectuate direct licensing was an overhaul of the consent decrees completely. Thus, in the summer of 2019, the DOJ opened a new review of the consent decrees, in large part to consider whether partial withdrawal for streaming rights should be permitted.[212] Indeed, partial withdrawal was the banner item on the agenda, as copyright holders such as the National Music Publishers' Association (the main trade association for music publishers and writers) have focused their reform efforts exclusively on "whether copyright owners should be permitted to 'selectively withdraw' digital public performance rights from the repertories of ASCAP and BMI."[213]

Then-Assistant Attorney General Makan Delrahim espoused the value of direct licensing over government oversight. "[T]he default," he stated at a workshop on "Competition in Licensing Music Public Performance Rights,"

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207. In 2019, Sony completed its purchase of EMI. There are now only three large music publishers. *See* Tim Ingham, *Who's the Biggest Music Publisher in the World?*, MUSIC BUS. WORLDWIDE (Dec. 17, 2019), https://www.musicbusinessworldwide.com/whos-the-biggest-music-publisher-in-the-world [perma.cc/9X4A-C75Y].

208. *See In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 331 (S.D.N.Y. 2014), *aff'd sub nom.* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015).

209. Note that parties have always been free to negotiate direct licenses with music publisher members of ASCAP and BMI, if they wished to do so, and request accordingly reduced fees from ASCAP and BMI to account for those direct licenses. *See* sources cited *supra* note 201. "Partial withdrawal," however, shifts the optional direct licensing scheme to a mandatory one.

210. *See* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73, 75–76 (2d Cir. 2015); *see also* sources cited *supra* note 201.

211. *In re* Pandora Media, Inc., No. 12 Civ. 8035, 2013 WL 5211927, at *6 (S.D.N.Y. Sept. 17, 2013); *Pandora Media*, 785 F.3d 73 at 79.

212. U.S. DEP'T OF JUST., STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION'S REVIEW OF THE ASCAP AND BMI CONSENT DECREES 3 (2021), https://www.justice.gov/atr/page/file/1355391/download [perma.cc/Y5N7-39UN].

213. DEBBIE FEINSTEIN, MATTHEW TABAS, DANIELLE AGUIRRE & JONATHAN COHEN, NAT'L MUSIC PUBLISHERS' ASS'N, "SELECTIVE WITHDRAWAL" OF NEW MEDIA RIGHTS FROM ASCAP AND BMI 2 (2019), https://media.justice.gov/vod/atr/ascapbmi2019/pc-550.pdf [perma.cc/JH4A-HTRV].

should be, echoing those magic words copyright holders have long touted, "the free market, not enforcement by government decree."[214] Echoing the logic of the laissez-faire economists, Delrahim explicitly invoked the principle that the "market" is where everyone obtains their fair share, their Lockean just deserts, stating that "it is critical that songwriters, composers, and musicians enjoy the fruits of a free market for their creativity."[215] Just as in the rhetoric surrounding the passage of Article 17, Delrahim explicitly paints consent decree regulation as oppressive to artists and the promise of partial withdrawal and marketplace transactions freeing for individual creators: "Artists who give us those melodies and songs deserve economic liberty," Delrahim tells us.[216]

But the incentives-for-authors rhetoric is contradicted by public statements and positions taken by the very songwriters that these changes are alleged to benefit. In reality, direct deals for performance rights negotiated outside the protection of the consent decrees and the PRO licensing system, just as with Article 17's direct deals for user-generated content, largely benefit corporate music publishers, not individual songwriters. While it is impossible to confirm that the music publishers' confidential direct deals with streaming services contained a provision similar to the Facebook deal that disclaimed any procedure for or obligation to pay songwriters their share of the enormous value at stake,[217] this concern was precisely what motivated the Songwriters Guild of America (SGA) to denounce partial withdrawal and direct licensing as "catastrophic" for "songwriters and composers due to obfuscation and oversight inability and failure."[218]

The SGA made these statements in response to a DOJ call for comments on the continued efficacy of the ASCAP/BMI consent decrees.[219] In its submission, the United States' oldest and largest organization for songwriters and composers emphasized that there was "strong disagreement between the songwriter community on the one hand and [the] music publisher members on the other" regarding "the wholly unnecessary extension to music publishers . . . of the authority to engage in the partial withdrawal of rights from the PROs."[220] Just as this Article has detailed in depth, the SGA was concerned that because direct deals are confidential, they eliminate

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214. Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Opening Remarks at the Antitrust Division's Public Workshop on Competition in Licensing Music Public Performance Rights: "Thank You for The Music!": Competition in Licensing Music Public Performance Rights (July 28, 2020), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-opening-remarks-antitrust-division-s [perma.cc/4VDY-59RY].

215. *Id.*

216. *Id.*

217. *See supra* note 198 and accompanying text.

218. SONGWRITERS GUILD OF AM., INC., RESPONSE OF THE SONGWRITERS GUILD OF AMERICA, INC. TO THE SOLICITATION OF PUBLIC COMMENTS BY THE UNITED STATES DEPARTMENT OF JUSTICE 4 (2014) [hereinafter SGA SUBMISSION], https://www.justice.gov/sites/default/files/atr/legacy/2014/09/12/307845.pdf [perma.cc/729W-3R89].

219. *Id.* at 1.

220. *Id.* at 2, 4.

> any semblance of transparency by music publishers in any direct performing rights licensing deal of their choosing, enabling them to completely obfuscate licensing terms from music creators including such crucial information as the inclusion of advances, administrative fees, equity interests, and other remuneration in which music creators have a rightful expectation to share . . . .[221]

And just as this Article has done, the SGA has had to rely on leaked information, or tidbits of information disclosed through public litigation, to glean even the slightest hint as to the types of deals that are being struck between large music publishers and large copyright licensees,[222] all of which serve to further enrich corporate interests with no regard for the creative welfare of the actual individual creators whose works are being exploited and whose well-being has long served as the false animating rhetoric for expansive copyright protections.

In one example, the SGA points to a licensing deal struck "outside of the PRO collective licensing system"[223] between Sony Music and DMX, a popular background music (sometimes referred to as "muzak"—those bland, soothing melodies that play over hotel and conference room speakers)[224] provider.[225] Only through deposition testimony that was made public through subsequent litigation was SGA able to discover that a direct license between DMX and BMI contained an advance of $2.4 million dollars (as well as a subsequent $300,000 payout to BMI).[226] "Were it not for this testimony," SGA writes, "it is likely that no songwriter or composer (whether or not he or she . . . has works in the Sony music publishing catalog . . .) would ever have known that Sony had received advances and administrative fees from DMX for the direct licensing of performing rights . . . ."[227]

The leaked numbers from the Sony deal are likely "the very tip of the iceberg concerning the economic harm already done to music creators through the direct, opaque licensing of performing rights," the SGA noted.[228] Direct licensing also presents a number of other ills for individual creators, many of which the SGA cataloged in its DOJ submission.[229] Perhaps one of the most worrying other examples is how direct licensing affects the process by which

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221. *Id.* at 5.

222. *See id.* at 13.

223. *Id.* at 12.

224. Indeed, one of DMX's largest competitors is Muzak, which dominated the background music industry for so long that the company's trademark has become almost generic for "elevator music." *See* Luke Baumgarten, *Elevator Going Down: The Story of Muzak*, RED BULL MUSIC ACAD., (Sept. 27, 2012), https://daily.redbullmusicacademy.com/2012/09/history-of-muzak [perma.cc/DVB7-RCAJ].

225. Broad. Music, Inc. v. DMX Inc., 683 F.3d 32, 37 (2d Cir. 2012).

226. SGA SUBMISSION, *supra* note 218, at 13.

227. *Id.*

228. *Id.*

229. *See id.* at 14–20.

music publishers recoup the advances they pay to the fledgling songwriters on their roster. In deals struck within the collective PRO licensing system, the PRO will pay the songwriter's royalty directly to the songwriter.[230] As a consequence, the music publisher is unable to recoup its advance out of these royalties—they belong strictly to the songwriter.[231] Direct licenses negotiated outside of the collective PRO licensing system, however, present a new boon to music publishers, as music publishers are free to retain any royalties or other payments paid to them by a direct licensee like Spotify *without* paying anything to the songwriter.[232]

Indeed, the common refrain that artists do not earn a penny from streaming oftentimes has nothing to do with alleged low royalties paid by streaming services—and everything to do with the fact that, in direct deals generally, royalties are paid directly to music publishers and record labels with no concomitant procedure for accounting to songwriters or musicians.[233] If a record label or music publisher wishes to use the royalties it receives from Spotify for a stream of an artist's song to recoup the advance paid to that artist, it is free to do so. As a result, a musician whose song gathers "over 100 million streams on Spotify" but is "not recouped on [their] original contract [with the record label or music publisher] . . . earns nothing from streams of that song."[234] Of course, record labels and music publishers need not necessarily rely on recoupment to keep most of the fruits of a lucrative licensing deal for themselves. Other leaked agreements, such as one between Spotify and the record label Sony, show that Spotify paid Sony Music up to $42.5 million in advances—and, just like the Facebook agreement, with no provision that provides for an accounting of that large sum to artists.[235] Reporting surrounding the (since removed) agreement confirms that "labels routinely keep [such] advances for themselves."[236] And these amounts *are on top of* the equity in Spotify that labels received—which amounted to billions of dollars in value upon Spotify's IPO.[237] Nothing in the confidential agreements obligated labels

230. *See id.* at 16.

231. *Id.*

232. *Id.*

233. *See, e.g.*, García, *supra* note 56, at 1815–16; Jem Aswad, *Why It's Misleading to Say 'Apple Music Pays Twice as Much per Stream as Spotify,'* VARIETY (Apr. 16, 2021, 2:35 PM), https://variety.com/2021/digital/news/apple-music-pays-twice-stream-spotify-1234953590 [perma.cc/YW9U-KFDM].

234. *See, e.g.*, Ben Sisario, *Musicians Say Streaming Doesn't Pay. Can the Industry Change?*, N.Y. TIMES (May 10, 2021), https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html [perma.cc/WG3X-LP8X].

235. Singleton, *supra* note 93.

236. *Id.*

237. Tim Ingham, *Here's Exactly How Many Shares the Major Labels and Merlin Bought In Spotify—And What Those Stakes Are Worth Now*, MUSIC BUS. WORLDWIDE (May 14, 2018), https://www.musicbusinessworldwide.com/heres-exactly-how-many-shares-the-major-labels-and-merlin-bought-in-spotify-and-what-we-think-those-stakes-are-worth-now [perma.cc/GZ68-UBU4].

to share any of that enormous value with artists—and it was only upon public disclosure of the true worth of those equity shares and subsequent artist complaints that labels were forced to publicly pronounce their commitment to sharing the proceeds with artists.[238]

Even as the consent decrees remain in place—for now[239]—other regulated areas of copyright are moving towards greater private market deference. The last Section of this Part considers the recently enacted Music Modernization Act and the replacement of the last vestiges of a public interest consideration in the Copyright Act with a market-based standard.

C. *The Music Modernization Act: Rejecting Public Interest Considerations in Favor of Private Ordering*

The § 115 mechanical license[240] is the oldest compulsory license in U.S. copyright law.[241] It is also one of the few compulsory licenses available under U.S. copyright law.[242] Originally enacted to prevent piano roll manufacturers from monopolizing the player piano market, the mechanical license requires owners of musical compositions to license it to anyone who wishes to make a copy.[243] In the digital age, services like Spotify, which make copies of the musical composition in the course of streaming,[244] can also take advantage of the

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238. Tim Ingham, *Universal: We Will Share Spotify Money with Artists When We Sell Our Stock in Streaming Platform*, MUSIC BUS. WORLDWIDE (Mar. 5, 2018), https://www.musicbusinessworldwide.com/universal-we-will-share-spotify-money-with-artists-when-we-sell-our-stock-in-streaming-platform [perma.cc/FWL6-ZJCP]; *see* Cooke, *supra* note 198; Tim Ingham, *If Universal Music Sells Its Spotify Stock Right Now, Artists Get $500 Million*, ROLLING STONE (Feb. 11, 2021), https://www.rollingstone.com/pro/features/universal-music-spotify-ownership-artists-1126893 [perma.cc/5JG2-722L].

239. *See* Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Address at the University of Vanderbilt Journal of Entertainment & Technology Law Webinar: "And the Beat Goes On": The Future of the ASCAP/BMI Consent Decrees (Jan. 15, 2021), https://www.justice.gov/opa/speech/file/1355241/download [perma.cc/ZB8E-E2BG]. The DOJ, however, stated that the Consent Decrees "should be reviewed every five years," noting that the very idea of offering a blanket license to anyone who wants one "runs counter to the principles that form the very foundation of the free market and rights in intellectual property." *Id.* at 5–6.

240. 17 U.S.C. § 115.

241. *See* U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 145 (2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [perma.cc/6TSW-58F3].

242. *See id.*; *Licensing Overview*, U.S. COPYRIGHT OFF., https://www.copyright.gov/licensing [perma.cc/2JQL-9WCF]. The others include a compulsory license for certain uses of sound recordings by so-called "noninteractive" services—think digital radio—and satellite radio. *See* 17 U.S.C. §§ 112, 114.

243. *See* H.R. REP. NO. 60-2222, at 6 (1909).

244. Note that whether a streaming service in fact makes copies of a musical composition in a manner that implicates the reproduction right is the subject of some dispute. *Discussion Draft of the Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 59–60 (2006) (statement of the U.S. Copyright Office) ("A stream does not . . . constitute a 'distribution,' the object of which is to deliver a usable copy of the work to the recipient . . . . Similarly, a stream should not

mechanical right. That is, a song that is streamed on Spotify is actually two distinct copyrighted works: a sound recording[245] and a musical composition.[246] Whereas Spotify must engage in individual negotiations with record labels to obtain the streaming rights for the sound recording, Spotify need only follow the procedure set forth in § 115 to obtain a compulsory license to reproduce the musical composition by serving notice upon the copyright holder that it intends to make use of the copyrighted work.[247]

Rates for the § 115 mechanical license are set by an administrative proceeding before the Copyright Royalty Board (CRB). And for the past four-plus decades—since the establishment of the CRB[248]—those rates were not based on marketplace rates but rather were determined according to a discrete set of "public-interest" oriented[249] policy objectives.[250] Those four objectives were:

> (A) [t]o maximize the availability of creative works to the public[,]
>
> (B) [t]o afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions[,]
>
> (C) [t]o reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication[, and]
>
> (D) [t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[251]

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be considered a [digital phonorecord delivery] as that term is presently defined by 17 U.S.C. § 115(d), because it most likely does not result in 'a specifically identifiable reproduction by or for any transmission recipient of a phonorecord.' ").

245. *See* 17 U.S.C. § 102(a)(7).

246. *See id.* § 102(a)(2).

247. *See id.* § 115(b)(2).

248. The CRB's predecessor, the Copyright Royalty Tribunal, was established as part of the Copyright Act of 1976. *See* Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 5 (D.C. Cir. 1981). The prior 1909 Copyright Act had set the mechanical rate at 2 cents per phonorecord. *Id.* at 4.

249. *See* Mark H. Wittow, Katherine L. Staba & Trevor M. Gates, *A Modern Melody for the Music Industry: The Music Modernization Act Is Now the Law of the Land*, K&L GATES (Oct. 11, 2018), https://www.klgates.com/A-Modern-Melody-for-the-Music-Industry-The-Music-Modernization-Act-Is-Now-the-Law-of-the-Land-10-11-2018 [perma.cc/A8NT-9BUZ].

250. *See* Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III), 83 Fed. Reg. 65210, 65220 (Dec. 18, 2018) (codified at 37 C.F.R. pt. 382) (distinguishing a "reasonable rate" under § 801(b) from a market-based rate under the willing buyer/willing seller standard).

251. 17 U.S.C. § 801(b)(1) (2017) (amended 2018).

As one CRB judge put it, "[n]otably, section 801(b)(1) does not require the Judges even to attempt to set market rates, or to use market rates to establish 'reasonable' rates under the statute."[252] Instead, the four itemized factors each have independent objectives that directly bear on the public interest, ensuring that the public has access to creative works and balancing the respective roles of the copyright holder and the copyright user in making those works available to the public. As noted by the CRB, "[t]hese are not factors necessarily implicated or fully addressed by a market-based analysis."[253] And as Professor Jacob Victor, who has examined the history of the mechanical license and the role that the § 801(b) policy-based factors play in detail, concludes:

> Through this unique approach to rate setting, the regime has fostered technologies that expand and enhance access to existing copyrighted works by allowing these new industries to sometimes take advantage of below-market royalty rates. In this respect, compulsory licensing—like the more frequently discussed copyright limitation, fair use—has provided an essential safety valve for preventing the exclusive rights provided by copyright from overly impeding public access to creative works.[254]

But in late 2018, Congress passed a new law, the Music Modernization Act (MMA),[255] that replaced, in the Copyright Office's own description of it, "the policy-oriented 801(b)(1) rate-setting standard" with a "new market-based willing buyer/willing seller" standard.[256] As the CRB explained, the "two standards are distinguishable by the fact that, unlike [the willing buyer/willing seller standard], *section 801(b)(1) does not focus on unregulated marketplace rates*."[257]

As the D.C. Circuit has previously noted, because the willing buyer/willing seller "standard favor[s] the copyright holders," rightsholders have long advocated for the abolition of the § 801(b) policy standards in favor of a more rightsholder-friendly willing buyer/willing seller standard.[258] The objections

252. Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1974 (Feb. 5, 2019) (codified at 37 C.F.R. pt. 385).

253. *Id.*

254. Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 921 (2020) (footnotes omitted).

255. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified at 17 U.S.C. § 115).

256. *Frequently Asked Questions*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/faq.html [perma.cc/8KDH-SSDH] ("The new market-based willing buyer/willing seller rate setting replaces the policy-oriented 801(b)(1) rate-setting standard.").

257. Phonorecords III, 84 Fed. Reg. at 1955.

258. SoundExchange, Inc. v. Muzak LLC, 854 F.3d 713, 715 (D.C. Cir. 2017). While the MMA's change from the policy-based standard to the willing buyer/willing seller standard was seen as a victory for copyright holders, there remains some question as to whether the *practical effect* of the change from § 801(b) to willing buyer/willing seller will actually be higher rates. For a thoughtful analysis of the issue, see Daniel Abowd, Comment, *Something Old, Something New:*

coalesced around one touchstone: that § 801(b) seemed to elide the realities and the seeming incontestability of the "market," a place where every transaction, by nature of having been negotiated by private parties in the "marketplace," bore some marker of indisputable fairness.[259]

For example, SoundExchange, the licensing collective that distributes sound recording royalties for satellite and digital radio services, has consistently "urged Congress to establish rate standard parity so [that] all digital services are subject to a 'willing buyer, willing seller' or fair market value royalty rate standard[]."[260] (In excising the four policy-based objectives of § 801(b) from the statute, the changes created by the MMA benefitted not just music publishers receiving mechanicals for interactive streaming, but also sound recording owners, who were previously subject to § 801(b) rates for certain digital radio and satellite radio transmissions.)[261] The § 801(b) policy standard, SoundExchange argued, allowed satellite radio services to pay "below-market value royalty rate[s]" for years while "recording artists and rights owners . . . subsidized these companies' growth."[262] Indeed, SoundExchange had long contested the CRB's use of the § 801(b) policy factors, including the third factor (which allows the CRB to reduce royalty rates by favoring technological contributions made by services like SiriusXM, which invests substantially in technological infrastructure) and the fourth factor (which allows the CRB take into consideration the disruptive effect of high royalty rates on copyright users).[263] In appeals of the CRB's § 801(b) rate-setting before the D.C. Circuit, SoundExchange referred to these policy objectives as "trump cards" used to "reduce . . . market-based rate[s]."[264]

While left unsaid, the copyright industry's frequent evocations of the importance of honoring a "market-based" rate—and, concomitantly, the injustice of a rate that deviates from it—once again echo the logic of the laissez-faire advocates of the twentieth century, who viewed the markets as a "domain of freedom where . . . all were rewarded 'in proportion to their just deserts.'"[265] Finally, then, the MMA's replacement of the § 801(b) policy standard with a willing buyer/willing seller rate wrote the last of the public policy-

Forecasting Willing Buyer/Willing Seller's Impact on Songwriter Royalties, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 574 (2021).

259. *See SoundExchange*, 854 F.3d at 715.

260. *Establishing Fair Market Value Royalty Rates*, SOUNDEXCHANGE, https://web.archive.org/web/20211122095741/https://www.soundexchange.com/advocacy/fair-market-value-royalty-rates [perma.cc/8X2L-7QKR].

261. *See id.*

262. *Id.*

263. *See* SoundExchange, Inc. v. Libr. of Cong., 571 F.3d 1220, 1224 (D.C. Cir. 2009).

264. *Id.*

265. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1795 (2020) (detailing the argument made by laissez-faire advocates that "markets were a domain of freedom where . . . all were rewarded 'in proportion to their just deserts'").

based rates out of copyright law's compulsory licensing statutes,[266] representing the privileging of private ordering, instead.

* * *

Private ordering around and in the shadows of the law has been, and will always continue to be, an inextricable fact of life. Yet as the burgeoning "platform law" literature showcases, private ordering by large digital platforms raises serious questions about power and accountability.[267] But even as scholars have theorized a triangular model of speech regulation for the digital age, adding platforms as the third actor, this Article has argued that no account of speech regulation on the internet can be complete without consideration of the powerful copyright owners who control large swaths of speech that users transmit every day. Unlike digital platforms, they do not own the infrastructure of communication—but they do own large parts of the communicatory contents. How they, in concert with platforms, choose to define the boundaries of permissible speech online has, as Part II described, important implications not just for users but also for copyright law. Part IV of this Article concludes by offering some proposals for how users can demand better elucidation of the new rules of platform copyright—and how they can take part in shaping and changing its contours.

IV. MAKING THE PRIVATE PUBLIC AGAIN

In the late 1990s and early 2000s, content holders—the TV, film, music, and software industries—felt threatened by advances in technology, the rise of the internet, and the seemingly frictionless and costless ease of copying. They began a campaign in both Congress and the courts to enforce shrinkwrap agreements, shut down peer-to-peer technologies, and cement the use of digital rights management tools by creating legal liability for circumventing

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266. Previously, some compulsory licenses in the Copyright Act were subject to a willing buyer/willing seller rate, while others were subject to an § 801(b) public policy-based rate. With the enactment of the MMA, the § 801(b) public policy-based rate no longer exists. *Compare* 17 U.S.C. § 801(b)(1) (2018), *and* 17 U.S.C. § 115 (2018), *with* 17 U.S.C. § 801(b)(1) (2017). The MMA, as the legislative history notes, "creates a uniform willing buyer, willing seller rate standard" across all categories of compulsory licensing—not just for musical compositions, but for transmissions of sound recordings, as well. S. REP. NO. 115-339, at 27 (2018) ("Section 103 [of the MMA] creates a uniform willing buyer, willing seller rate standard by amending 17 U.S.C. 114(f) [for transmissions of sound recordings]. . . . The discounted 'pre-existing services' rate standard [for sound recordings] established in 1976 is removed in order to equalize the rate setting process for all licensees.").

267. *See, e.g.*, Cohen, *supra* note 62, at 199 ("The broad scope of the authority that platforms exercise over their users . . . raise[s] a different set of questions, which have to do with the dividing line between power and sovereignty."); *see also* Van Loo, *supra* note 3.

them.[268] It worked, in a sense: Napster, Limewire, and Grokster all fell.[269] The DMCA validated the use of private architectures of control over how owners of DVDs and CDs could use those works.[270] And despite reasoned arguments against them,[271] the Seventh Circuit upheld the enforceability of shrinkwrap agreements in a decision that was celebrated by some as validating the importance of free contracting in the face of unprecedented technological change.[272] In this, as with all things in the copyright wars,[273] new technology created both a threat and an opportunity—as the argument goes, technology changes things, and the law needs to change to better and more perfectly protect property rights.

Then something odd happened. As it turns out, attempts to press consumers into submission mobilized them into rebellion instead. Copyright users such as purchasers and file-sharers—long thought of as poorly organized and diffuse (as compared to copyright holders, who were concentrated in industries with immense lobbying power)—began to protest such obvious and clumsy[274] incursions on how they could view or share content, raising public awareness and forming their own countervailing faction under the umbrella term "Access to Knowledge."[275] College students were suddenly talking about

268. Daniel Reynolds, Note, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH. 977 (2008).

269. *See The End of Peer-to-Peer File Sharing?*, 12 ILL. BUS. L.J. 11 (2011).

270. *See* ELEC. FRONTIER FOUND., UNINTENDED CONSEQUENCES: SIXTEEN YEARS UNDER THE DMCA (2014), https://www.eff.org/files/2014/09/16/unintendedconsequences2014.pdf [perma.cc/4QU5-VSTK].

271. *See* Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1249–50 (1995).

272. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Maureen A. O'Rourke, *Copyright Preemption After the* ProCD *Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 56 (1997).

273. The term "copyright wars" is generally understood to pit rightsholders against users of copyrighted works, and it is not unique to the twentieth and twenty-first centuries. Instead, different versions of the copyright wars have been fought for as long as copyright has existed—and indeed, even before its inception. *See* PETER BALDWIN, THE COPYRIGHT WARS 13 (2014).

274. Perhaps the most memorable artifact of the era of digital rights management for copyrighted works was the fact that none of it seemed particularly effective—and attacks based on this very fact became commonplace. *See, e.g.*, Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 317–18 (S.D.N.Y. 2000) (rejecting defendants' argument that a form of digital rights management called CSS was "based on a 40-bit encryption key" and thus was a "weak cipher" that could not "effectively control" access to a copyrighted work).

275. *See* Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. POCKET PART 262 (2008); *see also* Jessica Silbey, *Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change*, 61 CASE W. RSRV. L. REV. 195 (2010).

copyright law restrictions "with something like the reverence that earlier generations displayed in talking about social or racial equality."[276] Even as scholars astutely described the penetration of digital rights management tools as a market replacement for copyright's public law, some expressed doubt as to their ultimate efficacy.[277]

Thus, throughout the 2010s, public backlash and opposition neutralized the seeming expansion of copyright, creating a sort of stasis. The flurry of public-interest-led lawsuits challenging the prohibition against circumventing digital rights management tools abated.[278] The Recording Industry Association of America was no longer suing private citizens for copyright infringement.[279] The rise in legal streaming services returned revenues back to a music industry that had sustained prolonged losses in the era of Napster and Limewire and other illegal peer-to-peer networks.[280] Even copyright scholarship itself struck a less apocalyptic tone.[281] Instead of hand-wringing, scholars in favor of users' rights seemed almost celebratory—all turned out decently, after all.[282] And if the mentality of young people growing up in the 1990s and 2000s had been one of "information just wants to be free,"[283] when I presented that same argument to my students in 2017, I was met with confused looks—the battle of ideologies was over. The number of raised hands in response to a question about how many students used bit-torrent or other illegal peer-to-peer services diminished between 2015 and 2016, and then again from 2016 to 2017, and so on. These days, everyone pays for something, or, chances are, multiple things: Spotify, Apple Music, Netflix, Hulu.

The rapid rise and affordability of streaming services had put out the fire, both on the left and on the right. There is the feeling of satisfied complacency in the air, fed by an unprecedented glut of easy-to-access, well-priced content.

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276. Rachel Aviv, *File-Sharing Students Fight Copyright Constraints*, N.Y. TIMES (Oct. 10, 2007), https://www.nytimes.com/2007/10/10/education/10students.html [perma.cc/ZL9Z-JAAX].

277. *See, e.g.*, *Reimerdes*, 111 F. Supp. 2d at 317.

278. *See, e.g.*, *id.* at 294–346; Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004); Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178 (Fed. Cir. 2004).

279. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 143–44 (Michigan Publ'g, 2017) (2001).

280. *See* IFPI DIGITAL MUSIC REPORT, *supra* note 178, at 15, 22–23 ("Streaming services have also, along with copyright enforcement strategies, helped migrate consumers to licensed services by offering a convenient alternative to piracy."); LITMAN, *supra* note 279, at 145.

281. *Compare* Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 337 (2002) ("The borders between legitimate and illegal behavior are the subject of bitter dispute. What we have come to call the conventional entertainment industries—movie studios, music publishers, record companies—have declared war on the new digital media, and the courtrooms are battlefields." (footnote omitted)), *with* Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 483 (2015) (noting that the content industries attempted to respond to the internet by persuading Congress to pass new laws, criminalizing infringement, and filing countless suits, but that it "didn't work").

282. *See* Lemley, *supra* note 281, at 514–15.

283. *See* Aviv, *supra* note 276.

The advances of the free copyright and Access to Knowledge movements, so prominent across college campuses in the 1990s and at the turn of the millennium,[284] have instead given way to a call, across social media and even among some scholars, for *more* copyright, grounded in what users perceive as unfair freeriding off the intellectual labors of others.[285] Words like "appropriation" and "theft" were celebrated in the 2000s because they referred to a rising-up against coercive rightsholders.

The same words are now wielded on social media to denounce what users perceive as unfair freeriding off the intellectual labors of others.[286] In this, copyright *law* itself—as a network of rules, much of it public (common, statutory), but increasingly privatized on the largest internet platforms—has seemed to disappear altogether. If the major goal of this Article has been to shed light on the new private copyright, this final Part puts forth some proposals for reform: First, it recommends including copyright content moderation policies in generalized calls for content moderation reform and transparency. It then looks to developments in Europe that place certain aspects of public copyright law beyond the reach of private contracting, turning default rules into immutable rules. Finally, it suggests that users—nonparties to the very contracts that purport to govern their actions—may reinsert themselves in the process through litigation.

A. *Copyright Moderation Decisions Are Content Moderation Decisions*

As calls for platforms to make their content moderation decisions more transparent have intensified, Congress has introduced bipartisan legislation that would update § 230 of the Communications Decency Act to "make platforms' content moderation practices more transparent and hold those companies accountable for content that violates their own policies or is illegal."[287] The proposed PACT Act, for example, would

> [r]equir[e] online platforms to explain their content moderation practices in an acceptable use policy that is easily accessible to consumers; [i]mplement[] a biannual reporting requirement for online platforms that includes disaggregated statistics on content that has been removed, demonetized, or

284. *See* Kapczynski, *supra* note 275; Aviv, *supra* note 276.

285. *See* Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455 (2019) (describing social media policing of unfair appropriation and cries of copyright infringement); Madhavi Sunder, Opinion, *It's About Time Black Creators of Pop Culture Were Paid for Their Art*, L.A. TIMES (July 7, 2021, 3:15 AM), https://www.latimes.com/opinion/story/2021-07-07/tiktok-black-creators-strike-dance-copyright [perma.cc/BZN5-8H5J].

286. *See* Adler & Fromer, *supra* note 285, at 1464–65, 1476.

287. *Schatz, Thune Reintroduce Legislation to Update Section 230, Strengthen Rules, Transparency on Online Content Moderation, Hold Internet Companies Accountable for Moderation Practices*, BRIAN SCHATZ: U.S. SENATOR FOR HAW. (Mar. 17, 2021) https://www.schatz.senate.gov/news/press-releases/schatz-thune-reintroduce-legislation-to-update-section-230-strengthen-rules-transparency-on-online-content-moderation-hold-internet-companies-accountable-for-moderation-practices [perma.cc/79AL-XUB2].

> deprioritized; and [p]romot[e] open collaboration and sharing of industry best practices and guidelines through a National Institute of Standards and Technology-led voluntary framework.[288]

It is unclear how, or if, the PACT Act considers the moderation (including through blocking or muting) of works incorporating copyrighted content as included in its ambit. Copyright content moderation practices should either be included in the PACT Act or else similar copyright legislation should be introduced to likewise require platforms to publish clear guidelines for how consumers may use copyrighted content on digital platforms. Such legislation must also make clear that it takes precedence over any applicable confidentiality provisions in private agreements.

In short, any attempts to reform content moderation—a politically salient issue[289]—must include copyright content moderation within their ambit. Copyright moderation decisions *are* content moderation decisions.

B. *Certain Copyright Default Rules as Immutable Rules*

If this Article has detailed how public legislation driven by the interests of concentrated industry groups can end up deferring to private markets by couching itself in the rhetoric of artists' rights, it does not mean that one should abandon faith outright in the legislative process. One example from the EU of how individual member states have transposed Article 17 of the DSM[290] provides a blueprint for how a regime of privatized license agreements may accommodate existing public law by making certain statutory rules, such as fair use, immutable—rules that cannot be contracted around.[291]

Article 17 directs individual member states to "ensure that users . . . are able to rely on" certain existing exceptions to infringement in the law: use of copyrighted content for purposes of "quotation, criticism, [and] review" or for "caricature, parody or pastiche."[292] Much of the public criticism surrounding this provision, which was meant to ensure that the license agreements required by the Directive did not contravene important free speech principles,[293]

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288. *Id.*

289. *See* David Morar & Bruna Martins dos Santos, *The Push for Content Moderation Legislation Around the World*, BROOKINGS: TECHTANK (Sept. 21, 2020), https://www.brookings.edu/blog/techtank/2020/09/21/the-push-for-content-moderation-legislation-around-the-world [perma.cc/DXE7-JSUB].

290. *See supra* Section III.A.

291. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989).

292. Council Directive 2019/790, art. 17, 2019 O.J. (L 130) 92, 93 (EU).

293. Sebastian Felix Schwemer & Jens Schovsbo, *What Is Left of User Rights: Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime*, *in* INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS 569, 576 (Paul L.C. Torremans ed., 4th ed. 2020) ("In addition to the general acknowledgment of fundamental rights, the Directive comes with several specific references related to the Article 17-mechanism, notably in recital 70 . . . : 'The steps taken by online content-sharing service providers in cooperation with rightsholders should be

focused on how individual member states would transpose the provision in a workable manner.[294] Most notably, critics worried that the provision lacked teeth—platforms would have little incentive to underblock rather than overblock.[295]

Germany's implementation of the law was the first to contain a series of improvements largely welcomed as safeguarding user rights.[296] Most notable among these is a provision which actually provides a means of collective redress against platform overblocking by permitting associations representing user rights[297] to bring a legal claim against a service provider for repeated and

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without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users.' " (emphasis omitted)); *see also* JULIA REDA, JOSCHKA SELINGER & MICHAEL SERVATIUS, GESELLSCHAFT FÜR FREIHEITSRECHTE, ARTICLE 17 OF THE DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET 24–37 (2020), https://freiheitsrechte.org/home/wp-content/uploads/2020/11/GFF_Article17_Fundamental_Rights.pdf [perma.cc/4LJH-TPBM] (noting that free expression is explicitly referenced in Article 17 but arguing that this reference is insufficient to safeguard the right).

294. Cory Doctorow, *Europeans Deserve to Have Their Governments Test—Not Trust—Filters*, ELEC. FRONTIER FOUND. (Feb. 6, 2020), https://www.eff.org/deeplinks/2020/02/europeans-deserve-have-their-governments-test-not-trust-filters [perma.cc/D8B2-RYWG]; *see also* AXEL METZGER & MARTIN SENFTLEBEN, EUR. COPYRIGHT SOC'Y, SELECTED ASPECTS OF IMPLEMENTING ARTICLE 17 OF THE DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET INTO NATIONAL LAW—COMMENT OF THE EUROPEAN COPYRIGHT SOCIETY 10–11 (2020), http://dx.doi.org/10.2139/ssrn.3589323 (discussing how national laws might adopt a workable, harmonized definition of "caricature, parody and pastiche" despite the fact that platform providers will still need to "distinguish between permissible pastiche and prohibited piracy"); *Implementation Update: French Parliament Gives Carte Blanche, While the Netherlands Correct Course*, INFOJUSTICE (Oct. 10, 2020), https://infojustice.org/archives/42690 [perma.cc/7FHW-YMLY] (noting that, in terms of general implementation of Article 17 as of late 2020, Member States' laws were already inconsistent with one another in safeguarding user freedoms); Christophe Geiger & Bernd Justin Jütte, *The Challenge to Article 17 CDSM, an Opportunity to Establish a Future Fundamental Rights-Compliant Liability Regime for Online Platforms*, KLUWER COPYRIGHT BLOG (Feb. 11, 2021), http://copyrightblog.kluweriplaw.com/2021/02/11/the-challenge-to-article-17-cdsm-an-opportunity-to-establish-a-future-fundamental-rights-compliant-liability-regime-for-online-platforms [perma.cc/NXD2-LQPH] ("The 27 Member States have struggled with transposing the []DSM Directive and have so far produced various transposition drafts, many of which differ greatly. . . . In particular, the fact that [online content-sharing service providers] would largely have to make sensitive value judgments, e.g. whether a particular use constitutes a parody or falls under the quotation exception, is problematic. The economic pressure to avoid liability will most likely result in a decision to block or to filter in order to be on the safe side.").

295. *See, e.g.*, Cory Doctorow, *Yes, the EU's New #CopyrightDirective Is All About Filters*, ELEC. FRONTIER FOUND. (Nov. 30, 2018), https://www.eff.org/deeplinks/2018/11/yes-eus-new-copyrightdirective-all-about-filters [perma.cc/4UBQ-MMR4] (discussing the potential for under- and overblocking as a result of passing what would become Article 17).

296. *German Article 17 Implementation Law Sets the Standard for Protecting User Rights Against Overblocking*, COMMUNIA (May 20, 2021), https://www.communia-association.org/2021/05/20/german-article-17-implementation-law-sets-the-standard-for-protecting-user-rights-against-overblocking [perma.cc/9TBR-DR5P].

297. Under the law, any "association[] representing users" online may sue. Gesellschaft für Freiheitsrechte, *Copyright Reform in Germany: Damage Reduction on Article 17*, EUR. DIGITAL RTS. (June 2, 2021), https://edri.org/our-work/copyright-reform-in-germany-damage-reduction-

wrongful blocks of authorized uses.[298] Likewise, Germany's implementation carefully sets out a list of presumably authorized uses: statutory rules on permitted expression that cannot be trumped by private contracting.[299]

Any subsequent U.S. reform of § 512 (including any contemplated use of filtering technology) must likewise provide legal standing for users to police against arbitrary and overexpansive blocks. More importantly, like the German implementation of Article 17, the statute must make clear that private filtering technology and any license agreements that those filters operate under cannot trump certain existing rights in the Copyright Act, such as fair use. Instead, any blocks of user-generated content must be carried out in accordance with statutory law. In this manner, certain well-established copyright rules—such as the fact that parodies utilizing copyrighted works are permissible even if a copyright holder finds the parody offensive or in poor taste—become immutable rules, rules that cannot be contracted around. Thus, contractual terms that attempt to route around those rules would be void and unenforceable.

C. *Reinserting the User*

This Part began by considering the notable anti-copyright countermovement of the late 1990s and early 2000s. Individual users coalesced around flashpoints as obvious as peer-to-peer filesharing and as seemingly benign as coffee machines. In the latter case, the coffee company Keurig had enlisted an unlikely ally—copyright and patent law—to prevent customers from using non-Keurig-branded coffee products in its machines.[300] In the mass outcry and litany of public interest lawsuits that ensued, much of the litigation strategy focused on bringing class action claims on behalf of ordinary consumers

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on-article-17 [perma.cc/9UUP-6AP3]. For example, Gesellschaft für Freiheitsrechte, a nonprofit dedicated to civil rights impact litigation, could sue under the law. *See id.*; *see also* GESELLSCHAFT FÜR FREIHEITSRECHTE, https://freiheitsrechte.org [perma.cc/9HKH-QN94].

298. Urheberrechts-Diensteanbieter-Gesetz [UrhDaG] [Act on the Copyright Liability of Online Content Sharing Service Providers], May 31, 2021, ELEKTRONISCHER BUNDESANZEIGER [EBANZ] at 27 1219, § 18(6) (Ger.).

299. Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBL I at 1273, §§ 45d, 51a, 55a, 60g, 61g, last amended by Gesetz [G], June 23, 2021, EBANZ I at 1858, art. 25 (Ger.), http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.pdf.

300. *See* Chris Jay Hoofnagle, Aniket Kesari & Aaron Perzanowski, *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 800 (2019).

under state consumer protection statutes.[301] These state statutes are often referred to as "mini attorneys general"[302] statutes precisely because they empower private citizens to bring claims on account of the public interest.[303]

If consumer expectations are unsettled—when Facebook livestreams are muted,[304] when streams of songs are improperly tracked,[305] when legitimate criticism or discourse about culture is silenced[306]—consumers need not fumble helplessly amongst online forums[307] for answers and redress. Instead, litigation itself can act as a transparency tool, shedding light on the confidential licensing terms that circumscribe user speech.[308] Such litigation can act in tandem with, or even be superior to, the legislative solutions posed above that deem certain statutory copyright provisions immutable rules. Indeed, a simmering strand of common law copyright doctrine—broadly known as "copyright misuse"—suggests that because copyright law has important public policy considerations, private attempts to contract around it may be struck down as void against public policy.[309] Consider a user whose video was "demonetized" due to a violation of YouTube's copyright terms of service. Typically, "creators" on YouTube—famous influencers with large followings—are able to receive a portion of YouTube's advertising revenue from views of that

301. *See, e.g.*, *In re* Keurig Green Mountain Single-Serve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 233, 267–68 (S.D.N.Y. 2019) (holding that the consumer class action plaintiffs had sufficiently stated claims under state consumer protection statutes based on Keurig's seeking "to extend the protections afforded its K-Cup Brewer patents by restricting purchasers of Keurig's Single Serve Brewers from using Competing Portion Packs").

302. *See* Curtis v. Altria Grp., Inc., 813 N.W.2d 891, 899 (Minn. 2012) ("[Minnesota consumer protection law] grants private citizens the right to act as a 'private' attorney general" (quoting Ly v. Nystrom, 615 N.W.2d 302, 313 (Minn. 2000))); *see also* Reply Brief of Appellant Bill's Super Foods, Inc. at 12–13, G & K Servs. Co., Inc. v. Bill's Super Foods, Inc., 766 F.3d 797 (8th Cir. 2014) (No. 13-2919) ("In accordance with [Arkansas deceptive trade practices laws], private parties act as mini-Attorneys General and thus step into the shoes of the Attorney General office.").

303. All states have one or more consumer protection statutes that prohibit unfair or fraudulent business practices. CAROLYN CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES 14–15 (2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf [perma.cc/4RWN-C9JG]. For some representative examples, see CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 2017); CAL. CIV. CODE §§ 1750–1784 (West 2019); and N.Y. GEN. BUS. LAW §§ 349–350 (McKinney Supp. 2022).

304. *See, e.g.*, Lamm, *supra* note 141.

305. *See* Browne, *supra* note 163.

306. *See supra* Section II.B.2.

307. *See, e.g.*, ImMalteserMan, *supra* note 126.

308. It was through litigation, for example, that we discovered that a standard term in Disney's licensing agreement prohibits licensees from making "derogatory" statements *not just about Disney* but "critical of the entertainment industry" as a whole—a right found nowhere in the Copyright Act. Video Pipeline, Inc. v. Buena Vista Home Ent., Inc., 342 F.3d 191, 203 (3d Cir. 2003); *see* 17 U.S.C. § 512.

309. *See, e.g.*, Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 978 (4th Cir. 1990) (finding misuse where the plaintiff used its copyright "in a manner violative of the public policy embodied in the grant of a copyright").

video.[310] YouTube, however, may "demonetize" creators who violate the platform's terms of service, including its copyright policy.[311] In cases where another copyright holder has claimed that it owns the copyright in a portion of the creator's work, the creator's video may be "demonetized" while the other copyright holder gets to share in monetization proceeds.[312] The system is prone to error (and potential wrongful claims), such as when a famous YouTube creator tweeted screenshots that her videos were demonetized because someone else claimed copyright protection in the number "50."[313] To avoid losing out on sharing in ad revenue, YouTube creators may "avoid making fair use of copyrighted material they want to use in their work, and endlessly edit and re-edit lawful expression."[314]

All demonetized creators, then, might bring a class action lawsuit, arguing that YouTube's prohibition on monetizing even fair uses of copyrighted content contravenes public policy, rendering statements such as that YouTube "support[s] the free flow of ideas and creativity" misleading advertising under state consumer deception laws.[315] Similar suits have gained traction in recent months: for example, a nonprofit advocacy group recently brought suit against Facebook, alleging that the company violated state consumer protection law when it claimed in testimony to Congress that it removes any harmful content immediately, despite evidence that large swaths of hate speech remain available on the site.[316] As users everywhere become frustrated by the opaque content moderation policies of the largest internet platforms, they may increasingly turn to individual state mini-attorney-general statutes to force change.

After all, if the legislative process has shown itself to be suspect through industry capture,[317] then pursuing redress through the judicial system, by aggregating the thousands of small claims of everyday consumers, is one way to counterbalance powerful and concentrated lobbyists. Indeed, if one vision of the class action mechanism sees it as a regulatory device—to deter misconduct and enact wide-ranging social change—then class actions can in effect act as

310. Katharine Trendacosta, *Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online*, ELEC. FRONTIER FOUND. (Dec. 10, 2020), https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online [perma.cc/RSN9-5VJY].

311. *Id.*

312. Timothy Geigner, *YouTube Streamer Hit with Demonetization over Copyright Claims to Numbers '36' and '50,'* TECHDIRT (Jan. 24, 2020, 1:31 PM), https://www.techdirt.com/2020/01/24/youtube-streamer-hit-with-demonetization-over-copyright-claims-to-numbers-36-50 [perma.cc/UG2R-456U].

313. *Id.*

314. Trendacosta, *supra* note 310.

315. *See* YOUTUBE, COPYRIGHT TRANSPARENCY REPORT (2022), https://services.google.com/fh/files/misc/hytw_copyright_transparency_report.pdf?hl=en [perma.cc/YEY8-KJQE].

316. Complaint and Demand for a Jury Trial at 1–2, Muslim Advocates v. Zuckerberg, No. 2021 CA 001114 B (D.C. Super. Ct. Apr. 8, 2021).

317. *See generally* LITMAN, *supra* note 279.

"a regulatory process [that] furthers the design and administration of public policy."[318] And even if such suits face an uphill battle to a full adjudication on the merits, the mere *filing* of a class action complaint itself may serve as a threat and deterrent to overbroad contractual rights that tread on user expression—aggregated user claims, after all, mean increased exposure.[319]

Conclusion

The mushrooming literature on the law of the platform—examining how large digital intermediaries create their own substantive rules and procedures that, by nature of the sheer amount of content and users they apply to, become governmental and legal in nature—has been, for the most part, markedly pessimistic about the "quandary of ensuring democratic accountability and legitimacy when private organizations serve as regulators."[320] On the other hand, copyright scholarship has largely focused on the internet's democratizing effect on copyright industries formerly dominated by a select few record labels, movie studios, and publishers. In this sense, digital technologies have led to more content, diffuse and varied individual creators, and new distribution platforms for the amateur creator.[321] The rise of new technologies made it easier and cheaper for everyday individuals to create content, the classic story

318. David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 BYU L. Rev. 1511, 1517.

319. Putative class action suits that similarly seemed a long way from viable, such as the sprawling decade-long litigation brought by a putative class of Facebook users against the company for privacy violations that was repeatedly dismissed for lack of standing and for failure to state a claim, *see, e.g.*, *In re* Facebook Internet Tracking Litig., 140 F. Supp. 3d 922 (N.D. Cal. 2015) (dismissing earlier claim), ultimately resulted in a historic $90 million settlement agreement, *see* Order Granting Motion for Final Approval of Class Action Settlement at 3–4, *In re* Facebook Internet Tracking Litig., No. 12-md-02314 (N.D. Cal. Nov. 10, 2022).

320. Bloch-Wehba, *supra* note 2, at 33.

321. *See, e.g.*, Lemley, *supra* note 281, at 470 ("Today, music, movies, and art can all be made entirely of information. This led to a second, related change: the democratization of content distribution. . . . Existing content is no longer scarce." (footnote omitted)); Balkin, *supra* note 160, at 1 (arguing that digital technologies change the focus of free speech theory from a republican concern with protecting democratic process and democratic deliberation to a larger concern with protecting and promoting a democratic culture, in which all individuals have a fair opportunity to participate in forms of cultural meaning-making); Madhavi Sunder, *IP*^{3}, 59 Stan. L. Rev. 257, 262 (2006) (arguing that digital architecture "empowers democratic cultural participation and ushers in a 'semiotic democracy' in which all individuals can 'rip, mix, and burn' culture"); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 Cardozo Arts & Ent. L.J. 215, 217–18, 249–67 (1996) (discussing the ways in which the internet may further democracy and arguing that "the transformative power of cyberspace lies in its capability to decentralize the production and dissemination of knowledge"); Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 Vand. J. Ent. & Tech. L. 863, 865–66 (2008) ("User-generated content, per se, has been around for a long time. . . . It is only in the past few years, however, with the emergence of [user-generated content] mega-sites such as YouTube, MySpace, Facebook, Digg, and Revver, that [user-generated content] has taken on a new level of social significance, due to the sheer number of participants and the new ways in which they are interacting.").

goes.[322] In turn, barriers to distribution have also disappeared, as a number of platforms—YouTube, Facebook, TikTok, and self-publishing—allow creators to bypass traditional gatekeepers such as record labels, movie studios, or book publishers.[323] The end result is more varied types of, and cheaper, content than ever.[324] We are living in the golden age of creativity.[325]

But increasingly, today's digital fora look like the new gatekeepers. While this Article has highlighted how a consideration of the so-called "platform law"[326] is incomplete without an accurate understanding of how platforms moderate copyright disputes, this Article has also argued that understanding copyright content moderation demands a different framework than traditional content moderation frameworks. Whereas Professor Jack Balkin has theorized a triadic model of speech regulation—speakers, governments, and

322. *See, e.g.*, Lemley, *supra* note 281, at 461 ("The Internet has reduced the cost of reproduction and distribution of informational content effectively to zero. In many cases it has also dramatically reduced the cost of producing that content."); John Hall, *From TV to Digital Media: How Technology Changes Content Development*, FORBES (Mar. 7, 2017, 11:15 AM), https://www.forbes.com/sites/johnhall/2017/03/07/from-tv-to-digital-media-how-technology-changes-content-development/?sh=3fa5d90f517a [perma.cc/EK3T-B7QZ] ("Networks like Twitter, LinkedIn, and Facebook, as well as more visual platforms like Instagram and Snapchat, have completely changed how companies create and share content. Before social media and its continual platform changes, your content just couldn't reach as many people.").

323. *See, e.g.*, Eric Goldman & Rebecca Tushnet, *Self-Publishing an Electronic Casebook Benefited Our Readers—And Us*, 11 WASH. J.L. TECH. & ARTS 49 (2015); MICHAEL MASNICK & LEIGH BEADON, THE SKY IS RISING 10, 16–17 (2019), https://skyisrising.com/TheSkyIsRising2019.pdf [perma.cc/3CR3-WAD8]; Joshua Eferighe, *The Next Big Indie Filmmaker Might Be a TikToker*, OZY (June 11, 2020), https://www.ozy.com/the-new-and-the-next/the-next-big-indie-filmmaker-might-be-a-tiktoker/274344 [perma.cc/DM49-8MH2]; Amy X. Wang, *Spotify Now Lets Artists Bypass Labels and Upload Their Own Music*, ROLLING STONE (Sept. 20, 2018), https://www.rollingstone.com/pro/news/spotify-artists-direct-music-upload-726352 [perma.cc/D3UN-MLCR].

324. *See, e.g.*, CHRIS ANDERSON, THE LONG TAIL 15, 22–23 (2006) (arguing that "technology is turning mass markets into millions of niches," allowing creators to generate a massive amount of diverse content, and as a result, this "long tail" of content can "establish[] a market that rivals the hits" (cleaned up)); F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 RUTGERS COMPUT. & TECH. L.J. 293, 293 (2001) ("A cornucopia of copyrighted text, images, and music is currently being created and shared by the Internet community. . . . [T]he ease of digital copying and distribution has enabled authors and artists to freely share digital copies of their creative and original works with broad audiences."); John M. Newman, *Copyright Freeconomics*, 66 VAND. L. REV. 1409, 1412 (2013) ("This sea change in favor of zero-price, *legitimate* content has ushered in an era of what I refer to as 'copyright freeconomics' . . . [which is an] era of 'content abundance.'"); Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1557–58 (2019) (situating the twenty-first century in the context of two "digital disruptions": the first, which resulted in the rise of streaming services that facilitated greater quantities of content than ever before, and the second—driven by the collection of consumer data—which will "lead[] not only to a new competitive landscape . . . but also . . . to new ways of creating content").

325. *See, e.g.*, WALDFOGEL, *supra* note 28 (showing with empirical evidence that digitization democratizes access to the cultural marketplace by lowering the costs of creation, distribution, and promotion).

326. *See* Land, *supra* note 8.

digital intermediaries[327]—this Article has proposed a fourth player: copyright owners who do not control the infrastructure of the communication but claim property rights in the communicatory contents.

As this Article has detailed, the recent rise in private contracting between large content holders and concentrated technological intermediaries like Facebook and Google has supplanted substantive, public copyright law with a series of privately made rules that are obscured from public view. Little is known, and far less has been written, on just what those rules *are*. Using both public filings and confidential leaked documents, this Article attempted to piece together some clues as to what the new privatized copyright looks like—how it replaces and contravenes substantive public law, and how it may come to influence and shape substantive public law, as well.

Internet law scholars have previously pointed out that governments "are leveraging the infrastructure of private ordering . . . in order to carry out their own policy preferences."[328] Copyright holders, too, are keen on the benefits of exercising control through a technological intermediary—be it a social media network or a streaming service. Indeed, as Part III of this Article discussed, they are working on rewriting the public copyright law to make such private contracting a requirement or, in other cases, to shield public copyright rulemaking from public policy considerations. Creative speech on the internet now finds itself at a curious precipice: a seeming glut of low-cost or free content, much of which is created by, and distributed to, users—yet which is increasingly regulated by an opaque network of rules created by a select few private parties.

These recent developments threaten the democratizing potential of the internet in a way very different from how most copyright scholars have conceived of internet-facilitated democratization (that is, the idea that anyone can now be a creator).[329] Rather, the developments endanger the very concept of democratization as collective governance. If the rules of content creation on the internet come increasingly to be governed by invisible contracts negotiated between a select handful of large corporate conglomerates, then the meaning of democratization as the anything-goes freedom of content creation on the internet may be threatened. This Article concluded with some proposals for how the unruly masses that the new private copyright governs can reinsert themselves in the copyright process—by first pushing for a greater understanding of what the new privately made rules *are* before challenging their legality and reaffirming the primacy of public law in the courts. If they don't—if *we* don't—the democratized (in all senses of the word) digital renaissance may end up a failed experiment.

327. Balkin, *supra* note 4.

328. Bloch-Wehba, *supra* note 2, at 29.

329. *See supra* note 321 (collecting sources referring to the internet as democratizing creativity and content distribution).