EDITOR'S NOTE

Welcome to the first Issue of Volume 76 of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association (FCBA). We are excited to present the first Issue of this Volume showcasing the diverse range of issues encompassed by technology and communications law. This Issue provides analysis and insight into the future regulation of facial recognition technology and social media companies, as well as the implications of generative Artificial Intelligence (AI) in the art world.

This Issue begins with an article from Lawrence J. Spiwak, Esq., President of the Phoenix Center for Advanced Legal & Economic Public Policy Studies. His Article analyzes the ongoing proposal to consider social media companies to be "common carriers" from a regulatory perspective, filling the analytical gap of how such a regime might work and examining the intended and unintended consequences of such a proposal.

This Issue also features four student Notes, all of which explore innovative ways to apply existing frameworks to novel technology issues.

First, Ileana Thompson explores how the multi-district litigation against opioid manufacturers for their role in the opioid epidemic may serve as a framework for future mass tort litigation against social media companies whose algorithms are designed to drive social media addiction.

In our second Note, Katherine Wirvin argues for the adoption of a slightly modified Coogan Law to protect the financial interests of minors who are YouTube stars (or, "KidTubers").

In our third Note, Catherine Ryan explores the threat to individual rights posed by facial recognition technology and advocates for an expansion of human rights to include the right to one's own facial biometric data.

Finally, David Silverman proposes that the fair use doctrine used in the Supreme Court decision *Google v. Oracle* be applied to AI image generation in the world of art.

The Editorial Board of Volume 76 would like to thank the FCBA and The George Washington University Law School for their continued support of the Journal. We also appreciate the hard work of the authors and editors who contributed to this Issue.

The Federal Communications Law Journal is committed to providing its readers with in-depth coverage of relevant communication law topics. We welcome your feedback and encourage the submission of articles for publication consideration. Please direct any questions or comments about this Issue to fclj@law.gwu.edu. Articles can be sent to fcljarticles@law.gwu.edu. This Issue and our archive are available at http://www.fclj.org.

Catherine Ryan
Editor-in-Chief

Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and The George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, technology, privacy, communications and information policymaking, and other related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to over 2,000 subscribers, including Association members as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at www.fclj.org.

The *Journal* is managed by a student Editorial Board, in cooperation with the Editorial Advisory Board of the FCBA and two Faculty Advisors.

Federal Communications Bar Association

The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation, and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That's why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, D.C. area, the FCBA has eleven active regional chapters, including: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Southern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the U.S., its territories, and several other countries.

The George Washington University Law School

Established in 1865, The George Washington University Law School (GW Law) is the oldest law school in Washington, D.C. The Law School is accredited by the American Bar Association and is a charter member of the Association of American Law Schools. GW Law has one of the largest curricula of any law school in the nation with more than 275 elective courses covering every aspect of legal study.

GW Law's home institution, The George Washington University, is a private institution founded in 1821 by charter of Congress. The Law School is located on the University's campus in the downtown neighborhood familiarly known as Foggy Bottom.

The *Federal Communications Law Journal* is published by The George Washington University Law School and the Federal Communications Bar Association three times per year. Offices are located at 2028 G Street NW, Suite LL-020, Washington, D.C. 20052. The *Journal* can be reached at fclj@law.gwu.edu, and any submissions for publication consideration may be directed to fcljarticles@law.gwu.edu. Address all correspondence with the FCBA to the Federal Communications Bar Association, 1020 19th Street NW, Suite 325, Washington, D.C. 20036-6101.

Subscriptions: Subscriptions are $30 per year (domestic), $40 per year (Canada and Mexico), and $50 per year (international). Subscriptions are to be paid in U.S. dollars and are only accepted on a per-volume basis, starting with the first issue. All subscriptions will be automatically renewed unless the subscriber provides timely notice of cancellation. Address changes must be made at least one month before publication date, and please provide the old address or an old mailing label. Please direct all requests for address changes or other subscription-related questions to the journal via email at fclj@law.gwu.edu.

Single and Back Issues: Each issue of the current volume can be purchased for $15 (domestic, Canada and Mexico) or $20 (international), paid in U.S. dollars. Please send all requests for single or back issues to fclj@law.gwu.edu.

Manuscripts: The *Journal* invites the submission of unsolicited articles, comments, essays, and book reviews mailed to the office or emailed to fcljarticles@law.gwu.edu. Manuscripts cannot be returned unless a self-addressed, postage-paid envelope is submitted with the manuscript.

Production: The citations in the *Journal* conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia L. Rev. Ass'n et al. eds., 21st ed., 2021). Variations exist for purposes of clarity and at the editors' discretion. The *Journal* is printed by Joe Christensen, Inc.

Citation: Please cite this issue as 76 FED. COMM. L.J. ___ (2023).

FEDERAL COMMUNICATIONS LAW JOURNAL
THE TECH JOURNAL
GW LAW VOLUME 76 ISSUE 1 fcba THE TECH BAR
NOVEMBER 2023

ARTICLES

Regulatory Implications of Turning Internet Platforms into Common Carriers

The debate over how internet platforms moderate content has reached a fever pitch. To get around First Amendment concerns, some proponents of content moderation regulation argue that internet platforms should be regulated as "common carriers"—that is, internet platforms should be legally obligated to serve all comers without discrimination. As these proponents regularly point to communications law as an analytical template, it appears that the term "common carrier" has become a euphemism for full-blown public utility regulation complete with a dedicated regulator. However, proponents of common carrier regulation provide no details about how this regime would work. Viewing the question through a *regulatory*—as opposed to a First Amendment—lens, the purpose of this paper is to offer a few insights on how to fill that analytical gap, and to ask if we will be happy with the inevitable consequences (intended and unintended) if we proceed down that road. To provide context, this paper begins with a brief overview of the legal origins of the "internet platforms are common carriers" argument as a strategy to overcome First Amendment concerns. Next, this paper reviews the prominent academic literature arguing for internet platforms to be treated as common carriers, which draws upon direct analogies to the communications industry. However, if communications regulation is to provide the analytical template for internet platform regulation, then a more accurate understanding of communications law is required. Following this discussion, this paper reviews Justice Clarence Thomas's concurrence in *Biden v. Knight Foundation*, along with the two cases—one from the Eleventh Circuit and one from the Fifth Circuit—in which, at the time of this writing, the Supreme Court has just granted *certiorari* and where the question of whether internet platforms may be treated as common carriers is at the heart of the dispute. The penultimate section of this paper outlines some of the important—yet unaddressed—legal questions that will arise should the Supreme Court ultimately rule that internet platforms are common carriers that could eventually be subject to some sort of public utility regulation. Concluding thoughts are at the end.

NOTES

exactly what points of data an AI uses to generate an image, the Supreme Court's fair use analysis in *Google v. Oracle* should represent the model for fair use analysis as it applies to AI-generated art.

FEDERAL COMMUNICATIONS LAW JOURNAL

GW LAW

FCBA
FEDERAL COMMUNICATIONS BAR ASSOCIATION

VOLUME 76

Published by the GEORGE WASHINGTON UNIVERSITY LAW SCHOOL and the FEDERAL COMMUNICATIONS BAR ASSOCIATION

Regulatory Implications of Turning Internet Platforms into Common Carriers

Lawrence J. Spiwak*

TABLE OF CONTENTS

* Lawrence J. Spiwak is the President of the Phoenix Center for Advanced Legal & Economic Public Policy Studies (www.phoenix-center.org).

I. INTRODUCTION

The debate over how Internet platforms moderate content has reached a fever pitch. Congress is conducting oversight on so-called "Big Tech censorship," and states such as Texas and Florida have enacted laws designed to prevent Internet platforms from "silencing opposing voices." But while such legislative efforts are popular among certain political constituencies, the constitutional and practical implications of regulating Internet platforms' content moderation practices are less than clear.

The basic problem plaguing these efforts is that the First Amendment prohibits the government from controlling the speech of private actors. To get around this constitutional constraint, some argue that Internet platforms should be regulated as "common carriers"—that is, Internet platforms should be legally obligated to serve all comers without discrimination.[1] But while it is easy to propose an idea in the abstract, it is more difficult—yet crucial—to spell out how such a regulatory regime would work in practice. For example, is this vision of common carriage something akin to general public accommodation laws that are enforced by the courts or more like full-blown public utility regulation complete with a dedicated regulator? It is frustratingly hard to tell.

While some proponents of platform oversight appear (perhaps inadvertently) to equate common carrier regulation with public utility regulation, others are vague, though it may still be possible to divine meaning in the latter case. Based upon the language used and analogies cited in both the academic literature and the case law, it appears that the latter group of proponents of common carrier regulation also envision some sort of public utility model. Several factors support such an interpretation of the argument.

For example, while the phrase "common carrier regulation" appears regularly in the debate, regulation, by definition, requires rules. As such, somebody must be responsible for writing and enforcing these rules in compliance with the due process requirements of the Fifth Amendment[2] and the Administrative Procedure Act.[3] If the common carrier argument is, in fact, a public utility argument, then some sort of independent regulator (complete with its own dedicated enabling statute) will be required.

Second, many advocates for common carriage regulation (as well as reviewing courts) routinely turn to the telecommunications industry (and its governing statute, the Communications Act of 1934) as a supporting analogy. They say Internet platforms are "communications networks" and are therefore analogous to telephone companies and other electronic distribution networks, which are regulated as public utilities by the Federal Communications

1. A precise definition of "common carrier" is elusive in this context. For example, the Communications Act defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter . . . ." 47 U.S.C. § 153(11).

2. U.S. CONST. amend. V.

3. 5 U.S.C. §§ 551–59.

Commission (FCC).[4] Setting aside the fact that the assorted analogies to the telecommunications industry offered by proponents of Internet platform regulation generally do not paint an accurate picture of communications law or do not even involve common carrier regulation,[5] if FCC oversight of communications networks is the go-to analogy, then it must be understood that "common carriage" is a well-accepted term of art in the field which is synonymous with public utility regulation. Accordingly, by drawing heavily on the communications experience, that analogy would also seem to imply that some sort of public utility regulation for Internet platforms is the envisioned end goal.[6]

Finally, as discussed in Section V below, over the past several years, calls to regulate Internet platforms with a dedicated regulator have become prolific. Accounting for the political environment in which we currently find ourselves, it would not be unreasonable to infer that calls for common carrier regulation to regulate Internet platforms' speech are consistent with calls for a dedicated regulator to govern the economic behavior of Internet platforms. (Of course, if the vision for platform regulation is more like the less intrusive public accommodation model, then proponents should say so to clear up the confusion caused by statements suggestive of public utility regulation. They have not.)

---

4. Some advocates have gone so far as to argue that the FCC already has the authority under Section 230 of the Communications Decency Act to not only regulate Internet platforms as common carriers but to impose content regulation as well. Such arguments do not withstand scrutiny, however. *See* Lawrence J. Spiwak, *In Response to Joel Thayer*, FEDSOC BLOG (Apr. 8, 2021), https://fedsoc.org/commentary/fedsoc-blog/in-response-to-joel-thayer [https://perma.cc/C4ST-T32Z].

5. *See infra* Sections III-IV for discussion.

6. As common carriage is simply *one form* of public utility regulation mandated by the Communications Act, it is possible to be regulated as a public utility without also being classified as a common carrier. For example, voice telephone service (fixed and mobile) is subject to common carrier regulation under Title II and Title III of the Communications Act, yet Voice over Internet Protocol (VoIP) service exists in the regulatory netherworld of "voice" service, neither an information service under Title I nor a telecommunications service under Title II. Multichannel Video Programming provided by cable and satellite companies is not subject to common carrier regulation, but cable companies are subject to other regulatory requirements under Title VI of the Act. Broadcasting is similarly not subject to common carrier regulation but must comply with the licensing requirements of Title III. And Broadband Internet Access Services (fixed or wireless) are currently considered to be an information service under Title I of the Communications Act and therefore not subject to common carrier regulation under Title II, although now that the Biden Administration finally has a Democratic majority at the FCC it is moving aggressively on its promise to reverse this policy, *see* Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021); Safeguarding and Securing the Open Internet, *Notice of Proposed Rulemaking*, FCC 23-83, __ Rcd. __ (2023). Yet regardless of the exact form of public utility regulation, to varying degrees, the FCC oversees the whole lot. The same is true in the energy sector. Under the Federal Power Act and Natural Gas Act, electric utilities and natural gas pipelines are not regulated as common carriers, yet oil pipelines are. Still, the Federal Energy Regulatory Commission has jurisdiction over all these services. Finally, it is a misnomer to describe a particular communications firm as a "common carrier," as many communications firms provide a variety of services. Common carrier status is *activity-based*, *not status-based*. *See generally* FTC v. AT&T Mobility, 883 F.3d 848 (9th Cir. 2018).

Which brings us back to an interesting yet unanswered question: if we assume *arguendo* that First Amendment concerns are overcome (a question that will be answered by the Supreme Court relatively soon) and calls for common carrier regulation of Internet platforms are, in fact, calls for public utility regulation similar to FCC regulation of telephone companies, then what would such a regulatory regime for Internet platforms look like, and how would it work in practice? Proponents of the common carrier regulation provide no details. Viewing the question through a *regulatory*—as opposed to a First Amendment—lens, the purpose of this paper is to offer a few insights about how to fill that analytical gap and to ask if we will be happy with the inevitable consequences (intended and unintended) if we proceed down that road.[7]

To provide context, this paper begins with a brief overview of the legal origins of the "Internet platforms are common carriers" argument as a strategy to overcome First Amendment concerns. Next, this paper reviews the prominent academic literature arguing for Internet platforms to be treated as common carriers, which draws upon direct analogies to the communications industry. Given the language used and analogies to the communications industry provided, it appears that these proponents are using the term "common carriage" as a euphemism for public utility regulation. However, if communications regulation is to provide the analytical template for Internet platform regulation, then a more accurate understanding of communications law is required.

Following this discussion, this paper reviews Justice Clarence Thomas's concurrence in *Biden v. Knight Foundation*, along with the two cases—one from the Eleventh Circuit and one from the Fifth Circuit—in which, at the time of this writing, the Supreme Court has just granted *certiorari*. In these two cases, the question of whether Internet platforms may be treated as common carriers is at the heart of the dispute. Like the surveyed literature, these opinions copiously use the term "common carrier regulation" and make analogies to communications law, again leading the reader to infer that common carrier regulation really means public utility regulation. The penultimate section of this paper outlines some of the important—yet unaddressed—legal questions that will arise should the Supreme Court ultimately rule that Internet platforms are common carriers that could eventually be subject to some sort of public utility regulation. Conclusory thoughts are offered at the end of the paper.

II. COMMON CARRIAGE AS A POTENTIAL END-RUN AROUND FIRST AMENDMENT CONSTRAINTS

Under the First Amendment to the U.S. Constitution, "Congress shall make no law . . . abridging the freedom of speech."[8] Moreover, the Fourteenth

7. A discussion of whether or not designating Internet platforms as common carriers will survive First Amendment scrutiny is beyond the scope of this paper. Any discussion about Section 230 of the Communications Decency Act will also be mercifully avoided.

8. U.S. CONST. amend. I.

Amendment makes the First Amendment's Free Speech Clause applicable to the states.[9] As Justice Brett Kavanaugh wrote for the majority in *Manhattan Community Access Corp. v. Halleck,* the "text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech."[10]

Some argue that because Internet platforms serve as the "modern public square,"[11] they take on a quasi-governmental role and are therefore subject to First Amendment *obligations* rather than enjoying First Amendment *protections*. Not so. According to the Supreme Court in *Halleck*, under the Court's state-action doctrine, a private entity may be considered a state actor "when it exercise[s] a function 'traditionally exclusively reserved to the State.'"[12] As the Court observed, it is:

> [N]ot enough that the federal, state or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function.[13]

And, noted the Court, "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally provided."[14]

Given such a strong statement by the Court, it is probably safe to conclude that Internet platforms would not be held to provide a service that "only governmental entities have traditionally provided." Following the Court's reasoning, even though an Internet platform—which is clearly a private entity—provides "a forum for speech," it is "not transformed by that fact alone into a state actor" and may therefore "exercise editorial control over speech and speakers in the forum."[15]

---

9. U.S. CONST. amend. XIV, § 1.

10. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) (emphasis in original).

11. *Cf.* Packingham v. North Carolina, 582 U.S. 98, 107 (2017).

12. *Halleck*, 139 S. Ct. at 1926. A private entity can also qualify as a state actor "when the government compels the private entity to take a particular action" or "when the government acts jointly with the private entity." *Id.* at 1928 (citations omitted). As discussed in more detail below, however, there is a big difference between overt collusion between the government and the private sector and the day-to-day necessity of dealing with the constant coercive political pressures of the Administrative State. *See infra* Section III.A.2.

13. *Halleck*, 139 S. Ct. at 1928-29 (emphasis in original).

14. *Id.* at 1930.

15. *Id.* For a good summary of recent cases rejecting the application of the state action doctrine to Internet platforms, *see* Jess Miers, X (FORMERLY TWITTER) (May 15, 2023, 5:23 PM), https://twitter.com/jess_miers/status/1658221488607223808 [https://perma.cc/75Z7-W8VG]; Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021).

The logic supporting the Court's holding in *Halleck* is compelling: the Court understood that the government placing restrictions on the ability of private entities to control the content on their platforms would have a chilling effect on their First Amendment rights. As the Court pointed out, if all private property owners who open their property for speech are placed on the government side of the First Amendment equation, then they "would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum."[16] In such a case, private property owners "would face the unappetizing choice of allowing all comers or closing the platform altogether."[17] Accordingly, reasoned the Court:

> [T]o hold that private property owners providing a forum for speech are constrained by the First Amendment would be "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property.[18]

In light of the Court's precedent on what constitutes a state actor—and the repeated failure of arguments that Internet platforms are state actors[19]—proponents of Internet platform regulation have developed a new legal theory: Internet platforms are communications networks and thus should be regulated as common carriers just like telephone companies, including being subject to a non-discrimination obligation to ensure that all voices are treated equally. As common carriage is a well-recognized term of art in the communications field, this theory appears to use the common carriage designation as a euphemism for public utility regulation of Internet platforms. Rather than regulate Internet platforms' *economic* conduct (e.g., prices), however, the government would regulate the platforms' *speech*. The problem, of course, is that because neither common carriage nor public utility regulation were ever intended to serve this function, how that regulatory regime would work in practice is unclear.[20] We turn to that question next.

16. *Halleck*, 139 S. Ct. at 1931.
17. *Id*.
18. *Id.* (citations omitted).
19. *See* Miers, *supra* note 15.
20. *Cf.* Blake E. Reid, *Uncommon Carriage*, 76 STAN. L. REV. (forthcoming 2024) (draft at 3), https://ssrn.com/abstract=4181948 [https://perma.cc/3S84-X6DZ] (There is "no such thing as a broadly applicable law of 'common carriage,' nor any consistent body of First Amendment law consistently approving or disapproving of 'common carriage' laws for information platforms. The allegedly constituent parts of 'common carriage'—and its close cousin, 'quasi-common carriage'—often are pulled from disparate regimes in telecommunications law governing broadcast television and radio, cable TV, Internet access, newspapers, and other technological siloes, divorced from the contemporary technological and social contexts that shaped the development of the regimes and their treatment by the courts.").

III. ARE INTERNET PLATFORMS REALLY LIKE TELEPHONE COMPANIES? A REVIEW OF THE PROMINENT ACADEMIC LITERATURE

A. Professor Adam Candeub

Perhaps one of the earliest (and most frequently cited) proponents of imposing common carrier regulation on Internet platforms is Professor Adam Candeub of Michigan State University. While Professor Candeub has written extensively on the topic, his primary arguments are set forth in a paper entitled *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*.[21] As Candeub expressly calls for a new "regulatory deal" for network regulation which would "probably require an administrative agency"[22] and draws heavily from communications law and policy debates, he appears to sit squarely in the public utility camp for platform regulation.

1. Summary of Candeub's Regulatory Arguments

Candeub begins with the basic premise that Internet platforms—by virtue of their market power[23] and their provision of a "public good"[24]—should be treated as common carriers, complete with a non-discrimination obligation. While Candeub concedes that "[d]efining non-discrimination is not simple,"[25] under Candeub's proposed paradigm, discrimination based on "any valid business or technical reason" would not be illegal.[26] Instead, "only the most egregious cases would constitute discrimination . . . ."[27] But what constitutes "egregious" discrimination? Given the subjective nature of this proposed standard, it is hard to tell from his paper.

For example, Candeub argues that "social media is all about, at some level, discrimination. The platforms curate media that will interest you—but somehow, it is never clear how tweets or particular Facebook posts get to the top of one's feed."[28] Thus, Candeub posits that there is "no reason why the social media companies cannot allow users to create their own experience, block what they wish, and express desires to see more of a particular type of posts."[29] Yet there are many good reasons why Internet platforms may choose to provide a curated experience, and since most do, such curation appears to be preferred by its customers and to support the business model. (And, one must wonder, if "social media is all about discrimination," then wouldn't a non-discrimination requirement turn social media into something else?)

---

21. 22 YALE J.L. & TECH. 391 (2020).
22. *Id.* at 431.
23. *Id.* at 399.
24. *Id.* at 400.
25. *Id.* at 430.
26. *Id.*
27. *See* Candeub, *supra* note 21.
28. *Id*. at 430-31.
29. *Id.* at 431.

Candeub also argues that a mandatory non-discrimination obligation would "protect[] communications from government interference"[30] (even though such a mandate is, by definition, government interference). In Candeub's view:

> One of common carriage's anti-discrimination obligations' great virtues is that it protects private entities from complying with government's censorship demands. A private company with no legal obligation to treat users in a non-discriminatory fashion readily can accede to the government's request to censor, block, or otherwise treat users unfairly. But, if a private firm is prohibited by law to do so, then the government cannot even ask.[31]

To support his argument, Candeub points to three analogies in telecommunications law: net neutrality, cable regulation, and broadcast regulation.

a. Net Neutrality

Candeub's first analogy is to the FCC's controversial 2015 decision to classify Broadband Internet Access Services (BIAS) as an interstate common carrier telecommunications service under Title II of the Communications Act.[32] Citing the D.C. Circuit's rejection of the FCC's *2010 Open Internet Rules*[33] in *Verizon v. FCC*,[34] Candeub contends that the "legal status of network neutrality became enmeshed with common carriage because courts have identified the power to impose network neutrality rules with the power granted in section 201 of the Communication Act."[35] In Candeub's view, in exchange for "tolerat[ing] the market power of the broadband providers," the FCC in its *2015 Open Internet Order* demanded that Internet Service Providers (ISPs) provide "a public good—serve all equally and refrain from discrimination."[36] Moreover, argues Candeub, a common carrier non-discrimination rule "serves important social goals. It prevents 'de-platforming' of politically or socially unpopular views, thus encouraging full-throated public discussion and creating a universal communications platform for discussion of political and social issues."[37]

---

30. *Id.* at 432.
31. *Id.* at 432-33.
32. Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) [hereinafter *2015 Open Internet Order*], *aff'd* U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *reh'g en banc denied* 855 F.3d 381 (2017).
33. Preserving the Open Internet, Broadband Industry Practices, *Report and Order*, 25 FCC Rcd 17905 (2010) [hereinafter *2010 Open Internet Order*].
34. 740 F.3d 623 (D.C. Cir. 2014).
35. Candeub, *supra* note 21, at 415 (citing 47 U.S.C. § 201).
36. *Id.* at 416.
37. *Id.* at 416-17.

b. Cable Regulation

Although cable companies (or, more accurately, the services they provide) are not regulated as common carriers under the Communications Act of 1934, Candeub nonetheless contends that the history of cable franchise regulation is a good example of a "common carriage deal" between industry and local governments.[38] That is, argues Candeub, in exchange for a total government-sanctioned monopoly in a local franchise area, the cable company would agree to serve everybody in the franchise territory at a uniform price. According to Candeub, "[e]choes of this deal" can be found in the Cable Competition and Consumer Protection Act of 1992.[39]

c. Broadcast Regulation

As his final analogy, Candeub points to the public interest requirement in broadcast licensing. As Candeub notes, because the "federal government owns that [sic] airways and licenses their use to television and radio broadcasters," the "government gives a unique benefit that only government can provide."[40] That benefit, contends Candeub, is the ability of broadcasters to "command considerable rents" given the "scarcity of spectrum."[41] Thus, Candeub argues that in "return for the granting of rents, the government asks that licensees use their monopoly power to expand access and encourage the flow of information, often political information."[42]

2. Discussion

Professor Candeub has put forth an interesting yet controversial academic argument that has received some attention (including a citation by a sitting Supreme Court Justice).[43] As scrutiny of his regulatory proposal shows, however, not only has Candeub misstated the law, but his analogies are uniformly inapposite.

Let's start with Candeub's primary analogy: net neutrality.[44]

As noted above, citing to the D.C. Circuit's ruling in *Verizon*, Candeub maintains that the "highly topical debate over so-called network neutrality is really a common carriage argument."[45] Candeub mischaracterizes *Verizon*. There, the D.C. Circuit was tasked with reviewing the FCC's first formal attempt to write net neutrality rules: the *2010 Open Internet Order*.[46] The

38. *Id*. at 417.
39. *Id.*
40. *Id.*
41. Candeub, *supra* note 21, at 417.
42. *Id.* at 417-18.
43. *See infra* Section IV.A.
44. For a detailed legal background about the net neutrality debate, *see, e.g.*, Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law*, 18 J. INTERNET L. 1 (2015); Lawrence J. Spiwak, *USTelecom and its Aftermath*, 71 FED. COMM. L.J. 39 (2019).
45. Candeub, *supra* note 21, at 413.
46. *Supra* note 33.

2010 Order conspicuously avoided going down the Title II common carrier road by trying to regulate Title I information services using the FCC's authority under Section 706 of the Telecommunications Act of 1996.[47] After review, the court struck down the *2010 Order*, finding that the Commission impermissibly treated Title I information services as common carrier telecommunications services pursuant to Section 153(51) of the Communications Act.[48] In particular, the D.C. Circuit found that the "no blocking" rule mandated by the FCC's *2010 Order* essentially forced ISPs to provide edge providers with access at a regulated price of zero.[49] The court therefore remanded the case with a clear roadmap on how the FCC could remedy its order without reverting to Title II.[50] Rather than heed the D.C. Circuit's advice, the FCC capitulated to political pressure from the Obama White House and classified BIAS as a Title II common carrier interstate telecommunications service in the *2015 Open Internet Order*.[51] As the FCC decided in its *2015 Order* to forbear from many of the Title II common carrier requirements such as tariffing and universal service contributions (thus producing what then-FCC Chairman Tom Wheeler described as "Title II-Lite"), it can be argued that the FCC's reclassification strategy was more jurisdictional than philosophical.[52]

Candeub next claims that the FCC justified its *2015 Open Internet Order* "with the power granted in Section 201 of the Communications Act."[53] According to Candeub, under this authority, the FCC "tolerat[ed] the market power of the broadband providers" in exchange for requiring that they "serve all equally and refrain from discrimination."[54] Candeub misstates the Communications Act.

Candeub specifically points to Section 201(a), which provides in relevant part that: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request." But what Candeub omits is any reference to Section 201(b), which provides in relevant part that: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is

47. 47 U.S.C. § 1302.

48. 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . . .").

49. *Verizon*, 730 F.3d at 658.

50. For a full brief of this case, *see* Spiwak, *What Are the Bounds of the FCC's Authority*, *supra* note 44.

51. *Supra* note 32.

52. In so doing, the FCC played fast and loose with the statutory requirements required for forbearance as required by Section 10 of the Communications Act (47 U.S.C. § 160). However, apparently believing that half a loaf was better than nothing at all, the industry did not object, and the D.C. Circuit upheld the legal gymnastics in the FCC's *2015 Order*, vastly expanding the agency's power going forward. *See* Spiwak, *USTelecom and Its Aftermath*, *supra* note 44.

53. Candeub, *supra* note 21, at 415.

54. *Id.* at 416.

declared to be unlawful."[55] Thus, the primary purpose of Section 201 is *not* to provide the FCC with a jurisdictional hook (other provisions of the Communications Act are designed for this purpose[56]), but to provide the legal structure for the price regulation of common carrier services.[57] And price regulation was precisely what the net neutrality fight was (and continues to be) about: by mandating a no-blocking rule, the FCC forced ISPs to provide service at a regulated price of zero without fulfilling the due process requirements of identifying a cost methodology, conducting a rate case, and requiring a tariff.[58]

While Section 201 encapsulates telephone companies' general common carrier obligation to provide service upon reasonable request, by its own terms, Section 201 has *nothing* to do with discrimination—i.e., having to provide service to all comers upon reasonable request, the ability of telephone companies to treat their customers differently. For that, we need to turn to the eponymous provision in the Communications Act, which specifically deals with discrimination: Section 202. Under Section 202:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[59]

Yet, nowhere in Candeub's paper does he even mention Section 202. Perhaps this omission is due to the fact that once Section 202 and its implementing case law are properly understood, they do not help Candeub's discrimination argument.

Significantly, Section 202 does not bar all discrimination, but only *undue* or *unreasonable* discrimination. Under the express terms of Section 202(a), carriers are allowed to engage in *reasonable* discrimination—a standard with which Candeub generally agrees.[60] But if telecommunications

55. 47 U.S.C. § 201.

56. *See, e.g.*, 47 U.S.C. §§ 151, 152, 153.

57. For a primer on basic ratemaking under the "just and reasonable" standard, *see, e.g.*, George S. Ford & Lawrence J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, 67 FED. COMM. L.J. 1 (2015).

58. *See id.* In fact, the FCC in its *2015 Open Internet Order* ignored the rate regulation problem altogether. There, the FCC side-stepped the law by promulgating its "no paid prioritization" rule—not under Section 202(a), the provision in the Communications Act that is charged with regulating all issues of discrimination—but under the public interest catchall of Section 201(b) and Section 706. Spiwak, *USTelecom and Its Aftermath*, *supra* note 44, at 49.

59. 47 U.S.C. § 202(a).

60. Candeub, *supra* note 21, at 430.

law is to be the analytical template, then the inquiry is not what constitutes "egregious" discrimination (as Candeub argues), but what constitutes "unreasonable" discrimination? Fortunately, the term "unreasonable discrimination" is not an abstract concept; it is a common term of art found in many public utility statutes, and courts over the past nine decades have provided copious guidance about its parameters—regardless of whether the public utility is also regulated as a common carrier.[61]

Because Section 202 is designed to govern economic conduct (rather than speech), disputes under Section 202 generally involve complaints over differences in price and services offered by the providers to their assorted customers. According to well-established case law, any charge that a carrier has unreasonably discriminated must satisfy a three-step inquiry (in sequence): (1) whether the services offered are "like;" (2) if they are "like," whether there is a price difference among the offered services; and (3) if there is a price difference, whether it is reasonable.[62] If the services are not "like" or "functionally equivalent," then discrimination is not an issue, and the investigation ends. There is no valid discrimination claim for *different* prices or price-cost ratios for *different* goods.

A determination of whether services are "like" is based upon neither cost differences nor competitive necessity. Cost differentials are excluded from the likeness determination and introduced only to determine "whether the discrimination is unreasonable or unjust." Likeness is based solely on functional equivalence.[63] If the services are determined to be "like" or "functionally equivalent," then the carrier offering them has the burden of justifying any price disparity as reasonable, such as a difference in cost.[64] If a price difference is not justified, then the price difference is deemed unlawful. A price difference cannot be arbitrarily presumed unlawful, yet that is exactly what the FCC proceeded to do in its *2015 Open Internet Order*.[65]

Moreover, given that allegations of non-discrimination generally arise around disputes over price, interpretation of the concept of "undue discrimination" under Section 202 also cannot be read in isolation from the tariffing requirements of Section 203 of the Communications Act.[66] Under Section 203, a common carrier must file tariffed rates with the FCC for approval, upon which such tariffs are made available to the public. For this reason, one usual measure to determine reasonableness is an inquiry as to whether the different rates are offered to "similarly situated" customers.[67]

---

61. For example, under Section 206 of the Federal Power Act (16 U.S.C. § 824e), the Federal Energy Regulatory Commission has the authority to address any "rate, charge or classification" related to the transmission or sale of electricity that the agency determines is "unjust, unreasonable, unduly discriminatory or preferential."

62. *See, e.g.*, MCI Telecomms. Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990) and citations therein.

63. *Id.*

64. *Id.*

65. *See* Spiwak, *USTelecom and Its Aftermath*, *supra* note 44.

66. 47 U.S.C. § 203.

67. *See, e.g.*, Competition in the Interstate Interexchange Marketplace, *Notice of Proposed Rulemaking*, 5 FCC Rcd 2627, paras. 131-39 (1990) *(*citing Associated Gas Distribs. v. FERC, 824 F.2d 981, 1007-13 (D.C. Cir. 1987)).

That is, are the customers roughly the same size and exchange similar levels of traffic, or, for example, is one customer a wholesale customer while the other only buys at retail? In the standard course of regulating telecommunications rates, such distinctions permit different treatment.

Internet platforms, so far, are not subject to common carrier rate regulation and therefore do not have to file tariffs that govern their terms of service. They operate in a deregulatory environment. Moreover, they currently *voluntarily* charge a price of zero to the end consumer (i.e., their services are free). How, then, if we adopt Candeub's common carrier regulatory model, would we evaluate claims of "undue discrimination" by Internet platforms following the language and implementing precedent of Section 202? That is, if we assume *arguendo* that Internet platforms are common carriers and must provide service to all comers, then what level of content moderation among different customers would be unlawful? Although Candeub offers no answers, the D.C. Circuit's ruling in *Orloff v. FCC* may offer some guidance.[68]

Under the Communications Act, mobile voice is classified as a common carrier service (while mobile data service is not). In the mid-1990s—with the express blessing of Congress—the FCC removed the tariffing requirement of Section 203 for mobile voice, reasoning that competition would ensure that rates remained "just and reasonable."[69] The plaintiff in *Orloff,* however, argued that Verizon nonetheless engaged in undue discrimination under Section 202 because Verizon individually negotiated with customers and offered special deals. The D.C. Circuit disagreed.

As the court observed, in a *deregulated* environment, "[r]ates are determined by the market, not the Commission, as are the level of profits."[70] Thus, reasoned the court, Section 202 "prohibits only *unjust* and *unreasonable* discrimination in charges and service. [The plaintiff] is therefore not entitled to prevail merely by showing that she did not receive all the sales concessions Verizon gave to some other customers—that, in other words, Verizon engaged in discrimination."[71]

Orloff thus provides a powerful reminder that a common carrier public utility regulation is not an environment in which firms can exist as "half pregnant:" either the government affirmatively regulates a firm's rates, terms, and conditions of service, or the government surrenders that oversight function to the market. There is no middle ground. As *Orloff* holds, it is perfectly lawful for a firm providing a common carrier service to discriminate by individualized negotiations when the government opts for a deregulated market. Applying the lesson of *Orloff* to the "Internet platforms are common carriers" debate, even if classified as common carriers, under current market conditions, Internet platforms' content curation policies would likely not reach the level of "undue discrimination" that Section 202 prescribes. If the

68. Orloff v. FCC, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied,* 542 U.S. 937 (2004).

69. Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, para. 174 (1994).

70. *Orloff*, 352 F.3d at 420.

71. *Id.* (emphasis in original).

government wants to exert more control over how Internet platforms curate content, then the full panoply of public utility regulation is probably required so that the regulator can decide, for example, whether Donald Trump is "similarly situated" to an Instagram influencer.

Finally, Candeub makes a mistake common among many academics: he fails to offer even a basic cost/benefit analysis of his proposal.[72] It is axiomatic that while regulation has benefits, regulation also can be costly. It is also axiomatic that firms are not passive recipients of regulation. Thus, despite altruistic intentions, a common carrier regulatory regime may do more harm than good.

Such was the case with net neutrality. While the D.C. Circuit in *United States Telecom Association v. FCC* initially deferred to the FCC's then-predictive judgment that the *2015 Open Internet Rules* would not cause any economic harm,[73] when the FCC reversed those rules two years later in its *Restoring Internet Freedom Order* (*RIFO*), the Commission had the advantage of peer-reviewed econometric evidence which conclusively demonstrated that industry investment suffered as a result of reclassification.[74] Candeub may be unaware of the cost-benefit analysis described in the *RIFO*, as he incorrectly states that *Congress*—not the FCC's *2018 Restoring Internet Freedom Order*—was the governing authority that reversed the *2015 Order*.[75]

Next, let's turn to Candeub's cable regulation analogy. As noted above, Candeub argues that the cable franchise system is essentially a "common carrier deal"—i.e., in exchange for a government-sanctioned monopoly, the cable company agreed to serve the entire franchise area at a uniform price. Moreover, argues Candeub, this deal was "echoe[d]" in the Cable Competition and Consumer Protection Act of 1992. Again, Candeub's analogy is inapposite.

To begin, Internet platforms currently do not have a government-sanctioned monopoly, so it is unclear what kind of "common carrier deal" can be made with regard to content moderation. (And, quite frankly, unless we want state-run social media, the notion of granting a particular Internet platform a government-sanctioned monopoly in exchange for regulated content moderation is probably not a good idea in the first instance.)

---

72. *See, e.g.*, Lawrence J. Spiwak, *A Change in Direction for the Federal Trade Commission?*, 22 FEDERALIST SOC'Y REV. 304 (2021), https://fedsoc.org/commentary/publications/a-change-in-direction-for-the-federal-trade-commission [https://perma.cc/D24W-K4HD] (critiquing now-FTC Chair Lina Khan's argument for unfair methods of competition rulemaking).

73. *U.S. Telecom Ass'n*, 825 F.3d at 707-08.

74. Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311 (2018), paras. 95-98, *aff'd by, in part, vac'd by, in part, rem'd by* Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019) (*citing* George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, PHX. CTR. POL'Y PERSP. NO. 17-02 (2017), insert hyperlink [https://perma.cc/DKW2-594X] (subsequently published as *Regulation and Investment in the U.S. Telecommunications Industry*, 50 APPLIED ECONS. 6073 (2018)); *see also* George S. Ford, *Net Neutrality and Investment in the US: A Review of Evidence from the 2018 Restoring Internet Freedom Order*, 17 REV. NETWORK ECON. 175–05 (2019).

75. Candeub, *supra* note 21, at 416.

Second, a mandatory buildout requirement in exchange for a government-sanctioned monopoly is not the equivalent of common carriage. To ensure due process, regulation requires specificity, and Congress has never subjected cable companies to common carrier regulation when they provide multichannel video services (although cable companies are subject to varying degrees of public utility regulation by the FCC). If anything, all this "bargain" between the local franchise authority and the cable companies represents is simply another form of public utility regulation.

Finally, Candeub's description of a "common carrier deal" was most definitely not echoed in the 1992 Cable Act. Section 621(a)(1) of the Cable Act specifically called for the end of exclusive franchises.[76] And when local governments continued to drag their heels by forcing new entrants to live up to the same regulatory "bargain" of universal coverage the franchise authority made with the incumbent as a condition of approval, the FCC was forced to step in with their *2008 Cable Franchise Reform Order.*[77] As the FCC found, mandatory buildout requirements are anticompetitive as they raise rivals' costs and deter new entry.[78]

Candeub's broadcast regulation analogy is also misplaced. As noted above, Candeub's central argument is that "in return for the granting of rents, the government asks that licensees use their monopoly power to expand access and encourage the flow of information."[79] But Candeub incorrectly conflates a property right with the ability to exercise market power by either raising price or restricting output in a particular market.

An exclusive spectrum license is a property right conferred by the government which is specifically designed to protect the license holder against harmful interference from other users in a particular band at a particular location. But unlike the old exclusive cable franchise model highlighted above, an exclusive spectrum license does not bestow a state-sanctioned monopoly over a given market.[80] Indeed, we don't live in a world where there is a single state-run television or radio station; broadcast markets are typically characterized by multiple broadcast licensees competing in the same geographic area for ears and eyeballs. And if we expand the definition of the relevant product market to include other currently available

76. 47 U.S.C. § 541(a)(1).

77. Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101 (2007), *aff'd*, All. for Cmty. Media v. FCC, 529 F.3d 763 (6th Cir. 2008).

78. *Id.*

79. Candeub, *supra* note 21, at 418.

80. If we accept Candeub's argument, then all of America's wireless companies also have monopolies via their exclusive licenses—the only difference is that they purchased their spectrum from the government at auction, while the original broadcast licensees received their spectrum for free in exchange for a social contract with the government. *See* T. Randolph Beard et al., *Phoenix Center Policy Paper Number 47: An Economic Framework for Retransmission Consent*, PHX. CTR. POL'Y PAPER SERIES (2013), https://www.phoenix-center.org/pcpp/PCPP47Final.pdf [https://perma.cc/8QW7-MBEC]. However, like broadcasting, wireless markets generally have multiple licensees. *See, e.g.*, T. Randolph Beard et al., *Wireless Competition Under Spectrum Exhaust*, 65 FED. COMM. L.J. 79 (2012).

entertainment options—including one or more cable companies, two satellite companies, assorted streaming services, etc.—then the argument that broadcasters are feasting upon monopoly rents becomes preposterous. In fact, the continued erosion of the broadcasters' business model over the past several years led the FCC to loosen its media ownership rules and eliminate the broadcaster/newspaper cross-ownership ban.[81]

Finally, yet perhaps most germane, the Communications Act specifically bars treating broadcasters as common carriers. As Section 153(11) states, "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."[82] It is thus unclear how broadcast regulation is a "common carriage deal" when the Communications Act clearly belies that argument.

We also have Candeub's two (and somewhat interrelated) policy arguments: common carriage regulation is justified because Internet platforms are "dominant" and because they provide a "public good."

As noted in the preceding discussion, dominance depends entirely on how one defines the relevant market.[83] Take Facebook as an example. If we define the relevant market narrowly as "a social media platform where people can interact with both friends and public figures based on a unique propriety user interface," then sure: Facebook is dominant over itself (i.e., a relevant market of one firm). Yet Facebook competes for patronage with a host of other social media platforms, including Snapchat, X (formerly Twitter), TikTok, Mastodon, Substack, and Truth Social. The broadly defined social media market appears quite competitive, offering consumers a wide variety of choices free of charge.[84]

The question of market dominance also has legal implications. While market dominance may provide an argument for public utility regulation, does the fact that a firm is dominant *a fortiori* mean that this firm is also a common carrier? In a paper entitled *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy,*

---

81. 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets; Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, *Order On Reconsideration And Notice Of Proposed Rulemaking*, 32 FCC Rcd 9802 (2017).

82. 47 U.S.C. § 153(11).

83. *Cf.* Geoffrey A. Manne & J.D. Wright, *Google and The Limits of Antitrust: The Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171 (2011).

84. A market equilibrium is an economic outcome, not a political choice. Depending on the size of the market, the intensity of price competition and the amount of sunk costs required for entry, "few" firms may be the efficient outcome and therefore public utility regulation may be unwarranted. George S. Ford et al., *Competition After Unbundling: Entry, Industry Structure, and Convergence*, 59 FED. COMM. L.J. 331 (2007); *see also* George S. Ford, *'Hipster' Antitrust Meets Two-Sided Markets*, BLOOMBERG L. (Apr. 17, 2018), https://www.phoenix-center.org/oped/BloombergLawHipsterAntitrustMeetsTwo-SidedMarkets17April2018.pdf [https://perma.cc/2FE6-882Z].

University of Pennsylvania Law School Professor Christopher Yoo addresses this question directly.[85] After reviewing the case law, Professor Yoo finds "that none of the standard judicial definitions of common carriage depend on the presence of market power."[86] Yoo's finding makes sense. For example, electric companies—which are the very epitome of "natural monopolies"—have never been regulated as common carriers but are nonetheless extensively regulated as public utilities.[87]

This brings us to Candeub's "social media is a public good" argument. A public good is an economic concept explaining a kind of product or service that theoretically may be underprovided without policy intervention. Candeub provides the standard economic definition of a public good as "(i) non-rivalrous, meaning that when a good is consumed, it doesn't reduce the amount available for others and (ii) non-excludable, meaning that one cannot provide the good without others being able to enjoy it."[88] In Candeub's view, Internet platforms fit this definition:

> A universal communications platform is a public good. It is non-rivalrous, meaning my use does not affect or diminish your use. In fact, the more people who use the platform, the more valuable it becomes. And, it is non-excludable. It is difficult to hoard a universal communications forum for oneself. It allows government to explain itself to citizens—and citizens to express themselves to government and fellow citizens. It is therefore necessary for democracy and democratic institutions, which are themselves a public good. A universal communications platform lowers search costs for finding suitable goods and services and their associated transaction costs . . . . Above all, a universal communications platform allows for democratic self-government by promoting free speech.[89]

Candeub's application of the standard definition of a public good is incorrect and self-contradictory. A communications platform is not a public good. The fact that *information* is non-rivalrous in consumption does not imply that a service offering *access to information* is also a public good. Newspapers, books, and magazines are not public goods because exclusion is feasible through prices and subscriptions. Likewise, Internet platforms are excludable, as are the Internet accounts that make access possible. In fact, it is the platforms' ability to exclude that motivates Candeub's proposal, so he effectively rebuts his own public good argument. Any user of an Internet platform must have an account, and there are all kinds of technical, policy,

85. 1 J. FREE SPEECH L. 463 (2021).
86. *Id.* at 467 (citations omitted).
87. *See supra* note 6. *Cf.* Mia. Herald Pub. v. Tornillo, 418 U.S. 241 (1974) (striking down on First Amendment grounds a Florida law that required a newspaper to publish opposing views, even though the newspaper was the only print outlet in the market).
88. Candeub, *supra* note 21, at 399-400.
89. *Id.* at 400-01.

and even price restrictions on the use of their platforms. (If you think Facebook is a non-excludable service, try using it without logging in.) Since non-excludability is a necessary attribute of a public good, then the ability to discriminate—which Candeub seeks to regulate away—implies that Internet platforms are not a public good. It may be possible through regulatory fiat to make platforms look more like public goods, but doing so is a regulatory creation, not an economic descriptor.

Candeub further contradicts himself by abandoning his definition entirely, conflating something that is "good for the public" with a "public good." Many Americans use Internet platform services as their primary source of news and information, which makes them useful and important. Perhaps that is a separate reason for government oversight, but not because it makes platforms public goods.

For example, we have discovered that several Internet platforms blocked posts about Hunter Biden's laptop shortly before the 2020 election (a decision which was hardly the industry's finest).[90] But the central policy question is not whether some Internet platforms censored content; instead, the relevant policy question is whether these Internet platforms were able to suppress this information so totally that an inquisitive American could not avail herself of sufficient alternative news sources to make an informed decision. The answer, of course, is "no." If anything—as the "Streisand Effect"[91] dictates—these Internet platforms' bad decision to curate content about the laptop simply amplified attention to the story by a plethora of other news outlets.[92] If it is true that Americans have such a profound confirmation bias that they are unwilling to question what they see on the Internet, then that is hardly a compelling reason for massive government intervention into the market.

Finally, Candeub's argument that common carrier regulation will somehow insulate Internet platforms from government pressure merits some discussion. As noted above, Candeub posits that while unregulated firms are highly susceptible to government pressure to censor content, if a firm is subject to a mandatory common carrier non-discrimination obligation, then "the government cannot even ask."[93] Such an argument reveals a naivety about how public utility regulation works in practice. Regulation does not widen the gap between the regulated and the regulator; *regulation brings them closer together*. Indeed, as it will be the government that adjudicates any charge of undue discrimination, if the government pressures a firm to censor content, then the firm may gladly acquiesce because it knows the

90. *See, e.g.*, K. Paul, *Facebook and Twitter Restrict Controversial New York Post Story On Joe Biden: Social Media Platforms Move to Limit Spread of Article Amid Questions Over Its Veracity*, THE GUARDIAN (Oct. 14, 2020, 10:36 PM), https://www.theguardian.com/technology/2020/oct/14/facebook-twitter-new-york-post-hunter-biden [https://perma.cc/FZ32-VNNU].

91. *See Streisand Effect*, BRITANNICA (last updated Sept. 15, 2023), https://www.britannica.com/topic/Streisand-effect [https://perma.cc/R6RR-2FM5].

92. Abby Ohlheiser, *Twitter's Ban Almost Doubled Attention for Biden Story,* MIT TECH. REV. (Oct. 16, 2020), https://www.technologyreview.com/2020/10/16/1010644/twitter-ban-hunter-biden-emails-backfires [https://perma.cc/4CAN-YDMG].

93. Candeub, *supra* note 21, at 433.

government's wishes will likely immunize it from penalty (and it may, in fact, view such acquiescence as a proverbial deposit in the regulatory "favor bank" that can be cashed in later).[94] More likely, however, is that even if the firm is skeptical about trusting the government in such a case if an Internet platform is regulated as a public utility, then the government retains numerous other regulatory pressure points to push the firm to agree (i.e., if you don't help me in this case, I will stick it to you in another case where you want regulatory relief).[95] As it's hard to fight City Hall, acceding to the constant coercive pressure from the Administrative State is a far cry from outright "collusion" between the government and the private sector.[96]

B. Professor Eugene Volokh

In a paper entitled *Treating Social Media Platforms Like Common Carriers?*, Professor Eugene Volokh of UCLA School of Law posits that some form of government regulation over Internet platform's content moderation activities would likely survive First Amendment scrutiny.[97] Whether Professor Volokh's First Amendment arguments are correct is

94. If there is demonstrated evidence of collusion between industry and the government, then under *Halleck*, the state-actor doctrine could be implicated. *See* Halleck, 139 S. Ct. at 1928 ("Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity.") (citations omitted).

95. As Judge Frank Easterbrook observed nearly forty years ago:

> Often an agency with the power to deny an application (say, a request to commence service) or to delay the grant of the application will grant approval only if the regulated firm agrees to conditions. The agency may use this power to obtain adherence to rules that it could not require by invoking statutory authority. The conditioning power is limited, of course, by private responses to the ultimatums—firms will not agree to conditions more onerous than the losses they would suffer from the agency's pursuit of the options expressly granted by the statute. The firm will accept the conditions only when they make both it and the agency (representing the public or some other constituency) better off. Still, though, the agency's options often are potent, and the grant of an application on condition may greatly increase the span of the agency's control.

Frank Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 39 (1984). In fact, the expectation that the regulator will want to negotiate to exert some pound of flesh in exchange for regulatory approval is now unfortunately commonplace. *See* T. Randolph Beard et al., *Regulating, Joint Bargaining, and the Demise of Precedent*, 39 MANAGERIAL & DECISION ECON. 638 (2018).

96. *Cf.* Missouri v. Biden, No. 3:22-CV-01213, slip op. at 116-17 (W.D. La. July 4, 2023) (Memorandum Ruling on Request for Preliminary Injunction), *aff'd in relevant part,* Missouri v. Biden, No. 23-30445, 2023 U.S. App. LEXIS 23965 (5th Cir. 2023) ("The evidence thus far shows that the social-media companies cooperated [with the Biden Administration] *due to coercion, not because of a conspiracy*.") (emphasis added). That said, as the Ninth Circuit recently recognized, there is also a fine line between coercion and elected officials' First Amendment right to voice their opinions. *See generally* Kennedy v. Warren*,* 66 F.4th 1199, No. 22-35457, slip op. (9th Cir. May 4, 2023).

97. 378 J. FREE SPEECH L. 377 (2021).

ultimately up to the courts to decide. Of interest here are the regulatory implications of Volokh's arguments.

1. Summary of Volokh's Regulatory Arguments

Volokh's basic argument is that because "[w]e don't want large business corporations deciding what Americans can say in a particular medium of public communication," when "'dominant digital platforms' have the power 'to cut off speech,' we should be as concerned about that power as we are about, say, government power to exclude people from limited public forums."[98] To remedy this problem, Volokh contends that a "common carrier-like model" for Internet platforms' "hosting function"—which Volokh defines as "the distribution of an author's posts to users who affirmatively seek out those posts by visiting a page or subscribing to a feed"[99]—may be warranted.

But Volokh fails to provide any details about what his proposed common carrier regulatory regime would look like or how this regime would work in practice. For example, Volokh makes clear that he is not claiming that Internet platforms "are 'common carriers' under existing law, or are precisely identical to existing common carriers."[100] Instead, he simply wants to draw an "analogy" to "certain familiar common carriers, such as phone companies…."[101] Moreover, argues Volokh, even if telecommunications carriers "prove[] to be a helpful analogy, there's little reason to think that all the details of common carrier law ought to be fully adopted for social media platforms, or that the threshold for regulation should be defined by traditional common carrier rules."[102]

Yet while Volokh in his paper spends little time explaining how current common carrier telephone regulation might be used as a basis for Internet platform regulation, Volokh spends a considerable amount of time focusing on a regulatory regime expressly targeted at firms that are *not* common carriers: the must-carry provisions for cable companies contained in the 1992 Cable Act.[103] Although the Supreme Court upheld a First Amendment challenge to the FCC's must-carry rules,[104] the FCC's must-carry regime—and its closely related cousin, the FCC's retransmission consent regime[105]—are far from innocuous from a regulatory perspective and have produced a plethora of contentious fights at the FCC over the years.[106]

---

98. *Id.* at 385 (citations omitted).
99. *Id.* at 381.
100. *Id.* at 382.
101. *Id.* at 461-62.
102. *See* Volokh, *supra* note 97, at 382-83.
103. *Id.* at 383, 438-39; *see* 47 U.S.C. § 534.
104. Turner Broad. Sys. v. FCC, 520 U.S. 180 (1994).
105. *See, e.g.*, 47 U.S.C. § 534. Despite the highly interrelated nature of the must-carry and retransmission consent regimes, Volokh makes no mention of the FCC's retransmission consent regime in his paper.
106. For a detailed explanation of both the must-carry and retransmission consent regimes, *see* Beard et al., *An Economic Framework for Retransmission Consent*, *supra* note 80.

That said, unlike Candeub, Volokh—to his credit—at least recognizes the economic pitfalls of regulation.

First, Volokh recognizes "the value of private property rights." As Volokh notes, although "the government may sometimes require property owners to serve people they'd prefer not to serve—indeed, as it does for common carriers—this should be the rare exception and not the general rule."[107]

Second, Volokh doubts that a broad non-discrimination rule would survive a cost/benefit test. According to Volokh, "[p]erhaps people are just so concerned by a few incidents over a few years that they have lost a sense of perspective about what might ultimately be a minor problem."[108]

Third, Volokh appears to concede that there is a legitimate social value when Internet platforms curate content. As Volokh observes:

> One value of private property rights is that sometimes private property owners can enforce valuable norms that the government can't; protect us from violence and other harms that stem from violation of those norms; or at least create diverse and competing norms, which might itself provide valuable choice to users. We probably profit greatly, for instance, from the fact that our friends can eject rude people from their parties, and that most businesses can eject rude speakers from their property. Such ejections might be rare, but perhaps their very availability makes them less necessary.[109]

Fourth, Volokh recognizes that "[g]overnment regulation can easily make problems worse." As Volokh correctly notes:

> Some regulations may actually help entrench incumbents (for instance, by imposing costs that are too expensive for upstart rivals) and diminish future competition. Other regulations may create new governmental bureaucracies that could be indirectly used to suppress certain viewpoints, for instance, if the common carrier rules are enforced by some Executive Branch agencies.[110]

Finally, and along the same lines, Volokh recognizes:

> If access rules are not too costly to litigate, then they may unduly chill even legitimate removals of material—e.g., viewpoint-neutral removal of vulgarities, pornography, and the like, if a statute restricts only viewpoint-based removals—because platforms will worry that authors will

107. Volokh, *supra* note 97, at 412.
108. *Id.*
109. *Id.*
110. *Id.* at 413.

> wrongly assume that the removals were actually improper, and therefore file lawsuits that will be costly to defend.[111]

Given these and other concerns he raises, Volokh concedes that perhaps "the best solution might well be to stay the course, and to expect market competition to resolve what problems there might be."[112]

Yet even though Volokh provides many valid reasons for rejecting common carrier regulation for Internet platforms, Volokh is nonetheless undeterred from calling for some sort of common carrier regime to regulate content moderation by Internet platforms. Despite his multiple caveats, Volokh continues to suggest that "the phone company analogy is something that we should seriously consider" and, as such, legislation may be appropriate to regulate the "deeper levels of the communications infrastructure, for instance imposing common carrier obligations only on pure hosting companies, such as Amazon Web Services, or requiring platforms to make their services interoperable with rivals and thus diminishing monopoly-producing network effects."[113] Volokh's proposal looks a lot like the public utility regulation to which the communications industry is currently subjected.

2. Discussion

Volokh's argument for common carrier regulation of Internet platforms is perplexing. As one of the nation's leading scholars of the First Amendment, the thrust of Volokh's paper is to argue that the imposition of common carrier regulation on Internet platforms would survive constitutional scrutiny—an argument that will soon be considered by the Supreme Court. But if one calls for regulation, then one also needs to provide the details of the proposed regulatory regime. This Volokh does not do. Like Candeub, Volokh rebuts his own proposal. While he suggests that "the phone company analogy is something that we should seriously consider," he provides several valid reasons for not doing so and fails to rebut them. Moreover, if we adopt some form of the FCC's must-carry regime for Internet platforms, as Volokh posits, then we will need both a dedicated statute and a dedicated regulator to write rules and enforce such a regime. If anything, by detailing many of the pitfalls of regulation, Volokh makes a convincing case *not* to impose such regulation. Given Volokh's lack of specificity in his proposed regulatory regime and his admitted (and correct) caveats about the dangers of ill-formed regulation, Volokh's paper offers little insight into the practical and policy implications

111. *Id.*
112. *Id*.
113. *See* Volokh, *supra* note 97, at 413-14.

of regulating Internet platforms as common carriers—even if his First Amendment analysis of such regulation is correct.[114]

IV. RELEVANT CASES

The preceding section provided a review of some of the literature calling for Internet platforms to be treated as common carriers using telephone companies as a supporting analogy. This debate is no longer academic, however. Justice Clarence Thomas expressed support for the idea, and at the time of this writing, the Supreme Court has just granted *certiorari* in two cases—one from the Eleventh Circuit and one from the Fifth Circuit—where this question is directly at bar.

A. Justice Thomas's Concurrence in Biden v. Knight First Amendment Institute at Columbia University

The central dispute in *Biden v. Knight First Amendment Institute* was whether President Donald Trump (then a government official) violated the First Amendment when he blocked certain users from interacting with his Twitter account.[115] The Court found that because President Trump had only limited control of his account since Twitter had banned him from the platform and that President Trump had ultimately lost the 2020 election and no longer held elected office, the Court remanded the case to the Second Circuit with instructions to dismiss the case as moot.[116]

Although the Court issued its ruling *per curiam* without releasing an opinion, what makes the case interesting is that Justice Clarence Thomas decided to publish a lengthy concurrence to highlight the "principal legal difficulty that surrounds digital platforms—namely, that applying old doctrines to new digital platforms is rarely straightforward."[117] According to Justice Thomas, as it is "unprecedented" that there is "concentrated control of so much speech in the hands of a few private parties," perhaps the Court "will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned infrastructure such as digital platforms."[118]

Recognizing that the Court's earlier decision in *Halleck* imposed significant First Amendment constraints on any government attempt to impose content moderation constraints on private actors, Justice Thomas predicted that "part of the solution may be found in doctrines that limit the

---

114. Given the Supreme Court's recent ruling in 303 Creative LLC v. Elenis, it is unclear what it will conclude with regard to efforts to treat Internet platforms as common carriers. 600 U.S. __, slip op. at 14 (2023) ("No public accommodations law is immune from the demands of the Constitution. In particular, this Court has held that public accommodations statutes can sweep too broadly when deployed to compel speech . . . . When a state public accommodations law and the Constitution collide, there can be no question which must prevail.").

115. Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021).

116. *Id*. at 1221.

117. *Id.*

118. *Id.*

right of a private company to exclude."[119] Citing Candeub, Justice Thomas endorsed the idea of common carrier regulation.[120]

Justice Thomas grounded his argument (as so many others have) on the telecommunications analogy. In Justice Thomas' view, although Internet platforms are "digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another."[121] According to Justice Thomas, a "traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way."[122]

Justice Thomas also echoed Candeub's argument that common carrier regulation is appropriate for Internet platforms because of their "dominant market share."[123] In Justice Thomas' view, "[m]uch like with a communications utility, this concentration gives some digital platforms enormous control over speech."[124] Thus, reasoned Justice Thomas, if "the analogy between common carriers and digital platforms is correct, then an answer may arise for dissatisfied platform users who would appreciate not being blocked: laws that restrict the platform's right to exclude."[125] As such, Justice Thomas suggested that "similarities between some digital platforms and common carriers … may give legislators strong arguments for similarly regulating digital platforms."[126]

B. NetChoice, LLC v. Attorney General of Florida

Florida passed a statute that imposed significant content moderation obligations on Internet platforms.[127] NetChoice challenged the law in federal court. The case revolved around whether Internet platforms are private actors and, as such, engaged in constitutionally protected expressive activity when they moderate and curate content that they distribute on their respective platforms. The Eleventh Circuit found that they were private actors and thus held that the Florida law that restricted the platforms' ability to engage in content moderation "unconstitutionally burden[ed] that prerogative."[128]

The Florida law specifically said that Internet platforms are public utilities and that it was therefore appropriate to treat them "similarly to common carriers."[129] The Eleventh Circuit disagreed. While the court

119. *Id.* at 1222. It is interesting to note that subsequent to his concurrence in *Biden*, Justice Thomas joined the majority's opinion in *303 Creative*, *supra* note 115, which held that free speech concerns trump public accommodation laws forbidding discrimination.

120. *Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. at 1222-23.

121. *Id.* at 1224.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. at 1224-25.

126. *Id.* at 1226.

127. S.B. 7072 (Fla. 2021).

128. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1203 (11th Cir. 2022). As the Eleventh Circuit tersely noted, the fact that platforms are "private enterprises, not governmental (or even quasi-governmental) entities" would be "too obvious to mention if it weren't so often lost or obscured in political rhetoric." *Id.* at 1204.

129. S.B. 7072 (Fla. 2021) §§ 1(5)-1(6).

"confess[ed] some uncertainty" as to whether Florida meant to argue that "platforms are *already* common carriers, and so possess no (or only minimal First Amendment rights)" or that Florida "can, by dint of ordinary legislation, *make* them common carriers, thereby abrogating any First Amendment rights they may currently possess,"[130] the Eleventh Circuit—refreshingly drawing upon an accurate description of the communications industry and its governing laws—rejected both possible legislative interpretations.

As to the former interpretation of Florida's statute, the Eleventh Circuit offered three reasons why Internet platforms are not common carriers.

First, the court pointed out that Internet platforms have never acted like common carriers. In particular, the court noted that while common carriers do not "make individualized decisions… whether and on what terms to deal,"[131] Internet platforms behave differently:

> While it's true that social-media platforms generally hold themselves open to all members of the public, they require users, as preconditions of access, to accept their terms of service and abide by their community standards. In other words, Facebook is open to every individual if, but only if, she agrees not to transmit content that violates the company's rules. Social-media users, accordingly, are *not* freely able to transmit messages "of their own design and choosing" because platforms make—and have always made—"individualized" content- and viewpoint-based decisions about whether to publish particular messages or users.[132]

Second, the Eleventh Circuit found that neither the facts nor the case law supported treating Internet platforms as common carriers. To begin, the court noted that Internet platforms "aren't 'dumb pipes:'"

> They're not just servers and hard drives storing information or hosting blogs that anyone can access, *and they're not Internet service providers reflexively transmitting data from point A to point B.* Rather, when a user visits Facebook or Twitter, for instance, she sees a curated and edited

130. *Att'y Gen., Fla.*, 34 F.4th at 1220 (emphasis in original).
131. *Id.* (citations omitted).
132. *Id.* (emphasis in original).

> compilation of content from the people and organizations that she follows.[133]

Thus, reasoned the court, the case law dictates that "social media platforms should be treated more like cable operators, which retain First Amendment rights to exercise editorial discretion, than traditional common carriers."[134]

Finally, the Eleventh Circuit noted that in Section 223(e)(6) of the Telecommunications Act of 1996, Congress "explicitly differentiate[ed] 'interactive computer services'—like social-media platforms—from 'common carriers or telecommunications services.'"[135] According to the court, "Federal law's recognition and protection of social-media platforms' ability to discriminate among messages—disseminating some but not others—is strong evidence that they are not common carriers with diminished First Amendment rights."[136]

As to the second possible interpretation of Florida's law—that the government can render platforms common carriers by statute—the Eleventh Circuit was equally skeptical. As the court observed, "[n]either law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier."[137] Quite the contrary, reasoned the court:

> [I]f social-media platforms currently possess the First Amendment right to exercise editorial judgment, as we hold it is substantially likely they do, then any law infringing that right—even one bearing the terminology of "common carri[age]"—should be assessed under the same standards that apply to other laws burdening First Amendment-protected activity.[138]

The Eleventh Circuit went on to reject Florida's argument that because Internet platforms "are clothed with a 'public trust' and have 'substantial

---

133. *Id.* at 1204 (emphasis supplied); *see also* Comcast Cable Corp. v. FCC, 717 F.3d 982, 993-97 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("Just as a newspaper exercises editorial discretion over which articles to run, a video programming distributor exercises editorial discretion over which video programming networks to carry and at what level of carriage." Thus, "the FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon or Politics and Prose or Barnes & Noble what books to sell; or tell the *Wall Street Journal* or *Politico* or the *Drudge Report* what columns to carry; or tell the MLB Network or ESPN or CBS what games to show; or tell *SCOTUSblog* or *How Appealing* or *The Volokh Conspiracy* what legal briefs to feature.").

134. *Att'y Gen., Fla.*, 34 F.4th at 1220 (citations omitted).

135. *Id.* at 1220-21 (*citing* 47 U.S.C. § 223(e)(6)). As noted *supra*, the violation of a similar statutory prohibition was the exact reason why the D.C. Circuit in *Verizon* remanded the FCC's *2010 Open Internet Rules.*

136. *Id.* at 1221.

137. *Id.*

138. *Id.*

market power'" they "are (or should be treated like) common carriers."[139] The court gave two reasons for its rejection.

First, the court noted that Florida did not argue that market power and public importance alone are sufficient reasons to recharacterize a private company as a common carrier. Rather, Florida acknowledged that the "basic characteristic of common carriage is the requirement to hold oneself out to serve the public indiscriminately."[140] But as the court pointed out, the problem with Florida's argument was that "social-media platforms *don't* serve the public indiscriminately but, rather, exercise editorial judgment to curate the content that they display and disseminate."[141] Second, the Eleventh Circuit, citing the Supreme Court's decision in *Miami Herald Publishing Co. v. Tornillo,* reasoned that a private company "engaged in speech within the meaning of the First Amendment [does not lose] its constitutional rights just because it succeeds in the marketplace and hits it big."[142] Thus, concluded the court, "because social-media platforms exercise—and have historically exercised—inherently expressive editorial judgment, they aren't common carriers, and a state law can't force them to act as such unless it survives First Amendment scrutiny."[143]

C. NetChoice, LLC v. Paxton

In direct contrast to *Attorney General of Florida*, the Fifth Circuit in *NetChoice v. Paxton* upheld the constitutionality of a Texas law that formally classified Internet platforms as common carriers.[144] According to the Texas legislature, Internet platforms "function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States."[145] The Texas legislature further found that "social media platforms with the largest number of users are common carriers by virtue of their market dominance."[146] Given these findings, the Texas legislature imposed an assortment of restrictions and prohibitions on Internet platforms' ability to curate content. The Fifth Circuit upheld the Texas law. As the Fifth Circuit repeated several times throughout its opinion, the Texas law "does not chill speech; if anything, it chills censorship."[147]

The Fifth Circuit began its analysis by saying that Internet platforms "are communications firms of tremendous importance that hold themselves out to serve the public without individualized bargaining."[148] As such, reasoned the court, the Texas law "imposes a basic non-discrimination

139. *Id.*
140. *Att'y Gen., Fla.*, 34 F.4th at 1221.
141. *Id.* (emphasis in original).
142. *Id.* at 1222 (citing *Tornillo*, *supra* note 87).
143. *Id.*
144. NetChoice, LLC v. Paxton*,* 49 F.4th 439 (5th Cir. 2022) (upholding Tex. Bus. & Com. Code § 120.002(b)).
145. *Id*. at 445.
146. *Id.*
147. *See, e.g.*, *id.* at 447, 450, 452.
148. *Id.* at 469

requirement that falls comfortably within the historical ambit of *permissible common carrier regulation*."[149] To find otherwise, argued the court, "would represent the first time . . . that federal courts have prevented a State from requiring interstate . . . communications firms to serve customers without discrimination."[150]

When the petitioners pointed out that platforms are not members of the communications industry because their mode of transmitting expression differs from what other industry members do, the court flatly called that distinction "wrong."[151] Pointing to the Texas law—as opposed to the Communications Act of 1934—the Fifth Circuit found that the "whole purpose of a social media platform … is to 'enable[] users to communicate with other users.'"[152] Thus, reasoned the court, because Internet platforms "are communications firms, hold themselves out to serve the public without individualized bargaining, and are affected with a public interest," Texas permissibly determined that platforms are common carriers and, as such, can be "subject to nondiscrimination regulation."[153] But if so, as discussed in a moment, then why did this Fifth Circuit draw upon the Communications Act (albeit incorrectly) to support its decision to uphold the Texas law?

D. Discussion

Like the literature surveyed in Section III, Justice Thomas, the Fifth Circuit, and the Eleventh Circuit all draw heavily from communications law to reach their respective conclusions. As such, although it is not explicitly stated, it is again reasonable to infer that they are viewing common carrier regulation through a public utility lens. Indeed, although the three opinions discussed above focused on the First Amendment implications of the "Internet platforms are common carriers" question, the Eleventh Circuit confirmed what the debate is really about—*whether states may impose some form of public utility regulation on Internet platforms*.[154] As such, it is troubling that none of the three opinions discuss the regulatory implications—across many different industries—of declaring Internet platforms to be common carriers.

Second, if Internet platforms are indeed communications firms, as both Justice Thomas and the Fifth Circuit claimed, then the Communications Act and its decades of implementing case law cannot be swept under the rug. The Communications Act is Congress' most definitive statement about whether and how assorted communications firms should be regulated and must be included in any analysis. And with all due respect to both Justice Thomas and the Fifth Circuit, they both patently misunderstand Communications Law 101.

For example, Justice Thomas was wrong when he argued that although Internet platforms are "digital instead of physical, they are at bottom

149. *Id.*
150. *Paxton*, 49 F.4th at 469 (emphasis added).
151. *Id.* at 474.
152. *Id.*
153. *Id.* at 473-74.
154. *Id.*

communications networks, and they 'carry' information from one user to another."[155] According to Justice Thomas, a "traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way."[156] However, as the Eleventh Circuit correctly observed, Internet platforms do not engage in providing interstate common carrier telecommunications services and therefore are not currently subject to FCC subject matter jurisdiction under Title II. Moreover, the information infrastructure that carries their services to end-users is not their own but that of communications firms regulated under FCC jurisdiction.

Along the same lines, although Texas passed a statute that specifically declares Internet platforms to be common carriers, the Fifth Circuit's opinion does not discuss how the Commerce Clause may come into play.[157] Internet platforms do not provide an "intrastate" service; their service is clearly *interstate* (if not international). Accordingly, if the Fifth Circuit is going to hold that Internet platforms provide a communications service, then it cannot also conclude that states are allowed to require "interstate communications firms to serve customers without discrimination."[158] The Communications Act expressly prohibits such an extra-jurisdictional reach by states into interstate common carrier telecommunications services (which is under the FCC's exclusive purview). State jurisdiction is limited to *intrastate* telecommunications services.[159] But again, this reasoning assumes that these alleged communications networks are subject to the Communications Act.

Furthermore, if telecommunications law is the analytical template for common carriage regulation of Internet platforms, then there is an interesting legal paradox at play that the Fifth Circuit missed. Not only does the Communications Act prohibit states from regulating interstate telecommunications services, but Congress gave the FCC additional power to preempt states when local policy conflicts with federal policy. Under Section 253(d):

> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[160]

Thus, when the FCC classified BIAS as a common carrier telecommunications service in its *2015 Open Internet Order*, states were preempted from regulating any interstate BIAS service. When the FCC

155. *Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. at 1224.
156. *Id.*
157. U.S. CONST. art. I, § 8, cl. 3.
158. *Paxton*, 49 F.4th at 469 (emphasis supplied).
159. *See* 47 U.S.C. § 152.
160. 47 U.S.C. § 253(d).

subsequently returned BIAS back to an information service in its *2018 RIFO*, however, California decided to pass its own net neutrality law.[161] Although ISPs challenged the California law on the grounds of field, express, and conflict preemption, the Ninth Circuit ruled that by choosing to return BIAS back to a Title I information service, the FCC had surrendered its regulatory authority under Title II, and, as such, states were free to step in to fill the regulatory void.[162] Under this logic, it would appear that the Fifth Circuit has placed Texas into a box: On the one hand, if Internet platforms already provide an interstate common carriage telecommunications service, then Texas has no authority to pass its own law because federal law preempts it. Conversely, as Internet platforms clearly provide an information service under Title I of the Communications Act, then—as the Eleventh Circuit pointed out—states may not turn them into common carriers by statute (thus defeating the point of the legislative exercise).[163]

V. REGULATORY IMPLICATIONS OF CLASSIFYING INTERNET PLATFORMS AS COMMON CARRIERS

As noted at the outset of this paper, by constantly drawing (albeit often incorrect) analogies to the communications industry, both the academic literature and the case law appear to be using the concept of common carriage as a euphemism for broader public utility regulation of Internet platforms. The problem is that no one has articulated a clear vision of what this common carrier/public utility regulation would look like or how it would work in practice.

Let's thus assume *arguendo* that the Supreme Court upholds the Fifth Circuit's ruling in *Paxton* and rejects the Eleventh Circuit's ruling in *Attorney General of Florida* and rules that Internet platforms are common carriers. Such an outcome is more likely to raise questions than provide answers.

The first and most obvious legal conundrum arises due to the common carrier exemption in the Federal Trade Commission Act. Under Section 5 of the Act, the FTC lacks any jurisdiction over "common carriers."[164] Thus, should the Supreme Court agree with the Fifth Circuit, then the federal government will immediately lose much of its oversight authority over

161. *Cf.* Lawrence J. Spiwak, *The Preemption Predicament Over Broadband Internet Access Services*, 21 FEDERALIST SOC'Y REV. 32 (2020), https://fedsoc.org/commentary/publications/the-preemption-predicament-over-broadband-Internet-access-services [https://perma.cc/PT8W-3EB9].

162. ACA Connects-America's Commc'ns Ass'n v. Bonta, 24 F.4th 1233 (9th Cir. 2022).

163. *See Att'y Gen., Fla.*, 34 F.4th at 1222. If anything, the decision to regulate Internet platforms as an interstate common carrier telecommunications service under Title II or as an information service under Title I of the Communications Act rests exclusively with the FCC, not with the individual states. *See id.*

164. 15 U.S.C. § 45(a)(2).

Internet platforms, particularly in the areas of consumer protection and privacy.[165]

To remedy this situation, Congress would basically have two options: On the one hand, it could eliminate the common carrier exemption. In this scenario, while Congress would effectively return FTC oversight of Internet platforms back to the *status quo*, the practical effect would be to expose Internet platforms—along with a host of other common carrier services such as railroads and voice telephony (mobile and fixed)—to redundant regulatory oversight (and with it, increased compliance costs). On the other hand, because Internet platforms' service offerings (common carrier or not) do not fall under any part of the Communications Act, if Congress chooses not to eliminate the common carrier exemption, then Congress would probably have to opt for a totally new regulatory agency—complete with its own enabling statute—to regulate Internet platforms. This is an idea that has gained steam over the last several years.[166]

Creating a new regulatory regime out of whole cloth is easier said than done. Such a regime must satisfy fundamental due process concerns to be constitutionally valid. This task requires us to ask important questions: What is the new regulator's statutory mandate (i.e., Congressional policy goals)? Is the new regulator an independent agency like the FCC and FTC, or part of the executive branch like the Environmental Protection Agency? What is the new regulator's subject matter jurisdiction? Is the new regulator limited to enforcement, or does it have rulemaking authority? Can the new regulator impose penalties, and, if so, are there any statutory limits on these penalties? Do the new agency's rules of practice and procedure comply with the Administrative Procedure Act? If there is a conflict with a state rule or regulation, does the new agency have the statutory power to preempt? If market conditions change, does the regulator have the authority to forbear from any of its statutory obligations?[167] The list is endless, yet so far, there

165. Interestingly, the Fifth Circuit in *Paxton* made no mention of the FTC Act's common carrier exemption. Whether somebody raises this important issue if the Supreme Court grants *certiorari* remains to be seen.

166. *See, e.g.*, Report by the Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, GEORGE J. STIGLER CTR. FOR THE STUDY OF THE ECON. AND THE STATE, THE UNIV. OF CHI. BOOTH SCH. OF BUS. (July 1, 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf [https://perma.cc/C2T2-P6UX]; Tom Wheeler et al., *New Digital Realities; New Oversight Solutions in the U.S.: The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight*, SHORENSTEIN CTR. (Aug. 2020); https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf [https://perma.cc/3DCK-3YYJ].

167. *See* George S. Ford & Lawrence J. Spiwak, *Section 10 Forbearance: Asking The Right Questions To Get The Right Answers*, 23 COMMLAW CONSPECTUS 126 (2014).

has been little discussion of these basic regulatory fundamentals in the assorted proposals for a digital regulator that have surfaced to date.[168]

Moreover, given that Internet platforms provide an interstate service, the Commerce Clause is implicated.[169] That is, if we regulate Internet platforms as public utilities, then we must also decide how to allocate regulatory powers between the federal government and the individual states. Absent a cohesive federal framework, the Internet could be subject to a Death by Fifty State Cuts.[170]

Finally, if we are going down the common carrier road to prevent viewpoint discrimination by Internet platforms, will that regulatory regime apply to *all* online platforms—including, say, Amazon, which does not provide a social media service but is a large online retailer—to prevent traditional economic discrimination? The country just went through a major political fight when a bi-partisan group of legislators tried to pass the American Innovation and Choice Online Act ostensibly to prevent a select number of firms from favoring their own goods and services (i.e., to impose a non-discrimination obligation). Due to the numerous legal[171] and economic[172] deficiencies of this poorly crafted legislation, the bill died in

168. *See, e.g.*, George S. Ford, *Beware of Calls for a New Digital Regulator,* NOTICE & COMMENT BLOG – YALE J. ON REGUL. (Feb. 19, 2021), https://www.yalejreg.com/nc/beware-of-calls-for-a-new-digital-regulator-by-dr-george-s-ford [https://perma.cc/TX22-SBY5]; Lawrence J. Spiwak, *A Poor Case for a "Digital Platform Agency,"* PHX. CTR. POL'Y PERSP. NO. 21-02 (Mar. 9, 2021), http://www.phoenix-center.org/perspectives/Perspective21-02Final.pdf [https://perma.cc/RD2J-VLAL]; Neil Chilson, *Does Big Tech Need its Own Regulator?*, GEO. MASON UNIV. GLOB. ANTITRUST INST. (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733726 [https://perma.cc/PH75-PWVZ]; *see also* Lawrence J. Spiwak, *A Change in Direction for the Federal Trade Commission?*, *supra* note 72.

169. *Supra* note 157.

170. *See, e.g.*, T. Randolph Beard et al., *Developing a National Wireless Regulatory Framework: A Law and Economics Approach*, 16 COMMLAW CONSPECTUS 391 (2008); *but cf.* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (severely limiting the judicial doctrine of the dormant Commerce Clause).

171. Lawrence J. Spiwak, *The Third Time is Not the Charm: Significant Problems Remain With Senator Klobuchar's Antitrust Reform Bill*, FEDSOC BLOG (June 7, 2022), https://fedsoc.org/commentary/fedsoc-blog/the-third-time-is-not-the-charm-significant-problems-remain-with-senator-klobuchar-s-antitrust-reform-bill [https://perma.cc/MZJ2-M23U]; Lawrence J. Spiwak, *Why Does Congress Want to Break Amazon Prime?*, NOTICE & COMMENT BLOG – YALE J. ON REGUL. (Feb. 18, 2022), https://www.yalejreg.com/nc/why-does-congress-want-to-break-amazon-prime-by-lawrence-j-spiwak [https://perma.cc/QD7W-WB39].

172. George S. Ford, *The American Innovation and Choice Online Act is an "Economics-Free Zone,"* NOTICE & COMMENT BLOG – YALE J. ON REGUL. (June 10, 2022), https://www.yalejreg.com/nc/american-innovation-and-choice-online-act-economics-free-zone [https://perma.cc/RYA8-ZMJ6].

Congress. Still, as non-discrimination is the political buzzword *du jour*, the potential for future legislative and regulatory mischief is endless.[173]

This brings us back to an important point about potential Internet platform regulation that needs to be constantly re-emphasized: when the government decides to intervene in the market, we must always be wary of the "Law of Unintended Consequences." Given our hyper-political times, politicians often rush to pass sweeping laws without understanding the consequences, often incorporating unrelated items into the legislation that do society more harm than good.[174] As economist Dr. George Ford explained in the YALE JOURNAL OF REGULATION:

> Firms are not passive recipients of regulation. When new rules or taxes are put in place, firms adjust their activities to accommodate the new setting, maximizing profits across a multitude of margins. Some of these altered behaviors can reflect the intent of the regulation, while others will not. Obamacare wanted employers to pay for employee's healthcare, but many employers avoided the mandate by reducing hours below the threshold thirty hours per week. Affected workers faced lower incomes and had to search for second jobs. A 1990s effort to regulate cable television prices left prices largely untouched while cable companies curtailed quality and reduced industry investment.
>
> This is the "Law of Unintended Consequences."
>
> Unintended consequences are universal. Inevitable. And, often painful. No regulatory intervention can fully escape them. The unforeseen (though often predictable) responses to a regulatory intervention may cause the regulation to do more harm than good.[175]

---

173. For example, as this article was going to press, Senator Elizabeth Warren and Senator Lindsey Graham introduced the "Digital Consumer Protection Commission Act of 2023" to create a sector-specific regulator for the tech industry that would oversee everything from economic behavior to content moderation. *See* Digital Consumer Protection Commission Act of 2023, S.___, 118th Cong. (2023), http://ct.symplicity.com/t/wrn/504b0983e2025a653fce52d369083957/2665571418/realurl=https:/www.warren.senate.gov/imo/media/doc/Tech%20Bill_Full%20Text.pdf [https://perma.cc/MZE2-SXGY]. Although the Warren-Graham bill attempts to address the due process and regulatory structure issues highlighted in this paper, the bill's overly broad scope entails that its implementation would inevitably be plagued by the Law of Unintended Consequences. *See infra* n. 175.

174. *See, e.g.*, George S. Ford, *Phoenix Center Policy Paper Number 59: Is Social Media Legislation Too Broad? An Empirical Analysis*, PHX. CTR. POL'Y PAPER SERIES (July 2023), https://phoenix-center.org/pcpp/PCPP59Final.pdf [https://perma.cc/8E84-RMHS].

175 George S. Ford, *Antitrust Reform and the Law of Unintended Consequences*, NOTICE & COMMENT BLOG – YALE J. ON REGUL. (Jan. 7, 2022), https://www.yalejreg.com/nc/antitrust-reform-and-the-law-of-unintended-consequences-by-george-s-ford-phd [https://perma.cc/7KAV-HSXW].

If social media companies are regulated as public utilities, then no one should be surprised when the inevitable "Law of Unintended Consequences" rears its ugly head and other digital platforms (ranging from streaming services to online retailers) are dragged into this new regulatory morass.

VI. CONCLUSION

When Congress passed the Telecommunications Act of 1996, one of its stated policy goals was to "reduce regulation in order to … encourage the rapid deployment of new telecommunications technologies."[176] In fact, Section 230(b)(2) specifically states that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[177] While the U.S. government took occasional steps in that direction over the ensuing twenty-five-plus years, history has borne out that the siren call of regulation was often too strong to ignore.[178] Such is the current push to impose public utility-type common carrier regulation on Internet platforms.

For all its warts, the Telecommunications Act was designed to speed the transition from monopoly to competition.[179] But that is not what efforts to impose common carrier status on Internet platforms are about. The effort to treat Internet platforms as public utilities is, at bottom, an attempt to take a framework designed to govern the economic behavior of the Old Ma Bell monopoly and use it to govern questions of *speech*—the only constant being that the government would act as the final arbiter of a firm's conduct. As such a regime has never been attempted before (probably because a regime designed to govern economic behavior was never intended to be used to regulate speech in the first instance), implementing this new regime would inexorably force us to cross the "Regulatory Rubicon."[180]

And if we cross this Regulatory Rubicon, what then? As detailed above, there has been little meaningful discussion about how Internet platform regulation would comport with the due process protections guaranteed by the Fifth Amendment, nor has anyone conducted a basic cost-benefit analysis to determine whether efforts to increase government intervention into the market would pay off. Adding to the morass, given the inherently interstate nature of the services Internet platforms provide, the federal/state dynamic must be resolved. All we will know for sure is that if we take the logic of the common carrier argument to its inexorable conclusion, then the government will have vastly expanded powers to regulate Americans' speech.

---

176. Preamble, Telecommunications Act of 1996, Public Law 104–104.

177. 47 U.S.C. § 230(b)(2).

178. *See, e.g.*, George S. Ford, *"Regulatory Revival" and Employment in Telecommunications*, PHX. CTR. POL'Y PERSP. NO. 17-05 (June 12, 2017); https://www.phoenix-center.org/perspectives/Perspective17-05Final.pdf [https://perma.cc/BNL9-DMLH]; Exec. Order No. 14036, *supra* note 6.

179. *See, e.g.*, George S. Ford & Lawrence J. Spiwak, *Lessons Learned from the U.S. Unbundling Experience*, 68 FED. COMM. L.J. 95 (2016).

180. *See* Reid, *supra* note 20.

Which brings us back to the point of the pencil: Chief Justice John Roberts famously observed that the federal bureaucracy "wields vast power and touches almost every aspect of daily life."[181] We must ask ourselves, therefore, do we really want a bunch of unelected bureaucrats to determine what speech is acceptable? Given our hyper-partisan times (and the increasing disrespect for precedent and the rule of law generally[182]), the answer should be a resounding "no."[183] Otherwise, the definition of "reasonable" discrimination could shift with the political winds: Democrats in power would allow stringent curation of conservative content, and Republicans in power would allow stringent curation of liberal content.

But the potential mischief does not end there. Allowing the government to control how Internet platforms moderate content could prove to be the proverbial "camel's nose under the tent." If government can regulate the content moderation policies of Internet platforms, then we should not be surprised when assorted political constituencies petition the government to force cable companies to de-platform cable programming networks they find offensive. We have already witnessed senior Democrats in Congress aggressively push the FCC for exactly this outcome with regard to conservative news outlets, and the silence from the Democratic FCC Commissioners in response to such an outrageous threat to free speech was deafening.[184]

Rather than regulate, perhaps there is a far cheaper and less intrusive solution for complaints about how Internet platforms moderate content than massive government regulation: consumers can simply choose not to use social media platforms.

And who knows? If consumers find the content offensive, then they just might be happier for doing so.

---

181. City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted).

182. *See, e.g.*, Beard et al., *Regulating, Joint Bargaining, and the Demise of Precedent*, *supra* note 95.

183. *Cf.* Sen. MIKE LEE, SAVING NINE (Center Street 2022).

184. Kimberley A. Strassel, *'Just Asking' for Censorship*, WALL ST. J. (Feb. 25, 2021, 6:26 PM); https://www.wsj.com/articles/just-asking-for-censorship-11614295623 [https://perma.cc/5UTA-GPQ5].

Influenced into Addiction: Using the Multi-District Litigation Against Opioid Companies as a Framework for Social Media Companies

By Ileana Thompson*

TABLE OF CONTENTS

* J.D. Candidate, The George Washington University Law School, 2024. Thank you to the entire Federal Communications Law Journal Editorial Board and staff members for the time, effort, and patience they devoted to this publication.

I. INTRODUCTION

As you leisurely scroll through your favorite social networking site, you probably notice that your colleague is on vacation or that there is a new trending TikTok dance. You may even wonder if your device is listening to you after an advertisement for blenders pops up on your phone shortly after a conversation with your partner about needing a new one. Regardless of the type of content that dominates your preferred social networking site's timeline, social media use is likely a common activity for you or someone you know. This is even more likely to be true after the world was abruptly forced into isolation during the COVID-19 pandemic.

During and following the COVID-19 pandemic, social media use increased for everyone, with some of the most significant increases seen in 18 to 24-year-olds.[1] Since 2020, people increasingly depend on social media and other digital platforms for social interaction, news and other journalism coverage, information (and misinformation), and even education on current social movements. Today, access to social networking sites runs parallel with access to information irrespective of time and geographic limitations. But increased access to social networking sites does not mean that people will make the best choices for themselves mentally, emotionally, or physically.

The term "social media addiction" refers to a behavioral addiction that is "characterized as being overly concerned about social media, driven by an uncontrollable urge to log on or use social media, and devoting so much time and effort to social media that it impairs other important life areas."[2] Its effects on the individual present similar behavioral challenges as opioid addiction.[3] In fact, social media companies play a very similar, intentional role in encouraging their users' habitual and excessive scrolling as opioid manufacturers played in their consumers' maladaptive use and abuse of opioid drugs.[4] Biologically, similar dopamine-driven reward models, which play a key role in substance addiction, are implemented in the algorithms of social media companies, like Instagram and Facebook, to encourage users to

1. Anna Zarra Aldrich, *Finding Social Support Through Social Media During COVID Lockdowns*, UCONN TODAY (June 24, 2022), https://today.uconn.edu/2022/06/finding-social-support-through-social-media-during-covid-lockdowns/# [https://perma.cc/CF5U-XZCV].

2. Ashish Bhatt et al., *Social Media Addiction*, ADDICTION CTR. (Apr. 3, 2023), https://www.addictioncenter.com/drugs/social-media-addiction/ [https://perma.cc/H6AL-DG6F].

3. Jena Hilliard, *New Study Suggests Excessive Social Media Use is Comparable to Drug Addiction*, ADDICTION CTR. (Sept. 4, 2019), https://www.addictioncenter.com/news/2019/09/excessive-social-media-use/ [https://perma.cc/V655-PXCK] (last visited Sept. 4, 2023).

4. *Id.*

continue using their products.[5] Social media companies also enjoy similar market structures as opioid manufacturers and retailers, meaning that they may not escape liability by asserting a third party's conduct absolves them. Finally, liberal regulatory regimes under which social media companies currently operate, and under which opioid manufacturers and retailers previously operated, provide another similarity between the two.

The similarities between social media addiction and opioid addiction, the respective roles of social media companies and opioid manufacturers in their respective addiction rates, and the current regulatory regime governing social media companies will be discussed to support the overall thesis that social media companies may face similar multi-district litigation as opioid manufacturers and retailers. This Note will use mass tort litigation pursued against opioid manufacturers and retailers as a framework for hypothesizing the litigation strategy and the likelihood of success in potential litigation against social media companies.

Section I of this Note provides some background information on what social media addiction is, its growing prevalence, and how the failure to implement additional regulations for social media companies and social media use provides no incentives for social media companies to self-regulate. The lack of self-regulation, the similarities in market structures, and the effects on the individual's brain and behavior will be used to draw similarities to opioid manufacturers and distributors prior to the commencement of mass tort litigation against opioid manufacturing and retail companies in 2017.[6] Section II of this Note provides similar background information as Section I, but instead offers the information in the context of opioid manufacturers and retailers. It will explain what opioid addiction is, how policy and regulatory failures resulted in opioid manufacturers and retailers contributing to the opioid addiction crisis, and it will highlight key aspects of the multi-district litigation against several of the largest opioid manufacturers and retailers. Section III proposes that social media companies may face similar multi-district mass tort litigation as opioid manufacturers and retailers by analyzing the similarities between social media addiction and opioid addiction and the respective market strategy of social media companies and opioid manufacturers in their respective addiction rates. Finally, this Note will offer

5. Trevor Haynes, *Dopamine, Smartphones & You: A Battle for Your Time*, SCIENCE IN THE NEWS (May 1, 2018), https://sitn.hms.harvard.edu/flash/2018/dopamine-smartphones-battle-time/ [https://perma.cc/SNL2-A8MG] (explaining that Instagram's notification algorithms will sometimes withhold "likes" on photos to deliver them in larger bursts. Thus, when one posts content, they may be disappointed to find fewer responses than expected, only to receive them in a larger bunch later on. One's dopamine centers have been primed by those initial negative outcomes to respond robustly to the sudden influx of social appraisal. This use of a variable reward schedule takes advantage of our dopamine-driven desire for social validation, and it optimizes the balance of negative and positive feedback signals until one becomes a habitual user.).

6. *See* In Re: National Prescription Opiate Litigation, MDL No. 2804, Doc. 328 (J.P.M.L. Dec. 5, 2017) (order granting transfer of the 46 actions alleging the improper marketing of and inappropriate distribution of prescription opioid medications).

self-regulating steps that social media companies can implement to avoid future mass tort litigation.

II. SOCIAL MEDIA ADDICTION AND THE EXISTING REGULATIONS

Social media addiction is characterized by the compulsive use of social media.[7] Social media companies contribute to social media addiction by way of their algorithms, which are designed to predict which content will maintain a user's engagement, and thus, encourage the use of their products for extended periods of time.[8] Currently, sufficient incentives or regulations do not exist to encourage social media companies to change their practices in a manner that would prohibit or diminish the threat of social media addiction.[9] The background information presented in this section will be used to understand how social media companies are similarly situated to opioid manufacturers and retailers prior to the commencement of the mass tort litigation in which they were involved.

A. Social Media Addiction Explained

The self-perceived need to be "alone together," always connected via social media but in fact isolated, has given rise to research on technology-mediated and online behaviors by media scholars and psychologists.[10] Social media refers to interactive websites or Internet applications (apps) that allow users to generate and share content with others, create personalized profiles, and develop online social networks.[11] Today, there are over 3.8 billion social media users.[12] Studies show social media use is correlated with increased levels of anxiety, depression, loneliness, and other negative mental health outcomes associated with "salience, mood modification, tolerance, withdrawal, relapse, and conflict with regards to behavioral addictions."[13] Overuse of social media is associated with low work performance, less

7. *See* Bhatt, *supra* note 2.

8. Larissa Sapone, *Moving Fast & Breaking Things*: *An Analysis of Social Media's Revolutionary Effects on Culture and Its Impending Regulation*, 59 DUQ. L. REV. 362, 365-66 (2021).

9. Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms, 8 TEX. A&M L. REV. 451, 454 (2021).

10. *See generally* Daria J. Kuss & Mark D. Griffiths, *Social Networking Sites and Addiction—Ten Lessons Learned*, 14 INT. J. ENVIRON. RES. PUB. HEALTH 311, 311-12 (2011).

11. Anna Vannucci & Christine McCauley Ohannessian, *Social Media Use Subgroups Differentially Predict Psychosocial Well-Being During Early Adolescence*, 48 J. YOUTH & ADOLESCENCE 1469, 1470 (June 29, 2019).

12. Gizem Arikan et al., *A Two-Generation Study: The Transmission of Attachment and Young Adults' Depression, Anxiety and Social Media Addiction*, 124 ADDICTIVE BEHAVIORS 1 (2022).

13. Daria J. Kuss & Mark D. Griffiths, *Social Networking Sites and Addiction: Ten Lessons Learned*, 14 INT. J. ENVIRON. RES. PUB. HEALTH 311, 319 (Mar. 17, 2017).

healthy social relationships, sleep problems, low life satisfaction, and feelings of jealousy, anxiety, and depression.[14]

Addiction is defined as "an inability to stop using a substance or engaging in a behavior even though it may cause psychological or physical harm."[15] While typical understandings of addiction are usually associated with a substance, as is the case with opioid addiction, clinically, "addiction results from the relationship between a person and the object of their addiction." [16] As such, social media addiction is characterized by the compulsive use of social media. For the purposes of this Note, the term "social media addiction" will be used to describe "being overly concerned with social media, driven by an uncontrollable urge to use social media, and devoting so much time and effort to social media that it impairs other important life areas."[17]

Among the 3.8 billion users, social media use in as many as five to ten percent of Americans meets the criteria for social media addiction.[18] This presents a growing concern for younger individuals' excessive use of social media and the Internet. Research already suggests younger generations may be at a heightened risk for developing addictive symptoms because of their excessive engagement with online social networking platforms.[19] So when does social media use become problematic? Although there are no established clinical classification criteria for excessive social media use or social media addiction, studies show that adolescents who spend more than three hours per day using social media may be at heightened risk for mental health problems.[20]

Chamath Palihapitiya, the former Vice President of User Growth at Meta (formerly Facebook) explained how "the short-term, dopamine-driven feedback loops . . . are destroying how society works" and are turning us into bona fide addicts by leveraging "the very same neural circuitry used by slot machines and cocaine to keep us using the product[s] as much as possible."[21] According to a new study by Harvard University, self-disclosure on social

---

14. Yalin Sun & Yan Zhang, *A Review of Theories and Models Applied in Studies of Social Media Addiction and Implications for Future Research*, 114 ADDICTIVE BEHAVS. 106699, 1 (2021).

15. Adam Felman, *What is Addiction*, MEDICAL NEWS TODAY (last updated May 31, 2023), https://www.medicalnewstoday.com/articles/323465 [https://perma.cc/P2HH-C49Q].

16. Howard J. Schaffer, *What is Addiction?: A Perspective*, HARV. MED. SCH. DIV. ON ADDICTIONS (July 3, 2007), https://www.divisiononaddiction.org/html/whatisaddiction.htm [https://perma.cc/24KZ-4X94].

17. *See* Bhatt, *supra* note 2.

18. *Id.*

19. *See* Kuss, *supra* note 10, at 3538 (citing Enrique Echeburua & Paz de Corral, *Addiction to New Technologies and to Online Social Networking in Young People: A New Challenge*, 22 ADICCIONES 91 (2010), https://pubmed.ncbi.nlm.nih.gov/20549142/ [https://perma.cc/HD57-22PV].

20. Kira E. Riehm et al., *Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth*, 76 JAMA PSYCH. FIRST PAGE, 1266-73 (2019).

21. Stanford Graduate School of Business, *View from the Top: Chamath Palihapitiya*, YOUTUBE (Nov. 13, 2017), https://youtu.be/PMotykw0SIk?si=QqWwqKJ4B9LKVZv6 [https://perma.cc/EQ5H-K2RP]; *see* Haynes, *supra* note 5.

networking sites lights up the same part of the brain that ignites when taking an addictive substance:

> The reward area in the brain and its chemical messenger pathways affect decisions and sensations. When someone experiences something rewarding or uses an addictive substance, neurons in the principal dopamine-producing areas in the brain are activated and dopamine levels rise. Therefore, the brain receives a "reward" and associates the drug or activity with positive reinforcement. This is observable in social media usage; when an individual gets a notification, such as a like or mention, the brain receives a rush of dopamine and sends it along reward pathways, causing the individual to feel pleasure. Social media provides an endless amount of immediate rewards in the form of attention from others for relatively minimal effort.[22]

Users who may be addicted to using social networking sites can experience symptoms and consequences traditionally associated with substance-related addictions (i.e., salience, mood modification, tolerance, withdrawal, relapse, and conflict).[23] Positive social stimuli will similarly result in a release of dopamine, reinforcing the behavior (scrolling through social media or using social networking sites) that preceded it.[24]

The concerning effects are compounded when the individual exhibiting overuse of social media is younger. "When children are exposed to social media, they can overstimulate their reward center and increase their reward responsiveness," says Dr. Ofrir Turel.[25] He found that excessive and addictive use was associated with structural changes in the brain.[26] In fact, the brain's reward system was actually smaller.[27] A smaller system can process associations much faster.[28] This highlights one physiological concern for social media addiction in children and adolescents with malleable, developing brains whose reward systems are easily activated and develop faster.[29]

---

22. *See* Bhatt, *supra* note 2.

23. Kuss, Mark D. Griffiths, *Online Social Networking and Addiction—A Review of the Psychological Literature*, INT. J. ENVIRON. RES. PUB. HEALTH 2011, 8, 3528, 3529. https://pubmed.ncbi.nlm.nih.gov/22016701/ [https://perma.cc/62H9-C5T7] (citing Enrique Echeburua, Paz de Corral*, Addiction to New Technologies and to Online Social Networking in Young People: A New Challenge*, ADICCIONES 2010, 22, 91-95. https://pubmed.ncbi.nlm.nih.gov/20549142/ [https://perma.cc/A2UC-UTUG]).

24. *See* Haynes, *supra* note 5.

25. *See* Haynes, *supra* note 5.

26. *Id.*

27. *Id.*

28. Jeanne Ricci, *The Growing Case for Social Media Addiction*, THE CAL. STATE UNIV. (June 28, 2018), https://www.calstate.edu/csu-system/news/Pages/Social-Media-Addiction.aspx [https://perma.cc/T9RP-LCL9].

29. *Id.*

Another concern arises with productivity deficits. There has been evidence that social media addiction negatively impacts productivity, which may pose direct threats to younger generations who will be entering the workforce in the future and, therefore, the economy.[30] Similar to other forms of addiction, social media addiction involves broken reward pathways in the brain, whereby social media provides immediate rewards for minimal effort.[31] Because the reward pathways in the brain contribute to the ability to maintain focus and motivation, excessive social media use tends to affect productivity in the workforce and create distractions or diminish focus for students.[32] Students and teachers often report anecdotal evidence of the effects of excessive social media use on students' abilities to focus and complete their work, and several studies and surveys support their experiences.[33] Although social media addiction is a psychological addiction, as opposed to a substance use disorder (substance addiction), a TEDEd video explains that brain scans of people who are unable to control how excessively they use social media show "a similar impairment of regions [in the brain] that those with drug addiction have."[34] In fact, "there is a clear degradation of white matter in the regions [of the brain] that control emotional processing, attention and decision making."[35]

Social media addiction, like other forms of addiction, may also have negative effects on the healthcare system. Because the research examining social media addiction is still in its infancy, there are few published studies that have documented the costs that social media addiction has on society or the healthcare system. This lack of research is one key distinction between the societal effects of opioid addiction and social media addiction, which will be addressed in subsequent sections. For the purposes of this Note, the increased prevalence of depression and anxiety, combined with access to more social media, can be used to infer that social media addiction may contribute to increased costs on the healthcare system as individuals seek treatment for the psychological effects of social media addiction.

This demonstrates how detrimental social media addiction can be, but the next question is how social media companies are involved. Social media platforms like Facebook, Snapchat, and Instagram target the brain in similar ways as opioids and gambling.[36] Social media companies use complex

30. Brigid Brew, *How Social Media Affects Student Productivity*, ST. CLOUD TECH. & CMTY. COLL. (Oct. 20, 2020), https://sctcc.edu/news/10-20-2020/how-social-media-affects-student-productivity [https://perma.cc/MGB3-J2UD].

31. Kelly McSweeney, *This is Your Brain on Instagram: Effects of Social Media on the Brain*, NOW NORTHROP GRUMMAN (Mar. 17, 2019), https://now.northropgrumman.com/this-is-your-brain-on-instagram-effects-of-social-media-on-the-brain/ [https://perma.cc/7ACE-W9BB].

32. *See* Brew, *supra* note 30.

33. Alfonso Pellegrino et al., *Research Trends in Social Media Addiction and Problematic Social Media Use: A Bibliometric Analysis*, FRONT PSYCH. (Nov. 10, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9707397/ [https://perma.cc/7PFX-B8AE].

34. Shannon Brake, *5 Ways Social Media is Changing Your Brain*, TEDED (Sept. 7, 2014), https://ed.ted.com/best_of_web/qQzsdX2Y#watch [https://perma.cc/K3PM-RV7Z].

35. *Id.*

36. *See* Haynes, *supra* note 5.

mathematical predictive equations to design their algorithms to selectively distinguish specific content for specific users by identifying different preferences of users and predicting which types of content will keep the user's attention for extended periods of time.[37] Information on each individual company's internal analytical procedures used to design these equations is not publicly available nor essential to the analysis posed here. The purpose of using these equations to design their algorithms to work in such a manner to induce extended use of the platform is assumed to be an intentional business (marketing and design) decision meant to improve and increase the use of their product.[38]

B. Current Regulatory Limits on Social Media Companies

In an attempt to encourage interactive computer service providers—which in application has included social media sites—to self-regulate and impose content moderation policies without risking defamation suits, Congress passed Section 230 of the Communications Decency Act.[39] Section 230 gives Internet platforms legal protections for the content moderation policies they impose in line with the reasons specified in Section 230(c)(2), including moderation of obscene, lewd, lascivious, filthy, excessively violent, and harassing content.[40] It states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[41] Section 230(c)(1) essentially serves as a protection against defamation liability for third-party content (user content) and thereby allows platforms to facilitate discussion from their users without liability for libelous speech.[42] In practice, it has been used as a broad, all-encompassing defense of immunity by social media companies for anything to do with moderating third-party content.[43]

---

37. *See* Sapone, *supra* note 8.

38. Each individual social media company utilizes unique algorithms for different private business analytics, and that specific data is unavailable publicly. *See generally* Clodagh O'Brien, *How Do Social Media Algorithms Work*, DIGIT. MKTG. INST. (Jan. 19, 2022), https://digitalmarketinginstitute.com/blog/how-do-social-media-algorithms-work [https://perma.cc/S72A-Y6XD] (explaining, for example, that Facebook uses an algorithm that directs pages and content to display in a certain order).

39. Adam Candeub*, Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 144 (2021) (citing 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

40. *Id.* at 141-43; *see also* 47 U.S.C. § 230(c)(2).

41. 47 U.S.C. § 230(c)(1).

42. *See* Candeub, *supra* note 39, at 147.

43. Levitt v. Yelp! Inc., No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014) (holding section 230(c)(1) immunized Yelp!'s conduct of manipulating review pages by removing some reviews and publishing others against allegations of unfair or fraudulent business).

However, Section 230 was *not* enacted with the intent of immunizing social networking platforms from all uses of their product by third parties.[44] Notably, Section 230(c) was intended to distinguish Internet platforms as distributors rather than as publishers or speakers of third-party content. However, courts have yet to rule on whether this provision shields Internet platforms from liability for third-party use of their product when the platforms have knowledge that the use is potentially harmful.[45] As this Note will discuss later, Section 230 may eventually be used by social media companies as a defense against product liability and other mass tort claims for failure to warn of potential harm from the use of their products.

C. Exploring Other Attempts to Impose Regulations on Social Media Platforms

Several attempts and suggestions for regulating or inducing self-regulation among social media platforms provide additional information as to where the current regulatory landscape stands with respect to social media platforms.

For the purpose of imposing more regulations on social media platforms, some have suggested public provisioning, or treating social media platforms as public utilities.[46] However, this would mean that social media companies would have to abide by existing free speech doctrines that may render many of their existing policies unconstitutional when imposed by a public utility/government actor.[47] As a result, social media companies would not be able to moderate content effectively because effective online moderation would likely violate the First Amendment.[48]

Others propose using privacy and consumer protection laws to impose a fiduciary duty model on social media platforms to induce self-regulation.[49] Under a fiduciary duty model, social media companies that collect or use data

---

44. VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2021), https://crsreports.congress.gov/product/pdf/R/R46751 [https://perma.cc/WMX8-3NLH] ("Section 230 contains findings and policy statements, expressing, among other things, that Congress sought to promote the free development of the Internet, while also 'remov[ing] disincentives' to implement 'blocking and filtering technologies' that restrict 'children's access to . . . inappropriate online material' and 'ensur[ing] vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.'"); *see generally* Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023); *and* Gonzales v. Google LLC, 143 S. Ct. 1191 (2023) (Just this year, the Supreme Court had the opportunity to opine on whether social media platforms, like Twitter and YouTube, are liable for allowing third parties to post terror-related content on their sites. In both cases, the Court did not reach the Section 230 question and instead ruled on other grounds.).

45. *Id.* at 3.

46. Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 85 (2021).

47. *Id.*

48. *Id.*

49. *Id.* at 92 (referencing Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1209 (2016); and Jack M. Balkin, *The Fiduciary Model of Privacy*, 134 HARV. L. REV. F. 11 (2020)).

as information for their own use would have fiduciary duties towards the users whose data they collect and use, including, among other things, a duty of care.[50] A fiduciary model is not designed to alter content moderation or user practices; rather, it is designed to be flexible and to change how social media platforms think about their end users and their obligations to their end users.[51] However, given the flexibility in how a fiduciary model can be imposed—by statute, administrative regulation, or through judicial doctrines—this model evidently is not a sufficient means of encouraging self-regulation without other statutes and changes.[52]

While a common desire to impose regulations seems to stem from pursuing increased transparency of how social media companies operate, many of the proposed methods have limitations or obstacles that impede their use. As such, current attempts and suggestions have been insufficient to induce self-regulation or limits. The overall lack of accountability or enforcement of the excessive and harmful usage of social media platforms allows younger generations to exercise excessive use of social media platforms until they begin to experience addictive behaviors and other negative mental health implications.

Mass tort litigation is already beginning against social media companies. Over twenty-seven personal injury products liability cases filed across twenty-seven districts were consolidated in *In re v. Meta Platforms Inc*.[53] The most common claim is that "defendants' social media platforms are defective because they are designed to maximize user screen time, which can encourage addictive behavior in adolescents."[54] The plaintiffs assert that the defendants were aware and failed to warn the public that their platforms were harmful to minors.[55] These claims mimic several of the claims against opioid manufacturers and retailers in the multi-district litigation that commenced in 2017, in which claimants alleged manufacturers misrepresented the addictive nature of opioid products in marketing campaigns and failed to adequately warn consumers about the potential for addiction.[56] As the effects of social media addiction on the healthcare system and society continue to be researched and publicized, the growing prevalence of social media addiction, the practices that social media companies exercise in the market, and other political forces may establish the perfect storm for mass tort litigation.

---

50. *Id.*
51. *See* Balkin, *supra* note 46, at 92.
52. *Id.* at 93.
53. In re Soc. Media Adolescent Addiction/Personal Injury Prods. Liab. Litig., 637 F. Supp. 3d 1377 (J.P.M.L. Oct. 6, 2022).
54. *Id.* at 1378.
55. *Id.*
56. Rebecca L. Haffajee & Michael R. Abrams, *Settling the Score: Maximizing the Public Health Impact of Opioid Litigation*, 80 OHIO ST. L.J. 701, 705 (2019).

III. THE HISTORY OF LITIGATION AGAINST OPIOID COMPANIES

This section will present background information needed to understand key aspects of the most notable mass tort litigation suits against opioid manufacturers and retailers. It will explain what opioid addiction is and how policy and regulatory failures resulted in opioid manufacturers and retailers contributing to the opioid addiction crisis. This section will ultimately provide the legal framework that will be used to analyze why and how social media companies may similarly encounter mass tort litigation. It will also be used to draw inferences for how their potential litigation strategy may fare.

A. Opioid Addiction Explained

Opioid use disorder (opioid addiction) is a complex illness characterized by compulsive use of opioid drugs even when the person wants to stop or when using the drugs negatively affects the person's physical and emotional well-being.[57] The science behind why only some experience addiction to opioids is not yet known, but the feelings of euphoria that result from opioid use increase the odds that people will continue using them despite negative consequences.[58] The Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM 5-TR), describes opioid addiction as a problematic pattern of opioid use leading to problems or distress, craving, or a strong desire or urge to use opioids; problems fulfilling obligations at work, school or home; giving up or reducing activities because of opioid use, using opioids in physically hazardous situations, tolerance, as well as five other symptoms listed in the DSM 5-TR.[59]

More than any other form of addiction, opioid addiction is considered a public health crisis.[60] The opioid addiction public health crisis was exacerbated by the COVID-19 pandemic.[61] The National Center for Health Statistics (NCHS) at the Centers for Disease Control and Prevention (CDC) documented that the number of drug overdose deaths increased in 2021, with

57. *Opioid Use Disorder*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/conditions-and-diseases/opioid-use-disorder [https://perma.cc/5CHJ-FF42] (last visited Oct. 20, 2022).

58. *Id.*

59. *Opioid Use Disorder*, AM. PSYCHIATRIC ASS'N (Dec. 31, 2022), https://www.psychiatry.org/patients-families/opioid-use-disorder [https://perma.cc/MHT4-5LKX].

60. *Id.*

61 *See generally* Ghose, Rina et al., *Impact of the COVID-19 Pandemic on Opioid Overdose Deaths: a Spatiotemporal Analysis*, J. OF URB. HEALTH: BULLETIN OF THE N.Y. ACAD. OF MED. 2022, 2. vol. 99, 316. doi:10.1007/s11524-022-00610-0 [https://perma.cc/K4WK-XBN2]

opioid overdoses constituting the leading category of drug overdoses.[62] In 2021 alone, 80,411 of the 106,699 overdose deaths involved opioids.[63]

The effects of substance use disorder, including opioid addiction, on U.S. healthcare expenditures, is equally concerning. Emergency department visits for opioid overdoses rose thirty percent from July 2016 through September 2017.[64] The costs disproportionately fell on public insurance, which covered a total of 72.1% of opioid-related inpatient stays and 69% of opioid-related hospital stays.[65] The United States Joint Economic Committee estimates the opioid epidemic cost $1.04 trillion in 2018, $985 billion in 2019, and nearly $1.5 trillion in 2020.[66] The rise in fatal opioid overdoses in 2021 suggests the total cost is likely to continue to increase.[67] The economic burden of the opioid addiction crisis on the United States government likely contributed to the multi-district mass tort litigation against opioid manufacturers and retailers.

B. Explaining How the Existing Regulations and Policy Standstill Led to Opioid Mass Tort Litigation

Understanding how opioid manufacturers and retailers contributed to the opioid addiction epidemic is essential to understanding how social media companies are becoming similarly situated with respect to the rates of social media addiction. The first suits against opioid manufacturers and retailers began with private parties and eventually progressed into state and local governments finding their own stakes in the lawsuits.[68]

State and local governments joined the litigation for a variety of reasons. Aside from the public health concerns the opioid addiction presented, the civil suits were likely to result in large settlements, which would be used to help offset the cost of opioid addiction to the economy and to state

---

62. *Id.*

63. Drug Overdose Death Rates, NAT'L INST. ON DRUG ABUSE: TRENDS AND STATS. (Feb. 9, 2023), https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates [https://perma.cc/VY53-49XN].

64. *Opioid Overdoses Treated in Emergency Departments*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 16, 2018), https://www.cdc.gov/media/releases/2018/p0306-vs-opioids-overdoses.html [https://perma.cc/3VHN-WD5C].

65. *Value in Opioid Use Disorder Treatment Demonstration*, CTRS. FOR MEDICARE & MEDICAID SERVS. (last updated Oct. 7, 2022), https://innovation.cms.gov/innovation-models/value-in-treatment-demonstration [https://perma.cc/42PV-MLQR].

66. *The Economic Toll of the Opioid Crisis Reached Nearly $1.5 Trillion in 2020*, JOINT ECON. COMM. DEMOCRATS (Sept. 28, 2022), https://www.jec.senate.gov/public/index.cfm/democrats/2022/9/the-economic-toll-of-the-opioid-crisis-reached-nearly-1-5-trillion-in-2020 [https://perma.cc/GGH6-QUFA].

67. *Id.*

68 Derek Carr et al., *Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons from the Tobacco Wars*, 133 PUB. HEALTH REP. 207, 207-09 (2018); Nicolas Terry & Aila Hoss, *Opioid Litigation Proceeds: Cautionary Tales from the Tobacco Settlement*, HEALTH AFF. BLOG (May 23, 2018), https://www.healthaffairs.org/content/forefront/opioid-litigation-proceeds-cautionary-tales-tobacco-settlement [https://perma.cc/5MC3-PYSA].

Medicaid costs.[69] Litigation also presented the opportunity to discern internal practices and policies of opioid manufacturers and retailers that are otherwise not publicly available through discovery.[70] Subsequently, once state and local governments obtained more transparency from opioid companies during discovery, state and local officials were empowered to use the information as a political tool to establish a clear scapegoat or wrongdoer in the opioid addiction epidemic. Using this strategy helps fuel policymaking and increases regulations in the opioid manufacturing, prescription, and retail industries. The threats that accompany potential litigation, even if not successfully used to satisfy the aforementioned motives, are generally useful as a deterrent from harmful practices and as an incentive for self-regulation. As such, where policies and regulations were insufficient, litigation served as a tool to move public policy forward and simultaneously procure resources to support a more robust set of interventions to address the opioid addiction crisis.[71]

C. How Civil Litigation Played Out Against Opioid Manufacturers and Retailers

This section will describe key aspects of the litigation against some of the large opioid manufacturers and retailers. It will present examples of some of the most notable defendants, the claims against them, and the common defenses they asserted. This section will be used as a framework for how future litigation against social media companies can arise.

Beginning around 2000, individual opioid users first brought (unsuccessful) personal injury lawsuits against pharmaceutical companies for claims of public nuisance, negligence, strict liability in tort, failure to warn, breach of implied warranty, and several other theories of liability.[72] Since then, almost every state and over 2,000 local government entities have brought similar lawsuits against opioid manufacturers and downstream sellers, several of which were consolidated in December 2017 for the discovery and pretrial motion phase of the litigation for the cases in federal court.[73] Among the many civil suits against opioid manufacturers and retailers, common claims included negligent marketing, products liability for failure to warn and defective design, breach of implied warranty, and fraudulent misrepresentation of their product.[74] Claimants typically accused manufacturers of misrepresenting the addictive nature of opioid products in marketing campaigns and failing to adequately warn consumers about the

69. *Id.*

70. Lance Gable, *Preemption and Privatization in the Opioid Litigation*, 13 NE. UNIV. L. REV. 297, 306 (2021).

71. *Id.* at 305 (citing Brendan Saloner et al., *A Public Health Strategy for the Opioid Crisis*, 133 PUB. HEALTH REP. 24S, 31S (2018)).

72. Richard C. Ausness, *The Future of Opioid Litigation*, 84 BENCH & BAR 20, 20 (2020).

73. *Id.* at 21.

74. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 WEST VA. L. REV. 1117, 1122-30 (2013).

potential for addiction.[75] For example, the civil lawsuits against opioid manufacturer Purdue Pharma alleged that Purdue "promoted its opioid drugs to healthcare providers it knew were prescribing opioids for uses that were unsafe, ineffective, and medically unnecessary, and that often led to abuse and diversion."[76] State attorneys general for California, the District of Columbia, Hawaii, Maine, and 40 other states in a separate suit also alleged:

> Purdue's illegal and misleading marketing and sales practices played a major role in contributing to the nationwide opioid crisis . . . that Purdue created a public nuisance through its marketing and sale of opioids and misled healthcare professionals and patients about the addictive nature of opioids and their potential for abuse and diversion.[77]

Meanwhile, many of the claims against distributors alleged a failure "to monitor, detect, investigate, and report suspicious orders of prescription drugs, even though reasonably prudent suppliers would have done so and the federal Controlled Substances Act requires suppliers to maintain effective controls against diversion of controlled substances to illicit markets."[78] For example, the Department of Justice filed civil suits against AmerisourceBergen Corporation and two of its subsidiaries, AmerisourceBergen Drug Corporation and Integrated Commercialization Solutions, LLC (collectively "AmerisourceBergen"), one of the country's largest wholesale pharmaceutical distributors, claiming the companies' distribution of controlled substances to pharmacies and other customers across the country "resulted in at least hundreds of thousands of violations of the Controlled Substances Act (CSA)" and that AmerisourceBergen "had a legal obligation to report suspicious orders to the Drug Enforcement Administration (DEA), and [their] repeated and systemic failure" to do so "ignited an opioid epidemic."[79]

---

75. *See* Haffajee, *supra* note 56, at 705.

76. Press Release, *Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family*, U.S. DEP'T OF JUST., OFF. OF PUB. AFFS. (Oct. 21, 2020), https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid [https://perma.cc/5JY6-3ZLA].

77. Press Release, *Attorney General Becerra Sues Opioid Manufacturer Purdue Pharma for Its Illegal Practices and Role in the Opioid Crisis*, STATE OF CAL. DEP'T OF JUST. (June 3, 2019), https://oag.ca.gov/news/press-releases/attorney-general-becerra-sues-opioid-manufacturer-purdue-pharma-its-illegal [https://perma.cc/E55H-B4RR].

78. Nora Freeman Engstrom et al., *Suing the Opioid Companies*, STAN. L. SCH. BLOGS: LEGAL AGGREGATE (Aug. 30, 2018), https://law.stanford.edu/2018/08/30/q-and-a-with-mello-and-engstrom/ [https://perma.cc/3UP6-MC8S].

79. Press Release, *Justice Department Files Nationwide Lawsuit Against AmerisourceBergen Corp. and Subsidiaries for Controlled Substances Act Violations*, U.S. DEP'T OF JUST., OFF. OF PUB. AFFS. (Dec. 29, 2022), https://www.justice.gov/opa/pr/justice-department-files-nationwide-lawsuit-against-amerisourcebergen-corp-and-subsidiaries [https://perma.cc/2JQJ-KAYK].

Among the defenses and limitations asserted by opioid manufacturers, the most common were lack of causation, misuse by a third party or the user, and wrongful conduct.[80] For lack of causation, defendants often asserted that there lacked evidence of a causal connection between the manufacturer's marketing and promotion of the opioids and the plaintiff's injuries.[81] A few of the claims against manufacturers were also thwarted by lack of causation defenses whereby manufacturers were able to demonstrate that even if their warnings were inadequate, the deficiency would not have and did not influence providers from prescribing their products to patients.[82]

Another similar defense asserted by opioid manufacturers was misuse by third parties. In cases where plaintiffs (families and estate managers of those deceased by way of overdose) alleged that they died by overdose, a few opioid manufacturers successfully asserted that third parties abused their products.[83] This was only successful in jurisdictions where the doctrine of comparative negligence applies, but in multi-district litigation, it did not defeat a sufficient amount of claims to avoid national settlements.[84] A similar defense of wrongful conduct was successful in a few of the states that adopt the doctrine, whereby plaintiffs who engaged in illegal conduct were barred from recovery for harm caused by their wrongful actions.[85] However, once state and local government officials got involved in the litigation, many of the defenses did not fare well.[86]

In such cases, the state contends that it has standing to sue to protect its quasi-sovereign interests, or interests distinct from the interests of particular parties.[87] These suits have been successfully used against tobacco companies, firearms manufacturers, and lead paint manufacturers.[88] In these cases, the state usually claims negligent marketing has targeted vulnerable segments of the populations and a failure to supervise the distribution of the product at the retail level.[89] Although many of the major opioid manufacturers and

80. *See* Ausness, *supra* note 74.

81. *See* Koenig v. Purdue Pharma Co., 435 F. Supp. 2d 551, 557 (N.D. Tex. 2006); *see also* Franz v. Purdue Pharma Co., No. 05-CV-201-PB, 2006 WL 455998, at *1 (D.N.H. Feb. 22, 2006).

82. *See* Ausness, *supra* note 74.

83. *See* Labzda v. Purdue Pharma L.P., 292 F. Supp. 2d 1346, 1355-56 (S.D. Fla. 2003).

84. *Id.* at 1356.

85. *See, e.g.*, Pappas v. Clark, 494 N.W.2d 245 (Iowa Ct. App. 1992); Orzel v. Scott Drug Co., 537 N.W.2d 208 (Mich. 1995).

86. *See* Ausness, *supra* note 68.

87. *Id.*

88. *See* Ausness, *supra* note 68 (citing generally People ex rel. Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192 (App. Div. 2003) (Municipalities, instead of states, brought most of the suits against firearm manufacturers.); *see generally* State v. Lead Indus. Ass'n, 951 A.2d 428, (R.I. 2008); *see also* Amber E. Dean, Comment, *Lead Paint Public Entity Lawsuits: Has the Broad Stroke of Tobacco and Firearms Litigation Painted a Troubling Picture for Lead Paint Manufacturers?*, 28 Pepp. L. REV. 915 (2001) (explaining public entity lawsuits against lead paint manufacturers resemble the public entity lawsuits against tobacco and firearms manufacturers).

89. *See* Ausness, *supra* note 68 (citing Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and the Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 942-43 (2008)).

distributors ended up settling the cases in multi-million and multi-billion dollar settlements, states were initially concerned that the misuse defense might break the chain of causation and were thus initially skeptical about pursuing larger settlements.[90] Class actions against Purdue Pharma demonstrated one example of relying on misuse to break the chain of causation by shifting much of the blame to "pill doctors" who prescribed OxyContin in excessive quantities to their patients.[91] However, even Purdue was forced to settle a number of suits brought by state officials, with some of the most notable ones presented below:

> **Purdue Pharma:** agreed to a civil settlement in the amount of $2.8 billion to resolve its civil liability under the False Claims Act. Separately, the Sackler family has agreed to pay $225 million in damages to resolve its civil False Claims Act liability.[92]
>
> **Johnson & Johnson:** agreed to a $5 billion settlement and announced in 2020 it would remove itself from the opioid prescribing business in the U.S.[93]
>
> **AmerisourceBergen, Cardinal Health, and McKesson:** all agreed to pay a combined $21 billion. The three massive wholesalers were alleged to have continued to ship vast quantities of pills to small rural communities despite red flags that drugs like OxyContin were being diverted and sold on the black market.[94]

D. New Policies Since the Litigation Commenced

In the years following the successful suits against opioid manufacturers, retailers, and prescribers, many pharmaceutical companies have agreed to fund new monitoring systems to prevent communities from being flooded with high-risk medications.[95] The monitoring systems will pick up on patterns where too many pills are going into a community, and distributors for that community will be put on notice.[96]

---

90. *Id*. at 1163.
91. *Id.*
86. Christine Minhee, *All Major Opioid Manufacturers, Distributors, and Retailers have Offered to Settle*, OPIOID SETTLEMENT TRACKER, https://www.opioidsettlementtracker.com [https://perma.cc/PFU5-Q4XV] (last visited Sept. 4, 2023).
93. *Id.*
94. *Id.*
95. Elizabeth Williams & Heather Saunders, A Look at Changes in Opioid Prescribing Patterns in Medicaid from 2016 to 2019, KAISER FAM. FOUND. (Feb. 17, 2023), https://www.kff.org/medicaid/issue-brief/a-look-at-changes-in-opioid-prescribing-patterns-in-medicaid-from-2016-to-2019/ [https://perma.cc/F67A-8KY3].
96. *Id.*

Since the opioid epidemic was declared a public health emergency on October 26, 2017, states have also enacted limits on opioid prescriptions for acute pain, including limits on prescription length and daily dosage requirements.[97] The Centers for Medicare & Medicaid Services (CMS) also enacted preauthorization approval provisions for certain opioids to disincentivize unnecessary prescribing practices.[98] In 2018, a Kaiser Family Foundation survey of state Medicaid programs found nearly all states and the District of Columbia had implemented at least one opioid-focused pharmacy management policy, with forty states expecting to implement additional opioid-focused strategies the following year.[99] In 2019, CMS codified the framework for several opioid overutilization policies, including required drug management programs under Medicare Part D for all Part D sponsors and additional safety alerts at the time of dispensing an opioid drug.[100] By 2022, the CDC issued an updated Clinical Practice Guideline for Prescribing Opioids for Pain, which was intended to provide recommendations for clinicians providing pain care and how to assess the risk and address the harms of opioid use.[101] The added oversight and policy changes that followed the mass tort litigation against many opioid companies will likely encourage self-regulation among entities in a manner not previously imposed on the companies.

IV. ANALYSIS[102]

The similarities between social media addiction and opioid addiction, as well as their effects on individuals, younger generations, and society,

---

97. *Id.*

98. Press Release, *CMS Names an E-Prescribing Standard to Reduce Provider Burden and Expedite Patient Access to Needed Medications*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Dec. 29, 2020), https://www.cms.gov/newsroom/news-alert/cms-names-e-prescribing-standard-reduce-provider-burden-and-expedite-patient-access-needed [https://perma.cc/G64Q-XM3L].

99. Kathleen Gifford et al., *States Focus on Quality and Outcomes Amid Waiver Changes: Results from a 50-State Medicaid Budget Survey for State Fiscal Years 2019 and 2019*, KAISER FAM. FOUND. (Oct. 25, 2018), https://www.kff.org/medicaid/report/states-focus-on-quality-and-outcomes-amid-waiver-changes-results-from-a-50-state-medicaid-budget-survey-for-state-fiscal-years-2018-and-2019/ [https://perma.cc/6PTP-SMUN].

100. *Improving Drug Utilization Review Controls in Part D*, CTRS. FOR MEDICARE & MEDICAID SERVS. (last modified May 11, 2023, 4:45 PM), https://www.cms.gov/medicare/prescription-drug-coverage/prescriptiondrugcovcontra/rxutilization [https://perma.cc/8VRF-3NKA].

101. Deborah Dowell et al., *CDC Clinical Practice Guideline for Prescribing Opioids for Pain – United States, 2022*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 4, 2022), http://dx.doi.org/10.15585/mmwr.rr7103al [https://perma.cc/Z8U5-MUWT].

102. Roman McGee, *Mental Health and Social Media: Analyzing the Shift in Future Liability for Social media Platforms*, 24 N.C. J.L. & TECH. 101, (2022).
This article addresses a similar issue to this Note, and focuses on a specific case in which a social media company was unable to shield itself from liability for a car accident that resulted from individual's use of the social media filter. The main difference that this Note presents is an analogy between social media companies and addiction, and opioid companies and addiction in the context of mass-tort litigation. This Note and the Article reach different conclusions, but a similar issue is shared between both the Article and this Note.

provide some support for the possibility of future mass tort litigation. Social media companies' market role and practices contribute to the growing rates of social media addiction in a similar manner as opioid manufacturers. Finally, key aspects of the civil and criminal litigation against opioid manufacturers and retailers can be applied in potential litigation against social media companies to suggest a need for social media companies to self-regulate.

A. The Similar Addictive Effects of Opioid Addiction and Social Media Addiction Provide Some Support for Potential Future Litigation

As previously discussed, social media use creates similar addictive effects on the individual as opioid use by utilizing similar dopamine-mediated feedback signals that essentially establish the action of using opioids or social media as a reward.[103] When the action that is associated with a reward requires minimal effort, as is the case with taking opioids or scrolling through a social media platform, ease of use encourages continuous use and eventually results in uncontrollable or habitual use of the product.[104] The addictive behaviors and symptoms that are associated with habitual or addictive opioid use are like those associated with social media use.[105] This similar manifestation of addictive behaviors presents one reason in support of the potential for social media companies to face similarly scaled multi-district litigation.[106]

The lack of research and documentation on the costs and effects of social media addiction on state Medicaid programs and society may hinder state and local officials from engaging in litigation against social media companies. Unlike opioid addiction, where the costs of inpatient hospitalizations and treatment are well documented, similar research has not yet uncovered the costs to the healthcare system, the economy, and the future workforce in terms of productivity. This may weaken the argument that state and local actors may engage in multi-district litigation against social media companies.

103. *See* Haynes, *supra* note 5.
104. *See* Haynes, *supra* note 5.
105. *See* Brake, *supra*, note 34.
106. In October 2023, Arizona and nearly 30 other states filed a lawsuit in the Northern District of California against Meta Platforms regarding the harmful effects of its marketing on the mental health of youths. Though the suit is still in its early stages, it argues a similar product liability framework as proposed in this Note. *See* Complaint, Arizona v. Meta Platforms, Inc., No. 4:23CV05448, 2023 WL 7002550 (N.D. Cal. Oct. 24, 2023).

B. The Role that Social Media Companies Play in the Rates of Social Media Addiction Resembles the Role Opioid Manufacturers Played in the Opioid Addiction Crisis

Opioid manufacturers designed and marketed their products in ways that enabled and increased rates of opioid addiction.[107] Many failed to warn prescribers and consumers of the potential harmful effects of their products, and at times, they even misled consumers and prescribers about the harms of their products.[108] In congruence, social media companies collect user data to enable their algorithms to accurately predict and display content that will induce excessive use of the platform by each user.[109]

The evidence offered against opioid manufacturers, with respect to their misrepresentation in their marketing and failure to warn of harmful consequences, provides a useful analogy to demonstrate how opioid manufacturers' contribution to the opioid crisis was intentional. Specifically, claimants argued defective design claims based on the excessive amount of oxycodone in the large dose pills, the manufacturer's failure to add an antagonist substance to the pills, or that the time-release mechanism was defective because it was not tamper-proof.[110] This evidence functioned as confirmation that the opioid manufacturers had knowledge that the dosage in which they were manufacturing the opioids was significantly more dangerous and addictive than they disclosed, yet they took no steps to remedy or warn.[111] Likewise, the evidence of algorithms utilizing the same neural circuity/interval reward pathways that opioids, slot machines, and other forms of addiction harness may establish the inference that social media companies intentionally design their platforms to encourage excessive, and even addictive, uses of their product—without taking steps to remedy or warn users. In short, it can be shown that both opioid manufacturers and social media companies have knowledge that the products pose risks of harm to their consumers/users, yet they took insufficient action to rectify or warn the public.

The role that social media companies and opioid companies occupy in their respective forms of addiction establishes the strongest justification for the hypothesis that social media companies may face similar mass tort litigation as opioid companies. In particular, the effects that social media addiction has on younger generations may create at least political incentives for state and local government officials to undertake litigation against social media companies for their defective design of addictive platforms and for their failure to warn younger users of the harms associated with their product.

However, an aspect of social media companies' market structure makes them even more vulnerable than opioid manufacturers—the absence of a middle party (i.e., a prescriber). In the cases of private suits against

107. *See* Ausness, *supra* note 74.
108. *See* Ausness, *supra* note 74 at 1140-41.
109. *See* Sapone, *supra* note 8.
110. *See* Ausness, *supra* note 74.
111. *See* Ausness, *supra* note 74 at 1140-41.

manufacturers, opioid manufacturers were able to successfully assert the lack of causation defense by showing the prescribers severed the chain of causation.[112] Namely, manufacturers asserted that even if they had defective designs or failures to warn of harm, this did not stop prescribers from continuing to prescribe the opioids, notwithstanding their knowledge of the harm associated with opioids.[113] As such, courts that adopted the contributory negligence doctrine found the plaintiffs lacked causation in showing that their injuries were due to the marketing practices of the manufacturers.[114]

Unfortunately for social media companies, there is no "prescriber" of social media content that would allow them to assert a lack of causation defense. However, social media companies may try to weaponize Section 230(c) to assert that they are not liable for misuse by third parties (the users). While a general misuse defense has some weight, Section 230 likely does not. Because Congress's intent when enacting Section 230 was not to create complete blanket immunity in every context, it cannot be said that Section 230 is meant to shield social media companies from the harms of excessive use of their product. This claim has no basis in defamation or obscenity principles and thus will likely not fall within the protections of Section 230. As their main go-to defense will likely not be expanded to this context, social media companies may be at an increased risk of litigation, as opposed to opioid manufacturers, who had other actors involved in the harmful prescribing of opioids. The best litigation strategy that social media companies will likely pursue, similar to opioid manufacturers, will be to oppose consolidation and centralization of actions against them in light of their algorithms being trade secrets and confidential.

C. Current Regulations for Social Media Companies Incentivize the Use of Litigation to Advance Regulatory and Policy Goals

Currently, there are minimal limits on a social media company's use of addictive algorithms to encourage excessive use of their platform. Social media companies are free to continue with their practices and have no incentives to self-regulate in light of the immunizing protections that Section 230 has been interpreted to afford them. This presents the political motive for state and local governments to use litigation for similar reasons, outside of economic gain, as was pursued in the multi-district opioid litigation. States may see litigation as a means of advancing policy goals by using discovery and other evidence-gathering processes to expose the current practices and internal business models of social media companies. This increased transparency will likely spark the political motive to regulate as they uncover harmful practices that encourage excessive and addictive use of social media platforms. It may also spur other regulations with respect to how social media

112. *See* Ausness, *supra* note 74 at 1149
113. *Id.*
114. *Id.* at 1133.

companies are allowed to collect and utilize user data in order to present specifically catered content and advertisements.

The potential claims against social media companies, due to their role in the rate of social media addiction, are very similar to the claims advanced against opioid manufacturers, prescribers, and retailers. Most importantly, social media companies must undertake self-regulating practices to decrease the potential for mass tort litigation.

D. Using the Post-Opioid Settlement Policies to Avoid Mass Tort Litigation Based on Prior Authorization and Prescription Monitoring Policies

A more robust self-regulation model is needed for social media companies to protect themselves from future litigation. By examining some of the policies that were implemented following the opioid settlements, a few practices or changes can be extracted to decrease their likelihood of litigation.

Like the preauthorization approval and prescription monitoring programs for prescribing opioids in order to detect potential harmful or red-flag practices, social media companies can enforce screen time limits on all users, or at least all users under a certain age, and provide notice when an individual user's usage/practices are indicative of excessive use. Social media operators (such as Meta) already have data on users' behavioral practices. They could start using their behavioral data to identify excessive users and provide strategies to limit time spent on their products. This is already being used in the online gambling industry and could easily be applied by social networking sites.[115]

V. CONCLUSION

The trend of the various multi-district litigation against opioid manufacturers and retailers provides an analogous framework to support the notion that social media platforms are poised to see similar multi-district litigation for their role in the rise of social media addiction. The pandemic's forced isolation paved the way for social media companies to play a substantial role in the increase in social media addiction rates, especially among younger generations. The similar addiction-indicative behaviors and negative mental health outcomes that are associated with both social media addiction and opioid addiction justify analyzing the multi-district litigation against opioid manufacturers and retailers in a manner that can be applied to social media companies. The role and market structure that social media companies and opioid manufacturers similarly occupy, and thus, contribute to each addiction further supports the logic behind using the multi-district litigation against opioid manufacturers to hypothesize how similar litigation may play out against social media companies.

115. Michael Auer & Mark D. Griffiths, *Voluntary Limit Setting and Player Choice in Most Intense Online Gamblers: An Empirical Study of Gambling Behaviour*, 29 J. GAMBL. STUD. 647, 647-60 (2013).

Finally, the shortcomings of current regulatory approaches and the growing political pressure all function to establish congruent contexts that could set the framework for similar litigation against social media companies. This Note discussed how social media companies, unlike opioid manufacturers and retailers, do not have a "middleman provider/pharmacist" or some additional third party beyond the users to assert third-party doctrines of immunity, which signals that social media companies may also not fare well in mass tort litigation, regardless of their potential defenses. Finally, this Note offered self-regulating steps that social media companies can implement to avoid future mass tort litigation based on the policy changes that followed the multi-district opioid addiction crisis litigation.

A Star is Born: Lack of Income Rights for Entertainment's Newest Stars, "KidTubers"

Katherine Wirvin*

TABLE OF CONTENTS

* J.D., May 2024, The George Washington University Law School; B.A. Honors, May 2021, Political Science, Saint Francis Xavier University. Thank you to the FCLJ staff for all their help in the writing and publishing process. I would also like to thank my mom and dad for their love and support throughout all of my schooling. Lastly, a special shoutout to Annie MacKinnon and Jaimie Wood for all the hours we spent watching YouTube and talking about family vloggers while in university, which gave me inspiration for this Note topic.

I. INTRODUCTION

On July 2, 2021, a video—which has since garnered over 615,000 views[1]—was posted to then-eight-year-old KidTuber (a shorthand term this Note will use to jointly discuss kidfluencers and the children of family vloggers) Everleigh Rose Smith-Soutas's personal[2] YouTube channel.[3] The 15-minute video, titled "Everleigh Spends 24 Hours at Her Dance Studio!!!" and filmed by Everleigh's stepfather Cole LaBrant, documents the eight-year-old's 24-hour stay at her dance studio.[4] However, the video serves as an advertisement (ad) for the doll brand "Dream Seekers."[5]

The video starts out with Everleigh introducing the three different Dream Seeker dolls and stating that the reason she decided to do this video is "because [her] dream is to be a professional dancer . . . and these dolls are called *dream* seekers," which cuts to the start of the video long ad for the doll brand.[6] Everleigh and Cole nestle ads for the dolls in between scenes of Everleigh practicing her dance routine and showing her dance studio to viewers.[7] Cole suggests playing hide and seek with the dolls, Everleigh describes how the doll's box has a place to write your dreams, and throughout the whole video, the doll is by her side.[8] The video also has an ad that plays before the video starts and an ad placed in the middle of the video, indicating that this is a monetized video by YouTube.[9]

Everleigh appears in nearly every video posted on the LaBrant family YouTube channel while also starring in her own channel's videos, and a channel dedicated to videos of her and Cole.[10] However, because Everleigh, along with many other KidTubers, doesn't live in Illinois (the only state that

1. Everleigh, *Everleigh Spends 24 Hours At Her Dance Studio!!!*, YOUTUBE (Jul. 2, 2021), https://www.youtube.com/watch?v=qc4aJepfOo8 [https://perma.cc/CU6A-38J3] (view count 615,511 as of Oct. 5, 2023).

2. Everleigh's personal channel is an offshoot of her parent's main channel, "The LaBrant Fam," which has 13.1 million followers as of January 23, 2023. *The Labrant Fam*, YOUTUBE, https://www.youtube.com/@ColeAndSav/videos [https://perma.cc/XL6Y-V9MB] (last visited Apr. 9, 2023); Everleigh's own channel has gained 3.92 million subscribers alone. *See Everleigh*, YOUTUBE, https://www.youtube.com/@EverleighEverleigh [https://perma.cc/ZNS3-9JPG] (last visited Aug. 30, 2023); *Everleigh Rose*, IMDB, https://www.imdb.com/name/nm8957928/ [https://perma.cc/582H-BZ4Q] (last visited Oct. 13, 2023).

3. *Everleigh Spends 24 Hours At Her Dance Studio!!!*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.* (emphasis added).

7. *Id.*

8. *Id.*

9. *Everleigh Spends 24 Hours at Her Dance Studio!!!*, *supra* note 1.

10. *The Labrant Fam*, *supra* note 2; *Everleigh*, *supra* note 2; *Cole and Ev*, YOUTUBE, https://www.youtube.com/@ColeAndEV [https://perma.cc/5HAG-NGS3] (last visited Oct. 12, 2023).

has enacted a labor law for KidTubers as of the writing of this Note), she is not entitled to any money that the videos generate.[11]

This Note will focus on the lack of income rights for KidTubers and analyze potential legal pathways that would provide these children the right to their deserved income. Section II will discuss the current legal landscape for traditional child actors in the United States and the rise of YouTube and subsequently KidTuber content. Section II will also give a brief background on the right of family autonomy and the infancy law doctrine, two dilemmas that regulating KidTuber content faces, and ends with a discussion on the legal protections given to child social media stars in France. Section III will propose and analyze a three-component proposal for a federal Coogan Law that mirrors Section 5 of Pennsylvania's 2012 Child Labor Act—as well as the issues this proposal might face.

II. BACKGROUND

A. The Fair Labor Standards Act and Child Actors

The Fair Labor Standards Act (FLSA) was passed in 1938, establishing minimum wage rights, overtime pay, recordkeeping, and child employment regulations.[12] Child labor provisions (also known as child labor laws) were put in place to ensure that young peoples' health, well-being, and educational needs were being met while working and that the work they performed was safe.[13] The FLSA's child labor provision's focus is mostly tailored toward protecting children from working in dangerous jobs (mills, factories, farms) because those employment sectors had become popular during the Second Industrial Revolution, soon before the FLSA was written.[14] To prevent child labor issues, the FLSA "prohibits an employer from using 'oppressive' child labor and 'applies to all aspects of employment such as working conditions and allowable hours of work per week.'"[15]

---

11. Jyssica Schwartz, *Family Vloggers are Monetizing Kids Without Consent*, MEDIUM (Mar. 19, 2021), https://jyssicaschwartz.medium.com/family-vloggers-are-monetizing-kids-without-consent-2bd72a6523bd [https://perma.cc/4NCU-9JV3]; Munirat Suleiman, *Is Kidfluencing Child Labor?: How the Youngest Influencers Remain Legally Unprotected*, COLUM. UNDERGRADUATE L. REV. (Jun. 16, 2022); Claire Savage, *Child Influencers in Illinois Will Be Able to Sue if Earnings Aren't Set Aside*, TIME (Aug. 13, 2023, 12:56 PM), https://time.com/6304457/child-influencers-illinois-earnings/ [https://perma.cc/9Z3Q-PLYJ].

12. *Fair Labor Standards Act Signed*, LIBR. OF CONG., https://guides.loc.gov/this-month-in-business-history/june/fair-labor-standards-act-signed#:~:text=676%2C%2052%20Stat.,provisions%20related%20to%20child%20labor [https://perma.cc/GJ8P-L97B] (last visited Oct. 10, 2023).

13. Wages *and the Fair Labor Standards Act*, U.S. DEPT. OF LAB. WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/flsa#:~:text=The%20Fair%20Labor%20Standards%20Act%20(FLSA)%20establishes%20minimum%20wage%2C,%2C%20State%2C%20and%20local%20governments [https://perma.cc/R2KL-7TF3] (last visited Jan. 26, 2023).

14. Amanda G. Riggio, *The Small-er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE UNIV. L. REV. 493, 499 (2021).

15. Courtney Glickman, *Jon & Kate Plus…Child Entertainment Labor Law Complaints*, 32 WHITTIER L. REV. 147, 151 (2010); Fair Labor Standards Act of 1938, 29 U.S.C. § 212(c).

The FLSA also includes exemptions in its coverage of those protected.[16] Most notably, minor children employed by their parents have no minimum age requirement for work.[17] Another famous exception to coverage within the FLSA is the "Shirley Temple Act."[18] The "Shirley Temple Act" refers to the FLSA exemption of children working as actors or performers in "motion pictures or theatrical productions, or in radio or television productions."[19] This work was not considered oppressive or particularly hazardous[20] like the work that the FLSA intended to protect children from at the time of its enactment.[21] Furthermore, the FLSA was written during a time when child actors, such as Shirley Temple (for whom the exemption is nicknamed after), were becoming popular in entertainment.[22] Therefore, the FLSA does not provide protection for children in these industries. Because of this, it has been up to individual states to decide whether they will establish regulations on child acting and performance work and how strict those provisions are.[23]

B. Coogan Laws: Origins

Thanks to actor Jackie Coogan,[24] young child actors in California are (theoretically) [25] protected from financial exploitation due to the creation of Coogan Accounts.[26] Jackie Coogan was a child actor who became a star in the 1920s.[27] However, all of the earnings he made as an actor while he was a minor belonged to his mother.[28] In 1938, 23-year-old Coogan sued his mother and stepfather (who was also his former business manager) for "his life's earnings of more than $4 million" that he had earned over his childhood

16. Glickman, *supra* note 15, at 149; Kimberlianne Podlas, *Does Exploiting a Child Amount to Employing a Child? The FLSA's Child Labor Provisions and Children on Reality Television*, 17 UCLA ENT. L. REV. 39, 57 (2010).

17. Riggio, *supra* note 14, at 500; 29 C.F.R. § 570.2.

18. Podlas, *supra* note 16, at 58.

19. Glickman, *supra* note 15; Podlas, *supra* note 16.

20. Examples of hazardous and oppressive work for children under sixteen could include working in factories, operating dangerous machinery, etc. Podlas, *supra* note 16, at 57 n.159.

21. *See* 29 U.S.C §212(c); Marina A. Masterson, *When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers"*, 169 U. PENN. L. REV., 577, 586-87 (2020).

22. Podlas, *supra* note 16, at 58.

23. Glickman, *supra* note 15, at 152.

24. Later in his career, Jackie Coogan played Uncle Fester in The Addams Family from 1964 to 1966. *The Addams Family*, IMDB, https://www.imdb.com/title/tt0057729/?ref_=nm_knf_t_3 [https://perma.cc/4GVP-UQL2] (last visited Apr. 8, 2023).

25. While the discussion of current financial exploitation of traditional child stars is an interesting and important issue to look into, the modern loopholes that parents of traditional child stars have used is beyond the scope of this Note.

26. *Coogan Law*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits/young-performers/coogan-law [https://perma.cc/TVL7-28WS] (last visited Mar. 3, 2023).

27. *Id.*

28. *Id.*

career.[29] Unfortunately for Coogan, his mother had spent it all, insisting that she was "entitled to all his earnings up to the time he became of age."[30] Coogan won his lawsuit, but out of the $4 million he had earned, in the end he received only $126,000.[31]

In response to the Coogan scandal, California passed the California Child Actor's Bill (often known as the Coogan Act) the following year.[32] The original law gave judges "discretionary power to require that a contract set aside some of a child actor's income in a trust fund or savings account, only to be opened when the child reached the age of majority."[33] However, this original version of the law was plagued with loopholes that were often exploited by parents.[34]

In 2000, the California Coogan Law was updated with the hope that the revisions would help reduce the exploitation of loopholes.[35] This update to the California Coogan Law now requires that fifteen percent of the minor's gross earnings (rather than the minor's *net* earnings, like in the original 1939 Coogan Act), be deposited into the child's Blocked Trust Account by the minor's employer, removing judicial discretion.[36] This change to gross earnings was to try to avoid "management" or "secretarial" fees from being deducted by the minor's parents.[37] The money deposited into the account is not permitted to be accessed by the beneficiary (the child) or "any other individual, individuals, entity, or entities" until the child turns eighteen or is declared an emancipated minor *unless* there is a written order from the superior court accepting a petition of the parent or legal guardian, the minor, or the trustee showing that the trust needs to be amended or terminated.[38]

C. The Expansion (or Lack Thereof) of State Coogan Laws

Several other states have followed in California's footsteps, creating their own versions of Coogan Account requirements, which often require child actors to have that state's version of a Blocked Trust Account set up

29. *Mother is Sued by Jackie Coogan*, N.Y. TIMES, Apr. 12, 1938, at 3, https://timesmachine.nytimes.com/timesmachine/1938/04/12/96813030.html?pageNumber=31 [https://perma.cc/WG24-B5WE]; *Jackie Coogan*, BRITANNICA (Feb. 25, 2023), https://www.britannica.com/biography/Jackie-Coogan [https://perma.cc/N5EL-TZ7U].

30. *Mother is Sued by Jackie Coogan*, *supra* note 29.

31. Jennifer González, *More Than Pocket Money: A History of Child Actor Laws*, LIBR. OF CONG. BLOGS (Jun. 1, 2022), https://blogs.loc.gov/law/2022/06/more-than-pocket-money-a-history-of-child-actor-laws/ [https://perma.cc/5M7R-W6X9]; Richard Corliss, *Shirley Temple: A Cute Cocktail of Talent and Charm*, TIME (Feb. 12, 2014, 11:13 AM), https://time.com/6907/shirley-temple-remembrance/ [https://perma.cc/8774-C2QV].

32. *Coogan Law*, *supra* note 26.

33. González, *supra* note 31.

34. Child star Elizabeth Taylor's mother, for example, took on the title of "manager," which gave her access to ten percent of Elizabeth's salary, and Macaulay Culkin's parents used loopholes so they could use his income to fund their own custody battles. *Id.*

35. *Id.*

36. *Id.*; Cal. Fam. Code § 6752(b)(1).

37. González, *supra* note 31.

38. Cal. Fam. Code §§ 6752(b)(1), 6753(b), 6752(b)(7), 6752(c)(5).

before they start work in the entertainment industry.[39] However, the kind of account, how to open an account, and who qualifies for these protections differ between states.[40] Some states, such as Pennsylvania, hold that an "irrevocable child performer trust account or a qualified tuition program" must be established if the minor expects to earn more than $2,500 in the production, expects to receive residuals, or if the child has already earned $2,500 in previous employment.[41] Pennsylvania also provides that the account can only be accessed when the minor reaches eighteen years of age unless for a legitimate health or educational reason.[42]

In total, thirty-three states have some form of regulation on children participating in the entertainment industry, and twenty-six states require work permits for child entertainers.[43] Each state's work permit requirements and conditions vary, but many states that do have regulations in place protect children under eighteen, and nearly all protect children under sixteen years of age.[44] However, only ten states currently require a trust account for child actors, which gives child stars some protection over their profits.[45] These states are California, New York, Louisiana, Illinois, Nevada, New Mexico, Kansas, North Carolina, Pennsylvania, and Tennessee.[46]

D. Reality TV and Children

In the early 2010s, "reality television stars were the only 'ordinary' people to appear on screen," and network reality television shows such as *Jon*

39. *Coogan Law*, *supra* note 26; N.Y. EST. POWERS & TRS. LAW § 7-7.1 (Consol. 2023); 820 ILCS 205/12.5 (Ill. 2020); 2005 La. SB 158 (La. 2005); NM Stat § 50-6-19 (2018).

40. *The Comprehensive Guide to Child Actor Laws by State*, ASSEMBLE MAG. (Oct. 27, 2021), https://blog.assemble.tv/what-every-producer-should-know-about-child-actor-laws [https://perma.cc/P3MW-A2UL].

41. 2011 Pa. HB 1548 §§ 5(e)(1), 5(e)(2)(xi).

42. *See id*. The proceeds may also remain in the trust after the minor turns eighteen if the parent or guardian thinks it will serve in the best interests of the minor. *Id.* at 151(e)(2)(xi).

43. *Child Entertainment Laws as of January 1, 2023*, U.S. DEPT. OF LAB. WAGE AND HOUR DIV. (Jan. 1, 2023), https://www.dol.gov/agencies/whd/state/child-labor/entertainment#:~:text=Must%20have%20a%20certificate%20of%20age.&text=Yes-,Sec.,industry%20for%20a%20limited%20time [https://perma.cc/FRR2-6LPZ]/

44. *Id.*

45. *Id.*

46. *Coogan Accounts: Protecting Your Child Star's Earnings*, MORGAN STANLEY (Jan 10. 2022), https://www.morganstanley.com/articles/trust-account-for-child-performer# [https://perma.cc/9NVK-59ZR].

& Kate Plus 8 and *19 Kids and Counting* found immense viewership.[47] *Jon & Kate Plus 8* featured the highs and lows of the Gosselin family, with a prominent focus on the children.[48] With reality television, producers are often able to get around rules that govern traditional, scripted television because a star's involvement can be classified as "participation" rather than acting and because many reality stars are not represented by actor's unions such as the Screen Actors Guild (SAG) or the American Federation of Television and Radio Artists (AFTRA).[49]

The television show *Kid Nation*, which observed children left alone, without adults, on a fake town set with the goal of building a working society,[50] brought forth "the question of how 'child participants' are handled" in reality television.[51] The show's contract signed by the child and their parent or legal guardian directly stated that "participation in the show would not be employment and that the children would not be entitled to wages, salary, or other compensation," along with a laundry list of assumption of risk clauses.[52] To bypass working condition complaints, the network had framed the show as a "summer camp" experience rather than work.[53] However, once it was exposed that the children were working fourteen-hour days without compensation, the show came under fire.[54]

---

47. Alexandra Samuel, *With Social Media, Everyone's a Celebrity*, JSTOR DAILY (Jul. 16, 2019), https://daily.jstor.org/with-social-media-everyones-a-celebrity/ [https://perma.cc/7GCE-UCKN]; Mariah Espada, *The 50 Most Influential Reality TV Seasons of all Time: Jon & Kate Plus 8 Season 5 (2009)*, TIME (Aug. 4, 2022, 8:30 AM), https://time.com/collection/reality-tv-most-influential-seasons/6198506/jon-and-kate-plus-8/ [https://perma.cc/XDT8-NJGV]; Rick Kissell, *TLC's '19 Kids & Counting' Returns With Series-High Rating*, VARIETY (Sept. 4, 2014, 2:28 PM), https://variety.com/2014/tv/news/tlc-19-kids-and-counting-series-high-rating-1201298033/ [https://perma.cc/UV2X-XN6U]; Jon *& Kate Plus 8* was a documentary-style television show that featured the Gosselin family, a family of ten—the parents, Jon and Kate, plus their eight children. *Jon & Kate Plus 8*, IMDB, https://www.imdb.com/title/tt1124348/ [https://perma.cc/4QMZ-C3VT] (last visited Apr. 10, 2023); *19 Kids and Counting*, IMDB, https://www.imdb.com/title/tt1307083/?ref_=tt_sims_tt_i_3 [https://perma.cc/Q43W-FSBN] (last visited Aug. 30, 2023).

48. Glickman, *supra* note 15, at 156; *Jon & Kate Plus 8*, *supra* note 47; *19 Kids and Counting*, *supra* note 47; Alan Duke, *State: 'Jon & Kate' Broke Child Labor Law, but no Charges*, CNN (Apr. 14, 2010, 3:16 PM), https://www.cnn.com/2010/SHOWBIZ/TV/04/14/gosselin.kids.labor/index.html#:~:text=(CNN)%20%2D%2D%20%22Jon%20%26,it%20doesn't%20happen%20again [https://perma.cc/G4LW-SNKK].

49. Glickman, *supra* note 15, at 148-49.

50. The premise of the television show *Kid Nation* was to see if young kids could build a working society without adults by placing forty kids aged eight to fifteen in a ghost town set. The children were woken up at seven a.m. and were recorded until late at night, recording the kids talking, eating, doing assigned chores, fighting, or crying. Other assumption of risk clauses discussed the risk of their child getting pregnant, contracting a sexually transmitted disease, and being exposed to hazards and conditions that may result in serious bodily injury, illness, or death. Christopher C. Cianci, *Entertainment or Exploitation: Reality Television and the Inadequate Protection of Child Participants under the Law*, 18 S. CAL. INTERDISC. L.J. 363, 366, 368-70 (2009).

51. Glickman, *supra* note 15, at 149.

52. Cianci, *supra* note 50, at 368-69.

53. *Id.* at 371-72.

54. *Id.*

Kid Nation, at the time, seemed like an outlier of how reality television provided inadequate protections for its child stars,[55] due to the show being filmed in New Mexico, a state "where child labor laws are lax."[56] However, a 2010 probe into *Jon & Kate Plus 8*, which was set Pennsylvania, re-opened the door to the issue of inadequate protections for child reality television stars.[57] For each episode of *Jon & Kate Plus 8*, the Gosselin's made "$22,500 [] with none of the money specifically designated for the eight children."[58] Under Pennsylvania's[59] child labor laws at the time (which were repealed in 2012 and replaced with their current 2012 Child Labor Act),[60] children seven years old and above were permitted to work as long as they had the proper and necessary permits, which prohibited children from working past eleven thirty at night.[61] For children under seven years old, permits could be issued that allowed a child to work for up to eight hours a day as long as "their education, instruction, supervision, health and welfare needs [were] being met."[62]

In 2010, Pennsylvania did not have a provision in place that explicitly discussed any protections for *reality* television child stars, so when an investigation was launched into TLC for possible child labor law violations, the main question was whether the Gosselin's house was a "TV set . . . or a home where the kids aren't really working but are simply living their lives in front of cameras."[63] If the children were considered to be actors and performers rather than just subjects being followed passively by cameras, then the children would be seen as employees of the show.[64]

The investigation found that their participation in the television show did, in fact, add up to work, therefore requiring work permits and for "[a]t least [fifteen] percent of the money paid to the children must be put into an irrevocable trust account that can be spent only when the children turn [eighteen]."[65] Pennsylvania's Bureau of Labor Law Compliance stated that while the activity filmed was spontaneous, "children introduced episodes of the television show and transitions, DVDs and other merchandise were sold involving the children's appearance, [and] lighting was placed in the home for the show and there was product placement in some episodes," which ultimately led the Bureau to conclude that their participation was more than

55. "One member of the National Association to Protect Children claimed that "[i]n California or New York [the *Kid Nation*] show producers would never have gotten away with this." Glickman, *supra* note 15, at 167.

56. *Id.*

57. *Id.* at 149; *Jon & Kate Plus 8*, *supra* note 47.

58. Glickman, *supra* note 15, at 167.

59. The show was filmed in, and took place in Pennsylvania. *See* Duke, *supra* note 48.

60. The state's former child labor law was repealed in 2012 and completely replaced by Pennsylvania's current Child Labor Act, 2011 Pa. HB 1548, which became effective on Jan. 22, 2013. *See* 43 Pa. Stat. § 41 (repealed 2012); *see also* 2011 Pa. HB 1548 (Lexis 2012).

61. Glickman, *supra* note 15, at 157.

62. *Id.* (quotations omitted).

63. Glickman, *supra* note 15, at 158.

64. *Id.*

65. Duke, *supra* note 48.

just filming of spontaneous activity.[66] This investigation led to a change in Pennsylvania's laws regarding child reality stars.[67]

E. In Comes YouTube . . . and YouTube Income

Eventually, with the rise of YouTube, aspiring stars realized that they did not need to be scouted or discovered to become famous—ordinary people could launch themselves into stardom if they were lucky enough to go viral.[68] Nowadays, there is a viewer base for nearly every kind of content that could be posted to YouTube, including (among others)—gaming, makeup, comedy, drama, short films, skits, cooking—and all someone has to do to start gaining a fanbase is to upload videos that they film at home by themselves.[69]

Beginning in 2006, YouTube saw a surge in views and video content being posted each day.[70] By 2008, YouTube stars were making six-figure incomes through YouTube ads, sponsorships, and product placements.[71] TikTok, another social media platform focused exclusively on video content, has seen the same rise in popularity in recent years, with "1 billion global daily users" in 2022.[72]

A YouTuber's income primarily comes from monetizing videos through the YouTube Partner Program (YPP) and through a channel's independent sponsorships with companies, among other income streams.[73] Monetization occurs when a channel turns on advertisements ("in-stream

66. *Id.* (punctuation edited).

67. Masterson, *supra* note 21, at 602. This law has since been repealed and replaced with Pennsylvania's current law, which will be covered in Section III. *See* 43 Pa. Stat. § 41 (repealed 2012).

68. Joshua Gamson, *The Unwatched Life is Not Worth Living: The Elevation of the Ordinary in Celebrity Culture*, 126 MOD. LANGUAGE ASS'N, 1061, 1065-67 (Oct. 2011).

69. *See* Samuel, *supra* note 47; TikTok's rise in popularity in 2018 has also created a second, shorter-form content platform that allows people to experience the same sort of fame that YouTube has created for people. *See* Werner Geyser, *The Incredible Rise of TikTok*, INFLUENCER MKTG. HUB (Jul. 14, 2022), https://influencermarketinghub.com/tiktok-growth/ [https://perma.cc/BG9X-JD64].

70. William Hosch, *YouTube*, BRITANNICA (Aug. 6, 2009), https://www.britannica.com/topic/YouTube [https://perma.cc/LQ4Y-NPRL].

71. Brian Stelter, *YouTube Videos Pull in Real Money*, N.Y. TIMES (Dec. 10, 2008), https://www.nytimes.com/2008/12/11/business/media/11youtube.html [https://perma.cc/Y3A9-EXAB].

72. Deborah D'Souza, *TikTok: What It is, How it Works, and Why It's Popular*, INVESTOPEDIA (Aug. 14, 2023), https://www.investopedia.com/what-is-tiktok-4588933 [https://perma.cc/6268-4TS9].

73. Mary Hall, *How do People Make Money on YouTube?*, INVESTOPEDIA (Nov. 6, 2022), https://www.investopedia.com/ask/answers/012015/how-do-people-make-money-videos-they-upload-youtube.asp [https://perma.cc/78V9-JCMC]; *Choose How You Want to Monetize*, YOUTUBE HELP, https://support.google.com/youtube/answer/94522#ads [https://perma.cc/4SM6-XQYE] (last visited Jan. 23, 2023).

ads")[74] to be played either before and/or during the video as well as through smaller pop-up ads at the bottom of the video.[75]

A YouTube channel becomes eligible for monetization through the YPP through two pathways. The first is for the channel to gain over 1,000 subscribers and reach 4,000 valid public watch hours[76] over twelve months.[77] The second pathway is by gaining 1,000 subscribers on the channel and reaching 10 million paid public Shorts[78] views in the last ninety days.[79] Once a channel (1) meets the subscriber and public watch hour threshold for videos or Shorts, (2) accepts the YPP terms, (3) links an AdSense[80] account to their channel, and (4) has had their application reviewed, the channel's owners are eligible to monetize their videos.[81]

When a video is monetized, the channel receives a portion of the ad revenue.[82] Ad revenue can vary depending on the length of the video, the quality of the ad, how much interaction the ad receives, and the number of views the video gets.[83] While YouTube does not reveal how much YouTube channels make per view on a monetized video, it is reported that a channel makes an average of $0.018 per view.[84] Therefore, if a popular YouTube

74. Katrina Wu, *YouTube Marketing: Legality of Sponsorship and Endorsements in Advertising*, 22 J.L. BUS. & ETHICS 59, 61 (2016).

75. *Choose How You Want to Monetize*, *supra* note 73; As of January 2023, accounts can get monetization income through advertisements "viewed between videos in the Shorts Feed." *YouTube Shorts Monetization Policies*, YOUTUBE HELP, https://support.google.com/youtube/answer/12504220 [https://perma.cc/QF7D-K9YS] (last visited Jan. 23, 2023).

76. *YouTube Partner Program Overview & Eligibility*, YOUTUBE HELP, https://support.google.com/youtube/answer/72851 [https://perma.cc/M3NS-6RXW] (last visited Jan. 23, 2023).

77. *Id.* "Valid public watch hours" and "valid public Shorts hours" are just hours of views that are gained through eligible YouTube videos or Shorts that are set to public. *Id.*

78. "Shorts" are "short-form videos" that are up to a minute long that are posted from the YouTube app to the "Shorts" section of YouTube for viewers to watch, like, and comment like a regular YouTube video. *Get Started Creating YouTube Shorts*, YOUTUBE HELP, https://support.google.com/youtube/answer/10059070?hl=en#zippy=%2Ccan-i-earn-money-from-my-shorts%2Chow-will-viewers-find-my-shorts%2Chow-do-i-create-shorts [https://perma.cc/57VW-AA3X] (last visited Sept. 1, 2023). Shorts generate income from ad revenue after the channel has accepted the Shorts Monetization Module. *See YouTube Shorts Monetization Policies*, *supra* note 75.

79. *YouTube Partner Program Overview & Eligibility*, *supra* note 76.

80. AdSense is the name for the program Google uses that lets people and websites run ads and receive payment from advertisers and is mainly the payment tool for creators. YouTube Creators, *AdSense for YouTube Creators*, YOUTUBE (Apr. 21, 2022), https://www.youtube.com/watch?v=A3kgDi_IyAo&t=56s [https://perma.cc/5LDK-FKHL].

81. *YouTube Partner Program Overview & Eligibility*, *supra* note 76.

82. *Choose How You Want to Monetize*, *supra* note 73; *YouTube Partner Program Overview & Eligibility*, *supra* note 76.

83. *How Much Do YouTubers Make? Facts and Figures for 2022*, INTUIT MINTLIFE (Aug. 24, 2022), https://mint.intuit.com/blog/relationships/how-much-do-youtubers-make/ [https://perma.cc/R3W2-R4NM].

84. *Id.*

channel posts a video that gets 2.5 million views, the income from the YPP alone would be approximately $45,000.[85]

Another major source of income for YouTubers is through brand partnerships and sponsored content.[86] The concept of sponsored content is relatively simple. A brand (the "sponsor") partners with a YouTuber, and the YouTuber promotes their content, either through explicit sponsorship (typically by providing affiliated links) or by discussing their product through a demonstration of them sampling the product.[87] In turn, the brand pays the YouTuber either a "flat fee, a percentage of sales resulting from the video, or a specified amount per number of views on the video."[88]

F. KidTubers: Children of Family Vloggers and Kidfluencers

One form of video content, which is popular on social media, is "vlogging."[89] "Vlogging"—a portmanteau of "video blogging," where someone records their "thoughts, opinions, or experiences" to post on the Internet[90]—has grown into a huge Internet media industry.[91] The family vlogging channel, where parents film their family's daily lives, has emerged as one of the most popular vlogging genres on YouTube, piggybacking off the success of shows like *Jon & Kate Plus 8* and *19 Kids and Counting*.[92] The number of views for general-audience videos featuring children under the age of thirteen averaged 416,986 views in 2019; however, on popular channels,

85. This is just a hypothetical, and the income amount is just an estimate calculated based on what has been reported regarding income based on monetized video views. YouTube and most YouTubers are not transparent regarding how much they make from the YouTube Partner Project, so all incomes are just estimates. *See How Much Do YouTubers Make? Facts and Figures for 2022*, *supra* note 83.

86. Wu, *supra* note 74, at 64.

87. *See id.*

88. *Id.*

89. L. Ceci, *Share of Internet Users Worldwide Watching Vlogs Weekly as of 1st Quarter 2023, by Age and Gender*, STATISTA, https://www.statista.com/statistics/1254829/age-gender-reach-worldwide-watching-vlogs/ [https://perma.cc/E2NQ-6ZHT] (last visited Oct. 4, 2023).

90. *Vlog*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/vlog [https://perma.cc/V8J5-GYHW] (last visited Jan. 15, 2023).

91. L. Ceci, *supra* note 89 ("[A]lmost 35 percent of female internet users aged between 16 and 24 years watched vlogs . . . with this type of video content reporting a global usage reach of approximately 23.4 percent in the fourth quarter of 2022."); *See* Kyra Johnson, *The Dangers of Family Vlogging & Children on YouTube*, THE GAVEL (Dec. 9, 2021), https://bcgavel.com/2021/12/09/the-dangers-of-family-vlogging-children-on-youtube/ [https://perma.cc/9QPH-QMYT].

92. Kessel et al., *2. Children's Content, content featuring children and video games were among the most-viewed video genres*, PEW RSCH. CTR. (Jul. 25, 2019), https://www.pewresearch.org/Internet/2019/07/25/childrens-content-content-featuring-children-and-video-games-were-among-the-most-viewed-videos-genres/ [https://perma.cc/73YG-Y9KN] (explaining statistics on what kinds of videos are popular on YouTube); *see The Labrant Fam*, *supra* note 2; *see also SmellyBellyTV*, YOUTUBE, https://www.youtube.com/@smellybellytv/videos [https://perma.cc/Z5M2-42DY] (last visited Oct. 14, 2023).

those numbers can reach millions.[93] The children are usually the stars of family vlogging channels, and the videos are filmed to feel very casual, letting viewers see both the day-to-day lives of the family and big milestones.[94] This ranges from morning routines, birthdays, tantrums, and the child's birth.[95]

A similar and often overlapping video genre to family vlogging is the $8-billion industry of child influencers, aka "kidfluencers."[96] Kidfluencers are children, often those under thirteen (and sometimes as young as toddlers), who have large social media followings.[97] Kidfluencer content varies significantly. Whereas some channels may switch between vlogging and kidfluencer content,[98] other channels focus on educational content,[99] and others may focus on brand-sponsored videos.[100]

KidTubers—kidfluencers specifically on YouTube—amass huge followings, becoming micro-celebrities.[101] Due to the children's large followings, the children and their parents often enter into endorsement deals with major advertisers and brands like Mattel, Amazon Fresh, and L.O.L. Surprise.[102] The amount that a brand pays can vary depending on the size and

93. Kessel et al., *supra* note 92; *The Labrant Fam*, *supra* note 2 (showing numerous videos uploaded to the family's channel that have reached over a million views).

94. Monica Reilly, *Family Vlogging: Blurring the Line Between Parent and Employer*, THE SCIENCE SURV. (Jan. 18, 2023), https://thesciencesurvey.com/editorial/2023/01/18/family-vlogging-blurring-the-line-between-parent-and-employer/#:~:text=This%20phenomenon%20is%20known%20as,about%20their%20children's%20lives%20online [https://perma.cc/6FJQ-64BK]

95. *Id.*; The LaBrant Fam, *Our Baby's Official NAME REVEAL!!!*, YOUTUBE (Jan. 5, 2019), https://www.youtube.com/watch?v=T_RLOrnL8Ds [https://perma.cc/PD9N-UUBE] (a ten minute monetized video of the LaBrant family at the hospital right after the birth of their child, amassing over 9.5 million views as of October 5, 2023).

96. Masterson, *supra* note 21, at 579.

97. *Id.* at 583 ("Kids are the new social influencer . . . . Kids grow up and become less relevant. The sweet spot is between 2 and 4, [after which] they're not that cute."); *see* Sapna Maheshwari, *Online and Making Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html [https://perma.cc/GDU2-PD8P].

98. *See The Fishfam*, YOUTUBE, https://www.youtube.com/@Fishfam/videos [https://perma.cc/U8NF-RC8M] (last visited Apr. 9, 2023).

99. *Ryan's World*, YOUTUBE, https://www.youtube.com/@RyansWorld [https://perma.cc/4Z6S-HUHH] (last visited Mar. 4, 2023).

100. *Samia's Life*, YOUTUBE, https://www.youtube.com/@SamiasLife/videos [https://perma.cc/88VV-HHKP] (last visited Mar. 4, 2023).

101. Maheshwari, *supra* note 97; *Ryan's World*, *supra* note 99 (subscriber count of 34.2 million as of January 28, 2023).

102. *I Want to Monetize My Videos, But I Was Disapproved for Being Under 18*, GOOGLE ADSENSE HELP, https://support.google.com/adsense/answer/2533300?hl=en [https://perma.cc/5JQK-9AA3] (last visited Sept. 2, 2023); Maheshwari, *supra* note 97; The Fishfam, *Taytum and Oakley Give Little Sister the Best Dream Makeover Ever!*, YOUTUBE (Sept. 2, 2022), https://www.youtube.com/watch?v=NI_J8EBnUVw [https://perma.cc/ULN9-YHLZ]; Samia's Life, *Mommy and Me Fashion* Show, YOUTUBE (Jul. 7, 2021), https://www.youtube.com/watch?v=qA61lweZmO8 [https://perma.cc/W8D5-CCH5]; Samia's Life, *SKIING FOR THE FIRST TIME, OMG!*, YOUTUBE (Jan. 29, 2022), https://www.youtube.com/watch?v=pkXsQle1QBk [https://perma.cc/U3HW-7YYH]; The FishFam, *TIME for FIRST GRADE! (Back to School Shopping Haul)*, YOUTUBE (Aug. 11, 2022), https://www.youtube.com/watch?v=CagSgyMI0fs&t=368s [https://perma.cc/PR5E-3YWS].

popularity of a brand, but one KidTuber's parent anonymously (for fear that exposing themselves would harm future brand deals) shared that "brands might pay $10,000 to $15,000 for a promotional Instagram post, while a sponsored YouTube video might earn $45,000 [and] a 30- to 90-second shout-out in a longer video can cost advertisers between $15,000 and $25,000."[103]

Being a successful and popular KidTuber can be extremely lucrative, and parents can leave their child with no choice but to participate in videos and brand deals, regardless of what the child wants.[104] Even Kyler Fisher—the father of family vlogging channel "The Fishfam," whose twins Taytum and Oakley have become prominent KidTubers—has admitted that the "kids complete the package . . . [i]f [they] didn't have the girls, [he couldn't] imagine being as far as [they] are."[105] One KidTuber (who used a fake name—Claire—for her interview) told Teen Vogue that once her family's channel got popular, both of her parents quit their jobs since the income from YouTube:

> . . . [W]as enough to support the family and to land them a nicer house and new car, so when she told her father she wanted to stop doing YouTube, he told her that ending YouTube would mean that they would have to move out of their house, and her parents would have to go back to work, leaving no money for "nice things."[106]

G. The Right of Family Autonomy

The Supreme Court has recognized that parents in the United States have the right to establish a home and raise their children as they see fit as a constitutionally protected interest.[107] *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, both decided by the Court in the 1920s, established that legislation, even "under the guise of protecting the public interest," [108] may not interfere with a parent or guardian's decisions on their child's upbringing and

103. Maheshwari, *supra* note 97.

104. Melody Burke, *New Child Labor Laws Needed to Protect Child Influencers*, ONLABOR (Apr. 27, 2022), https://onlabor.org/new-child-labor-laws-needed-to-protect-child-influencers/ [https://perma.cc/32FU-EKGC].

105. Maheshwari, *supra* note 97.

106. Fortesa Latifi, *Influencer Parents and the Kids Who Had Their Childhood Made Into Content*, TEEN VOGUE (Mar. 10, 2023), https://www.teenvogue.com/story/influencer-parents-children-social-media-impact [https://perma.cc/6CV7-WEZK].

107. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the Fourteenth Amendment's protection of liberties applies to a parent or guardian's right to raise a child and establish a home however they please); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Wisconsin v. Yoder, 306 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate.").

108. *Meyer*, 262 U.S. at 400.

education because parents have the liberty to raise a child at their discretion.[109] The Court held that "liberties" under the Fourteenth Amendment included the liberty to establish a family and bring up children under the presumption that "the natural bonds of affection lead parents to act in the best interests of their children."[110]

This liberty is not, however, without limits.[111] The Supreme Court recognizes that the right to raise a child, as a parent or guardian sees fit, is not absolute.[112] In *Prince v. Massachusetts*, the guardian of a nine-year-old girl was charged with violating Massachusetts child labor laws and unsuccessfully appealed to the Supreme Court.[113] She argued that the Fourteenth Amendment guarantees a guardian the fundamental right to bring up a child how she pleases.[114] The Supreme Court disagreed, holding that "the family itself is not beyond regulation" and that in certain conditions, the state can indeed step in as *parens patriae* to restrict the parent's control when it relates to a child's welfare.[115]

KidTuber children and even some parents are coming out and discussing the negative impact that being posted online for millions to see and having the parents also acting as the child's manager has on a child's welfare.[116] In an article with Teen Vogue mentioned previously, a daughter of a family vlogging channel who used the name Claire in the article (her real name is not used) discussed the impact that engaging in family vlogging had on her life.[117] Claire's family's channel went viral when she was only a toddler and the family's channel is still ongoing.[118] Pressure on her to continue being in videos, being the one supporting the family financially, and having her father as her boss has led Claire to wish that "her childhood was [not] overshadowed by social media stardom that she didn't choose."[119] A similar story was told on the popular TikTok account @caroline_easom, after the TikToker was sent a letter from a KidTuber (who Caroline kept anonymous)

---

109. *Soc'y of Sisters*, 268 U.S. at 534-35.

110. *Meyer*, 262 U.S. at 399-400; Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 74 (2011).

111. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

112. *Id.* at 166 ("[T]he family itself is not beyond regulation in the public interest . . . that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."); Troxel v. Granville, 530 U.S. 57, 68 (2000) ("*so long as a parent adequately cares for his or her children* . . . there will normally be no reason for the State to inject itself.") (emphasis added).

113. *Prince*, 321 U.S. at 164.

114. *Id.* The appellant in this case primarily argued that her decisions were protected under the First Amendment's freedom of religion through the Fourteenth Amendment, and "buttress[ed] this foundation [] with a claim of parental right as secured by the due process clause of the [Fourteenth] Amendment." *Id.* at 164.

115. *Id.* at 166.

116. Latifi, *supra* note 106; Morgan Sung, *Their Children Went Viral. Now They Wish They Could Wipe Them From The Internet*, NBC NEWS (Nov. 3, 2022, 8:30 AM), https://www.nbcnews.com/pop-culture/influencers-parents-posting-kids-online-privacy-security-concerns-rcna55318 [https://perma.cc/Y7MP-FEPB**].**

117. Latifi, *supra* note 106.

118. Still ongoing at the time of the writing of the Teen Vogue article at least. *Id.*

119. *Id.*

who had reached out to the account, hoping that Caroline would share their story.[120] In the video, the letter tells any family considering starting a family vlog channel to not do it.[121] The letter goes on to say that a boss-employee relationship between a parent and child is damaging; the trauma of a child being an employee for their parents from a young age and never consenting to being online is not worth any money that might come from the fame.[122] Furthermore, a child who is posted online will not only be watched by fans; by being posted online, the child is exposed to everyone, including Internet trolls and pedophiles who will bully, harass, or sexualize KidTubers in the video's own comment sections and elsewhere online.[123]

When the state steps in to protect the welfare of the child, the state "may restrict the parent's control by . . . *regulating or prohibiting the child's labor*, and other means."[124] However, the bar for what is considered adequate parental care is low. The only guidance given by the Court for what is considered "adequate" comes from *Troxel v. Granville*, where the Court stated that a state has no reason to interfere "so long as a parent adequately cares for his or her children (i.e., is fit)[.]"[125]

H. Disconnect Between the Children, the Brands, and the Platforms

To monetize a video through the YouTube Partnership Program, YouTube requires that channels featuring individuals who are under eighteen link their account to an approved AdSense account of a parent or guardian who is over eighteen.[126] From there, the income goes directly to the approved account with no requirements that the child receive any of the profits.[127] The same issue arises with sponsored posts and brand partnerships as contract law has long held that in order to create a valid, enforceable contract, the parties to the contract must be at the age of majority (eighteen).[128] Known as the infancy law doctrine, it holds that a minor does not have the capability to enter into a contractual relationship.[129]

---

120. @caroline_easom, TIKTOK (Sept. 30, 2022), https://www.tiktok.com/@caroline_easom/video/7149213992307674410?lang=en [https://perma.cc/CK8U-Z2Q2].

121. *Id.*

122. *Id.*

123. Galvin Feller & Benjamin Burroughs, *Branding Kidfluencers: Regulating Content and Advertising on YouTube*, 23 TEL. & NEW MEDIA 555, 579 (2022); Latifi, *supra* note 106.

124. *Prince*, 321 U.S. at 166 (emphasis added).

125. *Granville*, 530 U.S. at 68.

126. YouTube suggests that accounts with owners under 18 "link the [minor's] YouTube account to an approved AdSense account (of a parent or guardian who is over 18)." *I Want to Monetize My Videos, But I Was Disapproved for Being Under 18*, *supra* note 102.

127. *Id.*; Margaret Arabpour, *Lights, Camera, (Legal) Action: Expanding Child Entertainment Laws to Protect Children on Social Media*, AM. U. J. OF GENDER, SOC. POL'Y & THE L. BLOG (Apr. 20, 2022) https://jgspl.org/lights-camera-legal-action-expanding-child-entertainment-laws-to-protect-children-on-social-media/ [https://perma.cc/UN34-W4CP].

128. Jessica Krieg, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J.OF LAB. AND EMP. L. 429, 430 (2004).

129. *Id.*

Because of the KidTuber's age, the parents are the ones entering into the contract deals with companies rather than the child; therefore the parent, rather than the child doing the work in front of the camera, is the party who has control of the money.[130] These parents are not always looking out for the best interests of the child, which is evidenced by the numerous celebrity scandals of parents stealing money that should ethically (and in some cases, legally) belong to their child.[131]

I. France's New Laws to Protect Child Influencers

In 2020, French President Emmanuel Macron approved a new law to protect child influencers that regulates the "commercial use of images of children under 16 years old on online platforms."[132] The French law fills a gap in France's labor laws regarding the unregulated industry of child influencers—a gap that still exists in the United States.[133]

To fill the French gap, the first part of the law establishes rules that will apply when the child is in a "labor relation."[134] When the child receives orders or directions on how to act for a video, that is considered a labor relation.[135] Once a labor relation is established, parents will need to seek government authorization "before a child can engage in online video activities."[136] Even if a child is not in an explicit labor relation, once certain factors—including the length of the video, income generated, and the time the child spent being a part of a video—surpass a certain threshold,[137] the child's parents will need to submit a declaration to government authorities.[138] Failure to comply with

130. Masterson, *supra* note 21, at 579, 592 ("parents often claim *they* are the ones completing the work by negotiating contracts").

131. González, *supra* note 31; despite the investigation's conclusion that the *Jon & Kate Plus 8* children were required to have trust accounts, Kate Gosselin accessed two of her children's trust accounts and stole $50,000 from each of their accounts. *Jon Gosselin Claims 'Morally Wrong' Ex Kate 'Stole' Money from Their Kids' Bank Account*, INTOUCH (Aug. 18, 2022, 1:26 PM), https://www.intouchweekly.com/posts/jon-gosselin-claims-kate-stole-money-from-kids-bank-accounts/ [https://perma.cc/8LJ8-WYML]; Krieg, *supra* note 128, at 432.

132. *France: Parliament Adopts Law to Protect Child "Influencers" on Social Media*, LIBR. OF CONG. (Oct. 30, 2020), https://www.loc.gov/item/global-legal-monitor/2020-10-30/france-parliament-adopts-law-to-protect-child-influencers-on-social-media/ [https://perma.cc/92HL-B3XU].

133. *Id.*; Cécile Sixou, *Child Influencers: "There is a Legal Void, That's the Reason for This Law,"* PUB. SENATE (Jun. 17, 2020), https://www.publicsenat.fr/article/parlementaire/enfants-influenceurs-il-y-a-un-vide-juridique-c-est-la-raison-de-cette-loi [https://perma.cc/S9JK-FLXT].

134. *See France*, *supra* note 132.

135. *Id.*

136. *Id.*

137. *Id.* These thresholds were "to be fixed by decree of the Council of State;" however, it does not seem that these thresholds have been determined yet. *See LAW n° 2020-1266 of October 19, 2020 aiming to regulate the commercial exploitation of the image of children under the age of sixteen on online platforms (1)*, RÉPUBLIQUE FRANÇOISE, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042439054 [https://perma.cc/RLH8-K92C] (last viewed Mar. 3, 2023).

138. *See France*, supra note 132.

the new authorization requirements can cause parents to "face fines of up to €75,000 and five years in prison."[139] The French law also imposes responsibilities on advertisers who want to work with a KidTuber.[140] The advertiser must check to see if the income must go into the child's blocked account or face the possibility of a €3,750 fine.[141]

KidTubers in France making significant sums of money from the videos in which they star will also now have their income protected, with a portion of the income from the videos being placed in a savings account that is not accessible until the child reaches adulthood.[142] By passing these laws, France established protections for social media child stars "in a manner similar to child models or child actors."[143]

III. ANALYSIS

Starting July 1, 2024, Illinois will be the first state to "entitle [KidTubers] to a percentage of earnings" received from online content—if that content was made in Illinois.[144] However, outside of Illinois, there are no laws in the United States that grant a child social media star a legal right to any income generated by videos in which they participate.[145] This section will go through this Note's proposed solution to fill that gap outside of Illinois and the roadblocks that this proposal might face.

A. Proposal Part 1.A: Create a Federal Coogan Law That Follows Section 5 of Pennsylvania's Child Labor Act

Previously suggested proposals sought to implement a federal Coogan Law that is updated to include the new class of child entertainers (children featured in monetized social media content) or to require each state to have

139. Laura Kayali, *France to Introduce Legal Protection for YouTube Child Stars*, POLITICO (Oct. 6, 2020, 8:57 PM), https://www.politico.eu/article/france-to-introduce-legal-protection-for-youtube-child-stars/#:~:text=Under%20the%20new%20rules%2C%20anyone,and%20five%20years%20in%20prison [https://perma.cc/KN8T-34US].

140. *Id.*

141. *Id.*

142. *See France*, *supra* note 132.

143. *Id.*

144. *See* Savage, *supra* note 11.

145. Neyza Guzman, *The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws*, 8 CHILD & FAM. L.J. 85, 109 (2020); Jessica Pacht-Friedman, *The Monetization of Childhood: How Child Social Media Stars Are Unprotected from Exploitation in the United States*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 361, 262 (2022); Amanda Silberling, *There Are No Laws Protecting Kids from Being Exploited on YouTube – One Teen Wants to Change That*, TECHCRUNCH (Apr. 12, 2022, 11:57 a.m.), https://techcrunch.com/2022/04/12/family-vlogs-child-influencers-exploitation-youtube-laws/#:~:text=There%20are%20no%20laws%20protecting,wants%20to%20change%20that%20%7C%20TechCrunch [https://perma.cc/G2NP-YE7Z].

their own Coogan Laws that also cover KidTubers.[146] The latter is what Illinois has done since the state had already required a trust account for child performers.[147]

Federal Coogan Law proposals could seek to federalize the California model (in which at least fifteen percent of a child's earnings must be put into a trust account that cannot be accessed until the child reaches eighteen years of age) and expand it to cover children who are featured in monetized social media content.[148] This proposal is strong because having a national Coogan Law would offer uniform protection to all children in performance and acting.[149] A federal Coogan Law can be rationalized as equivalent to the Fair Labor Standards Act as both pieces of legislation protect children from employer exploitation and would set federal standards to ensure uniformity. A federal Coogan Law would prevent families from "[r]elocate[ing] to [another state] that would provide a child less protection."[150] With the new Illinois Child Labor Law amendments, however, the Illinois model could become the new focus of federal law proposals to protect KidTubers.

However, instead of the traditional California model, this Note proposes that a federal protection for KidTuber's income should follow the lead of Pennsylvania's child labor laws for child performers. In 2012, Pennsylvania's Child Labor Act (the Act) was enacted, replacing Pennsylvania's prior child labor law.[151] Section 5 of the Act serves to explicitly discuss the "employment of minors in a performance."[152] In defining performance, section 5(a) of the Act holds that:

> [A] minor is engaged in a performance if . . . the minor models or renders artistic or creative expression . . . in a publication or via any other broadcast medium that may be transmitted to an audience and any person receives remuneration for the performance . . . [or if] [t]he minor participates in a reality or documentary program that *expressly depends upon the minor's participation*, *the minor's participation is substantial* and *any person receives remuneration for the minor's participation*.[153]

The Act then continues on to include requirements for permits, categories of work the minor is not permitted to be involved in, the working

146. Amber Edney, *"I Don't Work for Free": The Unpaid Labor of Child Social Media Stars*, 32 U. FLA. J.L. & POL'Y 547, 568 (2022); *see* Guzman, *supra* note 145; *see also France*, *supra* note 132.

147. Savage, *supra* note 11; *Coogan Law*, *supra* note 26.

148. Edney, *supra* note 146.

149. Guzman, *supra* note 145, at 109.

150. *Id.*

151. Child Labor Act 2011, Pa. H.B. 1548 (Lexis 2012); *See* 43 Pa. Stat. § 41 (repealed 2012).

152. Pa. H.B. 1548 (Lexis 2012).

153. *Id.* § 5(a) (Lexis 2012) (emphasis added).

hours for the performer, and the requirement of a child performer trust account.[154]

Section 5 of the Act, with minor tweaks, could provide a solid framework for a federal Coogan Law that protects minors appearing in monetized content online. This is because Pennsylvania's definitions of "performer" and "reality programing" already describe the work that KidTubers (either in the subcategory of kidfluencer or children of family vloggers) are engaged in.[155]

B. Proposal Part 1.B: Tweaking Section 5(a)(1) of Pennsylvania's Child Labor Act to protect Kidfluencers

Section 5(a)(1) of the Act holds that a minor is "engaged in a performance" when the "minor models or covers artistic or creative expression" that is transmitted to an audience.[156] Section 5(a)(1) specifically states one form of performance is "live performances on the radio, on television, in a movie, over the Internet, in a publication, or via any other broadcast medium that may be transmitted to an audience and any person receives remuneration for that performance."[157] With a minor adjustment to Section 5(a)(1), changing "live performance" into merely "performance" or striking "broadcast" from the section, kidfluencer channels focused on educational or brand deal content, as long as that content remained artistic and/or creative would have a strong argument that their content falls under Section 5(a)(1).

Because kidfluencer channel content often advertises different toys and brands to children, these channels' videos easily draw children's attention and make the toys seem entertaining.[158] For example, in a sponsored video promoting Moose Toy's *Magic Mixies Mixlings* (a magic toy cauldron and wand that simulates enchanted potions), a *Samia's Life* video includes a skit where she is "transported" to a magical world where she must use the toy cauldron to get back home.[159] While the video could arguably be considered an extended ad, the content itself is still artistic and creative, and because the video is a sponsored ad, there is payment for the performance.[160] As stated above, under Section 5(a)(1), a performance just needs to be an artistic or creative expression that is disseminated to an audience where someone is getting paid.[161] Therefore, with the slight tweaks in Section 5(a)(1)'s language, kidfluencer content could be considered performance through

154. *Id.*

155. Kidfluencers and children of family vloggers will be discussed separately in this section rather than jointly as "KidTubers" because of the differences in the content and structure of the videos that they star in.

156. Child Labor Act 2011, Pa. H.B. 1548 § 5(a)(1) (Lexis 2012).

157. *Id.*

158. *See* Maheshwari, *supra* note 97.

159. Samia's Life, *Samia Goes to A Magical World*, YOUTUBE (Jun. 1, 2022), https://www.youtube.com/watch?v=EV4q2Uc_YvE&t=15s [https://perma.cc/Y2SN-DCUR].

160. *Id.*; Wu, *supra* note 74, at 64.

161. *See* Child Labor Act 2011, *supra* note 156.

artistic or creative expression, and therefore would be covered by Section 5(a)(1).

C. *Proposal Part 1.C: Family Vlogging as a Reality Program Under Section 5(a)(2)*

Children of family vloggers, on the other hand, may run into an issue being covered by Section 5(a)(1). The concept of family vlogging is to provide viewers a glimpse into families' real daily lives—the good and the bad—without being particularly artistic or creative which doesn't fit under the Act's definition of "performance."[162] However, family vlogging is filmed in, and portrays content in, a way that falls under another umbrella of the Act—Section 2's description of a reality program, and Section 5(a)(2) regarding minors in reality programs.[163]

Section 5(a)(2) of the Act protects minors in reality or documentary programs whose engagement in performance and participation is substantial.[164] The Act defines a reality program as: "[a] genre of program that principally presents actual events and generally features ordinary people and not professional actors."[165] Family vloggers are not professional actors and are just ordinary people who gain a large following over time if they advertise themselves well.[166] The whole premise of family vlogging videos—to share the daily lives of an "ordinary" family—is how the Act defines a reality program.[167]

For a minor to be participating in a reality program, Section 5(a)(2) requires that the minor's participation is (1) "substantial;" (2) that an individual is receiving "remuneration for the minor's performance;" and (3) that the reality program "expressly depends on the minor's participation," i.e., the program would not happen but for the child's participation.[168] Section 5(a)(2)(ii) defines substantial participation in two ways,[169] with one definition of being when "the minor is a *principal subject* of the reality or documentary program."[170] Similarly, the new Illinois Child Labor Law amendment considers a minor under sixteen to be "engaged in the work of vlogging" when the child's "likeness, name, or photograph . . . visually appears or is the

162. The bill defines "perform" or "performance" as "[t]he providing of artistic or creative services to a live audience or recorded for exhibition or broadcast to an audience. This term shall include modeling." *Id.* § 2(2).

163. *See id.* § 5(a)(2) (Lexis 2012).

164. *See id.*

165. *Id.* § 2 (Lexis 2012).

166. *See* Gamson, *supra* note 68, at 1065.

167. Ordinary in that these are regular families; Child Labor Act 2011 Pa. HB 1548 § 2(2) (Lexis 2012); The LaBrant Fam, *Update on our sons* [sic] *seizure*, YOUTUBE (Jun. 5, 2022), https://www.youtube.com/watch?v=gJmd_f2h-14&t=482s [https://perma.cc/3G4Z-J5NW] ("I just wanted to remind you guys so much that we are just a totally normal family like you guys going through totally normal things.").

168. Child Labor Act 2011, Pa. H.B. 1548 § 5(a)(2) (Lexis 2012).

169. *Id.* § 5(a)(2)(ii) (Lexis 2012).

170. *Id.* (emphasis added).

subject of an oral narrative in the video segment" for at least thirty percent of the video which might be an even better metric than "principal subject."[171]

Regardless of how "substantial" is ultimately defined, having the children be the focus of the video's content is how family vlogging channels operate.[172] Many of their videos expressly depend on the child's participation, and the children are often the principal subject of the content—the stars of the show and who people tune in to see.[173] The structure of family vlogging videos is similar to the structure of a family reality television show—clips of the kids with the parents interjecting discussing what is going on and giving general comments.[174] For some channels, the families also partake in pranks, challenges, sit-down videos, or scripted skits.[175]

One reason that the *Jon & Kate Plus 8* investigation (also notably in Pennsylvania) held that the children were working was because of how the kids helped introduce episodes, the product placement in episodes, lighting set ups, and the production of merchandise featuring the children.[176] Family vlogging channels do the same,[177] strengthening the argument that children are the principal subject of the videos.

Just one example of a channel that shows the similarities between family vlogging and reality television is the Yeager family[178] where the children are the focus of their videos.[179] As Kyler Fisher admitted to Sapna Maheshwari in her New York Times article on kidfluencers, "the kids complete the package," and for the Yeagers, their kids complete the package.[180] The kids are the thumbnail photo, often help introduce videos, and are the ones mainly in front of the camera participating in product placement

171. 2023 Bill Text IL, S.B. 1782 § 2.6 (Lexis 2023).

172. Johnson, *supra* note 91.

173. Maheshwari, *supra* note 97.

174. *See* The LaBrant Fam, *Saying Goodbye to Our New House*, YOUTUBE (Mar. 11, 2023), https://www.youtube.com/watch?v=Dtw44O2TN4M [https://perma.cc/XL4H-PY6M].

175. *Shot of the Yeagers*, YOUTUBE, https://www.youtube.com/@soty/videos [https://perma.cc/PH6N-F8NA] (last visited Mar. 3, 2023); *The Norris Nuts*, YOUTUBE, https://www.youtube.com/@norrisnuts/videos [https://perma.cc/V8LN-HADJ] (last visited Mar. 3, 2023).

176. Duke, *supra* note 48.

177. *See Shot of the Yeagers*, *supra* note 175; Family vlogging channel, the FishFam, released bracelet sets based on their two twin daughters. The Fishfam, *Our Big Announcement!!*, YOUTUBE (Feb. 2, 2023), https://www.youtube.com/watch?v=6XqTUhnM7go [https://perma.cc/JYS2-U2RB]; *Love T and O*, LOVE T AND O, https://lovetando.com/ [https://perma.cc/VE22-JSY4] (last visited Sept. 2, 2023) ("Taytum and Oakley have curated fun, bright designs for their second collection.").

178. *See Shot of the Yeagers*, *supra* note 175.

179. *See id.*

180. Maheshwari, *supra* note 97; *Shot of the Yeagers*, *supra* note 175.

and sponsorships, doing challenges, and performing skits.[181] The channel offers merchandise with "SOTY" (Shot of the Yeagers) on it and even sells a jigsaw puzzle of the family.[182] The kids' participation is a key component of the content that "principally presents actual events and generally features ordinary people," making family vlogger content fall squarely within Pennsylvania's definition of reality program and the Act's authority to regulate.[183]

By framing family vlogging as an online, independent version of reality programing, policymakers could find that KidTubers are protected under the law just like the Gosselin kids were. By considering family vlogging as reality programing, a field of entertainment that Pennsylvania law already regulates, lawmakers would not have to find additional legal bases to regulate a whole new area of entertainment.

D. Issues and Solutions

There are three main issues to implementing a Coogan Law trust account requirement on KidTuber content. These issues are (1) developing a threshold that dictates what content being posted online is regulated, (2) the dilemma that there is no obvious direct employer of the child, and (3) the United States' emphasis on parental sovereignty.[184] However, with the passing of the Illinois Child Labor Law amendment to include vlogging,[185] these last two arguments may be weakened.

It is important to note that many people post their kids online for non-commercial reasons. The aim of a federal Coogan Law is not to regulate parents posting their child online but to ensure kids have a right to any money made from their active participation and likeness. Therefore, a federal Coogan Law would only reach children on accounts that are monetized, similar to the French law.[186] Limiting these protections to only monetized content gives the law a narrower scope and makes enforcing income protections easier—legally and logistically. Federal policymakers could look to France's new law and threshold criteria[187] (possibly mirroring the criteria used by the YPP)[188] and

181. *Shot of the Yeagers*, *supra* note 175; Shot of the Yeagers, *Don't tell Anyone Our Secrets!*, YOUTUBE (Nov. 15, 2022), https://www.youtube.com/watch?v=9CSD-eXTY4Y [https://perma.cc/E745-NXCQ]; Shot of the Yeagers, *LAVA MONSTER at a PARK! *Best Reaction**, YOUTUBE (Mar. 24, 2023), https://www.youtube.com/watch?v=vh6noAjIdtA [https://perma.cc/QCV5-EQXX]; Shot of the Yeagers, *We Become WWE Superstars!*, YOUTUBE (Dec. 16, 2022), https://www.youtube.com/watch?v=lCrsrUHaO8Y [https://perma.cc/G9MC-3E8F]; Shot of the Yeagers, *The Dollhouse!*, YOUTUBE (Feb. 3, 2023), https://www.youtube.com/watch?v=6JWGw13lqDM [https://perma.cc/BVE3-CN5A].

182. Store Tab of Shot of the Yeagers YouTube Channel Page, YOUTUBE, https://www.youtube.com/@soty/store [https://perma.cc/6A6T-T4XK] (last visited Mar. 4, 2023).

183. Child Labor Act 2011, Pa. H.B. 1548 §§ 2, 5(a)(2) (Lexis 2012).

184. Guzman, *supra* note 145, at 108.

185. Savage, *supra* note 11.

186. *See France*, *supra* note 132.

187. *Id.*

188. *YouTube Partner Program Overview & Eligibility*, *supra* note 76.

Section 5 of the Pennsylvania Child Labor Act[189] to determine what threshold triggers the trust account requirement.

Pennsylvania's Child Labor Act Section 5(e) requires that "[a]n irrevocable child performer trust account . . . shall be established for a minor if the minor is entitled to receive residuals . . . or earnings are anticipated to exceed $2,500 for the production . . . ."[190] This account must be established for the minor, and the parent or guardian must provide the employer the account information so that the funds payable to the minor can be deposited by the employer.[191] By following the French and Pennsylvania models, a trust account requirement would only come into play if (1) the minor's participation was substantial to the content of the uploaded video, and (2) the channel's subscriber and average viewer count surpasses a certain number and/or earning threshold indicative of an entertainment purpose.[192] While this solution would not reach smaller vlogging channels that are trying but failing to make money by posting their children online, it does combat parents who have succeeded at making income off of their children's online persona.

While there is no direct third-party employer of a KidTuber, implementation of a Coogan Law on the platform and brand side would be straightforward. For channels making money off children based on views, the video platform would need to require two accounts to be linked to the channel—the parent or guardian's account and the child's trust account. The AdSense account would then be linked to both the primary bank account (likely the parent's) and the minor's trust, and when income is generated from monetized videos, the money is split between both accounts in accordance with the proper percentages of proceeds.

Proof of a trust account would also be required when creators enter brand deals that the children participate in. The brand would require the parents to provide proof of the child's trust account before entering into a brand deal or risk facing penalties—penalties that would deter noncompliance. In both instances, the money would be sent to the adult's account and the child's trust account consistent with the required percentages of proceeds.

Parents and children are often *both* included in videos, so a question could be raised on what the appropriate split of proceeds between parent and child (or children) would be. While the question of appropriate percentages is outside the scope of this Note, a baseline of fifteen percent would bring social media into parity with traditional Coogan Laws.[193]

Lastly, there will undoubtedly be objections that this constitutes interfering with family autonomy and a guardian's choices on how to raise a child. However, regulating KidTuber income should not be seen as being within the protected confines of domestic autonomy. The Supreme Court in *Prince* held that government intervention in the family unit is justified when

189. Child Labor Act 2011, Pa. H.B. 1548 § 5(e) (Lexis 2012).

190. *Id.* § 5(e)(1) (Lexis 2012).

191. *Id.* § 5(e)(2) (Lexis 2012).

192. *See France*, *supra* note 132; Child Labor Act 2011, Pa. H.B. 1548 § 5 (Lexis 2012).

193. *Coogan Law*, *supra* note 26; Child Labor Act 2011. Pa. H.B. 1548 § 5(e)(2)(iii) (Lexis 2012).

it needs to *regulate or prohibit the child's labor* or step in to ensure a child's welfare.[194] This regulation of KidTubers would not force parents to open a Coogan trust account every time they wanted to post a video online for their friends and family to see; it would just trigger when the content is clearly meant for income-generating reasons.[195] If parents did not want to conform to the trust account requirement, they would still be free to post videos starring their children, but they just would not get any income from it.

Introducing your children into the KidTuber industry exposes them to possible exploitation and harm by their own parents.[196] Once the door is opened to expose a family and child's private life online for monetary gain, that should be seen as a transfer into the workforce, just like entering a child into traditional entertainment. Moreover, expanding Coogan Laws to cover KidTubers would not concern how the child is being raised. It would not limit what a parent could do or not do. The expansion merely allows a working child to have a right to a portion of the income derived from their online presence.

Congress also has the "broad power to regulate interstate commerce," and[197] Internet advertising has already been recognized as being interstate.[198] Therefore, the already enacted child labor laws,[199] regulations for children in traditional entertainment, [200] the Commerce clause,[201] and the *Prince* opinion[202] demonstrate that when it comes to the rights of child entertainers, the government has the right to regulate.

194. *Prince*, 321 U.S. at 166.

195. YouTube has the ability to moderate what content features children. In 2019, YouTube disabled comments on nearly all videos and channels that featured children in response to predatory comments being left in the comments section of videos of children. Therefore, it is clearly possible for YouTube's algorithm to find and differentiate between content featuring children and content that does not. Julia Alexander, *YouTube is Disabling Comments on Almost All Videos Featuring Children*, THE VERGE (Feb. 28, 2019), https://www.theverge.com/2019/2/28/18244954/youtube-comments-minor-children-exploitation-monetization-creators [https://perma.cc/H8J6-YLQZ].

196. Feller & Burroughs, *supra* note 123.

197. *Artl.S8.C3.1 Overview of Commerce Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-1/ALDE_00013403/ [https://perma.cc/W6XQ-T3RR] (last visited Sept. 1, 2023).

198. Masterson, *supra* note 21, at 588.

199. Child Labor Act 2011, Pa. H.B. 1548 § 5 (Lexis 2012).

200. *The Comprehensive Guide to Child Actor Laws by State*, *supra* note 40.

201. *Artl.S8.C3.1 Overview of Commerce Clause*, *supra* note 197.

202. *Prince*, 321 U.S. at 166-67.

IV. CONCLUSION

Despite the increased scrutiny of KidTuber channels and an influx of negative attention,[203] the continued popularity of KidTuber accounts makes it clear that the pop culture obsession with the domestic inner workings of a family has remained strong.[204] This negativity often revolves around stealth advertising to children (with nonprofits focused on protecting kids from marketing have called for the Federal Trade Commission to ban "influencer marketing" towards kids),[205] clickbait titles regarding children's wellbeing,[206] playing extreme pranks on kids,[207] or filming very upset children rather than providing them comfort.[208] However, these channels still garner hundreds of thousands (if not millions) of views on each video, launching these children

---

203. On August 30, 2023, former family vlogger Ruby Franke from the YouTube channel "8 Passengers" was arrested in Utah and is facing six felony counts of aggravated child abuse. The channel had long been criticized online for Franke's strict and abusive parenting that she allegedly displayed in her videos. Amy Beth Hanson, *Parenting Advice YouTuber Ruby Franke Charged with Aggravated Child Abuse of 2 of her 6 Children*, ASSOCIATED PRESS (Sept. 1, 2023, 6:19 PM), https://apnews.com/article/youtube-mom-parenting-advice-child-abuse-arrest-d011c50c6da8f3535d8dfda46654a50a [https://perma.cc/H5GB-ULS7].

204. *See* Kessel et al., *supra* note 92 (explaining statistics on what kinds of videos are popular on YouTube).

205. Jeff Chester, *Protecting Children and Teens from Unfair and Deceptive Marketing, Including Stealth Advertising*, CTR. FOR DIGIT. DEMOCRACY (Jul. 19, 2022), https://democraticmedia.org/publishings/protecting-children-and-teens-from-unfair-and-deceptive-marketing-including-stealth-advertising [https://perma.cc/4FZL-8UBS]; *We're Telling the FTC: Ban Influencer Marketing to Kids!*, FAIRPLAY, https://fairplayforkids.org/ban-influencer-marketing/ [https://perma.cc/LK5N-72U5] (last visited Sept. 2, 2023).

206. The LaBrant family uploaded a YouTube video titled *She Got Diagnosed with Cancer* in August 2021. The original thumbnail was a photograph of the whole family, and the thumbnail looked like their middle daughter was sick (it has since changed to a photo of the father, Cole, praying next to a child whose face is not in frame). Only after six minutes of runtime (which includes the daughter being sick and getting tests done) do viewers learn that the daughter does not have cancer and that the family was just visiting sick children. The LaBrant parents came under fire when this was posted because many people saw it as "clickbait" and that the parents were using cancer as a way to get more views. The LaBrant Fam, *She got diagnosed with cancer. (documentary)*, YOUTUBE (Aug. 28, 2021), https://www.youtube.com/watch?v=5mV7r75sil8 [https://perma.cc/8JYB-W3SW]; Sarah Templeton, *Influencer Couple Slammed After YouTube Video Implies 2yo Daughter has Cancer as a Way To 'Raise Awareness,'* NEWSHUB (Sept. 20, 2021), https://www.newshub.co.nz/home/lifestyle/2021/09/influencer-couple-slammed-after-youtube-video-implies-2yo-daughter-has-cancer-as-a-way-to-raise-awareness.html [https://perma.cc/FS2F-3G4C].

207. Good Morning America, *YouTube stars lose custody of 2 children after prank videos*, YOUTUBE (May 3, 2017), https://www.youtube.com/watch?v=Qv96khZHacU&t=1s [https://perma.cc/GX8F-QTM].

208. Former "mommy-vlogger" Jordan Cheyenne came under controversy and deleted her YouTube account after she accidentally released the unedited version of a video discussing the family's sick dog. The unedited video showed Cheyenne's young son crying and distraught, with Cheyenne instructing him to "act like you're crying," to which he responds, "I am crying." She continues to instruct him on how to rest his head and where to put his hand so that his face can be seen in the thumbnail. Rachel Paula Abrahamson, *Family YouTuber Deletes Account After Criticism Over Video Coaching Son to Cry*, TODAY (Sept. 14, 2021, 7:09PM), https://www.today.com/parents/jordan-cheyenne-speaks-out-about-youtube-video-son-crying-t231055 [https://perma.cc/6GJP-MZPZ].

into the spotlight to become micro-celebrities and generating significant income while doing so.[209] However, without updating the already tenuous legal protections surrounding child stars to include KidTubers, and expanding these protections to be federally applicable, this new generation of child stars will remain unable to assert a legal right to any of the money that they worked to generate.

209. *See* Maheshwari, *supra* note 97.

Facial Recognition Technology and a Proposed Expansion of Human Rights

Catherine Ryan*

TABLE OF CONTENTS

* J.D., May 2024, The George Washington University Law School; Editor-in-Chief, Federal Communications Law Journal, Volume 76; B.S., June 2017, Finance, California Polytechnic State University. I would like to thank the entire FCLJ staff for their incredible work in producing this publication. A special thanks to Professor Ralph Steinhardt, who inspired this Note, for his perpetual guidance and kindness. I would also like to thank my best friend, who makes everything in my life better. Finally, I would like to extend gratitude to my parents and brother for their unconditional love and support in all my endeavors, regardless of their practicality.

I. INTRODUCTION

One way to understand technology is through how it distributes power. The classic technological innovation—the wheel—began as a pottery tool in 3500 B.C.[1] When turned on its side, it resulted in a dramatic increase in farming capacity and an improved economy for agrarian societies.[2] The wheel also removed barriers to going to war, as soldiers no longer had to walk on foot.[3] While food output increased, benefitting communities generally, so did the ease with which wealthier nations could exert military power over poorer nations.

This is an important lens because the distribution of power is rarely equitable, and an imbalance of power invites abuse. For example, the crossbow appeared in Italy in the 10th and 11th centuries when metals were substituted for wood in its construction, making it a much-feared weapon of war.[4] Decades later, in 1139, Pope Innocent II attempted to outlaw crossbows as too dangerous of a weapon for war, realizing the disproportionate advantage this innovation would give certain countries.[5] More recently, wiretapping was invented in the late 19th century and became a common practice for the government and commercial industries in the early 20th century.[6] Public opinion soon soured on the practice following the Watergate scandal, as individuals realized the threat this technology could pose to the private citizen if it were abused.[7] Even the Laws of War respond to technological innovation to prevent abuse by ensuring regularly updated elementary considerations of humanity.[8]

Extreme abuses of power, those that create an unease in peoples' deeply held notions of humanity, lead countries to identify violations of fundamental human rights and act to prevent such atrocities from occurring again. The use

---

1. Megan Gambino, *A Salute to the Wheel*, SMITHSONIAN MAG. (Jun. 17, 2009), https://www.smithsonianmag.com/science-nature/a-salute-to-the-wheel-31805121/ [https://perma.cc/UN7F-NH7A].

2. Cody Cassidy, *Who Invented the Wheel? And How Did They Do It?*, WIRED (May 6, 2020), https://www.wired.com/story/who-invented-wheel-how-did-they-do-it/ [https://perma.cc/EMW6-7KKL].

3. Tanu Rao, *The Invention that Changed the World: The Wheel*, INTERSTEM (Mar. 31, 2021), https://www.interstem.us/events/the-invention-that-changed-the-world-the-wheel.html#:~:text=The%20wheel%20was%20first%20used,of%20getting%20tired%20of%20walking [https://perma.cc/KV7N-X4L4].

4. *Crossbow*, ENCYC. BRITANNICA, https://www.britannica.com/technology/crossbow [https://perma.cc/87CY-AENA] (last visited Jan. 28, 2023).

5. H. J. SCHROEDER, DISCIPLINARY DECREES OF THE GENERAL COUNCILS: TEXT, TRANSLATION AND COMMENTARY 195-96, 213 (B. Herder Book Co., 1937) (https://archive.org/details/DisciplinaryCouncils/page/212/mode/2up) [https://perma.cc/5LET-XR78].

6. April White, *A Brief History of Surveillance in America*, SMITHSONIAN MAG. (Apr. 2018), https://www.smithsonianmag.com/history/brief-history-surveillance-america-180968399/ [https://perma.cc/DFT9-X7W9].

7. *Id.*

8. Rain Liivoja, *Technological change and the evolution of the law of war*, 97 INT'L REV. OF THE RED CROSS 1157, 1157-77 (2016) (https://international-review.icrc.org/sites/default/files/irc_97_900-10.pdf) [https://perma.cc/Q9KH-9YYW].

of facial recognition technology (FRT) poses a great and systemic risk to individuals worldwide and violates notions of humanity. An individual's facial biometric data, often exploited using FRT without the individual's consent, is unique and inherently individualistic data that should be protected and codified as a human right. The best way to codify such a privacy right is through domestic legislation and executive action, and international agreements, specifically in applying the Ruggie Principles to facial recognition.

This Note begins with a background on the development of human rights, focusing on the process by which human rights are determined. This section concludes by proposing a process by which human rights come to fruition, the Progressive Theory of Human Rights, following events that upend peoples' deeply held notions of humanity. Next, this Note explains the relevant technology and terms of Artificial Intelligence (AI) and of FRT as a sub-category of AI. This section provides the reasoning for assuming that FRT is a substantially distinct form of AI and requires specialty rules and regulations. The Note then examines existing FRT case law, regulations, and authoritative statements and actions, both domestic and international. This section concludes by highlighting the most influential authorities that will inform the structure and substance of the proposed legal scheme. The background section ends with an exploration of the real-world implications of the use of facial recognition and the misaligned incentives of large corporations.

The Note proposes why the right to privacy of one's facial biometric data should be a protected human right. This section first argues how this right to privacy is a natural extension of the existing doctrine of human rights. It then argues in the alternative that the right to privacy of one's facial biometric data fits squarely within the first stage of recognizing a new human right. It concludes with a proposed framework of (1) domestic legislation, pulling from sources like the European Union's (EU) General Data Protection Regulation (GDPR) and domestic state privacy laws; (2) executive branch action in the form of agency mandates and exploration of AI-specific committee formation; and (3) international action through applying the Ruggie Principles to FRT to guide understandings of corporate responsibility for human rights in the use of FRT and through coordinated international agreements.

II. BACKGROUND

A. A Brief History of Human Rights

Human rights did not descend as proclamations from the skies, nor were they created and codified out of the goodness of those in powers' hearts. They developed from the ground up—through organizing and activism—following atrocities and major technological developments that created sufficient unease with currently accepted practices that violate deeply-held notions of humanity. Nor do they exist in a vacuum: any consideration of human rights

must acknowledge and incorporate the intersecting considerations of modern philosophy, society, culture, and politics.[9]

Take for example the freedom from "torture or cruel, inhuman, or degrading treatment or punishment."[10] Beginning in ancient Greece and continuing well into the 20th century, physical torture was a common form of punishment and often used as a means of justice.[11] The practice held significant political and social value, as well as a means for judicial expedition, as those accused of heresy or witchcraft favored admitting guilt over potential torture.[12] Nations with similar progressive ideologies began abolishing the practice in the 18th century for, among others, practical and moral reasons, as social understandings of humanity and dignity evolved.[13] However, the practice of torture was first recognized as a violation of international law in 1948 with the Universal Declaration of Human Rights, a direct response to the atrocities witnessed in the Second World War.[14] It was only through tireless efforts by non-governmental organizations and community groups in the 1970s, 80s, and 90s raising sufficient cries of outrage that actual instruments were put in place to hold perpetrators liable for acts of torture.[15]

The question then is, if not from the sky, nor from the better angels of our nature, where did human rights originate? While subtly hinted at in revolutionary declarations such as the 1776 American Declaration of Independence and the 1789 French Declaration des droits de l'Homme et de du citoyen (Declaration of the Rights of Man and Citizen), the enshrining of human rights into international law is a relatively recent development, beginning most notably with the aforementioned Universal Declaration of Human Rights (UDHR) of 1948.[16] The UDHR was an atonement for sins of the past and a promise to generations of the future, where—as of this writing—192 member nations have signed and mutually agreed upon basic understandings of human rights. Each subsequent treaty and convention reflects the growing understanding of what rights individuals must possess to maintain their inherent dignity and humanity.[17] The UDHR originally listed

9. A thorough analysis of the broad range of considerations and infuences on human rights is beyond the scope of this Note.

10. G.A. Res. 217 (III) A, ¶ 5 Universal Declaration of Human Rights (Dec. 10, 1948).

11. Nigel Rodley, *Torture*, ENCYC. BRITANNICA, https://www.britannica.com/topic/torture [https://perma.cc/N2HS-DG5H] (last visited Jan. 28, 2023).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Nancy Flowers, *A Short History of Human Rights*, UNIV. OF MINN., http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm [https://perma.cc/DZ7Q-FJ7Z] (last visited Jan. 28, 2023); Frans Viljoen, *International Human Rights Law: A Short History*, U.N. CHRONICLE, https://www.un.org/en/chronicle/article/international-human-rights-law-short-history [https://perma.cc/XPK5-HMM7] (last visited Jan. 28, 2023).

17. Viljoen, *supra* note 16.

six "families" of human rights[18] which the United Nations broadly categorized into three "generations" of human rights, " . . . as an echo to the cry of the French revolution: Liberté (freedoms, "civil and political" or "first generation" rights), Egalité (equality, "socio-economic" or "second generation" rights), and Fraternité (solidarity, "collective" or "third generation" rights)."[19]

This Note focuses on the first generation of rights, civil and political rights, as FRT poses the biggest risk to this collection of freedoms. The foundation of these rights is based on the UDHR, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights (ICCPR), which was adopted in 1966 and makes up one-third of the Geneva Convention.[20] The ICCPR in particular enshrines certain personal liberties and freedoms to all persons to liberty and security within their person, the right to liberty of movement, and to be free from restrictions on such liberties unless necessitated by law or national security.[21] Article 17 in particular guarantees the freedom from "arbitrary or unlawful interference with [one's] privacy."[22] The use of biometric data arbitrarily or unlawfully—that is, without proper consent or knowledge—directly violates the basic rights protected by the ICCPR, and therefore, the right to one's own biometric data should be considered a civil human right.

Consistent among these foundational documents—the UDHR, the European Convention on Human Rights, and the ICCPR—are the principles of freedom, self-determination, and the individual states' obligations to protect those rights and address any threats to them.[23] These documents also create the parameters within which new human rights might emerge to ensure the continued protection of these freedoms.[24] However idealistic this may sound, the actual process is much trickier.

With every generation of rights comes the benefit—and burden—of hindsight to better understand the process that leads to the creation of a

---

18. "(1) Security rights that protect people against murder, torture, and genocide; (2) Due process rights that protect people against arbitrary and excessively harsh punishments and require fair and public trials for those accused of crimes; (3) Liberty rights that protect people's fundamental freedoms in areas such as belief, expression, association, and movement; (4) Political rights that protect people's liberty to participate in politics by assembling, protesting, voting, and serving in public office; (5) Equality rights that guarantee equal citizenship, equality before the law, and freedom from discrimination; and (6) Social rights that require that governments ensure to all the availability of work, education, health services, and an adequate standard of living." *Human Rights*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 11, 2019), https://plato.stanford.edu/entries/rights-human/ [https://perma.cc/4PU8-T7GA].

19. Viljoen, *supra* note 16.

20. The European Convention on Human Rights followed shortly after the UDHR in 1950; other notable treaties include the American Convention on Human Rights and the African Charter on Human and People's Rights. *See* Viljoen, *supra* note 16.

21. G.A. Res. 2200A (XXI) A, Articles 9 and 11, International Covenant on Civil and Political Rights (Dec. 16, 1966).

22. *Id.*

23. *See* Universal Declaration of Human Rights, *supra* note 10; International Covenant on Civil and Political Rights, *supra* note 21.

24. *See* International Covenant on Civil and Political Rights, *supra* note 21.

recognized human right. This process never exactly repeats itself, but it does rhyme. This Note examines the creation of a human right as broadly occurring within three linear stages, with many zigs and zags, steps forward and backward, in between. This process is referred to in this Note as the Progressive Theory of Human Rights Development (Progressive Theory). The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is used to illustrate this Progressive Theory.

Stage One of the Progressive Theory begins with quiet whisperings, where small groups sound an alarm regarding the subject's destructive nature and propose aspirational change.[25] The multiple alarms likely approach the subject from different angles but reach the same conclusion. In the lead-up to the drafting of CEDAW, these angles included gender-based discrimination spanning marriage, the legal status of women, the economic status of women, employment opportunities, and educational opportunities.[26] All of these approaches ultimately zeroed in on common themes and proposed reforms.[27] Group advocacy for heightened protections for women resulted in the creation of the Commission on the Status of Women in 1946 to address urgent human rights issues facing women.[28] As important as the work in the Commission was, it failed to provide comprehensive protection for women against discrimination and therefore failed to promote equal rights.[29]

Down the line, either such alarms are tragically legitimized, following one or a series of major incidents, or societal consciousness reaches a point where the subject is no longer tolerable, thus marking Stage Two of the Progressive Theory.[30] For CEDAW, it was an emergence in the 1960s "of a new consciousness of the patterns of discrimination against women and a rise in the number of organizations committed to combating the effect of such discrimination."[31] Finally, and most importantly, in Stage Three of the Progressive Theory, the aspirational ideas become binding, as nations collectively choose not to turn their back on the atrocities experienced and pain suffered, but instead to codify the recognition of specific rights to prevent similar future tragedies.[32] This Progressive Theory highlights the

25. Th importance of grassroots activism is a fundamental principle of the Progressive Theory. *Human Rights Activism and the Role of NGOs*, COUNCIL OF EUROPE, https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos [https://perma.cc/VL6T-JX69] (last visited Jan. 28, 2023).

26. United Nations Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

27. *Id.*

28. *Short History of CEDAW Convention*, UNITED NATIONS, https://www.un.org/womenwatch/daw/cedaw/history.htm [https://perma.cc/J85D-6NR7] (last visited Jan. 28, 2023).

29. *Id.*

30. *See An Introduction to Human Rights*, AUSTL. HUM. RTS. COMM'N, https://humanrights.gov.au/our-work/education/introduction-human-rights#Where%20do%20human%20rights%20come%20from? [https://perma.cc/RG6Y-ZD26] (last visited Jan. 28, 2023).

31. UNITED NATIONS, *supra* note 28.

32. Nancy Flowers, *From Concept to Convention: How Human Rights Law Evolves*, UNIV. OF MINN., http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/from-concept.htm [https://perma.cc/SD2L-TZ9N] (last visited Jan. 28, 2023).

intersectional nature of human rights: as cultural norms change and new philosophical ideas gain popularity, political forces slowly take notice and, after sufficient advocacy following a human rights crisis, take action.

Extrapolating from this Progressive Theory must be done with discernment and care. There is no dearth of atrocities occurring in the world, but to push them all through this Progressive Theory may create what is called "human rights inflation," where recognizing too many human rights will lead to a devaluation of human rights as a whole.[33] One theory proposed in avoiding such inflation is that human rights "only deal with extremely important goods, protections, and freedoms."[34] This implies some threshold level of severity of the threat. One commonality among widely accepted human rights that deal with such extremely important needs is that they posed and continue to pose a threat so great and systemic that individuals require international legal protections.[35] To understand why facial recognition through AI poses a similarly great and systemic threat, it is essential to first understand the fundamental framework and incentive model of AI generally, and facial recognition specifically.

B. What Is Artificial Intelligence?

Although a ubiquitous term, AI's lack of a clear definition both infuriates and excites. The former is a common reaction among self-described realists and those less technologically inclined who have found no satisfying reason why the thing (AI) that they are expected to trust and rely on cannot be defined. The latter group, those excited by AI's lack of clear definition, would tell the realists that they still just don't get it. They would say that the evergreen promise of technology like AI is that it has the capacity, in the most theoretical terms, to transcend any form of subjectivity. To define it would be to prematurely limit its capabilities. They might suggest that popular understanding of AI is likely to go the way of the Internet: one cannot easily define the thing itself, but one can explain everything involved in it and around it until it is fully captured.

Etymologically, the term originated at Dartmouth in 1956, where scientists convened to test the theory that "every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it."[36] Sixty-seven years later, the technology has drastically improved and grown in complexity, but the aim remains the same.

---

33. *See Human Rights*, *supra* note 18.
34. *Id.*
35. *Id.*
36. *Artificial Intelligence (AI) Coined at Dartmouth*, DARTMOUTH COLL., https://home.dartmouth.edu/about/artificial-intelligence-ai-coined-dartmouth [https://perma.cc/85XS-QJYM] (last visited Jan. 28, 2023).

At its most technical level, an AI algorithm is a binary code of zeros and ones that analyzes other zeros and ones to give outputs.[37] Most technical communities, however, explain it simply as applying complex algorithms and systems to reach desired outcomes.[38] AI is often thought of not as a tangible thing in itself, but instead as a process by which data is analyzed.[39] An AI system "learns" through "training" on a particular set of data.[40] The process of AI learning is not relevant for purposes of this Note—which will focus on the data. Just as Peter Norvig, Google's Chief Scientist, said on the matter, "We don't have better algorithms than anyone else; we just have more data."[41] The more data that algorithms are trained on, the more accurate and efficient they become, creating a clear incentive for AI companies to gather as much data as possible.[42]

The pace of AI development is fundamental to understanding the power of the technology and why there is an imperative for legal action. All AI available today is considered Artificial *Narrow* Intelligence (ANI), meaning the system can complete one prescribed task but not much beyond that.[43] Containment of the problem (regulation of AI) is, therefore, relatively straightforward given the inherent limitations. However, technological developments of AI are headed for Artificial *General* Intelligence (AGI), "systems with general intelligence comparable to, and ultimately perhaps greater than, that of human beings." AGI is orders of magnitude more powerful and capable than ANI.[44] While in its current state, ANI poses a reasonably known and controllable threat given the simplicity of the technology, similar to food dye in a bottle. Once it progresses to AGI, the increase in relative difficulty in regulating it will be like trying to collect that food dye once it is poured into a bowl of water. It is therefore imperative to take legal action before this significant technological breakthrough.

To underscore this imperative, consider Stanford University's annual AI Index Report, which is useful in tracking both the rate of development of

---

37. *Zeros & ones: The fundamental building blocks of computing*, UNIV. OF OXFORD, https://atozofai.withgoogle.com/intl/en-US/zeros-and-ones/ [https://perma.cc/K8VA-6YYN] (last visited Jan. 28, 2023).

38. *How Does AI Actually Work?*, CSU GLOBAL (Aug. 9, 2021), https://csuglobal.edu/blog/how-does-ai-actually-work#:~:text=AI%20systems%20work%20by%20combining,performance%20and%20develops%20additional%20expertise [https://perma.cc/GA6Y-UTKJ].

39. Jeff Holmes, *The AI Process*, TOWARDS AI (May 18, 2022), https://towardsai.net/p/l/the-ai-process [https://perma.cc/BNJ3-6Q3W].

40. *Id.*

41. Ben Buchanan and Taylor Miller, *Machine Learning for Policymakers What It Is and Why It Matters*, HARV. BELFER CTR. FOR SCI. AND INT'L AFFS. 13 (Jun. 2017), https://www.belfercenter.org/sites/default/files/files/publication/MachineLearningforPolicymakers.pdf [https://perma.cc/25B6-YYZC].

42. *Artificial Intelligence Factsheet*, HARV. BELFER CTR. FOR SCI. AND INT'L AFFS. 2 (Jan. 2020), https://www.belfercenter.org/sites/default/files/2020-01/AI.pdf [https://perma.cc/D58C-9SRD].

43. *Id.*

44. Ben Goertzel, *Artificial General Intelligence: Concept, State of the Art, and Future Prospects*, J. OF ARTIFICIAL GEN. INTEL. 1 (2014), https://sciendo.com/downloadpdf/journals/jagi/5/1/article-p1.pdf [https://perma.cc/SMS6-BAPP].

AI and changing outlooks on its cultural and technological relevance.[45] The 2019 report crucially noted that, "[p]rior to 2012, AI results closely tracked Moore's Law, with compute[46] doubling every two years. Post-2012, compute has been doubling every 3.4 months."[47] The more compute ability increases, the more concentrated technological power becomes. The significance of this is that it creates an imperative for action to address this massive leap in technology. As will be explored in later sections, activists are sounding the alarm about the potential for harm that is festering in the gap between societal expectations around FRT and the existing legal system.

Stanford's 2022 AI Index Report solidifies this imperative for action.[48] Among other rapid developments, the report cites a significant increase in global legislation and the demand for formal AI ethics, both coinciding with a general realization of the increasingly severe risks posed by AI.[49] A prime example of why both legislation and ethics are crucial to AI is the reaction to ChatGPT beginning with its debut on November 30, 2022.[50] ChatGPT is an AI model that uses a massive amount of data that is organized in a neural network.[51] The neural network essentially means that ChatGPT can quickly understand writing and become very good at it, allowing the technology to answer questions and have conversations with users in a way that mimics human interactions.[52] Its astonishing capabilities underscore just how powerful such technology can be and how safeguards are in place to control it. While ChatGPT can help answer questions and recommend dinner recipes, it can also create "policy briefs, fake news reports or, as a Colombian judge has admitted, court rulings. Other models trained on images rather than text can generate everything from cartoons to false pictures of politicians."[53] The

45. *About*, STAN. UNIV., https://aiindex.stanford.edu/about/ [https://perma.cc/T9SU-X5YL] (last visited Jan. 28, 2023).

46. "Compute" is a "generic term used to reference processing power, memory, networking, storage, and other resources required for the computational success of any program." *What is Compute?*, AMAZON WEB SERVICES, https://aws.amazon.com/what-is/compute/ [https://perma.cc/LVN2-5H7C] (last visited Mar. 1, 2023).

47. Raymond Perrault et al., *The AI Index 2019 Annual Report*, STAN. UNIV. HUMAN-CENTERED A.I. INST. 5 (Dec. 2019), https://hai.stanford.edu/sites/default/files/ai_index_2019_report.pdf [https://perma.cc/5ZHA-SXP3].

48. *See* Daniel Zhang et al., *The AI Index 2022 Annual Report*, STAN. UNIV. HUMAN-CENTERED A.I. INST. 10-12 (Dec. 2022), https://aiindex.stanford.edu/wp-content/uploads/2022/03/2022-AI-Index-Report_Master.pdf [https://perma.cc/A6EP-23DD].

49. *Id.*

50. Grace Kay, *Elon Musk founded — and has since criticized — the company behind the buzzy new AI chatbot ChatGPT. Here's everything we know about OpenAI.*, BUS. INSIDER (Dec. 11, 2022), https://www.businessinsider.com/history-of-openai-company-chatgpt-elon-musk-founded-2022-12 [https://perma.cc/RE53-QAPS].

51. Matt Crisara, *ChatGPT Is a 'Very Sophisticated Guessing Engine' That Probably Won't Steal Your Job*, POPULAR MECHANICS (Feb. 3, 2023), https://www.popularmechanics.com/technology/a42733497/how-does-chatgpt-work/ [https://perma.cc/WW8E-WAYV].

52. *Id.*

53. Gian Volpicelli, *ChatGPT broke the EU plan to regulate AI*, POLITICO (Mar. 3, 2023), *https*://www.politico.eu/article/eu-plan-regulate-chatgpt-openai-artificial-intelligence-act/ [https://perma.cc/ZTS3-2J7A].

U.S. Congress is scrambling to respond, heeding the "ills" that flowed from fast-growing unregulated social media companies.[54] So, too, is the European Union (EU) grappling with the implications of the pace of development of AI, as ChatGPT has forced lawmakers to revise their proposed Artificial Intelligence Act to include stricter requirements.[55] While fascinating in its current state, scientists and researchers do not believe that AI models have a sufficient substantive or ethical understanding of the responses they provide.[56]

The state of AI today is one of promise and hazard. The move from ANI to AGI, powered by this rapid pace of development, would mean a significant leap in technology that is largely inconceivable now. ChatGPT is a good example of what the leaps look like, and the U.S. and EU's flat-footed responses further prove why there is an imperative for proactive legal action.

C. Facial Recognition Technology and Biometric Data

Facial recognition falls under the broad umbrella of AI but includes unique characteristics and poses novel legal questions that warrant separate consideration. To begin technically, FRT transforms "an image of a face into a numerical expression" that can then be compared to other faces rendered into a numerical code.[57] FRT ". . . works by identifying and measuring facial features in an image. Facial recognition can identify human faces in images or videos, determine if the face in two images belongs to the same person, or search for a face among a large collection of existing images."[58]

FRT requires a separate consideration from AI generally because the use of the technology directly concerns humans in a way that is not present with other categories of AI. The direct concern involves human rights considerations in ways that will be explored in this Note.

While the specific *technology* utilizing facial recognition is a subsection of AI, the actual *data collected* belongs to the family of biometric data. The EU defined biometric data as "personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique

---

54. Grace Yarrow, *Democrat pushes Congress to get a jump on regulating ChatGPT*, THE HILL (Feb. 16, 2023), https://thehill.com/policy/technology/3862109-democrat-pushes-congress-to-get-a-jump-on-regulating-chatgpt/ [https://perma.cc/6HXF-KN5C].

55. Volpicelli, *supra* note 53.

56. Melanie Mitchell, *What Does it Mean for AI to Understand?*, QUANTA MAG. (Dec. 16, 2021), https://www.quantamagazine.org/what-does-it-mean-for-ai-to-understand-20211216/ [https://perma.cc/RG6F-P5KP]; *see, e.g.*, Breena R. Taira et al., *A Pragmatic Assessment of Google Translate for Emergency Department Instructions*, 36 J. GEN. INTERNAL MED. 3361, 3361-65 (2021).

57. William Crumpler and James A. Lewis, *How Does Facial Recognition Work? A Primer*, CTR. FOR STRATEGIC AND INT'L STUD. at 3 (Jun. 10, 2021), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210610_Crumpler_Lewis_FacialRecognition.pdf?VersionId=xdae_qQa80_Fimc1mzF3wxN6KIp.01Xg [https://perma.cc/SWN4-WVBR].

58. *What is Facial Recognition?*, AMAZON WEB SERVICES, https://aws.amazon.com/what-is/facial-recognition/#:~:text=It%20works%20by%20identifying%20and,large%20collection%20of%20existing%20images [https://perma.cc/USH6-SB4M] (last visited Jan. 28, 2023).

identification of that natural person, such as facial images or dactyloscopic [fingerprint] data."[59] The National Institute of Standards and Technology (NIST) has a similar definition: "[a] measurable physical characteristic or personal behavioral trait used to recognize the identity, or verify the claimed identity, of an applicant. Facial images, fingerprints, and iris scan samples are all examples of biometrics."[60]

Facial images are distinct from other forms of biometric data for two reasons: one legal and practical, the other moral and philosophical.[61] The practical reason is that the taking of facial images and the use of facial recognition poses challenging questions regarding consent.[62] Unlike with, for example, a fingerprint, an individual does not always know when the biometric data of their face is being collected.[63] In fact, the U.S. Government Accountability Office (GAO) has raised this as a main concern around facial recognition since 2015: an individual's face can be recorded, and their movements tracked through FRT without their knowledge, much less consent.[64] This exponentially elevates the difficulty of protecting consumers in an already difficult and confusing realm of biometric data consent.[65]

The philosophical reason is that because so much of one's sense of individualism and humanity is tied to the face and its unique features, there is a moral inclination to regard it as a separate consideration from one's fingerprint or the sound of one's voice.[66] Recent biological research indicates that certain parts of the human brain have developed exclusively to identify faces.[67] The human face has also always been a foundational subject in art, literature, and academia.[68] Finally, arguments of philosophy have traditionally found a home in legal discussions regarding the consideration of

---

59. Council Regulation 2018/1725, Art. 3 2018 O.J. (L 295) 39 (EU).

60. Michael Nieles et al., *An Introduction to Information Security*, NATL. INST. STAND. TECHNOL. SPEC. PUBL. 800-12 REV. 1, 77 (Jun. 2017), https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-12r1.pdf [https://perma.cc/WJX7-YGC2].

61. *See generally* Kelly A. Gates, OUR BIOMETRIC FUTURE: FACIAL RECOGNITION TECHNOLOGY AND THE CULTURE OF SURVEILLANCE (Sarah Banet-Weiser and Kent A. Ono eds., 2011).

62. *Id.* at 18.

63. *Id.*

64. *Id.* at 63; U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-621, FACIAL RECOGNITION TECHNOLOGY: COMMERCIAL USES, PRIVACY ISSUES, AND APPLICABLE FEDERAL LAW (Jul. 2015).

65. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 64; *infra* notes 79-84.

66. Evan Selinger and Brenda Leong, *The Ethics of Facial Recognition Technology*, THE OXFORD HANDBOOK OF DIGITAL ETHICS (forthcoming) https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3762185_code1279812.pdf?abstractid=3762185&mirid=1&type=2 [https://perma.cc/YVR2-8SQK].

67. Elizabeth Norton, *Identifying the Brain's Own Facial Recognition System*, SCIENCE (Oct. 23, 2012), https://www.science.org/content/article/identifying-brains-own-facial-recognition-system [https://perma.cc/4D2E-J3VX].

68. *See, e.g.*, Bernard Rhie, The Philosophy of the Face and 20th Century Literature and Art 1-14 (2005) (Ph.D. dissertation, University of Pennsylvania) (on file with Penn Libraries, University of Pennsylvania) (on file with author).

human rights, providing rationale when the law has not yet caught up to the collective moral understanding of a specific issue.[69]

Therefore, due to the legal issues surrounding consent in collecting facial images and the deep sense of humanity of the face, facial data should be considered significantly distinct from other forms of biometric data and therefore treated as such. This Note will address this point later.

D. Domestic and International Government Action

1. The United States Federal Outlook on Facial Recognition Technology

In July of 2023, the Biden-Harris Administration announced an agreement with seven large AI companies to implement AI safeguards, including impacts for FRT.[70] The announcement highlighting the principles of the commitment—safety, security, and trust—demonstrates the White House's outlook on AI generally.[71] To understand the U.S. government's outlook on FRT specifically, consider reports from the GAO from 2015 and 2020 on the commercial use of FRT and the White House's proposed Blueprint for an AI Bill of Rights.

The 2015 and 2020 GAO reports present a useful comparison across three distinct benchmarks on the state of FRT: (1) the technology's uses; (2) risks associated with FRT; and (3) existing federal law.[72] For the first benchmark, what is notable in the findings of the 2015 report is the admission of the extent of the unknowns, as well as the conclusion that, in practice, it is not used to identify unique individuals.[73] The report states, "Facial recognition technology can be used in numerous consumer and business applications, but the extent of its current use in commercial settings *is not fully known* . . . Some security systems serving retailers, banks, and casinos incorporate facial recognition technology, but the extent of such use at present *is not fully known*."[74]

---

69. Randy E. Barnett, *Why We Need Legal Philosophy*, 8 HARV. J. L. & PUB. POL'Y 1, 4-5, 9-10 (1985) (Foreword to the "Symposium on Law and Philosophy").

70. Fact Sheet, *The White House, Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI*, THE WHITE HOUSE (July 21, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/ [https://perma.cc/7CK3-PMZH]; Michael D. Shear, Cecilia Kang and David E. Sanger, *Pressured by Biden, A.I. Companies Agree to Guardrails on New Tools*, N.Y. TIMES (July 21, 2023), https://www.nytimes.com/2023/07/21/us/politics/ai-regulation-biden.html [https://perma.cc/QZX8-BF4U].

71. *Id.*

72. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 64, at 6, 10, 32; *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-522, FACIAL RECOGNITION TECHNOLOGY: PRIVACY AND ACCURACY ISSUES RELATED TO COMMERCIAL USES 13 (Jul. 2020).

73. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 64, at 6, 10, 32.

74. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 64.

The 2020 report, by comparison, highlights the expanded use cases of FRT in commercial settings to include the identification of unique individuals: "[T]he technology can be used to count people in stores, amusement parks, or waiting in lines . . . Retailers and others can use facial analysis to analyze emotions, gender, and age to deliver targeted signs or billboards."[75] The technology has many uses, including security, as a method of loss prevention in retail stores, or for venues to use at large events to identify previously-banned fans.[76] One major driver of the increased use of FRT is the financial services sector, where "wider adoption of facial recognition technology was bolstered, in part, by regulatory changes included in the European Union's payment services regulation . . . [T]his regulation requires strong user authentication for payments which includes two-factor authentication—one of which can be biometric, such as face recognition."[77]

For the second benchmark, the 2015 report's characterization of the risks illustrates a situation that seems firmly planted within the first stage of the previously mentioned Progressive Theory: "Privacy advocacy organizations, government agencies, and others have cited several privacy concerns related to the commercial use of facial recognition technology."[78] Foundational to these risks is the difficulty in consent: "[I]f its use became widespread, it could give businesses or individuals the ability to identify almost anyone in public without their knowledge or consent and . . . that [the data] could be used, shared, or sold in ways that consumers do not understand, anticipate, or consent to."[79] The lack of consent and threat of use beyond consent are just a couple of examples of the different angles from which advocacy groups are sounding the alarm on the potential human rights threat of FRT.

The 2020 report highlights two key risks of FRT, the first previously mentioned in the 2015 report, the second a new conclusion based on ongoing research: privacy and inaccuracy concentrated in specific demographic groups.[80] Inaccuracy can mean one of two types of misidentification: a false positive, where the technology "incorrectly declar[es] two images to be a match when they are actually from two different people," and a false negative, where the technology "fail[s] to declare two images to be a match when they are actually from the same person."[81] The inaccuracy report for FRT underscores the inherently intersectional nature of the technology, further proving the danger it could pose to certain individuals (emphasis added):

> [A]lgorithms performed more accurately on white males. White males had the lowest false positive rate . . . while black females had the highest false positive rate. In verification algorithms, false positive rates for white males and black

75. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72, at 13.
76. *Id.* at 11.
77. *Id.* at 10.
78. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 64.
79. *Id.*
80. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72.
81. *Id.* at 26.

> females varied by factors of 10 to more than 100, meaning the lowest-performing algorithm could be *over 100 times more accurate* on white male faces than on black female faces. Additionally, for verification and identification vendor tests, false positives were higher for women than men.[82]

The consequences of misidentification range from mild (being incorrectly blocked from accessing a building) to traumatic (an anti-theft system misidentifying a shopper as a previous shoplifter based on some combination of their age, race, and gender).[83]

Similar to the 2015 report, the 2020 privacy concerns focus on data collection and consent.[84] The most obvious privacy risk identified is when facial and biometric data is collected entirely without consent.[85] The 2020 report details other risks unknown at the time of writing the 2015 report, as well as analyzes previously known risks with a more thorough understanding of consequences, both of which point to a more nuanced understanding of the potential privacy violations, as well as the severity of the risk.[86] While knowledge of risks is still insufficient to protect citizens, it indicates that the U.S. government may be primed for meaningful action.[87]

One such novel risk covered is when data is collected with the individual's consent for one use, but the actual use exceeds that consent, also known as "secondary use."[88] Another is the practice known as "web scraping," where companies will "scrape" the web for individual consumer data, often including location data collected by apps, without the knowledge or consent of the data owners.[89] This will be explored in more detail later in this Note when discussing the company Clearview AI. There is also the risk of aggregating facial data with other parts of the image:

> [T]hese data sets may include or reveal personal information beyond the individual's image . . . The data sets contain information that could potentially be identifiable, because . . . two surveillance camera data sets included data on the time and day of the week of collection, and the data set titles and publication information also included locations where the images were taken.[90]

Web scraping represents another angle from which advocacy groups are warning of the human rights threat posed by FRT: "Several privacy advocacy groups and academics have raised concerns that location and time

82. *Id.*
83. *Id.* at 31.
84. *Id.* at 14.
85. *Id* at 1.
86. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72.
87. *See id.* at 38-44.
88. *Id.* at 15.
89. *Id.*
90. *Id.* at 20.

data could allow individuals in anonymous data sets like these to be identified."[91]

Finally, the 2020 report mentions another privacy issue regarding reference data sets: nonpublic data sets that companies hold containing highly sensitive personal information tied to biometric data, such as one's face.[92] The use of reference data sets—with no public to answer to nor regulation imposed on data collection and storage—is a significant privacy concern: "[R]epresentatives of one financial institution we spoke with said that they stored member identification numbers with the biometric information linked to their account, and a privacy advocacy group said that location data may also be commonly collected in reference data sets."[93]

For the final benchmark, the 2015 report looks to the (nearly nonexistent) state of federal law: "No federal privacy law expressly regulates commercial uses of facial recognition technology, and laws do not fully address key privacy issues stakeholders have raised, such as the circumstances under which the technology may be used to identify individuals or track their whereabouts and companions."[94] However, there are certain laws "… governing the collection, use, and storage" of personally identifiable information that may apply to FRT in certain contexts such as data "… collected by health care entities or financial institutions."[95]

The state of federal law in 2020 is largely the same as it was in 2015: limited to data protection through orthogonal channels and lacking any comprehensive structure to protect consumers.[96] The two risks mentioned in the 2020 report, inaccuracy and privacy, demonstrate two major fundamental issues with the technology that have a disparate impact and are not being addressed in any meaningful way by the U.S. government.[97] The report does, however, highlight one promising avenue of individual protection: state law.[98] A handful of states have adopted laws protecting the collection and use of biometric data, with Illinois's Biometric Information Privacy Act (BIPA) as the most thorough.[99] However, a patchwork of state regulations is insufficient because the protection of national citizens becomes unequal and allows for strategic business practices to avoid liability.[100]

The 2020 GAO report is an effective comparison of growth in knowledge and technological capability to the 2015 report, referencing its own findings relative to those of the prior report.[101] Analyzed along the same three benchmarks—use cases, risks, and federal law—the 2020 report indicates the current U.S. government has a better understanding of the

91. *Id.*
92. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72, at 14.
93. *Id.* at 22.
94. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 64.
95. *Id.*
96. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72, at 39.
97. *See id.* at 24-25, 38-39.
98. *Id.* at 42.
99. *See id.*
100. *See id.* at 42, 44.
101. *Id.* at 1, 8, 11.

technology than it did in 2015, as well as heightened suspicion.[102] However, the gap created by the risks mentioned, where threats to human rights are proliferating with little to no intervention by the government or private actors, has all the telltale signs that FRT has already reached the first stage in the Progressive Theory.[103]

In October 2022, the White House published a 73-page Blueprint for an AI Bill of Rights, putting forward key principles that should guide the creation, implementation, and use of AI.[104] The five principles are (1) protecting people from unsafe or ineffective automated systems, (2) preventing discrimination by algorithms, (3) safeguarding people from abusive data practices and giving them agency over how their data is used, (4) informing people that an automated system is being used, and (5) letting users opt out of automated systems.[105] The Blueprint, while ambitious, remains nonbinding and aspirational, appealing to ideas instead of suggesting practical steps.[106] In response to the Blueprint, the former chief executive of Alphabet Inc.'s Google, Eric Schmidt, said, "I would not regulate things until we have to."[107] As will be explored in the next section, there is little to no incentive for companies to slow the pace of development through self-regulation, barring a government mandate.

In the context of its peers, the White House's Blueprint leaves much to be desired by activists. GDPR presents an unflattering comparison, as it authorizes significant fines for companies that are not in compliance with its strict regulations and limits the amount and ways companies may collect data.[108] GDPR's success in holding tech companies accountable provides a useful framework for the White House in crafting future regulatory recommendations.

Another comparison is Stanford University's Institute for Human-Centered Artificial Intelligence "AI Bill of Rights," published months before the Blueprint and with far more specific guiding principles and suggested areas of further exploration.[109] The Institute's research and publications are innovative and influential given their emphasis on the role of human-centered

---

102. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72.

103. *See supra* text accompanying note 25.

104. *Blueprint for an AI Bill of Rights*, WHITE HOUSE OFF. OF SCI. AND TECH. POL'Y 4 (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf [https://perma.cc/43QK-3ZYH].

105. *Id.* at 5-7.

106. *Id.* at 2.

107. Angus Loten, *White House Issues 'Blueprint for an AI Bill of Rights'*, WALL ST. J. (Oct. 4, 2022), https://www.wsj.com/articles/white-house-issues-blueprint-for-an-ai-bill-of-rights-11664921544 [https://perma.cc/E7RQ-UQJB].

108. *Id.* GDPR is Europe's data privacy and security law. It was put into regulation in 2018.

109. Michele Elam & Robert Reich, *Stanford HAI Artificial Intelligence Bill of Rights*, STAN. UNIV. HUMAN-CENTERED A.I. INST. 1 (Jan. 2022), https://hai.stanford.edu/sites/default/files/2022-01/Stanford%20HAI%20Artificial%20Intelligence%20Bill%20of%20Rights_0.pdf [https://perma.cc/GQ2P-PDH7]. While this comparison is not one-to-one, given the relative constraints of a government versus a university, it is a useful benchmark.

AI in determining public policy.[110] Similar to GDPR, the White House can leverage this "Bill of Rights" in creating more robust recommendations by prioritizing a focus on ethics in future policies.

Actions taken at the federal level, including agency reporting and congressional calls for investigation into FRT, both inform the state of FRT in the U.S. and influence the future regulatory framework. As was explored in a prior section, the GAO has published detailed reports on the state of FRT and its commercial use. The knowledge gathered in these reports, as well as the relationships built with the private companies and non-governmental organizations that contributed, will be essential to informing future legislative action regarding FRT. More recently, in May of 2022, a group of congresspeople urged the Federal Trade Commission (FTC) to investigate the identity verification company, ID.me, for misleading comments made about their use of FRT.[111] The letter lays out a terrifying possibility: the company's use of data may have gone far beyond what users consented to, where "millions of innocent people will have their photographs endlessly queried as part of a digital line up."[112] The request makes clear the severity with which congresspeople are addressing the harms of unregulated FRT, as well as the influence of activists in calling out potential harms to privacy and human rights: this request followed mere weeks after activists, in conjunction with members of Congress, urged the Internal Revenue Service to halt their deployment of ID.me, citing privacy concerns in their use of FRT.[113]

2. Domestic Case Law

There have been few domestic cases involving the legal use of FRT given the nascency of the technology, but those that have arisen demonstrate both public sentiment about the use of the technology and the gravity of the risk the technology poses when unregulated.[114] A high-profile example came in 2020, following the publishing of the explosive exposé in the New York Times of a secretive company called Clearview AI which designed and deployed a nefarious facial recognition app.[115] Shortly afterward, eight

110. *See id.*

111. Letter from Senators Ron Wyden et al., to Lina Khan, Federal Trade Commission Chairperson (May 18, 2022), https://www.wyden.senate.gov/imo/media/doc/Letter%20to%20FTC%20on%20ID.me%20deceptive%20statements%20051822.pdf [https://perma.cc/Z8AK-XQMG].

112. *Id.*

113. Joseph Cox, *Lawmakers Urge FTC to Investigate ID.me and its Facial Recognition Tech*, VICE (May 18, 2022), https://www.vice.com/en/article/4awj7j/lawmakers-urge-ftc-to-investigate-idme-and-its-facial-recognition-tech [https://perma.cc/EEU5-V4ME].

114. Andrew Blancher, *An Analysis of Facial Recognition Technology Lawsuits*, VERISK (Nov. 30, 2022), https://www.verisk.com/insurance/visualize/an-analysis-of-facial-recognition-technology-lawsuits/#:~:text=In%202019%2C%20plaintiffs%20filed%20a,and%20receive%20a%20written%20release.&text=The%20plaintiffs%20alleged%20that%20they,use%20of%20their%20biometric%20data [https://perma.cc/SHR5-QXPD].

115. Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html [https://perma.cc/W8HW-DZZP].

separate class action suits were filed against Clearview AI, with each case arising out of "Clearview's conduct in: (a) allegedly scraping billions of facial images from the Internet; (b) performing facial scans of those images; and (c) creating a biometric database that allows users of the database to immediately identify a member of the public merely by uploading a person's image to the database."[116]

This collection of cases (which, as of this writing, is still in litigation) demonstrates three important consequences. The first is the severity of the impact on the end user. Individuals are effectively helpless in preventing their face, and therefore their identity, from being added to these massive databases, which can be sold and used for any number of purposes with no clear repercussions. Second, the Illinois Northern District Court ruled that the plaintiffs had "sufficiently alleged that defendants' disclosure of their private information without their consent caused them the concrete harm of violating their privacy interests in their biometric data."[117] Identifying concrete harm under which to sue is a fundamental step in the creation of a legal scaffolding from which to build a regulatory framework. Finally, the causes of action in the respective cases against Clearview AI are brought primarily under state privacy acts, as there are no federal laws providing protection in facial recognition cases.[118]

The majority of the cases against Clearview AI, as well as the majority of facial recognition-related cases generally, have been successfully brought in Illinois under BIPA.[119] The Act "[p]laces restrictions on how private entities retain, collect, disclose, and destroy biometric identifiers and biometric data, and [r]equires companies to provide notice and obtain consent for collection, capture, purchase, or receipt of such data."[120] Most importantly, BIPA creates a private right of action for individuals, a right to which many activists credit the Act's success in suing large tech companies over their use of facial recognition.[121] Such private rights of action in issues of personal privacy are a useful but short-term, stop-gap tool. Many other states have passed similar, albeit less forceful, privacy acts, which provide some form of protection for individuals.[122] However, reliance on a patchwork of state laws is an insufficient solution. While the success of the Acts may help inform best

116. Calderon v. Clearview AI, Inc., No. 20 CIV. 1296 (CM), 2020 U.S. Dist. LEXIS 94926, at *5 (S.D.N.Y. 2020).

117. *In re* Clearview AI, Inc., Consumer Priv. Litig., 585 F. Supp. 3d 1111, 1126 (N.D. Ill. 2022).

118. Blancher, *supra* note 114; *Calderon*, 2020 U.S. Dist. Lexis 94926 at 8-10.

119. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72; *In re Clearview AI, Inc.*, 585 F. Supp. 3d at 8-10.

120. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 64.

121. Rachel Metz, *Here's why tech companies keep paying millions to settle lawsuits in Illinois*, CNN (Sept. 20, 2022), https://www.cnn.com/2022/09/20/tech/illinois-biometric-law-bipa-explainer/index.html [https://perma.cc/YH58-9S8G].

122. States whose laws specifically cover biometric data include Arizona, Arkansas, California, Colorado, Delaware, Illinois, Iowa, Louisiana, Maryland, Nebraska, New Mexico, New York, North Carolina, South Dakota, Washington, Wisconsin, and Wyoming; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72.

practices, a federal regulatory framework is necessary to provide equal protection.

This federal regulatory framework for FRT should build off common throughlines among the state laws mentioned above, executive orders, legislative statements, and, most importantly, international successes.

3. International Action

It is important to juxtapose the current state of U.S. policy with that of the EU. Technology does not respect borders, and FRT is no different. The EU has presented a far more robust and actionable plan in addressing not only AI generally but FRT specifically. Beginning notably with the passage of GDPR in 2016, the EU has put forward a white paper on how best to approach AI and passed an Act on regulating AI.[123]

Article 9 of the GDPR lays out a key principle of the regulation, which explicitly prohibits the processing of "biometric data for the purpose of uniquely identifying a natural person" without the individual's explicit consent.[124] Article 22 goes even further, giving individuals the right "not to be subject to a decision based solely on automated processing." This right has broadly been applied to cases utilizing FRT to prove that such technology must operate within clearly defined parameters.[125]

In 2020, as a follow-up to the successes and shortcomings of GDPR, the European Commission published a white paper on AI.[126] Not only does this paper more clearly define biometric data to include facial images, but it also concludes that "in accordance with the current EU data protection rules and the Charter of Fundamental Rights, AI can only be used for remote biometric identification purposes where such use is duly justified, proportionate and subject to adequate safeguards."[127] The paper then goes on to propose how the Commission might approach defining these justified uses.[128]

The Commission's work culminated in the previously mentioned proposed Artificial Intelligence Act in 2021.[129] What is most important about this Act is its objective: to create harmonized rules on AI in anticipation of its potential.[130] While simple, this objective recognizes not only the promise of the benefits of AI but also the importance of coordinated regulation to address the risks and negative consequences that individuals and society could face.[131]

---

123. *Infra* notes 126 and 129.

124. Council Regulation 2016/679 General Data Protection Regulation, 2016 O.J, (L 119) 1 (EU).

125. *Id.*

126. *Commission White Paper on Artificial Intelligence – A European Approach to Excellence and Trust*, COM (2020) 65 final (Feb. 19, 2020).

127. *Id.* at 22.

128. *Id.* at 16-18.

129. *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence and Amending Certain Union Legislative Acts*, COM (2021) 206 final (Apr. 21, 2021).

130. *Id.* at 1.

131. *Id.* at 1, 6.

A final consideration of relevant international action is the Ruggie Principles. Beginning in 2005 and unanimously endorsed by the United Nations Security Council in 2011, the Ruggie Principles were created as both a recognition of the further breaking down of siloes between business and human rights and as a workable mandate to nations and corporations of what the responsibilities of each might look like in protecting human rights.[132] Fundamentally, they are meant to encapsulate three guiding principles:

> (1) States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms; (2) [t]he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (3) [t]he need for rights and obligations to be matched to appropriate and effective remedies when breached.[133]

The Principles—31 in total, expanding on each of these three guiding principles—recognize, among other things, corporations as major stakeholders and influencers of human rights and their obligations to individuals.[134] While not yet explicitly applied to AI and FRT, these three main principles could potentially provide an existing framework for future international cooperation regarding the regulation of FRT.

While considerations of aspirational goals for AI and FRT on the international level are useful for this analysis, they cannot fully communicate the gravity of what is at stake for individuals. Beginning in 2017, reports came out about the Chinese government using FRT to monitor, track, and ultimately suppress the Uyghurs, a Muslim minority living in the western region of China.[135] This surveillance is one of the many atrocities committed by the Chinese government against the Uyghurs, including arbitrary detention and forced re-education camps, which many nations in the international community are calling a human rights crisis.[136] The technology, developed largely by local start-ups, engages in racial profiling to identify Uyghurs, bringing to life one of the fears of activists calling for regulation of the technology.[137] Reports continued to come out about how the Chinese

---

132. Special Representative of the U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [https://perma.cc/9KC2-6T5N].

133. *Id.*

134. *Id.*

135. Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNCIL ON FOREIGN RELS. (last updated Sept. 22, 2022), https://www.cfr.org/backgrounder/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights [https://perma.cc/NS5P-859R].

136. *Id.*

137. Paul Mozur, *One Month, 500,000 Face Scans: How China is Using A.I. to Profile a Minority*, N.Y. TIMES (Apr. 14, 2019), https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html [https://perma.cc/SL56-Q65Xv].

government exploited the group by setting up "U[y]ghur alarms"[138] and testing new software on them to detect emotions.[139] In recognizing the gravity of the human rights violations, the U.S. and many other nations and organizations formally recognized the actions taken against the Muslim Uyghur population as genocide.[140] For purposes of this Note, the fundamental point is that at the end of all the technology and legislative formal discussions and writings, there are individuals whose fundamental rights are at risk.

III. THE RIGHT TO PRIVACY OF ONE'S FACIAL BIOMETRIC DATA SHOULD BE CONSIDERED A HUMAN RIGHT

The use of FRT poses a great and systemic risk to individuals worldwide and violates deeply held notions of humanity. One's facial biometric data is unique and inherently individualistic data. Individuals should have the right to such data as a protected and codified human right. The best way to codify such a right is through domestic legislation, executive action, and international agreements, specifically by applying the Ruggie Principles to facial recognition.

A. Biometric Data as a Civil Human Right

As stated above, biometric data refers generally to personal data based on measurable physical or behavioral characteristics that are used to identify an individual, including facial images and fingerprints.[141] The use of this data to identify a specific individual threatens, and by the same token is protected by, the civil and political human rights as agreed upon in the International Covenant on Civil and Political Rights (ICCPR).[142] The use of biometric data arbitrarily or unlawfully—that is, without proper consent or knowledge—directly violates the basic rights protected by the ICCPR, and therefore, the right to one's own biometric data should be considered a civil human right.

As in previous sections, discussion of the category of biometric data generally leads to the focus on facial images and the use of FRT specifically. There are two compelling reasons to regard facial images as significantly distinct and worthy of separate consideration. The first is legal, that this specific biometric data can be captured without one's knowledge and therefore raises unique issues of consent.

---

138. Dres Harwell & Eva Dou, *Huawei tested AI software that could recognize Uighur minorities and alert police, report says*, WASH. POST (Dec. 8, 2020), https://www.washingtonpost.com/technology/2020/12/08/huawei-tested-ai-software-that-could-recognize-uighur-minorities-alert-police-report-says/ [https://perma.cc/WFT9-N8YU].

139. Jane Wakefield, *AI emotion-detection software tested on Uyghurs*, BBC (May 26, 2021), https://www.bbc.com/news/technology-57101248 [https://perma.cc/QZ2W-7KE7].

140. Press Statement, U.S. Department of State, Determination of the Secretary of State on Atrocities in Xinjiang (Jan. 19, 2021), https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/index.html [https://perma.cc/9Y67-G3XC]; Maizland, *supra* note 135.

141. *See supra* notes 58-59.

142. *See supra* notes 21-23.

The second reason is more philosophical: one's face is so deeply tied to one's individualism and humanity that it must necessarily be regarded separately. The philosophical appeal is made to the moral sense of self and identity—ideas that are not unheard of in discussions of human rights.

These arguments are also bolstered by the sense of unease and the cultural reaction to exploitations that occur using FRT, most notably the mass injustice inflicted on the Uyghurs, such that the exploitation upends some deeply held notion of humanity, and the law has not yet caught up to punish this specific violation of human rights. For these reasons, facial image biometric data should be considered significantly distinct from other forms of biometric data and should receive heightened protection.

The heightened protection afforded to facial image data should be its recognition as a human right. The ICCPR occupies the field of civil human rights: adopted in 1966 with 173 state parties and a further six signatories, it sets out widely accepted norms of international human rights that continue to wield influence.[143] It is grounded in ideas of certain freedoms and liberties endowed to individuals. Given the date of its writing, it is not too radical to imagine it might need to act as a malleable instrument for human rights lawyers facing technological exploitations unforeseeable in the mid-20th century. The freedom from surveillance, from having facial image biometric data collected without one's knowledge or consent, is a natural extension of the freedoms stated in the ICCPR and should, therefore, be a human right.

If so recognized, this right should be clearly codified through domestic legislation and executive action, as well as international agreements to ensure individual protection and to promote ethical private commerce.

If the right to privacy of one's facial biometric data is not recognized as a human right, it has, at the very, least reached Stage One of the Progressive Theory. Therefore, it is crucial to enact domestic legislation and executive action, as well as international agreements, in order to ensure individual safety and to prevent a human rights crisis. Good human rights lawyers are good historians, and good humans know it is far preferable to prevent a crisis than to repair the damage after one occurs.

The warnings from activists can be heard domestically and internationally. Domestically, they can be heard from both citizens who are filing lawsuits against companies unfairly using their facial data, as is seen in the class action suits against Clearview AI,[144] as well as from activists urging the GAO to research FRT and urging Congress to investigate specific companies' use of facial data.[145] Internationally, multiple governing bodies have acted to address the threat of FRT. The EU has enacted multiple pieces of legislation to address the risks and existential threats posed by AI and

143. Interactive Dashboard, *Status of Ratification* (from dropdown menu under "Select a treaty", select "International Covenant on Civil and Political Rights), https://indicators.ohchr.org/ [https://perma.cc/E64T-ABJV] (last visited Jan. 28, 2023); International Covenant on Civil and Political Rights, *supra* note 22.

144. Hill, *supra* note 115; *Calderon*, 2020 U.S, Dist. Lexis; *In re Clearview AI Inc.*, 585 F Supp. 3d; Blancher, *supra* note 114; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72.

145. Letter from Senators Ron Wyden et. al, *supra* note 111; Cox, *supra* note 113.

FRT.[146] Finally, nations have responded in alarm to the atrocities committed against the Uyghur population in China that are facilitated by FRT, with many formally referring to it as genocide.[147] Taken collectively, these pieces of evidence point to disruption in the global understanding of humanity. As governments and non-governmental organizations (NGOs) look for solutions, one glaring issue they must face is the misalignment of incentives for companies who create and use FRT.

B. Business Incentives in Facial Recognition Technology

John Ruggie opened his 2007 report to the United Nations Human Rights Council by stating, "[t]here is no magic in the marketplace. Markets function efficiently and sustainably only when certain institutional parameters are in place."[148] One of the primary reasons FRT requires legal intervention in the form of regulation is because there is an inherent friction between corporate incentives and societal interests coupled with a severe imbalance of power. The major themes running through this divide are a capitalistic drive for power, collectivist issues mischaracterized as individual responsibility, and a patchwork governmental response.

Private companies are interested in collecting as much data as they can to better "train" their systems. Google's Chief Scientist Peter Norvig's sentiment is worth reiterating here: "We don't have better algorithms than anyone else; we just have more data."[149] This drive to collect more individual data is in contention with the strong public interest in data privacy and transparency around how consumer data is collected, stored, and used.[150] A benevolent hostile solution pushed by incentivized private companies is simply to shift the responsibility of protecting an individual's online data from the company to the individual in response to this systemic issue of the company's own making.[151] Private companies also justify the drive to collect data and improve their algorithms by appealing to the pathos of the noble pursuit of technological innovation: moving fast and breaking things in theory is exciting but in practice leads to unexpected outcomes and individual injury.[152] The tension between private and public interest necessitates

146. Council Regulation 2016/679, *supra* note 122; *Commission White Paper on Artificial Intelligence – A European Approach to Excellence and Trust*, *supra* note 124, at 1; *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence and Amending Certain Union Legislative Acts*, *supra* note 127, at 1-3.

147. Maizland, *supra* note 135; Press Statement, *supra* note 140.

148. Special Representative of the U.N. Secretary-General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 1, U.N. Doc. A/HRC/4/35 at 3 (Feb. 19, 2007).

149. Buchanan and Miller, *supra* note 41.

150. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72.

151. Charlie Warzel & Stuart Thompson, *Tech Companies Say They Care*, N.Y. TIMES (Apr. 10, 2019), https://www.nytimes.com/interactive/2019/04/10/opinion/tech-companies-privacy.html [https://perma.cc/W6FK-ZJ3F].

152. *Id.*; "Move Fast and Break Things" was the motto of Facebook up until 2014, when it was updated to "Move Fast with Stable Infrastructure." Speculation abounds as to the motivation for such a change.

government intervention to protect consumers, as has been done at the state level for consumer data privacy.

Another private interest running against public interest is that companies may gather and eventually sell facial data specifically and biometric data more generally without individuals' consent or in excess of the use cases the consumer can consent to—risks previously highlighted in the 2020 GAO report.[153] There is little to no business incentive for private companies to prioritize the best interest of consumers through self-imposed requirements of explicit consent for all use cases when consumers share their data.[154]

A perfect example of this inherent friction and severe imbalance of power is Clearview AI, the facial recognition software start-up mentioned above.[155] The incentive of an AI company is to collect data to "teach" its FRT to improve its accuracy and thus sell it to more customers.[156] The company is therefore incentivized to maximize data collection through much-maligned tactics, like web scraping.[157] On the other side, consumers want restrictions placed on such tactics and to have control over their own data and to not have their face, and thus identity, added to massive data sets.[158] There is an imbalance of power between individuals and Clearview, where Clearview can scrape the deepest corners of the web to gather individuals' data with no mechanisms in place for individuals to stop it.[159] This illustrates the frustrating trend mentioned above of tech companies benevolently suggesting individuals are responsible for fixing the systemic problems that the companies create.[160] Here, tech companies are careless with data; thus, it becomes scrapable and ends up in the hands of an unregulated start-up that can use and sell individuals' data without their knowledge.[161] As mentioned in the GAO reports, this web scrapping by companies allows for data to be used beyond what customers consented to or without their full knowledge of the potential downstream uses.[162] The self-help advice is therefore reductive and ultimately punishing to individuals. Therefore, the solution must be one that works towards protecting individual consumers and incentivizing businesses to be responsible with user data and disclosures.

---

153. Press Release, Federal Trade Commission, Biometric Information and Section 5 of the Federal Trade Commission Act 1-3 (May 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-warns-about-misuses-biometric-information-harm-consumers [https://perma.cc/T74M-B7BR].

154. Alan McQuinn, *The Economics of "Opt-Out" Versus "Opt-In" Privacy Rules*, INFO. TECH & INNOVATION FOUND. (Oct. 6, 2017), https://itif.org/publications/2017/10/06/economics-opt-out-versus-opt-in-privacy-rules/ [https://perma.cc/S7RK-T5WQ].

155. Hill, s*upra* note 115.

156. Buchanan and Miller, *supra* note 42, at 13-14.

157. *Id.*; Hill, *supra* note 115.

158. Buchanan and Miller, *supra* note 42, at 29-31.

159. *Id.*

160. *See supra* text accompanying notes 149-152.

161. Hill, s*upra* note 115.

162. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72, at 15.

C. *Proposed Domestic and International Action*

Regardless of whether the right to privacy of one's facial biometric data is a bone fide human right or merely at Stage One of *becoming* a human right, both require the same solution: a framework of domestic legislation and executive action, in tandem with international agreements.

Domestically, the federal government should conduct research into FRT and its current commercial uses through executive agencies and the legislature. The executive branch should issue an executive order aimed at research and development of FRT that provides a mandate to executive agencies like GAO, FTC, and NIST to investigate and report on the state of FRT, existing business practices that utilize FRT, and consumer privacy risks. These reports should be treated like an iterative process, adjusting in scope and focus as the technology develops. The most important domestic action that needs to be taken is the passing of federal regulations around FRT. Such action should be informed by the above executive agency reporting, regular congressional hearings on developing technology, meetings with business leaders, and consultations with foreign governments who are also addressing the domestic threat of FRT. This legislation should use the relevant articles in the EU's GDPR on the right to privacy, the fundamental principles of the EU's AI Act, and Illinois's BIPA as scaffolding from which to build a federal regulatory scheme that creates clear guidelines for companies to ensure the safe collection, storage, and use of facial biometric data. Specifically, the legislation should include a private right of action similar to that in BIPA, which was the basis for the lawsuits against Clearview AI, to provide immediate remedies to individuals whose rights have been violated. The language of the legislation should also be sufficiently malleable to account for future developments in the technology and to allow for rapid response to technologies. The flat-footed response of the government to ChatGPT should serve as a sufficient incentive for such flexibility. Finally, the executive branch should explore creating a committee focused on AI ethics, partnering with private technology companies and technology ethicists to address the future of FRT and the proper handling of user data.

In tandem with the domestic framework, there should be an international effort, led by the EU and U.S., to further break down the silos of business and human rights. International change takes time, and so much of international cooperation is dependent on creating proper economic incentives for governments and transnational corporations. The optimal way of working towards the goal of international cooperation and the protection of this right is to utilize existing international law principles that can be applied to FRT to empower domestic governments, regional organizations, and global bodies to respond efficiently to violations of rights.

The best option to facilitate international cooperation is by applying the Ruggie Principles to AI and FRT, clearly defining the role of corporations in the protection of human rights. A notable aspect of these Principles that lends well to the nature of FRT is that the Ruggie Principles "reflect international

law obligations but propose no new ones."[163] The Ruggie Principles merely state commonly accepted ideas in a way that creates a coherent framework and ensures uniform applications. Similarly, recognizing the right to privacy of one's facial biometric data as a human right does not propose an entirely new human right but instead the extension of an existing framework (the right to privacy) to this new area of technology.

The three Guiding Principles (GPs) also provide an immediately applicable framework, which nations can use to address FRT. The first GP clearly explains the State's obligation "to respect, protect and fulfill human rights and fundamental freedoms," a concept common to many human rights treaties and conventions.[164] In application here, this GP would create a baseline understanding of the State's role in addressing FRT and protecting its citizens' rights to privacy. The second GP recognizes the special function business enterprises play in respecting and protecting human rights.[165] So many of the uses of FRT that could violate individuals' rights to privacy would be facilitated, knowingly or otherwise, by private businesses. Therefore, creating this positive obligation of business enterprises to respect and protect human rights would create a sizable incentive for companies to act with care when handling individuals' data and provide proper disclosures. These actions would be further incentivized by the third GP, which creates a need for the obligations stated in GPs one and two to be matched with an adequate remedy.[166] Not only would this language of an "adequate remedy" allow for changes to be made commensurate with the developing technology, but it would also give redress to individuals whose rights had been violated.[167]

The application of the Ruggie Principles would create a solid foundation upon which nations can build multilateral agreements regarding the regulation of FRT. As previously stated, technology does not respect international boundaries. In order to enact a robust system of regulation to protect individuals, there must be international cooperation regarding fundamental rights.

Any discussion of technology regulation, however, must mention the substantial barriers to its mere passage in the U.S. The 26 words of Section 230 of the Communications Decency Act of 1996 still heavily influence the fundamental business of massive technology companies like X (formerly "Twitter") and Google, as demonstrated in two Supreme Court cases heard in 2023 interpreting the Section.[168] A convenient argument is that the Principles, while influential and widely respected, were introduced twelve years ago and have not resulted in any major changes. However, such arguments of

---

163. John Ruggie, *A UN Business and Human Rights Treaty? An Issues Brief by John G. Ruggie*, HARVARD KENNEDY SCH. OF GOV'T (Jan. 28, 2014), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/UNBusinessandHumanRightsTreaty.pdf [https://perma.cc/7HE6-U7N2].

164. U.N. Human Rights Council, *supra* note 132.

165. *Id.*

166. *Id.*

167. *Id.*

168. 47 U.S.C. § 230; *see generally* Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023); Gonzalez v. Google LLC, 143 S. Ct. 1191 (2023).

convenience do not recognize the importance of incremental change. International and domestic regulatory frameworks change over time to respond to developing technologies, and there are ample reasons to believe such changes are taking place now. In 2014, three years after debuting the Principles, John Ruggie penned a brief on a potential future business and human rights treaty.[169] In it, he explores the complexities involved in creating such a treaty, ending with the same refrain as that of the Principles: that this is "the end of the beginning."[170]

Since then, lawmakers have pushed forward. In February 2021, the U.N. Human Rights Council Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Working Group) published the third revised draft of a business and human rights treaty.[171] In January 2023, Congressman Ted Lieu called for a federal agency dedicated to AI regulation.[172] Sam Altman, CEO of OpenAI and advocate for AI regulation, recently suggested lawmakers should have insight into the products and capabilities AI companies are building.[173]

While the problem of unregulated AI and FRT persists, commonly held beliefs have changed. John Ruggie wrote the Principles and his follow-up treaty brief with a look to a future that was ready to accept a business and human rights treaty. It seems that time has come.

IV. CONCLUSION

Human rights concerns are no longer in a silo to be observed as a tragic but noble cause; they are a quickly growing concern in nearly all areas of law. Most lawyers must, in some way, become human rights lawyers, and good human rights lawyers are good historians. They understand that the benefits of technological development are not shared equally and, without proper action, may result in crises of human rights. The development of AI, and specifically facial recognition technology, is the perfect embodiment of this principle.

FRT, through scanning faces without consent and collecting facial biometric data, upends a deeply held notion of humanity. Moral arguments aside, it poses significant legal concerns. Given the violation to privacy posed,

169. Ruggie, *supra* note 163.

170. *Id.* at 5.

171. U.N. Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/49/65/Add.1 (Aug. 17, 2021), [https://perma.cc/F8J2-BRAL] (published on U.N. Digital Library Feb. 28. 2022 [https://perma.cc/JY3D-QQX7]).

172. Ted Lieu, *I'm a Congressman Who Codes. A.I. Freaks Me Out*, N.Y. TIMES (Jan. 23, 2023), https://www.nytimes.com/2023/01/23/opinion/ted-lieu-ai-chatgpt-congress.html [https://perma.cc/8HFC-GWA3].

173. On With Kara Swisher, *Sam Altman on What Makes Him 'Super Nervous' About AI*, N.Y. MAG. (Mar. 23, 2023), https://nymag.com/intelligencer/2023/03/on-with-kara-swisher-sam-altman-on-the-ai-revolution.html [https://perma.cc/PB92-3SB6] (Transcript of podcast).

the right to one's facial biometric data should be considered a human right. Indeed, there are several indicators supporting the conclusion that the right to one's facial biometric data is squarely within Stage One of the Progressive Theory and there is a significant possibility of a major human rights crisis in this area, large enough to spur international response out of a sense of loss and regret. In either scenario, the threat posed to individuals creates an imperative for a coordinated domestic and international response.

Burying the Black Box: AI Image Generation Platforms as Artists' Tools in the Age of *Google v. Oracle*

David Silverman*

TABLE OF CONTENTS

* J.D., May 2024, The George Washington University Law School; B.A., May 2019, Linguistics, The George Washington University. Thank you to the Editorial Board of the FCLJ and Professor Tawanna Lee for supporting this Note's development. I would also like to extend my personal gratitude to Stacey Cheney, Senior Attorney Advisor at the National Telecommunications and Information Administration, whose guidance and mentorship sparked both the idea for this Note and my interest in Communications Law.

I. INTRODUCTION

When the Colorado State Fair's fine arts competition opened for entries, fantasy games designer Jason Allen submitted into the "digitally manipulated photography" category a piece he called "Théâtre D'opéra Spatial."[1] It was a rousing piece, to say the least, with a bold command of light, contrast, color, and detail, depicting a lavish futuristic pseudo-Victorian ballroom wherein figures dressed in finery observed a gaping portal to another fantastical world as if at a show.[2] It handily won first prize.[3] The crowd, however, was startled to learn that the art was largely the product of an artificial intelligence (AI) art generation platform called Midjourney, which Allen used to create the piece.[4] Allen attests that he spent many hours inputting the textual prompts that ultimately rendered the award-winning piece, claiming that his work was no less valid than anyone else's.[5] In response to his critics, Allen defied, "You said AI would never be as good as you, that AI would never do the work you do, and I said 'Oh really? How about this? I won.'"[6] Allen continued forebodingly, "[Artificial Intelligence Art Generating Tools are] here now. Recognize it. Stop denying the reality. AI isn't going away."[7]

Figure 1: Jason Allen's Award-Winning AI-Generated Image, "Théâtre D'opéra Spatial"

1. Drew Harwell, *He Used AI to Win a Fine-Arts Competition. Was it Cheating?*, WASH. POST (Sept. 2, 2022), https://www.washingtonpost.com/technology/2022/09/02/midjourney-artificial-intelligence-state-fair-colorado/ [https://perma.cc/F2JD-7HTE].
2. *Id.*
3. *Id.*; Kevin Roose, *An A.I.-Generated Picture Won an Art Prize. Artists Aren't Happy*, N.Y. TIMES (Sept. 2, 2022), https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html [https://perma.cc/82UJ-GTDW].
4. *Id.*
5. *Id.*
6. Harwell, *supra* note 1.
7. *Id.*

As AI art generation platforms become increasingly prolific, the truth of Allen's defiant warning rings louder and louder.[8] But what exactly are AI art generation platforms? Generally speaking, AI art generation platforms are machines that receive user input in the form of written text and produce images that match the user input.[9] For example, you could input text prompts such as "an oil painting of a corgi wearing a party hat," and the platform would generate one or several images to those specifications.[10] The internal mechanisms represent a black box, where the AI's method of processing data is so dynamic and complicated that it is presently impossible to model manually.[11] With the Internet offering millions of points of data as the bot's database from which to pull information, trouble necessarily arises when the AI creates an image that clearly violates existing copyright, doing so either at the behest of the user or by maligned happenstance.[12]

Recently, the Supreme Court held in *Google v. Oracle* that the creator of a software was protected from a copyright infringement claim by the doctrine of fair use (fair use) where the allegedly infringing code was copied directly from copyrighted code.[13] The Court relied on a qualitative and quantitative analysis, holding that Google did not infringe Oracle's copyright because the final product used only a small portion of the copyrighted code, the portion it used was small in proportion to the total volume of original code, and the purpose that the final product served was different from the purpose of the copyrighted code.[14] This case heralds important consequences in how to navigate the murky waters of AI-generated imagery.

This Note argues that because AI image-generation platforms treat the copyrighted works from which they gather information as data in a larger

---

8. Charlie Warzel, *Where Does Alex Jones Go From Here*, THE ATLANTIC (Aug. 9, 2022), https://newsletters.theatlantic.com/galaxy-brain/62f28a6bbcbd490021af2db4/where-does-alex-jones-go-from-here/ [https://perma.cc/4YLV-BUGW] (The article discusses the likely legal outcomes for Alex Jones during his pending litigation, but more importantly features a graphic of "Alex Jones inside an American Office under fluorescent lights" generated on the AI art generation platform Midjourney.); *see also* Press Release, Shutterstock, Shutterstock Partners with Open AI and Leads the Way to Bring AI-Generated Content to All (Oct. 25, 2022), https://www.shutterstock.com/press/20435?irclickid=39YTfO1jIxyNU8EUobwjwUDfUkDV7X2lQ1ECyw0&irgwc=1&utm_medium=Affiliate&utm_campaign=Skimbit%20Ltd.&utm_source=10078&utm_term=theverge.com [https://perma.cc/D67J-UX5R] (announcing that Shutterstock, the stock image company, would add a function wherein users could generate images using the AI image-generation platform DALL-E 2).

9. Tyler Lacoma, *How to Use Midjourney to Generate AI Images*, DIGITALTRENDS (Oct. 21, 2022), https://www.digitaltrends.com/computing/how-to-use-midjourney-to-generate-ai-images/ [https://perma.cc/6EZ9-L3CU].

10. Aditya Singh, *How Does Dall-E 2 Work*, MEDIUM (Apr. 27, 2022), https://medium.com/augmented-startups/how-does-dall-e-2-work-e6d492a2667f. [https://perma.cc/D54D-EUB3].

11. Harry Surden, *Machine Learning and the Law*, 89 WASH. L. REV. 87, 94 (2014).

12. MidjourneyBot (@Midjourneybot), Discord, https://media.discordapp.net/attachments/1012833258293182585/1069009887004213328/grid_0.webp?width=579&height=579 [https://perma.cc/Y9P7-JKJ3] (via private message, an AI-generated image responding to the prompt, "Mickey Mouse waving the Saudi Arabian flag").

13. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1204-05 (2021).

14. *Id.*

string of information, *Google v. Oracle* presents the best model for assessing whether the generated image is protected by fair use because the case provides a framework for analyzing code as a tool in the production of a creative work and is instructive on each of the fair use factors.

With the burgeoning technology and all its commercial implications just on the horizon, legal discussion, or more aptly litigation, seems unavoidable to determine the usage of such technology, particularly about how image generation platforms learn from copyrighted material or produce a final product that is otherwise very similar to copyrighted material. For example, a recent class action lawsuit was filed against Microsoft, GitHub, and OpenAI on behalf of programmers who submitted lines of code to the open-source database GitHub.[15] The complaint alleges that GitHub Copilot, an AI platform that uses the GitHub database to generate code in response to plain text user inputs, violated the copyrights of those who contributed code to the database by failing to attribute the code it produced to the code from which it learned, even when the two were substantially similar.[16] In a separate case, a complainant who works in developing and applying AI sued the Register of Copyrights and the Director of the United States Copyright Office after they denied a copyright application.[17] The complainant listed himself as the owner and listed the author of the work as an AI image-generating program of his own making.[18] The complainant echoes Allen's warning in his insistence that AI is "going to be profoundly economically and socially disruptive, as [AI programs] evolve from essentially academic pursuits to those having significant commercial value, including in the context of personalized music, journalism, and digital art."[19] In fact, the United States Copyright Office has recently shifted course to focus more heavily on issues arising from AI.[20]

This Note will first discuss the current status of copyright law as it pertains to AI, with a specific focus on fair use and how courts interpret whether an allegedly infringing work is "transformative" by way of "altering the original with new expression, meaning, or message."[21] Next, this Note will offer a brief introduction on the methodology employed by AI image-generating platforms when creating an image in response to a user prompt. This section will then discuss the difficulties in mapping exactly what data points, and in what proportions, the platforms use when creating an image,

15. James Vincent, *The Lawsuit that Could Rewrite the Rules of AI Copyright*, THE VERGE (Nov. 8, 2022), https://www.theverge.com/2022/11/8/23446821/microsoft-openai-github-copilot-class-action-lawsuit-ai-copyright-violation-training-data [https://perma.cc/9535-VXQ4].

16. Complaint and Demand for Jury Trial, J. Doe v. Github, Inc., No. 4:22-cv-06823-KAW, 2022 WL 16743590, at *2-3, 24 (N.D. Cal. Nov. 3, 2022).

17. Complaint, Thaler v. Perlmutter, No. 1:22-cv-01564, at *1-2 (D.D.C. 2022).

18. *Id.* at 2.

19. *Id.*

20. Riddhi Setty, *Copyright Office Sets Sights on Artificial Intelligence in 2023*, BLOOMBERG LAW (Dec. 29, 2022, 5:00 AM), https://news.bloomberglaw.com/ip-law/copyright-office-sets-sights-on-artificial-intelligence-in-2023 [https://perma.cc/4UCD-NU35].

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

also known as the "black box" problem. This section will also discuss different suggestions for viewing AI image-generation platforms as tools of the artists. Finally, this Note applies each of the fair use factors discussed in *Google v. Oracle* to AI image-generating platforms to demonstrate why the Court's analysis in the aforementioned case provides a pathway forward for cases surrounding fair use and AI-generated art.

With the rising popularity of various AI programs across different industries and markets,[22] the focus of this Note must necessarily be narrow. As such, this Note will not discuss fair use as it pertains to anything other than AI image-generation platforms. Moreover, this Note will not argue whether the user, programmer, or platform is fit for consideration as the primary author of a work fit for copyrightability, given the Copyright Office's stance on machine authorship.[23]

II. BACKGROUND

A. Copyright, Fair Use, and its Implications in Google

In general, Section 102 of the Copyright Act of 1976, codified as 17 U.S.C. § 102, sets the stage for applicable copyright law by establishing the broad categories of "original works of authorship fixed in any tangible medium . . . either directly or with the aid of a machine or device."[24] The phrase "original works of authorship" is vague by intent so as to incorporate the standard of originality "established by the courts under the present copyright statute."[25] The broad aspect of this language is specifically meant to mimic "the empowering language of the Constitution."[26] Critically, in the case of AI, the Copyright Office does not consider work generated by a non-

22. Serenity Gibbons, *2023 Business Predictions as AI and Automation Rise in Popularity*, FORBES (Feb. 2, 2023, 6:00 AM), https://www.forbes.com/sites/serenitygibbons/2023/02/02/2023-business-predictions-as-ai-and-automation-rise-in-popularity/?sh=4c7d6395744b [https://perma.cc/FNP4-E8CG]; *see also* OpenAI, *ChatGPT: Optimizing Language Models for Dialogue*, OPENAI (Nov. 30, 2022), https://openai.com/blog/chatgpt/ [https://perma.cc/69TX-C237] (describing the functionality of the popular AI chatbot, ChatGPT); Soundraw, *Frequently Asked Questions*, SOUNDRAW, https://soundraw.io/faq [https://perma.cc/2SPR-CVWQ] (an FAQ page describing an AI platform that uses user inputs to generate music).

23. Andres Guadamuz, *Artificial Intelligence and Copyright*, WIPO MAG. (Oct. 2017), https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html [https://perma.cc/G5U3-YMSZ] (discussing that the US Copyright Office does not recognize machines or computers as authors).

24. 17 U.S.C. § 102 (1976).

25. H.R. REP. No. 94-1476 at 51 (1976).

26. *Id.* (referencing CONST. art. I, § 8 cl. 8, "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries").

human to be copyrightable.[27] Other countries hold similar schema, with Spain and Germany holding that works created solely by machines are ineligible for copyright protections.[28] Spain goes further, eschewing fair use altogether, instead preferring a payment obligation scheme.[29]

A key aspect of authorship within the confines of Section 102 is the topic of creative or original authorship. Title 37 of the Code of Federal Regulations requires that "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."[30] Section (b) of the same rule qualifies that "[a] claim to copyright cannot be registered in a print or label consisting solely of trademark subject matter and lacking copyrightable matter."[31] The Supreme Court referenced this requirement for creative authorship in determining that a telephone company and telephone book producer lacked a copyright over the content of its white pages as it was merely a compilation of names, towns, and telephone numbers, which lacked an essential aspect of creative authorship that turns otherwise publicly accessible information into a "copyrightable expression."[32] The manual for Copyright Office practices expands on the concept, adding that the work must be "the author's tangible expression of his [or her] ideas," paired with the conveyance of that expression in a tangible medium.[33] Expressions that convey a sense of message or meaning either in a definite sense, as might be the case with a sculpture of the human form, or more abstractly, through color or "modernistic form," are copyrightable.[34] Such original authorship may manifest in content but also in form, such as "the linear contours of drawing,

27. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906 (3d ed. 2021) ("Works that have not been created by a human being . . . do not satisfy the requirement [for authorship]"); Riddhi Setty & Isaiah Poritz, *'Wild West' of Generative AI Poses Novel Copyright Questions*, BLOOMBERG LAW (Nov. 18, 2022), https://news.bloomberglaw.com/class-action/wild-west-of-generative-ai-raises-novel-copyright-questions?utm_source=rss&utm_medium=CLNW&utm_campaign=00000183-f0b0-dfbc-a5db-f3f82d760001 [https://perma.cc/3JMA-988F] (detailing how an artist became the "first person to register a copyright for an artificial intelligence-assisted work," with the US Copyright Office, however, upon realizing that the art had been created by an AI as opposed to the author himself, the Copyright Office informed him that it intended to revoke the Copyright, citing the necessity for a human author).

28. Guadamuz, *supra* note 23.

29. Iban Lopez et al., *Copyright Litigation in Spain: Overview*, THOMSON REUTERS (Dec. 1, 2018), https://uk.practicallaw.thomsonreuters.com/w-011-1027?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:text=To%20avoid%20being%20found%20guilty,does%20not%20exist%20in%20Spain [https://perma.cc/F66Q-6GZN]

30. 37 C.F.R. § 202.10 (1981).

31. *Id.*

32. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 341 (1991). Note that the Court also points out that while the work must possess "at least some minimal degree of creativity." *Id.* at 345. The requisite level of creativity is extremely low; even a slight amount will suffice. *Id*.

33. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 905 (3d ed. 2021) (quoting Mazer v. Stein, 347 U.S. 201, 214 (1954)).

34. *Id.*

the design and brush strokes of a painting, the diverse fragments of a collage…among other forms of pictorial or graphic expression."[35]

Section 103 of Title 17 of the United States Code describes the nature of copyright protections for derivative works, extending protections "only to the material contributed by the author of such work."[36] Congress elaborated that "[a] 'derivative work' on the other hand, requires a process of recasting, transforming, or adapting 'one or more preexisting works:' the 'preexisting work' must come within the general subject matter of copyright set forth in Section 102, regardless of whether it is or ever was copyrighted."[37] The Copyright Office considers copyrightable authorship in derivative works to stem from a subsequent author having "contributed a sufficient amount of new authorship to create an original work of authorship."[38]

1. The Key Factors of the Fair Use Doctrine

Section 107 of Title 17 describes the affirmative defense of fair use and lays out the four key factors of the doctrine.[39] They are:

> [1] The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> [2] The nature of the copyrighted work;
>
> [3] The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> [4] The effect of the use upon the potential market for or value of the copyrighted work.[40]

The most illustrative example of application of each of these factors is *Campbell v. Acuff-Rose*, wherein the Supreme Court explored fair use as it applied to a parody.[41] In that case, the Court held that the "purpose and character of use" factor was a key mechanism for determining whether the new work transforms the first "with a further purpose or different character, altering the first with new expression, meaning, or message."[42]

The "nature of the copyrighted work" factor oftentimes requires little analysis as it mainly applies within the context of delineating between

---

35. *Id.*
36. 17 U.S.C. § 103(a) (1976).
37. H.R. REP. No. 94-1476 at 54.
38. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 907 (3d ed. 2021).
39. 17 U.S.C. § 107 (1976).
40. *Id.*
41. Rachel Morgan, *Conventional Protections for Commercial Fan Art Under the U.S. Copyright Act*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 514, 531 (2020).
42. *Campbell*, 510 U.S. at 577, 579.

fictitious and factual works.[43] With regard to the analysis of AI-generated imagery, it is of little value.

The third factor, regarding the amount and substantiality of the copyrighted work used by the final product, asks whether "the quantity and value of the materials used . . . are reasonable in relation to the purpose of the copying."[44] This factor bears a significant amount of weight both in the breakdown of *Google v. Oracle* and in the analysis of AI-generated art. Critically, while this factor takes into account the sheer volume of copyrighted material functionalized by the work in question, it also takes into account the import of the copyrighted material to its overall use.[45] For instance, in *Harper & Row, Publishers v. Nation Enterprises*, the defendant had taken only some 300 words from the memoir of President Ford for use in an ultimately premature publication, yet the 300 words that they used represented the "heart" of the otherwise copyrighted work.[46] Because the defendant touched on an aspect of the copyrighted work that was central to its overall use and purpose, The Court, in rejecting the application of fair use, implicitly indicating that the weight assigned to each factor varies on a case-by-case basis according to both the content of the original work and the new work in which the original appears.[47]

Finally, the fourth factor regarding "the effect of the use upon the potential market for or value of the copyrighted work"[48] requires consideration as to whether the creation or existence of the new work "would result in a substantially adverse impact on the potential market for the original."[49] *Sony Corporation v. Universal City Studios* exemplifies such a non-infringing use by way of market impact created by the new work.[50] In that case, the Court held that there were a myriad of non-infringing uses for a Betamax VCR set, and therefore, the limited opportunity by which the devices could infringe on copyrighted materials was not unreasonable.[51]

2. *Google v. Oracle* Expands Application of Fair Use Doctrine on Technology

In *Google v. Oracle*, the Supreme Court decided whether Google's code was protected by fair use, where it used a small percent of open-source code owned by Oracle. In summary, in the development of software for its new Android cellphones, Google engineers, who had historically used the Java programming language, developed a new platform after negotiations between Google and Oracle's predecessor failed, whereby Google failed to

43. Morgan, *supra* note 41, at 532.
44. *Campbell*, 510 U.S. at 586 (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C. C.D. Mass. 1841)) (internal quotations omitted).
45. *Id*. at 587.
46 Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 565 (1985).
47. *Id*.
48. 17 U.S.C. § 107.
49. *Campbell*, 510 U.S. at 590 (internal quotations omitted).
50. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).
51. *Id*. at 444.

obtain a license to use Sun Java application programming interface (API) in its programming.[52] In Google's platform, the software engineers copied roughly 11,500 lines of code from the Java SE program as part of a tool called an API. An API "allow[s] programmers to use . . . prewritten code to build certain functions into their own programs rather than write their own code to perform those functions from scratch."[53] Oracle, who came to own the lines of code that the Google engineers had copied, sued Google, alleging that its Android Platform's use of the Sun Java API violated Oracle's copyright.

In its analysis of Google's fair use defense, the Court considered the Android Platform's use of Sun Java API under the four factors set forth by 17 U.S.C. § 107.[54] First, it investigated the nature of the copyrighted work. Without delving into the specifics of computer programming, Sun Java API represents a single aspect of the overall code, a tool that allows a significant portion of uncopied code to perform intricate tasks unrelated to the API itself and which require immense creativity on the part of the programmers.[55] Recalling *Campbell*, the Court emphasized that some creations are "closer to the core of [copyright] than others,"[56] counting the script as far enough from the core of the work to merit a fair use defense.[57]

Second, with regard to the purpose and character of the use, the Court once again applied its analysis from *Campbell*, finding that even when a work is copied verbatim, if it falls within the scope of a broader final product, the final product is transformative on the original work by adding something new or otherwise changing the message of the original work.[58] The Court proffered an example where verbatim copying would be protected by fair use by suggesting that an artistic work could directly copy a copyrighted logo as part of a broader work about consumerism.[59] In *Google*, the Court found that the Android platform served an entirely different purpose than the API.[60]

Third, in reference to the amount of the copyrighted material used, the Court noted that while at face value it would seem that 11,500 lines of copied code is substantial, it represents only 0.4% of the total set of Java API computer code.[61] Even a small portion of copyrighted material may defeat fair use where the material is the heart of the original's work, per *Harper & Row*. Here, the lines Google used were not the heart of Sun Java but a single functional aspect that Google used to allow programmers to continue to build on their own creative endeavors in such a way that programmers did not need to learn a new programming language.[62] While a small portion of a copyrighted material that is the "heart" of the original work may defeat a fair

52. *Google*, 141 S. Ct. at 1190-91.
53. *Id.* at 1191 (quoting Oracle Am., Inc. v. Google, Inc., 750 F.3d 1339, 1349 (Fed. Cir. 2014)).
54. *Id.* at 1201.
55. *Id*. at 1202.
56. *Id.* (quoting *Campbell*, 510 U.S. at 586).
57. *Id.*
58. *Google*, 141 S. Ct. at 1202-03.
59. *Id.* at 1203 (quoting 4 M. Nimmer & D. Nimmer, Copyright § 13.05[A][1][b]).
60. *Id.* at 1202, 1204.
61. *Id.* at 1205.
62. *Id.* at 1205-06

use defense, Google did not use the lines that were the "heart" of the Sun Java API.[63] Rather, Google programmers used lines from the API to continue their own creative endeavors without the need to learn an entirely new programming language.[64]

Finally, the Court delved into the market effects that would likely result from the widespread acceptance of the Android platform.[65] The Supreme Court found that not only would the public benefit from Android's product[66] but also that the Java product and the Android product served two different functions, so there was no risk to Oracle that the Android platform would supersede or replace the Java APIs it used.[67]

3. Transformative Use and its Role in the Fair Use Analysis

Campbell introduced the idea that the courts can consider whether the work is transformative, which calls for a case-by-case analysis to determine whether the new work provides a new meaning or message to the original such that the communicative effect of the new piece is noticeably different from the communicative effect of the old.[68] Courts may consider whether both the new and old works serve a commercial purpose, with the transformation from an original commercial use to a noncommercial use representing a particularly weighty factor in favor of fair use.[69] While transformative use is not necessary for a finding of fair use,[70] the more transformative the new work, "the less [it] will be the significance of the other factors, like commercialism, [which] may weigh against the finding of fair use."[71]

Since that ruling, several other cases have made use of the transformative use standard, illustrating how widely it can be interpreted, particularly in the realm of fan art and parody.[72]

In *Suntrust v. Houghton,* the Eleventh Circuit held that a parodical adaptation of *Gone with the Wind* was protected by fair use where it borrowed a measure of identical characters, lines of dialogue, and themes from the original because it ultimately made use of those identical elements to highlight a new story, namely the perspective of the black characters from the original, which ultimately framed a meta-critique of the original work and the whitewashed genre overall.[73] In doing so, the court found that the new work's use of the original work was transformative.

---

63. *Id*. at 1205.
64. *Google*, 141 S. Ct. at 1205-06.
65. *Id.* at 1206.
66. *See id.* at 1206, 1208.
67. *Id*. at 1207.
68. *Campbell*, 410 U.S. at 569.
69. *Id*. at 569, 577.
70. *Id*. at 579 (citing *Sony*, 464 U.S at 455).
71. *Id.*
72. Morgan, *supra* note 41, at 534-35.
73. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269 (11th Cir. 2001).

Conversely, in *Warner Bros. v. RDR Books*, the District Court for the Southern District of New York held that a fan-created encyclopedia of J.K. Rowling's literary universe was not protected by fair use.[74] Even though the existence of an encyclopedia embellishes the magical aspect of the literary universe, the transformative use of the information within is lessened because the encyclopedia copied verbatim text from the copyrighted source.[75] Critically, the copying was "in excess" without the requisite addition of some aspect that altered or enhanced the meaning of the original copied work.[76]

In *Authors Guild v. Google,* the Supreme Court held that Google's digital copying of entire books (and subsequent public display of small portions of those books) in a search engine for digital books was fair use of the copyrighted material because the search engine's purpose was distinctly transformative of the initial written work because it "communicat[ed] something new and different from the original or expand[ed] its utility, thus serving the copyright's overall objective of contributing to public knowledge."[77]

Finally, *Google v. Oracle* also describes transformative use in its analysis of purpose and character of the use.[78] In that case, the Court compared the two products in terms of the roles they fulfilled, not just in the market but at face value.[79] They observed that the role Java API played within the overall Android platform was limited and that the brunt of Google's creative input was in what the Java API helped the code accomplish and was not itself the accomplishment.[80] For this reason, the Court held that Google's use of Java API was transformative in nature and therefore weighed in favor of fair use.[81] These cases, taken together, provide a useful lens through which to view fair use as it applies to AI when combined with a substantive understanding of the inner workings of such mechanisms.

B. Artificial Intelligence Image Generation Platforms

AI Image Generation Platforms are programs that receive data in the form of user-inputted text describing an image and that use that data in conjunction with a process called machine learning[82] to generate an image to the specifications of the text.[83] This aspect of machine learning is meant to, in

74. Warner Bros. Ent. v. RDR Books, 575 F. Supp. 2d 513, 544 (S.D.N.Y. 2008).
75. *Id.*
76. *Id.*
77. Authors Guild v. Google, Inc., 804 F.3d 202, 214 (2d Cir. 2015).
78. *Google*, 141 S. Ct. at 1218-19.
79. *Id.* at 1206-07
80. *Id.* at 1203.
81. *Id*. at 1204.
82. Zack Naqvi, *Artificial Intelligence, Copyright, and Copyright Infringement*, 24 MARQ. INTELL. PROP. L. REV. 1, 18 (2020).
83. *See generally* Singh, *supra* note 10 ("[A] text encoder takes the text prompt and generates text embeddings. These text embeddings serve as the input for a model called the prior, which generates the corresponding image embeddings. Finally, an image decoder model generates an actual image from the embeddings.").

some regards, simulate the biological learning process.[84] While robust in the methods an AI may take to complete a task, AI lacks free will in the philosophical sense because it is bound by the task for which it was designed, vis-à-vis the inherent limitations of its programming.[85]

1. User Experience on Image-Generation Platforms

The user-facing aspects of these programs are similar in nature, so this section discusses the process for image generation through the unpaid non-subscription model on the platform Midjourney as generally representative of the overall user experience. Midjourney operates over the messaging app Discord, wherein users interact with the AI by sending it messages containing specific keywords to which it responds.[86] When a user has an idea for an image they would like to generate, they type "/imagine" into the chat, which opens up a specialized textbox where users can enter the specific parameters of their request. Requests can range from highly detailed, like "Dionysus, portrait, grapevine crown, vineyard, red palette, surrealistic (*sic*) art," to sparse, such as "loneliness."[87]

84. Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap*, 51 U.C.D. L. REV. 399, 404 (2017).

85. Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*, 57 IDEA: J. FRANKLIN PIERCE CTR. FOR INTELL. PROP. 431, 434 (2017).

86. *Quick Start Guide*, MIDJOURNEY DOCUMENTATION, https://docs.midjourney.com/docs/quick-start [https://perma.cc/EJ5S-NWJ9].

87 *See e.g.* MidjourneyBot (@Midjourneybot), Discord, https://media.discordapp.net/attachments/1012833258293182585/1161682127482540172/brynnprimrose_lonliness_3686f902-fa3b-438d-95d9-e5d92f532892.png?ex=65392fca&is=6526baca&hm=191db227c75f9f2fdb0cb50139983635825e5c084dc928cda45a4b9f9d5e646d&=&width=581&height=581 [https://perma.cc/87EZ-PV4Q] (via private message, an AI-generated image responding to the prompt, "loneliness").

Figure 2: AI-Generated Image Responding to the Prompt: "Loneliness"

The bot allows users to make specifications through use of additional commands, including altering the aspect ratio or changing the relative importance of each prompt.[88] When the user sends the prompt information as a Discord message, the bot processes the request and responds to the message with four variant images of its interpretation of the user's prompt.[89] The user is provided the opportunity to select an image and prompt the bot to return four more variations using that image as a basis.[90] Additionally, the user can opt to upscale the image, increasing its resolution and overall clarity.[91] Unless the user opts out, the images for each generation are posted publicly on a Discord message board for other users to see.[92] Platforms like Midjourney and DALL-E 2 provide salient examples of platforms to which the fair use analysis that this Note proffers applies.

88. Lacoma, *supra* note 9; *Invite the Bot to Your Server*, MIDJOURNEY (2022) https://docs.midjourney.com/docs/invite-the-bot [https://perma.cc/2FFD-2LMW]**.**

89. Lacoma, *supra* note 9.

90. *Id.*

91. *Id.*

92. *User Manual*, MIDJOURNEY DOCUMENTATION, (2022), https://midjourney.gitbook.io/docs/user-manual [https://perma.cc/4B3G-3QA8].

2. Inner Workings of Image-Generation Platforms

The inner workings of the AI are slightly more nebulous than the user experience, and not much documentation exists on the subject. As such, this section explores the inner workings of the image generation platform DALL-E 2 at a very basic level. Broadly speaking, the process occurs in three steps.

First, when the bot receives a text prompt, it sends the text data to a neural network model called Contrastive Language-Image Pre-training (CLIP), which makes connections to the textual description of an object and the visual images to which the text corresponds.[93] For example, when given the prompt, "a corgi in a party hat," DALL-E 2 will search through hundreds of millions of images with associated captions until it finds those that have a strong recurring association with the words "corgi" and "party hat."[94] CLIP then selects the images that match the textual prompt and discards those that do not, generating both encoded text information and encoded image information for what data to use when learning how to construct the prompt.[95] CLIP, in this way, creates its own dataset, which accounts for both "features of images and features of language."[96] That dataset is ultimately what CLIP uses to, in effect, teach itself the relative semantic relations between natural language and a visual concept.[97]

Next, even though CLIP generates image information, DALL-E 2 features a separate image encoder using a diffusion model, called a prior, to learn how to transform computerized information into an image.[98] It does this by taking an image and incrementally adding noise, or disorganization, to it until it is unrecognizable, then reconstructing it to learn how to turn disorder into an organized image, and can apply that process to other datasets of random noise.[99] This process is not dissimilar to taking a solved Rubik's Cube, disorganizing it randomly, and re-solving it to learn how to solve other random Rubik's Cubes.[100] Rather than simply using the CLIP-generated image embeddings, the prior allows DALL-E 2 to integrate multiple prompts into one image.[101]

---

93. AssemblyAI, *How Does Dall-E 2 Actually Work*, YOUTUBE (Apr. 15, 2022), https://www.youtube.com/watch?v=F1X4fHzF4mQ&t=375s [https://perma.cc/HWH7-TNMG].

94. Ryan O'Connor, *How Dall-E 2 Actually Works*, ASSEMBLYAI (Apr. 19, 2022), https://www.assemblyai.com/blog/how-dall-e-2-actually-works/ [https://perma.cc/XB38-G7YN].

95. AssemblyAI, *supra* note 93.

96. Daniel Fein, *Dall-E 2.0, Explained*, TOWARDS DATA SCIENCE (May 16, 2022), https://towardsdatascience.com/dall-e-2-0-explained-7b928f3adce7 [https://perma.cc/BAQ8-XDJ3]

97. O'Connor, *supra* note 94 (explaining that where there are many images and captions on a given subject, for instance a baboon, CLIP can accurately produce image data resulting from the textual input, "baboon." Where CLIP lacks data on a subject, it can often produce erroneous results, like producing an image of a howling monkey when given the textual prompt, "howler monkey").

98. Singh, *supra* note 10.

99. *Id*.

100. Fein, *supra* note 96.

101. AssemblyAI, *supra* note 93.

Finally, now that the prior has taught DALL-E 2 how to unscramble noise into an image that relates to the textual input, the AI can now generate the final image. To do this, DALL-E 2 employs a decoder called Guided Language to Image Diffusion for Generation and Editing (GLIDE) to generate the final image. GLIDE is a modified diffusion model, like the prior, but is unique because, rather than using the visual information to "unscramble the Rubik's cube," GLIDE can also use textual information gathered from CLIP.[102] During the unscrambling process, GLIDE can reapply the text encodings from CLIP while creating an image.[103] This means that, if the text input was "a man with blonde hair," based on the word "man," the prior would teach DALL-E 2 to consistently unscramble static into an image of a man.[104] GLIDE allows the reentry of textual input like "blonde hair" during the image generation process.[105] Note that with diffusion models, because they generate images based on pure "randomly sampled Gaussian noise" (like static), they cannot generate the same image twice because the data they are unscrambling is always different.[106]

Once GLIDE produces a 64x64 pixel image, DALL-E 2 sends the picture through a process called "upscaling," which increases the definition and resolution of the final image,[107] though this aspect is less critical to the copyright analysis of this Note.

3. The Black Box Problem in AI

In the context of computing, data recording, and engineering, a black box is a method or device that receives an input and applies a process to it to produce an output without revealing exactly how that process was applied.[108] Though the process is something the engineer may program, the engineer does not know exactly how it was applied to the input.[109] In this way, a black box operates a bit like a game of Plinko, where the input is the ball as it is dropped into the top of the board. The process includes features like the pegs on which the ball bounces and the gravity which propels the ball downwards onto the pegs. The output is the value of the terminal slot in which the ball lands,[110] with the caveat that the arrangement of pegs is hidden from the viewer such that they cannot chart the path of the ball. Although the setup of the pegs does not change, nor do the constants of gravity, the same input, when subjected to

102. Singh, *supra* note 10.
103. O'Connor, *supra* note 94.
104. *Id.*
105. *Id*.
106. Singh, *supra* note 10.
107. AssemblyAI, *supra* note 93.
108. Will Kenton, *What is a Black Box Model*, INVESTOPEDIA (Mar. 6, 2022), https://www.investopedia.com/terms/b/blackbox.asp [https://perma.cc/JM5X-PTAS].
109. *Id.*
110. Ethan Siegel, *How the Game of 'Plinko' Perfectly Illustrates Chaos Theory*, FORBES (Nov. 11, 2020), https://www.forbes.com/sites/startswithabang/2020/11/11/how-the-game-of-plinko-perfectly-illustrates-chaos-theory/?sh=50281fe41a09 [https://perma.cc/T329-LCUB].

those processes, yields different results while holding secret the path the ball took to reach those results.

In the context of AI, the method for processing user input includes an algorithm that intakes millions of data points from a given database, learns correlation about that data, and applies those correlations in an output.[111] Such data correlation often takes the form of decision trees, which are a set of rules[112] that outline the various choices the AI will make to a given string of data to lead to different answers.[113] A neural network, commonly the vehicle for the learning process AI utilizes in generating outputs, requires making computational decisions on millions, if not billions, of numbers.[114] The end result is a system that is too complex for the current mapping capabilities of computer science technology.[115] In this way, an AI functions like a series of interconnected nodes that tend to act when enacted upon by other nodes.[116] When a node receives data, it enacts a calculation in comparison with a threshold value.[117] Whether or not that calculation surpasses that threshold value determines the next node to which that data travels.[118] In essence, a neural network operates as innumerable sets of aforementioned Plinko sets, with the result of one game dropping the ball directly into the next. With millions of different permutations between nodes, it becomes functionally impossible for researchers to determine exactly which nodes fired to produce an output. That is a black box.

Within the context of AI Image Generation Platforms, a neural network learns how to interpret various aspects of an image by using nodes to track specific qualities such as color, brightness, and other such differences between adjacent pixels.[119] The machine then scours through its database of hundreds of thousands of examples, looking for statistical similarities in the trends it learned to establish the patterns and recreate an output.[120]

4. Conceptualization of AI as a Tool

As new technologies emerge to help artists in the pursuit of their artistic endeavors, copyright law adapts to accommodate.[121] The United States Code

111. Ivy Wigmore, *Black Box AI*, TECHTARGET (Aug. 2019), https://www.techtarget.com/whatis/definition/black-box-AI#:~:text=Black%20box%20AI%20is%20any,sense%2C%20is%20an%20impenetrable%20system [https://perma.cc/97JB-QA6T].

112. *See* Neil Savage, *Breaking Into the Black Box of Artificial Intelligence*, NATURE (Mar. 29, 2022), https://www.nature.com/articles/d41586-022-00858-1 [https://perma.cc/AE26-ZFSA].

113. *Id.*

114. *Id.*

115. *Id*.

116. *Id.*

117. Savage, *supra* note 112.

118. *Id.*

119. Naqvi, *supra* note 82, at 19.

120. *Id.*; Savage, *supra* note 112 (describing generally the process by which a neural network can learn to detect whether an image has a cat in it by first being fed images of cats).

121. *See* Naqvi, *supra* note 82, at 34; *See also* Hristov, *supra* note 85, at 433.

expressly permits the use of a machine or device in the creation of copyrightable works.[122] In fact, in 1884, long before the concept of AI had entered the boundaries of the Copyright Office's consideration, the courts were faced with the issue of how to contend with the introduction of a new form of creative expression: the photograph.[123] In *Burrow-Giles Lithographic Co. v. Sarony*, the Court held that a photograph of Oscar Wilde was eligible for copyright protection despite early protest that the author of the work merely operated a tool that ultimately produced the image because the picture was still emblematic of the author's (in this case photographer's) vision by way of selecting Mr. Wilde's pose, costume, setting, etc.[124] The key, therefore, lies in the extent to which the author exerts their own creative will over the end result.[125]

Today, artists seeking to create copyrightable works use cameras ubiquitously. Plenty of cameras in circulation today, such as that on the iPhone, rely heavily on computer processing and software that automatically captures, digitizes, and enhances a split-second moment of reality.[126] With both a digital camera and an AI art generation platform applying aspects of computer generation, the two mechanisms are comparable, especially if viewed as tools employed by an author to express an idea.[127]

In its present, nascent state, AI occupies a somewhat ambiguous stature in copyright law. Section 313.2 of the *Compendium of The U.S. Copyright Office Practices*, citing a report to the Librarian of Congress, states of works lacking human authorship (emphasis added):

> The Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically *without any creative input or intervention* from a human author. The crucial question is whether the work is basically one of human authorship, with the computer…merely being an assisting instrument, or whether the traditional elements of authorship in the work . . . were actually conceived and executed not by man but by machine.[128]

But in the context of AI, which operates both on user input and millions of points of data along a series of highly complex decision trees, what does

122. *See* 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

123. *See* Burrow-Giles Lithographic Co., v. Sarony, 111 U.S. 53, 53 (1884).

124. *See id.* at 59, 61.

125. *See id.* at 59.

126. APPLE INC., PHOTOS: PRIVATE, ON-DEVICE TECHNOLOGIES TO BROWSE AND EDIT PHOTOS AND VIDEOS ON IOS AND IPADOS, 12 (Sept. 2019).

127. Hristov, *supra* note 85, at 435-36.

128. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2021) (internal quotations omitted) (quoting U.S. COPYRIGHT OFFICE, REPORT TO THE LIBRARIAN OF CONGRESS BY THE REGISTER OF COPYRIGHTS, 5 (1966)).

the phrase "creative input or intervention" really mean? Details contained within Wikimedia Foundation's response to the United States Patent and Trademark Organization's Request for Comments is particularly illustrative on this point. It suggests that although the Copyright Office does not recognize works or aspects of works that are naturally occurring or randomly generated as copyrightable,[129] where a human author guides those processes along as part of a whole work, the authorship "is vested in the person who deliberately set the automated process in motion in a creative way, or who contributed human creativity by modifying or combining and arranging the results of natural or automated processes in a sufficiently creative way."[130]

Wikimedia's letter also describes a salient example of machine-assisted human creativity wherein a sculptor uses a 3D printer to print an object of their own design and inadvertently leaves the machine on too long, thereby altering the intended creation in such a way that the sculptor finds cohesive with and an improvement on the initial design.[131] In a separate example, where the sculptor simply turns the machine on with no model to print and simply allows the pliable plastic to form a pile, the pile lacks human authorship.[132] In the latter case, Wikimedia posits that already-established jurisprudence would exclude the pile of plastic under the ruling in *Feist Publications v. Rural Telephone Service*, where the Supreme Court held that there exists a threshold of originality and human-guided intention which controls copyrightability under the 1976 revisions to the Copyright Act.[133] While the Wikimedia article speaks to authorship as it pertains to copyrightability, its analysis is still germane to the defense of fair use insofar as it describes how a user can guide an image generation platform to create work that is transformative of whatever copyrighted material the AI uses in its black box calculations.

III. ANALYSIS

So, where does that leave AI image-generation platforms in terms of fair use? Fair use views art as an object of creativity, particularly as it subscribes to the underlying philosophy that art begets art, and authors need protections to take inspiration from the works that came before to produce what comes next. But AI, though in some ways mimicking the thought process of the human brain,[134] is at its core a program—lines of software that sit dormant unless acted upon by a human user. When given an input, an AI program carries out a series of instructions, passing information along a series

129. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 906.6-906.7 (3d ed. 2021), https://www.copyright.gov/comp3/chap900/ch900-visual-art.pdf. [https://perma.cc/8A27-QUPX].

130. Wikimedia Foundation, Comment Letter on Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation, 3 (Jan. 10, 2020), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.uspto.gov/sites/default/files/documents/Wikimedia-Foundation_RFC-84-FR-58141.pdf [https://perma.cc/S4C8-FGLZ].

131. *See id.* at 4.

132. *See id.*

133. *Feist*, 499 U.S. at 359-60.

134. Savage, *supra* note 112.

of decision trees, each of which directs and redirects the information, adding new instructions until it arrives at the terminus the end user requested.[135] In this way, the AI's treatment of information, be it user-inputted or derived from open-source material, is like the API's in *Google*, where the Court stressed the use of API as a tool for providing instructions.[136] Therefore, when it comes to assessing whether and to what extent the fair use doctrine applies to images created by an image generation platform that used copyrighted works as training data, the most germane basis for courts to apply is that of the outcome of *Google v. Oracle*.

In each factor of fair use, the Supreme Court's analysis in *Google* provides an instructive framework that courts can apply, particularly as the capabilities of computer scientists to crack the black box of AI improves.

A. The Court's Analysis of Purpose and Character of the Use in Google *as it Relates to AI*

The first two factors that 17 U.S.C. § 107 describes are (1) "[t]he purpose and character of the use" and (2) "the nature of the copyrighted work."[137] In applying *Google* to AI, these two factors may be considered together as they relate to whether an AI's use of copyrighted images is transformative. When determining whether a work is transformative, courts look to whether the new work has added something new or altered the standalone role of the original work. In *Google*, the Court found that the use of Oracle's API was transformative because the role it played in Google's overall code was similar to that of a tool that allowed Google engineers to enact their own creative expression on a final end-user product.[138] Had Google copied Oracle's code for the purpose of creating its own API that other software engineers would use in their own products, the Court may well have ruled differently.

AI image-generation platforms, similarly, use their database of images and text in the same way insofar as they functionalize the existing images only as points of data from which to generate something new. The most crucial aspect, in this regard, is the methodology by which the programs incorporate image data. Recall that there are three key steps to the way Image Generation Platforms like DALL-E 2 creates an image: (1) CLIP transforms text input into an encoded text and image information, (2) the diffusion model creates a prior and learns how to deconstruct and reconstruct the encoded text information from CLIP, and (3) GLIDE uses the diffusion data from the prior and applies it to the text information from CLIP to create a final image.

When a user enters a textual input into the program, the AI will access its database of millions of images and their co-occurring texts and metadata. It will then pass those points of data through its series of nodes to find commonalities like common colors, brightness differences between pixels,

135. *Id.*
136. *Google*, 141 S. Ct. at 1191-92.
137. 17 U.S.C. § 107.
138. *Google*, 141 S. Ct. at 1192

and other such characteristics to create correlations between the text and the images to which they correspond. In doing so, the AI learns to include those commonalities in its final generation. For example, if the text input is "a black cat perched on a windowsill," the AI will scour its database for instances where the term "black cat" appears with an image and will find commonalities within the images, such as black fur, two triangular ears, and yellowish eyes. When generating an image, the AI will apply those commonalities to its own image.[139]

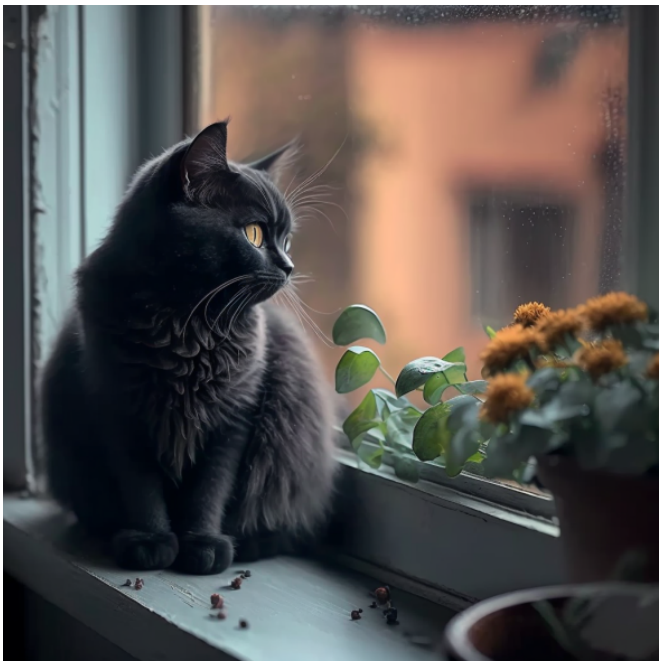

Figure 3: AI-Generated Image Responding to the Prompt: "Black Cat on a Windowsill"

This process, in effect, mimics Google's use of APIs as tools that enable further creative expression. In the black cat example, CLIP compiles the image and text data into strings. The strings themselves do not appear in the final generation but rather instruct the AI on *how* to generate an image which complies with the user input via the prior. Thus, any existing picture of a cat

139. MidjourneyBot (@Midjourneybot), Discord, https://media.discordapp.net/attachments/1012833258293182585/1068753916285685820/David_Silverman_a_black_cat_perched_on_a_windowsill_6e76306b-52bb-4eb3-ae92-a4ef610852bd.png?width=586&height=586 [https://perma.cc/9KNT-ZLKL] (via private message, an AI-generated image responding to the prompt, "Black cat perched on a windowsill").

serves not as a creative work itself but as a computer-readable tool that enables the computer to generate its own creative expression.[140]

The presentation of database images as code for a purpose and use analysis is superior to the presentation of the AI-as-artist because the black box problem presents a barrier to determining how an AI creatively interprets a copyrighted work. In the case of parody, for example, fair use may protect a work where it copies previous work in such a way as to transform the message of the old work into something new.[141] This, somewhat paradoxically, requires that the new work use enough of the source material that a reasonable viewer be able to both identify the source material and understand that the intent behind the new work is commentary in nature.[142] With a black box, however, it becomes difficult, if not impossible, to determine exactly how much of the source material the AI used and whether it used it with the intent of altering the message of the source material itself. In some cases, courts may have an easy time determining whether the AI substantially applied a particular copyrighted work in a given generation at face value, as they have in other substantiality and proportionality cases.[143] For example, in generating a pleasant landscape setting, Midjourney may occasionally add a facsimile of the Getty Images watermark, a mark used to specify an image as property of the eponymous stock photograph company.[144] This denotes the AI's neural network as having understood the Getty Images watermark as being strongly correlated with landscape imagery, but does it denote that the AI also intended to transform the overall message behind the original picture to make a statement about the images retained by Getty Images? The black box mechanism of AI makes that determination impossible.

140. *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1992) (In that case, the Ninth Circuit found that a video game company's identification and replication of elements of Sega's software to create a pathway for the compatibility of their own, independent games on Sega's console constituted fair use. The court emphasized a distinction between code that is copied to enable further creative expression, which is protected by fair use, and code that simply exploits the creative work of another, which is not).

141. *Campbell*, 510 U.S. at 579.

142. *Id.*; *see* Louis Vuitton Malletier v. Haute Diggity Dog, 507 F.3d 252, 268 (4th Cir. 2007).

143 See e.g., Cariou v. Prince, 714 F.3d 694, 710 (2nd Cir. 2013).

144. MidjourneyBot (@Midjourneybot), Discord, https://cdn.midjourney.com/6eaa6bb8-6248-4c8b-8d93-f4648ac1d613/grid_0.png [https://perma.cc/WT8F-PJS6] (via private message, an AI-generated image responding to the prompt, "renaissance city street, yellow stone buildings, cobblestone streets, vines hanging from balconies, merchants, beautiful, sunny, photogenic, scenic, 8k").

Figure 4: Image Generated by Midjourney Containing a Facsimile of the Getty Images Watermark

In other cases, the transformative, parodical intent of the user is clear, but the black box problem would present courts with the challenge of determining to what extent the AI applied aspects of copyrighted work with transformative intent. For example, under *Campbell*, where an AI image-generation platform's user enters prompts that render an imprecise but clearly recognizable image of Mickey Mouse and nothing else, courts might well find fair use does not protect the image because it does not add "a further purpose or character."[145] But if a user generated an image of Mickey Mouse leading a crusader charge,[146] courts may find that the work does indeed "[add] something new."[147] To the AI, however, both images are merely encoded interpretations of correlations gleaned from multiple data points. Thus, without the analysis added by *Google* in viewing AI generated images as products of code, the black box adds an impenetrable barrier to a determination of artistic interpretation.

145. *Campbell*, 510 U.S. at 579.

146. MidjourneyBot (@Midjourneybot), Discord, https://media.discordapp.net/attachments/1012833258293182585/1069011621361492048/David_Silverman_movie_shot_of_Mickey_mouse_leading_an_Arabian_c_3b6f581d-0e44-48b9-9143-3537355a0460.png?width=579&height=579 [https://perma.cc/YK9G-26ML] (via private message, an AI-generated image responding to the prompt, "movie shot of Mickey mouse leading an Arabian cavalry charge in the middle ages, brandishing a scimitar, charging on horseback, crusades, Mamluk armor, dynamic lighting, epic cinematography –niji") Note that the generated image both does not include features requested in the prompt, such as the scimitar, and includes features not specified, such as the cape. These AI-generated omittances or additions are akin to the blob of plastic added by the 3D printer to the initially specified model in Wikimedia's example.

147. *See Campbell*, 510 U.S. at 579.

Figure 5: AI-Generated Image of Mickey Mouse Leading a Crusader Charge

B. The Court's Analysis of Proportion and Substantiality in Google *as it Relates to AI*

17 U.S.C. § 107 also requires courts consider "[t]he amount and substantiality of the portion used in relation to the copyrighted work as a whole."[148] Absent some transformative effect of the work claiming fair use, courts view the verbatim copying of a copyrighted work as unprotected by fair use.[149] Moreover, even when a new work copies only a small portion of an existing work, fair use may not protect the new work if the portion of the existing work that the new work copied constitutes the "heart" of the existing work.[150] The key to determining what qualifies as the "heart" of a work is whether or not it encapsulates the work's "creative expression."[151]

In *Google*, the Supreme Court interpreted Google's use of Sun Java API not to be outside the boundaries of fair use in proportionality or substantiality.[152] With regards to substantiality, the Court found that Google's purpose in using the APIs was to create an entirely separate system, replete with its own creative expression.[153] Such a goal could not have been accomplished with less copying or use of a new programming language.[154] In

148. 17 U.S.C. § 107.
149. *Warner Bros. Ent. Inc.*, 575 F. Supp. 2d at 544.
150. *Harper & Row*, 471 U.S. at 565.
151. *Google*, 141 S. Ct. at 1205.
152. *Id*. at 1209.
153. *Id.*
154. *Id.*

so ruling, the Court determined that Google had not copied the "heart" of Oracle's product.[155]

Regarding proportionality, the Court in *Google* held that "the better way to look at the [proportion of Sun Java API] is to take into account the several million lines that Google did not copy."[156] Ultimately, the lines of code that Google copied comprised only 0.4% of the overall product.[157] That is to say, the Court suggests that a fair use analysis should also consider what aspects of a copyrighted work did *not* make their way into the final work.[158]

As it applies to AI, the question of substantiality presents yet another avenue in which the *Google* ruling is better suited to determine fair use for AI-generated images than a prescription of AI-as-artist. Namely, as the Supreme Court in *Google* explained, where a new work copies elements of a copyrighted work which represent the work's "creativity . . . beauty . . . or . . . purpose,"[159] it copies the heart of the work. But AI image generation-platforms make no consideration towards such elements. Just as the Copyright Office's policies denote a view of humans as the ultimate arbiters of creative will,[160] an AI views pictures as simple points of data—lines of code to be analyzed through a neural network. Indeed, the use of database images in determining the placement, relative coloring, and brightness of pixels for the purpose of creating a set of data to be later used in a diffusion model most similarly matches the way Google functionalized the Sun Java API in its final product. In the aforementioned black cat example, the individual images of black cats through which the neural net discovered commonalities did not make direct appearances in the final image (in line with the Court's example of a copyrighted advertising logo used for a work about a political statement).[161] However, the AI image-generation platform incorporated the data image, text data, and metadata the image provided to generate an entirely new image. This new image reflects the extent to which the data from the previous cat pictures had been transformed. This transformation is similar to the application of fair use in *Google* because the nature of the original work had been altered into something new without disturbing the "heart" of the original work.[162]

Proportionality presents perhaps the largest challenge to the application of *Google* as it pertains to AI image-generation platforms. And yet, the challenge it presents also lays the groundwork for its future superiority over other methods of applying fair use to AI. An AI image generator gathers data from a database of millions of points.[163] CLIP, for example, pulls data from across the Internet, revealing inherent biases in the resulting generations, such as "gender-biased occupation representations, and

155. *Id*.
156. *Id.*
157. *Google*, 141 S. Ct. at 1209.
158. *Id.*
159. *Id.*
160. *See* U.S. COPYRIGHT OFFICE, *supra* note 128.
161. *Google*, 141 S. Ct. at 1203.
162. *Id.* at 1202.
163. Singh, *supra* note 10.

. . . predominantly western features for many prompts."[164] Because AI, in its present form, relies on black box methodology, computer and data scientists lack the capability to determine exactly what points of data an AI like DALL-E 2 referenced, how it weighted them within the neural network, how it applied them during the creation of the prior, and how the prior influenced the GLIDE model for each particular generation. As such, it is presently impossible to know, in a manner other than visually, exactly what proportion of a given copyrighted work appears in a generated image.

One possible approach, given the current inadequacy of computer science, is to view the generated image as though it was an extension of the author's precise creative will and to treat the AI as merely drawing inspiration from its database images the way a fan artist might learn a style of drawing through exposure to the target art. Such an approach proffers a purely qualitative analysis of the generated image, which assumes that the AI used all of the database images that the user intended and none that the user did not. Such an approach fails, however, because the nature of machine learning that powers AI means that it will make connections wherever, so determined by its neural network, not its user. As a result, a user who simply inputs the otherwise innocuous description of a "2D cartoon mouse with circular black ears, red pants, gloves, shoes (sic)" will cause the AI to create a connection between those terms, and aspects of Mickey Mouse, which do not appear in the user's prompt (such as his silhouette, body proportions, widow's peak, and nose).[165]

164. *Id.*

165. MidjourneyBot (@Midjourneybot), Discord, https://media.discordapp.net/attachments/1012833258293182585/1161678561711751289/brynnprimrose_2D_cartoon_mouse_with_circular_black_ears_red_pan_9c9accb7-557f-455d-82e6-dc78aa5ed30c.png?ex=65392c78&is=6526b778&hm=a277f43f94a61b59aa5fe105bef5c8717095e2093f1d97e9d34a8dc23fe261e3&=&width=581&height=581 [https://perma.cc/SHU6-5RVA] (via private message, an AI-generated image responding to the prompt, "2D cartoon mouse with circular black ears, red pants, gloves, shoes ").

Figure 6: An AI-Generated Image of a Prompt Describing Some Aspects of Mickey Mouse Without Naming the Character

Suppose, though, that at a time in the future when computer science has progressed, courts could peer into the black box and learn accurately what reference images the AI used and in what proportion. In that reality, courts would be in the perfect position to apply *Google*, as it would become a trivial matter to determine proportionality for the purpose of fair use. Given the wealth of data from which a given AI image-generation platform may learn, such an analysis would alleviate from the courts' consideration any complaint brought by an artist who believes that an AI has wrongfully used their images when, in fact, it has not or has but only in small proportion.[166]

But the use of images for neural net training is not the only factor at play when considering the proportionality and substantiality of the copyrighted work. AI image-generation platforms like DALL-E 2 also rely on diffusion models to create images. Such models use Gaussian noise, or static, to unscramble into an image. Because static is random, no two generations will ever be the same.[167] To that end, even if the generator uses a copyrighted work in its CLIP stage, there is no way to determine, in each

166. Lindsey Feingold, *Man Inadvertently Proves that Hipsters Look Alike by Mistaking Photo as Himself*, NPR (Mar. 10, 2019, 5:14 PM ET), https://www.npr.org/2019/03/10/702063209/man-inadvertently-proves-that-hipsters-look-alike-by-mistaking-photo-as-himself [https://perma.cc/GW7E-ZA5U] (a news story describing a man who threatened to sue a magazine that ran an article about the visual similarities of hipsters for using a photograph of him as an example, only to later learn that the man in the photograph, who he perceived as himself, was, in fact, not him).

167. Singh, *supra* note 10.

individual generation, what proportion of the copyrighted work will appear without further peering into the ever-elusive black box.

C. *The Court's Analysis of Effect on the Market in* Google *as it Relates to AI*

The final fair use factor looks to whether the role of a new creation that incorporates copyrighted work "may serve as a market substitute for the original or potentially licensed derivatives."[168]

In *Google*, the Supreme Court gave particular emphasis in pointing out the complexity of making a determination in this category.[169] Importantly, in holding that Google's use of Oracle's code did not wrongfully supplant Oracle's place in the market, the Court focuses not only on the likelihood or lack thereof that Oracle would successfully enter the mobile smartphone industry in which Google was operating.[170] Rather, the Court also emphasized that even if Google's creation caused an economic loss to Oracle, such a loss is protected by fair use if it produces substantial public benefit.[171] Notably, the Court weighed Google's reason for using Oracle's code and found that, at least in part, it was predicated on the idea that it was simply the most useful programming language that the engineers spoke.[172] To deprive it of the ability to create new works of creative expression by barring their use of a vital part of the ubiquitous programming language would "risk harm to the public . . . [g]iven the costs and difficulties of producing alternative APIs with similar appeal."[173]

With regards to a consideration of the public benefit, *Google* becomes instructive as to how courts should apply this standard to AI-generated images. While it is true that the introduction of AI-generated images to the marketplace for the consumption of visual media creates some measure of threat to the artists and photographers already in the market,[174] a consideration for fair use must consider the copyrighted work itself. In other words, when determining the effect on the market for a given copyrighted work, courts must determine the effect that the work claiming fair use has on the copyrighted work's place in the market, not all works in that category.

Because AI image-generation platforms rely on hundreds of millions of points of data when training the neural network, where elements such as markers of style, color, or shape of a copyrighted work appear in a generated image, they tend to do so in a disjointed or piecemeal manner. In this way, the AI merely hints at any aspect of a copyrighted work without delving into what might otherwise be considered cohesive enough a recreation to supplant the

168. *Campbell*, 510 U.S. at 587.
169. *Google*, 141 S. Ct. at 1206.
170. *Id.* at 1206-07.
171. *Id*. at 1206.
172. *Id.* at 1206-07.
173. *Id.* at 1208.
174. *See* Blake Brittain, *Getty Images Says Stability AI Misued Photos to Train AI*, REUTERS (Feb. 6, 2023), https://www.reuters.com/legal/getty-images-lawsuit-says-stability-ai-misused-photos-train-ai-2023-02-06/ [https://perma.cc/DS4N-PYA6].

market value of the original.[175] Moreover, just as the Court found that it would be too restrictive on the creation of future expressive works to restrict the use of a tool like Sun Java API in programming in *Google*, courts could find that the use of a given image in creating a string of data provides a social benefit in that it affords the public access to a greater number of creative works. Conversely, the courts, applying *Google*, could determine that, though only a small proportion of a given generated image, the elimination of an AI's use of a copyrighted work would otherwise stifle the ability of the public to receive new creative expressions.

IV. CONCLUSION

Google v. Oracle represents a keystone fair use case. Its implications travel well beyond the rote lines of code that Google's engineers copied. Rather, the Supreme Court set the stage for a framework for interpreting fair use in AI-generated art. That framework appropriately reimagines the generation of an image not as the creative endeavor of an artist before a canvas but as a construction of data points compiled into lines of code. When viewed through that lens, courts may engage in a fair use analysis that accurately reflects the inner workings of these neural networks and AI. As the capability of computer scientists steams onward, the day rapidly approaches when we may finally crack open the black box of AI image-generating platforms.[176] Such a breakthrough would allow computer scientists, software engineers, and courts to view exactly the number and extent of copyrighted works used by AI in its image-generation process.[177] As Allen said, AI is here to stay, and *Google* gives courts the tools to be ready for it.

175. *Authors Guild*, 804 F.3d at 214-15 (There, the Second Circuit held that Google's search engine, Google Books, was protected by fair use where it showed portions of the books in its database with portions redacted such that no user could read a substantial portion of any book. The court reasoned that even where the use of the copyrighted work was the verbatim copying of the copyrighted work's text, fair use applied because the highly edited and redacted nature of the display ensured that the book previews did not become a marketplace substitute for the books themselves).

176. Savage, *supra* note 112.

177. *Id.*