

12-1-2021

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Recommended Citation

Angelina Sanchez, *Copystrikes and Meme Bans: Social Media and Copyright Protections in the Digital Age*, 47 *Brook. J. Int'l L.* 299 (2021).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol47/iss1/7>

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COPYSTRIKES¹ AND MEME BANS: SOCIAL MEDIA AND COPYRIGHT PROTECTIONS IN THE DIGITAL AGE

INTRODUCTION

Social media is now a pervasive and ever-present aspect of many peoples' lives.² Its use permeates nearly every aspect of our existence: from friendship to food, and from to dating to business, there truly is an app for everything.³ Most notably, social media operates internationally both in scope and usage allowing for the creation of an astounding global society that shares cultures and perspectives in a way unprecedented in human history.⁴ Never before in humanity's story have societies been as interconnected as they are now.⁵

Unfortunately, the issue of globalizing enforcement of copyright laws comes with similar interconnectedness. Infringement runs rampant online and forces creators to struggle against a seemingly faceless foe in their efforts to publicize and protect their work.⁶ Anyone with a couple of fingers and less than a second can screenshot and share, and creators are often left with limited recourse.⁷ The real harm, however, stems from social media sites themselves and their enabling of infringement through

1. "Copystrike" is a slang term for "copyright strike" as used in YouTube's copyright enforcement policy, typically referring to an abusive or derogatory copyright claim. Potatou, *Copystrike*, URBAN DICTIONARY (May 22, 2018), <https://www.urbandictionary.com/define.php?term=copystrike>.

2. "Pervasive" *Social Media to Bring Major Change*, WARC (Mar. 17, 2010), <https://www.warc.com/newsandopinion/news/pervasive-social-media-to-bring-major-change/26451>.

3. See Sam Venable, *How Bad is Social Media Addiction? It's Pervasive and May Be Getting Worse*, KNOX NEWS (Oct. 17, 2017, 7:00 AM), <https://www.knoxnews.com/story/entertainment/columnists/sam-venable/2017/10/17/social-media-addiction-pervasive-and-may-getting-worse/763654001/>.

4. 'Social Media Sites Help to Connect to People Worldwide', INDIAN EXPRESS (Feb. 16, 2015, 3:29 AM), <https://indianexpress.com/article/cities/mumbai/social-media-sites-help-to-connect-to-people-worldwide/>.

5. See *id.*

6. See Dyan Finguerra-Ducharme, Felicity Kohn & Maya Katalan, *Harmless Sharing or Copyright Infringement?*, WOMEN'S WEAR DAILY (Sept. 14, 2020, 11:20 AM), <https://wwd.com/business-news/business-features/think-tank-harmless-sharing-copyright-infringement-1234578737/>.

7. See discussion of social media sites' copyright enforcement policies, *infra* Part III.

their enforcement systems.⁸ While some users benefit from these enforcement regimes, more and more often these protocols allow for abuse, blackmail, and theft.⁹ Although there is nothing legally wrong with the structure and enforcement of social media platforms' copyright enforcement practices, their implementation disregards the expressed policy goals of the 1976 Copyright Act,¹⁰ as well as comparable international conventions and directives.

Part I of this Note explores the history and present state of copyright protections on social media. Part II describes the current approach to international copyright law and violations, and Part III discusses why the current approach creates issues given the online forum in which violations are perpetrated. Part IV presents an argument for a centralized enforcement body and reassessment of the current, active laws and Part V concludes.

I. BACKGROUND

A. The History of Copyright Protections, Domestically and Abroad

1. Copyright as a Natural Right

Certain rights are considered “natural rights” in that every person inherently possesses them.¹¹ Copyright protection is one of these natural rights and has been considered so throughout

8. *Id.*

9. See AngryJoeShow, *infra* note 93; PewDiePie, *infra* note 207.

10. See Copyright Act of 1976, 17 U.S.C. §§ 101–1511 (2021).

11.

By using the term property to refer to the realm of natural rights, Locke very concisely said at least these three things. First, Locke said that he meant ‘right’ to be that sort of moral claim that carries along with it claims to exclusivity. Second, Locke said that he meant there is such property in or by nature; that is, human beings possess natural rights of the sort that imply natural duties...According to Locke, then, the first or primary moral fact is self-ownership...Self-ownership procures ownership of body and action.

Michael P. Zuckert, *Do Natural Rights Derive From Natural Law?*, 20 HARV. J. L. & PUB. POL'Y 695, 727–29 (1996).

history.¹² As every person intrinsically owns the products of their own thoughts and expression, copyright protection has developed over time to reflect the ideals of each country's public policy in furthering human development and discovery.¹³ While the scope of copyright varies by country and type of work, historically, the United States has held that in order to garner protection, a work must be an "original work[] of authorship fixed in any tangible medium of expression."¹⁴ To better evaluate the current issues with copyright on social media, it is important to understand the path leading up to this point. A brief synopsis of the history of copyright in America is explained first, followed by a discussion of copyright developments abroad. Next, the history of social media is provided, as well as the issues the online community faces in its current state.

2. A Brief History of Copyright in the United States

In the United States, copyright protection was codified into law in the drafting of the Constitution.¹⁵ Under Article I, Congress shall have the power "to 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."¹⁶ While broadly written, the clause encompasses certain specific categories of work including "literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; sound recordings; motion pictures and other [audiovisual] works; computer programs;

12. See *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RES. LIBR., <https://www.arl.org/copyright-timeline/> (last visited Oct. 9, 2020).

13. See George Thuronyi, *Copyright Law and New Technologies: A Long and Complex Relationship*, LIBR. OF CONG. (May 22, 2017), <https://blogs.loc.gov/copyright/2017/05/copyright-law-and-new-technologies-a-long-and-complex-relationship/>.

14. 17 U.S.C. § 102(a).

15. ROBERT A. GORMAN, JANE C. GINSBURG & R. ANTHONY REESE, COPYRIGHT CASES AND MATERIALS 4 (Robert C. Clark, Daniel A. Farber, Heather K. Gerken, Samuel Issacharoff, Herma Hill Kay, Harold Hongju Koh, Saul Levmore, Thomas W. Merrill, Robert L. Rabin & Carol M. Rose eds., 9th ed. 2017).

16. U.S. CONST. art. I, § 8, cl.8.

compilations of works and derivative works; and architectural works.”¹⁷

i. Copyright from 1790–1909

After the United States’ break from England in 1776, copyright law continued developing in conjunction with new forms of constitutional “writings and discoveries.”¹⁸ The Copyright Act of 1790 was the first copyright statute promulgated in the United States and officially adopted a system of formalities and restrictions as outlined in the Statute of Anne.¹⁹ The 1790 Copyright Act created a copyright regime in America similar to that operating in England but did not provide for protection of foreign works in any capacity.²⁰ The exclusion of provisions for foreign authored works made the United States a “pirate nation” in the sense that any work not published domestically was essentially free to steal.²¹

Over time, the 1790 Copyright Act was revised. In 1831, domestic musical compositions were afforded protection and the term of protection was extended to twenty-eight years with a renewal option for the author or their widow and children.²² By 1870, domestic dramatic compositions with the right of public performance, photographs, paintings, drawings, sculptures, and models and designs for works of fine art were included under the umbrella of protected works.²³ In 1891, with the adoption of the International Copyright Act, the United States shed its status as a “pirate nation” with respect to foreign works of authorship.²⁴ At that point, America joined the international community in making copyright available for foreign authors who complied

17. *Copyright Overview*, PURDUE U. COPYRIGHT OFF., <https://www.lib.purdue.edu/uco/CopyrightBasics/basics.html> (last visited Oct. 3, 2020); *see also* 17 U.S.C. § 102(a).

18. *See* Thuronyi, *supra* note 13.

19. The Statute of Anne recognized the rights of authors and has served as the foundation for all subsequent copyright legislation both in the European Union and in the United States. GORMAN, GINSBURG & REESE, *supra* note 15, at 2. It created exclusive rights for a set term, allowed for extension of that term, and required registration and deposit of works. *See id.* The Statute of Anne did not recognize the rights of foreign authors. *Id.* at 3.

20. *See id.* at 5, 10.

21. *See id.* at 10.

22. *Id.* at 7.

23. *Id.*

24. *Id.* at 10.

with the requirements of title entry, notice, and deposit with the Secretary of State.²⁵ The 1909 Revision improved the preexisting law, allowing protection to begin on the date of publication rather than the date of filing; afforded protection to unpublished works designed for exhibition, performance, and oral delivery; and extended the possible term of copyright to fifty-six years.²⁶ These revisions adapted the existing legal regime to include the technology of the time period as well as new means of transmission and communication.²⁷ By extending protection to new technological advancements, the 1909 Revision set a precedent encouraging future lawmaking bodies to adapt the law in accordance with the needs of the time period.²⁸

ii. Copyright from 1976–Present

As time progressed, copyright law continued developing in response to quickly advancing technology.²⁹ The 1976 Copyright Act was the first meaningful departure from the Statute of Anne.³⁰ The key provisions included the creation of a single federal system of protection from the moment a work was fixed in a tangible medium; creation of a single term of protection being the life of the author plus fifty years; and recognition of a fair use exemption³¹ on exclusive rights and limitations favoring nonprofit, library, educational, and public broadcasting uses.³²

Many modern copyright statutes supplementing the 1976 Copyright Act focus on the emergence of new technology and its use by creators as a means of expression.³³ Further contemporary developments of American copyright protection include the 1995 White Paper,³⁴ the 1996 Agreement on Trade-Related Aspects of

25. *Id.*

26. *Id.* at 7.

27. *See id.* at 7–8 (some new additions included radio transmissions, motion pictures, and television broadcasting).

28. *See* Thuronyi, *supra* note 13.

29. *See* GORMAN, GINSBURG & REESE, *supra* note 15, at 7–8.

30. *Id.* at 8.

31. “The fair use doctrine affords a privilege to make what would otherwise be an infringing use of copyrighted expression.” Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 719 (2011).

32. GORMAN, GINSBURG & REESE, *supra* note 15, at 9.

33. *See generally* *Copyright Timeline*, *supra* note 12.

34. *Id.* The White Paper intended to amend the Copyright Act of 1976 by analyzing current copyright law. *Id.* Its amendments and recommendations were presented to Congress in 1995. *Id.*

Intellectual Property Rights (TRIPS),³⁵ joining the World Intellectual Property Organization (WIPO),³⁶ the Digital Millennium Copyright Act (DMCA),³⁷ the 2005 Family Entertainment and Copyright Act,³⁸ and the 2011 Stop Online Piracy (SOPA) and Protect IP Act (PIPA).^{39, 40}

3. A Brief History of Copyright Abroad

i. Copyright from 1556–1979

Foreign countries have simultaneously developed copyright legislation stemming from the concept of natural property rights. Beyond the Statute of Anne,⁴¹ the most influential legislation governing international copyright protection is the Berne Convention, adopted in 1886.⁴² The Berne Convention has been revised over time, most recently in 1979, and is currently

35. TRIPS implemented the General Agreement on Tariffs and Trade, which included Intellectual Property provisions. *Id.*

36. The WIPO consists of delegates from 160 countries. *Id.* These delegates analyze and adopt new versions of proposed treaties aimed at pushing copyright issues forward. *Id.*

37. The DMCA implemented WIPO's Internet Treaties and created the structure many online service providers adhere to today. *See id.* Among its provisions is a means for Online Service Providers to defer liability under certain circumstances, a key provision relied on by many social media sites. *Id.*

38. Created criminal penalties for infringers who recorded movies in theatres or distributed unpublished movies or software. *Id.* The Act included an exemption for home movie players capable of skipping content. *Id.*

39. Directly addressed "websites dedicated to infringing activities." *Id.* Due to massive backlash, neither bill passed. *Id.*

40. Contextual history is included here to illustrate that there have been numerous developments in modern Copyright legislation, but nothing specific to social media. *See generally id.*

41. The Statute of Anne was the first formalized copyright statute in history. GORMAN, GINSBURG & REESE, *supra* note 15, at 2. Promulgated in 1556, it created a means of protection for publishers of written works in England, provided they met certain requirements within certain circumstances. *Id.* at 1. The statute was promulgated shortly after the advent of the printing press, which made written works widely distributable, creating issues of unauthorized copying where they had not previously existed. *Id.*

42. Intended to harmonize the numerous different international copyright regimes in existence and create ease of enforcement for works by foreign authors seeking enforcement in non-native countries. Shahid Alikhan, *Role of the Berne Convention in the Promotion of Cultural Creativity and Development: Recent Copyright Legislation in Developing Countries*, 28 J. INDIAN L. INST. 423, 424 (1986).

adopted by 179 “Member States” including the United States.⁴³ Upon adoption, the Berne Convention requires Member States to adhere to certain baseline standards in their copyright law regime, such as inclusion of specific types of works as protectable and a minimum term of protection.⁴⁴ The Berne Convention also imposes requirements of national treatment and a prohibition on formalities for foreign parties seeking enforcement in a “Member State.”⁴⁵

ii. Copyright from 1996–Present

As newer mediums of expression developed, the international community adopted legislation to address these burgeoning areas.⁴⁶ Modern legislation includes the 1996 development of the World Intellectual Property Organization (WIPO) Copyright Treaty,⁴⁷ the 2001 and 2006 European Union Copyright Directives,⁴⁸ the 2012 WIPO Beijing Treaty on Audiovisual Performance,⁴⁹ and, most recently, the 2019 European Union Copyright Directive.⁵⁰ Each of these treaties and directives focused on the development of digital mediums over time and the ever-increasing need for regulation in areas never before

43. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Oct. 9, 2020); *WIPO-Administered Treaties*, WIPO IP PORTAL, https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15 (last visited Oct. 29, 2021) (listing contracting parties to the Berne Convention).

44. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, *supra* note 43; *WIPO-Administered Treaties*, *supra* note 43.

45. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, *supra* note 43; *WIPO-Administered Treaties*, *supra* note 43.

46. Lucie Guibault & João Pedro Quintais, *Copyright, Technology and the Exploitation of Audiovisual Works in the EU*, in *THE INFLUENCE OF NEW TECHNOLOGIES ON COPYRIGHT* 9, 9 (Nikoltchev S. ed., 2014).

47. *Copyright Timeline*, *supra* note 12.

48. Intended to harmonize the differing civil and common law regimes of the EU. EUR. PARLIAMENTARY RES. SERV., *COPYRIGHT LAW IN THE EU: SALIENT FEATURES OF COPYRIGHT LAW ACROSS THE EU MEMBER STATES* 1, 2–3 (2018), [https://www.europarl.europa.eu/Reg-Data/etudes/STUD/2018/625126/EPRS_STU\(2018\)625126_EN.pdf](https://www.europarl.europa.eu/Reg-Data/etudes/STUD/2018/625126/EPRS_STU(2018)625126_EN.pdf).

49. Designed to legally protect audiovisual performers. *Copyright Timeline*, *supra* note 12. Provides performers with exclusive moral and economic rights over their performances. *Id.*

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

contemplated.⁵¹ Areas addressed by newer treaties include treatment of downloadable content, licensing issues relating to international trade, and treatment of digital sound recordings.⁵²

B. A Brief History of Social Media

While technology has developed astoundingly in many contexts, over the past thirty years, social media in particular has blossomed into a highly lucrative industry and has become a daily ritual for many people, regardless of age or worldview.⁵³ The first social media site, sixdegrees.com, was developed in 1997 and allowed users to create profiles, list their connections, and send messages to one another.⁵⁴ From there, social media sites boomed to include everything from lesser known entities, like Hot or Not in 2000,⁵⁵ to popularly frequented sites like Friendster⁵⁶ in 2002, MySpace⁵⁷ in 2003, and The Facebook⁵⁸ in

51. See generally *Copyright Timeline*, *supra* note 12.

52. See generally *id.*

53. See generally Alexandra Samur, *The History of Social Media: 29+ Key Moments*, HOOTSUITE (Nov. 22, 2018), <https://blog.hootsuite.com/history-social-media/>; Maryam Mohsin, *10 Social Media Statistics You Need to Know in 2021 [Infographic]*, OBERLO (Apr. 5, 2021), <https://www.oberlo.com/blog/social-media-marketing-statistics>.

54. Samur, *supra* note 53.

55. Hot or Not was a website that allowed users to upload photos to the internet for the purpose of soliciting ratings from strangers on a scale of 1 to 10 based on attractiveness. Jess Joho, *HOTorNOT Shaped the Social Web as We Know It*, MASHABLE, <https://mashable.com/feature/hotornot-history-20-year-anniversary> (last visited Oct. 29, 2021).

56. Friendster was a social media predecessor to Facebook whose purpose was worldwide socialization and interaction. Ulunma, *Before Facebook There Was...Friendster? Yes, That's Right!*, DIGITAL INITIATIVE (Mar. 21, 2020), <https://digital.hbs.edu/platform-digit/submission/before-facebook-there-was-friendster-yes-thats-right/>.

57. Myspace is a social networking site that allows users to create profiles featuring photographs, music, and posts with the purpose of meeting others online. The Editors of Encyclopedia Britannica, *Myspace*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Myspace> (last visited Oct. 29, 2021).

58. Facebook is the largest social networking site in the world, aimed at connecting people worldwide. Mark Hall, *Facebook*, ENCYC. BRITANNICA (last updated Sept. 15, 2021), <https://www.britannica.com/topic/Facebook>.

2004.⁵⁹ Beginning in 2005, LinkedIn,⁶⁰ Photobucket,⁶¹ Flickr,⁶² and WordPress⁶³ gained popularity as networking, photo-sharing, and blogging platforms.⁶⁴ 2005 also saw the birth of YouTube⁶⁵, a video-sharing site.⁶⁶ Between 2006 and 2011, Reddit,⁶⁷ Twitter,⁶⁸ Instagram,⁶⁹ Snapchat,⁷⁰ and Pinterest⁷¹ emerged, further feeding society's growing need for online social interactions in every context.⁷² Most recently, Chinese company,

59. Samur, *supra* note 53.

60. LinkedIn is "the world's largest professional network." *About*, LINKEDIN, <https://about.linkedin.com/> (last visited Oct. 29, 2021).

61. Photobucket is a photograph hosting platform. *Explore*, PHOTOBUCKET, <https://app.photobucket.com/explore> (last visited Oct. 29, 2021).

62. Flickr is an "online photo management and sharing application." *About Flickr*, FLICKR, <https://www.flickr.com/about> (last visited Oct. 29, 2021).

63. WordPress is a "personal publishing system" that allows for the creation and sharing of online blogs. *Our Mission*, WORDPRESS, <https://wordpress.org/about/> (last visited Oct. 29, 2021).

64. Samur, *supra* note 53.

65. YouTube is a video hosting and sharing platform. William L. Hosch, *YouTube*, ENCYC. BRITANNICA (last updated Sept. 15, 2021), <https://www.britannica.com/topic/YouTube>.

66. Samur, *supra* note 53.

67. Reddit is an online message board platform that connects communities worldwide. *See About*, REDDIT, <https://www.redditinc.com/> (last visited Oct. 29, 2021).

68. Twitter is an online social network that allows microblogging among groups of people. The Editors of Encyclopedia Britannica, *Twitter*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Twitter> (last visited Oct. 29, 2021).

69. "Instagram is a free social media platform for sharing photos and videos." William Antonelli, *A Beginner's Guide to Instagram, the Wildly Popular Photo-Sharing App With Over a Billion Users*, BUS. INSIDER (Dec. 14, 2020, 12:14 PM), <https://www.businessinsider.com/what-is-instagram-how-to-use-guide>.

70. "Snapchat is a popular messaging app that lets users exchange pictures and videos (called snaps) that are meant to disappear after they're viewed." Christine Elgersma, *Everything You Need To Know About Snapchat*, PHYS.ORG (June 18, 2018), <https://phys.org/news/2018-06-snapchat.html>.

71. "Pinterest is a visual discovery engine for finding ideas like recipes, home and style inspiration, and more." *What is Pinterest?*, PINTEREST, <https://help.pinterest.com/en/guide/all-about-pinterest> (last visited Oct. 29, 2021).

72. *See* Samur, *supra* note 53.

ByteDance, introduced the newest social media craze, TikTok,⁷³ adapted from Musical.ly and Duoyin.⁷⁴

Social media sites have also consolidated their power in many ways. Facebook has acquired Instagram,⁷⁵ WhatsApp,⁷⁶ and others in a bid to monopolize every aspect of online interaction for its users.⁷⁷ Google acquired YouTube, and the Chinese company Tencent owns numerous messaging platforms including WeChat and QZone.⁷⁸ By consolidating website ownership amongst a few major players, those monopolies make competition nearly impossible for less powerful sites, further perpetuating potentially unfair business practices.⁷⁹ A perfect example of the larger players adopting one another's practices is clearly demonstrated within their social media copyright enforcement regimes, which largely

73. "TikTok is the leading destination for short-form mobile video." *Our Mission*, TIKTOK, <https://www.tiktok.com/about?lang=en> (last visited Oct. 29, 2021).

74. Musical.ly and Duoyin were both Chinese social media apps focused on music and content sharing, which were purchased by ByteDance and integrated into TikTok. Joe Tidy & Sophia Smith Galer, *TikTok: The Story of a Social Media Giant*, BBC NEWS (Aug. 5, 2020), <https://www.bbc.com/new9s/technology-53640724>.

75. Antonelli, *supra* note 69.

76. "WhatsApp started as an alternative to SMS . . . [that m]ore than 2 billion people in over 180 countries use...to stay in touch with friends and family, anytime and anywhere." *See About WhatsApp*, WHATSAPP <https://www.whatsapp.com/about> (last visited Oct. 31, 2021).

77. By purchasing both Instagram and WhatsApp, Facebook added 1.196 billion users within a year. Mozilla, *Social Media Giants Facebook, Tencent, Google Reign*, in INTERNET HEALTH REPORT 2018 2 (2018), <https://internethealthreport.org/2018/social-media-giants-facebook-tencent-google-reign/#:~:text=Google%20owns%3A%20YouTube%2C%20and%20Tencent,platforms%20in%20just%20one%20year>.

78. *Id.*; "WeChat is one of the world's most popular social media messaging apps, and is similar to WhatsApp." Vivian McCall, *What is WeChat? Everything You Need to Know About the Popular Messaging App, Including How To Sign Up*, BUS. INSIDER (Feb. 22, 2021, 6:01 PM), <https://www.businessinsider.com/what-is-wechat>; "Qzone is a Chinese social networking site and blogging platform for self-expression and content sharing." TechTarget Contributor, *Qzone*, TECHTARGET, <https://whatis.techtarget.com/definition/Qzone> (last visited Dec. 2, 2021).

79. *See* Nyshka Chandran, *Big Tech Monopolies are 'Going to be a Problem More and More,' Media Expert Warns*, CNBC (Sept. 11, 2018, 3:25 AM), <https://www.cnbc.com/2018/09/11/facebook-google-are-monopolizing-the-internet-warns-jonathan-taplin.html>.

mirror one another from site to site, regardless of company ownership or nationality.⁸⁰

1. Social Media and Copyright Issues— The Current Situation

The online world is teeming with content created by users every second of every day; too much to comprehend or consume by any singular person.⁸¹ However, losing sight of creators' humanity allows for problematic enforcement of copyright protections, sometimes against those who should benefit from them most.⁸² Here, three specific sites whose copyright enforcement practices call into question the equity of their approaches are discussed: YouTube, Instagram, and TikTok.

i. YouTube: Current System and Its Effects

YouTube is a video-sharing platform owned by Google with two billion users globally and five hundred hours of video content uploaded per minute.⁸³ In an effort to address copyright infringement on its platform, YouTube employs a half-automated, half-user-controlled system of “copyright strikes.”⁸⁴ YouTube

80. See *YouTube Copyright & Fair Use Policies: Making Claims*, YOUTUBE, <https://www.youtube.com/howyoutubeworks/policies/copyright/#making-claims> (last visited Nov. 20, 2020) [hereinafter *Making Claims*]; see also *Facebook Platform Terms*, FACEBOOK, https://developers.facebook.com/terms?helpref=hc_fnav (last visited Nov. 20, 2020); *Intellectual Property Policy*, TIKTOK, <https://www.tiktok.com/legal/copyright-policy?lang=en> (last visited Nov. 20, 2020). Each of these copyright enforcement policies follows a “notice-and-takedown” approach under the DMCA and largely put enforcement in the hands of creators.

81. *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, BERNARD MARR & Co., <https://www.bernardmarr.com/default.asp?contentID=1438> (last visited Nov. 20, 2020).

82. Currently, smaller creators are oppressed by the systems social media sites designed specifically to protect their own corporate interests. See William Worrall, *YouTube Has a Massive False Copyright Claim Problem*, CAPITAL & CELEB NEWS (Jan. 13, 2020, 8:31 AM), <https://www.ccn.com/youtube-has-massive-false-copyright-claim-problem/>.

83. Mansoor Iqbal, *YouTube Revenue and Usage Statistics (2021)*, BUS. OF APPS (updated May 14, 2021), <https://www.businessofapps.com/data/youtube-statistics/>.

84. See *Making Claims*, *supra* note 80. “Copyright strike” refers to the process YouTube employs in removing infringing content. DJ Pangburn, *Copyright Strike: What Is It & How to Avoid Getting One*, ARTLIST BLOG (May 17, 2020), <https://artlist.io/blog/copyright-strike-what-is-it-how-to-avoid-getting-one/>. First, an infringing user is given a copyright claim indicating that someone else has claimed the infringing material as theirs. *Id.* Then, if the infringer

provides users with three avenues for reporting copyright infringement claims via their Copyright Management Tools: submission of a copyright notification through their DMCA webform,⁸⁵ identifying re-uploads of protected videos through their Copyright Match Tool,⁸⁶ and scans of matching videos using their automated ContentID tool.⁸⁷ If a content creator receives three copyright strikes within a ninety-day period, their account, and any associated channels, face termination.⁸⁸ The resolution system for inappropriate or mistaken strikes allows creators to either wait for the strike to expire after ninety days, request a retraction of the strike, or submit a counter notification.⁸⁹ If the strike is executed via ContentID, the ID owner has the option of selecting how YouTube proceeds with enforcement.⁹⁰

While YouTube's copyright enforcement policy seems appropriate on its face, it is rife with abuse.⁹¹ Creators regularly report unfounded strikes against their channels, often for content exempted under Fair Use Doctrine.⁹² Many smaller creators

fails to resolve the claim, they may receive a Takedown Notice from the user, and if YouTube considers the Notice valid, the infringing video will be removed. *Id.* When an infringing video is removed, the infringing user is given a "copyright strike" as a warning and indicator of the violation. *Id.*

85. YouTube provides a means of submitting copyright complaints via a webform that requires information such as your authority to make a copyright claim, URL of the offending video, and acknowledgment of liability for misrepresentations. *See Making Claims, supra* note 80.

86. Available for use by YouTube Partners only. *Id.* Reuploads of copyrighted videos are identified via artificial intelligence and set aside for review in YouTube Studio. *Id.*

87. ContentID is YouTube's proprietary 'digital fingerprinting system' available only for use by copyright owners who meet specific criteria and who own exclusive rights to a substantial body of original material frequently uploaded by the YouTube creator community. *Id.*; *How ContentID works*, GOOGLE, <https://support.google.com/youtube/answer/2797370> (last visited Nov. 20, 2020).

88. *YouTube Copyright & Fair Use Policies: Enforcing Copyright*, YOUTUBE, <https://www.youtube.com/howyoutubeworks/policies/copyright/#enforcing-copyright> (last visited Nov. 20, 2020).

89. *Id.*

90. *See id.* (Owners can choose to block the video from view, monetize it by running ads against the uploader, or track the video's viewership statistics).

91. Jonathan Bailey, *YouTube's Copyright Insanity*, PLAGIARISM TODAY (Jan. 10, 2019), <https://www.plagiarismtoday.com/2019/01/10/youtubes-copyright-insanity/>.

92. "The fair use doctrine affords a privilege to make what would otherwise be an infringing use of copyrighted expression." Netanel, *supra* note 31, at 719.

experience targeted strikes from larger entities for “offenses” such as posting a negative movie review, effectively eliminating the smaller creator’s ability to collect revenue from their videos.⁹³ Under the current enforcement system, YouTube allows targeted strikes by entities that disagree with the message of the video in question.⁹⁴ Further, given the lengthy resolution process YouTube employs, that loss of revenue often stretches for months at a time, for the targeted video as well as others on the creator’s channel.⁹⁵ To make matters worse, YouTube’s copyright strike system has recently been exploited to victimize and blackmail creators, with strikes against videos being rescinded upon payment of a set sum of money to extorters.⁹⁶

ii. Instagram: Current System and Its Effects

Instagram is a photo-sharing app owned by Facebook that recently faced criticism regarding abuse of intellectual property on the platform.⁹⁷ As a Facebook subsidiary, Instagram employs their parent company’s terms and conditions.⁹⁸ Regarding Intellectual Property Rights on all Facebook affiliated platforms, the Terms and Conditions state that users agree not to infringe upon the copyrights of others and must secure licenses for use of the

Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 68 (2015) (discussing how the application of ContentID undermines Fair Use Doctrine through strikes against legitimate uses of copyrighted material).

93. Lionsgate allegedly “copystricked” user AngryJoe’s review video criticizing the trailer for the new Hellboy movie. Bailey, *supra* note 91; *see also* AngryJoeShow, *Lionsgate & YT Copyright Claims are out of Control! - Angry Rant*, YOUTUBE (Jan. 8, 2019), https://www.youtube.com/watch?v=diyZ_Kzy1P8.

94. Bailey, *supra* note 91. While not specifically permitted or encouraged, the user-controlled aspects of YouTube’s enforcement system permit improper strikes on a regular basis. *See* AngryJoeShow, *supra* note 93.

95. *See* Archit Mehta, *Does YouTube’s Copyright Laws Undermine Fundamental Rights?*, THE HINDU (Apr. 22, 2019, 7:48 PM, updated Apr. 23, 2019, 1:21 PM) <https://www.thehindu.com/sci-tech/youtubes-copyright-laws-undermine-fundamental-rights/article26912619.ece>.

96. Tom Gerken, *YouTube’s Copyright Claim System Abused by Extorters*, BBC NEWS (Feb. 14, 2019), <https://www.bbc.com/news/technology-47227937>.

97. Ann Potter Gleason, *Copyright Owners’ Love/Hate Relationship with TikTok and Instagram Raises Legal Issues*, THE NAT’L L. REV. (Aug. 28, 2020), <https://www.natlawreview.com/article/copyright-owners-lovehate-relationship-tiktok-and-instagram-raises-legal-issues>.

98. *Facebook Platform Terms*, *supra* note 80.

images and videos shared on their apps.⁹⁹ The terms and conditions further specify that users grant non-exclusive licenses to each app for the use and distribution of the content posted, while simultaneously guaranteeing that content owned by a user continues as their property, even after posting.¹⁰⁰

As Instagram gained popularity as a means for photographers and other visual artists to publicize and share their work, their approach to intellectual property remained disturbingly stagnant. Instagram's representative stated that implicit licenses are not granted to third parties who wish to use posted content.¹⁰¹ This statement shows a zero-progress stance on the actual protection of users' intellectual property and the app currently does nothing to prevent future abuse beyond verbal condemnation.¹⁰²

iii. TikTok: Current System and Its Effects

TikTok is a video-sharing app owned by Chinese technology company, ByteDance.¹⁰³ While new to the social media scene, the app is already chock full of its own problematic copyright issues.¹⁰⁴ The app's intellectual property policy states that use of infringing material is proscribed, but goes on to clarify that not every unauthorized use of copyrighted content is per se infringement, allowing users some wiggle room under Fair Use.¹⁰⁵ TikTok's copyright policy dictates that users' infringing content is subject to removal with or without notice; users' accounts may be suspended or terminated for multiple infringements; and users may be barred from creating another account if the

99. *See id.*

100. *Id.*

101. DL Cade, *Instagram Says You Need Permission to Embed Someone's Public Photos*, PETAPIXEL (June 5, 2020), <https://petapixel.com/2020/06/05/instagram-says-you-need-permission-to-embed-someones-public-photos/>.

102. *See id.* By failing to provide protection mechanisms to artists, Instagram has pushed the responsibility for protection onto the users themselves, rather than taken responsibility for publishers' exploitation of the platform they govern. Jonathan Bailey, *Instagram, Licensing and Embedding*, PLAGIARISMTODAY (Apr. 20, 2020), <https://www.plagiarismtoday.com/2020/04/20/instagram-and-embedding/>.

103. Tidy & Smith Galer, *supra* note 74.

104. Gleason, *supra* note 97.

105. Exceptions for Fair Use Doctrine are outlined under Copyright Infringement in the Policy. *Intellectual Property Policy*, *supra* note 80.

infringement is widespread or continuous.¹⁰⁶ Similar to YouTube's copyright strike system, TikTok allows users to file Copyright Infringement Reports for content they believe is infringing, with the possibility for accused users to file a Counter-Notification as a defense.¹⁰⁷

One of the most pervasive copyright abuses on the app is the unlicensed use of copyrighted music in creators' content.¹⁰⁸ According to The National Law Review, nearly fifty percent of all music on the app is unlicensed.¹⁰⁹ Although copyright of sound recordings is admittedly complex, TikTok has committed to broadly licensing registered music from recording and production companies to better combat unauthorized use and reduce infringement.¹¹⁰ While a step in the right direction, broad licensing of copyrighted music fails to address the inconsistencies in enforcement under the policy.¹¹¹ The copyright reporting system has only recently been modified to provide notice to creators whose videos are seen as violations, even if the content used belongs to that creator or is used legally.¹¹² Without a clear method of recourse for users whose content is deleted without notice, TikTok risks alienating its creators.¹¹³

Another deeply troubling source of copyright infringement on TikTok is the theft of music without creators' consent.¹¹⁴ Musicians hoping to publicize their work regularly post songs, in whole or in part, on the app to gain traction and broaden their audience.¹¹⁵ Unfortunately, due to the nebulous nature of copyright online, third parties have stolen those posted songs and, in some cases, taken credit and registered them without

106. *Id.*

107. *Id.*

108. Gleason, *supra* note 97.

109. *Id.*

110. *Id.*

111. See Sarah Perez, *TikTok Rolls Out A New Notification System For Content Removals*, TECHCRUNCH (Oct. 22, 2020, 11:05 AM), <https://techcrunch.com/2020/10/22/tiktok-rolls-out-a-new-notification-system-for-content-removals/> ("In the past, TikTok users have often complained about their videos disappearing without notice.")

112. *Id.*

113. See generally *id.*

114. See *TikTok 'Has Given New Artists a Chance'*, BBC NEWS (Sept. 11, 2020), <https://www.bbc.com/news/newsbeat-54059334>.

115. See *id.*

permission or notice to the creator.¹¹⁶ Many creators criticize the randomized effect of copyright enforcement on TikTok as worsening an already imperfect system.¹¹⁷ Without a clear avenue for copyright enforcement, these violations will simply continue to run rampant and unchecked.¹¹⁸

II. THE CURRENT APPROACH TO INTERNATIONAL COPYRIGHT VIOLATIONS

A. American Enforcement of Copyright Violations

1. American-Made Works Infringed Upon Abroad

Copyright protection enforcement is territorial, meaning any recourse is governed by local laws.¹¹⁹ Accordingly, in the United States, federal law governs.¹²⁰ The same is true of American works facing infringement in a foreign country.¹²¹ Luckily, most developed countries have signed on to the Berne Convention, which sets minimum standards for enforcement of copyright protections in countries foreign to the author.¹²²

The Berne Convention has several minimum standards, including a requirement for “national treatment” and a prohibition on imposing “formalities” on foreign authors seeking enforcement.¹²³ National treatment provisions require local laws to treat foreign authors in the same manner as domestic authors for purposes of enforcement protocols.¹²⁴ Essentially, national treatment prevents prejudice against foreign authors in enforcement proceedings.¹²⁵ The prohibition on formalities for foreign

116. Monika Barton, *‘That’s The Truth’: Kiwi Producer Whose Beat ‘Laxed’ Was ‘Stolen’ for Jason Derulo Track Speaks Out*, NEWSHUB (May 14, 2020), <https://www.newshub.co.nz/home/entertainment/2020/05/that-s-the-truth-kiwi-producer-who-s-beat-laxed-was-stolen-for-jason-derulo-track-speaks-out.html>.

117. See Perez, *supra* note 111.

118. See Barton, *supra* note 116.

119. Michael S. Denniston, *International Copyright Protection: How Does It Work?*, BRADLEY (Mar. 28, 2012), https://www.bradley.com/insights/publications/2012/03/international-copyright-protection-how-does-it-w__.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. See *id.*

parties decreases the difficulty of navigating enforcement of alleged violations for creators unfamiliar with local copyright requirements, which may differ from those familiar to them.¹²⁶ By prohibiting the imposition of formalities, the Berne Convention theoretically levels the playing field for all parties regarding the complexities of a new legal regime.¹²⁷

While American authors are entitled to protection under the Berne Convention via enforcement through local legal channels, the actual practice of enforcing judgments against infringement rarely plays out as hoped.¹²⁸ To start, foreign litigation can be incredibly expensive and difficult to navigate for parties unfamiliar with local laws and procedures.¹²⁹ Parties pursuing legal action abroad likely need local counsel familiar with the legal landscape, even with the prohibition on formalities.¹³⁰ Further, if infringement is occurring in multiple countries, multiple firms may be required.¹³¹ Another consideration for victims is that judgments abroad could be nearly impossible to actually enforce.¹³² If a country's local copyright regime lacks the strictness or penalties needed to truly deter infringement, offenses will likely continue regardless of a judgment in the owner's favor.¹³³

2. Foreign-Made Works Infringed Upon Domestically

Foreign authors fighting infringement on United States soil are entitled to the same protection under the Berne Convention as American authors fighting infringement abroad.¹³⁴ The true difference between foreign and domestic authors seeking enforcement of their copyright in the United States is the

126. *See id.*

127. *See id.*

128. *See id.*; Richard Stim, *Does U.S. Copyright Give Me Worldwide Protection From Infringement?*, NOLO, <https://www.nolo.com/legal-encyclopedia/international-copyright-protection.html> (last visited Oct. 24, 2020).

129. Stim, *supra* note 128.

130. Denniston, *supra* note 119.

131. *See* Stim, *supra* note 128.

132. Denniston, *supra* note 119.

133. Christopher Beam, *How Strict Are Chinese Copyright Laws?*, SLATE (Oct 22, 2009, 6:16 PM), <https://slate.com/news-and-politics/2009/10/is-copyright-law-in-china-any-different-from-in-the-united-states.html>.

134. Denniston, *supra* note 119.

requirement of registration and the potential remedies available.¹³⁵ Domestic authors are entitled to bring suit in the United States once their work has been registered with the United States Copyright Office and are unable to pursue legal action prior to that point.¹³⁶ Under the Berne Convention's prohibition on formalities for protection of foreign works, foreign authors are not required to register in order to bring an infringement suit in the United States.¹³⁷ That said, the remedies available to non-registered foreign works are limited to injunctive relief, actual damages, or an award of the infringer's profits.¹³⁸ In order to receive statutory damages¹³⁹ in an enforcement suit, foreign authors must register their work with the United States Copyright Office.¹⁴⁰

B. Enforcement of Copyright Violations in the European Union

1. Current Copyright Regime

Copyright law in the European Union (EU) has traditionally been a national issue broadly governed by several international treaties.¹⁴¹ Within the EU, each country's national law falls into two different legal traditions: civil law and common law.¹⁴² In civil law regimes, used by much of continental Europe, copyright is "based on authors' rights legislation," giving authors moral and economic rights inherent in their works of authorship.¹⁴³ The dual nature of the rights afforded in civil law countries allows for the existence of transferrable economic rights and

135. See Jeffrey Cadwell, *Don't Get Berned – An Important Limitation on Enforcement of Foreign Copyrights Under U.S. Law*, JDSUPRA (Aug. 8, 2017), <https://www.jdsupra.com/legalnews/don-t-get-berned-an-important-59489/>.

136. Andrew L. Goldstein, *United States: US Supreme Court Holds That Copyrights Must Be Registered In Order To Sue For Infringement*, MONDAQ (Mar. 14, 2019), <https://www.mondaq.com/unitedstates/copyright/788820/us-supreme-court-holds-that-copyrights-must-be-registered-in-order-to-sue-for-infringement#:~:text=On>.

137. Cadwell, *supra* note 135.

138. *Id.*

139. *Id.* Statutory damages can range between \$750 and \$30,000, sometimes more, depending on the judge's discretion. *Id.* Statutory damages are a very attractive means of recourse for plaintiffs who may not have been injured financially by infringement, but suffered nonetheless. See *id.*

140. *Id.*

141. EUR. PARLIAMENTARY RES. SERV., *supra* note 48, at 1.

142. *Id.* at 3.

143. *Id.*

inalienable moral rights, which are typically non-transferrable.¹⁴⁴ In common law regimes, the focus lands more on economic rights than moral rights.¹⁴⁵ Each Member State is free to promulgate laws unique to its own policy ideals and local goals, but the states' participation in the Berne Convention ensures a familiar framework from country to country.¹⁴⁶ While the two legal traditions differ in critical ways, the goal of the Berne Convention is to harmonize them and bridge the gap between the two systems for ease of enforcement and protection of authors.¹⁴⁷

Further, many EU Member States' laws also conform to the standards of international trade agreements, such as TRIPS,¹⁴⁸ and frameworks passed by European Council Directives.¹⁴⁹ Prior to 2019, the principal governing legal instrument in the EU regarding copyright, other than the Berne Convention, was the 2001 Copyright Directive, which harmonized disparate international rules and included new developments in technology.¹⁵⁰ Since 2001, there have been numerous amendments to the 2001 Copyright Directive aimed at remaining abreast of the pertinent copyright issues faced by the international community as technology continues advancing.¹⁵¹

2. The 2019 Copyright Directive and Associated Controversy

While EU Member States abide by a similar framework of laws in implementing their individual copyright regimes, the Copyright Directives approved by the EU are not uncontested.¹⁵² The most widely criticized Directive the EU has ever passed is the

144. *Id.* "In the Netherlands, authors may indeed contract to partially waive their moral rights." *Id.* at 4.

145. *Id.* at 4. The emphasis on economic rights is intended to allow for greater ease in granting exclusive licenses. *See id.*

146. *See id.* at 2, 4.

147. *Id.* at 4.

148. Through the implementation of the General Agreement on Tariffs and Trade, member countries are bound to comply with provisions of other treaties and conventions. *See Stim, supra* note 128.

149. *See* EUR. PARLIAMENTARY RES. SERV., *supra* note 48, at 2–3.

150. *Id.* at 2.

151. *See id.* at 3.

152. James Vincent, *Europe's Controversial Overhaul of Online Copyright Receives Final Approval*, THE VERGE (Mar. 26, 2019, 8:00 AM), <https://www.theverge.com/2019/3/26/18280726/europe-copyright-directive>.

2019 Copyright Directive, which threatens to upset the balance of free speech on the internet in potentially irreparable ways.¹⁵³

The new 2019 Copyright Directive includes two Articles, 11 and 17, that have faced immense backlash from people in Europe and from tech giants¹⁵⁴ in the United States.¹⁵⁵ The dramatic opposition culminated in a petition to strike the Articles from the 2019 Directive that garnered over five million signatures.¹⁵⁶ Despite significant resistance, both Articles were included in the enacted version of the 2019 Copyright Directive, which Member States were required to implement by the summer of 2021.¹⁵⁷

Advocates of the 2019 Copyright Directive argue that the included Articles allow for more balance between tech giants, like Google and Facebook, and smaller European content creators and platforms.¹⁵⁸ Critics point to the vagueness of the included provisions, arguing that implementation of the Articles essentially amounts to censorship of content that is lawfully distributed online.¹⁵⁹ The 2019 Copyright Directive embodies the clash between an older culture focused on the priorities of the

153. *Id.*

154. Tech giants, or big tech, refers to “disruptive” tech companies, such as Google, Facebook, Apple, and Amazon, that “push[] technology forward” in significant ways and tend to monopolize their respective markets. Andreas Stegmann, *What is (Big) Tech? A Taxonomy*, MEDIUM (Mar. 3, 2020), <https://medium.com/hyperlinked/what-is-big-tech-a-taxonomy-af17c3aff88d>. There are two significant aspects of a tech giant: (1) “services from this company are so ubiquitous that it is likely to have an account with them” and (2) “services from this company are the epicenter for other online activities.” *Id.*

155. Cory Doctorow, *The European Copyright Directive: What Is It, and Why Has It Drawn More Controversy Than Any Other Directive In EU History?*, ELECTRONIC FRONTIER FOUND. (Mar. 19, 2019), <https://www.eff.org/deeplinks/2019/03/european-copyright-directive-what-it-and-why-has-it-drawn-more-controversy-any>.

156. *Id.*; Michelle Kaminsky, *EU’s Copyright Directive Passes Despite Widespread Protests – But It’s Not Law Yet*, FORBES (Mar. 26, 2019, 1:15 PM), <https://www.forbes.com/sites/michellekaminsky/2019/03/26/eus-copyright-directive-passes-despite-widespread-protests-but-its-not-law-yet/?sh=366662982493>.

157. Julia Reda, *Why Americans Should Worry About the New EU Copyright Rules*, MEDIUM (Dec. 20, 2019), <https://medium.com/berkman-klein-center/why-americans-should-worry-about-the-new-eu-copyright-rules-97800be3f8fc>.

158. Vincent, *supra* note 152.

159. Reda, *supra* note 157.

entertainment industry and a younger culture focused on “the internet as a means of cultural expression.”¹⁶⁰

The first controversial provision, Article 11, raises potential antitrust issues and has been attempted before, on a smaller scale, in individual European countries with no success.¹⁶¹ At its most basic reading, Article 11 amounts to a “link tax” levied against hosting platforms for the display of news stories that include more than a “snippet” of the linked story.¹⁶² While it may not seem problematic initially, danger lies in the ambiguity of what qualifies as a “news site” and how much of a news story constitutes a “snippet.”¹⁶³ As written, the Article allows for the passage of laws condemning inclusion of as little as three words from a linked story.¹⁶⁴ Further, there are no exceptions for small, medium, or noncommercial services.¹⁶⁵ That means that not only are most European platforms, which are predominantly small to medium sized enterprises, at risk of being charged for every single story they host, but personal blogs are also subject to the tax.¹⁶⁶ The lack of delineation between site size presents a very serious risk of accelerating market concentration, putting many smaller platforms out of business or significantly decreasing the

160. *Id.* One explanation for the divide may be the differing use of technology from one generation to another. *See id.* The younger generation of users grew up with technology and internet-activity embedded in their daily lives, whereas the older generation has clung more stubbornly to older forms of entertainment and information-sharing. Danka Elsinga, *The Effects of the European Copyright Directive on Generation Z's News Consumption*, (2019) (Degree Project, KTH Royal Institute of Technology, Swed.), <http://www.diva-portal.se/smash/get/diva2:1377811/FULLTEXT01.pdf>. The prioritization of entertainment and information sources familiar to one group over another seems central to the debate on the 2019 Copyright Directive. *See Reda, supra* note 157.

161. “...given the cost of deploying such technology, the law may have the opposite effect to its intent – accidentally solidifying the dominance of US tech giants over online spaces.” Vincent, *supra* note 152; *See generally* Julia Reda, *When Filters Fail: These Cases Show We Can't Trust Algorithms to Clean Up the Internet*, JULIA REDA (Sept. 28, 2017), <https://juliareda.eu/2017/09/when-filters-fail/>.

162. Essentially, the “link tax” provision requires that if a platform hosts a portion of a story linked to another site, the host site would be required to pay the linked site for a license. Doctorow, *supra* note 155.

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.*

amount of content they are even capable of hosting.¹⁶⁷ Larger companies will likely license content from one another, leaving smaller, lesser known companies to falter, creating greater anti-trust issues than those that already exist.¹⁶⁸

The second contentious provision, Article 17, raises problematic concerns regarding censorship and free speech online.¹⁶⁹ Cheekily nicknamed the “meme¹⁷⁰ ban” provision, the Article is more accurately described as promoting the creation of “censorship machines”¹⁷¹ across online content-hosting platforms.¹⁷² The provision aims to eliminate deferred liability for platforms that host infringing content through no fault of their own.¹⁷³ Instead, Article 17 imposes a duty to stop the upload of infringing

167. *Id.*

168. *Id.*

169. Reda, *supra* note 157.

170.

Memes are cultural shorthand that...evolve with those who use them. ...[T]he term is most often associated with an image or video that portrays a particular concept or idea that is then usually spread through online social platforms.... The images and videos that convey the message are often altered and built upon during this process, which often results in the evolution of the original idea into something else entirely, or are simply posted with a new caption to portray an altered form of it.

Jon Martindale, *What is a Meme? Here's Everything You Need to Know*, DIGITALTRENDS (Mar. 26, 2021), <https://www.digitaltrends.com/computing/what-is-a-meme/>.

171. While there is no distinct definition of “censorship machine,” the term refers to algorithms created to make human content moderators’ work more efficient by flagging certain content for censorship. Shen Lu, *I Helped Build ByteDance’s Censorship Machine*, PROTOCOL (Feb. 18, 2021), <https://www.protocol.com/china/i-built-bytedance-censorship-machine>.

172. See Matt Reynolds, *What is Article 13? The EU’s Divisive New Copyright Plan Explained*, WIRED (May 24, 2019, 11:00 AM), <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban> (discussing the “meme ban”); Doctorow, *supra* note 155 (explaining “censorship machines”). In order to comply with Article 17 as written, platforms would be required to evaluate each post prior to publication, deleting content that allegedly infringes. See Vincent, *supra* note 152.

173. Ally Boutelle & John Villasenor, *The European Copyright Directive: Potential Impacts on Free Expression and Privacy*, BROOKINGS (Feb. 2, 2021), <https://www.brookings.edu/blog/techtank/2021/02/02/the-european-copyright-directive-potential-impacts-on-free-expression-and-privacy/>; see also Vincent, *supra* note 152.

content prior to posting.¹⁷⁴ Currently, platforms follow a “notice-and-takedown”¹⁷⁵ approach to infringement in alignment with DMCA requirements, but under the new 2019 Copyright Directive, that protocol creates massive liability for content-hosting platforms.¹⁷⁶

In order to avoid that liability, platforms will be required to implement “content filters” to prevent infringement before it occurs.¹⁷⁷ As demonstrated by YouTube’s ContentID system, one of the most well-known content filters in existence, these filters are prone to abuse and are notoriously inaccurate.¹⁷⁸ Content filters are not only difficult to regulate, but also tend to over-block legal uploads and are prohibitively expensive to create and implement.¹⁷⁹ YouTube’s ContentID tool, a highly criticized content filter that still employs a human element in regulation, has cost over \$100 million to date and is still far from perfection.¹⁸⁰ Due to the high cost of compliance, small and medium sized European platforms likely cannot afford to implement such content filters, and compliance with Article 17 is essentially impossible without them.¹⁸¹

One potential solution posed by advocates of Article 17 is increasing broad licensing of content by platforms to avoid infringement.¹⁸² While a good suggestion initially, this argument fails to consider that Article 17 does not differentiate between commercial and personal copyright, meaning nearly every single internet user is a potential rightsholder that the platforms

174. Vincent, *supra* note 152.

175. “Notice-and-takedown” refers to the procedure, found in § 512 of the Copyright Act, by which creators whose work is being infringed upon notify internet service providers of the existing infringement so the infringing material can be taken down. *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/dmca/> (last visited Oct. 29, 2021).

176. Reda, *supra* note 157.

177. Doctorow, *supra* note 155.

178. *Id.*

179. *Id.*

180. *Id.*; see also Reda, *supra* note 157.

181. Doctorow, *supra* note 155. Content filtering technology is incredibly expensive to develop and is still far from perfected. See Lauren Feiner, *YouTube and Its Users Face an Existential Threat from the EU’s New Copyright Directive*, CNBC (May 12, 2019, 6:00AM), <https://www.cnbc.com/2019/05/10/youtube-faces-existential-threat-from-the-eu-new-copyright-directive.html>.

182. Doctorow, *supra* note 155.

would need to license from.¹⁸³ That amounts to over three billion licenses paid for by content-hosting platforms, demonstrating that broad licensing is an unrealistic solution to the provision's biggest problem.¹⁸⁴

The international influence of the EU's 2019 Copyright Directive is another concern to keep in mind when discussing these troubling Articles.¹⁸⁵ The United States tends to mirror European copyright regulations, primarily due to lobbying by entertainment companies encouraging adoption of similar laws to maintain competitiveness in international markets.¹⁸⁶ The new provisions in the 2019 Copyright Directive create serious risk: allowing American tech giants to become even more powerful and causing the threat to free speech online to solidify into clear and unquestionable censorship.¹⁸⁷ While the actual effects of the 2019 Copyright Directive have yet to materialize as Member States continue to roll out new regulations, the vague requirements and internal contradictions inevitably create roadblocks to online content sharing and limit the ability of smaller platforms and companies to remain competitive in the European digital market.¹⁸⁸

183. *Id.* Each post made by each individual user is afforded a new copyright, so not only would sites need to license from each user generally, but they would also need to create ongoing license agreements to cover past, current, and future posts. *Id.* For context, Instagram alone has over 1 billion active monthly users. *Instagram: Distribution of Global Audiences 2021, By Age Group*, STATISTA (Aug. 2, 2021), <https://www.statista.com/statistics/325587/instagram-global-age-group/#:~:text=With%20over%201%20billion%20monthly,95%20million%20Instagram%20users%20each> (last visited Aug. 14, 2021).

184. *See Number of Global Social Network Users 2017-2025*, STATISTA (Sept. 10, 2021), <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/>.

185. *See* Reda, *supra* note 157.

186. *Id.* Historically, the United States has consistently followed this approach and continues to do so today. *Id.* In 1998, they adopted the Sonny Bono Copyright Act, which mirrored a term extension from European legislation in 1993. *Id.* The European legislation was largely spurred forward by lobbying from American entertainment companies, who presumably knew their efforts would be better spent overseas with the hopes that the United States adopted the measures as well. *See id.*

187. *See id.*

188. *See* Vincent, *supra* note 152.

III. RELYING ON A DOMESTIC APPROACH TO COPYRIGHT PROTECTIONS ONLINE INEVITABLY CREATES ISSUES

A. Lack of Consistency in Enforcement

Between the numerous social media sites, their various copyright enforcement policies, and the inconsistency of their approaches to similar scenarios on their own platforms, creators rightfully feel a sense of uncertainty when uploading content.¹⁸⁹ Smaller creators also face increased uncertainty due to larger creators or corporations utilizing the existing copyright strike system on TikTok and YouTube as a means of quieting opposing voices.¹⁹⁰

Further, the randomized effect of social media sites' enforcement protocols only deepens the feeling of unease.¹⁹¹ When a creator lawfully posts something, and that post is subsequently censored or removed for infringement, and then the site offers no explanation as to why the content was blocked, users simply cannot operate online with any confidence in their actions. When social media platforms create a system in which creators already feel a sense of uncertainty while uploading content, the imposition of additional regulations that threaten to further censor that content can only seem oppressive.¹⁹²

Additionally, the variety of copyright legal regimes worldwide creates a situation in which individuals or smaller companies hoping to break into the online market are pitted against wealthier, larger parties who can afford endless legal battles.¹⁹³ Even if a creator intended to sue a social media platform for censorship of their work or copyright infringement, depending on

189. Mehta, *supra* note 95; see Matt Binder, *Youtube Reversed My Bogus Copyright Strike After I Threatened To Write This*, MASHABLE (Jan. 28, 2020), <https://mashable.com/article/youtube-livestream-bogus-copyright-strike-warner-bros-cnn/>.

190. Mike Masnick, *As We Get Closer And Closer To The EU Requiring ContentID Everywhere, More Abuses of ContentID Exposed*, TECHDIRT (Jan. 24 2020, 3:23 AM), <https://www.techdirt.com/articles/20200115/17362843740/as-we-get-closer-closer-to-eu-requiring-contentid-everywhere-more-abuses-contentid-exposed.shtml>.

191. See Reda, *supra* note 157.

192. See *id.*

193. See Kristen Errick, *YouTube Sued by Content Creators For Copyright Infringement, Unfair Treatment*, LAW STREET MEDIA (July 6, 2020), <https://lawstreetmedia.com/tech/youtube-sued-by-content-creators-for-copyright-infringement-unfair-treatment/>.

where they sued, the plaintiff may essentially be throwing their money away. While the Berne Convention does create a more level playing field for copyright litigants, it in no way eliminates the existing issues inherent in international litigation, or litigation in general.¹⁹⁴ The lack of consistency in international enforcement means a lack of a clear path to resolution for smaller creators or platforms whose legal expertise and access is diminished compared to larger platforms and corporations with those capabilities already in place.¹⁹⁵

B. Diminished Confidence in Judgments

Even if a creator manages to shoulder the expense of international litigation against a large social media site, reliance on a foreign country or the United States to enforce that judgement may leave plaintiffs facing continuing infringement and no realistic injunctive relief.¹⁹⁶ Due to the great disparity between enforcement of copyright litigation worldwide, there is no consistent means of guaranteeing that work will actually be protected, especially given the widespread use of social media in countries whose copyright regimes are either underdeveloped or enforcement is borderline impossible.¹⁹⁷ One example of a country facing widespread infringement with little to no enforcement possible is China.¹⁹⁸ While their copyright regime is remarkably close to that of the United States, enforcement is essentially impossible given the size of the country and the lack of deterrence built into their regulatory scheme and penalties.¹⁹⁹ Other

194. See Denniston, *supra* note 119.

195. See *id.* (For instance, larger platforms and creators likely can afford the litigation and legal advice required to answer these questions in a way the vast majority of people cannot, and without understanding the legal rights at issue, many people are simply left without recourse.) See also Kris Erickson, *The EU Copyright Directive Creates New Legal Uncertainties*, LONDON SCH. ECON. & POL. SCI. (Apr. 6, 2019), <https://blogs.lse.ac.uk/businessreview/2019/04/06/the-eu-copyright-directive-creates-new-legal-uncertainties/>.

196. Stim, *supra* note 128.

197. See *id.*; Beam, *supra* note 133.

198. See generally Matthew Dresden, *China Copyrights: No You Can't Call It Fair Use*, CHINA L. BLOG (Feb. 28, 2017), <https://www.chinalawblog.com/2017/02/china-copyrights-and-fair-use.html>; Beam, *supra* note 133.

199. Due to the frequency of infringement coupled with the geographic dispersal of China's population, enforcement faces serious hurdles both from the volume of offenses and presence of enforcement authorities. Beam, *supra* note 133.

countries may not face identical difficulties, but the same principles apply regardless of nation.

Further, the new 2019 Copyright Directive from the EU essentially opens the door to a new wave of legislation and litigation that could completely undo the protections developed over the past few decades.²⁰⁰ Of course, adapting to changing technology is essential to maintaining effective and contemporary legislation, but until precedent is established based on the new, untested laws overseas, parties are left wondering about the validity of their legal outcomes.²⁰¹ Despite the European Council's best intentions, the risk remains that their decision penalizes smaller creators and platforms who have relied on the freedom of speech on the internet to make their living.²⁰²

200. Federico Ferri, *The Dark Side(s) of the EU Directive on Copyright and Related Rights in the Digital Single Market*, CHINA-EU. J. (2020)

The amendments to the old-fashioned legal framework are likely to make a remarkable impact both at national and at supranational level...Furthermore, from the EU perspective the new rules on copyright might as well mark a turning point in the negotiations with third countries whenever aspects concerning intellectual property – especially intellectual property rights – have to be dealt with; that applies not only to agreements specifically concluded to regulate intellectual property, but also to more comprehensive instruments, such as free trade agreements.

Id.

201. Erickson, *supra* note 195

Rather than solve existing problems, the directive creates a raft of new legal uncertainties. How is a rights holder to know whether a particular platform falls under the reduced liability regime? . . . Reliance on a vaguely-defined diligent search standard in the Orphan Works Directive (2012/28/EU) gave cultural institutions little clarity about best practices and led to a sprawling patchwork of different national standards of diligent search. This in turn increased transaction costs for would-be digitisers of cultural heritage, the very effect lawmakers sought to avoid...By changing the balance of intermediary liability, the EU has rejected the legal certainty and process of 20 years of notice-and-takedown, instead opting for a disorderly regime where innovation will be riskier and the one with the quickest filters is likely to prevail.

Id.

202. *See id.*

C. Unresolved Issues on Social Platforms: Content Filters and Their Rampant Abuse

As discussed, under the 2019 Copyright Directive's mandate, online platforms would be required to censor allegedly infringing content prior to upload.²⁰³ While it may seem like a good idea to stop illegal uploads before a user posts, the means of enforcing that censorship already exists and is incredibly flawed.²⁰⁴ YouTube's ContentID tool regularly fails in its only directive and allows for incredibly arbitrary claim submissions.²⁰⁵

Additionally, there remains a human element involved in deciding which content is acceptable and which infringes, which is both a benefit and a drawback.²⁰⁶ Allowing creators the ability to flag infringements on their content empowers them to defend their copyright as they choose.²⁰⁷ However, determining infringement is not as simple as trusting users to flag content they own that is being used without their permission.²⁰⁸ YouTube's current system not only contains loopholes and ways for users to misappropriate the revenue of other creators, but also to censor critics and blackmail channels for payouts.²⁰⁹ Threatening to "copystrike"²¹⁰ users has become commonplace on the platform and demonstrates how pervasive these issues have become.²¹¹ Even worse, existing content filters regularly block legitimately uploaded content and often provide very few avenues for reupload and recovery of lost revenue after the inappropriate block is resolved.²¹²

IV. PROPOSED SOLUTION

A. Creation of a Centralized Regulatory and Enforcement Body

The internet and social media have created such present and pressing issues that they require attention in an unprecedented

203. Doctorow, *supra* note 155.

204. *Id.*

205. *See id.*

206. *See id.*

207. PewDiePie, *STOP DOING THIS! – Copyright Striking Criticism etc.*, YOUTUBE (Jan. 11, 2019), <https://www.youtube.com/watch?v=yMuEeUyMfUo>.

208. *See generally id.*; AngryJoeShow, *supra* note 93.

209. PewDiePie, *supra* note 207.

210. Potatou, *supra* note 1.

211. *See Gerken, supra* note 96; PewDiePie, *supra* note 207.

212. Doctorow, *supra* note 155.

way. To better address the issues of copyright infringement online, a centralized regulatory and enforcement body should be established under the WIPO umbrella. WIPO already creates targeted units and sectors to discuss and promulgate goals and initiatives regarding specified areas of intellectual property,²¹³ making their authority the best choice to govern this new body. Social media desperately needs some attention from a group dedicated to handling the particularized issues running rampant among its platforms.

While the individuals currently involved in WIPO are likely incredibly talented and qualified, this new body should include representatives from nonpartisan groups as well as representatives both from social media platforms and content creators. To discuss possible solutions and new regulations, this body should be composed of one representative from each social media platform with authority to speak on its behalf, three content creators or users with large platforms, and three content creators with budding audiences. This specific breakdown in representation is intended to allow historically unheard voices (content creators) a greater weight in decision-making, while also accounting for the inevitability that not all content creators with similar platforms will agree on what is best for their constituencies. Due to these differences of opinion among individuals within the smaller sub-groups, occasionally a “majority” mini-vote will be required to further policy decisions, meaning that within each representative group a majority would need to support the policy in order to move forward. Content creators care deeply about these issues and have already taken to their platforms to discuss their concerns.²¹⁴ They deserve inclusion in crafting solutions that directly impact their ability to generate revenue and create content.

While this new enforcement body will have its hands full, its first initiative should be amending the 2019 Copyright Directive.

213. *Activities by Unit*, WORLD INTELL. PROP. ORG., https://www.wipo.int/about-wipo/en/activities_by_unit/ (last visited Oct. 29, 2021).

214. PewDiePie, *supra* note 207; Kristi (@RawBeautyKristi), TWITTER (Mar. 16, 2020, 2:41 PM), <https://twitter.com/RawBeautyKristi/status/1239622724873379840>; Mykie (@GlamandGore), TWITTER (Nov. 12, 2019, 5:05 PM), <https://twitter.com/GlamandGore/status/1194375765111926785>; James Charles (@jamescharles), TWITTER (July 19, 2017, 11:42 AM), <https://twitter.com/jamescharles/status/887699285646524416>.

This directive threatens to undermine free speech on the internet as it currently exists, and that simply is not sustainable.²¹⁵ Allowing further implementation of the 2019 Copyright Directive in its current form would bankrupt nearly all European online platforms in their attempts to comply by creating “content filters” and buying licenses from all users.²¹⁶ The 2019 Copyright Directive threatens to prevent smaller content providers from flourishing and to hasten the already concerning monopolization of online platforms by larger companies such as Facebook and Google.²¹⁷

The second initiative should be creating guidelines to which social media sites must conform. If legislation aims to control and regulate free speech on the internet, certain key values should be established and agreed to, such as freedom of speech, freedom from misinformation, freedom from abuse and hate speech, among others. With those identified principles in mind, the group should set clear metrics for success, which should in turn require check-ins and reporting at least every other year. Large scale change takes time, but in the interim, social media sites should submit plans for how they intend to implement and meet these new requirements. Executing major site-wide changes is expensive, but these private companies can and should shoulder that cost – their creators are their greatest source of revenue and the reason why they have the popularity and profit they do.²¹⁸ The very least these companies can do is put adequate and effective protections in place for the users keeping them afloat.

The third initiative should be the establishment of fines and a penalty breakdown based on offense. Part of the success of this proposal relies on the ability of international governments to agree to blanket enforcement procedures and penalties. While maintaining country-specific copyright regimes, individual countries must relinquish some control regarding fines and penalties for online offenses to adequately empower a centralized authority to act with binding, final force, similar to that seen in international adjudications. By centralizing enforcement protocols, private parties could be freed from the necessity of costly

215. See Vincent, *supra* note 152.

216. *Id.*; Doctorow, *supra* note 155.

217. Vincent, *supra* note 152; Doctorow, *supra* note 155.

218. See Iqbal, *supra* note 83.

litigation and travel, allowing greater reliance on the predictability of judgments.

Further, penalties should be confined to injunctive relief and punitive damages in the form of fines proportionate to the offense. Each fine should be based on a percentage of the infringer's revenue, increasing proportionately based on the severity of the offense and the annual revenue of the offender. Creating a system of punitive fines allows the regulatory body to agree on monetary amounts that are sufficiently deterrent and to avoid the issue of enforcement once a judgment has been finalized.²¹⁹ By allowing the centralized body to manage enforcement of infringements online, confusion between copyright regimes can be avoided and the same standard can be applied in each social media copyright infringement related case.

When making decisions regarding agenda items, all regulations passed should have a supermajority vote, and there should be acquiescence from government representatives, social media websites, and content creators. The supermajority should include a simple majority from each sub-category of representatives to ensure that no singular group monopolizes decision-making. Requiring a simple majority from each sub-category certifies that each group supports the measure. While this structure may delay significant change and progress, the items that are enacted will be of importance to all parties. In theory, policies that are not widely favored will never reach the critical mass of votes needed for enactment, whereas policies that are supported by multiple sub-categories of representatives should face fewer hurdles in becoming regulations. Balancing public policy ideals, private company priorities, and the desires and needs of private users is difficult, but not impossible. With some compromise and hard work, it is feasible to create an internet that accommodates all parties.

CONCLUSION

Despite hundreds of years of development in copyright legal regimes, the approach to copyright on social media has fallen dramatically short of where it needs to be. To continue ignoring

219. Given that one of the primary challenges to international enforcement of copyright judgment is the inability to enforce injunctive relief due to lack of deterrent effect, punitive damages provide a framework of fines that could sufficiently deter future or continued infringement. *See generally* Stim, *supra* note 128.

these looming issues and ever-growing dangers would be to doom an entire generation to failure through infringement and an inability to protect their work effectively.

With every new technological development, we have revisited our pre-existing systems and adjusted for change.²²⁰ Today's situation is no different. Perhaps until now, social media has not been as prevalent but solving this problem before we damage the system beyond repair is imperative to maintaining an internet where free speech and copyright protection remain high priorities. Shutting down free speech online via content filters is not the answer and never will be. The world contains immense and endless possibilities, and never has knowledge been easier to communicate than now. To stem that flow of information would be to cut the internet and its users off at the knee.

The proposal to create a centralized regulatory and enforcement body not only addresses the existing shortcomings on social media, but also those within currently enacted statutory regimes. Allowing experts in the field to have input is not only a practical idea but also demonstrates goodwill and a willingness for all parties to work together for a better future. By protecting content creators, we protect the global society that has been cultivated online and we strengthen humanity's collective progression into the future.

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220. See Thuronyi, *supra* note 13.

* B.A., Lafayette College; J.D., Brooklyn Law School (Expected 2022); Executive Articles Submissions Editor (2021–2022). Thank you to my amazing editors, Harpreet Kaur and Kristin Kuraishi, and the Journal staff for all their work in the publication of my Note. Thank you to the family and friends who supported me from start to finish. Thank you to Professor Catharine Du Bois for reading my rough drafts and offering words of encouragement. Thank you to Gabrielle D'Amato for being the absolute best hype-woman in the entire world; this Note and I would not be the same without you. Thank you to my cats, Spike and Skye, for napping on my laptop when I had deadlines and to my dogs, Buffy and Goose, for barking incessantly when I needed to concentrate; your cuddles made it all worth it. And finally, thank you to my significant other, Ryan, for making my life infinitely better. When I say I could not have done this without your unfaltering support and love, there is no exaggeration – you bring out the best me. All errors and omissions are my own.