

Censorship by Intermediary and Moral Rights: Strengthening Authors' Control Over Online Expressions Through the Right of Respect and Integrity

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But in each event [...] some unknown but still reasoning thing puts
forth the mouldings of its features from behind the unreasoning
mask. [...] I see in him outrageous strength, with an inscrutable
malice sinewing it.

~ Captain Ahab¹

Abstract

The mega intermediaries, the Leviathans of cyberspace, are practicing content discrimination and distortion of speech in the public communication space. These intermediaries operate vast close-walled digital empires that provide both communication platforms as well as an extremely broad range of products and services for billions of people. Consequently, they can easily slip past the deontological regulatory model that relies on a clear-cut determination between passive conduits, on one hand, and content providers or corporate speakers on another. In the United States, the First Amendment's editorial privilege and the Good Samaritan safe harbors under Section 230 of the Communications Decency Act of 1996 (CDA) shield networked intermediaries from liability arising from decisions to discriminate or suppress content. Furthermore, the ongoing de-intellectualization of user-generated content – through unethical terms of service (TOS) and as the outcome of the open access movement – further undermine the author-work relationship so much so that the society's free speech interests are now in jeopardy.

This study suggests that the problem of private censorship in cyberspace is in fact closely connected with the wider phenomena of how modern cybernauts find themselves being alienated from their privacy and personality interests as their personal data and fruits of intellectual labor are processed and disaggregated to be used in manners beyond their control. This article thus

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¹ HERMAN MELVILLE, *MOBY DICK* 140 (Norton Critical Edition, 2d ed., 2002) (1851).

argues that moral rights can be used to tackle the shortcomings of the current internet governance model that is based on obsolete deontological paradigms. The proposed solution first requires an adoption of a more European-oriented integrity right paradigm that addresses the public interest in the authenticity of works of authorship, and, at the same time, commands respect to the author-audience relationship ingrained in every act of creation. This solution introduces, in addition, a modernized model of moral-right consent framework that provides a carefully crafted inalienability effect whose conceptual groundings are influenced by data protection law.

Finally, considering that the proposed model for integrity protection is not required by the Berne Convention, it is recommended that mandating disclaimers be required as a form of formality to condition the enforcement of an elevated protective standard. Ideally, machine-readable notices or disclaimers should be mandated by law to facilitate the author-intermediaries communication regarding the acceptable manners of exploitation and in order to allow author to be notified when a breach of moral rights occurs.

1. Introduction

Self-censorship by Internet intermediaries is the issue that has gained a significant degree of attention by all quarters of our modern society. Free speech scholars, while acknowledging media's influencing of politics to be commonplace, feel uncomfortable with dominant online intermediaries' potential for bias.² Are these major Internet Service Providers (ISPs) merely exercising their own speech right or freedom of association when they actively assert control on what consumers can see or hear? Some commentators believe that, although corporate actors are not traditionally regulated by the Constitution's guarantee of speech, some corporations are even more powerful than the government with respect to their ability to influence our choice.³ The very large or super ISPs' ability to exclude certain speakers or works from their networks can produce consequences that reach every corner of the world – thereby amounting to *de facto*

² See, e.g., Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 119 & n.67 (2010) [hereinafter Pasquale (2010)].

³ See, e.g., REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 115-119, 153-159 (2012) (concluding that citizens' free speech rights are equally vulnerable to abuse, not only from the government but also from powerful ISPs; and that these "Leviathans" of the Internet – in order to maintain a global platform that can be used and trusted by people across all cultures – have sought to shelter their users from the dark side of human minds).

censorship with world-wide ramifications.⁴ The super ISPs' incorporation of moral judgment into their content policies may even undermine the goal of copyright system whose function is based on the economic incentive to create.⁵

Addressing the problem of censorship by proxy is, however, never straightforwardly easy. The emergence of the very large intermediaries, the Leviathans of Cyberspace, has modified every aspect of people's lives everywhere on a global scale. The mega ISPs' rise to prominence may not have been anticipated by lawmakers, but there is no denying that regulatory frameworks that emerged two decades ago bear a big share of responsibility for what modern intermediaries have now become. Early cyberspace lawmaking – including, *inter alia*, safe harbors of the Digital Millennium Copyright Act of 1998 (DMCA)⁶ and section 230 of the Communications Decency Act of 1996⁷ – was shaped by the collective desire to foster innovation and growth of private online businesses.⁸ In contrast to the deontological regulatory approach that imposes, on off-line intermediaries, the duties and responsibilities of the publisher and the editor, these safe harbors confer a broad range of privileges to cyberspace entrepreneurs – thus shielding them from intermediary and copyright infringement liability.⁹ Similarly, the absence of privacy constraint – a stark contrast to the European legal paradigm – was claimed to have engendered one of the Web 2.0's most prominent innovation: the consumer-oriented business model that allows companies to mine consumers' personal information in order to create a more lucrative advertising business and permits endless exploitations of user-generated content.¹⁰ The advertising model enabled online enterprises to offer basic services free of charge. But on a

⁴ Selena Kitt, *Slippery Slope Part 2: Why Frogs Boil*, THE SELF-PUBLISHING REVOLUTION (Feb 24, 2012), <http://theselfpublishingrevolution.blogspot.com/2012/02/slippy-slope-part-2-why-frogs-boil.html> (last visited May 7, 2014). MacKinnon, *supra* note 2, at 163-164 (noting that super ISPs' discrimination on dissident speakers will produce "serious political implications on a global scale").

⁵ Kitt, *supra* note 4 (discussing the effects of Amazon's content policy regarding self-published works).

⁶ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), codified at 17 U.S.C. §§512, 1201-05, 1301-22 [hereinafter the DMCA].

⁷ Communications Decency Act of 1996, Pub. L. No. 104-104 (Title V), 110 Stat. 56 (1996), codified at 47 U.S.C. §§223, 230 (Section 230 was §509 of the Act) [hereinafter the CDA].

⁸ For a discussion of how the legal shelters created by these laws has helped American startups to dominate the cyberspace, see, e.g., Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639 (2014) (explaining how lower legal constraints regarding content, intellectual property, and privacy liability allows Silicon Valley enterprises to out-innovate their competitors in Europe and Asia).

⁹ See Jonathan Cave, *Policy and Regulatory Requirements for A Future Internet*, in RESEARCH HANDBOOK ON GOVERNANCE OF THE INTERNET 145-147 (Ian Brown ed., 2013) (discussing the contrast between a teleological and a deontological approach of Internet governance).

¹⁰ Chander, *supra* note 8, at 666 – 67.

closer observation, this free distribution of innovative services is in fact rendered possible by the uncompensated uses of human-generated raw materials enjoyed by cyber corporations.¹¹

Coincidentally, Internet users find the control over their expressions judiciously circumscribed by broad-languaged and vaguely written terms of service (TOS) or community standards; and these content policies are now enforced by intermediaries' proprietary algorithms. The operations of these automated agents are affecting all aspects of consumers' lives online. Through their efficient auto-bots, mega intermediaries collect and constantly devise new ways to reuse and benefit from our private information. They process, disaggregate, tag, rank, and demote our content and expressions in manners that often go beyond our prior consent or knowledge.¹² Algorithms also enable intermediaries to avoid or keep out user-generated contents on the basis that it may not be safe to exploit or propagate these materials. Users, whose expressions deemed to be violating the ISP's content policy, can have their accounts suspended or even completely terminated.¹³ However, large intermediaries enjoy a power imbalance relative to their users. Thus, there is no guarantee that these online giants will take any responsibility in correcting the errors resulting from automated processing or in committing themselves to review their decisions and actions that can be potentially devastating to users' private lives and freedom of expression.

Seeing that the Internet is a global communication system and forum dominated by private facilitators, recent scholarship has tried to create a central unifying theme of cyberspace law by focusing on the study of intermediary liability.¹⁴ Prof. Jacqueline Lipton argues that a conception of cyber law that focuses on its global nature and on the role of dominant intermediaries will provide a unified framework of understanding that early commentators lacked.¹⁵ The problem of

¹¹ The astronomic growth of digital innovation relies heavily on information and content which are not cheap to generate. But digitization and the online "free culture" have enabled Internet companies to reproduce these data very cheaply and innovative uses of them are being discovered at a brisk pace. See ERIK BRYNJOFSSON AND ANDREW MCAFEE, *THE SECOND MACHINE AGE: WORK, PROGRESS, AND PROSPERITY IN A TIME OF BRILLIANT TECHNOLOGIES* 61-65, 116-121 (Norton & Company, Inc. 2014).

¹² FRANK PASQUALE, *THE BLACK BOX SOCIETY* 20-38, 51-55 (Harvard Univ. Press 2015) [hereinafter Pasquale 2015] (describing how corporations, including search engine providers, handle "big data" of which our personal information and content are a part.) See also Part II, *infra*.

¹³ See, e.g., Eric Goldman, *Online User Account Termination and 47 U.S.C. §230 (c)(2)*, 2 U C IRVINE L. REV. 659, 660 (2012) [hereinafter Goldman 2012] (noting that online account termination by intermediaries can result in a severe abridgement of users' right).

¹⁴ Jacqueline D. Lipton, *Law of the Intermediated Information Exchange*, 64 FLA. L. REV. 1337, 1342 (2012).

¹⁵ *Id.*

this approach is that the existing paradigms of Internet regulation cannot be applied to create consistent results in the face of intermediaries' unqualified autonomy to self-characterize the nature of their services, in order to benefit from the least exacting liability model. It has been suggested that dominant or "super" intermediaries cannot be defined under the traditional concepts of "Web 2.0" or "social media" because these terms take a functional approach to the technology they describe and, thus, do not reflect the "power status" of the contemporary Cyber Leviathans.¹⁶ Cyber Leviathans achieve a power on this scale by incessantly reinventing the digital necessity for the people of the planet – that is by "provid[ing] and shap[ing] digital spaces upon which citizens increasingly depend."¹⁷ Other observers have noted the cyclical shift when the technology's maturity enables those who control it to "recentralize" the power which had once been decentralized.¹⁸ The degree of power wielded by mega intermediaries makes them ideal partners for governments, whether oppressive or democratic, who invariably discovered the need to gain access to the private life of their citizens.¹⁹ Privacy experts claim, additionally, that there is a strong correlation between democracies and data privacy laws: countries that democratize at higher levels tend to have strong data protection regimes that apply to private sectors, whereas countries that democratize at lower levels tend to eschew these regulatory constraints.²⁰

¹⁶ Ira Steven Nathenson, *Super-Intermediaries, Code, Human Rights*, 8 INTERCULTURAL HUM. RTS. L. REV. 19, 37 (2013). Instead, Nathenson suggests using what he terms "stakeholder features" to differentiate between an ordinary intermediary and a super ISP. *Id.* at 38 (identifying these features to be: interactivity, networking, personalization, governmental legal scrutiny, private legal scrutiny, internal legal scrutiny, political activity, ubiquity, and hero/villain ambiguity).

¹⁷ MacKinnon, *supra* note 3, at 11.

¹⁸ See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 241 (Yale Univ. Press 2006) [hereinafter Benkler (2006)] (noting that "the congregation in small number of [providers]" is a natural course of the Internet as it tries to solve the problem of information overload); TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 5-7 (2010) (observing that communication technologies often go through a similar "cycle," in which new technologies, following their public introduction, briefly exhibit non-restrictive and revolutionary potentials before being transformed by monopolists into closed environments that show little tolerant toward uses of political nature or those which aim at challenging social complacency.)

¹⁹ MacKinnon, *supra* note 3, at 11 (observing that "[i]t is now normal for the world's most powerful governments to consult with multinational corporations to shape a range of financial trade, and foreign policy objectives"); Pasquale (2015), *supra* note 12, at 10 (noting that the distinction between state and market is fading and those who mobilize money and media for private gain may also act on behalf of the government).

²⁰ See, e.g., Graham Greenleaf, *Data Protection in a Globalised Network*, in RESEARCH HANDBOOK ON GOVERNANCE OF THE INTERNET 227-228 (Ian Brown ed., 2013).

Internet law scholars have, in addition, noticed the relationships between the continuing alienation of consumers' personality and privacy interests, on one hand, and mega intermediaries' ability to distort and control information around the web, on another hand. As Professor Frank Pasquale describes what he considers to be a troubling asymmetry: "as dominant intermediaries gather more information about users, users have less sense of exactly how life online is being ordered by the carriers and search engines they rely on."²¹ Professor Pasquale goes on to assert that there are fallacies in treating privacy and personality interests as economic commodities that can be purchased,²² noting that the absence of legal constraints in this area has provided incentives for dominant providers to "compete in ways that are corrosive to privacy."²³ Competition and innovation, according to Pasquale, are not the only tools that we can use to encourage responsible and useful intermediaries, and that privacy and other reputational interests must be treated as irreducible social values.²⁴ Jonathan Cave, an expert on European Union regulatory policy, likewise posits that competition and consumer protection must be seen as complements – so that effective competition may force firms to identify and serve consumer needs and desires.²⁵ Consumers' ability to withhold consent in matters concerning their privacy or personality interests is sometimes viewed as a debilitating hindrance to commercial operations of massive intermediaries.²⁶ But those who view the disproportionate power wielded by dominant ISPs as one of the major factors for the Internet's ill propose to the contrary: that the root of the information dystopia rests with the fact that we allow user-generated information and content to become free and available for uncompensated exploitations far more than they should

²¹ Pasquale (2010), *supra* note 2, at 108, 151 (stating that "dominant intermediaries tend to gain more information about their users, while shrouding their own business practices in secrecy.")

²² *Id.* at 151.

²³ *Id.* at 152.

²⁴ *Id.* at 160.

²⁵ Cave, *supra* note 9, at 147.

²⁶ Following the Court of Justice of the European Union's holding, in May 2014, regarding the "right to be forgotten," American Internet critics have come out in abundance to condemn the ruling as leading toward mass suppression of online data. See, e.g., Steve DelBianco, *No Easy Answer for Enforcing the European "Right to be Forgotten,"* FORBES (Oct. 6, 2014), <http://www.forbes.com/sites/realspin/2014/10/06/no-easy-answer-for-enforcing-the-european-right-to-be-forgotten/> (last visited Nov. 22, 2014); H.O. Maycotte, *America's "Right to be Forgotten" Fight Heats Up,* FORBES (Sep. 30, 2014), <http://www.forbes.com/sites/homaycotte/2014/09/30/americas-right-to-be-forgotten-fight-heats-up/> (last visited Nov. 22, 2014) (noting however that at least 61 per cent of American think that some form of "right to be forgotten" is necessary and that California is set to pass a statute protecting such right in January 2015).

be.²⁷ It follows therefore that, for the Internet to preserve its self-correcting capabilities, future legislation should endorse the retention by Internet users of a range of powers that will allow them to negotiate with powerful cyber proxies on a level playing field.²⁸

In this article, I propose that moral rights – the non-pecuniary aspects of copyright that deal with authorship and other personality-related interests of authors – should be strengthened to permit authors to exercise a greater level of control over their expressions when using services of dominant platform providers. The combined effects of the regulatory hand-off approach toward online intermediaries – including the deregulation of conduit ISPs' copyright liability, the statutory defense for viewpoint-based discrimination of services, the contractual arrangement that disproportionately favors unrestrained exploitations of user-generated content,²⁹ the popularity of the open access movement,³⁰ and the absence of effective privacy constraints – have stripped Internet users of the power to manage and maintain the integrity of their cultural expressions. This article argues that moral rights, as recognized among the true dualists' jurisdictions, do not only allow authors to subjectively determine the contextual integrity of their works but also serve the public interest by safeguarding the authenticity of both digitized and digitally-born works. Furthermore, I contend that moral rights – if they are protected as a form of intellectual property in the United States – can be used to circumvent both the intermediaries' editorial privilege under the First Amendment and Section 230 of the Communication Decency Act which exempts intermediaries from liability arising out of Good Samaritan content filtering and screening.

This article posits that, ultimately, the problem of private censorship by intermediaries has its root in the disproportionate distribution of power that leaves Internet users/authors with little subjective autonomy over their cultural productions. Moral rights, a system of rights that

²⁷ See, e.g., JARON LANIER, *WHO OWNS THE FUTURE?* 7-18, 190-193 (Simon & Schuster 2013) (discussing how giant online intermediaries are turning people's private information and content into "big data" to be processed and used by algorithms.)

²⁸ Cave, *supra* note 9, at 159.

²⁹ See, e.g., T.E. Domenic Yeo, *Viral Propagation of Consumer- or Marketer- Generated Messages*, in *THE ROUTLEDGE COMPANION TO DIGITAL CONSUMPTION* 273, 278-280 (Russell W. Belk and Rosa Llamas ed., 2013) (noting that consumer-generated viral messages are now important and profitable cultural products, and leading digital social network services are able to exploit these viral production without having to satisfy traditional media or cultural gatekeepers).

³⁰ Benkler (2006), *supra* note 18, at 59-61 (describing open access movement as creating a non-market, "common-based peer production" regime under which the commons are governed by no rule and no restriction – "[a]nyone can use resources within these types of commons at will and without payment.")

originated from privacy and personality rights, rectify this problem by putting subjectivity back in the hands of authors and allowing them to make informed decisions whether to give consent to certain technological transformative uses of their cultural expressions – while being sufficiently attentive to legitimate expectations of third parties. It is true that moral rights are not panacea for every instance of censorship by proxy, but they do empower users/authors to object to actions that interfere with their expressive interests. Furthermore, in contrast to popular criticisms,³¹ moral rights will not lead to the network dystopia because these rights do not concern with duplicative reproduction of works which is the domain of economic copyrights.³² Moral-right management is a form of private ordering that has been missing from academic discussions regarding intermediaries' bias, of which private censorship is a part. As the quality of cultural productions improves, authors will demand higher authorship norms capable of protecting the integrity and authenticity of their works. Internet users will also need a legal framework that allows them to wrestle control over their works of authorship back from exploitative intermediaries. In this respect, because moral rights seek to protect the irreducible personality interests of authors, the importance of moral rights can rival that of economic copyright in the twenty-first century.

In Part II, this article explores the connections between the rise of censorship by proxy and the shortcomings of an Internet governance model that relies on the conduit/speaker distinction for a deontological determination of an intermediary's duty or liability. First, the phenomenon of content discrimination by algorithm will be discussed. Then I proceed to address the problem of how the Cyber Leviathans' reliance on automated algorithms helps disguise the changing role of their commercial operations and, consequently, exposes the inadequacy of the existing Internet governance paradigm. This Part concludes with a discussion of the two major forms legal immunities that encourage self-censorship among intermediaries in the United States: the editorial privilege doctrine under the First Amendment and Section 230 of the Communications

³¹ Moral rights have been viewed negatively among the founders of the open access movement and derisively referred to as a form of aesthetic veto – precisely because they prevent downstream exploitations and remixing activities of Web 2.0's denizens. See, *e.g.*, LAWRENCE LESSIG, REMIXED: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 82-83 (2008) (noting that digital technology has removed economic restriction against remix and mash-up activities but the copyright and moral-right law remain a threat to that revolution).

³² See CHRIS REED, MAKING LAWS FOR CYBERSPACE 152 – 156 (Oxford 2012) (arguing that the solution for the reality mismatching between copyright law and the digital technology is to “restructure copyright law so that it allows creators an appropriate measure of control over the *use* of their works”) (emphasis original)

Decency Act. The combined effects of the two legal regimes confer too great a power on corporate autonomy to discriminate online speech and leave very little safeguard for consumers' expressive interests.

In Part III, this article offers a detailed study on the concepts of moral rights and their relationship with the author's interests to maintain integrity and authenticity of his or her works. This article's aim is to make a case that moral rights – as a system that safeguards authors' personality interests – have an important place in the future of cyberspace governance. In the current cyber landscape dominated by mega networked intermediaries whose business models demand that content must be free, the author's ability to control over the “use” of his cultural productions has become essential, not only to the author's own artistic statement, but also his long-term social and economic well-being. Hence, I argue in this Part that the moral right of integrity can be used to challenge some instances of content tampering by online intermediaries. Even in the United States, it will be shown that moral rights claims can defeat both the intermediaries' first amendment editorial privilege as well as the Section 230 (c)(2) safe harbor of the CDA. This Part also re-examines the problems of private interference with user-generated content or intermediary bias, and concludes that these problems are parts of a bigger crisis in Internet governance: the users' loss of autonomy over their personality interests and corporations' remarkable freedom to make uncompensated uses of personal information as well as intellectual productions.

Finally, the paper turns to a central argument that – because moral rights are a collection of authorship norms that have their origins in personality rights³³ – by adopting a stronger moral rights regime, we can turn the tide against the on-going dilution of individuals' autonomy and subjectivity over their intellectual outputs in online space. The suggested integrity right paradigm will need to be sufficiently broad to command respect to both the work authenticity and the author-audience relationship ingrained in every act of creation. Using the Wittem Project's European Copyright Code as a model,³⁴ I propose, in Part IV, that moral right can be reformed to

³³ Moral rights' authorship norms resemble privacy rights in several aspects. The European orthodoxy of “author's rights” includes concepts, such as the right against unauthorized divulgation, the right to retract, the right of attribution, right to object to modification and alteration, and the right on anonymity. See, *infra*, Part III. A.

³⁴ See, *infra*, Part III. E.

function positively on the Internet by borrowing the regulatory concepts from data protection law,³⁵ namely the principles of informed consent, proportionality and legitimate purpose.

2. Private Censorship by Mega-Intermediaries: A Problem of Free Speech or A Need for Better Internet Governance

Censorship at discretion of private online intermediaries is a topic that has recently received substantial media as well as academic attention. The leading media establishments' interference with users' expressions or points of view is, of course, not new. But two inter-related and relatively recent developments rejuvenated concerns over the issue of censorship by proxy. First, the dominant platform providers, such as Facebook and Google, did not just revolutionize online communication but have also become the genuine primary means of communications and expressions in the second decade of the twenty-first century, and the public's dependence on them continues to grow rapidly owing to the network effect.³⁶ They became far bigger and more powerful than their predecessors had ever been and their influence is unprecedented in the two-decade history of the Internet.³⁷ In fact, the intermediary giants at the top of the market hierarchy offer everything anyone can expect of the Internet – Facebook's and Google's product reach is near entirety of the social world.³⁸ When these digital superpowers spend billions to purchase

³⁵ The 1995 Data Protection Directive required "unambiguous" consent before an information processor can collect and process personal information, and then further requires that such information is used only for "specified, explicit and legitimate purposes." Directive 95/46/EC, of the Europe Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, 40 [hereinafter Data Protection Directive]. The data protection scheme of Europe is further reinforced by the Privacy and Electronic Communications Directive of 2002, which prohibits all kinds of "interception or surveillance of communications ... without the consent of the users." Directive 2002/58/EC, of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 O.J. (L 201) 37, 43 [hereinafter E-Privacy Directive].

³⁶ In a well-publicized 2010 case, Karen Beth Young sued Facebook when the social media giant disabled her Facebook account for not complying with its status policy. Ms. Young suffered a bipolar disorder and heavily relied on Facebook to effectively communicate with other people, and argued that she had much to lose to give up her Facebook account. Nevertheless, the court rejected both Young's First Amendment claim and claims under American with Disability Act - holding that Facebook was neither a state actor, nor a place of public accommodation. See *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1114-15 (N.D. Cal. 2011); *Young v. Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 2010 WL 4269304, at 2-3 (N.D. Cal. Oct. 25, 2010).

³⁷ Aida Akl, *A Decade later, Facebook Wields Unprecedented Mass Influence*, VOICE OF AMERICA (Feb. 7, 2014), <http://blogs.voanews.com/techtonics/2014/02/07/a-decade-later-facebook-wields-unprecedented-mass-influence/> (last visited Aug. 2, 2014) (noting how social network has facilitated an explosion of idea and industries, and has become an important source of news – arming citizen reporters with powerful technology to cover the scenes ahead of major media outlets).

³⁸ Nathan Jurgenson, *Short Comment on Facebook as Methodologically "More Neutral,"* THE SOCIETY PAGES (Jun. 9, 2014), <http://thesocietypages.org/cyborgology/2014/06/09/short-comment-on-facebook-as-methodologically-more-natural/> (last visited Nov. 10, 2014).

digital upstarts, the goal is not just to stay competitive by eliminating potential rivals, but to complete the global domination of cyberspace: to capture the users' imagination and "to be everything to everyone."³⁹

Second, very large intermediaries are no longer passive or quasi-conduit in their roles as communication and platform providers. Now Internet intermediaries are incorporating content-generating features into their arsenal of services, and are now hardly distinguishable from conventional media companies.⁴⁰ Automated decision-making tools, namely proprietary algorithms, are used to help platform providers enforce their content policy with little, or without, direct human intervention – thereby giving an impression that these decisions are carried out in a fair and non-intrusive manner.⁴¹ The algorithms process users' personal information and preferences in assessing the relevancy and quality of the "stories" users see in the news feed – often in real time and individually tailored for each user.⁴² The extent of these automated machines' ability to manage, curate and organize information is such that they influence users' perception of the reality.

2.1 Self-Censoring Algorithms: The Advent of Mechanized Censorship

Self-censorship is a psychological phenomenon that influences all levels of discourses and affects every speaker. People naturally withhold their true opinions from an audience perceived to disagree with that opinion.⁴³ In this regard, self-censorship is a form of speech function that

³⁹ ROBERT W. MCCHESENEY, *DIGITAL DISCONNECT: HOW CAPITALISM IS TURNING THE INTERNET AGAINST DEMOCRACY* 139-140 (The New Press 2013).

⁴⁰ David Carr, *The Evolving Mission of Google*, THE NEW YORK TIMES (March 21, 2011), <http://www.nytimes.com/2011/03/21/business/media/21carr.html> (last visited Jul 20, 2014); McChesney, *supra* note 39, at 128-129 (stating that all major Internet companies, including Apple, Google, and Amazon, are "joining the battle to control video consumption," and that YouTube is now a bona-fide platform for thousands of TV-style advertising-supported Internet channels).

⁴¹ Nathan Jurgenson, a cyber-sociologist, contends that the notion of "web objectivity" is a fallacious one and even morally deficient since, as he argues, "technology never removes humanity from itself." Nathan Jurgenson, *Digital Dualism and the Fallacy of Web Objectivity*, THE SOCIETY PAGES (Sep. 13, 2011, 11:29 AM), <http://thesocietypages.org/cyborgology/2011/09/13/digital-dualism-and-the-fallacy-of-web-objectivity/> (last visited Oct 15, 2014).

⁴² Nick Shcheto, *Facebook 101: How to Understand and Tweak Your News Feed*, WALL STREET JOURNAL (Jun 1, 2014), <http://blogs.wsj.com/digits/2014/07/01/facebook-101-how-to-understand-and-tweak-your-news-feed/> (last visited Aug. 1, 2014); News Feed FYI: A Window into News Feed, FACEBOOK (Aug. 6, 2013), <https://www.facebook.com/business/news/News-Feed-FYI-A-Window-Into-News-Feed> (last visited Nov. 1, 2014) (noting that "the goal of News Feed is to deliver the right content to the right people at the right time.")

⁴³ Andrew F. Hayes, Carroll J. Glynn, and James Shanahan, *Willingness to Self-Censor: A Construct and Measurement Tool for Public Opinion Research*, 17 *INTERNAT'L J. OF PUB. OPINION RESEARCH* 298, 299 (2005)

can be exercised on a subconscious level, subjecting to how people interact to one another.⁴⁴ The willingness to self-censor is considered a speech-related right in so far as it helps a speaker to disengage himself from an unwanted opposition.

For corporations who publish or disseminate information to the public, however, the willingness to self-censor may be guided less by perceived reactions from the audience than by commercial reasons or other objectives they will not communicate to the public.⁴⁵ Internet corporations' reliance on algorithms to do the censor works says nothing about how the intermediaries feel responsible toward a society. Online intermediaries typically shun the prospect of having to handle complex ethical dilemmas.⁴⁶ Technology makers prefer to reduce complex societal issues to a set of problems that can be solved by technological means – which offers an objective solution free from human bias.⁴⁷ This technocratic disposition allows technology companies to create an illusion that they are “neutral conduits who passively mediate between the epistemological and social world around them.”⁴⁸ Evgeny Morozov argues that the obsession for technological solutionism among technology moguls has created what is now known as Internet-centrism: the idea that the Internet does not need better governance, only better innovations.⁴⁹ Google, along with Microsoft and Yahoo, recently offered to use their dominant market position and powerful indexing technology to make the Internet safer by eliminating illegal materials such as child pornography.⁵⁰ The technological solutions offered by

(defining “self-censorship” as the willingness to “withhold[] one’s true opinion from an audience perceived to disagree with that opinion.”)

⁴⁴ Some psychologists posit that social reasons far outrank fear of government retribution as the major speech constraint. *Id.* at 299.

⁴⁵ Pasquale (2015), *supra* note 12, at 3-14 (arguing that corporations have relied on the power of secrecy – enabled by technology, law and practice – to prevent their law-flaunting operations from being subject to public scrutiny).

⁴⁶ EVGENY MOROZOV, TO SAVE EVERYTHING, CLICK HERE: THE FOLLY OF TECHNOLOGICAL SOLUTIONISM 148 (2013).

⁴⁷ *Id.* at 5-9.

⁴⁸ *Id.* at 151 (drawing a comparison to a “technocratic pose” of the French military engineer – which allowed them to assume a neutral role in the aftermath of the 1789 revolution.)

⁴⁹ *Id.* 31-35.

⁵⁰ *Google Announces Sweeping New Plan to Block Child Pornography*, RT.COM (Nov. 18, 2013), <http://rt.com/news/google-block-child-pornography-926/> (last visited Jun 20, 2014). Google’s child-porn filtering software is based on a powerful algorithm that combines advance technological features for facial recognition. Rebecca Boyle, *Smart Child Porn Detection Algorithm Will Help Cops Sift Through Illicit Imagery*, POPULAR SCIENCE (Oct. 4, 2011), <http://www.popsci.com/technology/article/2011-10/new-child-porn-algorithm-will-help-cops-sift-through-illicit-imagery> (last visited Aug. 5, 2014).

these online giants are appealing but unreflective of broader public interests.⁵¹ Google's critics have noted that the world biggest search engine continues to assist governments with strong censorship agenda in order to avoid direct legislative control of its activities⁵² – especially on privacy issues.⁵³

Super intermediaries' immense power of surveillance makes them perfect partners of any government that wishes to impose control over online behaviors of their citizens.⁵⁴ The Wikileaks episode accentuated the contemporary state of the Internet in which "commercial owners of the critical infrastructures of the networked environment can deny service to controversial speakers."⁵⁵ Dominant service providers like Google and Facebook design algorithms to target "[s]peech that tests boundaries, challenges existing notions and subverts expectations."⁵⁶ Google has fended off several online publishers and websites, whose content it deems to be pornographic, from having access to its popular AdSense service without providing a meaningful chance to appeal the decision.⁵⁷ Facebook also has a very well-documented history

⁵¹ Robinson Meyer, *The Tradeoffs in Google's New Crackdown on Child Pornography*, THE ATLANTIC (Nov 18, 2013, 4:37 PM), <http://www.theatlantic.com/technology/archive/2013/11/the-tradeoffs-in-googles-new-crackdown-on-child-pornography/281604/> (last visited Jun. 20, 2014) (noting that Google's relying primarily on algorithm would blackout a large number of legitimate material since only "human being can separate benign family pictures from abusive content").

⁵² Nicholas Diakopolos, *Sex, Violence and Autocomplete Algorithm, Future Tense* (Aug. 2, 2013, 11:43 AM), http://www.slate.com/articles/technology/future_tense/2013/08/words_banned_from_bing_and_google_s_autocomplete_algorithms.html (last visited Jun. 20, 2014).

⁵³ See, e.g., Cory Doctorow, *UK MPs Recommend Laws Compelling Google to Censor Search Result*, BOINGBOING.NET (Mar 26, 2012, 10:06 PM), <http://boingboing.net/2012/03/26/uk-mps-recommend-laws-compelli.html> (last visited Jun. 20, 2014) (criticizing the UK's attempt to use privacy issue as a pretext to censorship by compelling Google to cooperate).

⁵⁴ See McChesney, *supra* note 39, at 166 (citing the passage of Cyber Intelligence Sharing and Protection Act (CISPA) as an example of the U.S. government's top agenda in "policing the Internet with minimal public interference"); SUSAN LANDAU, *SURVEILLANCE AND SECURITY?: THE RISKS POSED BY NEW WIRETAPPING TECHNOLOGIES* 256 (MIT Press 2011) (observing that "when surveillance mechanisms are easy to turn on, the chance of misuse is high").

⁵⁵ Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 312 (2011) [hereinafter Benkler (2011)]

⁵⁶ Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L. Q. 235, 275 (2014).

⁵⁷ See, e.g., Morozov, *supra* note 46, at 140-141 (describing how expelled an online magazine *Guernica* from its AdSense service for publishing a short story called "Early Sexual Experiences" – after its algorithm determined that *Guernica* was pornography). Techdirt, a popular Internet news blog, also reported its encounter with AdSense's morality-police practice when one of its news stories, concerning a copyright dispute, was flagged as being pornographic due to the fact that the disputed works – to which Techdirt provided links – contain a music video featuring a famous porn actress performing non-pornographic pole dancing actions. Mike Masnick, *Google AdSense's Idiotic and Hypocritical Morality Police Force Us to Remove Ads on News Stories*, TECHDIRT (May 29, 2014, 10:53 AM), <https://www.techdirt.com/articles/20140528/15390227381/google-adsenses-idiotic-morality-policing-forces-us-to-remove-ads-news-stories.shtml> (last visited Jun. 22, 2014) (accusing Google of being "infamous for arbitrarily cutting sites off with little to no warning or explanation.")

of content suppression. The social media giant is widely accused of exercising a heavy-handed censorship even on users-generated content depicting fine art,⁵⁸ and there are even websites specifically created to document numerous evidence of Facebook's flirting with censorship.⁵⁹ Facebook makes subscribers agree not to post anything that is "hate speech, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence."⁶⁰ This broad and general objection against nudity and violence – along with Facebook's publicized aim to balance "the need and interest of a global population" under what it warmly terms "Community Standards"⁶¹ – provides generous pretexts for the social media giant to whimsically block or remove any artistic and political expression regardless of its redeeming value.⁶² Facebook's aversion to sex deeply confounds foreign observers, given that its problem with users' privacy is a far bigger concern and which causes conflicts with privacy laws in many countries.⁶³

⁵⁸ Facebook demonstrated zero tolerance towards nudity and has labeled artworks posted by well-known art institutions as pornography. See, e.g., David Kratz, *In the Wake of Facebook's Richter Blackout, Does the Social Network Still Stand for Censoring Art?*, HUFFINGTON POST (Aug. 14, 2012, 8:42 AM), http://www.huffingtonpost.com/artinfo/in-the-wake-of-facebooks-_b_1773003.html (last visited Jun. 22, 2014); G. Roger Denson, *Courbet's Origin of the World Still Too Scandalous for Facebook!*, HUFFINGTON POST (Nov. 11, 2011), http://www.huffingtonpost.com/g-roger-denson/courbets-1866-the-origin-_b_1087604.html (last visited Jun. 19, 2014).

⁵⁹ See, e.g., *Political and Religious Censorship and Harassment by Facebook*, <http://www.facebookcensorship.com/> (last visited Nov. 5, 2014).

⁶⁰ Statement of Rights and Responsibilities, §3.7, FACEBOOK.COM (revised Nov. 15, 2013), <https://www.facebook.com/legal/terms> (last visited Jun. 19, 2014) [hereinafter Facebook TOS].

⁶¹ See *Facebook Community Standards*, FACEBOOK.COM, <https://www.facebook.com/communitystandards/> (last visited Jun. 19, 2014).

⁶² Facebook further clarifies that its prohibition of nudity to include "other sexually suggestive content." *About Facebook's Security and Warning Systems*, FACEBOOK.COM, <https://www.facebook.com/help/365194763546571/> (last visited Jun. 20, 2014). Amazon's content guidelines for Kindle direct publishing are even murkier than Facebook's as it does not allow direct publication of "pornography or offensive depictions of graphic sexual acts," but only clarifies that "[w]hat we deem offensive is probably about what you would expect." Kindle Direct Publishing Content Guideline, AMAZON.COM, <https://kdp.amazon.com/help?topicId=A2TOZW0SV7IR1U> (last visited Jun. 20, 2014). Amazon was reported to have joined other eBook stores in banning self-publishing erotica literature from its site. See, e.g., Nate Hoffelder, *Self-Published Erotica is Being Singled Out For Sweeping Deletions From Major eBookstores*, THE DIGITAL READER (Oct. 13, 2013), <http://the-digital-reader.com/2013/10/13/amazon-bn-whsmith-now/#.U6XaDo1dU00> (last visited Jun 20, 2014).

⁶³ Charles Arthur, *Facebook's Nudity and Violence Guidelines Are Laid Bare*, THE GUARDIAN (Feb. 21, 2012, 4:36 PM), <http://www.theguardian.com/technology/2012/feb/21/facebook-nudity-violence-censorship-guidelines> (last visited Jun. 19, 2014) (suggesting that Facebook's prejudice to sex is probably a reflection of the American puritanical tradition rather than the desire to appease authorities in other countries); Par Boris Manenti, *Facebook Supprime La Photo D'Un Artiste Canadien*, LE NOUVEL OBSERVATEUR (Jun. 20, 2012), <http://obsession.nouvelobs.com/facebook/20120620.OBS9179/facebook-supprime-la-photo-d-un-artiste-canadien.html> (last visited Jun. 22, 2014) (criticizing Facebook for seeing nudity in a picture where most people would see a "harmony between a mother and child".)

The shortcomings of Facebook's censorship are exacerbated by the double standard evident in the company's execution of its policies – disfavoring certain political themes while leaving others intact.⁶⁴ Despite the company's statement claiming that it “aspire[s] to respect people's right to share content of personal importance,” and that people are welcomed to post and share graphic images that raise awareness on human right issues,⁶⁵ yet Facebook was reported to have repeatedly removed content featuring gay kisses,⁶⁶ breast-feeding, and human-right abuses.⁶⁷ Cyber Leviathans invariably display a similar level of passionate defense for their algorithmic agents. Facebook, when confronting the inflamed public regarding the integrity of their content policies, has been reluctant to admit that censorship accidents were perhaps due to the imperfection of its autonomous censors.⁶⁸ On many occasions, Facebook claimed that its removals of non-complying photos and posts were administered through human oversight and staff review, in response to third-party complaints – and that all removal mistakes were attributable to human errors.⁶⁹ There is no evidence that Facebook actually employs human

⁶⁴ See, e.g., Lina Dencik, *Why Facebook Censorship Matters*, Cardiff School of Journalism, Media, and Cultural Studies (Jan. 13, 2014), <http://www.jomec.co.uk/blog/why-facebook-censorship-matters/> (last visited Jun. 20, 2014) (discussing how Facebook allows posts and images relating to white supremacist images and violence against women to permeate its network while deleting female-empowering nudity themes); John Jalsevac, *Facebook Censors Pro-life Image But Allows Do-It-Yourself Abortion Instruction*, LIFE SITE NEWS (Feb. 17, 2012), <http://www.lifesitenews.com/news/facebook-censors-pro-life-image-but-allows-do-it-yourself-abortion-instruct> (last visited Jun. 22, 2014); *Controversial Art Project Addressing Violence Against Children Is Censored by Facebook*, HUFFINGTON POST (Sep. 10, 2013), http://www.huffingtonpost.com/2013/09/10/erik-ravelo_n_3900061.html (last visited Jun. 20, 2014) (discussing Facebook's censorship of artworks depicting child abuse in powerful industries and institutions); Jeremy Kryn, *Facebook, Google, Social Media Sites 'Actively' Censor Christian Content: Study*, LIFE SITE NEWS (Sept. 21, 2011), <http://www.lifesitenews.com/news/facebook-google-social-media-sites-actively-censor-christian-content-study> (last visited Jun. 22, 2014).

⁶⁵ Facebook Community Standard, *supra* note 61.

⁶⁶ Michael Zimmer, *Facebook's Censorship Problem*, HUFFINGTON POST (Apr 22, 2011, 11:50 AM), http://www.huffingtonpost.com/michael-zimmer/facebooks-censorship-prob_b_852001.html (last visited Jun. 19, 2014).

⁶⁷ Facebook was reported to have remove a status update by Article 19, which campaigns for freedom of speech, an update which was linked to a Human Rights Watch report detailing alleged torture in the Arab country. Josh Halliday, *Facebook Apologises for Deleting Free Speech Group Post on Syrian Torture*, THE GUARDIAN (July 6, 2012), <http://www.theguardian.com/technology/2012/jul/06/facebook-apologises-free-speech-syria> (last visited Jun 20, 2014).

⁶⁸ See, e.g., Ryan J. Foley, *Facebook Apologizes For Censoring Birth Photographer Laura Eckert*, HUFFINGTON POST (Jan. 6, 2011), http://www.huffingtonpost.com/2011/01/07/facebook-apologizes-birth-photographer_n_805823.html (last visited Jun. 22, 2014); Asher Moses, *Facebook Relents on Doll Nipples Ban*, THE SYDNEY MORNING HERALD (Jul. 12, 2010), <http://www.smh.com.au/technology/technology-news/facebook-relents-on-doll-nipples-ban-20100712-106f6.html> (last visited Jun. 22, 2014).

⁶⁹ See, e.g., Lorraine Chow, *Facebook Apologizes for Banning Mother's "Offensive" Photos of Terminally Ill Baby*, HOLLYWOOD LIFE (May 21, 2012, 9:33 AM), <http://hollywoodlife.com/2012/05/21/facebook-birth-defect-baby-ban/> (last visited Jun. 22, 2014).

arbiters to do most of the censoring jobs, and its poor handling of appeals by affected users suggests otherwise.⁷⁰ Some affected artists argued that Facebook should not be acting like a robot – hiding behind complaints from extremists and fundamentalists – but should give its community enough credit that they know the difference between art and pornography.⁷¹

Google has been noticeably more open regarding its reliance on algorithms, but nevertheless reluctant to acknowledge that its algorithms can occasionally malfunction.⁷² It is suggested that Google's penchant for invoking the neutrality of its algorithms allows it "to extricate itself from a number of tricky ethical aspects of its work,"⁷³ and to avoid acknowledging that it has become a "guardian and gatekeeper of our public life."⁷⁴ Eric Schmidt described the work of Google's algorithm, with its ability to "filter forward" and reveal the whole deep ocean of information, as being "a virtual mirror of the world" that is the Internet; and it is not the mirror's fault that users do not like what they are seeing.⁷⁵ Schmidt's mirror metaphor equally suggests that Google and other Internet giants distort the world by refusing to be transparent about the defect of its algorithmic mirror.⁷⁶ Closed-wall internet intermediaries perennially see communication and information generated by users as chaotic, messy and decontextualized, and look to bring these chaotic elements to order with their analytical power.⁷⁷ There is strong evidence of the patterns in which dominant intermediaries are consciously using their "passive" technology to influence and manipulate our cultural conversation, our dispositions and attitudes, and our speech value.⁷⁸ Social networking services (SNS) employ algorithmic gatekeeping to subtly dictate the public awareness by manipulating memes and trends of information consumption.⁷⁹ Despite the fact

⁷⁰ Jennifer Nix, *Art or Pornography? You Should Decide – Not Facebook*, HUFFINGTON POST (Jun. 22, 2012), http://www.huffingtonpost.com/jennifer-nix/facebook-censorship_b_1616735.html (last visited Jun. 22, 2014).

⁷¹ *Id.*

⁷² Morozov, *supra* note 46, at 142.

⁷³ *Id.* at 142-143.

⁷⁴ *Id.* at 148; Lanier, *supra* note 27, at 193 (noting that computer algorithms are consciously designed to dodge difficult issues, because "computer scientists are human, and are as terrified by the human condition as anyone else.")

⁷⁵ Morozov, *supra* note 46, at 143-145.

⁷⁶ Pasquale (2015), *supra* note 12, at 61 (stating that despite the search engines' claims of objectivity and neutrality, search-engine providers are constantly making value-based and controversial decisions each time they generate a search result, and that "[t]hey help create the world they claim to merely 'show' us.")

⁷⁷ Lanier, *supra* note 27, at 176.

⁷⁸ Tutt, *supra* note 56, at 273-275 (exploring the social and cultural impacts of censorship by algorithms.)

⁷⁹ Morozov, *supra* note 46, at 146-160; Anthony Kosner, *Facebook is Recycling Your Likes to Promote Stories You Have Never Seen to All Your Friends*, FORBES (Jan. 21, 2013, 8:04 AM),

that social media users are becoming a more prominent source for content and cultural productions on the Internet,⁸⁰ online authors and creators are not in the position to command respect over the fruits of their intellectual labors.⁸¹

The problem of censorship by proxy is real and it is intricately linked with the degree in which dominant intermediaries have a freehand in using proprietary technology to shape and influence the public consumption of content in ways that comport to their business practices and objectives.⁸² As growth in the SNS industry depends more and more on high-quality content production from users, SNS providers will become more apprehensive toward business practices that interfere with how their algorithmic mirrors work.⁸³ Google openly and constantly condemned content farming – a popular practice among Internet firms who hire freelancers to generate short and cheaply produced articles to respond to popular search terms in order to attract advertisement⁸⁴ – and has reconfigured its algorithm to punish websites that engage in such practices.⁸⁵ Facebook's relationship with content farms is more complicated – at one point viral content-farms like Upworthy and BuzzFeed generated some of the most popular content people shared on the SNSs.⁸⁶ But new evidence shows that Facebook became annoyed with these popular virility mills to the point that it introduced a meme-defeating filter – something which is

<http://www.forbes.com/sites/anthonykosner/2013/01/21/facebook-is-recycling-your-likes-to-promote-stories-youve-never-seen-to-all-your-friends/> (last visited Nov. 5, 2014).

⁸⁰ See, e.g., Donna L. Hoffman, Thomas P. Novak and Randy Stein, *The Digital Consumer*, in THE ROUTLEDGE COMPANION TO DIGITAL CONSUMPTION 28, 31-33 (Russell W. Belk and Rosa Llamas eds., 2013) (noting that some social media businesses, such as Yelp.com and Facebook, are depending on user-generated content to fuel their digital economy) [hereinafter Hoffman et al.]

⁸¹ *Id.* at 35 (noting that “consumers will likely exercise weaker control over content on websites to which they feel a more intimate connection” because their content will be treated like common resources to be shared and reused without ownership restrictions.)

⁸² *Id.*; Lanier, *supra* note 26, at 192 (noting that the machine's recommendation of content may appear harmless but “our exposure to art shouldn't be hemmed in by an algorithm that we merely want to believe predicts our tastes accurately.”)

⁸³ Lucille M. Ponte, *Preserving Creativity from Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution?*, 15 B.U. J. SCI. & TECH. L. 34, 35-38 (2009) (arguing that moral-right type of protection will become more important when the sources for creative productions become increasingly decentralized by the explosion of digital technology, and when more and more works are being digitized or created in the digital space).

⁸⁴ McChesney, *supra* note 39, at 188-192.

⁸⁵ Eric Vreeland, *Google Changes Algorithm to Punish Content Farms*, HUBSPOT (Feb. 27, 2011), <http://blog.hubspot.com/blog/tabid/6307/bid/10052/Google-Changes-Algorithm-to-Punish-Content-Farms.aspx> (last visited Nov. 2, 2014).

⁸⁶ Jeff Bercovici, *Does Facebook Think Virality Mills Are the New Content Farms?*, FORBES (Dec. 9, 2013), <http://www.forbes.com/sites/jeffbercovici/2013/12/09/does-facebook-think-virality-mills-are-the-new-content-farms/> (last visited Nov. 17, 2014).

dubbed by industry observers as “Facebook Panda”⁸⁷ – into the next-generation of its newsfeed algorithm. Facebook, furthermore, becomes increasingly obsessed with “quality content.” The company has revealed the ambition to become a provider of quality social content by taking a survey on its users to solicit their views regarding what defines quality.⁸⁸ Nobody understands how Facebook reaches conclusion pertaining to the quality of content being shared, but it is clear that Facebook are not interested in treating each piece of content without discrimination. Certainly, discriminating content based on quality criteria will help Facebook gain substantially more revenue from advertisement – both because it is easier for companies to make precision ad placements and also because marketers naturally want to associate with premium-quality content.⁸⁹

However, the higher-quality goal means that Facebook is now urging users and companies to spend more time and resources on cultural productions in the social network environment. Social media users themselves have, in fact, become a major source of content production for all types of online services.⁹⁰ Social media companies and online businesses have been configuring their sites to facilitate user-generated content, such as by making it easier for users to give reviews or to make short home videos.⁹¹ Social media users are encouraged, both explicitly and implicitly, to create and share a status, photo, place, and life event. Facebook coerces users to

⁸⁷ Peter Kefka, *Like This If You Like Pandas! Facebook Says Publishers Shouldn't Fret About News Feed Changes*, ALL THINGS D (Dec. 6, 2013), http://allthingsd.com/20131206/like-this-if-you-like-pandas-facebook-says-publishers-shouldnt-fret-about-news-feed-changes/?mod=atd_homepage_carousel (last visited Nov. 17, 2014).

⁸⁸ Bercovici, *supra* note 86.

⁸⁹ Greg Bobolo, *What Makes Digital Video Advertising Profitable? Content, Context, Placement*, INMA.ORG (July 1, 2014), <http://www.inma.org/blogs/innovative-advertising-solutions/post.cfm/what-makes-digital-video-advertising-profitable-content-context-placement> (last visited Nov. 17, 2014).

⁹⁰ This phenomenon is easy to observe but hard to accept, since uncompensated acts of generating content and information suggests that unfair exploitation is taking place. As of 2014, more than 43,000 hours of videos were uploaded onto YouTube each day, whereas Facebook saw a daily addition of over 250 million new photos to its site. Nevertheless, advocates of Silicon Valley argue that users, while donating their content and information for free, derive the benefits through endless stream of new goods and services. Brynjolfsson and McAfee, *supra* note 11, at 116-120 (admitting that user-generated content is a rapidly growing category of intangible assets but suggesting that it should not be included as “intellectual property” because its value is hard to measure.) See also Yeo, *supra* note 29, at 280-81.

⁹¹ See, e.g., Corey Eridon, *Why User-Generated Content is More Important Than You Think*, HUBSPOT (Feb. 7, 2012), <http://blog.hubspot.com/blog/tabid/6307/bid/31258/Why-User-Generated-Content-Is-More-Important-Than-You-Think.aspx> (last visited Nov. 10, 2014); *The Benefits of User-Generated Content and How to Implement It*, MOUNTAIN MEDIA (Jan 25, 2013), <http://www.mountainmedia.com/blog/2013/seo/the-benefits-of-user-generated-content-and-how-to-implement-it> (last visited Nov. 10, 2014).

“tell their stories” or to make “Sponsor Stories”⁹² and the social media giant now assumes the role of the perpetual co-author of everyone’s history as well as the publicizer of their tastes,⁹³ while constantly denying that it performs a content-providing role in that regard.⁹⁴ Video-sharing technology like *Vine*, now owned by Twitter, was developed to facilitate microblogging activities among social media users.⁹⁵ The Silicon Valley’s mega intermediaries, furthermore, create an environment that obliges people to share their intimate content and information and, at the same time, force them to surrender control over those materials.⁹⁶ Thus, the dividing line between “crowdsourcing” and “digitally distributed sweatshop labor” will ultimately depend on the level of control that users may exercise over the destiny of their personal stories or creative inputs.⁹⁷

In many senses, users’ time is the most valuable resource for SNSs. On one hand, time devoted by consumer to create a piece of content – detailed product reviews, for example – often translates into premium value.⁹⁸ On the other hand, the duration that each user spends with content will be analyzed to locate quality content that will be further exploited commercially.⁹⁹ Facebook and other SNSs are rapidly evolving into “social content farms” with users at the core of their content production source and destination.¹⁰⁰ In short, SNSs are transforming the social

⁹² In Early 2011, Facebook launched an advertising service labeled “Sponsor Story” that translated users’ “likes” actions as their stated preferences in connection with certain products and services. This advertising move later became a subject of a class action lawsuit in which a circuit judge found that Facebook’s action constitute violation of plaintiffs’ publicity rights. *Fraley v. Facebook, Inc.*, 830 F.Supp.2d 785, 791-793 (N.D. Cal. 2011).

⁹³ See Bianca Bosker, *Facebook Hasn’t Even Begun to Exploit Everything It Know About You*, HUFFINGTON POST (Nov. 4, 2013), http://www.huffingtonpost.com/2013/11/04/facebook-personal-data_n_4194040.html (last visited Nov. 12, 2014) (noting that Facebook has transformed itself “from a passive receptacle for our memories to an active transcriber of our everyday interaction.”)

⁹⁴ See, e.g., *Fraley*, 830 F.Supp.2d at 795, 801-803 (denying Defendant’s motion to dismissed based on Section 203 of the CDA, finding that “Facebook’s actions in creating Sponsored Story “go beyond ‘a publisher’s traditional editorial functions[,] such as deciding whether to publish, withdraw, postpone or alter content.’”) (citation omitted).

⁹⁵ As of August 2014, Vine boasts its monthly viewership to exceed 100 million individual viewers and it is estimated that there are more than 1 billion loops everyday. Alex Hern, *Vine Allows Users to Upload Videos Made with Other Apps*, THE GUARDIAN (Aug. 20, 2014), <http://www.theguardian.com/technology/2014/aug/20/vine-upload-videos-made-with-other-apps> (last visited Nov. 10, 2014).

⁹⁶ For an intelligent analysis of how giant Internet firms generate power and riches by capitalizing on the “free culture.” See Lanier, *supra* note 27, at 7–16, 37-52.

⁹⁷ See Morozov, *supra* note 46, at 36-37 (suggesting that the term “Crowdsourcing,” one of the chief attribute of the Web 2.0 Internet, may be just a euphemism for corporate unpaid profiting from user-generated content).

⁹⁸ *Id.*

⁹⁹ The web behavior of users is considered to be a part of each individual’s important personal data upon which SNSs’ business model is based. Lilian Edwards, *Privacy, Law, Code and Social Networking Sites*, in RESEARCH HANDBOOK ON GOVERNANCE OF THE INTERNET 312-313 (Ian Brown ed., 2013).

¹⁰⁰ Kevin Morris, *The Future of Facebook as a Social Content Farm*, THE DAILY DOT (Feb. 19, 2013), <http://www.dailydot.com/business/future-facebook-spam-social-content-farm/> (last visited Nov. 20, 2014).

network environment into one which encourages creation of quality non-proprietary content which they will then use as “big data” to process and make decision about what deserves their users’ and, ineluctably, advertisers’ attention. The future of the Internet, pursuant to Facebook’s vision, would be a lot less like a public forum of speech, but rather a strictly regulated place that is packed with premium-quality content experience in abundance. This transformation is likely to be both subtle and swift, guided seamlessly by smart and self-executing algorithms that are “set up for the explicit purpose of shaping users’ behaviors with their user-generated content.”¹⁰¹

2.2 The Machine-Human Distinction and the Lack of Safeguard for Personality and Privacy Rights

The algorithms behind super ISPs’ content-based discretion are programmed and implemented by people, and for this reason, it is tempting to classify the computers as being human surrogates or corporate agents in their own rights.¹⁰² Yet corporations who provide and maintain automated online services do not always readily admit that the tasks rendered by their pre-programmed autonomous agents are always analogous to human’s actions. Cyber Leviathans have been practicing secrecy regarding how they handle users’ private information by keeping the true picture behind the inscrutability of their black boxes.¹⁰³ Automated agents are typically painted to be efficient and powerful, yet innocent and without the dark curiosity, malice or any other humanly sin that normally subjects human information processors to a different paradigm of regulation.¹⁰⁴ Unsurprisingly, therefore, super intermediaries find freedom to push their information practices to the very edge of the legal the boundary, if are not in fact constantly flouting the law.¹⁰⁵

Google and other Internet giants have always maintained that they are entitled to intercept and read users’ emails or to process other content in order to improve their services, or because

¹⁰¹ Hoffman et al., *supra* note 80, at 32.

¹⁰² Samir Chopra, *Computer Programs Are People Too*, THE NATION (May 29, 2014, 1:38 PM), <http://m.thenation.com/article/180047-computer-programs-are-people-too> (last visited Jun. 4, 2014).

¹⁰³ Pasquale (2015), *supra* note 12, at 160-165 (discussing the Silicon Valley companies’ reliance on the inscrutability and opacity of their proprietary technologies to evade regulation).

¹⁰⁴ In response to criticisms surrounding its email-reading practice after the launch of Gmail in 2004, Google emphasized that its perusal of users’ emails was being performed by automated software, not unlike other anti-spam or antivirus software, and not by the company’s human employees. Andrew Orlovski, *Google Mail is Evil – Privacy Advocates*, THE REGISTER (Apr 3, 2004), http://www.theregister.co.uk/2004/04/03/google_mail_is_evil_privacy/ (last visited Jun. 4, 2014).

¹⁰⁵ Pasquale (2015), *supra* note 12, at 10-11 (suggesting that Google and other Silicon Valley’s leaders are probably routinely crossing the “creepy line.”)

of the fundamental necessity of protecting their property interests.¹⁰⁶ Google has relied on the statutory exceptions under the Wiretap Act¹⁰⁷ – as amended by the Electronic Communication Privacy Act (ECPA)¹⁰⁸ – to defend its email scanning practices, while arguing for a greater freedom to contractually determine what constitutes a functional or conduit practice.¹⁰⁹ In September 2013, a District Court held, in consolidated action *In Re: Google, Inc. Gmail Litigation*,¹¹⁰ that Google's email scanning operations violated the Wiretap Act and rejected Google's defense based on consent exception – reasoning that the consent exception did not give an ISP a broad license to engage in extensive content processing and data-mining practices.¹¹¹ The court, per Judge Lucy Koh, concluded that the language of Google's Privacy Policies were “too misleading” to support a claim that both Gmail and non-Gmail users agreed to allow Google to intercept and inspect their communications under the implied license theory.¹¹²

As *In Re: Google, Inc. Gmail Litigation* illustrates, the current privacy-protection framework in the United States is struggling to keep up with the changing role of mega intermediaries.¹¹³ Google is not the only online giant that tried to shrug off its social and legal responsibility by characterizing its operations strictly as functional conduit while constantly attempting to go

¹⁰⁶ Most webmail giants, including Microsoft, Apple, Yahoo, and Google, reserve the right to read their users' emails when they deem it necessary to protect their property interests. Alex Hern, *Yahoo, Google and Apple also claim right to read user emails*, THE GUARDIAN (Mar 21, 2014), <http://www.theguardian.com/technology/2014/mar/21/yahoo-google-and-apple-claim-right-to-read-user-emails> (last visited June 15, 2014).

¹⁰⁷ The Wiretap Act is passed as the Third Title of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, enacted Jun. 19, 1968. The Wiretap Act is codified at 18 U.S.C. §§ 2510-22.

¹⁰⁸ Pub. L. 99-508, 100 Stat. 1848 (October 21, 1986) [hereinafter ECPA]. The Wiretap Act provides a private right of action against any person who “intentionally intercepts, endeavors to intercepts, or procures any other person to intercept ... any wire, oral, or electronic communication.” 18 U.S.C. §§ 2511(1)(a), 2520 (2012).

¹⁰⁹ Section 2510(5)(a) of the Wiretap Act which provides that – as a provider of electronic communication service – an email service provider is immune from claims alleging interception by a “device,” provided that such processing occurred through equipment “used by a provider of wire and electronic communication service in the ordinary course of its business.” 18 U.S.C. § 2510(5)(a)(ii) (2012). Under the consent exception, if either party to the communication consents to its interception, then there is no violation of the Wiretap Act. 18 U.S.C. § 2511(2)(d).

¹¹⁰ *In re Google, Inc. Gmail Litigation*, 13-MD-02430-LHK, 2013 WL 5423918 (N.D. Cal. Sep 26, 2013) [hereinafter *In re Google, Inc. Gmail Litigation*]

¹¹¹ *Id.* at *13 (citation omitted).

¹¹² *Id.* at *14.

¹¹³ Google even sought to classify itself as a “public utility” in order to be exempted from liability under California's Invasion of Privacy Act (CIPA), Cal Pub. Util. Code §216 (a). *Id.* at *21-22 (finding that Google was not a “public utility,” within the meaning of the statute, and thus did not qualify for the exception). Some commentators believe that this is a poor strategy for Google since it could potentially compromise Google's immunity from the First Amendment scrutiny in other search engine litigations. Venkat Balasubramani & Eric Goldman, *Wiretap Claims Against Gmail Scanning Survive Motion to Dismiss*, TECHNOLOGY & MARKETING BLOG (Sep. 30 2013), http://blog.ericgoldman.org/archives/2013/09/wiretap_claims_1.htm (last visited Jun 20, 2014).

beyond that role. Modern intermediaries are becoming many more things than lawmakers could have anticipated twenty years ago. Given the reality of automated processing, the machine-not-human distinction no longer provides an effective regulatory safeguard for personality and privacy interests of cybernauts. An important aspect of Judge Koh's decision is that the ECPA's consent exception probably requires a more "informed" type of consent to effectively protect consumer interests.¹¹⁴ Ideally, the law should ensure that the burden of meeting an "informed consent" standard bear heavily on the companies who rely on adhesion contracts in exploiting consumers' private and valuable personal information.¹¹⁵ In contrast, a general waiver to such rights should not be enforceable. Unfortunately, unlike the European data protection law,¹¹⁶ a robust safeguard for consumers' privacy interests is not apparent from the U.S. statutes¹¹⁷ or case law.¹¹⁸

The emerging case law from the ninth circuit takes American privacy jurisprudence to the next level – by divorcing privacy concerns from machine-not-human rhetoric and focusing on the issue of consent and consumers' autonomy with respect to their personal information. This promising trend, however, is not likely to change the status quo.¹¹⁹ The American model of Internet governance is firmly based on the preference for private ordering through contractual relationship. Hence, the American statutory regulation of the Internet is confined to areas such as

¹¹⁴ *In re Google, Inc. Gmail Litigation*, 2013 WL 5423918, at *13 –*14 (rejecting Google's "implied consent" argument).

¹¹⁵ In another decision, involving an alleged violation of the Wiretap and Store Communication Act, a California District Court, *per* Judge Lucy Koh, found that LinkedIn had met the statutory "consent exception" standard, under 18 U.S.C. § 2701 (c)(2), when it notified a user at the point of collection that it was going to collect personal email address from the user's external email account. *Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2014 WL 2751053 at *13 (N.D. Cal. Jun. 10, 2014) [hereinafter *LinkedIn I*] (distinguishing the present case from *In re Google, Inc. Gmail Litigation*, based on the fact that LinkedIn provided an opt-out option in the form of "No Thanks" button.)

¹¹⁶ Data Protection Directive, *supra* note 35, art. 8(2)(a), 10.

¹¹⁷ See, e.g., Orin Kerr, *Is Gmail Illegal?*, THE VOLOKH CONSPIRACY (Oct. 4, 2013, 2:41 AM), <http://www.volokh.com/2013/10/04/is-gmail-illegal/> (last visited Jun 16, 2014) (arguing that "general notice" by a communication provider that a call may be monitored is enough to invoke the ECPA's consent exception)

¹¹⁸ See, e.g., *Jones v. Corbis Corp.*, 815 F.Supp.2d 1108, 1113 (C.D. Cal. 2011) *aff'd*, 489 Fed.Appx 155,156 (9th Cir. 2012) (held that, pursuant to the State common law right of publicity, "[c]onsent to use a name or likeness need not be express or in writing, but it may be implied from the consenting party's conduct and the circumstances of the case.")

¹¹⁹ Venkat Balasubramani, *Facebook Sponsor Story Settlement Approved – Fraley v. Facebook*, TECHNOLOGY & MARKETING LAW BLOG (Sep. 10, 2013), http://blog.ericgoldman.org/archives/2013/09/facebook_sponso_1.htm (last visited Feb. 10, 2015) (noting that the outcome of *Fraley* only coerced Facebook to "provide greater disclosure and transparency" about its practice so as to accommodate lawful consent; but Facebook "gave up absolutely nothing by way of injunctive relief" and was able to continue its exploitative operations even without providing any opt-out option for consumers).

Cybercrime and electronic eavesdropping – with a predominant emphasis on government actors rather than on private entities.¹²⁰ Dominant intermediaries thus continue to hold massive power to unilaterally shape the nature of their services by imposing on consumers,¹²¹ and even children,¹²² a general or complete waiver to important rights. The protean nature of modern intermediaries hence calls for a more fluid relationship with regard to the role played by contracts and statutory laws in Internet governance¹²³ – preferably with a greater reliance on statutory regulation in areas where the Internet facilitates behaviors that pose major threats to basic human rights or consumer interests, e.g. privacy and data protection.¹²⁴

2.3 Legal Immunities That Encourage Self-Censorship among Intermediaries: The Speaker Paradox under CDA's Section 230 and the First Amendment

A preference for private ordering requires deregulation in core areas of intermediary liability, namely intellectual property, privacy and defamation tort. Many commentators argue that privacy and intellectual property rights regimes impose unnecessary obstacles to the innovation on cyberspace just as publisher liability does.¹²⁵ The Silicon Valley's dominance

¹²⁰ See James Q Whitman, *The Two Western Culture of Privacy: Dignity versus Liberty*, 113 YALE L. J. 1151, 1159-64 (2004) (observing that the American paradigm of privacy is based on the concept of dignity against intrusion by an Orwellian government but is less concerned with the media).

¹²¹ Following a District Court's finding, in *Fraley*, 830 F.Supp.2d at 803-810, that Plaintiffs had stated claim for misappropriation of users' names and likenesses under California Right of Publicity Statute – in relation to Facebook's "Sponsored Stories" program – Facebook successfully reached settlement agreement with the plaintiffs and immediately revised its Terms of Service. Fox van Allen, *Facebook Now Wants You in an Ad Whether You Want It or Not*, TECHLICIOUS (Aug. 30, 2013), <http://www.techlicious.com/blog/facebook-now-wants-to-use-you-in-an-ad-whether-you-want-them-to-or-not/#ixzz2e97UjyoA> (last visited Feb. 10, 2015). The revised Terms of Service now stipulate clearly that Facebook henceforth has permission to exploit users' names, profile pictures, content and personal info and get paid thereby. Facebook TOS, *supra* note 60, sec. 9.1 ("[y]ou give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you.")

¹²² *C.M.D. v. Facebook, Inc.*, No. C.12-1216 RS, 2014 WL 1266291 (N.D. Cal. Mar. 26, 2014) (holding that minors do have power to enter into binding, albeit voidable, contracts with Facebook)

¹²³ Lee A. Bygrave, *Contract vs. Statute in Internet Governance*, in RESEARCH HANDBOOK ON GOVERNANCE OF THE INTERNET 193 (Edward Elgar, Ian Brown ed., 2013).

¹²⁴ *Id.* at 183, 189-190 (noting that governance through statutory regime is notably vigorous in areas such as cybercrime, data security, consumer protection and protection of fundamental human rights).

¹²⁵ See, e.g., Tutt, *supra* note 56, at 269-71 (discussing how privacy is used by Internet speech regulators to circumvent the First Amendment question); Lipton, *supra* note 14, at 1346, 1361 (noting that the scattered treatment of intermediaries liability will increase legal duties on intermediaries and lead to a chilling of online innovation.) In China, the less stringent copyright regime allowed users of Weibo, the country's top microblogging site, to attach media and stream content long before Twitter was able to do so. See Major Tian, *How Piracy and Weibo Helps Western TV Star Break Out in China*, REUTERS (May 2, 2013), <http://www.reuters.com/article/2013/05/03/us-piracy-weibo-idUSBRE94204U20130503> (last visited Nov. 5, 2014).

position in Internet technology and online industry in the world today, as Professor Anupam Chander recently points out, can be directly attributable to the absence of strict intermediary liability constraints and – in contrast to its European competitors – a more relaxed approach toward concerns about copyright violations and privacy rights.¹²⁶

Congress made an important legislative effort to change the liability landscape of online intermediaries by enacting Section 230 of the Communication Decency Act (CDA) – which superseded many common law liability doctrines relating to claims arising from the speech of third parties.¹²⁷ Section 230 of the CDA, along with safe harbors under Title II of the DMCA, has been singled out as the legal provision that made Web 2.0 possible.¹²⁸ However, Section 230's enormous scope – by placing the online platform providers out of the reach of most common-law tort liability – thwarted courts' ability to rework and modify the common law personality rights, including moral rights, to address new problems caused by the ever-evolving business practices of modern online proxies.¹²⁹ Although courts remain split as to whether Section 230 establishes a general immunity for online intermediaries,¹³⁰ it is generally conceded that Section 230 defense applies to protect online proxies against claims far beyond traditional defamation,¹³¹ including defamatory claims based on search engines' autocomplete functions,¹³²

¹²⁶ Chander (2014), *supra* note 8, at 649-650.

¹²⁷ David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 411 (2010).

¹²⁸ Chander (2014), *supra* note 8, at 657 (noting that the Supreme Court's invalidation of the greater portion of the CDA in *Reno v ACLU* was regarded as an important step to unleash the potential of this safe-harbor statute.)

¹²⁹ Ardia, *supra* note 127, at 411; Jonathan Zittrain, *A History of Online Gate Keeping*, 19 HARV. J.L. & TECH. 253, 262 (2006) (observing that Section 230 terminated judicial involvement in setting the proper level of gatekeeping liability for online defamation and decency.)

¹³⁰ Compare, e.g., *Zeran v American Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (holding that the CDA establishes "broad federal immunity to any cause of action that would make service providers liable for information originating with a third party"), *Johnson v Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (holding that § 230(c)(1) establishes an immunity defense), and *Almeda v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (same), with *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (holding that §230(c)(1) does not create a general immunity), and *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (holding that the statutory text of §230(c)(1) does not support a claim of general immunity).

¹³¹ *Barnes*, 570 F.3d at 1101 (stating that "the language of the statute does not limit its application to defamation cases)."

¹³² Recent decisions showed that Section 230 immunizes search engines from defamation claims based on "autocomplete" functions of the search engine. *Obado v. Magedson*, No. 13-2382 (JAP), 2014 WL 3778261, at *6 (D. N.J. July 31, 2014) (holding that "suggested search terms auto-generated by a search engine do not remove that search engine from the CDA's broad protection"); *Stayart v. Google Inc.*, 783 F.Supp.2d 1005, 1056-57 (E.D. Wis. 2011) *aff'd*, 710 F.3d 719 (7th Cir. 2013) (finding that plaintiff's allegation that Google automatically suggested the phrase that linked the plaintiff's name and the name of a sexual dysfunction drug, when someone Googled her name, did not allow plaintiff to "get around [the Section 230] obstacle.")

religious hate speech,¹³³ false and misleading information,¹³⁴ violation of anti-discrimination laws,¹³⁵ and negligence claims.¹³⁶

Section 230 was designed to further two objectives: 1) shielding ISPs from speech-related tortious liability and reducing the likelihood of collateral censorship,¹³⁷ and 2) to encourage voluntary censorship by both intermediaries and parents of offensive expressions – notwithstanding whether the suppressed expression is a constitutionally protected speech.¹³⁸ It is self-evident that Section 230 (c) does not simply adopt the conduit theory as a liability model for Internet intermediaries: the CDA's safe harbor clearly sanctions all basic activities of private censorship while refusing to treat intermediaries as speakers based on their exercise of editorial judgment.¹³⁹ In fact, courts have refused to accept that there is any discordance between the contemporary First Amendment jurisprudence that acknowledges intermediaries as bona fide speakers and Section 230's core distinction between eligible ISPs and non-eligible information content providers.¹⁴⁰ The Section 230's paradigm thus differs from its European counterpart, the

¹³³ *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 546 (E.D. Va. 2003) (holding that AOL is immune under the CDA and is thus not responsible for anti-Islamic hate speech in its online chat rooms).

¹³⁴ See, e.g., *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646 (E.D. Tex. 2006) (holding that §230 immunizes an online-data-gathering company that collected information from third parties about individuals and businesses from a claim alleging distributing false information).

¹³⁵ See, e.g., *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC.*, 521 F.3d 1157 (9th Cir. 2008) (en banc) (holding that §230 protects the defendant online apartment searching service from claims alleging violation of both state and federal anti-discrimination laws).

¹³⁶ See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (holding that §230 immunizes MySpace from a negligence claim relating to a sexual assault involving a young female victim who had been in contact with a sexual predator via MySpace social network service).

¹³⁷ 47 U.S.C. §230(c)(1).

¹³⁸ *Zeran*, 129 F.3d at 331; 47 U.S.C. §230(c)(2)(A).

¹³⁹ *Zeran*, 129 F.3d at 330 (stating that “lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or *alter content*—are barred”) (emphasis added). Courts have understood that the shift reason for establishing a protection for private blocking and screening of offensive material is “to control the exposure of minors to indecent material on the Internet.” *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 (9th Cir. 2009); *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (same).

¹⁴⁰ See, e.g., *O’Kroley v. Fastcase Inc.*, No.3-13-0780, 2014 WL 2881526 (M.D. Tenn. June 25, 2014) (adopting a view that “the automated editorial acts of Google in publishing the information which was the search result did not make Google an information content provider and did not take away Google’s statutory immunity from Plaintiff’s claims.”); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (holding that §230 expressly bars “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content.”)(citation omitted); *Obado*, 2014 WL 3778261, at *5 (D. N.J. July 31, 2014) (holding that Section 230 applies even if the defendants edited or manipulated their own search results). See also Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629, 1649-50 & n.102 (2014) [hereinafter Bracha (2014)] (contending that it is inconsistent to permit search engines to “avoid liability stemming from the content they index, usually under tort or intellectual property laws, [...] while also claiming free speech protection extended to them.”)

Electronic Commerce Directive,¹⁴¹ in that the Section 230 immunity is affected neither by the nature of service provided, nor the level of knowledge the proxy has – with respect to injurious or illegal material.¹⁴² Furthermore, the scope of this self-censorship power is generally understood to be very broad, owing to the generous language of subpart 230 (c)(2)(A).¹⁴³ In theory, an ISP may lose its Section 230 safe harbor should its editorial activities go beyond “Good Samaritan” blocking and screening to provide or generate content to serve its own interests.¹⁴⁴ Some courts have reacted to this seemingly uncapped power by reading “good faith” restriction into the Good Samaritan safe harbor.¹⁴⁵ A Massachusetts District Court recently developed a theory that the CDA’s Section 230 (c)(2) does not mandate a dismissal of a claim arising from the fact that the defendant interactive service provider engages in unscrupulous or bad faith manipulation of customer reviews that constitutes a misrepresentation of plaintiff’s business.¹⁴⁶ But the majority’s opinion remains that private intermediaries are free to supervise speech, even though the reason for suppression is no more than a pretext.¹⁴⁷

¹⁴¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, art. 12-15, OJ L. 178/1 of July 17, 2000 [hereinafter Electronic Commerce Directive].

¹⁴² See *Mazur v. eBay*, No. C 07-03967 MHP, 2008 WL 618988 at *9 (N.D. Cal. Mar. 4, 2008) (stating that “plaintiff’s assertion that eBay knew of the seller’s illegal conduct and failed to prevent it is ... ‘the classic kind of claim that [is] preempted by Section 230.’”)

¹⁴³ “[A]ny action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]” 47 U.S.C. § 230(c)(2)(A) (2012).

¹⁴⁴ See, e.g., *Fraley*, 830 F.Supp.2d at 802 (rejecting the CDA’s Section 230 immunity where Facebook allegedly “transformed the character” of Plaintiffs’ submissions); *Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2014 WL 6618753 at * 15 (N.D. Cal. Nov. 13, 2014) [hereinafter *LinkedIn II*] (rejecting the CDA’s Section 230 immunity because LinkedIn did not perform a “traditional editorial function” when it reproduced users’ names and likenesses in the reminders emails).

¹⁴⁵ See, e.g., *Zango*, 568 F.3d at 1178 (Fisher, J., concurring)(remarking that a service provider should not be allowed “to abuse [Section 230] immunity to block content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material ‘otherwise objectionable’”); *Smith v. Trusted Universal Standards in Electronic Transactions Inc.*, No. 09-4567 (RBK/KMW), 2011 WL 900096 at *9 (D.N.J. March 15, 2011) (noting that Defendant’s failure to respond to Plaintiff’s repeated requests for an explanation why it continually blocked Plaintiff’s outgoing email raised a question of fact that Defendant may have acted in bad faith).

¹⁴⁶ *Moving and Storage, Inc., v. Panayotov*, No. 12-12262-GAO, 2014 WL 949830 at *2 (D. Mass. March 12, 2014) (stating that the CDA Section 230 does not bar an action in which the defendants are not treated as the publisher or speaker but as “developers of the alleged misinformation.”)

¹⁴⁷ See, e.g., Goldman (2012), *supra* note 13, at 666.

On a constitutional level, the negative right of freedom of speech – or the right to withhold one's view¹⁴⁸ – has also been successfully asserted by online intermediaries when they assume the speech maker's role to exclude certain views or opinion in the course of their services. That the Constitution provides an equally strong safeguard against "compelled speech" as against the more familiar "compelled silence" was established in a Supreme Court's landmark decision *Miami Herald Publishing Co. v. Tornillo*.¹⁴⁹ The Court subsequently reinforced this principle and extended it beyond the newspaper context.¹⁵⁰ Editorial judgment turns out to be a mere subset of the broader *negative* First Amendment right that can be enjoyed by most business corporations as well as natural persons, even when they "engage in unsophisticated expression."¹⁵¹ Most pertinent to our discussion is the prevalent role of digital technology which, in what has been termed "the second machine age," are replacing humans as the curators and distributors of information.¹⁵² In recent years, the explosion of data has resulted in the increase in both the machines' ability to deliver high-quality information-driven services and the level of our reliance on them.¹⁵³ Knowledge and information under all forms of expression, once disseminated primarily by human beings before the advent of the Internet, are now intermediated, edited, suppressed and prioritized by machine.¹⁵⁴ In contrast to when dealing with privacy concerns, however, crafty intermediaries tend to characterize their automated processing algorithms as capable of performing speech function in order to avoid government regulation or liability stemming from mediating with consumer speech. And it was the search engines who first shattered the public understanding of these indexing tools which were once believed to be

¹⁴⁸ The Supreme Court has repeatedly expounded that the right to free speech "necessarily compris[es] the decision of both what to say and what *not* to say." *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-797 (1987) (emphasis original).

¹⁴⁹ 418 U.S. 241, 256-258 (1974) (declaring unconstitutional a Florida statute requiring newspapers to give equal reply space to those they editorially criticized).

¹⁵⁰ See, e.g., *Hurley v Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 578-581 (1995) (holding that the state courts' application of the Massachusetts public accommodations law to require private citizens who organize a parade to include among the marchers a group imparting a message that the organizers do not wish to convey violates the First Amendment); *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 14-17 (1986) (invalidating a rule requiring a private utility company to include with its bills a criticism of its practices published by a consumer group).

¹⁵¹ *Hurley*, 515 U.S. at 574.

¹⁵² Brynjofsson and McAfee, *supra* note 11, at 6-12 (arguing that the "second machine age," marked by the digital technology's competency in decision making tasks, is now unfolding.)

¹⁵³ *Id.*

¹⁵⁴ Tutt, *supra* note 56, at 240.

unbiased.¹⁵⁵ A study revealed that, in 2002, a majority of search engine users were not at all aware that websites could pay to have their sites appear on search results.¹⁵⁶ The complicated algorithms, which are proprietary and unique to each search engine, favor certain websites and types of content over others. This has come to be known as “search engine bias.”¹⁵⁷ Nevertheless, the search engine providers have succeeded in establishing a line of legal precedent that automated indexing and substantive editing activities are capable of receiving full first amendment protection.¹⁵⁸

The combine effects of the First Amendment’s editorial privilege and the CDA’s Good-Samaritan safe harbor create acclimate for private censorship that is both hard to detect and difficult to challenge. The First Amendment’s unqualified support for editorial power of private actors marginalizes free-speech interests of the public in favor of corporate self-censoring autonomy.¹⁵⁹ The absence of legal constraint on how online intermediaries may regulate speech within their domain of power will certainly lead to disproportionate responses against

¹⁵⁵ It is hard to imagine that a web indexing service like Alta Vista was making a speech choice in 1995. In fact, when people began to part way with Alta Vista or Hotbot in favor of Google, they did so because of a shared confidence that Google had a better technology and provided more trustworthy indexing services. SIVA VAIDHYANATHAN, *THE GOOGLIZATION OF EVERYTHING* 57 (Univ. of Cal. Press 2011). Other commentators asserted that, even now, most people still regard their preferred brand of search engine as a “‘credence good,’ whose value a consumer will have difficulty evaluating even after consuming it.” Oren Bracha and Frank Pasquale, (2008) *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1183 (2008).

¹⁵⁶ The study found that 68 per cent of users believed that search engines were fair and unbiased; with only 19 per cent saying that they could not place that trust in search engines. PEW Internet & American Life Project, *Search Engine Users: Internet Searchers Are Confident, Satisfied and Trusting* 8, 15-17 (2005), available at http://www.pewinternet.org/files/old-media/Files/Reports/2005/PIP_Searchengine_users.pdf [hereinafter PEW Report (2005)].

¹⁵⁷ Natalie Nicol, *Baidu’s Political Censorship is Protected by First Amendment, But Raises Broader Issues*, DIGITAL MEDIA LAW PROJECT (Apr. 30, 2014), <http://www.dmlp.org/blog/2014/baidus-political-censorship-protected-first-amendment-raises-broader-issues> (last visited July 3, 2014).

¹⁵⁸ *Search King, Inc. v. Google Technology, Inc.*, No. CIV-02-145-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (concluding that Google’s use of a unique-to-itself algorithm rendered its website-ranking results “subjective” and, hence, entitled to full First Amendment protection); *Kinderstart.com v. Google, Inc.*, No. C 06-2057 JF, 2007 WL 831806, at * 20 (N.D. Cal. Mar. 16, 2007) (dismissing a defamatory allegation against Google’s public presentation of PageRank results on the ground that Google did not hold out its results as statements of fact); *Langdon v Google, Inc.*, 474 F. Supp. 2d 622, 629-630 (D. Del. 2007) (holding that Google and Microsoft were constitutionally protected private speakers, in relation to their discretion when displaying search results and political ads); *Zhang v. Baidu.com Inc.*, No. 11 Civ. 3388, 2014 WL 1282730, at *2 - *4 (S.D.N.Y. Mar. 28, 2014) (holding that Baidu’s discrimination of plaintiffs’ political speech was fully protected by the First Amendment, and there is nothing in the First Amendment jurisprudence that disqualifies automated search results from joining other constitutionally protected expressions).

¹⁵⁹ Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 28-29 (2006).

provocative users-generated content.¹⁶⁰ The editorial privilege doctrine of *Tornillo* shields private censors from constitutional scrutiny, thus allowing them to use inexpensive blocking techniques that are not narrowly tailored to achieve the result.¹⁶¹ Given a highly hierarchical networked environment, powerful gatekeepers such as Google or Baidu may elect to block or take down entire websites instead of editing the results or merely disabling access to specific pages.¹⁶² Other platform providers, on the other hand, may simply terminate their services to users whose contents were determined by algorithms to be violating Terms of Service¹⁶³ – a frightful prospect given that the world now relies on providers of cloud storage to keep and maintain important private information. More appallingly, courts' unwillingness to recognize public forum in cyberspace condemns free expression on the Internet by thwarting any meaningful check on the intermediaries' abuse of right and discretion.¹⁶⁴ None of these intermediaries is, therefore, obliged to put in place effective review or appeal procedures with respect to their editorial decisions.¹⁶⁵

3. Moral Rights and Private Censorship

Compared with how government censorship and obscenity laws can affect copyright holders' ability to gain access to their audience and enforce their rights in courts, the problem of private censorship, however, poses an altogether different challenge to authors and creators. Copyright law is fundamentally about giving copyright owners the exclusive power over a set of economic activities – usually an act of copying or reproducing for consumption – pertaining to protected works of authorship. But copyright law has its limitations when it comes to preventing

¹⁶⁰ T.J. McIntyre, *Child Abuse Image and Cleeenfeeds: Assessing Internet Blocking System*, in RESEARCH HANDBOOK ON GOVERNANCE OF THE INTERNET 290-297 (Ian Brown ed., 2013) (citing common criticism of blocking systems, namely transparency, a lack of fair procedure, a lack of legitimacy and accountability, over blocking, and being prone to be used beyond its initial objective).

¹⁶¹ In *Center for Democracy & Technology v. Pappert*, the court invalidated Pennsylvania's "Internet Child Pornography" law, finding that the law has blocked access to more than 1.2 million wholly innocent web sites, while having little if any effect on the few hundred child pornography sites that were targeted under the law. 337 F.Supp. 2d 606, 642, 662-663 (2004).

¹⁶² Kreimer, *supra* note 159, at 30-31.

¹⁶³ See Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115 1117, 1121-30 (2005) [hereinafter Nunziato (2005)] (observing that private decision making is now responsible for much of Internet speech regulation.)

¹⁶⁴ *Id.* at 1118, 1144-60.

¹⁶⁵ McIntyre, *supra* note 160, at 294-295.

an interference with the authentic representation or integrity of the work itself.¹⁶⁶ Authors often lose control over the fate of their intellectual productions when they are forced to deal with parties having superior economic leverage. Art vendors, property owners, museums or publishers, to name a few, can supervise the content and make finalizing decisions with regard to a work's public representation or the quality of reproduction. On the Internet, the deregulation of copyright law – for instant through the DMCA safe harbors – immunizes mega intermediaries from both direct and secondary copyright liability, the condition which allowed them to surpass traditional media institutions in both economic importance and power.¹⁶⁷ At the same time, the emergence of closed-wall digital empires like Google, Facebook and YouTube brought about the circumstance in which authors/creators are reduced to mere users who are obliged to forfeit their intellectual property rights, through exploitative TOS, to overweening platform providers who make no qualms about commodifying and re-contextualizing content and information generated by users.¹⁶⁸

Attribution and integrity interests are well-recognized incentives for creativity in every culture with strong authorship norms. There are a number of scenarios in which individual creators, who are not concerned with or no longer hold any interest in economic exploitations of their works, will nonetheless want to object to the destruction, defacement or textual integrity violation of the fruits of their intellectual labor.¹⁶⁹ This Part offers a detailed study on the concepts of moral rights and their relationship with the author's interests to maintain integrity and authenticity of his or her works. My aim here is to develop a case that moral rights – as a system that safeguards authors' personality interests – have an important place in the future of cyberspace. This Part also re-examines the problem of private interference with user-generated

¹⁶⁶ Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940) (noting that the economic exploitative aspects of the copyright problem do not represent all of the issues that face artists and authors).

¹⁶⁷ PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* 293-294 (Princeton Univ. Press 2014) (arguing that the history concerning the passage of the DMCA and litigations that it spawned can be described as a war of transition between Hollywood and the Silicon Valley).

¹⁶⁸ Jaron Lanier, a computer scientist and music composer, contends that the current networked economy is made possible by coercing a huge amount of information and content to become free, so that they can be monetized by people at the top of the network hierarchy. According to Lanier, copyright law gets in the way of manipulating and benefiting from user-generated content, and it is one of the most enigmatic characteristic of our time that our middleclass amateur musicians and artists are working for free on the social media while the SNSs owners become rich very quick even though they create very little jobs. Lanier, *supra* note 27, at 1-19, 47-52.

¹⁶⁹ *Id.* at 127.

content or intermediary bias, and concludes that these problems constitute a part of a bigger crisis in Internet governance: the users' loss of autonomy over their personality-related rights and information privacy. Even in the United States, it will be shown that moral rights claims can circumvent both the intermediaries' first amendment privilege as well as the Section 230 (c)(2) safe harbor. In the current cyber landscape dominated by mega networked intermediaries whose business models demand that content must be free, the author's ability to control over the "use" of his cultural productions has become essential not only to the author's artistic statement but also his long-term social and economic well-being.

3.1 Moral Rights: A General Introduction

The concept of "moral rights" in modern copyright law as being independent from economic rights and reaching beyond commercial interest was originated in France where it is called "droit moral de l'auteur" or "the author's moral right."¹⁷⁰ This concept was first recognized by French courts in the early part of the nineteenth century,¹⁷¹ when the Continental copyright jurisprudence started to drift from property to the new natural right of personality.¹⁷² Moral rights sanctify the bond between authors and their works. They demand respect for the author's projection of his personality into the world by giving recognition and protection to artistic integrity, reputation and personality.¹⁷³ The concept of moral rights thus presupposes the continuing relationship between the creator and his creation that is personal as well as reputational¹⁷⁴ – as distinguished from the economic rights focusing on commercial exploitation

¹⁷⁰ MIRA SUNDARA RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY 49-51 (Oxford 2011) [hereinafter Rajan (2011a)].

¹⁷¹ GILLIAN DAVIES AND KEVIN GARNETT, MORAL RIGHTS 3 (Sweet & Maxwell 2010). David Saunders argued that the French jurisprudence regarding authorial personality was developed case by case through the courts' expansive interpretation of article 1382 of the *Code civil* which prescribes general rule of liability for civil wrong. DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT 103 (Routledge 1992).

¹⁷² Baldwin, *supra* note 167, at 127-130 (contrasting, during the same period, the development of Continental copyright and the Anglo-American copyright jurisprudence, noting that the concept of immaterial property in the Britain had ended following the House of Lords's 1774 decision, *Donaldson v. Beckett* (1774), 1 Eng. Rep. 837 (H.L.)). Post revolutionary France, however, clearly shifted from the privilege-based protection that focused on publishers to a new literary protection concept based on natural rights. According to the Revolutionary Decree of 1791, the nature of literary property was "the most sacred, most legitimate, most unassailable, and [...] the most personal of all property." Archives Parlementaires de 1787 à 1860, Première Série, Tome xxii, January 13, 1791, at 210, quoted in Davies and Garnett, *supra* note 171, at 16.

¹⁷³ Roeder, *supra* note 166, at 557 (stating that "[w]hen an artist creates, [...] he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use.")

¹⁷⁴ The doctrine of moral-right inherited the natural philosophical outlook of the Enlightenment period that started long before the French Revolution. Saunders, *supra* note 171, at 76. The French scholar André Morillot is

of the work. Whereas copyright law gives a work of authorship its property status and its author exclusive rights of exploitation, moral rights gives the author's a continuing freedom to control and manage the existence of his work, even when proprietary interests no longer play the role.¹⁷⁵ Nevertheless, even in France, the doctrine's homeland, moral rights' substantive formulation was gradually developed as a separate and piecemeal judicial treatment which took shape throughout the nineteenth century.¹⁷⁶ Most countries did not adopt moral rights in their copyright legislation until the inclusion of an express moral rights provision into the Berne Convention for the Protection of Literary and Artistic Works ("The Berne Convention")¹⁷⁷ in 1928.

Moral rights consist of five standard substantive rights that empower the author to control time, place and form of the distribution of his works, the context of presentation as well as how he is to be associated with them.¹⁷⁸ The right of disclosure – also known as the divulgation right – forbids anyone from revealing the work to the public without the author's consent.¹⁷⁹ The right of attribution, or the right of paternity, guarantees not only that the author will be credited as the creator, but also that no one may interfere with his freedom to use a false name or even assuming anonymity.¹⁸⁰ Closely linked with the first two right is the right of withdrawal which is sometimes referred to as the right of repentance. This right allows the author to remove a work from the public circulation following its release as well as to discontinue any reputational association with it.¹⁸¹ Next is the right of integrity which enables the author to object to any distortion, mutilation or unauthorized modification of the work. Broadly construed, the right of

commonly credited as the first to have used the term "moral rights" in a technical sense. Morillot's work combines together the French perspective of copyright – believing in the independent existence of the moral component of author's rights – and the German theory of the inviolability of personhood. Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 100-102 (2007) [hereinafter Rigamonti (2007)].

¹⁷⁵ The German Philosopher Friedrich Nietzsche writes that the key to creation lies with the author's power of judgment. Artists and authors, according to Nietzsche, are great workers who are "tireless – not only in inventing – but also in rejecting, sifting, reshaping and ordering." FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN I 118-119 (Stanford Univ. Press 1997).

¹⁷⁶ Saunders, *supra* note 171, at 80.

¹⁷⁷ Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

¹⁷⁸ Although we can enumerate five types of moral rights, the most important of these are the right of attribution and the right of integrity, as they are the rights that are expressly recognized by Article 6 *bis* of the Berne Convention. *Id.* art. 6*bis*.

¹⁷⁹ Davies and Garnett, *supra* note 171, at 6.

¹⁸⁰ Rigamonti (2007), *supra* note 174, at 72.

¹⁸¹ ELIZABETH ADENEY, THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL COMPARATIVE ANALYSIS 46 (Oxford 2006).

integrity prevents any derogatory action in relation to the work, including destruction.¹⁸² In most countries, however, this right is associated with the author's reputation and a violation is only deemed to occur when the plaintiff is able to prove a reputational harm arising as a result of the alleged mistreatment of his work.¹⁸³ Finally, the author is deemed to have the right of access which allows him to demand access to the work of the owner of an original work, such as painting or sculpture, or to a master copy of the work.¹⁸⁴

Certainly, not all of these five aspects of moral rights are endorsed by national legislation of every country. Most states that include moral rights in their copyright legislation invariably recognize only two types of moral rights: the right of attribution and the right of integrity. It is not the purpose of this paper to explore all aspects of moral rights. Thus, we shall focus our attention on the right of integrity which is most relevant to the problem of private interference on artistic statement and authenticity in online space.

3.2 The International Protection of Moral Rights: A View Through Major Moral Rights Systems

Moral rights can be comprehensively viewed as a set of principles that safeguard the author's autonomy with respect to his relationship with the public by giving him the moral sovereignty over his writings and other creative expressions. Moral rights guarantee that the author shall determine the place and the moment of dissemination, the extent, the form and character of the work, and the name under which the work shall be represented.¹⁸⁵ Some aspects of moral rights can overlap with the economic objectives of copyright which concerns exclusive commercial exploitations of the works. In Germany, where monistic interpretation of copyright prevails, moral rights are regarded as an integrated or synthetic part of the copyright system.¹⁸⁶ The German unitary view of copyright system clearly manifests itself in Section 11 of the

¹⁸² Davies and Garnett, *supra* note 171, at 6. (noting that the right of integrity, as understood in France, is based on a broader concept of "respect" which confined neither to the notion of honor nor reputation).

¹⁸³ Rajan (2011a), *supra* note 180, at 34. Under the Berne Convention, the right of integrity is bounded principally by the criterion of prejudice to "honour or reputation." The Berne Convention, *supra* note 187, art. 6 *bis*.

¹⁸⁴ The right of access is not rarely recognized outside Germany. Adeney, *supra* note 191, at 256. The example of this right can be found in §25 of the German copyright law. Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten [Law on the Administration of Copyright and Related Rights], Sep. 9, 1965, RGBI I at 1273, last amended by Gesetz, Oct. 1, 2013, RGBI. I at 3714, § 25 (Ger.), available in English translation at http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0050. [hereinafter German Copyright Act].

¹⁸⁵ Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM-VLA J. L. & ARTS 199, 207 (1994).

¹⁸⁶ *Id.* at 208.

country's Law on the Administration of Copyright and Related Rights, which states that:

"[c]opyright protects the author in his intellectual and personal relationship to the work and in respect to the use of the work."¹⁸⁷

The Hegelian philosophy of the indelible person-property relationship leaves an indelible mark on the German copyright law in two respects: the inalienability of moral rights, and the limited duration of its protection.¹⁸⁸ Copyright title under the German law is considered inalienable from its author and, thus, is not transferable *inter vivos*.¹⁸⁹ No outright transfer of copyright means that it is not possible for corporations to own copyright title in Germany. The exercise of economic exclusivity occurs solely through licenses – which can be as comprehensive as necessary to cover the licensee's intended exploitation.¹⁹⁰ In the past, the German monism allowed the author to retain for the entire duration of copyright its core – or the “trunk” of a copyright tree – and to have authority over its offshoots.¹⁹¹ Thus, under the old monism, future modes of exploitation, which are unknown or unprecedented at the time of licensing, could not be transferred by general expressions, or general waivers of moral rights, in the exploitation contract.¹⁹² The German monism today has further coalesced the economic and moral considerations together – meaning that the intent of the parties to the contract will determine whether unspecified types of exploitation would be covered by the license agreement.¹⁹³ As for the duration of protection, the German monism considers the purposes for protection of economic and personal interests to be congruent and thus demands that their terms of protection be coextensive.¹⁹⁴

The French, perhaps owing to their Cartesian root of mind-body distinction, divide the copyright system into two distinct and independent types of rights. The “dualist” (*Le Dualisme*)

¹⁸⁷ German Copyright Act, *supra* note 184, §11.

¹⁸⁸ Dietz, *supra* note 185, at 208.

¹⁸⁹ The German Copyright Act, *supra* note 184, art. 29(1) (stating that “[c]opyright is not transferable” except by execution of the testament).

¹⁹⁰ *Id.* art. 31-32.

¹⁹¹ Dietz, *supra* note 185, at 209.

¹⁹² The German Copyright Act, *supra* note 184, art. 31(4) (now repealed).

¹⁹³ *Id.* art. 31(5) (“If the types of exploitation have not been specifically designated when an exploitation right was granted, the types of use to which the right extends shall be determined in accordance with the purpose envisaged by both parties to the contract.”)

¹⁹⁴ Rajan (2011a), *supra* note 170, at 81

approach emphasizes the unique relationship between the artist and the creative process.¹⁹⁵ The dualist's moral right seeks to protect the artist's creative process by protecting the artist's control over that process as well as the finished work of authorship.¹⁹⁶ The dualist envisions a pluriform approach to copyright that, on one hand, safeguards the economic interests of the author and, on the other hand, serves to address both personal interests of the author and cultural interests of a society.¹⁹⁷ France's notion of copyright with a dual structure is often criticized for allowing the author's personal and moral objections to trump over the legitimate economic exploitations as well as the public freedom to use the work.¹⁹⁸ In practice, dualism means that the protection for authorial reputation and integrity will not be subject to the same limitations as economic rights.¹⁹⁹ The dualist's moral rights may therefore last indefinitely, as is the case in France, and cannot be contracted away in the same way as economic rights are.

3.2.1 Monism and the Prohibition Against an Integrity Violation of a Work

The monistic view of moral rights – that the act of creating a work of authorship generates a legally protectable author-work relationship, regardless of whether the author is motivated by profits or other non-monetary drives²⁰⁰ – necessarily narrows down the circumstances in which the author's moral and personal rights can be asserted. The German author's right against distortion, codified in Article 14,²⁰¹ does not conflate the deference given to the author autonomy with respect to his works with the goal of cultural preservation or any form of public interest.²⁰² The German moral rights protect the author's intellectual and personal interests in the work.²⁰³ Personal interests have been interpreted as covering the author's own standing as well as prestige

¹⁹⁵ Baldwin, *supra* note 167, at 130-132 (discussing the role of romanticism in shaping the development of the author's rights during the early nineteenth century).

¹⁹⁶ Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 43-44 (1998).

¹⁹⁷ Loi No.92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle (partie législative) [Law 92-597 of July 1, 1992, on the Intellectual Property Code (Legislative Part)], art. L111-1, Journal Officiel De La République Française [J.O.], July 3, 1992, p. 8801 [hereinafter C. Prop. Intell.] (stating that the right of author "shall include attributes of an intellectual and moral nature as well as attributes of an economic nature").

¹⁹⁸ For a scholarly criticism of French dualism model, see Dietz, *supra* note 185, at 206-213.

¹⁹⁹ Rajan (2011a), *supra* note 170, at 67.

²⁰⁰ Rigamonti (2007), *supra* note 174, at 109.

²⁰¹ The German Copyright Act, *supra* note 184, art. 14 ("The author has the right to prohibit the distortion or any other derogatory treatment of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work.")

²⁰² Adeney, *supra* note 181, at 241.

²⁰³ The German Copyright Act, *supra* note 184, art.14. (stating that "the author has the right to prohibit the distortion or any other derogatory treatment of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work.")

and reputation, whereas intellectual interests reflect the author's subjective concern on what happens to his work.²⁰⁴ German courts have construed the term "distortion" as involving an attack on the work's intellectual substance.²⁰⁵ The type of distortion that would trigger the right of integrity under the German law must result in either a devaluation or a denigration of the work.²⁰⁶ Deletion of important parts of the work – or any modification that causes the public to draw a false conclusion regarding the author's intellectual stance or attitude – will generally constitute a sufficient ground for objection.²⁰⁷

Nevertheless, the German copyright law places certain restrictions on the author's ability to voice objection to an alteration of his work against the holder of exploitation rights. Under the German law, a holder of the adaptation right may, for the obvious reason of having acquired the right, freely alter the content of the work licensed.²⁰⁸ There is, more importantly, no general prohibition on the waiver of moral rights in German law²⁰⁹ – and the author's permission can be recognized in either expressed or implied circumstances.²¹⁰ The German Copyright Act permits an author to contract away even his right to designation of authorship.²¹¹ An alteration of content is also permissible in circumstances where the author cannot refuse his consent – provided that it was done in good faith.²¹² Thus, a publisher or a broadcaster is authorized to censor portions of a work in order to comply with the law, even when the author disagrees with or has voiced objection to the censorial decision.²¹³

It is not clear, moreover, whether the destruction of a work would constitute a violation of the integrity right in Germany. Theorists tend to agree that the destruction is the most severe type of impairment to a work, but courts have not recognized that destruction amounts to mutilation

²⁰⁴ Adeney, *supra* note 181, at 246-247.

²⁰⁵ *Id.* at 242.

²⁰⁶ Oberlandesgericht München [OLG][Higher Regional Court of Munich] Jan. 8, 1985, GRUR 460, 461 (Ger.) [hereinafter *Neverending Story Case*], *quoted in* Adeney, *supra* note 181, at 242.)

²⁰⁷ Adeney, *supra* note 181, at 242.

²⁰⁸ The German Copyright Act, *supra* note 184, art. 39(1).

²⁰⁹ The German copyright law, however, safeguard the author's personal right by giving him the absolute discretion to revoke an exploitation contract for reasons of changed conviction. The right of revocation is not waivable in advance but the author must adequately compensate the holder of the exploitation right. *Id.* art. 42(1)–(3).

²¹⁰ Rajan (2011a), *supra* note 170, at 78; Adeney, *supra* note 181, at 249-250.

²¹¹ The German Copyright Act, *supra* note 184, art. 39(1).

²¹² *Id.* art.39(2).

²¹³ OLG Frankfurt am Main, GRUR 1989, 203 (holding that changes required by censorship for movies did not violate integrity right), *quoted in* Marjut Salokannel and Alain Strowel, *Study Contract Concerning Moral Rights in the Context of the Exploitation of Works Through Digital Technology* 60 (European Commission 2000), available at http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf).

under Article 14.²¹⁴ The total destruction of a work is perceived as being a different issue from distortion claims, since it does not directly affect the author's intellectual stance.²¹⁵ As a general rule, the seriousness of the destruction will likely depend on the nature of a work at issue: a destruction of the original embodiment of the work will implicate a greater public concern than a destruction of a work that can be reproduced cheaply and easily.²¹⁶ Nevertheless, because the German monism does not treat a moral-right issue as a matter of public policy, courts will weigh the interests of the author against the interests of the property owner or of the public that may be affected by an exercise of moral rights. Where the nature of the work is predominantly functional, as in the case of architectural works, courts routinely side with the owner of the object.²¹⁷ Furthermore, removals of art works whose content bear strong associations with certain political regimes have been held to comport with important public interests at a price of moral rights rejection. In 1991, soon after the fall of the Soviet Union, the Berlin Court of Appeals approved the removal of a statue of Lenin from its East Berlin location.²¹⁸ The Court ruled against the sculpture of the statue who objected its removal. After weighing the interest of both sides, the Court – agreeing with the Berlin municipality that the statue's existence jeopardized the unification – held that it was no longer tolerable to keep the statue because of its disfavored political message.²¹⁹ This suggests that the government's interest in censoring certain messages will generally prevail over the author's integrity right.

3.2.2 Cartesian Dualism: Dualist's Moral Right and Its Public Policy

The notable consequences of treating the moral right as being independent from economic rights are, as demonstrated by the French law, its perpetual duration and its public policy character. Article L.121-1 of the French Intellectual Property Code gives perpetual protection to moral rights.²²⁰ The justification for indefinite protection of non-patrimonial rights is based on the argument that the relationship between the author's personality and his work continues as

²¹⁴ Salokannel and Strowel, *supra* note 213, at 61.

²¹⁵ Adeney, *supra* note 181, at 244-245 (noting that at least one German court has held that a total destruction of a work is not "distortion" within the meaning of the statute).

²¹⁶ *Id.* at 245.

²¹⁷ Salokannel and Strowel, *supra* note 213, at 61.

²¹⁸ John Tagliabue, *Berlin Journal: In Unified Metropolis Lenin Icon Is Still Divisive*, THE NEW YORK TIMES (Nov. 2, 1991), <http://www.nytimes.com/1991/11/02/world/berlin-journal-in-unified-metropolis-lenin-icon-is-still-divisive.html> (last visited Sep. 5, 2014).

²¹⁹ Salokannel and Strowel, *supra* note 213, at 64.

²²⁰ C. Prop. Intell., *supra* note 197, art. L.121-1.

long as the work is capable of communicating to the public.²²¹ The French law also nullifies any contract or waiver that seeks to prescribe away the author's moral rights.²²² It should be noted that not every country that espouses France's dualistic approach agrees that moral rights should exist in perpetuity: such extent of protection is not obligated by the Berne Convention.²²³ Thus, while there are several countries, most notably Italy and Spain, that follow France's dualistic interpretation of moral right closely and similarly prescribe indefinite protection for moral rights,²²⁴ other dualist regimes, such as Netherlands and Belgium, do not recognize an eternal moral right.²²⁵ But there is a common tendency for courts, within dualist jurisdictions, to consider moral and personal aspect of copyright to be pre-eminent over the economic one.²²⁶ For the dualist countries, the moral-right concept is an integral part of the fundamental values of society and not limited to merely being a patrimonial incentive for creation.²²⁷

In France, courts have expressed the pre-eminence of moral rights by classifying the moral-right issues as being matters of public policy (*ordre public*).²²⁸ The historical development of these rights showed that the continuation of personal interests of the author with respect to a work of authorship often comports with the goals of cultural conservation or consumer protection.²²⁹ The indefiniteness of protection has been referred to by commentators as supporting the proposition that the moral right, especially through the right of integrity, performs an important function of cultural protection that goes beyond the personal interests of the artist.²³⁰ The non-waivability of the right implies that there is a need to protect the author against

²²¹ Dietz, *supra* note 185, at 213.

²²² C. Prop. Intell., *supra* note 197, art. L.121-1.

²²³ Dietz, *supra* note 185, at 213.

²²⁴ Italy grants perpetual protection to moral rights in Article 23 of its Copyright Act and Spain does similarly with Article 41 of its Intellectual Property Act. Salokannel and Strowel, *supra* note 213, at 91, 135.

²²⁵ *Id.* at 110.

²²⁶ C. Prop. Intell., *supra* note 197, art. L.111-1 (citing the "intellectual and moral nature" of the rights before the economic ones).

²²⁷ Adeney, *supra* note 181, at 171.

²²⁸ *Id.* at 171. One of the most famous case in this regard is the French High Court's decision involving the movie *Asphalt Jungle*. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 28, 1991, Bull. Civ. I, No. 172 (Fr.) (holding that the moral right is a matter of public policy and that the moral right provisions constitute a part of international private law which apply to everyone regardless of their national origin).

²²⁹ Adeney, *supra* note 181, at 169.

²³⁰ *Id.* at 170.

himself or herself.²³¹ In some dualist countries, such as Denmark, the perpetual protection of the right of integrity is available only when it appears that cultural interests are at stake.²³² In addition, the moral right can also assume a role of contractual regulation in art dealing transactions. In 1900, the Court of Cassation (*Cour de cassation*) decided the famous *Whistler case* – a case that weighed the author’s right of divulgation against his contractual obligation to deliver the painting.²³³ The dualist’s moral right thus allows courts to intervene on behalf of the economically inferior, but culturally important party who is being unfairly exploited.

3.2.2.1 The Protection of the Author’s Autonomy Under the Dualist’s Integrity Right Paradigm

The scope of the right of integrity, under a true dualist regime, is wider and less restricted than that of most other nations. The right of integrity in France and Belgium is based on the notion of respect, and is thus not subject to the proviso that the honor and/or reputation of the author have been affected.²³⁴ The French law grants the author the right to object to any modification or any initiative likely to transform the “spirit” of the work.²³⁵ For true dualist countries, the author is the arbiter of what constitutes the violation of the work’s integrity and the courts are not obliged to weigh the competing interests between the parties when they are called upon to enforce moral rights.²³⁶

²³¹ André Lucas, *Moral Right in France: Toward a Pragmatic Approach*, at 5, available at <http://www.blaca.org/Moral%20right%20in%20France%20by%20Professor%20Andre%20Lucas.pdf> (last visited Sep. 5, 2014).

²³² The Consolidated Act on Copyright 2010, Act No. 202 of February 27, 2010, art. 75 (Den.), English translation available at http://www.wipo.int/wipolex/en/text.jsp?file_id=191420. This means that the author’s heir will not be able to exercise the integrity right after the death of the author, unless the public policy agrees with an exercise of that right.

²³³ Cass. Civ., 14 March 1900: DP 1900, 1, p.497, *quoted in* Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists under French Law*, 16 AMERICAN JOURNAL OF COMPARATIVE LAW 465, 467 (1968)). In the *Whistler case*, Whistler the American painter was commissioned by Lord Eden to paint a portrait of his wife. When the painting was finished, however, Lord Eden offered to pay a sum significantly less than what Whistler had hoped. The artist refused delivery under the reason that he was not satisfied with the work. The Court of Cassation sided with Whistler, holding that – due to the “special nature” of the contract – the ownership in the commissioned work will not transfer until the artist has put the painting at the party’s disposal. *Id.* at 467 -68.

²³⁴ See Cour de cassation [Cass.] [supreme court for judicial matters] 1re civ., 5 Dec. 2006: RIDA 1/2007, p.359 (Fr.) (holding that “any change, whatever the importance, made to a work of the mind, affects the right of the author”), cited in Lucas, *supra* note 231, at 4.

²³⁵ Salokannel and Strowel, *supra* note 213, at 31-32; Pierre Sirinelli, *Moral Right in the 21st Century – The Changing Role of Moral Rights in an Era of Information Overload: France Report 7* (Brussels, ALAI Conference 2014) [hereinafter ALAI France Report (2014)], available at http://alai2014.org/IMG/pdf/alai_2014_-_questionnaire_-france.pdf.

²³⁶ In practice, however, courts may refer to customs or take into account other limiting circumstances. Salokannel and Strowel, *supra* note 213, at 32.

The strength of the right of integrity in the true dualist tradition protects creative works against private censorship in several ways. First, the dualist regimes of France and Belgium give the author the right to oppose any alteration to the work, even if the author cannot prove the prejudice to his reputation and honor.²³⁷ Not being hinged on the notion of honor and reputation means that there is no barrier for courts to recognize a violation of the right of integrity in the case of destruction or removal, especially when the manuscript or the original work is concerned.²³⁸ The protection against modification and distortion is strongest in literary, dramatic and musical works.²³⁹ The right of respect and integrity gives the author the right to oppose any use of the work in a context that denigrates the work's meaning or its philosophical outlook, even when no physical alteration is involved.²⁴⁰ To give some examples, French and Belgian case law on the right of integrity permits a playwright to oppose against changes proposed by a stage director with respect to the scenes or the constitutive traits of the *dramatis personae* of the play – to the extent that the spirit of the dramatic work is affected – even though no material harm has been demonstrated.²⁴¹ The Dutch case law also reports a moral right dispute in which the author successfully opposed, against a lawfully licensed publisher, the publication of an abridged version of her book.²⁴² Furthermore, the dualist's moral rights recognize harms to the work's integrity even if the alleged act of censorship leave no modification on the work, such as when the work is removed or re-contextualized by those who control access to it.²⁴³ In France, the removal of a work that exhibits the site-specificity character can be an infringement to the

²³⁷ See, e.g., Loi relative au droit d'auteur et aux droits voisins [Law on Copyright and Neighboring Rights] of Jun. 30, 1994, art. 1(2), *Moniteur Belge* [M.B.] [Official Gazette of Belgium], July 27, 1994 (Belg.), available in English translation at http://www.wipo.int/wipolex/en/text.jsp?file_id=125254 [hereinafter Belgium Copyright Act]; Salokannel and Strowel, *supra* note 213, at 16, 32.

²³⁸ Salokannel and Strowel, *supra* note 213, at 16, 33 (noting that French case law prohibits the destruction of the work).

²³⁹ *Id.* at 33-36.

²⁴⁰ Lucas, *supra* note 231, at 4 (commenting on the French law). However, the French law gives special treatment to parody and caricature – which demonstrate humorous and critical intent – on the condition that no confusion should arise between the parody and the original work. Adeney, *supra* note 181, at 189.

²⁴¹ Salokannel and Strowel, *supra* note 213, at 16 n.51, 34.

²⁴² Rb Amsterdam [District Court of Amsterdam] 3 February 2005, AMI 2005, p. 114 (Issidorides/Meteor Press) (Neth.), cited in *Moral Right in the 21st Century – The Changing Role of Moral Rights in an Era of Information Overload: Report The Netherlands* 29 n.73 (ALAI 2014) [hereinafter ALAI Dutch Report (2014)], available at http://alai2014.org/IMG/pdf/alai_2014_-_questionnaire_-_the_netherlands.pdf

²⁴³ Salokannel and Strowel, *supra* note 213, at 16.

right of respect and integrity, but the specificity of the site must be related to the authorial intention.²⁴⁴

Second, the dualist regimes refuse to conflate the moral aspect of integrity right with the economic right of adaptation. This is what commonly referred to as the inalienability doctrine. The inalienability of moral rights means that if the author waives or elects not to exercise the right of adaptation, the holder of the adaptation right will nonetheless has to observe the integrity of the work with respect to the essence, type, psychology of the character and other material elements of the work.²⁴⁵ Because any renunciation of moral right is void and unenforceable in true dualist jurisdictions, the author is always entitled to oppose to any distortion, mutilation, modification and removal of the work.²⁴⁶ In fact, even among dualist countries that subject the exercise of integrity right to a showing of prejudice to honor and/or reputation, the right to oppose mutilation and impairment is treated as being fairly absolute.²⁴⁷ Nonetheless, in reality, the propensity of moral rights to be in conflict with rights of others requires that courts apply the principle of *abus de droit* (abuse of right),²⁴⁸ especially when the author's integrity veto encroaches upon the rights of a property owner.²⁴⁹ Moreover, moral rights, though subsisting in perpetuity under some dualist jurisdictions, are strongest when invoked by the living author of the work; but courts will be more skeptical when the rights are brought by heirs of the deceased author.²⁵⁰

Due to the robustness of the dualist protection of moral rights, the author's integrity interests can sometimes interfere with a good faith exercise of an exploitation right and – as demonstrated

²⁴⁴ This principle is demonstrated in the *Baldaccini c./ Soc. Slyci* decision. Tribunal de Commerce de Lyon [TCL] [The Commercial Court of Lyon], Apr. 28, 1997, RIDA No. 173, 373 (1997) (Fr.), cited in Adeney *supra* note 181, at 187.

²⁴⁵ Salokannel and Strowel, *supra* note 213, at 19 (discussing the Belgium law); Adeney, *supra* note 181, at 189 (noting that, under the French law, a holder of the adaptation right still needs to respect the spirit of the source work).

²⁴⁶ Alexis Hallemans, *Moral Right in the 21st Century – The Changing Role of Moral Rights in an Era of Information Overload: Report Belgium 3* (ALAI 2014) [hereinafter ALAI Belgium Report (2014)].

²⁴⁷ See, e.g., ALAI Dutch Report (2014), *supra* note 242, at 40 (stating that, technically, courts are not obliged to apply the test of reasonableness when the right of integrity is being invoked.)

²⁴⁸ Historically, the abuse of right doctrine was necessitated by the liberal scope of the dualist's regime of moral rights. Davies and Garnett, *supra* note 181, at 361.

²⁴⁹ The most frequently found scenario is when the architect attempts to thwart the owner of the building from making modifications to the building. Adeney, *supra* note 181, at 191.

²⁵⁰ Davies and Garnett, *supra* note 181, at 398.

in the *Les Misérables* case²⁵¹ – even restricts the public’s ability to adapt famous works even long after they had gone into the public domain. According to the French National Report submitted for the 2014 ALAI conference (“the French Report”), the right concerning respect and integrity is the most frequently invoked moral right.²⁵² And, despite the apparent conflict between the French integrity right and contractual right of the licensee, there will be a presumption of liability each time the work is impaired.²⁵³ Publishing contracts in France usually contain a clause in which the publisher assures that the author’s integrity rights will be given compliance and respect.²⁵⁴ Thus, while it is not uncommon for exploitation contracts, in the case of audiovisual works, to contain a clause expressing the author’s agreement not to exercise his or her integrity rights against a producer of derivative works or a broadcaster,²⁵⁵ the licensee is, in practice, always advised to exercise due diligence and arrange for prior approval from the original author of the work concerned.²⁵⁶ The manner of how moral rights are enforced in a true dualist regime thus makes it difficult for corporate interference with individual’s speech to take place against the will of creators of cultural productions.

Finally, the protection of moral right of integrity has a potential to shape the relationship between online platform providers and users who rely on the intermediaries to host and disseminate their copyrighted expressions on the Internet. Works disseminated in the digital domain are indeed subject to a far greater risk of modification than works that are strictly circulated off-line. Empirically, there has not been many moral right disputes involving the content stored on the Internet, or which involved cloud computing technology.²⁵⁷ However, under the dualist’s view, there is no technical or conceptual limitation as to why moral rights

²⁵¹ Cour de Cassation [Cass.] 1^{er} Civ., Jan. 30, 2007, Bull. Civ. I, No. 47 (Fr.), cited in ALAI France Report (2014), *supra* note 235, at 13. *Les Misérables* case involved a dispute between the heirs of Victor Hugo, the author of *Les Misérables*, and a novelist who was trying to make a sequel to the classic work without first seeking approval from Hugo’s heirs. The court rejected the heirs’ assertion of absolute moral right, reasoning, first, that the work had gone into the public domain, and also that the right to make a sequel belong to the economic realm of the adaptation right rather than the moral right. The High Court noted that making a sequel to a work whose copyright protection had expired is fundamentally related to the freedom of expression which, if there is no evidence of impairment to the integrity of the original work, cannot be prohibited. Amélia Blocman, *The Moral Right of Victor Hugo Before the Court of Cassation*, IRIS MERLIN (March 13, 2007), <http://merlin.obs.coe.int/iris/2007/3/article19.en.html> (last visited Sep 9, 2014).

²⁵² ALAI France Report (2014), *supra* note 235, at 14.

²⁵³ *Id.* at 12.

²⁵⁴ *Id.* at 15.

²⁵⁵ ALAI Belgium Report (2014), *supra* note 237, at 9.

²⁵⁶ ALAI France Report (2014), *supra* note 235, at 15-16.

²⁵⁷ ALAI Belgium Report (2014), *supra* note 237, at 11-12.

should not play a more important role for works stored and used on the Internet.²⁵⁸ Hence, the predominant view in France is to avoid the creation of a special exception to moral rights in the digital environment.²⁵⁹

The role of moral rights in the context of intermediaries' self-censorship shows that, at least among the dualist countries, moral rights has helped authors to wrestle control and editorial power from publishers and property owners who provide necessary platforms for the exhibition of their art and expressions. The dualist's concept of moral right is entrenched upon the public interest awareness and its case law showed the courts' keenness of addressing issues pertaining to social and economic inequality between the author and the publisher or other powerful institutions. The dualist's moral right is a powerful concept for preserving broad personality interests of the author by treating the act of intellectual creation as his or her communication to the public. The rights of divulgation, for example, can be used to dictate the public perception of the author's personality as well as privacy.²⁶⁰ The right of access, available in both the France and Germany,²⁶¹ provides an alternative for an author to challenge destruction of his or her original work, even when the claimant's reputation and honor may not be at stake.²⁶² It remains to be seen how such rights will play out in the era of cloud computing where many original and important records are kept and maintained exclusively online.

²⁵⁸ *Id.* at 15.

²⁵⁹ ALAI France Report (2014), *supra* note 235, at 22.

²⁶⁰ Many famous thinkers have used moral rights in this regard. One example is Martin Heidegger, the German philosopher, who had a well-known history of his association with the Nazi regime. Heidegger kept an extensive notebook that recorded his thought throughout his career. Concerned with his reputation as a thinker, Heidegger requested in his will that the publication of the notebook be postponed until after the rest of his work extensive work was released. The content of Heidegger's black notebook was finally released in February 2014. See Paul Hockenos, *Release of Heidegger's 'Black Notebook' Reignites Debate Over Nazi Ideology*, THE CHRONICLE OF HIGHER EDUCATION (Feb. 24, 2014), <http://chronicle.com/article/Release-of-Heidegger-s/144897/forceGen=1> (last visited Sep. 10, 2014).

²⁶¹ C. Prop. Intell., *supra* note 197, art. L.111-3 (providing the right of access if the owner of the physical work abusively prevents the exercise of the author's right of disclosure); The German Copyright Act, *supra* note 184, art. 25 (providing the author with a general right of access, provided that the exercise of the right does not conflict with "legitimate interests" of the owner.)

²⁶² Salokannel and Strowel, *supra* note 213, at 42 (noting that a French court has found a violation of the right to access when a studio refused to give the author an access to the negative of his unfinished film).

3.2.3 The International Moral Rights Protection

Modern copyright law is largely a product of the few leading copyright regimes' desire to internationalize their normative frameworks regarding copyright matters.²⁶³ The global recognition of moral rights is also a part of that historical movement. While the protection of moral rights remains chiefly a matter of national law, it is helpful to understand the international frameworks that provide a minimum standard which is now considered to be a common core of transnational protection of moral rights. Furthermore, a historical account regarding the internationalization of moral rights reveals interesting conceptual concessions between the competing copyright traditions as well as the common values shared among the parties who pushed the idea of moral rights into the transnational regime of protection.

3.2.3.1 The Berne Convention and Moral Rights

The Berne Convention was first concluded and initially signed in 1886 under the promotion of the Association Littéraire et Artistique Internationale, now known as ALAI.²⁶⁴ The original text of the Convention however did not contain any moral rights provision until it was revised at the Rome Conference in 1928.²⁶⁵ Until its belated inclusion into the Berne Convention, the concept of moral rights had hitherto dwelled in the domain of judicial pronouncement rather than national legislation.²⁶⁶ The Berne Convention did not mandate the enactment of a particular theory of moral rights,²⁶⁷ and the history of its development is replete with evidence of compromised positions.²⁶⁸ The Convention adheres to the basic premise that moral rights exist independently of the economic rights associated with a particular work.²⁶⁹ Nevertheless, Article

²⁶³ See, e.g., CATHERINE SEVILLE, *THE INTERNATIONALISATION OF COPYRIGHT LAW* 41-77 (Cambridge Univ Press 2006) (giving an analysis on the international book-trade and literary protection movements which influenced the formation of the Berne Convention).

²⁶⁴ STEF VAN GOMPEL, *FORMALITY IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE* 118 (Wolters Kluwer 2011) [hereinafter van Gompel (2011)]

²⁶⁵ Act of Rome Conference of June 2, 1928, art. 6*bis*, reproduced in *The Berne Convention for the Protection of Literary and Artistic Works* [from 1886 to 1986] 230 (WIPO 1986) [hereinafter Act of 1928].

²⁶⁶ Rigamonti (2007), *supra* note 174, at 116.

²⁶⁷ *Id.* at 119.

²⁶⁸ One of the most important concessions was the flexibility in the form of protection chosen by contracting states. The Italian delegate, Piola Caselli, assured the skeptical Anglophone delegates that the Convention allowed its members to exercise substantial freedom in regard to the internal distribution of legal authority on moral rights – only requiring that the desired level of protection shall be met. A country's obligation to protect moral rights can, therefore, be met by resorting to what had been available under the common law – meaning that there would be no need to amend their current copyright statutes. Rigamonti (2007), *supra* note 174, at 119; *The Berne Centenary*, *supra* note 265, at 171 (Records of the Conference in Rome (1928)).

²⁶⁹ *The Berne Convention*, *supra* note 177, art. 6 *bis* (1).

6bis of Berne represents a “minimalist” approach and lacks many characteristics of moral rights under the true dualist tradition.²⁷⁰

First of all, the Convention’s prescribed duration for moral rights protection is not perpetual. The Article 6bis, as it now stands after the final revision at the Stockholm Conference, only guarantees that moral rights will last as long as the duration of economic rights.²⁷¹ Next, the finalized text of the 1928 Conference settled on just the two most fundamental rights:²⁷² the right of attribution (or the right of paternity) and the right of integrity.²⁷³ The right of integrity under Article 6bis is subject to the condition that an alleged modification of a work must be prejudicial to the author’s honor or reputation.²⁷⁴ Therefore, pursuant to Article 6bis, the author’s integrity right will not likely be implicated in the case of destruction or removal of the work or when someone uses the work out of its intended context.²⁷⁵ The negotiating history of the Rome Conference showed that Berne promised contracting states with a high degree of flexibility. Thus, rather than giving full deference to the author, Article 6bis probably intends to give courts a greater maneuvering space for interpreting whether the challenged act constitutes a violation of the author’s right of integrity.²⁷⁶

Most importantly, the Rome Conference declined to espouse the dualist’s notion of inalienability which considers the author’s *inter vivos* renunciation, e.g. a general waiver, of his or her moral rights to have no legal effect.²⁷⁷ Many contracting parties resisted rigorous inalienability and preferred the type of moral rights that can be abandoned or surrendered through contractual relationship – consistent with the legitimate expectation of the holder of

²⁷⁰ Dietz, *supra* note 185, at 203.

²⁷¹ The Berne Convention, *supra* note 177, art. 6 bis (2).

²⁷² The final draft of the Rome Act of 1928 omitted “the right to decide whether the work may be published.” The Conference Report explained that the divulgation right posed a “very delicate and complex problem of harmonizing the author’s personal or moral interests with those of the assignee of the copyright in the work.” The Berne Centenary, *supra* note 265, at 171.

²⁷³ Act of 1928, *supra* note 265, art. 6 bis. The Article 6bis’ scope of substantive moral rights has never been revised.

²⁷⁴ This is another important modification from the original proposal of the Italian delegations which granted “the right to object to any modification of the work which is prejudicial to his *moral interests*.” The Berne Centenary, *supra* note 265, at 170 (emphasis added).

²⁷⁵ See, e.g., Eleonora Rosati, *Has the CJEU in Deckmyn de facto harmonised moral rights?*, IPKAT (Sep. 8, 2014), <http://ipkitten.blogspot.com/2014/09/has-cjeu-in-deckmyn-de-facto-harmonised.html> (last visited Oct. 15, 2014).

²⁷⁶ Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention: Chapter VI: Moral Rights, 10 Colum.-VLA J.L. & Arts 547, 554 (1986) [hereinafter Ad Hoc Report (1986)].

²⁷⁷ Adeney, *supra* note 181, at 124.

exploitation rights.²⁷⁸ The Rome Conference eventually adopted a compromised position: deeming a waiver of moral rights or contractual restrictions of their exercise to be possible to some extent, but will not allow a total or an unconditional waiver of the rights.²⁷⁹ It remains unclear how the compromised position regarding the inalienability doctrine, reached at the Rome Conference, would be realized in practice.²⁸⁰

The Berne Convention is a classic embodiment of the “soft law” approach based on consensus and enforced not by coercive means but rather by the expectation of conformity.²⁸¹ But as the major international source of moral rights, Berne continued to influence the inclusion of moral rights in other international human right instruments, namely the 1948 Universal Declaration of Human Rights (UDHR)²⁸² and the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR).²⁸³ A proposal for inclusion of “moral interests”²⁸⁴ of authors into an enforceable human rights instrument drew diverse responses from a number of states during the drafting stage of the ICESCR. Some delegations, most notably the then USSR, contended that relations between States in regard to intellectual property matters should be addressed by special agreements outside the scope of covenants on human rights.²⁸⁵ Uruguay, the active promoter of Article 15(1)(c), responded that the interests of individual authors need not be in conflict with the interests of the public because “[r]espect for the right of the author would

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 125.

²⁸⁰ At the Brussels Conference in 1948, France tried once more to recapture its dualist influence by proposing that the preeminence of moral rights – i.e. that moral rights are superior to contractual relationship – would not preclude a judicial balancing of interests of the parties. But this proposal was once again defeated. *Id.* at 144-145.

²⁸¹ Rajan (2001a), *supra* note 170, at 229. The Berne Union authorizes its members to refer a dispute concerning the interpretation or application of the Convention to be adjudged before the International Court of Justice (ICJ). But this dispute mechanism is not mandatory and each of the contracting party may declare that it does not consider itself bound by the jurisdiction of the ICJ. The Berne Convention (Paris text), *supra* note 177, art. 33(1), (2).

²⁸² Universal Declaration of Human Rights, G.A. Res 217A (III), art. 27(2), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR] (recognizing “the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”).

²⁸³ International Covenant on Economic, Social, and Cultural Rights, G.A. Res 2200A (XXI), art. 15(1)(c), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 [hereinafter ICESCR] (recognizing the right of every individual to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”).

²⁸⁴ The term “moral interests” is deemed to be overly broad and was strongly opposed by the British delegations during the Rome Conference in 1928. See Baldwin, *supra* note 167, at 167.

²⁸⁵ Maria Green, International Anti-Poverty Law Center, *Drafting History of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights*, Background Paper, Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶39, E/C.12/2000/15 (Oct. 9, 2000), available at http://shr01.aaas.org/article15/Reference_Materials/E_C.12_2000_15_Eng.pdf.

assure the public of the authenticity of the works presented to it.”²⁸⁶ Interestingly, one prominent study of the drafting history of Article 15(1)(c) opines that: “the provision on authors’ rights, judging from the exchange between the USSR, Czechoslovakia, and Uruguay, became associated with protection of authors’ freedom from state intervention.”²⁸⁷ The drafting history of Article 15(1)(c) thus demonstrates a visible link between the effect of moral rights and a state’s exercise of censorship power.

3.2.3.2 Post-Berne International Moral Rights Development

With the creation of the World Trade Organization (WTO)²⁸⁸ and the adoption of an Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs),²⁸⁹ disputes on intellectual property matters are now subject to the general dispute-settlement mechanism of the WTO. The incorporation of intellectual property rights into the international trading system led to the moral rights being entirely excluded from the text of the Agreement. Thus, although the TRIPs is based largely on the copyright framework of the Berne Convention,²⁹⁰ it expressly excludes rights conferred by or derived from Article 6 *bis* of the Berne Convention.²⁹¹ Apart from the commercial nature of the treaty,²⁹² the chief reason for exclusion appeared to be the stance of the United State government who was keen to leave the moral aspect of authorship out of the new international commercial instrument.²⁹³ The most importance ramification of the exclusion of moral rights from the TRIPs Agreement is that the members of the Berne Union will be foreclosed from taking their grievances regarding the inadequacy of moral rights protection in

²⁸⁶ *Id.* at ¶ 35.

²⁸⁷ *Id.* at ¶ 43.

²⁸⁸ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement or WTO Agreement].

²⁸⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement].

²⁹⁰ TRIPs requires compliance to Article 1 through 21 of the Berne Convention. *Id.* art.9(1).

²⁹¹ *Id.*

²⁹² Daniel Gervais, *The TRIPs Agreement: Drafting History and Analysis* 214 (Sweet & Maxwell, 3rd ed., 2008) (noting that negotiating parties at the Uruguay Round viewed moral rights as “imped[ing] a purchaser’s right to exploit fully a legally obtained licence [sic].”)

²⁹³ *Id.*

any of the WTO member states to the dispute settlement panel of the WTO. Moral rights, in short, are exclusively governed by the legislation of the country where protection is claimed.²⁹⁴

TRIPs, however, is not the only international intellectual property instrument that eschewed the topic of moral rights. The European Union has consciously left moral rights within the domain of domestic legislation,²⁹⁵ and none of its IP-related directives sees the necessity of harmonizing moral rights among the member states.²⁹⁶ Nevertheless, there has been a collective intellectual effort from leading European copyright academics in advocating a stronger protection of moral rights through a draft model law, *the Wittem Project's European Copyright Code*,²⁹⁷ that seeks to promote “transparency and consistency of European copyright law.”²⁹⁸ It would not be until 1996 that moral rights would again gain their international treatment. The World Intellectual Property Organization Copyright Treaty (“WCT”)²⁹⁹ incorporated the entire copyright protection regime of the Berne Convention into its framework, and the WIPO Performances and Phonograms Treaty (“WPPT”) recognized, for the first time, the right of attribution and integrity in the context of performing artists and their “live aural performances or performances fixed in phonograms”.³⁰⁰ The performer’s moral rights under the WPPT are almost identical to the authorial moral rights of Berne Convention. But, under the WPPT, the performer’s ability to invoke the right of attribution will be “dictated by the manner of the use of

²⁹⁴ The Berne Convention (Paris text), *supra* note 177, art. 6bis (3).

²⁹⁵ A study on moral rights in the EU, completed in 2000, concluded that there was no need to pursue the goal of moral rights harmonization in the EU – as only Italy and Greece appeared to desire higher levels of moral rights than other European States. Rajan (2011a), *supra* note 170, at 274.

²⁹⁶ Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 357-358 (2006) [hereinafter Rigamonti (2006)].

²⁹⁷ The Wittem Project, *European Copyright Code* (2010), available at http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20april%202010.pdf [hereinafter The Wittem Project (2010)].

²⁹⁸ The Wittem Project’s European Moral Right Code advocates inalienability of moral rights – i.e. that moral rights cannot be completely assigned away – and while, the author can consent not to exercise moral rights, such consent must be limited in scope; general waivers are not possible. *Id.* art. 2.2, 3.5 & n. 30.

²⁹⁹ WIPO Copyright Treaty, art. 1(4), Dec. 20, 1996, 2186 U.N.T.S. 121, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 65 (1997) [hereinafter WCT].

³⁰⁰ WIPO Performances and Phonograms Treaty, art 5(1), Dec. 20, 1996, 2186 U.N.T.S. 203, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 76 (1997) [hereinafter WPPT]. Article 5(1) states that:

Independently of a performer’s economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation. *Id.* art 5(1)

the performance” whether or not it was expressly characterized in a written agreement.³⁰¹ Moreover, moral rights of performers under the WPPT do not cover the case of audiovisual performers. A decade and a half later, WIPO’s member states finally reached an agreement regarding audiovisual performers and, on June 24, 2012, adopted the Beijing Treaty on Audiovisual Performances (TAVP).³⁰² The TAVP now recognizes the independent rights of attribution and integrity for audiovisual performers, and the treaty applies fully to the digital environment.³⁰³ Like the WPPT, the TAVP does not strictly prohibit an assignment of moral rights but permits national laws to set an inalienability standard of moral rights.³⁰⁴ Consequently, the TAVP is expected to cause a sea change in the viral media market, such as YouTube and Facebook.³⁰⁵ Amateur audiovisual projects often do not require the performer to confer any economic and moral rights to the director. Thus, if an amateur video goes viral and becomes valuable asset, the performers will have a claim to a share of revenue and a possibility to exercise some control over future uses.³⁰⁶ Critics of moral rights, particularly in the United States, pour out concerns over the dark prospects in which of TAVP’s moral rights may disrupt the “mash-up” culture of the Web 2.0 and frustrate the right clearance practice.³⁰⁷ But the USPTO comments that the TAVP represents a careful compromise between the interests of audiovisual industry and the rights of performers – a group of creative individuals who have been overlooked throughout much of the international copyright’s history.³⁰⁸

³⁰¹ *Id.*

³⁰² Beijing Treaty on Audiovisual Performances, June 24, 2012, WIPO DOC. AVP/DC/20 [hereinafter TAVP], available at http://www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_20.pdf. The TAVP will not be in force until 30 eligible parties have deposited their instruments of ratification or accession. *Id.* art. 26.

³⁰³ *Id.* art. 5.

³⁰⁴ *The Beijing Treaty on Audiovisual Performances – an EIFL Briefing for Library*, EIFL (Sep. 2013), <http://www.eifl.net/beijing-treaty-audiovisual-performances-eifl-brief> (last visited Nov. 22, 2014) [hereinafter EIFL Guide to TAVP].

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ See, e.g., Hannibal Travis, *WIPO and the American Constitution: Thought on a New Treaty Relating to Actors and Musicians*, 16 VAND. J. ENT. & TECH. L. 45, 61 (2013) (arguing that “[the TAVP] threatens the freedom of speech by creating moral rights that could lead to endless litigation concerning mashups”); Carolina Rossini, Mitch Stoltz and Yana Welinder, *Beijing Treaty on Audio Visual Performances: We Need to Read the Fine Print*, ELECTRONIC FRONTIER FOUNDATION (Jul. 24, 2012), <https://www.eff.org/deeplinks/2012/07/beijing-treaty-audiovisual-performances> (last visited Nov. 22, 2014).

³⁰⁸ David Kappos, *A Milestone in Protecting Creative Content Around the World*, USPTO (Jun. 26, 2012), http://www.uspto.gov/blog/director/entry/a_milestone_in_protecting_creative [hereinafter The USPTO Comment] (noting that “[the TAVP] represents a win-win for labor and industry.”) (last visited Nov.22, 2014).

3.3 Moral Rights in the United States

Despite the fact that the negotiators at the Rome Conference tried very hard to accommodate the common law tradition which provided actionable claims against a violation of the author's personal interests, the United States was particularly appalled by the inclusion of moral rights into the Rome Act. The American copyright exceptionalism with its unique view of copyright law is usually referred to as the main reason for the country's procrastination from joining the Berne Convention.³⁰⁹ Even during the debate over the Berne Convention Implementation Act of 1988 (BCIA),³¹⁰ opposition to moral rights came from every direction including among the bill's staunchest supporters.³¹¹ As a leading treatise on copyright law comments, the only hope of passage for the BCIA rested with the fashioning of "a method for the United States to join the Berne Union without incorporating Berne-style moral rights provision into the fabric of American law."³¹² Fortunately, Berne's moral rights mandate allows the members of the Berne Union to point to other legal authorities that provide protection to personality and reputation of the author.

3.3.1 The American Minimalist's Approach toward Moral Rights

American legal experts were well aware of the possibility in meeting Berne's moral rights mandate without having to reshape the contour of copyright system at home.³¹³ Both the legislative report of the BCIA and the Ad Hoc Working Group on the U.S. adherence to the Berne Convention drew a similar conclusion that the U.S. domestic law provided an adequate coverage for the moral rights obligation set out in Berne.³¹⁴ Lawmakers were satisfied that "the

³⁰⁹ Robert C. Bird and Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 213, 247 (2006) (defining the U.S.'s copyright philosophy as "a utilitarian approach to creative works, seeking to promote the public good through granting economic incentives for creative endeavors.")

³¹⁰ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, 2(1) (Oct. 31, 1988) (codified as 17 U.S.C. 101, 104, 116, 116A, 205, 301, 401-408, 411, 501, 504, 801 (2011)) [hereinafter BCIA].

³¹¹ Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §8D.02 [C] n.29 [hereinafter Nimmer on Copyright]

³¹² *Id.* at § 8D.02 [C].

³¹³ See Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* 475 (1987) (discussing moral rights cause of action arising from defamation tort).

³¹⁴ House Report of the Berne Convention Implementation Act of 1988, H.R. Rep. No. 100-609, at 34 & n.67 (1988) [hereinafter H. Rep. BCIA (1988)]; Ad Hoc Report (1986), *supra* note 276, at 555 (declaring that "there are substantial grounds for concluding that the totality of U.S. law provides protection for the rights of paternity and integrity sufficient to comply with [Article] 6bis.")

wording of the Berne Convention leaves sufficient room for implementation of Article 6bis in various ways” without having to amend the country’s existing copyright legislation.³¹⁵ The question is rather whether the minimalist’s approach taken by the United States to facilitate its joining of the Berne Convention would really be sufficient to accord the level of protection contemplated by Article 6bis. The disadvantage of the minimalist approach is that one may overestimate the prospective application of the existing laws.³¹⁶ Initially, American Copyright experts were optimistic about the U.S. law’s capacity to provide protection for the author’s interests in receiving attribution for his or her authorship and in safeguarding the work’s integrity.³¹⁷ The expectation that a patchwork of rights created by federal and state statutes would approximate the moral rights in Article 6bis has remained, however, speculative and was based on little empirical evidence.³¹⁸

There are actionable claims under state tort law that provide redress to famed individuals and artists,³¹⁹ such as defamation tort,³²⁰ rights of privacy and publicity,³²¹ and even an emotional distress claim.³²² These personality-based causes of action were developed partly in

³¹⁵ Ad Hoc Report (1986), *supra* note 276, at 36-37.

³¹⁶ One example of this view is the comment by the Director-General of the World Intellectual Property Organization, Dr. Arpad Bogisch, who opined that the common law and Section 43(a) of the Lanham Act “contains the necessary law to fulfill any obligation of the United States under Article 6bis.” *Letter from Dr. Arpad Bogisch to Irwin Karp, June 16, 1987, reproduced in* The Berne Convention: Hearings Before the Subcommittee on Patents, Copyrights, and Trademarks of the Committee on the Judiciary, United States Senate, on S. 1301 and S. 1971, 100th Cong. 2d Sess. 232 (1988).

³¹⁷ See, e.g., Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States*, 19 CARDOZA ARTS & ENT. L.J. 9 (2001) (suggesting that §1202 of the Digital Millennium Copyright Act may perform the function of the moral right of attribution through its protection of copyright management information (CMI));

³¹⁸ See, e.g., *Williams v. Roberta Cavalli S.p.A.*, CV 14-06659-AB (C.D. Cal. Feb. 12, 2015) (concluding that partially reproducing graffiti murals on t-shirts while omitting the artists’ signatures constitutes a violation of 17 U.S.C. §1202 (b)).

³¹⁹ In Professor Martin Roeder’s seminal article, published in 1940, he proposed that: “Insofar as judicial recognition has been accorded the moral right, the expressed grounds on which common law protection has been based have been those of libel, unfair competition, copyright and the right of privacy, with some groping towards an inarticulate, sui generis tort theory.” Roeder, *supra* note 166, at 575.

³²⁰ The defamation theory requires the artist to establish that the defendant’s objectionable use of his work exposed him to contempt of public ridicule. See, e.g., *Shostakovich v. Twentieth Century Fox*, 196 Misc. 67, 80 N.Y.S.2d 575, 578 (N.Y.Spec.Term 1948), *aff’d* 275 A.D. 692; 87 N.Y.S.2d 430 (N.Y.App.Div. 1949) (holding that, to state a defamation claim, the plaintiff must show more than that their works were used in a subjectively unfavorable context).

³²¹ See, e.g., *Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 512 (2d Cir. 1977) (affirming the award of damages to John Lennon for injury to his reputation, pursuant to New York’s general privacy statute, caused by the defendants’ release of a low-quality record album of Lennon’s recordings.)

³²² In 2002, Connie Francis filed a suit against Universal Music, stating a claim for intentional infliction of emotional distress, based on the fact that the defendant licensed her music to be used in sex scenes in two movies. The court, however, dismissed the claim holding that the Francis – despite her history as a rape victim – failed to

reflection of America's fame culture and the way in which people's identification with celebrities dictates consumption.³²³ Until recently, there has been very little analysis as to whether these state law rights may indeed function as a moral-right surrogate within the United States. Professor Roberta Kwall, an American moral rights expert, asserts that although the right of publicity is widely regarded as a form of property rather than a right having moral characters,³²⁴ litigants have relied on the publicity right to protect their "persona-text" or personality interests in abstraction or things associated with their fame.³²⁵ Some of the litigated cases, Kwall argues, showed that the personas and their heirs could demonstrated non-commercial interests involving unauthorized or objectionable uses of persona-texts.³²⁶ These non-commercial publicity interests are more closely aligned with the moral rights orthodoxy under the Berne Convention because they focus on damage to the human spirit rather than the economic harm.³²⁷

Nevertheless, persona texts are subject matters associated with public recognition with one's identity and are different from subject matter arising out of authorship. For this reason, even in jurisdictions where the right of publicity is given strong protection, its status as "intellectual property" remains uncertain. Indeed, while it is possible to use moral rights claims to circumvent the CDA's Section 230 safe harbor that permits private intermediaries to engage in Good-Samaritan self-censorship,³²⁸ the status of state publicity rights as "intellectual property law" is

show that the defendant has acted "extremely or outrageously." *Franconero v. Universal Music Corp.*, No. 02 Civ. 1963 (RO), 2003 WL 22990060, *3 (S.D.N.Y. Dec. 19, 2003).

³²³ See, e.g., ROBERTA K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 111-117, 128-129 (Stanford Univ. Press 2010) [hereinafter Kwall (2010)].

³²⁴ See, e.g., David S. Welkowitz, *Privatizing Human Rights? Creating Intellectual Property Rights from Human Rights Principles*, 46 AKRON L. REV. 675, 686, 707 (2013) (noting that "[r]ather than protecting celebrities from invasions of their private space, the right of publicity allows celebrities to control many commercial uses of their names, likenesses, or 'persona.'") Compare, e.g., *Cohen v. Facebook, Inc.*, No. C 10-5282 RS, 2011 WL 5117164 at *2 -*3 (N.D. Cal. Oct. 27, 2011) (rejecting Plaintiffs' appropriation claim due to plaintiffs' failure in showing that Facebook's use of plaintiffs' names and likenesses – in relation to its Friend Finder function – can be seen as serving a commercial purpose), with *Fraley*, 830 F.Supp.2d at 800 (finding that plaintiffs had stated an appropriation claim by clearly identifying Facebook's own statements that plaintiffs' personal endorsements of products and services "are two to three times more valuable than generic advertisements.")

³²⁵ Kwall (2010), *supra* note 323, at 123 -128.

³²⁶ *Id.* at 128 (citing, for example, a case involving the film *Perfect Storm* in which several crew members and their families were depicted negatively, *Tyne v. Time Warner Entertainment Co.*, 901 So.2d 802 (Fla. 2005))

³²⁷ Kwall (2010), *supra* note 323, at 130.

³²⁸ 47 U.S.C. § 230 (e)(2) (provides that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.")

still being contested among courts in several circuits.³²⁹ In addition, constitutional questions tend to arise when these rights are being asserted outside of pecuniary-related interests.³³⁰ Thus, when the right of publicity or privacy right is invoked in connection with non-commercial interests over a persona-text, free speech interests will often trump over these state law rights.³³¹

3.3.2 The Right of Integrity under Early Decisional Rule and the Lanham Act

Historically, American courts used to apply decisional rules, or simply make judicial pronouncements, to recognize the rights of attribution and integrity more often during the time when the protection of statutory copyright was limited to published works.³³² For example, in *Drummond v Altemus*,³³³ a Pennsylvania District Court held that the defendant had violated the plaintiff's right of integrity by publishing a distorted version of the plaintiff's lectures on the evolution of human species. The court noted that while the subject of copyright is not directly involved, the plaintiff successfully asserted a type of right that was align with the public policy in preventing fraudulent practice in the publishing industry.³³⁴ The court also rejected the defendant publisher's argument that it had the editorial power to alter any work voluntarily submitted for publication, stating that the editorial position did not allow the defendant "to misrepresent [the] character and extent" of the plaintiff's work.³³⁵ Over the course of the twentieth century, although the United States never formally recognized the concept of moral rights, courts routinely acknowledged – through judicial pronouncements – the existence of "a right analogous to 'moral right[s]'" against a free and slipshod use of an author's intellectual

³²⁹ See *Perfect 10, Inc. v. CCBill, Inc.*, 488 F.3d 1102, 1118-19 (9th Cir. 2007) (holding that permitting the reach of any particular state's definition of intellectual property would undermine the federal safe harbors under Section 230 of the CDA).

³³⁰ Kwall (2010), *supra* note 323, at 123.

³³¹ *Id.* at 123 (noting that "[m]oral based objections [over the uses of persona-texts] can also occur in conjunction with less clear-cut commercial appropriations that often are the most difficult controversies to resolve due to the strong First Amendment interests at stake.")

³³² However, such "extra-copyright" rule making became less important from the time that copyright was deemed to vest upon creation. Rigamonti (2006), *supra* note 296, at 382.

³³³ 60 F. 338 (E.D. Pa. 1894).

³³⁴ *Id.* at 339 (stating that "[a] right, quite distinct from any conferred by copyright, to protection against having any literary matter published as his work which is not actually his creation, and incidentally, to prevent fraud upon purchasers. That such right exists is too well settled, upon reason and authority, to require demonstration.")

³³⁵ *Id.*

creation.³³⁶ In *Preminger v. Columbia Pictures Corp.*,³³⁷ a New York court restated a proposition that “the protection against publication of a garbled version” of a creative work exists even in the absence of express agreement between the parties.³³⁸

In 1976, the author’s right of respect and integrity was accorded with full copyright status for the first time in *Gilliam v. American Broadcasting Companies*.³³⁹ In *Gilliam*, the British comedy group of writers and performers known as “Monty Python’s Flying Circus” sought to enjoin ABC from broadcasting edited versions of three of the plaintiffs’ programs. ABC, while legally obtained the broadcasting right to televise the programs, truncated over one-fourth of the programs during the ninety minute special for the commercials.³⁴⁰ The Second Circuit found that a claim under Section 43(a) of the Lanham Act arises when a work of authorship is “designated as having been written and performed by a group ... [but] has been edited, without the writer’s consent, into a form that departs substantially from the original work.”³⁴¹ The court further explained that when a network deforms an artist’s work and “presents him to the public as the creator of a work not his own,” the network makes the artist “subject to criticism for work he has not done.”³⁴²

The Second Circuit, in *Gilliam*, did not openly declare that it was creating a copyright-independent right to object to distortion and mutilation out of the Lanham Act.³⁴³ The court, however, did conclude that the preoccupation of American copyright system on the economic incentive and proprietary interests does not in any way inconsistent with “the author’s personal right to prevent the presentation of his work to the public in a distorted form.”³⁴⁴ Following the *Gilliam* precedent, there existed reasons to believe that federal courts were willing to recognize

³³⁶ *Seroff v. Simon & Schuster, Inc.*, 162 N.Y. S.2d 770, 774 (Sup.Ct. N.Y. County 1957) *aff’d*, 12 A.D.2d 475 (1st Dept.1960) (observing that “at least in a number of situations the integrity and reputation of artistic creator have been protected by judicial pronouncements.”)

³³⁷ *Preminger v. Columbia Pictures Corp.*, 267 N.Y.S.2d 594 (Sup.Ct. N.Y. County 1966) *aff’d*, 269 N.Y.S.2d 913 (1st Dept.1966), *aff’d*, 273 N.Y.S.2d 80 (1966).

³³⁸ *Id.* at 599.

³³⁹ 538 F.2d 14 (2d Cir. 1976).

³⁴⁰ *Id.* at 17-18.

³⁴¹ *Id.* at 24.

³⁴² *Id.* at 24-25.

³⁴³ *Nimmer on Copyright*, *supra* note 311, § 8D.04 [A][1] (noting that the *Gilliam* court simply declared that unauthorized changes in the work that are so extensive as to impair the work’s integrity constitute copyright infringement, and this conclusion presupposes the existence of copyright in the first place); *Gilliam*, 538 F.2d at 24 (declaring that “American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation.”)

³⁴⁴ *Gilliam*, 538 F.2d at 24.

claims relating to authorial interests, under the Lanham Act, which are independent of copyright. For instance, in *Smith v Montoro*,³⁴⁵ the Court of Appeals of the Ninth Circuit held that a performer, whose name was removed from the film's credits and advertising and was substituted by another name, successfully stated an equivalent of "express reverse passing-off" claim under Section 43(a).³⁴⁶ The *Smith* court's liberal interpretation of the Lanham Act certainly did not amount to a recognition of the moral right of attribution in a federal court. But the fact that the unfair competition law was flexible enough to recognize a paternity-like claim raised by a performer, who owned no copyright in the cinematographic work,³⁴⁷ did portend a bright future for the U.S. moral rights.

3.3.3 The Supreme Court's Skepticism toward the Minimalist's Approach: *Dastar Corp. v. Twentieth Century Fox*

While tort-based moral rights regimes do not compensate for the traditional moral rights protection,³⁴⁸ they do offer a form of dualism – i.e. by providing independent causes of action that do not subject to the same limitations under copyright law – to the common law copyright system. However, the fact that the minimalist's approach intrinsically requires a dualist attitude toward the country's copyright system causes it to be in conflict with the American tradition in which copyright belongs to the exclusive domain of Federal legislation. The American lawmakers, in fact, chose a very curious path that effectively undermines the flexibility of the minimalist approach: they declared the Berne Convention to be executory – that is not self-executing.³⁴⁹ The declaration by Congress that there will be, in federal courts, no direct actionable right under the Berne Convention was based on the unconcealed fear that the continental model of moral rights would displace the American home grown doctrine in this area.³⁵⁰ The legislative reaction against the European influence thus created an ungainly paradox that was not adequately aware at the time: that while there was a high expectation for the

³⁴⁵ 648 F.2d 602 (9th Cir., 1981).

³⁴⁶ *Id.* at 606-608.

³⁴⁷ *Id.* at 607 (determining that the deletion of the plaintiff's name from the movie credits, "like traditional palming off, is wrongful because it involves an attempt to misappropriate or profit from another's talents and workmanship.")

³⁴⁸ Obviously, the tort-based solution requires evidence of personal damages, and is not likely to fulfill the cultural conservation objective under the dualist's conception of moral rights.

³⁴⁹ 17 U.S.C. § 101; Nimmer on Copyright, *supra* note 311, § 1.12[A].

³⁵⁰ Nimmer on Copyright, *supra* note 311, § 1.12[A].

Lanham Act to assist the U.S.'s accession to the Berne Convention with respect to moral rights,³⁵¹ the legislative history of the BCIA was unambiguous that the American federal courts were expected to dismiss most moral-right type of claims by concluding that the Berne Convention is not self-executing.³⁵²

The inevitable reality check on moral rights finally came to pass in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,³⁵³ when the Supreme Court disqualifies Section 43(a) of the Lanham Act³⁵⁴ from the possible authority that authors might invoke in support of attribution rights. The subject of dispute in *Dastar* was Fox's multi-part documentary film whose copyright had already expired. Fox claimed that the Lanham Act provided a cause of action against a reissue or a re-release of a "communicative product" with false attribution of authorship.³⁵⁵ The Supreme Court, however, held that the Lanham Act's prohibition on "false designation of origin" only regulates the source description of manufactured articles and it does not purport to protect the right to be recognized as the original creator of a work of authorship.³⁵⁶ The *Dastar* opinion, in effect, sternly rejects the possibility for moral rights to exist independently of economic copyright. The Court expressly questioned the possibility of extending the Lanham Act – originally conceived to provide cause of action to passing-off claims – to claims alleging false attribution of authorship, especially when the work has fallen into the public domain.³⁵⁷ In other words, *Dastar* could be read as the Supreme Court's rejection of the dualism in American copyright system.³⁵⁸

³⁵¹ See, e.g., Ad Hoc Report (1986), *supra* note 276, at 51-55 (citing authorities to support a position that the Section 43(a) of the Lanham Act grants authors protection against the integrity violation of their works as well as the omission of their names from the works with which they are associated); Nimmer on Copyright, *supra* note 311, § 8D.02 [D][6] (opining that it is extremely ironic for the Supreme Court to use a federal statute (i.e. Visual Artists Rights Act of 1990 ("VARA")), which was unambiguously designed to strengthen the U.S.'s moral rights obligation under Berne, as the basis for rejecting a moral-right claim under the Lanham Act.)

³⁵² See, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003) (stating that "[w]hen Congress has wished to create such addition to the law of copyright, it has done so with much more specificity than the Lanham Act's ambiguous use of 'origin.'")

³⁵³ *Id.*

³⁵⁴ Lanham Act of 1946, § 43(a), 50 Stat. 427 (Jul. 5, 1946), codified at 15 U.S.C. § 1125(a)(1) (2006).

³⁵⁵ *Dastar*, 539 U.S. at 26-27.

³⁵⁶ *Id.* at 32-35, 37.

³⁵⁷ *Id.* at 33-34 (noting that according special treatment to communicative products causes the Lanham Act to conflict with copyright law since "the right to copy, and to copy without attribution, once a copyright has expired, ... [inevitably] passes to the public") (citation omitted).

³⁵⁸ As Justice Scalia wrote for the Court, "[r]eading 'origin' in Section 43(a) to require attribution of uncopyrighted materials would pose serious practical problems. Without copyrighted work as the basepoint, the word 'origin' has no discernable limits." *Id.* at 35.

It is not clear if the outcome of *Dastar* might turn out differently if the Plaintiff had been a living author instead of a corporate owner of an expired copyright. On one hand, it is possible to read the *Dastar* opinion as rejecting any application of the Lanham Act in the relation to a work of authorship.³⁵⁹ The Supreme Court decision in *Dastar* appears to reject the idea that the Lanham Act may be used to as a backdoor alternative to a failed copyright claim.³⁶⁰ Indeed, many lower courts have followed *Dastar* in that direction.³⁶¹ But there have been a few decisions that interpreted *Dastar* as not categorically rejecting claims against false designation of origin in the context of works of authorship when the plaintiff has a valid claim over a copyrighted product – as opposed to a paternity claim over “idea, concept, or communication embodied in those goods.”³⁶² Many American moral rights experts have likewise offered various narrow readings to *Dastar*.³⁶³ But the overall outlook remains bleak, for there is no question that the *Dastar* opinion discourages a robust development of non-federal jurisprudence concerning non-pecuniary interests in works of authorship. Thus, despite the fact that the concept of unfair

³⁵⁹ The *Dastar* Court concluded that the term “origin of goods” must be restricted only to “the producer of tangible goods that are offered for sale, and not to the author of any idea, concept or communication embodied in those goods.” *Id.* at 37. See also Jane C. Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian Ad Litem*, 30 CARDOZO ARTS & ENT. L.J. 73, 81 (2012) [hereinafter Ginsburg (2012)] (noting that the number of decisions applying *Dastar* to rule that §43(a) of the Lanham Act precludes claims alleging attribution of authorship is constantly growing).

³⁶⁰ Nimmer on Copyright, *supra* note 311, § 8D.02 [D][6] (citing *Dastar*, 539 U.S. at 35).

³⁶¹ See, e.g., *Zyla v. Wadsworth*, 360 F.3d 243 (1st Cir. 2004) (rejecting § 43(a) claim by a former coauthor of a college textbook who was not given credit in the new edition of the textbook); *Rudovsky v. West Publishing Corp.*, 98 U.S.P.Q.2d (BNA) 1595 (E.D. Pa. 2011) (rejecting a Lanham Act claim based on a misattribution of authorship of a pocket update of a legal treatise, since the plaintiffs failed to establish that “the cover page of the pocket part is a form of ‘commercial advertising or promotion’”) (citation omitted).

³⁶² See, e.g., *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 935-36 (E.D. Va. 2010) (holding that the Lanham Act provides a cause of action in the case where the defendant “scraped” information from the plaintiff’s website, reformatted it, and posted it as its own, in violation of copyright laws); *Experian Marketing Solutions, Inc. v. U.S. Data Corporation*, No. 8:09 CV 24, 2009 WL 2902957, at *9–*10 (D.Neb. Sept. 8, 2009) (sustaining a reverse passing off claim for redistribution of proprietary databases, noting that plaintiff did not allege “copying the ideas embodied in the databases” but “rather they allege[d] improper use of the actual files”); *Cable v. Agence France Presse*, 728 F. Supp. 2d 977, 981 (N.D. Ill. 2010) (holding that a claim for mere repackaging arises based on the defendant’s copying and reproducing, for commercial purpose, the plaintiff’s photographs, while deliberately omitting the plaintiff’s tradename and hotlink).

³⁶³ June M. Besek and Brad A. Greenberg, *Moral Right in the 21st Century – The Changing Role of Moral Rights in an Era of Information Overload*: USA 4 (ALAI 2014) [hereinafter ALAI U.S. Report (2014)] (arguing that a claim may still arise under Section 43 (a)(1)(B) “if, in advertising or promotion, the seller of a product that copies a copyrighted work misrepresents the nature, characteristics or qualities of the work”); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademark Law*, 41 HOUS. L. REV. 269, 279 (2004) (arguing that there is no reason why courts may not apply §43(a) in the context of reverse passing off claims for works that remain protected under copyright law); Kwall (2010), *supra* note 323, at 32 (suggesting that, rather than relying on reverse passing off claim under Section 43 (a)(1)(A), an author can pursue a claim for misattribution under Section 43 (a)(1)(B) which governs uses that misrepresent the nature of goods or services).

competition law has “progressed far beyond the old concept of fraudulent passing off, to encompass any form of competition or selling which contravenes society’s current concepts of ‘fairness,’”³⁶⁴ the state of law after *Dastar* suggests that the Lanham Act has a rather limited utility for claims alleging a violation of the right of respect and integrity.³⁶⁵

3.3.4 The Statutory Rights of Integrity: The Visual Artists Rights Act (VARA)

The most conspicuous form of the right of respect and integrity in the U.S. exists in the Visual Artist Rights Act (VARA),³⁶⁶ enacted in 1990 to provide a further assurance of the U.S. adherence to the Berne Convention. VARA applies only to the original physical copy, or limited signed or numbered reproductions not exceeding two hundred copies, of “works of visual art” – a limited class of work that include paintings, drawings, prints, sculptures, or photographic images produced for exhibition only.³⁶⁷ VARA’s baseline protection of the integrity right is similar to Article 6bis of the Berne Convention in that it requires a demonstration of prejudice to the author’s honor or reputation.³⁶⁸ However, VARA also prevents “any destruction of a work of recognized stature, and any intentional or grossly-negligent destruction of that work.”³⁶⁹ This is the one area that the American moral rights regime chooses to go beyond the Berne Convention and even most European monist as well as dualist countries.³⁷⁰ VARA’s pioneering role in conferring a higher level of protection to works of proven stature has been commended by

³⁶⁴ *Montoro*, 648 F.2d at 604.

³⁶⁵ Nimmer on Copyright, *supra* note 311, § 8D.04 [A][2] (opining that a § 43(a) claim in a factual circumstance similar to *Gilliam*’s – where no product repackaging was involved – may be defeated pursuant to *Dastar*); Ginsburg (2012), *supra* note 359, at 81 (observing that more and more courts have come to conclude that a reverse passing-off claim for misattribution of authorship under the Lanham Act is no longer available); cf Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap”*, 2007 UTAH L. REV. 659, 693 (2007) (arguing that “it would not make sense to apply [Dastar]’s tight, physical manufacturing definition of ‘origin’” to Section 43(a)’s broad prohibition on “intentional false or misleading descriptions or representations of fact”).

³⁶⁶ Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128-33 (1990) [hereinafter VARA] (codified as 17 U.S.C. § 101, 106A, 107, 113, 301, 411, 412, 501, 506, 608-610 (2011)).

³⁶⁷ 17 U.S.C. § 101 (2011).

³⁶⁸ *Id.* at § 106A(a)(3)(A).

³⁶⁹ *Id.* at § 106A(a)(3)(B).

³⁷⁰ Robert J. Sherman, *The Visual Artists Act of 1990: American Artist Burned Again*, 17 CARDOZO L. REV. 373, 411 (1995); Rajan (2011a), *supra* note 170, at 443-44 (noting that VARA’s prohibition against destruction of an artwork is a bold expansion of the integrity right to a level that is ahead of the international standard of protection.)

foreign observers.³⁷¹ Its approach somewhat similar to the federal trademark dilution principle devised specifically to protect famous marks.³⁷²

VARA is far from following the dualist's conception of moral rights and differs there from in several aspects. First, while the rights of visual artists can be exercised independent of copyright title in a disputed work,³⁷³ they are circumscribed by both the general doctrine of fair use³⁷⁴ as well as VARA's own specific exceptions.³⁷⁵ VARA's emphasis is clearly to avoid conflicts between the rights of visual artists and that of the public,³⁷⁶ and a special deference is given to the owner of a building in which a work of visual art is incorporated or made part of.³⁷⁷ Secondly, for some observers, VARA's elevated protection for works of visual art appears to resemble personal tort protections, which expire with the death of the affected person.³⁷⁸ Most significantly, the rights of visual artists under VARA do not exist *post mortem*³⁷⁹ – and, although these rights cannot be transferred, they may be waived by a written instrument signed by the author.³⁸⁰ The short term of protection testifies to the statute's primary aim of protecting the author's personal interests rather than performing cultural preservation function.³⁸¹ VARA's lack of cultural-preservation benefit suggests that it offers no recourse in the case of removal of site-specific art. In 2006, the Court of Appeals of the First Circuit held, in the landmark case *Phillips*

³⁷¹ Dietz, *supra* note 185, at 224.

³⁷² See Ponte, *supra* note 83, at 41 (arguing that Congress can develop a new approach to moral rights for open access environment by learning from the concept of trademark dilution – which recognizes that harm can arise when a famous mark is used in non-infringement context, but nonetheless constitutes either blurring or tarnishment.)

³⁷³ Nimmer on Copyright, *supra* note 311, § 8D.06 [D].

³⁷⁴ 17 U.S.C. § 107 (2011). For example, in *Leibovitz v. Paramount Pictures Corp.*, the world famous photographer Annie Leibovitz unsuccessfully brought a suit against Paramount Pictures for making a promotional video that parodied her photographs. 137 F.3d 109 (2d Cir. 1998) (holding that despite disparagement, the Paramount photograph did not interfere with any potential market of the plaintiff's photographs).

³⁷⁵ 17 U.S.C. §§ 106A(c)(1), 113(d).

³⁷⁶ The limited scope of protection given to original and signed physical copies of protected works, however, seems to render the question of conflicts with the freedom of expression rather speculative. ALAI U.S. Report, *supra* note 363, at 11.

³⁷⁷ VARA gives the owner of a building with a near absolute discretion as to whether or not a work of visual art, incorporated in or made part of the building, should be preserved. 17 U.S.C. §§ 113(d). The near complete exemption for a property owner raises an important question of whether the owner of a building could also deface the work of visual art in a manner that is prejudicial to the author's reputation and honor. Nimmer on Copyright, *supra* note 311, § 8D.06 [C][3].

³⁷⁸ Mira Sundara Rajan, *Creative Commons: America's Moral Rights?*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 905, 914 (2011) [hereinafter Rajan (2011b)]

³⁷⁹ 17 U.S.C. § 106A(d).

³⁸⁰ 17 U.S.C. § 106A(e).

³⁸¹ See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 80 (2d Cir. 1995) (stating that Congress passed VARA to encourage artistic production by strengthening moral rights of artists but “it did not mandate preservation of art at all costs and without due regard for the rights of others.”)

v. Pembroke Real Estate, Inc.,³⁸² that VARA does not protect location as a component of site-specific art, and in fact “VARA does not apply to site-specific art at all.”³⁸³ But a much publicized 2013 decision, *Cohen v. G&M Realty L.P.*,³⁸⁴ concerning the destruction of “5 Pointz” a well-known graffiti center highlighted the possibility for artists’ interests in the preservation of their creative outputs to prevail over the site owners’ property interests – provided that the work of art concerned has developed a sufficient level of renown.³⁸⁵

Because VARA’s text shows clear congressional intent to limit the types of work qualified for protection, it is a hard case to argue that works in digital environment can also benefit from the statute’s protection.³⁸⁶ In passing VARA into law, Congress deliberately excludes motion picture, audiovisual work, and electronic publication from the definition of works of visual art.³⁸⁷ This automatically disqualifies most of user-generated content from VARA’s scope of protection. Professor Peter Yu, among other American academics,³⁸⁸ believes that VARA is an example of a pre-Internet legislation whose definitions only make sense in the physical world, but do not sit well with user-generated content or even traditional artistic works executed with the help of a computer.³⁸⁹ The modern state of digital photography exposes VARA’s shortcoming: photography today has largely been digitalized but VARA only applies to “a still photographic image produced for exhibition purposes.”³⁹⁰ Consequently, any claim that VARA’s

³⁸² 459 F.3d 128 (1st Cir. 2006).

³⁸³ *Id.* at 143.

³⁸⁴ 988 F.Supp.2d 212 (E.D.N.Y. 2013). In *Cohen*, the court ultimately denied the plaintiffs artists injunction against the graffiti being painted over, excusing itself for not having the authority to prevent the destruction and noting that “[the court’s] authority under VARA is consequently limited to determining whether a particular work of visual art that was destroyed was one of “recognized stature.”) *Id.* at 226.

³⁸⁵ According to *Cohen* court, the “recognized stature” under VARA is understood within the second circuit to mean the fame generated by the work itself. Thus, a work commissioned for private enjoyment – though created by a famous artist – “[would not be] a work of recognized stature within the meaning of VARA, since it had never been exposed to the public.” *Id.* at 218 (citation omitted).

³⁸⁶ See, e.g., *Carter*, 71 F.3d at 84 (stating that “Congress meant to distinguish works of visual art from other media, such as audio-visual works and motion picture.”)

³⁸⁷ 17 U.S.C. §101 (2012).

³⁸⁸ In an interview on the latest developments in moral rights, Prof. Jane Ginsburg opines that, although the right of integrity for digital works is possible under American law, “VARA extends only to hard copies and then only to certain hard copies [and right of integrity for a digitally expressed work] is not going to come from VARA.” Eva E. Subotnik and Jane C. Ginsburg, *Speaking of Moral Rights: A Conversation Between*, 30 CARDOZO ARTS & ENT. L.J. 91, 94 (2014).

³⁸⁹ Peter K. Yu, *Moral Right 2.0*, 1 TEX. A&M L. REV. 873, 879 (2014).

³⁹⁰ *Id.*

language is broad enough to encompass many digital visual arts must tread carefully.³⁹¹

Professor Roberta Kwall, while believing that VARA is a logical starting point for introducing stronger moral rights protections in the U.S., criticizes this piece of legislation as “poorly drafted, [and] also reflects questionable and seemingly inexplicable choices.”³⁹² In addition, there are other questions relating to purely digital works that have not been adequately answered, namely what constitutes “limited editions” of purely digital works, and how should these digital creations be signed.³⁹³ It also does not help that some of the digital moral-right issues overlap with the scope of a specific law dealing with copyright management information (CMI), i.e. the Digital Millennium Copyright Act,³⁹⁴ which establishes protection for technological means that help the author manage attribution information as well as integrity of the work.³⁹⁵

3.3.5 The Right of Integrity through Contractual Arrangement

Integrity rights can arguably be best protected in the U.S. by the use of contract. Contracts can be viewed as a form of private ordering and they allow authors and artists to secure the desired level of moral rights protection that fit their personal expectation.³⁹⁶ The obvious problem of this theory is that most artists and writers do not have the bargaining power that would enable them to demand inclusion of such terms.³⁹⁷ The power imbalance between Cyber Leviathans and their users is even more problematic in the digital environment where platform intermediaries routinely impose adhesion contracts with terms and conditions demanding that users give up their rights, both economic and moral ones, in the content.³⁹⁸

³⁹¹ For an argument that VARA applies in the digital realm, see Llewellyn J. Gibbons, *Visual Artists Rights Act and the Protection of Digital Works of “Photographic” Art*, 11 N.C. J.L. & TECH 531, 544-552 (2010) (arguing that the language of VARA is broad enough to accommodate digital photography and the new technology also allows digital copies to be signed).

³⁹² Kwall (2010), *supra* note 323, at 147.

³⁹³ For a detailed discussion of these topics, see Gibbons, *supra* note 391, at 544-551.

³⁹⁴ 17 U.S.C. §1202 (2011).

³⁹⁵ The definition of CMI provided by Section 1202 of the DMCA encompasses both attributive information and the copyright owner’s expectation over the works’ integrity, namely: the information in the copyright notice; the title of the work; the names of the authors, copyright owners, writers, performers, and directors; identifying numbers and symbols pertaining to the aforementioned information (and digital links thereto); the terms and conditions of use; and any other information required by the Register of Copyrights. 17 U.S.C. §1202 (c).

³⁹⁶ ALAI U.S. Report, *supra* note 363, at 4, 12-13.

³⁹⁷ Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 807 (2001); Roberta Rosenthal Kwall, *Copyright and Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 27 (1985).

³⁹⁸ See, e.g., Benkler (2011), *supra* note 55, at 368-69.

Not all contracts or license agreements, however, reject moral rights in their totality. There are several forms of off-the-shelf licenses that offer a considerable degree of respect toward moral rights and their popularity has bolstered the protection of moral rights in the United States. The best known example is perhaps the Creative Commons (CC) viral-license scheme, initiated by Professor Lawrence Lessig as a part of the bigger “Copyleft” or “open access” movements.³⁹⁹ The objective of Creative Commons is to offer a simplified version of copyright law and make it more manageable, especially for “creators who either are not creating for economic ends, or who believe that control over their creativity is not a necessary means to their economic success.”⁴⁰⁰ As a part of the open access movements, the Creative Commons is especially tailored for authors and creators who are more interested in a wide dissemination of their works and less with economic restriction.⁴⁰¹ All Creative Commons licenses thus presuppose that the authors who adopt them are happy to make their work available for use without requiring downstream users to seek permission, or imposing other copyright restrictions. Creative Commons licenses make no direct allusion to moral rights, and Lessig himself has confessed that the strength of moral rights protection in true dualist jurisdictions, where moral rights are inalienable and non-waivable, may in fact interfere with CC’s free dissemination objectives.⁴⁰²

As of version 4.0 of the licenses, CC license developers seemed to have departed even further from the moral rights commitment. The latest version of the licenses caters more to the international demand, with a clearer intention to “minimize the effect of moral rights on otherwise-permitted use.”⁴⁰³ Creative Commons has discontinued its effort to “port” the license in compliance with particularity of local laws of each country.⁴⁰⁴ Specifically, CC version 4.0 is configured such that “moral rights are waived to the limited extent necessary [and possible under

³⁹⁹ ALAI U.S. Report, *supra* note 363, at 12.

⁴⁰⁰ Lawrence Lessig, *On the Challenge of Moral Rights*, LESSIG BLOG (Feb. 26, 2005), <http://www.lessig.org/2005/02/on-the-challenge-of-moral-right/> (last visited Oct. 2, 2014) [hereinafter Lessig (2005)].

⁴⁰¹ All Creative Commons licenses, regardless of whatever manner of restrictions, always allow unlimited non-commercial distributions of the work licensed. *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses/> (last visited Sep. 27, 2014) [hereinafter CC License Info Page].

⁴⁰² Prof. Lessig, commenting on the effect of CC licenses on moral rights, stated that: “We don’t purport to affect the moral rights [in dualist countries] at all. They are left as they would be.” Lessig (2005), *supra* note 400.

⁴⁰³ *Frequently Asked Question: How Do Creative Commons Licenses Affect My Moral Rights, If At All?*, CREATIVE COMMONS WIKI, https://wiki.creativecommons.org/Frequently_Asked_Questions#How_do_Creative_Commons_licenses_affect_my_moral_rights.2C_if_at_all.3F (last visited Oct. 20, 2014) [hereinafter CC Wiki FAQ].

⁴⁰⁴ *Id.*

local law] to exercise the license rights.”⁴⁰⁵ Nevertheless, outside the true dualist jurisdictions – such as in the U.S. where the protection of moral rights has been accorded with less than a full statutory recognition – Creative Commons licenses continue to play an undeniable role in convincing amateur creators to free up their content while assuring that their rights of attribution and integrity will be respected if they so choose. Professor Mira Sundara Rajan thus argues that, given the non-economic nature of the open access movement, moral rights are in fact the foundation of the Creative Commons license.⁴⁰⁶ This view is in agreement with the French Report at the most recent ALAI conference.⁴⁰⁷

The creative common licenses create conditions that are enforceable and binding upon those who make use of the work marked with the licenses.⁴⁰⁸ Creative Commons’ “no derivative” principle is a broader concept than the moral right of integrity: it completely prohibits any alteration that might result in a creation of a derivative work,⁴⁰⁹ even if such alteration is not in fact prejudicial to the reputation and honor of the original author. However, it follows that editorial interventions – which may include reduction of content and other forms of censorial discretion – that do not result in creation of a new derivative work will not trigger the “no derivative” prohibition, unless the alteration “is so egregious as, in effect, to create a new work – the Monty Python scenario.”⁴¹⁰

Notwithstanding its limitation,⁴¹¹ Creative Commons licenses have a big potential in bringing a limited form of moral rights to the forefront of the most popular communicative technology of the twenty-first century. The integrity right, in the guise of CC no-derivative license, can offer Wikipedia a protection against page vandalism and untruthful editing by

⁴⁰⁵ *License Version: Treatment of Moral Rights*, CREATIVE COMMONS WIKI, https://wiki.creativecommons.org/License_versions#Moral_rights_clause_included (last visited Oct. 20, 2014).

⁴⁰⁶ Rajan (2011b), *supra* note 378, at 920.

⁴⁰⁷ ALAI France Report (2014), *supra* note 235, at 22 (suggesting that online viral licenses, such as CC licenses, can help extend France’s dualist influence to the world).

⁴⁰⁸ See, e.g., *Jacobsen v. Katzer*, 535 F.3d 1373, 1381 (Fed. Cir. 2008) (holding that the conditions embedded in an open-source Artistic License creates contractual covenants that bind the downstream users). For a list of case law involving enforcement of Creative Commons licenses around the world, see *Case Law*, Creative Commons, https://wiki.creativecommons.org/Case_Law (last visited Sep. 28, 2014).

⁴⁰⁹ The Creative Commons website explains that “no derivatives” license “allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to you.” CC License Info Page, *supra* note 401.

⁴¹⁰ Rajan (2011b), *supra* note 378, at 928.

⁴¹¹ The Creative Commons license may not be the only off-the-shelf content licensing scheme available, but its viral popularity makes it stand head-and-shoulder above any other alternative. Ginsburg (2012), *supra* note 359, at 88.

various interest groups – although the authorship of a collective piece of contribution remains to be worked out.⁴¹² Since 2009, the CC group has tried to persuade Facebook, and other social media platforms, to support CC licensing options of users' photos and other content.⁴¹³ As of September 2014, there are more than 96 million photos on Flickr that are offered under CC's no-derivative restriction to all prospective users,⁴¹⁴ and the impacts of the CC license on public uses of Flickr photos have been documented.⁴¹⁵ Other big platform providers such as Facebook and Instagram, however, have resisted the creator-centric sharing philosophy of Creative Commons.⁴¹⁶ Facebook, despite having become the world biggest photo repository since 2008, has so far refused to implement the necessary means to enable efficient searches and filters for CC-licensed works on its network.⁴¹⁷ A popular explanation as to why Facebook and Instagram do not support users' ability to attach and enforce CC-license, according to some industry observers, has to do with the social-network giants' obvious desire to make commercial use out of their users' content.⁴¹⁸ YouTube only permits users to mark their content with CC-BY (attribution) license, thus leaving user videos vulnerable for modification, alteration and commercial use by anyone.⁴¹⁹ It is no wonder that many independent musicians, who regularly publish their independently composed music on YouTube, often find their music get laundered and further distributed commercially on other websites such as Amazon.com or CD Baby.⁴²⁰

⁴¹² Rajan (2011b), *supra* note 378, at 946-952.

⁴¹³ See Fred Benensom, *Do You Want CC in Facebook?*, CREATIVE COMMONS (Feb. 18, 2009), <https://creativecommons.org/weblog/entry/12853> (last visited Sep. 30, 2014).

⁴¹⁴ Explore/Creative Commons, Flickr, <https://www.flickr.com/creativecommons/> (last visited September 29, 2014).

⁴¹⁵ See, e.g., Bobbie Newman, *The Danger of Using Creative Commons Flickr Photos in Presentations*, LIBRARIAN BY DAY (Jan. 27, 2013), <http://librarianbyday.net/2013/01/27/the-danger-of-using-creative-commons-flickr-photos-in-presentations/> (last visited Sep. 29, 2014).

⁴¹⁶ Users who wish to license their works on Creative Commons will have to use other services to release their photos with licensing information attached. See, e.g., Nathan Hurst, *How to License Your Instagram Photos on Creative Commons*, WIRED (Aug. 24, 2012, 4:30 PM), <http://www.wired.com/2012/08/i-am-cc/> (last visited Sep. 29, 2014).

⁴¹⁷ Ryan Singel, *Dear Facebook: Without the Commons, We Lose the Sharing Web*, WIRED (Dec. 14, 2012, 9:30 PM), <http://www.wired.com/2012/12/creative-commons-and-sharing-web/> (last visited Sep. 29, 2014).

⁴¹⁸ *Id.*; Kurt Opsahl, *Instagram's New Terms of Service to Sell Your Photos*, ELECTRONIC FRONTIER FOUNDATION (Dec. 18, 2012), <https://www.eff.org/deeplinks/2012/12/instagrams-new-terms-service-sell-your-photos> (last visited Sep. 29, 2014).

⁴¹⁹ YouTube boldly declares on its copyright information page that "[b]y marking your original video with a Creative Commons license, you are granting the entire YouTube community the right to reuse and edit that video [even commercially]." Learn About Copyright on YouTube: Creative Commons, YouTube, <https://support.google.com/youtube/answer/2797468> (last visited Oct. 20, 2014).

⁴²⁰ Kevin MacLeod, an independent professional musician, is one such victim. MacLeod published thousands of his own music on YouTube and found that many of his songs, as a result of CC-BY's being his only license choice, ended up being commercially distributed elsewhere. Some of these commercial sites file content ID with YouTube

YouTube's dominance in the networked content distribution economy enables it to coerce artists to agree to publish their creative outputs with reduced copyright and moral rights expectation.

This is not to say that an ability to mark one's creative works with CC-licenses gives authors more leverage against any online proxy they contracted with. In any event, users who condition the use of their works under Creative Commons licenses will nonetheless have to abide by the terms of service set by each platform provider. As the Creative Commons concedes:

*"Creative Commons licenses don't cancel out user agreements. That is, when you upload media to Flickr or YouTube, it's subject to the terms you agreed to when you signed up for those services, regardless of whether you license it under CC."*⁴²¹

Under this logic, a user who agrees to Facebook's terms of service will likely have surrendered his or her moral rights, except in jurisdictions where moral rights are not considered unwaivable.⁴²² Hence, dominant platform providers like Facebook and YouTube will not only be able to utilize users' content for commercial reasons, but will also be entitled to alter or modify the content for any reason, such as by muting a video's audio components or by reducing the video definition. The antagonism between TOS of popular platform providers and CC-licenses is clearly evident from their different ideologies. Whereas CC-licenses encourage creators to free online content from some copyright restrictions without completely surrendering their control over the use of their works,⁴²³ terms of service typically require authors to surrender their content without copyright or moral rights afterthought.⁴²⁴ Thus, so long as authors are not in the position to force online platform providers to respect the conditions set out in the licenses,⁴²⁵ securing

making any further upload or reuse of the songs restricted, even by MacLeod himself. Chase Hoffberger, *Royalty Free: Why YouTube and Creative Commons Can't Coexist*, THE DAILY DOT (Dec. 5, 2012), <http://www.dailydot.com/business/youtube-content-id-creative-commons-problems/> (last visited Oct. 20, 2014).

⁴²¹ Elliot Harmon, *Should Instagram Adopt CC Licensing?*, CREATIVE COMMONS (Dec. 19, 2012), <http://creativecommons.org/tag/facebook> (last visited Sep. 29, 2014) (emphasis original).

⁴²² Facebook's user agreements require users to grant Facebook: "a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook." This grant does not expire until "you delete your IP content or your account unless your content has been shared with others, and they have not deleted it" Facebook TOS, *supra* note 60, §2(1) (updated No. 15, 2013).

⁴²³ Rajan (2011b), *supra* note 378, at 930 (stating that "[n]o moral right statute in the world appears to provide for the author to control the method of attribution, yet it is a basic right recognized by Creative Commons").

⁴²⁴ See Facebook TOS, *supra* note 60, §2(1).

⁴²⁵ One example of such agreement is the baseline protections negotiated by author guilds, particularly in the film and television industry. The Directors Guild of America issued a Basic Agreement that set the minimum standards for all contractual relationship entered into between the guild members and production studios. The Basic Agreement not only treats the attribution issue seriously, but also provides strong integrity protection to the

attribution and integrity rights through viral contracts will be effective only against other end users but not the powerful private proxies, such as Facebook or YouTube.

3.4 Overcoming Private Censorship with Moral Rights

That the relationship between moral rights and censorship has been rarely addressed by academic literatures on moral rights is perhaps understandable since we are more inclined to correlate censorship with the state power and to overlook the roles played by private entities. Furthermore, strong and perpetual protection of moral rights is often cited as a form of private censorship on its own. Professor Lessig remarks in his book, *Remix*, that the artistic inclination to preserve integrity is fundamentally facilitated by the “Read/Only” or RO culture⁴²⁶ – which he defines to be “a culture less practiced in performance, or amateur creativity, and more comfortable with simple consumption.”⁴²⁷ Lessig personally views the integrity right as a form of control, but he admits that control can be good when it is used to preserve canonical forms of expression or to provide quality assurance to the consuming public.⁴²⁸

What makes moral rights different from censorship is that they proffer the power of control to individual creators with respect to their own creations at a culturally acceptable level.⁴²⁹ One of the original purposes of moral rights has always been to provide the author with a legal recourse against parties with stronger economic positions, such as publishers or property owners, and to enjoin them from unilaterally and arbitrarily interfering with the integrity of the work’s content.⁴³⁰ Due to the absence of moral rights in the United States during the early twentieth century, the public interest in the authenticity of renowned works of literature had to give way to

“Editor’s Cut” of the film. DGA Basic Agreement of 2011, at § 7-504 available at <http://www.dga.org/Contracts/Agreements/Basic2011.aspx> (stating that “[n]o one shall be allowed to interfere with the Director of the film during the period of the Director’s Cut. There shall be no ‘cutting behind’ the Director as that term is commonly understood in the motion picture industry.”)

⁴²⁶ Lessig (2008), *supra* note 31, at 85.

⁴²⁷ *Id.* at 28.

⁴²⁸ *Id.* at 85.

⁴²⁹ An exercise of moral rights in European countries is subject to restriction on an abuse of right ground, a universal doctrine in civil law system. In Germany, motion pictures and their ancillary works have a separate statutory regime which allows authors to invoke the integrity right only if their works are grossly distorted. Rigamonti (2006), *supra* note 296, at 365; Kwall (2010), *supra* note 323, at 55 (noting that moral rights tend to conflict with commercial interests of major corporations, whereas there is little evidence that these rights will adversely affect private audiences).

⁴³⁰ See Rigamonti (2006), *supra* note 296, at 360 (“[m]oral rights are meant to protect authors who actually create the work in question as opposed to those who finance or commission the creation of that work and who may qualify as initial copyright owners, especially in countries recognizing the work-for-hire doctrine.”)

unfaithful expurgation of unscrupulous publishers, especially when the alleged obscene nature of the work prevented the author from seeking injunction in court. The famous dispute between James Joyce and Samuel Roth, concerning the latter's publication of a pirated and expurgated version of *Ulysses* in America, demonstrates the importance of authors' moral rights in the face of private censorship.⁴³¹ As a work adjudged to be obscene in the 1920s, the availability of moral rights claims would not save *Ulysses* from either government censorship or piracy.⁴³² However, the *Ulysses* scenario shows that a strong and robust moral rights protection would have given an author like Joyce the power to save the integrity and dignity of his work from private hands.⁴³³

Moral rights theorists have found justifications for moral rights that go beyond mere economic and personal interests to include the expressivist as well as preservationist grounds.⁴³⁴ On a lower plane of justification, moral rights address types of authorial interests that are sometimes shared with other exclusive economic rights: this is the view espoused by the German monism. On a higher plane of justification, however, moral rights protect interests involved in the author-audience public communication, "with the view of furthering inter-human coalescence."⁴³⁵ It is the latter view that justifies a high regard for moral rights, not only on the basis of authors' personality concerns, but also with the interests of the general public. The expressivist argument sees the integrity right as instrumental in "establish[ing] an atmosphere of respect within a community for the creative efforts of members of that community."⁴³⁶ Moral rights' preference for the artistic sensibilities over patronizing reactions of general audience thus

⁴³¹ James Joyce, the author of *Ulysses*, lost his copyright for failing to comply with the formality and manufacturing requirement under the Copyright Act of 1909. Being a foreign author of an allegedly obscene book, Joyce was forced to rely on New York's publicity statute at the time to seek injunction in court against the publication of an expurgated version of his novel. See ROBERT SPOO, *WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN* 162 - 226 (Oxford 2013).

⁴³² This is because the equity doctrine of unclean hands used to be regularly invoked by American courts to deny copyright protection to works of seditious, blasphemous, and immoral nature. See James R. Alexander, *Evil Eulogy: Reflections on the Passing of the Obscenity Defense in Copyright*, 20 J. INTELL. PROP. L. 209 (2013) (outlining the rise and decline of the obscenity defense in American copyright infringement suits).

⁴³³ In Professor Spoo's words, due to the rigidity of American copyright law and the archaic equity doctrine of unclean hands, "a disreputable publisher had found [Joyce], expurgated his book, and used his growing celebrity to build a magazine." *Id.* at 226.

⁴³⁴ Brian Angelo Lee, *Making Sense of "Moral Rights" in Intellectual Property*, 84 TEMP. L. REV. 71, 96 (2011).

⁴³⁵ MAURIZIO BORGHI AND STAVROULA KARAPAPA, *COPYRIGHT AND MASS DIGITIZATION: A CROSS-JURISDICTIONAL PERSPECTIVE* 119, 145-46 (Oxford Univ. Press 2013).

⁴³⁶ Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ART 297, 303 (2003) (arguing that "the intrinsic value of integrity rights lies in their uniquely expressive character.")

places artists and authors in a better position to make firm artistic statements which, in turn, enrich the society.⁴³⁷ The right of integrity can also perform the preservationist function with respect to unique cultural and artistic creations.⁴³⁸ Admittedly, very few moral rights regimes offer the integrity protection that is strong enough to effectuate the level of protection necessary to accomplish the expressivist's and the preservationist's goals.⁴³⁹ But in recent years, there has been a renewed interest in using moral rights to preserve the integrity of communicative acts between human beings in an online space from private interferences.

Professor Maurizio Borghi, a leading academic on the copyright consequence of mass-digitization, argues that the moral right of integrity can indeed provide an instrumental mechanism to advance public interests concerning online speech.⁴⁴⁰ Borghi notes that the philosophical basis of the right to integrity – as contained in the writings of the Enlightenment philosopher, Immanuel Kant – view an act of authoring as having the same communicative significance as making a “public speech.”⁴⁴¹ Although the “authenticity” aspect of the integrity right was rarely discussed in legal literatures outside the dualist countries, Professor Jessica Litman has appealed against the legislative indifference toward the integrity right in the digital environment, observing that the public interests in the authenticity of electronic documents are just as strong as personality interests of an author.⁴⁴² Similarly, Borghi maintains that a robust protection for the original and authentic representation of digitized works holds a unique value for the general public in the digital environment.⁴⁴³ While Borghi's arguments do not directly address the issue of private censorship by intermediaries, he argues that moral rights are

⁴³⁷ B. A. Lee, *supra* note 434, at 96.

⁴³⁸ Rajan (2011a), *supra* note 170, 449-458 (discussing the justification for moral rights protection of art works and cultural artifacts).

⁴³⁹ To perform the art preservation role, the right of integrity must be non-waivable, inalienable, and the term of protection must extend long after the death of the artist. See B. A. Lee, *supra* note 434, at 99.

⁴⁴⁰ Maurizio Borghi, *Mass Digitization and the Moral Right of Integrity* (2011), available at http://conferences.ionio.gr/icil2011/download.php?f=papers/115-borghi-full_text-en-v001.pdf (last visited Oct. 30, 2014) [hereinafter Borghi (2011)].

⁴⁴¹ *Id.* at 7.

⁴⁴² JESSICA LITMAN, *DIGITAL COPYRIGHT 185* (Prometheus Books 2006) (“[a]uthors have a legitimate concern [in maintaining the integrity of their works in the cyberspace], and that concern is often shared by the public. Finding the authentic version of whatever document you are seeking can in many cases be vitally important.”)

⁴⁴³ Borghi, *supra* note 440, at 7, 14-15 (stating that “it is in the interest of the whole society to preserve the integrity of works that form part of our cultural heritage, ... [especially when] integrity is threatened by mass digitisation.”)

technology-neutral rights and can be violated by automatic processing activities, including digitization, indexing, search and automatic association.⁴⁴⁴

Legal obstacles against an author's ability to challenge private censorship with moral rights in the United States continue into the twenty-first century. The liability regimes of online intermediaries are based on a different deontological assumption from the ones that governs traditional publishers of printed matters or telecommunication service providers.⁴⁴⁵ As Internet intermediaries continue to expand the range of their services, they have found it possible to classify the nature of their service to fit the regulatory regimes that are least exacting.⁴⁴⁶ Forms of private censorship by intermediaries have been increasing and intermediaries have begun to realize that they have enormous freedom to restrict or remove undesirable content originating from their users.⁴⁴⁷ The constitutional editorial privilege and the Good Samaritan defense under the CDA §230 (c)(2) are the two legal frameworks that empower platform providers to engage in unrestricted self-censorship while being completely immune to the liability therefrom. The First Amendment, on one hand, provides an almost limitless protection for editorial discretions exercised by a publisher or by a private platform provider wishing to enforce its content policy. On the other hand, Section 230 of the Communications Decency Act considers blameless any online service provider that engages in "good Samaritan" blockings of objectionable content.⁴⁴⁸

⁴⁴⁴ *Id.* at 8-15.

⁴⁴⁵ The history of Internet governance was, consequently, replete with evidence of government deregulation of online intermediaries. Because of its perceived uniqueness, the Internet was able to dodge applications of axiomatic regulatory principles derived from other telecommunication technologies – as these appear too onerous to impose on "information services." See, e.g., John Palfrey, *Four Phases of Internet Regulation* 2 (Harvard Law School, Public Law and Legal Theory Working Paper No. 10-42, 2010), available at <http://www.law.harvard.edu/faculty/faculty-workshops/palfrey.faculty.workshop.summer.2010.pdf> (explaining that the early phase of Internet regulation from 1960s to 2000 can be described as the "Open Internet" era during which "most states tended either to ignore online activities or regulate them very lightly"); Ev Ehrlich, *A Brief History of Internet Regulation* 4-7 (Progressive Policy Institute, Policy Memo, March 2014), available at http://www.progressivepolicy.org/wp-content/uploads/2014/03/2014.03-Ehrlich_A-Brief-History-of-Internet-Regulation1.pdf (discussing the Clinton Administration's Internet policy that led to the deregulation of Internet services with the passage of the Telecommunication Act of 1996).

⁴⁴⁶ See Part II, *supra*.

⁴⁴⁷ IAN BROWN AND CHRISTOPHER T. MARSDEN, *REGULATING CODE: GOOD GOVERNANCE AND BETTER REGULATION IN THE INFORMATION AGE* 142 (MIT Press 2013). Voluntary censorship among ISPs is motivated by an intricate web of concerns, including ethical, business, and instrumental costs of undesirable speech. Danielle K. Citron and Helen Norton, *Intermediaries and the hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U.L. REV. 1435, 1440 (2011).

⁴⁴⁸ 47 U.S.C. §§ 230(c)(1),(2).

The pertinent question is whether these two legal defenses will also immunize an online intermediary against claims based on the author's moral rights.

3.4.1 Moral Rights and the Constitutional Protection on Free Speech

In Part II, this article discusses the judicial expansion of the First Amendment's editorial privilege doctrine to cover the case of search-engine bias and censorship of political speech. This important legal development, along with the courts' consistent rejection to treat online intermediaries as either surrogate state actors⁴⁴⁹ or public forums,⁴⁵⁰ has so far prevented aggrieved individuals from arguing that content-discriminating practices of online intermediaries like AOL, Google or Facebook violated their rights to practice freedom of speech.

Assuming that courts were correct – in concluding that automated indexing services are capable of generating speech worthy of constitutional protection⁴⁵¹ – this article argues that moral rights should, nonetheless, be considered as a system of intellectual property that comports with the American free speech tradition. The Supreme Court has repeatedly determined that the enforcement of copyright law does not necessarily conflict with the Constitution, because

⁴⁴⁹ See, e.g., *Young*, 2010 WL 4269304, at 2-3 (rejecting the plaintiff's state action claim against Facebook); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 588 (S.D.N.Y. 2007) (Holding that the plaintiff had no First Amendment claim against Yahoo, in relation to its temporary disablement of his ability to send emails, because Yahoo was not a state actor); *Noah*, 261 F. Supp. 2d at 546 (holding that AOL's discrimination against the plaintiff's pro-Islamic statements, including account termination, did not give rise to a First Amendment claim because AOL was not a state actor); *Island Online, Inc. v. Network Solutions, Inc.*, 119 F. Supp. 2d 289, 306 (E.D.N.Y. 2000) (holding that the task of assigning domain names is not an equivalent of state action); *Sanger v. Reno*, 966 F. Supp. 151, 163 (E.D.N.Y. 1997) (holding that "[b]ecause Internet providers are not state actors, they are free to impose content-based restriction [...] without implicating the First Amendment"); *Cyber Promotions, Inc. v. American Online, Inc.*, 948 F. Supp. 436, 443-44 (E.D. Pa. 1996) (holding that AOL is not a state actor because the plaintiff "has numerous alternative avenues of sending its advertising to AOL members over the Internet").

⁴⁵⁰ See, e.g., *Cyber Promotions*, 948 F. Supp. at 443-452 (concluding that AOL's provision of email service did not constitute a traditional exclusive public function because private companies had numerous alternative for reaching customers including, among others, mail, television, cable, newspapers, and competing online services); *Langdon*, 474 F. Supp. 2d at 632 (rejecting the plaintiff's argument that Google's search engine is a public forum); *KinderStart*, 2007 WL 831806, at 13-16 (rejecting the plaintiff's argument that Google's search engine is the functional equivalent of a traditional public forum). See also Enrique Armijo, *Kill Switches, Forum Doctrine, and the First Amendment's Digital Future*, 32 CARDOZA ARTS & ENT. L.J. 411, 436-41 (2014) (arguing that public forum doctrine applies only to "those speech channels that the State, in its own judgment, deems either sufficiently time-honored or sufficiently worthy of protection.")

⁴⁵¹ For recent scholarly criticism on the judicial extension of constitutional privilege to search engines, see, e.g., Bracha and Pasquale, *supra* note 155, at 1193-1201 (arguing that the First Amendment does not extend protection to search engine rankings); Bracha (2014), *supra* note 140, at 1667-71 (arguing that the social practices of search ranking are not reasonably related to the dominant normative theories of freedom of speech, namely democratic governance theory, pursuit of truth theory, and autonomy theory); Tim Wu, *Machine Speech*, 16 U. PA. L. REV. 1495, 1520-21 (2013) [hereinafter Wu (2013)] (arguing that the First Amendment contains a *de facto* principle of functionality; and the First Amendment will not protect the online provider's relationship to the information, if it is too mechanical, or if the information conveyed is an integral part to a task unrelated to the communication of idea.)

copyright law is equipped with built-in First Amendment accommodations.⁴⁵² Consequently, as a part of copyright's big picture, the moral right of integrity may serve as an alternative cause of action for an author whose work gets discriminated by dominant platform providers. Some provisions of the 1976 Copyright Act already offer protection, albeit indirectly, to moral rights of attribution and integrity. Title I of the DMCA, now codified as Section 1202, prohibits a violation of Copyright Management Information (CMI)⁴⁵³ and has recently been extended to protect non-digital work of art.⁴⁵⁴ Moreover, Section 115(a)(2) imposes a quasi-moral rights condition on the statutory compulsory license by stipulating that a musical arrangement made under a compulsory license privilege "shall not change the basic melody or fundamental character of the work."⁴⁵⁵ VARA, likewise, has been codified as a part of the Copyright Act and is thus entirely subservient to the fair use principles.⁴⁵⁶ Hence, there is no reason to doubt that these quasi-moral rights provisions are integral and bona fide parts of copyright law, and should not be subject to the constitutional scrutiny even if their enforcement may sometimes be seen as conflicting with others' freedom of speech.

Admittedly, the status of moral rights and their relationship with the Constitution has become more complicated since the Supreme Court's *Dastar* decision.⁴⁵⁷ Thus there is an equally valid argument that courts will not be predisposed to consider moral-right claims on the same footing with economic copyrights. As Professor Roberta Kwall observes: "a system of moral rights will be adopted in [the United States] only if it is viewed as practically feasible, constitutionally sound, and not otherwise out of step with much of the copyright system already in place."⁴⁵⁸ The *raison d'être* of copyright system in the United States, as manifested in the

⁴⁵² *Golan v Holder*, 132 S. Ct. 873, 890 (2012) (quoting *Eldred v Ashcroft*, 537 U.S. 186, 219 (2003)).

⁴⁵³ Section 1202 (a) prohibits the act of providing false CMI that will facilitate infringement, whereas Section 1202(b) prohibit removal or alteration of CMI, as well as the distribution and public performance of works whose CMI has been removed or altered. 17 U.S.C. §§ 1202(a), (b) (2012).

⁴⁵⁴ See *Williams v. Roberta Cavalli S.p.A.*, CV 14-06659-AB (C.D. Cal. Feb. 12, 2015) (concluding that partially reproducing graffiti murals on t-shirts while omitting the artists' signatures constitutes a violation of 17 U.S.C. §1202 (b)).

⁴⁵⁵ 17 U.S.C. § 115(a)(2).

⁴⁵⁶ 17 U.S.C. § 106A(a).

⁴⁵⁷ *Dastar*, 539 U.S. 23 (2003).

⁴⁵⁸ Kwall (2010), *supra* note 323, at 154.

Copyright Clause,⁴⁵⁹ is to create and to enrich the public domain.⁴⁶⁰ Strengthening moral rights could arguably compromise the public's ability to reach and manipulate information, thereby interfering with copyright's function as the "engine of free expression".⁴⁶¹ Advocates of moral rights have, however, argued to the contrary.⁴⁶² Kwall contends that moral rights fit within the purview of the U.S. Copyright Clause on two grounds: first, because the essence of "authors' rights" must have been regarded as relevant to "promoting progress" by the Framers; and second, because moral rights are "limited rights" that are "aimed only at preserving an author's dignity, honor, and autonomy."⁴⁶³ She also emphasizes the fact that moral rights tend to conflict more with the copyright industry rather than with the society's interests in the expansion of public domain.⁴⁶⁴ Using VARA as empirical evidence, Kwall contends that Congress's decision to confine the scope of VARA to a limited a class of visual arts was chiefly shaped by the desire to

⁴⁵⁹ U.S. Const. Art. I, § 8. Cl. 8 ("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").

⁴⁶⁰ Nimmer on Copyright, *supra* note 311, §1.03[A] ("the primary purpose of copyright is not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of authors'") (citation omitted). According to Pamela Samuelson, the concept of public domain revolves around three main pivots: "the legal status of the information resources, freedoms to use information resources, and the accessibility of information resources." Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 816 (2006).

⁴⁶¹ That strong and robust moral rights protection necessarily conflicts with the First Amendment has been discussed in numerous legal literatures. See, e.g., Lawrence A. Breyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011, 1070 (1988) (arguing that adopting a stronger protection of moral rights may alter the contour of copyright in a way that also infringes upon first amendment rights); Eric E. Benson, *The Visual Artists' Rights Act: Why Moral Rights Cannot be Protected under the United States Constitution*, 24 HOFSTRA L. REV. 1127 (1996) (arguing that VARA violates First Amendment by restricting and discriminating freedom of speech as well as interfering with the autonomy of the owner of a work of art); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L. J. 79, 93, 122 (1996) (identifying First Amendment concerns as the cause for American resistance against the European moral-right ideology; and advocating judicial presumption of fair use, in the case of a moral-right challenge, with respect to commercial parodies).

⁴⁶² See, e.g., Kwall (2010), *supra* note 323, at 56 ("it should not be assumed that enhanced protections for authors' attribution and integrity interests will undermine the future of the public domain or contradict constitutional norms"); Hector L. Macqueen, *The Google Book Settlement*, 40 INT'L REV. INTELL. PROP. & COMPETITION L. 247, 249 (2009) (commenting that while copyright may never be reconciled with the digital world, where copying is unavoidable, "[p]rivacy and confidentiality rights may serve better to protect the work which the author does not intend for publication of any kind, while moral rights of attribution and integrity can be the bulwark of other authorial interests"); Jane C. Ginsburg, *Author's Rights Under the "Next Great Copyright Act,"* Media Institute (Feb. 17, 2015), <http://www.mediainstitute.org/IPI/2015/021715.php> (last visited Feb. 22, 2015) [hereinafter Ginsburg (2015)](contending that although the Constitution authorizes Congress to secure "the exclusive right of authors to their writings," authors turn out to be the group whose right to enjoy the fruit of their intellectual labor has been neglected by copyright law.)

⁴⁶³ Kwall, *supra* note 323, at 55-57. Kwall further explains that moral rights that last for the life time of the author comports with the "limited time" constitutional requirement. *Id.* at 58.

⁴⁶⁴ *Id.* at 55.

avoid conflict with politically powerful entities who viewed the expansion of moral rights as a threat to their profits.⁴⁶⁵

From the judicial point of view, as propounded by the Supreme Court decisions in *Eldred v. Ashcroft*⁴⁶⁶ and *Golan v. Holder*,⁴⁶⁷ the most apposite inquiry is whether moral rights protection would alter “the traditional contour of copyright protection.”⁴⁶⁸ On this point, moral rights scholars argue that there is nothing in the Constitution that prevents the United States from formally integrating economically-independent author’s rights into the copyright statute. Roberta Kwall maintains that moral rights protection has, from the beginning, been within the purview of the Constitution. Historical records show that the copyright statutes adopted by states following the American Revolution featured strong emphasis on personal interests of the author.⁴⁶⁹ In addition, the role of common law copyright in protecting unpublished works before the passage of the Copyright Act of 1976 strongly testifies that American copyright regime cared deeply about the Author’s moral and personal interests, especially with respect to works that had yet to gain copyright protection.⁴⁷⁰ Professor Jane Ginsburg recently urges Congress and the Copyright Office to consider formally including at least the attribution or paternity aspect of moral rights into the next major revision of Copyright Act.⁴⁷¹ Her suggestion with respect to the scope of the rights bears all the fundamental characteristics of a European moral rights regime, including post-mortem protection, limited inalienability and the application of the reasonableness test as extra-fair use criteria.⁴⁷²

⁴⁶⁵ *Id.* at 55.

⁴⁶⁶ 537 U.S. 186 (2003).

⁴⁶⁷ 132 S.Ct. 873 (2012).

⁴⁶⁸ *Eldred*, 537 U.S. at 221. See also Derek Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2079 (2014) (noting that, based on recent Supreme Court precedent, intermediary liability that is based on copyright framework under title 17 is likely to be constitutional).

⁴⁶⁹ Kwall (2010), *supra* note 323, at 60; Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 999-1001 (1990) [hereinafter Ginsburg (1990)] (noting that “[s]ources shortly predating the Constitution also indicate American acknowledgement of authors' personal claims in addition to utilitarian motivations.”)

⁴⁷⁰ Howard B. Abrams, *The Historic Foundation of American Copyright Law*, 29 WAYNE L. REV. 1119, 1129-1130 (1983) (defining *common law copyright* to be “the right of an author, established by decisional law to prevent an unauthorized publication of a previous unpublished manuscript”).

⁴⁷¹ Ginsburg (2015), *supra* note 462.

⁴⁷² Specifically, Prof. Jane Ginsburg explains that the American copyright system will have to provide for protection of paternity interests that: 1) lasts the entire duration of economic rights and capable of being passed on to the author’s heir, 2) cannot be dispensed through a general or blanket waiver, 3) exist and can be enforced independently of economic rights, 4) are not confined to limited categories of “visual art,” and 5) will not subject to the American “work for hire” principle. *Id.*

Our foregoing analysis, in addition, does not suggest that moral rights will always prevail over all other speech interests. In surveying the international protection of moral rights, this study finds that even among countries where moral rights are at their strongest, case-by-case balancing by judiciary is important when moral rights clash with other basic or fundamental liberties.⁴⁷³ This approach was also suggested by France during the Brussels Conference of the Berne Convention in 1948.⁴⁷⁴ In the Netherlands, in the famous *Scientology* case,⁴⁷⁵ the Church of Scientology sued a publicist who quoted a large portion of its teachings on the Internet, claiming that such online publication violated the Church's divulgation right since it had not intended to make the texts and teachings available to the public.⁴⁷⁶ The Court of Appeals in Hague opined that the exercise of moral rights in a way that restricts the public access to information necessitates a direct application of Article 10 of the European Convention on Human Rights (ECHR),⁴⁷⁷ under which the court must weigh the plaintiff's moral right interests against the freedom of the public. Even in a true dualist regime like France, the author's ability to protect the spiritual integrity of his creation is subject to both statutorily and judicially created exceptions.⁴⁷⁸ In France, courts do not allow an integrity right claim to proceed unless the author is somehow misrepresented,⁴⁷⁹ and there is a special statutory treatment for "parody, pastiche and caricature, observing the rule of the genre."⁴⁸⁰ In the United States, courts tend to defer to a finding of "transformativeness" in establishing a *prima facie* case of fair use⁴⁸¹ – to the point that

⁴⁷³ See, e.g., Moral Right in the 21st Century – The Changing Role of Moral Rights in an Era of Information Overload: Report UK 10 (ALAI 2014), available at http://alai2014.org/IMG/pdf/alai_2014_-_questionnaire_-_uk.pdf [hereinafter ALAI U.K. Report (2014)] (stating that "the courts would rely on the principle of proportionality as it would be weighing two fundamental rights, i.e. intellectual property and freedom of expression"); Thomas P. Heide, *Moral Right of Integrity and the Global Information Infrastructure: Time for a New Approach?*, 2 U.C. DAVIS J. INT'L L. & POL'Y 211, 247-48 (1996) (discussing the French courts' propensity to apply the abuse-of-right doctrine when claims under the moral right of integrity are asserted).

⁴⁷⁴ Adeney, *supra* note 181, at 140-41 (proposing that the inalienability concept of moral rights be ameliorated by a judicial exercise of "reasonableness doctrine.")

⁴⁷⁵ Court of Appeal of The Hague 4 September 2003, *Scientology v. Service Providers*, NJ 2003, *cited in* ALAI Dutch Report, *supra* note 242, at 54.

⁴⁷⁶ ALAI Dutch Report, *supra* note 242, at 54.

⁴⁷⁷ *Id.* at 54-55.

⁴⁷⁸ Adeney, *supra* note 181, 188-192.

⁴⁷⁹ *Id.* at 190.

⁴⁸⁰ C. Prop. Intell., *supra* note 197, at L 122-5(4).

⁴⁸¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (stating that, while a parodic use is not presumptively fair, an effective parody would merit a strong fair use claim, since "as to parody pure and simple, it is more likely that the new work will not affect the market for the original [...] This is because the parody and the original usually serve different market function.")

the transformativeness doctrine threatens to override the exclusive right under 17 U.S.C. § 106 (2) that governs the preparation of derivative works.⁴⁸² The fact that integrity rights share certain grounds with the economic right of adaptation, and that moral rights safeguard non-financial interests suggests that the integrity rights are a decidedly weaker force than economic copyright and, as a consequence, likely to yield to stronger public interests.⁴⁸³ Suffice it for us to conclude that the American copyright law already has a safety valve for free speech that is equally valid for moral-right type of claims⁴⁸⁴ – and, on this account, does not alter the traditional contour of copyright protection.

3.4.2 Moral Rights and the CDA's Good Samaritan Safe Harbors

The relationship between moral rights and Section 230 of the CDA is primarily regulated by the intellectual property exemption clause of the Good Samaritan defense.⁴⁸⁵ Section 230(e)(2) of the CDA clearly states that all of the safe harbors under subpart 230(c)(2) shall have no effect on “any law pertaining to intellectual property.”⁴⁸⁶ Whether one may rely on this provision to de-immunize ISPs from a claim based on moral rights violation by online intermediaries is, however, still a controversial issue.⁴⁸⁷ In the ninth circuit, the current authority, *Perfect 10 v.*

⁴⁸² Following *Campbell v. Acuff-Rose*, the Second Circuit has gone as far as concluding that the evidence of transformative use is enough to bring a modified copy within the scope of the fair use defense. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2012) (“transformative works ... lie at the heart of the fair use doctrine’s guarantee of breathing space”)(citation omitted). That interpretation has been met with some recalcitrance from Judge Easterbrook of the Seventh Circuit who argues, in *Kienitz v. Sconnie Nation LLC*, that placing too much importance on the transformative factor could override the exclusive right under 17 U.S.C. § 106 (2) that governs the preparation of derivative works. No. 13 – 3004, 2014 WL 4494835 at *1 (7th Cir. Sep. 15, 2014). Interestingly, Judge Easterbrook conjectures that the defendant’s disparage modification of the plaintiff’s original photograph, even if constituting a transformative use, may “injure [the plaintiff]’s long-range commercial opportunities”, especially when the plaintiff clearly determined that “the photos will be license only for dignified uses.” *Id.* at *2.

⁴⁸³ See Kwall, *supra* note 323, at 63 (noting that a successful application of the “self-fulfillment” theory of free speech to moral rights require a proper balancing between the conflicting interests.)

⁴⁸⁴ This consideration comports well with how the Lanham Act functions, since one of the grounds to defend against a Lanham Act claim is to show that the defendant is “not in any sort of competition” with the plaintiff. *Montoro*, 648 F.2d at 607. See also Ponte, *supra* note 83, at 41, 88-89 (suggesting that a stronger regime for attribution and integrity protection, or “copyright dilution,” can be developed in the U.S. without harming free speech if Congress adopted a model similar to state and federal trademark dilution statutes).

⁴⁸⁵ See Part II (C), *supra*.

⁴⁸⁶ 47 U.S.C. §230 (e)(2) (emphasis added).

⁴⁸⁷ Recent decisions showed that Section 230 immunizes search engines from defamation claims based on “auto-complete” functions of the search engine. *Obado*, 2014 WL 3778261, at *5 (holding that “search terms auto-generated by a search engine do not remove that search engine from the CDA’s broad protection”); *Stayart v. Google Inc.*, 783 F.Supp.2d 1005, 1056-57 (E.D. Wis. 2011) *aff’d*, 710 F.3d 719 (7th Cir. 2013) (finding that plaintiff’s allegation that Google automatically suggested the phrase that linked the plaintiff’s name and the name of a sexual dysfunction drug, when someone Googled her name, did not allow plaintiff to “get around [the Section 230] obstacle.”)

CCBill, interprets the term “intellectual property law” as being confined to federally enacted legislation.⁴⁸⁸ The *CCBill* Court felt that the diversity of personality-based common law claims within the circuit threatened the integrity of the Section 230 safe harbor, and decided that these claims will continue to be subject to preemption by Section 230 of the CDA.⁴⁸⁹ Given the Section 230’s primary objective of shielding online intermediaries from tort liability, the *CCBill* Court’s refusal to consider state law claims as triggering the subpart (e)(2) exemption clause is not without merit.⁴⁹⁰ The Ninth Circuit’s interpretation of subpart (e)(2), however, has been met with scathing criticism in other circuits for failing to give deference to the plain meaning of the Section 230’s text.⁴⁹¹

The Ninth Circuit’s rejection of state law claims – as being non-uniformed and “having varying purposes and policy goals”⁴⁹² unlike that of federal intellectual property – is itself an unwholesome comprehension of the federal intellectual property policy. Moral rights interests may indeed be different from property or monetary interests that the Supreme Court, in *Zacchini v. Scripps-Howard Broadcasting Co.*,⁴⁹³ recognized as having an intellectual property character.⁴⁹⁴ But there are other evidence that give a direct support for a broad interpretation of subpart 230(e)(2) in relation to moral rights claims. For example, the legislative history of BCIA

⁴⁸⁸ *CCBill*, 488 F.3d at 1118-19 (stating that “permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes”); 3 Ian Ballon, E-Commerce and Internet Law §37.05[5] n.13 (2013-12014 update) (noting that *CCBill* is the law in the Ninth Circuit). See also Joude v. WordPress Foundation, No. C 14-01656 LB, 2014 WL 3107441, at *7 (N.D. Cal. July 3, 2014) (holding that “[b]ecause computer service providers in this circuit are entitled to immunity from state intellectual property claims, including the right of publicity, [the defendant] enjoys immunity from all state claims treating [the defendant] as a publisher, including Plaintiffs’ allegation of misappropriation of likeness.”)

⁴⁸⁹ See 3 Ballon, *supra* note 488, at §37.05[5] n.13.

⁴⁹⁰ Kelly Casey Mullaly, *Blocking Copyrights Revisited*, 37 Colum. J.L. & Arts 57, 95-96 (2013) (arguing that the tort-based U.S. moral rights causes of action lead to overly expansive IP claims).

⁴⁹¹ See, e.g., Doe v. Friendfinder Network, Inc., 540 F.Supp.2d 288, 299 (D.N.H. 2008) (holding that the Good Samaritan defense does not preempt the plaintiff’s right of publicity under New Hampshire law, and that the Ninth Circuit failed “to recon with the presence of the term ‘any’ – or for that matter, the absence of the term ‘federal’ – in section 230(e)(2)”; Atlantic Recording Corp. v. Project Playlist, Inc., 603 F.Supp.2d 690, 704 (S.D.N.Y. 2009) (noting that, though the drafters of Section 230 intended this provision to be broad, the expansive language of Section 230(e)(2) offers no indication whatsoever that Congress intended a limiting construction of the safe harbor’s intellectual property exclusion). See also Ohio State University v. Skreeneed Ltd., 16 F.Supp.3d 905, 918 (S.D. Ohio 2014) (declaring that “[Section 230] immunity provision does not apply in the trademark context or in the context of state law right of publicity claim.”)

⁴⁹² *CCBill*, 488 F.3d at 1118.

⁴⁹³ 433 U.S. 562, 576 (1977) (noting that the State’s interest to protect a performer’s right of publicity was not dissimilar to the consideration underlying the patent and copyright law.)

⁴⁹⁴ *Id.*

clearly testifies on how the federal legislature had relied on “[s]tate and local laws include those relating to publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy” to fulfill the United States’ moral rights obligation under the Berne Convention.⁴⁹⁵ The negotiating history of the Rome Conference in 1928 unveils the Berne Union’s approval of the contracting states’ reliance on the internal distribution of legal mechanisms to meet the obligations set out in the Convention.⁴⁹⁶ A claim that Congress intends to limit the construction of Section 230’s intellectual property exclusion is thus inconsistent with both the plain language of subpart 230(e)(2)⁴⁹⁷ and the Congress’ legislative strategy, in the form of minimalist’s approach, toward the country’s obligations under international copyright instruments.⁴⁹⁸ On top of that, the Government’s involvement as *amicus curiae* in *Dastar* elucidates almost conclusively that both the executive and legislative branches were in agreement in considering all domestic authorities supporting moral-right-like claims to be “intellectual property law” within the meaning of the CDA’s Section 230.⁴⁹⁹ The state-law rights of publicity and privacy have been shown as capable of addressing non-monetary interests involving unauthorized or objectionable uses of “persona-texts.”⁵⁰⁰

To reiterate our point, state law publicity rights are still evolving to fulfill the roles that were expected of them even before the passage of the CDA. In recent cases, it has become possible to catch an intermediary afoul when it shifted from the conduit role of an interactive service provider to a content provider that reuses and communicates users’ names or identifying

⁴⁹⁵ H. Rep. BCIA (1988), *supra* note 314, at 32-40.

⁴⁹⁶ Rigamonti (2007), *supra* note 174, at 116-119.

⁴⁹⁷ See, e.g., *Friendfinder Network*, 540 F.Supp.2d at 299 (D.N.H. 2008) (holding that the Good Samaritan defense does not preempt the plaintiff’s right of publicity under New Hampshire law, and that the Ninth Circuit failed “to recon with the presence of the term ‘any’ – or for that matter, the absence of the term ‘federal’ – in section 230(e)(2)”; *Atlantic Recording*, 603 F.Supp.2d at 704 (S.D.N.Y. 2009)(noting that the expansive language of Section 230(e)(2) offers no indication whatsoever that Congress intended a limiting construction of the safe harbor’s intellectual property exclusion).

⁴⁹⁸ H. Rep. BCIA (1988), *supra* note 314, at 7.

⁴⁹⁹ As *amicus curiae* in *Dastar*, 539 U.S. 23 (2003), the Solicitor General submitted a brief explaining that “In acceding to the Berne Convention, Congress carefully considered the United States’ obligations under Article 6*bis* and concluded that the protection available under then-existing domestic law, including the Lanham Act, were sufficient to meet those obligations.” Brief of the United States as Amicus Curiae Supporting Petitioner at 9, *Dastar v. Fox*, 539 U.S. 23 (2003), *quoted in* Nimmer on Copyright, *supra* note 311, at §8D.02 [D][6].

⁵⁰⁰ Kwall (2010), *supra* note 323, at 123-128.

information for commercial purposes.⁵⁰¹ But this possibility is limited only to circumstances where the intermediary's exploitations of consumers' personality interest are detectable. Besides, it remains easy for Cyber Leviathans to sidestep liability arising out of publicity rights – as contemporary CDA case law permits online platform providers to circumvent the liability by incorporating a complete or general waiver of publicity rights into their TOS.⁵⁰² Consequently, it would be foolhardy to foreclose their further development in this direction by declaring, as *CCBill* court did, that “intellectual property” subject matter is the federal legislation's exclusive domain.

3.4.3 The Moral Right of Integrity and Private Censorship in Cyberspace – A Problem of De-Intellectualization and the Creation of Digital Commons

Skeptics of Section 230(e)(2) exemption will be quick to note that an IP-related claim that will trigger subpart 2(e) exemption may not at all exist.⁵⁰³ And while the moral right of integrity seems like a good candidate to rebut this assumption, the manners of private censorship carried out by online intermediaries can be very different from integrity violations found in the physical world. Blocking of online content, for instance, would implicate no structural integrity – that is the external dimension – of the work. A complete removal or deletion of a copyrighted expression, rather than mere distortion or modification of its part, also does not directly interfere with the work's integrity – since a removal of content is not likely to cause prejudice to the author's honor or reputation. Facebook has been particularly careful in how the company enforces its censorship policies. Facebook encourages artists to self-censor their uploaded content by blurring nudity, especially nipples and genitals,⁵⁰⁴ but the social media giant will not alter or modify non-complying materials – only to take them down. Facebook also censors content with controversial themes not addressed by its community standards, using other

⁵⁰¹ *Fraley*, 830 F.Supp.2d at 801-803 (denying Facebook's motion to dismiss based on Section 230 defense, reasoning that the social media provider appeared to be “an information content provider” in relation to its “Sponsored Story” program.)

⁵⁰² Venkat Balasubramani, *Facebook Sponsored Stories Settlement Approved – Fraley v. Facebook*, TECHNOLOGY & MARKETING LAW BLOG (Sep. 10, 2013), http://blog.ericgoldman.org/archives/2013/09/facebook_sponso_1.htm (last visited Feb. 20, 2015) (commenting that Facebook ended up paying settlement fees to a small group of plaintiffs and then simply went on to make public about its commercial use of consumers' publicity and content).

⁵⁰³ Goldman (2012), *supra* note 13, at 661 n.16. (noting that it may be difficult to find an IP-related claim that triggers 2(e) exemption).

⁵⁰⁴ Nix, *supra* note 70 (featuring an interview with Gregory Colbert, a Canadian artist who was forced to censor his own photos after they were removed by Facebook for showing naked female breast).

techniques, such as by halting “likes” to prevent them from getting into its news feed.⁵⁰⁵ Many users were banned from continuing activities on Facebook for weeks on account of posting pictures or comments that contained political statements.⁵⁰⁶

Another much maligned form of censorship by intermediaries is the censorship of users' comments or reviews. It is well documented that Facebook censored user comments under vague criteria such as being “irrelevant or inappropriate.”⁵⁰⁷ Facebook's regular defense is that its algorithm sometimes mistook bona fide users' comments as spam messages.⁵⁰⁸ Amazon, another online giant that now provides a publishing platform for independent authors, is known for its censorship of customer reviews. According to one industry observer, Amazon's censorship of reviews especially target reviews written by indie authors who tend to be negative or critical in the genres of their expertise.⁵⁰⁹ Veteran reviewers are especially hurt by Amazon's suppression of their critical commentaries, and they have questioned Amazon's commitment in representing a complete and truthful picture of its customers' experiences. As indie writer Joni Rodgers reports:

As a book seller, I'm frustrated that the deletion of my reviews is resulting in broken links and bogus listings, which will damage customer experience. As a reviewer, I resent the waste of my time and disregard for my opinion, and as a reader/consumer, I'm wondering how many reviews I'm not seeing and why they were censored.⁵¹⁰

⁵⁰⁵ *Controversial Art Project Addressing Violence Against Children is Censored by Facebook*, HUFFINGTON POST (Sep. 10, 2013 11:33 AM), http://www.huffingtonpost.com/2013/09/10/erik-ravelo_n_3900061.html (last visited Oct 15, 2014) (discussing how Facebook censorship of breast cancer photos ‘blurred’ the message of the two affected advocate groups, *The SCAR Project* and *Stupid Dumb Breast Cancer*).

⁵⁰⁶ Anna Elliott, *Facebook Censors Photos of Children Rallying Against Monsanto*, LIBERTY NEWS (May 28, 2013, 10:26 AM), <http://www.libertynews.com/2013/05/facebooks-censors-photo-of-children-rallying-against-monsanto/> (last visited Oct 15, 2014).

⁵⁰⁷ Colleen Taylor, *Is This Censorship?: Facebook Stops Users for Posting ‘Irrelevant or Inappropriate’ Comments*, TECHCRUNCH.COM (May 5, 2012), <http://techcrunch.com/2012/05/05/facebooks-positive-comment-policy-irrelevant-inappropriate-censorship/> (last visited Oct. 15, 2014).

⁵⁰⁸ Josh Constine, *Facebook Says Today's Comment Limitations Are Due to Spam Filter not Censorship*, TECHCRUNCH.COM (May 5, 2012), <http://techcrunch.com/2012/05/05/facebook-comment-limitations-are-a-spam-filter-not-censorship/> (last visited Oct. 15, 2014).

⁵⁰⁹ Joni Rodgers, *Amazon is Censoring Self-Publishing Reviews*, THE ALLIANCE OF INDEPENDENT AUTHORS (Nov. 28, 2012), <http://www.selfpublishingadvice.org/amazon-censoring-indie-author-reviews/> (last visited Oct. 20, 2014).

⁵¹⁰ *Id.*

Content-publishing platforms, in general, want to publish with unrestricted freedom, and for this reason their desires will often be in conflict with moral rights.⁵¹¹ But, properly understood, moral rights and copyright are powerful mechanisms for regulating relationships in media and information markets.⁵¹² The essence of the right of integrity is to put a check on a publisher's abusive claim as an active speaker or a discretionary editor⁵¹³ – it “embodies the author's right to decide what is [the] ‘final’ or ‘official’ version of the work.”⁵¹⁴ Moral rights have equal importance for both fiction and non-fiction or factual works. They add gravity to people's expression and their thought and, in the gray sea of information that is the Internet, moral rights thus offer “the hope of culture and ritual of authorship to persist in the human development.”⁵¹⁵ This means that moral rights can also be used by journalists or even scientists to protect the highly sensitive structure and content of their stories and research papers from being quoted out of their contexts.⁵¹⁶ Advocates for journalist's rights solemnly testify that there is “an indivisible link between moral rights and the ethics and independence of journalism”⁵¹⁷ and, that journalists' reputation and honor, along with the integrity of their works, are especially at stake on the Internet.⁵¹⁸ The role of moral rights as an ethical safeguard of how intellectual labor can be exploited has been recognized since the end of the Second World War,⁵¹⁹ and is one of the IP-related human right issues addressed by Article 15(1)(c) of the ICESCR.⁵²⁰

⁵¹¹ See Carlo Lavizzari and Lenz Caemmerer, *Moral Rights in the 21st Century – A Perspective From the Standpoint of Publishers or Literary Works*, Contribution to ALAI Congress Brussels, Sep 18-19, 2014, at 2, available at http://alai2014.org/IMG/pdf/d2_-_s3_-_1520_-_lavizzari.pdf (last visited Oct. 10, 2014).

⁵¹² Guy Pessach, *Deconstructing Disintermediation: A Skeptical Copyright Perspective*, 31 CARDOZO ARTS & ENT. L.J. 833, 841 (2013).

⁵¹³ See *Drummond*, 60 F. at 339 (E.D. Pa. 1894) (stating that the editorial position did not allow the defendant “to misrepresent [the] character and extent” of the plaintiff's work.)

⁵¹⁴ Lavizzari and Caemmerer, *supra* note 511, at 2. See also Mike Holderness et al., *The Right Thing: Author's Rights Handbook for Journalist 5* (International Federation of Journalist 2011) (arguing that the susceptibility to alteration and distortion of works in an online environment makes the “[moral right] to object to changes that damage the integrity of the work ... more important than ever.”)

⁵¹⁵ Lavizzari and Caemmerer, *supra* note 511, at 3.

⁵¹⁶ *Id.* at 3; Holderness et al., *supra* note 514, at 18-20 (explaining that moral right of integrity guarantees “the authenticity, quality and integrity of work” – all of which are “preconditions for serious journalism.”)

⁵¹⁷ Holderness et al., *supra* note 514, at 20.

⁵¹⁸ *Id.* at 43.

⁵¹⁹ Article 27(2) of the UDHR, the forbear of the ICESCR's article 15(1)(c), was a response to the need for a stronger protection of intellectual labor following the tragic abuse of conscripted scientists and engineers in the Nazi Germany and Stalinist Russia. Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709, 723 (2007) [hereinafter Yu (2007)].

⁵²⁰ Green, *supra* note 285, at ¶ 35 (quoting the Uruguay delegate who asserted that the right of authenticity comports with public interests, since “[r]espect for the right of the author would assure the public of the authenticity of the works presented to it.”)

3.4.3.1 Digital Moral Rights: Moral Rights in the Era of Technological Transition

In establishing a connection between moral rights and online content restrictions or filtering, we must first be aware of the gap left by decades of collective oversight that failed to bring moral rights into the twenty-first century along with the rest of the copyright system.⁵²¹ The ongoing conflicts between moral rights and the digitization of works of authorship – from digital music to cultural artifacts – into the networked environment have, time and again, reminded us of the costs of this neglect.⁵²² Moral rights theorists and copyright scholars have studied how mass-digitization of works interferes with the internal cohesion of the work units and makes possible the exploitation of works in disaggregated forms.⁵²³ Unlike offline “indexing” of books or compilation of public-domain works – where the calculated choice of the index writer or the compiler renders the resulting labor an independent work of authorship⁵²⁴ – digitization dissolves a work into a data pool where it can be indexed, repurposed and retrieved in an infinite ways.⁵²⁵ The mechanisms of digitization, digital indexing websites and other content-aggregation services consequently produce non-authorial outputs – that is they are non-expressive uses of the original works or information.⁵²⁶ It is simple to see that none of these technologies can function unless they can make uncompensated uses of information and content available on the Internet. At the same time, non-expressive uses such as mass-digitization of books and search engine can deliver

⁵²¹ Smita Kheria, *Moral Rights in the Digital Environment: Authors Absence from Authors' Rights Debate*, A Paper Submitted at the BILETA Annual Conference 2007, at 4, available at https://www.academia.edu/7768798/Moral_rights_in_the_Digital_Environment_Authors_absence_from_Authors_rights_debate (last visited Oct. 31, 2014) (observing that the EU's choice to remove moral rights from its IP harmonization effort has resulted in moral rights being left out from recent policy debates in the U.K.)

⁵²² For a detailed discussion of moral rights issues involving digital music and digital reproduction of art, see Rajan (2011a), *supra* note 170, Chapter 6 and 8.

⁵²³ See, e.g., Vaidhyathan, *supra* note 155, at 171; Borghi (2011), *supra* note 440, at 3-5 (noting that works created in the off-line authorial context have the characteristic of discrete cultural products, whereas works created in digital context tend to be “fluid units” which are meant to be exploited in fragments or small units and are susceptible to have any of their components linked to external sources); Mathew Sag, *Copyright and Copy-Reliant Technology*, 103 NORTHWESTERN UNIVERSITY LAW REVIEW 1607, 1611-13 (2009) (arguing that “copy-reliant technologies,” such as search engines, mass-digitalization of books, and plagiarism detection software, are enabling uses of copyright works for non-expressive purposes; this endless technological possibility will change the way we think about fair use.)

⁵²⁴ In a 1987 French decision, *Le Monds c. Microfor*, the court held that the defendant's publication of books containing indexing, by selection of keywords, of the plaintiff's journal articles did not violate the integrity of the articles. *Le Monds c. Microfor*, Cour de Cassation, 30 Octobre 1987, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007019548&dateTexte=> (last visited Oct 30, 2014) (reasoning that an index work or a database of information is a work of the secondary author's choice theme and therefore cannot give a false impression of the original works).

⁵²⁵ Borghi (2011), *supra* note 440, at 8-9.

⁵²⁶ Sag, *supra* note 523, at 1616.

profound benefits to learning and there is no exaggeration in saying that the technologies that enable disaggregated portions of written works to be indexed and searched can revolutionize our relationship with knowledge.⁵²⁷

Authors cannot always rely on the economic rights of reproduction to oppose to exploitations by super large cloud-based intermediaries, since case law from both sides of the Atlantic has gradually expanded the scope of copyright limitations in favor of popular digital services. In Europe, when economic rights of making available and reproduction are invoked against automated indexing services, courts have, in the past, found that a “transformative use” by search engines is not covered by the traditional test that governs exceptions and limitations to infringement.⁵²⁸ But there is a growing body of decisions which declared technological transformativeness to be lawful, when the copying or reproduction is implicitly authorized by the author.⁵²⁹ In the United States, there are influential precedents that non-authorial uses of images by web-indexing services, such as Google, may pass the threshold of transformativeness because the access-improving functions of such use deliver a wholly different public utility from what we expect of traditional expressive uses.⁵³⁰ In holding that the “transformativeness” is met when

⁵²⁷ Rajan (2011b), *supra* note 378, at 959.

⁵²⁸ In fact, copyright laws of many European Countries do not consider “technological transformativeness” to be covered by the existing copyright exceptions. Courts in Belgium, France, Germany, the UK, as well as the Court of Justice of the European Union (CJEU), have ruled that digitization or digital processing that results in digital transformative extracts or thumbnails which were used for commercial purposes will be lawful only when an authorial consent has been given, because no relevant copyright exception can apply to such uses. Borghi and Karapapa, *supra* note 435, at 34 – 38.

⁵²⁹ The German Supreme Court has developed a theory of “implied license/consent” to exonerate Google’s thumbnails indexing from infringement claims, holding that such consent may be found where the copyright owner had allowed his content to be made available online without technological protection against web crawlers. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 29, 2010, I ZR 69/08, available at <http://lexetius.com/2010,1136> (last visited Nov. 10, 2014); Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 19, 2011, I ZR 140/10, available at <http://lexetius.com/2011,7424> (last visited Nov. 10, 2014). For commentary, see Matthias Leistner, *The German Federal Supreme Court’s Judgment on Google’s Image Search – A Topical Example of the ‘Limitations’ of the European Approach to Exceptions and Limitations*, 42 INT’L REV. OF INTEL. PROP. & COMP. L. 417 (2011). The concept of implied consent has recently been adopted by the CJEU in a case, referred to the CJEU by the German Supreme Court, involving an “embedded link” to legally uploaded content. Case C-348/13, *BestWater International GmbH v. Michael Mebes*, Oct. 21, 2014, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=159023&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=410839> (last visited Nov. 10, 2014) [hereinafter *BestWater International*] (holding that if a third party links to copyrighted content that was made freely available on the internet by a copyright holder - e.g. on YouTube - it is reasonable to assume that the copyright holder had intended to communicate to the wider audience on the internet, and that embedding the content on a third party website does not constitute an illegal reproduction because it does not communicate the material to a “new audience”).

⁵³⁰ See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (stating that “Arriba’s use of the images [as thumbnails] serve[d] a different function that Kelly’s use – improving access to information on the internet

“the copy serves different function than the original work,”⁵³¹ the Ninth Circuit appears to endorse an idea that the social benefit of a challenged use should dictate the outcome of a fair use analysis – irrespective of whether the unauthorized use’s function serves an expressive ends, as parody does.⁵³² Indeed, the Google Books saga also ended with Google’s enterprise vindicated on the ground of fair use, with the court’s analysis focused squarely on the social utility, the technological transformativeness and the non-replacement nature of Google’s operation.⁵³³ It thus seems that both European and American courts have been pressured to modify the scope of the limitations to exclusive rights as well as the fair use doctrine to accommodate the popularity of services operated by dominant intermediaries. The civil-law notion of integrity, in contrast, focuses not on whether the social benefit of the defendant’s operation should permit uncompensated reproduction, but on the responsibility in the manner of reproduction and a general duty to respect the textual integrity of the work reproduced.⁵³⁴ Thus, moral rights query does not stop just because the author explicitly, or by established practices, authorized copying or reproduction of the work to be made and further distributed online. Mass-digitization of books and information-aggregating services do indeed raise a set of different concerns whose nature is not only economic but also ethical and personal.⁵³⁵ The holding by a Belgian court,⁵³⁶ which was

versus artistic expression”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165-1166 (9th Cir. 2007) (finding that “a search engine transforms the image into a pointer directing a user to a source of information,” and that “the significantly transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s superseding and commercial uses of the thumbnails in this case.”)

⁵³¹ *Amazon*, 508 F.3d at 1165.

⁵³² *Id.* (noting that “[i]ndeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.”)

⁵³³ *Author Guild, Inc. v. Google Inc.*, 954 F.Supp.2d 282, 291-293 (S.D.N.Y. 2013).

⁵³⁴ Borghi (2011), *supra* note 440, at 12-14 (noting that mass digitization needs to take into account the “editorial and philosophical” approach of the works created in the authorial context).

⁵³⁵ According to a technology expert, Jaron Lanier: “a machine-centric vision of the [Google’s Book Scan] project might encourage software that treats books as grist for the mill, decontextualized snippets in one big database, rather than separate expressions from individual writers. In this approach, the contents of books would be atomized into bits of information to be aggregates, and the authors themselves, the feeling of their voices, their differing perspectives would be lost.” Lanier, *supra* note 27, at 192.

⁵³⁶ Google was sued by a Belgium-based right management organization, Copiepresse, based on its “Google News” service which provides short excerpts from indexed websites to help Internet users determine the relevancy of search results. In *Google Inc. v. Copiepresse SCRL*, a Belgium court rejected Google’s argument that its automated retrieval of news items constitutes a “right-of-quotation” exception to the moral right of integrity. The Court reasoned that whereas a “quotation” exception to integrity right must be a use “in the framework of commentary of which they only comprise an illustration”, the extracts generated by Google’s service were “randomly juxtaposed fragments” of the plaintiffs’ news articles. Google’s service therefore “owes its substance to extracts from reproduced works, which is contrary to the spirit of the institution of the citation law.” *Google Inc. v. Copiepresse SCRL*, The Court of First Instance in Brussels, Feb. 13, 2007, at 30 [hereinafter *Copiepresse I*], available in English

followed by a French decision,⁵³⁷ that Google's mass digitization projects and its news aggregate mechanisms – which display results in the form of “snippets” or short quotations – violated the integrity of the works was a watershed moment in the history of copyright law.

These court rulings shattered the public's complacency regarding the limits of non-expressive uses by new technology and sparked legislative reforms to tax search engines for news aggregates services.⁵³⁸ Google's reported settlements with its opposing litigants in Europe unsurprisingly brought a collective sigh of relief to many observers.⁵³⁹ Yet, at the same time, Google's moral-right ordeals in Europe showed that the moral right of integrity can deter a mega intermediary from freely engaging in uncompensated exploitation of works of authorship without getting authors' prior consent. In this regard, even if the evidence of technological transformativeness is strong such that the public would not mistake automated extracts, thumbnails or “snippets” for the actual works, it is best, according to the dualist's moral right paradigm, to secure a prior and informed consent from the authors instead of just going ahead with unprecedented manners of non-expressive uses made possible by new technology.⁵⁴⁰

translation at <http://www.groklaw.net/articlebasic.php?story=20070726152837334> (last visited Nov. 10, 2014). The Brussels Court of Appeals upheld the decision on most grounds in May 5, 2011. *Google Inc. v. Copiepresse SCRL*, Court of Appeal of Brussels 2007/AR/1730, 5 May 2011, available in English translation at http://www.copiepresse.be/pdf/Copiepresse%20-%20ruling%20appeal%20Google_5May2011.pdf [hereinafter *Copiepresse II*].

⁵³⁷ *Editions du Seul et autres c. Google Inc et France*, Tribunal de grande instance de Paris 3ème chambre, 2ème section, Judgement du 18 décembre 2009 (France) [hereinafter *Google France*], cited in Borghi (2011), *supra* note 470, at 12 (holding that “the display of excerpts from works that Google Inc. recognizes to be truncated randomly and in form of ripped banner of paper undermine the integrity of the works.”)

⁵³⁸ Legal reforms imposing “taxes” on news-aggregate operation by search engines have been announced in Germany and Spain. The new right has been termed as a “obligatory collective management right” which has the inalienable characteristic of moral rights and is not subject to the traditional limitations of the economic right. The reform is necessitated by the fact that the Information Society Directive, the EU's primary authority on copyright, does not contain any moral-right-related provision. See, e.g., Pablo Hernández, *Key Aspects of the New Reform of the Spanish Copyright Act*, KLUWER COPYRIGHT BLOG (Nov. 10, 2014), <http://kluwercopyrightblog.com/2014/11/10/key-aspects-of-the-new-reform-of-the-spanish-copyright-act/#tax> (last visited Feb. 15, 2015).

⁵³⁹ See, e.g., Matthew Lasar, *Google v. Belgium “Link War” Ends after Years of Conflict*, ARS TECHNICA (July 19, 2011), <http://arstechnica.com/tech-policy/2011/07/google-versus-belgium-who-is-winning-nobody/> (last visited Oct 30, 2014).

⁵⁴⁰ See, e.g., *Jean-Marie Queneau v. Christian Leroy et autres*, Tribunal de Grande Instance, [1998] ECC 47, Paris 5 May 1997 (France), cited in 11 *World Intellectual Property Report* 266 (1997) (holding that the defendant's placing Queneau's protected poems on a French website violated both reproduction and integrity rights); *Copiepresse I*, *supra* note 536, at 34 (stating that the fact that users are well aware that they are dealing with quotations and not the original texts was not apposite to the question of whether or not the right of integrity was violated – since “the editorial or philosophical line to which the author adheres may be altered [by Google's extracts].”)

A robust moral rights protection, however, does not equate an anti-trade practice or an unreasonable aesthetic veto. In civil law jurisdictions, the doctrine of “*abus de droit*” (abuse of right) can be invoked to administer restrictions on the exercise of moral rights; but it is a more flexible concept than, and should not be confused with, the delineated limitations to economic rights.⁵⁴¹ In Germany, the German Supreme Court has applied a broad exception to the integrity right to accommodate the need of technology.⁵⁴² This “technological necessity test” administered by the German Court is widely endorsed by moral rights theorists as a suitable doctrine to serve as “a logical internal limit to the integrity right.”⁵⁴³ Moral rights are not anti-technology: they merely seek to put power back into the hands of individual creators with a view of furthering technological transition.⁵⁴⁴ For this reason, moral rights can be used to address one of the most important problems of our time: the fragility of the humans’ personality interests in cyberspace – of which private censorship is just a part of the whole picture.

Many moral rights experts concur that there is nothing to prevent moral rights from asserting their influence in the world that is making a fast transition from physical archives to cloud computing.⁵⁴⁵ Professor Llewellyn Gibbons, for example, argues that VARA’s text and its legislative history give support for a sufficiently robust regime of protection in which “some digital works of visual art will be protected.”⁵⁴⁶ In *Cohen*, also known as the *5Pointz* case, a New York district court appeared to be persuaded that there is a strong possibility for “ephemeral works” – works created without permanent permission on others’ private property, and whose longevity is not for the author to decide – to acquire a required “stature” under VARA, provided that the work has garnered enough public awareness.⁵⁴⁷ Interestingly, the *Cohen* court pointed out that, while it lacked the authority under VARA to protect the *5Pointz*’s aerosol-art murals,

⁵⁴¹ See Wittem Project, *supra* note 297, Art. 3.6 (1) & n.36.

⁵⁴² Rajan (2011a), *supra* note 170, at 357-358.

⁵⁴³ Borghi and Karapapa, *supra* note 435, at 129-130.

⁵⁴⁴ *Id.* at 130; ALAI Belgium Report (2014), *supra* note 246, at 15 (stating that changes due to technological necessity such as a publication of a digitally remastered work was found, by the Court of Appeal of Brussels, not to be a violation of integrity right).

⁵⁴⁵ See, e.g., Subotnik & Ginsburg, *supra* note 388, at 94 (suggesting that a right of integrity “exists in the digital realm as much as it does in the hard copy realm”); Borghi (2011), *supra* note 440, at 15 (stating that moral rights are technology neutral and can apply “irrespective of whether [violations] are performed with digital or analogous technologies.”)

⁵⁴⁶ Gibbons, *supra* note 391, at 552.

⁵⁴⁷ *Cohen*, 988 F.Supp.2d at 221 (discussing an expert testimony by Professor Erin Thompson).

“the plaintiffs’ work can live on in other media.”⁵⁴⁸ This raises a very interesting question of whether VARA may apply to digitalization of works after the physical or real-site embodiments of the original artworks no longer exists. Moreover, as the *Cohen* court noted, audience exposure is fundamental to the recognized stature test under VARA.⁵⁴⁹ Banksy, a renowned mural artist, owes the rise of his fame to the viral exposure of his works in social media far much more than in real space,⁵⁵⁰ and some of his works whose whereabouts are unknown now only exist on popular websites.

The lack of real online example of moral-right disputes has been cited as the main cause for skepticism regarding the application of the right of integrity on the pressing issue concerning authenticity violations in online works.⁵⁵¹ Yet the prevalent attitude among countries which provide robust protection for moral rights is that, absent a statutory exception to the contrary, moral rights should equally apply in an online context.⁵⁵² It is, however, undeniable that Internet users, especially the people of the “remix” generation, are generally uncomfortable with the idea of having their right to remix restricted.⁵⁵³ Professor Jane Ginsburg believes that, because of the public animosity toward DRMs, the popular respect for integrity in cyberspace remains doubtful.⁵⁵⁴ According to Ginsburg, a working cyber moral-right regime must function as a

⁵⁴⁸ *Id.* at 227. Continuing to appease the plaintiffs, the court went on: “The 24 works have been photographed, and the court, during the hearing, exhorted the plaintiffs to photograph all those which they might wish to preserve. All would be protected under traditional copyright law.” *Id.*

⁵⁴⁹ *Id.* at 218.

⁵⁵⁰ See *Id.* at 221 (Professor Erin Thompson’s expert testimony).

⁵⁵¹ See, e.g., ALAI U.K. Report (2014), *supra* note 473, at 15-16 (commenting that there is no relevant evidence regarding the changing role of moral rights from ensuring respect to a work’s integrity to a right to respect the authenticity of the work); Stefania Ercolani, Moral Right in the 21st Century – The Changing Role of Moral Rights in an Era of Information Overload: Report Italy 7 (ALAI 2014) [hereinafter ALAI Italy Report (2014)] (noting that there has been no case that gives particular evidence of how moral rights has changed its role in the digital age).

⁵⁵² See, e.g., ALAI U.K. Report (2014), *supra* note 473 at 13 (noting that the CDPA 1988 does not treat user-generated content as a separate category of work); ALAI Italy Report, *supra* note 551, at 6 (remarking that “there are no specific distinct rules on moral rights relating to digital forms of exploitations, such as user generated content and cloud computing”); Hiroshi Saito, *Moral Right in the 21st Century – The Changing Role of Moral Rights in an Era of Information Overload: Report Japan* ¶12 (ALAI 2014) [hereinafter ALAI Japan Report (2014)], available at http://alai2014.org/IMG/pdf/alai_2014_-_questionnaire_-_japan.pdf (suggesting that moral rights in digital environment remains important but that technological measures, not law, will dictate how moral rights are to be protected); ALAI France Report (2014), *supra* note 235, at 22 (reporting that the predominant view in France is to refrain from creating a special exception regarding user generated content, although there has been no case that involves a moral rights claim in the context of cloud computing); ALAI U.S. Report (2014), *supra* note 363, at 14 (suggesting that user-generated works will be subject to moral rights norms even if it is clear that such works are qualified for fair use defense).

⁵⁵³ Rajan (2011a), *supra* note 170, at 317.

⁵⁵⁴ Subotnik & Ginsburg, *supra* note 388, at 101.

system through which we can establish “a professional authors’ integrity and attribution regime” in a sense where authors can get remuneration.⁵⁵⁵

Nevertheless, we must bear in mind that the author’s moral interests are not always about money; and the popularity of CC-licenses speaks volumes for itself despite the licenses’ inability to generate revenue. It has been said that the Web 2.0 generation renounces copyright law because our copyright system regulates copying rather than the use of works.⁵⁵⁶ Moral rights, on the contrary, regulate only how the works are used, not how many times they can be reproduced.⁵⁵⁷ This is the precise reason why No-Derivatives viral licenses make authors of a traditional type feel comfortable enough to share their creative content online.⁵⁵⁸ In other words, a working system of cyber moral rights should perform the role of integrating the authorship norm for respect of integrity and attribution into the cyberspace, while ensuring that the author’s expectations will not restrict access to the work distributed.⁵⁵⁹ Most importantly, such system will have to be enforceable, not only with downstream users, but also with the mega intermediaries themselves.

3.4.3.2 Networked Exploitation of Cultural Products: A De-Intellectualization or Creative Reuse?

From various evidence of censorship by private proxies, although the methods of censorship are varied, content restrictions by massive intermediaries almost always involve automated processing by algorithm that treats users’ expressions as data to be mined, processed, ranked and avoided. There are certain analogues between the automated processing of online content and our modern perception of culinary: we are used to seeing each dish constantly digested and analyzed into calorie count and ingredient composites. Food, in the process, becomes “bad” or “unhealthy” even before it reaches our mouth. Similarly, user generated or digitized content can

⁵⁵⁵ *Id.* at 102.

⁵⁵⁶ Reed, *supra* note 32, at 152 – 156 (arguing that the solution for the reality mismatching of copyright law is to “restructure copyright law so that it allows creators an appropriate measure of control over the *use* of their works”) (emphasis original).

⁵⁵⁷ Borghi and Karapapa, *supra* note 435, at 146 (“the essence of the author’s right rests in the positive entitlement of authors to reserve particular uses of the work once the latter has been alienated to the public.”)

⁵⁵⁸ Prof. Ginsburg concedes that certain publishers and professional authors highly value moral rights, and that they share a common interest in promoting authenticity in the publishing industry through stronger moral rights protection. Subotnik and Ginsburg, *supra* note 388, at 102.

⁵⁵⁹ Prof Ginsburg proposes what she terms “authorship integrity (AI) viral license” to supplement the existing CC-license scheme. The “AI” viral license anticipates that there will be lots of downstream distribution of further copies but contains embedded feature for making payment or contacting the author. *Id.* at 103.

be disaggregated and judged by objective criteria programmed into digital gatekeepers, whereas the author's subjectivity is disdained and even considered irrelevant. Family pictures are treated as child pornography because they contain children nudity, a thoughtful comment is considered racist because it contains one or two prohibitive terms, and the list goes on. Creative expressions are now being scrutinized and atomized by "smart" machines which are designed to help networked intermediaries commercially exploit these works "safely." Communication experts observe that the Cyber Leviathans are handling user-generated content much like Fox News does – judging a piece of story on its short-term values rather than its potential shelf-life.⁵⁶⁰

The de-intellectualization of human expressions on the Internet also coincides with a recent criticism of the open access movement which contributed toward the creation of business models in which users are treated as unpaid developers.⁵⁶¹ Jaron Lanier, a technology expert, laments that the middle classes of musicians, journalists, and photographers are being destroyed by the current networked economy – which Lanier refers to as "Siren Servers" – that conspires to make all information and content free.⁵⁶² The ability of digital Leviathans to process a freely accessible pool of information, comprising of users' personal information and creative expressions, enables the machine to become smarter – capable of making relevant suggestions to users and to earn more revenues through advertisement.⁵⁶³ This is how the current digital economy functions: "[o]rdinary people 'share,' while elite network presences generate unprecedented fortunes."⁵⁶⁴ The further de-monetized and de-intellectualized information and content become, the smarter the machines get – and the keener would be their ability to discriminate users' content. Thus, although censorship by algorithm may not directly interfere with the structural integrity of a given work, the automated procedures involved undermine the work's internal integrity by severing the tie that is author-audience relationship.

Ultimately, the question of whether private censorship by Internet intermediaries violates the right of respect and integrity depends on what kind of moral rights paradigm is used to evaluate

⁵⁶⁰ Morozov, *supra* note 46, at 152.

⁵⁶¹ Fred Turner, *Burning Man at Google: a Cultural Infrastructure for New Media Production*, 11 NEW MEDIA SOCIETY 73, 79 (2009), available at <http://web.stanford.edu/~fturner/Turner%20Burning%20Man%20at%20Google%20NMS.pdf>.

⁵⁶² Lanier, *supra* note 27, at 13-16.

⁵⁶³ *Id.* at 19-20 (describing how smart engines deliver automatic services such as translation by processing and comparing the pre-translated texts available on the Internet.)

⁵⁶⁴ *Id.* at 15.

the intervening actions. Under the minimalist's approach to integrity right – the model adopted by most countries and espoused by Berne – content filtering and restricting techniques used by mega intermediaries does not appear to be directly at odds with moral rights.⁵⁶⁵ But, if the guiding framework is replaced by the dualist's integrity paradigm, it turns out that whether the integrity of the works is violated depends, to some degrees, on the author's subjectivity.⁵⁶⁶ Thus, although editorial interventions by online intermediaries do not always distort or affect the external integrity of the work, they may nonetheless constitute undue interference with the author's ability to communicate to the public. For example, the removal of content by Facebook can distort or blur the message or integrity of a page that promotes certain political statement, such as that of breast cancer activists.⁵⁶⁷ YouTube and Twitch, a popular livestream website, are known to automatically mute users' audio components, based on mere suspicion that the music has not been unlicensed.⁵⁶⁸ Furthermore, much has been talked about a powerful ISP's ability to use quality degradation to foreclose users' content that compete with the ISP's own content.⁵⁶⁹ Finally, we must not forget that millions of users now rely on cloud storage capacity of their favorite social-network service providers to store works and vital information, and account terminations by these ISPs can do a lot more damage than the banned user's having to switch to other platform providers.⁵⁷⁰ It is no longer a mere flimsy speculation that an account termination, based on alleged violations of user agreement, can result in a destruction of important documents

⁵⁶⁵ This is chiefly because the harm to the author's honor or reputation is not apparent. See Dietz, *supra* note 185, at 221 (noting that, apart from France, Italy and Spain, other countries require evidence of prejudice against the author's honor and reputation as conditions for finding infringement).

⁵⁶⁶ Borghi and Karapapa, *supra* note 435, at 118 (noting that the integrity paradigm of the dualist regimes depends largely on the author's subjective stand points).

⁵⁶⁷ Tracy Miller, *Facebook 'Censorship' of Mastectomy Photos Angers Breast Cancer Awareness Advocates*, N.Y. DAILY NEWS (Jun 5, 2013), <http://www.nydailynews.com/life-style/health/facebook-bans-mastectomy-pix-anger-cancer-survivors-article-1.1363623> (last visited Oct. 15, 2014).

⁵⁶⁸ Alex Newhouse, *Twitch Mimics YouTube, Begins Automatically Muting Videos with Copyrighted Audio*, GAMEPOT (Aug 6, 2014), <http://www.gamespot.com/articles/twitch-mimics-youtube-begins-automatically-muting-/1100-6421554/> (last visited Dec. 20, 2014) (noting that this practice is performed with incomplete copyright information and initiated without notices identifying infringement).

⁵⁶⁹ See, e.g., Laura Nurski, *Net Neutrality, Foreclosure and the Fast Lane: An Empirical Study of the U.K.*, Presentation at the ICT Conference organized by the I&R Chair, Paris Oct. 5-6, 2012 (2012), at 3-4, available at <http://innovation-regulation2.telecom-paristech.fr/wp-content/uploads/2012/10/Nurski-2012.pdf> (last visited Oct. 20, 2014) (observing that discriminating content through quality degradation is possible, although not necessary profitable for ISP).

⁵⁷⁰ Lanier, *supra* note 27, at 169-172 (arguing that the amount of information we store and the network effects, which magnify the experience we derive from services supplied by dominant platform providers, make a termination of service a potent sanction that keeps users in conformity with the policies.)

or other creative expressions.⁵⁷¹ Moral rights, in this respect, can perform a much needed consumer protection role, and the connection between them and how private networked intermediaries handle works of authorship is worth being investigated.

What prevents individual authors and creators from coming together as a cohesive force to bargain for themselves a stronger respect for their moral rights? The answer to that question appears to be the fact that users' relationship with internet super-intermediaries leaves them considerably worse-off, or being disesteemed, as authors, when compared with the relationship between traditional media institutions. Copyright experts have for many years suspected that copyright deregulation in cyberspace may have resulted in a disproportionately empowerment to mega online intermediaries at the cost of creative users being marginalized. Prof. Mira Sundara Rajan and Prof. Jane Ginsburg have warned that, while viral licenses like the Creative Commons brought moral rights to the Web 2.0 and the Read/Write culture,⁵⁷² these license schemes are designed for authors whose chief concern is to have their works exposed to as many audiences as possible, and such a scheme may be ill-fitted to those who are more serious about their role as authors.⁵⁷³ The Web 2.0's open access movement over-glorifies the Read/Write culture and – by emphasizing reputational reward over the ability to exclude – contributes to a decline of art as a profession.⁵⁷⁴ Professor Guy Pessach eloquently explains how the copyright deregulation movement – what he calls “disintermediation in copyright law”⁵⁷⁵ – is directly responsible for the displacement of traditional distributors and corporate media with a handful of mega-intermediaries whose ideology is commodification of free content within the economy of networked intermediaries.⁵⁷⁶ Jaron Lanier, a technology writer, offers a similar observation when

⁵⁷¹ See Rajan (2011a), *supra* note 170, at 477-78 (observing that tampering with digital images can violate the work's integrity, since “it is possible that a photographic image could be used to generate new ‘hard copies’ of the original work.”)

⁵⁷² One of the CC-licenses' biggest achievements is to successfully address the problem of downstream users who are not directly contracted with the creator of the work. The CC-licenses allow authors to impose conditions on downstream uses of the work. CC License Info Page, *supra* note 401; Ginsburg (2012), *supra* note 359, at 87.

⁵⁷³ Rajan (2011b), *supra* note 378, at 927-936; Ginsburg (2012), *supra* note 359, at 87 (suggesting that “authorship integrity” (AI) license is needed to address the integrity/authenticity issue of online works, but such a scheme first needs to attract the public in a way similar to what CC has done).

⁵⁷⁴ Rajan (2011b), *supra* note 378, at 931-936.

⁵⁷⁵ Legal innovations of the past two decades that focused on developing and supporting robust safe harbors for Internet intermediaries transformed successful and popular intermediaries such as YouTube and Facebook into “distribution platform[s] which operate on behalf of and together with creators and rights owners.” Pessach, *supra* note 512, at 864

⁵⁷⁶ *Id.* at 838. Professor Guy Pessach offers a thesis that the networked intermediaries are no less exploitative than traditional corporate media and distributors; and they tend to engage in unscrupulous exploitation because these

he posits that people are becoming information and content fodders to the data-hungry machines controlled by the digital elites who displaced many jobs and created very few in replacement.⁵⁷⁷ Professor Borghi, likewise, notes how digital technology and the open access movement dilute the once sacred tie between a creator and work of authorship – thus gradually transforming the society's relationship with cultural products: from copies to work and then to data.⁵⁷⁸ In sum, the great irony of the Web 2.0 Internet is that, in the networked economy diffused by a collective obsession with the free,⁵⁷⁹ if one does not pay for the product, one becomes the product.⁵⁸⁰

4. Recommendations and Proposals: A New Look at the Dualist's Tradition through Data Protection Law

In our investigation of moral rights, we found that this complex legal theory encompasses aspects of relationship between authors, publishers and the public that sometimes overlap and intercede into other areas of law.⁵⁸¹ Moral rights can emerge from unlikely places⁵⁸² and, because of their conceptual flexibility, there are insights to be gained from other legal doctrines. In the

intermediaries do not finance or invest in the production of the content, and financial investment is borne entirely by creators and producers. *Id.* at 847 – 848.

⁵⁷⁷ Lanier, *supra* note 27, at 1-17.

⁵⁷⁸ Borghi and Karapapa, *supra* note 435, at 139 – 143. See also Lanier, *supra* note 27, at 175-176, 191-193 (arguing that the current networked economy is set up to “obscure the human element” by creating “a world in which data starts out as a mess, decontextualized and mysterious, until it is brought to order by the server’s analytics;” and the dominant intermediaries achieved this by offering users access to free technology in exchange for free personal data and de-intellectualized content); Brynjolfsson and McAfee, *supra* note 11, at 64-66 (noting that the growth and popularity of user-generated content is not surprising if we understand that the smart engines demand access to a large pool of free information (i.e. big data) to improve their service).

⁵⁷⁹ It is in this environment that users are constantly inculcated that the online space belongs to the mash-up generation and not for serious or professional artists. See Peter Sloterdijk, *In the World of Interior of Capital* 218-219 (Wieland Hoban trans., Polity Press 2013) (claiming that the current state of the Internet forges a fundamentally new relationship between the content and its users where “user-self,” a lighter form of subjectivity, is replacing “educated-self” or a traditional and more ponderous form of subjectivity).

⁵⁸⁰ Lanier, *supra* note 27, at 15 (noting that “[i]t is too easy to forget that “free” inevitably means that some one else will be deciding how you live”); Scott Goodson, *If You're Not Paying for It, You Become The Product*, FORBES (Mar. 5, 2012), <http://www.forbes.com/sites/marketshare/2012/03/05/if-youre-not-paying-for-it-you-become-the-product/> (last visited Oct. 21, 2014).

⁵⁸¹ Rigamonti (2007), *supra* note 174, at 120-121 (explaining that, in Continental Europe, moral rights emerged as a codification of personality rights and as decisional rules devised by judges to enforce authorship norms that were not covered by early copyright laws); Rigamonti (2006), *supra* note 296, at 367 – 380 (disaggregating judicially-developed moral rights doctrines in Europe into contractual and tort scenarios).

⁵⁸² See, e.g., Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 781 (2007) (observing that, because the attribution right plays an important incentive-to-create function, its protection can be achieved through various legal doctrines outside copyright law); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171 (2005) (arguing that protecting authorship attribution is clearly within the consumer-protecting purpose of Lanham Act); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1931-1946 (2007) (calling for more attention to the role of custom as a set of “clearing principles” – informal indications of what is reasonable, what should be done and what should be avoided – in the field of IP laws).

United States, state law rights of personality and unfair competition laws have been referred to for supplying a baseline level of protection concerning attribution and integrity rights. In the cyberspace around the world, the Creative Commons' viral licenses offer moral-right options that allow online authors to set customized conditions on the use of their works without obstructing free and unlimited distribution that has become the hallmark of the open access movement. Moral rights, in this respect, clearly benefit from a system of fair and well-thought-out contracts that sufficiently inform both users and authors of the manners of permitted use without inducing copyright scare. More importantly, this study has also found that the problem of private censorship in cyberspace is in fact closely connected with the wider phenomena of how modern cybernauts find themselves being alienated from their privacy and personality interests as their personal data and the results of their intellectual labor are disaggregated to be used in different ways. In an era of information overload, people increasingly become more dependent on intermediaries to perform information filtering and retrieval functions.⁵⁸³ Whoever performs those functions will likely interfere with consumer speech as long as there are laws exempting them from liability arising out of IP infringement, censorship and content discrimination.⁵⁸⁴ It should be noted that, although dominant platform providers have found it increasingly difficult to impose unfair or unconscionable TOS upon consumers and to modify the terms without prior notice to the same,⁵⁸⁵ courts cannot do much to protect consumers' interests relying on basic contract principles alone.

This article suggests that moral rights will be instrumental in helping authors, as well as Internet users in general, wrestle back the control over the fate of their intellectual creations from unscrupulous and unforeseeable corporate exploitations. To perform such function, the current

⁵⁸³ See Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135 (2007) (discussing how intermediaries perform an important navigation function that drastically reduces consumers' search costs – a function that is recognized by unfair competition law).

⁵⁸⁴ See, e.g., Joshua A.T. Fairfield, *The God Paradox*, 89 B.U. L. REV. 1017, 1024 (2009) (noting that communication intermediaries or “game gods” always “control what people can say via their networks, own all content posted to their networks, and record and parse all conversations that occur through their networks.”)

⁵⁸⁵ This line of case law is centered on the so-called “industry standard” contract provisions that typically preserve an ISP's ability to “any time, and at its sole discretion, modify these Terms and Conditions of Use, including without limitation the Privacy Policy, with or without notice.” See, e.g., *Elaine v. Blockbuster, Inc.*, 622 F.Supp.2d 396, 398-400 (N.D. Texas 2009) (Holding that a Blockbuster's contract provision in which users agree to waive the right to commence class actions was “illusory” for lack of consideration as thus unenforceable); *Douglas v. U.S. Dist. Court ex rel Talk America*, 495 F.3d 1062 (9th Cir. 2007) (holding that customer was not bound by revised terms of contract with long distance telephone service provider, posted on provider's website, inserting additional charges, class action waiver, arbitration clause, and choice-of-law provision).

moral rights framework needs to be strengthened and, at the same time, must be efficiently enforced without delivering crippling effects on the current Web 2.0 culture and infrastructures. On one hand, this demands an adoption of an integrity right paradigm that handle the problem of integrity and authenticity violation with a greater level of vigor – comparable to the true dualist's standard. On the other hand, in fashioning a moral-right framework that will not overly impede online freedom of speech and innovation, we need to look at moral rights in the same way we tackle other personality rights issues – like privacy and data protection. A working moral rights framework in an environment where works are de-intellectualized, de-moralized, de-contextualized and then repurposed to be used as raw materials for information-driven products and services of cyber Leviathans will certainly need to go beyond the current international standard established by Article 6*bis* of the Berne Convention.⁵⁸⁶

A strategy for creating a system of moral rights capable of turning the tide against private censorship can be summarized in two parts. First, the concept of integrity right should be expanded to cover the public interest in the authenticity of works of authorship. Second, this article suggests an inter-disciplinary solution to the problem of moral rights management by supporting a consent model developed by the scholars of the Wittem Project. In the space below, this article seeks to show that a moral-right reform proposal can gain much from looking through the lenses of data protection law. Indeed, the correct way of handling the problems of moral rights violation by automated processing and content tampering is to approach the protection of moral rights with the same intensity as when dealing with other forms of privacy rights violation.

4.1 Recognizing Authenticity Interests with the Dualist's Integrity Paradigm

An integrity paradigm that is strong enough to safeguard the authenticity of works of authorship will have to be deduced from a higher plane of justification for moral rights protection. This integrity paradigm adopts the level of abstraction espoused by the true dualist

⁵⁸⁶ We cannot deny that the successful integration of moral rights into the Berne Convention was probably due to the fact that each of the members of the Berne Union were given assurance, through Article 17, that their ability to restrict and to control dissemination and reproduction of copyright works would not be affected by a private exercise of moral rights. Berne Convention, *supra* note 177, art. 17 (“The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.”) See also Baldwin, *supra* note 167, at 83, 147 (noting that the origin of moral rights was judge-made and was based on positive law rather than being bona fide natural rights; thus moral rights may not be asserted contrary to public interest or policy).

regimes we discuss in Part III (B)(2), and which also influenced the drafters of Article 15(c) of the ICESCR.⁵⁸⁷ A strong protection for authorship integrity is necessitated, firstly, by the practical importance of maintaining the integrity of the open source environment,⁵⁸⁸ and secondly, due to how works of authorship are increasingly repurposed to be used for unforeseeable non-expressive ends – in which the work’s original inter-human coalescence is removed or distorted.⁵⁸⁹ The emergence of authenticity as a vital value for the Web 2.0 environment, in other words, coincides with the apparent need for a stronger protection of personality rights in the online space. From a moral-right perspective, the problem of private censorship is exacerbated in the online space, not because corporations have a free speech right to withhold views, but because authors are forced to depart with the rights to compel respect for the integrity of their expressions. Automated processing, content disaggregating and censorship by algorithms are new forms of interference with author-work relationship, and “established copyright norms are not fully equipped to regulate these activities, whose boundaries remain unsettled.”⁵⁹⁰

The dualist’s right of respect and integrity permits authors to object to distortion and alteration even in cases where it is not obvious that the author’s honor and reputation has been implicated. To give an example, the Belgium Report at the 2014 ALAI Conference notes a shift in the country’s case law towards a broader application of the right of integrity that covers the authenticity of the work – irrespective of the environment in which the work is used.⁵⁹¹ The dualist’s interpretation of integrity right, as demonstrated in Google News and Google Books litigations in Europe,⁵⁹² gives strong deference to the author’s subjectivity with respect, not only to the work’s internal structure, but also to the context in which it is represented to the public.⁵⁹³

⁵⁸⁷ U.N. Committee on Economic Social & Cultural Right, Comm. (CESCR), General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, 35th Sess., ¶12, U.N. Doc E/C.12/GC/17 (Jan. 12, 2006) [hereinafter the General Comment No.17 (2005)] (stating that the intention of the drafter of Article 27 (2) of the Universal Declaration of Human Rights, on which the ICESCR’s Article 15(1)(c) is based “was to proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations.”)

⁵⁸⁸ Rajan (2011a), *supra* note 170, at 529.

⁵⁸⁹ Borghi and Karapapa, *supra* note 435, at 47 – 51.

⁵⁹⁰ *Id.* at 158.

⁵⁹¹ The ALAI Belgium Report (2014), *supra* note 246, at 15.

⁵⁹² See *Copiepresse I*, *supra* note 536; *Copiepresse II*, *supra* note 536; *Google France*, *supra* note 537.

⁵⁹³ Borghi (2011), *supra* note 440, at 11-12 (commenting on Belgian and French decisions concerning Google’s mass digitization and news aggregate operations.)

These modifications are perhaps more difficult to perceive than changes resulting from human intervention, but their effects on the author's editorial and philosophical preference are not negligible.⁵⁹⁴

In practical terms, an assurance for the authentic and original representation of any work may perhaps be best left to technological restrictions and laws that prevent a circumvention of such technology.⁵⁹⁵ But, in the current state of networked environment, authors are simply not in the position to set favorable conditions in regard to the integrity and authenticity of their works. The New York Times reported that the overriding trend of online media consumption is now "search and social."⁵⁹⁶ Content providers are thus obliged to design their content packages in accordance with mega intermediaries' preferences.⁵⁹⁷ The networked giants' ability to filter out content that does not match their format preferences gravely frustrates authors' technical solutions in protecting their works against digital tampering. A broad interpretation of the right of respect and integrity, like the Belgian approach, can reinforce and compel respect for the author's choice of technological protection by preventing the dominating platform providers from withdrawing technical supports on the author's choice of presentation and authenticity reinforcement.⁵⁹⁸ On the other hand, the principle of "technological necessity" – which has been widely adopted by courts among civil law jurisdictions – can effectively serve as an internal limit to the integrity right,⁵⁹⁹ thereby providing breathing space for technologists to make minor modifications necessitated by the technological needs in order to improve the quality of or access to the works.⁶⁰⁰

A broad integrity right regime is a big asking, precisely because the complexity involved in reshaping the authorship norms in the Web 2.0 Internet. Leading copyright and moral rights

⁵⁹⁴ Borghi and Karapapa, *supra* note 435, at 138.

⁵⁹⁵ See, e.g., Stef van Gompel, *Copyright Formalities in the Internet Age: Filters of Protection or Facilitator of Licensing*, 28 BERKELEY TECH. L. J. 1425, 1447-1448 (2013) [hereinafter van Gompel 2013]] (discussing alternative digital technologies that improve copyright management information (CMI)).

⁵⁹⁶ Ravi Somaiya, *How Facebook Is Changing The Way Its Users Consume Journalism*, THE NEW YORK TIMES (Oct. 26, 2014), http://www.nytimes.com/2014/10/27/business/media/how-facebook-is-changing-the-way-its-users-consume-journalism.html?_r=0 (last visited Oct 27, 2014).

⁵⁹⁷ *Id.*

⁵⁹⁸ The ALAI Belgium Report (2014), *supra* note 246, at 15 (suggesting that a broad integrity right can compel platform providers to provide support for the author's choice of format and communication techniques).

⁵⁹⁹ Borghi and Karapapa, *supra* note 435, at 129-130.

⁶⁰⁰ The ALAI Belgium Report (2014), *supra* note 246, at 15 (commenting that a remastering of an audio visual work would not violate the country's integrity right); Borghi and Karapapa, *supra* note 435, at 130 (discussing an application of the "technological necessity test" in the context of audiovisual works).

scholars have begun to interpret moral rights as a body of codified authorship norms.⁶⁰¹

Accordingly, any moral rights reform effort is believed to require interdisciplinary investigations into the areas in which authorship norms are based.⁶⁰² As stated earlier, the problem of this approach is, not only the complexity of the norms involved, but also the fact that established authorship norms are silent on how to deal with the protean nature of digital exploitations. There is simply no consensus regarding what can be an appropriate level of authorship norms in an online space. Professor Peter Yu notes that as the quality of cultural productions on the Internet continues to improve, content creators are likely to become more passionate about their moral rights.⁶⁰³ Nevertheless, Yu contends that the freedom of cybernauts to remix and reuse popular cultural expressions as a vehicle of communication may outweigh the justifications for a strong moral rights protection – at least among despotic or repressive societies.⁶⁰⁴

4.2 Modernizing Moral Rights Management through Data Protection Principles

I now proceed to explain the second component of this article's moral rights reform proposal. Borghi and Karapapa insightfully observe that there are certain analogues between data protection law and moral rights, and that the latter can benefit from the well-studied field that is data protection.⁶⁰⁵ They posit that the concerns for personality rights – especially regarding a person's dignity and autonomy – in the philosophy of Kant and Hegel came to crystalize as author's rights and, subsequently, moral rights because these interests were closely related to what authorship norms sought to protect.⁶⁰⁶ In Europe, the issues of automated processing and data mining practices have hitherto been dealt with by other areas of law, particularly data

⁶⁰¹ See, e.g., Michael Birnhack, *Copyright Law and Creative Social Norms*, OXFORD UNIVERSITY PRESS BLOG (Nov. 21, 2012), <http://blog.oup.com/2012/11/colonial-copyright-law/> (last visited Dec. 21, 2014) (suggesting that as a part of authorship-related social norms, moral rights may be respected to certain extent even if they are absent from written law; but a strong authorship norm cannot exist outside a close-knit community.)

⁶⁰² Kheria, *supra* note 521, at 8 (proposing an inter-disciplinary approach toward moral rights reform because “unlike other [IP Rights] arguably more economic in nature, moral rights are the most personal and have a strong cultural emphasis, where the creativity of individual artist is valued over all else.”)

⁶⁰³ Yu (2014), *supra* note 389, at 886 (predicting that “moral rights will precipitate more disputes between authors and users” in the Web 2.0 environment).

⁶⁰⁴ Professor Yu contends that there should always be rooms for what he terms “liberative reuse” – the public ability to use “parodies, satire, coded words, euphemisms, and allusions to popular culture [as] dominant vehicles of communication” among people in repressive societies, and that moral rights may stand in the way of these liberative activities. *Id.* at 891, 896.

⁶⁰⁵ Borghi and Karapapa, *supra* note 435, at 151-158.

⁶⁰⁶ *Id.* at 144-146 (noting that the author's integrity rights protect “the interest of communicating publicly with one another, with the view of furthering inter-human coalescence” and that comports closely with the conception of liberty and dignity).

protection and privacy law.⁶⁰⁷ The business model developed by popular platform providers affects copyright works in a strikingly similar way it affects personal data. The smart and information-driven algorithms of dominant SNSs give birth to new services that are fighting for the right to get access to as much free information and content as possible.⁶⁰⁸ Consequently, social media companies heavily rely on a combination of legal safe harbors and free or de-intellectualized content generated by users to attract viewers – whose personal data and preferences will then be collected to improve advertise placement and the quality of services.⁶⁰⁹

Data protection regulatory frameworks generally harbor two dual objectives: protecting individual privacy, while preventing the restriction of the free flow of personal data across borders.⁶¹⁰ To prevent the national privacy protection rules from becoming a barrier to international trade, these frameworks adopt the principles of *proportionality* and *legitimate purpose* to ensure that the flow of personal data necessary for transactions and for provision of goods and services will not be blocked.⁶¹¹ Proportionality in data processing means that personal data may be processed only for specified lawful purposes, and in a manner that is adequate, relevant and not excessive in relation to the purpose for which data is collected and/or processed.⁶¹² The principle of purpose limitation, on the other hand, is laid down in Article 6(b) of the Data Protection Directive under which the processing of personal data is lawful when it is carried out “for specified, explicit and legitimate purposes” and must not be incompatible with the purposes of the operation.⁶¹³ The other goal of a data protection regime is to reinforce consumers’ confidence in their privacy autonomy by maintaining the principle of *informed consent* – providing clear information to customers about the purpose for and the extent to which

⁶⁰⁷ *Id.*

⁶⁰⁸ Lanier, *supra* note 27, at 191 (“[w]hile innovation in algorithms is vital, it is just as vital to feed algorithms with “big data” gathered from ordinary people.”)

⁶⁰⁹ Brown and Marsden, *supra* note 447, at 49.

⁶¹⁰ *Id.* at 50. See Data Protection Directive, *supra* note 35, at Recital paras. 7-10.

⁶¹¹ Brown and Marsden, *supra* note 447, at 50.

⁶¹² W. Kuan Hon, Christopher Millard, and Ian Walden, *Who is Responsible for Personal Data in Clouds?*, in CLOUD COMPUTING LAW 193 (Oxford Univ. Press, Christopher Millard ed., 2013). This principle is stipulated in Article 6 of the Data Protection Directive (95/46/EC). Data Protection Directive, *supra* note 35, art 6(1)(c).

⁶¹³ Data Protection Directive, *supra* note 35, art 6(b).

personal data are gathered and used.⁶¹⁴ Recently, it became mandatory to notify a breach of data security to regulators and affected individuals.⁶¹⁵

A suggested dualist approach to integrity will require a certain level of inalienability, but the rule can be fashioned to allow courts to balance the interests of the author against that of the public, thereby safeguarding legitimate expectations of the parties involved. One useful model is the Wittem Project's European Copyright Code ["the Wittem Code"] – a scholarly-developed model for copyright harmonization within the European Union.⁶¹⁶ The Wittem Code is unique for its adoption of the principles of informed consent, proportionality, and legitimate purpose to create a limited inalienability model for moral rights. Article 3.5 of the Wittem Code stipulates that the author's consent not to exercise his moral rights "must be limited in scope, unequivocal, and informed."⁶¹⁷ With respect to the scope of consent, it is not possible for the author to make general waivers, and consent must be indicative of particular uses.⁶¹⁸ More significantly, the Wittem Code states that "[c]onsent is only informed where *full information* [regarding the way in which the work will be used] is disclosed to the author."⁶¹⁹ The Wittem Code holds a particularly strict view toward adhesive contract terms generally adopted by major Internet intermediaries or other powerful economic entities. The Code clarifies that "[t]he condition of informed consent will weigh particularly heavy in cases of *standard contracts* stipulating a far reaching consent of the author not to exercise moral rights."⁶²⁰ At the same time, however, the Wittem Code ensures that moral rights may not be exercised if doing so "would harm the legitimate interests of third parties to the extent which is manifestly disproportionate to the interests of the author."⁶²¹

The concept of legitimate purpose in moral rights context is difficult to define. Unlike the principle of "normal exploitation" of economic copyright enshrined in the Article 9(2) of the Berne Convention,⁶²² there are relatively little historical or empirical guidelines for determining what qualifies as legitimate expectations of a lawful user in relation to the author's integrity

⁶¹⁴ Brown and Marsden, *supra* note 447, at 51.

⁶¹⁵ See E-Privacy Directive (as amended by Directive 2009/140/EC), *supra* note 35, art. 4(3); Brown and Marsden, *supra* note 447, at 51; Greenleaf, *supra* note 20, at 224.

⁶¹⁶ The Wittem Project, *supra* note 297.

⁶¹⁷ *Id.* at Art. 3.5

⁶¹⁸ *Id.* at Art 3.5 & n.30.

⁶¹⁹ *Id.* at Art. 3.5 & n.32. (emphasis added).

⁶²⁰ *Id.* at Art. 3.5 & n.33. (emphasis original).

⁶²¹ *Id.* at Art. 3.6 (1).

⁶²² The Berne Convention, *supra* note 177, art. 9(2).

interests.⁶²³ Borghi and Karapapa posit that the “legitimate expectation” concept is closely related to the principles of purpose limitation and proportionality.⁶²⁴ Pursuant to the spirit of moral rights, an expressed consent should not be required when the use down the line is “consumptive” rather than “exploitative.”⁶²⁵ They propose that in the context of mass digitalization of copyright works, the proportionality doctrine should be taken to mean that “the work may be processed only insofar as it is adequate, relevant and not excessive in relation to the purpose for which it has been reproduced.”⁶²⁶ In other words, the author’s act of reproducing content onto the Internet will be used to determine the scope of his or her right.⁶²⁷ Similarly, the Wittem Code ameliorates the strictness of the informed-consent paradigm by adhering to the traditional doctrine of *abus de droit* (abuse of right) – also referred to as “the reasonableness test” – which invites courts to subject moral rights claims to scrutiny and make sure that the moral rights are not applied arbitrarily according to the wishes of the author.⁶²⁸ The Wittem Code specifically adds “[the harm to] legitimate interests of third parties” as a compulsory part of a judicial determination of abuse.⁶²⁹ The term “interests of third parties” is defined as “interests of any private parties, such as publisher, as well of the public in general which, for instance, has a legitimate interest in *improving access* to the work.”⁶³⁰ Borghi and Karapapa likewise identify “the enhancement of accessibility” as the most obvious type of use that corresponds immediately

⁶²³ See STAVROULA KARAPAPA, *PRIVATE COPYING* 105-112 (Routledge 2012) (analyzing the scope of three-step test’s “normal exploitation” test under Article 9(2) of the Berne Convention).

⁶²⁴ Borghi and Karapapa, *supra* note 435, at 154.

⁶²⁵ *Id.* at 158. In this respect, non-expressive or non-authorial reproductions by search engine or content-aggregating operations along with ad-placement services, discussed *supra*, are likely to be exploitative uses.

⁶²⁶ *Id.* at 155-156 (emphasis original).

⁶²⁷ *Id.* This concept of implied consent comports with a recent CJEU decision, referred to the CJEU by the German Supreme Court, involving an “embedded link” to legally uploaded content. *BestWater International (CJEU)*, *supra* note 529 (holding that there is no infringement when a third party links to copyrighted content that was made freely available on the Internet by a copyright holder, because it is reasonable to assume that the copyright holder intended to communicate to the wider audience on the internet.)

⁶²⁸ The Wittem Project, *supra* note 297, at Art. 3.6(1) & n.36. In most civil law countries, including the dualist Netherlands, the doctrine of abuse of right is covered by the general civil law doctrine of “misuse of rights.” Lucie Guibault and Kevin van Klooster, *The balance of Copyright: Dutch Report*, at 34, available at <http://www.ivir.nl/publicaties/guibault/Netherlands%20balance%20of%20copyright%20report%20final%2006092011.pdf> (last visited Sep. 3, 2014). Prof. Jane Ginsburg comments that if we will adopt a stronger moral rights in the United States, “U.S. statute might profitably emulate other countries’ approaches, which include placing on the exploiter the burden of showing reasonableness, setting out statutory reasonableness factors, and encouraging the creation of voluntary codes for various sectors of creative activities.” Ginsburg (2015), *supra* note 462.

⁶²⁹ Wittem Project, *supra* note 297, at Art. 3.6 (1).

⁶³⁰ *Id.* at Art. 3.6 (1) n. 34 (emphasis added).

to the legitimate interests of third parties.⁶³¹ Recall that the principle of technological necessity, now recognized by many civil law jurisdictions, is devised to give an assurance that digital processing engendered or necessitated by technological transitions will not be blocked by an exercise of integrity right.⁶³² For the Wittem Code, the technological necessity doctrine is subsumed by the traditional exceptions and limitations of economic copyright. The basic rule is that uses contained in the delineated exceptions and limitations to economic rights are “permitted without prejudice to the right of integrity” unless alterations are inherently required by the exempted uses, or that the alteration effectuated by the “fair use” is reasonable “due to the technique of reproduction or communication applied by the use.”⁶³³ This is a clever approach to reconcile moral rights interests with uses that are exempted from copyright liability, although it will be difficult to emulate in countries that adopt common-law-style “fair use” jurisprudence.⁶³⁴

In summary, this article supports the Witten Project’s approach and solutions to the problem of moral rights management. One of the legal innovations of the Witten Project is how it modernizes the concept of inalienability by incorporating the core principles of data protection, so far as it is permissible, into the moral rights’ consent scheme. This approach puts human subjectivity and authorial autonomy back to the author, and enables him or her to make informed decisions when giving permission to uses that might compromise or damage the author’s personality tie with the works⁶³⁵ – especially in the face of unforeseeable exploitations and technologically-enable non-expressive uses whose boundaries remain uncertain. However, unlike personal data, copyright works are expressly addressed to the public.⁶³⁶ This points toward a

⁶³¹ Borghi and Karapapa, *supra* note 435, at 156.

⁶³² ALAI Belgium Report (2014), *supra* note 246, at 15.

⁶³³ The Wittem Project, *supra* note 297, at Art. 5.6 (3).

⁶³⁴ See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentive*, 122 HARV. L. REV. 1569, 1573-74 (2009) (arguing that the common law “fair use” doctrine is based on what he terms as “foreseeability concept” – a doctrinal device that “limit[] either a plaintiff’s entitlement or a defendant’s liability to event and consequences that were objectively capable of being anticipated at a certain point in time”); Baldwin, *supra* note 167, at 126-130 (observing that the Anglo-American Fair Use/Fair Dealing principles were developed under the understanding that copyrights are alienable proprietary interests); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. (2007) (distinguishing, based on the “information costs” theory, copyright from patent law – deeming the former to be tort-like or operating under liability rule, whereas patent law embodies the spirit of property rule).

⁶³⁵ See Morozov, *supra* note 46, at 179-180 (arguing that there is a grave danger in completely replacing “the older, inefficient, human-driven alternatives” with the machine-based and net-centric solutions, since human subjectivity, however flawed and inefficient “are not deficiencies at all; rather they are important but fragile accomplishments that we ought to defend.”)

⁶³⁶ Borghi and Karapapa, *supra* note 435, at 153.

natural conclusion that there must be certain implied consents, dictated by the custom, once the work has been divulged to the public.⁶³⁷ Thus, the notion of “informed consent” in the case of copyright works will not be important to every type of use, especially if the uses concerned are of consumptive nature.⁶³⁸ Owing to the communicative nature of an act of authorship, it has been argued that the author even has a duty to make his or her work as accessible to the public as possible.⁶³⁹ The Creative Commons’ “some rights reserved” ideology is clearly based on this proposition. The based-line condition for those who adopt CC-licenses requires that they must allow unlimited distribution of their works to anyone who requires access to them.⁶⁴⁰ Therefore, in my view, the Witten Project’s principles of informed consent, proportionality and legitimate expectation are appropriately tailored to create a consent framework that sufficiently safeguards the author’s interests without requiring the true dualist’s concept of strict inalienability.

Admittedly, the suggested integrity right reform is not required by Berne’s Article 6*bis* which only protects a work’s integrity in circumstances where the violation resulted in harms or damages to the author’s honor or reputation.⁶⁴¹ But it is worth recalling that the language of Article 6*bis* does not exhibit a preference for the monist’s view of moral rights over the dualist’s, and vice versa. There are in fact several aspects of moral rights that the drafters of Article 6*bis* leave for the Berne members to decide, with regard to the appropriate level of protection, namely the duration of protection, the inalienability of rights and the availability of the types of protection.⁶⁴² Some copyright experts argued that because moral rights are considered to be an intrinsic part of the right of privacy and the right to fundamental expressive freedom, they should never be subject to formalities.⁶⁴³ Nevertheless, to condition a greater level of moral rights

⁶³⁷ According to Borghi and Karapapa, regulators are advised to differentiate between consumptive use, on one hand, and exploitative use on another hand. *Id.* at 145-146, 155.

⁶³⁸ *Id.* at 153. Professor David Welkowitz notes that, under the international human right law’s doctrine of proportionality, the inevitable conflict between moral rights and freedom of expression may require that “the author of a work that has been made public may have to accept a certain level of public use of the work.” Welkowitz, *supra* note 324, at 716.

⁶³⁹ The frequently quoted writing of Thomas Jefferson remains the most eloquent support of this argument. Jefferson stated that ideas and learning are something that a person may never gain control as soon as he decides to divulge them to the public. See LAWRENCE LESSIG, CODE: VERSION 2.0 197 (Basic Books 2006).

⁶⁴⁰ Rothman (2007), *supra* note 582, at 1928-1930 (describing the Creative Commons as “alternative open access norms”); Kwall (2010), *supra* note 323, at 66.

⁶⁴¹ The Berne Convention, *supra* note 177, art. 6*bis*.

⁶⁴² See Rigamonti (2007), *supra* note 174, at 116-120.

⁶⁴³ See, e.g., van Gompel (2011), *supra* note 264, at 280-81, 284 (arguing that moral rights should never be subject to formalities, “[g]iven that the fundamental right to human dignity is inviolable and that moral rights aim to protect authority dignity.”)

protection through inexpensive and simple formalities seems perfectly reasonable under the Berne Convention, provided that the formalities requirements comport with the rule of national treatment – that is they apply equally with the nationals of the granting state as with foreigners.⁶⁴⁴

Accordingly, pursuant to this paper's endorsement for a heightened level of the protection for integrity interests, it may be sensible to condition such level of protection under the proviso that the author divulge or distribute the work to the public with a declaratory disclaimer. Using public disclaimers to enforce the right of integrity has been strongly advocated by Professor Kwall. Disclaimers are especially valuable to the Wittem Project's principle of informed consent. Since, under a strong moral rights regime where the author's subjectivity and preference command special observance, it is the author's duty to communicate to the public "acknowledging variations inconsistent with the original author's meaning and message when a work is used in a manner deemed objectionable by the original author during the author's lifetime."⁶⁴⁵ Mandatory disclaimers would enhance the intellectual tie between the author and the work of authorship, not just in the sense of moral rights, but also as a clarification of one's speech act. Professor Kwall avers that a legal protection against misattribution and integrity violation serves a fundamental interest of the freedom to speak – under which no one should be compelled to embrace or to endorse a view that is not his or her own.⁶⁴⁶ Given the subjectivity of moral rights interests, a legal requirement for mandating disclaimers to trigger protection in instances of integrity violation would also be an intelligent approach for ushering stronger authorship norms into the cyberspace.

The disclaimer method could benefit greatly if popular viral license projects, most notably the Creative Commons, extend technical assistance to further this approach. Unfortunately, license developers at the Creative Commons see moral rights as squarely at odds with what they want to achieve.⁶⁴⁷ Despite its "some rights reserved" motto, the Creative Commons' real goal is

⁶⁴⁴ van Gompel (2013), *supra* note 595, at 1445 (noting that Berne's no-formality rule under Article 5(2) "not only applies to the Berne minimum requirements, but it also prevents contracting states from subjecting the rights that must be granted pursuant to the rule of national treatment to formalities.")

⁶⁴⁵ Kwall (2010), *supra* note 323, at 61.

⁶⁴⁶ *Id.* at 62.

⁶⁴⁷ CC Wiki FAQ, *supra* note 403 (stating that although "all CC licenses preserve moral rights to the extent they exist," a user who applies version 4.0 of the licenses "agree[s] to waive or not assert any moral rights you have, to the limited extent necessary to allow the public to exercise the licensed rights.")

to encourage voluntary abandonment of copyright and moral rights in order to enrich the digital public domain.⁶⁴⁸ The latest version of CC-Licenses now discards the commitment to “port” or specifically tailor the licenses in conformity with each country’s special needs.⁶⁴⁹ The fact that the developer of the world’s most popular individual-to-public license system unceremoniously spurns moral rights is surely damaging to the moral rights’ cause. The Creative Commons has achieved an admirable feat in freeing up content from copyright law’s restrictiveness and in enriching the public domain. But the runaway open access culture that seeks to convert all human-generated information into non-proprietary resource is now hurting online speech. Viral licenses can help the creator to communicate his or her preferences to downstream users and, in fact, is one of the most successful right-clearance and CMI systems currently available.⁶⁵⁰ Indeed, because mega intermediaries interact with user-generated content through automated processing, the future of digital moral rights will need help from technologists to devise suitable means of engraving machine-readable disclaimers into digitalized works.⁶⁵¹ Standardized and interoperable meta-data are being encouraged by the current international copyright framework with the aim to facilitate rights clearance.⁶⁵² A moral-right disclaimer is a form of CMI and voluntary formalities can produce only limited effect especially when intermediaries are not compelled to implement infrastructures that are both conducive and enabling with respect to these technologies.⁶⁵³ User-generated content is now poised to take center stage in the online content production economy and, soon, more sophisticated users-authors will demand a type of

⁶⁴⁸ The CC’s technological solutionist’s view has not been appreciated by everyone. See Mike Masnick, *Portuguese Politicians Want to Make Creative Commons Illegal*, TECHDIRT (May 9, 2011), <https://www.techdirt.com/articles/20110509/02295314206/portuguese-politicians-want-to-make-creative-commons-illegal.shtml> (last visited Nov. 26, 2014) (describing how the Portuguese Socialist Party is trying to reform its copyright law so as to prevent a complete waiver or renouncement of copyright).

⁶⁴⁹ CC Wiki FAQ, *supra* note 403.

⁶⁵⁰ See Michael W. Carroll, *Creative Commons as Conversational Copyright*, in *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 445-446 (Peter K. Yu ed., Praeger 2007) (“Creative Commons copyright licenses enable a creator to signal that his or her work can be reused and republished as part of the robust cultural conversation taking place on the Internet so long as certain conditions are respected.”)

⁶⁵¹ *Id.* at 456-459 (arguing that the future of digital copyright license will have to combine both human-readable and machine-readable features).

⁶⁵² van Gompel (2013), *supra* note 595, at 1457 (arguing that the Berne Convention perhaps allows formalities to be reintroduced as a condition for the protection of CMI’s integrity).

⁶⁵³ See, e.g., *id.* at 1438 (suggesting that lawmakers should devise rules that incentivize compliance with formalities with respect to CMI); Subotnik and Ginsburg, *supra* note 388, 101-103 (suggesting new types of viral licenses – namely, Authorship Integrity (AI) or Authorship Authenticity (AA) licenses – that better facilitate the creator’s control over the work’s authenticity in the open-source environment, although noting that these licenses need to be popular to be effective.)

viral license that meet their expectations for respect and integrity concerning their cultural productions. Creative Commons should, consequently, revise its policies toward moral rights and refocus its attention to develop future licenses that better facilitate moral rights management for online users.

But there are other obstacles as well. For a robust system of moral rights to work, we need a legal safeguard ensuring that general waivers of rights will be inoperative.⁶⁵⁴ Thus, for countries where copyright ownership is sometimes determined by the work-for-hire doctrine, it is suggested that work for hire agreement must cease to operate “as *de facto* waivers of moral rights.”⁶⁵⁵ Perhaps, for the United States, it may help the moral rights’ cause to allow moral rights to expand through the state-law framework – meaning that States with stronger authorship norms can have the freedom to pursue stronger attribution and integrity models of protection. A moral rights protection regime with multiple sources of law operating in parallel has a unique advantage in that it makes a general waiver of rights more difficult. But, in the United State, such a system will work only if the federal government continues to harbor no interest in moral rights regulation. Ultimately, the problem of moral rights in the twenty-first century – like any other problems concerning personality rights violation – is an issue affecting the interstate commerce. In May 2012, a California district court struck down the California Resale Royalty Act, holding that the California statute – the only statute in the country to provide “*droit de suite*” or right to royalties on secondary sale of art – was unconstitutional pursuant to the Commerce Clause of Article I of the U.S. Constitution.⁶⁵⁶ The United States can do better than just pretending that moral rights do not exist and permitting causes of action involving personality interests to be developed, in unpredictable fashions, within state forums. A better step should be for Congress to ratify the TAVP by means of statutory implementation. Unfortunately, the recent hearing held by the U.S. House of Representative’s Subcommittee on Courts, Intellectual Property and the

⁶⁵⁴ Kwall (2010), *supra* note 323, at 156-157 (noting that for moral rights to really perform their intended functions – whether that would be to provide inspirational motivations for creativity or to redress violations of authorship dignity – “[general waivers] should be inoperative as a general matter”); Ginsburg (2015), *supra* note 462 (suggesting that, to make a strong moral rights system enforceable, “ambiguities in the scope of the waiver should be construed against the party asserting the waiver,” especially if the scope of the waiver covers future works of employees).

⁶⁵⁵ Kwall, *supra* note 323, at 157.

⁶⁵⁶ Estate of Graham v. Sotheby’s Inc., 860 F.Supp.2d 1117 (C.D. Cal. 2012) (holding that the California Resale Royalties Act, Cal. Civ. Code §986, violates the Commerce Clause of the United States Constitution).

Internet signaled in the negative: that it appears unlikely that the U.S. will adopt moral right reforms in the near future.⁶⁵⁷

5. Conclusion

There is no question that mega intermediaries, the Leviathans of Cyberspace, are practicing content discrimination and distorting public speech. These intermediaries own vast digital empires that serve, not only as popular communication platforms for billions of people, but also provide an extremely broad range of products and services. Consequently, they can easily slip past the deontological regulatory model that relies on a clear-cut determination between passive conduits, on one hand, and content providers or corporate speakers on another. In the United States, the First Amendment's editorial privilege and the Good Samaritan safe harbors under Section 230 of the CDA shield networked intermediaries from liability arising from decisions to discriminate or suppress content. Furthermore, the ongoing de-intellectualization of user-generated content – through unethical terms of service (TOS) and the wider open access movement – further undermine the author-work relationship so much so that the society's free speech interests are now in jeopardy.

This study suggests that the problem of private censorship in cyberspace is in fact closely related with the wider phenomena of how modern cybernauts find themselves alienated from their privacy and personality interests as their online behaviors and their cultural contributions in cyberspace are processed and disaggregated to be used in manners beyond their control. This article argues that moral rights can be instrumental in helping authors, as well as Internet users in general, wrestle back the control over the fate of their intellectual creations from unscrupulous corporate exploitations. To perform the said function, the current moral rights framework needs to be strengthened and, at the same time, must be efficiently enforced without delivering crippling effects on the current Web 2.0 culture and infrastructures. Although this will not be easy to achieve, this article proposes an adoption of a more European-oriented integrity right paradigm with a sufficiently broad scope to command respect to the author-audience relationship ingrained in every act of creation. This solution introduces a carefully balanced model of moral-

⁶⁵⁷ See Lucas S. Michels, *U.S. Congress Evaluates Copyright Reforms with Cross-Border and Trade-Related Implications*, THE IP EXPORTER (July 18, 2014), <http://theipexporter.com/category/trans-pacific-partnership/> (last visited Nov. 24, 2014).

right consent framework whose conceptual groundings are influenced by data protection law. Indeed, the correct way of handling the problems of private censorship and content tampering by super intermediaries should be to re-conceptualize moral rights using our experience from other forms of personality rights violation. The consent model developed by the scholars of the Wittem Project is recommended as an example of an inter-disciplinary solution to the problem of general waivers that have, hitherto, undermined moral rights management. Finally, considering that the proposed model for integrity protection is not required by the Berne Convention, it is recommended that mandating disclaimers be required as a form of formality to condition the enforcement of an elevated protective standard. Ideally, machine-readable notices or disclaimers should be mandated by law to facilitate the author-intermediaries communication regarding the acceptable manners of exploitation and in order to allow authors to be notified when a breach of moral rights occurs.

As a system of rights that protects integrity and other personality-related interest of one's intellectual creation, moral rights do not necessarily come into conflict with the freedom of speech. The abuse-of-right doctrine, the principle of legitimate expectation and technological necessity provide ample "free-speech accommodation" within the moral rights system. Moral rights can function as a suitable safety valve for the runaway mash-up culture that is now hurting free speech interests. Moral rights are certainly not antithetical to how the Internet works. We are hoping for Creative-Commons-like viral licenses that offer moral rights options allowing online authors to set customized conditions on the use of their works without obstructing free and unlimited distribution that has become hallmark of the open access movement. Moral rights can indeed be the type of intellectual property that the Web 2.0 needs for the future. They can become the new copyright of the twenty-first century.