

Practice Project Title: 'Digital Legitimacy: A Model for Internet Intermediaries'

ABSTRACT

The development of the Internet and the expansion of online content has made legitimate decision making by intermediaries a pressing concern. Calls for collaboration on a uniform approach to the monitoring of content among the digital platforms continue to grow. The current legal and private systems for notice and takedown procedures fail to encourage proper legitimate decision making by digital platforms at the expense of end-users. The focus now should be developing a solution for intermediaries to follow under the basic principles of legitimacy: accountability, transparency, due process and proportionality. This paper argues for a more legitimate notice and takedown decision-making process through a global, uniform code imposing more specific obligations on intermediaries in line with these legitimacy principles.

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LEGAL OPINION

DIGITAL LEGITIMACY: A MODEL FOR INTERNET INTERMEDIARIES

I INTRODUCTION

The Internet is a significant source of creative content. Digital intermediaries provide platforms for many users to distribute and consume content, acting as a crucial component for developing ideas and works online. Billions of people watch billions of hours of videos on YouTube each day,¹ conduct a Google search,² or actively use Facebook³ or Twitter.⁴ In terms of user-generated content, millions of people produce and upload photos or short clips to Instagram⁵ or YouTube daily.⁶ Musicians have expanded platforms to distribute their songs, initially through Myspace⁷ and now more recently with Spotify⁸ and iTunes.⁹ The opportunities for consumers to interact with businesses has dramatically increased with e-commerce platforms like Amazon¹⁰ and Alibaba¹¹ connecting a variety of vendors with their customers.

These interactions on the Internet create risks for intermediaries and rightsholders. Many bad actors illegally copy and distribute works through intermediary networks.¹² Rightsholders rightfully seek protection for their works from such forms of piracy and counterfeiting.¹³ One standard method is to lodge notices with the respective intermediaries to

Note: all websites listed were accessed on 13 September 2020.

¹ YouTube, 'YouTube for Press' <<https://www.youtube.com/intl/en-GB/about/press/>>.

² Salman Aslam, 'Digital Marketing by the Numbers: Stats, Demographics & Fun Facts' (*Omnicores*, 30 June 2020) <<https://www.omnicoreagency.com/digital-marketing-statistics/>> para 17.

³ Facebook, 'Facebook Q2 2020 Results' <https://s21.q4cdn.com/399680738/files/doc_financials/2020/q2/Q2-2020-FB-Earnings-Presentation.pdf> 3.

⁴ Twitter, 'Q1 2019 Selected Company Metrics and Financials' <https://s22.q4cdn.com/826641620/files/doc_financials/2019/q1/Q1-2019-Selected-Company-Metrics-and-Financials.pdf> 1.

⁵ Salman Aslam, 'Instagram by the Numbers: Stats, Demographics & Fun Facts' (*Omnicores*, 10 February 2020) <<https://www.omnicoreagency.com/instagram-statistics/>>.

⁶ Salman Aslam, 'YouTube by the Numbers: Stats, Demographics & Fun Facts' (*Omnicores*, 10 February 2020) <<https://www.omnicoreagency.com/youtube-statistics/>>.

⁷ Myspace <<https://myspace.com>>.

⁸ Spotify <<https://www.spotify.com/>>.

⁹ Apple iTunes <<https://www.apple.com/au/itunes/>>.

¹⁰ Amazon.com, Inc, 'Amazon.com Announces Second Quarter Results' <https://s2.q4cdn.com/299287126/files/doc_financials/2020/q2/Q2-2020-Amazon-Earnings-Release.pdf>; J. Clement, 'Number of paying Amazon Prime members worldwide as of 4th quarter 2019' (*Statista*, 3 February 2020) <<https://www.statista.com/statistics/829113/number-of-paying-amazon-prime-members/>>.

¹¹ Yihan Ma, 'Number of annual active consumers across Alibaba's online shopping properties from 2nd quarter 2015 to 2nd quarter 2020' (*Statista*, 31 August 2020) <<https://www.statista.com/statistics/226927/alibaba-cumulative-active-online-buyers-taobao-tmall/>>.

¹² Statista, 'Media piracy in the U.S. and worldwide' (2018) <<https://www.statista.com/study/42923/media-piracy-worldwide/>>.

¹³ International Federation of the Phonographic Industry ('IFPI'), 'Global Music Report – The Industry in 2019' (2019) <https://www.ifpi.org/wp-content/uploads/2020/07/Global_Music_Report-the_Industry_in_2019-en.pdf> 53.

have the infringing content taken down.¹⁴ Where intermediaries comply with the notice, they can avoid potential liability. These mechanisms sought to create a balance between the interests of intermediaries and rightsholders.¹⁵

However, these notice and takedown ('N&TD') systems have their limitations which impact the rights of end-users. Many critics point to over-compliance by intermediaries, who avoid proper investigation into the claim and remove the offending content to reduce costs.¹⁶ Intermediaries acting as arbitrators is another concern, as such allocation of power transfers a judicial role to private actors not suitable for assessing the different rights involved in such decisions.¹⁷ A lack of due process can also limit the ability of end-users to object to the removal of content.¹⁸ These critiques, among others, generally point to a lack of legitimacy with the potential to hamper the rights of individuals.

This paper argues for establishing a more legitimate N&TD decision-making mechanism for the benefit of end-users. It will draw upon the common legitimacy principles of accountability, transparency, due process and proportionality to provide a framework for decision-making by digital platforms. Chapter II covers what is understood by legitimacy, and the elements of accountability, transparency, due process and proportionality. It also outlines why Internet intermediaries should be subject to these principles. Chapter III sets out and critiques the current approach in respect of N&TD systems. Chapter IV sets out potential

¹⁴ Digital Millennium Copyright Act 17 U.S.C. ('DMCA') §512; 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 (Directive on electronic commerce) [2000] OJ L178/1 ('ECD'), arts 12-15; Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92 ('DSMD'), art 17.

¹⁵ Nicolas Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge University Press 2019) 66; Matthew Sag, 'Internet Safe Harbors and the Transformation of Copyright Law' (2017) 93 *Notre Dame Law Review* 499, 502-3.

¹⁶ Electronic Frontier Foundation ('EFF'), 'VidAngel v Disney EFF Amicus Brief' <<https://www.eff.org/document/vidangel-v-disney-eff-amicus>> 19-20; Arthur Neill and Erika Lee, 'Fixing Section 512 - Legislative Reforms for the DMCA Safe Harbor Provisions' (2017) *California Western School of Law Research Paper No. 17-1* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2879696>; Zoe Carpou, 'Robots, Pirates, and the Rise of the Automated Takedown Regime: Using the DMCA to Fight Piracy and Protect End-Users' (2016) 39 *Columbia Journal of Law & the Arts* 551, 565-66; Jennifer Urban, Joe Karaganis and Brianna Schofield, 'Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice' (2017) 64 *Journal of the Copyright Society* 371, 384-389 ('Urban et al'); Jennifer Urban and Laura Quilter, 'Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act' (2006) 22 *Santa Clara Computer and High Tech Law Journal* 621 ('Urban and Quilter').

¹⁷ Suzor (n15) 72; Maayan Perel and Niva Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement' (2016) 19 *Stanford Technology Law Review* 473, 476; Jack Balkin, 'Free Speech Is a Triangle' (2018) 118 *Columbia Law Review* 2011, 2031; Frederick Mostert, "'Digital Due Process": A Need for Online Justice' (2020) *Journal of Intellectual Property Law & Practice* 1 (forthcoming), 8; Complaint, *Ligeri v. Google, Inc.*, No. 1:15-cv-00188-M-LDA (D.R.I. May 7, 2015) 4-5 ('*Ligeri Complaint*').

¹⁸ Mostert (n17).

reform based on a global code grounded on the legitimacy principles. It is beyond the scope of this to discuss all the various approaches to tackling secondary liability.¹⁹ However, the legitimacy principles may generally apply across all forms of intermediary liability systems.

II ESTABLISHING LEGITIMACY

Accountability, transparency, due process and proportionality are fundamental principles in achieving legitimacy. It is essential to understand the meaning of each principle in order to create a new legitimate framework for N&TDs. This Chapter's purpose is to outline the importance of legitimate decision making and the principles of accountability, transparency, due process and proportionality. It will conclude by explaining the reasons behind applying these legitimacy principles to intermediaries. These principles are not exhaustive, and some do overlap. However, they provide a minimum baseline to construct reforms for digital platforms.

A. Legitimacy

Legitimacy is the cornerstone of good governance. Legitimate governance can create trust in an organisation and its decision-making process.²⁰ By increasing trust, individuals have greater faith in the accuracy and fairness of an organisation's decision. This outcome creates an enhanced exchange relationship between two partners that produce benefits for both parties and society generally.²¹ If users are unable to trust the platforms they use, then they may be less willing to engage with those platforms.²² Reduced trust has two possible results: (i) less demand for these services, limiting the potential growth of the digital economy; or (ii) demands for greater adherence to the legitimacy principles to build trust.²³ By developing trust, users are more likely to engage with digital platforms and grow the digital economy. This growth relies then on legitimising a platforms decision making process. Building the digital economy

¹⁹ For a summary, see US Copyright Office, 'Section 512 of Title 17 – A Report of the Register of Copyrights' (May 2020) <<https://www.copyright.gov/policy/section512/section-512-full-report.pdf>> ('Copyright Report') 50-63.

²⁰ Suzor (n15) 148-149; Lee A Bygrave, *Internet Governance by Contract* (Oxford University Press 2015) 133–136; Sebastian Felix Schwemer, 'Trusted Notifiers and the Privatization of Online Enforcement' (2019) 35 *Computer Law and Security Review* 1, 5-6; Sag (n15) 61.

²¹ Phanish Puranam and Bart S. Vanneste, 'Trust and Governance: Untangling a Tangled Web' (2009) 34(1) *The Academy of Management Review* 11, 11; Russell Hardin, 'Trust in Government' in Valerie Braithwaite and Margaret Levi (eds) *Trust and Governance* (Russell Sage Foundation 1998) at 24.

²² Giancarlo F Frosio, 'Resisting the Resistance: Resisting Copyright and Promoting Alternatives' (2017) 23 *Richmond Journal of Law & Technology* 1, 10.

²³ Justin Hurwitz, 'Trust and Online Interaction' (2013) 161 *University of Pennsylvania Law Review* 1579, 1614.

relies on the development of trust in a platform's decision-making process through the legitimacy principles.

In Western legal culture, the general principles of the rule of law are considered the foundations of legitimate governance.²⁴ The rule of law requires accountability, transparency, due process and proportionality to ensure that decisions are fair and balanced.²⁵ It limits discretion in decision making, and avoids arbitrary or capricious exercise of that discretion through established rules. Those rules can only change within appropriate procedures and limits.²⁶ Legitimacy also depends on some consensus on the governing rules,²⁷ and that the decision-maker has a right to govern.²⁸ Although these principles generally apply to public bodies, a growing body of literature is now calling for these concepts to apply to technology companies. These concepts of the rule of law provide the backbone to the legitimacy principles, a normative understanding of platform responsibility and a model for legitimate decision making.²⁹

B. Accountability

Accountability is arguably the overarching principle. It refers to the extent that a decision-maker: (i) is expected to justify the decision-maker's choice to those affected by such choices; (ii) is held answerable for their actions; and (iii) is held responsible for their failures and wrongdoings.³⁰ Accountability ensures that decision-makers exert power fairly and effectively.³¹ It further overlaps continuously with the other principles. A decision-maker must be transparent with documentation and reasoning so the public understands the decision-making process and can challenge it. Due process provides the public with an opportunity to hold the decision-maker responsible by challenging the decision fairly and in a balanced

²⁴ Nicolas Suzor, 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms' (2018) 4 *Social Media and Society* 1.

²⁵ Derek E Bambauer, 'Cybersieves' (2009) 59(3) *Duke Law Journal* 377, 386.

²⁶ Brian Z Tamanaha, *On the rule of law: History, politics, theory* (Cambridge University Press 2004) 137; Suzor (n24) 5; Suzor (n15) 106.

²⁷ Trevor Allan, *Constitutional justice: A liberal theory of the rule of law* (Oxford University Press 2003).

²⁸ Julia Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes' (2008) 2(2) *Regulation & Governance* 137.

²⁹ Suzor (n24) 9.

³⁰ Michael Dowdle, 'Public Accountability: Conceptual, Historical, and Epistemic Mappings', in Michael Dowdle (ed), *Public Accountability: Design, Dilemmas And Experiences* (Cambridge University Press 2006) 3; Adam M. Samaha, 'Government Secrets, Constitutional Law, and Platforms for Judicial Intervention' (2006) 53 *UCLA Law Review* 909, 916; Perel (n17) 481-2.

³¹ Perel (n17) 482.

manner. Finally, proportionality provides the yardstick against which one could judge what is fair and balanced.

The analysis here should not focus entirely on traditional accountability notions.³² Governments, regulators and organisations can adopt more flexible rules that ultimately suit the cyber-space environment.³³ Nonetheless, accountability remains vital to ensure a fair and balanced process. Manipulation of content, abuse of power, creation of new barriers to competition and innovation, and a challenge to civil rights may emerge where intermediaries are adjudicating online content without accountability.³⁴ Intermediaries are private actors making adjudication decisions for their users.³⁵ Legitimate business practices of intermediaries could undermine fair and balanced oversight, monitoring and adjudication of online content.³⁶ Users may turn away from platforms that appear to unfairly suppress fundamental rights, including creativity, equality, free speech and freedom to conduct business.³⁷

The accountability process is vital to resolving this power struggle between intermediaries and users. Perel and Elkin-Koren identify three proxies in their ‘accountability toolbox’ in respect of the algorithmic decision-making process: (i) understanding the decision-making process; (ii) sufficient opportunities to challenge such process; and (iii) correct erroneous or improper decisions.³⁸ The first point covers transparency, where the intermediary encourages public literacy of its decision-making process.³⁹ Due process covers the second and third points.⁴⁰ Proportionality assists in determining the correctness of a decision. We now explore these principles in more depth.

C. Transparency

Transparency aims to develop public understanding and literacy. The activities of intermediaries can then be securitised appropriately.⁴¹ Transparency is not a novel concept. Companies systematically provide documents and information, whether voluntarily or as required by law, to ensure that the public understands their operations and obligations owed to

³² Perel (n17) 494.

³³ *ibid* 485; Jodie Freeman, ‘Private Role in Public Governance’ (2000) 75 *NYU Law Review* 543, 549.

³⁴ *ibid* 483; Edward Lee, ‘Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten’ (2016) 49 *UC Davis Law Review* 1017.

³⁵ *ibid* 485; Freeman (n33) 547.

³⁶ *ibid* 485; Freeman (n33) 574-75.

³⁷ *ibid* 484.

³⁸ *ibid* 495.

³⁹ *ibid*; Mark Fenster, ‘The Opacity of Transparency’ (2006) 91 *Iowa Law Review* 885, 894.

⁴⁰ *ibid* 495-6; Danielle Citron and Frank Pasquale, ‘The Scored Society: Due Process for Automated Predictions’ (2014) 89 *Washington Law Review* 1, 20.

⁴¹ Perel (n17) 495.

society.⁴² Without knowledge, the public cannot pass judgment whether an intermediary's conduct was fair and balanced.⁴³ In encouraging transparency, public literacy is enhanced by creating an environment where society can demand fairness.⁴⁴ Decision-makers are also exposed to the risk of shaming, operating in fear of public concern about their improper conduct. Organisations who operate in such an environment are discouraged from making illegitimate decisions over concern for public backlash.⁴⁵ Transparency also ensures that users can choose between online intermediaries, which can place market pressure on organisations to suit end-user interests.⁴⁶ Proper oversight of an intermediary's conduct cannot occur without transparency.

Disclosure alone is not sufficient to hold firms accountable. Many assume disclosure of information results in heightened transparency.⁴⁷ However, greater disclosure may not lead to increased accountability. Companies can use transparency and disclosure to hide the details, concealing proper understanding of its operations. A lack of detail can allow companies to respond to requests while avoid providing real accountability to the public.⁴⁸ Transparency must be targeted not just towards increasing the amount of information available, but also presented in a way to hold intermediaries accountable.⁴⁹ By adopting greater transparency, users can then use the information provided to challenge decisions through due process.

D. Due Process

Due process refers to procedures designed to ensure review of decisions for fairness and accuracy.⁵⁰ General elements of due process consist of both the procedural and substantive.⁵¹ Procedural due process ensures any adjudication is fair and balanced. Substantive due process addresses the protection granted to an individual's rights and freedoms which is analysed under proportionality below. This section primarily addresses the procedural issues. The common law is rife with principles of procedural due process, including a fair and

⁴² However, the growth rate of transparency reports has been in decline since 2018. See AccessNow, 'Transparency Reporting Index' <<https://www.accessnow.org/transparency-reporting-index/>>.

⁴³ Perel (n17) 495.

⁴⁴ Tal Zarsky, 'Transparent Predictions' (2013) 4 *University of Illinois Law Review* 1530, 1533-34; Perel (n17) 495.

⁴⁵ Perel (n17) 495.

⁴⁶ *ibid* 495.

⁴⁷ Suzor (n15) 137.

⁴⁸ *ibid*.

⁴⁹ *ibid*.

⁵⁰ Danielle Citron, 'Technological Due Process' (2008) 85 *Washington University Law Review* 1249, 1301-13; Perel (n17) 495.

⁵¹ Mostert (n17) 7.

public hearing by an independent tribunal, prior notice of that hearing, an opportunity to be heard, right to legal representation, right to an appeal, the right to receive a decision, and a clear set of reasons behind that decision.⁵² While most intermediaries operate in the private space, this fact should not prevent due process safeguards applying to their activities.⁵³

Due process concerns arise especially from an intermediary's N&TD procedure. Many users have their content removed with only a complex or no opportunity to appeal the decision. Digital platforms may also prefer to take down without further recourse to avoid any liability imposed by law.⁵⁴ One case involved a track uploaded by a musician that was later taken by a third party who added vocals and a guitar to make it their own work. The third party's work was uploaded on to YouTube, and the original musician was served with the copyright infringement notice.⁵⁵ Algorithmic takedowns have also removed a home video uploaded by Stephanie Lenz featuring her children dancing in the kitchen along to Prince's 'Let's Go Crazy' song. The video was protected under fair use as it was non-commercial, used a small portion of the song and did not affect the original market for the song.⁵⁶ Through due process, online platforms could present a venue and opportunity for appropriate review of end-users' claims and correct non-logical or arbitrary decisions.⁵⁷

E. Proportionality

Proportionality provides a benchmark for establishing legitimate decisions as part of substantive due process. The concept is derived mainly from human rights law. Proportionality is designed to ensure that interferences with such rights are justified as no more than necessary to protect other rights or to achieve legitimate goals.⁵⁸ Under EU law, the principle of proportionality consists of suitability, necessity and proportionality *stricto sensu*.⁵⁹ Suitability determines whether a measure is suitable to achieve a legitimate aim.⁶⁰ The grounds provided

⁵² *ibid* 7-8.

⁵³ See Martin Redish and Lawrence Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process', (1986) 95 *Yale Law Journal* 455, 478-89.

⁵⁴ Urban and Quilter (n16) 638; Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australia Online Intermediaries' (2018) 40 *Sydney Law Review* 469, 496; Suzor (n15) 146; Frederick Mostert, 'Free speech and internet regulation' (2019) 14(8) *Journal of Intellectual Property Law & Practice* 607, 612; Mostert (n17) 8.

⁵⁵ Tom Gerken, 'YouTuber in Row over Copyright Infringement of His Own Song' (*BBC News*, 5 July 2018) <<https://www.bbc.com/news/technology-44726296>>.

⁵⁶ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151-52 (N.D. Cal. 2008) ('*Lenz*'); Perel (n17) 476.

⁵⁷ Mostert (n17) 11.

⁵⁸ Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4 *Law & Ethics of Human Rights* 1.

⁵⁹ Takis Tridimas, *The General Principles of EU Law* (2nd ed, Oxford University Press 2006) 139; David Lindsay, 'Website Blocking Injunctions to Prevent Copyright Infringements: Proportionality and Effectiveness' (2017) 40 *UNSW Law Journal* 1507, 1512.

⁶⁰ *ibid*.

by the decision-maker to justify such measures must also be ‘relevant and sufficient’.⁶¹ Necessity assesses whether the measure is necessary to achieve that aim, and there are no other less restrictive means capable of producing the same result. A legitimate aim can consist of: (i) domestic security, public safety or economic well-being of a country; (ii) the prevention of crime or disorder; and (iii) protection of the reputation or rights and freedoms of others.⁶² Proportionality *stricto sensu* requires that, even where there are no less restrictive means, the measure must not have a disproportionate effect on the applicant’s interests.⁶³ In other words, the level of intrusiveness of a measure and impact on an individual’s rights are also factors to be considered.⁶⁴ Although a decision-maker enjoys some margin of appreciation, the final evaluation as to whether such measures are proportionate is subject to review by the court. These elements are generally applied to qualified rights like freedom of expression. Within these broad parameters, there is considerable flexibility in applying the principle to particular disputes.⁶⁵ Nonetheless, this principle sets the standard in assessing the fairness of a decision by digital platforms, especially when balancing the rights of users and copyright.

F. Application

As these principles were generally developed for controlling government action, we must justify their application to intermediaries as private actors. Digital platforms generally establish their governance through contracts. They have general freedom to set any terms and not provide any safeguards against arbitrary or capricious decision making.⁶⁶ The concepts of accountability, transparency, due process and proportionality were born out of administrative and human rights concepts. These constructs were designed notably in democratic nations to curtail the excessive or coercive behaviour of public bodies.⁶⁷ However, the development of these principles through public law does not mean they cannot apply in the private sphere.

⁶¹ *Peck v the United Kingdom* (2003) 36 EHRR 41 [76]; *S and Marper v the United Kingdom* (2008) ECHR 1581 [101]; *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [78].

⁶² *Golder v the United Kingdom* (1979) 1 EHRR 524 [44].

⁶³ *Tridimas* (n59) 139; *Lindsay* (n59) 1512.

⁶⁴ *James and Others v the United Kingdom* App no 8793/79 (ECtHR, 21 February 1986) [51]; *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [121].

⁶⁵ *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, 257 [138].

⁶⁶ *Bygrave* (n20) 18-23, 30-2, 37-48, 104-108; *Sag* (n15) 58-59; *Suzor* (n24) 6-9; *Suzor* (n15) 108-109.

⁶⁷ *Mostert* (n17) 8.

There has been increased recognition of digital intermediaries playing an essential role in protecting the rights of their users⁶⁸ and standing in the shoes of government.⁶⁹

The Internet provides a new legal infrastructure for governments, business and individuals.⁷⁰ Digital platforms have an increasingly important role in governing cyberspace with these other actors. Many intermediaries are already considered the ‘gatekeepers’ of content on the Internet.⁷¹ These gatekeepers are generally divided into groups to include access providers, mere conduits and hosting providers, with each required to provide access to online content.⁷² They are generally subject to the relevant safe harbour and N&TD provisions. Given the volume of information and speed of distribution over the Internet, these intermediaries are reasonably considered in the best position to moderate content. Large digital companies already have a global presence and financial resources to implement these principles.⁷³ Their function makes them ideal partners for performing enforcement roles online.⁷⁴ Technology corporations are also deeply involved in a range of issues relevant to human rights.⁷⁵ In the US, free speech claims are now made directly to or frequently involve an online media platform.⁷⁶

Big Tech also act more consistently like governments. Each has begun to introduce their own constitutions, supreme courts, rules and bureaucracies, creating a unified system of government without the separation of powers.⁷⁷ These gatekeepers set new norms in society through their content moderation.⁷⁸ They provide essential community stages for information

⁶⁸ Internet Rights and Principles Coalition (‘IRPC’), ‘IRPC Charter’ (2019) <https://internetrighsandprinciples.org/wp-content/uploads/2020/03/IRP_booklet_Eng_7ed_Nov2019.pdf>; EFF, ‘Manila Principles on Intermediary Liability’ (2015) <<https://www.manilaprinciples.org/>> (‘*Manila Principles*’); Nicolas Suzor, Tess Van Geelen and Sarah West, ‘Evaluating the legitimacy of platform governance: A review of research and a shared research agenda’ (2018) 80(4) *International Communication Gazette* 385.

⁶⁹ Daphne Keller, ‘Who Do You Sue, State and Platform Hybrid Power Over Online Speech, A Hoover Institute Essay’ (2019) <https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf> 15; Mostert (n54) 609.

⁷⁰ Keller (n69) 2.

⁷¹ Lawrence Lessig, ‘Code and Other Laws of Cyberspace 2.0’ (2nd edn, Basic Books 2006) 6.

⁷² See ECD (n14) arts 12-14; DMCA (n14) §512.

⁷³ Dianne Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology Law* (4th edn, Routledge 2011) 73.

⁷⁴ Jack Goldsmith and Tim Wu, *Who controls the internet?: illusions of a borderless world* (Oxford University Press 2006); Jonathan Zittrain, ‘A History of Online Gatekeeping’ (2006) 19 *Harvard Journal of Law and Technology* 253; Perel (n17) 480.

⁷⁵ Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Geneva, Switzerland: United Nations, Human Rights Council’ (2016) <<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/PrivateSectorintheDigitalAge.aspx>>.

⁷⁶ Mike Masnick, ‘Following Trump Ruling Against Twitter Blockade, AOC Sued For Her Blocks On Twitter’ Following Trump Ruling Against Twitter Blockade, AOC Sued For Her Blocks On Twitter’ (*TechDirt*, 11 July 2019) <<https://www.techdirt.com/articles/20190710/22503542560/following-trump-ruling-against-twitter-blockade-aoc-sued-her-blocks-twitter.shtml>>.

⁷⁷ Oversight Board <<https://www.oversightboard.com>>; Mostert (n17) 4.

⁷⁸ Mostert (n17) 2.

dissemination and debate on public issues.⁷⁹ Nevertheless, they are not treated like governments. End-users are often treated to the arbitrary exercise of power.⁸⁰ The rules and procedures behind an intermediary's system are often opaque, providing no real mechanism for accountability, transparency, due process or proportionality. This outcome has resulted in calls for greater legitimacy in a digital platform's decision making.

III THE PROBLEM

This Chapter assesses both the legislative regime and intermediary approaches to N&TD. As we will see, the current systems do not fully subscribe to the principles of accountability, transparency, due process and proportionality to ensure legitimate decision making by digital platforms.

A. Legislation

The N&TD system is commonly used across the globe to limit intermediary liability.⁸¹ Most major platforms that host user-generated content implement some form of N&TD.⁸² The US introduced the Digital Millennium Copyright Act ('DMCA') N&TD regime to other countries through trade agreements.⁸³ Even without a trade agreement, the DMCA has become the standard for N&TD mechanisms with most major digital platforms based in the US and adopting its rules.⁸⁴ The compromise struck under the DMCA's provisions has been key to the growth of digital platforms like YouTube, Twitter, Facebook and more recently TikTok.⁸⁵ Uploaded content often contains copyright-protected material. As massive amounts of content

⁷⁹ W Lance Bennett, 'New Media Power: The Internet and Global Activism' in Nick Couldry and James Curran (eds), *Contesting Media Power: Alternative Media in a Networked World* (Rowman & Littlefield 2003); Mostert (n17) 3.

⁸⁰ Suzor (n24) 5-6; Suzor (n15) 109; Mostert (n17) 8.

⁸¹ Josaphine de Ruyck, 'Global Project Looks At Takedown Notices Across The Internet' (*Intellectual Property Watch*, 23 July 2014) <<https://www.ip-watch.org/2014/07/23/global-project-looks-at-takedown-notices-across-the-internet/>>.

⁸² YouTube, 'Submit a copyright takedown notice' <<https://support.google.com/youtube/answer/2807622?hl=en>>; Facebook, 'Reporting Copyright Infringements' <<https://www.facebook.com/help/400287850027717/>>; Twitter, 'Copyright Policy' <<https://help.twitter.com/en/rules-and-policies/copyright-policy>>.

⁸³ Australian-US Free Trade Agreement <<https://www.dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-seventeen-intellectual-property-rights>> art 17.11, para 29; Juan Carlos Lara Gálvez and Alan Sears, 'The Impact of Free Trade Agreements on Internet Intermediary Liability in Latin America' in Giancarlo Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020).

⁸⁴ Rory O'Neill, 'Tech Industry wants US-style copyright rules in deal' (*World Intellectual Property Review*, 7 July 2020) <<https://www.worldipreview.com/news/tech-industry-wants-us-style-copyright-rules-in-uk-trade-deal-19919>>; Suzor (n15) 66.

⁸⁵ H.R. Rep. No. 105-551, pt. 2 at 21 (1998); Urban et al (n16) 379; Copyright Report (n19) 73-6; Suzor (n15) 66.

are uploaded every day, the process of screening and vetting that content becomes a gigantic task for intermediaries to complete.⁸⁶ These N&TD provisions seek a balance to maintain a space where everyone has the chance to freely express themselves while providing the copyright owners an opportunity to protect their works.⁸⁷

In achieving this balance, the DMCA's safe harbour provisions were designed to shield intermediaries from secondary liability for intellectual property infringement. The main similarity between each system is the basic concept of providing a safe harbour from liability for intermediaries where certain conditions are met.⁸⁸ For hosting content, if the intermediary acquires 'knowledge' of the infringing content on their system, then the safe harbour may not apply unless the intermediary removes the content from the platform.⁸⁹ Digital intermediaries can acquire knowledge by notice, through which the intermediary may lose its protection from liability unless the content is removed or access disabled.⁹⁰ There is also no general obligation for the intermediaries to monitor for infringing content.⁹¹ These elements form the basic tenants of the safe harbour and N&TD system.

Despite widespread adoption of some form of N&TD mechanism, there are some differences between each jurisdiction's approach.⁹² First, some mechanisms do not have horizontal application across all forms of intellectual property, but only limit liability in respect of copyright.⁹³ Second, the procedure for providing notice varies widely from detailed

⁸⁶ Suzor (n15) 66.

⁸⁷ Arian Galavis, 'Reconciling the Second and Ninth Circuit Approaches to Copyright Preemption: A Universal System Is Paramount to the Protection of Idea Purveyors' Rights' (2013) 19 *Boston University Journal of Science and Technology Law* 157, 184-5; Pedro Asensio, 'Internet Intermediaries and the Law Applicable to Intellectual Property Infringements' (2012) 3(3) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 350, 352; Benjamin Boroughf, 'The Next Great YouTube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation' (2015) 25 *Albany Law Journal of Science and Technology* 95, 112; Seth Ericsson, 'The Commodification of Internet Intermediary Safe Harbors: Avoiding Premature Harmonization Around a Suboptimal Standard' in Hanns Ullrich et al (eds), *In: TRIPS plus 20: from trade rules to market principles* (Springer 2016) 260; Sag (n15) 6; Suzor (n15) 66.

⁸⁸ DMCA (n14) §§512(a), (b)(1), (c)(1), (d)(1); ECD (n14) arts 12-14.

⁸⁹ DMCA (n14) §§512(c)(1)(A)(i), (ii); ECD (n14) art 14(1)(a).

⁹⁰ DMCA (n14) §512(c)(3). It is largely accepted that a notice and takedown procedure is encouraged and implied under the ECD. See Graeme Dinwoodie, 'A Comparative Analysis of the Secondary Liability of Online Service Providers' in Graeme Dinwoodie (ed), *Secondary Liability of Internet Service Providers* (Springer International Publishing AG 2017) 38.

⁹¹ DMCA (n14) §512(m); ECD (n14) art 15(1)(a). This aspect of limiting intermediary liability has come under question in the EU with the introduction of Article 17 of the DSM Directive. See Giancarlo F. Frosio, 'The Death of "No Monitoring Obligations": A Story of Untameable Monsters' (2017) 8(3) *Journal of Intellectual Property, Information Technology and E-Commerce Law* 199.

⁹² See Miquel Peguera, 'The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems' (2009) 34(4) *Columbia Journal of Law and the Arts* 481, 482-484; Asensio (n87) 351.

⁹³ DMCA (n14) §512(a), (b)(1), (c)(1), (d)(1); cf ECD art 12-14; Peguera (n92) 482-484; Althaf Marsoof, 'Notice and Takedown: A Copyright Perspective' (2015) 5 *Queen Mary Journal of Intellectual Property* 183, 195.

provisions on providing the initial notice and counter-notice by users⁹⁴ to a general principle without a specific procedure.⁹⁵ Third, the required knowledge standard differs between jurisdictions, favouring either the intermediary on the one hand or the rightsholder on the other.⁹⁶ These features can contribute to a lack of legitimate decision making by intermediaries.

B. Intermediaries

The N&TD system carries a unique function on the Internet. There are not many other systems of regulation with the capacity to monitor billions of potential infringements. However, it works because both rightsholders and the major platforms can and have developed automated systems to filter content and send and receive takedown request at such scale. Without these automated systems, it would make the N&TD procedure unworkable.⁹⁷ Generally, automated mechanisms take two forms. One involves automatic takedown of infringing content once the rightsholder has notified the intermediary. The other approach is to either filter content ex-ante before it is uploaded or purging content ex-post after the platform later identifies it.⁹⁸ These filtering mechanisms arguably are beyond what is required by the legislative regimes.⁹⁹ Nonetheless, they potentially offer more flexibility to rightsholders and platforms than staying within the traditional N&TD system.¹⁰⁰

YouTube's Content ID is the most notorious content filtering system.¹⁰¹ YouTube introduced Content ID in 2007. Although YouTube does not have an obligation to generally monitor uploaded content, Content ID is designed to compare and identify user content against rightsholder reference files to assess the user's content for copyright infringement.¹⁰² If Content ID finds a match, it implements its policy and provides the rightsholder with three options: (i) track the content; (ii) monetise the content through advertising; or (iii) block the content.¹⁰³ These options create a flexible environment for both rightsholders and YouTube. Once Content

⁹⁴ DMCA (n14) §512(c)(3).

⁹⁵ ECD (n14) rec 40 and 49, art 16; DSMD (n14) rec 70, art 17; Peguera (n92) 482-484.

⁹⁶ Ericsson (n87) 267.

⁹⁷ Sag (n15) 45.

⁹⁸ *ibid* 45-6

⁹⁹ Annemarie Bridy, 'Copyright's Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries' in John Rothchild (ed), *Research Handbook On Electronic Commerce Law* (Edward Elgar Publishing 2016); Urban et al (n16) 380-3; Annemarie Bridy, 'The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform' (2020) 22(2) *Vanderbilt Journal of Entertainment and Technology Law* 323, 348-50 ('Bridy').

¹⁰⁰ Sag (n15) 45.

¹⁰¹ YouTube, 'How Content ID Works' <<https://support.google.com/youtube/answer/2797370?hl=en>>.

¹⁰² Lauren Gallo, 'The (im)possibility of "Standard Technical Measures" for UGC Websites' (2011) 34 *Columbia Journal of Law and the Arts* 283, 290, 296-7.

¹⁰³ YouTube, 'Policy and Claim Basics' <<https://support.google.com/youtube/answer/107383?hl=en>>.

ID implements the selected policy, it recognises the owner of the reference file as claiming ownership over the matched video.¹⁰⁴ As a system outside the usual N&TD procedure, Content ID is considered as making ‘the licensing process shorter, clearer, and more efficient.’¹⁰⁵ YouTube and rightsholders can then rely on reference files, algorithms and bots to detect and alert the other of potential copyright infringement.¹⁰⁶ Content ID is not entirely automatic in some cases,¹⁰⁷ and YouTube does offer a dispute and appeal procedure.¹⁰⁸ In using automated filtering systems, however, a large majority of infringements can be detected at far less cost than is required for human manual enforcement.¹⁰⁹ Rightsholders may also avoid high transaction costs that may come through other mediums,¹¹⁰ and tolerate some infringing use to the benefit of enhancing creativity on the Internet.¹¹¹ Content ID has since become so successful for rightsholders that many major broadcasters, movie studios and record labels use it to detect infringement.¹¹² Nonetheless, through the lens of the legitimacy principles, there are several concerns with algorithmic filtering.

C. Critique

Several components of N&TD legislation and intermediary action generally fail to incorporate the legitimacy principles. These failures generally focus on the disadvantage suffered by one group: end-users.¹¹³ This outcome is not surprising given the history of N&TD regimes.¹¹⁴ In passing the DMCA, Congress only considered consumers as an afterthought.¹¹⁵ In the recent US Copyright Office Report on the DMCA,¹¹⁶ the focus of suggested reform was on striking a fairer balance between rightsholders and platforms. It makes little reference on

¹⁰⁴ Carlos Pacheco, ‘YouTube Content ID Handbook’ (2013) *SLIDESHARE* <<https://www.slideshare.net/carlospacheco74/youtube-content-id-handbook>> 59.

¹⁰⁵ Yafit Lev-Aretz, ‘Second Level Agreements’ (2012) 45 *Akron Law Review* 137, 153, 158.

¹⁰⁶ Boroughf (n87) 105.

¹⁰⁷ Pacheco (n104) 55, 77.

¹⁰⁸ YouTube, ‘Dispute a Content ID claim’ <<https://support.google.com/youtube/answer/2797454>>.

¹⁰⁹ Ben Depoorter and Robert Walker, ‘Copyright False Positives’ (2013) 89 *Notre Dame Law Review* 319, 326, 333.

¹¹⁰ Paul Heald, ‘How Notice-and-Takedown Regimes Create Markets for Music on Youtube: An Empirical Study’ (2014) <<http://ssrn.com/abstract=2416519>>.

¹¹¹ Tim Wu, ‘Tolerated Use’ (2008) 31 *Columbia Journal of Law and the Arts* 617, 633.

¹¹² Lev-Aretz (n105) 153, 158.

¹¹³ Emily Asp, ‘Section 512 of the Digital Millennium Copyright Act: User Experience and User Frustration’ (2018) 103 *Iowa Law Review* 751, 763.

¹¹⁴ Frosio (n22).

¹¹⁵ 144 Congress Record 9239 (1998) (statement of Sen. Ashcroft); Asp (n113) 763.

¹¹⁶ Copyright Report (n19).

any amendment benefitting end-users.¹¹⁷ The recent EU Directive on Copyright in the Digital Single Market ('DSMD') also places a significant emphasis on the relationship between 'online content-sharing service providers' ('OCSSP') and rightsholders.¹¹⁸ It leaves few concrete or clear safeguards for end-users.¹¹⁹ Copyright policymakers have little regard for protecting end-users' rights against rightsholders and intermediary decisions. The power imbalance between intermediaries and end-users further exacerbates this problem.¹²⁰ As private entities, intermediaries can then make decisions without accountability, transparency, due process or proportionality. This general issue leads to more specific problems facing the N&TD system in terms of legitimacy.

(i) Lack of Accountability

One concern confronting end-users is an apparent lack of accountability in the N&TD systems. The DMCA and E-Commerce Directive ('ECD') initiated a move away from public to private adjudication of copyright and free speech issues. It was not a complete transition, as the courts still determine any copyright dispute once a N&TD process is complete.¹²¹ The transition to automated systems standing outside the N&TD process later completed a near full shift to private adjudication.¹²² The convergence of rulemaking, adjudication and enforcement around the operations of the digital platforms raise significant complications for accountability.¹²³ There are generally few obligations placed on digital platforms to ensure that they are held accountable for their decisions about end-user content. Internet intermediaries are not required to introduce mechanisms to ensure accountability. Some digital platforms actively seek to maximise their discretionary power at the expense of accountability.¹²⁴ As a result, end-users have little opportunity or basis to challenge a decision made by a digital platform that

¹¹⁷ Mike Masnick, 'Does The US Copyright Office Not Know That Copyright Policy's Main Stakeholders Are The Public?' (*TechDirt*, 22 May 2020) <<https://www.techdirt.com/articles/20200522/11164044557/does-us-copyright-office-not-know-that-copyright-policys-main-stakeholders-are-public.shtml>>.

¹¹⁸ Bridy (n99) 325; Pamela Samuelson, 'Europe's Controversial DSMD Finalized' (2019) 62(11) *Communications of the ACM* 24 <<https://cacm.acm.org/magazines/2019/11/240358-europes-controversial-digital-copyright-directive-finalized/fulltext>>; DSMD (n14) rec 61, arts 17(1) and (2).

¹¹⁹ Christina Angelopoulos, 'On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800> 40; Giancarlo Frosio, 'Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy' (2017) 112 *Northwestern University Law Review* 19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2912272> 39; DSMD (n14) rec 70, arts 17(7) and (9).

¹²⁰ Neill (n16).

¹²¹ DMCA (n14) §512(j); ECD (n14) rec 52, arts 12(3), 13(2), 14(3) and 18.

¹²² Sag (n15) 61.

¹²³ Joshua Kroll et al, 'Accountable Algorithms' (2017) 165 *University of Pennsylvania Law Review* 633; Sag (n15) 61.

¹²⁴ Suzor (n24) 9.

may reduce the legitimacy of those decisions in the eyes of the public. This lack of accountability is further fostered by a lack of transparency, due process and proportionality.

(ii) Lack of Transparency

From the perspective of end-users, digital platforms generally operate in secret.¹²⁵ The legislation does little to encourage greater transparency from intermediaries. Under the DMCA, the N&TD regime encourages transparency by establishing a duty to notify the user about the removal of content.¹²⁶ However, this requirement does not apply to search engines which can remove links to allegedly infringing websites despite the significant implication on public discourse.¹²⁷ Neither the ECD nor DSMD place obligations on intermediaries to provide information to users to challenge decisions.¹²⁸

There is also little publicly available information on how digital media firms make decisions.¹²⁹ While many technology firms have begun to release transparency reports,¹³⁰ they only provide a limited picture of their N&TD procedures.¹³¹ The limitations of these transparency reports are numerous. First, they only provide summary statistics that cannot be used to determine the consistency or accuracy of an intermediary's decision making. Second, such reports provide little detail on processes the intermediary may go through to make a decision and fail to provide the proper context for the decision. Third, the reports do not reflect the policy-based choices made by intermediaries, and the reasons behind those choices.¹³² This information is crucial to the understanding of content moderation by online intermediaries, and yet it is not provided to the public to scrutinise that decision making.¹³³ The use of automated processes compounds the issue further. It is unclear and hence unpredictable what exact portion may trigger a filtering system, and users cannot appreciate how it exercises a digital platform

¹²⁵ Rebecca MacKinnon et al, *Fostering freedom online: The role of internet intermediaries* (UNESCO Publishing 2014); Suzor (n15) 136.

¹²⁶ DMCA (n14) §512(g)(2)(A).

¹²⁷ Perel (n17) 499.

¹²⁸ ECD (n14) arts 12-15; DSMD (n14) art 17.

¹²⁹ Suzor (n15) 136.

¹³⁰ Google, 'Transparency Report – Content delistings due to copyright' <<https://transparencyreport.google.com/copyright/overview?hl=en>>; Twitter, 'Transparency Report' <<https://transparency.twitter.com>>; Facebook, 'Facebook Transparency Report' <<https://govtrequests.facebook.com>>.

¹³¹ Mark Leiser, 'The Copyright Issue and Censorship Threat Buried Within Google's Transparency Report' (*The Drum*, 23 December 2013) <<http://www.thedrum.com/news/2013/12/23/copyright-issue-and-censorship-threat-buried-within-googles-transparency-report>>; Mostert (n17) 10; Suzor (n24) 4; Suzor (n15) 137.

¹³² Suzor (n15) p. 137.

¹³³ *ibid.*

power.¹³⁴ Automated systems generally struggle to assess the various nuances of copyright, especially applying fair use, fair dealing or other exceptions. Bots cannot replace human judgment in determining whether something is fair or falls within the public domain.¹³⁵ While these systems are generally considered more efficient,¹³⁶ it comes at the expense of understanding how and why the intermediary made the decision.¹³⁷

(iii) Lack of Due Process

The lack of procedural due process denies protection to end-users from illegitimate decision making.¹³⁸ A primary concern is the considerable procedural imbalance set out in the legislative N&TD schemes. For example, under the DMCA, a notification of claimed infringement by a rightsholder need only include a ‘statement that the complaining party has a *good faith belief*’ (emphasis added) that use of the material in the manner complained of is not authorised by the copyright owner.¹³⁹ However, a counter notification by the end-user must include a ‘statement under *penalty of perjury*’ (emphasis added) that the subscriber has a good faith belief the material was removed or disabled as a result of mistake or misidentification.¹⁴⁰ Similarly, the allotted time periods internet intermediaries have to respond to a notice and counter-notice are lopsided.¹⁴¹ An intermediary must act ‘expeditiously to remove, or disable access to, the material that is allegedly infringing or to be the subject of infringing activity.’¹⁴² In practice, the intermediaries remove the content immediately.¹⁴³ By contrast, under the counter-notice procedure, an intermediary may not re-enable access to the removed content for at least ten days.¹⁴⁴ The ECD does not mention a counter-notice procedure. The DSM makes scant reference to OCSSPs implementing place effective and expeditious complaint and redress

¹³⁴ Perel (n17) 514-5.

¹³⁵ Giancarlo Frosio, ‘Why keep a dog and bark yourself? From intermediary liability to responsibility’ (2017) 26 *International Journal of Law and Information Technology* 1, 23.

¹³⁶ Thomas Davenport and Jeanne Harris, ‘Automated Decision Making Comes of Age’ (2005) 46 *MIT Sloan Management Review* 83, 84; Perel (n17) 477; Carpou (n16).

¹³⁷ Perel (n17) 478.

¹³⁸ Mostert (2020); M.E. Kaminski, ‘Positive Proposals for Treatment of Online Intermediaries’ (2012) 28 *American University International Law Review* 203, 210; Perel (n17) 500-2.

¹³⁹ DMCA (n14) §512(c)(3)(A)(i–vi); Ericsson (n87) 269-70.

¹⁴⁰ DMCA (n14) §512(g)(3)(C); Ericsson (n87) 270.

¹⁴¹ Ericsson (n87) 270.

¹⁴² DMCA §512(c)(1)(C).

¹⁴³ *Online Policy Group et al. v Diebold Inc.* 337 F.Supp.2d 1195 (2004); *Lenz* (n56); Kristofer Erickson and Martin Kretschmer, ‘“This Video is Unavailable”: Analyzing Copyright Takedown of User-Generated Content on YouTube’ (2018) 9 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3144329> 24; Ericsson (n87) 270; Urban and Quilter (n16) 638; Vikrant Vasudeva, ‘The Notice and Takedown Procedure under Copyright Law: Developing a Measured Approach’ (2011) 13 *University of Notre Dame Australia Law Review* 193, 209.

¹⁴⁴ DMCA (n14) §512(g)(2)(B) and (C).

mechanisms for users to raise a dispute, without any procedural specifics for intermediaries, rightsholders or end-users to follow.¹⁴⁵ While the DSM's approach is a recognition of the issues faced by users, it leaves uncertainty.¹⁴⁶ Neither the US nor EU legislation requires a neutral arbitrator. The implementation of both jurisdiction's laws has reversed the traditional burden of proof with a defendant user to prove their innocence instead of the rightsholder proving the user's guilt.¹⁴⁷ The end-user's ability to challenge a decision by an intermediary or rightsholder under the law remains problematic.

Automated systems that sit outside the legislated N&TD regime also suffer from a lack of procedural protections for end-users. Indeed, algorithmic copyright enforcement has been considered 'chaotic' based on anecdotal reports.¹⁴⁸ For example, commentators argue that YouTube's Content ID dispute and appeals procedure lacks proper due process.¹⁴⁹ The process accepts that the rightsholder's claim of infringement as correct until proven otherwise.¹⁵⁰ The first level of review simply returns the claim to the rightsholder for verification. The rightsholder may review of the underlying works or reasons for the dispute, or reject the dispute without any consequence. The 'appeal' process after the initial dispute returns it to the rightsholder for reconsideration.¹⁵¹ There is no neutral referee for these disputes.¹⁵² The only difference between a dispute and an appeal is the rightsholder can lodge a takedown notice at which point the user can then follow with a counter-notice.¹⁵³ If there is no delay by the end-user, then the process can take up to 70 days.¹⁵⁴ If the rightsholder contests a claim at the dispute or appeal level, the process results in a strike against the user's account.¹⁵⁵ After three strikes, YouTube may terminate the user's account and prevent the user from creating a new channel.¹⁵⁶ A user then is limited to only three challenges at once or otherwise risk losing their accounts. Beyond YouTube, there have been efforts by other digital platforms to improve their

¹⁴⁵ DSMD (n14) art 17(9).

¹⁴⁶ Angelopoulos (n119) 39; Bridy (n99) 356; Thomas Spoerri, 'On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market' (2019) 10(2) *Journal of Intellectual Property, Information Technology and E-Commerce Law* 173, 183.

¹⁴⁷ Vasudeva (n143) 200; Urban and Quilter (n16) 659.

¹⁴⁸ *Ligeri Complaint* (n17) 4-5; Perel (n17) 476.

¹⁴⁹ Perel (n17) 514-5.

¹⁵⁰ Sag (n15) 55.

¹⁵¹ YouTube (n108).

¹⁵² Sag (n15) 55.

¹⁵³ YouTube (n108).

¹⁵⁴ Sag (n15) 55.

¹⁵⁵ YouTube (n108).

¹⁵⁶ YouTube, 'Copyright Strike basics'

<https://support.google.com/youtube/answer/2814000?hl=en&ref_topic=9282678>.

due process mechanisms.¹⁵⁷ However, observers have also criticised these systems as not providing sufficient procedures to challenge decisions.¹⁵⁸

(iv) Lack of Proportionality

There is no requirement for proportionality in a digital platform's decision-making process. Intermediaries are generally not required to provide a space for free speech or enhance creativity, as private action is too remote from state action to violate laws on freedom of speech.¹⁵⁹ Unlike public authorities, digital platforms are also not mandated to adhere to the principles of proportionality nor justify their decisions to remove content beyond what is required under law. The DMCA, for example, only requires the rightsholder to consider issues relating to fair use.¹⁶⁰ However, this does not always occur with both good and bad faith mistakes made by rightsholders on the application of fair use.¹⁶¹ The DSMD does mandate that OCSSPs consider freedom of speech implications of their decisions.¹⁶² Nevertheless, these may be difficult to implement in practice given the limitations of today's automated systems to analyse these issues.¹⁶³ Consequently, there is no real required benchmark for intermediaries to base or legitimise their decisions.

The outcome of a lack of proportionality, and accountability generally, is the potential 'chilling effect' on free speech and other human rights.¹⁶⁴ As intermediaries err on the side of caution with N&TD mechanisms, they will establish control mechanisms over user communications to reduce the platform's liability and police copyright.¹⁶⁵ The predictable result is that intermediaries may introduce systems that are not proportionate to the harm and

¹⁵⁷ Oversight Board (n77).

¹⁵⁸ Casey Newton, 'Facebook's independent oversight board could be overwhelmed by the challenge' (*The Verge*, 7 May 2020) <<https://www.theverge.com/interface/2020/5/7/21249154/facebook-oversight-board-membership-announcement-history-challenges>>; Margaret Sullivan, 'Facebook has a huge truth problem. A high-priced 'oversight board' won't fix it.' (*The Washington Post*, 15 May 2020) <https://www.washingtonpost.com/lifestyle/media/facebook-has-a-huge-truth-problem-a-high-priced-oversight-board-wont-fix-it/2020/05/14/c5b53cba-95d9-11ea-9f5e-56d8239bf9ad_story.html>.

¹⁵⁹ Sag (n15) 62.

¹⁶⁰ *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1129 (9th Cir. 2015).

¹⁶¹ Wendy Seltzer, 'Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment' (2010) 24 *Harvard Journal of Law and Technology* 171, 178; Ira Nathenson, 'Looking for Fair Use in the DMCA's Safety Dance' (2009) 3 *Akron Intellectual Property Journal* 121, 143, 147; Erickson (n143) 17-26.

¹⁶² DSMD (n14) rec 70, art 17(7).

¹⁶³ Bridy (n99) 356.

¹⁶⁴ Asp (n113); Copyright Report (n19) 11.

¹⁶⁵ Pamela Samuelson, 'The U.S. Digital Agenda at WIPO' (1996) 37 *Virginia Journal of International Law* 382.

potentially impinge on end-users' human rights or rights entitled under copyright law.¹⁶⁶ There is some empirical and anecdotal evidence of overbreadth and inaccurate filtering of user content.¹⁶⁷ Abusive notices and a lack of penalties against rightsholders for misrepresentation of their rights also contribute to excessive enforcement without proportionate decision making.¹⁶⁸ End-users may avoid doing something entirely legal to reenforce their rights out of fear of penalty or liability,¹⁶⁹ even where their claim is legitimate. Other studies have pointed to privacy concerns as reducing an end-user's motivation to challenge any digital platform's decision.¹⁷⁰ Any challenge by an end-user is further complicated by a lack of, or uncertainty in, due process and a complex fair use analysis.¹⁷¹ While the reasons behind a lack of user pushback remain primarily theoretical, studies indicate end-users are failing to defy the lack of proportionality in intermediary decision making.¹⁷² These deficiencies in proportionality and accountability must be remedied for end-users by creating a legitimate decision making procedure for intermediaries.

IV THE SOLUTION

A. Policy Framework

The overall goal is establishing new norms for the role of intermediaries to balance the rights of end-users.¹⁷³ From the analysis above, intermediaries lack legitimate decision making and end-users have no ability to hold those digital platforms to account. Any reform should adopt the purpose of: (i) clarifying individual expectations of intermediaries and digital

¹⁶⁶ Leron Solomon, 'Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube' (2015) 44(1) *Hofstra Law Review* 237, 255.

¹⁶⁷ Daniel Seng, 'The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices' (2014) 18 *Virginia Journal of Law and Technology* 369; Urban et al (n16); EFF, 'Takedown Hall of Shame' <<https://www.eff.org/takedowns>>.

¹⁶⁸ Sag (n15) 55; Aleksandra Kuczerawy, 'From "Notice and Take Down" to "Notice and Stay Down": Risks and Safeguards for Freedom of Expression' in Giancarlo Frosio (ed), *The Oxford Handbook of Intermediary Liability Online* (Oxford University Press 2020).

¹⁶⁹ Jonathon Penney, 'Privacy and Legal Automation: The DMCA as a Case Study' (2019) 22 *Stanford Technology Law Review* 412, 431-2; Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect' (1978) 58 *Boston University Law Review* 685, 730.

¹⁷⁰ Annemarie Bridy, 'Graduate Response American Style: "Six Strikes" Measures Against Five Norms' (2012) 23(1) *Fordham Intellectual Property, Media and Entertainment Law Journal* 1; Doris Long, 'Copyright Reform in the 21st Century: Adding Privacy Considerations into the Normative Mix' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3275081>; Penney (n169).

¹⁷¹ Asp (n113) 753-4, 69; Seltzer (n161) 178; Sag (n15) 37.

¹⁷² Carpou (n16) 567; Bruce Boyden, 'The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem' (*Center For The Protection Of Intellectual Property*, 2013) <<http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf>>.

¹⁷³ Mark Bunting, 'Keeping Consumers Safe Online: Legislating for platform accountability for online content' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274556> 13.

platforms' handling of content; (ii) ensuring intermediaries governance of online content is accountable and proportionate; and (iii) acknowledging the need for certainty and the differences between intermediaries of varying sizes and business models.¹⁷⁴ Any reform should consider a diversity of interests involved in these issues,¹⁷⁵ especially the role of end-users who have historically been neglected by policymakers.¹⁷⁶ Any change should not necessarily extend or modify liability, but set out society's expectations of intermediaries.¹⁷⁷ A global, uniform and holistic solution should then be considered as the backbone of any framework given the global nature of the Internet and distribution of content.¹⁷⁸ An international methodology to intermediary liability practically requires a 'soft law' approach in the form of customary rules by which the major digital players can subscribe and follow.¹⁷⁹ This structure should be clear and coherent for the benefit of all within the digital ecosystem. It is within these general policy-making principles that the intermediary framework should be built.

Digital platforms have their part to play in the development and implementation of a legitimate decision-making structure. They must ensure that their business models conform to society's expectations. Corporations should undergo proper due diligence on their respective product's lifecycle, reviewing operational policies and procedures to determine whether to comply with the legitimacy principles.¹⁸⁰ Digital platforms should undertake impact assessments, performance tracking and consultation with stakeholders to meet the due diligence standard expected of them and maintain ongoing compliance.¹⁸¹ It may be challenging to have intermediaries adopt a legitimacy framework that runs contrary to their interests without binding legal requirements. However, specific and extensive demands on digital platforms may influence those companies to incorporate this structure into their internal processes.¹⁸² Technology companies may also benefit from adopting a legitimacy framework by improving trust. Unfortunately, platforms are in an unenviable position of being unable to please everyone. Some technologies companies have attempted to hide their responsibility by

¹⁷⁴ Bunting (n173) 13-4.

¹⁷⁵ Urban et al (n16) 404-6.

¹⁷⁶ Frosio (n22) 56.

¹⁷⁷ Pappalardo (n54) 498.

¹⁷⁸ Mostert (n54) 611; Mostert (n17) 6.

¹⁷⁹ Mostert (n54) 611; Giancarlo Frosio and Martin Husovec, 'Accountability and Responsibility of Online Intermediaries' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451220> 2.

¹⁸⁰ Suzor (n24) 131.

¹⁸¹ *ibid.*

¹⁸² *ibid* 148.

pretending to be neutral, but this position is becoming more untenable.¹⁸³ As public pressure and the threat of legal regulation increase, there is now an opportunity for corporations to participate in creating a universal set of values to ensure their decisions are justifiable to end-users.¹⁸⁴ Some Big Tech companies have already begun attempting to create their own values to establish legitimate decision making.¹⁸⁵ A legitimacy framework may provide a mechanism for platforms to transfer some responsibility for the decisions they make in respect of end-users. In failing to do this, they may face new laws much less favourable to their interests.¹⁸⁶

There are some current governance structures commentators have pointed to as an example for intermediaries. However, these examples should not necessarily be considered the gold standard. Mostert points to the Uniform Domain-Name Dispute Resolution Procedure ('UDRP')¹⁸⁷ run by the International Corporation for Assigned Names and Numbers ('ICANN')¹⁸⁸ as a potential base for creating a universal framework.¹⁸⁹ While the UDRP is a global mechanism providing some due process for domain name disputes, it is not without its faults, including a lack of legitimacy and structure for enforcing intellectual property disputes.¹⁹⁰ These concerns do not necessarily prevent the use of the UDRP as a basic model for reform. However, caution should be adopted to ensure the same issues are not replicated in an intermediary framework. Other legal structures may better apply to intermediaries. The *Santa Clara Principles* set out a starting point outlining minimum levels of transparency and accountability, including providing numbers and reasons, adequate notice to end-users, human reviews and an ability to appeal.¹⁹¹ The *Manila Principles* also established a structure for intermediary liability based on human rights and other international legal concepts, specifying clear rules and processes, a right to be heard, and an accessible avenue to appeal decisions.¹⁹² These principles are more directly applicable to digital platforms as each set is tailored

¹⁸³ Mike Isaac, 'Dissent Erupts at Facebook Over Hands-Off Stance on Political Ads' (*The New York Times*, 28 October 2019) <<https://www.nytimes.com/2019/10/28/technology/facebook-mark-zuckerberg-political-ads.html>>.

¹⁸⁴ Suzor (n24) 148.

¹⁸⁵ Oversight Board (n77).

¹⁸⁶ Suzor (n24) 149.

¹⁸⁷ International Corporation for Assigned Names and Numbers ('ICANN'), 'Uniform Domain-Name Dispute Resolution Procedure' ('UDRP') <<https://www.icann.org/resources/pages/help/dndr/udrp-en>>.

¹⁸⁸ ICANN, 'Get Started' <<https://www.icann.org/get-started>>.

¹⁸⁹ Mostert (n54) 611; Mostert (n17) 11.

¹⁹⁰ Elizabeth Thornburg, 'Fast, Cheap, and out of Control: Lessons from the ICANN Dispute Resolution Process' (2002) 6 *Computer Law Review and Technology Journal* 89, 114; Bygrave (n20) 57-8; Annemarie Bridy, 'Notice and Takedown in the Domain Name System: ICANN's Ambivalent Drift into Online Content Regulation' (2017) 74 *Washington and Lee Law Review* 1343, 1353-60; Schwemer (n20) 12.

¹⁹¹ The Santa Clara Principles on Transparency and Accountability in Content Moderation <<https://santaclaraprinciples.org>> ('*Santa Clara Principles*').

¹⁹² *Manila Principles* (n68).

explicitly for intermediaries. They provide a basis for limitations of private power and modify the general rules as they may apply to government power.¹⁹³ Policymakers can then look to these doctrines to develop procedures that legitimise an intermediary's decision-making process.

B. Universal Code

The focus now should be on generating more specific rules for intermediaries to follow. While espousing general principles is desirable, more specific guidelines create greater certainty for both end-users and intermediaries alike. However, this should not be done at the expense of flexibility. Policymakers should balance clarity and flexibility in developing a framework for legitimate decision-making by intermediaries. How one can achieve such balance requires participation from all relevant parties in the development of a framework, notably consumer groups, intermediaries and rightsholders. Both the *Santa Clara Principles* and *Manila Principles* provide a base to build this framework. From these guidelines, an expanded universal code should be developed for intermediaries to make content decisions.¹⁹⁴

Any code should then ensure that it is clear in scope, application and procedure in applying the legitimacy principles.¹⁹⁵ The type of content covered must be clear for digital platforms and end-users to understand the scope of and materials that are subject to the code. Any scope must also be flexible enough to change with the law. The code's application to the type of intermediary should be unambiguous to create business certainty for the digital platform. Categories of intermediary types can also be developed to determine their particular ability to produce harm in society.¹⁹⁶ Any procedures covered must be well-defined and precise to facilitate the legitimacy principles established above. These should be set out expressly to address accountability, transparency, due process and proportionality. Intermediaries can improve their transparency by collecting the relevant data on N&TD references, publishing more succinct and accurate transparency reports,¹⁹⁷ publishing reasons behind N&TD decisions and disclosing policies and procedures for removing content.¹⁹⁸ Other mechanisms

¹⁹³ Suzor (n15) 131.

¹⁹⁴ See e.g. European Commission, 'Code of Practice on Disinformation' (26 September 2018) <<https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>>; Frosio and Husovec (n179) 8-9; Copyright Report (n19) 35-9.

¹⁹⁵ Bunting (n173) 21.

¹⁹⁶ *ibid* 23.

¹⁹⁷ Suzor (n15) 137.

¹⁹⁸ Asp (n113) 778; Suzor (n15) 139.

can be included to protect rightsholders' and intermediaries' interests,¹⁹⁹ especially their trade secrets. Due process can be enhanced for the benefit of end-users by adjusting the burden of proof,²⁰⁰ encouraging the consistent application of any code,²⁰¹ developing clear procedural rules,²⁰² and creating an efficient appeal process through independent review.²⁰³ Proportionality can be improved by publishing the standards they intend to base their decisions and ensuring end-users can pursue due process to hold the intermediary to those standards.

Any code should additionally provide for independent oversight. Regulatory certainty requires ongoing oversight and iteration of any code to ensure corrections are made and sanctions imposed.²⁰⁴ End-users, intermediaries and rightsholders will also need advice and a determination on their rights and responsibilities. An oversight board would meet these needs while operating as efficiently as possible. Resources dedicated to the body must be sufficient to ensure it can undertake its obligations properly.²⁰⁵ The board and code should also stand independently of stakeholders. Parties to the code should not be able to unilaterally add particular content types to the code or make changes to the code. The oversight body should also be responsible for consulting with relevant stakeholders on the code and any other interventions. It should likewise provide a means of appeal for end-users to challenge decisions by intermediaries or rightsholders. A board's other functions could include developing, maintaining and publicising the code, communicating with the relevant stakeholders on the code, applying regulatory incentives and sanctions where necessary for compliance, and assess the effectiveness of the code.²⁰⁶ The benefit of independent oversight for intermediaries is an ability to delegate some responsibility for their decision making, hence reducing the pressure to legitimise their decisions.²⁰⁷

A code will only stand where participants engage with and support it. This outcome depends on appropriate and proportionate incentives and sanctions. The oversight body may offer incentives to encourage compliance, including accreditation or beneficial rights in accessing arbitration or adjudication mechanisms. Sanctions should also be available to the

¹⁹⁹ Asp (n113) 779-80.

²⁰⁰ Benjamin Wilson, 'Notice, Takedown, and the Good-Faith Standard: How to Protect Internet Users from Bad-Faith Removal of Web Content' (2010) 29 *St Louis University Public Law Review* 613, 636; Suzor (n15) 142-3.

²⁰¹ Suzor (n15) 144.

²⁰² Mostert (n17) 11.

²⁰³ Suzor (n15) 145-6.

²⁰⁴ Perel (n17) 496.

²⁰⁵ Asp (n113) 780-1; Perel (n17) 531.

²⁰⁶ Bunting (n173) 25-6.

²⁰⁷ Suzor (n15) 147.

oversight board, potentially including the ability to issue warnings, impose fines and request Internet Service Providers to block intermediaries.²⁰⁸ The basis of this approach is to require digital platforms to assess risks and take action to reduce those risks. Intermediaries may take appropriate steps to avoid involvement by the oversight body to elude being caught in a regulatory process. It may be impossible to eliminate risks entirely, but this approach may encourage intermediaries to engage with end-users to develop a legitimate decision-making process.²⁰⁹

V CONCLUSION

The creation of the Internet and the expansion of online content has made legitimate decision making by intermediaries a pressing concern. The calls for collaboration on a uniform approach to the monitoring of content among the digital platforms continue to grow.²¹⁰ The current legal and private systems for N&TD, while acknowledging the issues, fail to encourage proper legitimate decision making by digital platforms at the expense of end-users. In order to remedy this environment, the focus should be developing a global solution for technology companies to follow. One such solution would be developing a code creating more specific obligations on digital intermediaries in line with the legitimacy principles. This solution should also have independent oversight and appropriate incentives and sanctions to encourage participation. Intermediaries can build trust through this system for the benefit of themselves and end-users.

²⁰⁸ Bunting (n173) 26.

²⁰⁹ *ibid* 26-7.

²¹⁰ Frosio (n135) 2; Ariadna Matamoros-Fernandez and D Bondy Valdovinos Kaye, 'TikTok suicide video: It's time social media platforms collaborated to limit disturbing content' (*ABC News*, 10 September 2020) <<https://www.abc.net.au/news/2020-09-09/why-so-hard-tiktok-remove-disturbing-content-suicide-video/12643832>>.

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